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<b>TO:</b>	<b>CHAIR AND MEMBERS PLANNING COMMITTEE MEETING ON DECEMBER 8, 2008</b>
<b>FROM:</b>	<b>JAMES P. BARBER CITY SOLICITOR</b>
<b>SUBJECT:</b>	<b>INJUNCTIONS AND NUISANCES - RESIDENTIAL UNITS</b>

<b>RECOMMENDATION</b>
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That this report **BE REFERRED** by the Planning Committee to the Town and Gown Committee for review.

<b>PREVIOUS REPORTS PERTINENT TO THIS MATTER</b>
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December 8, 2003, Report to Planning Committee

<b>BACKGROUND</b>
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At its meeting of September 29, 2008 City Council adopted the following recommendation of Planning Committee:

29. That in response to an enquiry by Councillor N. Branscombe, the City Solicitor's Office **BE REQUESTED** to bring forward a report to be considered in public at a future meeting of the Planning Committee which will indicate implications for the City of London in relation to the recent Ontario Superior Court of Justice Decision (Court File No. 49820/07) concerning residential intensification of lands, as brought forward by the Corporation of the City of Oshawa, The Neighbourhoods of Windfields Limited Partnership, and the owners of 30 homes in The Neighbourhoods, to a future meeting of the Planning Committee.

At its meeting of October 29<sup>th</sup>, 2008, Board of Control received and noted the 4<sup>th</sup> report of the Town and Gown Committee which included the following reports:

1. That the Town and Gown Committee (TGC) heard a verbal delegation and received a communication dated September 10, 2008 from Sgt. L. Prelazzi, Supervisor, London Police Services, with respect to limiting the activities and number of people on front lawns; it being noted that the TGC asked that the above-mentioned communication, along with a report on the East Lansing (Michigan) Police Department nuisance and disorderly conduct issues and the attached excerpt from the Boulder, Colorado By-law, entitled "Nuisance Party Prohibited" be referred to the City's Legal Department for a report to be considered at a future meeting of the TGC outlining suggestions to address the concerns noted in Sgt. Prelazzi's communication.

4. That the Town and Gown Committee (TGC) reviewed and received a communication dated August 27, 2008 from Councillor N. Branscombe, with respect to a Superior Court decision relating to the an application by the City of Oshawa and the Neighbourhoods of Windfields Limited Partnership relating to the conversion of 30 homes into short-term rental/lodging accommodations that would predominately be occupied by students; it being noted that the City's Legal Department is preparing a report on what the implications of this decision could be for London.

Pursuant to the direction of City Council and the request of the Town and Gown Committee, this report will address the availability of injunctions to restrain land uses and conduct contrary to the City's by-laws and the possibility of further local legislation to address nuisance parties. The



Civic Administration has recently brought forward a report concerning a revised noise by-law and a report concerning the licensing of rental residential units is forthcoming.

### Injunctions

The City of Oshawa and a residential subdivider brought proceedings for an injunction before the Superior Court of Ontario to restrain the use of 30 homes in a subdivision in the City of Oshawa. According to the decision granting the injunction<sup>1</sup>, they alleged that the homes owned by the respondents had been altered internally, with or without building permits and using misrepresentations of the purpose of the alterations, to convert them into short-term rental/lodging accommodation for between five and nine persons per home. The occupants were predominantly, if not exclusively, students.

The Court reviewed the evidence, the Official Plan and Zoning By-law and considered the definition of dwelling unit which provided that a "dwelling unit consists of one or more rooms, together with toilet and cooking facilities, and must be designed for use as a single housekeeping establishment" and the term "single housekeeping establishment" which was not defined in the by-law. The Court found that based on the evidence the use of some of the homes was contrary to the by-law in that the use was as a lodging house and not in the nature of a single housekeeping establishment for those homes. The application was dismissed with respect to some of the homes based on the evidence. The decision has been appealed to the Ontario Court of Appeal.

The Oshawa decision is subsequent to an earlier Court of Appeal decision<sup>2</sup> interpreting a Waterloo by-law containing a similar provision ("residential unit: a unit ... used as a single housekeeping unit, which includes a unit in which no occupant has exclusive possession of any part of the unit ..."). In the Waterloo case, the Court of Appeal upheld the finding that a house occupied by 3 students represented a lawful use under the zoning by-law of a residential unit stating that the court correctly addressed "the critical phrase to be interpreted, namely whether the premises in question are a "single housekeeping unit". [The judge] used as an important interpretative criterion whether there was collective decision making sufficient to create a single unit for housekeeping purposes."

Both of these decisions were subsequent to the decision of the Ontario Divisional Court<sup>3</sup> interpreting a similar provision in the City of London by-law finding that a fraternity house was not a single and independent housekeeping establishment. In that case, the use of a fraternity house was held to be contrary to the by-law based on the evidence in circumstances where the Divisional Court dismissed an appeal on the basis that "the appellant's evidence establishes that "each occupant - will be a tenant to Phi Delta." As a tenant if he fails to pay his rent he will be subject to eviction by the landlord. Accordingly, the whole house is not occupied or used as a "single and independent housekeeping establishment".<sup>4</sup>

The writer advised City Council in a report in December of 2003 that many students in London live in dwelling units which are rented by a group of individuals under a common lease. Where complaints arise concerning the occupancy of dwelling units under a common lease, they may be addressed through by-laws such as the zoning by-law. The Oshawa and Waterloo decisions reinforce the conclusion in the 2003 report based upon the London decision that it may only be possible to obtain a remedy under the zoning by-law against persons who occupy premises under a common lease where they do not live as a single and independent housekeeping unit. Whether occupants are living as a single and independent housekeeping unit will be based upon a consideration of the evidence tendered before the court<sup>5</sup>.

It appears that Oshawa is the only recent Ontario case where injunctive proceedings to restrain the use of premises as not being a single housekeeping establishment have been commenced as other court decisions relating to this issue have arisen as a consequence of other types of

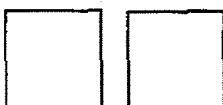
<sup>1</sup> *Neighbourhoods of Windfields Limited Partnership v. Death*, 2008 CanLII 42428 (ON S.C.)

<sup>2</sup> *Good v. Waterloo (City)* [2003] O.J. No. 4027 (C.A.)

<sup>3</sup> *Phi Delta Beta of London Inc. v. London (City) C.B.U.*, (1995), 25 M.P.L.R. (2d) 140; 36 M.P.L.R. (2d) 319 (Div. Ct.)

<sup>4</sup> *Phi Delta Beta*, 36 M.P.L.R. (2d) 319 @ 320

<sup>5</sup> *Neighbourhoods of Windfields Limited Partnership v. Death*, 2008 CanLII 42428 (ON S.C.);



proceedings.<sup>6</sup> Much of the evidence for the injunction in the Oshawa case was secured by the subdivider. Injunctive proceedings are available under section 440 of the *Municipal Act, 2001* to restrain an illegal use and this municipality has used injunctive proceedings on occasion in the past to enforce compliance with its zoning by-law but not with respect to this type of occupancy. The decision to utilize or to become a party to statutory injunctive proceedings is in the discretion of the municipal council and should be based on evidence demonstrating a breach of the zoning by-law.

### Nuisance Parties

The London Police Force and City By-law Prosecution staff have encountered nuisance and disorderly conduct issues involving large assemblies of people in residential areas in proximity to post-secondary educational institutions which have included loud music, noise, open air burning, traffic obstruction, littering, loitering, consumption of liquor on public and private property, and disorderly conduct<sup>7</sup>.

This kind of activity has been regulated under "nuisance party" ordinances in the United States and under general legislation in Britain on the basis that street parties or parties on private property may be of such a magnitude that they constitute a nuisance<sup>8</sup>. Where nuisance parties have been prohibited by local legislation in municipalities in the United States, the applicable ordinances provide a variety of remedies for law enforcement personnel who receive complaints. The regulatory purpose of a nuisance party by-law is to create a duty upon those hosting a social event or party to control the participants and gives law enforcement personnel a mechanism to control and disperse people where the event has become a nuisance which does not reach the standard of an unlawful assembly which may be dispersed under the provisions of the Criminal Code<sup>9</sup>. The difficulty encountered by law enforcement personnel arises because of the unwillingness of owners or residents to identify, control or to take responsibility for the conduct of individuals who attend a party who may or may not be invitees.<sup>10</sup>

Criminal charges<sup>11</sup> (i.e. causing disturbances and unlawful assembly), charges under Provincial Statutes<sup>12</sup> (i.e. liquor, trespass) and by-law charges (i.e. noise<sup>13</sup>, traffic<sup>14</sup>, littering<sup>15</sup>, parking, or zoning<sup>16</sup>) may be laid against individuals where law enforcement personnel deem it appropriate to do so<sup>17</sup>.

A nuisance party ordinance in other jurisdictions has included the following elements:

(1) *Definition of Nuisance Party:* A social gathering or party which is conducted on premises within the city and which, by reason of the conduct of the persons in attendance, involves any one or more of the following activities carried on so as to constitute a public nuisance occurring at the site of the said party or social gathering, or on neighboring public or private property,

<sup>6</sup> See also *St. Catharines (City) v. Bradley Fish* [2000] O.J. No. 3677 (QL) (Ont.S.C.); *Heer v. Allstate Insurance Company of Canada* [1993] O.J. No. 3360 (Ont.G.D.); *Ottawa (City) v. Bentolilla* [2006] O.J. No. 5444; 2006 ONCJ 541; 73 W.C.B. (2d) 423 .

<sup>7</sup> Fall Homecoming has been cancelled at Queen's University for 2009 in Kingston owing to an annual street party involving conduct which has generated complaints.

<sup>8</sup> This Bowling Green ordinance was discussed at a conference in London, Ontario. Please see: [www.london.ca/Committees\\_and\\_Task\\_Forces/PDFs/TGPPbowlinggreen-present9.pdf](http://www.london.ca/Committees_and_Task_Forces/PDFs/TGPPbowlinggreen-present9.pdf)

<sup>9</sup> See Criminal Code s. 67 in Appendix A to this report

<sup>10</sup> These kinds of issues are also addressed by a recent private member's bill (Bill 106, Safer Communities and Neighbourhoods Act, 2008) which creates an office of Director who is given law enforcement powers to address complaints. This private member's bill appears to be similar in approach to neighbourhood nuisance legislation in England (Anti-Social Behaviour Act, 2003) and code enforcement strategies in the United States (see Civil Remedies and Crime Prevention: An Introduction, Lorraine Green Mazerolle and Jan Roehi, [http://www.popcenter.org/library/crimeprevention/volume\\_09/0b\\_editor\\_introduction.pdf](http://www.popcenter.org/library/crimeprevention/volume_09/0b_editor_introduction.pdf)).

<sup>11</sup> Criminal Code, Appendix A

<sup>12</sup> Liquor Licence Act, Trespass to Property Act in Appendix A

<sup>13</sup> Noise Control By-law

<sup>14</sup> Traffic and Parking By-law

<sup>15</sup> Clearing of Grounds By-law, Streets By-law (s. 2.6 prohibits public nuisances on the streets), Property Standards By-law

<sup>16</sup> Z-1 Zoning By-law

<sup>17</sup> Other applicable by-laws include the Public Nuisance By-law (prohibits only urination and defecation), Open Air Burning By-law, Animal Control By-law, Parks and Recreation Area By-law

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- (a) the consumption of alcoholic beverages or drunkenness,
- (b) public urination or defecation,
- (c) the sale, furnishing, or distribution of alcoholic beverages,
- (d) the deposit of trash or litter on public or private property,
- (e) destruction of public or private property;
- (f) pedestrian or vehicular traffic or illegal parking which obstructs the free flow of residential traffic or interferes with the ability to provide emergency services,
- (g) excessive, unnecessary or unusual loud noise which disturbs the repose of the neighbourhood,
- (h) open burning or fireworks,
- (i) public disturbances, brawls, fights, quarrels, or,
- (j) any other conduct or activity that threatens injury, inconvenience, or alarm to persons or damage to property.

(2) *Duty to control premises.* Any person who is an owner, occupant, tenant, or otherwise has rightful possession or possessory control, individually or jointly with others, of any premises, who either sponsors, conducts, hosts, invites, or permits a social gathering or party on said premises which is or becomes a nuisance party, as defined in subsection (1), and which nuisance is either the intentional result of, or within the reasonable expectations of, the person or persons having such possessory control is deemed to be in violation of this section.

(3) No person who is an owner, occupant, tenant, or who otherwise has rightful possession or possessory control, individually or jointly with others, of any premises shall knowingly, negligently, or recklessly allow, cause or permit a social gathering or party on said premises to become a nuisance party as defined by subsection (1) above.

(4) *Order to cease and disperse.* A party or social gathering that is or becomes a nuisance party, as defined in subsection (1), shall cease upon the order of the Police Chief or his or her designate and all persons shall leave such party or social gathering on any public lands including a sidewalk, street, park or boulevard immediately and in the case of private property all persons not residing at the site of such social gathering or party shall leave any residential property immediately. No person shall fail or refuse to obey such an order and any person who fails to leave the site of a party or social gathering after being ordered to do so under this section is guilty of an offence.

(5) *Retaliation.* No person shall direct a verbal, physical or electronic act against the person, family or property of any individual who complains of or witnesses a violation of this section for the purpose of intimidating or retaliating against that person for the exercise of the right to complain or testify to a violation of this section.

(6) *Remedies cumulative.* The above references to conduct which may also be prosecuted under federal or provincial law or city by-laws shall not be interpreted to require that prosecution of the specific offence under federal or provincial law or city by-laws is a necessary prerequisite to enforcement under this section.

Although the use of nuisance party ordinances is now widespread throughout the United States, there appears to be only one reported decision involving a challenge to such an ordinance. The Bowling Green ordinance was upheld on appeal based upon a constitutional challenge to its validity<sup>18</sup>. The Court found that the nuisance party ordinance in issue had a real and substantial relation to the public health, safety, morals or general welfare of the public.

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<sup>18</sup> *Bowling Green v. Schabel*, 2005-Ohio-6522

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To date, no Ontario municipality has enacted nuisance party regulations to the best of the writer's knowledge. It would appear that the statutory authority enabling such a by-law is as broad in Ontario as it is in the other jurisdictions where such by-laws have been enacted.<sup>19</sup> An Ontario municipality has enacted a public nuisance by-law<sup>20</sup> which defines and prohibits the following:

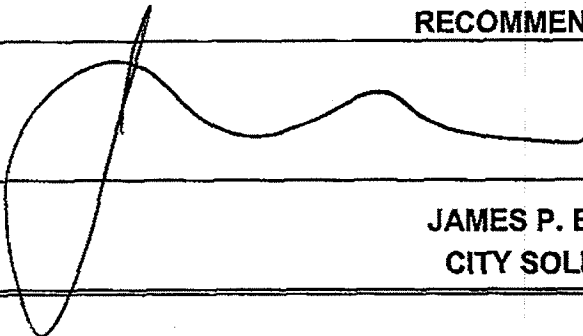
"any action or activity that creates a disturbance to residents of the Township and shall include activities such as spitting, defecating, urinating, fighting, swearing, using profane or obscene language, impeding or molesting persons, obstructing the movement of persons, causing or allowing excessive noise and damaging, defacing or vandalizing property"

Other Ontario municipalities have enacted or are considering prohibitions on public nuisances.<sup>21</sup> It may be advisable to consider a general prohibition on public nuisances as well as nuisance party regulation.

The *Municipal Act, 2001* provides that a by-law is inoperative to the extent of any conflict with a provincial or federal Act or regulation if the by-law frustrates the purpose of the Act or regulation<sup>22</sup>. If nuisance party regulations were enacted in London, both administrative law and constitutional law challenges to their validity could be expected.

If City Council were disposed to consider "nuisance party" regulations, the Civic Administration could be directed to prepare an amendment to the City's Public Nuisance By-law and the draft amendment could be referred to the Community and Protective Services Committee for a public meeting.

The Manager of By-law Enforcement and London Police were consulted with respect to this report.

<b>RECOMMENDED BY:</b>

<b>JAMES P. BARBER CITY SOLICITOR</b>

cc. Manager of By-law Enforcement  
cc. Chief of Police

<sup>19</sup> Municipal Act, 2001, s. 128

**Public nuisances**

128. (1) Without limiting sections 9, 10 and 11, a local municipality may prohibit and regulate with respect to public nuisances, including matters that, in the opinion of council, are or could become or cause public nuisances. 2001, c. 25, s. 128 (1); 2006, c. 32, Sched. A, s. 68.

**Not subject to review**

(2) The opinion of council under this section, if arrived at in good faith, is not subject to review by any court. 2001, c. 25, s. 128 (2).

<sup>20</sup> See The Corporation of the Township of East Zorra-Tavistock County of Oxford By-law # 2008-37 at [http://www.twp.ezt.on.ca/council/consolidated\\_bylaws/2008-037\\_nuisance\\_bylaw.pdf](http://www.twp.ezt.on.ca/council/consolidated_bylaws/2008-037_nuisance_bylaw.pdf)

<sup>21</sup> Kingston is reportedly considering a public nuisance by-law. Oakville has enacted a by-law at [http://www.town.oakville.on.ca/Media\\_Files/by-laws/2007-143\\_Nuisance.pdf](http://www.town.oakville.on.ca/Media_Files/by-laws/2007-143_Nuisance.pdf); which defines a public nuisance as "an activity or activities, intentional or negligent in origin, which have a detrimental impact on the use and enjoyment of properties in the vicinity of the premises." The Oakville by-law provides that "No Person shall cause or permit any Public Nuisance."

<sup>22</sup> Municipal Act, 2001, s. 14



**TABLE OF OFFENCES**

**CRIMINAL CODE**

Unlawful assembly

**63. (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they**

**(a) will disturb the peace tumultuously; or**

**(b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.**

Lawful assembly becoming unlawful

**(2) Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had assembled in that manner for that purpose.**

Exception

**(3) Persons are not unlawfully assembled by reason only that they are assembled to protect the dwelling-house of any one of them against persons who are threatening to break and enter it for the purpose of committing an indictable offence therein.**

Riot

**64. A riot is an unlawful assembly that has begun to disturb the peace tumultuously.**

R.S., c. C-34, s. 65.

Punishment for unlawful assembly

**66. Every one who is a member of an unlawful assembly is guilty of an offence punishable on summary conviction.**

R.S., c. C-34, s. 67.

Reading proclamation

**67. A person who is**

**(a)... mayor ..., or the lawful deputy of a mayor ...,**

**who receives notice that, at any place within the jurisdiction of the person, twelve or more persons are unlawfully and riotously assembled together shall go to that place and, after approaching as near as is safe, if the person is satisfied that a riot is in progress, shall command silence and thereupon make or cause to be made in a loud voice a proclamation in the following words or to the like effect:**

**Her Majesty the Queen charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business on the pain of being guilty of an offence for which, on conviction, they may be sentenced to imprisonment for life. GOD SAVE THE QUEEN.**

Offences related to proclamation

**68. Every one is guilty of an indictable offence and liable to imprisonment for life who**

**(a) opposes, hinders or assaults, wilfully and with force, a person who begins to make or is about to begin to make or is making the proclamation referred to in section 67 so that it is not made;**

**(b) does not peaceably disperse and depart from a place where the proclamation referred to in section 67 is made within thirty minutes after it is made; or**

**(c) does not depart from a place within thirty minutes when he has reasonable grounds to believe that the proclamation referred to in section 67 would have been made in that place if some person had not opposed, hindered or assaulted, wilfully and with force, a person who would have made it.**

Causing disturbance, indecent exhibition, loitering, etc.

**175. (1) Every one who**

**(a) not being in a dwelling-house, causes a disturbance in or near a public place,**

**(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,**

**(ii) by being drunk, or**

**(iii) by impeding or molesting other persons,**



(b) openly exposes or exhibits an indecent exhibition in a public place,

(c) loiters in a public place and in any way obstructs persons who are in that place, or

(d) disturbs the peace and quiet of the occupants of a dwelling-house by discharging firearms or by other disorderly conduct in a public place or who, not being an occupant of a dwelling-house comprised in a particular building or structure, disturbs the peace and quiet of the occupants of a dwelling-house comprised in the building or structure by discharging firearms or by other disorderly conduct in any part of a building or structure to which, at the time of such conduct, the occupants of two or more dwelling-houses comprised in the building or structure have access as of right or by invitation, express or implied,

is guilty of an offence punishable on summary conviction.

Evidence of peace officer (2) In the absence of other evidence, or by way of corroboration of other evidence, a summary conviction court may infer from the evidence of a peace officer relating to the conduct of a person or persons, whether ascertained or not, that a disturbance described in paragraph (1)(a) or (d) or an obstruction described in paragraph (1)(c) was caused or occurred.

R.S., 1985, c. C-46, s. 175; 1997, c. 18, s. 6.

Trespassing at night

177. Every one who, without lawful excuse, the proof of which lies on him, loiters or prowls at night on the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction.

R.S., c. C-34, s. 173.

Common nuisance

180. (1) Every one who commits a common nuisance and thereby

(a) endangers the lives, safety or health of the public, or

(b) causes physical injury to any person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Definition

(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby

(a) endangers the lives, safety, health, property or comfort of the public; or

(b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.

R.S., c. C-34, s. 176.

## LIQUOR LICENCE ACT

### Unlawful purchase

27. No person shall purchase liquor except from a government store or from a person authorized by licence or permit to sell liquor. R.S.O. 1990, c. L.19, s. 27.

### Sale to intoxicated person

29. No person shall sell or supply liquor or permit liquor to be sold or supplied to any person who is or appears to be intoxicated. R.S.O. 1990, c. L.19, s. 29.

### Rules, persons under 19

30. (1) No person shall knowingly sell or supply liquor to a person under nineteen years of age. R.S.O. 1990, c. L.19, s. 30 (1).

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**Idem**

(2) No person shall sell or supply liquor to a person who appears to be under nineteen years of age. R.S.O. 1990, c. L.19, s. 30 (2).

**Definition**

31. (1) In this section,

"residence" means a place that is actually occupied and used as a dwelling, whether or not in common with other persons, including all premises used in conjunction with the place to which the general public is not invited or permitted access, and, if the place occupied and used as a dwelling is a tent, includes the land immediately adjacent to and used in conjunction with the tent. R.S.O. 1990, c. L.19, s. 31 (1).

**Unlawful possession or consumption**

(2) No person shall have or consume liquor in any place other than,

(a) a residence;

(b) premises in respect of which a licence or permit is issued; or

(c) a private place as defined in the regulations. R.S.O. 1990, c. L.19, s. 31 (2).

**Exception**

(3) Subsection (2) does not apply to the possession of liquor that is in a closed container. R.S.O. 1990, c. L.19, s. 31 (3).

**Intoxication**

(4) No person shall be in an intoxicated condition,

(a) in a place to which the general public is invited or permitted access; or

(b) in any part of a residence that is used in common by persons occupying more than one dwelling in the residence. R.S.O. 1990, c. L.19, s. 31 (4).

**Arrest without warrant**

(5) A police officer may arrest without warrant any person whom he or she finds contravening subsection (4) if, in the opinion of the police officer, to do so is necessary for the safety of any person. R.S.O. 1990, c. L.19, s. 31 (5).

**TRESPASS TO PROPERTY ACT**

**Trespass an offence**

2. (1) Every person who is not acting under a right or authority conferred by law and who,

(a) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or

(ii) engages in an activity on premises when the activity is prohibited under this Act; or

(b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier,

is guilty of an offence and on conviction is liable to a fine of not more than \$2,000. R.S.O. 1990, c. T.21, s. 2 (1).