LIDSTONE & COMPANY

the Law Letter

In this issue

To Disclose or Not to Disclose

Although local governments often make headlines, it is rare for the headline to advertise the conviction of an elected official under the *Freedom of Information and Protection of Privacy Act* ("FOIPPA"). That's what happened when a Prince George councillor was convicted for disclosing a confidential workplace report in breach of s. 30.4 of FOIPPA.[1] Although Mr. Skakun's conviction was reportedly the first of its kind,[2] in our experience it is not uncommon for local governments to be contemplating the disclosure of the same type of information. The case therefore provides a timely opportunity to explore some pertinent privacy issues related to workplace harassment reports.

A summary of the case is as follows. In response to complaints of harassment made by employees at the Prince George RCMP detachment, the City retained a lawyer to conduct a confidential complaint investigation and to prepare a report. Once the report was provided, Staff took steps to maintain its confidentiality because it contained "personal information" (as defined in FOIPPA) of named individuals and could not lawfully be disclosed. City Council received the report in a closed restricted meeting. However, Mr. Skakun admitted in court that after he received the report, he personally delivered a copy of it to the CBC. The report was subsequently posted on the CBC's website. Mr. Skakun was charged under s. 30.4 of FOIPPA for the unauthorized disclosure of personal information within the custody and control of the City.

In his defence, Mr. Skakun argued that s. 30.4 did not apply to him because the reference to "officer" did not include a city councillor. He also claimed that he was protected as a whistleblower.

The Court found that there was no reason to restrict the meaning of "officer" to exclude a city

[1] *R. v. Skakun,* 2011 BCPC 98.
[2] According to Robert Matas in his article, "*Brian Skakun: Whistleblower or violator of privacy laws?"* Published in the Globe and Mail, May 23, 2011.

To Disclose or Not to Disclose (continued from page 1)

councillor. City councillors are defined as "municipal public officers" for the purposes of the *Local Government Act* and to find that FOIPPA did not apply to them would permit councillors to commit the sort of mischief that FOIPPA was designed to prevent. The Court also found that the whistleblower defence was not available to Mr. Skakun as he was not an employee, he had not utilized the existing internal processes to disclose the information, there was no evidence that disclosure was required to expose illegal activity or to protect the health and safety of the public, and the defence was not generally available in quasi-criminal cases. Mr. Skakun was ultimately found guilty and fined $750.00.

the Law Letter is published quarterly by:

LIDSTONE & COMPANY
Barristers and Solicitors

1300 – 128 Pender Street West
Vancouver, BC V6B 1R8
Telephone: 604-899-2269
Facsimile: 604-899-2281
lidstone@lidstone.info

A big thank you to our editors Deborah Low and Kimberly Mittelsteadt.

This Newsletter is printed on 100% post-consumer recycled paper. Copies are available in PDF format by request.

Aside from the highlighting the obvious – which is that breaches of FOIPPA are treated seriously and can result in a criminal conviction, the case is illustrative of the difficulty that public bodies (and their officials) face in attempting to balance the goals of openness, accountability and transparency with the requirement to protect personal privacy. Indirectly, the case raises other pertinent issues which are important for local governments to be aware of. Some of these are explored below.

1. Workplace harassment reports can almost never be disclosed in their entirety under FOIPPA

Confidential reports detailing complaints and findings in respect of alleged workplace harassment by named individuals will almost always be protected from disclosure under FOIPPA (at least in part), unless the persons referred to in the report have consented in writing to their disclosure.[3] This is because the reports invariably contain "personal information" as defined in the Act and tend to fall into an exemption from disclosure pursuant to s. 22 of FOIPPA, which provides that the head of a public body *must refuse* to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. Information relating to "employment, occupational or educational history" and "personal recommendations or evaluations, character references or personnel evaluations" is presumed to be an unreasonable invasion of a third party's personal privacy and must not be disclosed: ss. 22(3)(d) and (g). Decisions from the Privacy Commissioner's office support the conclusion that workplace reports that detail

complaints and findings in respect of alleged harassment or misconduct by an employee will

[3] As required by ss. 22(4)(a) of FOIPPA and s. 6 of the FOIPPA Regulation.

To Disclose or Not to Disclose (continued from page 2)

often fall into one or both of these sections and therefore must not be disclosed.[4]

Although s. 22(4) authorizes the disclosure of information about a third party's "position, functions or remuneration as an officer, employee or member of a public body...", the Privacy Commissioner has clarified that this section must be given its plain meaning. It does not authorize the disclosure of private information of a public servant with respect to these topics.[5]

The information set out above is relevant when a public body is responding to a request for access. However, even independent of requests, public bodies are not authorized to disclose personal information except as permitted by ss. 33.1 and 33.2. In most cases, neither of these sections will authorize the blanket disclosure of a workplace harassment report.

2. Local governments cannot avoid the requirements of FOIPPA by considering such reports at open meetings

Councils and Boards are subject to the requirements of the *Community Charter* and FOIPPA with respect to matters that can or must be considered in camera and the subsequent disclosure of those matters to the public.[6] Section 90(2) sets out circumstances in which a meeting *must* be closed to the public. We think two of those subsections could be applicable with respect to the consideration of workplace harassment reports.

First, subsection (a) provides that a meeting must be closed to the public matter if the subject matter is a request under FOIPPA if the council is designated as head of the local public body for the purposes of that Act in relation to the matter. So, this section would be applicable if an individual requested access to a workplace harassment report and the council had been designated as the head of the public body for the purposes of FOIPPA. The consideration by Council at a meeting as to whether the disclosure of the particular report was permissible would have to happen in camera.

Second, subsection (d) requires a meeting to be closed to the public if its subject matter refers to "a matter that, under another enactment, is such that the public must be excluded from the meeting". We think this section would be applicable in circumstances where Council is not necessarily considering an FOI request, but is simply considering a workplace harassment report more generally. Given our conclusion above that FOIPPA generally prohibits the disclosure of references to named individuals and their conduct in the context of workplace harassment investigations, a Council would not be permitted to 'disclose' that personal information at an open meeting. It would be an indirect way of disclosing information that FOIPPA explicitly requires the local government to keep in confidence.

3. Local governments cannot avoid the requirements of FOIPPA by adopting a resolution to authorize the disclosure of protected information

The judge in the *Skakun* case noted that no release of the confidential report in a complete or redacted form had ever been authorized by the head of the public body for Prince George. Specifically, the City Manager had not had an opportunity to review the report to determine what text, if any, from the report could be the subject of a lawful release to an applicant. The "lawful release" issue should perhaps be clarified. Not only must the head of a public body authorize

[4] See, for example, *Board of School Trustees of School District No. 68 (Nanaimo-Ladysmith), Re,* 2005 CanLII 444 (B.C.I.P.C.) (Francis).

[5] *Workers' Compensation Board, Re,* 1995 CanLii 1713 (B.C.I.P.C.) (Flaherty); See, also, Order No. 139-1996, School *District No. 31 (Merritt), Re,* 1996 CanLii 365 (B.C.I.P.C.) (Flaherty).

[6] Found in Division 3 of Part 4 of the *Community Charter,* which also applies to regional districts by virtue of section 793(7) of the *LGA*.

To Disclose or Not to Disclose (continued from page 3)

the release of information, but FOIPPA must also authorize its release. In the *Skakun* case, even if Prince George's City Council had adopted a resolution authorizing the release of the report or if the City Manager had the authority to release the report (depending on who was designated as the head of the public body for the purposes of FOIPPA), the report would still have been exempted from disclosure under FOIPPA unless the individuals referred to therein had consented to its disclosure or if redactions had been made to the report such that it did not contain the personal information of any identifiable individual.

4. Elected officials need to be aware of the duty of confidentiality imposed by s. 117 of the Charter

In addition to the limits on disclosure set out in FOIPPA, section 117(1) of the *Community Charter* imposes two additional duties on current and former councillors:

a) they must keep in confidence any record held in confidence by the municipality, until the record is released to the public as lawfully authorized or required; and

b) they must keep in confidence information considered in any part of a council meeting or council committee meeting that was lawfully closed to the public, until the council or committee discusses the information at a meeting that is open to the public or releases the information to the public. [7]

Although the councillor in the *Skakun* case was only charged under s. 30.4 of FOIPPA, the facts seem to indicate that he could also (or alternatively) have been charged for breaching s. 117. Since Council had received the report in a closed meeting and had not otherwise authorized it to be disclosed, Mr. Skakun was under a continuing obligation to keep the report confidential under s. 117(1)(b). We also note that s. 117(1)(a) was also applicable in the circumstances because FOIPPA required the City to keep the report confidential.

Conclusion

We acknowledge that "workplace harassment report" is a broad umbrella term. Whether the rules and requirements discussed in this article will be applicable to any given report will depend on the content of that report and the circumstances that led to its creation. Often there will be portions of these reports that can be disclosed because they do not refer to identifiable individuals, such as general descriptions of the investigation process. It may also be possible to prepare a summary version of a report that redacts personal information that must not be disclosed and simply explains in general terms the purpose and findings of the report. However, this can be difficult to do in a manner that adequately protects the privacy of individuals named or referred to in the reports. For instance, redaction of an individual's name or job title alone is unlikely to offer sufficient protection if other statements in the report would still make that individual identifiable.

In any given case, we encourage local governments to consult a lawyer (or another individual with expertise in FOI matters) for guidance in dealing with these types of reports.

Marisa Cruickshank

[7] These duties are also imposed on regional districts by virtue of s. 787.1 of the *LGA*.

Defamation Lawsuits by Municipal Governments in Canada

Defamation is a cause of legal action that developed as a means to protect the good reputations of individuals. The first and most

Defamation Lawsuits by Municipal Governments in Canada
(continued from page 4)

important issue to be determined in a defamation action is whether a statement is defamatory. [8] A widely accepted test defines a defamatory statement thus: "a communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with or dealing with him".[9]

The English and Canadian common law gradually evolved to allow municipal corporations to sue for damages for defamation to their characters and as John P.S. McLaren has noted, "the business of municipalities has always been a fertile field for defamation actions."[10] He attributes the comparative frequency of such lawsuits to three factors. First, unlike meetings of parliament and provincial legislatures, meetings of municipal councils are not occasions of absolute privilege that allow statements that would be otherwise defamatory to be made without legal consequence.[11] Second, municipal governments are usually less subject to the strong party allegiances and discipline characteristic of more senior levels of government that often temper the strong feelings and biases of individual politicians. Third, local politicians are often perceived by citizens as having a more direct impact on their day-to-day lives than provincial or federal politicians. McLaren notes that the result of this is "sometimes an intensity of feeling on issues which makes for a strong brand of criticism."[12]

The first reported Canadian case regarding a municipal corporation's right to sue for defamation was *City of Prince George v. British Columbia Television System Ltd*.[13] In that case, the city sued the defendant broadcasting company for allegedly broadcasting words which were intended to mean that the city through its council and other servants and agents, had been "corrupt. dishonest, fraudulent, inefficient, and unfit to discharge its duties."[14] Before the matter could be heard at trial, the defendant made a motion to dismiss the plaintiff's claim arguing that the city could not sue for defamation in a corporate capacity. The judge hearing the motion ruled against the defendant and in so doing stated that "a municipal corporation, although it lacks many *indicia* and attributes of a natural person, enjoys a reputation delineated by those powers and obligations created by the *Municipal Act*, the functions that it actually engages in and the manner in which it performs those functions." [15]

This ruling was appealed to the British Columbia Court of Appeal [16] and on appeal, the plaintiff municipal corporation was once again successful. After finding that the municipal corporation had the statutory right to sue for defamation, Aikins, J.A., said that:

> "In my opinion, it is beyond question that municipal corporations have reputations. A cursory examination of the *Municipal Act* reveals the great diversity of matters in respect of which municipalities may legislate and the diversity of activities in which such corporations may engage. The
>
> way in which a municipality legislates and the way in which it administers the legislation it enacts and conducts itself in relation to activities which it lawfully undertakes cannot but create a municipal reputation, be it good, bad or indifferent. I

[8] Allen M. Linden, *Canadian Tort Law (3d)* (Butterworths, Toronto, 1982), p. 676.
[9] *Restatement, Torts, Second*, §559 as quoted in Linden, *Ibid.,* p. 677.
[10] John P.S. McLaren, *"The Defamation Action and Municipal Politics"* ", 29 U.N.B.L.J. (1980), 123 at p. 123.
[11] lbid., pp. 123-4.
[12] *lbid.,* p. 124.
[13] [1978] B.C.J. No. 1198, at *Lexisnexiscom/ca,*.
[14] *Ibid.*, para. 2.
[15] *Ibid.*, para. 12.
[16] As quoted in *City of Prince George v. British Columbia Television System Ltd.* [1979] B.C.J., No. 2071, at *Lexisnexis.com/ca* at para. 28.

Defamation Lawsuits by Municipal Governments in Canada
(continued from page 5)

> can see no basis in principle for holding that a municipal corporation, empowered by statute to sue in its corporate name, cannot maintain an action for libel. To hold otherwise would leave municipalities the helpless victims of all those who choose to publish untrue imputations which injure their reputations."[17]

A significant change in Canada's legal landscape occurred in 1982 with the enactment of Canada's *Charter of Rights and Freedoms*[18], and some commentators questioned whether *Prince George* would have been decided differently given the *Charter's* guarantees of "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" under section …2(b).[19] Nevertheless, the judgement in *Prince George* was not called into question until 2006 by a pair of judgments in Ontario. The cases of *Montague (Township) v. Page*[20] and *Halton Hills (Town) v. Kerouac*[21] were heard separately by different judges but reached the same conclusion. In *Montague*, the defendant brought a motion for summary judgment dismissing the defamation action by the plaintiff township. The judge hearing the motion, Pedlar J., concluded that a government entity cannot bring a civil action for defamation against one of its citizens and he distinguished the judgement in *Prince George* on the basis that it predated the *Charter*. The learned trial judge concluded his analysis by coming down firmly in favour of protecting freedom of expression under s. 2(b) of the *Charter*:

> "In balancing the various interests at stake in this proceeding, I find that it is inconsistent with section 2(b) of the *Canadian Charter of Rights and Freedoms* for a government entity, such as the plaintiff herein, to bring a civil action for defamation against one of its citizens. The risk of a governing body using defamation as a tool to inhibit criticism of institutional governmental activities, and thereby inhibiting free speech outweighs the risks of allowing such criticism, even if intemperate.
>
> In a free and democratic system, every citizen must be guaranteed the right to freedom of expression about issues relating to government as an absolute privilege, without threat of a civil action for defamation being initiated against them by that government. It is the very essence of a democracy to engage many voices in the process, not just those who are positive and supportive. By its very nature, the democratic process is complex, cumbersome, difficult, messy and at times frustrating, but always worthwhile, with a broad based participation absolutely essential. A democracy cannot exist without freedom of expression, within the law, permeating all of its institutions. If governments were entitled to sue citizens who are critical, only those with the means to defend civil actions would be able to criticize government entities. As noted above, governments also have other means of protecting their reputations through the political process to respond to criticisms."[22]

If *Montague* and *Halton Hills* called into question the decision in *Prince George*, the judgment of the court in *Dixon v. Powell River (City)* [2009] B.C.J. No. 588 (BCSC) firmly established that *Prince George* is no longer good law in British Columbia.

[17] *Ibid.*, at para. 25.
[18] Part 1 of Schedule B, *Canada Act,* 1982, c. 11 (U.K.).
[19] *Ibid*., s. 2(b).
[20] [2006] O.J. No. 331, (Ont. HCJ), at *Lexisnexis.com/ca.*
[21] [2006} O.J. No. 1473 (Ont. HCJ), *Lexisnexis.com/ca.*
[22] *Supra,* note 13, para.s 27 – 29.

Defamation Lawsuits by Municipal Governments in Canada (continued from page 6)

Following the hearing of an uncontested motion by the plaintiffs, the court said:

> "It seems clear to me... that common law causes of action must be applied in a manner that is consistent with the *Charter*. It is evident that the law of defamation and the constitutional law of freedom of speech ought not to develop in two separate streams incorporating different values. Rather, the two should accommodate each other. In this case, I agree with the judgments in the *Halton Hills* and *Montague* cases in which the justices decided that governments cannot sue for defamation for damage to their governing reputations. The *Charter* enshrined value of freedom of expression is paramount and local governments have resort to other means to protect their reputations from citizens who publish critical commentary about the government itself. In *Prince George*, Aikins J.A. considered and rejected the freedom of speech argument advanced by the plaintiffs, and held that a local government could sue for defamation on the same basis as any corporation. That reasoning cannot withstand *Charter* scrutiny."[23]

Given the judgment in *Dixon v. Powell River*, we think it is very unlikely that a municipal corporation could succeed in an action for damages for defamation to its character. A higher court has not definitively pronounced on the issue and the matter could be decided differently in the future; however, until then, municipal governments are advised to tread carefully. The advice of John P.S. McLaren, rings as true today as it did when written in 1980:

'The cynic might be forgiven for characterizing the defamation suit as a fool's paradise. Certainly, the combined wisdom of those who have been active in defamation litigation over the years would suggest that such actions should not be launched lightly. While it may appear to the potential plaintiff that this is the only way to vindicate his character, he should be made to recognize that the law contains a number of substantive and procedural pitfalls which may frustrate the endeavour and even a successful suit may be a dubious victory if it has meant further scrutiny of and publicity about his reputation."[24]

Lindsay Parcells

Agreements to Service Reserves

Local governments in British Columbia routinely enter into agreements with First Nations to provide water, sewer, fire, police and other services to Reserves. It is not advisable to rely on historical precedents from other local governments for a number of reasons: the traditional agreements were based on formulas dependent on the property taxation to be imposed by the First Nations, the agreements were made before the *First Nations Lands Management Act* and First Nation land codes and before the *First Nations Fiscal and Statistical Management Act,* the agreements did not account for regional district utility or other impositions on municipalities (or in some cases transit or other matters paid for by municipal property taxes off-Reserve) or for off-site works and services charges or community amenity contributions by developers on Reserves, and in some cases the decisions of the Courts have altered the landscape since the old agreements were made.

As well, recently a number of local governments have asked what rules govern interruption or termination of services when a First Nation does

[23] *Dixon v. Powell River (City) [2009] B.C.J. No. 588 (BCSC)* at para. 46.

[24] McLaren, *supra,* note 3, at p. 146.

Agreements to Service Reserves (continued from page 7)

not pay for services or does not enter into an agreement for services.

1. Off-site Charges

Recent agreements, in fairness to the rate payers off-Reserve, provide for recovery of off-site works and services charges in regard to new development (other than aboriginal housing) on the Reserve based on the calculation of development cost charges off-Reserve. New development on the Reserve imposes capital burdens on the local government. Accordingly, developers on the Reserve should pay DCC equivalents.

The basis for off-site works and services charges under the Agreement is as follows:

1. New development on the Reserve creates additional servicing costs for the local government, but the local government DCCs and taxation are not budgeted to cover this new development.

2. Under the traditional servicing agreements, revenue received does not match revenue foregone (taxes plus DCCs) or actual costs of providing services.

3. Elimination of taxes and DCCs creates uncertainty about future servicing obligations and makes financial planning difficult.

4. Local governments are required by statute to comply with a strict budgetary process, including reporting cycles, capital financing and servicing provision commitments, yet development on the Reserve is unpredictable.

5. The First Nation can share the benefit of capital cost charges with the local government.

The net fiscal impact on the District would be fair and inequitable in the absence of off-site servicing charges.

2. Public Amenities

The agreements should also include public amenity objectives and a process for securing amenities or other community benefits in relation to new development. Currently municipalities have public amenity policies and a process for securing amenities or other community benefits in relation to new development.

Under municipal policies, new developments contribute to community liveability by providing public amenities and benefits. These are usually provided under phased development agreements or amenity zoning, but these are not available in relation to development on Reserves.

New development or redevelopment in most cases nowadays is associated with an established amenity objective based on project scope, size and "lift". Accordingly, the amount or value of the amenity is often based on the project scale and scope and the community impacts, the project's financial capacity to support the amenity, and the bargaining strength of the parties.

The provision of amenities by way of contributions can be established in a services agreement. The agreement can provide for amenities, based on municipal public amenity objective policies, as a condition of new development on the Reserve. The objective would be to make community amenity contributions programs applicable to new development on the Reserve by using the same criteria the municipality has for off-Reserve development and by applying the same to on-Reserve new development by way of a contractual provision in the services agreement.

Agreements to Service Reserves (continued from page 8)

For these reasons, local governments must carefully consider the current law and issues before proceeding with consideration of what goes into the services agreements, particularly since the current trend is to have long term agreements.

3. Termination of Services

A question that keeps coming up is whether and how a local government can interrupt or terminate services if the First Nation does not pay for services or will not enter into a services agreement. In this regard, a common law duty to provide the services to the First Nation is owed by the local government where the local government has been providing services. The decision of the British Columbia Court of Appeal in *Tsawwassen Indian Band v. Delta (Corporation),* [1997] 9 WWR 626 is instructive. In that case, the Court considered whether there was a common law duty on the part of Delta to provide services to the Tsawwassen Indian Band and on the part of Salmon Arm to provide services to the Adams Lake Indian Band. The Court reviewed the relationship between the parties and considered the following to determine whether there was a common law duty and if so to what extent:

1. the relative size of the parties;
2. the resources available to the parties, including capacity to raise revenue;
3. the ability to maintain and repair new and existing infrastructure;
4. the experience each party has in regard to the services;
5. the time period during which the service has been provided.

The Court concluded in relation to both municipalities that there was a common law obligation to provide the services, subject to termination after reasonable notice. In most cases there will be an obligation because:

1. the local government population, budget and area are significantly greater than in respect of the Nation;
2. generally, the local government owns and operates the water system, sewer system, fire department, police department, and the other services provided, while the Nation does not provide any of these services or have a relationship with another local government;
3. although the Nation may have some history and experience with respect to implementing and maintaining infrastructure on the Reserve, this is usually minimal in comparison with the local government's engineering and public works complements;
4. local governments have significant experience over many decades in relation to providing these services, while the First Nations have no or little experience, except in some cases in regard to maintaining infrastructure on the Reserve;
5. whether the local government has provided the services to the Nation over a significant period of time is significant.

Despite the common-law obligation, the British Columbia Court of Appeal held in the *Tsawwassen Indian Band* case that a municipality may terminate the common law obligation so long as it provides reasonable notice. "Reasonable" is determined, among other things, on the basis of the evidence governing how long it would take the First Nation to provide its own services based on their capacity and resources, including their authority to tax. This will likely be one to two years, or in some cases longer, based on the criteria discussed above. Before determining what a reasonable notice period may be, it is necessary

Agreements to Service Reserves (continued from page 9)

to review the content of any existing services agreement or one that has expired and any extension arrangements, to be satisfied that there is no contractual obligation that goes beyond the common law ability to terminate the services within the reasonable time frame.

Don Lidstone

Excess or Extended Services: Latecomers 101

The *Local Government Act* requires municipalities and regional districts to set up latecomer regimes in certain circumstances, but provides very little guidance regarding the specific mechanics of how this is to be done.

Latecomers come into play when land is being subdivided or developed, and when either a developer, or a local government, or both, are providing highway, water, sewage or drainage systems, that will service land other than land being subdivided or developed. These are referred to as "excess or extended services". Local governments may require the developer to install excess or extended services, either at the cost of the local government, or at the cost of the developer. The cost may also be shared between the parties.

If the developer is required to pay for the excess or extended services, then the local government **must**

(a) determine the proportion of the cost of the entire service that reflects the services being provided to land other than the subject land (in essence, the costs of the "excess or extended" portion);

(b) determine which part of the "excess or extended service" will benefit each parcel of non-subject land that will be served by the highway, water, sewage or drainage system; and

(c) impose a charge related to this benefit, as a condition of an owner connecting to or using the excess or extended service.

In order to determine the dollar amount of the latecomer charge per parcel, numerous factors may be used, such as parcel area, frontage, or development potential. Typically the cost of the excess or extended service (item a), is divided by this factor (item b), to yield the charge related to the benefit (item c).

The local government **must** remit any payments it collects to the developer, or if the local government and developer jointly paid for the excess or extended service, the local government must remit the developer's share. Local governments are not required to enact a bylaw in order to set up a latecomer regime: it may be done by resolution. However, the latecomer regime must include interest calculated annually, and this interest rate must be set by bylaw.

Latecomer regimes may last up to a maximum of 15 years from the time the service is completed, and the term must either be agreed to between the local government and developer, or set pursuant to the *Commercial Arbitration Act*.
In circumstances where the local government foots the bill for the excess or extended services, it **may** recover its costs via a latecomer mechanism. Alternatively a local government may recoup its costs via a local service tax, or a fee.

Sara Dubinsky

Lawful Nonconformity: Proving Commitment to Use

A vexing problem is deciding whether or not a property owner has established a "commitment to use" such that the use becomes a lawful non-conforming use. At one time it seemed as though significant physical alteration to the land was required, but no single factor is determinative of the result. A judge must look at the objective facts of the situation to draw a conclusion as to whether the owner has shown an unequivocal commitment to leave intact the use of the property.

1. Origins of Commitment to Use in B.C.

Commitment to use is a common law extension of the statutory provisions surrounding non-conforming uses and siting which are currently found in s. 911 of the *Local Government Act*, RSBC 1996, c 323. S. 911 reads in part:

> **911 (1)** If, at the time a bylaw under this Division is adopted,
>
> (a) land, or a building or other structure, is lawfully used, and
>
> (b) the use does not conform to the bylaw,
>
> the use may be continued as a non-conforming use...

This "grandfathering" provision protects owners who might suffer significant deprivation from application of a new bylaw even though the use of their property had been lawful prior to the enactment of the bylaw. But what if a person builds a structure, and before they begin using the structure, a bylaw is enacted that prohibits the intended use?

Lambert JA addressed this situation in *Cowichan Valley (Regional District) v Yole* (1988), 41 MPLR 78 (BCCA) *[Yole].* In *Yole*, an owner built a stable for raising horses, but before the owner began using the stable a bylaw was enacted that prohibited the keeping of livestock on the property. Lambert JA held that in such a situation, the owner's commitment to the use of the structure was enough to give the use legal non-conforming status. In doing so, Lambert JA set out the fundamental principles of commitment to use in B.C.:

1. commitment to a use is equivalent to actual use for the purposes of establishing a non-conforming use; and

2. any doubt as to prior use should be decided in favour of the owner.

It was relatively straightforward to apply these principles in *Yole*, because the owner had built a structure specific to the intended use. However, the correct application of the principles has been a source of some confusion since that time.

2. Physical Alteration of the Land

After *Yole*, a body of case law developed which seemed to indicate that significant physical alteration of the land in question was required to establish commitment to use.

In *Linton v Comox Strathcona (Regional District)* (1991), 8 MPLR (2d) 157 (BC SC) [Linton], the Court found that although the owners of an interest in a property had taken many steps toward establishing a golf course on the property, they had not made any alterations to the land to further the plans for a golf course. Hutchinson J concluded:

> Plans have been drawn, designers retained, investors approached and the regulatory authorities consulted; but the crucial step of moving from a concept to an unequivocal commitment of the lands to

Lawful Nonconformity: Proving Commitment to Use (continued from page 11)

> the use of a golf course has not been taken.

Even if an owner establishes a commitment to use on one portion of their property, legal non-conforming status may not necessarily extend over unaltered portions of the property. In *Cowichan Valley Regional District v Little* (1992), 12 MPLR (2d) 122 (BC CA) [*Little*], commitment to use was established by the bulldozing of a portion of the owner's property to make space for the expansion of a used car sales lot. The court declined, however, to extend legal non-conforming status to another area of the property. There was no evidence that the area had been altered or otherwise prepared for use as a car sales lot prior to the rezoning which prohibited the intended use.

Physical alteration of property was also essential to the result in *Sunshine Coast (Regional District) v Bailey* (1995), 30 MPLR (2d) 91 (BC SC) [*Bailey*]. Here, owners of a shared interest recreational property argued that the servicing of the entire property, including a road and paths, a dam, and water and hydro connections, combined with evidence of an overall plan for the property, established a commitment to use that extended to allow building of cabins on empty sites on the property. Lysyk J agreed, and found that it would be unfair to prevent the owners from constructing units that would bring the density of the site up to the density that was originally intended:

> Presumably, it is the concept of fairness that supplies the underlying rationale for the statutory non-conforming use exemption, for its liberal interpretation by the courts through development of the "commitment to use" doctrine, and for the accompanying proposition that any doubt as to prior use ought to be resolved in favour of the owner. To prohibit completion of a land development project to which there has been an unequivocal commitment, <u>including significant physical alteration to the site</u>, savours of unfairness because it is tantamount to giving the zoning bylaw retroactive effect, to the prejudice of the owner. [emphasis added]

Subsequent cases have cited this passage from *Bailey* as a summary of the doctrine of commitment to use, and have respected its emphasis on the physical alteration of the land in question.[25]

3. Everything Except Physical Alteration of the Land

But the true test for whether legal non-conforming use has been established is more general and cannot be reduced to a question of whether significant physical alteration of the land has occurred.

The recent case of *Sierra Club of Canada v Comox Valley Regional District*, 2010 BCSC 74 [*Sierra Club*] showed that under certain circumstances a commitment to use could be established <u>without any significant alterations to the site</u>. The property owner in Sierra Club had consistently taken steps to prepare the property for use as a gas station, including adding conditions in the purchase and sale agreement regarding suitability of the site for the intended use. The owner had also hired professionals to prepare several necessary studies, including a traffic study and stormwater management plan. B.D. MacKenzie J specifically distinguished this situation from the facts in *Linton*:

[25] See, e.g. *Duke v Regional District of Nanaimo,* 1998 CanLII 6721 (BC SC); *SCIC v Burnaby*, 1999 CanLII 7012 (BC SC), rev'd on other grounds 2001 BCCA 708; *Country Lane Developments v Coquitlam*, 2003 BCSC 1121; *3252 Holdings v Sunshine Coast Regional District*, 2004 BCCSC 699;

Lawful Nonconformity: Proving Commitment to Use (continued from page 12)

> I agree with the respondents that these undertakings went well beyond the planning stage or a mere intention to use. From the outset, significant work was undertaken in preparing many professional studies and reports for the singular purpose of building a gas station. This is a far cry from the circumstances in *Linton.* There the plan never moved beyond a mere concept to an "unequivocal commitment" to use the land for a particular purpose, in that case, a golf course. [*Sierra Club* at para. 73]

As a result, the court held that the owner had demonstrated an unequivocal commitment to use the land as a gas station and that such use had acquired legal non-conforming status.

Conclusion

Sierra Club confirms that any number of factors may be relevant to establishing commitment to use, and each situation must be evaluated on its own facts. Commitment to use may apply to built structures or to empty properties; it may even apply to parts of a property, but not other parts of the same property. The commitment must be unequivocal. Mere intent or speculation cannot establish the required commitment. This explains why evidence of physical alteration of the property is often given great weight in evaluating commitment to use.

Yet ultimately, when confronted with a question of whether commitment to use has been established, there is no simple bright line test for a judge to apply. Like an umpire determining whether a batter has struck at a pitch, the judge must apply a holistic approach to the objective evidence available and determine a fair outcome.

Cam Mitchner

Yanke v. Salmon Arm (City), 2011 BCCA 309 (B.C.C.A.)

This case clarified the provincial and federal government role with regard to approval of developments in streamside protection and enhancement areas.

Mr. Yanke owned property in Salmon Arm and a portion of that property was within the riparian assessment area for Shuswap Lake. In 2007 Yanke wanted to build a house on the lot and engaged a registered professional biologist to prepare an assessment report as required by the *Riparian Areas Regulation* (“RAR”). The biologist investigated and formed the opinion that if the proposed development stayed within certain parameters there would be no “harmful alteration, disruption, or destruction of natural features, functions and conditions that support fish life processes in the riparian assessment area” (“HADD”). Under RAR the next step was that both the Ministry of Environment (MOE) and the Department of Fisheries and Oceans (DFO) were to receive a copy of the biologist’s report and were to notify the City of Salmon Arm that they had received that notification. MOE chose not to notify Salmon Arm that it and DFO had received the report - MOE officials believed that it had the discretion to withhold that notification until DFO actually approved the contents of the report.

The central question in this case was whether the City of Salmon Arm needed the approval of DFO before authorizing development in the sensitive riparian area. The BC Court of Appeal concluded that the legislation did not support the practices of the provincial and federal governments and they had gone far beyond the actual requirements of the RAR when they established a decision-making role for DFO with respect to non-HADD development proposals. Nothing in s. 4 of RAR allowed DFO to veto development where a qualified environmental professional had given an opinion that the proposed development would not result in HADD. The City had the power to

Yanke v. Salmon Arm (City), 2011 BCCA 309 (B.C.C.A.)
(continued from page 13)

authorize the development even if DFO raised objections, and DFO had an obligation to provide the notification that it had received the report, an obligation that could be enforced by court order.

Scott Black

Greater Vancouver Regional District v. British Columbia (Attorney General), 2011 BCCA 345

In this case, the strength of section 3(c) of the *Local Government Act*, RSBC 1996, c. 323, ("LGA") was significantly reduced for regional districts. Section 3(c) provides that "notice and consultation is needed for Provincial government actions that directly affect regional district interests". However, the BC Court of Appeal held that this section is aspirational only, and does not create any legally enforceable obligation on the part of the Province to provide notice to, or consult with, a regional district before taking an action that directly affects its interests.

The Greater Vancouver Regional District (the "District") challenged the constitutional validity of the *Musqueam Reconciliation, Settlement and Benefits Agreement Implementation Act*, SBC 2008, c. 6, (the "*Reconciliation Act*"), which transferred parts of Pacific Spirit Regional Park (the "Park Lands") in the University Endowment Lands to two companies controlled by the Musqueam Band. The Park Lands were sold to the District by the Province in 1989, but subject to an expressed condition that the conveyance was "without prejudice to the aboriginal claim of the [Musqueam]". Then, in March of 2008, the Musqueam and the Province entered into a "Settlement Agreement" whereby the Province agreed to transfer four parcels of land, including the Park Lands, in exchange for the settlement of and release from certain claims. The District argued that the *Reconciliation Act* was ultra vires the Provincial legislature, as it was, in pith and substance, a law in relation to 'Indians and Lands reserved for the Indians', which are areas of federal jurisdiction. The District also pointed out that the province transferred the Park Lands to the companies without notice to the District, or consultation with it.

This was an appeal from the decision of the BC Supreme Court that section 3 of the LGA was not a mandatory provision entitling the District to be consulted and notified. The BC Court of Appeal upheld the previous decision, finding that the section was too vague as to who was to be consulted and how notification was to take place. Further, no imperatives such as "must" or "shall" were used, indicating that there was not an intention to create a legal obligation on the part of the Province. Therefore, the Court held that the section did not create any requirement or obligation on the part of the Province to consult or provide notice to a regional district before legislating in any particular way, and the appeal was dismissed.

Lisa van den Dolder

0742848 B.C. Ltd. v. Squamish (District), 2011 BCSC 747

This case relates to acceptable interpretation of Official Community Plans ("OCPs"). The petitioner company, 0742848 B.C. Ltd. ("the Company"), owned land in the District of Squamish (the "District"). About 15 of the 78 acres were west of a dike that ran through the western part of the property. The zoning of the property specified various minimum setback requirements for the location of the principal building. The Company applied for a development permit to place a 1,300 square foot modular home on the western,

0742848 B.C. Ltd. v. Squamish (District), 2011 BCSC 747
(continued from page 14)

outward side of the dike, for the use of the owner of the Company.

The District's 1998 OCP designated certain areas as "development permit areas". The property was located within what the OCP designated as "Development Permit Area #1: Protection of the Natural Environment". The designation was pursuant to section 919.1(1)(a) of the *Local Government Act*, which allows a municipal government to designate a development permit area for the purpose of "protection of the natural environment, its ecosystems and biological diversity". The District Council maintained that the development permit guidelines allowed it to insist that the home be placed on the eastern, inward, side of the dike, and refused to allow the structure on the grounds that the OCP designated where structures could be located relative to river.

The Company applied for judicial review, arguing that the development permit application met all lawful requirements and had to be approved. The Court allowed the petition. The Court explained that when deciding whether to grant or refuse issuance of a development permit, the municipality must apply the guidelines specified in the OCP and cannot act on the basis of extraneous concerns. The Court concluded that the motion and discussion at the second Council meeting were contrived to bring the Council's decision within the guidelines because of fear of an expected legal challenge. The comments at the first meeting more truly reflected Council's real reasons, reasons that were not rooted in the guidelines and were extraneous.

The Court further stated that the guidelines did not grant the District the authority to prohibit placement of the house outside of the diked area, and, therefore, Council acted without jurisdiction in rejecting the application. The guidelines should be construed in context, in light of the special conditions or objectives described in the OCP. The Court also found that the decision of the District was unreasonable and stated that there would be an order in the nature of mandamus compelling the district to issue the permit.

Lisa van den Dolder

Lidstone & Company Personnel

Paul Hildebrand is Associate Counsel at Lidstone & Company. Paul is the head of the law firm's Litigation Department. He won the Gold Medal in law at the University of British Columbia in 1980. Paul has a Doctorate in Economics in addition to his Law Degree and Master of Science degree in mathematics. For nearly 29 years, Paul Hildebrand has practiced law in the area of complex litigation, including a 12 year stint with McAlpine & Company, one of the leading complex litigation firms in Canada. Paul is responsible for the conduct of our local government clients' litigation matters, including defense of claims, insurance matters, suing other parties, injunctions, appeals, and other litigation related matters. He also has expertise in regard to arbitration, mediation and conciliation. He has done securities work, including financings for public and private companies, and real estate transactions.

Don Lidstone Q.C. has practiced generally in the area of local government law since 1980. His municipal law focus is in the areas of constitutional, administrative, and environmental law, particularly in respect of governance, land use/sustainable development, regulatory approvals, and legislative drafting. Invited to speak regularly at conferences, symposia and universities, he has chaired the Sustainable Region Initiative (Governance and Finance), Liquid Waste Expert Review Panel, Fire Services Review Panel, Whistler Waste Blue Ribbon Panel, and the Municipal Law Section of the British Columbia Branch of the Canadian Bar Association. Don has published numerous papers and manuals and consulted on the development of the *Community Charter* and other municipal statutes in a number of provinces. He was designated Queen's Counsel in 2008.

Lidstone & Company Personnel (continued from page 15)

Lindsay Parcells practices municipal law with a particular interest in land use, real property, corporate, commercial, mediation and environmental matters. Lindsay joined Lidstone & Company in September, 2011 with 19 years of legal experience practicing law on Vancouver Island and in Calgary. He was called to the Alberta bar in 1992 and the British Columbia bar in 1995. Lindsay completed a Masters degree in Municipal Law from Osgoode Hall Law School in 2009 and a combined Bachelors of Laws and Masters of Business Administration degree from Dalhousie University in 1991. Before attending Law School, he served for one year as a legislative intern at the Alberta Provincial Legislature. Lindsay is currently Treasurer of the Municipal Law Section of the BC Branch of the Canadian Bar Association.

Marisa Cruickshank advises local governments in relation to a variety of matters, with an emphasis on constitutional, administrative and environmental law issues. Marisa completed her law degree at the University of Victoria. She was awarded five major scholarships and academic awards. She also served as a judicial law clerk in the British Columbia Court of Appeal.

Sara Dubinsky is a graduate of the University of Victoria Faculty of Law. Sara summered with a boutique litigation firm in Vancouver and appeared at the Braidwood Commissions of Inquiry on behalf of the British Columbia Civil Liberties Association, where she articled. Sara is a litigation lawyer and handles bylaw enforcement matters. She also provides legal opinions on a wide variety of issues, and is the go-to person in our firm for conflict of interest opinions. Sara received three awards in law school for her performance in the Wilson Moot Competition.

Cam Mitchner advises local government on a wide range of local government issues, including governance, land use, environmental and constitutional matters. Prior to attending law school at the University of British Columbia, he worked in the software industry, where his experience included building municipal geographic information systems applications for the City of London, Ontario. Cam articled at Bull Housser & Tupper in Vancouver before joining Lidstone & Company as an associate. He enjoys cycling and is a long-time volunteer for the Tour de Delta cycling race hosted in Delta, B.C.

Scott Black completed his law degree at the University of Victoria and worked as a policy analyst before beginning work with Lidstone & Company as an articling student. Scott has worked for provincial and other governments on access to information and privacy, legislative drafting and bylaw drafting.

Lisa van den Dolder completed her law degree at the University of Victoria. During that time, she had co-op terms as an advisor at the University of Bristol's Law Clinic in England, and as a Contract and Policy Analyst at the Capital Regional District in Victoria. Lisa has a Master's Degree in English from the State University of New York at Buffalo. Lisa completed her undergrad at Thompson Rivers University with a BA in Psychology and English, and before studying law she managed website content for Halifax Bank of Scotland and Hilton International in the UK.