

# **A DUTY TO CARE**

An Investigation into Municipal Licensing and Standards'  
Treatment of a Resident with Dementia

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## **1.0 The Complaint**

1. My office received a complaint that the City had acted unfairly in cutting down a private tree on the property of a senior with dementia at the request of a neighbour. As the initial complaint was made by the son of the affected individual and raised larger systemic issues about the manner in which the City treats people with diminished capacity, I investigated this matter on my own initiative.

## **2.0 The Investigation**

2. Ombudsman staff conducted extensive preliminary enquiries with Municipal Licensing and Standards Division (MLS) staff.
3. Notice of a formal investigation was sent to the City on June 2, 2010.
4. My investigator interviewed a number of employees in MLS, Urban Forestry and Toronto Building. She also interviewed the property owner's caregivers, the private arborists retained by the property owner's son and relevant experts on the mental health aspects raised by this complaint. My staff reviewed City documents, applicable legislation, policies and related research.

## **3.0 The Issues**

5. The investigation addressed the following systemic and individual issues.

(a) Systemic Issues

The information provided to my office raised concerns about MLS policies and procedures for communicating with and providing service to residents who have dementia or diminished capacity.

(b) Individual Issues

The investigation also examined the following individual issues:

- (i) the actions and conduct of the Property Standards Officer (PSO);
- (ii) the City's response to requests for information by the property owner's son;
- (iii) the manner in which MLS policies and procedures were applied when responding to this matter; and
- (iv) the process by which the City arrived at the decision to cut this tree.

## 4.0 The Facts

### 4.1 Tree Inspection

6. On August 5, 2009, a neighbour of Ms W asked the City to cut down a mature silver maple tree on Ms W's property. A branch had fallen and the neighbour believed the tree was unstable.
7. On August 6, 2009, a City Arborist and a PSO went to Ms W's property to respond to the complaint and inspect the tree. There are different accounts of what occurred during this visit.
8. The PSO noted in the Investigation Summary Notes that the visit took place at 11:15 a.m. and that he spoke with a caregiver. He told my investigator that the caregiver did not mention Ms W had dementia. He recalled that she said something about contacting Ms W's son. The PSO said he told the caregiver to have the son contact him if he wished to discuss the matter. He left his business card.
9. Ms W's two caregivers work separate shifts from 8:00 to 11:00 a.m. and 6:00 to 8:00 p.m. Ms W is alone at other times. Neither caregiver recalls speaking to the PSO on August 6, 2009. The morning caregiver remembered finding the PSO's business card in the kitchen when she arrived at work one morning during this period. She said Ms W occasionally answers the door when she is alone. She also stated that Ms W's illness is quite apparent to anyone speaking with her.
10. The City Arborist said that he observed the PSO speaking with an individual at the door of the residence. He did not see who it was or hear the conversation.
11. The City Arborist inspected the tree and documented that,

South leader of central stem failed at union approximately 10 meters [sic] above ground level, with evidence of included bark in the remaining central scaffold. The remaining scaffold is left with a weak stem union. The remaining stem also has a weak included bark union with central stem. Removal of the entire tree is appropriate, within a 180-day time frame.
12. The PSO advised my investigator that contact with the property owner during tree inspections is a courtesy rather than a requirement. The City has the authority to go on the property and conduct an inspection without the consent of the owner.

## 4.2 Order to Remove Tree

13. On August 12, 2009, the City issued an order by registered mail to Ms W pursuant to section 15.2(2) of the *Building Code Act*. The order stated that the inspection conducted on August 6, 2009 “revealed that in some respects the property does not conform with the standards prescribed by the Toronto Municipal Code, Chapter 629, Property Standards.”
14. The order attached a Schedule ‘A’, which cited the relevant section of the Toronto Municipal Code followed by the finding of the City Arborist. Schedule ‘A’ stated:

The items listed below are in violation of the Toronto Municipal Code, Chapter 629, Property Standards.

The tree, plant, limb or branch, which is located on the property is diseased, decayed or damaged and has not been removed or otherwise pruned to remove the diseased, decayed or damaged portion. As per the City of Toronto Arborist report: South leader of central stem failed at union approximately 10 meters [sic] above ground level, with evidence of included bark in the remaining central scaffold. The remaining scaffold is left with a weak stem union. The remaining stem also has a weak included bark union with central stem. **Removal of the entire tree is appropriate, within a 180-day time frame.** [Emphasis in original]

15. The order required that the tree be removed by Feb 8, 2010 and stated that Ms W could appeal the order on or before August 31, 2009.

## 4.3 Efforts to Contact MLS

16. Ms W’s son, Mr. Y, learned of the order in late August 2009, when he accompanied his mother to pick up the registered letter. He contended that the order did not provide a clear explanation of what was wrong with the tree. He left two voice mail messages for the PSO, who was identified in the order. Mr. Y advised that neither message was returned.
17. Mr. Y reached the PSO on his third try. He explained that his mother had severe dementia, making it impossible for her to understand or respond to the information that had been provided. He asked the PSO to clarify the order to help him understand what was wrong with the tree. He was concerned that removal would be costly and that his mother was not in a position to cover the expense. He also asked the PSO to inspect the recently constructed pool in the neighbour’s yard as he believed it might relate to the neighbour’s request to have his mother’s tree removed.

18. Mr. Y reported that the PSO told him “very curtly” that all the information was in Schedule ‘A’ of the order. He also told Mr. Y that the order would be dismissed if he provided an arborist report stating that the tree was safe. When Mr. Y asked to be referred to his Supervisor, the PSO told him he did not have one.
19. Mr. Y said that work commitments kept him out of the city much of the time during the next several months and he was unable to pursue the matter further at that time. No appeal was filed.
20. In January 2010, Mr. Y determined that the PSO’s manager was a Supervisor in Investigation Services. He called and told the Supervisor that he was unhappy with the PSO’s attitude and unwillingness to provide further information. He also told the Supervisor that he would have no further dealings with the PSO and wanted him removed from the case. He requested the Supervisor’s assistance in clarifying the order.

#### **4.4 MLS Enforcement of the Order**

21. On February 11, 2010, three days after the 180-day period for removal, the PSO and the City Arborist went to Ms W’s property. The PSO said he spoke to Ms W’s caregiver. He believed it was the same caregiver he had met on August 6, 2009. He said the caregiver asked him to speak with Ms W’s son. He told her to “have whoever is in charge call me.” The PSO also stated that he was not told about Ms W’s condition.
22. The caregiver recalled that the PSO told her during this visit that he had spoken to Ms W on his first visit. She recalled telling the PSO that Ms W has Alzheimer’s disease and would not have understood the information she was given. The caregiver stated that she asked the PSO to contact Ms W’s son and offered to provide his contact information, but the PSO told her he did not want it. Instead, he said Mr. Y could contact him, otherwise the tree would be cut down if no one got in touch with him.

#### **4.5 Communications – February to March 2010**

23. From February to April 2010, Mr. Y sent 10 e-mails to the Supervisor, attempting to obtain information about what exactly was wrong with the tree, what testing had been done and whether the tree could be pruned instead of cut down. His Councillor also contacted the Supervisor on his behalf. The Supervisor did not provide the requested information.
24. Instead, on February 19, 2010, the Supervisor sent an e-mail to Mr. Y and told him to contact the City Arborist for further information about the tree.
25. On March 2, 2010, Mr. Y advised the Supervisor by e-mail that he had called the City Arborist twice but his calls had not been returned.

26. The same day, the Supervisor responded that the tree was considered a potential hazard, not an imminent one. He also said in the e-mail:

Unless we receive by 12 noon on March 5th, a report from a Certified Arborist stating that the tree is safe and no remedial action thereto is required, or confirmation in writing that the tree is removed by then, City contractor will proceed with removal of the tree in the morning on Monday March 8, 2010.

27. Mr. Y was informed that the cost would be \$4,320 plus an administration fee of \$500, and that these expenses would be applied to the homeowner's property taxes.
28. The Supervisor's e-mail also said that, in addition to the City Arborist's report, MLS had received an arborist report from a third party. This report was attached to an undated cover letter from the neighbour who had requested the tree be cut down. The report was undated and referred to a red maple. (Ms W's tree was a silver maple.) It recommended that the tree be cut down.
29. The address where the tree was located was incorrect in the report and had been altered with a handwritten, unacknowledged notation. Neither the letter from the neighbour nor the attached report was date-stamped by the City. There was an entry by the PSO in the Investigation Summary Notes on August 26, 2009:

Received fax from neighbour has his own arborist report – no specific date line issued to be reviewed by management.
30. Neither the PSO nor the Supervisor knew when this arborist's report was completed or when it was received. There was no indication that they had reviewed this report, even though they had relied on it.

#### **4.6 Arborist Information**

31. On March 3, 2010, Mr. Y sent an e-mail to the Supervisor informing him that he had retained two arborists. Both professionals stated that the tree posed no immediate danger or imminent hazard. Mr. Y again asked the Supervisor why the tree needed to be removed and whether an arborist's report stating that the tree is not an immediate hazard would be sufficient. He also said that, for liability reasons, no arborist will certify that a tree is safe.
32. Both arborists stated that the tree had a structural defect but was not "diseased, decayed or damaged" as indicated in Schedule 'A' of the order.
33. The first arborist said the tree was healthy with branch unions that could potentially break. He stated that the tree could have been maintained by reinforcing it with two or three cables, costing approximately \$200 each. He



would not have recommended the tree be cut down. Further, the arborist said there are probably hundreds of trees in the city with comparable defects. The arborist's company has never been asked to cut down a tree because of the condition described in this case.

34. The second arborist stated that the tree could have been maintained with cables if the area being cabled was defect-free.
35. Both arborists stated that the recently constructed pool in the neighbour's yard appeared to encroach on to the six-metre protection zone prescribed for the tree under the Private Tree Protection by-law and the neighbour should have been required to obtain a "permit to injure a tree."
36. The City Arborist's information indicated that the tree was being cut because of a structural defect rather than a health issue. He stated that decay can be present with this particular branch defect when "included bark" is present. However, he had not examined the tree for decay. He did not describe the tree as diseased, damaged or decayed.
37. The City Arborist told my investigator that he did not believe the tree could be adequately maintained with cables, as they are not guaranteed to prevent branch failure. He acknowledged that there are possibly hundreds of trees in a similar condition around the city.

#### **4.7 Response to Requests for Information – March to April 2010**

38. On March 4, 2010, the Supervisor replied to Mr. Y's e-mail of the previous day. He said the order was based on the City Arborist's report confirming that the tree was in violation of section 11E of the Property Standards By-law; his mother was in violation of the confirmed order and that, if she did not have the tree removed, the City would do so on March 8, 2010.
39. Mr. Y's Councillor contacted the Supervisor on March 4 to request a two-week extension to the 180-day removal period. The Supervisor sent an e-mail that day to the City Arborist asking for his position on the Councillor's request.
40. The same day, the City Arborist replied that it was difficult to predict exactly when the remaining leader(s) on the tree would fall, and this is the main reason arborists will never say that a tree is safe. He said that if Mr. Y was prepared to install cables and follow up with annual inspections to ensure they were effective, it could buy some time for the tree.
41. In his response to the City Arborist that day, the Supervisor suggested that Mr. Y be asked to install the cables by the following weekend, and the extension could be given.

42. There were no further communications on the matter of cabling. The suggestion was never conveyed to Mr. Y.
43. The City Arborist also stated that the concerns Mr. Y had raised about the neighbour's removal of trees on his own property during his pool installation should be investigated.
44. The Supervisor then sent an e-mail on March 4 to Mr. Y's Councillor granting a two-week extension to allow him to obtain a report from a certified arborist stating that the tree was "safe" and no remedial action was required, or to have the tree removed. The Supervisor told the Councillor that no further extensions would be given.
45. Between March 9 and 12, Mr. Y sent a number of e-mails to the Supervisor in which he requested:
  - an investigation into possible by-law and construction infractions involving the pool that was built in the neighbour's backyard. He explained that the two private arborists he consulted stated that the neighbour's pool was dug too close to the tree on his mother's property, would have injured its root system and should have required a permit to injure the tree. He also advised that the neighbour had cut down protected trees on his own property
  - more details about the methods the City Arborist used to determine the condition of the tree
  - clarification of how the two-week extension related to his right to appeal, since the Supervisor had told him that the appeal period could not be extended
46. He did not receive a response.
47. On March 22, the City proceeded to cut down the tree. The caregiver told the PSO, who was on site, that Mr. Y wanted the wood left on the property.
48. On March 23, Mr. Y sent an e-mail to the Supervisor requesting an update on the investigation into the PSO's conduct that he had detailed over the phone in January 2010. He also asked for an update on the investigation into the construction of the neighbour's pool.
49. The Supervisor replied saying that he had forwarded Mr. Y's previous e-mails to the City Arborist. He also said that MLS has no jurisdiction over the construction of the neighbour's pool. Regarding the PSO's continuing involvement, the Supervisor stated that the PSO was "following the Division's guidelines with respect to investigation and by-law enforcement."

50. On March 24, the City finished cutting down the tree and took away the wood. Ms W's caregiver told Mr. Y that the PSO was present on the property. Mr. Y sent an e-mail to the Supervisor asking why the PSO was there when he had requested he be removed from the case. The Supervisor replied two days later and asked Mr. Y to submit details of his complaint about the PSO in writing.
51. Mr. Y did so on March 31. The Supervisor forwarded the complaint to the PSO for comment. The PSO responded that he had never spoken to Ms W. He had only left his business card with the caregiver and had not been given any contact information. He said that he did not give any documents to Ms W and never spoke with her son. The Supervisor did not convey this information to Mr. Y until June 10, 2010, following the removal of the tree and after my investigation had commenced.
52. On April 7, 2010, Mr. Y re-sent his March 31, 2010 e-mail to the Supervisor as he had not received a response. He repeated his request for more information from the City Arborist. He also told the Supervisor that another tree in his mother's backyard had been damaged when the tree was cut down.
53. The Supervisor wrote to the City Arborist on the same day asking for a response to Mr. Y's concerns. The City Arborist responded that he had determined the two trees cut by the neighbour had been authorized by permit. This information was not relayed to Mr. Y.
54. On April 9, 2010, the Supervisor again asked the City Arborist for his comments regarding the damage to the second tree. The City Arborist said that only the outer bark was damaged. This information was not given to Mr. Y.

## **5.0 Policies and Procedures**

### **5.1 MLS Operational Practice**

55. MLS Operational Practice #10B – Tree Protocol – states:

Upon attending the property the Officer should attempt to speak to the property owner on [sic] with regards to where the tree in question is located.

### **5.2 MLS Complaint Compliance Protocol**

56. MLS has a Complaint Compliance Protocol for investigating residents' complaints.
57. The complaint is to be reviewed and directed to the appropriate member of management. The Supervisor/Manager will review it and speak to the

complainant, the identified employee and any other relevant individuals. This investigation is to be completed in 10 days.

58. If the complainant is not satisfied with the Supervisor/Manager's decision, the matter will be referred to the head of that program area, who will investigate and advise the complainant of his/her decision, again within 10 days.
59. Should the complainant remain dissatisfied, the complaint is escalated to the Executive Director, who will review the findings and make any further appropriate inquiries within 10 days. If the complainant considers the matter unresolved, the complainant may be referred to the Ombudsman.

### **5.3 MLS Policies Regarding Dementia and Diminished Capacity**

60. The Supervisor stated that MLS has handled cases where property owners may have dementia or diminished capacity. He said that MLS does not have any policies, processes or procedures for responding to such individuals. He said they try to accommodate individual needs by communicating with an alternative person if they are aware of one.
61. He said the City's intent is that the property owner understand the order, but considers that it has met the service requirements when the order is issued to the registered owner(s) even if the person does not understand it.

### **5.4 Policies in Other Areas of the Toronto Public Service**

62. My staff canvassed nine City areas that have extensive interface with the public to determine what policies and procedures are in place to guide staff on how they should accommodate individuals with diminished capacity, mental health issues and vulnerabilities.
63. Different service areas apply different procedures tailored to the service they provide.
64. Four divisions informed my investigator they have procedures that focus on finding appropriate social supports to assist vulnerable clients, with one referencing a duty to accommodate people with disabilities, including those with mental health issues and illness.
65. Three divisions referred to the protocols under the *Accessibility for Ontarians with Disabilities Act*. One of these referred to the Customer Service Policy under that Act which states that "all staff are expected to be pleasant, courteous and respectful in all dealings and contact with all citizens of the City of Toronto".
66. One advised that it requests assistance from Public Health when it encounters an emergency situation.

67. Another has procedures to deal with individuals who are considered to have “psychiatric disorders”.
68. None of the nine canvassed have a policy or any procedures that expressly address the needs of persons with diminished mental capacity.

## **6.0 Ombudsman Findings**

### **6.1 The Fairness Lens**

69. I have considered the issues raised in this matter through a lens that encompasses substantive, procedural and equitable fairness. These three components of fairness have come into play in this matter.
70. Substantive fairness concerns the fairness of the decision itself. Decision-making is a process that begins at the first point of contact with the public. From clarifying the issues to gathering data and assessing the facts, the information gathered influences the ultimate decision. Generally, I would not look at the decision itself unless the process was sufficiently flawed that it may have been made on a faulty premise. In light of the procedural issues raised by this complaint, the substantive aspect of fairness is engaged.
71. Procedural fairness concerns how the decision was made – the steps to follow leading up to a decision being made. It includes the duty of fairness, which provides a member of the public with the right to notice that an adverse decision is going to be made, the right to respond to the decision maker and the right to an unbiased decision.
72. Equitable fairness involves how parties to a complaint are treated. It is about ensuring that people are treated fairly, not necessarily identically. In fact, treating people differently to provide access to the same result is critical. To intend to be fair is important but it is the result that matters.

### **6.2 Adverse Impact**

73. I have considered the issues in this matter at both the individual and systemic levels. Ms W, the property owner, is a senior with dementia who required not only accommodation but, as a member of a vulnerable group, she required specific service that would ensure fair treatment given her circumstances.
74. In light of Ms W’s circumstances, the lack of policy or process and the manner in which the City handled the situation have resulted in an unfair and adverse impact on an identifiable group of residents, those who experience dementia.
75. It should also be noted that this group of residents experience multiple disadvantages as most of them are seniors and the majority are women.

### 6.2.1. The Context

76. Dementia<sup>1</sup> is increasingly prevalent in Toronto. It is the most significant cause of disability over the age of 65. In 2010, more than 38,000 residents in Toronto live with dementia. By 2015, this is projected to be 42,000<sup>2</sup>.
77. Since age is a primary and unchangeable risk factor for the disease, the growth of the problem will accelerate as the population ages.
78. It is also significant that many seniors with dementia live alone<sup>3</sup>.
79. Dementia is described in the research as an impending crisis for the health system with consequent economic implications. With such an alarming rate of growth, this sector of Toronto's population will inevitably come into more frequent contact with government because of their needs.
80. Many governments have taken steps to make dementia a priority. This is not the case in Canada although some jurisdictions have begun to address the issue. In this province, the *Ontarians with Disabilities Act, 2001*, applies to Toronto and stipulates accommodation for those with mental and physical capacity limitations. *The Accessibility for Ontarians with Disabilities Act, 2005*, expanded the scope of the legislation.

### 6.2.2. Failure to Address the Needs of Residents with Dementia

81. Equitable fairness explicitly takes into account the resident's particular circumstances especially her vulnerable situation, in this case, Ms W's dementia. It should not surprise us that persons with diminished capacity are likely to have greater difficulty in understanding allegations made against them, in responding to them and in having their complaints dealt with in an appropriate and responsible manner.
82. The events at the source of this complaint would have been unsettling for any individual. The City was taking enforcement action against a resident. An officer with the authority to trespass, investigate and issue infraction notices presented himself at the residence and told the property owner she was alleged to be in

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<sup>1</sup> "Dementia refers to a large class of disorders characterized by the progressive deterioration of thinking ability and memory as the brain becomes damaged." These include Alzheimer's disease, the most common form of dementia. Symptoms of dementia include loss of memory, judgement and reasoning and affects the ability to communicate. See *Rising Tide: The Impact of Dementia on Canadian Society*, 2010 Alzheimer Society.

<sup>2</sup> Robert W. Hopkins and Julia F. Hopkins, "Dementia Projections for the Counties, Regional Municipalities, and Districts of Ontario", *Geriatric Psychiatry Programme Clinical / Research Bulletin*, Number 15, December 2005.

<sup>3</sup> In 2001, 22% of seniors in Canada aged between 65 and 74 and 31% of seniors aged 85 and over, lived alone. See *A Portrait of Seniors in Canada*, Statistics Canada, 2006.

violation of a property standard under the Code. The PSO was aware that the information he provided required a response from the resident and that inaction by the resident could have serious consequences.

83. There must be procedures in place to ensure that residents understand notices and orders made against them and that residents have a meaningful opportunity to answer. This need is particularly heightened when dealing with a resident who has dementia or diminished capacity.
84. MLS has neither a policy nor a process for serving residents who lack capacity. The Supervisor stated that if MLS is aware of a resident's mental health status and there is an alternative person available, it will communicate with that person. This means that if there is no other person involved, MLS apparently ignores the needs of a vulnerable resident.
85. MLS failed to follow even its own practice in this case. The PSO declined the son's contact information. This is not a reasonable standard of service. The fact that the City is not required to have personal contact with the property owner prior to serving notice does not excuse this conduct. Once MLS had attempted to contact Ms W and became aware that she might not be competent, there should have been follow-up. MLS had an obligation to execute this step in a manner that achieved the same result for an individual with apparent capacity issues as for one without.
86. It is inexcusable that MLS chose to proceed without regard for the needs of this resident once her vulnerability became apparent. MLS was aware of Ms W's condition yet chose to ignore it with the full knowledge that her son was available to address the problem. MLS failed to accommodate Ms W by not following its own stated practice or adapting to the situation in any way.
87. Public service is most accessible to those who can navigate the established processes. It favours those with education and those who can meet the bureaucracy on its own terms.
88. In this case, the resident is marginalized and is representative of many others in similar situations. In fact, many residents with dementia do not have a family member readily available to advocate on their behalf.
89. The absence of policy or an established process to accommodate persons with dementia or diminished capacity is a gap MLS must address. At a systemic level, its absence creates an adverse impact on what is already a vulnerable group. A process to fairly serve the needs of those with dementia is especially urgent as the population ages.
90. It is time to address this gap. The City has recognized the need to respond to an aging population, and has, as part of the global Age Friendly City movement,

considered steps it could take to provide access and equity of City services for older residents. However, the measures proposed appear to focus primarily on physical disabilities that may interfere with the ability of the aging population to access Toronto's spaces, facilities and services.

91. The City in general has not addressed barriers encountered by those with dementia and diminished mental capacity. In particular, MLS has failed to address these barriers.
92. This complaint clearly demonstrates that such barriers exist. The City cannot hope to be accessible, equitable or age friendly to residents with dementia unless it has ensured that barriers to this population have also been identified and removed.

### **6.3 Unreasonable Conduct**

#### **6.3.1. Actions of the Property Standards Officer**

93. The PSO failed to respond adequately to the needs of the property owner by not taking any steps to communicate in a responsive or responsible way with the appropriate person during the initial inspection before issuing the order.
94. The PSO's information regarding the August 6 inspection is different from the account of the caregiver. The PSO says he spoke with a caregiver during his August 6, 2009 visit and was offered contact information for Mr. Y but was not told that Ms W had dementia. The City Arborist did not know who the PSO spoke to or what was said. Both caregivers say they did not speak with anyone from the City on that day. One caregiver said she found the PSO's business card when she arrived at Ms W's home.
95. I find the accounts of the caregivers more credible. Their recollections are consistent with the timing of their shifts (8:00 to 11:00 am and 6:00 to 8:00 pm) and the PSO's visit which occurred at 11:15 am. Neither caretaker was working at the time of the PSO's inspection. In addition, I find the caretakers more likely to remember what would be an uncommon event for them, than the PSO who conducts inspections regularly as part of his duties.
96. I believe that the PSO spoke to Ms W that day. It should have been apparent to him that she could not understand the information. The caretakers, Mr. Y and my investigator's experience in communicating with her all support Ms W's obvious condition.
97. The PSO knew that the procedure was to go to the residence and tell the property owner the purpose of the visit. The MLS Operational Practice says the officer should try to speak with the property owner about the location of the tree.



98. MLS had an obligation to effect the purpose of the visit in a meaningful way. If it was obvious the property owner was not able to understand the information, the PSO should have attempted to speak with an alternative contact. He did not. Even by his own account, he was asked to contact Ms W's son but decided not to do so. This is unacceptable.
99. Mr. Y complained that the PSO was dismissive, rude and obstructive when he spoke with him later in August 2009.
100. I do not accept the PSO's assertion that he never spoke with Mr. Y. The latter's account of his telephone conversation with the PSO in August 2009 was detailed, consistent and credible. He was seeking clarification and called the person named on the order, the PSO. Mr. Y subsequently complained to the PSO's Supervisor in early 2010 about the PSO's conduct. This contact was acknowledged by the Supervisor. There would have been no reason for Mr. Y to subsequently seek out the PSO's Supervisor and inform him of his concerns about the PSO's conduct if there had been no contact.
101. The PSO's outright denial of contact with Mr. Y calls into question his credibility in general. I find that the PSO, when asked, told Mr. Y that he did not have a Supervisor. Mr. Y is more credible on this matter. Again, this is unacceptable conduct on the part of the PSO.
102. MLS says it puts the PSO's name and contact information on the order so that residents can ask questions. This is precisely what Mr. Y did, yet the PSO told him that all the information he needed was in Schedule 'A' of the order. Schedule 'A' is extremely difficult to understand as I find at paragraph 107 of this draft report. Mr. Y was simply seeking information and clarification. Despite the reasonableness of his queries, MLS did not provide him with the information.
103. I also find the PSO's conduct on the second visit to the property in February 2010 to be unacceptable. It is undisputed that the PSO spoke to Ms W's caretaker who asked him to speak with Ms W's son which he declined to do. The caretaker said she told the PSO Ms W has Alzheimer's disease and would not understand the information she was given. The PSO denies he was told about Ms W's condition.
104. For the reasons noted above, the account of the caretaker is more credible. It is unlikely that she would have offered contact information for Ms W's son without saying why. Regardless, the PSO declined to contact Mr. Y. The PSO was told that the property owner was not able to understand the information, was offered an alternative contact, but decided not to act on that information. This conduct is unacceptable.
105. Further, given that it was the PSO who declined the caregiver's offer of Mr. Y's contact information, it is disingenuous that he would attempt to justify his failure to contact him by saying that no contact information was given to him.

106. The PSO's conduct throughout was dismissive and cavalier.
107. Further, MLS failed to respond appropriately to Mr. Y's complaint about the PSO's conduct.
108. According to the MLS Complaint Compliance Protocol, the matter should have been investigated. Instead, the complaint was ignored from the Supervisor's first telephone conversation with Mr. Y in January until March 23, 2010, when the Supervisor told Mr. Y that the PSO had just been "following Division guidelines."
109. When Mr. Y questioned this response, he was asked to put his complaint in writing. Mr. Y did so within a week, two months after he first made his complaint. His submission of March 31, 2010, was forwarded to the PSO for comment. Nothing further occurred until June 10, 2010, when the Supervisor told Mr. Y that the PSO had not been given his contact information, that the PSO had never spoken to Mr. Y, and that the PSO was required to be on site when the tree cutting was done. The City did nothing else in response to Mr. Y's complaint.

## **6.4 Inadequate Process**

### **6.4.1. Content of Notice Served**

110. Schedule 'A' is awkward, misleading and difficult to understand. It partially cites the section of the Code that refers to dead, diseased, decayed or damaged trees but the information is incomplete. It then provides a very short statement about the condition of the tree, which comprises the City Arborist's full report, such as it was, but which does not describe the problem clearly.
111. Although Schedule 'A' may make sense to an arborist, the document's intent is to inform the resident, presumably a layperson, of the reason for the City's decision to destroy the tree.
112. Schedule 'A' misled Mr. Y into thinking that the tree was diseased, and he directed the two arborists that he retained accordingly.
113. While the document may satisfy the minimum requirements of the law, it is woefully inadequate for a property owner who is entitled to a clear report with cogent reasons for the City's actions.

### **6.4.2. By-law Enforcement Process**

114. Mr. Y believed the neighbour may have wanted this tree removed because it overhung his yard and interfered with the enjoyment of his newly constructed pool. Mr. Y noted that the neighbour had cut down other large healthy trees on his property.

115. The private arborists told him the neighbour's pool encroached upon the protection zone of his mother's tree and may have injured its root system. He was troubled that the City had allowed this construction without requiring a permit to injure the tree and without any notice to his mother. He was concerned that the City's handling of the neighbour's pool construction and the neighbour's complaint might together indicate bias in the neighbour's favour.
116. My investigation did not find evidence of such bias on the part of the City. The PSO handled both the neighbour's pool enclosure inspection and his complaint about this tree, but this appears to have been coincidence only.
117. The investigation did not reveal a connection between the City's removal of Ms W's tree and the pool construction in the neighbour's yard, since the removal was for structural defects.
118. That said, my review suggests inconsistent by-law enforcement by the City.
119. The neighbour's complaint of an unstable tree on Ms W's property was acted on the next day. On the other hand, Mr. Y repeatedly requested that the City look into possible by-law and construction infractions by the neighbour during the pool construction and the impact on his mother's tree.
120. Nothing was done in response to his complaint until after my investigation had commenced, when he was informed simply that the two trees cut by the neighbour had been authorized by permit.
121. I can understand how Mr. Y might perceive bias in these events.

## **6.5 Failure to Communicate**

122. MLS failed to communicate adequately throughout the life of this matter. The division sent a notice to the property owner even though it was alerted that she had dementia. Once Mr. Y contacted MLS, the latter accepted him as the property owner's representative, yet continuously neglected to respond appropriately to his requests for information.
123. MLS failed to convey critical data.
124. While it is unfortunate that Mr. Y interrupted his pursuit of the matter from August 2009 to January 2010, the difficulty in obtaining prompt, clear and complete responses to his inquiries occurred at every juncture of his dealings with the City.
125. Communications by MLS were woefully inadequate. In fact, they constituted unacceptable public service at its most basic.

126. Between February and April, 2010, Mr. Y requested but did not receive clarification of:
- the problem with the tree that made removal necessary and the basis on which the City Arborist had made his determination
  - why MLS would request an arborist's report stating the tree was safe when no arborist would make such an undertaking
  - whether the neighbour's pool installation affected the health of the tree
  - what action had been taken to follow up on his complaints about the conduct of the PSO
  - why the cut wood was not left on his mother's property as he had requested.
127. It was not until June 10, 2010, five months after his first conversation with the Supervisor, and after I notified the City of my intention to investigate, that Mr. Y received more information about the perceived problem with the tree. Even then he was not told whether the City had followed up on his questions about the impact of possible permit and by-law contraventions by the neighbour. Furthermore, he did not receive a clear response to his complaint about the PSO.
128. The City's failure to inform Mr. Y about the City Arborist's view that the structural integrity of the tree could be maintained with cables was an egregious lapse in the City's responsibility to communicate information. This was critical information. It was obvious that Mr. Y wished to avoid destroying the tree and was seeking options throughout. If the City had advised him of this alternative, he might have been able to save the tree and avoid the \$4,820 expense of its removal. He would also have been spared the ongoing aggravation of attempting to obtain information from the City.
129. The MLS responses to what were legitimate requests for accurate and complete information are unacceptable.
130. The fact that the resident in question has dementia makes the situation all the more disgraceful.

## **6.6 Erroneous Decision**

### **6.6.1. Misapplication of the Toronto Municipal Code**

131. The City relied on section 629-11E of the Toronto Municipal Code to order the removal of Ms W's tree. This section applies only to "dead, diseased, decayed or damaged" trees. Based on the facts, the tree was not any of these. The City Arborist's inspection did not identify disease, decay or damage of the tree. None

of the arborists, including the City's, described it as dead, diseased, decayed or damaged. The private arborists described it as healthy with unstable branch unions. The City Arborist indicated to the Supervisor that the tree was being cut for a structural reason rather than its health.

132. MLS incorrectly applied this section. On the evidence, the tree did not fall within the definition of trees that could be ordered removed. This section does not give the City the authority to destroy healthy but unstable trees.
133. I am troubled by the subsequent MLS reliance on an erroneous arborist report, submitted by the neighbour, to support its decision.
134. I share the City's concern with ensuring public safety. However, its actions must be based on the correct legislation. I note that, although this is not the situation here, section 105.1 of the *City of Toronto Act* allows the City to remove trees that pose an imminent danger. None of the arborists found the tree to pose such a danger. The City Arborist described it as a potential hazard, not an imminent one. Further, the MLS order allowed the tree to stand for six months before removal.

#### **6.6.2. Misinterpretation of the Toronto Municipal Code**

135. MLS further misinterpreted the Code. Before a property owner is required to remove a tree at their own expense, the onus is on the City to establish that there has been a violation of property standards under the Code. When Mr. Y sought to challenge the City's decision, he was told he had three days to provide a report stating that the tree was safe or the City would remove it.
136. Given the language of section 629-11E, MLS in requiring this report, reversed the onus onto the resident, and imposed a requirement that was not required by law and which was impossible to satisfy. Nothing in the section requires that a tree be "safe". MLS set a standard for Mr. Y that the City's own arborist acknowledged was impossible to meet.
137. Ultimately, there was no need to cut the tree down. There was an option to cable the tree to ensure its structural integrity, as confirmed by the private arborists. The City Arborist raised the option of cabling with the Supervisor in March 2010 and the Supervisor suggested asking Mr. Y about installing cables the following weekend. This option was much cheaper and was one which Mr. Y would have been prepared to do. However, he was never given the chance because he was never told. Instead, the tree was cut down, leaving Ms W with a substantial bill.
138. The City's actions reflected a tunnel vision that inexorably led to the cutting of the tree, despite Mr. Y's actions, those of his Councillor, and the existence of an acceptable option of cabling.
139. These actions stand in stark contrast to the City's public policy on tree preservation.

## 7.0 Ombudsman Conclusions

140. Toronto Municipal Code Chapter 3, section 3-36 provides that the Ombudsman, in undertaking an investigation, shall have regard to whether the decision, recommendation, act or omission in question may have been:
- A. Contrary to law;
  - B. Unreasonable, unjust, oppressive or improperly discriminatory;
  - C. Based wholly or partly on a mistake of law or fact;
  - D. Based on the improper exercise of a discretionary power; or
  - E. Wrong.
141. There are generally accepted definitions of these terms in both case law and the ombudsman field. I have considered those definitions in reaching my tentative conclusions.
142. Specifically, I have reached the following conclusions:
- (1) The failure by MLS to develop a policy and to put in place procedures to address the needs of residents with dementia or diminished capacity resulted in an adverse impact on this group and is improperly discriminatory.
  - (2) The PSO's failure to contact the property owner's son when capacity issues of the property owner were apparent and when he was offered the son's contact information, was unreasonable and unjust.
  - (3) The PSO's refusal to provide basic information in response to Mr. Y's inquiries and his cavalier and dismissive conduct towards him, were unreasonable.
  - (4) The MLS failure to investigate Mr. Y's complaint about the conduct of the PSO in accordance with the Complaint Compliance Protocol was unreasonable.
  - (5) The MLS order was difficult to understand, misleading and failed to provide clear grounds for the removal of the tree, and was therefore unreasonable.
  - (6) The Supervisor's failure to provide Mr. Y with clear answers to his requests for information about the decision to destroy this tree was unreasonable.

- (7) The MLS misapplication of section 629-11E of the Toronto Municipal Code was a mistake of law.
- (8) The MLS subsequent reliance on an erroneous arborist report, submitted by the neighbour, to support its tree removal decision was a mistake of fact.
- (9) The requirement imposed by MLS on Mr. Y to provide proof that the tree was “safe”, when the City Arborist acknowledged that it was one that was impossible to meet, was a mistake of law, unreasonable and unjust.
- (10) The MLS failure to communicate the cabling option to Mr. Y was unreasonable and unjust.

## **8.0 The City’s Response**

143. In accordance with section 172 (2) of the *City of Toronto Act*, I notified the City of my findings and recommendations to provide it with an opportunity to make representations.
144. The City did not dispute my findings, accepted my recommendations, and acknowledged that I had identified “a number of issues that require our immediate attention to address a range of systemic issues.”
145. The City notified me of the increasing frequency of situations involving enforcement and personal health challenges and that it has created a Multi-Jurisdictional Enforcement Team to deal with the growing challenge of providing service for vulnerable adults.
146. I have been informed that MLS will develop more effective working relationships with staff in Parks, Forestry and Recreation, through training and revision of its Operational Practice, to avoid a recurrence of the circumstances of this case.
147. The City acknowledged that its service delivery fell below an acceptable standard in this case, and indicated that this will be addressed. The City said that MLS will take steps to clarify, and ensure adherence with, its complaint protocol.

## **9.0 Ombudsman Recommendations**

148. I have taken into account all the evidence gathered through this investigation in arriving at my recommendations.
149. Recommendations 1 to 13 are made in the public interest to address the systemic issues arising from this complaint. They are intended to put in place the necessary policy and processes to prevent situations such as this from occurring in the future.

I recommend:

- (1) That MLS develop a Policy, in consultation with the Medical Officer of Health and other appropriate bodies such as the Alzheimer Society of Toronto, the Advocacy Centre for the Elderly and the Centre for Addiction and Mental Health, that addresses the needs of residents with dementia or diminished capacity.
- (2) That the Policy follow best practice by clearly setting out its purpose and objectives. The Policy should include performance standards, timelines, and communications and accountability mechanisms. The Policy should be well publicized.
- (3) That in keeping with this Policy, MLS develop a procedure for providing full and proper notice to property owners and residents to accommodate the needs of residents with dementia or diminished capacity, where it has such knowledge or ought reasonably to have such knowledge.
- (4) That, as applicable, MLS take steps to determine if there is someone responsible for the person's affairs and make every reasonable effort to bring the matter to that person's attention.
- (5) That, in cases where there is no apparent representative, the MLS official bring the matter to the attention of his or her Supervisor.
- (6) That MLS put an Escalation Protocol in place that enables management access to expert advice.
- (7) That MLS deal with such situations in accordance with the established Policy and accompanying procedures.
- (8) That MLS provide my office with a copy of the Policy and accompanying procedures, no later than March 1, 2011.
- (9) That the Executive Director of MLS send the Policy and accompanying procedures to the field no later than March 30, 2011, and provide my office with a copy.
- (10) That MLS ensure its notices, orders and schedules provide sufficient information in order that the recipient can understand its actions.
- (11) That MLS develop a service standard to ensure that a resident is provided with clear, prompt and complete answers.



- (12) That MLS follow its Complaint Compliance Protocol and that all managers be trained on its provisions.
- (13) That employees and managers be held accountable for all aspects of their duties and performance managed accordingly.

Recommendations 14 to 17 relate to the individual aspects of the complaint. I recommend:

- (14) That by December 15, 2010, the Executive Director of MLS provide Ms W and Mr. Y with a written apology for the actions and omissions noted in these investigation findings.
- (15) That by December 1, 2010, MLS consults with my office on the draft of the above apology prior to its issuance.
- (16) That the City forthwith reverse the \$4,820.00 levy for the removal of this tree, and all associated fees and accrued interest, from Ms W's tax bill.
- (17) That the City compensate Ms W for the loss of her tree by planting on her property a replacement tree, with a minimum diameter of 20 centimetres, in Spring 2011, in consultation with Mr. Y.

[ Original Signed ]

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Fiona Crean  
Ombudsman  
November 19, 2010

## 10.0 Appendix A – Relevant Legislation

Section 15.1 (3) of the *Building Code Act*, 1992 S.O. 1992, c.23 states that the council of a municipality may pass a by-law to prescribe standards for the maintenance and occupancy of property within the municipality, and require property that does not conform with the standards to be repaired.

The City's property standards are set out in section 629 of the Toronto Municipal Code (the Code). Section 629-11E of the Code states that:

A tree or other plant, or a limb or branch or it [sic], that is dead, diseased, decayed or damaged shall be removed from the property or otherwise pruned to remove the dead, diseased, dying or dangerous portions of the tree or plant.

Section 15.2 (1) of the *Building Code Act* provides that,

Where a by-law under section 15.1 is in effect, an officer may, upon producing proper identification, enter upon the property at any reasonable time without a warrant for the purpose of inspecting the property to determine,

- (a) whether the property conforms with the standards prescribed in the by-law; or
- (b) whether an order made under subsection (2) has been complied with.

The order to remove the tree at issue in this case was made pursuant to subsection (2), which states that,

An officer who finds that a property does not conform with any of the standards prescribed in a by-law passed under section 15.1 may make an order,

- (a) stating the municipal address or the legal description of the property;
- (b) giving reasonable particulars of the repairs to be made or stating that the site is to be cleared of all buildings, structures, debris or refuse and left in a graded and levelled condition;
- (c) indicating the time for complying with the terms and conditions of the order and giving notice that, if the repair or clearance is not carried out within that time, the municipality may carry out the repair or clearance at the owner's expense, and

(d) indicating the final date for giving notice of appeal from the order.

Section 15.2 (3) of the *Building Code Act* provides that:

The order shall be served on the owner of the property and such other persons affected by it as the officer determines and a copy of the order may be posted on the property.

Section 27 states that,

(1) A notice or order required by this Act to be served may be served personally or by registered mail sent to the last known address of the person to whom notice is to be given or to that person's agent for service.

(2) If a notice or order is served by registered mail, the service shall be deemed to have been made on the fifth day after the day of mailing unless the person to whom the notice or order is given or that person's agent for service establishes that, acting in good faith, through absence, accident, illness or other unintentional cause the notice was not received until a later date.

Section 105.1(2) of the *City of Toronto Act* also makes provision for the immediate removal of dangerous trees, as follows,

105.1 (1) The City may enter on land, without notice to the owner, tenant or occupant of the land, to inspect a tree located on the land that, in the opinion of the city, is in a condition creating an immediate danger to persons or property.

105.1 (2) If, upon inspection under subsection (1) or under subsection 375 (1) in respect of a bylaw described in subsection (3), a tree on the land appears, in the opinion of the City, to be in a condition creating an immediate danger to persons or property, the City may enter on the land after making reasonable attempts to notify the owner, tenant or occupant of the land and remove the tree or otherwise eliminate the condition creating the immediate danger.

Subsection 813-10 of the Code provides that,

No person shall injure or destroy any tree, including a multi-stem tree having at least one stem that has a diameter measurement of 30 centimetres or more measured at 1.4 metres above ground level in accordance with this article, unless authorized by permit to do so.