



# Ontario Superior Court of Justice decision on the Rural Low Level Radioactive Waste (LLRW) Fund

## WHAT YOU SHOULD KNOW

On June 30, 2016, the Ontario Superior Court of Justice provided a decision in the case of *Angus & Ross v The Municipality of Port Hope* regarding the \$10 million rural Low Level Radioactive Waste (LLRW) Fund.

**Council has instructed lawyers to proceed with an application to appeal the decision to the Court of Appeal.**

## What does the decision say?

- The rural (Ward 2) LLRW Fund is a valid non-charitable purpose trust, for which the Municipality is trustee. The purpose of the trust is to defray (that is, pay some or all) Municipal taxes in the rural area.
- The Court decided the way the Municipality managed the rural LLRW Fund was not in strict accordance with the agreement.
- The Trust violates the common law rule against perpetuities, meaning the Trust cannot go on indefinitely.
- The Trust would have been invalid altogether but for the saving provisions of s.16 of the *Perpetuities Act*, which allows the Trust to exist for 21 years. The Trust will become invalid in less than six years on April 12, 2022, at which time the Municipality must apply to the Court to decide what will happen with any remaining undistributed funds.
- When the Canadian Nuclear Safety Commission (CNSC) granted the LLRW site licence on October 16, 2009, the restriction on the encroachment of the \$10 million capital was eliminated.
- The Municipality is required to prepare and provide an “accounting” regarding the manner in which the funds have been used within 120 days (from June 30, 2016).
- No individual property owner has any personal legal claim to the funds, or to benefit directly from its use.

## What does the judgment mean for the Municipality and its ratepayers?

If the judgment remains as it stands today, it will have a number of implications for rural taxpayers and for the Municipality of Port Hope:

- Within the legal framework of a non-charitable purpose trust, the beneficiary to the Trust is the *purpose*, which in this case, is the defrayment of municipal taxes in the rural area. Ratepayers may not directly benefit from the Trust, for example, making a personal claim to the funds, but rather benefit only indirectly through the reduction or offset of municipal taxes.
- It will be necessary for the Trust to retain a trusts lawyer (at the expense of the Trust) to provide advice and assistance in the administration of the trust and the performance of obligations.
- In accordance with Schedule 8, the Trust will deploy up to 8% of the fund on an annual basis, to the abatement of rural taxes.
- As a trust, the rural LLRW Fund will collapse in April 2022, therefore failing in the original intent to create an indefinite and lasting legacy for rural residents into the future. At that time, the matter will be further determined by the court, with the distinct possibility that any remaining monies in the Fund will revert to the original provider or “settlor” of the fund, being the Government of Canada as stated by Justice McCarthy. This is a consequence of s. 16 of the *Perpetuities Act* and the law of trusts. Due to the 8% limit on annual distributions, there is likely to be more than \$6 million in the fund at 2022 which may be completely lost to the Municipality and rural taxpayers.

- As a consequence, while rural taxpayers will receive more tax relief in the short term (i.e. the next 5 years), they will likely receive much less over the long term.
- Unlike municipalities, non-charitable purpose trusts are typically taxable entities, and therefore the decision may raise serious tax implications. Tax counsel will be required by the Municipality (at the expense of the trust) to advise of its obligations as trustee of the trust with respect to tax issues. At a high level, possible tax implications include:
  - A requirement to file returns with the Canada Revenue Agency (CRA) for prior years.
  - The Trust earned income every year, and was therefore required to pay tax on any income that it did not completely distribute in the year.
  - The Trust is required to deal with the CRA with respect to unfiled returns, and to pay taxes. The trust will face potential liability for (i) unpaid taxes; (ii) interest on unpaid taxes; and (iii) penalties.

### **Why were the funds managed by Investment Counsel instead of a Trustee?**

Following receipt of the rural \$10M LLRW Hosting Grant in 2001, three separate investment companies - Royal Trust, TD Canada Trust and CIBC/TAL - were approached regarding management of the fund. In addition, advice was also provided by a third party financial advisor. Numerous concerns and considerations were identified, including costs, complexity and the eventual time restrictions if established as a trust.

The Council of the newly amalgamated Municipality of Port Hope established the "Ward 2 Host Community Fee Committee" (By-law 22/2002) to review how to establish the "Township of Hope Fund". Members of the Committee included elected chair Ian Angus, the Mayor at that time and four members of the rural area. After several meetings, the Committee recommended to Council a revised Schedule 8 of the legal agreement pertaining to the Hope Township Fund to allow for the option of an investment advisor or a trustee. Based on the recommendation of the Ward 2 Host Community Fee Committee, Council revised the LLRW agreement with the Federal Government.

### **How has the fund been used in the past?**

We understand that for most rural taxpayers, the primary concern is how the fund has been used. While some of the fund was used to directly reduce Municipal taxes, some money was allocated towards the Municipality's general operating and capital budgets, and infrastructure reserves that would have otherwise required an increase in the tax levy.

Council has considered transferring money back into the rural LLRW Fund, which was included in the 2015 settlement agreement proposed and rejected by the two applicants of the legal challenge.

### **Where would the money come from?**

The source of money, if added back into the fund, is yet to be determined. It should be noted that some of the money remains in the municipal infrastructure reserves, but these reserves are already underfunded. Money used to reduce general operating or capital costs in past years has already been spent.

It is also important to note that Schedule 7 of the LLRW legal agreement states that the urban LLRW Fund is "for the exclusive benefit of the ratepayers of the former Town of Port Hope" (urban area). The amalgamation order also requires the reserves of the former Port Hope Hydro Commission "shall only be used for the benefit of the ratepayers of the geographic area of the former Town of Port Hope." If the Municipality is to begin reviewing past use of one fund, it should do so for more than one fund in order to be equitable. Any subsequent adjustment to any fund will result in numerous impacts to our community.

### **How are the funds currently used?**

This Council, beginning with our first budget in 2015, has used the earnings from both the rural and urban LLRW funds to directly reduce Municipal property taxes for rural and urban ratepayers respectively. We have used 80% of the earnings in the prior year to reduce taxes and left the remaining 20% of earnings in the fund to generate additional earnings and offset the increasing cost of living.

This decision was made with consideration to the LLRW agreement that anticipates earning 10% annually, while applying up to 8% of the value of the fund for defraying taxes, and hence increasing the value of the fund over time.

## **What happens next?**

While the legal agreement indicates the intent of Hope Township Council to establish a fund to benefit rural taxpayers on an ongoing basis, upon commencement of attempts to establish a trustee agreement during 2001/02, it became clear there would be an end to the Trust in the future.

The draft trustee agreements identify that when the restriction on the life of the Trust occurred, the intention was for the funds to be transferred to a municipal reserve fund which maintained the original tax defrayment purpose.

**With the outcome of the current judgment, the future of the fund in 2022 is uncertain and will need to be determined by the court.**

Our initial thoughts when reading Justice McCarthy's decision were that a similar arrangement as previously intended would be the most likely outcome in 2022, however, it appears that may not be the case.

After conferring with legal counsel, it is our understanding that when the Trust becomes invalid in the year 2022, the funds would most likely revert not to the ratepayers or the Municipality, but to the "settlor" of the funds, being the Federal Government of Canada, as described in the judgment.

While the eventual outcome remains unknown, the risk of this significant fund not continuing for the benefit of rural residents defies the entire intention of Hope Township Council, and is certainly not in the best interests of rural residents in the future.

While the issue of costs, income taxes, and other consequences of establishing a trust in accordance with the current judgment are similar to those considered by the Ward 2 Host Community Fee Committee in 2002, the decision raises a much more significant concern of the total loss of any remaining funds in under six years.

This Council has a responsibility to take all steps within our power to prevent this unfortunate outcome from occurring. While we were hoping to have an end to this matter that would enable the community to move forward, Council was instead faced with the difficult decision of whether to appeal the current outcome in court.

**Given that the consequences of not appealing far outweigh the impact of doing so, Council has decided to appeal the decision to the Court of Appeal.**

Council will continue to perform our duty to act in the best interests of those we represent, and we thank you for your patience in this matter. We will continue to provide updates as the legal process permits.

Respectfully,



**Mayor Bob Sanderson**  
**On behalf of Council for the Municipality of Port Hope**