



Cunningham Swan
LAWYERS

Tony E. Fleming

[REDACTED]
LSUC Certified Specialist in Municipal Law
(Local Government / Land Use Planning)

March 16, 2018

PRIVILEGED AND CONFIDENTIAL

Melinda Reith
Clerk/CAO
United Townships of Head, Clara, and Maria
15 Township Hall Road
Stonecliffe, ON K0J 2K0

Dear Ms. Reith:

RE: Opinion - Plowing Roadway to Permit Access to the Ottawa River
Our File No. 29822-10

You requested our opinion as to whether the United Townships of Head, Clara, and Maria (the "Township") has any potential liability for providing access to the ice surface of the Ottawa River during winter from a roadway cleared by the Township. It is our understanding that residents have been plowing a road through the Township's municipal park to the Ottawa River in order to gain access with their vehicles to the river for the purposes of ice fishing. We understand that Council would like to provide this service in future years.

After reviewing the situation and relevant case law, it is our opinion that the Township may be liable for any damages caused by an accident at the interface of the Township's property and the ice surface of the Ottawa River. However, after a vehicle gains safe access to the river, it is unlikely that the Township will have any liability for incidents that occur thereafter.

As a result, we recommend that the Township ensure that the ice-land interface between the Township's property and the Ottawa River be maintained in a manner that protects against foreseeable hazards. The Township should place adequate signage near the ice-land interface requiring drivers to stop their vehicles prior to driving over the interface, warning drivers of potential unstable ice, and instructing drivers to use caution when accessing the ice. The Township may also, as a matter of policy, implement a monitoring program to assess the safety

of the interface throughout the winter season. Whether a monitoring program is needed and the potential liability associated with monitoring is discussed below.

While it is unlikely that the Township will have any liability for incidents that occur after a vehicle has accessed the ice from the Township's property, it is also recommended that signage be placed along the roadway informing drivers that they are using the ice of the Ottawa River at their own risk, and that the Ottawa River is not in any way supervised by the Township.

ANALYSIS

i) Liability for Any Foreseeable Hazard Created At The Ice-Land Interface

We have not been provided with any indication that the municipal roadway through the Township's park constitutes a public highway, or that the area immediately adjacent to the Ottawa River can be classified as such. Therefore, our assessment of the Township's potential liability for hazards created at the ice-land interface has been assessed under the *Occupier's Liability Act*, R.S.O. 1990, c. O.2.

The relevant provisions of the *Occupier's Liability Act* that are applicable to this situation are as follows:

1. In this act, "occupier" includes,

(a) a person who is in physical possession of premises, or

(b) a person who has responsibility and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises.

3(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

(2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

Therefore, there is a statutory duty of care owed by the occupier of premises to a person that has entered onto such premises. Four fundamental principles regarding the interpretation of this duty of care have emerged in the case law:

1. Occupiers have an affirmative duty to make their premises "reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm." This standard of care has also been expressed as one which requires the occupier to "protect against dangers that are sufficiently probable that they should normally be foreseen";

2. It is not necessary that occupiers become insurers and therefore liable for any damages suffered by persons entering their premises;
3. Although the statutory duty on occupiers does not change from case to case, the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation; and
4. The duty may include a positive responsibility on the occupier to inspect his or her premises to ensure that subsection 3(1) is satisfied.

The case law is clear that an occupier will be liable if they create a hazard or danger on their premises, even if the injury or damage to an individual or property as a result of that hazard occurs on the lands of a third party. This can be seen in the many “diving cases” that have been decided under the *Occupier’s Liability Act* throughout Ontario. In these cases, if an occupier is found to have created or permitted the existence of a foreseeable hazard at the edge of their property which results in injury to an individual in the water located beyond the boundaries of their property, the occupier is found to be in breach of their statutory duty of care.¹

In your situation, the nature of the land-ice interface at the edge of the Township’s property has the potential to create a hazard or danger that could result in damage to persons or property. As the interface will be easily accessible by drivers (ie. the path to the interface will be cleared by the Township), the hazard and dangers are certainly foreseeable. The Township must therefore undertake measures to ensure that this interface is reasonably safe for drivers seeking to access the ice of the Ottawa River.

In order to ensure that the interface is safe, we recommend that the Township do the following:

1. Ensure that the arrangement/layout of the interface does not create a hazard that could result in harm to drivers or their vehicles. To do so, the Township should ensure that the roadway allows for level access of a vehicle onto the ice, and does not contain any steep drops that could result in the breach of the ice by a motor vehicle. The Township should also ensure that the ice along the interface is stable, capable of supporting a motor vehicle, and free of any cracks, holes, or crevices that may result in damage. The Township should also confirm that the area under the ice at the interface is shallow so as to minimize any damage to a driver or their motor vehicle should their vehicle break through the ice.
2. Place signage before the interface:
 - a. Requiring drivers to stop their vehicle prior to proceeding;
 - b. Warning drivers of the existence of the interface and the potential instability of the ice at the interface; and

¹ *Woods v Ontario (Ministry of Natural Resources)*, 2001 CarswellOnt 1223 (Ont Sup Ct); affirmed by 2003 CarswellOnt 1240 (Ont CA).

c. Instructing drivers to proceed with caution.

Signs should also be placed at the actual interface notifying drivers of exactly where the interface exists.

After the Township has set up the interface in accordance with the above, it should document the condition of the access to have a record of the hazard-free condition of the interface.

In addition to the above, the Township may wish to implement a monitoring program that would involve regular inspections of the interface to ensure that it does not create an ongoing hazard for persons or vehicles upon entry to the Ottawa River. Again, the standard of care imposed on an occupier under the *Occupier's Liability Act* can include a positive obligation to inspect. However, the decision about whether the Township will or will not implement a monitoring program constitutes a policy decision. The Supreme Court has held that generally, a municipality cannot be held liable in the creation of policy or when deciding not to establish a policy. In *Laurentide Motels v Beauport (Ville)*², the Court provided:

The only duty incumbent upon the authority in the policy sphere is to make its decisions responsibly and in accordance with the object of the Act which conferred the power. However, the discretion conferred by the legislator is not so broad so as to exclude all liability for the authority's actions. Once the authority moves into the operational sphere of its power, i.e. the practical execution of its policy decision, the authority will be liable for damage caused to an individual by its negligence.

Similarly, in *Just v British Columbia*³, the Court stated:

The need for distinguishing between a governmental policy decision and its operational implementation is thus clear. True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions upon social, political, or economic factors. However, the implementation of such decisions may well be subject to claims in tort.

As well, section 450 of the *Municipal Act, 2001*, SO 2001, c 25 provides a municipality, member of a municipal council, or an officer, employee or agent of a municipality with immunity from liability incurred as a result of good faith policy decisions. Section 450 states:

No proceeding based on negligence in connection with the exercise or non-exercise of a discretionary power or the performance or non-performance of a discretionary function, if the action or inaction results from a policy decision of a municipality or local board made in a good faith exercise of the discretion, shall be commenced against:

- (a) a municipality or local board;
- (b) a member of a municipal council or of a local board; or
- (c) an officer, employee or agent of a municipality or a local board.

² *Laurentide Motels v Beauport (Ville)*, [1989] 1 SCR 705.

³ *Just v British Columbia*, [1989] 2 SCR 1228.

The Township must ensure that it records and is able to provide some form of reasonable justification for the policy; whether it be economic, social, financial, or political. Provided the Township considers whether or not to provide the monitoring, and decides not to provide the services due to financial or other valid considerations, the policy should be immune from liability. Not considering the issue deliberately is not a valid policy basis and failure to provide the service through simple inaction will not have the protection of section 450.

If the Township does make the decision to implement a monitoring program, it must recognize that it will be open to liability should that program not be adequately implemented. The Township should ensure that any monitoring program includes regular (ie. daily or more frequently as conditions dictate) inspections of the interface by Township staff, including detailed assessments of the signage installed and the ice along the interface. Such assessments should evaluate the ice to ensure that it is sufficiently stable to support motor vehicles and clear of any cracks or other hazards that may result in damage. All inspections should also be documented in accordance with a system established by the Township.

ii) Liability for Incidents Occurring on the Ottawa River After a Vehicle Has Safely Entered the Ice from the Township's Property

After extensively researching the issue, we have determined that it is unlikely that the Township will be liable for any incident that may occur after a driver has safely accessed the Ottawa River from the Township's property. The Township cannot be held liable for such incidents by the mere fact that it provided access to the Ottawa River through its property.

The case law is clear that in order for a duty of care to exist, a relationship of proximity must be established between two or more entities or parties. A relationship of proximity is not established as between a party that has merely accessed public waters through a landowner's property, and that landowner.⁴

Based on our review of the law, it is our opinion that there is no legal relationship between the Township and those who utilize the ice of the Ottawa River simply because those individuals accessed the Ottawa River using the Township's property. As such, there is no duty of care that exists as between the Township and those individuals, and therefore it is unlikely that any liability exists.

However, we nevertheless recommend that the Township still place signs along the municipal roadway leading to the Ottawa River confirming that individuals using the ice of the Ottawa River do so at their own risk. This would put such individuals on notice that the ice of the

⁴ *Rogers v Holman*, 1949 CarswellOnt 69 (Ont Supr Ct (CA)); *Hashemi-Sabet Estate v Mazzulla*, 2015 ONSC 4611 affirmed by 2016 ONCA 273; *Sto. Domingo Estate v Kenora (Town)*, 1997 CarswellMan 267 (Man QB) (note that this case was decided under the laws of Ontario).

Ottawa River is not supervised by the Township, and serves to confirm that there is no relationship between the Township and those individuals with respect to the ice/waters of the river.

CONCLUSION

The Township must recognize that it has potential liability for any hazard that may be created with respect to the land-ice interface where drivers and vehicles will access the Ottawa River. As such, we recommend that the Township ensure that when this access point is established, there is a level access allowing vehicles to safely enter onto the ice, that the ice is stable and capable of supporting motor vehicles when the access is created, and that the ice is free of any cracks, holes, crevices etc... that may create a danger. We also recommend that adequate signage be provided warning drivers that the ice at the interface may be unstable, and requiring drivers to stop their vehicles prior to entering the interface and to proceed with caution. The Township may also, as a matter of policy, implement a monitoring program with respect to the interface. This monitoring program, if implemented, must ensure that regular inspections of the interface occur and are adequately documented, and that any deficiencies observed during an inspection are corrected by the Township.

It is unlikely that the Township will have any liability for incidents that occur after a vehicle or individual has entered onto the ice from the interface. However, the Township should ensure that signage is placed along the roadway leading to the interface informing drivers and individuals that the ice of the Ottawa River is not supervised by the Township, and that individuals and drivers are using the ice of the river at their own risk.

We trust that this opinion will be of assistance. If you have any further questions, please do not hesitate to contact us.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP



Tony E. Fleming, C.S.

TEF:rjg