ISSN 1181-9006

The Digest of
MUNICIPAL & PLANNING LAW

Editor in Chief: John Mascarin, M.A., LL.B.
Aird & Berlis LLP

Cited 5 D.M.P.L. (2d)

(2012) 5 D.M.P.L. (2d), January 2012, Issue 13

Published 12 times per year by
CARSWELL, A DIVISION OF
THOMSON REUTERS CANADA LIMITED
One Corporate Plaza
2075 Kennedy Road
Toronto, Ontario
M1T 3V4

Production Editor: Tina Beier, B.A. (Hon.)

Subscription Rate is $528 for 12 issues per annum

Customer Relations
Toronto 1-416-609-3800
Elsewhere in Canada/U.S. 1-800-387-5164
Fax 416-298-5082
www.carswell.com
E-mail www.carswell.com/email

MUNICIPAL COUNCILLORS — DON'T EVEN THINK ABOUT IT! THE UNPRECEDENTED DECISION IN MONDOUX v. TUCHENHAGEN

by George H. Rust-D'Eye

Introduction

Every municipal councillor and municipal legal advisor in Ontario should be aware of both the majority and dissenting reasons in the judgment of the Ontario Divisional Court in *Mondoux v. Tuchenhagen*, 2011 ONSC 5398 (Ont. Div. Ct.), released October 26, 2011 (application for leave to appeal filed November 4, 2011), particularly the decision of the majority as to when and how a municipal councillor was found to have acquired a pecuniary interest in the sale of a municipally-owned property.

The case is well worth reviewing in any event, due to the substantial number of issues and the wide range of principles of municipal conflict of interest law addressed, and the significant judgments quoted — both by Lederer and D. Gordon JJ., for the majority, and J. Wilson J., in dissent.

The outcome of the case is to significantly lower the burden upon an elector to establish a pecuniary interest on the part of a municipal council member in an application under the *Municipal Conflict of Interest Act*, R.S.O. 1990. c. M.50, as amended ("*MCIA*").

In a nutshell, the case concerned a situation in which a member of the council of the City of Thunder Bay (the "City") expressed an interest in a tax sale property to be disposed of by the City by tender. The essential facts are best summed up in the following questions in the dissenting opinion, to which the majority answered "Yes":

> . . . where a decision by council has been made to sell property by public tender, does an elected member of council have an "indirect pecuniary interest" within the meaning of the MCIA where he expresses interest by email to perhaps put in an offer on the property, requests a copy of the public advertisement, and sets up an appointment to view the property? Is this member in these circumstances required to declare a conflict of interest in a meeting when the issue of declaring the land surplus is considered?

The expression of interest was made in the councillor's e-mail to a City staff member requesting a copy of the advertisement for the property, in which he stated: "I may be interested in bidding on this property."

Based on these facts, Councillor Tuchenhagen (the appellant/respondent in the appeal) was found by the application judge and on appeal by the majority of the Divisional Court, to have contravened the *MCIA*. Since he was no longer a member of city council at the time of the hearing of the application, the Court ordered him disqualified from being a member of council for four years, in order to prevent his running in the next election.

The Court held that the contravention was committed not through inadvertence or by reason of an error in judgment. It also ordered costs of the appeal payable by the appellant to the elector who brought the applicant (the respondent in the appeal), in the amount of $9,612.31.

Determining the Presence of a Pecuniary Interest

The relevant facts, and the *only* essential facts (subject, perhaps, to the fact that Councillor Tuchenhagen later submitted

a bid on the property and ultimately purchased it), are set out above in the quotation from the dissenting opinion.

The following sets out further findings of fact, essentially undisputed by the parties, which formed the context for the decisions:

- Councillor Tuchenhagen was open with the City about his interest in the property;
- There is no evidence that he acted in bad faith;
- The City suffered no loss or prejudice, nor did any other party;
- There was no public policy prohibiting a councillor from bidding on real estate declared surplus to the City's needs;
- There was no interference with the public tendering process;
- The councillor had given the City 12 years of public service.

With respect to the conclusion that Councillor Tuchenhagen had a pecuniary interest in the sale of the property from the point in time at which he made an appointment to see it (the council meeting in question occurred later on the day that he made the appointment and the day before he actually viewed the property), the following undisputed facts are also relevant:

- Councillor Tuchenhagen had not made a decision as to whether or not to bid on the property, and had not viewed it;
- He had made no commitment and invested no money;
- It was the policy and practice of the City to offer repossessed tax arrears properties by calling for public tenders;
- The Council decision to declare the property surplus was passed unanimously without debate;
- There was no serious suggestion that Councillor Tuchenhagen had any insider information, or acted in bad faith;
- Councillor Tuchenhagen had previously sought legal advice confirming that a member of council was not precluded from bidding on tax sale properties;
- There was no evidence to suggest that he directed his mind to the issue of whether or not he could have acquired a pecuniary interest by communicating that he might be interested in bidding, obtaining the advertisement and/or making an appointment to see the property;
- Once Councillor Tuchenhagen had put in a bid on the property (through a corporation which he owned), he declared an interest, and took no further part in council consideration of any matter relating to the sale.

It is respectfully submitted that the majority decision got off on the wrong foot by reason of the confusion and ambiguity in the documentary record before the Court. In effect, it equated "interest" of the councillor, in his statement suggesting a possible bid to purchase the property (which posed potential for his acquiring a financial interest), on one hand, with a pecuniary "interest" in council decision-making with respect to the proposed sale of the property, on the other.

Having stated its conclusion as to the meaning of "pecuniary interest" as generally "a financial interest, an interest related to or involving money", and that "a decision to buy, or offer to buy, property is demonstrative of a pecuniary interest", the Court then proceeded to extend this term to encompass a decision to consider whether or not to bid on a property.

There also appears to be potential for confusion in the majority decision as to what is an "indirect pecuniary interest", as including, accurately, a pecuniary interest attributed to a member by reason of the interest of others, on one hand, and an interest not yet crystallized but having a potential to impact on the financial position of a member, on the other.

Having noted that Councillor Tuchenhagen "indicated that he had an active, immediate and personal interest in examining whether to enter into a financial transaction with the municipality", the majority decision concluded that, by delivering the e-mail and arranging to visit the site to assist in deciding whether to submit a bid, his indirect pecuniary interest then arose.

With respect to the principles that formed the basis of the majority decision, the question then becomes: at what point does a "potential" interest arise, sufficient to constitute the establishment of a time when a pecuniary interest vests in the councillor? What degree of expression of intention is sufficient to establish that potential? What, if anything, is required in addition to the statement of intention, to demonstrate a degree of commitment or actual likelihood of financial commitment or impact, which, together with the statement of intent, may be held to have demonstrated the required potential interest in the acquisition of a financial interest sufficient to meet the required test? Was the making of the appointment to view the property the final tipping-point which turned a simple statement of intent to consider the possibility of a financial transaction into a binding attribution of pecuniary interest? What would have been the result if the councillor, having viewed the property, had decided in his own mind *not* to bid on it? The three components would still exist, except that the statement of intent would have been negatived by subsequent activity, all committed prior to the council vote on declaring the land surplus.

On the actual facts of the case, what if the councillor had decided in his own mind not to view the property? If such evidence were accepted on the hearing of the application, would that have led the Court to conclude that, at the time of the council vote, he no longer had the financial interest previously suggested by his expression of "interest"? In principle, probably not.

Questions such as these demonstrate the significant ambiguity and precariousness which may befall councillors throughout Ontario who even give *consideration* to the possible acquisition of municipal property, at least where any steps are taken for the purpose of providing the councillor with the basis for a final decision.

The whole concept of a matter to be voted upon having a *potential* to affect the pecuniary interest of the member, creates an area of uncertainty, which in this case led the majority of the Court to conclude that by indicating that he *might* be interested in bidding on the property, the councillor was thereby fixed with an interest, involving the imposition of duties under section 5 of the *MCIA*.

Decisions by the Divisional Court under the *MCIA* are relatively few and far between. For this additional reason, the majority decision, while it stands, should be regarded as a major warning light to councillors who might even *think* about entering into a financial transaction with their municipality, or becoming party to any other transaction which might vest in them a pecuniary interest. In the words of the majority judgment:

> The question that must be asked and answered is "does the matter to be voted upon *have a potential* to affect the pecuniary interest of the municipal councillor?" . . . *As soon as Robert Tuchenhagen saw himself as a potential buyer, he had become a person with a pecuniary interest.* The e-mail he sent on July 2, 2008 indicated that he might be interested in bidding on the property. At that point, he was no longer looking at this only from the perspective of a member of Council with the public responsibilities that entails. From the moment he decided he might make a bid, he began examining the situation to see how it could advantage his private interests. He had acquired a pecuniary interest.
>
> Robert Tuchenhagen had been a member of the City Council for almost twelve years. He should have been aware of the need to avoid placing himself in a position of conflict. It is difficult to understand how, when, on July 2, 2008, he advised the Realty Department that he might be interested in making a bid, he would not see that he was demonstrating a personal pecuniary interest that would conflict with that of the municipality and the electors he served.
>
> [emphasis added]

Issues Addressed in the Decisions

1. The Parameters of an Appeal under *MCIA*, s. 11

Subsections 11(1) and (2) of the *MCIA* provide as follows:

> 11. (1) An appeal lies from any order made under section 10 to the Divisional Court in accordance with the rules of court.
>
> (2) The Divisional Court may give *any judgment that ought to have been pronounced*, in which case its decision is final, or the Divisional Court may grant a new trial for the purpose of taking evidence or additional evidence and may remit the case to the trial judge or another judge and, subject to any directions of the Divisional Court, the case shall be proceeded with as if there had been no appeal.
>
> [emphasis added.]

The issue of the scope of an appeal under this provision has been raised in previous decisions under the *MCIA*, due to the similarity of its wording with those used in the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 34, under which latter provision the following principles have been confirmed in the decision of the Supreme Court of Canada in *Housen v. Nikolaisen*, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235:

> Those principles confirm:
>
> - "the standard of review on a question of law is that of correctness" and an appellate court is free to substitute its own opinion for that of the trial judge (para. 8);
> - "the standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a 'palpable and overriding error'" (para. 10);
> - The standard of review on questions of mixed law and fact "lie along a spectrum [. . .] Where the legal principle is not readily extricable, then the matter is one of 'mixed law and fact' and is subject to a more stringent standard [. . .] where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error" (para. 36).

The majority of the Divisional Court, however, decided to proceed with the appeal as a hearing *de novo*, stating as follows:

> The *MCIA* is important legislation. It seeks to uphold a fundamental premise of our governmental regime. Those who are elected and, as a result, take part in the decision-making processes of government, should act, and be seen to act, in the public interest. This is not about acting dishonestly or for personal gain; it concerns transparency and the certainty that decisions are made by people who will not be influenced by any personal pecuniary interest in the matter at hand. It invokes the issue of whether we can be confident in the actions and decisions of those we elect to govern. The suggestion of a conflict runs to the core of the process of governmental decision-making. It challenges the integrity of the process. This being so, anything short of a complete review may leave some part of any challenge unresolved. This is not unlike an allegation of "bias" in an administrative decision-maker. In such a circumstance, the nature of the review is one that is not limited. There is no "standard of review". The Court will not tolerate the possibility of leaving in place a decision infected by bias. Insofar as a consideration of whether the *MCIA* has been contravened is concerned, we can do no better than follow the guidance of the two judges we have quoted above [Krever J. and Holland J. in *Moll v. Fisher* (1979), 8 M.P.L.R. 266, 23 O.R. (2d) 609 (Ont. Div. Ct.)]. *We have dealt with this appeal as we would have as judges in the first instance.*

[emphasis added]

The dissenting judgment would have proceeded on the basis of the principles in *Housen v. Nikolaisen*, in holding that "an appellate court should not intervene unless there is an error in principle, a serious misapprehension of the evidence, or an error in a matter of general principle and law."

2. When and How Does a Pecuniary Interest Arise?

(a) General Principles of Conflict of Interest Law

The general governing principles in municipal conflict of interest addressed or confirmed in the court decisions in this matter involving the acquiring of a pecuniary interest by a councillor include the following:

- " . . . the *MCIA* is penal in nature. This does not mean that it should be interpreted narrowly, in favour of the member, in case of ambiguity. 'Even with penal statutes, the real intention of the legislature must be sought, and the meaning compatible with its goals applied'. . ." (para. 26)
- The obvious purpose of the Act is to prohibit members of councils and local boards from engaging in the decision-making process in respect to matters in which they have a personal economic interest. The scope of the Act is not limited by exception or proviso but applies to all situations in which the member has, or is deemed to have, any direct or indirect pecuniary interest. There is no need to find corruption on his part or actual loss on the part of the council or board. So long as the member fails to honour the standard of conduct prescribed by the statute, then, regardless of his good faith or the propriety of his motive, he is in contravention of the statute . . .
- This enactment, like all conflict of interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less. (*Moll v. Fisher* (*supra* at p. 612)) (para. 27)
- The issue is whether [the councillor] breached the requirements of the *MCIA*, not whether he acted out of any improper motive or lack of good faith. (para. 28)
- "'Pecuniary interest' is not defined by the *MCIA*. Generally, it is a financial interest, an interest related to or involving money. A decision to buy, or offer to buy, property is demonstrative of a pecuniary interest". (para. 31)
- This latter statement is a significant quote from the majority decision, which concludes that a *decision* in the mind of a councillor, as to the *possibility* of seeking to acquire an interest in property, not involving commitment, investment or active follow-up, in itself provides evidence of a pecuniary interest. (para. 31)

(b) The Vesting of a Pecuniary Interest

The key element in a court's finding of a breach of the *MCIA* is that, at the time of the member's attendance at the meeting in question, he or she *had a pecuniary interest*, direct or indirect, in the matter under consideration by the council. From the facts of this case, it is clear that all of the judges and parties involved agree that at some point Councillor Tuchenhagen acquired a pecuniary interest in the matter of the sale of the property in question. Disagreement, however, exists among them as to when it could be said that the Councillor first "had the interest". The following are the possible times:

- when he first decided that he might at some point decide to make a bid for the property;
- when he first decided in his own mind that he might take steps in furtherance of the making of a decision to seek to acquire the property;
- when he sent the e-mail to a City employee asking for a copy of the public announcement of the sale, and indicating that he might be interested in acquiring the property;
- when he received a copy of the public advertisement;
- when he made an appointment to view the property;
- at the point that he viewed the property;
- when, having viewed the property, he decided to put in a bid;
- when he submitted the bid in the public tender process.

It appears to have been accepted on behalf of the Councillor that he acquired the pecuniary interest at the point at which he decided to put in a bid, a decision to do what was within his power, to acquire it.

J. Wilson J. concluded that the *MCIA* requires that the member have acquired an interest that exists and has crystallized and that is more than a thought or idea that may be potentially affected by the decision of the Council, and that, "until the appellant as a prospective purchaser has had an opportunity to view a property and determine whether or not there was interest in making a bid on the property, that there can be 'no indirect pecuniary interest' that crystallizes". The majority, however, accepted that either the purely mental speculation that he might take steps to acquire the property, or that thought, together with the sending of the e-mail, constituted his acquisition of a pecuniary interest in the decision of the council as to whether or not to declare the property surplus to its needs:

- In this case, it was held that the interest of the councillor had crystallized at the time of the sending of the e-mail, "[f]rom the moment he decided he might make a bid"; (para. 32)

- Any decision of the members of Council could affect the price or whether the property would be sold at all. "The question that must be asked and answered is: does the matter to be voted upon *have a potential* to affect the pecuniary interest of the municipal councillor? . . . As soon as [the councillor] saw himself as a potential buyer, he had become a person with a pecuniary interest. The e-mail he sent . . . indicated that he might be interested in bidding on the property. At that point, he was no longer looking at this only from the perspective of a member of Council with the public responsibilities that entails. From the moment he decided he might make a bid, he began examining the situation to see how it could advantage his private interests. *He had acquired a pecuniary interest*." (para. 32) [emphasis added]
- The Court held that the councillor had indicated that he had an active, immediate and personal interest in examining whether to enter into a financial transaction with the municipality, when he delivered his e-mail indicating that he might bid, "and continued that interest when, on July 21, 2008, he arranged to visit the site to assist in deciding whether to submit a bid". (para. 34)

(c) Factors Relevant to a Determination of Whether a Contravention has occurred

In the eyes of the dissenting judge, in order for a pecuniary interest to exist it must have crystallized; it must be more than a thought or idea that may be potentially affected by a decision taken by council. To create an indirect pecuniary interest, it is clear that the matter under consideration at the meeting in question does not need to *actually* affect a pecuniary interest of the member in question. It is sufficient that the matter has the *potential* to affect the person's financial interest. The conflict is that the member of council has, personally or indirectly through a family member or a corporation, some sort of *existing* interest or right at the date of the meeting in question that may be affected. (para. 95)

The dissenting opinion goes on to quote from the Court in *Re Green and Borins* (1985), 28 M.P.L.R. 251, 18 D.L.R. (4th) 260, 8 O.A.C. 141, 50 O.R. (2d) 513 (Ont. Div. Ct.), to the effect that: "It is of no consequence . . . what the nature of the effect might be — for his betterment or otherwise — as long as it may be seen by the public to affect that pecuniary interest." (para. 96)

The dissenting decision concludes:

> As far as I can determine, there is no case that has interpreted the meaning of an "indirect pecuniary interest" to include an expression of interest by a member of council in a property that is in the process of being sold by public tender. Indirect pecuniary interest refers to holding that exists held by corporations or other family members. (para. 98)
>
> . . .
>
> I part company with my colleagues in this matter, based primarily upon an analysis of the facts and the application of the facts to the law. I conclude that to paint with too broad a brush in defining an "indirect pecuniary interest" to include an expression of interest in a property *exceeds any principle enunciated in the case law considering the issue to date, and opens the door to speculation, uncertainty, and potential abuse*. (para. 102)
>
> [emphasis added]

3. Inadvertence or Error in Judgment — The Saving Provision in the *MCIA*, s. 10(2)

Having determined that Councillor Tuchenhagen had contravened the *MCIA*, the Court then directed its mind to section 10, dealing with the actions available to a judge determining that a member has contravened the Act.

Under subsection 10(1), a court finding contravention is *required* to declare the seat of the member vacant, *may* disqualify the member or former member from being a member during a period thereafter of not more than seven years, and *may* require the making of restitution to a party suffering a loss or to the municipality.

The Court then addressed the provisions of subsection 10(2), which provides that where the judge finds that the contravention was committed through inadvertence or by reason of an error in judgment, the councillor is not subject to having his seat declared vacant or being disqualified as a member.

The majority judgment refers with approval to the decision of the application judge concluding that the councillor, by expressing an interest in the property by e-mail and making an appointment to view the property, "was reckless or willfully blind to the question of conflict", and that "a reasonable and fair minded member of the public knowing all of the facts would not accept the appellant's suggestion that failure to declare a conflict was an error in judgment within the meaning of the *MCIA*".

In the majority decision, the Court then confirms previously-established law to the effect that "the defence of inadvertence applies where the breach can be linked to an oversight of fact or law that was not reckless or wilfully blind". In this case, however, the Court held that Councillor Tuchenhagen, in making a bid, should have seen that he was demonstrating a personal pecuniary interest that would conflict with that of the municipality and the electors he served.

> The municipality would seek to get the best price. His interest would be to pay as little as possible. At that time, he already knew more than others who might wish to purchase the property. He knew the decision to sell had been spurred by a $1.00 offer. He had taken an active role by seconding the motion that, contrary to recommendation found in the staff Report, the offer not be accepted, creating the possibility that the land would be available for other bids to be made. This was only exacerbated when, on July 21, 2008, he arranged to view the property as part of his consideration as to whether to

> make a bid and then, at the meeting of the Committee of the Whole that evening, failed to declare an interest. This is not inadvertence; it is fairly characterized as being willfully blind or reckless. (para. 63)

Similarly, the majority held that the defence of "error of judgment" was not available. It stated as follows:

> In one sense, any contravention of a statute based on deliberate action can be said to involve an error of judgment. A criminal act, for example, involves a serious error in judgment. The purpose of this second branch of this saving provision in subsection 10(2) of the Act must be to exonerate some errors in judgment which underlie contraventions of the Act, but obviously not all of them. The Legislature must have intended that contraventions of s. 5 which result from honest and frank conduct, done in good faith albeit involving erroneous judgment, should [not] lead to municipal council seats having to be vacated. Municipal councils require the dedicated efforts of good people who will give of their time and talent for the public good. What is expected and demanded of such public service is not perfection, but it is honesty, candour and complete good faith. (para. 65)

The Court continued:

> Robert Tuchenhagen based his bid on what he expected another possible buyer that he was aware of might offer. Who can say what that potential bidder might have done if he or she had known what Robert Tuchenhagen knew about the circumstances leading to the property being offered for sale by public tender. As he seconded the motion requesting staff to check if 141 Hardisty Street North had been offered for sale by tender, as he took part in the considerations of the matter on July 21, 2008, Robert Tuchenhagen knew something the other councillors did not. He was considering a bid. In fact, he was going to visit the property the next day to continue his investigation of that possibility. This lacked the required candour and good faith. This was not an error in judgment, as that term must be understood in the context of a breach of the *MCIA*.
>
> Robert Tuchenhagen cannot rely on s. 10(2) of the *MCIA*. (paras. 66-67)

The dissenting opinion, having referred to the lists of relevant factors set out above, held:

> If the appellant had an indirect pecuniary interest on July 21, 2008 [which is not my conclusion], then this extraordinarily broad interpretation of what constitutes an indirect pecuniary interest *appears to be without precedent and takes the conflict provisions to new heights*. This extremely broad, novel interpretation of the scope of the *MCIA*, which is a penal statute, should also be a factor in determining whether the saving provisions should apply. (para. 185)
>
> [emphasis added]

In determining the standard of review to be used in addressing the issue of the application of the saving provision, Wilson J. holds that:

> The application of the saving provision to the facts of this case is a question of mixed law and fact which requires an interpretation of the evidence as a whole, as well as social and political context. Therefore, it ought to be reviewed on the standard . . . of whether there is a palpable and overriding error . . . in the application judge's reasons . . . As discussed above, failure to consider important evidence in reaching a conclusion, may constitute a palpable and overriding error.

Wilson J. concludes that certain undisputed facts, relevant to the issues decided by the Court, were not considered by the application judge, such as: the fact that the councillor disclosed his interest at the first opportunity after he perceived that he had it; the appellant and respondent had been involved in an unpleasant disagreement as adjoining property owners, where the appellant's worker had inadvertently cut off hydro to the respondent's side of the building, leading to an altercation; City staff did not support the application; the record of what had occurred at the various meetings of council and the committee of the whole was incomplete; and the respondent (original applicant) had "initiated the proceeding for financial gain".

The dissenting justice thereby found a palpable and overriding error to have been committed by the application judge, and therefore could not support his conclusion that the conduct of the appellant was reckless or wilfully blind to the question of conflict, in the key meeting of July 21, 2008.

Wilson J. also found "that the conclusion that a reasonable and fair minded member of the public knowing all of the facts would not accept the appellant's evidence that the failure to declare a conflict was an error in judgment within the meaning of the *MCIA*, cannot be supported by the evidence". As stated in her dissent:

> I conclude that if a broad interpretation of "indirect pecuniary interest" is adopted, as suggested by the application judge and the majority of this court, then in light of the application judge's failure to consider all of the undisputed facts of this case, his decision not to apply the savings provisions constitutes an overriding and palpable error and should be reversed.
>
> In the undisputed facts of this case, the only possible reasonable conclusion was that the appellant's conduct was through inadvertence, or was an error in judgment. (paras. 189-190)

The majority justices, having found the opposite result, then went on to consider what "penalty" was available in the circumstances, in which Councillor Tuchenhagen was no longer a member of city council.

Additional Issues

The importance of this case is not restricted to the three principal issues which it decided. The majority and dissenting

decisions, between them, provide useful references to a large number of issues of municipal conflict of interest law and procedural and administrative matters raised in a municipal conflict of interest application, some of which are as follows:

1. Failure by the City to Appear or Take a Position

Strangely, all three justices on the panel referred, with apparent surprise, to the fact that the City did not appear in the proceedings, was not represented, and took no position with respect to the issues between the parties. All three appeared critical of this situation, with the majority noting that "counsel were asked to communicate with counsel for the City and seek whatever assistance could be provided and to make further submissions in writing. Unhappily, the material that was subsequently filed was not as helpful as it could or should have been."

Even the dissenting member of the panel noted that the application was not supported by the City or its council, and consequently "there was no assistance or perspective available from those in the trenches as to where lines should be drawn in a case that appears to me to not [to] be one with bright lines."

It is respectfully submitted that in an application under the *MCIA*, the municipality is neither a necessary nor proper party, and would not be expected to take a position in the proceedings — particularly where one of its members stands to be removed from its membership. On the other hand, Justice Wilson's comments are well taken in that she felt that the absence of evidence from members of City staff restricted the ability of the application judge and the Divisional Court to sort out exactly what had happened at the various meetings.

The dissenting judge also remarked on the fact that the application was brought by a private individual and was not supported by the City or its council. In relation to the saving provision, she refers to the fact that no City staff were pursuing the application. In her general comments on the case, she also referred to the confusion in the evidence as to exactly what had happened at what meetings, on the basis of the voluminous documentary evidence, in which no viva voce evidence was called.

It is suggested herein that a municipality, not being an "elector", could not be an applicant in a *MCIA* application, and it would be unusual, though not unheard of, for either another member of council or a member of city staff, to act as applicant in such an application, although not legally precluded from doing so.

2. Motives in Bringing the Application

The dissenting judge refers in some detail to the context in which the application had been brought, in addressing the issue of sanctions for breach of the *MCIA* and the saving provision in subsection 10(2) where she finds that the contravention was committed through inadvertence or by reason of an error in judgment. In this respect, she refers to the following facts:

- The respondent had previously put in the only other bid on the property for $1.00, later raised to $100.00;
- The appellant and respondent were adjoining owners of land adjacent to the property in question;
- Staff had recommended that the City accept the respondent's offer, rather than putting the property up for tender;
- The "conflict between neighbours who had difficulties as abutting landowners. This complaint was made by the respondent who is clearly a disgruntled abutting property owner who was unsuccessful in the public tender bid for the property. The respondent had resubmitted his unsuccessful bid for the property for $1.00 and was obviously unhappy";
- After the appellant had acquired the property, he began making the required improvements stipulated by the municipality. In rectifying the hydro in the appellant's building, a technician working for him on the common wall inadvertently cut off hydro to the respondent's building;
- a verbal conflict arose as a result of this hydro incident;
- In the proceedings, the respondent sought large sums of money as compensation referred to by the dissenting judge as "the respondent's exorbitant financial claims", presumably extending beyond mere restitution which would, in an appropriate case, be within the jurisdiction of the Court to grant.

3. The Need for a Declaration that the Property was Surplus

In this case, to the extent revealed by the judgments, it appears that the decision to sell the land by public tender, or at least the decision to advertise it for sale, occurred on or before June 27, 2008, following in which staff advertised the property for sale by public tender. It was on July 2, 2008 that the appellant obtained a copy of the advertisement and communicated that he might be interested in bidding on the property. Looking at the sequence of events, including the fact that the property was seized for tax arrears, and not acquired by the municipality because it had any use for it, this left the need for a declaration of surplus to be almost an administrative issue, one which one could well argue was implicit and inherent in the initial decision to put the property up for public tender in any event. One might even go so far as to argue that, once the tender call was published, the City was not in a position to insert ambiguity into the proposed transaction or create unfairness in the tender system, through a failure to make a declaration of its surplus status. In the circumstances, the vote of council held on July 21, 2008 amounted to a perfunctory and technical administrative rubber stamp, in itself having no impact on the then-current status of the property for sale or creating a financial interest in the pocket of any-

one who at that point in time was considering whether or not to bid on it.

The dissenting judgment refers at length to the propriety of steps taken by the City and the procedures and practices followed by the City leading up to the vote on whether or not to declare the property surplus to its needs. It may also be that the City could have declared the property surplus at any time *following* the receipt of bids and before authorizing the sale. By then, of course, Councillor Tuchenhagen would have been a bidder and would have declared an interest in the matter, which he did after his decision to make such a bid had been made.

4. Pecuniary Interest in Common with Electors Generally

Clause 4(j) of the *MCIA* excuses a member from compliance with the *MCIA* where his or her pecuniary interest is *an interest in common with electors generally*. The phrase has been described in cases as applying to electors in the area in question who are "affected" by the matter. It is those affected electors who are to be regarded when considering the issue of conflict of interest, and not necessarily *all* the electors. In this case, counsel for the Appellant argued that "electors generally" included only two electors, those interested in viewing and potentially bidding on the property. This approach was rejected by the Court.

5. "Conflict of Interest" with the Municipality

The majority judgment suggested that Councillor Tuchenhagen had a "direct conflict with the municipality (and the 'electors generally'). Its and their general interest was to get as much for the property as it could. Contrary to the position taken by counsel for Robert Tuchenhagen, this conflict was manifest and it was real." (para. 46)

This is a somewhat peculiar approach to the issue of conflict, in that, while the City, acting in the public interest, is expected to choose the highest bid tendered for the purchase of the land, this hardly puts the interests of the municipality in conflict with those of the tenderer. The parties are simply on two sides of a potential business transaction, with no sinister overtones to be attributed to the potential purchaser.

6. What is the Matter?

"Matter" has been defined in this context to mean an issue upon which there can be some meaningful discussion or debate and the prospect of some decision being made. The majority reasoned that, since the by-laws of the City at the time required that land had to be declared surplus before it could be sold, the fact that the issue was raised in a report and discussed at the Committee of the Whole on July 14, 2008, which passed a resolution "'ratified by the Committee on July 21, 2008', confirms that there could be 'meaningful discussion' and there was the prospect of some decision being made." (para. 50)

What is not emphasized is the fact that there was virtually no likelihood of this happening, which arguably made the councillor's interest, if he had one, remote or insignificant.

7. The Relationship of the Committee of the Whole to the Whole Council

Resolving into "Committee of the Whole" council is a device used by many municipalities to enable members of council to deal with a matter not appropriately dealt with by the council at a council meeting, such as hearing deputations, or dealing with matters required or permitted to be discussed in camera. It is called a "committee", since it is not formally the council itself, but a committee which may make recommendations to the council, even though both bodies consist of the same members.

In the decisions, the use of the word "ratification" causes some confusion in that, in some cases it refers to a resolution of the Committee of the Whole being ratified by the council, i.e. its recommendation adopted, whereas in other matters, it refers to the council's approving the minutes of previous meetings, which does not involve voting a second time on whether to decide the substance of the question.

Typically, councils "approve" minutes following consideration of whether or not the minutes accurately reflect, in form and content, what occurred at the previous meeting. Approval of the minutes does not involve either ratifying the actions taken at the previous meeting or recognizing the requirement of a condition precedent of retroactively confirming decisions represented by them. A motion to adopt the minutes does not involve reconsideration of decisions previously made, which in most councils would require a separate motion properly introduced, often required to be supported by a significant percentage of the council members, such as two-thirds of them.

In this context, the fact that Councillor Tuchenhagen declared an interest in the minutes of the previous meetings at the time they were adopted, by which latter date he had acquired a pecuniary interest, would not involve in itself an admission of having previously held a precluded pecuniary interest or participated unlawfully in discussion of a matter under consideration. It is also not a breach of the *MCIA* to declare an interest which the member does not necessarily have.

8. What is a "Meeting"?

It is respectfully suggested that the majority decision has the potential to cause confusion, in that it appears to have decided that "a meeting of a committee of the whole is a meeting of 'a council'". This conclusion arose from a discussion of whether or not Councillor Tuchenhagen contravened the *MCIA*, in that, while he was not in attendance at the Committee of the Whole meeting on July 14, 2008, which may have recommended a decision or confirmation of a decision to declare the property surplus, thus enabling its sale, he was in attendance at the open meeting of council held on July 21, 2008, at which time the Committee of the Whole recommendation was "ratified" by the same committee, but "was not placed before council, other than within the minutes of the two earlier meetings".

The majority then goes on to discuss the issue of whether or not the councillor violated the *MCIA* by his attendance at the Committee of the Whole meeting on July 21, 2008, and for that purpose, the majority goes to the definition of "meeting" in section 1 of the *MCIA*, which states: "'Meeting' includes any regular, special, committee or other meeting of a council or local board as the case may be."

While it would be clearer if this definition included "a meeting of a committee of a council", as opposed to "a committee or other meeting of a council", the point is well taken by the majority that the meetings which the councillor attended on July 21, 2008 were both "meetings" as defined by the *MCIA*, which improperly uses "committee" as an adjective probably intending to refer to standing committees, as well as the committee of the whole. The majority took from the wording of the *MCIA* that the councillor should have made a declaration of interest at the Committee of the Whole. Unfortunately, however, it did so by equating a meeting of the Committee of the Whole with "a meeting of council", which, it is submitted, is not the case, even though both bodies share the same membership.

9. Inadvertence or Error in Judgment

Once again, the majority of the Court came down heavily on the conduct of Councillor Tuchenhagen, without discussion of or reference to the fact that, whatever he did, he does not appear to have adverted his mind to issues of conflict, whether or not he was mistaken in proceeding on the basis that on July 21, 2008, he had not yet acquired a pecuniary interest in the matter under consideration by the council. Another court might well find this to be a clear situation to which this provision was intended to apply to relieve the member from penalty. However, the majority in this case (quoting from the decision of the application judge) found his conduct to be "fairly characterized as being willfully blind or reckless".

The majority appear to have attributed to Councillor Tuchenhagen an interest and intent in conflict with the interests of the City, and even the possession of "insider information", in the fact that he was considering a bid. The majority continues:

> In fact, he was going to visit the property the next day to continue his investigation of that possibility. This lacked the required candour and good faith. This was not an error in judgment, as that term must be understood in the context of a breach of the *MCIA*.

This is an incredible description of what, on the basis of all of the evidence, undisputed, involved nothing more than a councillor considering whether or not to acquire property from the City, property which had already been decided should be sold, and had been advertised for sale. What amounted to a mere formality, declaring the property surplus, turned into a decision found to impact on the pecuniary interest of the councillor, even though what he had done involved entirely mental considerations on his part. Acquiring and reading the advertisement, and making an appointment to see the property, simply involved actions ancillary to those mental processes, hardly the acquisition of a pecuniary interest in the sale of the property at that time.

10. The Councillor must be Penalized

Having decided that Councillor Tuchenhagen had contravened the *MCIA*, the majority judges turned their minds to what, if any, consequences to the councillor should flow from that conclusion.

By the time that the case was decided by the Court, Mr. Tuchenhagen was no longer a member of council, and therefore the Court was not in a position, nor was it required, to comply with the mandatory term in clause 10(1)(a) of the *MCIA*, to declare the seat of the member vacant.

The application judge, whose reasoning in this regard was adopted by the majority in the Divisional Court, addressed this issue in the following words:

> There is no evidence that Mr. Tuchenhagen acted in bad faith. The City suffered no loss. There was no policy prohibiting Mr. Tuchenhagen from bidding on real estate declared surplus to the City's needs. There was no interference with the public tender process. Mr. Tuchenhagen has given the City 12 years of public service. However, because the municipal election has just been held, any disqualification of less than the four-year term of the present council would result in no sanction. It was Mr. Tuchenhagen's choice not to run in the most recent election. The only meaningful sanction that I can impose, because I cannot declare his seat vacant, is to disqualify Mr. Tuchenhagen from running in the next election. If I had been required to declare Mr. Tuchenhagen's seat vacant, I would have been disposed to impose a shorter disqualification . . .

The application judge went on to state:

> In the present case, there must be some consequence flowing from the contravention. I hold that a disqualification of four years would be fair and just in this case.

The majority of the Divisional Court followed the approach reflected in this quotation, by the following words:

> The penalty imposed was the minimum available if consequences were to flow to Robert Tuchenhagen. The considerations the judge applied are fair, complete, balanced and reasonable. We can do no better than defer to his judgment as to the appropriate penalty and adopt his reasons in this regard as our own.

I have not been able to find any decided case establishing a principle that a penalty *must* flow to a councillor as punishment for contravening the *MCIA*. The purpose of the statute is to protect the public interest, and to make it clear in no uncertain terms, and with the threat of drastic results, both personal and economical, the results which flow from contravention of the Act, in which a member of a municipal council participates in consideration of a matter at council, which impacts directly on his or her financial situation, or indirectly through impact on the pecuniary interests of immediate

members of his or her family, or a body of which he or she is a member. It does not appear that the public interest is served in a situation where the Court, although concluding that the seriousness of the councillor's conduct does not warrant lengthy preclusion from office, decides that it is a required result that some such penalty be meted out through removal of the possibility of his running for office in the next election.

In the result, the decisions of the application judge and that of the majority of the Divisional Court would have the effect of precluding Councillor Tuchenhagen from holding or seeking municipal office for a period of eight years and one month — assuming, in the normal course of things, his inability to run as a candidate for municipal office in the 2014 general municipal election, with the result that he could not hold municipal office until the term commencing January 1, 2019.

Under the *MCIA*, the maximum time within which a member may be disqualified from office is a period of not more than seven years. Consequently, there are grounds to argue that the Court's decision was not lawfully authorized by the legislation, and on that ground alone should be set aside.

It is difficult to find authority in section 10 of the *MCIA* for the conclusion reached by the majority that it had a duty to preclude the member from holding office for some period. While it does provide a mandate, in the case of a sitting member, to make the declaration of vacancy, the additional power to disqualify is simply that — a discretionary power. There is certainly nothing in the conduct of Councillor Tuchenhagen in this case, even in the opinion of the application judge and the majority of the Divisional Court, which warranted the conclusion that he was so unfit for office that he should not be able to serve for a period of over eight years.

11. What is a "Pecuniary Interest"?

The *MCIA* does not define "pecuniary interest"; indeed it might be practically impossible for it to do so. At the same time, the phraseology would not have appeared to preclude a member of a council from considering whether to acquire a pecuniary interest in a property to be sold by the municipality without running afoul of the requirements of the *MCIA*.

The majority judgment of the Divisional Court appears to have inserted the word "potential" before the phrase "pecuniary interest" in section 5 of the *MCIA*, increasing the uncertainty currently inherent in the key provision of the statute, and posing serious quandaries to members of council trying to comply with its requirements.

Here, the Court appears to assume, as did the council, that there was a legal requirement that, having decided to sell the property and putting it up for tender, it was also legally required to make a declaration that the land was surplus to the requirements of the municipality. While its by-law did anticipate this procedure, the council could also have considered amending or waiving that requirement, in view of the fact that the proposed transaction was simply a tax sale situation, and the decision as to "surplus" was inherent and implicit in its previous decision. In hindsight, if such had been recognized, and if Mr. Mondoux had not been aggrieved by reason of being prevented from purchasing the property for $1.00, this conflict of interest litigation might never have occurred.

Conclusion

It will be interesting to see whether or not the Ontario Court of Appeal grants leave to appeal from the decision of the Divisional Court in this case.

Certainly, the judgment is, on a number of grounds, of great importance to all members of municipal councils in Ontario, and generally in the area of municipal conflict of interest law.

There appears to be no previous case in which the Court imposed such a relatively small burden on an applicant in a municipal conflict application, or attributed such sinister motives to a councillor in considering whether or not to enter into a transaction with the municipality.

The decisions of the Court are also significant in terms of the scope of the powers of the Divisional Court on appeal, and the significance, if any, of the motives of an applicant in a conflict of interest application.

In the meantime, MUNICIPAL COUNCILLORS BE FOREWARNED!

George Rust-D'Eye is Partner Emeritus of WeirFoulds LLP in Toronto. He is one of Canada's leading municipal law lawyers. George is designated by The Law Society of Upper Canada as a Certified Specialist (Municipal Law - Local Government/Land Use Planning and Development Law). In 2007, he was awarded the Ontario Bar Association's Award of Excellence in Municipal Law. He is designated as a Local Government Fellow by the International Municipal Lawyers Association in recognition of demonstrated excellence in the field of Local Government Law. George has written books, papers and articles in the area of municipal law, including a significant body of material relating to municipal powers and procedures, licensing and regulation, heritage law and practice, conflict of interest, municipal contract and employment law, municipal liability issues, regional planning, and freedom of information. He is the author or co-author of a number of leading published texts and is a prodigious speaker and educator. George is also the current Integrity Commissioner for the City of Mississauga.

CASES DIGESTED IN THIS ISSUE*

Administration portuaire de Montréal, Montréal (Ville) c. See Montréal (Ville) c. Administration portuaire de Montréal.

Ajax (Town) v. Wong (2011), 2011 CarswellOnt 6315, 2011 ONCJ 352, P.L. Bellefontaine J. (Ont. C.J.) **508**

Alexander (Rural Municipality), Beaulieu v. See Beaulieu v. Alexander (Rural Municipality).

Associated Developers Ltd. v. Edmonton (City) (2011), 2011 CarswellAlta 1689, 2011 ABQB 592, 89 M.P.L.R. (4th) 72, J.M. Ross J. (Alta. Q.B.) **527, 528, 533**

Beaulieu v. Alexander (Rural Municipality) (2011), 2011 CarswellMan 478, 88 M.P.L.R. (4th) 290, 2011 MBQB 213, Perlmutter J. (Man. Q.B.) **503, 507, 539, 540, 542**

British Columbia (Minister of Transportation), Vesuna v. See Vesuna v. British Columbia (Minister of Transportation).

Brock, Re (2011), 2011 CarswellOnt 1011, 81 M.P.L.R. (4th) 115, *(sub nom. Fort Erie (Town) Zoning By-law No. 26-10 (Re))* 67 O.M.B.R. 175, R. Rossi Member (O.M.B.) **536**

Brock, Re (2011), 2011 CarswellOnt 11006, 2011 ONSC 5252, 89 M.P.L.R. (4th) 278, P.B. Hambly J. (Ont. Div. Ct.) **535, 543**

Campbell, Municipal Property Assessment Corp., Region No. 15 v. See Municipal Property Assessment Corp., Region No. 15 v. Campbell.

Cardston County (Subdivision & Development Appeal Board), Van Bezooyen v. See Van Bezooyen v. Cardston County (Subdivision & Development Appeal Board).

Chalets St-Adolphe inc. c. St-Aldophe d'Howard (Municipalité) (2011), 88 M.P.L.R. (4th) 1, 2011 CarswellQue 8580, EYB 2011-194339, 2011 QCCA 1491, Chamberland J.C.A., Gagnon J.C.A., Léger J.C.A. (Que. C.A.) **506, 537**

Condominium Corp. No. 9813678 v. Statesman Corp. (2009), 2009 ABQB 493, 2009 CarswellAlta 1751, 65 M.P.L.R. (4th) 178, 16 Alta. L.R. (5th) 74, 85 C.L.R. (3d) 186, [2010] 5 W.W.R. 494, 472 A.R. 33, J.D.B. McDonald J. (Alta. Q.B.) **517**

Cusimano v. Toronto (City) (2011), 88 M.P.L.R. (4th) 138, 2011 CarswellOnt 8486, 2011 ONSC 4768, Lederman J. (Ont. Div. Ct.) **545, 547**

Durham (Regional Municipality) v. Todd (2011), 2011 CarswellOnt 11116, 2011 ONCJ 449, 89 M.P.L.R. (4th) 130, L. Cameron J. (Ont. C.J.) **514**

Edmonton (City), Associated Developers Ltd. v. See Associated Developers Ltd. v. Edmonton (City).

Edmonton (City), McNulty v. See McNulty v. Edmonton (City).

Fiore v. Whitchurch-Stouffville (Town) (2011), 2011 ONSC 3928, 2011 CarswellOnt 5381, M. Fuerst (Ont. S.C.J.) **515, 521**

Fort Erie (Town) Zoning By-law No. 26-10 (Re) See Brock, Re.

Fuhr v. Perth South (Township) (2011), 2011 ONCJ 413, 2011 CarswellOnt 11095, 89 M.P.L.R. (4th) 139, K.L. McKerlie J. (Ont. C.J.) **546**

Gander International Airport Authority Inc., Gander (Town) v. See Gander (Town) v. Gander International Airport Authority Inc.

Gander (Town) v. Gander International Airport Authority Inc. (2011), 2011 CarswellNfld 335, 2011 NLCA 65, 88 M.P.L.R. (4th) 179, 9 R.P.R. (5th) 1, B.G. Welsh J.A., C.W. White J.A., J.D. Green C.J.N.L., L.D. Barry J.A., M.H. Rowe J.A. (N.L. C.A.) **534**

Griffin (Rural Municipality) No. 66, Sprecken v. See Sprecken v. Griffin (Rural Municipality) No. 66.

Grist, Meaford (Municipality) v. See Meaford (Municipality) v. Grist.

Jodoin v. Steinbach (City) (2011), 88 M.P.L.R. (4th) 154, 2011 CarswellMan 475, 2011 MBQB 218, Cameron J. (Man. Q.B.) **544**

Johnston v. Victoria (City) (2011), 2011 BCCA 400, 2011 CarswellBC 2665, 89 M.P.L.R. (4th) 1, 22 B.C.L.R. (5th) 269, Donald J.A., Levine J.A., Lowry J.A. (B.C. C.A.) **501**

Kent (Litigation Guardian of) v. Laverdiere (2011), 2011 CarswellOnt 9647, 89 M.P.L.R. (4th) 7, 85 C.C.L.T. (3d) 296, 2011 ONSC 5411, D.A. Wilson J. (Ont. S.C.J.) **519, 520**

Kimery v. Sherwood (Rural Municipality), No. 159 (2011), 2011 CarswellSask 568, 2011 SKCA 98, Herauf J.A. (Sask. C.A. [In Chambers]) **531**

Laverdiere, Kent (Litigation Guardian of) v. See Kent (Litigation Guardian of) v. Laverdiere.

Markwart v. Prince Albert (City) (2010), 93 C.L.R. (3d) 288, 368 Sask. R. 98, 73 M.P.L.R. (4th) 291, [2010] S.J. No. 494, 2010 SKQB 312, 2010 CarswellSask 551, M.D. Popescul J. (Sask. Q.B.) **499**

McNulty v. Edmonton (City) (2011), 82 M.P.L.R. (4th) 201, 2011 ABQB 297, 2011 CarswellAlta 752, 42 Alta. L.R. (5th) 217, Donald Lee J. (Alta. Q.B.) **516, 522**

Meaford (Municipality) v. Grist (2011), 87 M.P.L.R. (4th) 118, 2011 CarswellOnt 9661, 2011 ONSC 5195, Daley J. (Ont. S.C.J.) **498, 502, 504, 505**

Mississauga (City), Tuli v. See Tuli v. Mississauga (City).

Mondoux v. Tuchenhagen (2011), 88 M.P.L.R. (4th) 234, 2011 CarswellOnt 11438, 2011 ONSC 5398, D. Gordon J., J. Wilson J., Lederer J. (Ont. Div. Ct.) **509, 510**

Mondoux v. Tuchenhagen (2010), 2010 CarswellOnt 9765, 2010 ONSC 6536, 79 M.P.L.R. (4th) 1, D.C. Shaw J. (Ont. S.C.J.) **511**

Montréal (Ville) c. Administration portuaire de Montréal (2011), 2011 CarswellNat 3788, 2011 FC 937, 89 M.P.L.R. (4th) 49, 2011 CF 937, 2011 CarswellNat 3014, Luc Martineau J. (F.C.) **530**

Moore v. Municipal Property Assessment Corp., Region No. 18 (2011), 2011 CarswellOnt 7852, A. Castel Member (Ont. Assess. Review Bd.) **523, 524**

Municipal Property Assessment Corp., Region No. 09 v. Wolfe-Betz (2011), 2011 CarswellOnt 8771, J.L. Walker Member (Ont. Assess. Review Bd.) **525, 526, 532**

Municipal Property Assessment Corp., Region No. 15 v. Campbell (2011), 2011 CarswellOnt 8770, P. Stillman Member (Ont. Assess. Review Bd.) **529**

Municipal Property Assessment Corp., Region No. 18, Moore v. See Moore v. Municipal Property Assessment Corp., Region No. 18.

Payne v. Windsor (City) (2011), 2011 CarswellOnt 10685, 89 M.P.L.R. (4th) 251, 2011 ONSC 5123, Richard C. Gates J. (Ont. S.C.J.) **541**

Perth South (Township), Fuhr v. See Fuhr v. Perth South (Township).

Prince Albert (City), Markwart v. See Markwart v. Prince Albert (City).

Sherwood (Rural Municipality), No. 159, Kimery v. See Kimery v. Sherwood (Rural Municipality), No. 159.

Sprecken v. Griffin (Rural Municipality) No. 66 (2011), 2011 CarswellSask 472, 2011 SKQB 236, G.A. Chicoine J. (Sask. Q.B.) **518**

St-Aldophe d'Howard (Municipalité), Chalets St-Adolphe inc. c. See Chalets St-Adolphe inc. c. St-Aldophe d'Howard (Municipalité).

Statesman Corp., Condominium Corp. No. 9813678 v. See Condominium Corp. No. 9813678 v. Statesman Corp.

Steinbach (City), Jodoin v. See Jodoin v. Steinbach (City).

Todd, Durham (Regional Municipality) v. See Durham (Regional Municipality) v. Todd.

Toronto (City), Cusimano v. See Cusimano v. Toronto (City).

Tuchenhagen, Mondoux v. See Mondoux v. Tuchenhagen.

*

Digests or summaries of the most recent and significant decisions of Canadian courts and tribunals, written with a focus on the legal issues involved in each decision. More than one digest may be written for each decision.

Tuli v. Mississauga (City) (2011), 2011 CarswellOnt 5637, 2011 ONSC 3267, 88 M.P.L.R. (4th) 206, L.A. Pattillo J. (Ont. S.C.J.) **500**

Van Bezooyen v. Cardston County (Subdivision & Development Appeal Board) (2011), 2011 CarswellAlta 1638, 2011 ABCA 263, Peter Martin J.A. (Alta. C.A.) **512, 513**

Vesuna v. British Columbia (Minister of Transportation) (2011), 2011 BCSC 941, 2011 CarswellBC 1867, 9 R.P.R. (5th) 114, S. Griffin J. (B.C. S.C.) **538**

Victoria (City), Johnston v. See Johnston v. Victoria (City).

Whitchurch-Stouffville (Town), Fiore v. See Fiore v. Whitchurch-Stouffville (Town).

Windsor (City), Payne v. See Payne v. Windsor (City).

Wolfe-Betz, Municipal Property Assessment Corp., Region No. 09 v. See Municipal Property Assessment Corp., Region No. 09 v. Wolfe-Betz.

Wong, Ajax (Town) v. See Ajax (Town) v. Wong.

CIVIL PRACTICE AND PROCEDURE

498. Limitation of actions — Actions involving municipal corporations — General principles —— Laches and acquiescence — Plaintiff municipality purported to establish public road ("road") by way of by-law ("first by-law") — First by-law was not registered on title, and lost for 150 years — After discovering first by-law, municipality passed by-law asserting portion of road ("disputed road") was valid public road ("second by-law") — Disputed road ran over defendant property owners' lands — Property owners had used road as private driveway — Property owners, with municipality's approval, restored road after portion was washed away prior to second by-law — Municipality brought action for declaration that it owned disputed road, and that it was public highway — Property owners brought motions for summary judgment dismissing municipality's action — Municipality brought cross-motion for interim injunction to preserve disputed road — Motions granted — Cross-motion dismissed — Doctrine of laches and acquiescence applied — Over 150 years passed between enactment of first by-law and second by-law — There was no evidence why first by-law was not registered and was lost — Municipality did not adequately explain extraordinary delay in asserting its rights to public roadway — All parties proceeded on basis that lands were privately owned until first by-law was discovered — Even if first by-law was valid and enforceable, it would prejudice property owners and be unjust to allow municipality to take title to disputed road.

Meaford (Municipality) v. Grist (2011), 87 M.P.L.R. (4th) 118, 2011 CarswellOnt 9661, 2011 ONSC 5195, Daley J. (Ont. S.C.J.).

499. Limitation of actions — Actions involving municipal corporations — General principles —— When statute commences to run — Striking out statement of claim — Plaintiff landlord was owner of apartment complex — Apartment complex did not meet city standards — In November 2004, city ordered demolition of apartment complex — Landlord appealed order to city council, leading to further litigation — Separately, landlord brought action against city claiming malicious actions, conspiracy, false statements and libel — Judge granted city's application to strike claim on ground it was statute-barred — Court of appeal affirmed that decision — In 2007, landlord brought second claim against city, H, police board, members of police, health board and public health officer ("defendants") — Defendants brought application to strike landlord's statement of claim — Application granted — New claims in second action were struck — Second statement of claim alleged new cause of action arose when city council rendered its second decision confirming demolition order in 2008 — Limitation period commenced when landlord discovered relevant facts in November 2004 — City council's second decision did not revive statute-barred claim — Applicable limitation period in s. 307 of Cities Act was one year from when damages were sustained and had expired.

Markwart v. Prince Albert (City) (2010), 93 C.L.R. (3d) 288, 368 Sask. R. 98, 73 M.P.L.R. (4th) 291, [2010] S.J. No. 494, 2010 SKQB 312, 2010 CarswellSask 551, M.D. Popescul J. (Sask. Q.B.); affirmed on other grounds (2011), 2011 CarswellSask 619, 87 M.P.L.R. (4th) 32, 2011 SKCA 104, Caldwell J.A., Richards J.A., Smith J.A. (Sask. C.A.).

CONSTRUCTION LAW

500. Statutory regulation — Miscellaneous —— Applicants had red oak tree on their property estimated to be between 50 and 70 years old — Property services officer issued order pursuant to Building Code Act, 1992 requiring applicants to remove tree in order to eliminate condition which was source of danger — Property standards committee dismissed applicants' appeal — Section 15.3(4) of Act provided that appeal of committee's decision could be brought to superior court by notifying clerk of municipality in writing and by applying to court with 14 days after copy of decision was sent — Applicants' counsel contacted representative of committee within 14 days and requested extension of time to appeal to enable review of file — Request was denied — Applicants brought motion for extension of time to appeal or, alternatively, validating service of notice of appeal pursuant to R. 16.08 of Rules of Civil Procedure — Motion dismissed — In seeking extension under Act, applicants relied on R. 3.02 or, alternatively, court's inherent jurisdiction — Rule 3.02 of was not applicable to appeal provisions provided by s. 15.3 of Act — Rule 3.02 did not permit court to extend limitation period prescribed by statute — In absence of following procedure set out in s. 15.3(4) of Act, practice and procedure of court as set out in rules could not assist applicants — Authorities are clear that unless power has been granted by statute, courts have no inherent jurisdiction to extend limitation period provided by statute — It was clear from wording of both ss. 25 and 15.3 of Act that s. 25 did not apply — Appeal was not from order made by chief building official, registered code agency, or inspector under Act, but rather from committee's decision following order of property standards officer — Rule 16.08 had no application — Again, rules could not assist applicants in absence of following s. 15.3(4) procedure — Further, no application had been commenced to court appealing committee's decision — There had been no improper service of document which required validation.

Tuli v. Mississauga (City) (2011), 2011 CarswellOnt 5637, 2011 ONSC 3267, 88 M.P.L.R. (4th) 206, L.A. Pattillo J. (Ont. S.C.J.); additional reasons at (2011), 2011 CarswellOnt 9784, 88 M.P.L.R. (4th) 216, 2011 ONSC 5534, L.A. Pattillo J. (Ont. S.C.J.).

MUNICIPAL LAW

501. Attacks on by-laws and resolutions — Grounds — Charter of Rights and Freedoms — Right to life, liberty and security of the person —— Respondent municipality of V enacted by-law prohibiting erection of temporary shelters in city parks and public spaces, which had been challenged in earlier case — In that case, court held that by-law violated s. 7 of Canadian Charter of Rights and Freedoms in that homeless people had right to protect themselves from elements while sleeping at night — When V amended by-law so it was only in force during daylight hours, appellant J and others set up shelters in park as challenge to enforcement during daylight hours and were convicted under by-law — On appeal to summary conviction appeals court, V filed affidavits deposing that emergency shelters had over 30 cots available for sleeping during day; J did not file any evidence — Summary conviction appeals court judge found there was "no proven shortage of daytime shelter for homeless people" and upheld J's conviction — J appealed result — Appeal dismissed — In several places, summary conviction appeal decision mistakenly referred to right to erect temporary shelters, which, if it were so, would amount to property right that this court said, in earlier case, was not legal result — J understandably thought he was operating at justification stage upon assumed breach, but earlier case did not create "right" to do anything, neither did it declare by-law unenforceable for all purposes — Effect of earlier case was to prevent interference with efforts of homeless people in sheltering themselves at night on city property; that did not set up presumed s. 7 breach for daytime regulation — Scant evidence about daytime shelter beds did not support J's claim of necessity; consequently, J failed to establish breach of s. 7 of Charter.

Johnston v. Victoria (City) (2011), 2011 BCCA 400, 2011 CarswellBC 2665, 89 M.P.L.R. (4th) 1, 22 B.C.L.R. (5th) 269, Donald J.A., Levine J.A., Lowry J.A. (B.C. C.A.); affirming (2010), 78 M.P.L.R. (4th) 216, 2010 BCSC 1707, 2010 CarswellBC 3246, [2011] 5 W.W.R. 305, 14 B.C.L.R. (5th) 372, J.K. Bracken J. (B.C. S.C.).

502. Attacks on by-laws and resolutions — Grounds — Improper motive —— Plaintiff municipality purported to establish public road ("road") by way of by-law ("first by-law") — First by-law was not registered on title, and lost for 150 years — After discovering first by-law, municipality passed by-law asserting portion of road ("disputed road") was valid public road ("second by-law") — Disputed road ran over defendant property owners' lands — Property owners had used road as private driveway — Property owners, with municipality's approval, restored road after portion was washed away prior to second by-law — Municipality brought action for declaration that it owned disputed road, and that it was public highway — Property owners brought motions for summary judgment dismissing municipality's action — Municipality brought cross-motion for interim injunction to preserve disputed road — Motions granted — Cross-motion dismissed — There were no genuine issues requiring trial relating to claim that second by-law established public road — Second by-law was invalid and unenforceable — Second by-law was not passed for proper municipal purpose — Municipality preferred wishes of small group of citizens over concerns of town planner and property owners.

Meaford (Municipality) v. Grist (2011), 87 M.P.L.R. (4th) 118, 2011 CarswellOnt 9661, 2011 ONSC 5195, Daley J. (Ont. S.C.J.).

503. Attacks on by-laws and resolutions — Grounds — Procedural error — Hearing —— Applicants purchased land in respondent rural municipality (RM); shortly after purchase, road was constructed immediately behind their property — Road was intended to service proposed subdivision; developer applied to municipality for subdivision approval, and approval was granted — Applicants brought concerns with respect to location of road to Municipal Council (Council) and Winnipeg River Planning District (WRPD) during rezoning hearings, but rezoning by-law and resolutions approving subdivision and road were all passed — Applicants brought application for order invalidating by-law and resolutions — Application dismissed — There was no statutory requirement that WRPD consider road issue any further than it did — Council and WRPD had significant discretion and flexibility when interpreting nature of development plan; plan was to be interpreted broadly and purposively — There was no basis to conclude that decision did not fall within range of possible, acceptable outcomes which were defensible in respect of facts and law — No basis to declare by-law or resolutions invalid.

Beaulieu v. Alexander (Rural Municipality) (2011), 2011 CarswellMan 478, 88 M.P.L.R. (4th) 290, 2011 MBQB 213, Perlmutter J. (Man. Q.B.).

504. Attacks on by-laws and resolutions — Grounds — Procedural error — Hearing —— Plaintiff municipality purported to establish public road ("road") by way of by-law ("first by-law") — First by-law was not registered on title, and lost for 150 years — After discovering first by-law, municipality passed by-law asserting portion of road ("disputed road") was valid public road ("second by-law") — Disputed road ran over defendant property owners' lands — Property owners had used road as private driveway — Property owners, with municipality's approval, restored road after portion was washed away prior to second by-law — Municipality brought action for declaration that it owned disputed road, and that it was public highway — Property owners brought motions for summary judgment dismissing municipality's action — Municipality brought cross-motion for interim injunction to preserve disputed road — Motions granted — Cross-motion dismissed — There were no genuine issues requiring trial relating to claim that second by-law established public road — Second by-law was invalid and unenforceable — In passing second by-law, municipality violated principles of procedural fairness — By-law was discussed in closed municipal meeting, contrary to principle that meetings were to be held in public in usual course — Municipality did not give adequate notice of meeting to property owners — Municipality did not provide survey report to property owners — Municipality did not carry out due diligence normally related to acquisition of land by municipality for municipal purpose.

Meaford (Municipality) v. Grist (2011), 87 M.P.L.R. (4th) 118, 2011 CarswellOnt 9661, 2011 ONSC 5195, Daley J. (Ont. S.C.J.).

505. Attacks on by-laws and resolutions — Grounds — Procedural error — Notice —— Plaintiff municipality purported to establish public road ("road") by way of by-law ("first by-law") — First by-law was not registered on title, and lost for 150 years — After discovering first by-law, municipality passed by-law asserting portion of road ("disputed road") was valid public road ("second by-law") — Disputed road ran over defendant property owners' lands — Property owners had used road as private driveway — Property owners, with municipality's approval, restored road after portion was washed away prior to second by-law — Municipality brought action for declaration that it owned disputed road, and that

it was public highway — Property owners brought motions for summary judgment dismissing municipality's action — Municipality brought cross-motion for interim injunction to preserve disputed road — Motions granted — Cross-motion dismissed — There were no genuine issues requiring trial relating to claim that second by-law established public road — Second by-law was invalid and unenforceable — In passing second by-law, municipality violated principles of procedural fairness — Municipality did not give adequate notice of meeting to property owners — Municipality did not provide survey report to property owners prior to meeting, and did not disclose it to public.

Meaford (Municipality) v. Grist (2011), 87 M.P.L.R. (4th) 118, 2011 CarswellOnt 9661, 2011 ONSC 5195, Daley J. (Ont. S.C.J.).

506. Attacks on by-laws and resolutions — Grounds — Ultra vires — Beyond power of municipality — Prohibiting activity —— Riparian owner operated small cottage rental business and put motor boats at his customers' disposal — Boats could be launched into water using municipal boat ramp — Municipality passed by-law providing that lake and municipal boat ramp were for exclusive use of its residents — Claiming that municipality had exceeded its jurisdiction in passing by-law, riparian owner brought motion seeking to have by-law declared invalid — Trial judge was of view that dominant aspect of impugned provisions, while incidentally affecting Parliament's power to legislate in relation to navigation, was protection of environment — Referring to double aspect doctrine, trial judge concluded that municipality had authority to pass by-law — Trial judge held that discriminatory consequences of by-law were reasonable considering its purpose, and he dismissed riparian owner's motion — Riparian owner appealed — Appeal allowed in part — Pith and substance of impugned provisions encroached upon "basic, minimum and unassailable core" of exclusive jurisdiction of Parliament over navigation — Municipality's objective to protect its lakes was not achieved by targeting non-residents and prohibiting them from accessing lakes — In fact, by-law already tackled environmental problem by providing that all pleasure boaters had to clean their boat before using it on lakes — Despite broad powers conferred to municipality by enabling legislation, impugned provisions could not be saved under ancillary powers doctrine — Therefore, municipality had exceeded its jurisdiction in passing impugned provisions of by-law — Considering that rest of by-law contained valid provisions, it was unnecessary to declare whole by-law invalid.

Chalets St-Adolphe inc. c. St-Aldophe d'Howard (Municipalité) (2011), 88 M.P.L.R. (4th) 1, 2011 CarswellQue 8580, EYB 2011-194339, 2011 QCCA 1491, Chamberland J.C.A., Gagnon J.C.A., Léger J.C.A. (Que. C.A.).

507. Attacks on by-laws and resolutions — Grounds — Unreasonableness —— Applicants purchased land in respondent rural municipality (RM); shortly after purchase, road was constructed immediately behind their property — Road was intended to service proposed subdivision; developer applied to municipality for subdivision approval, and approval was granted — Applicants brought concerns with respect to location of road to Municipal Council (Council) and Winnipeg River Planning District (WRPD) during rezoning hearings, but rezoning by-law and resolutions approving subdivision and road were all passed — Applicants brought application for order invalidating by-law and resolutions — Application dismissed — There was no statutory requirement that WRPD consider road issue any further than it did — Council and WRPD had significant discretion and flexibility when interpreting nature of development plan; plan was to be interpreted broadly and purposively — There was no basis to conclude that decision did not fall within range of possible, acceptable outcomes which were defensible in respect of facts and law — No basis to declare by-law or resolutions invalid.

Beaulieu v. Alexander (Rural Municipality) (2011), 2011 CarswellMan 478, 88 M.P.L.R. (4th) 290, 2011 MBQB 213, Perlmutter J. (Man. Q.B.).

508. By-laws — Enforcement — Practice and procedure — Appeal —— LW was convicted of offence of failing to comply with property standards order to remedy breaches of property standards by-law affecting her property, contrary to Building Code Act, 1992 — LW appealed — Appeal dismissed — Given conclusion that there was no burden on prosecution to establish that no appeal had been taken for order to have been confirmed, error by justice of the peace did not create any injustice.

Ajax (Town) v. Wong (2011), 2011 CarswellOnt 6315, 2011 ONCJ 352, P.L. Bellefontaine J. (Ont. C.J.).

509. Council members — Conflict of interest — Disqualification —— City acquired property as result of unpaid taxes — T, member of city council, emailed staff member who prepared report about property, indicating he might be interested in bidding on it — T made appointment to view property — At meeting, committee recommended that property be declared surplus and sold by public tender — T did not declare conflict of interest at meeting — T submitted successful bid to purchase property through corporation he owned and operated — After making bid, T disclosed his pecuniary interest in sale to council as required by Municipal Conflict of Interest Act (MCIA) — M, only other bidder, applied for declaration that T had contravened municipal conflict of interest legislation — Application judge held that T had contravened s. 5 of MCIA and ordered that he be disqualified from being member of city council for four years — Appeal by T dismissed — T had pecuniary interest in sale of property as of delivery of his email to member of city staff, indicating his possible interest in bidding on it — As result of having pecuniary interest in matter of sale of property, T was required by s. 5(1) of MCIA to disclose his interest at council meeting he attended, when resolution adopting recommendation that property be sold by public tender was adopted — T could not rely on "saving provision" in s. 10(2) — He should have been aware of need to avoid placing himself in position of conflict — Section 10(1)(a) of MCIA requires that where s. 5(1) has been breached, member's seat is to be declared vacant — This penalty was not available as T was no longer member of council — Penalty imposed was minimum available if consequences were to flow to T — Considerations application judge applied were fair, complete, balanced and reasonable.

Mondoux v. Tuchenhagen (2011), 88 M.P.L.R. (4th) 234, 2011 CarswellOnt 11438, 2011 ONSC 5398, D. Gordon J., J. Wilson J., Lederer J. (Ont. Div. Ct.); affirming (2010), 2010 CarswellOnt 9765, 2010 ONSC 6536, 79 M.P.L.R. (4th) 1, D.C. Shaw J. (Ont. S.C.J.); additional reasons at (2011), 87 M.P.L.R. (4th) 240, 2011 CarswellOnt 7130, 2011 ONSC 3310, D.C. Shaw J. (Ont. S.C.J.).

510. Council members — Conflict of interest — Failure to disclose interest — Pecuniary interest — What constitutes —— City acquired property as result of unpaid taxes — T, member of city council, emailed staff member who prepared report about property, indicating he might be interested in bidding on it — T made appointment to view property — At meeting, committee recom-

mended that property be declared surplus and sold by public tender — T did not declare conflict of interest at meeting — T submitted successful bid to purchase property through corporation he owned and operated — After making bid, T disclosed his pecuniary interest in sale to council as required by Municipal Conflict of Interest Act (MCIA) — M, only other bidder, applied for declaration that T had contravened municipal conflict of interest legislation — Application judge held that T had contravened s. 5 of MCIA and ordered that he be disqualified from being member of city council for four years — Appeal by T dismissed — T's pecuniary interest did not crystallize only when he viewed property and decided to make offer — T had pecuniary interest in sale of property as of delivery of his email to member of city staff, indicating his possible interest in bidding on it — Section 4(j) of MCIA did not exculpate T from responsibility to disclose his interest to city council — There was "matter" concerning sale of property placed before committee by time T's pecuniary interest in sale had been established, and matter was considered at council meeting which T attended — There were issues on which there could be "meaningful discussion" and there was "prospect of some decision being made" — As result of having pecuniary interest in matter of sale of property, T was required by s. 5(1) of MCIA to disclose his interest at council meeting at which resolution adopting recommendation that property be sold by public tender was adopted.

Mondoux v. Tuchenhagen (2011), 88 M.P.L.R. (4th) 234, 2011 CarswellOnt 11438, 2011 ONSC 5398, D. Gordon J., J. Wilson J., Lederer J. (Ont. Div. Ct.); affirming (2010), 2010 CarswellOnt 9765, 2010 ONSC 6536, 79 M.P.L.R. (4th) 1, D.C. Shaw J. (Ont. S.C.J.); additional reasons at (2011), 87 M.P.L.R. (4th) 240, 2011 CarswellOnt 7130, 2011 ONSC 3310, D.C. Shaw J. (Ont. S.C.J.).

511. Council members — Conflict of interest — Miscellaneous —— City acquired building for non-payment of taxes — City offered property for sale through tax sale process, but there was no interest from public — Applicant, who learned that city had scheduled demolition for building, offered to buy property for $1 — It was instead determined that property would be advertised for sale — On morning of July 21, 2008, respondent, who was councillor at time, arranged to view property on next day, as he was potentially interested in bidding on property — In evening of July 21, 2008, respondent attended meeting in which committee passed resolution to recommend that council declare property surplus, following council's previous decision that property be sold by public tender; respondent did not declare interest in subject of report — Respondent's corporation submitted bid to purchase property for $5,790, which was successful — Applicant, who made unsuccessful bid of $100, brought application for declaration that respondent contravened s. 5 of Municipal Conflict of Interest Act, and for related relief — Applicant sought restitution in amount of $279,589.70 — Application granted in part; claim for restitution dismissed — Respondent contravened s. 5(1)(a) of Act — Respondent paid fair market value as successful bidder — Best evidence of fair market value of property at defined point in time is what it actually sold for in free and open market at that point in time — Municipal Property Assessment Corporation assessment of $53,000 for property in question was not sufficient proof of personal financial gain — Applicant did not prove that he suffered financial loss as result of contravention of Act — Reason applicant lost opportunity to buy property was that he did not make bid higher than that of respondent — Applicant's claims for loss of rental income, business interruption loss and cost to replace three phase power were not accepted — Applicant's claims were in nature of damages, not restitution — Section 10(1)(c) did not permit court to award damages, and application was not appropriate forum for determining damages where material facts relating to damages claimed were in dispute.

Mondoux v. Tuchenhagen (2010), 2010 CarswellOnt 9765, 2010 ONSC 6536, 79 M.P.L.R. (4th) 1, D.C. Shaw J. (Ont. S.C.J.); additional reasons at (2011), 87 M.P.L.R. (4th) 240, 2011 CarswellOnt 7130, 2011 ONSC 3310, D.C. Shaw J. (Ont. S.C.J.); affirmed on other grounds (2011), 88 M.P.L.R. (4th) 234, 2011 CarswellOnt 11438, 2011 ONSC 5398, D. Gordon J., J. Wilson J., Lederer J. (Ont. Div. Ct.).

512. Development control — Development approval — Jurisdiction and powers — Development appeal board —— Applicants purchased 75-acre parcel of land in remote area — County's Subdivision and Development Appeal Board issued conditional development permit that allowed applicants to construct home — Condition required applicants to enter into development agreement with county to first construct public road leading to land where proposed residence was to be built — Applicants objected and applied for leave to appeal board's decision — Application dismissed — Leave to appeal decision of board may be granted if judge is of opinion that appeal involves question of law of sufficient importance to merit further appeal and has reasonable chance of success — Board added impugned condition, consistent with county's updated policies, because applicants' property could only be accessed by "fair weather road" — Board was alive to concern that it might cost from $500,000 to $1,000,000 to satisfy condition, and directed that development agreement include clause to ensure that county used its best efforts to reimburse applicants with contributions from future home builders who might benefit from road — Applicants submitted that board erred in law because it either lacked authority to impose impugned condition, or it acted in arbitrary and discriminatory manner in so doing — County and board recognized that condition was onerous one, but insisted it was necessary for orderly and efficient development of land — None of proposed arguments gave rise to error of law or jurisdiction.

Van Bezooyen v. Cardston County (Subdivision & Development Appeal Board) (2011), 2011 CarswellAlta 1638, 2011 ABCA 263, Peter Martin J.A. (Alta. C.A.).

513. Development control — Development permits — Conditions —— Applicants purchased 75-acre parcel of land in remote area — County's Subdivision and Development Appeal Board issued conditional development permit that allowed applicants to construct home — Condition required applicants to enter into development agreement with county to first construct public road leading to land where proposed residence was to be built — Applicants objected and applied for leave to appeal board's decision — Application dismissed — Leave to appeal decision of board may be granted if judge is of opinion that appeal involves question of law of sufficient importance to merit further appeal and has reasonable chance of success — Board added impugned condition, consistent with county's updated policies, because applicants' property could only be accessed by "fair weather road" — Board was alive to concern that it might cost from $500,000 to $1,000,000 to satisfy condition, and directed that development agreement include clause to ensure that county used its best efforts to reimburse applicants with contributions from future home builders who might benefit from road — Applicants submitted that board erred in law because it either lacked authority to impose impugned condition, or it acted in arbitrary and discriminatory manner in so doing — County and

board recognized that condition was onerous one, but insisted it was necessary for orderly and efficient development of land — None of proposed arguments gave rise to error of law or jurisdiction.

Van Bezooyen v. Cardston County (Subdivision & Development Appeal Board) (2011), 2011 CarswellAlta 1638, 2011 ABCA 263, Peter Martin J.A. (Alta. C.A.).

514. Licensing and regulation — Regulation of behaviour — Miscellaneous —— Harbour — Appellant T was owner of vessel that he anchored in navigable waters in harbour controlled by respondent municipality without permission from harbour manager and without paying fees; T left behind his mooring ball — Municipality charged T under municipal by-laws with nuisance, mooring vessel without obtaining permission from marina manager, and failing to abide by by-laws and rules of marina — Justice of Peace held that harbour manager had right to direct manner in which vessel was moored and acted within his authority to advise T to remove his vessel from location where it was moored — Justice of Peace held that doctrine of paramountcy was not applicable to defeat by-law provisions and wording of federal legislation was used in by-laws to avoid conflict with federal laws — It was held that T's mooring ball constituted nuisance under municipal by-law — T was convicted — T appealed conviction — Appeal dismissed — In s. 19 of agreement between federal government and municipality, there was requirement that agent, in this case municipality, charge dues or toll — Justice of Peace's interpretation of agreement and by-law was upheld.

Durham (Regional Municipality) v. Todd (2011), 2011 CarswellOnt 11116, 2011 ONCJ 449, 89 M.P.L.R. (4th) 130, L. Cameron J. (Ont. C.J.); affirming (2010), 2010 ONCJ 122, 2010 CarswellOnt 1994, 71 M.P.L.R. (4th) 138, M. Coopersmith J.P. (Ont. C.J.).

515. Municipal liability — Negligence — Building review, inspections and permit issuance —— Plaintiffs suffered flooding of their land and basement, and backing up of their septic system and septic bed was on portion of neighbour's property which had been previously severed from their property — Plaintiffs commenced action against neighbour and municipality seeking various remedies including quashing of neighbour's building permit and damages for municipality's negligence in issuance of permit — Neighbour commenced counterclaim seeking damages for trespass and other remedies — Appeal of building permit dismissed; action dismissed; counterclaim allowed in part — Evidence showed that it was both correct and reasonable that building permit was issued to neighbour — Municipality knew nothing about septic bed resting under neighbour's property since plaintiffs did not disclose this until action began — Expert evidence was accepted as showing that neighbour's placing of fill on his property and grading of it did not create problems of which plaintiffs complained, but actually reduced some of sub-surface flow of water onto plaintiffs' property — Plaintiffs had drainage problems because grading around their house was inadequate and land there was flat — Municipality was not negligent and did not do or fail to do anything that caused plaintiffs to suffer damage since grading of neighbour's property did not cause surface or sub-surface water to flood plaintiffs' property.

Fiore v. Whitchurch-Stouffville (Town) (2011), 2011 ONSC 3928, 2011 CarswellOnt 5381, M. Fuerst (Ont. S.C.J.).

516. Municipal liability — Negligence — Building review, inspections and permit issuance —— Defendant city owned property on which community hall was built — City had right to approve renovations to premises, according to license agreement with defendant community organization — Community organization performed renovations to building, including deck which had steps on two sides only and 16-inch drop on one side — Community organization did not obtain building permit for deck construction — Plaintiff M was guest of renters of community hall for birthday party — M stepped off edge of deck while distracted and fell, damaging quadriceps muscles and requiring surgery — M suffered long-term injuries and brought action against city, community organization and contractor who had built deck — Action allowed against community organization only — License agreement between city and community organization put responsibility for renovations or maintenance on organization — M had not met onus of proving that deck did not comply with Building Code — In any event, compliance with Code would not have been determinative of negligence issue.

McNulty v. Edmonton (City) (2011), 82 M.P.L.R. (4th) 201, 2011 ABQB 297, 2011 CarswellAlta 752, 42 Alta. L.R. (5th) 217, Donald Lee J. (Alta. Q.B.); additional reasons at (2011), 2011 CarswellAlta 1331, 2011 ABQB 481, Donald Lee J. (Alta. Q.B.).

517. Municipal liability — Negligence — Building review, inspections and permit issuance —— Condominium project under construction was destroyed by fire caused by propane torch used to apply waterproofing — Surrounding buildings also suffered heavy damage or destruction — Project was five stories wood construction but lowest story was to be banked with earth to qualify as residential basement to take advantage of Building Code exemption from non-combustible materials requirement — Plaintiffs brought action for damages and included claim against city for negligence in approving project — Action dismissed against city — Plaintiffs required to prove not mere negligence but bad faith due to liability exemption in s. 12 of Safety Codes Act — Actions of chief building inspector S in approving construction fell far short of bad faith — No proof that if S had turned down application end result would have been different — No causal connection between alleged wrongdoing by city and resultant damages.

Condominium Corp. No. 9813678 v. Statesman Corp. (2009), 2009 ABQB 493, 2009 CarswellAlta 1751, 65 M.P.L.R. (4th) 178, 16 Alta. L.R. (5th) 74, 85 C.L.R. (3d) 186, [2010] 5 W.W.R. 494, 472 A.R. 33, J.D.B. McDonald J. (Alta. Q.B.); additional reasons at (2010), 28 Alta. L.R. (5th) 291, 489 A.R. 37, 2010 CarswellAlta 1783, 92 C.L.R. (3d) 228, [2011] 2 W.W.R. 134, 2010 ABQB 501, J.D.B. McDonald J. (Alta. Q.B.); leave to appeal allowed (2011), 2011 ABQB 489, 2011 CarswellAlta 1341, J.D.B. McDonald J. (Alta. Q.B.).

518. Municipal liability — Negligence — Flooding from sewage system —— Applicants, TS, FM and S Ltd. were plaintiffs in action brought against respondent municipality for permanent injunction directing municipality to install three culverts in road directly east of farmstead and for damages for losses suffered by plaintiffs from failure of municipality to properly take action to prevent flooding on land — Application dismissed — Application for interlocutory mandatory injunction against public authority did not meet any of three tests set — Applicants failed to meet all three threshold tests for interlocutory order of mandamus — Applicants have not established strong prima facie case for action in negligence — Secondly, damages could be quantified, as was done by FM in her supplementary affidavit — Court was satisfied that applicants have also failed to prove that they would suffer irreparable harm if interim order of mandamus was refused because damage caused can be quantified in money terms — Applicants, by failing to provide undertaking to

cover such potential losses should municipality be found liable for causing damage downstream as result of increasing the rate of water flow, have admitted that balance of convenience did in fact favour municipality.

Sprecken v. Griffin (Rural Municipality) No. 66 (2011), 2011 CarswellSask 472, 2011 SKQB 236, G.A. Chicoine J. (Sask. Q.B.).

519. Municipal liability — Negligence — General principles —— Defendant HL kept nine dogs in rented premises located in defendant municipality of U — By-law limited number of dogs allowed on premises to three — Animal control officers visited HL's home but did not tell her she had to get rid of any of her dogs — Plaintiff JK, who was HL's granddaughter, was subsequently attacked and injured by dogs — JK and her litigation guardian brought action against HL and U — HL counterclaimed against JK and U — Action against HL allowed; action against municipality dismissed — Counterclaim dismissed — Duty of care suggested by JK was novel and was not extension of existing tort law — To decide whether new duty of care ought to be recognized, court had to be persuaded that risk of harm was foreseeable and that relationship between parties was sufficiently close to give rise to duty of care and that there were no policy considerations that negative or limit duty's scope — Court was concerned with whether case disclosed factors that showed that relationship between JK and U was sufficiently close and direct to give rise to legal duty of care — There was no reliance by JK on U to ensure that she was safe in presence of dogs, nor did JK rely on any representations made by U — Additionally, there was absence of control over premises and animals exerted by U; while U did have by-law directed to number of dogs permitted on property, U had no ability to remove dogs nor to impose any other conditions on dogs' presence — JK reasonably expected that her grandmother would have protected her from any dangers that were created by presence of numerous dogs.

Kent (Litigation Guardian of) v. Laverdiere (2011), 2011 CarswellOnt 9647, 89 M.P.L.R. (4th) 7, 85 C.C.L.T. (3d) 296, 2011 ONSC 5411, D.A. Wilson J. (Ont. S.C.J.).

520. Municipal liability — Negligence — Miscellaneous —— Injury by dog — Defendant HL kept nine dogs in rented premises located in defendant municipality of U — By-law limited number of dogs allowed on premises to three — Animal control officers visited HL's home but did not tell her she had to get rid of any of her dogs — Plaintiff JK, who was HL's granddaughter, was subsequently attacked and injured by dogs — JK and her litigation guardian brought action against HL and U — HL counterclaimed against JK and U — Action against HL allowed; action against municipality dismissed — Counterclaim dismissed — Fact that U had enacted by-law restricting number of dogs on property to three did not make U liable for damages suffered by third party — Court was not persuaded that attack would not have occurred if there had only been three dogs present — It could not be said that attack on JK was "a natural and probable result of what the alleged wrongdoer did or failed to do" — Dogs had history of being obedient, they were confined to their pens, JK was familiar to them, and HL had strict rules about dogs that JK was aware of — Under these circumstances, court did not find that U ought to have realized that by allowing HL to have more than three dogs on property, there was probability that injury would take place — It was not foreseeable to U that someone would sustain injury as result of fact that HL had more than permitted number of dogs at her home.

Kent (Litigation Guardian of) v. Laverdiere (2011), 2011 CarswellOnt 9647, 89 M.P.L.R. (4th) 7, 85 C.C.L.T. (3d) 296, 2011 ONSC 5411, D.A. Wilson J. (Ont. S.C.J.).

521. Municipal liability — Nuisance — Flooding —— Plaintiffs suffered flooding of their land and basement, and backing up of their septic system and septic bed was on portion of neighbour's property which had been previously severed from their property — Plaintiffs commenced action against neighbour and municipality seeking various remedies including damages for nuisance — Neighbour commenced counterclaim seeking damages for trespass and other remedies — Action dismissed; counterclaim allowed in part — Evidence showed that it was both correct and reasonable that building permit was issued to neighbour — Municipality knew nothing about septic bed resting under neighbour's property since plaintiffs did not disclose this until action began — Expert evidence was accepted as showing that neighbour's placing of fill on his property and grading of it did not create problems of which plaintiffs complained, but actually reduced some of sub-surface flow of water onto plaintiffs' property — Plaintiffs had drainage problems because grading around their house was inadequate and land there was flat — Municipality did not create nuisance that caused damage to plaintiffs.

Fiore v. Whitchurch-Stouffville (Town) (2011), 2011 ONSC 3928, 2011 CarswellOnt 5381, M. Fuerst (Ont. S.C.J.).

522. Municipal liability — Occupier's liability —— Defendant city owned property on which community hall was built — City had right to approve renovations to premises, according to license agreement with defendant community organization — Plaintiff M was guest of renters of community hall for birthday party — M stepped off edge of deck while distracted and fell 16 inches, damaging quadriceps muscles and requiring surgery — Community organization performed renovations to building, including deck which had steps on two sides, but not on side where M suffered accident — M suffered long-term injuries and brought action against city, community organization and contractor who had built deck — Action allowed against community organization only — License agreement between city and community organization put responsibility for renovations or maintenance on organization — City was protected from liability under common law by s. 530 of Municipal Government Act, as it had not acted in bad faith.

McNulty v. Edmonton (City) (2011), 82 M.P.L.R. (4th) 201, 2011 ABQB 297, 2011 CarswellAlta 752, 42 Alta. L.R. (5th) 217, Donald Lee J. (Alta. Q.B.); additional reasons at (2011), 2011 CarswellAlta 1331, 2011 ABQB 481, Donald Lee J. (Alta. Q.B.).

523. Municipal tax assessment — Business tax — Classification of business — Hotel —— Subject properties were cottages that abutted golf course which were used periodically during golf season to provide overnight accommodation to golfers who purchased "golf package" from golf club — Property owners sought to have properties classified in residential property class for part or all of taxation years under appeal — Municipal Property Assessment Corporation (MPAC) classified properties in commercial property class — Property owners appealed — Appeal allowed — Properties should be classified in residential property class — Properties were not hotels within meaning of s. 17 of General Regulations under Assessment Act, being neither hotel as defined in Hotel Registration of Guests Act, or land that would otherwise be in multi-residential property class or land that was unit as defined in Condominium Act, 1998 — Just because cottages were rented out on seasonal

basis did not qualify them as hotels — Properties, like bed and breakfast establishments, and camp grounds or tourist establishments, were land used for residential purposes on seasonal basis and belonged in residential property class — Properties were used for overnight accommodation, which was residential purpose — As properties were used for residential purposes, properties did not by default belong in commercial property class.

Moore v. Municipal Property Assessment Corp., Region No. 18 (2011), 2011 CarswellOnt 7852, A. Castel Member (Ont. Assess. Review Bd.).

524. Municipal tax assessment — Business tax — Determination whether tax payable — Commercial activity —— Subject properties were cottages that abutted golf course which were used periodically during golf season to provide overnight accommodation to golfers who purchased "golf package" from golf club — Property owners sought to have properties classified in residential property class for part or all of taxation years under appeal — Municipal Property Assessment Corporation (MPAC) classified properties in commercial property class — Property owners appealed — Appeal allowed — Properties should be classified in residential property class — Properties were not hotels within meaning of s. 17 of General Regulations under Assessment Act, being neither hotel as defined in Hotel Registration of Guests Act, or land that would otherwise be in multi-residential property class or land that was unit as defined in Condominium Act, 1998 — Just because cottages were rented out on seasonal basis did not qualify them as hotels — Properties, like bed and breakfast establishments, and camp grounds or tourist establishments, were land used for residential purposes on seasonal basis and belonged in residential property class — Properties were used for overnight accommodation, which was residential purpose — As properties were used for residential purposes, properties did not by default belong in commercial property class.

Moore v. Municipal Property Assessment Corp., Region No. 18 (2011), 2011 CarswellOnt 7852, A. Castel Member (Ont. Assess. Review Bd.).

525. Municipal tax assessment — Practice and procedure on assessment appeals and objections — Correction of errors and omissions —— Members of original panel made mathematical error in calculation of current value; parties submitted, and Ontario Assessment Review Board agreed, that value was $1,689,000 rather than $1,826,000 as stated in original decision, so variation was allowed under R. 146 of board's rules of practice and procedure.

Municipal Property Assessment Corp., Region No. 09 v. Wolfe-Betz (2011), 2011 CarswellOnt 8771, J.L. Walker Member (Ont. Assess. Review Bd.).

526. Municipal tax assessment — Practice and procedure on assessment appeals and objections — Jurisdiction and power — Board or tribunal —— Original panel of Ontario Review Assessment Board, under s. 44(3) of Assessment Act, determined current value of subject property to be $1,826,000 and reduced assessment to $1,645,000 to make it equitable with assessments of similar lands in vicinity — Municipal Property Assessment Corporation (MPAC) brought its motion seeking order granting rehearing of appeal for subject property for 2009 and 2010 taxation years — Motion dismissed — Scope of board's inquiry under R. 149(c) of its rules of practice and procedure is to determine whether moving party has demonstrated that previous panel made error of fact or law, and that error was such that board would likely have reached different decision — Resulting assessed value of $1,645,000 was roughly two per cent lower than MPAC's proposed reduction of assessment to $1,683,000, which was within range of reasonable outcomes — Board is often presented with evidence that one or both of parties can demonstrate is not on "all fours" with subject property, leaving it with small handful of comparable properties — Original panel had ten comparable properties before it and, in determining current value under s. 44(3)(a), panel provided its reasons for rejecting seven properties — Original panel's finding of fact resulted in circumstances where assessment to sales ratio (ASR) was difficult to apply where there were few sales — Present board could not discern any error in fact on face of decision regarding original panel's choice of comparable properties — It is well-established in law that findings of fact by original decision-maker should be disturbed only in narrowest of circumstances — Order was varied to correct mathematical error in calculation.

Municipal Property Assessment Corp., Region No. 09 v. Wolfe-Betz (2011), 2011 CarswellOnt 8771, J.L. Walker Member (Ont. Assess. Review Bd.).

527. Municipal tax assessment — Practice and procedure on assessment appeals and objections — Miscellaneous —— Composite Assessment Review Board assessed developers' property as industrial rather than farmland — Developers brought application for leave and appealed pursuant to s. 470 of Municipal Government Act — Application granted; appeal allowed; matter remitted for rehearing — Board failed to provide adequate reasons — Reasons were conclusory and not explanatory — Reasons did not address conflicts in evidence between developers' expert and assessor who was city's representative — Board gave no explanation for giving expert report little weight — Statements that board made did not provide clear path of analysis to permit assessment of its reasoning — Board did not address credibility concerns raised in regard to employee email, or provide basis for why it relied so heavily on this one piece of evidence in light of other evidence, including historical evidence concerning property — Importantly, board in its reasons did not address appropriate test under legislation and regulations for determining whether property should be assessed as farmland — Without such analysis, there was no way to determine whether board accepted city's argument that crop must be produced (swathed and baled) every year on property to qualify as farmland, and if so, why — Reasons did not provide basis for rejecting expert's argument that property could still be assessed as farmland if it lay fallow for justifiable agricultural reason — Board breached principles of natural justice and duty to be fair by failing to provide adequate reasons for its decision.

Associated Developers Ltd. v. Edmonton (City) (2011), 2011 CarswellAlta 1689, 2011 ABQB 592, 89 M.P.L.R. (4th) 72, J.M. Ross J. (Alta. Q.B.).

528. Municipal tax assessment — Practice and procedure on assessment appeals and objections — Procedural requirements — Miscellaneous —— Leave to appeal — Composite Assessment Review Board assessed developers' property as industrial rather than farmland — Developers brought application for leave and appealed pursuant to s. 470 of Municipal Government Act — Application granted; appeal allowed on other grounds — Allegations of failure to identify and apply legal tests and failure to provide adequate reasons raised questions of law — Sufficiency of reasons by assessment review board was of jurisprudential importance and was closely related to whether board appropriately identified legal test and definitions — Specific question of what constituted farmland

operations also had important jurisprudential implications — Appeal had reasonable chance of success — Parties raised several arguments that board's reasons did not address, even in cursory manner — These included arguments regarding interpretation of Act, definition of farming operations, and whether property was being farmed during relevant taxation year — Board indicated that it gave little weight to some evidence and much weight to other evidence, but did not explain its rationale for doing so — It was appropriate to grant leave on questions of whether board provided adequate reasons and whether board failed to identify and apply appropriate legal tests — It was appropriate to decide appeal at same time as leave application — Requirements, that entire record be before court; that parties have appropriately stated and responded to question of law (or jurisdiction); and that there be no need to add further respondents, were satisfied.

Associated Developers Ltd. v. Edmonton (City) (2011), 2011 CarswellAlta 1689, 2011 ABQB 592, 89 M.P.L.R. (4th) 72, J.M. Ross J. (Alta. Q.B.).

529. Municipal tax assessment — Practice and procedure on assessment appeals and objections — Procedural requirements — Miscellaneous —— Discovery — Assessments with respect to taxation years 2009 and 2010 for certain property were appealed — Municipal Property Assessment Corporation (MPAC) brought motion for discovery pursuant to R. 56 of Rules of Practice and Procedure of Ontario Assessment Review Board — Motion granted — Under R. 56, Board may grant order for discovery where needed in order for party to obtain necessary information from another party, where party has requested information and it has been refused or no answer was received — Supporting affidavit deposed that criteria for R. 56 order had been met in that inspection was requested, request had been refused, and inspection was needed in order to determine correct current value for subject property — Nothing in R. 56 limits time within which motion may be brought — Nothing in authorities presented or arguments advanced by appellant would take away either MPAC's right of inspection pursuant to s. 10 of Assessment Act, or its entitlement to relief requested in its notice of motion.

Municipal Property Assessment Corp., Region No. 15 v. Campbell (2011), 2011 CarswellOnt 8770, P. Stillman Member (Ont. Assess. Review Bd.).

530. Municipal tax assessment — Tax exemptions — Crown — Occupiers of Crown-owned land — Crown corporation——Respondents and applicant were involved in litigation regarding payments due to applicant by respondents under Crown Corporation Payments Regulations (CCPR) which was resolved in favour of applicant — Respondents made principal payments but refused to pay late payment supplements (LPS) under CCPR — Applicant brought application for judicial review of decision of respondents to refuse to pay LPS — Application granted — Impugned decisions were made in exercise of discretionary power — Payments in Lieu of Taxes Act (PILT) was largely based on principles of tax system for ordinary taxpayers, while taking into account constitutional immunity of Crown — In legal terms, making of PILT was voluntary, but in practice, taxing authority expected government to exercise discretion in manner that reflected actual tax situation in place where properties were located — LPS existed to compensate municipalities for delayed payments — Public Works and Governments Services Canada policy established procedure and listed criteria for payment of LPS to ensure that they were processed in fair, equitable and predictable manner — Pursuant to CCPR, LPSs were to be paid for unreasonable delay in making PILT payments — Applicant made timely request for PILT in each applicable taxation year and delay in making full PILT payments was sole responsibility of respondents — By choosing to act unilaterally and over applicant's objections, respondents opened door to possibility of having to pay late payment supplements at later date — Taxpayers who challenged notice of assessment and lost their case before could not refuse to pay government interest because they thought they had good case — If merely contesting PILT amount suspended payment obligation until final judgment then whether or not LPS was paid would depend on purely external events, that were difficult to foresee, like lottery.

Montréal (Ville) c. Administration portuaire de Montréal (2011), 2011 CarswellNat 3788, 2011 FC 937, 89 M.P.L.R. (4th) 49, 2011 CF 937, 2011 CarswellNat 3014, Luc Martineau J. (F.C.).

531. Municipal tax assessment — Valuation — Factors — Miscellaneous —— Environmental assessment — Waste management facility operated from subject property — Applicant alleged that assessment appeals committee failed to take into account environmental site assessments in establishing valuation parameters regarding 2009 assessment of property owned by unrelated third party — Applicant alleged that failure to take costs of Phase II study and resulting stigma into account in determining property assessment resulted in error of law — Committee that heard appeal found costs associated with having Phase II environmental site assessment completed should not be removed from property's assessed value, nor should subject's assessed value be adjusted for stigma in order to reflect its market value — Applicant brought application for leave to appeal committee's decision — Application dismissed — Committee gave careful and detailed reasons for rejecting applicant's appeal — Nothing in those reasons gave rise to error in law that would justify granting leave.

Kimery v. Sherwood (Rural Municipality), No. 159 (2011), 2011 CarswellSask 568, 2011 SKCA 98, Herauf J.A. (Sask. C.A. [In Chambers]).

532. Municipal tax assessment — Valuation — Method of assessment — Similar real property in vicinity —— Original panel of Ontario Review Assessment Board, under s. 44(3) of Assessment Act, determined current value of subject property to be $1,826,000 and reduced assessment to $1,645,000 to make it equitable with assessments of similar lands in vicinity — Municipal Property Assessment Corporation (MPAC) brought its motion seeking order granting rehearing of appeal for subject property for 2009 and 2010 taxation years — Motion dismissed — Best evidence that board could have had before it would have been good number of sales of similar properties in vicinity of subject property — Board is often presented with evidence that one or both of parties can demonstrate is not on "all fours" with subject property, leaving it with small handful of comparable properties — Board accepted argument of respondent assessed property owner and municipality that presiding members of original panel perhaps did not use assessment to sales ratio (ASR) in this case because they found only four similar properties, one of which was not subject of sale, for purposes of its s. 44(3)(b) analysis — While Court of Appeal articulated best approach to evidence through principle that equity in taxation can only result from equity in assessment, it cannot be consistently applied; approach is governed by evidence itself, which is why language of s. 44(3)(b) of Assessment Act is not proscriptive — Assessment disputes coming before board do not lead to one specific,

particular result, but to number of possible conclusions — Order was varied to correct mathematical error in calculation.

Municipal Property Assessment Corp., Region No. 09 v. Wolfe-Betz (2011), 2011 CarswellOnt 8771, J.L. Walker Member (Ont. Assess. Review Bd.).

533. Municipal tax assessment — Valuation — Particular property — Farm lands —— Composite Assessment Review Board assessed developers' property as industrial rather than farmland — Developers brought application for leave and appealed pursuant to s. 470 of Municipal Government Act — Application granted; appeal allowed; matter remitted for rehearing — Board failed to provide adequate reasons — Reasons were conclusory and not explanatory — Reasons did not address conflicts in evidence between developers' expert and assessor who was city's representative — Board gave no explanation for giving expert report little weight — Statements that board made did not provide clear path of analysis to permit assessment of its reasoning — Board did not address credibility concerns raised in regard to employee email, or provide basis for why it relied so heavily on this one piece of evidence in light of other evidence, including historical evidence concerning property — Importantly, board in its reasons did not address appropriate test under legislation and regulations for determining whether property should be assessed as farmland — Without such analysis, there was no way to determine whether board accepted city's argument that crop must be produced (swathed and baled) every year on property to qualify as farmland, and if so, why — Reasons did not provide basis for rejecting expert's argument that property could still be assessed as farmland if it lay fallow for justifiable agricultural reason — Board breached principles of natural justice and duty to be fair by failing to provide adequate reasons for its decision.

Associated Developers Ltd. v. Edmonton (City) (2011), 2011 CarswellAlta 1689, 2011 ABQB 592, 89 M.P.L.R. (4th) 72, J.M. Ross J. (Alta. Q.B.).

534. Municipal tax assessment — Valuation — Particular property — Miscellaneous —— In March 2001, by means of ground lease, federal government transferred operation of international airport to airport authority, which was not-for-profit corporation — Municipal assessment agency assessed land and structures pursuant to Assessment Act — Property was assessed at $14,754,000 — Airport authority appealed this valuation, unsuccessfully, to assessment review commission — Appeal to Trial Division was allowed, and notices of assessment for 2004 and 2005 were amended with property being assessed at value of one dollar — Trial judge rejected commissions's use of cost approach — Municipality appealed — Appeal dismissed — Assessor erred by proceeding on assumption that federal government and airport authority were in comparable positions and should be treated same for assessment purposes — Federal government as owner with complete authority over property could not be compared to airport authority as tenant subject to strict conditions affecting, among other things, its revenue generating capability and use to which property must be put — Assessor further erred by failing to identify market and to take account of restrictions on airport authority — Assessor valued land as "vacant land", comparing runway lands to nearby industrial lands, even though runways, integral part of airport operation, could not be used for alternate purpose — Where alternate use was not possible, it could not be said that, if sold on open market, willing buyer would offer more than nominal amount — It was appropriate to adopt somewhat different analytical approach from that of trial judge, focusing on restrictions in ground lease and their effect for purposes of application of s. 17 of Act — Nonetheless, application of s. 17 led to conclusion that trial judge did not err in determining that property was properly valued at one dollar.

Gander (Town) v. Gander International Airport Authority Inc. (2011), 2011 CarswellNfld 335, 2011 NLCA 65, 88 M.P.L.R. (4th) 179, 9 R.P.R. (5th) 1, B.G. Welsh J.A., C.W. White J.A., J.D. Green C.J.N.L., L.D. Barry J.A., M.H. Rowe J.A. (N.L. C.A.).

535. Planning appeal boards and tribunals — Judicial review — Leave to appeal — Miscellaneous —— Developer proposed construction of 12-storey, 87-unit residential condominium building with ground floor commercial uses, public uses and lower-level parking structure in town's beach neighbourhood — Developer and town sought to amend zoning by-law from "General Commercial C2 Zone", which permitted commercial and residential units of 2.5 storey maximum height, to "General Commercial Holding C2-427(H) Zone" — Ontario Municipal Board dismissed waterfront preservation association's appeal of rezoning — Board found zoning by-law amendment should be approved as it was consistent with 2005 Provincial Policy Statement (PPS) pursuant to s. 3(5) of Planning Act, and it addressed purposes of Act — Board found development conformed to policies of Growth Plan, Niagara Regional Policy Plan, and town's Official Plan, and that amendment addressed relevant sections of 2006 Parks and Open Space Master Plan and 2005 Neighbourhood Plan — Board found that development was appropriate in urban design context, was compatible with adjacent community, created no undue or adverse impacts on adjacent properties, represented good land use planning, and was in public interest — Board found environmental impact study was not required prior to approval of amendment as issues surrounding encroachment of structures within dynamic beach zone and impacts on natural beach, dune dynamics and surrounding land uses were satisfactorily addressed — Association brought motion for leave to appeal — Motion dismissed — Board accepted proposed shoreline protection works in expert report would protect building, which was planning decision — While plans for proposed shoreline protection works must be approved by conservation authority, this would be done in future, and association would not have access to plans before they were presented to authority, nor would association be able to present alternate design plans to developer's plans — However, this was system province put in place through Niagara Peninsula Conservation Authority: Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses (Regulation 155/06) — Board found proposals in expert report were consistent with PPS — Board applied right test — Board heard evidence of three qualified engineers, two who testified that development placed public safety in jeopardy and third who testified that development adequately protected public — Board chose to accept opinion of third engineer, which was finding of fact — Requirement of s. 3 of Ontario Municipal Board Act that appeal lies to Divisional Court with leave only question of law as interpreted by case law did not permit courts to intervene — Board decision raised no issue of law on which Divisional Court could conceivably find that board's decision was unreasonable.

Brock, Re (2011), 2011 CarswellOnt 11006, 2011 ONSC 5252, 89 M.P.L.R. (4th) 278, P.B. Hambly J. (Ont. Div. Ct.); refusing leave to appeal (2011), 2011 CarswellOnt 1011, 81 M.P.L.R. (4th) 115, *(sub nom. Fort Erie (Town) Zoning By-law No. 26-10 (Re))* 67 O.M.B.R. 175, R. Rossi Member (O.M.B.).

536. Planning appeal boards and tribunals — Practice and procedure — Adjournment —— Developer proposed construction of 12-storey, 87-unit residential condominium building with ground floor commercial uses, public uses and lower-level parking structure in town's beach neighbourhood — Developer and town sought to amend zoning by-law to rezone subject property from "General Commercial C2 Zone" to "General Commercial Holding C2-427(H) Zone" — While former town council entered into partnership with developer to develop portion of property, as result of recent municipal elections, three new councillors, representing four of seven possible council votes, expressed their view that they did not support proposed bylaw amendment — Waterfront preservation association and residents opposed rezoning and filed appeal — Waterfront preservation association and residents brought motion to adjourn hearing for ninety days so that matter could be placed before new town council for consideration — Appeal dismissed — Public interest would not be served by granting adjournment of hearing to permit future council not yet sworn in, to revisit agreement between current, sitting council and private entity whose proposed development was properly before board by way of appeal from appellants in attendance — Board's decision to proceed with hearing and ultimately render decision on proposal did not represent limitation on municipality's legislative power — Procedural and process mechanisms were available to new town council to respond to any determination of matter before board.

Brock, Re (2011), 2011 CarswellOnt 1011, 81 M.P.L.R. (4th) 115, *(sub nom. Fort Erie (Town) Zoning By-law No. 26-10 (Re))* 67 O.M.B.R. 175, R. Rossi Member (O.M.B.); leave to appeal refused (2011), 2011 CarswellOnt 11006, 2011 ONSC 5252, 89 M.P.L.R. (4th) 278, P.B. Hambly J. (Ont. Div. Ct.).

537. Powers of municipal corporation — Extent of powers — To pass by-laws —— Riparian owner operated small cottage rental business and put motor boats at his customers' disposal — Boats could be launched into water using municipal boat ramp — Municipality passed by-law providing that lake and municipal boat ramp were for exclusive use of its residents — Claiming that municipality had exceeded its jurisdiction in passing by-law, riparian owner brought motion seeking to have by-law declared invalid — Trial judge was of view that dominant aspect of impugned provisions, while incidentally affecting Parliament's power to legislate in relation to navigation, was protection of environment — Referring to double aspect doctrine, trial judge concluded that municipality had authority to pass by-law — Trial judge held that discriminatory consequences of by-law were reasonable considering its purpose, and he dismissed riparian owner's motion — Riparian owner appealed — Appeal allowed in part — Pith and substance of impugned provisions encroached upon "basic, minimum and unassailable core" of exclusive jurisdiction of Parliament over navigation — Municipality's objective to protect its lakes was not achieved by targeting non-residents and prohibiting them from accessing lakes — In fact, by-law already tackled environmental problem by providing that all pleasure boaters had to clean their boat before using it on lakes — Despite broad powers conferred to municipality by enabling legislation, impugned provisions could not be saved under ancillary powers doctrine — Therefore, municipality had exceeded its jurisdiction in passing impugned provisions of by-law — Considering that rest of by-law contained valid provisions, it was unnecessary to declare whole by-law invalid.

Chalets St-Adolphe inc. c. St-Aldophe d'Howard (Municipalité) (2011), 88 M.P.L.R. (4th) 1, 2011 CarswellQue 8580, EYB 2011-194339, 2011 QCCA 1491, Chamberland J.C.A., Gagnon J.C.A., Léger J.C.A. (Que. C.A.).

538. Subdivision control — Jurisdiction to approve subdivision applications — Approval by Minister or provincial authority — Miscellaneous —— Negligence — Plaintiff landowner purchased property that was adjacent to defendant neighbours' land — Property was north section of former district lot created by subdivision in 1960 — Highway ran along south side of south section of former district lot — Plan of property showed road allowance but road was not built and could not now be built because of presence of fish-bearing stream and poor visibility at proposed intersection — Landowner accessed property first time by going across road on neighbours' land that intersected with road allowance ("disputed road"), but later was prohibited from using such road by neighbours — Landowner did not investigate road allowance prior to purchase — Landowner brought action for declaration that disputed road was public road, or for damages arising from Crown's negligent supervision of subdivision of land — Action dismissed — Disputed road was not public road — Crown was not found to be negligent in approving 1960 subdivision plan — It could not be determined whether standard of care was breached — There was no evidence on process of approval of subdivision in 1960, and whether process was in accordance with statutory regime or accepted standard of practice — It was not determined whether at time of subdivision there would have been any practical or legislative barriers to constructing road near creek — There was no expert evidence that it would have been dangerous to build highway at junction of existing highway and road allowance in 1960.

Vesuna v. British Columbia (Minister of Transportation) (2011), 2011 BCSC 941, 2011 CarswellBC 1867, 9 R.P.R. (5th) 114, S. Griffin J. (B.C. S.C.).

539. Zoning — Attacking validity of zoning by-laws — Grounds — Bad faith —— Applicants purchased land in respondent rural municipality (RM); shortly after purchase, road was constructed immediately behind their property — Road was intended to service proposed subdivision; developer applied to municipality for subdivision approval, and approval was granted — Applicants brought concerns with respect to location of road to Municipal Council (Council) and Winnipeg River Planning District (WRPD) during rezoning hearings, but rezoning by-law and resolutions approving subdivision and road were all passed — Applicants brought application for order invalidating by-law and resolutions — Application dismissed — Applicants failed to establish bad faith — Statutory preconditions to passing by-law and resolutions were met and there was no evidence of unauthorized purpose — While applicants disagreed with decisions made, there was no evidence that relevant matters were not considered or that Council and WRPD proceeded on basis of irrelevant considerations — Evidence did not meet threshold to establish that majority of city councillors voting on by-law and resolutions were acting in bad faith.

Beaulieu v. Alexander (Rural Municipality) (2011), 2011 CarswellMan 478, 88 M.P.L.R. (4th) 290, 2011 MBQB 213, Perlmutter J. (Man. Q.B.).

540. Zoning — Attacking validity of zoning by-laws — Grounds — Discrimination —— Applicants purchased land in respondent rural municipality (RM); shortly after purchase, road was constructed immediately behind their property — Road was intended to service proposed subdivision; developer applied to municipality for subdivision approval, and approval was granted — Ap-

plicants brought concerns with respect to location of road to Municipal Council (Council) and Winnipeg River Planning District (WRPD) during rezoning hearings, but rezoning by-law and resolutions approving subdivision and road were all passed — Applicants brought application for order invalidating by-law and resolutions — Application dismissed — Applicants failed to establish discrimination — In order to prove discriminatory, by-law and resolutions either had to give permission to one party while refusing it to another, or carry out differential treatment with improper motive of favouring or hurting individuals without regard to public interest — There was no evidence that by-law or resolutions met two traditional elements of discrimination — What was or was not in public interest was matter to be determined by municipal council; and it's determination, if conclusion was reached honestly and within limit of its powers, was not open to review by court.

Beaulieu v. Alexander (Rural Municipality) (2011), 2011 CarswellMan 478, 88 M.P.L.R. (4th) 290, 2011 MBQB 213, Perlmutter J. (Man. Q.B.).

541. Zoning — Attacking validity of zoning by-laws — Practice and procedure — On quashing zoning by-law — Jurisdiction —— Two applicants, HP and LL, represented approximately 200 people belonging to citizens group and were affected by existence of approximately 112 houses — Houses had been previously purchased by Canadian Transit Company ("CTC") over number of years to assist in future plan for construction of second span of bridge — Houses in question which were vacant and boarded up in view of residents had become blight on community — Applicants brought application against city to quash by-laws as being illegal — Application dismissed — No evidence to suggest that by-laws were rushed through by council with inordinate speed; if anything, length of time taken to complete entire process reflected cautious approach by council in considering task at hand — There was no evidence of city's usual practices and procedures being set aside — In fact, as reflected in notices given and number of public hearings held, not all of which were required by either statute or regulation, this too could not be established — By virtue of extensive pre-meeting announcements for public meetings and council debates, suggestion that process was shrouded in secrecy and that affected parties were not informed was utterly without merit.

Payne v. Windsor (City) (2011), 2011 CarswellOnt 10685, 89 M.P.L.R. (4th) 251, 2011 ONSC 5123, Richard C. Gates J. (Ont. S.C.J.).

542. Zoning — Rezoning land — Rezoning for development — Agricultural and rural land — Zoning by-law —— Applicants purchased land in respondent rural municipality (RM); shortly after purchase, road was constructed immediately behind their property — Road was intended to service proposed subdivision; developer applied to municipality for subdivision approval, and approval was granted — Applicants brought concerns with respect to location of road to Municipal Council (Council) and Winnipeg River Planning District (WRPD) during rezoning hearings, but rezoning by-law and resolutions approving subdivision and road were all passed — Applicants brought application for order invalidating by-law and resolutions — Application dismissed — There was no statutory requirement that WRPD consider road issue any further than it did — Council and WRPD had significant discretion and flexibility when interpreting nature of development plan; plan was to be interpreted broadly and purposively — There was no basis to conclude that decision did not fall within range of possible, acceptable outcomes which were defensible in respect of facts and law — No basis to declare by-law or resolutions invalid.

Beaulieu v. Alexander (Rural Municipality) (2011), 2011 CarswellMan 478, 88 M.P.L.R. (4th) 290, 2011 MBQB 213, Perlmutter J. (Man. Q.B.).

543. Zoning — Rezoning land — Rezoning for development — Miscellaneous lands —— Developer proposed construction of 12-storey, 87-unit residential condominium building with ground floor commercial uses, public uses and lower-level parking structure in town's beach neighbourhood — Developer and town sought to amend zoning by-law from "General Commercial C2 Zone", which permitted commercial and residential units of 2.5 storey maximum height, to "General Commercial Holding C2-427(H) Zone" — Ontario Municipal Board dismissed waterfront preservation association's appeal of rezoning — Board found zoning by-law amendment should be approved as it was consistent with 2005 Provincial Policy Statement (PPS) pursuant to s. 3(5) of Planning Act, and it addressed purposes of Act — Board found development conformed to policies of Growth Plan, Niagara Regional Policy Plan, and town's Official Plan, and that amendment addressed relevant sections of 2006 Parks and Open Space Master Plan and 2005 Neighbourhood Plan — Board found development was appropriate in urban design context, was compatible with adjacent community, created no undue or adverse impacts on adjacent properties, represented good land use planning, and was in public interest — Board found environmental impact study was not required prior to approval of amendment as issues surrounding encroachment of structures within dynamic beach zone and impacts on natural beach, dune dynamics and surrounding land uses were satisfactorily addressed — Association brought motion for leave to appeal — Motion dismissed — Board accepted proposed shoreline protection works in expert report would protect building, which was planning decision — While plans for proposed shoreline protection works must be approved by conservation authority, this would be done in future, and association would not have access to plans before they were presented to authority, nor would association be able to present alternate design plans to developer's plans — However, this was system province put in place through Niagara Peninsula Conservation Authority: Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses (Regulation 155/06) — Board found proposals in expert report were consistent with PPS — Board applied right test — Board heard evidence of three qualified engineers, two who testified that development placed public safety in jeopardy and third who testified that development adequately protected public — Board chose to accept opinion of third engineer, which was finding of fact — Requirement of s. 3 of Ontario Municipal Board Act that appeal lies to Divisional Court with leave only question of law as interpreted by case law did not permit courts to intervene — Board decision raised no issue of law on which Divisional Court could conceivably find that board's decision was unreasonable.

Brock, Re (2011), 2011 CarswellOnt 11006, 2011 ONSC 5252, 89 M.P.L.R. (4th) 278, P.B. Hambly J. (Ont. Div. Ct.); refusing leave to appeal (2011), 2011 CarswellOnt 1011, 81 M.P.L.R. (4th) 115, *(sub nom. Fort Erie (Town) Zoning By-law No. 26-10 (Re))* 67 O.M.B.R. 175, R. Rossi Member (O.M.B.).

544. Zoning — Zoning variances — Practice and procedure on variance application — Procedural irregularities —— Corporate respondent SP Inc. owned land in respondent municipality S that consisted of two adjacent properties — Planning Act requires S's

council to conduct public hearing as precondition to granting of conditional use and/or variation orders, with notice of hearing provided in accordance with s. 169 of Act — SP Inc. successfully applied for conditional use order and for variation order — MJ brought application to quash order on grounds that S did not strictly comply with notice provisions mandated by Act — MJ claimed, among other things, that attempt to combine hearing for conditional order and for variation order was confusing and unclear — Application dismissed — Section 174(1) of Act provides procedure to combine hearings where development application requires multiple hearings because more than one by-law or other approvals require amendment — Further, s. 174(2) provides that notice of hearing of each matter may be combined into single notice as long as requirements regarding notice are met — Conditional use portion of notice was clearly identified separately from variation notification — Notice did not employ exact words found in legislation but average person reading it would understand that persons were allowed to attend public hearing — Requirement to post notice in conspicuous "locations" must be read in light of fact that there will be instances where affected property is adjacent to more than one public road — MJ did not suffer prejudice simply because one notice was posted as opposed to two — In some instances, municipal law creates presumption of regularity favouring acts of municipality; this was appropriate case for application of that presumption.

Jodoin v. Steinbach (City) (2011), 88 M.P.L.R. (4th) 154, 2011 CarswellMan 475, 2011 MBQB 218, Cameron J. (Man. Q.B.).

PUBLIC LAW

545. Elections — Practice and procedure on controverted elections — In municipal elections — Appeals —— Intervenors on appeal from declaration of invalidity of municipal election were permitted, within specific terms and limitations, to augment record with evidence of their own to serve as basis for their argument in order to allow meaningful participation on appeals and to ensure that essential evidence was not omitted, and with view to not unduly widening focus, scope or nature of appeals.

Cusimano v. Toronto (City) (2011), 88 M.P.L.R. (4th) 138, 2011 CarswellOnt 8486, 2011 ONSC 4768, Lederman J. (Ont. Div. Ct.); additional reasons at (2011), 2011 CarswellOnt 10568, 2011 ONSC 5578, 88 M.P.L.R. (4th) 151, Sidney N. Lederman J. (Ont. Div. Ct.).

546. Elections — Practice and procedure on controverted elections — In municipal elections — Appeals —— Following municipal election, candidate brought unsuccessful application to Township of Perth South Compliance Audit Committee (CAC), seeking audit of fellow candidates' campaign finance records — Applicant believed that some candidates were in breach of s. 69(1) of Municipal Elections Act, 1996, which required all candidates to maintain campaign account with financial institution — Applicant appealed decision — Appeal allowed in part — Applicant was entitled to audit of campaign finances with respect to those candidates who reported campaign income and expenses other than nomination filing fee, and did not provide evidence of campaign account — CAC was reasonable in not ordering audits for candidates who recorded no campaign expenses or income other than nomination filing fee, which was not required to be paid from campaign account — CAC was also reasonable to not order audit of candidate who reported income and expenses, but also showed evidence of dedicated campaign account — Even if income and expenses were minimal and paid entirely by candidates themselves, s. 69(1) was still applicable and campaign accounts were required — CAC was unreasonable in not ordering audits of finances relating to two candidates who each reported income and expenses, yet did not show evidence of dedicated accounts — Matter was remitted to CAC to appoint auditor to examine finances of candidates in question.

Fuhr v. Perth South (Township) (2011), 2011 ONCJ 413, 2011 CarswellOnt 11095, 89 M.P.L.R. (4th) 139, K.L. McKerlie J. (Ont. C.J.).

547. Elections — Practice and procedure on controverted elections — In municipal elections — Parties — Other parties—— Respondent C, candidate who lost to applicant A in election for city councillor in municipality of T, successfully brought application to have election results declared invalid — Applicant S discovered her vote had been discounted because election official had not signed form adding S's name to voter list — Municipality of T appealed result — A, S and municipality of M brought applications for intervenor status — Applications granted — According to R. 13.01(1) of Rules of Civil Procedure, person who is not party to proceeding may move for leave to intervene as added party if person claims interest in proceeding's subject matter; that person may be adversely affected by judgment in proceeding; or that there exists between person and one or more of parties to proceeding question of law or fact in common with one or more of questions in issue — Likelihood of applicant being able to make useful contribution to resolution of appeal without causing injustice to immediate parties is considered — Present appeals were public in nature; issues raised engaged fundamental democratic values of participation and enfranchisement, thus more liberal approach to interventions was warranted — As winning candidate in election, A had interest in subject matter of proceeding and would be adversely affected by judgment in proceeding, thus clearly came within R. 13.01(1)(a) and (b) — S's participation provided context of voter's experience; her perspective was different than that offered by other parties — Municipality M, which ran elections under Municipal Elections Act, 1996, met test under R. 13.02, as it could provide information that might be useful to court.

Cusimano v. Toronto (City) (2011), 88 M.P.L.R. (4th) 138, 2011 CarswellOnt 8486, 2011 ONSC 4768, Lederman J. (Ont. Div. Ct.); additional reasons at (2011), 2011 CarswellOnt 10568, 2011 ONSC 5578, 88 M.P.L.R. (4th) 151, Sidney N. Lederman J. (Ont. Div. Ct.).

WORDS AND PHRASES*

CONDITIONAL USE

Manitoba

♦ A conditional use is one that is not included in the zoning description, but is approved of in principle and may become an allowable use if a conditional use order is granted by Council.

(Municipal law)

Jodoin v. Steinbach (City) (2011), 88 M.P.L.R. (4th) 154, 2011 CarswellMan 475, 2011 MBQB 218 (Man. Q.B.), at para. 3 Cameron J.

ELECTORS GENERALLY

Ontario

♦ . . . "electors generally" [in s. 4(j) of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50] refers to something other than all electors.

(Municipal law)

Mondoux v. Tuchenhagen (2011), 88 M.P.L.R. (4th) 234, 2011 CarswellOnt 11438, 2011 ONSC 5398 (Ont. Div. Ct.), at para. 40 Lederer J. (Gordon J. concurring)

HOTEL

Ontario

♦ Just because the cottages are rented out on a seasonal basis does not qualify them as hotels.

(Municipal law)

Moore v. Municipal Property Assessment Corp., Region No. 18 (2011), 2011 CarswellOnt 7852 (Ont. Assess. Review Bd.), at para. 18 A. Castel (Member)

INDIRECT PECUNIARY INTEREST

See also PECUNIARY INTEREST.

Ontario

♦ Indirect pecuniary interest refers to holding that exists held by corporations or other family members.

(Municipal law)

Mondoux v. Tuchenhagen (2011), 88 M.P.L.R. (4th) 234, 2011 CarswellOnt 11438, 2011 ONSC 5398 (Ont. Div. Ct.), at para. 98 Wilson J. (dissenting)

PECUNIARY INTEREST

See also INDIRECT PECUNIARY INTEREST.

Ontario

♦ "Pecuniary interest" is not defined by the [*Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50]. Generally, it is a financial interest, an interest related to or involving money. A decision to buy, or offer to buy, property is demonstrative of a pecuniary interest.

(Municipal law)

Mondoux v. Tuchenhagen (2011), 88 M.P.L.R. (4th) 234, 2011 CarswellOnt 11438, 2011 ONSC 5398 (Ont. Div. Ct.), at para. 31 Lederer J. (Gordon J. concurring)

TRAVELLED ROAD

British Columbia

♦ There appears to be little authority on the meaning of "travelled road" in the context of s. 42 of the *Transportation Act* [S.B.C. 2004, c. 44]. However, the case law there is suggests that the meaning requires the route in question to have had some substantive public use, something more than occasional or rare use.

(Transportation)

Vesuna v. British Columbia (Minister of Transportation) (2011), 2011 BCSC 941, 2011 CarswellBC 1867, 9 R.P.R. (5th) 114 (B.C. S.C.), at para. 107 Griffin J.

*An alphabetical list of individual words and phrases that are given judicial consideration in the cases digested in this issue. Whenever possible, the entries are taken verbatim from the judgment.

Printed in Canada by Thomson Reuters.