LIDSTONE & COMPANY

Law Letter

In this issue

Tsilhqot'in Nation v British Columbia

The Supreme Court of Canada decision in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, marked the first declaration of aboriginal title to Crown Land in Canada. Thirty years earlier, the Tsilhqot'in Nation had objected to BC granting a commercial logging licence on land the Tsilhqot'in considered part of their traditional territory. The Tsilhqot'in brought an action to prohibit logging and added a claim of aboriginal title to the land when their talks with the province "reached an impasse."

The BC Supreme Court found that the Tsilhqot'in established aboriginal title by showing regular and exclusive use of the territory claimed before the assertion of British sovereignty in 1846. The BC Court of Appeal applied a narrower, site-specific occupation test requiring proof of intensive use of a definite tract of land. SCC Chief Justice McLachlin, writing for a unanimous court held:

> There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. [Para. 42]

The SCC summarized the requirements for establishing aboriginal title as, "sufficient pre-sovereignty occupation, continuous occupation (where present occupation is relied on); and exclusive historic occupation." [Para. 30]

In reaching its decision to grant the Tsilhqot'in aboriginal title to 1700 square kilometres west and south of Williams Lake, the SCC noted that the beneficial interest in that land now rests with the Tsilhqot'in and

not the Crown. The SCC defined aboriginal title in terms of a broad range of ownership

the Law Letter is published quarterly by:

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

Thanks to our editors Deborah Low and Kimberly Mittelsteadt.

This Newsletter is circulated in PDF format by request.

rights similar to fee simple land interests:

- the right to decide how the land will be used;
- the right of enjoyment and occupancy of the land;
- the right to possess the land;
- the right to the economic benefits of the land;
- the right to pro-actively use and manage the land. [Para. 73]

Importantly, following the Tsilhqot'in decision, if the Crown or others seek to use or occupy aboriginal title lands, they must first obtain the consent of the First Nation holding aboriginal title. If that consent is not forthcoming, they must meet a stringent test to justify the incursion on aboriginal title lands pursuant to s. 35 of the *Constitution Act, 1982*. The Court summarized:

> Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also **be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group.** [emphasis added, Para. 88]

The SCC also noted that an aboriginal title interest differs from fee simple interest in land in a significant respect:

> In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, **subject to one carve-out — that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations**. [emphasis added, Para. 88]

Implications for the Crown

First Nations with a strong aboriginal title claim that have not yet established title can be expected to assert their title interests if their rights are not properly recognized and accommodated by the Crown. Indeed, if aboriginal title is proven at some later date, a project that proceeded in the face of an aboriginal title claim may be cancelled. The SCC noted:

> …Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. [Para. 91]
>
> Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. [Para. 92]

While provincial laws of general application will, for the most part, continue to apply to aboriginal title lands, constitutional limits will have a bearing. For example, while legislation aimed at protecting the environment would likely continue to apply, legislation which grants a timber licence on aboriginal title lands to a third party would not. As the SCC noted:

> General regulatory legislation, which may affect the manner in which the Aboriginal right can be exercised, differs from legislation that assigns Aboriginal property rights to third parties. The issuance of timber licences on Aboriginal title land for example — a direct transfer of Aboriginal property rights to a third party — will plainly be a meaningful diminution in the Aboriginal group's ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent. [Para. 124]

Local government implications

The Tsilhqot'in decision makes it clear that local governments with federal and provincial Crown land parcels within their boundaries have a strong, though mostly indirect, interest in consultation with First Nations. The duty to consult and accommodate First Nations` interests always rests with the Crown[1], but the outcome can have a direct impact on local governments.

[1] For a further discussion of Crown and Local Government consultation, the reader is referred to the article by Rob Botterell in our June 2014 Law Letter and the article by Maegen Gitrow in our December 2012 Law Letter.

First Nations who have actual aboriginal title or 'de facto' aboriginal title (through government recognition of a strong aboriginal title interest) to Crown land parcels may have significantly different goals, priorities and requirements than the provincial or federal Crown.

The impact on Crown land parcels of this "ownership change" will likely be felt in a number of areas including:

- Land use management and planning;
- Existing and proposed developments and tenures;
- Property taxation and payments in lieu of taxes;
- Existing local government tenures on the Crown land parcels; and
- Development servicing.

The Crown, local government and the First Nation have a common interest in identifying and reviewing these impacts collaboratively and reconciling their respective interests to the satisfaction of all parties, including local government.

In our view the provincial and federal Crown should make the resources available to local governments so they have the capacity to meaningfully participate in these reconciliation processes necessitated by the Tsilhqot'in decision. ***Rob Botterell***

Partnering for Economic Development

One of the core purposes of BC municipalities under s. 7(d) of the *Community Charter* is to foster the "economic, social and environmental well-being" of their respective communities. In fulfilling this purpose, BC municipalities are of course subject to national and international economic trends over which they have little control; nevertheless, economic development remains an important objective of most local governments.[2] However, while economic development remains an important objective of most local governments, a 2010 study by the UBCM found that many local governments are hampered by a lack of resources:

> "The challenge of economic development delivery is largely one of resources… There remains a large discrepancy in the level and type of local government intervention in economic development. The reasons for this appear to be mixed. For some local governments economic development planning is simply not an area that is considered a necessary or desirable activity and for others more pressing issues win out. For a large majority, however, it comes down to a lack of resources. Lack of human and financial resources were the primary barriers identified in the survey and for the majority of local governments

[2] *Evaluating the Economic Development Role of Local Governments*, UBCM, April 2010.

Economic Development (continued from page 4)

> there remains little room to move beyond traditional service delivery even though that is often what is expected, particularly in the current economic climate."[3]

One option local governments may use to leverage their resources is a partnering agreement under s. 21 of the *Community Charter* (and s. 183 of the *Local Government Act*). Under the partnering agreement, a person, corporation or other business entity or a public authority provides economic development services on behalf of the local government either generally or in connection with particular economic development projects. The party providing the economic development services may be a wholly-owned municipal corporation controlled by the local government or an independent entity acting at arm's length.

There may be a number of advantages for local governments in entering into partnering agreements for economic development purposes. The arrangement may enable the local government to limit liability and financial exposure to taxpayers by transferring those risks to the partner. Delegating responsibility for economic development to the partner may also free up council and staff time and take advantage of expertise provided by individuals who are not municipal councilors or employees. The partner may also be able to access funding that would otherwise not be available to the local government for economic development purposes. For all of these reasons, partnering agreements can serve a useful purpose in furthering the economic development objectives of the local government. In most partnering agreements, a local government will provide some kind of assistance to the party providing the services on behalf of the local government. The assistance may take any of the forms detailed in s. 24 of the *Community Charter* (or s. 181 of the *Local Government Act*) including the provision of land or improvements for less than market value, financial grants or low-interest loans, loan guarantees or other forms of assistance detailed in the partnering agreement. If the partner under the partnering agreement is a business, whether wholly-owned by the local government or an independent entity, local governments may only provide assistance to the business in accordance with the requirements of the *Community Charter* and the *Local Government Act.* Subject to certain statutory exceptions, section 25 of the *Community Charter* prohibits municipal councils from providing any "grant, benefit, advantage or other form of assistance to a business" unless expressly authorized under this or another Act". Similarly, under section 182 of the *Local Government Act*, a regional board may not "provide assistance to an industrial, commercial or business undertaking." unless otherwise permitted under the Act.

The partnering agreement is typically the most common instrument used by local governments to provide assistance to business. In accordance with the definition of partnering agreement in s. 1 of the Schedule to the *Community Charter*, a partnering agreement requires the business to provide a service on behalf of the municipality, other than a service that is part of the general administration of the municipality. Likewise, in accordance with the definition of service in s. 1 of the Schedule, a service requires "an activity, work or facility undertaken or provided by or on behalf of the municipality". In the case of *Conibear v. Tahsis (Mayor)*, the BC Supreme Court found that an agreement between Tahsis and a music promoter, "Bounce Hard", for a music concert did not constitute a partnering agreement because the music promoter's obligations under the contract did not constitute a service. In relation to the contract, the judge said the following:

[3] See note 1, at p. 64.

Economic Development (continued from page 5)

> "In my opinion, although putting on a concert qualifies as an "activity", it cannot be considered "providing a service on behalf of the municipality." A person does something "on behalf of" another, when he or she does the thing in the interest of, or as a representative of, the other person. Bounce Hard is not acting on behalf of the Village. Bounce Hard is promoting the Festival because it wants to earn profits and the Village also hopes to earn profits and promote Tahsis as a tourism destination. Both parties want the Festival to be a success and it cannot be said that Bounce Hard is providing a service on behalf of Tahsis."

A local government should therefore ensure that any partnering agreement it enters into clearly provides a service on behalf of the local government.

Of course, any expenditure or liabilities incurred by a municipality in connection with assistance provided under a partnering agreement will need to comply with Part 6, Division 3 of the *Community Charter* (ss. 173-187). As well, before providing assistance under a partnering agreement, the local governments must provide notice of assistance. Pursuant to s. 24 of the *Community Charter*, the notice must identify the intended recipient of the assistance and describe the nature, term and extent of the proposed assistance. The notice must be posted in the public notice posting places and published in a local newspaper for two consecutive weeks or as otherwise required under section 94 of the *Community Charter*. Similar requirements apply to local governments under section 185 of the *Local Government Act*.

Local governments should be careful to ensure that the notice requirements are met before the assistance is provided under a proposed partnering agreement. A council or board resolution to approve assistance is permissible provided the assistance is subject to, and conditional upon, notice of the proposed assistance being provided to the public in accordance with the statutory requirements. In *Coalition for a Safer Stronger Inner City Kelowna v. Kelowna (City)*, the petitioners sought a declaration that the respondent City's resolution approving a lease of its property was void and of no effect due to its alleged failure to comply with the notice requirements under the *Community Charter*. The Petitioners contended that the resolution of City council approving the lease was passed before notice was given to the public; however, the BC Supreme Court disagreed and said the following concerning the timing of the resolution and the notice provided:

> "23 I find that the resolution authorizing the execution of the lease is not a disposition of land or improvements. Thus, the resolution of itself simply provides the authority for the creation of the legal obligation and not the legal obligation itself. The learned editor of the *Law of Canadian Municipal Corporations, 2nd edition*, Toronto, Carswell, 2005, says in para. 197.31:
>
> > '... a mere resolution or by-law whereby a corporation agrees to do something, without more, does not give rise to a legal obligation on the part of the corporation. A resolution authorizing the contract or accepting a tender is to be

Economic Development (continued from page 6)

> regarded as a mere expression of willingness to enter into an agreement but not necessarily as a contract itself.'
>
> "24 Similarly, in *North Vancouver (District) v. Tracy* (1903), 34 S.C.R. 132, the court at p. 139 says this:
>
> '... a resolution sanctioned by a vote ... of the council" can only be interpreted as specifying the method by which the enactment of the governing body giving authority for such a sale should be made. Until acted on the plaintiff acquired no right under it. So far as he was concerned it could have been rescinded or modified at the pleasure of the council.'"

The restrictions on assistance to business prescribed by the *Community Charter* and *Local Government Act* reflect the fact that local governments and businesses have different purposes. Businesses generally earn a profit, while local governments are established to provide services, laws and other matters for community benefit, provide for stewardship of the public assets of its community, and foster the economic, social and environmental well-being of its community. Despite the differences, a local government and business may work together for mutual benefit for the purpose of furthering economic development in the community. If and when these circumstances are identified, a partnering agreement may provide a very useful tool. ***Lindsay Parcells***

Employment Law: the Right to be Heard

For years, the common law provided that public employees were entitled to procedural fairness protections in the termination process. Such protections generally included the right to know the reasons for the termination and an opportunity to be heard by the employer prior to being terminated. In *Dunsmuir v. New Brunswick,* 2008 SCC 9, the Supreme Court of Canada re-wrote this requirement, with a majority of the Court ruling that the dismissal of public employees should generally be governed by the law of contract. If a decision to dismiss an employee is properly within the public authority's powers and is taken pursuant to an employment contract governing that employee, there will be no additional duty of fairness imposed on the employer. However, the majority emphasized that public authorities must still abide by any statutory restrictions on the exercise of their discretion as employers, regardless of the terms of an employment contract, and that public authorities could not contract out of their statutory duties.

Interestingly, municipal officers under the *Community Charter* are public employees who still enjoy certain procedural fairness protections before being terminated because such protections are expressly provided for in s. 152 of the *Community Charter.* [Municipal officers include the Chief Administrative Officer, the Corporate Officer, the Financial Officer, and any other employees who occupy positions that Council may have designated as officer positions by bylaw.] Section 152 of the *Charter* requires Council to provide an officer with an opportunity to be heard prior to being terminated. A recent decision of the B.C. Supreme Court affirms the importance of meeting this requirement.

In *Ramsay v. Terrace (City),* 2014 BCSC 1292, the plaintiff sued the City of Terrace for damages arising from what he said was his forced

resignation from his employment as the CAO of the City of Terrace. The City argued, in part, that the plaintiff had voluntarily resigned and that he was entitled to pay in lieu of notice of two weeks in accordance with his resignation agreement.

The plaintiff had begun working for the City as CAO in March 2012. His employment with the City lasted three and a half months, ending on the day that Council addressed his first performance review. The Mayor met with the plaintiff and advised him that the performance review had not gone well. He handed the plaintiff a letter which advised the plaintiff that, based on the results of the first performance review, Council had determined that he was unsuitable for the position of CAO and recommended that his employment be terminated. The letter noted s. 152 of the *Community Charter* and the plaintiff's right to be heard and advised that, in accordance with the *Employment Standards Act,* he was entitled to one week's wages as compensation after three consecutive months of employment. The letter also contained an offer by the City that the plaintiff simply resign from his position with a severance package of two weeks' wages in return for agreeing to waive the right to a hearing. The letter advised the plaintiff to sign the letter if he agreed to accept the offer. If he did not, he would be suspended and a special *in camera* meeting would be scheduled as soon as possible to give him an opportunity to be heard.

The Mayor also provided the plaintiff with a redacted copy of the performance review. The court noted that the document was conclusory: "It contained no commentary and no facts. It did not provide reference to a single incident or contain a single particular of Mr. Ramsay's conduct which apparently was complained of" (at para. 21). Although the City argued that the plaintiff would have been provided with the particulars necessary to defend himself at the hearing if he had requested one, the court found that this information was not conveyed to the plaintiff at the meeting. Essentially, he had to choose between resigning and facing the hearing without knowing the case against him. The plaintiff signed the letter to resign and the meeting ended. The plaintiff later brought his claim for damages.

The Court ruled, first, that the plaintiff did not resign because the alleged resignation was neither informed nor voluntary. The Court noted that the plaintiff had a statutory right to be heard under s. 152 of the *Community Charter.* The right to be heard includes two components: the right of the individual to know the case against him or her and the right to present his or her case to the decision maker. In this case, the plaintiff was deprived this right because he was never informed of the case against him. More importantly, the court noted, before he was required to reach his decision to resign or have a hearing, he was not told he would ever be provided with the case against him. Therefore, his decision to resign was uninformed. It was also involuntary as the City framed the question for the plaintiff as one of resigning with the inducement of an extra week's pay or facing immediate suspension and a termination hearing, the outcome of which seemed obvious from the plaintiff's perspective.

Given that the plaintiff was forced to resign, the court ruled that there was never a termination in the manner required by statute. The City was not saved by the fact that the plaintiff had been a probationary employee. The Court cited *Reglin v. Creston (Town),* 2004 BCSC 790, for the authority that an employer who denies hearing rights to which an employee is entitled before being dismissed is liable in damages as a result. As in *Reglin,* the court ruled that the only reasonable remedy for the plaintiff was an award of damages in addition to those to which he was otherwise entitled. Given that he was a probationary employee, he was not entitled to damages in lieu of notice because he was not entitled to notice. However, for the denial of the plaintiff's full hearing rights, the court awarded damages

equivalent to six months' of the plaintiff's salary as of the date of termination, together with any other payments the plaintiff would have received from the City, had he been dismissed without cause on six months' notice as an employee not on probation.

The *Ramsay* case serves as a useful reminder of what the obligation in s. 152 encompasses. Even in instances where Council may put forward a resignation offer or an offer to terminate on more favourable terms if the employee will waive the right to a hearing (which is quite common), it must still identify to the employee that he or she has a right to be heard and give that employee some indication of what the reasons for the proposed termination are. That way, if the employee chooses to exercise the right to be heard, he or she has some idea of what they might say to address the concerns of Council and to convince a majority of Council not to vote in favour of termination. If the employee chooses not to exercise the right to be heard, at least the Council will have discharged its statutory duty and avoid a finding that the resulting resignation is informed or involuntary. ***Marisa Cruickshank***

Burnaby fights to protect domain of municipal laws

Municipal bylaw enforcement powers are starkly in issue right now in a matter the City of Burnaby has brought before the B.C. Supreme Court. Burnaby has asked the Court to rule that the National Energy Board does not have the authority under the Canadian Constitution to make any Order against Burnaby that would interfere with the City's enforcement of its own bylaws.

This is an important issue for municipalities that face proposals for nationally regulated projects inside their municipal boundaries.

Burnaby filed a Notice of Civil Claim with the B.C. Supreme Court in early September after, Burnaby alleges, Trans Mountain Pipeline ULC or its agents ("Trans Mountain"), damaged parkland, cleared bush and cut down trees inside the Burnaby Mountain Conservation Area, and obstructed roads and diverted traffic on Burnaby roads. All of these activities are to test the feasibility of a proposed new alternate route for Trans Mountain's proposed pipeline Expansion Project. Trans Mountain had further advised Burnaby that it intended to do further work including drilling of bore holes and establishing a helicopter staging area to fly in drilling equipment.

Burnaby says that all of this is in contravention of Burnaby bylaws. Trans Mountain has responded that it is not bound by Burnaby's bylaws, but operates rather under the authority of s. 73 of the National Energy board Act.

The National Energy Board had previously granted an order to the company allowing it to enter lands owned by Burnaby, under s. 73 of the *National Energy Board Act*. However, Burnaby is not disputing that order before the B.C. Supreme Court. Burnaby has not brought the constitutional challenge based on being a landowner that is subject to the *NEB Act*. Burnaby's challenge is based on its role as government, with law making authority over the lands at issue.

Burnaby's position, based on the materials filed in Court, is that unless and until the B.C. Supreme Court makes a determination that Burnaby's bylaws are constitutionally inapplicable to lands upon which Trans Mountain wishes to cut and drill, the City has the responsibility and authority to enforce its bylaws on those lands. Burnaby has said that this is especially so at this early stage of Trans Mountain's proposal, as the National Energy Board has not yet even determined whether the proposed inter-provincial pipeline is a project that

Burnaby Fights to Protect (continued from page 9)

is in the national public interest or should be an approved pipeline under federal regulation.

Burnaby is arguing that it can't be presumed that the City's bylaws are automatically displaced, just because a company that has an application before the NEB wishes to conduct investigative cutting and drilling in a municipal Conservation Area. There are important constitutional hurdles to be gone through before provincial (and therefore municipal) legislative jurisdiction is overtaken by federal jurisdiction—including whether both provincial and federal laws might apply, under "cooperative federalism".

On September 17, 2014 the B.C. Supreme Court denied Burnaby's application for an injunction against Trans Mountain until trial of the matter, although the Court has not yet provided Reasons for the decision. Burnaby's Civil Claim is still before the Court. ***Maegen Giltrow***

New Uniform Building Code: Changes to Local Government Authority to Set Standards

The Province has announced it plans to amend the building regulation scheme, which will affect all local governments other than the City of Vancouver. One of the key proposed changes is known as the uniform Building Code, which will result in consistent technical building requirements by removing local government authority to adopt bylaw standards that exceed the BC Building Code. Local governments will still be tasked with administering and enforcing the Code, but only the Province will be able to set standards.

In order to achieve the uniform Building Code the Province plans to amend the *Community Charter* and the *Local Government Act.* The legislation is anticipated to be introduced in 2015. Local governments will then have a two year period within which they will be expected to review and amend bylaws to delete any building standards which go beyond the Building Code. At the conclusion of the two year period any remaining technical building requirements in excess of the Code will be deemed to be of no force or effect.

According to the Province, at present the most common local bylaw requirements which exceed the Code pertain to fire sprinklers, adaptable housing, wildfire interface and energy efficiency.
With respect to fire sprinklers, the Province has created a working group to develop recommendations for the requirements to be imposed as a component of the uniform Code. Once the new regime is in place local governments will be able to submit proposals to the Province for increased standards. If approved, the new standards would take effect throughout BC (except for Vancouver). ***Sara Dubinsky***

Receiving Gifts: A Flowchart to Navigate s. 105 of the Community Charter

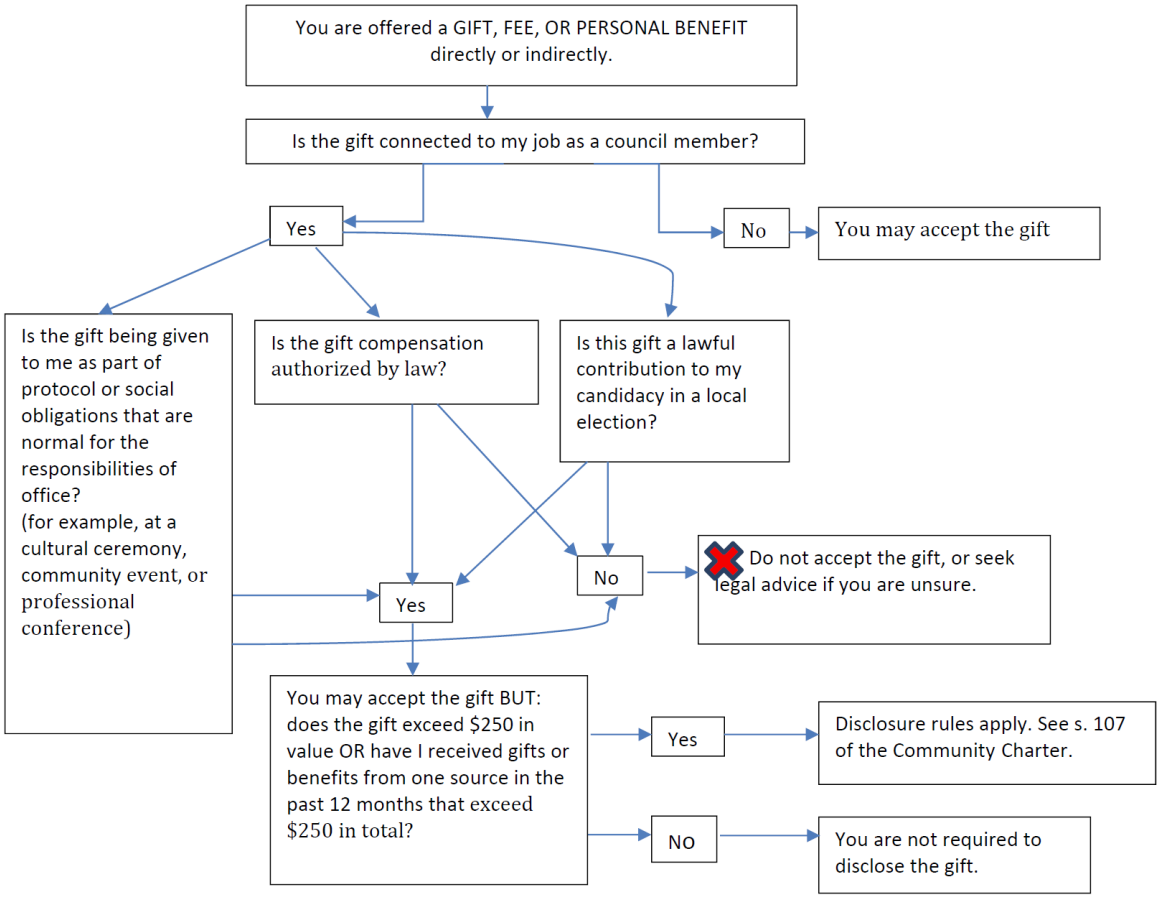
"To the goats, all people are equal, except for those who have treats."
-Karin Tidbeck, *Sing*

Democracy and good governance are undermined when formal rules are bypassed and elected officials can be swayed or "bought" with a gift. Council members must be alert to the fact that gifts or personal benefits come in many different forms, such as memberships, tickets, meals, or hotel accommodation.

Section 105 and 106 of the *Community Charter* outline the rules with respect to accepting gifts and disclosure of gifts. These sections are frequently misunderstood to mean: "As long as I disclose a gift valued over $250, accepting the gift is okay". This is not the rule.

The general rule is as follows. A council member must not accept a fee, gift or personal benefit that is connected with the member's performance in their duties of office. The rule is not intended to capture gifts such as a birthday present from a family member. If you do receive a gift in connection to your job, then you must ask yourself if the three exceptions to this general rule listed under s. 105(2) apply. This flowchart sets out the questions a council member should consider before accepting a gift that could potentially result in their disqualification from office under s. 108.1.

Carrie Bavin



Something in the Water: Local Governments and Drinking Water Liability

As drinking water infrastructure ages, local governments must upgrade existing facilities and treatment technologies. In the face of the financial burden such requirements impose, questions arise regarding a local government's liability should the drinking water it supplies cause illness, loss or damage. This article discusses a local government's potential liability in negligence as well as its responsibilities under the *Drinking Water Protection Act ("DWPA").*

Drinking Water Protection Act

In British Columbia, drinking water systems are governed under the DWPA and the *Drinking Water Protection Regulation*. The five regional Health Authorities administer the DWPA and employ drinking water officers who ensure compliance through operating permits and orders.

Under the DWPA, water suppliers[4] are responsible for providing safe drinking water and notifying the relevant health authority as well as the public should water quality problems arise. Drinking water must be (1) potable and (2) meet any additional requirements under the regulations and/or the operating permit.

Potable water is water that:

a) meets the standards prescribed by regulation,[5] and

b) is safe to drink and fit for domestic purposes without further treatment.

A water supplier must comply with all terms and conditions of its operating permit. Health Authorities are authorized to include certain terms and conditions in the permit. These terms and conditions can include requirements regarding:

a) treatment;

b) equipment, works, facilities and operations;

c) qualifications and training of the persons operating, maintaining or repairing the water supply system;

d) monitoring of the drinking water source and the water in the water supply system;

e) standards applicable to the water in the water supply system;

f) reporting and publication of monitoring results or other information respecting the water supply system.[6]

The terms and conditions in an operating permit may be more stringent than what the Act requires. A drinking water officer may order the water supplier to undertake additional monitoring or testing if the drinking water officer has concerns about whether the drinking water meets the standards in the Act, regulations, or the requirements of an operating permit.

If a drinking water officer has reason to believe that a health hazard exists or that there is a significant risk of an imminent health hazard, the drinking water officer may make an order requiring the water supplier to do one or more of the following:

a) abate the drinking water health hazard;

b) acquire, construct or carry out any works or do or cease to do any other thing, if this is reasonably necessary to

[4] The Act defines "water supplier" as "a person who is the owner of a water supply system".

[5] Schedule A to the *Drinking Water Regulation* sets forth the standards for potable water.

[6] This list is included in the Act, but is not exhaustive of the terms and conditions that may be included in an operating permit.

Something in the Water (continued from page 12)

control, abate, stop, remedy or prevent the drinking water health hazard;

c) adjust, repair or alter any works to the extent reasonably necessary to control, abate, stop or prevent the drinking water health hazard.

In addition to seeking a court order or an injunction requiring compliance with an order, the drinking water officer may direct that, if the water supplier fails to take the action required by the order, the action be done at the expense of that person, including entering or authorizing other persons to enter any property for the purpose of taking action in default.

A person who contravenes the DWPA commits an offence, which is punishable by a fine or imprisonment.

Liability in Negligence

Having undertaken to supply water to its residents, a local government may be liable for failure to provide potable water or water fit for domestic purposes. A local government that knowingly maintains a contaminated water supply may be liable in negligence to all those who suffer injury as a result of drinking it.[7] While breach of a statutory requirement alone is not determinative of negligence, it can be evidence of negligence,[8] and in the event of a loss, injury or damage arising from a failure to act, a local government could be found liable for ignoring the recommendation of the health authority or for deciding to do nothing.

For these reasons, decisions related to water systems that may give rise to liability should be made by regional district board or council, as, generally speaking, a local government is immune from liability in negligence in circumstances where it has made a policy decision to take the impugned course of action. True policy decisions are exempt from tort claims so that local governments can freely make decisions that are based upon social, political or economic factors. In contrast, the implementation or operational result of those policy decisions may be subject to tort claims.[9]

It is possible, however, that negligence could be found either where (a) a policy decision was made to operate the water system, and despite the orders or conditions of a health authority, the water system did not conform to the required standard at an operational level, or (b) the policy decision was not "reasonable and in good faith" as required by the case law.

On the operational level, a local government could be liable if operations are performed negligently. The standards set by the DWPA and associated regulations likely inform the standard of care with respect to the provision of water.

Prosecution under the DWPA

A breach of the DWPA can result in criminal prosecution. DWPA section 45 renders an offence any breach of the Act, a regulation, an order or a direction of a drinking water officer or contravention of a permit:

Contraventions of the DWPA are punishable by a fine of up to $200,000 or imprisonment for no longer than 12 months, or both. If a corporation commits an offense under the Act, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the commission of an offence commits an offence. An indemnity bylaw or resolution would not be available for such fines.

[7] Campbell v. Kingsville (Town), [1929] AC 171 at 183 (HL).

[8] R. v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205 (page 227).

[9] Brown v. British Columbia, [1994] 1 S.C.R. 420.

Something in the Water (continued from page 13)

To avoid a successful prosecution under the DWPA, a local government must take all reasonable steps to avoid the contravention. In the late 1970s, the Supreme Court of Canada recognized that the due diligence defence was available to defendants charged with strict liability offences.[10] The Court held that those charged with regulatory offences (such as the DWPA), ought to have the opportunity to avoid conviction by showing, on a balance of probabilities, that all reasonable steps were taken to avoid the contravention—i.e. to show that it was duly diligent. What constitutes due diligence depends on the facts of each case. In a DWPA prosecution, adhering to the terms and conditions of an operating permit may be sufficient to establish a due diligence defence.

However, in *R. v. Regional District of North Okanagan,* 2013 BCPC 271, the RDNO was prosecuted under the DWPA and the *Water Act* after raw effluent entered its drinking water system. Eventually, the contaminated water was sent directly to residents' faucets. The Crown claimed that the RDNO was criminally responsible for delivering polluted water to users of its water system. There was little controversy that the RDNO violated the DWPA's requirements, and the court's reasons focussed on whether the RDNO could take advantage of the due diligence defence.

Thus, the question was whether RDNO took all reasonable care in avoiding the risks attendant on operating the well. The Court was not satisfied on the balance of probabilities that RDNO used due diligence in avoiding the risk that the well would become contaminated and thereafter provide non-potable water to the users because the RDNO knew that there was a major problem with the water system.

[10] R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299.

Thus, even where a water system is operating under a permit that allows old technology during a transition or upgrade, a local government could still be vulnerable to prosecution should someone fall ill if it is aware of a serious problem that brings the system out of compliance with the Act.[11]

Many court cases, including those involving regulatory offences, hinge in large part on documentary evidence. It is therefore important that in addition to taking all steps necessary to ensure compliance with the DWPA and the *Water Act*, local governments maintain detailed records of all preventative steps taken in relation to provision of water services and comply with the orders and recommendations issued by health authorities. Local governments should also ensure that their environmental staff undertake regular training and continuing education and keep up to date with professional certifications. ***Robin Dean***

Permitted Uses under Zoning Bylaws: Paldi Khalsa Diwan Society v. Cowichan Valley (Regional District) 2014 BCCA 335

In the 1960's, a wood-fueled crematorium was build on a piece of property in the Cowichan Valley Regional District (the "CVRD"). At that time, there was no zoning bylaw in place. The crematorium was used by the South Asian community for their traditional funeral rites.

In 1998, the CRVD passed a zoning bylaw which encompassed the land on which the crematorium was located. The newly-created zone was "P-1

[11] We note, however, that the RDNO had also failed to comply with Interior Health's directions to install a backflow preventer, which did not aid them in arguing their due diligence defence.

Permitted Uses (continued from page 14)

Zone – Parks and Institutional". In 2010 and 2011, the petitioners obtained permits to construct and operate a new gas-fueled crematorium on their property. The permits were granted and the crematorium began operating.

Upon learning that the new facility was operating as a commercial enterprise and had been providing services to the general public, the CVRD contacted the owners and advised them that a commercially operated enterprise was not a permitted use under the zoning bylaw. It was the CVRD's position that "the commercial use of a crematorium not associated with gatherings of persons for public worship during the cremations is not permitted." The owners disagreed. The CVRD contacted Consumer Protection BC, the organization who issued the operating permit, and informed them that they had not been consulted as required by the Regulation. Consumer Protection BC required the owners to provide documentation from the CVRD proving that a commercial crematorium was a permitted use. The CVRD refused and the owners' licence was suspended.

The issue at both the British Columbia Supreme Court and the Court of Appeal was whether a crematorium fit within the definition of "institution" in the zoning bylaw and, if so, whether it could be operated as a commercial enterprise. The bylaw read that "institution includes an arena, armory, cemetery, college, community centre, community hall...".

The British Columbia Supreme Court refused to grant the declaration, finding that crematorium did not fit within the ordinary meaning of "institution". Furthermore, the Court inferred from the specific inclusion of cemetery that the drafters of the bylaw did not intend to include crematoriums as a permitted use.

At the Court of Appeal, the owners argued that the factual matrix surrounding the creation of the bylaw was relevant. Specifically, they pointed to the fact that the land had always been used for a crematorium, including at the time the bylaw was passed, and that no other zone specifically included crematoriums. They argued that the drafters would have considered this when drafting the bylaw. The CRVD opposed this argument, saying that extrinsic evidence was irrelevant and that because the bylaw was not ambiguous, it must be read on its face.

The Court of Appeal applied the principles of statutory interpretation of municipal legislation, which direct the Court to search for the broad purpose of the bylaw "with a view to giving effect to the intention of the Municipal Council as expressed in the bylaw upon a reasonable basis that will accomplish that purpose". The Court found that the purpose of "P-1 Zone – Parks and Institutions" was to permit uses that provided, in the broadest sense, public services. The Court found that the definition of "institution" in the bylaw used the word "includes", suggesting that the uses were not limited to those listed. In addition, the Court looked at the dictionary definition of the word "institution" and found that a crematorium fit within the definition as a facility that serves a social purpose. The social purpose served, providing the public with a means of dealing with human remains, was similar to that of a cemetery.

On the issue of whether the crematorium could operate as a commercial enterprise, the Court considered that many of the expressly permitted uses such as an arena, college and stadium typically charge a fee for their services. As there was nothing in the bylaw that indicated intent to prohibit commercial activities, the Court found that the crematorium could be operated commercially.

Permitted Uses (continued from page 15)

The owners were granted a declaration that the crematorium was a permitted use as well as an order of mandamus requiring the CVRD to provide required documentation. ***Rachel Vallance***

Municipal Councillors and the Disclosure of Personal Information: R v Skakun 2014 BCCA 223

This case was an appeal from a decision of the British Columbia Supreme Court holding that Mr. Skakun, a municipal councillor in Prince George, had violated s. 30.4 of the *Freedom of Information and Protection of Privacy Act* ("*FOIPPA*"). Mr. Skakun made an unauthorized disclosure to the CBC of personal information that included a copy of a confidential workplace harassment report he had received during a closed restricted city council meeting.

Section 30.4 of *FOIPPA* prohibits an employee, officer, or director of a public body who has access, whether authorized or unauthorized, to personal information in the custody or control of a public body, from disclosing the information except where authorized under the Act. Mr. Skakun appealed the BCSC's decision on the legal issue of whether a municipal councillor is an "officer" of a public body.

There is no definition of the term "officer" in *FOIPPA* and Mr. Skakun argued that this created ambiguity. Given that penal nature of the provision, he argued that it should be construed narrowly. Mr. Skakun argued that the definition should only apply to appointed officials, not elected ones.

The Court rejected Mr. Skakun's arguments, finding that the term "officer" was not ambiguous. The Court used the modern approach to statutory interpretation, which requires reading the words of the specific provision in context and in their grammatical and ordinary sense, while considering the scheme of the legislation and the intention of the legislature.

In interpreting the term "officer", the Court found that the dictionary definition included both appointed and elected officials of public bodies. Considering this definition in the context of *FOIPPA*, the Court found that there were no provisions that suggested that an elected official could not also be an "officer". While Mr. Skakun argued that definitions of "officer" from other statutes such as the *Community Charter* and the *Local Government Act* should be imported, the Court found that this was not a helpful because those statues were aimed at granting authority to local governments, whereas *FOIPPA* is a broad piece of legislation that targets a wide range of public bodies. Further, the Court found that an interpretation that excluded municipal councillors from s. 30.4 would lead to a gap in the application of the legislation, especially given s. 3(3)(e) which broadens the application of s. 30.4, making it applicable to officers and employees of the Legislature that are not treated as public bodies for the rest of the Act. Finally, the Court found that an interpretation that excluded elected municipal councillors would create an absurdity given that municipalities are clearly subject to the requirements of *FOIPPA.*

In the end, the Court dismissed Mr. Skakun's appeal. Based on the plain and ordinary meaning of the term, when read in the context of the broadly-stated purposes of the Act and its wide range of targets, the Court concluded that "officer" in s. 30.4 includes an elected municipal councillor. ***Rachel Vallance***

Encroachments on Local Government Property: District of West Vancouver (Corporation of) v Liu 2014 BCSC 1230

This hearing involved two petitions concerning parts of an existing dwelling including a living room, retaining walls, decorative ponds, hedges and a fence that obstruct an unimproved highway in the District of West Vancouver. The roadway is undeveloped and has only ever been used as a footpath for access to the Burrard Inlet. While the area of the encroachment varies, at points it stretches 35 feet into the 60 foot roadway. The District first became aware of the structures in 2005. Between 2005 and the summer of 2011 the District had written three letters to the previous owner requesting that he remove the structures. The District also wrote to the current owner, Ms. Liu, in August 2011.

The first petition was filed by the District to enforce its bylaws as well as provincial legislation that prohibits the obstruction of highways. The District sought an order removing parts of the Liu dwelling. Ms. Liu also filed a petition seeking an easement under s. 36 of the *Property Law Act*. Section 36 allows the Court to declare an easement when a person has an interest in or a right to possession of a piece of land.

The District submitted that the structures were unlawful, and that no agreement or permit to encroach had been issued pursuant to the District's bylaws. In response to Ms. Liu's petition, the District argued that s. 36 of the *Property Law Act* should not apply to highways since the legislature has required by statute that highways be free of unauthorized obstructions. Further, the District argued that there was no equitable reason why relief should be granted to Ms. Liu, especially considering the public's interest in the highway. If entitled an interest, the District argued that Ms. Liu should be required to pay, at a minimum, the market value for the interest.

Ms. Liu submitted that the structures were lawful. She also submitted that, in any event, the Court should exercise their discretion to refuse an injunction for the removal of the structures, as the public interest concerns in this case are outweighed by the equitable considerations and private hardship. Further, Ms. Liu argued that s. 36 can apply to encroachments on highways.

The Court found that the ultimate issue in this case was whether the structures were unlawfully encroaching.

Ultimately, the District was unable to prove that the structures were unlawful. Mr. Maki, the manager of Permits and Inspections for the District, gave affidavit evidence that the District had never granted a building permit for the structures, but it was unclear what factual basis led to the formation of this opinion. Mr. Reid, a land and property agent, gave similar evidence about the absence of an encroachment permit, which the Court concluded must have been based on the absence of records in the District's files. The Court found that the District's building permit records were incomplete. Both of these opinions were found to be inadmissible for lack of evidence and of no value.

The District also gave no evidence of when the structures were built. Through affidavit evidence, the District was able to establish that the earliest building permit for the property was from May 1961, although the file for the property began in 1949. In 1961, the Zoning Board of Appeal granted the then owner permission to construct additions to the south and west of the existing dwelling.

There was also evidence that the District had previously conducted inspections of the property without concerns or complaints, and that it regularly maintained the footpath next to the

Encroachments (continued from page 17)

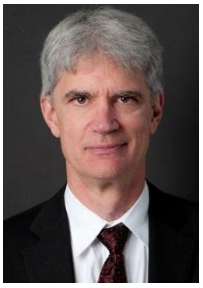
encroachment. Due to the fact that the District did not explain how the encroachment could have been overlooked for so many years, the Court inferred that the District employees must have known the encroachment was authorized.

The Court, without evidence to the contrary, concluded that the structures must have existed in their present location since at least 1961, and that the encroachments were authorized. Given this decision, it was unnecessary for the Court to consider issuing a mandatory injunction or to decide whether s. 36 of the *Property Law Act* had any application. The Court granted Ms. Liu an easement over the encroachments for the life of the buildings. Ms. Liu was not required to pay any compensation for the encroachment.
Rachel Vallance

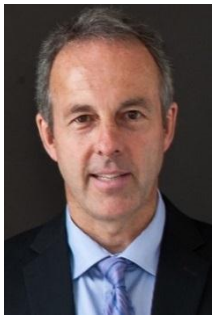
Lidstone & Company

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.



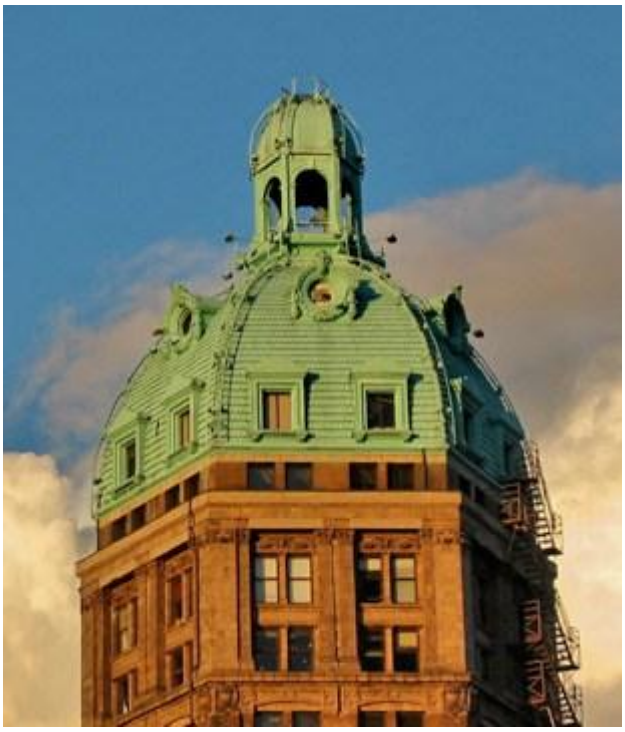
Lindsay Parcells practices municipal law with a particular interest in land use, real property, corporate, commercial, mediation and environmental matters. Lindsay has 20 years of legal experience. He was called to the Alberta bar in 1992 and the British Columbia bar in 1995. Lindsay completed a Masters 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.

Lidstone & Company (continued from page 18)

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.

Carrie Bavin handles legal research and writing, opinions, and administrative tribunal and environmental matters. 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.

Robin Dean 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.



MEET RACHEL VALLANCE

Articled Student

Rachel has just joined Lidstone & Company as an articled student. She graduated from the University of Victoria Faculty of Law where she participated in the law co-op program. In addition to course work, Rachel completed co-op terms at the Ontario Securities Commission in Toronto, the Ministry of Justice in Victoria, Chimo Community Services in Richmond, and Chandler & Thong-Ek, a leading corporate law firm in Bangkok, Thailand.

Lidstone & Company (continued from page 19)

Rob Botterell focuses on major project negotiations for local governments (such as in relation to pipelines, LNG, dams and reservoirs, mines, oil and gas, and similar matters). He also deals with law drafting as well as local government matters in relation to aboriginal and resource law. Rob will also conduct lobbying on behalf of local governments. Rob led a team that put together the *Freedom of Information and Protection of Privacy* legislation and advised on the *Personal Property Security Act* and others. He negotiated the key provisions of the Maa-nulth Treaty for Huu-ay-aht, has drafted over 500 pages of laws, and has negotiated with all levels of government and industry on major projects. He was a Trustee of the Islands Trust and in 2012 chaired a panel at the UBCM annual convention on "Voting on the Internet". Rob has an LL.B. from UVic and MBA from UBC, and is a Fellow of Institute of Canadian Bankers after having been the TD Bank Regional Comptroller in the 1980's. Rob has practiced law in British Columbia for 20 years.

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 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.