

Tattooing - From Taboo to Mainstream to Class Actions

Municipalities and public health units are facing new legal challenges today as the result of a fashion trend that has seen a dramatic increase in popularity – the tattoo. In Ontario, we are starting to see multimillion-dollar class action lawsuits being launched against public health units and the municipalities under which they are established. The plaintiffs allege that the municipality and the local public health unit owed them a duty of care to oversee, supervise and inspect the particular tattoo parlour and were negligent in carrying out this duty. The allegations still remain to be proven.

Tattoos – From Taboo to Mainstream

Tattooing or “inking” has gone from taboo to mainstream in the last 10 to 15 years, especially among younger adults and middle aged women – in large part because the tattoo is seen as up-market and hip. The process is viewed as an “artistic practice”. The surge in popularity of tattoo artistry is evidenced by reality TV shows such as “Miami Ink”, “L.A. Ink” and “Tattoo Wars”. To keep up with this new trend, tattoo shops are opening at a quick pace.

There is also a growing perception amongst the public that the health risks associated with tattooing are decreasing. We are seeing a rise in the “professionalism” of the business and the shops opening in popular shopping districts or trendier areas of town place a greater emphasis on cleanliness and sanitary conditions.

The public’s perception is also fueled by the fact that in some jurisdictions tattoo parlours must be licensed to conduct business. In Ontario, the Infection Prevention and Control in Personal Services Settings Protocol (2008) requires public health units to conduct annual inspections.

Tattooing – The Risks of an Unregulated Profession

While tattoos have become part of our mainstream culture – and yes, they can be done safely – if improperly administered, tattoos can result in a number of life-threatening illnesses such as hepatitis B, hepatitis C and HIV among other bacterial and viral infections.

What makes tattooing an even greater risk to the public health is the fact that it is not a regulated profession. There are no standards or licensing requirements for the tattoo artist. The artists are left on their own to learn proper and safe procedures. They learn their profession from other artists through an unregulated apprenticeship, attending an unregulated school or buying a “how to kit” online. Training in health and safety procedures and governing legislation depends on the instructor, the course curriculum and the instructions that come with the online toolkit.

Lack of infection prevention and control practices before, during and after the process can lead to the transmission of blood borne infections to the client, future clients or the tattoo artist.

Managing the Risks

In 1999, Health Canada, in partnership with provincial and territorial governments, published a set of Infection Control Guidelines for Personal Services which includes tattooing. These infection guidelines were written for tattoo practitioners. The regulatory oversight of Personal Services remains a provincial public health responsibility.

While each province and territory handles their own regulatory oversight, we will focus on Ontario since this is where we are seeing the class actions.

...cont'd on page 2

What's inside

Page 1

- Tattooing - From Taboo to Mainstream to Class Actions

Page 2

- Tattooing - From Taboo to Mainstream to Class Actions
(Continued)

Page 3

- Community Gardens on Public Land
Negotiating a Win-Win Situation

Page 4

- Baseball Diamonds & Soccer Fields - What is Your
Duty of Care

Tattooing - From Taboo to Mainstream to Class Actions

In Ontario, the Health Protection and Promotion Act (HPPA) provides the legislative mandate for boards of health. Section 5 of HPPA mandates boards of health provide health programs and services in specified areas. Section 7 of HPPA gives the Minister of Health and Long Term Care (MOHLTC) the power to

“publish guidelines for the provision of mandatory health programs and services and every board of health shall comply with the published guidelines”.

In 2008, the MOHLTC published guidelines for the provision of mandatory health programs and services. These guidelines are known as the Ontario Public Health Standards (OPHS) 2008. Within the OPHS are protocols that provide direction to boards of health. The Infection Prevention and Control in Personal Services Setting Protocol, 2008 (replaces the Personal Services Setting Protocol, 1998) provides boards of health with direction on how to minimize the risk of contracting blood-borne and/or other types of infections for patrons and workers within the personal service settings.

What Does Ontario’s Infection Prevention and Control in Personal Services Setting Protocol, 2008 Mandate?

The Protocol mandates that:

- Tattoo parlours are inspected at least once a year.
- Inspections must also be conducted in response to complaints and to follow-up any identified non-compliance with infection prevention and control practices in the annual inspection.
- Outlines four (4) additional responsibilities; These are identifying and investigating health hazards, educating the general public and the tattoo artist in public health and safety, enforcement of non-compliance and data collecting and reporting.
- Requires that risk assessments be conducted to determine whether or not a health hazard exists. The risk assessment should include reviewing sterilizer monitoring logs and spore test results.

The Role of Public Health

The role of public health is multi-faceted. Responsibilities include the delivery of a wide variety of public health and education programs, investigation and assessment of health and education programs, investigation and assessment of health hazards, enforcement of provincial and municipal legislation and inspections of food premises, public institutions, schools, nursing homes and personal service settings, just to name a few. Public health units and their inspectors have a long list of priorities.

In January 2009 the MOHLTC released the Infection Prevention and Control Best Practices for Personal Services Settings to assist public health inspectors in educating personal services practitioners in reducing the risk of transmission of blood borne pathogens. Though the purpose of this document is education of the personal services worker, it also provides a blue-print for an inspection protocol as it provides recommendations regarding hygiene, sterilization, equipment requirements, laboratory testing and test results, preventing cross-contamination and other operational requirements.

Where are Tattoo Parlours on Your List of Priorities?

Tattoo parlours should be considered a "high priority" due to the health risks they can pose. This invasive procedure, which is administered by an unlicensed and unregulated practitioner, involves piercing the skin with a number of needles holding various dyes, causing a permanent imprint and/or design. Whenever the skin is punctured, blood and bodily fluids can escape.

With the practice increasing in popularity and larger numbers of people frequenting the premises, the potential for infecting thousands of people, from just one unsafe occurrence, is a real risk. When a large group of people are collectively harmed, they could collectively bring a claim before the Court. In law, this is referred to as a class action.

We recommend that public health units reduce the risk of a class-action lawsuit by complying with the legislation, the guidelines and the protocols. Use the best practices documents to develop **your best practices**.



Community Gardens on Public Land

Negotiating a Win-Win Situation

In many cities across Canada, community gardens have become a popular alternative for urban dwellers that don't have access to the type of gardening space readily available in the countryside or private backyard. They can also be beneficial for municipalities – if properly managed.

Community gardens are parcels of public land that are sub-divided into smaller plots and gardened by a group of people. They provide an open space where residents can grow their own food, engage in healthy exercise and make their community a better place.

Community gardens can also be beneficial to municipalities, allowing cities to assume a leadership position in the protection and use of open space, while promoting healthy lifestyles and community building.

If managed properly, they can be a win-win situation. If not, community gardens can grow into a weed of problems for all parties involved.

What can happen if it's managed improperly?

In one example of what can go wrong, a municipality granted permission to a community group to build a garden on a particular parcel of land. Both parties entered into a short term agreement which specified that the municipality retained the right to sell the land but would provide advance notice of sale.

At the beginning of the gardening season, the association signed the short-term rental agreement, began fundraising activities and used the funds to install new raised beds. The municipality's real estate division, unaware of this contractual arrangement, sold the land. The community group did not receive advance notice of sale but rather received notice to evacuate as the land was now under new ownership and construction would begin shortly. Needless to say, the gardeners and their supporters were upset by the process.

The situation resolved itself when the municipality apologized for its error and agreed to find another suitable location, relocate and rebuild the garden at its own cost. As a result of this unfortunate incident, the municipality developed a comprehensive Community Gardening Policy.

Issues to consider when developing Community Gardening Policies

If you are planning to grant permission for a community group to build a garden on a certain parcel of land, we recommend that you:

- 1) Compile an inventory of suitable land space such as, undeveloped land; marginal areas of parkland;

public easements and rights of way. Do not consider land slated for development in the near future. Make sure the land is free of environmental contaminants, has a water source and has suitable parking.

- 2) Consider Zoning Regulations that establish community gardens as a permitted use of the land. Address the issue of public sale of produce on community gardening property to prohibit unlicensed vegetable markets from popping up in various municipal locations.
- 3) Develop appropriate land use policies such as:
 - Land tenure terms
 - Size of plots
 - Types of plants that can be grown
 - Use of herbicides, pesticides, composting
 - Water access and water use
 - Provision of gardening tools and sheds
 - Garbage pick-up
 - Provision of benches so gardeners can rest
 - Annual rental fees
- 4) Consider whether you will provide operational support. If yes, what sort of support? ie: rotatilling; garden tools, etc.
- 5) Appoint a municipal point person to address public concerns.
- 6) Enter into partnerships with local non-profit groups such as gardening clubs and/or neighbourhood associations. Let them manage the process with your support.
- 7) Work with these partners to identify the target group of gardeners and any modifications that may be necessary. For example, seniors and those with limited mobility may require raised beds, wheelchair accessibility, longer-handled tools, etc.
- 8) Enter into formalized Land Use Agreements with either the community gardening association or each individual gardener. Include in the agreement a Hold Harmless and Indemnification Clause and a requirement for insurance. Consider waivers of liability.
- 9) Develop a set of Community Garden Rules that are both fair and firm and apply to each gardener. Require all gardeners to agree to the rules in writing at the beginning of every season.

If you require a sample set of Community Gardening Rules, please contact Barb Szychta at barb.szychta@frankcowan.com

Baseball Diamonds & Soccer Fields - What is Your Duty of Care?

In the springtime, children are eager to hit the baseball diamonds and soccer fields – and get out all of the pent up winter energy. If the playing surfaces and surrounding fences aren't ready, it could lead to serious injury as in the following claims situation.

Two public school students were hanging out at a near-by baseball diamond during their lunch hours. One student was standing inside the baseball diamond while the other student was standing on the other side of the fence. While they were talking, one of the boys leaned against the fence. The pressure of his weight caused a piece of fencing to jut out piercing the other boy's eye. This unfortunate accident resulted in the loss of sight in the boy's eye.

The boys didn't know it at the time, but a large hole had been cut into the fence. The municipality had prior knowledge of this hazard and failed to repair the fence in a timely manner.

Your Duty of Care

Most municipalities have a large number of baseball diamonds and soccer fields that are open for free play. They are often located near school properties and parks and easily accessible by the public. Baseball diamonds and soccer fields are often an unsupervised allurements for children who are eager to get back to their summer sports. Under Statutory and/or Common Law you have a duty to keep your property and any equipment located on your property in a safe condition to accommodate its intended purpose.

Meeting Your Duty of Care

1. Inspections

- Perform comprehensive spring inspections of all baseball diamonds and soccer fields in your community
- Establish a comprehensive policy regarding seasonal inspections including regular inspection frequency and maintenance timelines
- Create a standard inspection checklist to guide staff
- Create a work order form that allows staff to record the description of a hazard, the exact location of the hazard and its severity

2. Maintenance

- Create a work flow process that addresses timely maintenance of identified hazards as per the work order form
- If repairs can't be effected immediately consider posting a sign warning the public and giving an approximate timeline
- If necessary, close the area until repairs can be completed

3. Documentation

- Document all inspections, work orders and maintenance performed
- Remember to date and sign all documents
- Keep all inspection and maintenance documents on file
- Do not discard any inspection checklists or maintenance records – they may be needed at some point in the future to prove you met a reasonable standard of care

4. Contract with Third Parties

- If the maintenance of the soccer field or baseball diamond is outsourced to a third party, enter into a formalized contract
- Within the contract address the roles and responsibilities of the contracting parties for the contracted period
- Include within the contract a Hold Harmless and Indemnification Clause and insurance requirements
- Request that they add the municipality as an additional insured to their liability policy
- Request a Certificate of Insurance prior to executing the contract
- Provide all contracted parties with your policies and procedures, inspection checklists, maintenance procedures and documentation methods and forms
- If you rent your playing fields to a soccer association or baseball league, enter into a formal rental agreement that clearly outlines the rental terms

5. Signage

- Signs are a means of transferring risk. They should be posted in all fields.
- Include information such as:
 - This is an UNSUPERVISED FIELD
 - Rules of Conduct
 - Location of nearest telephone
 - Municipal contact numbers to report unsafe conditions
 - Hours of operation
 - Warnings of hazardous conditions

Children will never take the time to inspect playing surfaces and fencing before they get down to the serious business of play. They leave that part of the game to you.

Frank Cowan Company

4 Cowan Street East
Princeton, ON N0J 1V0

Toll free: 1-800-265-4000

Phone: 519-458-4331

Fax: 519-458-4366

www.frankcowan.com

