LIDSTONE & COMPANY

Law Letter

In this issue

The Real Court Drama of Shawinigan Lake

Self-interest, hidden evidence and unfair treatment of witnesses do not only happen in TV court dramas. These were factors in the disputes about a quarry operated by Cobble Hill Holdings Ltd. near Shawnigan Lake. In the case of *Shawnigan Residents Association v. British Columbia (Director, Environmental Management Act)* 2017 BCSC 107, the BC Supreme Court set aside the permit which allowed Cobble Hill to landfill contaminated soil at the quarry. This was a victory for the Shawnigan Residents Association (SRA) and the Cowichan Valley Regional District (CVRD) both of which have been fighting the Cobble Hill operation since (at least) 2013. The B.C. Environment Minister has subsequently cancelled the permit.

Previously in this matter…

By way of a brief background, Cobble Hill owns some land in the Cowichan Valley and (through another company) operates a quarry on these lands. In August 2013, the Ministry of Environment issued a permit to Cobble Hill allowing it to import contaminated soil onto the site and to process it through landfilling. The CVRD and the SRA (together with a few nearby residents) challenged the permit. A few lines of action were pursued.

Firstly, appeals were filed with the Environmental Appeal Board – a statutory entity under the *Environmental Management Act* established to review similar decisions. The appellants wanted the Board to rescind the permit. The CVRD and the SRA did not succeed – on March 20, 2015, the Board upheld the permit.

The CVRD also filed a petition at the BC Supreme Court arguing that Cobble Hill was using the property as a contaminated soil treatment facility and a landfill, which was contrary to the CVRD's zoning bylaw. Cobble Hill argued that they were simply reclaiming a quarry, which was an integral part of mining and, as such, not subject to municipal bylaws. The BC Supreme Court agreed

with the CVRD and found that the deposit of contaminated soil was not necessary or normal reclamation activity in the circumstances. Cobble Hill was ordered to stop using the lands as a landfill and as a soil treatment facility.

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Cobble Hill appealed this decision and on August 17, 2016, the BC Court of Appeal overturned the lower court judgment, in part, and held that the landfill reclaimed the quarry and was permitted. The soil treatment facility was not related to reclamation and was not permitted. On December 29, 2016, the CVRD appealed this decision to the Supreme Court of Canada (SCC). If the SCC agrees to hear the appeal, this will be a significant decision for municipalities to watch.

And now, to the January 24, 2017 decision…

As the CVRD was fighting its fight, the SRA appealed the March 20, 2015 decision of the Environmental Appeal Board to the BC Supreme Court. They asked that the permit be set aside because, among other things, the Board treated SRA unfairly, was biased, and was misled by Cobble Hill. The resulting decision is a notable commentary on administrative process.

The Environmental Appeal Board is an entity established under the *Environmental Management Act*. Its mandate is to hear appeals of some of the decisions made under the Act, such as the decision to issue the permit. In some instances, such as the appeal of the decision to issue the Cobble Hill permit, the Board conducts a formal adversarial hearing, with two opposing parties – the decision maker and the aggrieved person. These types of hearings often come down to the battle of the experts.

The Court stated that when an adversarial hearing is conducted by the Board, a high degree of fairness should apply, akin to a court proceeding. That did not happen in this instance. The Board required that SRA's experts be qualified (a complex process including cross-examination). However, it relied on the opinion of the Ministry's employees as if they were experts, without qualifying them as experts. This uneven treatment disadvantaged the SRA. Therefore, the decision to issue the permit must be set aside.

The most arresting part of the decision was that new evidence surfaced after the Board hearing, suggesting that Cobble Hill misled the decision maker and provided false evidence to the Board. Someone sent an anonymous email to the SRA suggesting that the qualified professional who opined that Cobble Hill's proposed landfill and treatment facility were safe was in fact involved in negotiations with Cobble Hill for a partnership in the business. Cobble Hill had not disclosed this information to the decision maker or the Board, and the Board did not ask the professional to

declare its independence. The Court concluded that this information reinforced its decision to set aside the permit.

Notwithstanding the above (and other allegations of uneven treatment), the Court did not find that the Board was biased. The law presumes that the decision-maker is impartial, unless there is clear evidence to the contrary. In this case, there was not enough evidence to find bias.

The *Shawnigan Residents Association* decision is a great victory for equal treatment of public entities and associations appearing before statutory tribunals.

Olga Rivkin

Care and Handling of Petitions

The proper treatment of petitions may give rise to various legal concerns for local governments. This article examines both the disclosure of personal information contained in a petition and the current legal status of online petitions.

a) Confidential Information and Petitions

Personal information is defined in the *Freedom of Information and Protection of Privacy Act* as recorded information about an identifiable individual that is not contact information. Contact information means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.

Petitions may present some concern for municipalities as petitions contain information that is not contact information, yet disclosing the information contained in a petition can be useful and in the public interest. Two Orders by the Office of the Information and Privacy Commissioner of BC ("OIPC")—Order F15-21 and Order F14-39—have considered this issue.

In Order F15-21, 2015 BCIPC 23, the adjudicator considered whether it is plain and obvious that a Municipality is required to refuse to disclose the

personal information contained in a petition. The adjudicator concluded that "it is not plain and obvious that disclosure of the third parties' personal information would be an unreasonable invasion of their personal privacy under s. 22 of FIPPA" (at para. 28). In arriving at his decision, the adjudicator relied on a prior BC Order, Order F14-39, 2014 BCIPC 42, where the adjudicator reasoned that individuals who sign a petition view the personal information of those who signed before them know that their personal information will be seen by those who sign after them.

Both BC adjudicators considered an Ontario Order, MO 1506, (Chatsworth (Township) (Re), 2001 CanLII 26201 (ON IPC)) which found that petitions

are not intended to be kept secret because those who sign a petition understand that the petition will be circulated and ultimately disclosed to those whom they are trying to influence. Given this context, the Ontario adjudicator decided that individuals who sign a petition knowingly forego some element of personal privacy and have "implicitly consented to this personal information being made available to others."

In light of the two BC OIPC Orders, and the similar reasoning in Ontario, there is likely a low degree of risk, from a privacy perspective, in disclosing petitions that are not clearly confidential.

b) Online Petitions

The legal status of online petitions, or e-petitions, received by a municipality may also be unclear. In BC, petitions to the legislative assembly must meet certain requirements, including that all signatures must be original and written directly on the face of the petition, and not pasted or transferred to it, and that petitions cannot contain erasures or insertions. Petition that consists of more than one sheet of signatures must include the text of the petition at the top of each sheet. Petitioners must be residents of BC and each person must print his or her name and address and sign his or her name under the text of the petition. In addition, petitions must be written, typewritten or printed, and the legislature recommends that the paper be standard letter or legal size.

Currently online petitions do not conform to the requirements to be legally recognized by the BC legislature. A local government derives its authority from the provincial government and it is reasonable to assume that the treatment of online petitions by a local government is expected to conform to provincial requirements. Despite not conforming to legislative requirements in BC, proponents of online petitions still see them as useful because of the way e-petitions can reach a large audience and garner many signatures in a short period of time. In this way, e-petitions can unofficially reflect community concerns.

At present, there has been recognition of e-petitions by other provinces and territories. Moreover, the federal government now hosts a website that allows the creation of e-petitions. Given this, the BC legislature may allow e-petitions in the future and local governments in BC would be prudent to keep an eye on this issue.

Robin Phillips

Security for Works and Services

a) Introduction

Local governments commonly enter into agreements with contractors for the provision of services, supply of goods and construction projects. To ensure contract performance by the contractor, an agreement should include a requirement for the contractor to provide security, typically in the form a surety bond or letter of credit. The terms "surety bond" and "letter of credit" are sometimes used interchangeably with the assumption that their terms and purposes are similar; however, there are clear distinctions between the two types of security and this article explains their characteristics and the most important differences between them.

b) Surety Bonds

A surety bond is a type of guarantee that is usually issued by a bonding or insurance company (the "surety") on behalf of the contractor (the "principal") to protect the interests of the beneficiary (the "obligee") under the surety bond. It is a written promise under seal which commits the surety to fulfill the obligations of the principal under the contract either by specific performance of the principal's obligations or by payment of money up to a stipulated sum to the obligee. A surety bond is not an insurance policy but instead a three-party undertaking whereby the surety

agrees to indemnify the owner against loss arising from the failure of the contractor to perform obligations under contract.

Most surety bonds have three parts consisting of the recitals, obligations and conditions. The recitals explain the transaction and set out the relevant facts, the obligations specify what obligations the surety has under the bond and the conditions set out the conditions in which the obligations of the surety will apply. Usually, the surety bond will provide the surety with a right to elect between paying the amount of damages suffered by the obligee up to the amount specified in the bond or correcting or completing the principal's obligations under the contract. In consequence, surety bonds usually include a provision that the surety be notified in the event of any default by the principal.

In general terms, the surety is entitled to the full range of rights and defences to which guarantors are entitled and there may be circumstances in which a surety may avoid an obligation to pay under the bond if a defence is successfully made out. The surety is also only liable to the obligee for the actual damages sustained by the obligee as a result of nonperformance by the principle. It is important to note that the surety's obligations under the surety bond cease if certain specified conditions are not satisfied. The conditions invariably relate to the manner and timing in which claims are made under the surety bond and to the performance of the contractor under the contract. If the conditions are not satisfied, the local government beneficiary may have no recourse under the surety bond. The surety's obligations under the surety bond are a matter of contractual interpretation and the terms of the surety bond should be carefully reviewed by the local government beneficiary before and after they are approved to ensure they are acceptable and understood.

Surety bonds are used for a variety of purposes including in the procurement process as well as for contracts for services, supply of goods or construction. For procurements in which an invitation to tender is issued, the local government may require bidders to submit bid bonds with their bids. The bid bond guarantees that if the bid is selected, the successful bidder will enter into a formal contract with the local government on the terms specified in the invitation to tender. If the successful bidder fails to do so, the surety will guarantee, up to the amount specified in the bid bond, to pay to the local government the financial difference between the amount of the successful bidder's bid and the amount for which the owner legally contracts with another contractor. Bid bonds do not ensure that a surety will provide the necessary performance bond once the bid is accepted; therefore, it is prudent to request a separate undertaking signed by a surety company to issue a performance bond if the contractor is awarded the contract.

For contracts of service, supply or construction, performance bonds indemnify the local government, up to the amount specified in the bond, if the contractor fails to fulfill its obligations under the contract. In the event of a contractor's default, the performance bond will cover the costs of completing the contract as well as other costs for which the surety is liable, up to the total amount of the bond. Typically, the amount of a performance bond is based on a percentage of the contract amount, such as 50% or 100% of the contract amount. Labour and material bonds are another type of surety bond that guarantee that sub-contractors, sub-trades and suppliers who have direct contracts with the contractor will be paid for labour and materials provided to the contractor for use on the project identified in the bond. Repayment bonds are another form of surety bond used to guarantee contractor's obligations under contracts and they provide security to local governments for the repayment of down payments or advances in the event of a

breach of contract by the contractor that gives the local government a right to recover the amounts advanced.

c) Letters of Credit

In contrast to a surety bond, a letter of credit is an independent undertaking by a bank or other financial institution (the "issuer") to pay a sum of money on behalf of the contractor (the "applicant") to the local government (the "beneficiary") upon the happening of an event specified in the letter of credit, invariably related to some default of the contractor under the contract. A letter of credit may be revocable or irrevocable by the issuer; however, for most local government contracts, only irrevocable letters of credit are used as security because revocable letters of credit undercut the secure nature of the instrument. Typically, letters of credit remain in effect for a limited period of time and they expire at the end of the time period specified in the instrument. To address time limitation issues, letters of credit usually include provisions to provide for advance notice of cancellation to the parties and to issue a further line of credit upon expiry of the specified term. The terms of a letter of credit are negotiable and can be flexible and they can be tailored to suit the needs of the both the applicant and the beneficiary. This flexibility makes them attractive instruments for securing a contractor's obligations under a contract.

Unlike a surety bond in which the surety's obligations to the obligee are collateral to the obligations of the principal under the contract, the obligations of the issuer under a letter of credit are independent of the contractor and determined by the terms and conditions of the letter of credit itself. Consequently, an issuer cannot rely on the rights and defences to which it would be otherwise entitled under a surety bond. The issuer must honour its obligations under the letter of credit upon the happening of an event specified in the letter of credit.

d) Comparative advantages of Surety Bonds and Letters of Credit

In assessing the respective advantages and disadvantages of surety bonds and letters of credit, it should be noted that contractors generally prefer surety bonds to letters of credit. This is because surety bonds are cheaper, easier to obtain and do not affect the contractor's ability to access credit. Consequently, they do not have an adverse effect on the contractor's cash flow in the same way that a letter of credit may. In most cases, a contractor must have access to significant cash resources or borrowing lines to secure a line of credit and this limits the ability of some contractors to provide security in the form of a letter of credit.

Conversely, letters of credit have the advantages of certainty, ease of administration, simplicity and the related advantage that the issuer does not have the rights and defences that would otherwise be available to a surety under a surety bond. This eliminates the potential costs and delays that may be incurred under a surety bond in the determination of the surety's obligations and in the resolution of any disputes associated with that determination. In *Ricwil Piping Systems Ltd. v. Ideal Welders Ltd.*, 1998 CanLII 5397 (BCSC), the court summarized the advantages of a letter of credit over a surety bond as follows at paragraph 16 (noting that the Court was referring to a standby letter of credit which is even less robust a security than a standard letter of credit):

> "There are several aspects to the relative simplicity of stand-by letters of credit. For instance, sureties are entitled to a broad range of defences that arise from dealings between the creditor and principal and from dealings by the creditor with collateral securities. These defences are not available to the issuers of letters of credit. While the defences to which a surety is entitled may be excluded by

contract, there is no need to rely upon the skillful drafting of a guarantee contract under a letter of credit is not dependent upon actual proof of damage, and thus there is no inherent element of dispute between the issuer and the creditor as to the amount owing under the letter of credit."

For these reasons, a letter of credit is generally a preferable form of security for local governments to ensure performance under contracts.

e) Best Practices

In considering requirements for contractors to provide security under agreements, local governments should remember the following principles:

1. Contracts should include a clear requirement for contractors to provide security for the performance of their obligations on terms and conditions that are satisfactory to the local government. In particular, the type and amount of security should be specified and subject to the review and approval of the local government.

2. The terms and conditions of the surety bond or letter of credit should be carefully reviewed to ensure their rights and obligations under the security instrument are acceptable and well understood. In particular, special attention should be paid to the amount, the time period and the conditions of the instrument.

3. The surety or issuer should be accessible and located within the province and preferably the municipality where the local government is located.

Lindsay Parcells

Dealing with Dangerous Dogs

Montreal's controversial pit bull ban and a number of high profile dog attacks have thrust the issue of dangerous dogs into the headlines in

recent months and have highlighted the fact that local governments across Canada continue to struggle with the issue of how best to address dangerous dogs and protect public safety.

Similar to municipalities in other Canadian jurisdictions, municipalities in British Columbia have broad statutory powers to deal with dangerous dogs. Section 8(3)(k) of the *Community Charter* provides municipalities with the power to regulate, prohibit and impose requirements in relation to animals, enabling the creation of licensing schemes, including those that impose specific requirements on aggressive or dangerous dogs. In addition, the Charter contains a number

of more specific provisions relating to animal control, including powers relating to seizure (section 48) and dangerous dogs (section 49). While the powers granted to regional districts are more limited, those regional districts that provide animal control services are authorized to deal with dangerous dogs in accordance with section 49 of the Charter.

Section 49, which authorizes local governments to apply to the court for an order that a dangerous dog be euthanized or otherwise dealt with, is often considered to be the most important tool for dealing with dangerous dogs. In this article, I will review the benefits of this tool while also highlighting some of its drawbacks. I will also discuss some alternative options for local governments to consider when determining how best to address dangerous dogs.

(a) Section 49(10)

In addition to a number of powers related to the seizure of dangerous dogs, section 49(10) of the Charter provides that if an animal control officer has reasonable grounds to believe that a dog is a dangerous dog (as defined in the statute), the officer may apply to the Provincial Court for an order that the dog be "destroyed" in the manner specified in the order.

While section 49(10) specifically contemplates orders for the destruction of dangerous dogs, this provision has been interpreted broadly by the court to allow judges to make orders short of destruction; for example, the court regularly makes orders that dangerous dogs be returned to the owner on conditions or re-homed to another owner. In practice, if the court determines that a dog is a dangerous dog, it will then ask whether the appropriate order is for destruction or whether some other order short of destruction will protect the safety of the public, considering factors such as the dog's past behaviour, current state, and an examination of the owner's care of the dog and ability to control it.

The need to assess the dog, the owner and the owner's plan for future management of the dog means that section 49 hearings are often lengthy and resource-intensive. Further, local governments usually choose to retain counsel and in many cases it is also necessary to retain experts in animal behaviour. In addition to staff and legal costs, limited court time often leads to significant delays in the hearing of section 49 applications, meaning that local governments incur additional costs to shelter animals that have been seized.

In addition to the associated costs, proceeding with an application under section 49(10) does not guarantee that the animal control officer will obtain the order he or she believes is appropriate in the circumstances. Firstly, judges are often reluctant to make an order for destruction except in the most serious cases where there is no realistic alternative. Secondly, even in cases where staff agrees that an order short of destruction may be appropriate, these types of orders often require the local government to monitor compliance on an on-going basis and can lead to problems if the owner moves out of the local government's jurisdiction.

Proposals have been put forward to strengthen section 49 and local government dangerous dog powers generally. For example, UBCM membership resolved in September 2016 to support amendments to section 49 that would restrict the court's discretion to make discretionary orders, but give clear authority to the parties to enter into court-approved consent orders for release of the dog. The proposed amendments would also provide mechanisms for cost recovery. However, until the legislation is amended to include these changes, local governments must use the tools that are available to them.

(b) Other Enforcement Options

In light of the limitations of section 49(10), we generally encourage local governments to use this

power sparingly. Instead, local governments may consider whether other tools can be used to achieve their goals, such as tickets and bylaw notices. Local governments may also designate problem animals as aggressive or dangerous and impose higher licensing fees and management conditions (such as requirements for muzzling, leashing and microchipping; mandatory rehabilitation, training and education; and restrictions on the use of leash-free areas) on the dog owner pursuant to the provisions of the local government's animal control bylaw.

These enforcement options are generally less resource-intensive and may be just as effective in many cases at achieving compliance. Further, if it becomes necessary to apply to the court, a record of progressive enforcement and non-compliance will assist in supporting the animal control officer's position. In all cases, we recommend that local governments maintain detailed records of incidents (including victim and witness statements), compliance efforts and conversations with the owner.

Like other types of bylaw enforcement, local governments should not incur liability for failing to enforce their bylaws dealing with dangerous dogs provided the local government acts reasonably (including by undertaking a reasonable investigation) and makes good faith policy decisions regarding enforcement: *Butterman v. Richmond (City)*, 2013 BCSC 423.

In addition to alternative enforcement options, local governments may consider developing strategies to address the root causes of aggressive dog behaviour. For example, many municipalities have moved towards a "responsible pet owner" model which recognizes the central role that dog owners play by emphasizing owner education, prohibiting owners from leaving dogs unattended when tethered, and requiring mandatory training and rehabilitation for dogs that have been deemed aggressive. Some municipalities, including the City of Calgary, have also developed public awareness and education campaigns. The development and implementation of these strategies may be financed by dog licensing fees and fines.

While there will always be cases where section 49 applications are necessary, developing a robust licensing and regulatory regime and proactive strategies can assist in reducing the likelihood of dangerous dog incidents and ensure that animal control officers have a wide variety of out-of-court tools at their disposal.

Rachel Vallance

Bylaw Enforcement Part 1: Relative Merits of Bylaw Notices vs. Tickets

We have recently received a number of requests for advice regarding the relative merits of various bylaw enforcement mechanisms.

There are two types of "infraction notices" that may be handed out by local governments in order to issue a fine for a bylaw breach:

1. Tickets (s. 264 of the *Community Charter*; s. 414 of the LGA); and

2. Bylaw Notices pursuant to the *Local Government Bylaw Notice Enforcement Act*.

All local governments may issue tickets for bylaw contraventions provided that the bylaw in issue is designated as enforceable via ticketing. However, only local governments that have been expressly designated by the Province are authorized to issue bylaw notices. Schedule 1 of the Bylaw Notice Enforcement Regulation lists the local governments that may issue bylaw notices.

Both types of infraction notices can be issued in respect of almost any bylaw infractions (firearm and speeding infractions cannot be dealt with by

bylaw notice). The main differences between them are the following:

(a) Tickets

- maximum penalty of $1000
- if disputed, the offence is prosecuted in Provincial Court and must be proven to the criminal standard of proof: beyond a reasonable doubt
- even if proven, the court retains discretion to reduce the fine (s. 88 of the Offence Act)

(b) Bylaw Notices

- maximum penalty of $500
- if disputed, the offence proceeds to oral or written adjudication and must be proven to the civil standard of proof: on a balance of probabilities
- the adjudicator does not have authority to impose a lesser fine

The discussion in the Legislature when the Province first introduced the Bylaw Notice system indicates that the system was designed to provide a new mechanism for bylaw enforcement that:

a) recognizes the relatively minor and administrative, rather than quasi criminal, nature of bylaw infractions;
b) is more efficient and effective and reduces the demands on the court system;
c) is less expensive to administer than the court process
d) creates more proportionality between the cost of the fine and the cost of pursuing the fine

Sara Dubinsky

Bylaw Enforcement Part 2: Relative Merits of Offence Act Prosecutions vs. Injunctions

There are two types of court processes that may be employed by local governments seeking to enforce their bylaws:

1. Offence Act prosecutions per s. 260(2) of the *Community Charter*; and

2. Civil injunctions per s. 274 of the *Community Charter*.

While both types of proceedings are accessible to local governments, there are significant differences between the options and typically it is beneficial to pursue a civil injunction rather than an *Offence Act* prosecution.

The drawbacks associated with the *Offence Act* process are the following:

- The offence must be proven to the criminal standard of proof: beyond a reasonable doubt
- Oral testimony (and cross examination) will almost certainly be required
- The prosecution proceeds in Provincial Court, where parties have less control over scheduling court time than in Supreme Court
- For these reasons it is more difficult to prosecute and greater court time (and legal costs) are incurred
- Even if proven, the court has authority to reduce the fines (s. 88 *Offence Act*)
- Even if proven, the fines can be difficult to collect
- A conviction may include a court order that the person stop doing the offending act (s. 263.1(1)(c) of the *Community Charter*)
- Although on its face the *Community Charter* enables recovery of prosecution costs (s. 263(3)), in practice they are not recoverable because the Province has not adopted the requisite regulations. This issue is addressed in *R. v. Morshedian and Janani*, 2016 BCPC 80 (see paragraphs 59 -72).

In contrast, the benefits of the civil injunction process are:

- The breach of the bylaws must only be proven on the civil standard: balance of probabilities.

- Once proven, the court has very limited discretion to refuse the injunction
- Once granted, the injunction prohibits the person from continuing the bylaw breach
- A non-party to the initial injunction may also be found in contempt of court for breaching the injunction
- The hearing proceeds via affidavit evidence and so less court time is required - it is common to obtain injunctions in less than 2 hours
- For matters 2 hours or less the parties have a lot of control over scheduling
- Legal costs are (partly) recoverable as a matter of course. Special costs can be awarded in cases of flagrant bylaw breaches (see *Delta (Corporation) v. WeeMedical Dispensary Society*, 2016 BCSC 1566 at paras 32-36).

Sara Dubinsky

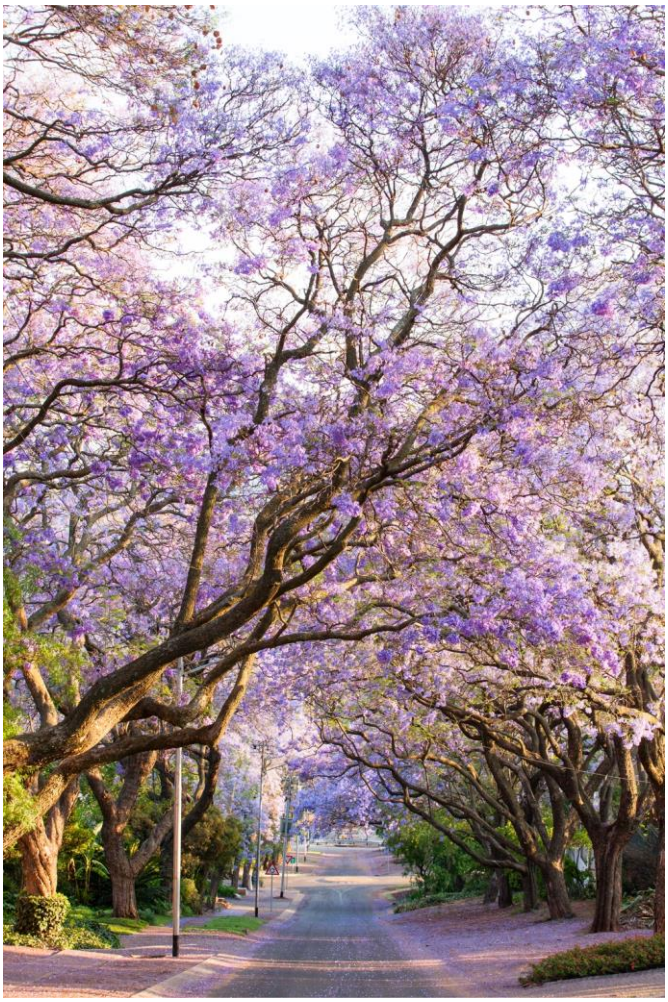
Bylaw Revision and Consolidation

From time to time a local government will consider it necessary to revise a bylaw without amending it. This may be the result of a typographical error or may be part of a more intensive clean-up effort. Examples of revisions include altering the numbering, arrangement, title or preamble, or correcting grammatical/typographical errors or clarifying meaning, so long as the revision does not alter the meaning.

This bylaw revision process was crafted to parallel the provincial statute revision process. When a new set of "Revised Statutes of BC" is published, the revised statutes contain no substantive changes, but are revised to make things like the numbering, order, meaning and headings more consistent, clear and useful.

The advantage of the local government scheme is that a revision adoption bylaw is not subject to the statutory procedures or conditions that applied to the original bylaw.

Staff do not have the authority to simply revise bylaws. The *Community Charter* requires the Council or Board to carry out a two step process,



involving the enactment of a foundational standing Revision Authority Bylaw to govern future revisions, and then a specific Revision Adoption Bylaw every time there is a revision process.

A standing Revision Authority Bylaw governs the revision of bylaws from time to time (including changes to a zoning bylaw) to allow future bylaw revisions. The specific Revision Adoption Bylaw then alters the bylaw being revised, without the

necessity of proceeding with all of the normal statutory amendment procedures and conditions such as notices, hearings and provincial approvals.

Here are the rules:

1. The rules are the same as the rules applicable to provincial revision of provincial orders, regulations or statutes as set out in the *Statute Revision Act*.

2. The authority for the bylaw revision power is set out in section 140 of the *Community Charter* and the Bylaw Revision Regulation 367/2003.

3. The statute states that Council may enact a bylaw Revision Bylaw that authorizes the revision of existing bylaws in accordance with the Regulation.

4. The 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.

5. Despite the normal rule under section 138(2) of the *Community Charter*, a Revised Bylaw adopted in accordance with a Revision Bylaw and the Regulation is NOT subject to the procedural requirements that applied to the originating bylaw.

Here is the legal effect (from section 4 of the Regulation):

(1) When a revised bylaw comes into force, the bylaw provisions that it revises are repealed to the extent that they are incorporated in the revised bylaw.

(2) A reference in an enactment or document to a provision of a bylaw that has been repealed under subsection (1) is deemed, in respect of any transaction, matter or thing occurring after the revised bylaw comes into force, to be a reference to the provision of the revised bylaw that has been substituted for the repealed provision.

(3) A revised bylaw does not operate as new law but has effect and must be interpreted as a consolidation of the law contained in the bylaw provisions replaced by the revised bylaw.

(4) To the extent that a provision of a revised bylaw has the same effect as the provision of a previous bylaw for which it is substituted, the provision of the revised bylaw operates retrospectively as well as prospectively and is deemed to have come into force on the date on which the previous bylaw provision came into force.

(5) If a provision of a revised bylaw does not have the same effect as the provision of a previous bylaw for which it is substituted,

(a) the provision of the previous bylaw prevails with respect to all transactions, matters and things occurring before the date on which the revised bylaw comes into force, and

(b) the provision of the revised bylaw prevails with respect to all later transactions, matters and things.

When the corporate officer is certifying a bylaw for a court proceeding, provincial approval, statutory declaration, transaction or other purpose, it is critical that the certification must apply only to a bylaw that is adopted by the Council or Board or that has been validly revised by the Council or Board. As well, a certified bylaw must be the bylaw adopted, not a document that is consolidated for convenience.

Consolidation must be carried out strictly in accordance with section 139 of the *Community Charter*. That section authorizes the Council or Board to enact a bylaw to authorize the corporate officer to consolidate a bylaw by incorporating in it all amendments and omitting any provisions that have been repealed or that have expired.

In addition to the revision and consolidation processes, a local government may wish to consider carrying out a number of powers under a single bylaw under section 138 of the *Community Charter*. For example, a land use bylaw might contain bylaws governing development procedures, zoning, subdivision, development approval information, screening, landscaping, tree cutting, parking, drainage and other matters, with one set of definitions, enforcement provisions, penalties and procedures. This exercise is subject to satisfying all of the statutory approvals, conditions and procedures applicable to any particular part of the bylaw.

Some refer to this exercise as the creation of a "municipal code", which is a notion that is popular in a number of cities in the United States, and has been adopted by the City of Kitimat in relation to its regulatory authority.

Don Lidstone, Q.C.

Burden of Proof in Assessment Hearings

Civil burdens of proof and presumptions comprise a conceptually narrow topic, but one quite difficult to grasp for practical purposes.' (Davis, 2001,1)

Canadian lawyers can easily agree with this statement. Lack of clarity in the law remains since Davis wrote his article in 2001, but that seems to be a feature of the law of evidence.

Therefore, the thesis of this article is that the concept of *burden of proof* ought not to be strictly applied by assessment tribunals in Canada, subject to the precise legislative directive in each jurisdiction. The law of the Province of Alberta is compared to laws of other Canadian provinces and then compared again to those of American states.

Of course where the burden of proof is placed is a policy issue. And this must always be kept in mind.

Interestingly, the laws of each state and province appear to be complementary, keeping in mind that procedures differ from province to province or state to state. That is to say, we can understand each other in this discussion. So practitioners on both sides of the fence should find this article helpful.

In Canada, property tax issues are dealt with by administrative tribunals. Matters are then referred to superior courts by judicial review—but this of course is limited to concepts of administrative law. In Canada, this means that the courts decide whether the decision was *reasonable* with regard to the comparative expertise of the courts and the tribunal. The concept of a *tax court* does not exist in Canada, except for federal income tax, and those matters go directly to the Federal Court of Canada.

The following is a quick review of Canadian provincial legislation regarding burden of proof in assessment hearings:

1. In British Columbia the burden of proof is on the complainant, or if the assessor makes a recommendation, the burden of proof is on the assessor.

2. In Manitoba, the burden of proof is on the assessor for valuation issues, but on the taxpayer if the issue is one of liability for taxation.

3. In Ontario, the burden of proof is on the assessor.

4. In Prince Edward Island, the burden of proof is on the minister to demonstrate the uniformity of the assessment.

The other Canadian provinces are silent on the subject; this likely means that they revert to "he who asserts must prove."

There is virtually no legal scholarship on the subject in the context of administrative tribunals. There is, however, recent case law. We think *burden of proof* can be interpreted as "the burden of persuasion." In addition, we are all aware of the legal adage that, "he who asserts must prove." But what if the person proving is an unrepresented David and the object of the proving, with all the resources, is Goliath? What if there are statutory provisions that say the rules of evidence do not apply? Is there a presumption of correctness in Canada, or is it simply a matter of tribunals being too close to the assessing and taxing authority? How does the burden of proof relate to a taxing authority's ability to collect and share information?

The Alberta Position

(a) The Legislation

In Alberta, the law is dependent on the following provisions:

1. The governing statute, the Municipal Government Act (MGA), places the following legal obligations on the shoulders of taxpayers when complaining about their assessed values. [Note that the act is in the process of massive revision. However, new Section 460(9), formerly Section 460(7), where this legal obligation is found, remains the same.] They must

a. Indicate what information shown on an assessment or tax notice is incorrect

b. Explain in what respect that information is incorrect

c. Indicate what the correct information is

d. Identify the requested assessed value in the complaint relates to an assessment.

2. It is actually at this juncture where problems arise, so the question then becomes, What is required of the complainant taxpayer in order to discharge this legal obligation? Does the taxpayer have to prove *conclusively* what the correct information is? (This is the language used in some of the tribunal decisions and appears to equate "to beyond a reasonable doubt.") Or does the taxpayer have to establish a prima facie case? And, in any event, why are we talking about complicated evidentiary provisions?

3. Section 464(1) (similarly not affected by the new revisions to the act) provides that the rules of evidence, along with any other law applicable to court proceedings, do not apply. The board may determine the admissibility, relevance, and weight of any evidence.

4. The assessing authority has statutory duties as well:

a. The municipality must prepare an annual assessment for each property in the municipality (MGA, RSA 2000, c M-26, section 285).

b. Each assessment must be prepared by the assessor appointed by the municipality [MGA, RSA 2000, c M-26, section 289(1)].

c. Each assessment must reflect the characteristics and physical condition of the property on December 31 [MGA, RSA 2000, c M-26, section 289(2)].

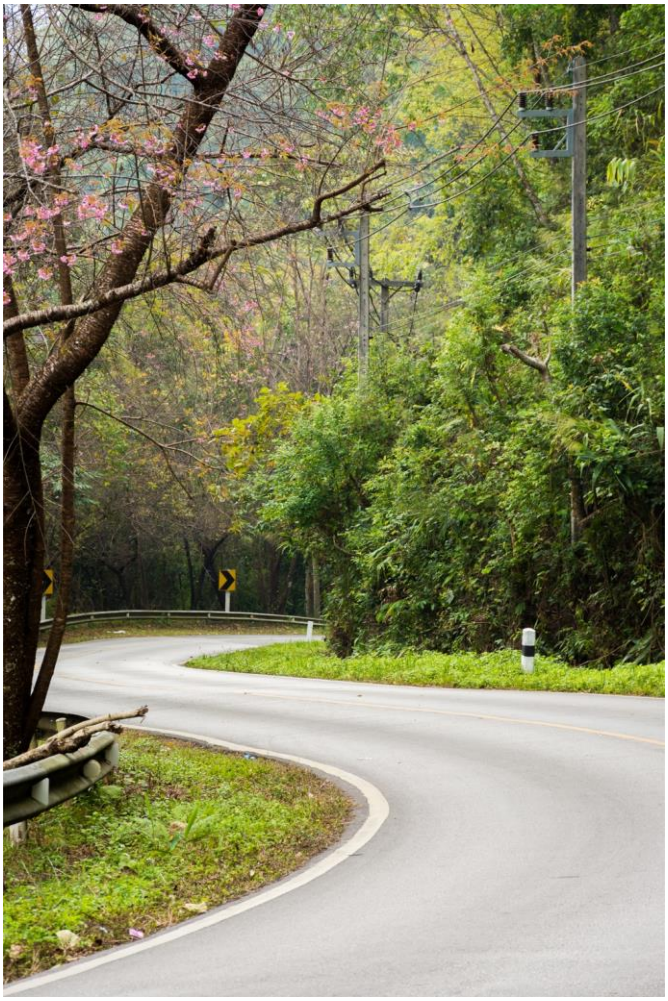
5. The assessor has mandatory duties as follows:

a. The assessor must, in a fair and equitable manner, apply the valuation and other standards, follow the procedures set out in the regulations [MGA, RSA 2000, c M-26, Section 293(1)].

6. As does the tribunal, who must not alter any assessment that is fair and equitable [MGA, RSA 2000, c M-26, section 467(3)].

(b) Judicial Decisions

In two initial decisions on the topic of burden of proof, Alberta courts have found that the taxpayer is obliged to adduce "conclusive evidence" to satisfy the tribunal that the assessed value is incorrect and further adduce evidence of what the correct value of the assessment should be. These decisions were later questioned in further court decisions. Notably, the courts were *not* alerted to the above provision that "the rules of evidence do not apply." Essentially, this is how the law developed. In *GSL Chevrolet Cadillac Ltd. v. Calgary* (2013), the court said that the correct standard of proof is a question of law. The normal burden of proof in civil cases is "a simple balance of probabilities" and that was found to be the applicable burden even though the tribunal itself referred to "conclusive proof." The burden on the complainant is set out in Section 460(7) of the Municipal Government Act. In this case, the complainant taxpayer was found to have introduced no evidence at all. This case was followed in 2014 by *Genesis Land Development*



Corp. v. Calgary (City) (2014). In this case, the assessing and taxing authority, the City of Calgary, chose not to provide any evidence at all even though taxpayer materials had been filed. Because there was no assessing authority evidence, the taxpayer was not allowed to put in rebuttal evidence. At the end of the hearing, the board said the taxpayer had failed to demonstrate that the assessed value was incorrect or inequitable. The board further said that the appraisal report tendered in evidence was prepared post facto, the appraiser was not available to give evidence, it was not clear how adjustments had been made, and there was no specific evidence, amongst other things. The court agreed and disagreed that the taxpayer had established a prima facie case. The

court said that the facts as alleged by the taxpayer were not proved and that the board's actions were reasonable. The court said, "On the issue of onus and standard of proof, the test is also one of reasonableness. The standard of proof relates to the sufficiency of the evidence." This reflects the commentary of Davis (2001) and *Genesis Land Development Corp*. (2014, para 32). However, how is it that the taxing authority was permitted to effect a procedural manoeuvre before the tribunal by providing the evidence, yet not tendering it, when tendering the evidence was a simply formality and the legislation provides for a mandatory "filing" of evidence with the board? A year later, the issue was raised again in *Ross v. Edmonton (City*) (2015). The court said, "... the City argues that the law on the standard of proof was settled in GSL ... however, there are cases that suggest that an applicant must simply raise 'some evidence'." The court concluded that the law was not settled and that it was a question of wide-ranging importance to municipal taxpayers. Leave was granted.

The case law, therefore, is evolving, not settled (subject to the most recent *Ross* decision, discussed at the end of this article.) In addition, two important elements were missing from the judicial considerations: that the law of evidence does not apply to a tribunal [MGA, RSA 2000, c M-26, section 464(1)] and that an assessing authority in Canada has a positive duty to prepare an assessment in accordance with the Municipal Government Act and regulations. This latter duty has ramifications for how the taxing authority presents its case at a hearing—that is, as a public authority, it has a duty to demonstrate to the public how the assessment was arrived at and ought to be prohibited from procedural manoeuvres such as not presenting evidence that supports the value. On the basis of authority that reaches to the Supreme Court of Canada, there is a positive duty on the part of assessors to prepare an assessment in accordance with the governing act and regulations (*Royal Montreal Golf Club v. Dorval* [1946]; *Estevan Coal Corp. v. Estevan* [2000]; *Kramer Ltd. v. Sherwood (Rural Municipality No. 159)* [2003]; *Kolitsas Holdings Ltd. v. Regina (City)* [2003]; *Pacific Logging Co. v. British Columbia (Assessor)* [1976]).

It is therefore not sufficient for the assessing authority to merely attack the evidence of the taxpayer or otherwise point out deficiencies, but rather it must adduce positive evidence to support its own assessment. The mandatory language of the relevant provisions of the Municipal Government Act and the MRAT (Matters Relating to Assessment and Taxation Regulation) also supports the conclusion that there is a positive duty on assessors. By the time the parties are at a hearing, the complaint has been shepherded through the system by support staff, the complainant has paid a fee to complain, and the complaint has been staffed by three tribunal members. It is not appropriate for the assessing authority to decline to formally enter evidence which they have a mandatory duty under the legislation to provide. (See for example, section 4 of the Matters Relating to Assessment Complaints Regulation, AR 310/2009, which provides that "the respondent [taxing authority] must, at least 7 days before the hearing date, disclose to the complainant and the local assessment review board the documentary evidence ... ") In fact, it is simply unfair when they are present at the hearing and ready to go. In the 1927 decision of the *Royal Montreal Golf Club v. Dorval* (supra, p. 2), the court said, *A valid assessment is an indispensable prerequisite to a valid tax, and valid assessment must be effected according to law...*

The requirement for the assessor, and not the taxpayer, to establish the correct assessment of the property was reinforced by the Saskatchewan Court of Appeal in *Estevan Coal Corp v. Estevan (Rural Municipality No. 5)* (2000).

Estevan was applied by the Saskatchewan Court of Appeal in *Kramer Ltd. v. Sherwood (Rural*

Municipality No. 159) (2003), another decision of Sherstobitoff for the appellate court. Sherstobitoff said it was striking that there was a lack of evidence about what the Saskatchewan Assessment Management Agency had done in order to carry out its obligation to consider and determine whether abnormal economic obsolescence existed in respect of the buildings in question, and he concluded that it had not done anything. Rather than presenting evidence to contradict or dispute the expert evidence led by the appellant taxpayer, the agency simply argued that the onus was on the taxpayer to prove conclusively that the assessment was wrong and what the assessment should be, and that the taxpayer had failed to meet that onus.

The court said that on the basis of authority that reaches to the Supreme Court of Canada, there is a positive duty on the part of assessors to prepare an assessment in accordance with the governing act and regulations.

Estevan was again applied by the Saskatchewan Court of Appeal in *Kolitsas Holdings Ltd. v. Regina (City)* (2003). *Estevan* was applied with respect to the positive obligation on an assessor: *These controlling authorities stress the legal importance of the assessor's role and actual exercise of discretion in the statutory taxation scheme.* And finally the Supreme Court of Canada weighed in. The positive duty of an assessor to prepare an assessment in accordance with the statutory regime was emphasized in dissent by Justice McIntyre of the British Columbia Court of Appeal in *Pacific Logging vs. British Columbia (Assessor)* (1976). The significance of this is that the Supreme Court of Canada overturned the majority decision and adopted the dissenting reasons of McIntyre (decision at [1977] 2 S.C.R. 623, 16 N.R. 513).

In *Pacific Logging*, in the dissenting judgment of the Court of Appeal that was adopted by the Supreme Court, the court stated,

The assessor must determine the actual value of these lands. He must do so in accordance with [Section] 37(1) of the Assessment Equalization Act, R.S.B.C. 1960, c. 18, as amended. In doing so he may give consideration to the various factors mentioned in the section, or some of them, and he may as well consider 'any other circumstances affecting the value.' …It is my opinion from reading the stated case that the assessor has not assessed according to the statute and has thus fallen into error. [Emphasis added]

In the result McIntyre, in dissent, would have referred the matter back to the assessor for reassessment as he had adopted an arbitrary method of assessment. This reasoning was adopted by the Supreme Court of Canada.

(c) Landing on an Acceptable Interpretation of the Law

In Alberta, both the governing statute and regulations use mandatory language to impose a positive duty as described above. This was also addressed in the *Boardwalk* decision**,** a decision of the Alberta Court of Appeal, in which the court says,

The assessor is a statutory officer with statutory powers and duties. Only the City's assessor could use section 295 and only he could assess land. A complaint to the [ARB (Assessment Review Board)] ... are from acts by the assessor. Error by the assessor dictates a successful appeal. (*Boardwalk REIT LLP v. Edmonton* 2008, at para 159) In *Boardwalk*, the assessing authority was heavily criticized by the Court of Appeal in Alberta for seeking to disallow the taxpayer's complaint on a technical ground of failing to respond to a request for information. In other words, the court was saying that the assessor, as a statutory officer, has been given special powers. The court found that the assessor had not been fair.

A reasonable interpretation of the law in Alberta is as follows:

1. The taxpayer must adhere to Section 460(7) of the MGA. He must

a. "Indicate what information shown on an assessment notice or tax notice is incorrect
b. Explain in what respect that information is incorrect

c. Indicate what the correct information is

d. Identify the assessed value."

2. However, subsection (1) of the same section provides that the complaint must be "in the form prescribed in the regulations." This is a one-page form. Sometimes this confuses unrepresented complainants.

3. Using the language of the law of evidence, this is a *burden of proof* of sorts, but we know from the act that the law of evidence does not apply to these tribunals. Therefore, it is better to interpret this as a *statutory requirement* imposed on the complainant taxpayer.

4. And just how much information is required at this stage? Davis would call this the "standard of proof." In *Genesis Land Development Corp. v. Calgary* (2014, at para 32), the Alberta Court of Queen's Bench said, "The standard of proof relates to the sufficiency of the evidence." But again, this language is found in the law of evidence.

5. It is submitted that *some evidence* is enough and that this then means that the assessing authority, with its superior statutory powers and mandate, must explain its assessed value to the tribunal. Justice Yungwirth said, "In other words, the complainant must provide the evidence sufficient to warrant consideration of its claim that the assessment is wrong. If it does, the CARB must consider the issue of whether or not the assessment is correct" *(Alberta Ltd. v. Edmonton* 2015, at para 53). Further, this case is of note in that the judge essentially finds that the evidence of the taxpayer was the only valid evidence of market value due to the deficiencies in the evidence of the city. Note that the justice also said that, "*Further, I agree with the comments of Acton J, that statistical models used to prepare the mass assessments cannot be used to defend an assessment..."* [Emphasis in original]*)*

(d) Ross Decision of 2016: At Last Some Clarity

The decision (on the merits) in *Ross v. Edmonton (City)* (2016) was delivered on December 21, 2016. The leave application is referred to on page 6, *Ross v. Edmonton (City)* (2015). Briefly, in this case a residential property assessment was increased by 24 percent when there was an average decrease of 4.4 percent in the neighbourhood. The taxpayer appealed and offered a real estate firm valuation as evidence. The court said,

As will be demonstrated below, the correct analysis of the burden of proof on hearings before the Board is that a complainant must initially provide only some evidence that the assessment is incorrect, after which the evidentiary onus switches to the City to provide evidence that the assessment is correct. After hearing all submissions on all the evidence, the Board should have decided whether the assessment of the Ross property was fair and equitable. Here, Ms. Ross had provided some evidence that the assessment was incorrect; the City then provided evidence which the Board rejected; the Board was then presumably left only with Ms. Ross' evidence; Ms. Ross' claim should therefore have been accepted. The Board's actual approach was incorrect.

In summary, the Board's imposition of an ultimate burden rather than an initial burden on Ms. Ross was unreasonable.

(e) Conclusion

It is not unusual in law to find a legislative provision that the law of evidence does not apply to a particular administrative tribunal.

This is because administration tribunals are not courts of law and therefore, theoretically, are not bound by the formality of the courts: witnesses are not sworn, hearings are held in an office, not a court-like setting, and moreover, the rules of evidence do not apply. The rules of evidence are complicated and, at least in the case of criminal law in Canada, are designed as *procedural safeguards*. And if you have not studied the law of evidence, you ought not to be applying its rules.

You must have some rational means of dealing with evidence:

... individuals appearing before agencies and agency decision makers cannot simply ignore the concept of evidence. The fact that an administrative decision-maker may not be bound by the legal 'rules of evidence' does not mean that anything should go respecting the material which you receive in the course of a proceeding. The rules of evidence exist for a reason, and while, perhaps one need not know the formal rules, one must know what the rules of evidence are trying to accomplish and one should try to guide one's approach to evidence according to those aims. [Macaulay and Sprague 2010, 17.1(c)]

True. But it need not be legalistic.

Susan Trylinski

Case Law Update

Abbotsford (City) v Mary Jane's Glass & Gifts Ltd, 2017 BCSC 237

The BC Supreme Court has issued a decision on two cross-petitions, concluding that a medical marijuana dispensary operating in Abbotsford was violating that City's zoning and business license bylaws, as well as that these bylaws are constitutionally valid.

The dispensary in question, Mary Jane's Glass & Gifts Ltd, opened on September 15, 2015 without a business license and continued to operate for over a year afterwards. Although two business license applications were submitted by the company's sole director, no license was issued for a number of reasons, including that the proposed use wasn't allowed for within the zoning bylaw, that the proposed use was unlawful, and that the City's business license bylaw requires every business to comply with all applicable laws in order for a license to be issued.

At the beginning of the proceeding, the operators consented to a number of orders sought by the City related to closure of the business and to preventing the operators from opening a similar business in Abbotsford again in the future. As such, Justice Gropper only needed to address the question of whether the bylaws were being breached and whether the bylaws were constitutionally valid

Justice Gropper first addressed whether the operators were in breach of the City's business license bylaw. Section 5.1 of the business license bylaw prohibits a business from operating within the City without a valid license, unless that business is expressly exempt from this requirement. Justice Gropper found that the dispensary clearly fit the definition of a business within the bylaw and that no exemption applied. As such, the dispensary was violating the business license bylaw.

Next, Justice Gropper addressed whether the operators were also in breach by the zoning bylaw. Given that the retail sale of cannabis is neither listed as a permitted use in the zone in

which the business was operating and that "cultivating, growing, producing, packaging, storing, distributing, dispensing, trading or selling" cannabis is expressly prohibited unless otherwise provided for within a zone, the operators were held to be clearly in violation of the zoning bylaw.

Finally, Justice Gropper held that the City's zoning and business license bylaws were constitutionally valid. Given that the operators conceded that they operate a business, it was only necessary to address the validity of the zoning bylaw. Justice Gropper held that the zoning bylaw was constitutionally valid on the basis that it was a valid regulation of land use that did not interfere with the federal government's criminal law powers over the production, distribution, and use of cannabis.

Lizotte v Aviva Insurance Company of Canada, 2016 SCC 52 *("Lizotte")* and *Alberta (Information and Privacy Commissioner) v University of Calgary,* 2016 SCC 53 *("University of Calgary")*

In late 2016, two decisions were issued by the Supreme Court of Canada (the "SCC") reaffirming the importance of litigation privilege and solicitor-client privilege.

In *Lizotte*, the assistant syndic of the Chambre de l'assurance de dommages (the "Chambre") asked an insurer to send her a complete copy of its claim file of an insured. The basis of the assistant syndic's request was section 337 of the *Act respecting the distribution of financial products and services* (the "ADFPS"), which imposes an obligation to produce "any…document" concerning the activities of a representative whose professional conduct is being investigated by the Chambre. In response, the insurer produced a number of documents and claimed solicitor-client privilege or litigation privilege over a number of others. The main issue at the SCC was whether litigation privilege could be claimed by the insurer.

The SCC dismissed the appeal and held that litigation privilege could be claimed by the insurer. The Court held that litigation privilege is a class privilege that gives rise to a presumption of inadmissibility for the class of communications it applies to. The Court went on to state that litigation privilege can only be abrogated in the case of certain clearly defined exceptions—the same exceptions that apply to solicitor-client privilege. These include exceptions relating to public safety, the innocence of the accused, criminal communications, evidence of a claimant party's abuse of process, and where there is statutory language that is clear and explicit in its intent to allow for abrogation of litigation privilege. The Court also states that litigation privilege can be asserted against third parties, including third party investigators with a duty of confidentiality.

University of Calgary clarified the kind of statutory language that would be needed to authorize administrative tribunals to infringe solicitor-client privilege. It arose in the context of a constructive dismissal claim between the University of Calgary and a former employee.

A delegate of the Information and Privacy Commissioner of Alberta (the "IPCA") ordered production of documents over which the University of Calgary claimed solicitor-client privilege. The delegate acted in accordance with the Office of the Commissioner's "Solicitor-Client Privilege Adjudication Protocol," which required either provision of a copy of "the records at issue" or two copies of "an affidavit or unsworn evidence verifying solicitor-client privilege over the records" to substantiate the claim of solicitor-client privilege. The University responded with a list of documents identified by page number, along with a sworn affidavit indicating solicitor-client privilege had been claimed over the records. The delegate of the IPCA, unsatisfied with the substance of the claim to solicitor-client privilege, then responded with a Notice to Produce Records

under s 56(3) of the *Freedom of Information and Protection of Privacy Act* (the "FOIPP"). This section states that a public body must produce records to the Commissioner "[d]espite…any privilege of the law of evidence." The University sought judicial review of this decision.

The most important holdings of the Court were:

1. Solicitor-client privilege is no longer merely a privilege of the law of evidence, but also a substantive right that is fundamental to the proper functioning of our legal system.

2. Legislative language purporting to abrogate solicitor-client privilege must be interpreted restrictively and must demonstrate clear and unambiguous legislative intent to do so.

Ultimately, the majority of the Court held that section 56(3) of FOIPP could not be used to force the abrogation of solicitor-client privilege as the use of the words "law of evidence" was not clear enough to justify its breach.

Canada (Governor General in Council) v Courtoreille, 2016 FCA 311

A recent Federal Court of Appeal decision concluding that no duty to consult Aboriginal peoples arises when legislation is being contemplated and introduced may have implications for future challenges to BC's municipal enabling legislation and amendments to the same.

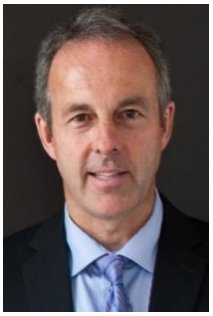
In a judicial review of two omnibus bills that reduced federal regulatory oversight on works and projects that might affect the Mikisew Cree's treaty rights to hunt, fish, and trap, Justice Yves de Montigny, with Justice Wyman W Webb in agreement, held that no duty to consult in the context of legislative development exists.

Justice Yves de Montigny concluded that finding that the legislative process triggered the duty to consult would undermine the principle of the separation of powers that allows for efficient and balanced governance to take place. He highlighted that because no clear distinction can be made between a minister's executive and legislative responsibilities—as the Mikisew Cree asserted—it would be impossible to delineate portions of the legislative process where a duty arises and other portions where the legislature has complete control. Furthermore, he explained that the proper role of the courts is to "only come into the picture after legislation is enacted and not before" (except in the case of a reference). Finally, he stated that the only procedural rights Canadians are entitled to in the development of law are found in the requirement for three readings in the Senate and House of Common, and that of Royal Assent.

Ian Moore

Lidstone & Company Lawyers

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.



Lindsay Parcells practices municipal law with a particular interest in land use, real property, corporate, commercial, mediation and environmental matters. Lindsay has 20 years of legal experience. He was called to the Alberta bar in 1992 and the British Columbia bar in 1995. Lindsay completed a Master's 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.

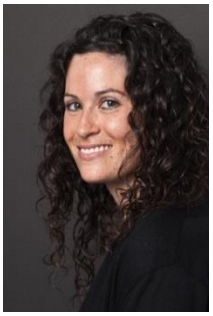
Rob Botterell focuses on major project negotiations for local governments (such as in relation to pipelines, LNG, dams and reservoirs, mines, oil and gas, and similar matters). He also deals with law drafting as well as local government matters in relation to aboriginal and resource law. Rob also advocates 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.

Susan Trylinski is Associate Counsel at Lidstone and Company, located in Calgary, Alberta. While Susan has over 18 years of experience in municipal law, she first started her career in litigation at major Calgary law firms. She now primarily does board work (with related litigation to the Court of Queen's Bench and Court of Appeal) and advises on administrative law issues, municipal taxation, statutory interpretation and a variety of municipal law issues including enforcement, environmental legislation, historical resources, duties of councillors and planning and development. Susan is also called as a solicitor in the state of New South Wales, Australia.

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. practices generally in the area of local government law. His municipal law focus is in the areas of governance, finance and taxation, land use and development, environmental law, aboriginal law and bylaw/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.

Olga Rivkin, a former partner in the local government department of a national law firm, has joined Lidstone & Company as a senior associate lawyer. She advises municipalities and regional districts on a variety of topics, including aboriginal law, land development, subdivision, real estate, highways, remediation, water, infrastructure, governance and operations. Olga has represented local governments across British Columbia in numerous negotiations, drafted a variety of agreements and assisted with project management.

Robin Phillips joined Lidstone and Company as an associate lawyer after completing a clerkship with five judges of the Supreme Court of British Columbia. She was called to the BC Bar in 2016. Robin received her J.D. from the University of British Columbia, where she was awarded several awards for academic excellence, including the Barbara Bluman Memorial Prize in Dispute Resolution and the Bruce McColl Memorial Prize in Alternate Dispute Resolution. Robin is also a mediator, having completed the court mediation program through Mediate BC.

Rachel Vallance provides legal opinions, agreements and bylaws on all local government matters. She completed her degree at the Unversity of Victoria, where she participated in the law co-op program. Rachel has woked 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 PhD (Law) Candidate. His work on urban brownfield redevelopment financing has been presented at several law conferences.

Ian Moore is Lidstone & Company's articling student. He is a graduate of Queen's University's joint law-public administration program. While at Queen's he co-founded the student newspaper *Juris Diction* and sat on the executive committee of the Law Students' Society for two years. Prior to law school he lived in Edmonton and worked on a number of municipal initiatives, including the City of Edmonton's energy, food, and environmental strategies.

ERRATUM: In the Fall 2016 Edition, on page 16, we left out the word "not" in the first bullet point. It should read:

- Courts do not want to tell local governments how to spend their money, and what their priorities should be.

LIDSTONE & COMPANY *acts primarily for local governments in BC and Alberta. The firm also acts for entities that serve special local government purposes, including 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.*