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the Law Letter

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The "Insite" decision: lessons for local governments

The Supreme Court of Canada has handed down its unanimous judgment in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44. The case concerned the constitutionality of the criminal prohibitions against possession and trafficking that prevented Vancouver's safe injection site (Insite) from legally operating, unless it maintained a Ministerial exemption from the prohibitions.

Insite was established in response to a public health crisis in Vancouver's Downtown East Side. Increasing deaths from drug overdoses and the spread of infectious disease including HIV/AIDS prompted years of research, planning, and intergovernmental cooperation, and eventually yielded North America's first supervised safe injection facility where intravenous drug users were provided with clean equipment and medical oversight in order to safely inject intravenous drugs.

Local, provincial and federal authorities cooperated in the creation of Insite, and the experiment proved a success- Insite has saved lives and improved health, without an increase in the incidence of crime or drug use. The City of Vancouver, Vancouver Police Department, and Provincial government all supported the continued operation of the facility, but the Federal Government refused the grant Insite a continued exemption from the prohibitions against possession and trafficking of controlled substances. Prior to the final exemption lapsing, the case went to court.

Two main arguments were presented at the Supreme Court of Canada. First, certain parties (including the Attorney General of BC) argued that because it was a health care facility, which falls under exclusive provincial jurisdiction, the federal criminal prohibitions did not apply to Insite.

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Second, a number of parties argued that the prohibitions violated the *Canadian Charter of Rights and Freedoms*.

The Court held that the criminal prohibitions against possession and trafficking were valid exercises of federal jurisdiction over criminal law, and applied to Insite despite the fact that Insite was a health institution within provincial jurisdiction.

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The Court also ruled that while the prohibitions implicated *Charter* rights, because the Minister could grant exemptions from the prohibitions for medical, scientific and public interest purposes, the *Charter* was not violated by the provisions.

However, the Court ruled that as with all governmental exercises of discretion, the Minister's decisions regarding exemptions from the criminal prohibitions must comply with the *Charter*. Here, the Minister exercised his discretion by refusing to grant Insite an additional exemption from the prohibitions against possession and trafficking. Because this discretionary decision resulted in a violation of the *Charter* rights of the patients and staff at Insite, that discretion was unconstitutionally exercised. The Court ordered the Minister to grant an exception to Insite.

The case is significant from a local government perspective because it emphasizes that discretionary decisions must comply with the *Charter*. While it is up to governments to craft policies concerning matters within their respective spheres of jurisdiction, once the policy is implemented as law or action, it becomes subject to scrutiny under the *Charter*. Accordingly, municipal councils, regional district boards, and staff with delegated decision making authority must consider whether their decisions will cause violations of the *Charter*, and are at risk of being required to exercise their discretion in a particular fashion if that is the only way to comply with the *Charter*.

For those local governments concerned about a sudden proliferation of safe injection sites as a result of this judgment, the Court was careful to set out that its decision was not a licence for similar facilities to set up shop. Key to the outcome of this case was the evidence demonstrating the benefits of Insite with respect to alleviating mortality and disease, without any associated negative impact on the federal government's criminal law objectives of protecting public health and safety from the effects of addictive drugs.

Sara Dubinsky

The Occupy Movement: Use of Public Space

The use of public space is one of the fundamental characteristics of urban life. The right to use and occupy public space is an accepted norm that usually runs beneath the surface of our day-to-day experience of the City. Occasionally, however, the issues surrounding the right to use public space are brought into stark relief by a conflict such as the recent clashes between municipalities and various "Occupy" movements loosely aligned with the "Occupy Wall Street" ("OWS") movement. While the Occupy movement cases were not the first disputes over public space to be litigated in Canada, the court actions regarding Occupy Vancouver and Occupy Toronto have added some clarity to the rights and powers of municipalities to control public space.

Statutory Powers

In B.C., municipalities draw their powers to regulate public space from the *Community Charter* (the "*CC*"). Section 8(3)(b) of the act gives municipalities the power to, by bylaw, "regulate, prohibit, and impose requirements in relation to...public places." This gives municipalities broad powers, subject only to provincial or federal laws and the rights guaranteed to individuals and groups in the *Charter of Rights and Freedoms* (the "*Charter*").

Typically, municipalities use these powers to enact bylaws which regulate the use of public space by prescribing limits on time of use, prohibiting certain activities, and establishing fees and permitting systems for the exclusive use of certain spaces or commercial activities on public space.

Provinces may also address perceived problems with the use of public space in cities by enacting laws that regulate spaces that are controlled by provincial legislation. An example of this is the use of the *Safe Streets Act* to control panhandling and other disruptive behaviour on city streets and sidewalks [for more on the *Safe Streets Act*, refer to the article by Lindsay Parcells on page 7 of this issue of the Law Letter.]

Legal Challenges

The centrality of public space to the democratic ideals of freedom of expression and freedom of assembly are not in dispute. They are established as fundamental freedoms in the *Charter*:

> 2. Everyone has the following fundamental freedoms:
>
> …
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; …

As well, the right for certain people to occupy public space has, at times, been characterized as a component of the right to "life, liberty and

The Occupy Movements (continued from page 3)

security of the person" guaranteed in s. 7 of the *Charter.*

If a plaintiff can establish that one of these rights has been infringed by a municipality as a result of the exercise of its statutory powers, then the municipality has the opportunity to establish that the infringement "can be demonstrably justified in a free and democratic society" (*Charter*, s. 1), in which case the law which imposes the limitation on the plaintiff's *Charter* rights will not be quashed or declared invalid. This is what is known as a law being "saved by s. 1".

This constitutional battleground has been traversed in a number of recent cases dealing with conflict over public space in B.C. Two of these cases in particular have set the legal context for the Occupy movement disputes: *Vancouver v Zhang* and *Victoria v Adams*.

a) *Vancouver v Zhang* (2010 BCCA 450)*[Zhang]*

Zhang was a case which focused on the section 2 rights of protesters who belonged to a spiritual movement known as Falun Gong. In protest against the treatment of the group in mainland China, the protesters began a 24-hour vigil outside the Chinese Consulate in Vancouver. For nearly eight years members of the group occupied a meditation hut located on the boulevard outside the Consulate in one-person shifts. The hut and the accompanying eight-by-one-hundred foot banner displayed photographs of alleged human rights abuses and political messages.

In 2009, the City of Vancouver was successful in obtaining an injunction to enforce provisions of the City's *Street and Traffic Bylaw* requiring the protesters to remove the structures and enjoining them from building any more structures. The B.C. Court of Appeal found in favour of the protesters and declared the applicable sections of the bylaw constitutionally invalid. The Court of Appeal found that the structures had expressive content and were protected under s. 2(b). The court also remarked on the nature of public streets in the context of political discourse:

> Public streets are, as they have been historically, spaces in which political expression takes place and where structures are maintained. A multiplicity of free-standing objects exists on city streets, suggesting that the presence of a structure on a street does not undermine the values of s. 2(b).(para. 41)

While the balancing of numerous claims on the use of public streets was found to be a pressing and substantial objective, the section of the bylaw (s. 71) addressing the prohibition on structures failed to meet the "minimal impairment" test: a law that infringes a fundamental right must be within a reasonable range of alternatives which attempt to minimize the infringement of the right in question. The key failing of the bylaw was its inflexibility. As Huddart JA noted:

> [N]o evidence or argument was put forward as to why the City could not develop a policy allowing for the administrative regulation of political expression comparable to those in place for commercial and artistic expression. Had the Council instituted what might be called a "Political Structure Policy," as it did policies for commercial and artistic expression, as part of its regulatory scheme, my conclusion might well be different. (at para. 69)

b) *Victoria v Adams* (2009 BCCA 563) [*Adams*]

The Trial Judge (Ross J) in *Adams* introduced the case as follows:

The Occupy Movements (continued from page 4)

> This litigation arises from what Senior District Judge Atkins in *Pottinger v. City of Miami*, 810 F. Supp. 1551 at 1554 (S.D. Fla. 1992) described as:
>
> > …an inevitable conflict between the need of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets.

The dispute centred around two Victoria bylaws, the *Parks Regulation Bylaw* and the *Streets and Traffic Bylaw*. The combined effect of these bylaws was to prevent homeless people from constructing temporary shelter in public parks and streets. At trial, the court held that provisions of the bylaws infringed upon homeless persons' section 7 rights to life, liberty and security of the person, and the provisions could not be saved by s.1, as the absolute ban was not minimally impairing.

The Court of Appeal agreed, noting at para. 132 that:

> The respondents have not demonstrated that the Bylaws, in and of themselves, are unconstitutional. The violation is a result of the combination of the two Bylaws, the City's operational policy that defines "temporary abode", and the fact that there is a shortage of adequate shelter in the City for homeless persons. Put simply, the homeless have no place to sleep at night without severe risk to their health, caused, at least in part, by the prohibition against the use of temporary overhead shelter.

As in Zhang, the absolute ban and lack of exceptions to the bylaws was fatal:

> The prohibition on shelter contained in the Bylaws is overbroad because it is in effect at all times, in all public places in the City. There are a number of less restrictive alternatives that would further the City's concerns regarding the preservation of urban parks. The City could require the overhead protection to be taken down every morning, as well as prohibit sleeping in sensitive park regions. (para. 116)

The City subsequently amended its bylaws to allow overnight temporary shelters only. In *Johnston v Victoria* (2010 BCSC 1707; aff'd 2011 BCCA 400), a challenge to the amended bylaws based on alleged infringement of s. 7 rights failed, as the court held that there was insufficient evidence of a lack of available shelter beds during the daytime to establish that homeless persons were being deprived of their rights to life, liberty and security of the person by laws that prohibited erecting temporary shelters during the day.

The Occupy Movement

During the fall of 2011, OWS, initially a protest in New York, transformed into a worldwide phenomenon, with groups of protesters occupying public spaces in several cities. In Canada, "occupied" cities included Victoria, Vancouver, Regina, Winnipeg and Toronto. The protests were initially almost entirely political in character, but in many cities the occupied public spaces also came to serve as improvised homeless shelters. For this reason, when cities in Canada began to enforce their bylaws in order to clear out the occupied spaces, they were faced with Charter challenges based both on section 2 and section 7 rights.

De-Occupying Toronto – *Batty v Toronto* (2011 ONSC 6862 [*Batty*])

Toronto's occupiers settled in St. James Park and the City took no action to remove them for one month. The City then served numerous protesters a notice under the *Trespass to Property Act*,

The Occupy Movements (continued from page 5)

forbidding them from erecting shelters or structures or using the park overnight pursuant to provisions of the City's Parks By-Law.

The protesters commenced an application challenging the validity of the notices, claiming that the notices infringed upon the protesters' section 2 rights.

As with *Zhang*, the court had no difficulty finding that the limitation of the expressive activities at the park was an infringement of section 2 rights, particularly ss. 2(b) and 2(c). The issue was whether such infringement could be saved by s. 1. The crux of the issue was once again the question of whether the measures taken by the City were within a range of reasonable alternatives that met the minimal impairment test.

At this point, D.M. Brown J distinguished *Zhang*:

> I think one can fairly characterize the degree of interference by the protesters' structures in the *Zhang* case with the use of a public street as *de minimis* to non-existent, hardly equivalent to the occupation of an entire city park which is at issue in the case before me. (*Batty* at para. 86)

The court was alive to the fact that the protesters essentially "appropriated public land to their exclusive, private use" (at para. 108) and found that the "rigidity and absolutism of the Protesters' position – let us keep our tents and around-the-clock occupation – does not fit with the balancing of competing interests which our *Constitution* requires." (at para. 111).

On the other hand, the City's Parks By-law had the flexibility where exceptions to the prohibitions could be granted through a permit process – which the protesters had not taken advantage of. The City's measures to enforce the By-law were minimally impairing given the objective of balancing "in a fair way, the different uses we wish to make of our public parks so, at the end of the day, we all get to enjoy them". (at para. 95).

As a result, the application was refused and the City was subsequently free to act to enforce the trespass notices in order to clear the park. As D.M. Brown J noted:

> The *Charter* offers no justification for the Protesters' act of appropriating to their own use – without asking their fellow citizens – a large portion of common public space for an indefinite period of time...Nor does the *Charter* remove the obligation on all of us who live in this country to share our common urban space in a fair way. (at paras. 12-14)

De-Occupying Vancouver – *Vancouver v O'Flynn-Magee* (2011 BCSC 1647)

In Vancouver, the City chose to apply for an injunction against the protesters prior to enforcement of notices that had been served under the *City Land Regulation Bylaw*. The application was successful, and the court ordered the protesters to decamp from the Art Gallery Lands.

Because the application was for an interim injunction, the hearing revolved around establishing that the City had met the test for a court to grant such an injunction. While the lawyers for the protesters argued that sections 2, 7 and 15 (equality) of the *Charter* were engaged, MacKenzie ACJ ruled that:

> "...an interlocutory injunction application is not the appropriate time to address constitutional arguments (*Okanagan Indian Band*). Rather, constitutional arguments are properly examined at the trial of the matter..." (at para. 41)

The Occupy Movements (continued from page 6)

There are two potentially applicable tests to meet in this context. In the *Thornhill test*, if a city can show that there has been a clear breach of a by-law, the court will grant the injunction unless there are "exceptional circumstances" which permit the court to deny the application. This test is clearly favourable to a city, and in this case the court noted there were no exceptional circumstances which would permit refusal of the injunction, particularly in the face of "flouting" of the by-law and an intention to continue in violation of the bylaw (at para. 48).

The court also applied the *RJR-MacDonald* test. The application met this test as well, as the court found that the City would suffer irreparable harm if the injunction was not granted and the balance of convenience favoured the City (at paras. 60, 65). The court put it this way:

> The City has an obligation to regulate city lands to maintain safety. It is liable for the activities which occur on city lands. Therefore, it must have control over those lands. (at para. 66)

As a result, Vancouver was granted the court order they sought – a very powerful tool for enforcing bylaws – without having to fully argue the constitutional issues.

Conclusion

Canadian courts will support the enforcement of city bylaws and policies aimed at regulating the use of public spaces, provided that the limitations and restrictions they impose are flexible enough to take into consideration and minimize potential *Charter* violations. This is shown by the willingness of courts to support municipal attempts to remove the protest camps set up by the Occupy movement protesters. Even in the case where public space is not being monopolized or "appropriated" by a protest, cities can successfully regulate temporary shelters on public land, so long as they do not implement an absolute ban with no flexibility or exemptions.

Cam Mitchner

Legal Challenges to Panhandling Laws

Panhandling is a term defined as the various methods used by persons to obtain money, food, shelter, drugs, alcohol or other things from people they encounter. Panhandling includes traditional begging in which the panhandler will use successful approaches which seem to attract more attention or entice or entertain passersby.

Legal Challenges to Panhandling (continued from page 7)

Panhandling also includes more inappropriate and intimidating behaviour defined as "aggressive panhandling". This behaviour consists of soliciting donations in a place or manner that intimidates the intended mark into providing money.

Laws aimed at regulating or prohibiting panhandling have existed in Canada since its foundation as a colony of Great Britain. After confederation in 1867, the Canadian parliament assumed responsibility for these laws; however, no laws prohibiting begging have existed at the federal level since 1972 and more recently, it has fallen to the provinces and municipalities in Canada to enact laws and bylaws respecting panhandling. Many of these laws have been enacted in response to demands by citizens and business people concerned about a perceived decline in the quality of life and attendant concerns about crime and disorder in downtown areas. Most of these laws prohibit 'aggressive panhandling" and regulate more passive forms of panhandling. A 2003 survey of sixteen Canadian cities found that fourteen Canadian cities had anti panhandling bylaws of some kind.[1]

Municipal anti-panhandling bylaws in Canada typically impose restrictions on the time, place, and manner in which panhandling can occur and in a few cases, impose an outright ban. The bylaws typically regulate when panhandling can occur; generally by prohibiting it after dark. As well, the bylaws impose restrictions on where begging may occur in public places. Many of the bylaws prohibit asking for money at transit stops and shelters; in the vicinity of banks, automated teller machines, liquor stores; on busy pedestrian walkways; at traffic control signals; and on roadways. Many of the bylaws also regulate the manner in which panhandling occurs. Behaviour that is considered persistent, intimidating, obstructive, or threatening is commonly considered to constitute "aggressive" panhandling in the bylaws and made illegal. For example, Vancouver's panhandling bylaw[2] makes it illegal to "continue to solicit from or otherwise harass a pedestrian after that person has made a negative initial response to the solicitation or has otherwise indicated a refusal," "to physically approach and solicit from a pedestrian as a member of a group of three or more persons," and to "solicit in a manner which causes an obstruction."

Panhandling bylaws enacted by municipal governments may be challenged on common law grounds including breach of fairness, vagueness or uncertainty. They may also be attacked on the basis that they are enacted outside the jurisdiction of local governments under the enabling legislation or the *Canadian Constitution*. The bylaws may also be challenged for infringing upon the freedoms protected under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Challenges are apparently rare though as there have been only one reported case in Canada that has considered the legality of a panhandling bylaw - *Federated Anti-Poverty Groups of B. C. v. Vancouver* (*City*) ("*Federated*")[3], which considered a challenge to the City of Vancouver's panhandling bylaw.

In the *Federated* case, Vancouver bylaw was attacked on the basis that the bylaw was beyond the authority granted to the City under its enabling legislation and that it impinged on the federal government's exclusive jurisdiction to pass legislation with respect to criminal laws. The court rejected these arguments by finding that the

[1] D. Collins and N. Blomley, Private Needs and Public Spaces: Politics, Poverty and Anti-Panhandling Bylaws in Canadian Cities" in *New Perspectives on the Public-Private Divide* (UBC Press 2003), P. 43. The 14 cities with laws were Fredericton, Moncton, Quebec City, Ottawa, Kingston, Hamilton, Sudbury, Windsor, Winnipeg, Saskatoon, Edmonton, Calgary, New Westminster, Vancouver.

[2] *City of Vancouver, Bylaw No. 2849, section 70A.*

[3] *[2002] BCJ, No. 493, BCSC.*

Legal Challenges to Panhandling (continued from page 8)

bylaw fell within the City's authority to make bylaws "for regulating pedestrian, vehicular, and other traffic and the stopping and parking of vehicles upon any street or part thereof" under the *Vancouver Charter*.[4] The court concluded that the bylaw sought "to balance panhandling with the multitude of other activities occurring on the streets - the most dominant of which is the efficient and safe movement of people along the sidewalk."[5]

The court in the *Federated* case also considered whether the Vancouver bylaw was invalid on the basis that it could be characterized as impinging on the federal government's exclusive jurisdiction to pass legislation with respect to criminal laws. On this issue, the court concluded that the bylaw was "a regulation of a particular kind of street conduct juxtaposed against a myriad of other forms of street conduct or usage."[6] In determining the issue, the court concluded that the bylaw's "pith and substance concerns the consequences of a specific type of conduct that impairs the safe and efficient passage of pedestrians on the City's streets"[7] and that it was also "part of a broader legislative program, in which other street activities and usages are also regulated in the context of providing safe and efficient movement of pedestrians on sidewalks."[8] On this basis, the court found that the law was not criminal in nature and within the jurisdiction of the city. Local governments in British Columbia could no doubt rely on comparable authority granted under the *Community Charter.*

The court in the *Federated* case also considered whether the Vancouver violated certain protected freedoms of panhandlers under the *Charter* including freedom of expression, the right to life, liberty and security of the person, and panhandlers' rights to equality. With respect to panhandlers' freedom of expression, the court concluded that passive panhandling was a form of expression protected by the *Charter*; however, the court concluded that the Vancouver bylaw did not prohibit panhandling and was drafted so as to interfere with panhandling as a form of social interaction (i.e. expression) as minimally as possible so that the act of panhandling did not impair the dominant purpose of the street."[9] With respect to the panhandlers' rights to life, liberty and security of the person under the *Charter*, the court concluded that the bylaw did not prohibit panhandling but sought to regulate particular conduct that affected the use of the streets by others."[10] On that basis, the court concluded that the bylaw's specific prohibition of panhandling within certain areas did not infringe freedoms protected under the *Charter* insofar as it sought to balance the interests of all who use the street.[11] The court declined to rule on the question of whether the Vancouver bylaw infringed the *Charter* by denying panhandlers' the ability to provide for the necessities of life by noting that the Supreme Court of Canada had not yet determined the issue. Further, the court noted that the law did not prevent "...panhandling provided it is done in a manner that does not obstruct. There are a multitude of areas in which the activity may be pursued, and there is nothing to suggest that one area is preferable over another."[12] Finally, the court in *Federated* concluded that the Vancouver bylaw did not infringe equality rights under the *Charter* insofar as it did "not, even if it were concluded to create differences between those who panhandle and other users of the street, impose a burden upon or

[4] *SBC 1953, c. 55, s. 317(1)(a).*
[5] *Supra*, note 3, at para. 93.
[6] *Ibíd*., at para. 121.
[7] *Ibíd*. at para. 136.
[8] *Ibíd*. at para. 140.
[9] *Ibíd*. .at para. 161.
[10] *Ibid.* at para. 210.
[11] *Ibid*., at para. 218.
[12] *Ibid*., at para. 226.

Legal Challenges to Panhandling (continued from page 9)

withhold a benefit from those engaged in panhandling that could be said to affect essential human dignity."[13]

Two conclusions can be drawn from the court's *Charter* analysis of the Vancouver bylaw in the *Federated* case. First, the court made it clear that "aggressive panhandling" as defined in the bylaw was not worthy of *Charter* protection. Second, it would seem from the trial judge's comments than an outright prohibition on panhandling anywhere in the City would have infringed the constitutionally protected freedoms under the *Charter*. The judgment in the *Federated* case demonstrates that in situations where a local government deems it desirable to enact a panhandling bylaw, the bylaw must be carefully drafted to survive legal challenges. The limited case law in this area suggests that the bylaw should reasonably prescribe and not prohibit the activities of panhandlers in order to survive legal challenge. Bylaws that prohibit "aggressive panhandling" are more likely to survive legal challenge than bylaws that prohibit all forms of panhandling.

Lindsay Parcells

Assistance to Business

Although 'tis generally the season to be giving assistance to others, it's never the season for local governments to provide assistance to businesses. We take this opportunity to provide a primer (or a refresher) on the basics with respect to unlawful assistance.

1. The General Prohibition

Section 25(1) of the *Community Charter* prohibits a municipal council from providing a grant, benefit, advantage or other form of assistance to a business unless expressly authorized by statute. Regional districts are subject to the same prohibition by virtue of section 182 of the *Local Government Act*. Forms of prohibited assistance include, but are not limited to:

- Providing an exemption from a tax or fee;
- Disposing of land or improvements for less than market value;
- Lending money; and
- Guaranteeing repayment of borrowing or providing security for borrowing.

"Business" is defined broadly in the *Charter* to mean "carrying on a commercial or industrial activity or undertaking of any kind" and "providing professional, personal or other services for the purpose of gain or profit".[14]

2. Exceptions

There are a few specified exceptions to the prohibition on providing assistance.

a) The assistance is related to heritage or conservation purposes

Section 25(2) lists several purposes for which a council may provide assistance to a business, as follows:

- Acquiring, conserving and developing heritage property and other heritage resources;
- Gaining knowledge and increasing public awareness about the community's history and heritage; and

[13] *Supra*, note 3, at para. 295.

[14] It does not include an activity carried on by the Provincial government, by corporations owned by the Provincial government, by agencies of the Provincial government or by the South Coast British Columbia Transportation Authority or any of its subsidiaries.

Assistance to Business (continued from page 10)

- Any other activities a council considers necessary or desirable with respect to heritage property and other heritage resources.

Section 25(3) further provides that a council may, by affirmative vote of at least 2/3 of all council members, provide assistance for the conservation of protected heritage property, property subject to a heritage revitalization agreement (s. 966 *LGA*), or property subject to a s. 219 covenant relating to the conservation of heritage property.

These exceptions are also applicable to regional districts as a result of s. 183.1 of the *LGA.*

b) The assistance is provided under a partnering agreement

Section 21(1) of the *Charter* provides that if a municipality enters into a partnering agreement for the provision of a service on behalf of the municipality, the council may provide assistance, other than tax exemptions, to a business in accordance with the agreement. It may also provide assistance by way of a tax exemption in accordance with Division 7 [*Permissive Exemptions*] of Part 7 [*Municipal Revenue*].

Regional districts may also enter into partnering agreements under section 183 of the *LGA*.

There are a few points to highlight. First, an agreement can only properly be considered a partnering agreement under s. 21(1) if it is for the partner to provide a "service" – defined in the *Charter* as an "activity, work or facility undertaken or provided by or on behalf of the municipality". It does not include services provided for a municipality. This was made clear in *Conibear v. Dahling*, 2010 BCSC 985, in which the court concluded that a contract between the Village of Tahsis and a concert promoter could not be a partnering agreement because putting on a concert could not be considered "providing service on behalf of the municipality". The judge noted that "a person does something 'on behalf of' another when he or she does the thing in the interest of, or as a representative of, the other person" (at para. 34).

Second, assistance under a partnering agreement is only valid if the local government has given public notice of the agreement which is published prior to the assistance being provided and which includes the intended recipient of the assistance and the nature, term and extent of the proposed assistance.

Finally, we highlight that 'partnering agreements' are treated differently than both franchise agreements and agreements with other public authorities which are subject to specific requirements set out in ss. 22 and 23 of the *Charter*.

c) The assistance is provided to "eligible developments"

Local governments can waive or reduce development cost charges for businesses in certain circumstances without such waiver constituting unlawful assistance. Section 933.1 of the *LGA* provides that local governments can, by bylaw, waive or reduce DCCs for "eligible developments", which must fall in at least one of the following categories:

- Not-for-profit rental housing, including supportive living housing;
- For-profit affordable renting housing;

Assistance to Business (continued from page 11)

- A subdivision of small lots that is designed to result in low greenhouse gas emissions; or
- A development that is designed to result in a low environmental impact.

d) Other

There are some other miscellaneous exceptions to the prohibition on providing assistance, including the following:

- A municipal council may grant money to a corporation or other organization that has, as one of its aims, functions or purposes, the planning and implementation of a business promotion scheme: s. 215 *Charter* ;
- Regional districts may operative the service of providing capital financing for services provided by a telephone, natural gas or electric power utility: s. 797.1(3)(a); and
- Regional districts may operate the service of giving grants to an applicant for a business promotion scheme under s. 215 of the *Community Charter* in relation to a mountain resort: s. 797.1(3)(b);

3. Case law

Although the prohibition on providing assistance is worded broadly, the courts tend to take a narrow view of what constitutes unlawful assistance.

In *Nelson Citizen's Coalition v. Nelson (City)*,[15] the Court considered whether compensation arranged under a development contract constituted improper assistance. In that case, a developer and the City agreed to share certain expenses and the City agreed to transfer two parcels of land to the developer for less than market value (for $1). The judge disagreed that the arrangement constituted unlawful assistance because it did not "clearly confer a benefit" on the developer:

> With respect to the construction services and "nominal" transfers of land, the Agreement's complicated matrix of covenants, viewed as a whole, do not clearly confer a benefit on [the developer] unsupported by any concomitant obligation benefiting the City. I think "assistance" within s. 292 of *the Municipal Act*[16] implies the conferring of an obvious advantage. Where, as here, a municipality exercises its power to contract ... to effect purposes that are clearly within the realm of public policy, I do not think s. 292 is an available mechanism to obtain a review of the contract, weighing the tangible and inchoate benefits, to determine if the municipality has made a good deal or not.

This line of reasoning has been approved and followed in subsequent cases, such as *International Paper Industries Ltd. v. Greater Vancouver (Regional District)*, 2006 BCSC 72. In that case, the court held that the Greater Vancouver Sewerage and Drainage District ("GVSDD"), which was party to the agreement under attack, was not subject to a general prohibition against providing assistance to business as its enabling legislation did not contain a prohibition similar to those in the *Charter* and *LGA*. However, the court did take the opportunity to consider "assistance" generally. The court held that the provision of facilities by the GVSDD for a recycling business would not be assistance in any event because this operation was merely a single aspect of a complicated formula the GVSDD had chosen to compensate the private sector operator of district recycling services and there was no distinct benefit to the private operator from the District because benefits and obligations flowed

[15] *Nelson Citizen's Coalition v. Nelson (City)* 1997 CanLII 2032 (BCSC), (1997), 31 B.C.L.R. (3d) 134

[16] This is the predecessor section to s. 25 of the *Charter*.

Assistance to Business (continued from page 12)

both ways.

More recently, in *Misty Mountain Charters Ltd. v. Revelstoke (City)*, 2010 BCSC 1246, a bus company complained that a resolution adopted by the City was invalid because it provided assistance to the Revelstoke Mountain Resort. The bus company had an existing contract to provide bus services within the City. Increased development resulted in the need for increased services to the ski resort. Subsequently, the City passed resolutions and entered into agreements with the Resort to provide a bus shuttle service with pickups at various locations in the City and to the Resort. The City also subleased two buses to the Resort for a nominal fee. The passengers would not pay a fee and could get on or off the shuttle service at any of the stops, including getting on at locations within the City and getting off again before the shuttle reached the Resort. The bus company claimed, in part, that the resolution was invalid as it was providing assistance to the resort which was prohibited by the *Charter*. The judge did not agree, stating at para. 51:

> I have concluded that when looked at as a whole, including the agreement, which was ultimately entered into in December of 2008, that this was not assistance which offended the Act. The Resort certainly wanted a shuttle service, but after initial interest shown in operating it, concluded that they could not do so financially. This was even with the provision of the buses by the City. It was only after the City was unable to find alternative arrangements that the Resort agreed to do so and entered into the agreement of December of 2008. The agreement provided for the Resort to operate and pay for the operation of the shuttle service, with certain restrictions and obligation. This provided a benefit to the City who wished to promote the City as a tourist destination and to develop its tourist business. This benefited the City and the businesses that offer travel accommodation. This is a situation where there were mutual obligations and benefits. This is not a situation where the Resort was receiving something for nothing.

4. Conclusion

The cases interpreting 'assistance' indicate that as long as an agreement viewed as a whole involves a mutual exchange of benefits and obligations, the mere fact that a business is receiving a benefit from or profiting under an agreement will not constitute unlawful assistance.
However, we do caution that the factual circumstances in which 'assistance' has been considered by the courts are somewhat limited. We can envision and are aware of many circumstances whereby a particular agreement, grant, or exemption will constitute unlawful assistance.

We encourage local governments to consider carefully the substance of any business arrangement to ensure that it is valid under the *Charter* or *LGA* and does not run afoul of the prohibition on providing assistance.

Marisa Cruickshank

Strategic Litigation against Public Participation: SLAPP Shots

The recent decision of the British Columbia Supreme Court on *Scory v. Krannitz*, 2011 BCSC 674, is a reminder that elected and appointed local government officials must remain vigilant with respect to lawsuits initiated against Council members or staff to intentionally intimidate the local government officials and sap their financial

SLAPP Shots (continued from page 13)

and other resources in the context of local government decisions or actions that might affect the plaintiff. These suits are commonly referred to as "SLAPP" suits (strategic litigation against public participation).

In *Fraser v. Saanich* [1999] B.C.J. No. 3100 the British Columbia Supreme Court considered a case where a developer commenced a law suit against the District of Saanich and a number of individuals who had petitioned for zoning amendments. The plaintiff developer sued for negligence, breach of fiduciary duty, interference with contractual relations, conspiracy of tort, collusion and bad faith. Mr. Justice Singh in that case defined a SLAPP suit as follows:

> "*A SLAPP suit is a claim for monetary damages against individuals who have dealt with a government body on an issue of public issue or concern. It is a meritless action filed by a plaintiff whose primary goal is not to win to case but to silent or intimidate citizens who have participated in proceedings regarding public policy or public decision making."*

The action of the developer did not succeed.

In *MacMillan Bloedel v. Galiano Island Trust Committee et al*. [1995] B.C.J. No. 1763 (BCCA), multimillion dollar claims were made against individual elected local government officials in relation to a zoning bylaw that limited development opportunities for the property owner *MacMillan Bloedel*. The action did not succeed.

In the recent decision of *Scory v. Krannitz, Scory* proposed to deposit 750,000 cubic meters of soil on about 66 acres of land in Langley characterized by two fish bearing streams fed by smaller tributaries. The neighbour Krannitz was a member of the Glenn Valley Watershed Society which was incorporated to preserve and improve watersheds in Langley. Although the Township of Langley sought additional environmental impact information before considering Scory's soil permit application, this decision was not based on the opposition expressed by Krannitz and the Society. Scory sued Krannitz and others for defamation, injurious falsehood, conspiracy to injure, unlawful interference with economic relations, trespass and nuisance. He claimed $13,000,000 in damages against the Society and two respondents. The claim against Krannitz was for $5,500,000.

The B.C. Supreme Court in Scory determined that there was insufficient evidence to support any of the causes of action. The court held further that Scory had made unproven allegations and further that he had "exaggerated" the public statements made by the respondents and "fabricated" other concerns about their public statements. Subsequently, the B.C. Supreme Court determined that the lawsuit was a SLAPP suit. The judge stated:

> *"I find, therefore, that this action not only contains an unreasonable claim, is meritless and devoid of any factual foundation, but also has been used as an attempt to stifle the democratic activities of the defendants, the neighbourhood residents. I find the plaintiff's conduct reprehensible and deserving of censure by an award of special costs".*

The Court noted that the lawsuit had the effect of stifling the public utterances of the neighbourhood residents and would likely have that effect with respect to other land use applications by the land use developer. The Court ordered special costs to allow the respondents to recover their actual legal expenses. Krannitz was

SLAPP Shots (continued from page 14)

awarded more than $30,000.00. The Court ordered that the respondents receive either special costs, or double costs, whichever is greater, at each step of the lawsuit after the date the respondents had offered to settle.

In 2001, the Province of British Columbia enacted the *Protection of Public Participation Act*, S.B.C. 2001, c. 19 to give the Courts tools to dismiss SLAPP suits at an early stage, to protect SLAPP defendants from unnecessary legal costs, and to discourage SLAPP suits in the first place. The legislation was repealed on August 16, 2001 after a general election by the Province in 2001 on the basis that the existing Supreme Court rules dealing with "vexatious and frivolous lawsuits" and "insufficient evidence" and "costs" would be sufficient to deal with the problem. The Province at the time of repeal also noted that the case law already provides remedies for abusive process, summary judgment, and the striking out of pleadings.

As a result of a significant number of SLAPP suits in the United States, numerous States have enacted legislation to deal with SLAPP suits. The approaches include new rules of court, codes of procedure, and anti-SLAPP legislation. California and New York have adopted specific anti-SLAPP legislation.

In 2009, the Province of Quebec enacted legislation targeting SLAPP suits. The first major case in this context was the decision of the Quebec Superior Court that Barrick Gold's lawsuit against the authors of a book attacking Canadian mining practices in Africa was in fact a SLAPP suit. The Court found that the mining company appeared to be attempting to intimidate the book's authors in an abusive manner. The Quebec anti-SLAPP legislation states that it was enacted by the legislature to "discourage judicial proceedings designed to thwart the right of citizens to participate in public debate" and "to strike a fairer balance between financial strength of the parties to a legal action".

On April 30, 2010 the Uniform Law Conference of Canada adopted a "*Uniform Abuse of Process Act*". This has not yet been adopted by any of the Provinces, although the Province of Ontario is considering the legislation at this time.

Don Lidstone

Susan Heyes Inc. dba Hazel & Co. v. South Coast British Columbia Transportation Authority et al. (B.C.) (Civil) (By Leave) (34224)

The construction of the Canada Line rapid transit route lasted from 2005 until 2009. A "cut and cover" construction method was used, disrupting traffic and interfering with access to businesses in the area. Susan Heyes, owner of an affected business, brought an action against the City of Vancouver, Translink, the construction companies involved, and the provincial and federal governments. At trial TransLink, CLRT and InTransit BC were found liable in nuisance and Heyes was awarded $600,000 in damages for business losses. In February of 2011 the BC Court of Appeal overturned that decision and dismissed Heyes' claim. While it agreed that the defendants had committed the tort of nuisance by cutting off access to the plaintiff's business, the Court of Appeal concluded that the defendants were protected by the defence of statutory authority. Legislation authorized the building of the Canada Line and some form of nuisance would have inevitably resulted from the exercising of that authority. Financial realities could not be ignored when weighing the practicality of the different options available and the significantly lower cost

Susan Heyes Inc. (continued from page 15)

and reduced risk of the "cut and cover" method made it the only feasible option.

On October 20, 2011 the Supreme Court of Canada refused to hear Heyes' appeal. As a result, local governments undertaking construction and public works projects can confidently rely on the principles set out in the Court of Appeal decision when assessing the risk of being held liable in nuisance.

As explained by the Court of Appeal, the tort of private nuisance occurs when there is an unreasonable interference with the use and enjoyment of land. A defendant may escape liability by establishing that the act causing the nuisance was expressly or implicitly authorized by legislation and that the nuisance was the inevitable result of the authorized action. Political, scientific, and financial considerations may be relevant when determining whether an alternative option is practically feasible. Where only one method of achieving the result is feasible then the defendant must establish that it was practically impossible to avoid causing a nuisance using that method. Where there is more than one feasible method the defendant must establish that the alternative would also have resulted in unreasonable interference.

Scott Black

Information Privacy Complaint MC08-91/ MC08-92, 2011 CanLII 47522 (ON IPC)

This case dealt with unsolicited personal information received by local governments and whether that information should be used only for purposes approved of by the sender. The complainants claimed that the City of Vaughan had collected, compiled, retained and disclosed their personal information in contravention of the Ontario *Municipal Freedom of Information and Protection of Privacy Act*. The records at issue were correspondence sent by the complainants to City staff, former City employees and members of City Council. The City acknowledged that it had received correspondence from the complainants, had compiled it, and had provided it to its legal services department. The complainants argued that the City had collected the information contrary to the Act and objected to the fact that the City did not notify them or seek their consent prior to compiling the information and forwarding it on to City lawyers.

The Ontario Information and Privacy Commissioner ruled in favour of the City. The collection-related provisions of Ontario's privacy legislation did not apply to unsolicited personal information voluntarily provided to a local government. The legislation did not contain a requirement to either notify or obtain the consent of an individual prior to the use of his or her personal information - notice was only required for the collection of personal information. The personal information was correspondence passively received from the public and then compiled and forwarded to the legal department for the purposes of effective administration of the municipality and the City's actions were consistent with the legislation.

Scott Black

Green Mountain Holdings Ltd. v. Merritt (City), 2011 BCSC 1183

This case demonstrates the flexibility that courts allow municipalities with regard to latecomer agreements. Green Mountain Holdings ("Green Mountain") was building a sales office and show home for its mobile home development in the City

Green Mountain Holdings Ltd. (continued from page 16)

of Merritt (the "City"), and it wanted to connect these buildings with the City's sewer line. In consideration of the potential for future development of their property along its entire length, and the requirement of a sewage line for any such development, Green Mountain decided that it would be most economical to build one continuous sewer line along the border of its property. This created greater capacity on the line than was required to service the sales office and show home, but Green Mountain expected that it would reach an agreement with the City that future developments in the area would use the line and pay latecomer charges. No agreement was ever reached between the parties. The City connected property owners to the sewer line without the consent of Green Mountain, which Green Mountain was aware of in 2002. The City collected latecomer charges from the property owners who connected to the line and submitted them to Green Mountain, but Green Mountain refused to accept them as no agreement on charges had been reached.

Green Mountain's claim was initiated in 2005, and in 2010 the claim was amended to focus on the City's use of the portion of the sewer line that extended beyond Green Mountain's own property line. Green Mountain sought an injunction restraining the City from using, or allowing others to use, that portion of the sewer line, and for an injunction compelling the City to immediately remove the connections in the extension. This was an application by the City for summary dismissal of the action based on the six month limitation period for claims against municipalities in section 285 of the *Local Government Act* ("*LGA*").

The Court held that as Green Mountain had known of the City's use of the line in 2002, its claim for injunctive relief was made long past the six month limitation period. However, the Court still explained that the City was empowered by section 939(2) of the *LGA* to require Green Mountain to extend the line beyond its property. Further, the City was not prevented from using the extension simply because a latecomer agreement had never been reached, as the *LGA* empowers the City to collect latecomer charges from property owners for the benefit of the developer of the line.

Lisa van den Dolder

Tuchenhagen v. Mondaux, 2011 ONSC 5398

This case potentially broadens the definition of "indirect pecuniary interest" with regard to council members. This is an appeal by a former Council member in the City of Thunder Bay (the "City") from a decision of the Ontario Divisional Court finding that he had violated a section of the Ontario *Municipal Conflict of Interest Act* ("*MCIA*") and consequently disqualifying him from Council for four years. The City acquired a property due to tax arrears. The respondent, Mondoux, offered the City $1 for the property. A staff report recommended that the City accept the bid. The report was not accepted by the Council, and the property went to public tender. The appellant, Tuchenhagen, was a Council member, and was present at these meetings. Shortly thereafter, he purchased the property from the City. Mondoux argues that Tuchenhagen did not declare his pecuniary interest in sufficient time.

The sequence of events was as follows:

- On June 23, 2008, the Council met and made the decision not to accept Mondoux's $1 offer.
- On July 2, Tuchenhagen contacted the realty division of the City for a copy of the

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advertisement for the property, noting he may be interested in it.

- On July 5, the City ran an advertisement indicating the property was for sale.
- On July 14, the Special Committee of the Whole met and considered a report on the property. Tuchenhagen was not there as he was on vacation.
- On July 15, Mondoux submitted his confidential bid of $100 for the property.
- On July 21, Tuchenhagen made an appointment to view the property. He was unable to view it the same day, but made an appointment to view it on July 22.
- On the evening of July 21, the Committee of the Whole met, and Tuchenhagen was present. He did not make a disclosure of interest, even though the motion to sell the property was made and carried.
- On July 22, Tuchenhagen viewed the property.
- On July 23, Tuchenhagen submitted a bid of $5,790 for the property.
- On July 29, Council met and Tuchenhagen disclosed a pecuniary interest relative to the meetings of the Committee of the Whole of July 14 and July 21.

Tuchenhagen said that his interest in the property did not crystallize until he viewed it on July 22, and that he had disclosed his interest at the next opportunity.

The Ontario Superior Court dismissed the appeal, holding that Tuchenhagen had a pecuniary interest from the moment he saw himself as a potential buyer, and that began when he sent the email of July 2. He should have disclosed his interest at the next possible meeting – July 21 (as he was away July 14). Any Council discussion regarding the property could impact his decision about whether to buy, and he was privy to information that could assist him in making the successful bid. Moreover, his financial interest was directly in conflict with the City's.

The Court found that Tuchenhagen's non-disclosure was reckless or wilfully blind – not simply an error in judgment or inadvertent. As the four year disqualification imposed on him for violating the *MCIA* was the minimum penalty that would create an actual consequence for him (he had not run in the most recent election), the penalty was fair.

In response, Justice Wilson in dissent stated (at para. 102):

> I conclude that to paint with too broad a brush in defining an "indirect pecuniary interest" to include an expression of interest in a property exceeds any principle enunciated in the case law considering the issue to date, and opens the door to speculation, uncertainty, and potential abuse.

Lisa van den Dolder

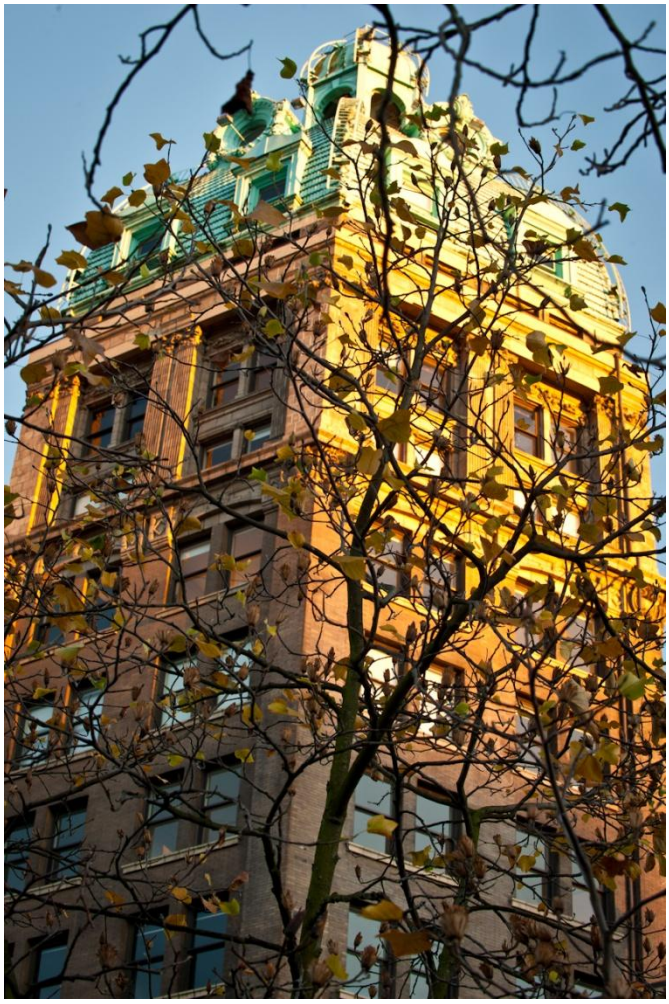
Lidstone & Company Personnel

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

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

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

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



Lidstone& Company Personnel (continued from page 19)

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

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

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

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