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Law Letter

In this issue

The new medical marihuana regime: what you need to know about the new way to grow

The new *Marihuana for Medical Purposes Regulations* ("MMPR's") are currently in force, and will be the sole medical marihuana regime in force as of April 1, 2014. There are a number of significant differences between the old regime, the *Medical Marihuana Access Regulations* ("MMAR's") and the new MMPR regime.

The MMAR regime, which was enacted in 2001, expressly allows individuals that have been issued an authorization to possess marihuana to grow their own medical marihuana, or have another individual grow it on their behalf. The production of medical marihuana is authorized under either a personal-use production licence ("PPL") or a designated-person production licence ("DPL"). Both PPL and DPL licence holders may produce marihuana only at the production site and area authorized in the licence.

PPL and DPL licences are issued for medical marihuana cultivation in private residences (in addition to non-residential premises), but licence holders may not produce marihuana outdoors if the production site is adjacent to a school, public playground, daycare facility or other public place frequented mainly by persons under 18 years of age.

Health Canada has released the following statistics regarding licences issued under the MMAR's at December 31, 2012:

> Number of persons who hold an Authorization to Possess Dried Marihuana in Canada: 28,115
>
> Number of persons who hold a Personal-Use Production Licence in Canada: 18,063
>
> Number of persons who hold a Designated Person Production Licence in Canada: 3,405

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British Columbians make up a disproportionately large share of these figures. BC residents hold approximately 48% of the ATP's; 52% of the PPL's; and 66% of the DPL's.

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Under the MMAR regime, Health Canada is authorized to provide limited information regarding licence holders. Health Canada will only respond to an information request from a Canadian police force engaged in an investigation under the *Controlled Drugs and Substances Act*, or the MMAR.

In contrast, the new MMPR's will fundamentally alter the process by which medical marihuana users are supplied with the product. Rather than being produced by individual users or designated licence holders, including in private residences, medical marihuana will be exclusively produced indoors, by commercial licensed producers.

Health Canada will publish the name and contact information of each licensed producer on its web page, so that consumers may select which provider they wish to patronize. Medical marihuana will only be attainable from the licensed producers by authorized users via the following mechanisms:

1. Direct purchase from the licensed producer through secure shipping only (this is the primary mechanism for distribution); or
2. In person from a pharmacist, authorized health care practitioner, or hospital, all of whom would purchase it from a licensed producer.

Accordingly the new regime replaces individual / proximate accessibility with centralized, large scale commercial production, and a product that is only accessible via the mail (or an intermediary that likewise receives it by mail). The MMPR does not allow for users to attend at the growing premise and fill an order. All transactions must occur remotely. The MMPR's do not allow for the retail sale of medical marihuana.

A critical element of an application for a licence to produce (or for an amendment to the licence to produce) under the MMPR is that the applicant must first notify the local police force, fire authority and government of the pending application for a licence, and the notices must include the address of the proposed commercial production facility. The applicant must submit copies of these notices to the federal government as part of the application materials. If the

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applicant has not provided the requisite notice to local authorities, the licence (or licence renewal or amendment) must be refused.

Local governments should anticipate receiving copies of these notifications, if they have not already, and should be prepared to provide comments responding to the notifications (if desired), such as whether the proposed use complies with the zoning for the specified location. ***Sara Dubinsky***

Federal government officials have indicated that they do not intend to disclose the location of premises whose licenses expire as of March 31, 2014. As this will create difficulty in ensuring that production ceases and the premises are properly remediated upon the expiry of the licenses, local governments should prevail upon the federal government to amend the regime such that the location of prior licenses may be disclosed. Ed.

Obligations upon local governments—bullying and harassment of employees

We are asked routinely whether recent changes to the Workers Compensation Act place new obligations upon local governments and their elected representatives. The major changes in Bill 14, the *Workers Compensation Amendment Act 2011* took effect July 1, 2012.

The Amendment Act brought into force changes to expand the circumstances in which workers can claim compensation for injury to their mental health. In particular, workers are now expressly permitted compensation for mental disorders arising from bullying and harassment in the workplace. However, the changes are not limited to bullying and harassment; incidents need no longer be acute reactions to traumatic events (such as emergencies or accidents). Compensable mental disorders can arise from a "significant work-related stressor" or "a cumulative series of significant work-related stressors."

The mental disorder must be diagnosed by a psychiatrist or psychologist (examples of disorders that may arise from bullying or harassment are depression, anxiety disorder, and adjustment disorder). The disorder cannot however arise from "a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment."

These changes add to the obligation upon employers under the *Workers Compensation Act,*

Obligations (continued from page 3)

including local governments, to ensure the health and safety of all workers (s. 115(1)). Employers must remedy any workplace conditions that are hazardous to the health or safety of the employer's workers (s. 115(2)).

Complicated situations may arise in which bullying or harassment comes from outside the organization, but is related to the worker's employment. For example, a harassing campaign against a staff member by a member of the public related to the staff member's work (e.g. staff's recommendations to Council on a controversial project) can engage the employer's obligation in different ways. If the conduct by the member of the public occurs at the workplace, including public meetings, the employer's obligation to "remedy any workplace conditions that are hazardous to the health or safety of the employer's workers" may be engaged. However, bullying or harassment over social media including blogs and online comments would in most cases be outside "workplace conditions." While the employer would likely not be under the strict obligation to remedy a workplace condition in that case, the general obligation to ensure the health and safety of all workers would remain.

How these obligations can be met by the employer will depend upon the particular facts of the work-related stressors that are putting an employee's health at risk, and legal advice should be sought. However, the Act itself places several relevant obligations upon employers:

- Ensure that workers are made aware of reasonably foreseeable health and safety hazards to which they are likely to be exposed—this can include the effects of vocalized public anger aimed at staff over local government actions or policies.
- Establish occupational health and safety policies and programs
- Provide training necessary to ensure the health and safety of workers
- Consult and cooperate with joint committees and worker health and safety representatives

The Act also expressly places obligations upon supervisors to ensure the health and safety of those workers under the direct supervision of the supervisor (s. 117), and on directors and officers of a corporation to ensure the corporation complies with the Act (s. 121). While there is no case law on the question, it is possible that at least appointed municipal officers under the *Community Charter* are caught by the obligation set out at s. 121.

The Act makes it an offence to contravene the obligations placed upon employers, supervisors, directors and officers, but provides for a defence of due diligence (ss. 213 and 215). Accordingly, it is in the interest of local governments and their employees to take a proactive policy approach to prevent health impacts from bullying, harassment and related work-place stressors. Such policies should set out clear guidelines for reporting and responding to incidents and conduct that arise both in the workplace, and outside the workplace but that are related to the course of employment. This includes conduct arising through social media related to the work of local government.

Duties of directors and officers of a corporation

Oct 1/99 121. Every director and every officer of a corporation must ensure that the corporation complies with this Part, the regulations and any applicable orders.

Obligations (continued from page 4)

Persons may be subject to obligations in relation to more than one role

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123. (1) In this section, "**function**" means the function of employer, supplier, supervisor, owner, prime contractor or worker.

(2) If a person has 2 more functions under this Part in respect of one workplace, the person must meet the obligations of each function.

Maegen Giltrow

MUNICIPALITIES MAKING THEIR MARKS: OFFICIAL MARKS AND ARMORIAL BEARINGS

Official Marks

Official Marks are authorized marks used by public authorities in Canada that are protected under the provisions of the *Trade-marks Act,* R.S.C., 1985, c. T-13. Official Marks are comparable to trade-marks; however they are not used for commercial purpose or in the course of trade but rather to identify goods and services that meet the regulations and standards of a public authority. The law provides under section 9(1)(n)(iii) of the *Trademarks Act* that:

> "no person shall adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for, …any badge, crest, emblem or mark adopted and used by any public authority, in Canada as an official mark for wares or services, in respect of which the Registrar has, at the request of Her Majesty or of the university or public authority, as the case may be, given public notice of its adoption and use."

To acquire protection for the mark as an official mark under the *Trade-marks Act,* a public authority provides a letter of request to the Registrar of Trade-marks along with the prescribed fee and supporting evidence that the body is a public authority and that the mark has been adopted and used. Official Marks are automatically protected upon a request being made by the public authority to the Registrar of Trademarks and the Registrar must only assure

Making their marks (continued from page 5)

itself that the official mark has been adopted and used by the public authority.

The term "public authority" is not defined in the *Trademarks Act* and what constitutes a public authority has been established by the case-law. In *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, 2002 FCA 218, the Federal Court of Appeal adopted a two-part test for determining whether an entity is a public authority by deciding that "there must be a significant degree of governmental control, and any profit earned must be for the benefit of the public and not for private benefit." Further, in determining whether a body's functions are sufficiently for the public benefit, the Court said the following:

> "52. …I see no reason for departing from the two-part test of government control and public benefit. However, in determining whether a body's functions are sufficiently for the public benefit, a court may consider its objects, duties and powers, including the distribution of its assets…"

A municipal government would clearly satisfy this test as would most subsidiary corporations or other entities controlled by the municipal government provided the municipal government has a sufficient level of active supervision over the activities of the body, the government is empowered, directly or indirectly, to materially influence the body's governance and decision-making and the body's functions are sufficiently for the public benefit.

In addition to satisfying itself that the official mark holder is a public authority, the Registrar of Trade-marks must also satisfy itself that the official mark has been adopted and used by the public authority. What constitutes "adoption and use" of the official mark for purposes of section 9(1)(n)(iii) of the *Trademarks Act* has also been subject to judicial consideration. The question of whether an official mark has been adopted was considered by the Federal Court of Appeal in *FileNet Corp. v. Canada (Registrar of Trade Marks)*, [2002] F.C.J. No. 1508 where the court said the following:

> "First, there is the question of what constitutes "adoption" of an official mark. Counsel for Filenet argued that the official mark in question had never been adopted because there is no formal document in the nature of a resolution of a board of directors or government body that constitutes evidence of its formal adoption. However, he was unable to point to any law or regulation that mandates any particular procedure for the adoption of an official mark by a Minister or agency of the Crown. In my view, the question of adoption of an official mark is a question of fact. In this case, and I would expect in most cases, that fact is sufficiently proved by the request to the Registrar to give public notice under section 9 unless there is some cogent reason to believe that the request was not authorized. There is no such reason here."

Under this test, a council resolution to approve an official mark would provide sufficient evidence of adoption for the purposes of the *Trade-mark Act.* In addition, some element of public use or display would appear to be necessary to constitute an official mark. In *See You In - Canadian Athletes Fund Corp. v. Canadian Olympic Committee*, [2007] F.C.J. No. 541[1], the Federal Court of Canada found that "a common feature of both 'use' and 'adoption' is that there is an element of public display."

[1] Affirmed by the Federal Court of Appeal in [2008] F.C.J. No. 580.

Making their marks (continued from page 6)

Once approved, the Registrar publishes the official mark in the federal Trade-marks Journal and upon publication, the public authority can prevent any third party in Canada from adopting, registering or using the Official Mark or a mark resembling it without the consent of the public authority. Unlike trade-marks which are protected for renewable 15-year terms, Official Marks are protected indefinitely. Official Marks can be challenged in the Federal Court relying on judicial review procedures; however, these challenges are using complex and costly. As such, Official Marks are provided a high degree of permanent protection.

Coats of Arms

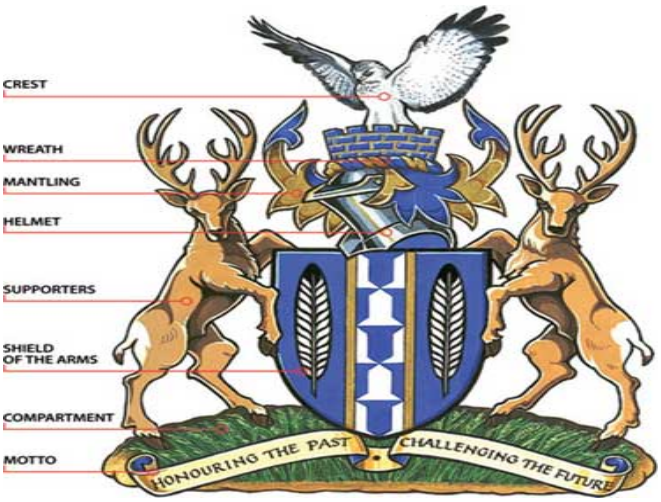
Canadian municipalities, in common with all other Canadian citizens or corporate bodies, may petition the Canadian Heraldic Authority (the "Authority") for a grant of Armorial Bearings. Armorial Bearings in Canada consist of coats of arms, flags and badges granted by the Canadian government through the Authority. The Canadian Heraldic Authority was created by Letters Patent issued on June 4, 1988, which authorized and empowered "the Governor General of Canada to exercise or provide for the exercise of all powers and authorities lawfully belonging to Us as Queen of Canada in respect of the granting of Armorial Bearings in Canada". Prior to that time, Canadians who wished to acquire arms from a lawfully established authority under the Crown were obliged to apply to one of two heraldic offices in the United Kingdom, the College of Arms in London or the Court of the Lord Lyon in Edinburgh.

To apply for Armorial Bearings, the petitioner submits a request to the Canadian Heraldic Authority. A municipality's request should include a brief history and a copy of the document establishing its legal existence, a current annual report or financial statement and a copy of the council resolution requesting the grant. Upon recommendation of the Chief Herald, a warrant is signed authorizing the Authority to proceed with the preparation of the Armorial Bearings.

There are three main stages in the grant process: 1) the creation of a written description for the Armorial Bearings; 2) the preparation of a preliminary design; and 3) the production of the official letters patent approving the Armorial Bearings. The first two stages involve the interaction of the Petitioner and Authority officials in the preliminary design and approval of the heraldic emblems. This includes the involvement of accredited artists and calligraphers in the design of the Armorial Bearings: The proposed Armorial Bearings must be approved by both the petitioner and the Chief herald of Canada, who is responsible for following acceptable heraldic practice and for maintaining aesthetic standards. An example of Coats of Arms following this practice is shown at the bottom of this article. [2]

The third and final stage of the grant process involves the preparation of the grant document known as letters patent. The letters patent include the final artistic illustration of the Armorial Bearings accompanied by a legal text and it is signed and sealed by the Authority. Notice of the grant is published in the *Canada Gazette* and the Armorial Bearings are added to the online Public Register of Arms, Flags and Badges of Canada. The petitioner pays all costs of the process before the Letters Patent are issued. These costs include: a processing fee (payable at the time a warrant is signed authorizing the grant of Armorial Bearings); research and translation costs; artwork costs; and the cost of letters patent. On average, the time required to complete a grant is about 12 to 14 months after the warrant has been signed. ***Lindsay Parcells***

[2] The Coat of Arms of the Town of Penhold, Alberta, as displayed on the website of the Heraldic Authority of Canada: http://archive.gg.ca/heraldry/pg/index_e.asp .



Bylaw Drafting: Avoiding Vague Provisions

If a provision in a bylaw has no definite meaning in law and is too uncertain to be enforceable the provision is invalid. A bylaw is uncertain when it is "too general and nebulous to admit of any definite interpretation". In the BC Court of Appeal decision in *Okanagan Land Development Corp. v. Vernon (City)*, Levine J.A. (upholding an excess and extended services bylaw) adopted the reasoning in *Riley v. Columbia Shuswap (Regional District)* (2002, BCCA) and *Dhillon v. Richmond (Mun.)* (1987, BCSC) and described the test for uncertainty as follows:

> The general approach to examining a municipal by-law whose validity is challenged on the grounds of uncertainty or vagueness is that the vagueness must be so pronounced that a reasonably intelligent person would be unable to determine the meaning of the by-law and govern his actions accordingly. A mere difficulty in interpretation will not be sufficient.

Levine J.A. went on to cite the Supreme Court of Canada decision in *The City of Montreal v. Morgan* (1920, SCC):

> I fully recognize the force of the general rules that the language of by-laws should be explicit and free from ambiguity, and that by-laws in restraint of rights of property as well as penal by-laws should be strictly construed. But the very statement of the latter rule implies that a by-law is not necessarily invalid because its terms call for construction - as does also another well recognized rule, viz., that a by-law of a public representative body clothed with ample authority should be "benevolently" interpreted and supported if possible. *Kruse v. Johnston* [[1898] 2 Q.B. 91 at 99] It may be a counsel of perfection that in drafting by-laws the use of words susceptible of more than one interpretation should be avoided; but it is too much to exact of municipal councils that such a degree of certainty should always be attained. It would be going quite too far to say that merely because a term used in a by-law may be susceptible of more than one interpretation the by-law is necessarily bad for uncertainty.

Ultimately in the Vernon case, in regard to the latecomer bylaw, Levine J.A. held that despite the fact that the impugned bylaw and schedules were inelegantly drafted, if they are read together as a whole, a reasonably intelligent person would be able to determine the meaning of the bylaw and know his or her obligations. On that basis, the Court of Appeal upheld the validity of the bylaw at issue.

On the other hand, in *Barthrop et. al.* v. *Corporation of the District of West Vancouver and Field* (1979, BCSC), the impugned bylaw referred to structures that were "near the bank of any water course" and at "variance with the technical standards of … the drainage survey of Dayton and Knight Ltd.". The Court held that it would be impossible for the landowner to determine

Bylaw drafting (continued from page 8)

whether his residence was near a water course or whether there was a variance with the technical standards set out in the 238 page report. The technical report was written in "non-legal language" and contained reference to hypothetical cases based on "estimated channels". Mr. Justice Murray stated at page 205 that "the mere fact that the channels are estimated is sufficient to create "uncertainty".

In *British Columbia Electric Company Limited* (referred to above) Mr. Justice McInnes stated that:

"applying the test of those decisions to the particular wording under attack, viz, "provided that the establishment of such utility transmission line in no way shall adversely affect the orderly development of the area through which it passes", the first question that naturally arises is, when is the test contemplated by the words in question to be applied? Secondly, who is to apply the test, and what will be the basis upon which the test will be applied? The words of the bylaw presently drafted are far too general and nebulous to admit of any definite interpretation being put upon their meaning. As one example, namely, the question of who is to apply the test, is it to be the municipal council itself, is it the municipal engineer, the building inspector, or the chairman of the town planning commission, or some other authority?"

Words and phrases which have been held to be uncertain (resulting in the bylaw being unenforceable) include:

- "small articles": *Re Bunce and Cobourg* (1963), 39 D.L.R. (2d) 513 (Ont. C.A.);
- "seasonal dwelling": *Mueller* v. *Tiny* (1976), 72 D.L.R. (3d) 28 (Ont. S.C.);
- "dangerous goods": *Can. Occidental Petroleum* v. *North Vancouver* (1983), 46 B.C.L.R. 179 (B.C.S.C.);
- "within a reasonable time": *Long Branch* v. *Hogle*, [1947] O.R. 436 (Ont. S.C.);
- "reasonable efforts": *Re Weir* (1979) 102 D.L.R. (3d) 273 (Ont. S.C.);
- "sex-oriented products": *Red Hot Video Ltd.* v. *Vancouver* 91985) 29 M.P.L.R. 211 (B.C.C.A.); and
- "environmental impact study": *Doman Industries Ltd.* v. *North Cowichan* (1980) 111 D.L.R. (3d) 358 (S.C.B.C.).

Finally, if there are two possible meanings for a term in a bylaw, the meaning which favours the property owner or resident (as opposed to the local government) must be applied [*Wilson* v. *Jones*, [1968] S.C.R. 554 (S.C.C.); *Home Depot Canada v. Richmond (City)* (1996), 33 M.P.L.R. (2d) 227 (B.C.S.C.)]. – ***Don Lidstone, Q.C.***

Potable Water: Dealing With Your Health Authority

The *Drinking Water Protection Act* applies to all water systems other than domestic water systems that serve only one single-family residence. The main requirements of the Act is that a water supplier must provide, to the users served by its water system, drinking water that:

a) is potable; and

b) meets any additional requirements established by the regulations or the water supplier's operating permit.

Potable water (continued from page 9)

However, the *Drinking Water Protection Regulation* provides exemptions from this requirement for small systems: (a) that do not provide water for human consumption or food preparation (and are not connected to a water supply system that does); or (b) where each recipient of the water from the system has a point of entry or point of use treatment system that makes the water potable.

The five regional health authorities established under the *Health Authorities Act* are responsible for implementation of most aspects of the Act. In particular, the regional health authorities employ the drinking water officers who are the statutory officials that hold responsibility for most of the powers and functions under the Act. The health authorities also employ other officials to whom the powers of drinking water officers may be delegated. Drinking water officers are appointed under section 3 of the Act. There may be one or more drinking water officers in each health authority.

A drinking water officer may enter on or into any property to conduct an inspection for the purpose of determining whether a health hazard exists or compliance with the Act and Regulations. A drinking water officer may also undertake an investigation, which occurs when an official has some reason to believe that some form of non-compliance exists.

Significantly, the Act provides that a water supplier must comply with all terms and conditions of its operating permit (section 8(1)(b)). Sections 8(3) and (4) of the Act authorize the drinking water officer to amend the terms and conditions of an operating permit, if the officer "considers this advisable". Section 8(3) of the Act expressly contemplates treatment and monitoring requirements, and section 8(5) authorizes terms and conditions that are more onerous than those set out under the Act.

Because of s. 4 of the Regulation, which expressly makes s. 8 of the Act apply to all water supply systems, a water supplier is bound to meet all operating permit and monitoring requirements even if one of the exemptions set out above applies. That said, where an exemption does apply, the water supplier's operating permit cannot impose requirements stricter than potability under s. 8(3)(e) of the Act.

While the Act provides for reconsiderations and reviews of a "decision" of a drinking water officer, the term "decision" is limited by section 39.1 and does not include amendment of the terms of an operating permit. Thus, there are no legislative

Potable water (continued from page 10)

provisions for a reconsideration or review of a decision made pursuant to s. 8. ***Matt Voell***

Limitation Act Amended

The Province of British Columbia has amended the *Limitation Act* in an attempt to synchronize the legislation with that of other provinces. Though much of the old act has been carried forward, the new Act attempts to bring more clarity. It should be noted that aboriginal and treaty claims will remain governed by the limitations set out in the old act despite its repeal.

As before, the "basic limitation period" is the generally applicable period in which someone can bring a civil claim to court. This period remains based on the "accrual method," so the time only starts running once the damage reasonably ought to have been discovered. However, just one basic limitation period of 2 years (s. 6), and a 10-year limitation period for enforcing a monetary judgment (s. 7), replace the previous three different periods which were dependent upon the type of claim.

The "ultimate limitation period" has also been decreased from 30 years to 15. This period determines the maximum time a claim can be brought, despite being "extinguished" by a basic limitation period. Under the new Act, the single period runs from the date of the act or omission that caused the damage, regardless of when, or whether, the claimant has discovered the damage (s. 21(1)).

Exceptions are still made for minors, persons with disabilities, and dishonest defendants, to whom the basic limitation period still does not apply. The ultimate limitation period remains ineffective with respect to minors; is now ineffective respecting disabled persons without caregivers (s. 7); and now resets on the date a claimant discovers damage or loss if they were willfully mislead (s. 21(3)), or on the date the defendant admits to liability.

These changes may over time prove to be advantageous to local governments, whose works or conduct is often exposed to long-term liability and stale-dated claims. In addition to this protection, it should be noted the Act does not interfere with the application of limitation periods established for local governments under more specific legislation, namely the *Local Government Act*. This includes the continued effect of the 6 month period for claims against municipalities for actions done with statutory authority (*Local Government Act*, s. 285), and the two month period for receiving notice of liability (*Local Government Act*, s. 286). However, the degree of protection that s. 285 can offer municipalities remains dependent on its reading. Following the cases of *Gringmuth v. North Vancouver* (2002) and in *Pausche v. B.C. Hydro et al* (2000), local governments can be excluded from this provision's protection in regard to negligence or breach of contract. In such cases, these actions are subject to the time limits set out in the *Limitation Act*. Previously, such actions would have had periods of two and six years respectively, but now both actions would fall under a two year limitation period if the protection of s. 285 is excluded.

In regard to s. 286 of the *Local Government Act*, judicial consideration is not restricted to unlawful acts as in regard to s. 285, and thus s. 286 more predictably offers local governments more protection. However, in *Thauli v Delta (Corporation)* (2008), it was said that if the gravity of the loss was only apparent after the expiry of the notice period, the complainant would have a legitimate excuse under s. 286(3)(a) to escape the time limitation in s. 296, and therefore in such case the municipality might be faced with a significantly older claim.

***Limitation Act* (continued from page 11)**

Though local governments, often faced with long-term liability, are generally supportive of the changes to the *Limitation Act*, some pundits submit that the limitation periods favour the defendants. In fact, local governments may themselves face such a constraint if, for example, they attempt to claim in regard to a public work that was found to be negligently constructed by a contractor, but only after the ultimate limitation period. It is argued by some that though the Act is much simpler in application than it was previously, it now has the potential to promote a mentality of "suing first and asking questions later." The amended Act came into force June 1.

Don Lidstone, Q.C.

Constitutionality of moorage zoning bylaw challenged: West Kelowna (District) v. Newcombe, 2013 BCSC 1411

In 2009, the District of West Kelowna amended its W1 Water Use (Recreational) Zoning bylaw to prohibit "moorage of floating residential structures such as houseboats" on Okanagan Lake. In 2010, the Province granted the District a 10 year Licence of Occupation for "public recreation and park purposes" for Gellatly Bay, an area covered by the District's WI Zone. The defendant, Mr. Newcombe, lost his moorage at one marina, and moved his houseboat to a buoy in Gellatly Bay, inside the Licence Area, where he kept the boat from 2008 to 2010. When the Licence Area came into effect in 2010, houseboat owners permanently moored in the area were given notices to relocate their vessels. Mr. Newcombe remained in the Licence Area for over two weeks before moving his houseboat but was still within the District's W1 Zone.

The District sought a declaration that Newcombe was in breach of the Licence of Occupation, an injunction restraining him from mooring in the Licence Area and a declaration that he was in breach of the W1 Zoning regulations.

The first issue was to identify the boundaries of the Licence Area. The defendant argued that the bed of the bay was not included in the description of the Licence. The court quickly disposed of this issue, finding that as the BCCA has held, when lands conveyed in a grant are described by reference to a plan, the description of the land is a legal construction. By looking at the plan, the court held that Licence Area included the foreshore and the bed of the bay.

Secondly, the court analyzed whether the Licence of Occupation was constitutionally valid. The question was whether the Province had authority to regulate this area as it overlaps with federal fisheries jurisdiction. The court easily found that the Province does have authority over the management and sale of public lands, including provincial foreshore. Public land, as defined in the *Land Act* includes "land, whether or not it is covered by water". It found that land beneath the water is the property of the provincial government, and Licence of Occupation is constitutionally valid.

However, the court held that because the W1 Zone prohibits even temporary moorage within the W1 Zone, the District has trenched on the federal government's powers over matters of navigation and shipping. Therefore, it found that the Licence of Occupation and the Bylaw are constitutionally valid, but must be read down so as to not apply to temporary moorage, directly incidental and related to, the active recreational use of vessels in the waters within the W1 Zone.

The final issue was to determine whether Mr. Newcombe's moorage in the Licence Area or W1 Zone breached the Licence of Occupation or zoning bylaws. The court held that Mr.

Constitutionality of moorage (continued from page 11)

Newcombe's moorage amounted to a breach of both the Licence of Occupation and the terms of the W1 Zone because he was not mooring the boat temporarily or actively using it for recreation.
Carrie Bavin

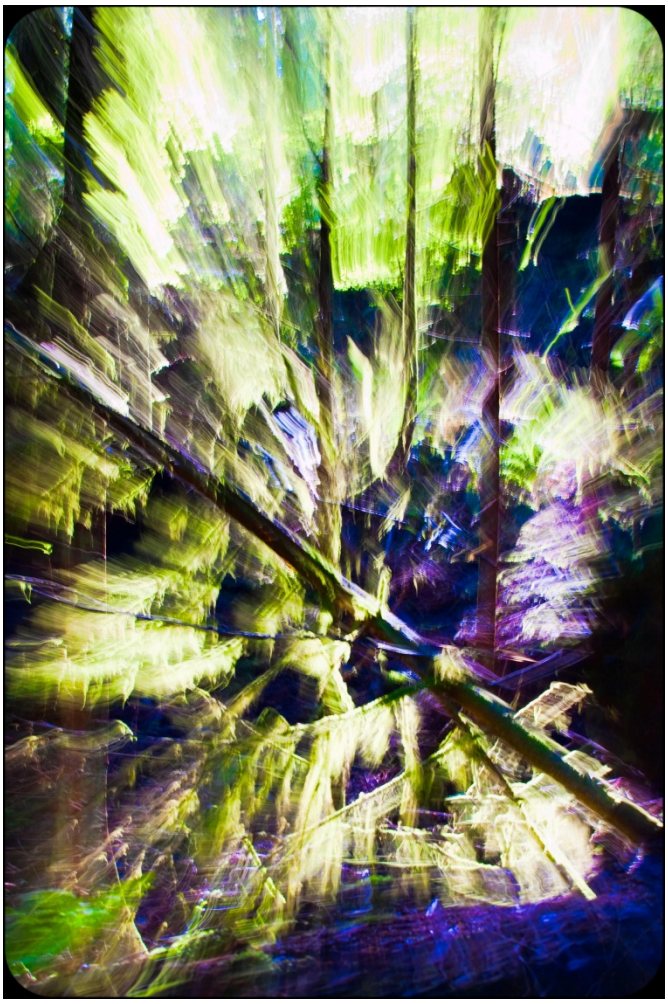
City does not have to prove property owners knew about drug lab to recoup clean-up costs: Abu Moosa v. City of Mississauga, 2013 ONSC 4887

Mr. Moosa and his wife own a house in Mississauga and rented it out while living in Qatar since 2004. They hired a property management company to manage the property. It was rented out to a couple with two children. In late July, 2006, there was an explosion and fire at the property. The fire marshall determined that the cause was due to an illegal drug lab on the property.

The City of Mississauga incurred costs totalling $178,309.05 for cleaning up Mr. Moosa's house, which were assessed against the property. Mr. Moosa challenged the City's bylaw prohibiting the production, trade and distribution of a controlled substance. The bylaw read in part, "No person, owner or occupant of property within the City of Mississauga shall permit or allow the property to become or remain a place for the trade, business, manufacture of a controlled substance".

Mr. Moosa argued that because he was outside of the country and had hired a property manager, he had no knowledge or reason to believe that the drug lab operation was taking place and therefore the bylaw should not apply to him.

The court looked at the overall context of the bylaw and noted that the purpose is to provide the City with the means to deal swiftly with health and safety issues that arise from prohibited conduct. Further, the bylaw was classified by the court as a strict liability offence, meaning that there is no requirement for the City to prove that the property owner had knowledge. The only aspect the City had to prove was that the prohibited act occurred; however, it is open to a defendant to demonstrate they had mistaken belief in a set of facts or exercised reasonable care and should escape liability.



The court concluded that Mr. Moosa had not been charged with an offence; rather, the City relied on the bylaw to recover costs associated with the clean-up of the property. The City acted reasonably in seeking to recoup the costs of the clean-up. Mr. Moosa's reliance on the information

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provided to him by the property management firm was found to not excuse him from the application of the bylaw. The court noted that he was open to recover the costs from the property management company, and he had already commenced an action to do this. ***Carrie Bavin***

Court rules noise bylaw not too vague but could be improved: Salt Spring Island Rod and Gun Club v. Capital Regional District, 2013 BCSC 1612

Salt Spring Island Rod and Gun Club was seeking a declaration that sections of the Capital Regional District's (CRD) "Noise Suppression" bylaw are invalid. Since 1961, the Club has operated an indoor and outdoor shooting range on Salt Spring Island. Over the past two years, the CRD received numerous complaints from neighbours adjacent to the Club's property about the noise from the discharge of firearms.

The CRD issued three tickets under s. 3(6) of the bylaw, which reads: "No person shall discharge a firearm before 9:00 am or after sunset that disturbs other people as described in Section 2 of this Bylaw". An additional three tickets were issued under s. 2: "No person shall make, cause to be made, or continue to make any noise or sound in the Electoral Area which creates a noise that disturbs or tends to disturb the quiet, peace, rest, enjoyment, comfort or convenience of the neighbourhood or of persons at or near the source of such noise or sound". The zoning of the land where the Club is located permits "non-commercial active outdoor recreation".

The Club argued that s. 2 of the bylaw is too vague because it does not articulate what noise is permitted when discharging a firearm. The court outlined the test for determining whether a municipal bylaw is too vague: "The general approach to examining a municipal bylaw whose validity is challenged on the grounds of uncertainty or vagueness is that the vagueness must be so pronounced that a reasonably intelligent person would be unable to determine the meaning of the bylaw and govern his actions accordingly. A mere difficulty in interpretation will not be sufficient".

The court drew a comparison between this case and a previous case involving a commercial dog kennel in the City of Coquitlam, stating: "Just as dogs bark, firearms make noise when discharged. This must have been realized by the Islands Trust when the zoning bylaws were passed, allowing activities which include the discharge of firearms on the petitioner's property". In other words, the court said it would be absurd to think that the permitted activity of discharging firearms on the Club's property only allows the discharge of firearms that do not create noise.

The court concluded that the bylaw does not restrict the noise emanating from the discharge of firearms on the Club's property between 9:00 a.m. and sunset. While the bylaw was not struck down for being too vague, it was recommended that the CRD make amendments to clearly define impermissible noise from the Club "by reference to criteria such as the decibel level as measured on a sound level measuring device or other objectively determinable criteria". The tickets issued under s. 3(6) of the bylaw were quashed. ***Carrie Bavin***

Soil removal bylaw deemed invalid at BC Court of Appeal: Peachland (District) v Peachland Self Storage Ltd. 2013 BCCA 273

You may remember our summary of this case at the Supreme Court level from our April 2013 newsletter. The case was subsequently appealed. The District of Peachland was seeking to uphold a bylaw that limits soil extraction from a parcel of land to 200 m^3 per year. The BC Court of Appeal agreed with the chambers judge's conclusion that the bylaw places the limit on soil removal so low that no industrial-scale extraction is possible; thus, it was characterized as a prohibition. The court stated that the focus of s. 9(3) of the *Community Charter* is on the provincial interest in extraction industries, and therefore any bylaws that "prohibit" soil removal requires ministerial approval.

The bylaw was deemed invalid and the appeal was dismissed. ***Carrie Bavin***

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Lidstone & Company is a local government law firm that acts primarily for municipalities and regional districts. The firm also acts for entities that serve special local government purposes, including local government associations, and local government authorities, boards, commissions, corporations, societies, or agencies, including police forces and library boards.

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

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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 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 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 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 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 labour and employment, 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.

Matt Voell is a litigation lawyer and also prepares legal opinions, agreements and bylaws in relation to a wide variety of local government law matters, with a strong interest in labour and employment law and trademarks, copyrights and heraldry. Matt obtained his law degree at the University of British Columbia then worked as an Ethics and Research Fellow in the areas of health and intellectual property policy. 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.

Carrie Bavin is an articled student. Carrie graduated from the University of Victoria Faculty of Law in the spring of 2013, and commenced the Professional Legal Training Course shortly thereafter. Carrie was selected as a top applicant from her first year law class for a fellowship to generate research reports on debt regulation. Carrie's legal academic paper on the legal consequences of failing to regionalize BC's police forces was nominated for a law faculty writing award. Carrie has received numerous other awards throughout her academic career. Prior to going to law school Carrie worked as an independent communications professional for the provincial and federal government, non-profit organizations and the private sector.

Robin Dean is our new articled student. Robin studied law at University of British Columbia and University of Washington, and served as a judicial law clerk at the Washington State Court of Appeals. While in law school Robin was Editor of the Pacific Rim Law & Policy Journal. Before beginning her path to a career in the law, Robin served as an art gallery and museum curator.