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BARRISTON^{LLP} LAW

Municipal Law Today

Presented by: Jim McIntosh & Sarah Hahn – Barriston LLP


October 24, 2019

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1

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Our Municipal Lawyers



Jim McIntosh



Sarah Hahn

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2

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Overview

1. Human Resources and Employment Law
2. Municipal Law Update
 - Bill 108
 - Recent decisions affecting municipalities
 - Cannabis regulation update
 - Regional review
3. Ask the Solicitors

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Human Resources and Employment Law

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Constructive Dismissal

Constructive dismissal may be found when employer makes significant change to terms of employment

- Single unilateral act by employer breaching an essential term of contract, or
- Series of acts by employer indicating it no longer intends to be bound by the contract

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Constructive Dismissal

- Generally, an employee does not have vested right in a particular job
- There is an implied term of employment contract that employer may reasonably reassign employee to other duties
- But and Employee is not required to accept substantially different duties
- Employers may consider adding a term to employment contracts to provide flexibility
 - E.g. "Employee's duties will include _____, and may be amended by the Employer from time to time."

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Job Descriptions

- [Whalley v Cape Breton Regional Municipality, 2018 NSSC 325](#)
- Employee worked mainly on one project for his 15 year career until he was reassigned. He promptly quit and alleged constructive dismissal.
- Test: Would a reasonable person have felt that the essential terms of the employment contract were being substantially changed?
- Since the job description was worded broadly, the municipality could reassign files and the court did not find constructive dismissal.

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Job Descriptions [Whalley v Cape Breton Regional Municipality](#)

In conjunction with other departments in a partnership with the community and its appropriate agencies and the public sector, develops an internal strategy that will enable the municipality to play a lead role in creating a self-sustaining, competitive economy in this region.

- Manages the implementation of municipally approved recommendations of the Cape Breton County Economic Development Authority's economic development strategy.
- Manages the overall plan for the administration of municipally owned industrial parks and prepares studies, reports and related information for future management and rationalization of all industrial parks in the region.
- Defines procedures and service levels for industrial (business) parks. Develops required marketing strategies for the recruitment of new investment and growth from within initiatives.
- Initiates, directs and negotiates public private sector contractual agreements with business looking to establish or expand in the area.

For the purpose of establishing growth for the region, develops and sustains liaison between CBRM and local economic development agencies, including but not limited to: Cape Breton Economic Development Authority, Board of Trade, Downtown Development organizations, and Community Development groups

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Determining whether someone is an employee for the purpose of running in a municipal election

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Firefighters: Employee or Volunteer?

- **Fire Protection and Prevention Act, 1997, s.1:**
 - "Firefighter": fire chief and any other person employed in, or appointed to, a fire department and assigned to undertake fire protection services
 - Includes a volunteer firefighter
 - "Volunteer firefighter": firefighter who provides fire protection services either voluntarily or for a nominal consideration, honorarium, training or activity allowance
- **Fire Protection and Prevention Act, 1997, s.41:**
 - "Firefighter": a person regularly employed on a salaried basis in a fire department and assigned to fire protection services
 - Includes technicians
 - Does not include a volunteer firefighter

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Firefighters: Employee or Volunteer?

Amendments to FPPA removed the requirement that those who were not full-time salaried firefighters were "volunteers"

- Opened the door for part-time non-volunteer firefighters
- Person may now be found to be working in a non-volunteer capacity even if working part-time
- Amendments have also expanded definition of volunteer firefighter to include those in receipt of a 'training or activity allowance'
- If honorarium received by an individual is comparable to that of a non-volunteer firefighter working the same number of hours, may not be considered a volunteer
 - Courts have found fixed regular payments are akin to a salary
- Courts also look to see whether volunteer is regularly employed
 - E.g. required to be present for certain shifts vs present at will

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Employee of Municipality or Local Board?

Does a BIA Manager fall under MEA s.30(1) either as an employee of the municipality or local board?

- **Municipal Affairs Act:** "local board" includes "body or local authority established or exercising any power or authority under any general or special Act with respect to any of the affairs or purposes [...] of a municipality"
- **Municipal Act, 2001: Business Improvement Areas: 204(2.1):** "A board of management is a local board of the municipality for all purposes"
- BIA would be considered a local board, so a manager of the BIA would be an employee of a local board
 - Would therefore have to take an unpaid leave of absence as of the date of nomination as member of Council

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General Municipal Law Update

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Bill 108: More Homes, More Choice Act, 2019 Transition Highlights: *Planning Act*

O. Reg. 174/16, as amended by O. Reg. 296/19

- All matters shall be continued in accordance with the *Planning Act* as it reads on/after September 3, 2019, unless an exception is prescribed in the Regulation
- Existing appeals of OP, OPA, ZB or ZBA will continue under pre-Bill 139 Regime where appeal was already transitioned from the application of the Bill 139 regime (prior to Dec. 2017)
- Appeals commenced after September 3, 2019 will be continued in accordance with Bill 108
- For existing matters under Bill 139 regime:
 - If a hearing of the merits has been scheduled, the matter will proceed pursuant to Bill 139
 - If a hearing of the merits has not been scheduled, the matter will be transitioned to Bill 108

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Bill 108: More Homes, More Choice Act, 2019 Transition Highlights: *Planning Act*

O. Reg. 174/16, as amended by O. Reg. 296/19

- Appeals of Plans of Subdivision (s. 51(39), (43) and (48))
 - Third party appeals of plan of subdivision decisions have been removed
 - Appeals filed before September 3, 2019 continue under Bill 139 version of the *Planning Act*
- Appeals of non-decisions by approval authorities (s. 17(40))
 - Private appeals of approval authority non-decisions have been removed, unless filed before Sept. 3
 - Appeals filed before April 2, 2018 continue under pre-Bill 139 version of the *Planning Act*
- Appeals filed April 3, 2018 – Sept. 2, 2019
 - If hearing on the merits scheduled before Sept. 3, Bill 139 applies
 - If hearing of the merits not scheduled before Sept. 3, Bill 108 applies

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Bill 108: More Homes, More Choice Act, 2019 Transition Highlights: *LPAT Act*

O. Reg. 303/19

- Appeals commenced before Bill 139 transition to Bill 108
- Appeals commenced under Bill 139 with hearing on the merits scheduled before Sept. 3 remain under Bill 139
- Appeals commenced under Bill 139 without hearing on the merits scheduled before Sept. 3 transition to Bill 108

O. Reg. 102/18

- Prescribed timelines for LPAT to render decisions, time limit on oral submissions, & restrictions on calling evidence and cross-examination
- Revoked

LPAT Rules of Practice and Procedure

- Introduced Sept. 3, 2019
- Rules similar to pre-Bill 139

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Recent Decisions Affecting Municipalities

Biffis v. Sainsbury 2018 ONSC 3531 & 79 M.P.L.R. (5th) 61

- Council member discussed potential implementation of water service to large condo complex of which she was resident
- Court held this didn't satisfy a breach of s. 5(c) of the *Municipal Conflict of Interest Act*
 - Council member had shared interest in common with other electors generally, acted in good faith
- Applicant argued that councillor couldn't retract her previous declaration that there was a conflict of interest
 - Court rejected this argument – abundance of caution and good faith
- Decision was appealed to the Court of Appeal
 - No right of appeal from a decision finding that there was no conflict of interest

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Recent Decisions Affecting Municipalities

[Clublink v. Town of Oakville, 2018 ONSC 7395](#)

- Oakville passed 5 by-laws with effect of establishing Glenn Abbey golf course as a cultural heritage site (*Ontario Heritage Act*)
- Oakville also passed a resolution to approve a Cultural Heritage Landscape Conservation Plan for the property
- The Court quashed the By-laws and Conservation Plan
 - Found Oakville violated 3 principles of jurisdiction, vagueness, bad faith – only 1 violation required to quash
 - "There is nothing in the OHA or otherwise in provincial legislation and policy that empowers a municipality to require a private business...to keep running as a business"

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Recent Decisions Affecting Municipalities

Clublink v. Town of Oakville, 2018 ONSC 7395

- “Badges of bad faith” (from *Toronto Taxi Alliance Inc. v. City of Toronto, 2015 ONSC 685*)
 - Questionable timing
 - Decisions made under false pretenses
 - Improper motives
 - Lack of notice
 - Setting aside of the usual practices & procedures
 - Keeping the parties most affected in the dark
 - Law singling out one individual/property
- By-law was said to be applicable to all cultural heritage landscapes, but application was aimed at Glen Abbey alone

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Recent Decisions Affecting Municipalities

Clublink v. Town of Oakville, 2018 ONSC 7395

- Vagueness: Court cited *Wainfleet Wind Energy Inc. v. Township of Wainfleet, 2013 ONSC 2194, para 31*:
 - A by-law is invalid for vagueness and uncertainty if: (a) it is not sufficiently intelligible to provide an adequate basis for legal debate and reasoned analysis; (b) it fails to sufficiently delineate any area of risk; and, (c) it offers “no grasp” for courts to perform their interpretive function. This standard is exacting, and the onus is on the applicant to establish that the by-law should be declared invalid.
- Terminology not susceptible to an agreed-upon definition, or too general to be applied to specific cases, is vague

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Recent Decisions Affecting Municipalities

[Tay \(Township\) v. Fan, 2018 ONSC 6375](#)

- Respondents were growing 800+ marijuana plants in structure on their property contrary to the Township’s zoning by-law
 - Licensed growers conducting their activities [legally] for personal, medical use
- Court granted interlocutory injunction, enjoining Respondents from growing, cultivating, processing or otherwise producing marijuana at the property

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Recent Decisions Affecting Municipalities

Township of Tay Zoning By-law Final Draft: May 2018

- MEDICAL MARIJUANA PRODUCTION FACILITY means a wholly enclosed building, structure or part thereof, used to possess, produce, sell, provide, ship, deliver, transport or destroy marijuana or cannabis by a Licensed Producer authorized by Health Canada according to the Marijuana for Medical Purposes Regulations SOR/2013-119 and any successor thereto.

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RECOMMENDATIONS

That the following recommendations be and are hereby adopted by Council:

15. That a medical marijuana production facility be considered a permitted use under the definition of a processing plant which is a permitted use in the General Industrial and Prestige Industrial Zones.

COUNCIL ACTION: Carried.

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SECTION 16 - VILLAGE COMMERCIAL "C1" ZONE

16.1 GENERAL PROHIBITION

Within the General Commercial "C1" Zone, no person shall use any land, erect, alter, enlarge, use or maintain any building or structure for any use other than as permitted in subsection 2 of this Section and also in accordance with the regulations contained or referred to in subsections 3 and 4 of this Section.

16.2 USES PERMITTED

- Antique Shop
- Automobile sales and service establishment
- Automobile service station
- Automobile washing establishment
- Business or professional office
- Clinic
- Commercial garage
- Commercial school
- Craft shop
- Club
- Day Care Facility
- Dwelling units, Accessory
- Financial institution
- Funeral home
- Garden Centre
- Hotel
- Laundromat
- Motel
- Parking lot
- Personal service shop
- Place of entertainment
- Post office
- Public use
- Restaurant
- Retail store
- Tavern
- Veterinary establishment

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SECTION 22 – GENERAL INDUSTRIAL "M1" ZONE

22.1 GENERAL PROHIBITION

Within an Industrial "M1" Zone no person shall use any land, erect, alter, enlarge, use or maintain any building or structure for any use other than as permitted in subsection 2 of this Section and also in accordance with the regulations contained or referred to in subsections 3 and 4 of this Section.

22.2 USES PERMITTED

Accessory commercial use and wholesale use
 Accessory office
 Accessory open yard storage
 Assembly plant
 Automobile Repair Garage
 Automobile sales and rental establishment
 Bulk fuel storage and supply
 Commercial garage
 Commercial self-storage facility
 Construction or building supply yard
 Contractor's yard
 Custom workshop
 Dwelling unit, Accessory
 Excavating salvage yard
 Fabricating plant
 Farm implement or heavy equipment sales outlet
 Farm sales and service establishment
 Manufacturing plant
 Machine shop
 Processing plant
 Sawmill or planing mill
 Service repair shop
 Transportation terminal
 Warehouse

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Cannabis Regulation Update

Where you can smoke and vape cannabis:

- Private residences (unless it is also a workplace)
- Many outdoor public places – where smoking is permitted
- Designated smoking guest rooms
- Residential vehicles and boats that meet certain criteria
 - E.g. have permanent sleeping accommodations and cooking facilities, and are parked/anchored
- Scientific research and testing facilities
- Controlled areas in:
 - Long-term care homes
 - Certain retirement homes
 - Residential hospices
 - Provincially-funded supportive housing
 - Designated psychiatric facilities or veteran's facilities

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Cannabis Regulation Update

Two pieces of legislation grant municipalities authority to regulate where cannabis can be smoked/vaped:

- *Smoke Free Ontario Act, 2017*
- *Municipal Act, 2001*
 - s. 115(1) Without limited sections 9, 10 and 11, a municipality may prohibit or regulate the smoking of tobacco or cannabis in public places and workplaces
 - s. 115(2) A by-law under this section binds the Crown
 - s. 115(3) A by-law under this section shall not apply to a highway but may apply to public transportation vehicles and taxicabs on a highway

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Cannabis Regulation Update

<p>Cannabis stores operating in Ontario:</p> <ul style="list-style-type: none"> • Toronto: 5 • Brampton: 1 • London: 3 • Ottawa: 3 • Kingston: 2 • Niagara Falls: 1 • Sudbury: 2 • Hamilton: 2 • Ajax: 1 • St. Catharines: 1 • Burlington: 1 	<p>Proposed location of new cannabis stores:</p> <ul style="list-style-type: none"> • East Region: 7 • GTA Region: 6 • North Region: 5 • Toronto Region: 13 • West Region: 11
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Regional Governance Review

- The provincial government, with an advisory body of 2 special advisors, reviewed 8 regional governments, Simcoe County, and their lower-tier municipalities
- 82 municipalities total
- Objective: ensure these municipalities are providing the vital services that residents and local businesses depend on
- Mandate of advisory body:
 - Provide expert advice to Minister of Municipal Affairs and Housing
 - Make recommendations to government on opportunities to improve regional governance and service delivery

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Regional Governance Review

- There were reportedly 8,500 submissions made to the special advisors
- Results were submitted to the province on September 20 but have not [yet] been made public
- There is speculation that the results will not be made public
- Because the province appointed special advisors to do the review, they may argue that Seiling and Fenn are simply providing confidential advice to it
- If commissioners had been appointed, the expectation would be that the report would be public
- The province need not follow the recommendations of the report

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Two Roads Less Travelled

Colonization Roads
What Are They?

- No mention of the term “colonization roads” in Municipal Act, 2001 or any of its predecessor legislation
- Nevertheless, status as highways recognized by Section 26 of the Act because they existed in law on December 31, 2002
- Origin goes back to the early 1800’s – Highway Act of 1810
- Legislation recognized road allowances laid out by the King’s surveyors and roads created through the expenditure of public money
- Also recognized roads created where Statute Labour had been usually performed

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Colonization Roads
What Are They?

- Most colonization roads not surveyed – simply axed and cleared
- Purpose was to get settlers inland to settlement areas via the most favourable route
- Colonization roads meander and deviate to avoid topographical obstacles – did not always follow surveyed road allowances
- Colonization roads may vary in width depending upon where and how wide they were cleared/constructed

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Colonization Roads
How are They Identified?

- No record in the Land Registry/Land Titles System
- Not precisely recorded by Crown Lands Department – approximate locations shown on plans created in 1890’s
- MNRF records also include imprecise plans showing approximate locations
- Best source of information is through local land surveyors
- Evidence on the ground as verified by surveyor

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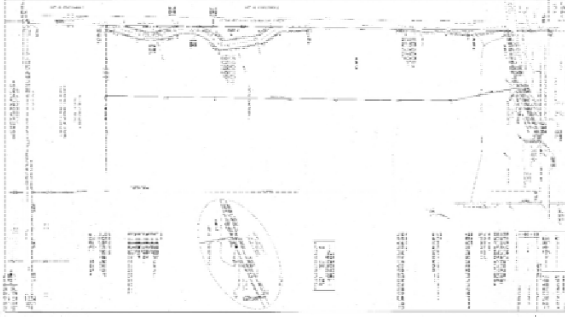
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Colonization Roads Stisted Colonization Road – Huntsville

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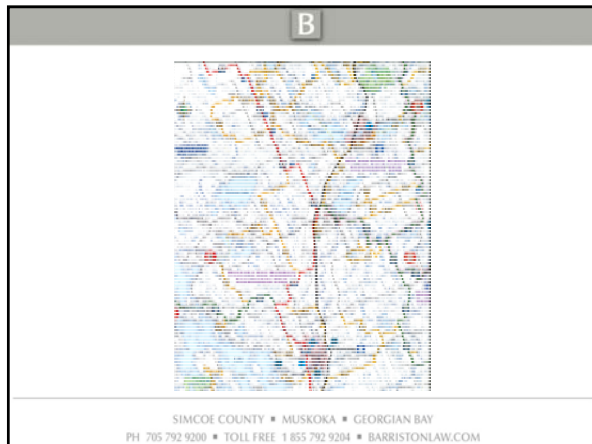
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Colonization Roads
What is Their Status?

- Until they are stopped up and closed by by-law, they are highways
- Even though not recorded in the Land Registry Office, they are vested in the local municipality
- Once identified by survey, the municipality can and should have its vested interest recorded
- Once municipal ownership has been recorded, the colonization road is dealt with as any other highway
- There is no increased maintenance obligation – can simply remain an unmaintained road (or trail)
- Can be stopped up, closed and sold at the discretion of the local municipality subject to notice
- Some colonization roads serve as travel routes for ATVs and snowmobiles

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Deviation Roads
What are They?

- Roads that have been created or constructed on land other than that laid out as part of a road allowance
- The terms “trespass road” and “forced road” are synonymously used and refer to a road that crosses over private property
- The term “given road” is a variable that suggests an implied dedication of the land by the owner for public use
- A deviation road may be constructed on land deeded to the local municipality by the private owner for that purpose

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Deviation Roads
Who is the Owner?

- Except where ownership has been granted by deed or transfer to the municipality, the title remains in private ownership
- Where title to a road used and maintained by the public remains in private ownership, it should be rectified
- Title rectification could be through voluntary transfer, court application or expropriation

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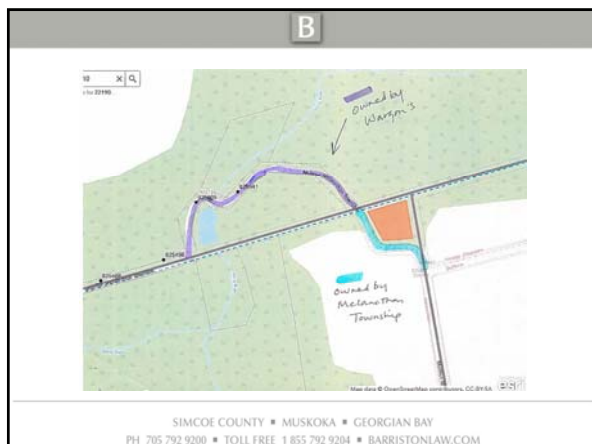
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An Odd Example – Clearview/Melancthon Townline Deviation Road History:

- Land to construct deviation road deeded to Nottawasaga and to Melancthon in 1878
- Both municipalities passed by-laws to establish the deeded land as a road
- Melancthon registered its by-law on title, Nottawasaga did not

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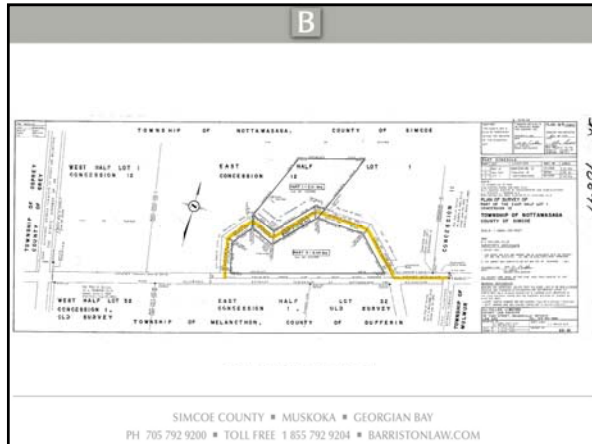
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An Odd Example – Clearview/Melancthon Townline Deviation Road History continued:

- In 1966, the farm from which the Nottawasaga portion of the road was granted was sold by municipal tax sale to Wargon
- The tax sale deed did not save and except the portion of the deviation road deeded to Nottawasaga
- In 1982, Wargon applied to the County of Simcoe to have the farm lot severed
- Plan 51R-10847 was prepared and submitted to the County and the severance was approved

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An Odd Example – Clearview/Melancthon Townline Deviation Road
History continued:

- The severance deed registered in 1982 included part of the deviation road described as Part 2 on Plan 51R-10847
- At the time, the land was still in the Land Registry system and had not been converted to Land Titles
- The severed land and the retained land parcels were converted to the Land Titles system on October 16, 2000
- In each case, Wargon was recorded as the owner of the lands including the deviation road

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An Odd Example – Clearview/Melancthon Townline Deviation Road
Where do Things Stand Now or What's the Big Deal?

- Wargon claims ownership of the land and wants it to be regarded as private
- The public still uses the road and Clearview Township wants the road to remain open
- The County of Simcoe claims ownership of the bridge structure over the Noisy River forming part of the road
- The County of Simcoe recently spent \$400,000 of federal grant money to rebuild the bridge
- The road including the bridge serves as a seasonal access route used by local residents

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Two Roads Less Travelled

An Odd Example – Clearview/Melancthon Townline Deviation Road
What is the Remedy?

- Voluntary transfer of registered title by Wargon (unlikely)
- Court Application based on:
 - deeded ownership granted to the township in 1878
 - by-law to establish passed in 1878 still in effect
 - road not closed by by-law
 - continued use by public
 - expenditure of public funds on maintenance
 - 1966 tax deed could not have included deviation road

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Ask the Solicitors

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47

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For questions...

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48