LIDSTONE & COMPANY

Law Letter

In this issue

Regional Growth Strategies

The British Columbia Supreme Court has issued two decisions clarifying the status of regional context statements in official community plans, and their relation to regional growth strategies adopted by regional districts.

In two petitions filed against the Township of Langley, the Greater Vancouver Regional District challenged amendments to Langley's Official Community Plan. One of the amendments created a University District, to accommodate the expansion of Trinity Western University and a residential subdivision near to the university. The other amendment re-designated one parcel of land for limited residential development along the urban rural interface, near the developed area of Murrayville. All of the planning decisions in question were undertaken with approval of the Agricultural Land Commission.

GVRD argued, among other things, that the amendments were not consistent with the Regional Context Statement included in the Langley OCP, and that Langley had effectively amended its Regional Context Statement without GVRD approval.

The Supreme Court of British Columbia upheld both Langley OCP amendments, and dismissed the petitions filed by GVRD. In the course of the reasons for judgment, the court endorsed several principles relating to the interpretation of official community plans and regional context statements.

First, the Court accepted that Langley's planning decisions would be upheld so long as its interpretation of the planning documents was reasonable; the "correctness" standard did not apply. Second, the Court stated that the "consistency" requirement in the *Local Government Act* must take into account the wide variety of factors that are considered in planning documents. In each of the decisions, the Court also accepted Langley's argument that the OCP

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amendments did not create inconsistency with the Langley Regional Context Statement.

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Finally, the Court also rejected GVRD's argument that it had a supervisory role over the planning decisions of its member municipalities, and found that the regional growth strategies of regional districts have limited control beyond matters of truly a regional nature. The Court held that "Regional matters can only be those that require coordination or that affect more than one municipality. [The Langley OCP] is not regional in nature and thus it is exempt from GVRD scrutiny." The GVRD has filed an appeal notice in the BC Court of Appeal Registry. ***Paul Hildebrand***

Personal Emails and FOI

The Provincial *Freedom of Information and Protection of Privacy Act* ("FOIPPA") applies to all records in the custody or under the control of a public body, subject to specified exceptions set out in s. 3 of the Act. What about emails that relate to municipal business that are sent or received from the personal email accounts of Council members or employees? Are these emails "records" for the purposes of FOIPPA, even if they are not within the municipality's physical custody? Interestingly, a California Appeal Court has recently ruled that when officers and employees of public agencies in California use their private accounts and personal electronic devices to send or receive messages, the messages will not be considered "public records" under the *California Public Records Act*, even if the messages relate to public business.[1] The decision provides a timely opportunity to consider how this issue would be treated in British Columbia.

The access request that was made by the applicant in California was not unlike the requests that are made to local governments in BC. Specifically, he submitted a request to the City of San Jose, seeking 32 categories of public records relating to the redevelopment of downtown San Jose. Several of the requests were for voicemails, emails or text messages sent or received on private electronic devices used by the Mayor or members of the City Council or their staff that related to the redevelopment. The City refused to disclose the records from any of the private electronic devices using personal accounts on the basis that they were not "public records" within the meaning of the *CPRA*. The applicant then brought the matter before the courts. Although the trial court ordered the disclosure of the records, the Court of Appeal reversed this order.

[1] *City of San Jose v. Superior Court*, No. H039498 (Cal. Ct. App. March 27, 2014).

Personal Emails and FOI (continued from page 2)

The Court of Appeal noted that the definition of "public records" in the *CPRA* is broad and includes any "writing" (which includes emails and text messages) relating to the public's business if it is "prepared, owned, used, or retained by any state or local agency". The Court also noted that this broad definition is designed to protect the public's need to be informed regarding the actions of government. However, with respect to messages on private accounts or devices, the Court ultimately concluded that because a public agency cannot access or control them, it cannot prepare, own, use or retain them.

One of the implications of the Court's finding, and one that the Court expressly acknowledged, is that City Council members and other public officials could essentially conceal their communications on public issues by sending and receiving them on their private devices from personal accounts. However, the Court noted that such conduct was for lawmakers to deter with appropriate and clearer legislation. Although the language in FOIPPA is not too different from that in California's statute, we would caution that British Columbia's Privacy Commissioner takes a different view of the matter and would likely order the disclosure of such records in similar circumstances.

As noted above, FOIPPA applies to records that are in the custody or under the control of a public body. Although the terms "custody" and "control" are not defined in the Act, the OIPC has set out several factors that can be assessed in determining whether a document is within the custody or under the control of a public body, thus making it subject to disclosure under FOIPPA:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
5. Does the institution have a right to possession of the record?
6. Does the content of the record relate to the institution's mandate and functions?
7. Does the institution have the authority to regulate the record's use?

Personal Emails and FOI (continued from page 3)

8. To what extent has the record been relied upon by the institution?
9. How closely is the record integrated with other records held by the institution?
10. Does the institution have the authority to dispose of the record?[2]

Taking some of the above factors into consideration, it becomes clear that emails contained within personal accounts that concern public business could nonetheless be considered to be within the custody or under the control of a public body. Namely, although the public body may not have possession of the record, it would be held by the officer or employee in question for the purposes of his or her duties as an officer or employee; the content of the record would relate to the public body's mandate and functions; and, the record would potentially have been relied upon by the public body in conducting business or making pertinent decisions.

More recently, a majority of the Supreme Court of Canada endorsed a simpler test (although not in the context of FOIPPA), agreeing that a record not within the physical possession of a government institution could still be under its control if two questions are answered in the affirmative:

(1) Do the contents of the document relate to a departmental matter?
(2) Could the government institution reasonably expect to obtain a copy of the document upon request?[3]

Applying this test to emails sent or received from personal email accounts, we also think that in many instances the questions would be answered in the affirmative. First, it is likely the contents of the email would relate to the officer or employee's duties as an officer or employee, which therefore relate to a public body matter. We also think the local government could (or should) be reasonably expected to obtain a copy of the email upon request.

In any given case, the determination of whether a public body has custody or control of a record will depend on the facts. However, the OIPC does take the position, as a general rule, that *any* email an employee sends or receives as part of his or her employment duties will be considered to be a record under the public body's control, even if a personal account is used. We think this finding would also be made in respect of emails sent or received by Council or Board members in relation to their official mandates and functions within the local government. Therefore, local governments are encouraged to create policies on the use of personal email accounts for work purposes. The OIPC notes that the preferred solution would be for public bodies to require the use of their own email systems for work purposes and, if this is truly not practicable, the policy should require employees to copy their work email accounts on any work-related email they send from a personal account.[4] While the OIPC notes that this should be a part of each employee's conditions of employment, we would suggest that this requirement be conveyed to Council and Board members as well.[5]

[2] As set out in *Workers' Compensation Board*, Order No. 02-29.

[3] *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25.

[4] *Use of Personal Email Accounts for Public Business,* OIPC Guidance Document dated March 18, 2013, accessed at: http://www.oipc.bc.ca/tools-guidance/guidance-documents.aspx

[5] We note that Council members are considered to be "officers" within the meaning used in FOIPPA, based on the decision in *R. v. Skakun*, 2012 BCSC 1033. An appeal of this decision will be heard by the Court of Appeal on April 24, 2014.

Personal Emails and FOI (continued from page 4)

For a more detailed discussion about some of the implications of using personal email accounts for public business, the OIPC has published a helpful bulletin on the topic, which can be accessed on its website. ***Marisa Cruickshank***

PROPERTY DISPOSAL 101

Under section 8(1) of the *Community Charter*, SBC 2003, c. 26, municipalities have "the capacity, rights, powers and privileges of a natural person of full capacity." These natural person powers include the power to dispose of property. The power granted to municipalities to dispose of property is subject to certain limitations and requirements contained in Part 3, Division 3 of the *Community Charter* that municipalities should be aware of before any disposition occurs.

Under section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 the term "dispose" means "to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things." This definition would include a charge granted against land such as an easement or a restrictive covenant. While there is some question whether a licence constitutes a disposition, the more widely accepted view is that a licence is not a disposition.

Without exception, a disposition of property should be accompanied by a written agreement that accurately describes the transaction. Depending on the circumstances of the disposition, the agreement may be an agreement of purchase and sale, a lease, an easement agreement, a restrictive covenant or other applicable agreement. The agreement will need to accurately describe the property, the parties to the transaction, the date and the nature of the transaction. The agreement should also include conditions that, among other things, provide that the agreement is not final until approved by the municipal board or council and the municipality has satisfied all statutory requirements.

In most cases, the agreement will also need to be in a form, or accompanied by a form, that meets the requirements for registration at the Land Title Office as most dispositions of land should be registered. Under section 20(1) of the *Land Title Act*, RSBC 1996, c. 250, "an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land unless the instrument is registered in compliance with this Act." Leases for terms under

Property Disposal 101 (continued from page 5)

three years in which there is actual occupation of the land are an exception to this general rule.

Under section 26 of the *Community Charter*, before a council disposes of land or improvements, it must publish notice of the proposed disposition in accordance with section 94. The requirements of section 94 include posting notice in a public notice place and publication of the notice in accordance with the requirements of section 94. Under subsection 26(2), in the case of property that is available to the public for acquisition, notice must include a description of the land or improvements, the nature and, if applicable, the term of the proposed disposition and the process by which the land or improvements may be acquired. Under subsection 26(3), in the case of property that is not available to the public for acquisition, the notice must include a description of the land or improvements, the person or public authority who is to acquire the property under the proposed disposition, the nature and, if applicable, the term of the proposed disposition and the consideration to be received by the municipality for the disposition.

In addition to these notice requirements, municipalities should be aware of the requirement to provide notice of assistance under section 24 of the *Community Charter* to any person or organization if assistance is contemplated in connection with the disposition of property. Municipalities should also be aware of the general prohibition on assistance to business under section 25 of the *Community Charter* (except in circumstances where the municipality has entered into a partnering agreement under section 21 or the limited circumstances detailed in subsection 25(2) for acquiring, conserving and developing heritage property and other heritage resources or gaining knowledge and increasing public awareness about the community's history and heritage). Under subsection 24(1) of the *Community Charter*, assistance includes "disposing of land or improvements, or any interest or right in or with respect to them, for less than market value." Courts in British Columbia have also interpreted "assistance" to be the granting of any type of advantage or "something for nothing". In view of these requirements, a municipality that proposes to grant any form of assistance in connection with the disposition of land to a person or organization, or to a business under a partnering agreement, must publish notice of the assistance in accordance with section 94. The notice must include the identity of the intended recipient of the assistance and the nature, term and extent of the proposed assistance.

Municipalities should also be aware of the special rules that apply with respect to dispositions of park land. Under section 27 of the *Community Charter*, a municipality may only dispose of park land created in relation to a subdivision or in place of development cost charges with the approval of electors. Furthermore, the park land disposed of must be in exchange for other land suitable for a park or public square, or alternatively, the proceeds of disposal must be placed to the credit of a park land acquisition reserve fund under section 188 (2) (b) of the *Community Charter*.

Special rules also apply with respect to the disposition of other particular kinds of property owned or acquired by a municipality. For example, the disposition of land acquired through property tax sales are subject to the special rules detailed in Part 11 of the *Local Government Act*, RSBC 1996, c. 323. As well, under section 41 of the *Community Charter*, a municipality that proposes to dispose of a highway or part of a highway that provides access to the ocean or a lake, river or other stream or watercourse may only dispose of the highway provided the requirements of subsections 41(1)(c) or (d) are satisfied. Specifically, the municipality may only dispose of the highway, or part of it if: (c) it exchanges the property for other property that it considers will provide public access to the

Property Disposal 101 (continued from page 6)

same body of water that is of at least equal benefit to the public, or (d) the proceeds of the disposition are to be paid into a reserve fund, with the money from the reserve fund used to acquire property that the council considers will provide public access to the same body of water that is of at least equal benefit to the public.

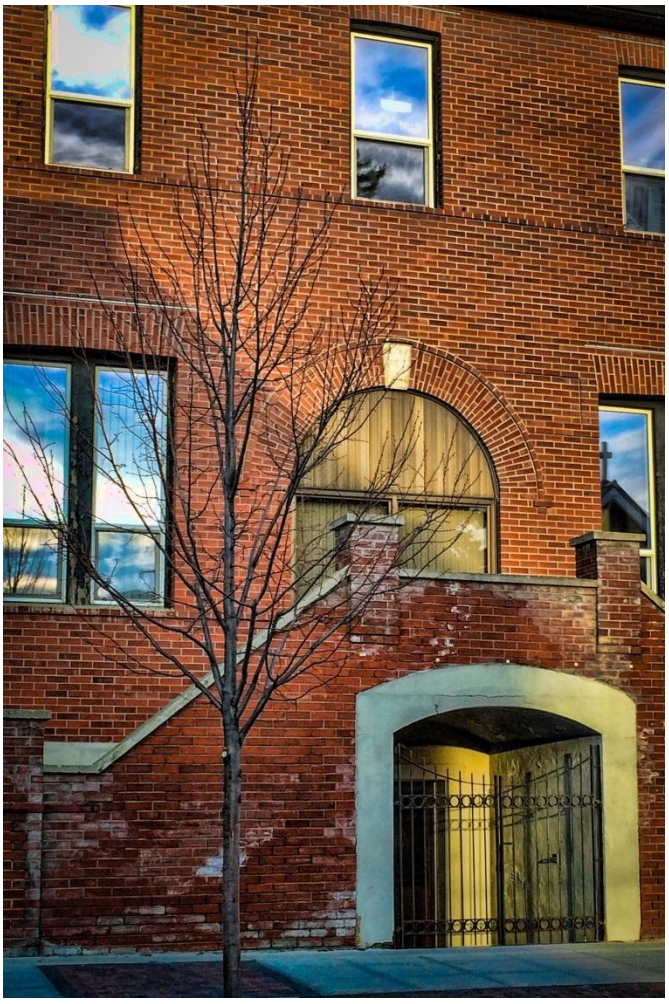
Municipal lands are public assets and municipalities have a responsibility to manage them in the public interest. Lands may be disposed of to achieve any number of municipal objectives including the raising of revenues, facilitating development, or creating additional property tax revenues and when there is a disposition of those lands, municipal governments must ensure that the requirements of the *Community Charter* and the *Local Government Act* are satisfied. In addition to the foregoing requirements and limitations, municipalities should ensure that any disposition of land is considered in the context of its *Official Community Plan, Financial Plan*, and *Annual Report*. ***Lindsay Parcells***

How Thick is Your Skin: Defamation of Elected Officials

We are regularly asked for opinions regarding whether negative comments appearing in social media, emails, and the press regarding elected officials are defamatory and actionable.

As a starting point, as a matter of law, local governments themselves cannot pursue an action for defamation. In *Dixon v. Powell River (City*), 2009 BCSC 406, the court held:

> Governments cannot sue for defamation for damage to their governing reputations (para 46);
>
> It is antithetical to the notion of freedom of speech and a citizen's rights to criticize his or her government concerning its governing functions, that such criticism should be chilled by the threat of a suit in defamation (para 47); and
>
> The City of Powell River lacks any legal basis or right to bring civil proceedings for defamation of its governing reputation, or bring other proceedings of similar purpose or effect, or to threaten to do so (para 49).



While governments may not sue for defamation, individual council or board members, officers or employees may sue for defamation to their personal reputations. However, the law draws a distinction between what constitutes defamation of a public official versus a private individual.

Defamation (continued from page 7)

In *Grant v. Torstar Corp*., 2009 SCC 61, the Supreme Court of Canada (unanimously on this point) set out the basic law of defamation:

> 28 A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

With respect to whether the words are defamatory, the courts have held that "this should be assessed from the perspective of someone reasonable, namely, a person who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility. A degree of common sense must be attributed to viewers." [6] Further, courts have explicitly held elected officials to a higher standard in light of their role as public officials, in the sense of requiring that they have 'tougher skin' than ordinary individuals. For example, in *Black v. Lund Press*, 2009 BCSC 937, a case involving alleged defamation of a regional district director, the BC Supreme Court held:

> [118] The words were critical of the plaintiff and it is plain that they were intended to be critical of his performance as the elected director for the Juan de Fuca electoral area. But in my view, the comments did not go beyond legitimate criticism of a public official in the context of a highly controversial issue. While this criticism might not be recognized as justified in the case of a private person, it is acceptable as part of the public interest right to bring criticism to bear respecting the conduct of public officials: *Langlands v. John Lang and Co*. (1916), 1 S.L.T. 168, (1916) S.C. (H.L.) 102, where it was stated:
>
> > The first thing I wish to say is that, in dealing with a newspaper written about a public functionary, considerable latitude is allowed by the law. Any gentleman who takes the position of architect under the School Board of Dundee is filling a capacity as a public official, and he must expect criticism, such criticism as the law might not recognize as justified in the case of a merely private person but readily admits when it is in the public interest that criticism should be brought to bear upon the conduct of public officials. When a person is in a public capacity, he may be criticized by the newspapers in the public interest…

In dismissing the allegation that defamation had occurred, the Court stated:

> [123] It is important to any community that matters of public interest are debated freely and openly. Sometimes, in the heat of discussions over a controversial issue where strong personal differences exist, persons on one side or other of the debate make comments that offend. But the fact that they offend is not enough. The comments must go beyond strong criticisms of a public man acting in his capacity as a public official. Here, the comments were critical of his actions within the political arena.

Accordingly, elected officials are expected to tolerate criticism regarding their performance of their duties, and for this reason are less likely to

[6] *Shavluk v. Green Party of Canada*, 2010 BCSC 804 **a**t para. 48, citing *Color Your World Corp. v. Canadian Broadcasting Corp.* 1998 CanLII 1983 (ON CA).

Defamation (continued from page 8)

be able to successfully pursue an action in defamation. ***Sara Dubinsky***

The Perils of Public Works under Private Property without Proper Access

Many local governments in BC have municipal infrastructure such as water lines, sewer pipes and storm drains that cross under private property. In many cases, the owners are not aware this infrastructure is on their land until something goes wrong, or the community realizes it needs access to the works. Even worse, there is no statutory right of way (SRW) agreement or easement registered on the property granting access to repair or maintain the infrastructure.

There are two main risks to having public works on private property without the benefit of an SRW: i) increased liability and ii) damage to works by owners.

If infrastructure lies under private property without an SRW, there is an increased risk of potential liability for damages or nuisance claims. If the infrastructure fails, the local government may be on the hook for the full cost of damages to the property (subject to limitations or immunities provided under the *Local Government Act*).

The second risk is if the land does not have an SRW attached to it in favour of the local government, owners of private property may build over, on top of, or disrupt the infrastructure (provided they otherwise comply with the local government's land use bylaws).

An SRW agreement with the owner can limit liability and restrict the owner's ability to build or disrupt the area where infrastructure lies. Usually, owners are agreeable to having the municipality pay nominal compensation to the owners for the SRW agreement.

While it is possible absent an SRW to obtain the owner's consent to repair works, this consent is required each and every time staff need access to the property. Further, this option does not alleviate the risks described above. An SRW agreement is attached to the land, so it remains in place if an owner sells their property.

Municipalities may also exercise their authority under s. 32 of the *Community Charter* to enter private property to repair works. However, s. 33(2) provides that if a municipality enters property in this manner, compensation is payable for any loss or damages caused by exercising this power. If this method of entry is chosen, municipal bylaws should be updated to reference their authority under s. 32.

Finally, a local government can seek a court declaration for an implied or equitable easement over the property. An implied easement is only available if the local government can demonstrate that the original owner historically allowed the local government to enter on to the property. An equitable easement could be granted if the local government presents sufficient evidence to show that the current landowners encouraged the local government to continue to use the land for the purposes of water, storm and sewer services, and that it relied on these representations to its detriment. Obtaining a court declaration is available in narrow circumstances, increases legal costs, and there is no guarantee that the court will find in the local government's favour.

Overall, establishing SRW agreements with private property owners is likely the most affordable and

The Perils of Public Works (continued from page 9)

least intrusive option. Of all the options referred to above, only an SRW agreement can specify that owners cannot build over or disrupt the infrastructure on their land. SRW agreements also provide local governments with long-term assurance that should issues with public works arise on private property, there are limitations on the local government's liability. ***Carrie Bavin***

Recent Legislation

Ministerial approval no longer required for certain bylaws

Section 195(3), *Community Charter* is to be repealed, which means Ministerial approval will no longer be required for municipal bylaws that impose rates or fees for a permit for soil removal or deposit of soil on land in a municipality.

In addition, the Bill implements a new section 874.1 which gives the minister discretion to require ministerial approval before a regional district adopts an OCP, zoning bylaw, subdivision servicing bylaw, temporary use permit bylaw or land use contract amendment bylaw. The Bill eliminates the absolute requirement that the minister approve various regional district bylaws by repealing ss. 882(4), (6)(b), (7), 913, 921, 930, 938.

Province to have more policy oversight over development of Official Community Plans (OCPs)

Bill 17 proposes a new section in the *Local Government Act* to give the Province more policy oversight over the development and content of municipal and regional district's OCPs, and particularly over regional district's land use bylaws. These provincial guidelines are supposed to be developed after consultation with UBCM.

The new section 873.2 reads as follows:

> "(1) The minister may establish policy guidelines regarding the process of developing and adopting official community plans by a municipality or a regional district.
>
> (2) The minister may establish policy guidelines regarding the process of developing and adopting any of the following by a regional district:
>
> > (a) a zoning bylaw;
> > (b) a subdivision servicing bylaw;
> > (c) a temporary use permit bylaw;
> > (d) a land use contract amendment bylaw under section 930 (2) (a).
>
> (3) The minister, or the minister together with other ministers, may establish policy guidelines regarding the content of the plans and bylaws listed in subsections (1) and (2).
>
> (4) Guidelines under subsection (1), (2) or (3) may be established only after consultation by the minister with representatives of the Union of British Columbia Municipalities."

Termination of Land Use Contracts

Bill 17 requires local governments to terminate all land use contracts by June 30, 2024. Additionally, local governments must implement a zoning bylaw by June 30, 2022 for land subject to a land use contract that will apply as of June 30, 2024.

The amendments also provide that local governments may terminate land use contracts earlier than 2022, and sets out how the bylaw should come into force and the notice requirements (s. 914.2-914.3). Despite early termination, owners will be eligible to apply to a

Recent Legislation (continued from page 10)

board of variance for a continuation of the land use contract if they can show that the timing of termination would "cause the owner hardship", and their application is brought within 6 months of the bylaw's adoption.

Further, if a land use contract is registered as a charge against a title to land and the contract is terminated, the charge is "deemed to be discharged as of the date of the termination of that land use contract". Only a certified copy of the bylaw terminating the land use contract is required to be submitted to the Land Title Office.

The Bill expands s. 914(1) to protect local governments from having to pay compensation for reduction in a person's interest in land, loss or damages that result from adopting a bylaw that terminates a land use contract prior to June 30, 2024.

Development Cost Charges cannot be increased for "In-Stream" Applications

The Bill provides that developers are not subject to DCC fee increases for 12 months if a bylaw is adopted after an application for a rezoning or a development permit has been submitted to a local government for approval.

An increase in DCC fees also cannot be applied to a "precursor application to that building permit" if it is "in-stream" on the date the new bylaw is adopted. It defines "in-stream" to mean "not determined, rejected or withdrawn" and provides a lengthier definition for "precursor application". ***Carrie Bavin***

Cumulative impacts of energy projects on local governments

There are several major proposed projects in our province right now: the Site C dam, five proposed LNG pipelines and LNG terminals, oil and gas activities in the Northeast, the Enbridge pipeline, and the Trans Mountain "Kinder Morgan" pipeline are some. While not all communities will be directly affected, some are affected several times over.

Local governments are playing an important role in asking tough questions about these proposed projects. Local governments, like First Nations, are uniquely well positioned to anticipate and see the cumulative impacts of these and other projects on the lands, people, infrastructure, and environment within their boundaries. Local governments also face concerns over their ability to pay for infrastructure required to support large scale industrial development. Meanwhile, the province has suggested it may be capping local government taxation powers on new LNG plants.

We are also observing local governments taking on questions that might traditionally be thought to lie in the Province's regulatory realm. In some cases local governments have environmental and population health concerns that go beyond protections or standards put in place by provincial and federal governments.

The National Energy Board has just announced that 20 local governments are among the 400 intervenors who will be participating in the assessment process for the Kinder Morgan pipeline. Each will have unique concerns, and come with different perspectives on the proposed project. Some will be opposed, some supportive, some neutral. However there will be commonalities between them--concerns about how the construction of the project will impact local lands, streams, infrastructure and

Cumulative Impacts (continued from page 11)

businesses, as well as concerns about what risks communities will be left with during operation of the proposed project, including marine shipping.

Local governments do not have direct constitutional regulatory authority with respect to most of these projects, but they are in many cases taking strategic action in the regulatory processes to assert the interests of the communities that they represent. ***Maegen Giltrow***

Pending Revisions to ATR Policy

The current review of the additions to reserve policy ("ATR Policy") by the Federal Government illuminate the need for the Federal Government to respect the key interests and decision-making role of local governments in parallel with the key interests on the role of First Nations.

In recent BC Treaties, for example, a municipality's consent is generally required to expand a First Nations' Treaty Land base with fee simple lands located within the boundaries of a municipality. See, for example, section 2.10.2 of the Maa-nulth First Nations Final Agreement and Chapter 4, section 45 of the Tsawwassen First Nation Final Agreement. In the case of pre-approved additions to treaty settlement lands, prior municipal consent may not be required, however, local government matters are identified and addressed during treaty negotiations.

Similarly, the revised ATR policy should explicitly give local government a decision-making role for the addition of such lands to a reserve, subject to appropriate dispute resolution.

As well, Canada would do well to adopt for municipalities the two key requirements most First Nations have when considering major natural resource developments proposed within their territory:

1. early and meaningful engagement to identify key issues and jointly develop "win/win" solutions, and
2. the First Nation's free, prior and informed consent for the proposed natural resource development.

The early and meaningful engagement and prior consent of local governments should be standard practice for additions to reserves when land use planning, bylaw harmonization, servicing, economic development and taxation are involved. Let us hope that Canada recognizes this opportunity.

For more background see the Lidstone & Company Additions to Reserve Policy Bulletin dated October 24th, 2013. ***Rob Botterell***

Deer cull gets go ahead: Suman v. Invermere (District), 2013 BCSC 2166

In 2011, the District adopted two resolutions to address its deer problem. Over the last decade, the District received incident reports from its residents concerning aggressive and invasive deer. The frequency and severity of these incidents increased over time as the deer population increased. Reported incidents included deer attacking pets within fenced back yards or on leash and deer charging pedestrians. Deer had also entered school grounds and attempted to take food from children.

One resolution adopted the urban deer management program recommended in the final report of the District's Urban Deer Committee and directed staff to contact the Ministry of Environment to begin the permitting process for

Dear Cull (continued from page 12)

trapping, culling, and relocating deer. The other resolution awarded a contract for deer removal and allocated funds to deer control.

The Petitioner society was a group of residents who formed the Invermere Deer Protection Society (the "Society") to find humane ways to live with deer in the Invermere area by researching scientific data, advancing community education and public outreach and engaging in political activism.

Petitioners alleged that: (1) the District did not have the jurisdiction to enact a resolution to cull deer, arguing that a municipality's power to regulate animals does not extend to the culling of deer; (2) the District breached its duty of procedural fairness; and (3) the decision to cull deer was unreasonable.

With respect to the Petitioners' first argument, the court agreed with the District that neither resolution regulates the culling of deer, i.e. they do not set out a mechanism to cull deer. The first resolution was directive and the second was contractual. The court stated that awarding the contract or authorizing expenditures did not constitute regulating, prohibiting, or imposing requirements on the deer population. The Province had the exclusive authority to issue a cull permit, which it did.

The court also sided with the District on the issue of procedural fairness. Although no notice of the Deer Committee meetings were posted on the website and the minutes showed that no members of the public attended the meetings, the court held that these meetings were not closed to the public. The fact that no members of the public attended the meetings, did not mean they had not been open.

Finally, the court adopted the principles in *Catalyst Paper Corporation* v. *North Cowichan (District)*, 2012 SCC 2 that "courts have refused to overturn municipal bylaws unless they were found to be "aberrant", "overwhelming", or if "no reasonable body" could have adopted them …". The court held here that the District had not acted unreasonably. It had received complaints from residents about deer since 2003 and followed a procedure recommended by the Province in 2010. The Committee reviewed various options for handling the urban deer problems and its final report made several recommendations that were typical of handling the issue. Thus, the District's actions were not unreasonable in deciding on a cull. ***Robin Dean***

Composting Facility stunk out of judicial review: Foundation Organics Ltd. v Capital Regional District, 2014 BCSC 85

The Petitioner operates a composting facility under a licence issued by the CRD. The CRD received an increasing number of complaints about the facility after it began operations in 2011. From August 2012 to July 2013, there were 498 online complaints and an additional 180 complaints by telephone. More than 50 different individuals made the complaints. An additional 1400 complaints were made between April and September 2013, with 50 complaints on one day, September 9, 2013.

The odours were described as sewage like, putrid/rancid, rotten, sweet/fruity, sour, earthy, moldy/musty. About 60 of the complaints were of a severe odour (as determined by the CRD), causing physical responses such as vomiting, gagging, difficulty breathing, runny eyes and noses. In addition, some complained that they had to keep their windows closed and there were difficulties selling property because potential

Composting Facility (continued from page 13)

buyers commented on the odour. Some of the complaints were from neighbors who had lived in the area before and after the commencement of the Petitioner's composting facility.

The CRD set up seven different monitoring stations around the perimeter of the Petitioner's property between November 2012 and September 2013. On 81% of the days monitored, odours were detected emanating from the Petitioner's property. An expert retained by the CRD also noted odours approximately 500 metres from the Petitioner's property in September 2013. These were specifically identified as a rancid odour and described by the expert as a result of compost that was immature because the compost process had not completed.

Prior to granting the licence to the company, the CRD enacted a bylaw which regulated the operation of composting facilities. It stated that "no owner of a composting facility will operate the facility 'in a manner that creates or results in litter, dust (spores or other particulates), odours, vectors so as to pose a risk to public health or the environment or constitute a public nuisance.' A "vector" is defined to mean a "rodent, bird, fly or mosquito or other animal or insect carrier that ingests or conveys garbage, odour, micro-organisms and/or pathogens from one location to another."

The bylaw contained provisions to do with cancellation and suspension of the license and appeal procedures. The licence was granted with an operation plan, which contains lengthy requirements.

The CRD conducted inspections and provided written warnings about nuisance odours to the company. The CRD also wrote several letters to the company, outlining contraventions such as the Petitioner receiving kitchen scraps or food waste in amounts greater than permitted under its licence. There were complaints and direct observations of gulls loitering at the composting facility and roosting on the roof. After the company failed to remedy the numerous contraventions, the CRD held a hearing and issued a decision to conditionally suspend the licence. As well, according to the CRD, the Petitioner was composting more than the permitted amounts of feedstock. The petitioner appealed, and another hearing was held in which the CRD commissioned an expert report about the matter. It set out a written decision denying the appeal.

The Petitioner submitted a new operating plan and felt that any previous issues were dealt with under this new plan. However, according to the Petitioner, there were significant delays by the CRD and other agencies in either approving the

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new plan or turning it down. Among other orders sought, the Petitioner sought orders to facilitate a decision on its new plan and judicial review on the original suspension of the licence. The court dismissed the application.

The court held that the standard of review in this case is reasonableness due to the informality of the CRD hearings. The court held that the process was not unfair to the company, and the CRD was entitled to hear additional evidence (the expert report) and issues at the appeal hearing because the bylaw stated that the appeal was to consider "the matter under appeal"- not "the decision under appeal". The court struck down each of the Petitioner's submission regarding unreasonableness, and the CRD's decision was upheld. As for the Petitioner's request to direct the CRD to make a decision on the new operations plan, the court found that the CRD was waiting to hear from other regulatory agencies such as the ALC, and the court did not have the jurisdiction over these agencies to issue an order to make a decision. ***Robin Dean***

Trial Courts have discretion to issue conditional orders for dangerous dogs under Community Charter s. 49(10): Smith v. Regional District of Central Okanagan, 2013 BCSC 228

Dave Smith, the owner of a mixed-breed dog named Diesel, appealed a provincial court order directing that Diesel be euthanized. Smith argued that the provincial court erred by finding Diesel to be a "dangerous dog" within the meaning of *Community Charter* s. 49 and that the provincial court incorrectly ruled that it could not issue a conditional order under s. 49. S. 49 provides that a dog is a "dangerous dog" if one of three conditions are met: (1) the dog has killed or seriously injured a person; (2) the dog has killed or seriously injured a domestic animal, while in a public place or while on private property, other than the owner's property; or (3) an animal control officer has reasonable grounds to believe the dog is likely to kill or seriously injure another person. Under s. 49(10), an animal control officer who has reasonable grounds to believe that a dog is a "dangerous dog" may apply to the Provincial Court for "an order that the dog be destroyed in the manner specified in the order."

On appeal, the supreme court held that the provincial court judge did not err in finding that Diesel was a dangerous dog. Diesel had most recently seriously injured a 75-pound shar-pei in a dog-park attack that resulted in severe lacerations to multiple body parts and a weighty vet bill.

Neither did the provincial court err by concluding that the animal control officer in this case had reasonable grounds to believe that Diesel was likely to kill or seriously injure another person. The animal control officer testified that Diesel had the most extensive history of complaints that she had come across. Additionally, two members of the public testified to occasions where Diesel had attacked them. In determining whether the animal control officer's opinion that Diesel was likely to harm another person was reasonable, the provincial court also found persuasive evidence that Smith himself was an irresponsible pet owner who failed to control his pet and showed an "extreme indifference" to his neighbours' safety.

The court stated, however, that a failure of a Regional District to exhaust internal remedies under its bylaws before seeking an order under s. 49 might be evidence of bad faith, even though it is not required under the *Community Charter*.

Finally, Smith challenged the provincial court's ruling that it was not authorized to make a

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conditional order. The provincial court stated that it's only options were to return Diesel to Smith or to order Diesel to be euthanized. On appeal the court held that s. 49 does confer jurisdiction to make conditional orders. The court stated that because s. 49(10) contained no limits within which the court might act, it has wide discretion under that section to fashion an order as it sees fit.

The court remitted the case to the trial judge to consider whether an order for Diesel's adoption should be made. ***Robin Dean***

Heritage Alteration Permit ruled to vary density of use: Society of Fort Langley Residents for Sustainable Development v. Langley (Township), 2013 BCSC 2273

A developer wanted to build a three-storey, mixed-use development on property zoned Community Commercial Zone (C-2) and situated within a historical conservation area. The applicable zoning bylaws required buildings no more than two storeys high with a footprint of less than 60 percent of the land. The Township issued a heritage alteration permit ("HAP") to the developer, and the Petitioners sought to have the HAP set aside. The Petitioner society was incorporated with the stated purpose of keeping the Township's character consistent with its historical origins, and its members were individual petitioners who lived within the conservation area. Petitioners argued that the HAP impermissibly varied the use or density of use of lands within a heritage conservation area.

The court granted the application and set aside the HAP. The court held that in approving the HAP, the Township breached s. 972(4)(a) of the *Local Government Act*. While s. 972(2)(b) allows amendments to zoning bylaws through the HAP process, s. 872(4)(a) restricts what council can do under the HAP. Specifically, council is prohibited from varying the use or density of use of lands that are subject to a HAP.

In allowing the building at issue to have a footprint in excess of the 60 percent maximum and to be taller than two storeys, the Township effectively changed the density of use of the land. Therefore, the Township acted beyond its powers as set forth in s. 972 of the Act. Notably, the court remarked that the Act does not define "density use", nor did the court attempt to define "density of use" in its reasons. Therefore, the case is of limited guidance to local governments trying to decide whether to issue certain development permits. ***Robin Dean***

Once a Highway, Always a Highway?: The Court tackles owner acquiescence under s. 42(1) of the Transportation Act in 452195 B.C. Ltd. v. Abbotsford (City), 2013 BCSC 2055, and Northern Rockies Regional Municipality v. Loewen Resort Management Ltd. and 0921477 B.C. Limited, 2014 BCSC 342

These two cases concerned whether s. 42(1) of the *Transportation Act* requires owner acquiescence or intent before a travelled road can be considered a highway under the Act. The relevant portion of the Act states: **"**if public money is spent on a travelled road that is not a highway, the travelled road is deemed and declared to be a highway." In both cases, the court declined to decide whether intent or acquiescence is an absolute requirement of the Act. Instead, both

Once a Highway… (continued from page 16)

courts decided that in the cases before them, even if acquiescence were required, it had been proved.

In the case against Abbotsford, the road at issue had been well-travelled since the early 1900s. Thus the court held:

> If consent of the owner who originally acquiesced in the incorporation of the Disputed Land into Clearbrook Road is a requirement for application of s. 42(1)of the *Transportation Act*, or if that owner's actual dedication to public use as an additional fact is required to be proven before s. 42 can apply, in order to deem and declare the Disputed Land to be a "highway" or part of a "highway", then I so infer that such consent or acquiescence or dedication was given a long time ago by the owner of the Property and the Disputed Land when Clearbrook Road in its present form was established for travel by the public.

In the Northern Rockies Regional Municipality case, the landowners agreed in the 1970s to dedicate a portion of their property for public use as a road. Due to an administrative oversight, the land was never so dedicated. However, the road continued to be well-travelled and publically-used. The municipality sought a declaration that certain lands within its boundaries are a highway within the meaning of s. 42(1). Again, the court declined to decide whether the Act requires proof of either an intention or acquiescence on the part of the owner. The court ruled that the evidence demonstrated that, either way, there was an intention to dedicate the road in question as a public highway and that thereafter all interested parties acquiesced in the public's use of the road until the administrative error came to light in 2006. The court declared the road a public highway under s. 42(1). ***Robin Dean***

Municipal Directors on Regional Boards

Two legal issues arise routinely in regard to municipal directors appointed to sit on regional boards. The first deals with confidentiality (in regard to regional board matters that must not be communicated to the council or staff of the director's municipality). The second deals with conflicts of interest that might arise as a result of wearing both the council and board hats at the same time.

In regard to confidentiality, regional district directors are subject to section 117 of the *Community Charter* which prohibits breach of confidentiality in regard to any record held in confidence by the regional district and keeping in confidence information considered in any part of a board meeting that was lawfully closed to the public (unless released by resolution of the board). A regional board director who contravenes section 117 may be subject to prosecution under the *Offence Act* or recovery of damages for any loss or damage arising from the breach of confidentiality. As well, some local governments have considered motions of "censure" in relation to breaches of confidentiality, subject to procedural fairness.

Some regional boards have formal policies in regard to the need for municipal directors to share information with, consult with or communicate with their municipal elected officials or staff. At the other end of the spectrum, some regional boards have express written policies prohibiting communications between the municipal directors and their municipal officials. We have also noted that a number of regional districts have loose policies or practices, not based on any resolution or formally adopted policy, to allow municipal directors to share confidential board information with their staff and in some cases with the members of their municipal councils.

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In the absence of a resolution of the regional board to allow the release of the record or to allow communication of confidential information, the municipal director would be in contravention of section 117. Accordingly, every regional board should consider this matter and determine by resolution whether and to what extent the policy would allow a municipal director to communicate the confidential information to their municipal elected and appointed officials.

The second issue deals with potential conflicts of interest that might arise in circumstances where a municipal director is sitting on a regional board considering matters that affect the municipal director's municipality.

In this regard, the Supreme Court of Canada has held that in circumstances that might otherwise give rise to a conflict of interest because of overlapping functions, where the overlap is authorized by statute there is no conflict.

The *Local Government Act* regulates the composition of regional district boards. Pursuant to s. 783(1), a board consists of municipal directors and electoral area directors. Pursuant to s. 784(1), the municipal directors are appointed from and by the councils of the member municipalities. Accordingly, the statutory regime not only authorizes, but mandates that regional district boards will partly consist of councillors from their member municipalities.

Typically, the application of this exception is straightforward, and entitles the otherwise conflicted member to participate as if no conflict exists. For instance, in *Save St. Ann's Academy Coalition v. Victoria (City of)*, at issue was the ability of two City of Victoria Councillors to vote on zoning bylaws that affected a property owned by the Provincial Capital Commission. At the time of the vote the Councillors were also members of the Provincial Capital Commission. They had been selected by the City to represent it in those positions, and the statute that established the Provincial Capital Commission mandated that two of its members were appointed by the City.

The zoning bylaws were challenged on the basis that the Councillors ought to have disqualified themselves from participating in the debate and vote. The Court of Appeal unanimously found that the statutory regime created an exception such that there was no conflict of interest.

However, the Court also clarified that the two Councillors, as with the entire Council, were still subject to the requirement to have open minds, capable of being persuaded, every time they participated in a public hearing and voted on a bylaw.

The ability of the legislature to authorize overlapping functions (that would otherwise give rise to a conflict of interest) is subject to constitutional constraints. As an example, courts are constitutionally required to possess objective guarantees of both individual and institutional independence. Accordingly, it would not be open to a legislature to pass legislation that would purport to detract from judicial independence.

Solicitor client privilege qualifies as a quasi-constitutional constraint on the ability of legislatures to authorize overlapping functions. In other words, legislation may not allow overlapping functions where to do so would violate solicitor client privilege. The fundamental importance of solicitor client privilege has been repeatedly expressed by the Supreme Court of Canada. See *Lavallee, Rackel & Heintz v. Canada (Attorney General)*. Present day constitutional norms include the status of solicitor client privilege as a principle of fundamental justice within the meaning of s. 7 of the *Canadian Charter of Rights and Freedoms* (at para. 21). The decision also states that solicitor client privilege is a civil right of supreme

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importance in Canadian law, and the courts must adopt stringent norms to ensure its protection.

Therefore, solicitor client privilege qualifies as a "constitutional constraint" on the ability of legislatures to authorize overlapping functions. In short, because there is a statutory requirement that a council member also sit on the regional board, this is a general exception to the conflict of interest that would otherwise arise when the Board is considering matters that affect the municipality. This exception is subject to constitutional constraints, including being privy to information that is subject to solicitor-client privilege regarding a matter in respect of which the director's municipality is adverse in interest.

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.

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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.

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 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

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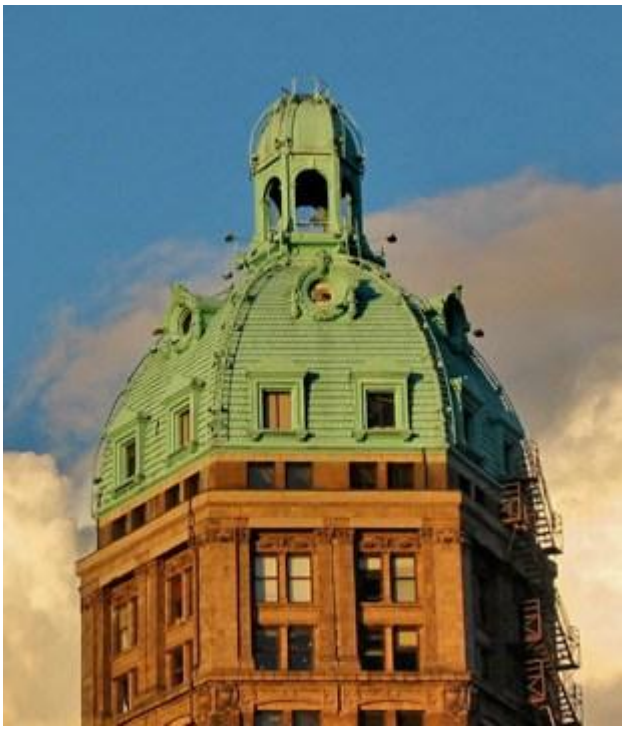
other awards throughout her academic career. Prior to going to law school Carrie worked as an independent communications professional for the provincial and federal government, non-profit organizations and the private sector.

Robin Dean is an 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.



Lidstone & Company welcomes our new Associate Counsel Rob Botterell

Rob 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.