To: The City of Burlington
Council Meeting Dec 16th, 2019

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

Date: December 14, 2019

Re: City of Burlington Proposed Tree Bylaw.

With Reference to the By-Law entitled "The City of Burlington Private Tree By-Law" {Appendix A of RPF-18-19}

1) Statement of Facts:

The City of Burlington wants to pass a City-wide By-law which is requiring permits and setting conditions with respect to trees on private owned property.

The City cites global climate change as a prime reason they are passing this By-Law By-Law in its report to the committee of the Whole. (Report RPF -18-19 page 1)

2) Statement of Issues:

For purposes of this factum, Act refers to Municipal Act, 2001, S.O. 2001, c. 25

Without prejudice:

It is acknowledged and accepted, that the City of Burlington has authority to regulate and/or prohibit the removal, destruction, pruning or injuring of trees on Public lands owned by the City of Burlington.

We acknowledge the City claim to authority comes from section 135, 139-141 of the Act

Respective to the by-law, the by-law does not give sufficient weight and authority to following sections and guidelines within the Act

1) Respective to section 135 upon which the city claims authority to pass a by-law,

Section 135 does not give authority to the city to pass a by-law over private property trees. Reading the Act in totality, Section 135 is only applicable to property owned by the City and private lands where the city has agreements with the property owner.

Specifically in the Act where the legislation address's trees and private property: section 62 (1) and section 141 both address the authority the municipality has when it comes to trees on private land. Had the Legislature intended 135 to apply to trees on private land it would have said so either in 135 or in another part of the Act.

By the omission of the definition of Private lands in 135, section 135 only gives authority over trees that are assets of the municipal corporation. 135 does not state geographical jurisdiction so as defined in section Part I general interpretation1 (1) in this Act... Municipality section (2) Municipality must be interpreted as assets owned by the municipal; corporation.

2) **Part II, section 8.(1); general Municipal Powers , Scope of Power** in the Act does not give authority over private trees.

It refers to the words "its affairs" which in English grammar its is a possessive pronoun and means "relating to that which it owns or has right to" and by inference does not relate to the affairs of others.

3) **Part II, section 9); "general Municipal Powers, Powers of a Natural Person**" in the Act does not give authority over private trees.

The power is that of a natural person and as a natural person the municipality has no more to impose its will on another person then that person has to impose its will on the municipality.

4) **Part II, section 11(3): "By-Laws re: matters within Spheres of jurisdiction, general Municipal Powers ",** as identified in the Act does not give jurisdiction to pass a private tree by-law effecting control over private owned trees and indeed restricts the City authority to do so for private property trees.

Although Part II, section 11(2) refers to climate change section but 11(3) specifically identifies where the city has power to pass a by –law, and nowhere does it say this authority extends to trees on private property.

5) **Section 394 (1) of the Act entitled "Restriction, fees and charges"** is absolutely clear and limits the city authority re permit fees and charges:

> **394** (1) No fee or charge by-law shall impose a fee or charge that is based on, is in respect of or is computed by reference to,

Section 394 (1) (e) is even more direct and says

> no fee or charge by-law shall impose a fee or charge that is based on, is in respect of or is computed by reference to "the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources. 2001, c. 25, s. 394 (1); 2006, c. 32, Sched. A, s. 166

I'm not sure what the municipality thinks a tree is, but according to a dictionary : the definition of a NATURAL RESOURCE is:

> "Noun, materials in substances occurring in nature which can be exploited for economic gain"

I am confident the Ministry of Natural Resources and Forestry is pretty clear that trees in the Province are a renewable natural resource.

Any attempt to charge a fee, or assess a charge with respect to cutting a tree on private property is forbidden

6) We believe the proposed By-law in its current format fails to adequately recognize **section 14 (1) and (2)** within the Act and ignores rights of tree ownership under other Provincial and federal Acts and Regulations and Instruments as defined in law.

> **14** (1) 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. 2001, c. 25, s. 14.
>
> **Same**
>
> (2) 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. 2006, c. 32, Sched. A, s. 10.

Section 14 is very clear that 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).

Looking to Acts, Regulations and instruments that conflict with this city by-law as currently proposed: this by-law conflicts and thus becomes "without effect" from a number, which are not limited to the following:

a) Contravenes private property ownership rights that run with the land per **"The Conveyancing and Law of Property Act R.S.O. 1990**

> 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).

It is patently clear that if we are going to be argue who has the right to control and benefit from trees, that on private owned property they are a property and owned asset of the property owner. The Province and the

municipalities own and control rights for the trees only on public lands and the private property owner owns and controls rights for trees on his property.

b) contravenes **the Registry Act R.S.O 1990 section 15 (1) and (2)** by not defining instruments of authority to be superior to this act and using the definition of an instrument as is defined in the registry Act as part of its definitions

> **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 Definition:**
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> "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")

The Registry Act it is clear: Crown Grants are "instruments" as defined in the Registry Act.

Being legal instruments they have authority.

This is significant because the municipal Act is very clear under section 14 (1) b

> **14** (1) A by-law is without effect to the extent of any conflict with,
>
> (b) **an instrument of a legislative nature**, including an order, licence or approval, made or issued under a provincial or federal Act or regulation. 2001, c. 25, s. 14

c) Fails to clearly identify in the By-law the authority to rely on superior instruments and laws of authority to avoid falling under the jurisdiction of the by-law and allow private property owners to exercise their **Instruments of authority** within the powers so given them and that make said by-law "not in effect" with respect to that property owner.

d) Fails to recognize and accept "**Instruments of the Crown"** which are legally binding on the municipality thus has taken the position it has the right and the powers to impose its own authority and demands on property owners to comply with its permit system wherein, nullifying the power and prerogative of the Crown, and the foundation of Canadian law based on the **"Doctrine of Paramountcy"**.

7) Opens the City to significant costs from engaging in expropriation action:

Section 6(1) of the Act gives authority to the City to be an expropriating Authority.

The Expropriation Act R.S.O 1990, Chapter E.26 section 1. (1) is very clear in its definitions as to what "expropriation" means and what "injurious affection means"

Definitions "injurious affection" means,

(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,`

Of course the word "works" is not limited to a physical work or project it can be also defined as any action policy the Municipality, as a statutory authority, engages in as a corporate action that involves taking control of a personal or private owned asset, to use to the benefit, use, needs or program the expropriating authority needs the assets to achieve its corporate action.

Where there is "injurious affection to the private property owner the Act says he is entitled to compensation

Compensation for injurious affection
21 A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection. R.S.O. 1990, c. E.26, s. 21.

Now should one say the municipality is protected by the Municipal Act from said claims. The Expropriation Act specifically states it has "all encompassing power" over all other Acts when it comes to defining expropriation and Injurious affection.

Conflict
(4) Where there is conflict between a provision of this Act and a provision of any other general or special Act, the provision of this Act prevails. R.S.O. 1990, c. E.26, s. 2 (4).

According to the expropriation Act if the city passes this by-law worded as it is, the city has engaged in an act of injurious affection and property owners must be compensated.

8) **Section 58 of the Public Lands Act** regarding cutting of tree ownerships 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).

Reservations of trees voided
(2) A reservation of all timber and trees or any class or kind of tree contained in letters patent granting public lands disposed of under this or any other Act for a summer resort location is void. R.S.O. 1990, c. P.43, s. 58 (2).

Idem
(3) A reservation of all timber and trees or any class or kind of tree contained in letters patent dated on or before the 1st day of April, 1869 and granting public lands disposed of under this or any other Act is void. R.S.O. 1990, c. P.43, s. 58 (3).

Effectively trees in post confederation grants (instruments) for agricultural use and for any tree in a pre-confederation registered letters patent are now also removed from authority and 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. They are outside not in the Province and the Province has no authority to claim right or jurisdiction over any tree on private owned land where there is a crown grant.

9) The Forestry Act is specific that the province must enter into agreements with property owners, iot has no authority to dictate or legislate a requirement upon private land owners respective to trees or forest

Forestry Act, R.S.O. 1990, c. F.26
Versions
Regulations under this Act
current ***December 15, 2009*** – *(e-Laws currency date)*
January 1, 2003 – December 14, 2009

Agreements re forestry development
2 (1) The Minister may enter into agreements with owners of land suitable for forestry purposes that provide for the management or improvement of the land for these purposes upon such conditions as the Minister considers proper. 1998, c. 18, Sched. I, s. 20

Indeed it specifically staes a municipality to pass a by-law re private trees in the municipality must purchase or acquire the land. That this is a condition for a by-law to become in effect.

By-laws for acquiring lands for forestry purposes
11 (1) The council of a municipality may pass by-laws,
(a) for acquiring by purchase, lease or otherwise, land for forestry purposes;
(b) for declaring land that is owned by the municipality to be required by the municipality for forestry purposes;

10) **The Farming and Food Production Protection Act (FFPPA)** as federal law, supersedes any authority to interfere with farming operations .

The *FFPPA* provides protection for "normal farm practice" from the enforcement of municipal by-laws. The failure of a municipality to consider application of this statutory protection before threatening or commencing enforcement proceedings may render the municipality liable for resulting damages

11) **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.

The City has no right of law to take possession or effect control over private owned trees without compensating the owner.

11) 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.

12) **The Legislation Act, 2006** address's the authority of the Crown prerogatives when it comes to authority: The act clearly identifies that an instrument of the crown is superior to federal, provincial or municipal law. Which is exactly what is said in section 14 (1) (2) of the municipal Act

> **Legislation Act, 2006**
> S.o. 2006, chapter 21
> Schedule F
> **Consolidation Period:** From December 15, 2009 to the e-Laws currency date.
> Last amendment: 2009, c. 33, Sched. 2, s. 43.

Crown

Crown not bound, exception

71. No Act or regulation binds Her Majesty or affects Her Majesty's rights or prerogatives unless it expressly states an intention to do so. 2006, c. 21, Sched. F, s. 71.

Succession

This Act provides even more evidence that the prerogative of the crown is supreme

72. Anything begun under a reigning sovereign continues under his or her successor as if no succession had taken place. 2006, c. 21, Sched. F, s. 72.

13) Of course one must also look to **The Constitution Act of Canada**`` and what it says.

It is this constitution that identifies what power the province has and what it does not. The Province may only pass down authority it has based on the constitution and it has no authority over trees on private property except through escheat and expropriation. As such as the Province has no authority neither can it give authority to do what it itself has no authority.

section 92 of this Act 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.

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)

Regarding section 109 of the Constitution let us ask **WHAT IS CONSIDERED "IN" THE Province and as such what authority can it give municipalities.**

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.

14) The Supreme court of Canada has addressed property rights involving instruments of the crown and interpretation of authority in numerous instances.

> **As stated in *Mercer*, 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)

15) 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.**
> *[Page 342]*

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.

16) 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, more so 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 government wants this to be the case but the reality is "the 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

There are numerous rulings from the Supreme Court that uphold the sanctity of private property rights based on crown grants.

In as much as it is reasonable to assume 99.9% of the land privately owned in Burlington has a pre-confederation crown grant - land patent, which is a legal instrument as its foundation for root of ownership, the owner's rights to the trees is very clear and as such the By-law is "without effect" .

17) I iterate my opinion that the by-law as written has significant errors and omissions regarding city authority to impose on private property tree owners. That said make this by-law without effect.