To: The City of Burlington:

- **Mayor** Marianne Meed Ward.
- Councillor Kelvin Galbraith.
- Councillor Lisa Kearns.
- Councillor Rory Nisan.
- Councillor Shawna Stolte.
- Councillor Paul Sharman.
- Councillor Angelo Bentivegna.
- City Clerk for Committee of the Whole

From: Donald Johnson B.Sc.Agr.
[redacted]

Date: Nov 19th, 2019

Re: City of Burlington Proposed Tree Bylaw.

Mayor Marianne Meed Ward and Council Members:

I came across an article in the Burlington Post stating the City is in the process of creating a City wide "Tree Bylaw". That this will require a new city department with an anticipated budget cost of $300,000 per year. This bylaw will require citizens to obtain a permit from the city before cutting or removing a tree that is on their property.

I was aware the City had a trial tree Bylaw designed for the Roseland community but was unaware the city was planning to move forward and expand this across the city.

It is this tree bylaw I wish to address.

1) As a long time citizen in the City of Burlington, to my recollections, this issue has come before at least two previous councils and both times was turned down.

2) As a citizen and taxpayer I believe it is council's duty to give guidance and exercise budget control over the affairs of the City. I also believe that the first priority in these duties is to provide sound and prudent financial guidance to the City and to be accountable for tax payer monies.

3) The Burlington Post article cites the Cities need for a tree bylaw is: to protect trees from being removed in order to help prevent and to protect us from "climate change"

4) As a taxpayer it is my belief that, before any action is taken, that the City should first quantify the size and scope of the problem and need for action. In this case I believe determining the scope of the problem, regarding healthy trees being removed, needs to be determined before the City even contemplates trying to create a tree bylaw, let alone trying to impose upon private property owners.

In the previous 2 instances when council examined this issue, their investigation revealed, there was no real problem nor need, for such a bylaw. Indeed there were very few trees in Burlington where their removal by their owner, might have been considered an issue. If my memory serves me right the number was in the order of roughly a half dozen. Now considering, there may be 10 million trees contained within the city municipal borders it would appear to me we are manufacturing rather than responding to a problem.

5) The argument, the bylaw is needed as part of the "Climate Change" prevention programs is exceptionally weak when it comes to a cost benefit analysis, creating a very expensive process that might result in saving half a dozen or at most a couple dozen mature trees.

a) If we assume the bylaw saves 2 dozen mature trees a year the cost per tree saved is over 12,500$ per tree.

b) Recognizing mature trees have a shorter lifespan then young trees, the mature trees saved are in the back half of their lives and might have, at most, an average of 30- 50 years more lifespan. These trees being saved are likely older native species which are more vulnerable to climate change impact, new invasive species, and aging problems. They may indeed also be hindering growth of surrounding younger trees.

c) From climate change perspectives small young fast growing trees remove more carbon than mature trees. If the City is truly concerned about climate change then with the $300,000 it could plant upwards of 150,000 tree seedlings, of new hardier varieties which will be far more suitable to global climate change, per year, on municipal and co-operating private lands. This will result in a massive increase in escalating amounts of carbon removal for the same budget costs compared to the carbon reduction impact of saving a few trees. It will also be far more effective in maintaining and expanding the city canopy cover.

d) We all know the perceived role of using trees to assist slowing Climate Change. The benefit arguments include, they provide shade and cooling, that they absorb carbon, provide oxygen, and that they assist in water management and flood control.

Unfortunately the shade and cooling doesn't result in any real temperature reduction as the solar radiation is just dispersed by the canopy cover and heat generated by solar action is still there in the atmosphere. Moisture given off by the tree leaves in photosynthesis does provide some cooling, but also increases humidity putting water back into the air, to rain down once more. If a tree or shrub results in air flow issues around an air conditioner it can actually make it less efficient. Trees in their growing stages absorb much more carbon then they do in the mature stages and indeed trees over their lifetime generate as much carbon as they absorb. Just contemplate what happens to all the leaves that drop every fall and the impact their decomposition has on co2 levels. Water management and flood control is at best marginal. Trees pick up moisture from the soil drying it to make it more water retentive when it rains but a crop of corn or a good lawn will remove as much moisture. The root systems help hold soil together but if water is moving over the root zone it will carve out the soil and the tree can topple.

If indeed we are looking to use trees as carbon storage systems, the best way to extend this function is to timber the mature trees and recycling them into lumber. Their timber being used in buildings, can extend the wood life by 100's of years versus letting the tree die, cut or fall down, decay on the ground or be chipped up and carted away, because the wood is no longer good for timber use.

e) If one asks, what is the impact of trees in combating climate change in the City the answer is telling. I attended the City Sponsored Climate Action Meeting, on November 12th 2019, and publically asked City employee and forester Brianna Thornborrow, "what is the role of trees and the impact they will have in the City plans for it to meet Climate Change carbon emission targets". Her public response was refreshingly honest. She stated "that trees were not of significance in achieving City Carbon Emission Targets".

f) We should also not ignore the reason an owner wants to remove his tree. Stopping its removal, will not eliminate the need or desire to remove the tree. One must really wonder if the property owner will do anything to maintain the tree and if he doesn't is the city going to take on the responsibility?

6) As a citizen and taxpayer, it strikes me that, it is a total waste of taxpayer money to commit spending an additional yearly 300,000$ to create a new department (requiring hiring professional foresters) that will not result in any significant number of trees being saved, have no impact on climate change prevention and indeed is using resources that used elsewhere will have significantly more impact and benefit.

7) I also question, does the City have the legal authority to create a municipal tree bylaw requiring City permission or a permit before cutting a tree on private property? If the city does not have the legal authority to stop a citizen from cutting a tree on their owned private property what is the potential cost risk to the City if the City try's to enforce an illegal bylaw. For sure if the Bylaw is in conflict the city insurance will not cover damages and costs caused by the cities own actions.

If the City does require a permit and refuses right of an owner to remove a tree on his private owned land, is the city now liable if a branch falls off or the tree topples hurting someone? Interfering with the property iowners right to remove a tree or delaying its removal will place significant new liability on the city!

8) Under law, there are three types of property in Canada (and Ontario): Crown Land, Native Land and Private owned land. Crown land is all lands owned by the Crown which includes lands owned by the Province and Municipalities. Native lands are the lands owned by native bands and normally verified by treaties with the crown. The third type is lands that are privately owned. Private owned lands are easily identifiable as their ownership is recognized as being "fee simple" on the owners' deed which were recorded in the old registry system or are now shown on title in the newer land titles system.

9) In as much as the envisioned tree bylaw, is to place control over private property, forcing private property owner to get permission from the City before removing a tree from his private land: the question one also needs to ask is, "does the municipality have authority under the Municipal Act or other relevant legislation to impose its will upon a property owner which is superior to the owners right of self-determination re removing a tree?"

We all know the City is a creature of the Province and that the Province gives authority to the City to use specific Provincial powers to manage its functions, normally under the Municipal Act of Ontario. Effectively where the Province has authority, it can delegate this down to municipalities. Where it has no authority it cannot delegate what it does not have.

In government there is a chain of authority. Under the "Doctrine of Paramountcy", Municipal bylaws must respect Provincial legislation. Provincial Legislation must respect Federal Legislation and Federal Legislation must respect the Constitution and authority of the Crown. The Crown is the ultimate authority over all.

Effectively if a superior authority has dictated a decision, provided legislation or a law, given a permit or entered into a contract, said instrument and authority has priority over a lower tier authority to interfere with it.

10) Let's examine the prime source of the Cities authority source, the "Municipal Act of Ontario".
In this Act, the city is provided all sorts of authority when it comes to City authority over lands and assets owned by the Corporation of the City of Burlington or Province owned assets the Province has given the City authority to manage.

However, when it comes to city authority over private owned land, the City's authority is extremely limited. The City, in the Act, has all the powers of a natural person which means its power is limited and the City has no more authority to dictate to a private property owner what they can or cannot do on their private property, than, the authority a citizen has to dictate to the city what it can do on city property.

The Act talks about jurisdiction, but fails to define the definition of jurisdiction. Most laypersons assume, it refers to a geographical area over which the City has control. This is an incorrect interpretation. Jurisdiction, actually refers to, control over "crown lands" and assets owned, or under the authority of, the Municipality and/or under the authority of the Province, for which said authority, is delegated to the City.

The City has no authority over Crown assets under authority of the federal government which includes crown land, unless the City was given Federal approval of authority. It has no authority on any native lands in the geographic boundaries and it has extremely limited authority when it comes to private owned lands.

The Municipal Act does provide specific power to instruct a property owner to move a parked car on his property if it affects sight lines on the roadway, it does allow the city to set standards on service providers who provide private services to the City (meaning to the Corporation City of Burlington) and it allows the city to undertake expropriation of private property if private owned property is needed for the public good.

Looking at some specific parts of the Act it is apparent :

MUNICIPALITIES HAVE NO POWER OR AUTHORITY ON PRIVATE PROPERTY

The legal maxim ``*expressio unius est exclusio alterius*`` means that within a statute or regulation, when one or more things of a class are expressly mentioned, others of the same class are excluded. To say it another way, the inclusion of one thing means the exclusion of everything else.

Ontario Municipal Act Regulation 586/06 has specific exclusions of private property.

Section 2(4) says "*Nothing in this Regulation authorizes a municipality to enter and undertake a work as a local improvement on private property without the permission of the owner or other person having the authority to grant such permission.*"

Section 36.1 says "*In accordance with this Part, a municipality may raise the cost of undertaking works as local improvements on private property by imposing special charges on the lots of consenting property owners upon which all or part of the works are or will be located.*"

Notice that the Municipal Corporation needs permission/consent from the private property owner, without which they have no authority.

The **Ontario Municipal Act** itself has specific inclusions of public property owned by the Municipal Corporation and specific exclusions of services/things it does not own.

Sections 10(2)4 & 11(2)4 says the Municipal Corporation may pass by-laws respecting "*Public assets of the municipality acquired for the purpose of exercising its authority under this or any other Act.*"

Sections 10(4) & 11(6) says the Municipal Corporation does not have "*the power to pass a by-law respecting services or things provided by a person other than the municipality or a municipal service board of the municipality.*"

Section 8(1) says that the Municipal Corporations scope of power is there so it can "*govern its affairs.*" The word "its" is a possessive pronoun, meaning you have the power to govern the affairs that belong to the Municipal Corporation only.

Notice that a City only has authority over public assets that it owns, the city has no authority over services/things that it is not providing, and your scope of power is for governing your own affairs only.

Within the above Act and Regulation, we see that public property is specifically included and private property is specifically excluded from the Municipal Corporations control. Private property is NOT included, and therefore the maxim of *expressio unius est exclusio alterius* applies. The Municipal Corporations power, authority and control is limited only to public property it owns, and not to private property.

This maxim can further be confirmed by another section of the **Ontario Municipal Act**.

Section 9 says "*(Powers of a natural person) A municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act.*"

Section 5(3) says "*(Powers exercised by by-law) A municipal power, including a municipality's capacity, rights, powers and privileges under section 9, shall be exercised by by-law unless the municipality is specifically authorized to do otherwise.*"

Section 9 states the Municipal Corporation has the capacity, rights, powers and privileges of a natural person. A natural person has no authority on private property they do not own, and therefore a Municipal Corporation cannot indirectly give itself authority that it never directly had in the first place.

Municipal Corporation powers exercised under by-laws therefore have no power, no authority and no control over private property which the Municipal Corporation does not own.

The Municipal Corporation cannot give itself more power or authority than what was granted by statute from the Province. And the Province cannot grant power or authority to the Municipal Corporation over something that it does not have to give. Therefore the Municipal Corporation has no power, authority or control over private property it does not own.

Municipal by-laws are *ultra-vires* (of no force or effect) if they conflict with or frustrate the purpose of a provincial or federal Act/regulation or an instrument of legislative nature. From the **Ontario Municipal Act** we have the following:

Section 14(1) says "*(Conflict between by-law and statutes, etc.) A by-law is without effect to the extent of any conflict with, (a) a provincial or federal Act or a regulation made under such an Act; or (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.*"

Section 14(2) says "*Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.*"

A municipal by-law cannot frustrate the purpose of a Federal/Provincial statute/law or an instrument of legislative nature, otherwise the by-law is *ultra-vires* (meaning it is of no force or effect).

Respective to Authority given under the Act to the Municipality with respect to Trees on private property: Nowhere in the municipal Act does the Act give the city authority to regulate private owned trees.

11) Do Conservation Authorities have authority over private trees?

Well the Conservation Act of Ontario section 21 (c) and 21 (g) state: Conservation authorities have no authority on private land unless the owner has given them authority, entered into an agreement with the Authority or the Authority expropriates the property. So it is very plain that despite all the smoke and mirrors used by conservation authorities, they do not have the authority to impose their will on private land owners when it comes right down to it. They do have the right to expropriate and pay a fair value if that is their desire.

12) You might surmise that the Ministry of Natural Resources and Forestry)MNRF) or the Ministry of the Environment (MOE) would have authority under which the city can operate. Again, you might be very surprised to find that their (MNRF and MOE) hands are also significantly tied by Federal Legislation, the Constitution of Canada and by actions of the Crown.

Indeed I quote from the MNR website which at one time had a section re Crown Land Tenure: Sale and Issuance of Letters Patent (dated 14-03-09):

``The Ministry of Natural Resources does not retain future future options for the land and does not control use

13) Further pursuing the question of authority over trees, it is clear that trees on private property are owned by the property owner. They are not property of the City.

This is not my perception of the law, this is the law of the Province and also the dictates of the Crown.

13 a) The "Conveyancing and Law of Property Act" is pretty clear that when a person buys property in the province that all "trees, woods, underwoods," on the property are the property of the property owner.

> The "**Conveyancing and Law of Property Act"**
> R.S.O. 1990, CHAPTER C.34
> **Consolidation Period:** From December 15, 2009 to the e-Laws currency date.
> Last amendment: 2009, c. 33, Sched. 11, s. 3.
>
> **What included in conveyance**
> **15** (1) Every conveyance of land, unless an exception is specially made therein, includes all houses, outhouses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to such land belonging or in anywise appertaining, or with such land demised, held, used, occupied and enjoyed or taken or known as part or parcel thereof, and, if the conveyance purports to convey an estate in fee simple, also the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of the same land and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever of the grantor into, out of or upon the same land, and every part and parcel thereof, with their and every of their appurtenances. R.S.O. 1990, c. C.34, s. 15 (1).
>
> **Application of section**
> (2) Except as to conveyances under former Acts relating to short forms of conveyances, this section applies only to conveyances made after the 1st day of July, 1886. R.S.O. 1990, c. C.34, s. 15 (2).

13 b) Section 15 (1) Within the ""**Conveyancing and Law of Property Act"** also talks about **"an estate in Fee Simple.**

On Page 24 of Elizabeth Marshall's Book, titled "Property Rights 101"
Freehold tenure is without any incidents or obligations for the benefit of the Crown. All lands granted by the Crown in fee simple are granted in free and common socage - freehold tenure.

Manual of Practical Conveyancing
The definition of fee simple in the Manual of Practical Conveyancing (pg 116 -117) defines fee simple as "the largest estate in land which is permitted to a subject. It gives him the absolute use of it—liberty to use it in any way not injurious to his neighbour, or contrary to the law of the land. But he has not the absolute ownership—the Dominium... for the public good, the Crown can take it from the subject, but on terms of compensation. ...ordinarily a grantee in fee simple has disposing power over it, to take effect either in his lifetime or afterwards;... and with no impossible restriction so long as it is virtually his to dispose of.

Within the City of Burlington almost all of the private owned land in the city is owned in "Fee Simple, subject to the reservations in the crown grant".

Indeed these Crown Grants (Land Patents) are almost entirely pre-confederation grants in which the Crown gave unique and exceptional authorities to the grantees, heirs and assignees forever.

Effectively to whoever is identified as the property owner(s).
According to English common law and Scott Kaldeway at the Ministry of Natural Resources and Forestry: I highlight part of his letter

> **From:** Kaldeway, Scott (MNRF)
> **Sent:** Friday, January 6, 2017 8:58 AM
> **Subject:** RE: Request Further Clarification re: Holder of the Deed of real property in Fee Simple
>
> Good morning Mrs. Furney,
>
> *Crown grants for land in what is now Ontario have been given since the early 1790's. From 1791 until* 1841, the Province was known as "Upper Canada", and from 1841 until Confederation in 1867, it was known as the Province of Canada. Throughout these times the provinces were continually under British rule. The Sovereign, currently Her Majesty the Queen, has always been and remains today the head of state for Canada, including Ontario. All legislation is made with the Sovereign's Royal Assent via Her representative in the Province, the Lieutenant Governor. Similarly, Crown grants were, and are even now, given by the Sovereign by the Lieutenant Governor, under the Great Seal of the Province.
>
> Any rights you, as the landowner, would have to land would flow from the rights granted by the original Crown grant, being the root of title for the lands.
>
> "Fee Simple" is the highest estate in land that a private individual can hold under British and Canadian common law. Fee simple estates have a long history, going back nearly 1000 years.

13 c) **"Subject to the Reservations in the Crown Grant"**

In pre confederation days both in Upper Canada and the Province of Canada land was negotiated from the Native tribes to become property of the Crown through use of treaties.

The crown, largely under King George the third and King George the fourth, encouraged settlement in the colonies within Canada by providing property to settlers in agreements/ contracts (land patents) in return for their services. This was done by use of Crown Grants issued at the prerogative of the Crown, and, certified under the seal of Upper Canada or the Province of Ontario, in land patent's, removing the crowns authority on land and giving the crowns total authority to the grantee respective to activities that could take place on the lands identified in the Grant.

These authorities did however, still provide for certain powers or ownerships to remain in the ownership of the crown and these were identified as "the reservations". Hence the ownership deed showing you own property "Fee Simple, subject to the reservations in the Crown grant"

All property within the Boundaries of the City of Burlington was obtained by the Crown through treaties with native people. All land that became owned privately within the City boundaries was transferred from the authority of the Crown, to the settlers by way of contracts in form of Crown grants normally verified by land patents. Upon the registration of the Crown grant (letters Patent) the Crowns authority to control use of the property was assigned to the "grantee, their heirs and assignees" and the crowns only remaining authority was to exercise its authority under the reservations contained in the agreement.

Effectively the crown grant removed the authority, over the property, from the crown at time of issuance.

For this reason, property titles for private owned lands show you own the property "Fee Simple subject to the reservations in the Crown Grant" It was to protect the Provinces ability to exercise its right to remaining reservations still valid post 1869 and with the Formation of Canada under the Constitution Act of Canada.

As an aside, under the "Nullum Tempus Act" of 1769, the Crowns reserved the right to exercise its prerogative to rescind granted letters patent, if they were a gift of the crown, but this right was time restriction of 60 years from time of grant. Under the Code of Honour money is not as important as is the Kings Honour so the king by rescinding a grant was obliged to make the other party whole. If this happens after 60 years then it is an expropriation. With respect to reservations in Crown Grants, issued prior to confederation or 1869, all of the standard reservations for trees and minerals have been voided. Crown requirements for clergy land reserves and tree reservations where removed by the Crown prior to 1867 & recognized in the Public Lands Act Sect 58(3). All reservations for minerals in pre 1913 letters patent were also nullified by the government (Public Lands Act Sect 61.(1). So there are no tree or mineral reservations remaining on any lands with pre-confederation grants.

To paraphrase the grant, these grants specifically state, that among what is owned by the property owner are all "... woods, trees and waters ... ". This applies to on, or in the land, and that said are the property of the grantee and remain with the land forever, to the ownership of any property owner.

Hence, the "Conveyancing and Law of Property Act", has no option, but to reaffirm ownership rights, as per those given to private property owners by the crown.

13 d) CONFLICT WITH CROWN LAND PATENT GRANT

A Crown Land Patent Grant was the Crown (and hence Federal/Provincial/Municipal government) giving up their right, title and interest in a piece of land, to an individual or corporation. It then became private property, no longer under the authority or control or power of the Crown. Most of these grants include the wording "heirs and assigns forever" meaning it can be passed down from generation to generation without the Crown ever being able to interfere with those private property rights again. Since "forever" has not come yet, any Municipal Corporation by-law allowing entry onto private property or trying to exercise power, authority or control over private property would frustrate the purpose of the Crown Land Patent Grant, making the cities action ultra-vires.

The question as to what a Pre-confederation grant gives the grantee when he may become in conflict with the power of the crown going forward, was defined in England in 1819:

"If the legislature mean to claim such an authority, it must be reserved in the grant. Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 1819 , ...It determines, in the most unequivocal manner, that the grant of a state is a contract ... and that it implies a contract not to re-assume the rights granted. *A fortiori,* the doctrine applies to a charter or grant from the king. Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 1819.

13 e) When it comes to **Bylaws and legislation** that make a claim of right, title or interest over any one of the 45 rights listed in Section 15.1 of the Conveyancing Act, there are numerous court cases in which the courts already have ruled. When a claim is made against the rights of ownership in 15.1, (Lynch vs St Johns) or harm is done to the property or the ability to make money from it (like in the Antrim case, it is very clear that if the government or an authority that has expropriating authority rights makes **legislation or takes action that affects private property in a negative way, the government has to pay.**

There are a large number of cases that have been heard by the Supreme Court of Canada since Confederation, in which battles between the federal government, provincial governments and or Municipal governments with Private property owners who have property rights granted by the crown, formalized in Crown Grants prior to confederation. In every one of these cases I have discovered the Crown Grant holder has never lost when the battle involves a right granted by the Crown to the property owner.

Indeed the recent case of Lynch vs St. John's is a critical case in that the SCC upheld the Appeal Court of Newfoundland ruling, that Natural heritage zoning on the Lynch property was an act of expropriation of rights held by the Lynch family through their Crown Grant.

Based on the case law I have read, a city by law to require permits when property owners already have permits from the crown may well leave the city open to very expensive litigation which could well overturn the by law and indeed leave the city open to vast costs for an act of expropriation.

Before I address this expropriation issue let me address authority and a couple of additional legislations

14) If one asks **"what is the authority of an Instrument issued at the prerogative of the Crown when it is in conflict with Provincial legislation"** the answer comes from the Supreme Court of Canada.

The prerogative of the Crown is all supreme and this the position of the Supreme Court in its judgement dated 1894-03-13 Report (1894) 23 SCVR 458 Attorney general (Canada) v. The Attorney General of the Province of Ontario

"the act of the Ontario legislature, now in question, was clearly *ultra vires* because it assumed to legislate upon all prerogative powers, no matter how high and sovereign a character, so far as such powers had their operation in or had respect to the matters placed within the legislative jurisdiction of the provinces by sec. 92 of the British North America Act. He pointed out that the powers contained in commissions and
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instructions to Governors and Lieutenant Governors were almost exclusively of a high, sovereign and fundamental character, and not what have been called minor prerogatives. The learned counsel contended that the fact that such prerogatives might in their exercise and operation touch the subjects placed within the exclusive legislative jurisdiction, of the Provincial legislatures, did not bring the prerogative powers themselves within that jurisdiction and that under what has been called the general law of the Empire, colonial legislatures

have no right to legislate with regard to them, and that, therefore, the Ontario legislature had no power whatever "thus to enact."

So where Ontario Legislation is in conflict with Prerogatives issued by the Crown, even on matters the Province has jurisdiction, as given by the legislative jurisdiction by sec 92 of the BNA Act and the Constitution Act of Canada, the Ontario Legislature is ultra vires and the Crown prerogatives as given are in authority.

When it comes to trees on private land where there is an underlying Crown Grant which gives tree ownership to the property owner the city, province and federal government have no course of action but to respect the crown grant and if they do interfere their bylaw, legislation or law is ultra vires.

15) For additional clarity sake, to ensure we know what a Crown Grant is, we can also look at the Registry Act.

Registry Act
R.S.O. 1990, CHAPTER R.20
Consolidation Period: From December 3, 2015 to the e-Laws currency date.
Last amendment: 2015, c. 28, Sched. 1; s. 156.

Instrument Defn

"instrument" includes every instrument whereby title to land in Ontario may be transferred, disposed of, charged, encumbered or affected in any other way, and, without limiting the generality of the foregoing, includes any instrument mentioned in subsection 18 (6) and a Crown grant of Canada and of Ontario, a deed, conveyance, mortgage, assignment of mortgage, certificate of discharge of mortgage, assurance, lease, release, discharge, agreement for the sale or purchase of land, caution under the *Estates Administration Act* or renewal or withdrawal thereof, municipal by-law, certificate of proceedings in any court, judgment or order of foreclosure and every other certificate of judgment or order of any court affecting any interest in or title to land, and a certificate of payment of taxes granted under the corporate seal of any municipality by the treasurer, a sheriff's and treasurer's deed of land sold by virtue of his or her office, a contract in writing, every order and proceeding in bankruptcy and insolvency, a plan of a survey or subdivision of land, and every notice, caution and other instrument registered in compliance with an Act of Canada or Ontario; ("acte")

From the Act it is clear Crown Grants are "instruments" as defined in the Registry Act. Being legal instruments they have authority.

16) Regarding tree ownership, in the City boundaries, on private owned land, you can also refer to:

Section 58 of the Public Lands Act regarding cutting of trees which states:

Property in trees vested in patentee
58 (1) Where land is disposed of under this Act for agricultural purposes, the property in all trees thereon shall be deemed to have passed to the patentee by the letters patent, and every reservation of any class or kind of tree contained in the letters patent shall be deemed to be void. R.S.O. 1990, c. P.43, s. 58 (1).

Effectively trees in post confederation grants for agricultural use are now also removed from ownership of the Province. So on any land in Burlington, transferred from the Crown post confederation to private land ownership the trees are owned by the property owner.

17) Let us also consider **Ontario Bill 190, Property Rights and Responsibilities Act, 2009**
The Act states:

> **9.1** (1) Every person has a right to own the real and personal property that he or she has acquired in accordance with law and, except to the extent provided by law, to the peaceful enjoyment and free disposition of the property.
>
> Respect for private property
>
> **(2)** No one may enter onto another person's real property or into another person's home, whether or not the person is the owner of the home, or take any personal property from the real property or home without the person's express or implied consent, except to the extent provided by law.
>
> 12) The amendments to the *Human Rights Code* recognize, subject to specific limitations at law, the right to own property, whether real or personal, the right to peaceful enjoyment of one's property and the right to freedom from search of one's real property and home and from seizure of one's personal property located there. Those rights have long been recognized at common law but are largely missing from the *Canadian Charter of Rights and Freedoms*. The amendments to the *Human Rights Code* also include the moral responsibility to maintain one's real property.

18) Of course one must also look to **The Constitution Act of Canada``** and what it says. Indeed section 92 becomes a foundation upon which tree ownership in the Province is defined:

> **Exclusive Powers of Provincial Legislatures**
> Marginal note: Subjects of exclusive Provincial Legislation
>
> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> 5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon

Note: the province does not have authority over private owned lands, timber and woods thereon.

Indeed nowhere in the Constitution Act does the Province acquire authority over private owned lands, Timber or Woods and indeed the constitution requires Canada and the Provinces to recognize and ``abide with Trusts existing in respect thereof, and to any Interest other than that of the Province in the same(Section 109)

Re section 109 of the Constitution and **WHAT IS CONSIDERED "IN" THE MUNICIPALITY**

The various levels of government are simply corporations, so anything which is "IN" the government must belong to the government as property of that specific corporation.

As stated in *Mercer* case below, privately owned property is not "IN" the province, is not "IN" the federal government, and is not "IN" the municipalities as part of these entities' administrative property:

> Judge Gwynne in *Mercer v. Attorney General for Ontario, (1881) 5 S.C.R. 538*
> at page 706 says "*the term 'public lands' in the province, which is but an equivalent expression to 'lands belonging to the provinces at the Union'* "
> and at page 707 says "*the 'lands' therefore which are referred to in sec. 109 of the British North America Act can only be construed to mean those ungranted or public lands belonging to the Crown*".

Pre confederation Crown Grants and Land Patents are Trusts and contract instruments of the Crown. By Mercer lands owned under pre-confederation Grants (land Patents) are not in the province. As such these lands do not come under control of the municipality.

(This is further confirmed by the MNR statement included in 12) above)

19) The question "can the City or Province require a property owner to get or pay for a permit to do what the property owner already has the right to do"? This is answered in the Case **Attorney General of British Columbia v. The Deeks Sand & Gravel Company Limited, [1956] SCR 336, 1956 CanLII 55 (SCC)**

1. The learned judge said:
The present case is one of the Province of British Columbia asserting and thereby exacting by compromise rights which it did not enjoy under the original lease, or the Railway Belt Agreement, by which it nullified in part its obligation under clause 3 of the latter agreement to carry out the lease granted by the Dominion according to its terms, and the Plaintiff's rights under those contracts.
There is no distinction in principle. The Imperial Act and the Statute of Canada confirming the Railway Belt Agreement imposed the same constitutional limitation on the prerogative of the Crown, in the right of the Province of British Columbia, that Natural Resources Agreement and the confirming Statutes imposed on the authority of the Alberta Legislature; in neither case would the consent of the contracting parties allow the Province to break the bounds imposed by that limitation.
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In this view, for which he found support in the decision of this court in *Mark Anthony* v. *Attorney General of Alberta*[5] , the learned judge decided:

It is unnecessary to consider whether the Province and the lessee could amend the leases without the authority of Dominion and Provincial legislation by an agreement fairly and freely made to meet their mutual requirements under circumstances which did not involve a compromise of untenable claims made by the Province in conflict with the Railway Belt Agreement.
This judgment was upheld on appeal[6] , O'Halloran J.A., who wrote the judgment of the court, stating:
Once it appears, therefore, that the Province has no power to impose a royalty on the leased lands, it is beyond the capability of the Province, or of any official on its behalf, to enter into an agreement in virtual effect forcing the Respondent to subscribe to payment of a royalty which there was no power in the Province to demand.

If, therefore, it is argued that a compromise agreement came out of such conditions it becomes apparent that such compromise agreement must be invalid and not binding on the Respondent, because the subject-matter of such attempted agreement was *ultra vires* the Province to bring into being. Since the subject-matter never could have had a legal existence, there remains no foundation for an agreement; in short, there could not be an agreement.

20) Our government is based on a Constitutional Monarchy and thus subject to the Doctrine of Paramountcy``, where within, the authority of the Crown is supreme to all levels of government and an agreement, contract or permission given by the crown cannot be overturned or refused by any authority below the Crown.

In as much as Crown grants are given by the Crown, the authority with in these grants, given to property holders, can be challenged, but the Supreme court is pretty clear; these grants are permits to the grant holder issued by the Crown and as such the City, Region, Province nor Federal Government have any authority, except that of expropriation to interfere with these rights given by the Crown.

I'm not a lawyer, however there are numerous Supreme Court cases involving private property owners with crown grants in conflict with various government levels, regarding issues of authority. In my search of these records I have never found a case where a property owner with a valid pre-confederation issued crown grant ever lost an argument regarding his authority over his land.

In todays' modern and legislative times there is a circulating conception that old law and common law rights are out of fashion and as such have become redundant, and, that the concepts of fee simple and pre-confederation grants are no longer valid and remain only of historical esoteric purpose. Do not be misled, the fact is government wants this to be the case but the reality and prerogative power of the crown is supreme and these old pre-confederation rights are as alive today as they were in pre 1867.

I suggest the recent 2016 SCC ruling re "Lynch vs St John's (City)", in which the City of St John's, natural heritage zoning on the Lynch family property was ruled an expropriation of an asset (the water), owned by the Lynch family as defined by their Crown grant; leaves the city wide open to legal actions by property owners should the city try to enforce private tree permit requirements

21) I iterated the view, that City Action in passing a private property tree Bylaw, to require private property tree owners to obtain city permits to cut trees on private land, may be opening the City to compensation claims from property owners from acts of `injurious affection.

Expropriations Act
R.S.O. 1990, Chapter E.26
Consolidation Period: From June 6, 2011 to the e-Laws currency date.
Last amendment: 2011, c. 9, Sched. 27, s. 25.
Interpretation
Definitions

1. (1) In this Act,

"expropriate" means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers; ("exproprier")

"expropriating authority" means the Crown or any person empowered by statute to expropriate land; ("autorité expropriante")

"injurious affection" means,

(a) where a statutory authority acquires part of the land of an owner,

(i) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and

(ii) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,

(b) where the statutory authority does not acquire part of the land of an owner,
(i) such reduction in the market value of the land of the owner, and
(ii) such personal and business damages,

resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,`

and for the purposes of this clause, part of the lands of an owner shall be deemed to have been acquired where the owner from whom lands are acquired retains lands contiguous to those acquired or retains lands of which the use is enhanced by unified ownership with those acquired; ("effet préjudiciable")

This Act is clear, if the municipality has expropriating authority then actions by it meeting a definition of expropriation or Injurious affection to a private property owner`s land will be deemed as leaving the municipality open to pay damages.

22) If a tree stands on a property line between two property owners, if the 2 owners decide between themselves they will remove the tree, then they have the right to exercise their mutual ownership rights. Should one owner refuse then the courts have a right to decide if the tree remains or can be removed. This is common law and there is no need to try to argue a tree bylaw is needed.

23) In closing I wish to reiterate I am not a lawyer, but I am a ``Realty professional`` with 35+ years of realty expertise and a student of private property rights. I have lived in Burlington well over 60 years and have considerable experience with environmental issues, farming, logging, mining, government legislation and the views of property owner in the city.

People in the City love trees, but from my realty experience, if you clearly ask a property owner if he wants the city to remove his ownership of the trees, on his private property, and place them under the control of the city for the city to determine their life span ; you will find an exceptionally high percentage who will say no!

I believe the decision to pass a tree cutting bylaw that is specific to municipal lands and municipal owned trees is in the scope of the municipality authority, if it so decides this is what the City needs. Again, to do so seems redundant and wasteful as the city already has the authority to manage its own trees. .

I believe creating a bylaw requiring spending $300,000 on a yearly bases, to enforce a tree cutting permitting system, to save what at best is a very few tree, especially on the rational to help stop global climate change is exceptionally bad public policy and indeed is fiscally irresponsible. It completely and totally fails any cost benefit analysis when those moneys spent can be immensely more useful if allocated elsewhere.

It is my belief citizens will want more bang for the money being spent if it needs to be spent. For example there is a hidden problem within the city in which many families are living below the poverty line and the children are going without. As a citizen I would far rather have this yearly expense of $300,000 be used to provide fiscal support of $250/month to 100 needy families with children in the community then to use it to potentially save a few trees.

From my investigation into property rights, I very seriously question that the City has legal authority to charge a fee from of a private property tree owner, and more so, the cities right to enforce any privately owned`` tree cutting bylaw.

It is my belief any city effort to require permits from the city re trees on private lands, if challenged in superior or higher courts will result in significant cost to the City and the Bylaw will most likely be deemed invalid, as it conflicts with superior legislation, laws and private property rights.