LIDSTONE & COMPANY

the Law Letter

In this issue

Flushing bodies: not just for goldfish anymore?

The legal and environmental pros and cons of green cremation

The disposition of human remains is not everyone's favourite subject, but it has been the subject of a great deal of scientific, entrepreneurial, legal and ethical debate over the years. And now there is a technology that takes our bodies back to basics. So basic that the liquid remains left after a human corpse is processed can allegedly be flushed safely into local sewer systems.

This new process is called *alkaline hydrolysis*, or the more catchy industry trademark term *resomation* (from the Greek resoma, meaning rebirth of the body). Resomation is catching on because it touts a number of environmental benefits over traditional burial, cremation and even green burial options.

This article looks at the new technology, who's using it now, some benefits it may present to local governments and the environment, and how it might fit in with British Columbia's and Canada's current legal landscape.

What's wrong with coffins and cremation?

Traditional burial and cremation both use massive amounts of resources, chemicals and land. Mark Harris, author of *Grave Matters* (2008) writes, "We call our cemeteries parks and lawns and fields and greens. Yet the American graveyard hardly qualifies as a natural environment… Over time the typical ten-acre swatch of cemetery ground, for example, contains enough coffin wood to construct more than forty houses, nine hundred-

Flushing bodies: not just for goldfish anymore? (continued from page 1)

plus tons of casket steel, and another twenty thousand tons of vault concrete. To that add a volume of [formaldehyde] sufficient to fill a small backyard swimming pool and untold gallons of pesticide and weed killer to keep the graveyard preternaturally green." Formaldehyde is a known toxin, allergen, and carcinogen and biocide. In the US alone, about 8.4 million gallons of embalming fluid is pumped into human bodies, and the unsterile blood is usually dumped directly into the sewer. Even then, the body can remain infectious.

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Exposing a body to temperatures in excess of 1,600F for four hours, cremation uses a lot of natural gas, and emits carbon dioxide (approximately 600lbs per process), toxins, carcinogens, pathogens and other chemicals and particulate matter. As an example, each cremated amalgam tooth filling gives off 0.74 grams of mercury, an element second only to radioactive materials in terms of being hazardous to the living. Other drug and hormone accumulations go up in smoke, and items like hip implants and pacemakers have to be removed prior to cremation.

"Green burials" exclude toxic embalming fluids, concrete vaults and involve biodegradable caskets. Though this process is slightly better, the putrefaction process and consumption of land make green burial less than ideal. And any kind of burial and even interment of cremated remains take up a lot of land and, where real estate is at a premium, it is difficult for these facilities to expand or at least to justify the financial cost of expansion.

What is resomation?

In resomation, a body is placed in a steel chamber along with a mixture of water and potassium hydroxide (KOH). Also known as caustic potash, KOH is an inorganic compound commonly used in the production of soaps, biodiesel and other potassium compounds. Air pressure inside the vessel is increased to about 145 pounds per square inch, and the temperature is raised to about 356F (180C). Hydrolysis is the process of forcing water molecules between the chemical bonds holding tissue molecules such as fats, DNA and proteins together. This process breaks the tissue down to its original small molecular building blocks.

After two to three hours, the result is a small quantity of brownish liquid (containing amino

Flushing bodies: not just for goldfish anymore? (continued from page 2)

acids, peptides, sugars and salts) and soft, porous white bone remains (calcium phosphate) easily crushed to form a white-coloured dust. The white ash can then be returned to the next of kin (which is the sole remains of *one* individual, in contrast with residue that necessarily accumulates in cremation). The liquid, which allegedly has had all of our worldly bad chemicals broken down into their basic elemental components, can be neutralized and then either put down the drain or be used as a calcium phosphate soil fertilizer (great for rose bushes!).

Who's doing resomation?

Resomation equipment producers are quick to note that this is actually a very natural process. The oldest practitioner, they say is good old Mother Nature: to a great extent, bodies buried in shallow soil with a neutral or alkaline pH undergo the same decomposition process, it's just that the soil bacteria are much less 'efficient' than a commercial resomation chamber. The enzymes in our small intestines also perform alkaline hydrolysis.

On a more commercial scale, resomation has been approved for use on human remains in Florida, Maine and Oregon, and according to the Cremation Association of North America, is being considered in several other states. The University of Florida and the Mayo Clinic in Minnesota have used alkaline hydrolysis to dispose of cadavers since about 1995 and 2005, respectively. Other users include veterinary schools, universities, pharmaceutical companies and the US government. Liquid waste from cadavers goes down the drain at both the Mayo Clinic and the University of Florida, as does the liquid residue from human tissue and animal carcasses at alkaline hydrolysis sites elsewhere. Alkaline hydrolysis is the same process used in the UK to destroy the carcasses of cattle with mad cow disease.

Is resomation a better environmental choice?

Some resomation processes (e.g. the company CycledLife) claim to consume 90% less fossil fuel and emit 94% less carbon dioxide, compared to cremation. According to equipment suppliers, the total carbon footprint of a resomation is 18 times less than that of a cremation. Further, mercury, pacemakers, titanium, gold fillings and other items contained in the body are saved, not buried nor incinerated. These items may be disposed of environmentally, returned to the families, or donated to those in need. Coffins are not constructed, buried or burned and so trees are saved and less carbon emissions are created. Any drugs in the body are claimed to be broken down and destroyed in the resomation process.

Are these claims true? Given that 99% of the mass of the human body is made up of the six elements oxygen, carbon, hydrogen, nitrogen, calcium, and phosphorus, it seems conceivable that we can be broken down into our elemental parts.

But what about everything *else* that goes into our bodies over a lifetime? To name a few from the laundry list, human bodies contain amounts of PBDEs (flame retardant), DDT, PCBs, lead, mercury, dioxins, pesticides, bisphenol A, and phthalates. Any one or more of these has been linked to: thyroid function, reproductive problems, neurological damage, liver impairment. And of course they are all carcinogens. With toxicology, dose is said to be everything: most toxicologists—and not just those who have ties to the chemical industry—insist that the smidgens of chemicals *inside us* are mostly nothing to worry about.

But what about when the chemicals from each of us combine *outside of us* in the environment? This does happen with burial and cremation to varying degrees. Chemicals and hormones from these

Flushing bodies: not just for goldfish anymore? (continued from page 3)

processes, and also from most sewage treatments, wash into lakes, streams and oceans and work their way up the food chain in a process called bioaccumulation to make any tuna, whale or polar bear carcass toxic waste. Being a lawyer and not a chemist, I will remain skeptical that the process of resomation can break all of these dangerous chemicals down such that the liquid is *actually safe* to dump down the drain – even in municipalities with only screening or primary sewage treatment. Less hype from industry and more scientific study of this process is needed.

Legality

In addition to more scientific study, resomation will also require some legal reforms before it can be implemented in British Columbia. Currently the *Cremation, Interment and Funeral Services Act* and the *Business Practices and Consumer Protection Act* set out specific requirements for cemetery, columbarium and crematorium operators. Given that it's illegal – except with special permission – to spread ashes, it would also currently be illegal to spread liquid or ash/crushed remains from resomation. There is no provision for commercial operators of alkaline hydrolysis processes, and reforming the Acts to allow for this would likely be controversial task when taking into account existing industry viewpoints and religious and cultural beliefs. Moreover, resomation is a more expensive process and so if operators are not willing to invest in the equipment, it may not happen at all.

There is also the end-of-the-pipe problem of wastewater treatment. Many local governments have dated or environmentally sub-standard wastewater treatment in place. Screening, primary, and even secondary treatment would do nothing to treat the potentially chemically-laden liquid disposed of after resomation. Until better scientific analysis of the resomation liquid is done, it is also possible that its contents could violate limits under the *Municipal Sewage Regulation* of the *Environmental Management Act.*

In addition, the federal government is developing a regulation under the *Fisheries Act.* The proposed Regulations would set national effluent quality standards for specified deleterious substances in effluent deposited from wastewater systems. They also specify the conditions to be met in order to deposit effluent containing deleterious substances, such as requirements concerning toxicity, effluent monitoring requirements, receiving environment monitoring requirements, and record-keeping and reporting requirements. These regulations are currently in draft only.

While it looks like resomation is a long way off from being a legal reality in BC, for local governments that operate their own cemeteries or columbariums, resomation has the long term potential to assist with greenhouse gas emission targets and reduction strategies required under the *Local Government (Green Communities) Statutes Amendment Act.*

More difficult than the law: social, cultural, and religious implications

Cremation – and therefore likely also resomation – goes against many religious traditions and beliefs. Cremation, resomation, or even embalming can be seen as a sign of disrespect for the body that housed a soul, and may not accord with other rites and rituals reserved for the deceased. Needless to say then, resomation is not for everyone, and other options should be available to accommodate diverse belief systems.

Don't fear the reefer: other outlandish options

While we are on the subject, there are some other 'creative' ways that citizens could consider for a posthumous adventure, alleviating the locality of nearly all carbon emissions and wastes. For example, a person can become part of a reef

Flushing bodies: not just for goldfish anymore? (continued from page 4)

(eternalreefs.com), be made into a diamond for a loved one (lifegem.com), or participate in a land trust (naturalburial.coop).

Rachel Forbes (For references please contact Lidstone & Company)

Nuisance and Statutory Authority: the Canada Line decision

On February 18, 2011, the Court of Appeal handed down its judgment in *Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority,* 2011 BCCA 77.

As had been widely anticipated, the Court of Appeal overturned the trial level decision, in part.

At trial a business whose profits were affected by the construction of the Canada Line rapid transit route brought an action against the City of Vancouver, the transit authority, a number of construction companies, and the provincial and federal governments for negligence, negligent misrepresentation and nuisance. The trial judge dismissed the claims for negligent misrepresentation and negligence, but allowed the claim in nuisance against certain defendants, ruling that the nature, severity and duration of the impact on the business outweighed any social or public utility associated with the creation of the Canada Line and that the nuisance was not inevitable. The claimant was awarded damages of $600,000 for business loss.

Although certain defendants were found to be liable for nuisance, the claims in nuisance against the City of Vancouver, Canada and the Province of BC were dismissed by the trial judge. The plaintiff had argued that the City of Vancouver was liable because it owned the land where the Canada Line was built and allowed the construction to take place. The trial judge found that the City of Vancouver "did not have sufficient involvement with, or knowledge of, the specifics of the project that caused the nuisance to justify a finding of liability against it."[1]

On appeal the Court of Appeal upheld the trial judge's finding that the construction of the Canada Line created a nuisance. However, the Court of Appeal ruled that the defence of statutory authority was made out, and that the claim in nuisance therefore had to be dismissed.

The Law of Private Nuisance

The Court of Appeal affirmed that private nuisance is an unreasonable interference with an occupier's use and enjoyment of his or her land. Whether the interference constitutes nuisance is determined by considering four factors: the nature, severity and duration of the interference; the character of the neighbourhood; the sensitivity of the plaintiff's use; and the utility of the activity that is causing the interference.

The Court recognized that a certain degree of inconvenience and interference is inevitable in modern society, but also held that the focus of the nuisance analysis is the harm suffered by the plaintiff, and not the lawfulness of the defendant's conduct.

The Court also specifically addressed the significant social utility of public transportation infrastructure, but held that this does not necessarily trump harm to an individual in a nuisance analysis. Accordingly, even where a project entails significant public benefit, which could not be achieved without widespread disruption to residents and/or businesses, the nature severity and duration of the interference

[1] *Heyes v. City of Vancouver*, 2009 BCSC 651 at para 173.

Nuisance and Statutory Authority: the Canada Line decision (continued from page 5)

may still outweigh the social utility, thus leading to a finding of nuisance.

The Defence of Statutory Authority

The Court overruled the trial decision with respect to the conclusion that the defence of statutory authority was not made out in this case.

The Court affirmed that the defendant must establish the following in order to make out the defence: the act causing the nuisance was expressly or implicitly authorized by statute or subordinate legislation, and the nuisance was the inevitable result of the statutorily authorized action.

Where only one method of achieving the result is practically feasible, the defendant must establish that was practically impossible to avoid nuisance using that method. Where there is a viable alternative, the defendant must establish that the alternative would also have caused nuisance, in order to escape liability.

The Court reiterated that statutory authority is a narrow defence that is not easily made out.

The Court ruled that in this case the transit authority clearly had statutory authorization to construct the Canada Line but that the statute provided broad discretion to the transit authority in deciding how to construct it, rather than authorizing the specific construction method to be utilized.

The judgment indicates that where the statutory authority expressly authorizes the particular form or location of the activity and the nuisance is the inevitable consequence of carrying on that activity, judges are not able to consider whether other options might have avoided the nuisance. Conversely, in situations in which entities are afforded wide discretion to act, but choose a particular course of action, if another course of action would have avoided the nuisance then the defence of statutory authority will not be made out because the nuisance was not inevitable. In other words, if a practically feasible non-nuisance causing alternative exists, then the defence fails.

Political, policy, scientific, and financial considerations may all be relevant to determining whether an alternative option is practically feasible. While the mere fact that one option is considerably less costly does not excuse selecting it over a non-nuisance causing alternative, where costs are such as to make an option practically impossible then financial considerations may be taken into account.

The Court found that in this case the trial judge erred by considering alternative potential construction methods to be interchangeable – instead the construction method was one component of a comprehensive proposal and the transit authority had to consider the proposal as submitted, as a whole (and could not request, for instance, that a proposal be altered with respect to the construction method). In addition, the Court found that a number of significant factors led to the decision to select the construction method that was ultimately employed. For instance, the alternative construction method was cost prohibitive, involved the assumption of significant financial risks by the public sector, had additional risks with respect to the timeline for completion, and did not equally serve the objectives of the project overall. Accordingly the Court ruled that the construction method that was selected was the only practically feasible option.

The Court then considered whether it was practically impossible to avoid the nuisance using the construction method that was employed, and found that it was.

Nuisance and Statutory Authority: the Canada Line decision (continued from page 6)

Although not necessary (as the ruling that the nuisance was the inevitable result of the only practically feasible option was sufficient to find that the defence was made out) the Court went on to consider whether the alternative (though not practically feasible) construction method would have likewise created the nuisance.

The Court found that in the circumstances of this case it was wrong to look at the plaintiff alone in determining whether another option would have caused the nuisance. Instead, it was proper to consider that many businesses and residents would inevitably have been disrupted by the construction of the Canada Line, regardless of the construction method that was utilised. The other construction method would simply have shifted the disruption to other areas. The Court ruled that in this case, an alternative option that would only have relocated the disruption was not a non-nuisance alternative and therefore should not bar the defence of statutory authority.

Also of note, the Court briefly discussed whether the authority to regulate traffic set out in the *Vancouver Charter* gave rise to the defence of statutory authority. The judgment indicates that the City's powers to regulate vehicular and pedestrian traffic clearly provide statutory authorization for the traffic closures and disruptions that were necessitated by the construction method, and that this authorization could apply to private parties. The Court held that the defence of statutory authority was also available pursuant to the *Vancouver Charter.*

Municipalities other than the City of Vancouver are likewise authorized to regulate traffic. In particular, sections 8(2), 36 and 38 of the *Community Charter* authorize municipalities to regulate and prohibit traffic on highways.

However, as with most enabling legislation in the municipal context, these provisions do not set out the specific manner in which the regulation must occur. Instead, the legislation confers discretion on municipalities to regulate as they see fit.

Accordingly, the main issue for municipalities in asserting the defence of statutory authority is likely to be whether another form of achieving the result would have avoided the nuisance. In particular, is there a practically feasible alternative way of attaining the objectives without causing a nuisance to the plaintiff. Even where there are no practically feasible alternatives, the municipality must still establish that it was practically impossible to avoid the nuisance in proceeding in the manner in which it did. ***Sara Dubinsky***

To Zone or Not to Zone: fighting Puff and other dragons

Recently, a number of municipalities have considered amending their zoning bylaws to regulate medical marihuana grow-operations, in addition to or instead of relying on traditional grow-op/meth bylaws. One has defined "grow operation" in a zoning bylaw and amended the definition of "agriculture use" such that it expressly excludes grow operations. In addition, they added "grow operation" to the list of uses not permitted as a home occupation. Medical marihuana users have complained the bylaw is unfair and discriminatory, particularly against persons with physical disabilities that prevent them from growing their own medical marihuana.

The regulation of medical marihuana grow-operations is subject to a different set of considerations than the fight against illegal grow-ops. In this article we provide an overview of what we consider to be the main issues with the use of zoning powers to regulate medical marihuana production (as opposed to the other statutory powers which are more likely to be upheld).

To Zone or Not to Zone: fighting Puff and other dragons (continued from page 7)

a) Is regulation of marihuana production an aspect of land use regulation or is it regulating drug production?

There is no question that local government zoning powers are broad and include the power to prohibit any use or uses in a zone. In the past, courts have upheld prohibitions on body rub parlours, casinos and pawn shops. A broad prohibition generally seems to be upheld as long as there are proper planning grounds or standards that warrant it. We do think a local government could argue that a prohibition or restriction on marihuana production is justified on the basis of public health and welfare, which is a valid purpose of land use regulation.

However, given a recent decision of the Supreme Court of Canada, we think it is possible that a zoning amendment which had the sole purpose and effect of prohibiting the production of marihuana would be characterized as regulation of drug production rather than land use. Drug production comes under the scope of the criminal law power and is solely within the jurisdiction of the federal government.

The decision we are referring to is *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38. In that case, the municipality had amended its zoning bylaw to prohibit aerodromes on a particular lake and in a larger part of the municipality. The bylaw was challenged by a company which had been carrying on a business of air excursions on the lake and which had obtained a federal licence which authorized it to provide the services. A majority of the Supreme Court determined that the real purpose of the amending bylaw was to regulate the location of water aerodromes in the municipality's territory which was, in pith and substance, the regulation of aeronautics rather than land use. Given that the regulation of aeronautics was an area of exclusive federal jurisdiction, the bylaw was held to be invalid.

We acknowledge that aviation is a unique subject matter. Courts are generally quick to find that local government interference with any aspect of aviation is invalid. This is not necessarily the same for other subject matters, and may not hold true for medical marihuana. Nonetheless, it is possible to analogize from the *Lacombe* case that a zoning bylaw which had as its sole purpose and effect the prohibition of medical marihuana production in all (or most) zones in a municipality would be classified as regulation of drug production rather than land use.

b) Would a zoning bylaw restricting marihuana production conflict with federal law?

Only the federal government can set out exemptions from the criminal prohibitions on possession and production of marihuana, as well as issue licences which designate how much marihuana can be produced and by whom. This is precisely what the federal *Marihuana Medical Access Regulations* do. Assuming that local governments can also regulate marihuana production as an aspect of land-use, the question becomes whether such regulation would conflict with the federal law.

Valid federal and municipal legislation can overlap in certain areas, referred to as the "double aspect" doctrine. For example, regulation of medical marihuana could be held to have both a land-use aspect and a criminal law aspect. The federal *MMAR* would only be paramount to a local government zoning bylaw if there was a direct conflict between the two. A court may find direct conflict if the application of the local government law frustrates the purpose of the federal law.

To Zone or Not to Zone: fighting Puff and other dragons (continued from page 8)

We think it is possible that a zoning bylaw which prohibited marihuana production in specific zones or all zones would be found to be incompatible with the purpose of the federal *MMAR*. The *MMAR* seeks to provide medical marihuana users with a safe, reliable and reasonably accessible source of marihuana and grants them the right to produce it at approved locations, including their own homes. If a local government bylaw prohibited marihuana production in all zones, or just in residential zones, it could be seen to frustrate the basis purpose of the *MMAR*. To see how this incompatibility would play out on a larger level, if every local government amended its zoning bylaw to prohibit the production of medical marihuana within its boundaries, the federal scheme would be largely paralyzed in its application.

It is certainly possible to enact less prohibitive provisions in a zoning bylaw which do not frustrate the federal scheme. However, even less prohibitive prohibitions that do not engage the principle of paramountcy, may still engage s. 7 of the *Charter of Rights and Freedoms,* as discussed below.

c) Challenge under the Charter of Rights and Freedoms

Recent case law makes clear that the right of access to medical marihuana for those with a medical need for it engages section 7 of the *Canadian Charter of Rights and Freedoms*. This section guarantees everyone the right to life, liberty and security of the person and the right not to be deprived of these rights except in accordance with the principles of fundamental justice. As one court has explained, "liberty" contemplates the right to choose to use medical marihuana on medical advice and the right to access the substance. The "security" interest includes the right for those in medical need to have access to their medication without undue state interference.

A local government bylaw which prevents medical marihuana users from growing marihuana in their own homes or from obtaining marihuana from a designated producer within their own community may be found to constitute state interference with access. Even if the bylaw did not impose a blanket prohibition but allowed the production of marihuana only in certain zones – such as industrial zones, this may still be held to breach section 7 because it would impose additional barriers to access than those that already exist in the federal Regulations.

Given the approach that courts have been taking in the cases that consider access to medical marihuana, we think it likely that a bylaw which imposed broad prohibitions on production may breach section 7 and would not be in accordance with the principles of fundamental justice.

d) To what extent is marihuana production a "home occupation" at present?

The *MMAR* are currently structured to restrict medical marihuana production from becoming a large-scale operation by any one person or at any one location. In addition, the most recent information provided by Health Canada suggests that the majority of production licences are personal production licences, which means that most individuals are growing marihuana for themselves. As a result, we query to what extent a zoning bylaw which prohibits a grow operation as a home occupation would be effective.

To Zone or Not to Zone: fighting Puff and other dragons (continued from page 7)

e) Section 911: non conforming uses

Finally, even if a local government can use its zoning power to regulate medical marihuana and avoid legal challenge on any of the grounds we have set out, individuals who are already lawfully using their homes (or other areas) for medical marihuana production would be entitled to continue that use pursuant to s. 911 of the *Local Government Act*.

Our brief conclusion based on the foregoing: given the number of possible issues that arise with respect to using zoning powers to regulate medical marihuana, it is our opinion that the better avenue for a local government is regulation pursuant to a licensing and inspection scheme, as set out in a previous newsletter.

Marisa Cruickshank

Take a Hike: limiting liability on recreational trails

Local governments face a staggering amount of liability with regard to personal injury claims under the *Occupiers Liability Act* (the "Act"). The typical case occurs where someone slips and falls on municipal property and sues the municipality as an occupier. In 1998, the Act was amended so that people entering recreational trials are deemed to be accepting all associated risks. With thousands of kilometres of recreational trails in municipalities and regional districts, it is important for local governments to take advantage of this protection. As noted in *Skopnik v. BC Rail Ltd.*, one of the principal purposes of the 1998 amendments was to encourage landowners to let outdoor recreationists use their lands.

The basic rule with regard to recreational trials is that when someone is using the trail, the occupier is held to a lesser standard of care if certain criteria are met. First, the occupier must not receive any payment from the person who is using the trail (this is not usually an issue for local governments). Second, the area must meet the definition of a "recreational trail". Finally, the recreational trail must be reasonably marked as such. If these criteria are satisfied, the only thing an occupier should not do is intentionally create a danger or act with reckless disregard toward persons using the trail.

Since these amendments came into force, there has yet to be a case in British Columbia to comprehensively consider the provisions relating to recreational trails

Dally v. London (City), an *Occupier's Liability Act* case, provides some guidance as to how local governments can limit trail liability. In that case, the plaintiff was rollerblading along a strip of asphalt when she slipped on a patch of gravel. The Court determined that the paved pathway met the definition of a recreational trail as it was designated solely for pedestrian use. The City was therefore entitled to provide a lesser standard of care and was subsequently relieved of liability. If this reasoning is followed in British Columbia, the provisions of the Act limiting liability may not be confined to the traditional concept of "recreational trails".

The case of *Kennedy v. London (City)* provides some insight into the third criteria that a

recreational trial must be marked as such. In that case a cyclist was riding on a trail and suffered injuries after hitting a post erected in the middle of the trial. The plaintiff argued that the trail was not reasonably marked as a "recreational trail". The Court concluded that posting bylaw signs at various access points, and indicating the trial was

Take a Hike: limiting liability on recreational trails (continued from page 10)

a "recreational trail" in a brochure produced by the City, was sufficient. Nonetheless, the City was found liable in that case because the placement of a post in the middle of the trail was considered to be a reckless disregard for the safety of trail patrons.

If the case law from Ontario is any indication of how the Courts of British Columbia will interpret the amendments to the Act, there are certain measures that municipalities can take in attempting to limit liability for recreational trails. First, local governments may want to consider expanding the conventional definition of a "recreational trail". Local governments may want to consider designating boardwalks and other pedestrian walkways as "recreation trials" through signage, brochures, or other municipal publications. Second, to ensure that trails are reasonably marked as such, municipalities should erect signs at all normal points of access stating any applicable bylaws and indicating that the trail is a recreational trail. Additionally, local governments may consider producing brochures or pamphlets indicating the areas designated as recreational trails within its boundaries. Finally, signs should be erected along the trails themselves if there are any unusual dangers present. Such proactive measures could assist a local government in an assertion that it was not acting with reckless disregard towards user safety.

In addition to the protection offered under the Act, local governments can rely on the operational/policy distinction as a defence. This defence states that government bodies, including municipalities, are entitled to make policy decisions based on budgetary factors, and that such policy decisions are not reviewable by the courts so long as the policy itself is rational. However, once a policy is implemented it becomes an operational matter and reasonable care must be exercised. In *Fox v. Vancouver (City)*, the Court determined that the policy/operational defence is available even where a claim arises under a statute such as the *Occupiers Liability Act*.

In *Oser v. Nelson (City)* it was held that a municipality can legitimately maintain a "no inspection" policy. In that case, the Court determined that it was reasonable for the City to maintain a policy that streets and sidewalks would only be inspected and repaired on a complaints related basis. In relation to recreational trails, this means that a municipality can institute a policy whereby it does not carry out scheduled inspections, but only responds to complaints with regard to the condition of its trails. On the other hand, it has consistently been shown that if a municipality decides to implement a maintenance and inspection schedule, it must be followed in order to avoid liability. With these considerations in mind, the best course of action for a local government is to maintain a complaints based maintenance policy with respect to its recreational trails, and simply respond as complaints are received. ***Stuart Ross***

Keeping Good Form: amendments to Letters of Assurance under the BC Building Code

There is often confusion on behalf of local governments, developers, home owners, and professional engineers alike with regard to the proper use of Letters of Assurance.

Generally, Letters of Assurance are documents endorsed by a professional engineer or architect to indicate that building plans (or the construction of a building) are in compliance with the BC Building Code (the "Code"). However, in a strictly legal sense, Letters of Assurance are legal

Keeping Good Form: amendments to Letters of Assurance under the BC Building Code (continued from page 11)

accountability documents which are prescribed under section 2.2.7 of Division C of the Code. Under the Code, if a building is classified as an *assembly occupancy*, a *care* or *detention occupancy*, or a commercial or residential occupancy exceeding 600 m^2 or three stories in height (often collectively described as "Part 3 Buildings"), prescribed form Letters of Assurance must be used. Additionally, the *Buildings and Other Structures Regulation* under the *Community Charter* states that a local government is not permitted to change the form of a Letter of Assurance as prescribed by the Code.

A recent change to the modified form of Letters of Assurance. From a risk management perspective, it is advisable that local governments ensure these amended forms are being submitted with building plans for Part 3 Buildings.

In *Parsons v. Finch*, a municipality was sued for negligent approval of building plans after the plaintiff's house settled unevenly on unstable soil. The municipality was found not to be liable because the municipality had received Letters of Assurance from a geotechnical engineer. The Court noted the Letters of Assurance were in the form prescribed by the Code. The Court then relied on the predecessor to section 290 of the *Local Government Act* which states that, if a local government receives and relies on a report from a professional engineer that a building plan conforms to the Code, it cannot later be held liable.

There are circumstances in which the prescribed Letters of Assurance should not be used. Under sections 55 and 56 of the *Community Charter*, a local government may, by bylaw, require a means of accountability on matters not addressed in the Code. On the basis of site conditions or the complexity of a development, a local government may require an applicant for a permit to provide professional certification that the plans comply with the Code. In a recent publication the Province has stated that Letters of Assurance prescribed by the Code cannot be used for these purposes. A local government may require a certification with language and format similar to the Letters of Assurance prescribed by the Code, but the prescribed forms cannot themselves be used for these purposes. ***Stuart Ross***

What's the use? non-conformity as to use versus non-conformity as to other regulations

Lawful non-conformity as to use must be distinguished from non-conformity of buildings or structures with siting or other regulations adopted after construction. The doctrine of "lawful non-conforming uses" allows a use to be continued if, at the time a bylaw under Division 7 of Part 26 is adopted, the land/building/structure is lawfully used but the use does not conform to the bylaw.

On the other hand, the doctrine of non-conformity as to siting or other regulations stipulates that *if the use and density of buildings or other structures conform* to a bylaw under Division 7 of Part 26 of the LGA, but the siting/size/dimensions constructed before adoption do not conform with the new bylaw, then the building or other structure may be maintained, extended or altered but only to the extent this would involve no further contravention of the bylaw.

In the case of both non-conformity as to use and non-conformity as to other regulations, there is a public policy "tension" between private property rights versus the public interest. On one hand, section 911 LGA grandparents the use of land and

What's the use? non-conformity as to use versus non-conformity as to other regulations
(continued from page 12)

the siting, size or dimensions of a building or structure existing before a new bylaw is adopted. The policy of the legislation protects vested private property interests. Despite this, the scheme of section 911, on the other hand, notionally contemplates the ultimate phasing out of non-conforming uses and non-conforming siting or other conditions so that at some point the uses and buildings or structures comply with the new land use enactments.

There are numerous court decisions in relation to lawful non-conformity as to the use of land or building or other structure, but less so with respect to the grandparenting of buildings or structures where the use or density conforms to a new bylaw and where the siting, size or dimensions do not conform with the new bylaw. A key difference between non-conformity as to use as opposed to non-conformity as to other regulations is that in relation to the former, the use does not conform to the new bylaw, where as in relation to the latter, the use and density of the buildings and other structures conform to the new bylaw.

Non-conformity as to siting and other regulations under section 911(9) and (10) LGA applies not only to zoning bylaws but to bylaws under Division 7 Part 26 of the LGA. Such other bylaws include bylaws imposing precipitation runoff controls, regulating signs, requiring or regulating screening or landscaping, and designating and regulating in relation to floodplains.

Under section 911(9) LGA, *if the use and density of buildings and other structures conform* to one of these bylaws but the siting, size or dimensions of a building or other structure constructed before the bylaw was adopted do not conform with the bylaw, the building or structure may be maintained, extended or altered. Section 911(10) stipulates the extent to which the building or structure may be maintained, extended or altered: only to the extent that this would, when completed, involve no further contravention of the bylaw than that existing at the time the repair, extension or alteration was started.

The question then rises as to what constitutes a "further contravention of the bylaw". This includes any additional or increased encroachment or expansion of the building or structure beyond the state of its existence at the time of the adoption of the bylaw. This would include, for example, a repair, extension or alteration of a deck or staircase that extends further into a required side yard, a window box or eve that intrudes further into a required rear yard, or an addition to the roof that would increase building height further (where in each case the siting, size or dimensions of the building or structure already fail to conform with the new bylaw). Think of a computer model of the building or structure after the date of adoption of the new bylaw but before the repair, extension or alteration was started; the building or structure may be maintained, extended or altered but only to the extent that the repair, extension or alteration would not punch out beyond the confines of the model into required setback areas adjacent to or above the existing building or structure.

Despite this, the owner could apply to the council or board for a development variance permit (or to the council or board or its delegate if there is a development permit already in play, but only in accordance with applicable guidelines). In the alternative, under the case law the owner could apply to the board of variance.

The legislation sets out different rules for a structural alteration or addition to a building or structure in which a *non-conforming use* is

What's the use? non-conformity as to use versus non-conformity as to other regulations (continued from page 13)

continued. Section 911(5) LGA states that a structural alteration or addition must not be made to a building or structure while the non-conforming use allowed under section 911(1) through (4) LGA is continued in all or part of the building or structure. There are two exceptions: where the alteration or addition is required by an enactment or where it is permitted by the board of variance under section 901(2). ***Don Lidstone***

Gemex Developments Corp. v. Coquitlam (City) 2010 BCSC 1616

In this case, the City was attempting to enter onto property owned by Gemex for the purpose of conducting a survey in relation to a proposed expropriation. Gemex subsequently brought an application seeking an injunction to restrain the City from entering onto its property. The Court refused to grant an injunction and found that the City had authority to enter onto the property under both the *Expropriation Act* and the *Community Charter*.

The novelty of this case is that it represents the first time Courts in British Columbia have considered section 16 of the *Community Charter*. This is of particular interest because there were no equivalent provisions under the *Local Government Act* prior to the enactment of the *Community Charter*. Section 16 of the *Community Charter* provides that municipal officers and employees have the authority to enter onto private property, without the consent of the owner, if the purpose is related to municipal services (municipal "services" are broadly defined as "an activity, work or facility undertaken or provided by or on behalf of the municipality"). This case provided an interpretation of section 16 favourable to local governments. The Court determined that the *Community Charter* provided the City with authority to enter onto Gemex's property independent of the surveying authority contained in the *Expropriation Act*. This means that municipalities will not have to find independent statutory authority before relying on section 16 of the *Community Charter* to enter onto property. Additionally, the Court stated that there is "nothing in s. 16 which prevents a permanent occupation of real property or requires consent to that occupation". This statement should not be taken to mean that a local government can engage in a de facto expropriation without providing compensation. However, a reasonable interpretation would suggest that a local government is not strictly limited in the amount of time it may occupy private property for the purpose of providing services or ensuring compliance with municipal regulations.
Stuart Ross

Johnston v. Victoria (City), 2010 BCSC 1707

In this case, the appellants had set up cardboard shelters in a park next to Victoria City Hall to directly challenge a City of Victoria bylaw that prohibited the erection of temporary shelters in public parks during the daytime. The appellants ignored written warnings from the City, were issued offence notices and were subsequently convicted at trial. They then applied for an order setting aside their convictions, arguing that the City of Victoria's homeless had a right under section 7 of the *Canadian Charter of Rights and Freedoms* to erect temporary shelters on public property and that right could not be abridged or limited by restricting it to night hours only.

The Court found that the bylaw in question imposed a reasonable limit on the right of the homeless in Victoria to erect temporary shelter

Johnston v. Victoria (City), 2010 BCSC 1707
(continued from page 14)

and the appeal was dismissed. Previous court decisions had made clear that the City's bylaws could not prevent homeless people from erecting temporary shelter in public places such as parks when there was insufficient space for them indoors. However, during daytime hours adequate services and shelter were available and during normal weather conditions many homeless people did not require daytime shelter. There was insufficient evidence documenting the number of homeless who needed shelter during the day for the purpose of sleeping and no evidence supported the conclusion that the homeless in Victoria required or were entitled to erect temporary shelters at any time. The restrictions imposed by the City bylaw allowed other users the freedom to enjoy public spaces without the disruptive presence of temporary shelters. The restrictions also allowed the City to maintain its parks and prevent the damage that would be caused by the presence of relatively permanent shelters. ***Scott Black***

Vancouver (City) v. Zhang, 2010 BCCA 450

In this case Falun Gong practitioners had set up signs and a makeshift shelter in front of the Chinese Consulate in Vancouver and had maintained a continuous vigil at that location. The hut and an accompanying billboard were covered with photos, posters and painted messages. The City of Vancouver petitioned the Supreme Court for an injunction requiring the practitioners to remove the structures because they contravened the City's *Street and Traffic By-Law*. The City also sought an injunction prohibiting the practitioners from constructing new structures without permission. The practitioners responded to the injunction petition with a request for a constitutional exemption from the application and enforcement of the bylaw. The chambers judge granted the City's injunction and found that the bylaw did not violate section 2(b) of the *Canadian Charter of Rights and Freedoms*. The practitioners appealed that decision.

The Court of Appeal ruled that the chambers judge had erred in finding that the appellants' method of expression removed the protection of section 2(b)

of the *Charter*. The important question was not whether the form of expression was compatible with the function of the street, but whether free expression in the chosen form would undermine the values section 2(b) of the *Charter* was designed to promote. The functioning of public streets was compatible with open public expression and it could not be said that structures that encroached on City streets without obstructing pedestrian or vehicle traffic somehow subverted democratic discourse.

While the management of competing uses of public streets was a pressing and substantial objective, the City bylaw had the effect of banning the use of structures for political expression. No City bylaws or policies granted exceptions for political structures and a more reasonable regulatory scheme than the one adopted by the City was possible. The billboard and meditation hut were integral to how the practitioners chose to express themselves and the inconvenience they experienced from not being able to use the structures outweighed any benefit to the City. The effective ban on the use of structures for political expression did not minimally impair the practitioner's right to freedom of expression and the Court of Appeal declared the bylaw to be of no force and effect insofar as it was inconsistent with the *Canadian Charter of Rights and Freedoms*. ***Scott Black***

Lidstone & Company

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

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

Marisa Cruickshank has experience preparing legal opinions on a wide range of matters, including in relation to constitutional, administrative, and environmental law issues relevant to municipal law. Marisa completed her law degree at the University of Victoria. She was awarded five major scholarships and academic awards. She also served as a judicial law clerk in the British Columbia Court of Appeal.

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

Rachel Forbes graduated from the University of Victoria Faculty of Law, articled with the Environmental Law Centre and Ratcliff & Company, and then practiced law as an associate at Ratcliff & Company. Rachel has won several awards for academics and community service. She has an undergraduate degree in urban studies and worked as a planning assistant for the UniverCity development on Burnaby Mountain. Rachel provides legal opinions on a wide variety of municipal law matters, drafts agreements in relation to real property and other matters, drafts bylaws, and is the go-to person in our firm for environmental law issues.

Stuart Ross is an Articled Student. Stuart drafted bylaws and conducted legal research for the City of Coquitlam Legal Department for the past two summers. Stuart won three scholarships this year at University of Victoria, including for the highest marks.

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