Lidstone & Company Law Letter

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Walking the line: waiver of solicitor client privilege

We are frequently asked to advise our clients about disclosing documents that are subject to solicitor client privilege, which raises the issue of how local governments can rely on legal advice without waiving privilege over that legal advice.

Waiver of solicitor client privilege is a complicated issue. There are times in which a local government may want to make it clear that they have received legal advice on an issue, but at the same time do not want to make that advice subject to freedom of information requests or disclosure in any future litigation.

Solicitor client privilege is defined as the right to communicate in confidence with one's legal advisor.[1] This right is a fundamental civil and legal right, founded upon the unique relationship between solicitor and client. Not all communications between a local government and its solicitor are covered by privilege, only those in which the lawyer is "providing legal advice or otherwise acting as a lawyer."[2] The privilege extends to materials "directly related to the seeking, formulating or giving of legal advice or legal assistance."[3]

The privilege belongs to the client and can only be waived "by the client or through his or her informed consent."[4] Thus, a single council or board member has no authority to waive the privilege, nor does a member of local government staff.[5] Rather, pursuant to the *Community Charter*, S.B.C. 2003, c. 26, privilege may only be waived by municipal council or regional district board

[1] *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860.

[2] *Canada v. Blood Tribe Department of Health*, 2008 SCC 44.

[3] *Susan Hosiery Ltd. v. Canada*, [1969] 2 Ex. C.R. 27.

[4] *R. v. Shirose*, [1999] 1 S.C.R. 565.

[5] *Guelph (City) v. Super Blue Box Recycling Corp.*, [2004] O.J. No. 4468, 134 A.C.W.S. (3d) 787 (Ont. S.C.J.).

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Waiver of privilege generally occurs where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege.[6] Privilege may be waived explicitly or implicitly. Two circumstances may give rise to implicit waiver: "waiver by disclosure" and "waiver by reliance."[7]

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When a privileged communication has been disclosed, the privilege that attaches to it is said to be lost ("waiver by disclosure"). Disclosure may involve disclosure of the actual communication itself (for example, a copy of a legal opinion) or disclosure of the substance of the communication (for example, describing the contents of the legal opinion). Privilege can also be implicitly waived by pleading or otherwise relying upon the privileged communication as part of a substantive position taken in legal proceedings ("waiver by reliance"). This can occur where a local government puts the contents of its legal advice in issue by justifying its conduct on the basis of the legal advice it received. Fairness dictates that the legal advice must be disclosed in these circumstances.

However, solicitor-client privilege is not waived by simply disclosing that a solicitor's advice was obtained. Rather, it is waived when the client discloses or relies upon the receipt of the advice to justify its conduct in respect to an issue. In some circumstances wrongful disclosure by an unauthorized person or mistaken disclosure may not amount to waiver of privilege, as it has been recognized that this might act as a disincentive for local governments to obtain and share within its own ranks the benefits of legal counsel.[8] That said, individual councillors; board members and local government staff must take great care to avoid referring to legal advice or opinions.

Waiver of privilege is serious, as waiver of privilege as to part of a communication will generally be held to be waiver of the entire communication.[9] It is very is difficult to limit the extent of a waiver. Waiver of legal advice extends to all incidental materials, such as notes or letters relating to that particular communication. For example, if the subject matter of a waived communication is legal advice regarding the transfer of a property, otherwise privileged documents relating to the same transfer may lose

[6] *S. & K. Processors Ltd.* (1983), 45 B.C.L.R. 218 (S.C.); *Biehl v. Strang*, 2011 BCSC 213; *Pacific Concessions v. Weir*, 2004 BCSC 1682.
[7] *Guelph (City) v. Super Blue Box Recycling Corp.*
[8] *Birch Builders Ltd. v. Esquimalt (Township)*, [1993] B.C.J. No. 1778; *Guelph (City) v. Super Blue Box Recycling Corp.*
[9] *S. & K. Processors Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

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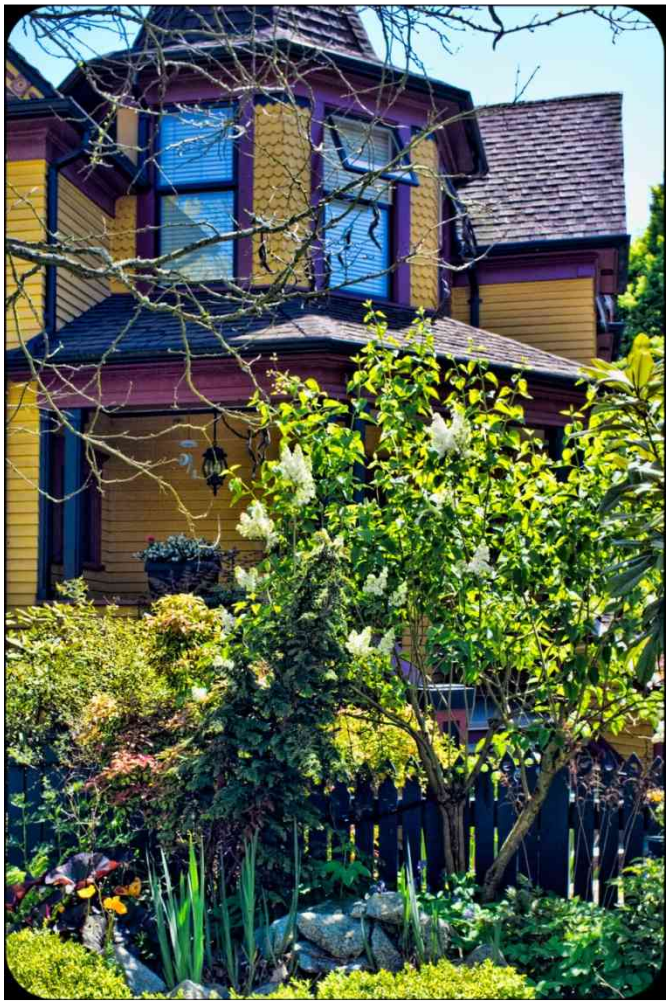
their privilege.[10] Furthermore, once privilege is waived, it cannot be restored.[11]

For these reasons, we routinely advise our clients that if they wish to release a document containing our opinion, we be instructed (by resolution) to prepare a summary legal statement, written and released expressly pursuant to instructions. This maintains privilege over the remainder of the file, limiting the waiver to only the document indicated by the council or regional board.

Absent a bylaw or resolution waiving privilege, members of a board or council and municipal staff must be careful not to refer to the contents of legal advice or a legal opinion. If elected officials or staff wish to publicly discuss a matter upon which legal advice has been obtained, and want it to be known that the local government received legal advice on the matter, the fact that the local government has obtained legal advice on the issue may be disclosed, as can be the course of action that the local government has decided to pursue. It is critical that the contents of the legal advice not be revealed, and that the local government not infer that it is relying on the contents of the legal advice to justify its conduct, but it can disclose that it has received legal advice without waiving privilege over the legal advice itself.

Also important, although it does not technically involving a waiver of privilege, is the possibility that the courts may "displace" solicitor client privilege in favour of disclosure where it is deemed necessary for public policy reasons or in the interests of justice. For example, in *McIntosh Estates Ltd. v. Surrey (City),*[12] landowners alleged that Surrey Council had acted in bad faith and wilfully breached a court order with respect to rezoning of their land. Council had considered a number of legal opinions regarding the matter, in camera. The lower court held that there was a basis for the allegations and that the legal



opinions and in camera minutes were relevant and necessary to determine the issues. The Court of Appeal upheld this decision, finding that this was a unique case in which privilege would "prevent full scrutiny of the conduct of a public body in which circumstances where it has been found to have acted with oppression and discrimination" and

[10] Gloria Geddes, "The Fragile Privilege: Establishing and Safeguarding Solicitor-Client Privilege" (1999) 47:4 *Canadian Tax Journal* 799 at 829.
[11] *London Trust & Savings Corp. v. Corbett* (1994), 24 C.P.C. (3d) 226.

[12] 1997 Canlii 3117 (BC CA); leave to appeal to the Supreme Court of Canada refused: [1997] S.C.C.A. No. 533 (S.C.C. Feb 19, 1998)

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ordered the disclosure of the privileged documents.

Sara Dubinsky & Matt Voell

The New Limitation Act

On April 26, the proposed new *Limitation Act* received third reading by the BC Legislative Assembly. When brought into force, Bill 34 will repeal the existing *Limitation Act*[13] and introduce a number of significant changes to the limitation of causes of action in British Columbia. The changes reflect many of the reforms sought by insurers and other groups, including both the UBCM and MIABC.

First and foremost, the new *Limitation Act* will subject all civil claims in BC to a two-year basic limitation period.[14] The existing Limitation Act imposes limitation periods of two, six, or ten years depending on the legal nature of the claim, which runs from the time the cause of action arose, or, in certain cases, from when it ought reasonably to have been discovered. Under the new *Limitation Act*, the two-year period will run from the time at which the claim ought reasonably to have been discovered.[15] The Act sets out special discovery rules for successors, predecessors, principles and agents;[16] minors;[17] and persons under disability.[18]

Bill 34, when brought into force, will also reduce the ultimate limitation period, or maximum time limit for filing a claim, from 30 years to 15 years.[19] The clock on the ultimate limitation period will start on the day of the act or omission that gives rise to the action.[20] The new *Limitation Act* includes the possibility of extending the ultimate limitation period in circumstances in which there is fraud or wilful concealment with respect to liability.[21]

The new *Limitation Act* has transitional provisions to address situations where the act or omission underlying the claim took place under the existing Act, but a claim is not made until after the proposed changes come into force. Where a potential claimant has not yet discovered the cause of a claim when the new Act comes into force, the ultimate limitation period will be the earlier of expiration of the 30-year claim period under the old Act or 15 years after the coming into force of the new Act, subject to any extensions as set out therein.[22]

UBCM and MIABC are both supportive of the legislation on the basis that the changes go a long way in reducing the liability risk for local governments. As an example, whereas the current *Limitation Act* gives a plaintiff six years to start a cause of action against local governments for negligent misrepresentation, the new legislation will limit that time period to two years.

We also highlight that the new *Limitation Act* will not alter the existing special limitation periods in the *Local Government Act* that further protect the interests of local governments. Specifically, section 285, which establishes a six-month limitation period for certain actions against a municipality, will remain in force. Similarly, municipalities will still retain the immunity from damages set out in s. 286(1) unless notice of the damage sustained is delivered to the municipality within 2 months from the date on which the damage was sustained. These and the other provisions set out in Division 2 of Part 7 of the

[13] Section 31.
[14] Section 6.
[15] Sections 6 and 8.
[16] Section 17.
[17] Section 18.
[18] Section 19.
[19] Section 21.
[20] Section 21(1).
[21] Sections 12 and 21(3).
[22] Section 30.

The New *Limitation Act* (continued from page 4)

Local Government Act will still remain in force to provide special protections to local governments.
Marisa Cruickshank

INCREASING USE OF AIR SPACE PARCELS (TO INFINITY AND BEYOND)

What are Air Space Parcels and how are they created?

Ownership of land includes not only the physical surface but also the space above and below the surface as necessary for the ordinary use and enjoyment of the land. That space above or below the surface may be subdivided to create an air space parcel. An air space parcel is a 3-dimentional space that exists above or below ground. It is defined in section 138 of the *Land Title Act* as "a volumetric parcel, whether or not occupied in whole or in part by a building or other structure, shown as such in an air space plan." The air space plan subdivides the air space above or below a parcel of land to create one or more air space parcels.

Air space parcels are created by the registration of the air space plan in the Land Title Office in accordance with Part 9 of the *Land Title Act.* The air space plan "shows on it one or more air space parcels consisting of or including air space"[23] and must comply with the requirements of section 144 of the *Land Title Act (B.C.).* Under section 144, the air space plan must be prepared by a B.C. Land Surveyor and it is usually prepared once a building structure has been substantially completed within the air space to be subdivided. The filing of the air space plan creates titles to one or more three-dimensionally defined air space parcels as well as a separate title for the portion of the original lands not included in the air space parcel(s) which is identified as the "remainder" parcel. Each air space parcel is an autonomous and separate legal entity that is registered in the Land Title Office and can be bought, sold, mortgaged, subdivided or subject to any number of charges or land use controls permitted for ordinary parcels of land. Air space parcels may be further subdivided in accordance with the *Strata Property Act.*

The importance of agreements for support and services for Air Space Parcels

Air space constitutes land under section 139 of the *Land Title Act* and lies in grant; however, a grant of an air space parcel does not transfer to the grantee an easement of any kind whatsoever nor does it imply a covenant restrictive of use or a covenant to convey another portion of the grantor's land. Unless expressly granted, the title to the air space above the upper limits and below the lower limits of an air space parcel remains in the grantor. Almost all developments that include an air space subdivision involve construction of a strata building on top of land or buildings owned by the owner of the remainder parcel, typically, the developer. In an air space subdivision, it is therefore essential that appropriate arrangements are made with the owner of the remainder parcel and owners of the other strata parcels to maintain the necessary physical support and related services to the air space parcel.

Agreements to maintain the necessary physical support and related services take the form of multi-party easement agreements and statutory rights of way to deal with obligations of support, access, parking, provision of utilities, insurance and other important matters. The easement agreements will provide for reciprocal easements between the owners with respect to vehicle and pedestrian access, service connections, fire safety and emergency systems, structural support, future construction, maintenance, repair and the use of other common building services, such as sewer, garbage, water and electrical services. It is also the

[23] *Land Title Act (B.C.)*, s. 138.

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norm for the owner developer to include in such agreements reciprocal or joint insurance obligations, cost sharing arrangements for common costs, and provisions to ensure compliance with such obligations in the form of indemnities and equitable charges. Without these arrangements, an owner of an air space parcel may be left with vacant airspace strata lots which have little value as the air space cannot exist without support or these arrangements for services. Local governments will usually be closely involved in this process to ensure municipal interests are adequately addressed.

Air Space Subdivision and managing autonomy and interdependence

In mixed-use developments involving air space parcels, a typical concern is how the commercial space can keep its autonomy from the residential portion of the building, while matters of mutual concern can still be addressed. The air space multi-easement agreements referred to above are one answer. Another solution for managing autonomy and interdependence is by applying the provisions of the *Strata Property Act* which provides two main methods by which developers may organize a mixed use building to provide for separation between its residential and commercial components.

The first method is by use of air space subdivision under the provisions of the *Strata Property Act.* The residential portion of the building is subdivided to create a strata corporation and strata units for the residential component of the building. The commercial portion is not similarly subdivided but becomes a neighbour of the residential portion of the building and is not subject to the residential strata corporation's bylaws, rules and resolutions. This is attractive to the owners and occupiers of the commercial portion of the building who do not want to be subject to the control and associated costs of the residential portion of the building. Multi-party easements and other agreements between the residential and commercial components of the building ensure that matters of common concern are adequately addressed.

Another method for managing autonomy and interdependence in air space developments is by subdividing the entire building under the provisions of the *Strata Property Act* and creating separate sections for the development within a single strata corporation. Under Part 11 of the *Strata Property Act,* the owner-developer may create separate sections in the strata corporation's bylaws to create separate sections for each of the commercial and residential portions of the building. After the sections are created, the strata corporation retains the powers necessary for matters of common interest to all owners. At the same time, each section has its own council, bylaws and regulations to govern matters relating exclusively to that section. This enables the residential section and commercial section to each be autonomous and self-governing with respect of matters that relate only to that section. For matters of common concern that relate to all owners in the strata corporation, the sections may have representation on the strata council.

Uses and benefits of Air Space Parcels

The provincial government and municipalities may apply to register air space plans in respect of highways under section 142 of the *Land Title Act*. Under subsection 142(1), for highways that are vested solely in the province, the minister charged with administration of the *Transportation Act (B.C.)* may register an air space plan to create air space parcels in respect of the highway. For highways in which a municipality has a statutory right of possession, under subsection 142(2), the provincial cabinet, on recommendation of the minister charged with administration of the

To infinity and beyond (continued from page 6)

Transportation Act (B.C.), may authorize the municipality that has the statutory right of possession to a highway to create air space parcels in respect of the highway. If title to all or part of a highway is vested solely in a municipality, then under subsection 142(3), the municipal council may, by bylaw, authorize an application to be made for the registration of an air space plan in respect of the highway. Air space parcels created under section 142 of the *Land Title Act* may be used for any number of purposes to create buildings and structures over and under highways.

For developers, the primary benefits of air space subdivisions are that they can be used to create two or more separate legal parcels and uses within the same building. As a result, air space parcels are most often used for projects involving mixed uses involving residential and commercial components. In this way, different parties can own the residential and commercial components of the building. Typically, the developer subdivides the air space parcel(s) designated for residential use under the provisions of the *Strata Property Act.* These residential units are then sold and a strata corporation is created to govern the internal affairs of the residential units. The owner usually retains control of the air space parcel(s) designated for commercial use and can then operate the commercial space autonomously without involving the strata corporation in its decision-making. The owner developer retains the flexibility to keep the commercial portion of a building for a period of time, or file a strata plan with respect to the commercial units, and then sell the commercial strata lots individually.

Creating mixed-use developments by air space subdivision enhances the developer's flexibility for long-term investment opportunities and use. Having separate titles for the residential and commercial portions of a development leads to a number of other practical benefits. Although they share the same complex, each parcel controls a separate portion of the structure. The separation of the residential and commercial components often makes it easier to apportion costs for those building expenses that are not shared. As well, the owners of the commercial and residential portions of the development are free to occupy, manage and maintain their parcels to the exclusion of each other.

These features and benefits of air space subdivisions can be used by developers and local governments in a wide variety of contexts including the creation or preservation of affordable housing, the achievement of smart growth objectives by increasing density and use of space and the conservation or restoration of heritage property. For example, in most municipalities, there are typically neighbourhoods with a mixture of buildings of varying ages, conditions and uses. When vacancy rates are low and housing costs are rising, market pressures encourage the maximization of land use and increasing the supply of residential housing. In these situations, it is often older structures that provide more affordable housing that are identified for demolition and redevelopment. This often results in a loss of affordable housing and the disappearance of unique buildings that provide character to neighbourhoods and communities. To avoid this, air space subdivisions can be used to preserve or restore the older buildings while enabling a developer to build a new development on top of the existing the building. Typically, a section 219 covenant is registered against title to the air space property to ensure preservation of the older portion of the building and existing uses.

Air space subdivisions may also be used in conjunction with the transfer of air rights to achieve similar objectives. The transfer of air rights is a concept that is used in many North American cities. The concept allows the owner of

To infinity and beyond (continued from page 7)

an undersized building to sell the unused space above the building to the maximum height allowed by the local government to a developer which then allows the developer to add additional space to the new building. For example, a builder developing a project may wish to increase the size of its development beyond the allowable limits imposed by the zoning bylaw. In cooperation with the local government, the developer could identify an opportunity to acquire air rights from a neighbouring building to enable the project to proceed by adding more floors and increasing density. The transaction thereby provides the owner of the older building with financial resources to maintain and restore the older building while also achieving development and densification objectives for the municipality.[24]

Air space parcels can provide many benefits if monitored carefully by municipal planning departments and properly supported by section 219 covenants, statutory rights of way and agreements that address municipal concerns.
Lindsay Parcells

Brown fields redevelopment

There are more than 30,000 brown fields sites in Canada. These include industrial and commercial lands formerly used for tanning, gasoline retailing, oil refining, warehousing, dry cleaning, or port or rail services. Some contain toxic substances above ground in tanks or other storage facilities or below ground in the form of contaminated soil or storage.

Local governments often become owners or occupiers of brown fields sites. There are a number of economic benefits to redeveloping brown fields, including creation and retention of employment opportunities, increased competitiveness for communities, and an increased tax base.

Despite potential economic benefits, there are significant legal issues in regard to redeveloping brown fields. In British Columbia, the *Environmental Management Act* and the Contaminated Sites Regulation apply to future development of brown fields with a view to remediation (and thereby elimination of risks to human health and the environment).

Environmental Management Act and Contaminated Sites Regulation

The *Environmental Management Act* of British Columbia contains Part 4 "Contaminated Site Regulation". The statute sets out a five stage process for dealing with contaminated sites. The stages are screening, investigation and decision, planning, remediation, and evaluation and monitoring. Although this article deals with local government property, these rules also apply to private owners.

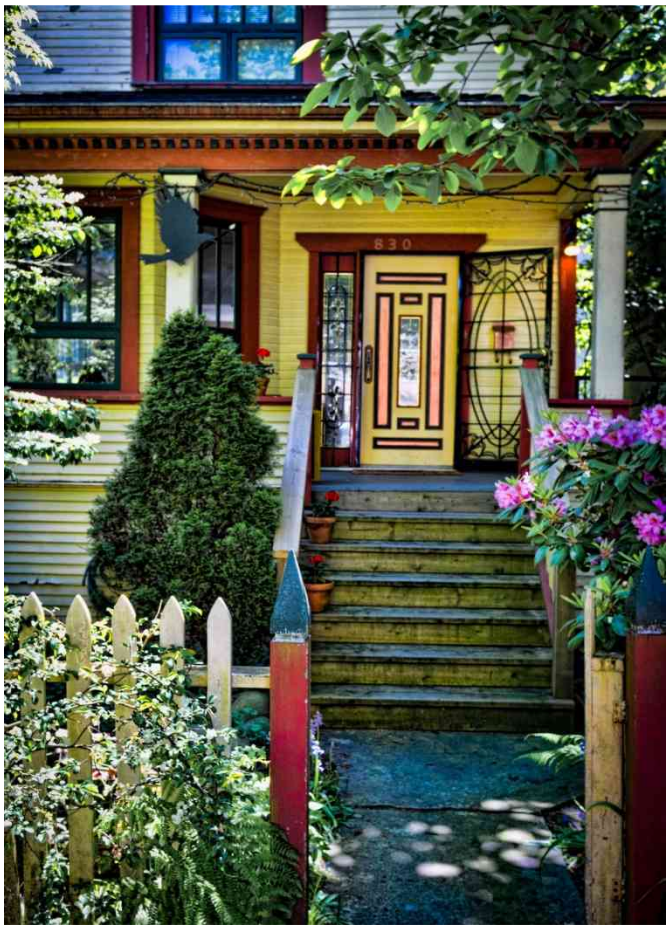
In regard to screening, many local governments have site profile schemes in place. If a site profile scheme is in place, the profile is required when the owner or occupier applies for zoning, subdivision, development, demolition or removal of prescribed soils. As well, a site profile can be ordered by the Director of Waste Management.

In regard to site investigation and the making of a determination, there are a number of approaches if the local government is the owner. These include communications with prior owners or occupiers, a search of the provincial Site Registry, initial investigations on site, a search of archival records and historical activities, and detailed on-site investigations with sampling and chemical analysis. Under the regulation, remediation is required when substances are contaminated in accordance with a scheme of numerical standards

[24] *Air Space Parcel Primer* (James Mitchell, February, 2008).

Brown fields (continued from page 8)

set out in the regulation. As well, the Director can make a determination as to whether a site is contaminated.



In regard to planning, a local government proposing to develop contaminated land may consider a number of processes to deal with responsibility. A "responsible person" may be absolutely, retroactively or jointly and severally responsible for contaminated site cleanup costs. A responsible person may be an existing or prior owner or occupier, a neighbour of a parcel from which contamination migrated, or a producer or transporter of toxic substances. There are a number of statutory exclusions, including where the subject site is polluted by an adjacent or nearby site. As well, a person may apply to the Director to be designated a "minor contributor" to liability and to cap liability for the applicant.

The investigation process may result in the need to plan for remediation. In this regard, a local government proposing to redevelop its brown field site may proceed with contaminated soil relocation, required where underground basements or parking lots will be developed, pursuant to contaminated soil relocation agreements under the Regulation; approval in principle by the Director of Waste Management after they have evaluated remediation alternatives and programs; or litigation. In regard to implementing remediation, the regulation provides that contaminated soil may be either removed if it exceeds the numerical standards and/or underground facilities such as basements and parking lots are being developed or contained and managed on site where the Regulation provides for "risk based standards"

In regard to the final stage, the local government as owner or occupier may apply for a Certificate of Compliance if the regulation's numerical or "risk based standards" have been complied with. The Director may require as well as a confirmation of remediation report. The certificate may be accompanied by conditions, including registration of a covenant under section 219 of the *Land Title Act* or a notation on the Site Registry.

"Responsible Person"

To the extent a person has caused contamination, the person is identified under the British Columbia scheme as a "responsible person". Responsible persons include existing owners, former owners, owners of a parcel from which pollution derives, producers or transporters of contaminated substances, and others.

There are a number of exclusions from these general rules, including circumstances where the parcel of land has been polluted by a previous owner if the new owner acquired the property "innocently", migration of contamination from another parcel, a third party with no relationship to the owner, a natural occurrence, or an "act of God". A local government is also exempt if it is

Brown fields (continued from page 9)

merely holding the benefit of a covenant under section 219 of the *Land Title Act*, statutory right-of-way, easement, judgment, lien, crown grant reservation, or subsurface right interest in real property.

Under the *Environmental Management Act*, subject to due diligence or the exclusions from responsibility for remediation of a site, a responsible person is liable in three ways to any other person for costs of remediation: absolute liability, where there is no due diligence defence; retroactive liability, where a person is liable for cleanup of past contamination; or joint and several (separate) liability, where each responsible person is liable to pay all or part of the cost of cleanup.

Site Profile

The *Act* provides for a "site profile" regime for identifying and registering "contaminated sites". The regulation spells out more details with respect to administration of site profiles. The scheme applies to industrial or commercial lands, not lands that have always been used for residential purposes. As stated, most municipalities require site profiles. If a site profile regime is in place, the profile is required in relation to an application for zoning, subdivision, development, development variance, soil removal, prescribed soil removal, or demolition. As well, a site profile is required if a site is being decommissioned, a person is a trustee, receiver or liquidator, the owner is proposing to transfer a parcel that has been subject to an activity listed under schedule 2 of the Regulation, or there has been an application for a "Certificate of Restoration" under the Provincial *Petroleum and Natural Gas Act.* There are a number of exceptions set out in the Regulation.

If a site profile submitted to a local government has a "yes" response in sections IV to IX, the local government will forward the site profile to the Director whereas if they are all "no" responses, the profile will be entered into the Site Registry in Victoria. The Director has fifteen days to decide whether a site investigation is required. If it is required, the development application is frozen until the applicant sets up a voluntary remediation agreement, an approval in principle, a Certificate of Compliance, or a determination that the site is not contaminated, or if the municipality or regional district obtains a "release" notice from the Director.

The Site Registry (on BC Online) holds documentation on properties that have been investigated (and remediated) since 1988. The registry includes properties that were investigated and/or contaminated and/or cleaned up. The less formal on-line registry provides general information but more detailed information is only available on hard copies from the Ministry of Environment.

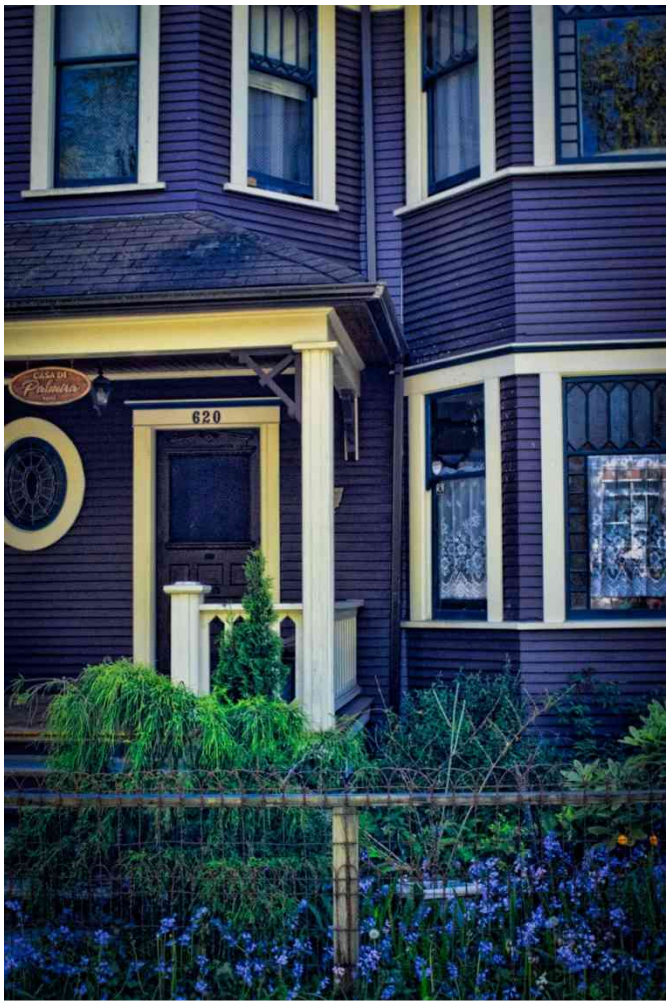
The Site Registry provides information in relation to the location of a site, the remediation status, and the current site profile; information on legal proceedings and administrative processes such as site investigations and remediation reports; information on persons related to a site; information on the existence of reports related to a site; and information on the land use related to a site

Liability for Contamination

Under section 45(1)(a) of the *Environmental Management Act*, the current owner or operator of a site is responsible for remediation, unless they fall under a section 46 exemption (such as a tax sale acquisition by a municipality). An owner includes a person who is in possession, has the right of control, or occupies or controls the use of the property, including a person who has an estate or interest (legal or equitable) in the property, but

Brown fields (continued from page 10)

does not include a secured creditor unless the secured creditor has exercised control over or imposed requirements in relation to treatment, disposal or handling of a substance resulting in contamination or if they become the registered owner in fee simple of the real property. An operator is a person who is or was in control of or responsible for any operation located at a contaminated site, except for the secured creditor as described in relation to the definition of "owner". A previous owner or operator of the site is also responsible for remediation of a contaminated site.



Parties to litigation are often moved to settle because of the joint and several liability provisions under s. 4 of the *Negligence Act*, the joint and separate liability provisions of the *Environmental Management Act*, and the case law respecting joint and several liability. As a result of joint and several liability, despite court determinations of the *pro rata* liability of each party, if a party is insolvent or uninsured, one or more of the other parties may end up paying a greater share of the court award.

Part 2 of this review of the law affecting local governments involved in brown fields redevelopment (in our next newsletter) will address ways to manage risk and liability.
Don Lidstone

Health Care Costs Recovery Act

In 2009, the Provincial Government of British Columbia (the "Province") enacted the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 (the "Act"), which grants the Province the legislative means to recover health care expenditures related to the care of injured persons. In his introduction of the Act, former Health Minister George Abbot stated that the Act would strengthen government's ability to more effectively hold third parties accountable and ensure that those who commit wrongdoing, and not the taxpayers, pay for the past and future health-care costs for impacted individuals.[25]

By way of overview, the Act provides that when a party is liable for damages suffered on account of personal injuries by way of negligence or other wrongdoing, the party is obliged to reimburse the Province for health care costs. An injured person is granted the right to recover those costs on behalf of the government.[26] The Act also grants the Province the ability to insert itself into the claims process, as well as ensure that any matter which

[25] News Release: BC Introduces Health Care Costs Recovery Act, April 9, 2008, online: http://www2.news.gov.bc.ca/news_releases_2005-2009/2008HEALTH0036-000498.htm.
[26] Section 2.

Health Care Costs Recovery Act **(continued from page 11)**

gives rise to health care costs does not settle unless the Province is satisfied with the settlement, or otherwise has had an opportunity to decide whether it wishes to pursue recovery of the health care costs from the negligent party itself.

Since the enactment of the Act in 2009, the Province has started pursuing municipalities and municipal police departments for health care costs related to incidents occurring within their jurisdiction. Local governments, by their nature, are most often secondary defendants in litigated cases. This led the UBCM, at its 2011 AGM, to request the Province to withdraw all current claims under the Act against municipal governments, as well as provide a commitment to review their practice of pursuing claims against local governments except in cases of gross negligence.[27] In response, the Ministry of Health has recently stated that municipalities, if negligent, are not different than any other group or individual and should therefore be treated the same.[28] To that end, the Province's position is that it would be unfair to hold all taxpayers responsible for paying health care costs for a specific municipality that has been negligent. In light of these comments, the Ministry of Health stated the following in February 2012:

The Ministry of Health is not considering changes to the *Act* or policy on how the *Act* is applied at this time. Municipalities will be expected to settle health care claims with the Ministry, as would any other group of individual.[29]

[27] UBCM, Resolutions and Responses, online: http://www.ubcm.ca/EN/main/resolutions/resolutions-responses.html.
[28] Ministry of Community, Sport and Cultural Development, *PROVINCIAL RESPONSE to the Resolutions of the 2011 Union of British Columbia Municipalities Convention*, February 2012, at p. 180.
[29] *Ibid*.

The Act

An injured party who commences an action against a negligent party (referred to in the Act as a "beneficiary") must include, in their notice of civil claim, a claim for the cost of past and future health care services.[30] A beneficiary is obligated to notify the Province within 21 days of the filing of such a notice of civil claim.[31] The Act excepts a number of claims from the health care costs recovery scheme, including claims covered by the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 (s. 24(3)(c)); costs related to health care services arising out of a wrongdoer's use and operation of a motor vehicle, if the wrongdoer was covered by the Plan, as defined in the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 31 (s. 24(3)(a)); and claims covered by the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 (s. 24(3)(b)). The Act applies regardless of whether or not a lawsuit was actually filed by the beneficiary. Notably however, the Act does not apply to Small Claims Court cases.

The Third Party Liability Department (part of the Accounting Operations Branch in the Ministry of Health) is responsible for the recovery of health care costs for the Province. The Province may intervene in any proceeding covered by the Act, or may assume conduct of the claim if it so chooses. Consent of the minister must be obtained and filed with the court prior to any discontinuance or dismissal by consent between the parties.[32] The Act also provides the Province with a subrogated

[30] Section 3(1). Health care services is defined to include benefits under the *Hospital Insurance Act, Medicare Protection Act, Continuing Care Act, Emergency and Health Services Act,* and costs prescribed by regulation (section 1 "health care services"). The *Health Care Costs Recovery Regulation*, BC Regulation 397/2008 also prescribes a number of services provided by the Ministry of Children and Family Development or the Community Living Authority; the regional health authorities; and Pharmacare, for recovery under the Act.
[31] Section 4.
[32] Sections 5 and 6.

Health Care Costs Recovery Act **(Continued from page 12)**

right and an independent right to recover the cost of health care services.[33]

Implications for local governments

If the defendant is insured, section 10 of the Act requires that an insurer must notify the minister within 60 days of an act or omission of an insured person that has or may have caused or contributed to the personal injury of death of a beneficiary. A claim for damages arising from or related to personal injury or death must not be settled unless the person liable for any payments under a proposed settlement provides notice to the minister, and the minister consents in writing to the proposed settlement.[34] To that end, the minister may request that the payor provide the minister with any records or information that the minister considers necessary to evaluate the proposed settlement. In the event that it is determined that the injury of a beneficiary was caused by the negligence of two or more parties, those parties are jointly and severally liable for past and future health care costs.

The provision of any information or records to the minister under sections 10 through 13 does not constitute a waiver of any privilege that may exist in them, and the information and records may only be used by the Province for the purposes of the recovery of past and future health care service costs under the Act.

An award granted by a court must designate the amount of the judgement that is applicable to the health care services claim.[35] The Act renders this amount a debt due to the government by the person obliged to pay the judgement or settlement amount. If the award is paid to the beneficiary, that amount is held in trust for the government and must be submitted within 30 days. All of the prescribed notices, including those required by sections 10 and 13, must be in writing and be served on the Attorney General at the Ministry of the Attorney General, Victoria, BC. Forms for prescribed notices are available on the Third Party Liability website.[36]

In a recent paper presented at the 2012 Local Government conference at the Pacific Business and Law Institute, Tom Barnes and Lindsay Nilsson of the Municipal Insurance Association of BC state that in the three years since the Act was enacted, the practical impact of the changes has not been too onerous. They state that the additional step incorporated into the claims resolution process has resulted in occasional modest delays and that for a number of reasons, the imposition of liability for health care costs has not resulted in a significant increase in amounts owed by local governments.[37]

Conclusions

In light of the above, we recommend that:

- When forming contractual relationships with third parties, local governments insist upon a provision that indemnifies the government from third party liability with respect to health care costs recoverable under the Act; and
- Local governments contemplate the manner in which they will produce information and documents to the Minister, so as to facilitate the timely resolution of health care cost claims.

Matt Voell

[33] Sections 7 and 8.
[34] Section 13.
[35] Section 20(1).

[36] Third Party Liability, Ministry of Health, online: http://www.health.gov.bc.ca/thirdpartyliability/
[37] Tom W. Barnes & Lindsay E.W. Nilsson, "Municipal Insurance, Liability and Risk Management" *Pacific Business & Law Institute Conference*, Vancouver BC, Local Government 2012.

Neskonlith Indian Band v. Salmon Arm (City), 2012 BCSC 499

This recent BC Supreme Court case made an important ruling for local governments: local governments do not have a constitutional duty to consult with First Nations regarding matters that could potentially negatively affect Aboriginal rights and title. The case involved a petition by Neskonlith Indian Band to quash the issuance of an environmentally hazardous area development permit for the development of a shopping centre in a floodplain. (Note that this "environmentally hazardous area" designation means that there is a risk of the environment harming the development – not that there is a risk of the development harming the environment.) The Neskonlith are concerned that the development property will flood, and that the flooding with necessitate flood-control measures, which will do damage to the environment and the interests of the Band. The Neskonlith Reserve borders on and is downstream from the development property.

The Neskonlith stated that it was not consulted with respect to the potential negative impacts of the approval of the permit on its asserted Aboriginal rights and title. They led expert evidence suggesting that if the development were to go ahead as set out in the development permit, there was a substantial risk that the land would flood. The Neskonlith argued that the constitutional principle of the honour of the Crown necessitates that the federal and provincial Crown consult with Aboriginal peoples when making decisions that could potentially affect asserted Aboriginal rights and title, and that the City, as the delegate decision maker, had the responsibility to fulfil the duty to consult in accordance with section 35 of the *Constitution Act, 1982*.

The Court disagreed with the arguments of the Neskonlith, and found that as the honour of the Crown was 'non-delegable', final responsibility rests with the Crown at all times, and not local governments. The Court noted that while procedural aspects of the duty to consult can be delegated to third parties, such delegation must be done expressly or impliedly by statute. Further, in the event that a duty to consult is delegated, ultimate relief lies against the Crown, and not the delegate. For these reasons, the Court rejected the argument that the duty to consult vests automatically with whoever is empowered to make decisions affecting Aboriginal rights (local governments, in this case), and dismissed the petition to quash the permit. An application to appeal this judgment has been made.

Lisa van den Dolder

Canada (Attorney General) v. Bedford, 2012 ONCA 186

In March of this year, the Court of Appeal for Ontario released this landmark ruling related to prostitution, which will likely have implications for local governments across the country. The Court addressed the constitutionality of three provisions of the *Criminal Code*, RSC 1985, c. C-46, and held that the sections prohibiting the operation of bawdy-houses and prohibiting living on the avails of prostitution were unconstitutional. However, the section banning communicating in public for the purpose of prostitution was held to be valid.

The three *Criminal Code* provisions at issue were:

1. Section 210, which prohibits the operation of common bawdy-houses. This prevents prostitutes from offering their services out of fixed indoor locations such as brothels, or even their own homes;

Canada v. Bedford **(continued from page 14)**

2. Section 212(1)(j), which prohibits living on the avails of prostitution. This prevents anyone, including but not limited to pimps, from profiting from another's prostitution; and

3. Section 213(1)(c), which prohibits communicating for the purpose of prostitution in public. This prevents prostitutes from offering their services in public, and particularly on the streets.

The Court held that the bawdy-house provision breached section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), "the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The prohibition on bawdy-houses for the purpose of prostitution was found to infringe the safety of sex trade workers, as the ability to work out of fixed, controlled premises would improve their safety. The section was found to be too broad, and disproportionate to its legislative objective, as it prevented a single sex trade worker from operating in her own premises. The provision was struck down, though the declaration of invalidity was suspended for 12 months to allow Parliament an opportunity to re-draft a *Charter*-compliant section. The Court noted that it should not be taken as holding that any bawdy-house prohibition would be unconstitutional.

With regard to the section on living on the avails of prostitution, the Court noted that it was the only section of the three specifically directed at the protection of sex trade workers (aimed at pimps). However, the Court also found that this section violated section 7 of the *Charter* in so far as it criminalized non-exploitative commercial relationships between sex trade workers and others, as such relationships could improve the sex trade workers' safety. The Court did not strike down the section, but read into it words of limitation so that the prohibition applies only to persons who live on the avails of prostitution in circumstances of exploitation. The amended section is now in effect.

The section prohibiting communicating for the purposes of prostitution was found not to violate the principles of fundamental justice, and it remains in full force.

If this decision comes into effect, local governments will have to address zoning, licensing, and regulatory issues with regard to bawdy-houses. However, as previously noted, the declaration striking down the prohibition of bawdy-houses was suspended for 12 months. It is likely that the Supreme Court of Canada will consider this matter on appeal.

Lisa van den Dolder

Lennox v. New Westminster (City), 2012 BCSC 410

This summary trial addressed whether the City of New Westminster was negligent in not repairing a sidewalk before Lennox tripped and fell on it, suffering injuries. The case is particularly interesting to local governments because it includes an assessment of liability when the local government has voluntarily instituted a policy that goes "above and beyond" the standard of care that is required.

The City's written Sidewalk Policy details standards for sidewalk inspection and repair, under which the section of sidewalk that Lennox tripped on was to be inspected every three years. Defects or hazards in the sidewalk are classified either as Level 1 faults or Level 2 faults. Level 1 faults are documented upon discovery, reviewed

***Lennox v. New Westminster* (continued from page 15)**

on the next scheduled inspection and placed on the list for repair as resources allow. Level 2 faults are immediately marked for public notice and scheduled for repair upon discovery.

The fault that Lennox tripped over was a Level 1 fault, and had been classified as such on February 3, 2005. Therefore, no immediate repairs were required to be performed under the Sidewalk Policy, and no repairs had been done when Lennox fell on May 30, 2006.

However, the City also has an unwritten policy on sidewalk repair, under which all sidewalk faults that the City receives a complaint about, regardless of Level, are re-inspected and repaired. This is done in the interest of customer service to taxpayers, to promote the reporting of faults, and to ensure that the particular fault complained of does not result in future problems. The plaintiff argued that the City was negligent in its operational implementation of the unwritten sidewalk policy.

The Court stated that the City owed Lennox a duty of care to maintain its sidewalks reasonably. It determined that although the City had received some complaints about faults in the sidewalk on the block that Lennox fell prior to the accident, the City did not receive a specific complaint about the fault on which Lennox tripped. Therefore, the unwritten policy was not engaged, and the City did not act unreasonably in failing to repair the fault. The Court noted that noncompliance with an inspection policy will not necessarily lead to a negligence finding. Further, as a matter of public policy, the law should encourage local governments to go beyond what is merely reasonable in the circumstances, and "when a municipality takes upon itself a level of service that exceeds what would be reasonable in the circumstances, courts should be exceedingly slow to characterize the failure to discharge that enhanced level of service as negligence" (para. 70).

Lisa van den Dolder

Schlenker v. Torgrimson, 2012 BCSC 41

This case addressed conflict of interest rules for local governments. The petitioners in this case sought to disqualify two of three trustees (the "Trustees") of the Salt Spring Island Local Trust Committee ("LTC") for failing to disclose a direct or indirect pecuniary conflict of interest. The Trustees, on behalf of the LTC, had voted to dedicate funds to two non-profit societies of which the Trustees were also directors. The funds were granted for the purpose of undertaking various projects relating to water and climate concerns.

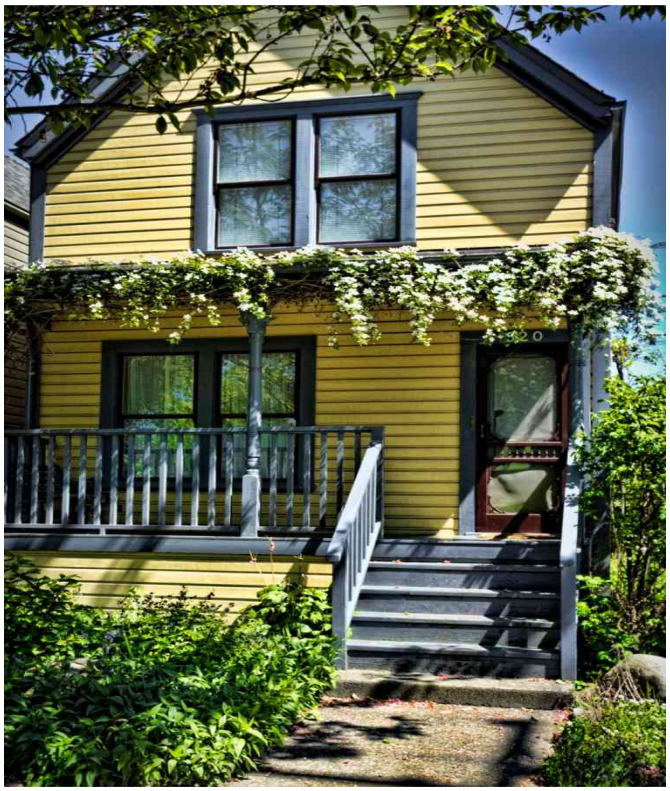
The Court held that the Trustees did not have any direct pecuniary interest in the dedication of the funds, and that mere membership in the societies was insufficient to demonstrate that the Trustees had an indirect pecuniary interest. The Court rejected the argument that membership in the societies, which themselves had a direct pecuniary interest, was sufficient to demonstrate an indirect pecuniary interest, and in so finding, drew a distinction between the law of conflict of interest in British Columbia and Ontario. The Court explicitly rejected Ontario's broad definition of "indirect pecuniary interest" (see *Mondoux v. Tuchenhagen*, 2010 ONSC 6536), which Ontario courts have interpreted to include those situations where an individual is a member of a body that in turn has a pecuniary interest in the matter. Instead, the Court affirmed the findings of the BC Court of Appeal in *Fairbrass v. Hansma*, 2010 BCCA 319, wherein the Court held that in the absence of sufficient evidence to establish a personal pecuniary interest, a court cannot draw an inference that membership in a society with a

***Schlenker v. Torgrimson* (continued from page 16)**

direct pecuniary interest is grounds to establish an indirect one.

Thus, the Court held that "disqualification [from office] on the grounds of indirect pecuniary interest requires evidence sufficient that there can be a readily recognizable pecuniary incentive to vote other than for planning reasons" (para. 43, internal citations and quotations omitted), and dismissed the petition.

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.

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.

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

Lidstone & Company Personnel (continued from page 17)

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.

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.

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.

Matt Voell obtained his law degree at the University of British Columbia. After completing law school Matthew worked as an Ethics and Research Fellow in the areas of health and intellectual property policy, and completed the first half of his articles at a public law litigation boutique in Victoria, BC. Prior to commencing articling Matthew partially completed a Master of Laws graduate degree, and in his spare time continues to work on his graduate thesis. Matthew has also volunteered with the Access Pro Bono Society of British Columbia and the UBC Law Student Legal Advice Clinic.

Guy Patterson enrolled in law school at the University of British Columbia in 2010, after working for nearly a decade as a land use and community planner with local government and non-profit organizations in British Columbia and overseas. His most recent position was Housing Planner at the Resort Municipality of Whistler. He holds an undergraduate degree in Geography (McGill University) and an M.A. in Community and Regional Planning (UBC). He was a member of UBC's winning team in the Gale Cup moot competition in February 2012.