LIDSTONE & COMPANY
Law Letter

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Medical Marihuana Update

Recent regulatory amendments brought into force by the Province have impacted the ability of local governments to regulate medical marihuana production in the ALR.

On May 7, 2015 the Province amended the *Agricultural Land Reserve Use, Subdivision and Procedure Regulation* (the "Regulation"). In particular, Order in Council No. 200 amended s. 2(2) of the Regulation, which designates certain activities as farm use and specifies that these farm uses may be regulated but must not be prohibited by any local government bylaw, unless the bylaw receives ministerial approval pursuant to s. 917 of the *Local Government Act.*

Previously s. 2(2) of the Regulation was silent with respect to marihuana production. Now, as a result of the amendment, an additional farm use has been designated. Section 2(2)(p) has been added:

(p) the production of marihuana in accordance with the Marihuana for Medical Purposes Regulations, SOR/2013-119 (Canada).

<u>The implications of this change are significant.</u>

Previously we had advised our clients that, in short:

1. The *Agricultural Land Commission Act* ("ALCA") requires local government zoning bylaws to be consistent with the ALCA and the Regulation, and s. 46(4) renders such bylaws of no force or effect to the extent of an inconsistency. Under s. 46(6), however, a bylaw that provides additional restrictions on farm use of agricultural land beyond those imposed by the ALCA is not,

for that reason alone, inconsistent with the ALCA.

2. The ACLA deems an inconsistency where a zoning bylaw contemplates a use that would interfere with the Act's intent.

3. A zoning bylaw prohibiting medical marihuana grow operations ("MMGO's") on agricultural land previously was not inconsistent with the ALCA's intent because the intent of the ALCA is narrow: its purpose is to preclude non-farm uses of agricultural land, and encourage farming of agricultural land. A zoning bylaw prohibiting MMGOs (which must be operated indoors in commercial buildings, pursuant to the federal requirements) is not permitting a non-farm use or interfering with traditional farm uses. Thus, in our view such a bylaw was not inconsistent with the Act.

4. In our view the ALC's own bulletin reflected our interpretation of the ALCA. The bulletin states (in part):

Zoning bylaws enacted by municipalities may set out restrictions on land use, including but not limited to the use of land for medical marihuana production. Where such restrictions may apply to land within the ALR, such restrictions with respect to the particular land use of lawfully sanctioned medical marihuana production would not in and of themselves be considered as inconsistent with the *ALC Act.*

Our advice also expressly referenced s. 2(2) of the Regulation, and in particular noted that marihuana production was not on the list of activities that could not be prohibited.

Our complete analysis on these issues is set out in our client bulletin of June 26, 2014, available on our website .

The legal landscape has now changed as a result of marihuana production being designated a farm use. The implications of the change to the Regulation are the following:

1. **Local governments cannot zone to prohibit MMGOs in the ALR (unless they receive ministerial approval to do so). Such a bylaw would now be inconsistent with the Regulation (which expressly precludes such a bylaw) and so would have no force or effect, pursuant to s. 46(4) of the ALCA.**

2. **Local governments may regulate MMGO's in the ALR, and are encouraged to adopt the new bylaw standards.**

The Ministry of Agriculture has updated its Guide for Bylaw Development in Farming Areas by including specific bylaw standards with respect to MMGO's. The Minister adopts bylaw standards pursuant to s. 916 of the *Local Government Act:*

Provincial standards for farm bylaws

916 (1) In this section and sections 917 to 919, **"minister"** means the minister responsible for the administration of the *Farm Practices Protection (Right to Farm) Act*.

(2) The minister may establish, publish and distribute standards in relation to farming areas for the guidance of local governments in the preparation of zoning bylaws and bylaws under this Division.

(3) Standards under subsection (2) may differ for different parts of British Columbia.

The bylaw standards that are specific to MMGO's are the following:

- Maximum setback of 15m-30m from lot lines and 30 m from a domestic water supply intake;

- Maximum 150m setback from parks and schools;

- Maximum setback from non-ALR residential uses of 30m (with a buffer) or 60m (if no buffer);

- Riparian protection setback of 30m from natural streams, channelized streams, and constructed channels or ditches.

The bylaw standards also expressly provide that local governments may require business licences for MMGO's (at s. 2.4.2).

the Law Letter is published quarterly by:

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Thanks to our editors Adriane Giberson and Lia Psomiadis.

Adopting the bylaw standards is discretionary for most local governments. The regulated municipalities (currently only Abbotsford, Delta, Kelowna and the Township of Langley are regulated, pursuant to s. 918 of the *Local Government Act*), must review their zoning bylaws for consistency with the new standards. This is required by s. 919 of the *Local Government Act:*

Three year review of bylaws affecting farming areas

919 (3) A board, council or local trust committee to which a regulation applies must review all its zoning bylaws in order to identify to what extent, if any, the provisions of those bylaws, relating to any farming areas within the geographic area to which the regulation applies, are inconsistent with the standards established under section 916 by the minister.

Sara Dubinsky

The Building Act: Implications for Local Government

The Building Act (Bill 3) was introduced by the Province with the goal of establishing more consistent building requirements throughout British Columbia. It modifies the current building regulation scheme established by the Community Charter and the Local Government Act, which allows local governments to enact bylaws that exceed the standards set out in the Building Code. Many local governments have opposed the creation of a uniform regulatory system, due to its effect on the validity of certain local government bylaws, such as those that require residential sprinkler systems. The current system provides local governments with the flexibility to respond to regional needs that cannot be addressed by a province-wide regulation.

Proponents argue that a lack of uniform building provisions leads to inconsistent interpretations of the Building Code, poor compliance with Building

Code provisions, and building officials with a lack of skills or Building Code knowledge. To address these issues, the Act aims to eliminate any local variations in building regulation. It will take precedence over the Community Charter, the Local Government Act, and other legislation relevant to local governments, and a local building requirement will have no effect to the extent that it relates to a matter that is the subject of a requirement under the Act or its regulations, including the Building Code, or is prescribed as a restricted matter. The new legislation will apply to all areas of the province, except the City of Vancouver.

The Act also creates a new regime for regulating and licensing building officials. Pursuant to section 10, a local authority is restricted from allowing a person to make decisions regarding building regulations on behalf of the local authority unless that person is a qualified building professional under the Act or the person is otherwise exempted from the provisions of the Act. Local governments will have four years from the date the Act comes into force to ensure that their building inspection officials are properly trained and certified.

The Act does contemplate some local variation, although it is unclear to what degree such variations will be permitted. Under section 7 of the Act, a local authority may request a variation from the Minister and, if granted, the Minister may make a building regulation in respect of the local authority. The Minister may also designate a matter or class of matters as not subject to all or part of a building regulation. If a local government makes a request for variation, it may be required to pay the Minister's reasonable costs of determining the request and, if necessary, engaging a consultant.

The changes made by the Act will come into effect gradually. The Act, which received royal assent on March 31, 2015, will come into force by Cabinet regulation, and its various sections will have effect when the necessary supporting regulations are passed. Local governments will have two years from the date the Act comes into force before the restrictions on local authority will apply. While it is recommended that local governments review their bylaws and procedures to eliminate individualized requirements and ensure compliance with the Act and the current Building Code, the exact extent of the Act's restriction of local government authority will only be known once the relevant regulations are enacted.

Rachel Vallance

BC Court of Appeal confirms scope of public hearings does not include scrutiny of business operations

The BC Court of Appeal resoundingly overturned the lower court's decision in Community Assn. of New Yaletown v. Brenhill Developments Ltd. 2015 BCCA 227, clarifying the scope of local government's disclosure requirements in public hearings.

Brenhill Developments Ltd. ("Brenhill") negotiated a land swap with the City of Vancouver whereby Brenhill would take over a City-owned social-housing site located across the street from its property and construct a new building containing condo units, market rental units and a daycare. In exchange, Brenhill would construct a replacement for the social housing on its property and give that

site to the City. The development would result in Brenhill constructing two new buildings across the street from each other with Brenhill trading ownership of the sites with the City.

The condo building proposal required rezoning, while the new social housing development only required a development permit. Under the Vancouver Charter (and similarly, under s. 890 of the Local Government Act), a public hearing is required for rezoning applications but not for development permits. A group of residents in the area opposed to the developments formed the Community Association of New Yaletown ("CANY") to challenge the City's public hearing process for the rezoning. CANY's essential submission was that the City's public disclosure was inadequate and the process was artificially divided into two stages such that residents could not comment on the overall land exchange plan (para 7).

Chief Justice Bauman for the Court of Appeal distinguished the three main functions of municipal governments between 1) legislative (i.e. making bylaws and resolutions); 2) business (managing municipal assets, purchase and sale) and 3) quasi-judicial (licencing and zoning powers). Often, these three functions overlap. When conducting business operations, such as a land exchange contract, municipalities should take care to "not let its business interests overwhelm its duty to make good law" or to "fetter[1] the discretion it must have when exercising its legislative powers" (para 65). However, the public hearing is not the arena in which citizens can challenge local government's business decisions. Residents do not possess a general right to review municipal contracts or know all of the negotiating points in a business transaction between the local government and a developer. The public hearing, as set out in legislation, is to allow the public to make representations and be heard strictly respecting matters in the proposed bylaw.

In this case, the only bylaw subject to a public hearing was a rezoning bylaw. The City provided the public with the same 81-page policy report regarding the rezoning that was put forward to council for its consideration. The land exchange contract had been properly considered and approved at an in camera council meeting as per the Vancouver Charter (a similar provision is provided at s. 90(e) of the Community Charter). The court emphasized that local governments have statutory authority to enter into real estate transactions without public scrutiny and oversight, and when the City approved the contract, it was "doing its business" (para 117). As such, the City properly restricted the public hearing to the rezoning bylaw, and residents did not have a right to comment generally on the entire land exchange deal.

The court also considered whether the City adequately disclosed the relevant documents to the public for consideration before the public hearing. The court agreed with the City that procedural fairness in a public hearing requires it to disclose the materials that Council will consider when deciding whether to enact the rezoning bylaw at issue (para 88). Here, the City met that requirement by disclosing the policy report pertaining to the rezoning. It was not required to also disclose the land exchange contract, the minutes from the in camera meeting, or the

[1] The term "fetter" literally means "a chain or shackle for the feet" (*Black's Law Dictionary)*; as such, to "fetter discretion" means to put council in a position which binds the exercise of their discretion in a certain way.

development permit application for the social housing property. Citizens did not need to see these documents to make inform comments on the rezoning, nor were they entitled to see these documents which were negotiated pursuant to the City's business powers (para 95).

Bauman, J. pointed out that the City exceeded its disclosure requirements by providing substantial and clear information (including some details on the land exchange) in its policy report and did not prevent discussion at the public hearing about the land exchange. There was no finding that council's discretion was improperly fettered in deciding on the rezoning. Ultimately, recourse for residents who are unhappy with a council's decision to enact a certain bylaw or pursue certain business options resides "at the ballot box" (para 62). The public hearing for zoning bylaws is not the forum in which citizens can expect to challenge or be heard on a local government's general business dealings.

Carrie Moffatt

Statutory Limits on Farming Bylaws

"Farming is hard. Farmers growing legal crops in British Columbia must at times feel like they are stuck in a card game that is being played with a stacked deck." So noted the judge in the BC Supreme Court decision in *Alberni-Clayoquot (Regional District) v. Durmuller* (2013). Recognizing this fact, the importance of farming to the BC economy and the challenges that farmers were facing in carrying on their farming operations, the province enacted the *Farm Practices Protection (Right To Farm) Act* (the "***FPPA***") in 1995. As a result of this legislation, the power of local governments in BC to make bylaws with respect to farm operations is subject to certain statutory limitations. These limitations are found in the application of the *FPPA*, the *Local Government Act* (BC) (the "***LGA***") and the *Agricultural Land Commission Act* (the "***ALCA***").

The *FPPA* protects "farm operations" conducted in accordance with "normal farm practice" from nuisance actions by any person for odour, noise, dust or other disturbance resulting from the farm operation as well as from certain local government authority. A "farm operation" is defined by s. 1 of the *FPPA* to include a number of prescribed activities including: (a) growing, producing, raising or keeping animals or plants, or the primary products of those plants or animals; (b) clearing, draining, irrigating or cultivating land; (c) using farm machinery, equipment, devices, materials and structures; (d) applying fertilizers, manure, pesticides and biological control agents, including by ground and aerial spraying; (e) conducting any other agricultural activity on, in or over agricultural land, (h) aquaculture as defined in the *Fisheries Act* if carried on by a person licensed, under Part 3 of that Act, to carry on the business of aquaculture, and (i) raising or keeping fur bearing animals or game, within the meaning of a regulation made under the *Animal Health Act*, by a person licensed or permitted to do so under that Act.

Under s. 2(3) the *FPPA,* a farm operation that is: (a) conducted in accordance with normal farm practice; (b) conducted on land that is either in an agricultural land reserve, on which farm use is allowed under the *LGA*, permitted by a valid and subsisting licence, issued under the *Fisheries Act*, for aquaculture, or Crown land designated as a farming area, and (c) not in contravention of the *Public Health Act*, *Integrated Pest Management Act* or the *Environmental Management Act* is immune from municipal bylaws respecting the subject matters detailed in ss. 2(3)(a) and (b) of the *FPPA*. Under s. 2(3)(a), farm operation immunity is provided against bylaws enacted under s. 8(3)(d) of the *Community Charter* [firecrackers, fireworks and explosives], s. 8(3)(e) [weapons other than firearms], s. 8(3)(h)

[nuisances, disturbances and other situations], s. 8(3)(k) [animals], or s. 8(5) [firearms]. Similarly, under s. 2(3)(b), farm operations conducted in accordance with normal farm practice are immune from bylaws enacted with respect to s. 703 of the *LGA* [animal control authority], s. 724 [noise control], s. 725 [nuisances and disturbances], or s. 728 [fireworks].

The *ALCA* also contains restrictions on local government bylaw making powers. Under s. 46(2), local governments made after August 26, 1994 must ensure consistency in respect of their bylaws with respect to the *ALCA*, the regulations and orders of the Agricultural Land Commission. As well, under s. 46(4), a local government bylaw that is inconsistent with the *ALCA*, the regulations or an order of the Agricultural Land Commission has, to the extent of the inconsistency, no force or effect. A bylaw is deemed to be inconsistent under s. 46(5) if it allows a use of land in an agricultural land reserve that is not permitted under the *ALCA*, or it contemplates a use of land that would impair or impede the intent of the *ALCA*, the regulations or an order of the commission, whether or not that use requires the adoption of any further bylaw or law, the giving of any consent or approval or the making of any order.

In addition to these limitations on regulating farm operations, the ability of local governments to regulate farm businesses, farm operations and intensive agriculture in respect of zoning and other development regulation is limited by s. 903 of the *LGA*. Subsections 903(5), (6) and (7) limit local government powers by requiring the approval of the minister responsible for *FPPA* (the Minister of Agricultural) in relation to municipal zoning and development bylaws that regulate farm operations, farm businesses or related undertakings. Subsections 903(5), (6) and (7) provide as follows:

> (5) Despite subsections (1) to (4) but subject to subsection (6), a local government must not exercise the powers under this section to prohibit or restrict the use of land for a farm business in a farming area unless the local government receives the approval of the minister responsible for the administration of the *Farm Practices Protection (Right to Farm) Act*.
>
> (6) The minister responsible for the *Farm Practices Protection (Right to Farm) Act* may make regulations
>
> > (a) defining areas for which and describing circumstances in which approval under subsection (5) is not required, and
> >
> > (b) providing that an exception under paragraph (a) is subject to the terms and conditions specified by that minister.
>
> (7) Regulations under subsection (6) may be different for different regional districts, different municipalities, different areas and different circumstances.

Approvals granted by the minister under s. 903(5) of the *LGA* must be established by regulation under s. 918 of the *LGA* and are detailed in the *Right to Farm Regulation* (BC Reg. 261/97). To date under that regulation, four municipalities (Langley (Township), Abbotsford, Delta and Kelowna) have been granted the requisite approvals within the geographic areas detailed in the regulation.

Section 915 and 917 of the *LGA* also restrict the ability of local governments to regulate “intensive agriculture”, “farm businesses” and farm operations. Subsection 915(1) defines "intensive agriculture" as “the confinement of poultry, livestock or fur bearing animals” and “the growing of mushrooms” and under s. 915(2), intensive agriculture is permitted as a use on land despite a

zoning bylaw if the land is located in an agricultural land reserve under the *ALCA*. These limitations on local government authority may also be overridden by ministerial approval under s. 903(5).

Similarly, under s. 917 of the *LGA*, local governments are only permitted to make bylaws in relation to farm operations with the approval of the minister as established by regulation under the *Right to Farm Regulation* and, as noted above, only the four municipalities listed in the *Right to Farm Regulation* presently have that ability. With ministerial approval, the local governments are permitted to enact bylaws in respect of the conduct of farm operations, the types of buildings, structures, facilities, machinery and equipment that are prerequisite to conducting farm operations, the siting of stored materials, waste facilities and stationary equipment, and the prohibition of specified farm operations. Approval of local government bylaws by the minister entails a review process in which the minister may approve or refuse the bylaw, as well as approve the bylaw on condition of specific changes being made prior to its adaption.

The application of s. 917 is seen in a BC Supreme Court judgment in *Windset Greenhouses (Ladner) Ltd. v. Delta (Corp.)* (2003). That case involved an application by Windset Greenhouses for a declaration that a municipal bylaw was void. Windset operated a large tomato greenhouse within that ALR within Delta and intended to use artificial light at night to increase production, and to use wood waste for heating to save money. Delta passed a bylaw severely restricting artificial light in large greenhouses and the use of wood waste heating and did not obtain ministerial approval. Among other things, Windset argued that the bylaw restricted normal farm operations and was void because of the lack of ministerial approval. The court found against the municipality by finding that the bylaw was a farm bylaw under the *LGA* and the *FPPA* because it restricted the greenhouse from engaging in standard farming operations. Because the municipality had not obtained ministerial approval, the bylaw was declared void.

Local governments seeking further information on this subject may consult the *Guide for Bylaw Development in Farming Areas* published by the Ministry of Agriculture (revised in May, 2015). The guide is published under the authority of s. 916 of the *LGA* which provides that the minister may "establish, publish and distribute standards in relation to farming areas for the guidance of local governments in the preparation of zoning bylaws and bylaws". The guide provides a valuable resource to local governments in respect of zoning and land use regulations by offering standards and general information for developing and amending bylaws affecting farming areas.

Lindsay Parcells

Role of Discount Rate in Infrastructure Decisions

Governments at all levels are often tasked with comparing the cost of competing infrastructure projects as well as deciding whether a particular infrastructure project should be built by the public sector or through a public private partnership (P3).

Where the costs and revenues of a project are spread over a number of years, present value (PV) analysis is the standard financial analysis tool used for evaluating competing projects and competing delivery mechanisms. One of the most important decisions in the PV analysis is the choice of discount rate because that rate drives the outcome of the analysis.

Partnership BC defines discount rate as follows:

> A rate used to relate present and future dollars. Discount rates are expressed as a percentage and are used to reduce the value of future dollars in relation to

> present dollars. This equalizes varying streams of costs and benefits, so that different alternatives can be compared on a like-for-like basis.[2]

The discount rate is a combination of

a) the cost of capital related to the project, plus

b) a risk premium to account for the risk profile of the particular project, e.g., project construction risk.

A high discount rate may be warranted if substantial capital is invested to produce a product where there are significant demand and price risks - usually indicated by high levels of price volatility.[3]

For example, assume your government is considering an infrastructure project with two expenditure scenarios:

Option A requires an expenditure of $1 million at the end of year one. Option B requires an expenditure of $1 million spread over for four years ($250,000 per year).

Assuming the same discount rate of 5%, the PV of each option can be summarized as follows:

Option A Present Value Cost = $952,381 (Adding 5% = $1,000,000 at Year 1)

Option B Present Value Cost = $886,487 (Adding 5% for 1, 2, 3, for 4 years as applicable = $250,000 each year for four years).

The present cost of Option B is lower than Option A because those parts of the expenditure further into the future have lower values at present.

Now consider whether Option B should be built by the public sector or through a P3. The supporting financial analysis[4] often turns on the choice of discount rate. Often a higher discount rate is used for the P3 to reflect a higher cost of private vs. government financing.

The CD Howe Institute describes this as a flawed analytic:

> It is undeniable that the public sector can generally borrow at lower interest rates than the private sector. But why is the cost of financing lower for a public-sector enterprise if it is involved in the same activities and in the same way as a private-sector company – same technology, same inputs, same markets, same price – and, therefore, faces the same risk factors? The answer is that a government has the power to levy additional fees and taxes to compensate and repay lenders if its projects incur cost overruns and/or lower than expected benefits. The interest rate paid by the public sector reflects the fact that, through its taxing power, it implicitly subscribes loan insurance wherein all taxpayers act as the insurer.
>
> …
>
> If citizens gave a private company a similar option, i.e., the right to levy a tax if it was in financial distress, the private company could finance its activities at a rate similar to that of a governmental agency.[5]

This confusion results from treating the risk to lenders to a project as the same as the risk to taxpayers, which is not. Both the C.D. Howe Institute and Partnership BC agree that the

[2] Partnerships BC, Methodology for Quantitative Procurement Options Analysis, Discussion Paper, Updated April 2014, Page 78.

[3] Site C Business Case Assumptions Review, McCullough Research, May 25, 2015, Pages 9-10.

[4] It is important to remember that there are non-financial considerations when deciding whether or not to use a P3, but the financial analysis can often be a determining factor.

[5] C.D.Howe Institute, The Valuation of Public Projects: Risks, Cost of Financing and Cost of Capital, Commentary No. 388, September 2013, Pages 3-4.

discount rate used in deciding between a public sector project and a P3 project should be the same if the sole difference between the projects is who is delivering it.

The discount rate can also be determinative in evaluating competing options to meet a particular infrastructure need. The comparison of the planned Site C dam to a portfolio of primarily renewable energy sources, e.g., wind turbines backed by natural gas (*Clean Energy Act* compliant) is an example. Both options would produce the same amount of energy but Site C involves a significant up front cost of at least $8.8 billion followed by low operating costs, while a renewable portfolio has lower upfront costs followed by higher ongoing operating costs.

The impact of discount rate on this comparison is summarized by respected energy economist Robert McCullough using the measure of unit energy cost:

Bonneville Power Administration has cited BC Hydro in defense of adopting a 12% discount rate for hydroelectric projects. Tennessee Valley Authority uses discount rates between 6% and 12% based on various factors.

…

While discount rates often sound academic to those who have not been schooled in energy economics, their impact on decision-making is immense. The situation revolves around the timing of investments. Hydroelectric projects require substantial capital investments. Their operating costs are very low. This means that they are relatively unaffected by discount rate assumptions. Thermal plants – especially those fueled by natural gas – have relatively low capital costs, but also relatively high operating costs. Their economic viability is greatly affected by the choice of a discount rate.…

When the industry standard discount rate of 12% is used to reflect all the energy options, instead of a Site C discount rate of 5% and a 7% discount rate for the energy alternatives, and this is combined with other industry standard assumptions, the unit energy cost of the Site C dam is much higher than other energy alternatives[6]:

Type of Plant	**Average $/MWh**
Natural Gas	$58.04
Combined Heat & Power	$73.33
Wind	$74.36
Landfill biogas	$85.50
Coal gasification	$99.97
Geothermal	$112.30
Hydro	**$164.35**
Mass Burn incineration	$ 256.85

The choice of the 5% discount rate for Site C dam, rather than the industry standard 12% discount rate, is therefore significant in the analysis of options for delivery of provincial energy infrastructure.

In conclusion, there is much to consider when deciding on the appropriate discount rate for financial analysis of important government infrastructure decisions. And as Robert McCullough's analysis of Site C demonstrates - getting it wrong could result in large unnecessary capital expenditures, effectively crowding out funding for other important provincial and local government infrastructure projects.

Rob Botterell

[6] McCullough, Page 16-17.

Bylaw Revision

A council of a municipality has the authority to revise a bylaw to fix errors or omissions or clarify meaning, without satisfying all the procedural requirements that applied to enactment of the original bylaw.

Under section 140 (1) of the *Community Charter*, the council may by way of a "Bylaw Revision Bylaw" authorize the revision of any existing bylaw in accordance with the provincial bylaw revision regulation (B.C. Reg 367/2003). The rules for bylaw revision are the same as those applicable to provincial revision of orders, regulations or statutes under the *Statute Revision Act*.

The bylaw revision regulation authorizes the classes of revisions that can be included in a revision bylaw, and provides that once a bylaw with its revisions is complete (e.g., altering the numbering, arrangement, title, preamble, map, plan, schedule or correcting grammatical/typographical errors or clarifying meaning), then the revised (and consolidated) bylaw must be adopted by bylaw. This Adoption Bylaw must contain a certification of the corporate officer before third reading that the Revised Bylaw has been revised in accordance with the Revision Bylaw.

Despite the normal rules under the *Community Charter*, a Revised Bylaw adopted in accordance with the Revision Bylaw and the bylaw revision regulation is not subject to the procedural requirements that applied to the originating bylaw.

This authority allows a council to proceed with the following:

- consolidating a bylaw by incorporating in it all amendments to the bylaw;
- omitting, without providing for its repeal, a bylaw or a provision of a bylaw that is expired, inoperative, obsolete, spent or otherwise ineffective;
- omitting and providing for its repeal, a bylaw or a provision of a bylaw that is of a transitional nature or that refers only to a particular place, person or thing or that has no general application throughout the municipality;
- combining 2 or more bylaws into one, dividing a bylaw into 2 or more bylaws, moving provisions from one bylaw to another or creating a bylaw from provisions of one or more bylaws;
- altering the citation or title of a bylaw and the numbering or arrangement of its provisions;
- adding, changing or omitting a note, heading, title, marginal note, diagram, map, plan or example to a bylaw;
- omitting the preamble or long title of a bylaw;
- omitting forms or schedules contained in a bylaw that can more conveniently be contained in a resolution, and adding to the bylaw authority for forms or schedules to be established by resolution;
- correcting clerical, grammatical and typographical errors;
- making changes, without changing the substance of the bylaw, to bring out more clearly what is considered to be the meaning of a bylaw or to improve the expression of the law.

Under the regulation, when a revised bylaw under this process comes into force, the bylaw provisions that it revises are repealed to the extent they are incorporated in the revised bylaw. Any reference in another bylaw or document to a

provision of a bylaw that has been deleted by the revision bylaw is deemed to be a reference to the provision of the revised bylaw that has been substituted for the deleted provision. A revised bylaw does not operate as new bylaw but has legal effect and is to be interpreted as a consolidation of the law contained in the bylaw provisions replaced by the revised bylaw.

The regulation also provides that if a provision of a revised bylaw has the same effect as the provision of the original bylaw, the provision of the revised bylaw operates retrospectively as well as prospectively and is deemed come into force on the date on which the previous bylaw provision came into force.

However, if a provision of a revised bylaw does not have the same effect as the provision of the original bylaw, the provision of the *previous* bylaw prevails for things occurring before the date the revised bylaw comes into force, and the provision of the *revised* bylaw prevails with respect to subsequent things.

This scheme has been used by a number of municipalities to fix boo boos such as those listed above, to create official consolidations, or to modernize and update old bylaws.

Don Lidstone, Q.C.

British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City), 2015 BCCA 142

This appeal arose out of an action concerning the removal of homeless people from a tent city in an Abbotsford park. The plaintiff association claimed that certain bylaws and actions of the City violated sections 2(c), 2(d), 7 and 15 of the *Charter of Rights and Freedoms* (the *Charter*) and sought declarations that the impugned bylaws were of no force or effect and a remedy under section 24(1) of the *Charter*. Allegedly, the City used displacement tactics such as spreading chicken manure in the park, pepper spray and destruction of belongings.

The City applied to have the actions dismissed on three grounds – first that the Association had no standing, second, that the claim should be struck under Rule 9-5(1), and third, that a representative association in general had no standing to receive *Charter* relief. The Supreme Court held that public interest standing should be granted to the Association in this case considering the lacking capacity of Association members to mount their own individual challenges. The Supreme Court also found that the pleadings could be refined after the action's discovery phase. Finally, the Court held that it was not plain and obvious that the Association was not an appropriate vehicle to advance a section 24(1) *Charter* remedy.

The Court of Appeal unanimously agreed with the Supreme Court and dismissed the City's appeal, setting out that the only real question was not whether the Association had standing, but whether the Association had standing to pursue a section 24.1 *Charter* remedy.

To this end, the Court of Appeal discussed *Canada v. (Attorney General) v. PHS Community Services Society v. Canada (Attorney General)* and *Inglis v. British Columbia (Minister of Public Safety)* as potentially "opening" the door for a section 24(1) remedy to be pursued on behalf of others by an entity or person when the proceeding involves unconstitutional conduct by the state. The Court of Appeal further agreed with the Supreme Court's broad reading of *Fédération des parents francophones de Colombie-Britannique v. British Columbia (Attorney General)* for the arguable proposition that remedy for the breach of a *Charter* right with a uniquely collective dimension could be collectively pursued.

Accordingly, the Court of Appeal outlined that there was no persuasive legal ground to find the Association ineligible to claim a *Charter* remedy and that the available case law did not necessarily

limit *Charter* section 24(1) remedies to being claimed and enforced by individuals.

Robert Sroka

Madaninijad v. North Vancouver (District), 2015 BCSC 895

The applicant homeowners challenged the District's Remedial Action Resolution based on section 73 of the *Community Charter*, declaring that their property was in and was creating an unsafe condition due to its slope stability. The issue originally arose out of a 2005 landslide in the area which destroyed several homes and killed a woman. Between 2008 and 2013 the District obtained a number of reports that identified a risk of a landslide originating from fill materials and a retaining wall at the rear of the homeowners' residence. The remedial action requirement in this case would have caused severe financial hardship for the homeowners.

The homeowners submitted that to order remedial action based on geotechnical risk was beyond the jurisdiction of the District and that Council failed to properly consider the alternative of a debris fence at the bottom of the slope adjacent to their property. Specifically, the homeowners argued that "unsafe" must include an imminent and immediate danger, cannot include complex geotechnical guidelines not outlined in any legislation, regulation or bylaw, and effectively means that a low landslide risk to a property is not unsafe. Further, the owners claimed that for the District to interpret the term "unsafe condition" in section 73 of the *Community Charter* in a manner that expands its meaning to include geotechnical risk is contrary to basic rules of statutory interpretation. The owners submitted that this was especially so when interpreting a term with plain meaning in a manner as to impose remedial action that causes financial hardship.

The applicable standard of review was reasonableness – "whether the District's decision is justified, transparent, intelligible, and within the range of possible, acceptable outcomes that are defensible on the facts and in law." The critical issue here was whether Council was "capable of justifying its decision" based on the evidence before it.

The Court noted that risk assessment was the domain of the District in terms of both generally acceptable levels of risk as well as specific properties of concern. Accordingly, the Court found that risk of property damage, blocking of a road to a housing development and a very low risk of fatality were sufficient to deem Council's decision to pass the Remedial Action Resolution as reasonable.

Still, the Court was careful to note that not all similar decisions would be assumed as reasonable and that every case must be considered on its facts. A further warning was provided that "if municipal districts were to insist on costly remediation at the expense of property owners based solely on extremely conservative standards with regards to management of geotechnical risk, such decisions might well be considered unreasonable."

Robert Sroka

Burnaby (City) v. Trans Mountain Pipeline ULC, 2015 BCCA 78

In September, Burnaby's application for leave to appeal a previously refused injunction against Trans Mountain Pipeline was denied in chambers. The City applied to the Court of Appeal for a variance of that order in February. In its appeal, Burnaby raised two issues. The first concerned whether the judge erred in deferring the enforcement of bylaws pursuant to the *Community Charter* to the National Energy Board (NEB) on the basis that they were a collateral attack on a NEB ruling. The second issue was whether there was an error through the application of the test for an equitable injunction

as opposed to a statutory injunction. Trans Mountain, the respondent, argued there was no error and in any event, the issues surrounding the application for injunction were moot as the NEB order for testing had since expired.

The judicial process in this case was in itself interesting, as it ran somewhat parallel to proceedings at the NEB and Federal Court of Appeal. The initial application for injunction was dismissed on the basis that the conflict between the NEB's powers to provide access to investigate a proposed pipeline and Burnaby's bylaws was already at issue before the NEB. As Burnaby was a party to the NEB proceedings, there was no serious issue to be tried in the BC Supreme Court. Prior to leave to appeal being sought, the NEB had found Burnaby's bylaws inoperative based on the constitutional paramountcy and interjurisdictional immunity doctrines. The chambers judge refused leave to appeal, citing that its granting would be an abuse of process, with the only proper recourse being to the Federal Court of Appeal. The Federal Court of Appeal subsequently dismissed a leave to appeal of the NEB ruling.

The BC Court of Appeal found no error on the part of the chambers judge and declined to address Burnaby's second point of appeal at all. Speaking for the Court, Justice Donald also agreed with Trans Mountain's argument that the proposed appeal was moot, specifying that the action was at this point "useless." The Court noted that any fresh action would have to be freshly adjudicated as injunctions are discretionary remedies that must be adapted to the specific needs of the case.

Robert Sroka

Police Act amendments on specialized policing

Among several other relatively recent amendments to the *Police Act*, the provincial government introduced new regulations on specialized policing and law enforcement. These amendments provide the Minister of Justice the ability to create integrated and specialized police units throughout BC and require that local governments with populations in excess of 5,000 to pay for and use the specialized police services. The amendments also necessitate that specialized police services established in a particular region must likewise be used and paid for by municipal police boards in that region. The specialized services may include criminal investigations, traffic enforcement and support services such as police communications and forensics.

A service agreement for specialized policing must specify the services to be provided, the body to deliver those services, the municipalities within which the services will be delivered, as well as the criteria, rules, methods and formulas by which the proposed provider will determine costs and allocation of costs. The service agreement can also (but does not have to) specify the processes for coordination between police forces, processes for evaluation of services, qualifications of service providers and dispute resolution processes. Costs for specialized policing services are to be paid by the municipality directly to the specialized service provider if directed by the province, or otherwise to the province itself.

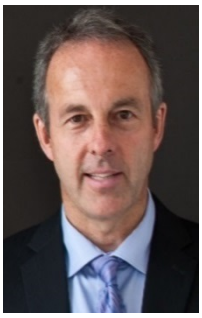
Records in relation to the specialized service provider, if that service provider is not a public body under the *Freedom of Information and Protection of Privacy Act* (FIPPA), will be deemed to be in the custody and control of the municipality in which those services are provided. If the service provider is already a public body under FIPPA, those records will remain in the control of that service provider. Members, directors and employees, both current and former, of specialized support service providers are also deemed immune from their actions and omissions in relation to a specialized support service, save for a finding of malice or wilful misconduct.

These amendments can in significant part be viewed as a response to recommendations from the Missing Women Inquiry that highlighted shortcomings in coordination of policing across jurisdictions. In commenting on this aspect of regulatory changes to the *Police Act*, the Minister has indicated that this is not a move towards police department amalgamation across jurisdictions.

Robert Sroka

Lidstone & Company *acts primarily for municipalities and regional districts. The firm also acts for entities that serve special local government purposes, including local government associations, and local government authorities, boards, commissions, corporations, societies, or agencies, including police forces and library boards. Lidstone & Company has been selected by the Municipal Insurance Association of British Columbia to be the provider of its Casual Legal Services available to MIABC Casual Legal Services subscribers.*

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 30 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.



Lindsay Parcells practices municipal law with a particular interest in land use, real property, corporate, commercial, mediation and environmental matters. Lindsay has 22 years of legal experience. 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 Co- Chair of the Municipal Law Section of the BC Branch of the Canadian Bar Association.

Rob Botterell focuses on major project negotiations for local governments (such as in relation to pipelines, LNG, dams and reservoirs, mines, oil and gas, and similar matters). He also deals with law drafting as well as local government matters in relation to aboriginal and resource law. Rob also advocates on behalf of local governments. Rob led a team that put together the Freedom of Information and Protection of Privacy legislation and advised on the Personal Property Security Act and others. He negotiated the key provisions of the Maa-nulth Treaty for Huu-ay-aht, has drafted over 500 pages of laws, and has negotiated with all levels of government and industry on major projects. He was a Trustee of the Islands Trust and in 2012 chaired a panel at the UBCM annual convention on "Voting on the Internet". Rob has an LL.B. from UVic and MBA from UBC, and is a Fellow of Institute of Canadian Bankers after having been the TD Bank Regional Comptroller in the 1980's. Rob has practiced law in British Columbia for 20

years.

Maegen Giltrow practices in the areas of governance, bylaw drafting, environmental law and administrative law. She is also a well known practitioner in the area of aboriginal law, and negotiated a treaty and worked on the Constitution, land use and registration laws and regulatory bylaws for a number of First Nations before she entered the practice of municipal law. Maegen clerked with the British Columbia Court of Appeal after graduating from Dalhousie Law School in 2003.

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.

Sara Dubinsky 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 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 received three awards in law school for her performance in the Wilson Moot Competition.

Marisa Cruickshank advises local governments in relation to a variety of matters, with an emphasis on labour and employment, 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.

Carrie Moffatt is a research and opinions lawyer in the areas of municipal law, land use, administrative law and environmental matters. Carrie graduated from the University of Victoria Faculty of Law in the spring of 2013, and commenced the Professional Legal Training Course shortly thereafter. Carrie was selected as a top applicant from her first year law class for a fellowship to generate research reports on debt regulation. Carrie's legal academic paper on the legal consequences of failing to regionalize BC's police forces was nominated for a law faculty writing award. Carrie has received numerous other

awards throughout her academic career.

Rachel Vallance provides legal opinions, agreements and bylaws on all local government matters. She completed her law degree at the University of Victoria, where she participated in the law co-op program. Rachel has worked at the Ontario Securities Commission in Toronto, the Ministry of Justice in Victoria, Chimo Community Services in Richmond, and Chandler & Thong-Ek, a business law firm with offices in Thailand and Myanmar. During law school, Rachel received awards both for academic performance and involvement in student affairs. Prior to her law degree, Rachel completed an Honours BSc in Psychology and Ethics, Society & Law at the University of Toronto.

Robert Sroka provides legal opinions and drafts agreements on all local government matters with an active interest in land use planning and real estate development. Robert came to Lidstone & Company from The City of Calgary Law Department, where he served as a bylaw prosecutor, drafted real estate transactions, and advised on planning issues. Robert obtained his JD from The University of British Columbia and spent two summers as an Ottawa intern in the offices of federal cabinet ministers. He is currently a LLM Candidate at the University of Calgary, where his work on urban brownfield redevelopment financing has been presented at several law conferences.