

The Legal Case:

Why You Should Not Litigate to Shut Down Blueberry Creek

Let me start with the bottom line. I am here to present the case that Tay Valley Township (TVT) ought not to litigate against Blueberry Creek.

It is easy to demonstrate that Blueberry Creek Nature Centre is 100% compliant with the restrictions that TVT's zoning bylaw places on the use of the land at 17638 Highway 7. If you give me the time I need, I will make this demonstration tonight.

To assist in this demonstration, each Councillor has been given a package, with copies of documents to which I'll be referring in the course of my presentation. As I refer to each document, I will direct you to the relevant page, each of which is tabbed. This will allow you to see for yourselves a number of the documents that prove that we are fully compliant with the law. I am confident that a number of these documents have never before been shared with Council, and that this may have caused you to be unaware just how groundless the legal case against us really is.

There are two matters of disagreement between TVT (or at least, TVT staff), and Blueberry Creek.

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1. The issue as to whether or not BB Creek is engaged in a use of the land that is not permitted under TVT's zoning law.

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2. Whether or not the permit to build a studio on the land, which was issued by Tay Valley Township in September 2017, was lawfully or unlawfully issued. What I mean is this: If it turns out that our use of the land for educational purposes is not a permitted use under the zoning law, then it can be argued that the building permit was issued in error. But only if it **also** turns out that in the application for the building permit, Robyn misstated the purpose of the building, thereby misleading TVT officials as to the intended use of the building,

Should this be the case, then the erroneous issuing of the permit is entirely her fault, and if she is never permitted to complete the structure, or even ordered to demolish it, she will have no right to seek compensation from the township.

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I propose to start with this second issue, as it is the one which is more easily resolved.

Was the Permit sought, under the false pretense that the building would be used for some purpose other than for education?

Here is the Township's position, as articulated on March 28 by your lawyer, Tony Fleming:

"It is apparent that the basis for the application was not accurate and therefore the permit was issued in error." (Tab 1)

As recently as August 23, Reeve Kerr was reported in the Ottawa Citizen as follows: "Reeve Keith Kerr defended the township's actions, saying the building permit was issued 'falsely'."

The claim that the Township could not have known that the studio building was being used for educational purposes, coupled with the claim that education is not permitted on the land, makes its first appearance in a letter from Larry Donaldson to our lawyer, dated February 8, 2018 ([Tab 2](#)---please note that I have highlighted two passages in this letter).

Mr Donaldson writes:

At a meeting on November 15, 2017, between the property owners and Township staff it was determined that the house was being used as a school.

Later on in the letter, he states:

It is noted that the submission for the permit to reconstruct the vacant accessory structure on site was originally to be a studio as presented in the building permit application.

As you can see, in the first passage he is claiming that prior to November 15th, Tay Valley Township officials were not aware of the intended use of the property as a whole. He is implying that the intended use of the property for educational purposes had never, prior to this point, been communicated to his staff.

In the second passage, Mr. Donaldson's argument seems to be that the term "studio" itself is misleading---I suppose because he imagines that it implies, say, a studio in which pottery is sold, or in which an artist sits alone and paints, rather than a studio in which children make art.

In truth, there's nothing misleading at all in Robyn's use of the word "studio" in the application for a building permit. I draw your attention to [Tab 3](#) and [Tab 4](#). These are, respectively, Robyn's application for a building permit, dated Sept. 18, and the building permit itself. As you can see, the proposed use is "studio," which is exactly what our intended purpose of the building is, and

always has been. It's just a fact that the word "studio" can also mean a children's art studio, attached to a forest school.

It is significant, therefore, that Robyn had already informed your planner that she intended to use the property for educational purposes. I draw your attention now to two documents, which show that Robyn did in fact clearly and truthfully state the intended purpose of the building.

Take a look at [Tab 5](#). This is an email from Robyn to your planner, Noelle Reeve, dated May 19, 2017: The subject line of the email is: "License for 17638 Highway 7." Robyn writes:

"Hello! My name is Robyn and I have recently purchased a property in Tay Valley that is mixed residential/commercial. My hope for this property is to have a not for profit forest school and community garden, with space for workshops."

We know that this email was received and read by TVT staff, because (as you can see), Noelle forwarded it on to Martha Bradburn, at Rideau Valley Conservation Authority, within an hour of having received it from Robyn.

This proves that prior to the date on which the building permit was issued, your planning department knew that the intended use of the land was for a not-for-profit forest school.

Now, read Noelle's email to Ms. Bradburn. She already knew, back in May, that Robyn was planning to tear down and replace the old antiques store on the existing footprint.

Moreover, lest any suggestion be made that somehow Robyn had left Tay Valley staff in the dark as to the intended use of the *studio building itself*, please look at [Tab 6](#). This is an email, dated June 2, 2017, sent by Eric Kohlsmith, an inspector with the Mississippi Rideau Septic System Office, with a cc. to Tay Valley Township staff. The drawings are for the septic system that he was installing for the studio building.

In his email, Mr. Kohlsmith states:

*"Please find attached a site plan for the proposed change of use at 17638 Highway 7. As indicated on the permit application the current use is Residential **with a proposed use Educational/Residential.**"*

Finally, there's this point: when Robyn and I met with Tay Valley officials, on November 15, they stated, clearly, that while there might be a problem with the site of the studio, this was purely an issue of flooding risk, and it was the purely the result of a failure on the part of Township staff.

The concern expressed on November 15 was that Rideau Valley Conservation Authority had objected to not having been consulted by Township officials, prior to a building permit being issued in a floodplain.

I made an audio recording of the November 15th meeting. Here is what Bob Demerath, the TVT official who issued the Stop Work Order, said ([Tab 7](#)):

We acknowledge that our planning staff missed the floodplain because of the time-lag in getting it into the zoning bylaw, okay? However, now it has been identified, so we have to deal with it.

It is, therefore, clearly counterfactual to assert that Township staff had any reasonable excuse for not knowing that the intended purpose was educational at the time the permit was issued. It is entirely possible that, during Noelle Reeves' extended stress leave, which commenced some time after Robyn sent her email to Noelle, nobody consulted with Noelle, or checked her email in-basket. But it is not possible to argue that any omission on Robyn's part, either deliberate or inadvertent, was responsible.

Therefore, as a practical matter, if either Tay Valley Township or the Rideau Valley Conservation Authority prevents us from completing the studio building, we will be in a strong position to demand full compensation from Tay Valley Township.

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Now I turn to the second part of my presentation, which deals with whether or not the use of the land for educational purposes by Blueberry Creek Nature Centre qualifies as a permitted or non-permitted use.

Tay Valley Township's position on this matter is outlined in a letter sent to our lawyer by Mr Fleming on May 14. ([Tab 8](#)). I'll be referring to this letter a lot, so please keep it at your finger-tips. Please remember, as well, that this letter represents the entire case that your lawyer is making, as to why Blueberry Creek is, supposedly, engaged in a non-permitted use of the land.

I will go through the letter, point-by-point, to show just how weak this case really is.

First of all, Mr. Fleming writes as follows:

"[T]he Township's position is that the use as a private school is non-compliant with zoning. The Township and its land use planners considered the 'community service' use in arriving at this position and nothing has changed.

"Your client is a commercial entity; they operate a private school and charge students for providing that service. Whether your client turns a profit or not, in and of itself, is not germane to whether the use conforms to the By-law. The By-law clearly states that it applies to service clubs or charitable organizations---which do not describe your client. This should be the end of the assessment; your client is not a service organization."

This argument is relevant because our claim to be using the land lawfully hinges on the fact that it is permissible to use this land for “Community Service,” and Robyn maintains that Blueberry Creek Nature Centre’s use of this land fits within the definition of “Community Service.”

So let’s take a look at how the zoning bylaw defines “Community Service” ([Tab 9](#)):

“COMMUNITY SERVICE shall mean the use of land, buildings, or structures by a not-for-profit, non-commercial body or society such as a service club or charitable organization for promoting athletic, cultural, educational, health, recreational, social, philanthropic or other similar functions.”

You’re going to want to keep that tab at your finger-tips too, as we’ll be returning to this definition.

As of May 14th, when Mr. Fleming’s letter was sent, Robyn was operating Blueberry Creek as a *de facto* not-for-profit. This a perfectly respectable thing to do, and it is very commonly done. Moreover, she had always made the intention to be not-for-profit crystal-clear. In her May 2017 email to Noelle, she refers to her plan to establish a “nonprofit forest school.” In our November 15th meeting with Tay Valley staff, she characterizes it as a “not-for-profit alternative school ... licenced under the *Private Schools Act*.”

However, as a gesture of goodwill, Robyn responded to Mr. Fleming’s assertion by seeking, and gaining a charter of incorporation as a federally-registered not-for-profit organization. The Certificate of Incorporation for Blueberry Creek Nature Centre is located at [Tab 10](#).

This disposes of Mr. Fleming’s first argument. Blueberry Creek is now, beyond any shadow of a doubt, a not-for-profit, non-commercial body, and therefore conforms with this aspect of the Community Service definition.

Mr. Fleming next states, in his May 14th letter:

“Even if we accepted that they [Blueberry Creek] were a service organization, the definition [“of Community Service”] goes on to describe the [permitted] use as, ‘promoting ... educational ... objectives’. You describe your client’s activities as, ‘an outdoor education delivery model’. The school is not ‘promoting’ education, it is delivering education, as a private school.

“The common meaning of ‘promote’ is to advance or support, not to deliver the actual service. It is clear that your client does not ‘promote’ education, they deliver that service, for a fee. The Education Act makes this distinction in various sections and distinguishes ‘promote’ as an indirect advancement of educational purposes, not the direct delivery of education.”

I think it might be appropriate to examine the accuracy of Mr. Fleming's assertions. First, is it really true, as he claims, that the **only** meaning of 'promote' is to advance or support? Many words in the English language are used to signify more than one meaning. To determine whether "advance or support" is the only dictionary definition of the word "promote," I visited several dictionaries online. The results of my search can be seen at [Tab 11](#).

For example:

- the Merriam-Webster dictionary has this definition for "promote": "*to help bring (something, such as an enterprise) into being: LAUNCH.*"
- the Oxford Living Dictionary says that "promote" can mean "*further the progress of.*"
- the Macmillan Dictionary says that "promote" can mean "*To help something to progress.*"
- the FreeDictionary.com says that one meaning of "promote" is "*To contribute to the progress or growth of; further. See Synonyms at 'advance'.*"

Therefore I think we can say with confidence that Mr. Fleming's claim as to the common meaning of "promote" would only have been correct if he had said, "One common meaning of 'promote' is to advance or support, while other commonly-used meanings of 'promote' involve active contributions to and participation in the matter in question."

Now I'd like to establish whether Mr. Fleming is accurate when he says,

"The Education Act makes this distinction [between 'support' and 'deliver'] in various sections and distinguishes 'promote' as an indirect advancement of educational purposes, not the direct delivery of education."

I looked up the Act, [which is available online](#). Here's what I discovered:

1. There is no definition of the word "promote" in the Definitions section at the front of the Act.
2. The word "promote" is used 35 times in the Act (twice in titles, and 33 times in the text of the Act). I invite you to turn to [Tab 12](#) to see each of these 33 uses.
3. The word is used for a number of distinct purposes in the Act:
 - a. To mean, "the advancement of a student from one grade to another, or of a ministry employee from one level to another. For example: Section 265 (1) (g) reads,

*"It is the duty of a principal of a school...subject to revision by the appropriate supervisory officer, to **promote** such pupils as the principal considers proper."*

Here, "promote" means "advance to the next grade."

- b. To mean, "advertise for sale." Thus, for example, Section 217(1):

*"No teacher ... shall, for compensation of any kind other than his or her salary ... **promote**, offer for sale or sell, directly or indirectly, any book or other teaching or learning materials...."*

- c. In some sections, "promote" really does mean, as Mr. Fleming suggests, simply, "encourage" or "advocate." For example, Section 303.1(1) reads,

*"Every board shall support pupils who want to establish and lead activities and organizations that **promote** a safe and inclusive learning environment, the acceptance of and respect for others and the creation of a positive school climate."*

- d. But the sections of the Act in which the word "promote" is a synonym for, "cause to happen" are far more numerous. For example:

- 11.1(6)(f): *"A regulation made under subsection (1) may require a board to ... adopt and implement measures specified in the regulation to **promote** the safety of the board's pupils and staff".*

Here, "promote" is a synonym for "achieve" or "cause to happen" or (to use Tony Fleming's term), to "deliver";

- 169.1(2.1): *"In fulfilling its duties ... with respect to the effectiveness of policies developed by the board to **promote** the the goals referred to ... every board shall use surveys to collect information from its pupils and staff...."*;

Here, "promote" is again a synonym for "achieve"---that's why this section mandates surveys to collect information on whether or not the board has been effective in promoting / achieving its policies.

- 301(7): *"The Minister may establish policies and guidelines to **promote** the safety of pupils."*

In this section, "promote" clearly means "provide, to the limited extent realistically within the Minister's capabilities." The recognition that the Minister is not omnipotent, and can't achieve 100% success, is presumably why the word "guarantee" was not used.

But here's the point: Isn't this exactly what Blueberry Creek is attempting to do? To provide, to the limited extent realistically within a Forest

School's capacity, education to students who must rely primarily upon the education efforts of the schools in which they are enrolled?

Another section where "promote" is used in this way is 302(3).

- S. 300.0.1: *"The purposes of this Part include the following: (5) To establish disciplinary approaches that **promote** positive behaviour and use measures that include appropriate consequences and supports for pupils to address inappropriate behaviour."*

This could very nearly be the mission statement of Blueberry Creek: To promote positive behaviour (and learning) for children who are receiving the bulk of their education elsewhere, and to use measures that include appropriate consequences and supports for pupils....

In short, Mr. Fleming's characterization of the meaning of the word "promote" in the *Education Act* is just wrong.

Let's leave the *Education Act* aside for a moment. If Mr. Fleming's interpretation of "Community Service" were to be taken seriously, it would not merely be unlawful to engage in education in Tay Valley Township. It would also be unlawful to actually engage in any of the other activities listed in the definition of "Community Service." It would be unlawful to engage in athletic, cultural, health, recreational, social, or philanthropic or other similar activities---although I am happy to report that their advocacy and promotion would still be lawful. According to Mr. Fleming, there's a lot of unlawful activity going on in Tay Valley Township.

But that's not the real problem with Mr. Fleming's logic. The real problems (and there are two of them) is as follows:

1. The list provided in the definition of Community Service is a non-exhaustive list. To qualify as a community service you must be:

*a not-for-profit, non-commercial body or society **such as** a service club or charitable organization for promoting athletic, cultural, educational... (etc.)*

You have to be non-profit to engage in community service, but you don't have to be a service club or a charitable organization. These are just examples. Mr. Fleming's argument collapses on this point alone.

2. Not only is this not an exhaustive list of permitted uses for the land, it's not a list of permitted uses at all. It is a description of **the kind of organization** that might qualify to be a provider of community services. The clear meaning of this section is "a service club or charitable organization, which has, **as its organizational goal**, the promotion of

athletic, cultural, educational ... or other similar functions.” Blueberry Creek, now that it is incorporated as a not-for-profit, meets this definition in every detail.

Let me now turn to the final argument in Mr. Fleming’s May 14th letter. He states,

“[A] private school is not a permitted use in the Commercial Zone. On this basis alone the use is not permitted.

“I have confirmed this interpretation with the Township’s land use planners and agree with their assessment that a private school is not a ‘community service.’

Now, you should be aware that a little rhetorical trick has just been played. The Township’s land use planners, Novatech, no doubt did agree---as do I---that a private, **for-profit** school is not a community service. Remember that earlier in the same letter, Mr. Fleming made the statement, *“Your client is a commercial entity; they operate a private school and charge students for providing that service.”* In other words, Blueberry Creek is a private, for-profit school. I am confident that if Mr. Fleming did indeed speak to Novatech about whether a private, for-profit school would qualify as a “community use,” Novatech would have said, absolutely not.

But if you were to ask the planners at Novatech whether a registered not-for-profit (whether styled a “school” or not) would qualify as a “Community Service,” I think they would answer, yes it does.

More to the point, that’s also the conclusion that will be arrived at by a court, should you decide to proceed with litigation.

Mr. Fleming’s entire basis for claiming unlawful use hinges on the inaccurate, and demonstrably unwarranted, conflation of “private school” with “private, **for-profit** school.” Take away the for-profit element, and he has no argument at all that Blueberry Creek is not fully in conformity with the zoning for the property.

Therefore I invite you, the next time you hold another of your in-camera meetings on the subject of Blueberry Creek, to ask your solicitor, Mr. Fleming, the following questions. He is legally obligated to give you an honest answer:

1. Question 1: If we (Tay Valley) litigate, what are the chances that we (Tay Valley) are going to win? Mr Fleming will tell you that your chances are very poor.
2. Question 2: How much will our lawyer's bills likely be, by the time the litigation is completed? I can only speculate on this one---but he'll give you a number, and it will be large.
3. Question 3: In the event we (Tay Valley) lose, what percentage of our opponent's court costs will we be required to pay? Mr. Fleming will tell you that the standard rate is 60%.

4. Question 4: In the event Tay Valley Township loses, will our opponents be in a good position to ask the court to seek "substantial indemnity"? That's the formal term for requiring TVT to pay 80% of our legal costs, and it is what courts do, to discourage vexatious cases like the one that you would be presenting. I believe your lawyer will tell you that the danger that you'll be ordered to pay substantial indemnity is very high.

I don't make these observations as threats. The history of threats, in the relationship between TVT and Blueberry Creek, has been entirely in the other direction: Threats to litigate, threats to shut us down, threats to force us to tear down our partly-built arts studio, and even the threat of changing the zoning law by means of a new definition of "School" designed specifically for the purpose of capturing Blueberry Creek. I just want you to stop putting my beautiful, idealistic wife, through a living hell. Surely it's time for Tay Valley Township to show some decency towards its law-abiding citizens.