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Law Letter

In this issue

Anonymous submissions: to consider or not to consider

There are pitfalls associated with Councils or Boards receiving and considering anonymous submissions, particularly in the context of quasi-judicial decision making. Quasi-judicial decisions are decisions involving individual rights and interests, such as an applicant's entitlement to a licence or permit or to an appeal.

Numerous cases have considered whether it is proper for a decision maker to rely on anonymous submissions from third parties, without disclosing the contents of those submissions to the applicant. While the results in the cases vary, the common thread is that any prejudicial information contained in the anonymous submissions must be disclosed to the applicant, such that he or she has the opportunity to address or correct the submissions. Otherwise the applicant's right to procedural fairness may be violated, particularly where the decision maker relies on the anonymous information in coming to a decision.

That said, the requirement is that the decision maker provide notice of the *contents* and an opportunity to respond - there is no requirement to show an actual copy of the submissions to the applicant, provided that the substance of the allegations contained therein are disclosed.

While these cases arise in the immigration context, the same reasoning may be applied in the context of quasi-judicial decisions made by local governments. For this reason councils and boards must be careful to provide notice and an opportunity to respond to the substance of anonymous submissions to applicants, otherwise they risk their decisions being quashed on judicial review.

Further, as the courts have noted, anonymous communications are inherently suspect and unreliable. Because they frequently cannot be verified or trusted, they often should not be given

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much weight. There may also be liability concerns, from a defamation standpoint, with further publishing the contents of anonymous communications by disclosing them at a public meeting.

For these reasons local governments should consider adopting a policy of not receiving or considering anonymous correspondence.
Sara Dubinsky

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LIDSTONE & COMPANY
Barristers and Solicitors

1300 – 128 Pender Street West
Vancouver, BC V6B 1R8
Telephone: 604-899-2269
Facsimile: 604-899-2281
lidstone@lidstone.info
www.lidstone.info

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Local and First Nation governments share concern over "Safe Drinking Water" Bill

Our clients have been asking us about what the implications for local governments are of the Federal Bill S-8 "*The Safe Drinking Water for First Nations Act*." Many local governments are concerned that the Act would impose costly obligations upon local governments with respect to the provision of safe drinking water and waste water treatment to reserves.

In fact, the Bill itself, which has not yet passed second reading in Parliament, does little except transfer any liability relating to the provision of drinking water and disposal of waste water on reserve away from the federal government (ss. 11-13). The Bill merely provides for the future provision of drinking water and wastewater treatment standards through regulations, which have yet to be developed.

Nothing in the Bill directly implicates local governments; moreover, the federal government would not be constitutionally permitted through regulation to unilaterally compel local governments to provide drinking water or waste water treatment to reserves. Sections 92 (8-10) of the *Constitution Act, 1867* would require provincial government cooperation for any such obligation to be imposed. In fact, Bill S-8 differs from its predecessor Bill S-11, to which there was strong opposition, by removal of language that could be interpreted as powers to compel First Nations into an agreement with third parties (e.g. municipalities) to manage water and wastewater on First Nation lands.

However, for local governments that do provide water services to First Nation lands under agreement, the regulations once developed will have implications. In addition to setting standards for the quality of drinking water on First Nation

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lands, the regulations will be able to impose requirements with respect to the following:

- Training and certification of operators of drinking and waste water systems—*relevant where the operator is a local government*
- Protection of sources of drinking water from contamination—*relevant where source water is within local government boundaries*
- Location, design, construction, modification, maintenance and decommissioning of drinking and waste water systems—*relevant where these are local government systems, or hook up to local government systems*
- Collection and treatment of waste water and the handling, use and disposal of products of waste water treatment—*relevant where local government is responsible for this by agreement*
- Monitoring, sampling and testing of drinking and waste water and reporting of test results—*relevant for any local government providing water services*

The regulations can also provide for remediation orders, emergency measures, and penalty and enforcement systems.

Of particular significance as well, the regulations may fix the fees payable "to any person or body for the use of a drinking water system or a waste water system" s. 5(d). Such a provision could directly impact service agreements between local governments and First Nations. That said, such a provision would also likely have to be pursuant to provincial government cooperation, so as not to run afoul of provincial constitutional jurisdiction.

In light of the potential significant implications on local governments that could arise from the regulations to be developed following the passage of Bill S-8 into law, there is good reason for local governments to be involved in discussions with both the federal and provincial governments on this matter.

And indeed, local governments would likely find strong allies in First Nations themselves, many of whom oppose the Bill as drafted. First Nations organizations such as the Assembly of First Nations, and members of the Official Opposition, have expressed their strong concern that all Bill S-8 does is transfer the obligation and liability for water safety standards onto First Nations, without providing for the infrastructure and capacity funding to make it possible to meet these obligations. First Nations are in fact more vulnerable under the Bill than local governments are, since the obligations cannot be unilaterally imposed on local governments without provincial

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cooperation. Both First Nation and local governments have good reason to lobby to ensure that federal and provincial governments do not download obligations without ensuring infrastructure and capacity funding are in place to carry out the obligations. ***Maegen Giltow***

Municipal Corporations

Local governments in British Columbia have the power to incorporate corporations and own shares in corporations under section 185 of the *Community Charter, SBC 2003, c. 26* (the "*Charter*") and section 195 of the *Local Government* (the "*LGA*"). Local governments may find it advantageous to incorporate a municipally owned corporation for any number of purposes. For example, a local government may wish to incorporate to control risk, limit liability or limit financial exposure to taxpayers in providing a particular service or engaging in a business venture. A local government may also wish to incorporate to free up council and staff time for a particular project or service or take advantage of expertise provided by individuals who are not municipal councilors or employees. Local governments may also find it beneficial to create corporations with other public authorities to create economies of scale or embark on projects that would be less effectively managed by the local government on its own.

Before incorporating a municipal corporation, local governments must obtain the approval of the Inspector of Municipalities. The purpose of Inspector approval is to protect the public interest and ensure that local governments do not avoid the obligations they would be otherwise subject to under the provisions of the *Charter* and the *LGA.* The process for Inspector approval involves submission of a written request for approval together with a copy of the council resolution approving the incorporation, details of the corporate business plan and any relevant feasibility studies or background reports and draft articles in final form. The local government's written request should include information about the local government's objectives for the corporation, the degree and nature of the local government's ownership and control of the corporation and the local government's financial exposure if the corporation is approved. The written request should also detail the corporation's policies for dealing with any conflicts of interest and should also provide information detailing record keeping, information disclosure and the process and public input obtained for the incorporation. Approval for the incorporation will typically take at least several weeks but frequently longer if further details are requested or the information submitted is considered deficient.

Local governments should consider a number of important issues before proceeding with incorporation. First and foremost, council should clearly determine the municipal objective and consider whether that objective is best accomplished by means of a corporation. As an alternative to incorporating, a local government may consider establishing an in-house department with dedicated staff or some other means of achieving its objectives directly rather than through a municipal corporation. Local governments should also consider if there is another type of business entity or arrangement that might better accomplish municipal objectives. For example, a local government may consider entering into a partnering agreement under section 21 of the *Charter* (or section 183 of the *LGA*) or creating a society or trust as an alternative to incorporation.

A decision to incorporate will also need to be considered in context of political support. A local government will want to be confident that the objectives and the municipal corporation will be supported by the public as a wise use of

Municipal Corporations (continued from page 4)

municipal resources. Council will need to consider what parties may be affected by the municipal corporation and once again, whether there is an alternative that better meets the needs of the community. Informing and involving the public and municipal employees in this process is vital in building and maintaining public support. As part of this process, the Inspector requires that every municipal corporation hold an annual information meeting that is open to the public; however, local governments will need to consider other opportunities to regularly inform and engage the public.

Once a decision is made to incorporate, local governments should carefully consider the makeup of the corporation's board of directors. As is true of any corporation, qualified and experienced individuals should be sought out and appointed; however, in appointing these individuals, it is important to ensure that clear and comprehensive policies and guidelines are established to avoid conflicts of interest. To reduce the likelihood of a conflict of interest, municipal councilors should generally not be appointed to the municipal corporation's board of directors. To ensure that council is able to adequately supervise the business of the corporation, local governments should require the board to report to council on a regular basis and to otherwise advise council when significant business is conducted by the corporation. Local governments should also consider appointing municipal employees to the board and task the appointee with keeping council informed and ensuring the local government's interests are addressed in board deliberations and decision making.

Local governments will also need to consider how to finance the municipal corporation. Financing can take the form of an equity investment in which money is invested in the corporation in exchange for shares. An investment of this nature is an exception to the general investment restrictions under section 183 of the *Charter*; however, before monies can be invested, the investment must be approved by the Inspector under section 185 of the *Charter* (or section 195 of the *LGA* for Regional Districts). Alternatively, a local government may choose to lend money to the municipal corporation. The requirements for financial loans or other forms of assistance are the same as for arm's-length businesses and before lending any monies, the local government must enter into a partnering agreement with the municipal corporation under section 21 of the *Charter* and provide notice to the public of its intention to loan monies in accordance with sections 24 and 94 of the *Charter.*

Once a decision has been made to incorporate and approval has been obtained from the Inspector, the municipal corporation is incorporated under either the *Business Corporations Act* of British Columbia or the *Canada Business Corporations Act.* For most municipal corporations, the provincial statute should be relied on for incorporation as the *Canada Business Corporations Act* is generally used for corporations that do business in more than one province. There may be unique circumstances that justify an incorporation under the federal legislation and local governments should consult legal counsel if this is a potential option. The incorporation is completed by entering into an incorporation agreement, establishing the corporate articles (with the approval of the Inspector) and filing an incorporation application with the corporate registry. Following incorporation, the municipal corporation must comply with the requirements of the applicable *Business Corporations Act* to maintain its corporate existence. This includes maintaining a records and registered office, corporate records that are at least partially open and available to the public and the filing of annual reports with the corporate registry. A corporation must also file documentation with the corporate registry when there is a change of

Municipal Corporations (continued from page 5)

directors or other significant change in the corporation or its structure. A municipal corporation that is wholly-owned by a local government is also subject to the requirements of the *Freedom of Information and Protection of Privacy Act* and must comply with that legislation in the maintenance of its records.

In addition to these general requirements, there are specific requirements that are unique to municipal corporations. As indicated above, the articles of a municipal corporation must be approved by the Inspector and in order to obtain this approval, the articles must include provisions for an annual information meeting, for the appointment of an auditor and annual audited financial statements, for keeping copies of the audited financial statements and corporate records at the municipal office and making those records available to the public, for shareholder approval for disposal of assets and for a corporate year-end date of December 31. The articles must also include a prohibition on creating corporate subsidiaries or amending the articles of the corporation without the further approval of the Inspector.

Municipal corporations offer many potential advantages to local governments including limited liability protection, flexibility and enhancement in the delivery of services and completion of projects and the reallocation and focused application of resources for various undertakings. However, in considering these advantages, local governments should also be mindful of applicable statutory requirements and restrictions including those requirements under the *Charter,* the *LGA* and the *Business Corporations Act* of British Columbia or Canada.

Lindsay Parcells

Conflict of Interest Update

The law has changed as a result of the decision of the British Columbia Court of Appeal in *Schlenker v. Torgrimson,* 2013 BCCA 9. Now a Council or Board member can be disqualified from office if voting on a financial matter affecting a society or corporation if the member is also a director of the entity. Previously, the general rule was that the only penalty was nullification of their vote on the matter, but now disqualification from office applies. Here is the summary of the law:

1. The issue of conflict exists for a member of a council or regional board when they are also sitting as a director of a society or corporation, whether that position is a voting or non-voting director (or an honourary director).

2. Under section 25(1)(a) of the *Society Act*, every director of a society must “act honestly and in good faith and in the best interests of the society" in exercising the powers and performing the functions as a director, which means they cannot as an elected member vote in a Council or Board meeting or a committee meeting on a society matter. Similarly, directors of corporations, including wholly owned subsidiaries of the municipality or regional district, must act in the “best interests of the company” under s. 142(1)(a) of the *Business Corporations Act.*

3. Disqualification is an issue if the council or board matter in relation to the society or corporation is financial (e.g., grant or loan).

4. There is no conflict when a council/board member is merely a member but not a director of the society, for example, when the Council/board member is a member of Rotary but not director.

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A council/board member who is a society or corporation director has two potential kinds of conflict of interest if voting at a Council meeting on a society or corporation matter:

1. a common law conflict, which would likely result in their vote being set aside/not counted [*Starr v. Calgary (City)*, 52 D.L.R. (2d) 726, unless there is statutory authority to sit and vote on both entities as *in Save St. Ann's Academy Coalition v. Victoria (City of)*, 1991 CanLII 1331 (BC C.A.)]; and

2. an indirect pecuniary interest if the matter is financial in nature, which would likely result in disqualification from office (based on *Schlenker*), unless the contravention was done inadvertently or due to an error in judgment made in good faith.

The test for conflict #1 is whether a reasonable person would believe the council/board member would be more likely to vote in favour of the interests of the society or corporation than to vote against the interests of the society or corporation, whether or not the matter is financial: the member is wearing two hats as a council/board member and as a society/corporation director, and those duties collide.

The test for conflict #2 is whether a reasonably well-informed person would conclude that the member's interest as a director would influence their decision to vote on a financial matter that affects the society or corporation: the pecuniary interest of the member/director would lie in the fulfillment of their fiduciary obligation to the society/corporation, noting that directors have a fiduciary duty of loyalty to "act honestly and in good faith and in the best interests of the" entity.

Therefore the council/board member who is also a society or corporation director must follow the procedures as set out in s. 101(2) *Community Charter* and must not remain in the meeting, participate in any discussion on the matter, vote on the matter, or attempt to influence voting on a financial matter relating to the society/corporation.

What is often missed in these conflict decisions is that the council/board member has similar obligations to avoid conflicts of interest in respect of their role as a director of a society or corporation. Some municipalities and regional districts have addressed the need to have a Council member or director involved in a society or corporation (such as a subsidiary corporation) by appointing a Council or Board member as a non-voting "liaison" (but not as a voting or non-

Conflict of Interest (continued from page 7)

voting or honourary director) in order to avoid these conflict of interest issues.
Don Lidstone Q.C.

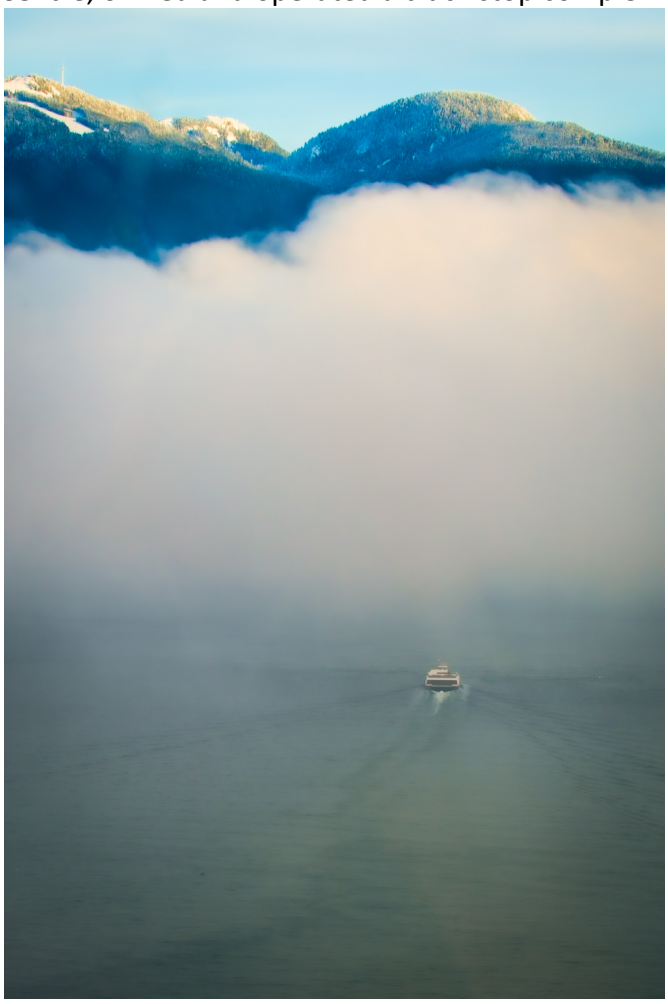
Peachland (District) v. Peachland Self Storage, 2012 BCSC 1872

Peachland Self Storage wished to operate an aggregate mine on its property pursuant to a Provincial mines permit authorizing the annual extraction of 100,000 cubic meters (the "Mines Permit"). At the time of the application for Mines Permit, the District had in force a soil removal and deposit bylaw which did not include any annual limit. After being notified of Peachland Self Storage's Mines Permit application, the District amended the soil removal bylaw to impose an annual removal limit of 200 cubic metres. The District did not obtain Ministerial approval of the amending bylaw. Before Mr. Justice Betton, Peachland Self Storage argued that the Bylaw frustrated the purpose of the Mines Permit and that the Bylaw was prohibitory. The District took the position that the Bylaw was not prohibitory but merely regulatory, despite the fact that commercial soil removal operations might not be viable under the Bylaw.

Mr. Justice Betton held that the question before him was whether the prohibition of *commercial* sand and gravel extraction constitutes a prohibition within the meaning of section 9(1)(e) of the *Community Charter*, which would require ministerial approval. While recognizing that regulation necessarily involves elements of prohibition where the regulatory prerequisites have not been satisfied, Mr. Justice Betton held that the purpose of section 9 of the *Community Charter* was to protect the value of provincial permits, and further "[i]f the effect of a bylaw is to render a permit of no value and prevent the provincial permit holder from using the permit, then Ministerial approval of the bylaw must be obtained." On that basis, Justice Betton held that the bylaw was *ultra vires* the District.

Antrim Truck Centre Ltd. v. Ontario (Transporation), 2013 SCC 13

The Supreme Court of Canada recently weighed in on the law of injurious affection in the case of *Antrim Truck Centre*. The appellants, Antrim Truck Centre, owned and operated a truck stop complex



on Highway 17 near the hamlet of Antrim (the "Truck Stop"). In 2004, Ontario opened a new section of Highway 417 running parallel to Highway 17 near the Truck Stop. Motorists travelling on the new highway did not have direct access to the Truck Stop and it was effectively put out of business. The appellant brought a claim for

Antrim Truck Centre Ltd. (continued from page 8)

injurious affection and the Ontario Municipal Board awarded the appellant approximately $400,000 in damages for business loss and loss in market value of the land. The Ontario Court of Appeal set aside the Board's decision on the basis that it failed to recognize the importance of the utility of Ontario's conduct where the interference was the product of an essential public service.

The question before the Supreme Court was how to decide whether interference with the private use and enjoyment of land is unreasonable when it results from construction which serves an important public purpose. The Supreme Court, in reasons written by Cromwell J., held that the reasonableness of the interference must be determined by balancing the competing interests, and by answering the questions of whether, in the circumstances, the claimant has shouldered a greater share of the burden of construction than it would be reasonable to expect them to bear without compensation.

The Court held that the interference with the appellant's land caused by the construction of the new highway inflicted significant and permanent loss on the appellant. It held that the Municipal Board did not fail to take account of the utility of Ontario's activity or fail to engage in the required balancing when it awarded the appellants the $400,000.00 for injurious affection. To that end, Mr. Justice Cromwell stated "[t]he Board properly understood that the purpose of the statutory compensation scheme for injurious affection was to ensure that individuals do not have to bear a disproportionate burden of damage flowing from interference with the use and enjoyment of land caused by the construction of a public work." On that basis, the Court held that the Board's decision was reasonable, and restored the award of damages to the appellant.

Biskey v. Chatham-Kent (Municipality), 2012 ONCA 802

The Biskeys asserted a claim for damages arising from their purchase of a property formerly owned by the municipality of Chatham-Kent (the "Property"). The Property had previously been used by Chatham-Kent and local residents as a dump. Prior to selling the Property Chatham-Kent conducted an environmental site assessment (the "Assessment"). Chatham-Kent then sold the Property to two individuals, and two months later, those individuals sold the Property to the Biskeys for more than double the original purchase price. The Biskeys intended to build their 'dream home' on the Property. Chatham-Kent disclosed the Assessment to the first owners, but the first owners did not disclose that report to the Biskeys, nor did Chatham-Kent bring it to their attention prior to the purchase. After purchasing the property, and subsequently applying for a building permit, the Biskeys became aware of the Property's history. While their building permit application was still pending, the Biskeys obtained a copy of the Assessment as well as an additional assessment conducted by Chatham-Kent as part of the building permit process. These reports, in addition to a report commissioned by the Biskeys themselves, contained detailed information regarding the former use of the Property and its suitability as a building site.

Before a building permit was issued, the Biskeys commenced an action for damages against Chatham-Kent for negligence, nuisance, and negligent misrepresentation, as well as additional costs related to assessing the environmental conditions of the Property and clean-up. After the claim was filed, the original owner offered to re-purchase the Property from the Biskeys for the original purchase price, but the Biskeys refused the offer and decided to proceed with construction, which they did. The building permit

Biskey v. Catham-Kent (continued from page 9)

issued by Chatham-Kent required the Biskeys to comply with the reports of their own engineers. The trial judge held that Chatham-Kent was liable to the Biskey's in negligence and awarded damages in the amount of $386,142.82. On appeal, the Ontario Court of Appeal held that before the Biskeys commenced construction, they knew that the Property had been used as a dump and knew that they were bound to encounter additional construction costs and other environmental issues. The Court held that information regarding the Property was disclosed to the Biskeys but despite the information, they continued the development of the Property. The Court of Appeal held that when the Biskeys decided to reject the repurchase offer and to proceed with construction in the knowledge that they were building on a dump site and that they would incur added costs, any causal link with the alleged negligence of Chatham-Kent was broken. In light of this ruling, namely, that there were no damages, the Court of Appeal did not make any ruling on whether Chatham-Kent owed any duty of care to the Biskeys. ***Matt Voell***

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

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

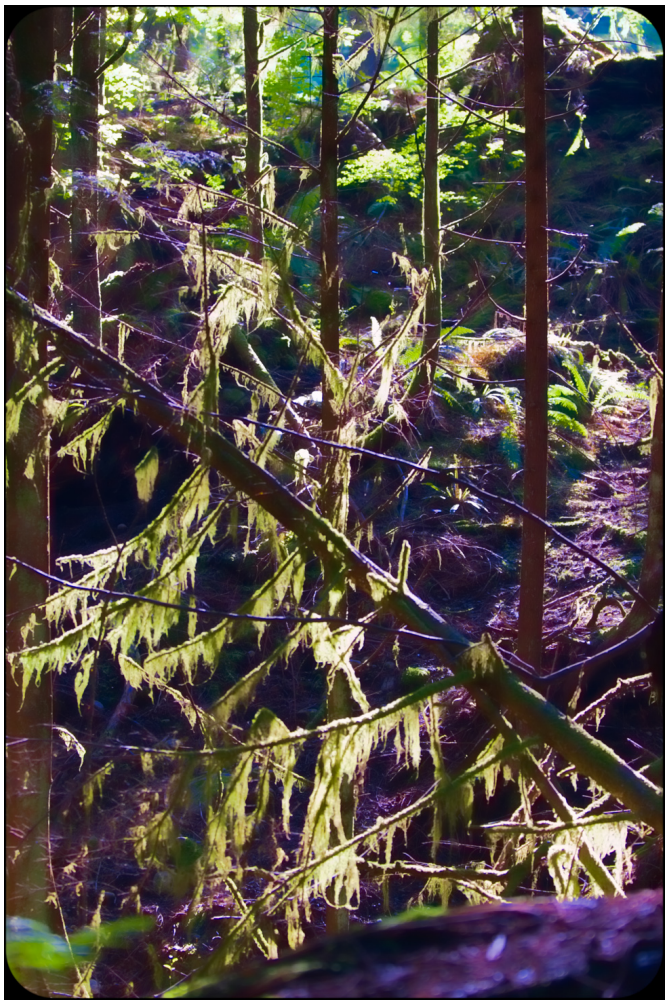
Lidstone & Company Personnel (continued from page 10)

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 entities 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.