

21ST REPORT OF THE
STRATEGIC PRIORITIES AND POLICY COMMITTEE

Meeting held on August 31, 2015, commencing at 4:03 PM, in the Council Chambers, Second Floor, London City Hall.

PRESENT: Deputy Mayor P. Hubert (Acting Chair); and Councillors M. van Holst, B. Armstrong, M. Salih, J. Helmer, M. Cassidy, P. Squire, J. Morgan, A. Hopkins, V. Ridley, S. Turner, H.L. Usher, T. Park and J. Zaifman and L. Rowe (Secretary).

ABSENT: Mayor M. Brown.

ALSO PRESENT: A. Zuidema, J.P. Barber, J. Braam, K. Graham, G. Kotsifas, L. Livingstone, V. McAlea Major, D. O'Brien, K. Pawelec, M. Ribera and C. Saunders.

I. CALL TO ORDER

1. Disclosures of Pecuniary Interest

That it BE NOTED that Councillor J. Helmer disclosed a pecuniary interest in clause 3 of this Report, having to do with the Canada Post Community Mailbox Program, by indicating that his spouse is employed by Canada Post.

II. CONSENT ITEMS

2. 2015 Annual Community Survey

That, on the recommendation of the City Manager, the staff report dated August 31, 2015 regarding the City of London 2015 Annual Community Survey BE RECEIVED for information; it being noted that the Director, Community and Economic Innovation gave a brief overview of the survey findings.

Motion Passed

YEAS: M. van Holst, B. Armstrong, M. Salih, J. Helmer, M. Cassidy, P. Squire, J. Morgan, P. Hubert, A. Hopkins, V. Ridley, S. Turner, H.L. Usher, T. Park, J. Zaifman (14)

III. SCHEDULED ITEMS

None.

IV. ITEMS FOR DIRECTION

3. Canada Post Community Mailbox Program

That the following actions be taken with respect to Canada Post's Community Mailbox Program:

- a) the City Solicitor BE DIRECTED to report back to the Strategic Priorities and Policy Committee (SPPC) on the legal actions being undertaken by the City of Hamilton with respect to Canada Post's Community Mailbox Program and on what legal remedies the City of London might have available to it in order to address concerns within the City of London's jurisdiction;
- b) the Managing Director, Environmental and Engineering Services and City Engineer BE DIRECTED to:
 - i) bring forward the draft proposed agreement with Canada Post, as directed by the Municipal Council on July 28, 2015, to the SPPC at its meeting on September 14, 2015; and
 - ii) liaise with Canada Post to obtain a clear, easy-to-understand list of proposed Community Mailbox locations, and to make that list

available to the public, including the various concerns raised by the City of London in relation to specific locations;

- c) the following communications BE RECEIVED:
- i) a communication dated August 17, 2015, from the Deputy City Clerk, advising of the receipt of a petition in support of keeping door-to-door postal service;
 - ii) a communication dated August 6, 2015, from S. Margles, Vice President, Government Relations and Policy, Canada Post, providing information regarding Canada Post's Community Mailbox Program;
 - iii) a communication from A. Paterson, Canada Post, providing information regarding Canada Post's community outreach and customer interaction activities in 2015 for London;
 - iv) a communication dated August 17, 2015 from H. Rabb, Special Projects Coordinator, Councillor Terry Whitehead's Office, City of Hamilton, requesting delegation status for Councillor T. Whitehead;
 - v) a communication from Samuel E. Trosow requesting delegation status;
 - vi) a communication from Wendy Goldsmith requesting delegation status;
 - vii) a communication from David Heap, representing himself and the Kensington Village Association, requesting delegation status; and
- d) the attached delegation record summarizing the oral submissions BE RECEIVED.

Voting Record:

Motion to hear delegations from S.E. Trosow, W. Goldsmith and D. Heap.

Motion Passed

YEAS: M. van Holst, B. Armstrong, M. Salih, M. Cassidy, P. Squire, J. Morgan, P. Hubert, A. Hopkins, V. Ridley, S. Turner, H.L. Usher, T. Park, J. Zaifman (13)

Motion to hear a delegation from Councillor Terry Whitehead.

Motion Passed

YEAS: M. van Holst, B. Armstrong, M. Salih, P. Squire, J. Morgan, P. Hubert, A. Hopkins, V. Ridley, S. Turner, H.L. Usher, T. Park, J. Zaifman (12)

NAYS: M. Cassidy (1)

Motion to receive the communications and delegations.

Motion Passed

YEAS: M. van Holst, B. Armstrong, M. Salih, M. Cassidy, P. Squire, J. Morgan, P. Hubert, A. Hopkins, V. Ridley, S. Turner, H.L. Usher, T. Park, J. Zaifman (13)

Motion to have the City Solicitor report back on the legal actions being undertaken by the City of Hamilton with respect to Canada Post's Community Mailbox Program and what legal remedies the City of London might have available to it in order to address concerns within the City of London's jurisdiction.

Motion Passed

YEAS: M. van Holst, B. Armstrong, M. Salih, M. Cassidy, P. Squire, J. Morgan, V. Ridley, S. Turner, H.L. Usher, T. Park, J. Zaifman (11)

NAYS: P. Hubert, A. Hopkins (2)

Motion to direct the Managing Director, Environmental and Engineering Services and City Engineer to:

- a) bring forward the draft proposed agreement with Canada Post, as directed by the Municipal Council on July 28, 2015, to the SPPC at its meeting on September 14, 2015; and
- b) liaise with Canada Post to obtain a clear, easy-to-understand list of proposed Community Mailbox locations, and to make that list available to the public, including the various concerns raised by the City of London in relation to specific locations.

Motion Passed

YEAS: M. van Holst, B. Armstrong, M. Salih, M. Cassidy, P. Squire, J. Morgan, P. Hubert, A. Hopkins, V. Ridley, S. Turner, H.L. Usher, T. Park, J. Zaifman (13)

4. 5th Report of the Governance Working Group

That the following actions be taken with respect to the 5th Report of the Governance Working Group, from its meeting held on July 29, 2015:

- a) the City Clerk BE REQUESTED to amend section (d) of Council Policy 5(1) "Appointment of Deputy Mayor" to provide for the use of a ranked voting process with respect to the selection and appointment of the Deputy Mayor selected by Municipal Council;
- b) the City Clerk BE REQUESTED to amend Council Policy 5(34) "Appointment of Council Members to Standing Committees of Council and Various Civic Boards and Commissions" to reflect the current Standing Committee structure and appointment process;
- c) the Civic Administration BE REQUESTED to undertake the following actions with respect to the recruitment process for Advisory Committees, Boards, Commissions and Striking Committee Terms of Reference:
 - i) the City Solicitor's Office BE REQUESTED to review and report back to the Governance Working Group (GWG) regarding the recommendation from the Striking Committee that applicants be requested to voluntarily disclose information pertaining to diversity;
 - ii) the City Clerk and the City Solicitor's Office BE REQUESTED to review and report back to the Governance Working Group (GWG) regarding the processes undertaken by other municipalities with respect to Council appointments to Advisory Committees, Boards and Commissions and provide a recommendation regarding best practices that could be considered to ensure a transparent, streamlined and fair process for appointments; it being noted that the review is to consider, but not be limited to, the following matters:

- A) staggered term appointments to provide for appointments to be made at the beginning and middle of each term of Council so that the process is not onerous;
 - B) membership of the Striking Committee;
 - C) provisions that restrict Striking Committee members from being appointed to Advisory Committees, Boards or Commissions;
 - D) possible creation of a different type of committee structure for appointments;
 - E) a process that provides for the short listing of applicants;
 - F) an interview process for applicants;
 - G) an improved communications and recruitment process;
 - H) clear and plain language descriptions of the role of the Advisory Committees, Boards and Commissions; and,
 - I) clearer guidelines with respect to the disclosure of potential conflicts of interest by appointed Advisory Committee members;
- d) the Governance Working Group (GWG) Terms of Reference BE AMENDED to extend the term to December 31, 2015, in order to provide additional time for the GWG to complete its work; and
- e) clauses 1, 2, 3, 4 and 8 BE RECEIVED.

Motion Passed

YEAS: M. van Holst, B. Armstrong, J. Helmer, M. Cassidy, P. Squire, J. Morgan, P. Hubert, A. Hopkins, V. Ridley, S. Turner, H.L. Usher, T. Park, J. Zaifman (13)

5. Appointments to the Old East Village Business Improvement Area Board of Management

That the following individuals BE APPOINTED to the Old East Village Business Improvement Area Board of Management for the term ending November 30, 2018:

Maria Drangova - Representative
 Ken Keane - Business Owner/Property Owner
 Michelle DeVeau - Business Owner
 Henry Eastabrook - Outreach/Advocate Worker
 Dave Chandler - Property/Business Owner
 Jeff Pastorius - Business Owner
 Dave Thuss - Business Owner
 Aaron Chandler - Business Owner
 Victor Wagner - Business/ Property Owner
 Maryse Leitch - Representative
 Clark Bryan - Business/ Property Owner
 Michelle Navackas - Representative
 Heather Blackwell - Corporate Affairs Manager

it being noted that the Strategic Priorities and Policy Committee received a communication dated August 14, 2015, from J. Pastorius, Old East Village Business Improvement Area Manager, with respect to the above appointments.

Motion Passed

YEAS: M. van Holst, B. Armstrong, J. Helmer, M. Cassidy, P. Squire, J. Morgan, P. Hubert, A. Hopkins, V. Ridley, S. Turner, H.L. Usher, T. Park, J. Zaifman (13)

6. Appointments to the Argyle Business Improvement Area Board of Management

That the following individuals BE APPOINTED to the Argyle Business Improvement Area Board of Management for the term ending November 30, 2018:

Lee Bryar, GoodLife Fitness General Manager
 Drew Gardener - Co-Operators Insurance

it being noted that the Strategic Priorities and Policy Committee received a communication dated August 10, 2015 regarding a vacancy in accordance with section 4.4 of By-law No. A.-6873-292.

Motion Passed

YEAS: M. van Holst, B. Armstrong, J. Helmer, M. Cassidy, P. Squire, J. Morgan, P. Hubert, A. Hopkins, V. Ridley, S. Turner, H.L. Usher, T. Park, J. Zaifman (13)

V. DEFERRED MATTERS/ADDITIONAL BUSINESS

None.

VI. CONFIDENTIAL

That consideration of Agenda Item C-1, being a matter pertaining to personal matters about identifiable individuals including current and former municipal employees, regarding employment related matters; outstanding litigation affecting the municipality; advice that is subject to solicitor-client privilege; and advice or recommendations of officers and employees of the Corporation, including communications necessary for that purpose, BE DEFERRED to a future meeting of the Strategic Priorities and Policy Committee.

Motion Passed

YEAS: M. van Holst, B. Armstrong, J. Helmer, M. Cassidy, P. Squire, J. Morgan, P. Hubert, A. Hopkins, V. Ridley, S. Turner, H.L. Usher, T. Park, J. Zaifman (13)

VII. ADJOURNMENT

The meeting adjourned at 6:15 PM.

DELEGATION RECORD

3. Canada Post Community Mailbox Program

- Samuel E Trosow – indicating that the delegations have been here a few times on Canada Post’s Community Mailbox Program; encouraging the City of London to take a proactive position regarding placement of the mailboxes; noting there are a number of safety considerations regarding placement such as access by seniors and disabled persons, liability, snow removal, graffiti, vehicular and pedestrian traffic, slip and falls, as well as fiscal considerations for the City of London; noting that London City Council has taken a “hands off” position, where other municipalities have been more proactive, such as the cities of Hamilton and Montreal, and other municipalities have been less proactive than London; stating that any attempt to reason with Canada Post is futile as they have decided what they are going to do and they are doing it; encouraging the City of London to ask Canada Post to stop until after the end of October when the City of London will have more clarity regarding the Program; suggesting that the City Engineer would not have let some of the boxes go up in certain locations had he known where those locations were going to be; noting that many boxes are close to intersections; encouraging the City of London to call for a moratorium until after the implementation date of October 19, 2015 and indicating that his recommending a moratorium to a particular date is not politically motivated; also encouraging the City of London to give serious consideration to joining with the City of Hamilton; noting that the City of Hamilton lost the first round in the Courts, but will very likely be back in the Courts; emphasizing it is extremely important for municipalities to protect their general rights; noting that the City of Hamilton has been active in trying to get assistance and he would not guess what assistance the City of London should give; suggesting that the Municipal Council should get a more technical report from their legal staff; asking that the Municipal Council please offer their colleagues in Hamilton some assistance and if they have not read Hamilton’s documentation on this matter, encouraging the Members to do so; re-emphasizing that this is about municipal issues including safety and cost; and asking the Municipal Council to make an affirmative statement that the City wants Canada Post to stop implementation, at least for now, and also asking that the Municipal Council consider a potential role in helping the City of Hamilton.
- Wendy Goldsmith – indicating she is a social worker and was encouraged to hear from a number of Council Members about the importance of the needs of citizens, though on the other hand some other Members are saying they don’t want to hear or learn from other municipalities that have more experience; expressing that she expects more from City Council; noting she is also speaking as someone concerned for the economy of the community; indicating that she is speaking for a local business owner who is deeply concerned about the placement of community mailboxes in front of the business he is still running as an octogenarian; noting that the gentleman was advised to contact Canada Post about his concerns and Canada Post told him to speak with London City Council because Canada Post did not have a role in his concerns; stating that the latter is a contradiction and Canada Post just passed this off and alleging that Canada Post is deliberately trying to decline to speak to Council, seniors and other people who care in the community; indicating that people had asked to speak at a prior date and asking the Committee to invite more delegations than those who have sent in a written request on today’s agenda since the matter is very important to more people; stressing that unlike the Community Survey, this issue is more than a “snapshot in time” and it is important for Council to take a look at all concerns and deal with them in a way that supports the community it serves.
- David Heap, Kensington Village Association – providing the attached presentation; noting Kensington Village Association is the newest Association; indicating that the Association requested a meeting with Canada Post in May, but Canada Post refused to come as the Association did not have an “Executive”; expressing thanks to Councillor T. Park in assisting with the meeting arrangements; stating that Canada Post refused to place a community mailbox on a dead end, though it appears that sometimes it is OK to

place a community mailbox on a dead end and sometimes it is not; noting that a particular location was very unsafe from a traffic and parking perspective and that is why they wanted it moved to a safer location; indicating that one resident felt unsafe with the location of a community mailbox near their property and another resident was fine with that mailbox being relocated to their property, but Canada Post refused to move the mailbox; pointing out some placements have resulted in damage to tree roots; suggesting that location criteria are not serious and are based more on a whim, without proper consultation; indicating that the information Canada Post provided for mailbox locations was strictly a “data dump” and not very useful; asking for location information that is more comprehensive; and encouraging the City of London to call for a moratorium on the installation of the community mailboxes.

- Councillor Terry Whitehead, City of Hamilton – emphasizing he is not here to provide advice; outlining his lengthy experience and thanking Councillor Ridley for inviting him to come and speak to the Committee; indicating the importance of municipalities ensuring they are better informed; advising that Canada Post came to Hamilton with a desire to transform mail delivery in that community, one in which two-thirds of the community received home delivery; indicating that implementation began in the Mountain area of Hamilton; pointing out that while Canada Post talks about pre-existing mailboxes, what they don't say is that the mailboxes already in place went through a planning process; providing the attached information outlining some of the difficulties they have encountered in Hamilton with mailbox placement and a communication dated June 16, 2015 from I. Binnie, providing a legal opinion with respect to Hamilton vs Canada Post Corporation; emphasizing that there are many considerations for ensuring competing needs for such things as telecommunications roads, sewers, driveways, etc. are dealt with safely; stating that there is a need for planned community mailboxes versus unplanned community mailboxes in areas where cars have to stop in an active lane, or where there is a reduction in lanes, or there is a high incident of accidents; noting they have asked Canada Post to move the mailbox locations from unsafe locations and they will not do so; pointing out that Hamilton's by-law is to ensure that there is the highest standard of safety while allowing Canada Post to proceed; and stating that Hamilton City Council believes it should be the highest decision body to have final say on safety considerations; and asking London to join Hamilton's fight.

Kensington Village Association
(KeVA)'s experience with Canada
Post 'consultation'
regarding cuts to postal service

KeVA

- requested a meeting with Canada Post in May
- refused by Mr. Paterson because we don't have an 'executive' (not a requirement of the Urban League when we registered there).
- residents given the run around re inconsistent 'criteria' for placement: dead-ends? lighting?
- parking & traffic safety: 'not enough resources' to study each location

effect on boulevard trees roots in the Forest City?



implications that have yet to be adequately considered (a partial list):

- effects on trees & public boulevards
- safety & traffic
- finances (city tax rolls)
- access for disabled & elderly
- personal safety relating to lighting
- mail theft and policing (cost) implications
- and more...

What exactly is the 'process' here?

'follow-up' on a request to move a mailbox, agreed to by all parties:

- **From:** "PATERSON, Andrew Wilson" <Andrew.Paterson@canadapost.postescanada.ca>
- **To:** Kensington Village <kensingtonvillageassociation@gmail.com>
- **Cc:** ESTELLE MILL <estellemill@rogers.com>
- **Sent:** Wednesday, August 19, 2015 9:57 AM
- **Subject:** RE: community mail boxes
-
- Thank you Mr. Heap.
-
- I have spoken to the project manager and he tells me that he has met with Maxine and discussed the CMB placement.
-
- He would also prefer not to add to the other site as it will create a larger number of boxes than we usually like to put in one place.
-
- Regards,
-
-
-
- Andy
- Canada Post
- [519-457-5247](tel:519-457-5247)
-
-

- From: **PATERSON, Andrew Wilson** <Andrew.Paterson@canadapost.postescanada.ca>
Date: 19 August 2015 at 09:52
Subject: RE: community meeting invitation for June 18
To: Kensington Village Association <kensingtonvillageassociation@gmail.com>
Cc: "Ridley, Virginia" <vridley@london.ca>, "Park, Tanya" <tpark@london.ca>, "van Holst, Michael" <mvanholst@london.ca>, "husher@london.ca" <husher@london.ca>
- Thank you Mr. Heap.
-
- Unfortunately I am not available on those dates.
-
- Andy
- Canada Post
- [519-457-5247](tel:519-457-5247)
- **From:** Kensington Village Association [mailto:kensingtonvillageassociation@gmail.com]



Councillor Terry Whitehead
Ward 8 – West Hamilton Mountain

Drip Line of a Tree



Roots torn out



Cut Utilities

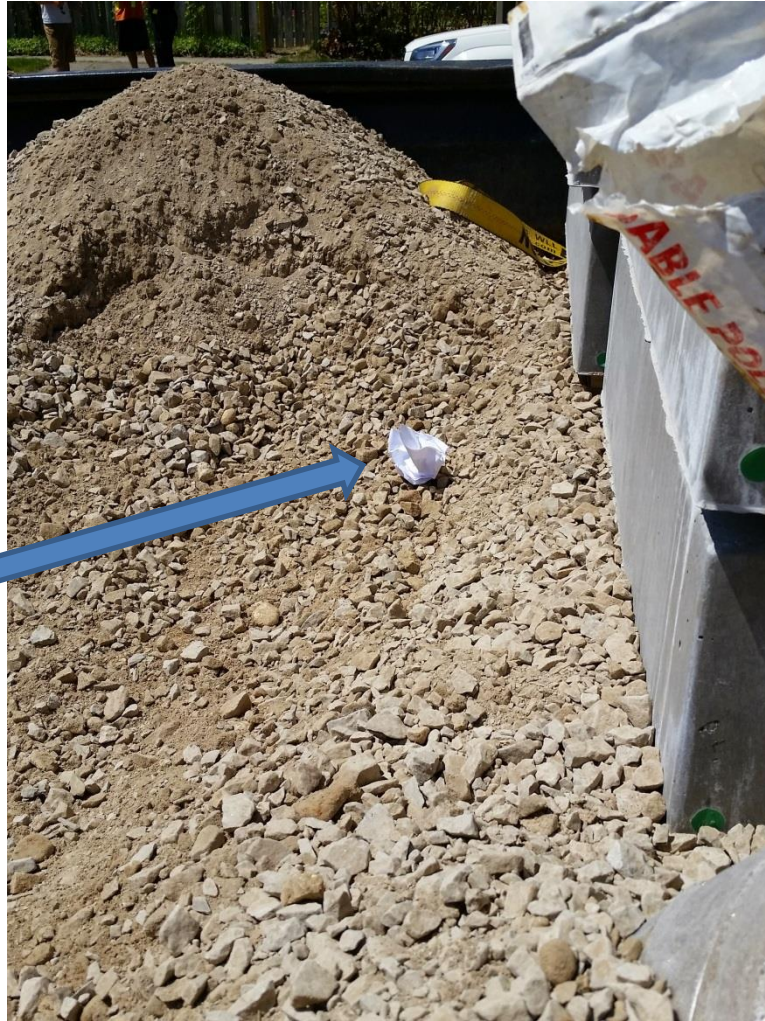


Cut Utilities



Homeowner Investments





Stop work order

Safety Concerns



Whose Standards Apply?



Frustration of Federal Purpose

...for “federal paramountcy” to apply, it must be **impossible** for Canada Post to comply with both the federal regulation and, at the same time, comply with the Hamilton municipal bylaw.

Ian Binnie

Former Supreme Court Justice

Interference With Other Permits

HAMILTON MUNICIPAL PARKING SYSTEM
APPLICATION FOR RESIDENTIAL DRIVEWAY ACCESS PERMIT

Property Address: _____, HAMILTON
Lot#/Concession: _____
Mailing Address: _____, HAMILTON Postal Code: _____
Applicant: _____ Phone: _____ Fax: _____
Survey: Yes [] No [X]
Type of request: Construct a new entrance Change the design of an existing entrance
 Relocation of an existing entrance Construct a temporary entrance

CLASSIFICATION, USE, PURPOSE AND DETAIL OF ACCESS

In the case that the Owner/Applicant or Agent installs the access, it is understood that it is their responsibility to contact the CALL BEFORE YOU DIG (1-800-400-2255) for all utility locates prior to excavation. Any utility relocation required as a result of this access installation must be to the satisfaction of the respective utility company. All works, including utility relocation, will be reconstructed, altered, maintained or operated at the expense of the undersigned, and work must not begin before a permit has been issued by the City. The issuance of a permit by the City does not relieve the holder of the responsibility of complying with relevant Municipal By-Laws.

In consideration of any permit issued in respect to this application, we, the Applicants for ourselves, our Heirs, Executors, Administrators, Successors and Assigns hereby agree to observe, keep and perform and be subject to the regulations and conditions of the said permit and to indemnify and save harmless, the City and its agents from and against all loss, cost, damages, expenses, claims and demands whatsoever to which the City may be put or which the City may be liable by reason of anything done or omitted to be done in the construction, maintenance, alterations or operation of the works authorized. The General Manager of Public Works may issue permits upon such terms as considered proper and may cancel any such permit at any time as provided for in the Streets By-law R77-109 and 86-077.

Access required for: Rural area Urban area

Applicant's Details: Would like new driveway and approach ramp to property on the _____ side. Owners have safety concerns with present driveway on _____

Signature of Applicant _____ Dated _____

Please provide a detailed sketch of where you would like the parking space, approach ramp, approach ramp extension, culvert entrance or culvert extension to be located. Please clearly indicate the measurements of your proposal. When writing descriptions, please use North, South, East and West directions.

FOR OFFICE USE ONLY

Approved Denied Concrete Approach Culvert
Access to be constructed by: Approach ramp length
District # Bonded contractor Culvert diameter Culvert length
Foreman/Superintendent _____ Phone # _____
Details: Approved for 6 metre approach ramp at white marks on the length 30' to be suff onto private property



Existing driveway permit already issued

Existing CMBs Were Approved By Planning Committees



Arterial Roads



Arterial Roads



Arterial Roads



Arterial Roads



Thank You

June 16, 2015

Ian Binnie
Direct line: 416-865-3737
Direct fax: 416-865-3740
Email: ibinnie@litigate.com

Via E-mail

Ms. Janice Atwood-Petkovski
City Solicitor
City of Hamilton
City Hall
71 Main Street West
Hamilton, ON L8P 4Y5

Dear Ms. Atwood-Petkovski:

RE: Hamilton ats Canada Post Corporation

I acknowledge receipt of a copy the Decision of Justice Whitten in the above matter dated June 11, 2015 holding that Hamilton City By-Law No. 15-091 in relation to the installation of “super” community mail boxes (CMBs) on City owned property by Canada Post is “inapplicable and inoperative”. You have asked whether in my opinion an appeal to the Court of Appeal is warranted.

My view is that this case raises some quite complex constitutional questions which deserve the consideration of a higher court. While the outcome of an appeal is not free from doubt, it seems to me that there is good reason to dispute the correctness of some of Justice Whitten’s conclusions. The issues are of considerable importance across Canada. The clarification of the applicable law by a higher court is, I believe, desirable.

**1. THE CITY OF HAMILTON V. THE HAMILTON HARBOUR
COMMISSIONERS LITIGATION**

In some ways, this litigation is similar to the lengthy battles between the City of Hamilton and the Hamilton Harbour Commissioners in the 1960’s and 1970’s culminating in the City’s victory in the Court of Appeal in *Hamilton vs. Hamilton Harbour Commissioners* (1978) 21 O.R. 2nd 491 (CA). That contest, as here, involved a “federal undertaking”. The Commissioners sought immunity from the regulatory authority of the City. They complained that their plans for the development of harbour lands were unduly impaired

by the City of Hamilton municipal land use by-laws. The courts disagreed and concluded that the Harbour Commissioners had exaggerated any valid protected federal purpose. It is arguable that here Justice Whitten had similarly overstated the federal purpose and conflated federal constitutional power with Canada Post's business plan. In paragraph 86, he speaks of "the right of CP to deliver mail in an economically viable fashion" [the existence of such a "*right*" may be questioned] and in paragraph 87:

The by-law would in effect give the City the final say of the location of CMBs after a permit application process which has no relationship to the temporal exigencies facing CP, both in terms of satisfying its **existing collective agreements** and CP's **cost reduction goals** to achieve financial sustainability in an era of steadily reducing transaction mail. [emphasis added]

And at paragraph 57:

The effect of the permit process contemplated by the by-law is that it jeopardizes the timelines of CP. Timelines established to maintain its objective of a self-sustaining financial basis and a level of satisfactory services to citizens. [emphasis added]

The City, of course cannot block Canada Post from establishing "super boxes", but just as Canada Post trucks comply with municipal speed limits when delivering the mail within the City it is certainly arguable that under the frequently endorsed principle of "cooperative federalism" Canada Post can achieve its plans while fully respecting the City's interest in safe roads and good planning. The Court of Appeal might conclude that whether a super box is located at one end of the block or the other or within the required setbacks is unlikely to jeopardize the "economic viability" of Canada Post. Equally, the Court of Appeal might conclude that the 120 day moratorium is prudent rather than obstructive.

However, at this stage of the litigation, the only issue is whether the City wishes to take the opportunity to make its arguments in the higher court.

2. INTER-JURISDICTIONAL IMMUNITY

Canada Post argued here, as did the Hamilton Harbour Commissioners in the 1970's, that provincial/municipal regulation cannot invade a "core" federal jurisdiction. This is

known as the doctrine of inter-jurisdictional immunity. However, the Supreme Court of Canada in *Canadian Western Banks vs. Alberta* [2007] 2 SCR 3, 2007 SCC 22 made it clear that federal undertakings (in that case the chartered banks) cannot set themselves up as judges of what is essential to their undertakings. In *Canadian Western Banks*, the federally regulated banks argued that provincial consumer legislation regulating the sale of insurance did not apply to banks when banks sold insurance because banks were a “federal undertaking” and they preferred not to comply with provincial standards. The court rejected the federal argument. In doing so, the Court said that inter-jurisdictional immunity “is a doctrine of limited application...” and:

The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly. [emphasis added] (para. 42)

The fact that the business plan was to improve the profits of the banks by selling insurance did not expand federal jurisdiction at the expense of the provinces even when the insurance was sold to secure bank loans. Equally, in the present case, it is certainly arguable that the laudable desire of Canada Post’s business plan to achieve “cost reductions” is without constitutional significance.

3. FEDERAL PARAMOUNTCY OR FRUSTRATION OF FEDERAL PURPOSE

Justice Whitten references s. 14 (1) of the *Municipal Act* in holding that the City’s by-law is in conflict with the federal *Mail Receptacle Regulation* SOR/83-743. Quite apart from the *Municipal Act* it is well established as a matter of constitutional law that where there is an operational conflict between a valid federal regulation and an otherwise valid municipal by-law, the federal regulation will prevail. However, in order for “federal paramountcy” to apply, it must be impossible for Canada Post to comply with both the federal regulation and, at the same time, comply with the Hamilton municipal by-law. Justice Whitten does not find dual compliance to be impossible but he concludes at paragraph 104 that the municipal by-law “frustrated the purpose of the *Mail Receptacles Regulation*”. It is certainly arguable by the City that there is no such frustration. The

federal purpose is to replace home delivery with “super boxes”. This mandate can be achieved in a number of ways that fully comply with the City’s requirements for road safety and good planning.

Undoubtedly it would be more convenient for Canada Post to proceed to install super boxes without compliance with the City’s procedures but Canada Post’s convenience is not the constitutional test. If the Court of Appeal agrees with the City that Canada Post can implement its super box program while also complying with municipal regulations then the “federal purpose” is not frustrated and the municipal by-law would **not** be rendered inoperative on this ground.

4. IS BY-LAW 15-091 VOID FOR UNCERTAINTY OR VAGUENESS?

Justice Whitten concludes at paragraph 49 that City By-Law 15-091 is “standardless” and thus vague and uncertain and therefore invalid. However, one of the Supreme Court authorities on which he relies, *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606, cautions that “the threshold for finding a law to be vague is relatively high. The factors to be considered include (a) the need for flexibility and the interpretive rule of the courts; (b) the impossibility of achieving absolute certainty ... [the] standard of intelligibility being more appropriate and; (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps co-exist”. The Court went on to say that a challenge on the basis of vagueness must establish that the law “**so lacks in precision as not to give sufficient guidance for legal debate** – that is for reaching a conclusion as to its meaning by analysis applying legal criteria ... no higher requirement as to certainty can be imposed on law in our modern state”. [emphasis added]

Despite finding the City’s approach to lack any intelligible standards, Justice Whitten acknowledges at paragraph 43 that Chapter 5 of the City’s manual (*Above Ground Plant, Above Ground Equipment Intended to be Accessed by the Public*, pages 25-16) does in fact address the need to ensure “the ease of safety and of users”. The installation itself, Justice Whitten observes,

is not to be “overly intrusive” to neighbouring residential and commercial uses. Permit explanations are to explain why CMB

[super box] cannot be located abutting a corner lot or non-arterial road. Obviously the authors are expressing their preferences as to location at the outset, and shift the burden of proof to the applicant to justify why these preferences cannot be met. Mandatory language stipulates basis considerations of safety, accessibility, illumination, avoidance of hazards, non-interference with snow removal, and a location on a flat, stable surface. One cannot imagine any of these mandatory items escaping the attention of CP. [emphasis added]

The Court of Appeal might conclude that while Canada Post should think of these things, it might not. Road safety is a matter that lies within the regulating authority of the City not the “business plan” of Canada Post.

It is certainly arguable that in fact By-Law 15-091 does not fail the standard of “sufficient guidance for legal debate”.

5. CROWN IMMUNITY

Finally, Justice Whitten says that Canada Post as a crown agent enjoys a level of “immunity” from the municipal by-law. This argument was pursued by the Hamilton Harbour Commissioners over many years of litigation with the City of Hamilton and (although those cases are not cited by Justice Whitten), the Ontario Court of Appeal rejected the Hamilton Harbour Commissioners’ argument based on crown immunity. It is certainly arguable that the argument should be rejected when raised by Canada Post as well.

6. CONCLUSION

This case raises a number of difficult constitutional issues dealing with the interaction between federal and provincial/municipal enactments. Within the relatively succinct reasons for judgment of 20 pages, Justice Whitten deals with complex constitutional doctrines of inter-jurisdictional immunity, federal paramountcy and Crown immunity as related to Canada Post. Justice Whitten finds that the federal and municipal regulations are in conflict. These are all legal questions deserving of consideration by the Ontario Court of Appeal if not by the Supreme Court of Canada.

Janice Atwood-Petkovski

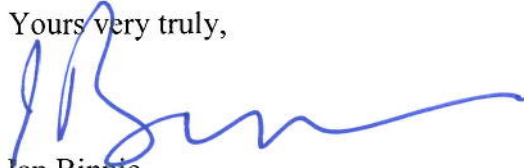
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In my view, the City has a good arguable case to go forward to the Court of Appeal.

I would, of course, be glad to respond to any questions you may have in this regard.

Yours very truly,

A handwritten signature in blue ink, appearing to read 'Ian Binnie', with a long horizontal flourish extending to the right.

Ian Binnie

IB/pc