LIDSTONE & COMPANY

Law Letter

In this issue

Magder v. Ford

In the recently released and much talked-about decision in *Magder v. Ford,* 2012 ONSC 5615, Justice Hackland of the Ontario Superior Court of Justice held that the Mayor of Toronto, Rob Ford, breached Ontario's conflict of interest legislation by speaking to and voting on a matter in which he had a pecuniary interest. Justice Hackland declared Mayor Ford's seat vacant, although he suspended the effect of the judgment for 14 days. Within that time frame, Mayor Ford obtained a stay of the decision pending the outcome of the appeal to the Divisional Court.

The facts giving rise to the case are that in August of 2010 the City's Integrity Commissioner prepared a report and concluded that (then) Councillor Ford had breached the City's code of conduct by using the City log, his position, and City resources to obtain donations for a private football charity. The report recommended that Mr. Ford personally reimburse $3150 in donations. This recommendation was adopted by City Council. Nonetheless, and despite five follow up letters sent by the Integrity Commissioner, Mr. Ford never repaid the $3150 as required.

Accordingly, the Integrity Commissioner brought the matter back before Council. In February 2012 Council considered a resolution to require (by this time) Mayor Ford to provide proof of the reimbursement by a particular date. Mayor Ford spoke to this motion. A second motion was then tabled, to rescind the 2010 resolution requiring the $3150 reimbursement. **Mayor Ford voted on this resolution.** The resolution passed, such that Mayor Ford was no longer required to personally reimburse the $3150. This vote was the subject of the legal challenge.

In an attempt to avoid a ruling that his seat be declared vacant, amongst other arguments that are particular to the statutory regime in Ontario, Mayor Ford took the positions that the amount involved was small enough that it could not be regarded as having influenced his actions, and that

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his breach was committed through inadvertence or an error in judgment.

Like the *Community Charter*, the Ontario legislation provides exceptions to the conflict of interest provisions where the pecuniary interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the official. However, Justice Hackland did not accept that the amount was insignificant, as in speaking to the motion regarding proof of reimbursement, Mayor Ford had expressly objected to having to personally repay those funds. Thus, the repayment of the $3150 was of significance to Mayor Ford.

Likewise, Justice Hackland did not accept Mayor Ford's contention that he had inadvertently violated the conflict of interest rules. Rather, he found that Mayor Ford had deliberately spoken to and voted on this issue. He had received the agenda the week before the meeting, considered the matter, planned his submissions and came to the meeting intending to speak. As his testimony indicated that he understood that the resolution had a personal financial impact, and he didn't regret speaking or voting on the matter, it could not be said to have been inadvertent.

Regarding the error in judgment exception, Justice Hackland held that in order to qualify the official must have acted honestly and in good faith. A reasonable explanation for the conduct and an effort to have understand and complied with the requirements are significant in this respect. In this case Mayor Ford had not sought legal or other advice, in his 12 years in office he had never read the conflict of interest provisions, and he was specifically warned that he was in a conflict prior to voting on this same issue in 2010. Justice Hackland found that Mayor Ford had given little or no consideration to whether it was permissible to speak and vote on the reimbursement matter, but persisted in doing so out of a sense of entitlement, ignorance of the law, a lack of diligence, and wilful blindness. Thus he did not qualify for the good faith error in judgement exception.
This case serves as a timely reminder of the importance of adhering to the rules against participating in meetings or voting on matters in respect of which an official has a conflict of interest. ***Sara Dubinsky***

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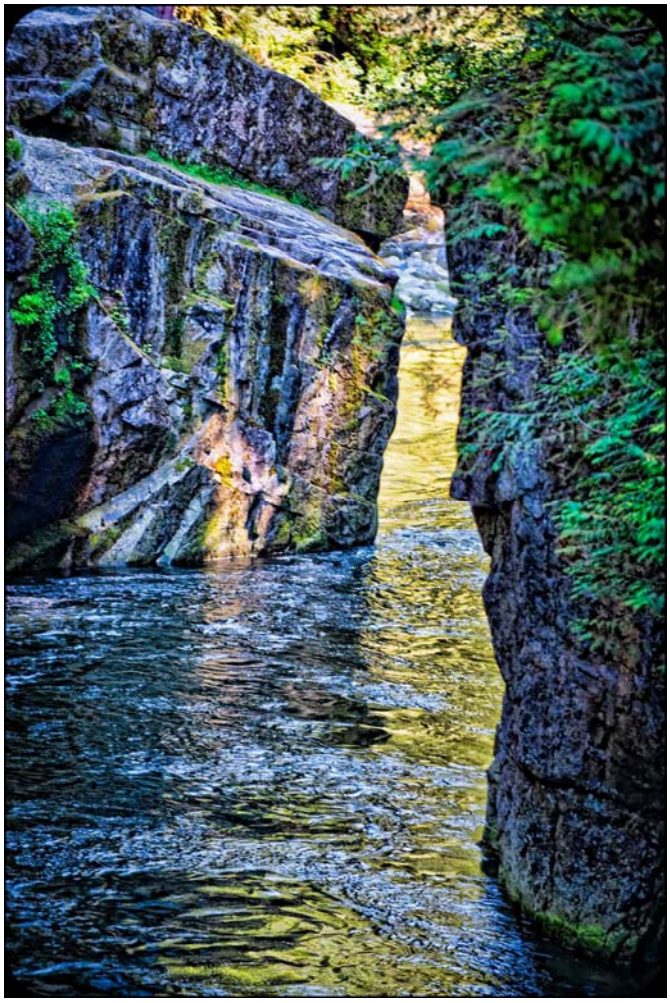
First Nation Consultation

This year was an important one at the B.C. Court of Appeal for municipalities seeking to better understand their legal relationships with First Nations in British Columbia.

First, in *Adams Lake Indian Band v. B.C.*, 2012 BCCA 333 issued in August, the Court of Appeal held that where the incorporation of a municipality merely substitutes "one form of local government for another", creating no new or greater opportunities to infringe aboriginal rights, the Crown's duty to consult and accommodate the affected First Nation with respect to the incorporation is discharged by relatively minimal measures. However, the Court also held that the Crown maintains an on-going obligation to consult with the First Nation regarding land use issues under the new municipality's Master Development Agreement.

Then, in *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379 issued in September, the Court of Appeal held that as "creatures of statute" municipalities do not, as a matter of law, have the authority to consult with First Nations in making decisions that would otherwise trigger the duty by potentially affecting asserted aboriginal rights. In that case the City had before it an application for an Environmentally Hazardous Area Development Permit for land adjacent to the First Nation's reserve. The Court held that the municipality was akin to the "third party" in *Haida Nation v. B.C.* 2004 SCC 73 seeking permission from the Crown for resource exploitation, and was not under the Crown's duty. (Although under the *Haida* scenario relief was allowed against the Crown if not against the third party, whereas under this analogy relief is available to affected First Nations neither against the government body permitting land use, nor against the third party seeking the permit). While municipalities are subject to the *Charter of Rights and Freedoms*, they are not subject to the Crown's duty to consult pursuant to s. 35 of the *Constitution Act*, 1982. Despite the recent trend in the case law to interpret municipal powers generously, the Court cited "Dillon's Rule"—the traditional narrow construction of municipal powers—in support of its Judgment.



Finally the most recent decision of the Court of Appeal dealing with contested resource use involving a local government and First Nation is *Halalt First Nation v. British Columbia,* 2012 BCCA 472, released in late November. The appeals in that case were from orders made on judicial review from Crown permits (Environmental Assessment Certificate) allowing the District of North Cowichan to pump water from the aquifer of the Chemainus River to provide water to the Town of Chemainus. The pumps were to be installed on fee simple land held by the District, but the River itself runs through the reserve of the

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Halalt First Nation. The original project proposal contemplated year round pumping. But evidence from the environmental assessment process revealed in that pumping during the summer months was likely to cause adverse effects upon the River. The scope of the project for environmental assessment purposes was accordingly reduced to pumping during winter months. However, the judicial review judge held that "the environmental assessment ought to have encompassed all aspects of the Project for which its infrastructure was designed and is intended." She found that the District intends in the near future to extract groundwater on a regular basis during summer low flow periods and held accordingly that year round extraction should have been the subject of the environmental assessment and of the Crown consultation with the Halalt. She held that removal of the summer pumping from the environmental assessment process "amount[s] to avoidance of Halalt's concerns, not their accommodation. They certainly did not result from consultation." The Court of Appeal however overturned this finding, holding that the assessment and consultation were properly restricted to the modified (winter pumping) project, and that if the District were to attempt to expand the project (to summer pumping), the Crown's duty to consult would be engaged at that time. The Court of Appeal held that the consultation with respect to the modified project had been adequate and that the scaling back of the project submitted for environmental assessment was an accommodation of the Halalt's concerns.

Overall, local governments now know that they are not themselves responsible to meet the Crown's duty to consult with First Nations (*Neskonlith*). Local governments also now know that where they acquire new jurisdiction over lands, the Crown's duty to consult will be minimal if no new powers are being delegated from the Crown to the local government level (*Adams Lake*). However, where new jurisdiction and powers are being transferred from the Crown to the local government level, the Crown's duty to consult may be engaged—this is especially so since it has now been established that once decision making over land use passes from the provincial to the local government level, First Nations do not have an enforceable right to be consulted. The Supreme Court of Canada held in *Rio Tinto Alcan v. Carrier Sekani Tribal Council* 2010 SCC 43 that structural changes to the management of a resource including the transfer of power over a resource from the Crown to a third party (read 'local government': *Neskonlith*) "may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact" (para. 47).

Local governments also know that any decision they seek to make that is contingent upon Crown action or approval may trigger the Crown's duty to consult. Even though the duty does not fall to local governments, important aspirations of local government are beholden to the duty. This can lead to significant delays in the implementation of local government plans (the District of Cowichan's application for approval of its water pumps was made over *nine years* before the Court of Appeal's determination of the matter). In many cases the aspirations of both local governments and First Nations are better served by early engagement and negotiated ongoing cooperation at the local government/First Nation level. ***Maegen Giltow***

Public Private Partnerships - Promise and Precaution

Introduction

Public Private Partnerships ("P3s") are becoming more popular as cash-strapped local governments look for creative ways to build or upgrade public infrastructure and deliver services to taxpayers. It has been estimated that Canada's infrastructure deficit could be as high as $125 billion. P3s provide an alternative way for governments to help address this infrastructure deficit without increasing the burden on taxpayers.[1] In British Columbia, it is estimated that P3s will help meet up to 25 percent of the province's capital infrastructure expenditures.[2]

Characteristics of P3s

A public private partnership ("P3") is a business arrangement between a public sector entity and a private business entity to deliver infrastructure or services to the public that would otherwise be provided by the government. The Canadian Council for Public-Private Partnerships has offered a widely-accepted definition of P3s:

> "Public-private partnerships span a spectrum of models that progressively engage the expertise or capital of the private sector. At one end, there is straight contracting out as an alternative to traditionally delivered public services. At the other end, there are arrangements that are publicly administered, but within a framework that allows for private finance, design, building, operation and possibly temporary ownership of an asset."[3]

P3 have a number of characteristics that set them apart from conventional public projects. Unlike conventional projects where separate procurements are often arranged for each contract phase, private sector partners in P3s often complete two or more phases of a project. As well, P3 contracts typically focus on results rather than inputs in which private partners are not compensated until the project is completed and performing according to agreed-upon parameters. Furthermore, unlike conventional projects, P3s are often financed privately and with the private sector partner assuming responsibility for delivery of the infrastructure or services.

A local government may consider a P3 when it has a need that requires resources or expertise beyond its level of capacity. Local governments may also consider P3s when they perceive that a project may be delivered more efficiently and effectively in comparison to conventional procurement. In addition, P3s may be considered on the basis of a policy decision by the municipal council.

Advantages of P3s

Proponents of P3s point to a number of benefits provided by this form of procurement model including the following:

> Timely delivery and efficient use of capital: P3 contracts often provide that the private partner is not compensated until the project is completed with penalty provisions for late delivery. This encourages completion of the project on time. As well, governments avoid up-front capital costs and pay for infrastructure only when it is ready to be used.
>
> Risk transfer: For conventional projects, governments are typically responsible for cost increases arising from scheduling delays and overruns for materials and labour. Governments are also typically responsible for costs related to repair, maintenance and

[1] www.partnershipsbc.ca/pdf/2011-09-02.
[2] Supra.
[3] Public-Private Partnerships (P3s) and Municipalities: Beyond Principles, a Brief Overview of Practices, Pierre J. Hamel, pp. 18-19.

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operations. In contrast, P3s frequently pass these costs along to the private partner in which the private partner will commit to design, build or maintain a facility for a fixed time period and be responsible for the costs associated with its commitment.

Innovation: Private partners in P3s that are financially responsible for timely delivery and cost overruns for projects have an increased incentive to innovate at every stage of a project. That innovation results in financial savings and enhanced delivery of projects and services.

Investment and job creation: Proponents contend that projects using P3s often attract outside financial investment into the economy which frees up capital raised from local sources for other priorities. In addition, proponents contend that P3s create employment opportunities and result in enhanced delivery of infrastructure and services which in turn sets the stage for increased economic growth.[4]

These arguments have been borne out by recent research. According to some recent studies of P3 projects, P3s can deliver efficiency gains ranging from 0.8 per cent to 61.2 per cent of the cost of a conventionally procured project.[5] In addition, P3s for construction projects have been found to deliver a high level of cost and time certainty.[6] These studies have found that the efficiency gains come from performance-based contracts, allocation of risk to private sector partners and integration of design, construction, operation and maintenance phases of a project to reduce total life-cycle costs.

[4] www.partnershipsbc.ca/pdf/2011-09-02.
[5] Dispelling the Myths: A Pan-Canadian Assessment of Public-Private Partnerships for Infrastructure Investments, The Conference Board of Canada, January 2010, Mario Iacobacci
[6] Supra, note 5.

Disadvantages of P3s

P3s also have their critics and a report commissioned by the Federation of Canadian Municipalities in 2007 highlights the criticism directed against P3s.[7] The FCM report makes the following observations with respect to a P3's disadvantages:

Financing: P3s offer no real advantages to local governments in savings on financial costs in the funding infrastructure and project delivery. This is because local governments have access to capital at interest rates far more favourable than most private sector parties. P3 proponents acknowledge this but argue that private partner financing costs are more than offset by savings created by efficiency gains and risk allocation;

Risk allocation: A private partner in a P3 may be the result of an ad-hoc consortium created by private businesses for the purpose of participating in the P3. If the private partner is a consortium, each private business's liability is limited to its participation in the consortium. Furthermore, lending obtained by the consortium will typically be secured against the assets of the company created by the consortium and not the private consortium members. As a result, if a P3 project results in losses or a return that is less than anticipated, private consortium members may withdraw their participation and leave the consortium without any viable means of support other than the local government partner. In consequence, risk allocation to the private partner may end up being more theoretical than real.

Sale of interests by private partners: A private partner is often selected for its expertise and experience in delivering a project; however, it is not uncommon for a private partner to sell its equity to another private party after a project is completed. This may be particularly **Public Private**

[7] *Supra*, note 3.

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true with public works or engineering companies that are mainly interested in the construction phases of a project. In consequence, ownership of the private partner changes and the local government partner may find itself in a business relationship with a party not of its own choosing.

Flexibility: Critics contend that rather than increase flexibility for local governments as some proponents contend, P3s actually reduce a local government's options. This is because a private partner will most likely require strict adherence to the negotiated P3 contract unless there is some financial advantage to varying the contract. In consequence, a long-term P3 contract may greatly inhibit a local government's ability to adjust to changing circumstances, shift resources or shed itself of unwanted obligations.

Accountability: P3s shift responsibility for the delivery of infrastructure and services to private partners. This reduces local government accountability and the ability of local governments to address public concerns.

Transparency: Private partners in P3s are not subject to the same public disclosure requirements as local governments and in general, there is no advantage to a private partner in releasing information about its operations to the public. In consequence, taxpayers may have a limited ability to access information about projects delivered through P3s.

Competition: The intended benefits to be gained by private enterprise competing for P3 contracts may be more apparent that real. This is because there are often very few private contractors who have the experience or expertise to participate in a P3. In consequence, a local government may be confronted with no bidders or only a single bidder when calling for private partners on a P3 project. As a result, a public monopoly may be replaced by a private monopoly. In addition, small and medium-sized local businesses may find themselves squeezed out of the market by a larger P3 private partner that has a monopoly in that area.

These disadvantages can be addressed through careful negotiation and drafting of a P3 contract; however, in cases where satisfactory terms cannot be agreed upon, local governments should carefully consider whether the disadvantages will outweigh the perceived benefits of the P3 project.

Relevant statutory powers and requirements

Municipalities have the power to enter into P3 agreements on the basis of their natural person powers under section 8 of the *Community Charter*, SBC 2003, c. 26 (the "Charter"), their authority to enter into partnering agreements under section 21 of the *Charter* and their authority to grant limited or exclusive franchises under section 22. Regional Districts are granted comparable powers under section 176 and subsection 796(3) of the *Local Government Act*, RSBC 1996, c. 323 (the "*LGA*").

A municipality may provide assistance to a private partner by means of the partnering agreement under subsection 21(a) or by means of a permissive tax exemption under subsection 21(b) of the *Charter*; however, any assistance consisting of the disposition of land or improvements for less than market value, lending money, guaranteeing repayment or providing security for borrowing or any assistance under a partnering agreement requires notice to the public in accordance with sections 24 and 94 of the *Charter*. The notice must identify the intended recipient of the assistance and the nature, term and extent of the proposed assistance. A permissive property tax exemption

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under subsection 21(b) is also subject to the requirements of Division 7 of Part 7 of the *Charter* including enactment of a bylaw and public notice in accordance with the provisions of section 227. Comparable powers and requirements for Regional Districts are found in sections 183, 185 and 812 of the *LGA*.

The duration of the P3 contract will depend on the nature of the contract. Other than franchise agreements entered into under section 22 of the *Charter* (which are limited to a maximum of 21 years), there are no prescribed limits for the term of a P3 contract. The term of a "Design and Build" P3 contract will be of a shorter duration equating to the period for design and construction of the project. In contrast, a "Design, Build and Operate" P3 contract will normally have a longer term commencing with the design of the project and ending when the private partner concludes its operation of the project. Franchise agreements entered into under section 22 of the *Charter* are permitted for a maximum of 21 years while there is no maximum time period for other If the term of a P3 contract exceeds 5 years and the local government will incur a liability as a result of the contract, elector approval for the project is required under section 175 of the *Charter* unless the project falls within one of the exceptions in subsection 175(4). Regional Districts require electoral approval under section 819 of the *LGA* and there are no exceptions for liabilities incurred for a period of 5 years or less. Electoral approval will be a critical element if the P3 project is controversial or subject to significant community opposition.

Best practices for P3s

Before embarking on a P3 project, local governments should undertake a detailed value-for-money analysis to ensure that there is a financial benefit to proceeding with a P3. The province of British Columbia, the government of Canada and most other Canadian provinces have published specific guidelines to help public sector bodies determine whether a P3 is worth considering. While P3s carry the potential for significant cost savings, not every project is suitable for a P3 and the disadvantages outlined above may well outweigh the benefits.

Local governments should also recognize that a healthy level of competition is often essential to ensure the success of the P3 project. The competition ensures that the cost a local government must pay for the benefits of a P3 contract are minimized. It has been noted that:

> "The literature on privatization and public-private partnerships has long recognized that business transactions between government and private companies are more likely to serve public objectives when competition is robust, when measurable performance requirements can be specified in advance, when the contractor can be readily replaced and when the transactions are transparent."[8]

Accordingly, any process to select a private partner should ensure that there is a sufficient level of competition and provide an option for the local government to withdraw from the process in the event that an insufficient number of private partner applicants come forward. To enhance competition, the study conducted by the Federation of Canadian Municipalities suggests a creative option in which local government departments themselves participate in public invitations to tender. For example, during the period from 1968 to 1984, the City of Gatineau (formerly Hull), Quebec, issued 79 invitations to tender for public works projects. The City's public

[8] Pamela Bloomfield, "The Challenging Business of Long-Term Public-Private Partnership: Reflections on Local Experience," Public Administration Review, Vol. 66, No. 3 (March/April, 2006), pp. 400–411, p. 409.

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works department responded to 39 of these invitations to tender and was awarded 24 out of the 39 tenders on which it bid. Sherbrooke, Quebec, Phoenix, Arizona and Indianapolis, Indiana have also tried this approach to public tendering with comparable results.[9]

Once a private partner is selected, careful attention must be paid to the terms of the P3 contract. First and foremost, the P3 contract should be performance-based and focused on desired outcomes rather than prescribing specific inputs or materials. Performance based contracts are most suitable where outputs are easily measured and as such, the P3 contract will typically specify how performance will be measured and prescribe penalties if the outcomes are not satisfactory. Second, P3 contracts should allocate risk between the public and private partners so that those risks that can be managed at a lower cost by the private partner are transferred to private partner. Risks where value can be gained by transferring them to a private partner include risks related to financing, construction cost escalation, scheduling delays, design coordination, commissioning and facility readiness and operation and maintenance. Third, P3 contracts should generally seek to integrate the design, construction and operational components of a project in a single contract.[10] This encourages the private partner to take a whole-life approach to the project and to seek efficiencies and innovations that result in cost savings. Finally, a P3 contract should address the local government's interests in maintaining transparency, accountability and flexibility for the project as well as addressing any other potential disadvantages. While P3 hold the promise for significant financial benefits, local governments should exercise proper precautions to ensure those benefits are realized. ***Lindsay Parcells***

[9] *Supra*, note 3.
[10] *Supra*, note 5, at pp. 32-34.

Joint and Several Liability

Local governments are often the victims of court awards to the extent other defendants cannot pay. The principle of joint and several liability means that a percentage of fault can cost a local government millions if the other defendants do not have the deep pockets. The issue often arises when another defendant does not have adequate

insurance or other means to cover their percentage of liability. Local governments usually have adequate insurance coverage for the entire damage award, and also have the ability to tax (or to have a tax imposed to enforce a judgment). Joint and several liability leads to significant financial obligations in cases where insurance coverage is insufficient, and over time leads to higher insurance premiums.

Joint and Several Liability (continued from page 9)

Joint and several liability is based on the provisions of the BC *Negligence Act* which give a plaintiff the statutory right to collect 100% of the damage award from any of the defendants where there is more than one defendant who is assessed a percentage of fault. Under the principle of "contribution and indemnity" the defendants may collect from each other to the extent of their respective percentage of fault. In a local government liability case, since the municipality or regional district has the insurance coverage and taxation power, the plaintiff is likely going to collect from the local government where there is an issue with the other defendants.

In *New v. City of Moose Jaw and Mitchell*, 2004 a child was struck by a car and is now a quadriplegic. She sued the City, Chief of Police and driver. The court found liability on the basis of 45% City, 35% driver, and 20% Chief. The City was liable because it was found that it could have prevented the accident if it had installed a crosswalk and, considering all the circumstances, it ought to have done so. Damages, including court ordered interest, exceeded $16 million. Although the court found the driver responsible for $5.6 million worth of damages, he had only $200,000 of insurance. Accordingly, the City was responsible for the remainder under joint and several liability.

In recreation facilities, parks and areas not excluded from occupiers' liability, there are often third parties who might be liable in some cases where claims are made, such as teams, leagues, trainers, event bookers and others. On streets or sidewalks there are often third parties who cause the damage directly. However, if they have limited coverage or assets, a partially liable local government could be jointly and severally liable. The local government liability could arise due to occupiers' liability laws, negligence, ineffective disclaimers/waivers or other reasons.

$1-2M liability coverage is not sufficient if you consider some of the decisions of the courts in Canada. There are a number of cases where the damages exceed a local government's insurance limits of coverage, and a municipality or regional district can be forced to make up the difference by taxing its ratepayers in order to raise the amount that is not covered by the insurance. Under the *Local Government Act,* a sheriff may carry out a

writ of execution by raising taxes to pay a court award.

There are numerous cases where damages in excess of $2M were awarded against municipalities. In *Aberdeen v. Langley (Township)*, 2007 BCSC 993, the defendants were found liable for $5,647,773 for quadriplegia injuries. One of the reasons for substantial damage awards is the

Joint and Several Liability (continued from page 10)

principle that the injured party must be restored to the position he or she would have been in if the event had not occurred, to the extent this can be accomplished monetarily. This test was set out in the leading case of *Milina v. Bartsch* 1985 CanLII 179 (BC SC), (1985) 49 B.C.L.R. (2d) 33. In that case a plaintiff suffered paralysis from his neck down. The Court set out the principles governing assessment of damages for future care costs (to be awarded in addition to wage loss, home adjustments, special damages, and "non-pecuniary loss"), based on the doctrine that the plaintiff should be restored to where they would have been without the accident having occurred.

Local government financial responsibility is amplified by "vicarious liability". A local government as a corporation is vicariously liable for the conduct, including wrongful acts, of its municipal officials and employees. It can seek indemnity against the official or employee if he or she is guilty of dishonesty, gross negligence or malicious or willful misconduct. These exceptions, however, are rare and in any event subject to joint and several liability.

The Union of British Columbia Municipalities and Municipal Insurance Corporation of British Columbia have on a number of occasions lobbied the Province to review the local government implications of joint and several liability. In 2003 UBCM and MIABC made a submission to the Province that summed up the issue as follows:

> It is the submission of UBCM and MIABC that joint and several liability no longer represents a fair and reasonable application of the law in apportioning responsibility for a plaintiff's loss. It imposes on local governments, and others, an unfair and unacceptably high share of damage awards based solely on the perception of a local government as a "deep pocket defendant", without regard to the degree of fault attributable to the conduct of local government. ***Don Lidstone***

Eng v. Toronto (City), 2012 ONSC 6818

In 2011 the City of Toronto adopted a bylaw which provided that "no person shall possess, sell or consume shark fin or shark fin food products within the City of Toronto." The first recital to the Bylaw provided that "the consumption of shark fin and shark fin products may have an adverse impact on the health, safety and well-being of persons and on the economic, social and environmental well-being of the City of Toronto. The applicants sought a declaration that the Bylaw was *ultra vires* the City and of no force and effect. Justice Spence began his analysis by stating that the City only had powers to deal with "municipal issues", and that a City bylaw must have a "municipal purpose." He then found that the purpose of the bylaw must be inferred from the Preamble, and held it reasonable to infer that the bylaw "is directed to the possibility of poisoning or similar deleterious effects because of consumption of shark fin."

After reviewing the various purposes for the ban as put forth by the City, Spence J. concluded that the bylaw was not a ban with respect to animals; was not a bylaw respecting the environmental well-being of the City; was not a bylaw affecting the social well being of the society; and was not a bylaw for a municipal purpose respecting the health of persons in the City, and on these bases, was *ultra vires* the authority of the City. Justice Spence found that there was nothing to suggest that the offensive practice of shark-finning in distant oceans affected the ability of Torontonians to live together as an urban community, and it therefore could not be said that the ban related to the social well being of Torontonians. ***Matt Voell***

Salt Spring Island Local Trust Committee v. Westcoast Vacations Inc., 2012 BCSC 1590

This case involved an application by the Salt Spring Island Trust for a declaration that the defendant, Westcoast Vacations, was using properties (or allowing properties to be used) as commercial guest accommodation in contravention of the applicable land use bylaw. The parties submitted a question of law to the BC Supreme Court asking whether the defendant was in breach of the bylaw. The defendant in this case was not the owner of the properties in question, but rather a management and booking agency which represented the 76 owners of the individual properties. Before Mr. Justice Leask of the BC Supreme Court, Salt Spring argued that the and use regulations applied to non-owners and non-occupiers of land. In support of this claim they pointed to the language of the bylaw which stated "[a]ny person who does any act or permits any act or thing to be done…" Salt Spring further argued that Westcoast was using the properties as an agent of the owners as well as on its own behalf. In the alternative, Salt Spring argued that Westcoast was in contravention of the bylaw by permitting or facilitating the use of the properties for commercial guest accommodation. Westcoast, for its part, argued that it did not "authorize use" in any sense. They pointed to the fact that the contracts for rental were between the owners and the users (guests), that Westcoast did not enter into any contract that amounted to a lease or a license that granted any rights or control over the properties, and that in its dealings with the guests it granted no right of possession or occupation.

Mr. Justice Leask agreed with Salt Spring that the Bylaw applied to both non-owners and non-occupiers of land, however rejected all of Salt Spring's arguments that Westcoast was in violation of the bylaw. He held that Salt Spring had not demonstrated that Westcoast was an agent of the owners and found that there was no evidence that Westcoast used the properties for its own benefit. Justice Leask also rejected the argument that Westcoast was contravening the land use bylaw by permitting or facilitating the use of the properties by the guests. First, he held that the bylaw did not use the term "facilitates", and in the context of the bylaw he could not accept that the term "permit" included the meaning "facilitates". Second, he accepted Westcoast's submission that in a regulatory context the term "permit" must involve "an activity of allowing something that the person has the legal ability to prevent or prohibit. In this sense, Leask J. held that Westcoast did not have the ability to prevent or prohibit guests from using the properties in question and therefore could not be said to be "permitting" use of those properties. ***Matt Voell***

Balmoral Developments Hilda Inc. v. Corporation of the City of Orillia, 2012 ONSC 6040

The applicant constructed and owned two multi unit buildings in the City of Orilla. The buildings were three-storied plus a basement, each of which was divided into twelve units. Access to each of the units was from an exterior entrance reached by one of two balconies that ran the length of the building. The applicant sought a ruling that would permit it to rent each unit to up to seven students who attended a nearby college and university. The City opposed the application, and took the position that renting to greater than four students per unit would render the buildings "boarding, lodging or rooming houses", uses which were not permitted in the zone in which the buildings were located.

The Ontario Superior Court adopted a purposive and contextual approach to the interpretation of the relevant zoning bylaw, and stated that it was necessary to consider the entire planning scheme

Balmoral Developments **(continued from page 12)**

within which the zoning bylaw was enacted, including the regional growth plan and the official plan of the City. Healey J. found that on the facts in the case, the students the students occupying the Balmoral project were operating as single households as opposed to a boarding house, where the owner ultimately retains control over the use of the property. Justice Healey held that for the purposes of land use, the collective types of decisions made by the students, when weighed against the restrictions on the use of the property by the landlord, "allow[ed] the use to assume the character of a single household establishment for purposes of this particular zoning by-law." Madam Justice Healey held that the zoning bylaw in issue "fail[ed] to provide any bright line between a dwelling unit encompassing a single household unit and a boarding, lodging or rooming house other than the required sharing of both washroom and cooking facilities for a single household use, which is the case here, and a number." In finding for the building owner, Healey J. also noted that "a number ceases to have any meaning in particular cases of large families living together or various groups of individuals that function as a single household unit." ***Matt Voell***

Lidstone & Company

Lidstone & Company has been selected by the Municipal Insurance Association of British Columbia to be the provider of its new Casual Legal Services available to MIABC Casual Legal Services subscribers commencing January 1, 2013.

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

Lindsay Parcells practices municipal law with a particular interest in land use, real property, corporate, commercial, mediation and environmental matters. Lindsay has 20 years of legal experience. He was called to the Alberta bar in 1992 and the British Columbia bar in 1995. Lindsay completed a Masters degree in Municipal Law from Osgoode Hall Law School in 2009 and a combined Bachelors of Laws and Masters of Business Administration degree from Dalhousie University in 1991. Before attending Law School, he served for one year as a legislative intern at the Alberta Provincial Legislature. Lindsay is currently Co- Chair of the Municipal Law Section of the BC Branch of the Canadian Bar Association.

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

Don Lidstone Q.C. has practiced generally in the area of local government law since 1980. His municipal law focus is in the areas of constitutional, administrative, and environmental law, particularly in respect of governance, land use/sustainable development, regulatory approvals, and legislative drafting. Invited to speak

Lidstone & Company Personnel (continued from page 13)

regularly at conferences, symposia and universities, he has chaired the Sustainable Region Initiative (Governance and Finance), Liquid Waste Expert Review Panel, Fire Services Review Panel, Whistler Waste Blue Ribbon Panel, and the Municipal Law Section of the British Columbia Branch of the Canadian Bar Association. Don has published numerous papers and manuals and consulted on the development of the *Community Charter* and other municipal statutes in a number of provinces. He was designated Queen's Counsel in 2008.

Sara Dubinsky is a 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.