LIDSTONE & COMPANY
Law Letter

In this issue

Is your local government protected? Misuse of information and authority

We await the report of the Charbonneau Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry in Quebec, which is due for release November 2015. The findings and recommendations from the inquiry will be helpful and important to governments everywhere. It is important to remember that the potential for collusion, conflict of interest and misuse of authority lies everywhere that personal benefit can be gained by the misuse of information or authority. While legal mechanisms are in place to guard against conflict of interest, these mechanisms are not exhaustive. We notice that most attention is paid to the potential for conflict of interest at the council level; moreover, the *Community Charter* ss. 100-109 addresses conflict of interest at that level specifically. However, organizations are vulnerable all the way through. A true risk-management approach requires local governments to examine their own systems and vulnerabilities to prevent corruption at all levels: from the high level decisions by elected and appointed officials to the everyday routine of data entry and control.

Vulnerabilities arise around access to, and control and security of information that can be of potential value if obtained in an advantageous way: for example premature access to information about potential sites for new public buildings works, or potential tax sales. Similarly, testimony at the Charbonneau inquiry has revealed the important role of premature notice to potential bidders regarding upcoming calls for tenders. Large public events are also a recognized area of vulnerability due to the complex logistics, tight timeframes and sometimes substantial public funds at play.

It is important to assess your local government's risks, and review and test the policies and risk mitigation measures that you have in place (also known as "integrity testing"). Risk management mechanisms include: developing integrity checklists to be applied to personnel recruitment and management, codes of conduct, employment contract provisions aimed directly at protection of confidential information, establishing internal whistleblower protections, proactive identification of vulnerable positions within the organization, and in some cases, the development of "risk maps" for specific processes. A risk map outlines where an existing process or procedure may create opportunities for misuse of information or authority. Roles or functions that are particularly vulnerable to corruption are identified (e.g. functions that involve discretionary authority or activities that may not be easily supervised). At an operational level, it is important for managers and supervisors to assess and understand the various risks of corruption and fraud associated with the activities and functions for which they are responsible.

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Code of Ethics

Certain ethical principles shall govern the conduct of any member of the Local Government Management Association of British Columbia, who shall:

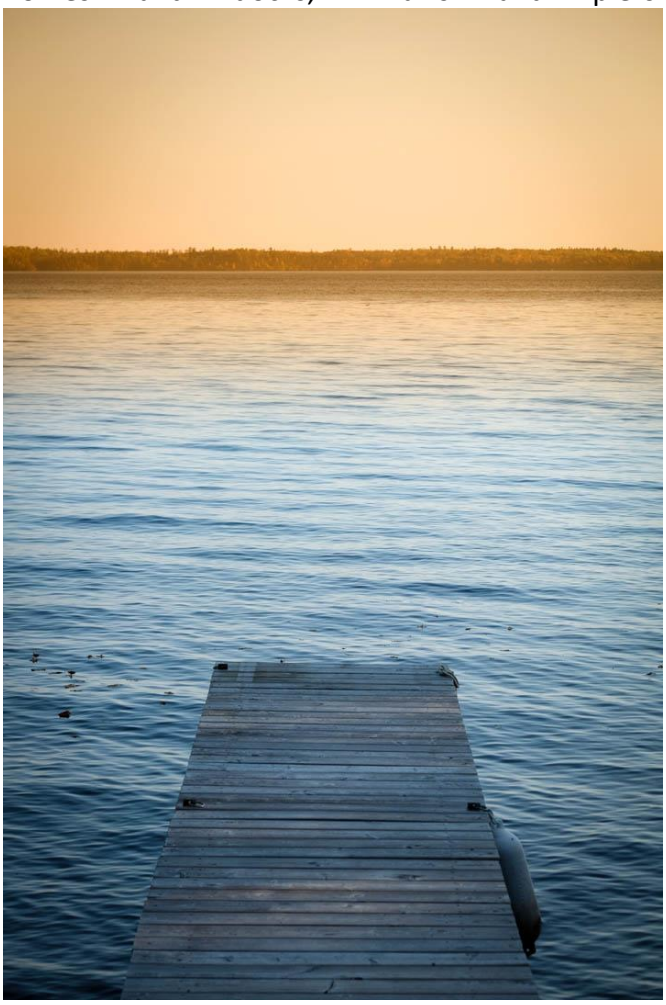
1. Maintain the highest ideals of honour and integrity in public and personal relationships and discharge faithfully the duties of office without fear or favour.
2. Not use confidential information for the personal profit of themselves or others, nor for the purpose of gaining promotion, nor shall he/she misuse public time in the pursuit of such objectives.
3. Not deal in property directly or indirectly within the municipality he/she serves other than his/her personal residence without first informing the Municipal Council, in writing, in open Council Meeting.
4. Declare his/her direct or indirect interest in any enterprise, which proposes to transact business with his/her municipality.
5. Declare his/her interest, direct or indirect, in any property, which is subject to a rezoning proposal or subdivision within his/her municipality.
6. a) Report to the Senior Administrative Officer any conflict of interest or potential conflict of interest of which he/she is aware involving himself/herself or his/her family, or any other officer in the municipality.
   b) As Senior Administrative Officer, report to the Municipal Council any conflict of interest or potential conflict of interest of which he/she is aware involving

himself/herself or his/her family, or any other municipal officer in the municipality.
7. Continually strive to improve his/her professional ability and to encourage the development of competence of his/her associates in serving the municipality.
8. Recognize that the chief function of a municipal officer at all times is service to his/her employer, and to the public.
9. Carry out his/her duties with impartiality and equality of service to all.
10. Avoid any situation, which could impair his/her judgment in the performance of his/her duties or give that impression to others.
11. Not knowingly engage in any unlawful activity.
12. Not conduct themselves in any way that would detract from the image of integrity or professionalism of the Association.
13. When he/she becomes aware of reasonable grounds to believe that transgression of the Code of Ethics is taking place on the part of any other member, report the apparent transgression to the Ethics Committee of the Association.

Maegen Giltrow

Sitting on the Dock of the Bay, Watching the Bylaws Roll Away

Land is defined in the *Community Charter* (BC) to include the surface of water and that definition also applies to the *Local Government Act* under s. 5.1 of that Act. The authority delegated to local governments under Part 26 of the *Local Government Act* to regulate land use includes the power to regulate uses on water surfaces within their jurisdiction. Local governments commonly use this authority in their zoning bylaws to regulate zones consisting of, or including, water surfaces. For example, the City of Victoria's zoning bylaw includes a GWP zone in the Gorge Waterway Park District that allows parks and uses accessory to parks and water related recreational activities as permitted uses and prohibits the anchoring or mooring of vessels between the hours of 11 p.m. and 6 a.m., live-aboard or float homes and docks, wharfs and piers.



The power delegated to local governments to regulate land use derives from the authority granted to the province under s. 92 of the *Constitution Act* (Canada) to enact laws in respect of property and civil rights. Under Canada's federal form of government, powers are divided between the federal government and the provincial governments. Each level of government is empowered to govern and enact laws within its own sphere of jurisdiction and the general rule is that one level of government may not enact laws in a subject area in which the other level of government has jurisdiction. There are occasions

when the constitutional authority granted the federal and provincial governments may overlap or conflict and the courts may be required to resolve a particular issue of jurisdiction. With respect to land use regulation, the general rule is that local government land use regulation does not apply to lands under the federal government and when local government bylaws overlap or conflict with federal jurisdiction in these areas, they may be subject to attack. One area where this may affect local governments is in the matter of land use regulation with respect to the surface of water.

When local governments enact bylaws to regulate water surfaces, they should be mindful of the potential for conflict with the authority of the federal government. Parliament is granted constitutional authority to enact laws with respect to navigation, shipping and buoys and local government bylaws that regulate water surface use sometimes come into conflict with federal laws in those areas. In this regard, local governments should be aware of relevant federal laws including the *Canada Shipping Act* (Canada), the *Navigation Protection Act* (Canada) and the regulations enacted under those statutes. For example, the *Private Buoy Regulations* enacted under the *Canada Shipping Act* regulate the form and placement of buoys in Canadian waters. Similarly, under the *Navigation Protection Act*, Transport Canada considers mooring buoys as "works" since they usually secure vessels in fixed and do not aid or direct navigation. Local government bylaws that infringe on those regulations may be found to be unlawful on the grounds they conflict with the federal government's sphere of authority.

The recent decision of the British Columbia Court of Appeal in *West Kelowna (District) v. Newcomb* (2015) is illustrative of a bylaw challenge on constitutional grounds in this subject area and the manner in which courts resolve jurisdictional conflicts. In *Newcomb*, the BC Court of Appeal considered a lower court decision that upheld a West Kelowna bylaw that restricted the moorage of vessels in a W1 Zone on the surface of Okanagan Lake. Newcomb wished to moor his houseboat in the W1 Zone and challenged the bylaw in court on constitutional grounds by arguing that the bylaw was, in pith and substance, about navigation and shipping which fell under the powers of Parliament.

The trial judge found that the West Kelowna bylaw was in pith and substance about land use regulation and not navigation and shipping; however, the trial judge also concluded that the bylaw did impact moorage of vessels by only permitting temporary boat moorage and moorage buoys if accessory to the use of the immediately abutting upland parcel. She concluded that those bylaw provisions regulating moorage fell within the protected "core" of shipping and navigation, a matter exclusively within federal jurisdiction. In the result, the trial judge upheld the bylaw but "read down" the provisions of the bylaw with respect to moorage to permit temporary moorage of vessels.

The British Columbia Court of Appeal affirmed the trial court decision and also provided a useful summary of how the courts address conflicts of laws between levels of government. The court noted that a division of powers analysis asks the following questions:

(a) What is the pith and substance of the challenged bylaw? The court noted that the pith and substance analysis requires consideration and examination of the purpose of the bylaw and its effect. This includes consideration of whether there is a dual aspect (provincial and federal) to the subject matter in which both levels of government may regulate within their core areas of jurisdiction.

(b) If the subject matter of the bylaw is within the jurisdiction of the Province (as delegated to the local government), does it

encroach too far on the federal sphere, either by:

i. "impairing" the "core" of a federal undertaking or head of power (interjurisdictional immunity);
ii. creating an "operational conflict" with valid federal legislation (paramountcy); or
iii. frustrating the purpose of a federal legislative scheme (paramountcy)?

In *Newcomb*, the court of appeal concluded by reference to both the purpose statement and the substantive provisions of the bylaw that the purpose and pith and substance of the W1 Zone provisions of the bylaw were to regulate land use. On that basis, the District was entitled to enact the W1 Zone provisions based on division of powers principles. The court also affirmed the trial judge's decision that the bylaw restrictions on temporary moorage infringed on the federal government's power to regulate navigation and shipping and consequently "read down" the bylaw to permit temporary moorage. It appears from the *Newcomb* decision that long term moorage of vessels has a dual aspect that is subject to regulation by both federal and provincial/local government regulation.

What lessons does *West Kelowna (District) v. Newcomb* have for local governments? First, any bylaws enacted by local governments with respect to water surfaces must be in pith in substance focused on land use regulation and matters within their jurisdiction under the *Community Charter* and *Local Government Act*. Second, beyond the pith and substance of a bylaw regulating water surface uses, local governments should be aware of federal statutes that might be relevant to regulation of water surfaces and take reasonable measures to ensure bylaws do not offend paramountcy or a protected core of federal power. With regard to the former, paramountcy means that a bylaw will be inoperative to the extent that it conflicts with a federal law. Still, laws can overlap if it is possible to comply with both. Third, local government bylaws that regulate moorage should not prohibit temporary moorage of vessels which is a core protected area of the shipping and navigation powers granted to Parliament under the Canadian *Constitution Act*.

Lindsay Parcells

Privilege and Confidentiality: Keeping Information Protected

Communications between clients and their lawyers are generally subject to solicitor client privilege. The privilege protects the client and the lawyer from having to disclose the information to third parties. For this reason solicitor client privilege is a powerful tool, and clients should guard against taking steps that result in waiver of the privilege.

Solicitor client privilege applies to communications between the lawyer and client, which involve the seeking or giving of legal advice, and which are intended to be kept confidential by the parties. Disclosure of the communication to a third party (outside of the local government) can result in a waiver of the privilege. For this reason it is critical that correspondence you receive from your lawyers is not forwarded on to any other parties outside your organization, even to entities that are "on the same side" or are affiliated with your local government, such as the local government's insurance company or police department. There are circumstances in which a local government may share communications from their lawyers with outside parties, without waiving privilege, as long as the parties share a common interest in the matter. For example, both a municipality and its police department have a common interest in the lawful enforcement of municipal bylaws. Bylaw enforcement staff may be able to share legal advice about bylaw enforcement file with the police department, without waiving privilege.

However as a general rule legal communications should never be provided to outside parties. If in doubt, seek legal advice about the ability to share information without it constituting a waiver. Another important aspect of keeping information confidential is ensuring compliance with the duty imposed by s. 117 of the *Community Charter* (which applies to Regional Districts by virtue of s. 787.1 of the *Local Government Act).* This duty requires current and former councillors and directors to keep records and information confidential, including *in camera* information, unless and until it is released to the public. If a director or councillor intentionally violates this provision, they can be personally liable for resulting damages.

Sara Dubinsky

50 Ways to Lose Your Bylaw

Councils and regional boards adopt bylaws routinely at nearly all their meetings. Regulatory bylaws, however, require special care and attention. This is because regulatory bylaw provisions impact private interests, including financial and property interests, and therefore can attract opposition. If an opponent cannot get a local government to remove or soften an impact by making submissions to the local elected officials, then there are many lawyers in BC ready to attack a bylaw in court for ten or twenty thousand dollars.

A bylaw opponent will throw numerous arguments at the wall, and only one has to stick in order for a court to set aside the bylaw. This is why I recommend that local governments use detailed checklists for procedures and content, as well as proven notice templates. Keeping up with the law of bylaw attacks is advisable, so I also recommend attending the LGMA bylaw drafting workshops at least every few years.

An opponent can apply to the BC Supreme Court to set aside a bylaw under section 262 of the *Local Government Act* or under the *Judicial Review Procedure Act*. The court may set aside the bylaw for illegality and award costs. Under the LGA, the notice must be served on the local government in most cases within one month of adoption and the case must be started in the court within two months. If the attack is under the JRPA, the application "is not barred by the passage of time" and there are cases where the bylaw was set aside 9 and 11 years after adoption, respectively. Under JRPA, although the time limits are of concern to local governments, the court may refuse relief if the sole ground for relief is a defect in form or procedure. A resolution can also be attacked. Finally, a person charged with an offence under a bylaw may defend the charge by attacking the validity and enforceability of the bylaw.

What are the ways to lose your bylaw? Here are some (but not all) grounds for attack on all or part of a bylaw:

- Defective notice of hearing
    - Dates for bylaw inspection
    - Purpose of bylaw
    - Description of lands
    - Sketch missing or bad
    - Adjoining road not shown
    - Posting of notice breached
    - Dates of publication
    - Delegation not shown
- Choice of "Newspaper" non-compliant
- Approval of Minister, MOT, etc. not obtained between 3R and adoption
- No reasonable effort to mail or deliver notices to owners/occupiers in the defined area
- Council/Board members receive new information after hearing
- Copies of all information for Council/Board not available to persons attending or preparing for hearing
- Member disqualified from voting due to conflict
- Hearing adjourned improperly

- Hearing delegated improperly
- Chair refuses hearing attendees to repeat each other
- Chair wrongly refuses to allow submission
- Amendment of use/density after hearing
- Zoning inconsistent with OCP
- OCP inconsistent with RCS
- OCP lacked consultation policy
- OCP consultation done by staff
- Council/Board failed to consider OCP consultation input
- OCP not considered with financial plan/waste management plan
- OCP: no affirmative majority each reading
- OCP: not referring to ALC for comment
- Non-zoning bylaw prohibits uses
- Zoning bylaw requires something (e.g., extra storey)
- No approval for farm business restriction
- Inconsistency with *ALC Act*
- Zoning affects use of land by Crown
- Amenity zoning: base use unreasonable
- Bylaw encroaches on exclusive federal area (e.g., aeronautics)
- Zones not clearly defined on map or by description
- Conditions imposed on zoning that should be in PDA or other bylaw
- No power in statute for bylaw content
- Bylaw exceeds power in statute, regulation, letters patent or order
- A new fee bylaw is really a tax bylaw, but no authority for the tax
- Assent or AAP not conducted validly
- Bylaw considered at Council/Board meeting after most debate conducted at illegal meeting (e.g., beach of open meeting or quorum rules)
- Content of bylaw is vague or uncertain
- Breach of concurrent authority requirements in s. 9 CC
- Bylaw contains unlawful delegation to staff or others
- Bylaw contains unlawful re-delegation or reference back to Council/Board
- Bylaw repeats statutory power instead of enacting under the power
- Bylaw must be enacted in good faith
- Breach of procedural fairness
- Failure to include enacting clause (e.g., DCC bylaw with a schedule of charges, but no imposition of charges in the bylaw)
- Bylaw not enacted for "municipal purpose" as set out in enabling legislation

Don Lidstone

Local Government Environmental Assessment – An Important Planning Tool

Local governments across BC are frequently faced with projects and developments that have significant environmental, economic, social, health and heritage impacts on their community. This

may be because of the scale and geographical location of the project, or perhaps because the cumulative effects of development in the community have reached a tipping point.

Developments that qualify as a "reviewable project", under section 1 of the BC *Environmental Assessment Act,* allow a provincial environmental assessment to be conducted on:

(a) the facilities at the main site of the project,
(b) any designated off-site facilities related to the project, and
(c) any designated activities related to the project.

Provincial environmental assessment typically involves a significant project in the energy, mining, industrial, tourism destination, transportation, waste disposal or water management sectors.

While there are strong differences of opinion on whether the impacts on local government communities are adequately addressed through the provincial environmental assessment process, local governments are provided an opportunity to identify project impacts and propose mitigation measures.

The provincial process does leave a gap in the environmental assessment of other developments including:

(a) major projects that are not reviewable under the *Environmental Assessment Act*,
(b) project-related facilities and activities that are not designated as reviewable under the *Environmental Assessment Act*, and
(c) proposed industrial, commercial or residential development triggered by the overall level of growth within the community and the surrounding area.

To address this gap in environmental assessment, a local government may enact a development approval information (DAI) bylaw under section 920.1 of the *Local Government Act.* A DAI bylaw enables the local government to require a developer, at the developer's cost, to provide a wide range of relevant studies, information, and recommendations for mitigation equivalent to a provincial environmental assessment. For example, a local government could require studies and mitigation recommendations regarding:

(d) socioeconomic impacts such as economic impacts, demographics, housing, local services and cultural issues,
(e) land use impacts such as noise, vibration, glare and electrical interference,
(f) landscape and visual impacts,
(g) transportation impacts,
(h) air quality impacts,
(i) ground and surface water impacts,
(j) geotechnical conditions,
(k) infrastructure and site servicing,
(l) community facilities and services,
(m) historical, archaeological or cultural impacts,
(n) protection from hazardous conditions,
(o) impact on the natural environment,
(p) impact on forestry or agriculture,
(q) impact on public facilities,
(r) wildlife and habitat,
(s) cumulative impacts, and
(t) impacts on other matters identified by the public or the local government as a concern.

Section 920.01 of the *Local Government Act* requires an official community plan to designate the circumstances or areas where specified development approval information may be required. Circumstances could include:

(a) a proposed change to Official Community Plan designation,

(b) a proposed change to zoning,

(c) a requirement for a development permit, or

(d) a requirement for a temporary use permit.

To address any deficiencies in the development information provided by a developer, a local government may include a provision in the DAI bylaw to require peer review of the developer's DAI report.

Effective use of a DAI bylaw helps ensure:

- the developer, not local taxpayers, bear the cost of key studies,
- an appropriate balance is struck between timely provision of key studies and the developer incurring costs prior to development approvals,
- the full range of potential impacts are canvassed and mitigation measures are identified,
- studies are subject to peer review where appropriate, and
- important considerations are addressed prior to consideration of subdivision approval.

Further, if your community is experiencing considerable commercial, industrial or residential growth or the expansion of activities and developments triggered by projects reviewed under the BC *Environmental Assessment Act*, a DAI bylaw may be applied by a local government to accompanying developments or parts of a development that fall outside the provincially-defined "reviewable project."

Rob Botterell

Putting Climate Change into Consumers' Hands: Municipal Authority to Impose Gas Pump Labelling Requirements

The impacts of climate change are increasingly being felt at a local level and scientists who study the issue predict further changes over the coming decades. Longer and more severe forest fire seasons, increased risk of flooding, decreased snow packs and an increased likelihood of extreme weather events threaten local environments, infrastructure and economies as well as the health and safety of local populations. Although some climate change is attributable to natural causes, the more rapid climate change seen in recent years has been attributed to human activities, such as the burning of fossil fuels. In light of these impacts, and in response to perceived inaction at the provincial, federal and international level, local governments across Canada are looking for new ways to tackle this global issue. Given the significant impact of transportation on greenhouse gas emissions, encouraging reductions in gasoline consumption is an obvious place to start.

In this article, we consider whether municipalities[1] in B.C. can use their authority over business regulation to require gasoline retailers to place labels on pumps warning consumers of the climate-related effects of consumption. Similarly to cigarette labelling, the goal of gas pump labelling is to remind consumers of the effects of burning fossil fuels, provide immediate feedback regarding the long-term consequences of their decision and remind them of their role in and responsibility for the problem of climate change.[2]

Municipalities are permitted to regulate in regulation to business pursuant to section 8(3) of

[1] Our discussion in this article does not apply to regional districts, the City of Vancouver or local governments in other jurisdictions.

[2] Our Horizon Society (ourhorizon.org)

the *Community Charter*. The definition of regulate includes "authorize, control, inspect, limit and restrict, *including by establishing rules respecting what must or must not be done*, in relation to the persons, properties, activities, things or other matters being regulated". As set out in subsection 8(8), the power to regulate includes "to provide that persons may engage in a regulated activity only in accordance with the rules established by bylaw."

The decision of the B.C. Supreme Court in *International Bio Research v. Richmond*, 2011 BCSC 471, describes the extent of municipal authority to regulate business. In that case, the Court considered the validity of a bylaw that prohibited pet stores from selling dogs on the basis that it would reduce the number of unwanted and abandoned pets in the municipality. Despite the fact that the bylaw prohibited a certain type of transaction, it was found not to be a prohibition on business generally and was upheld as valid. The Court noted that the regulation of business will necessarily involve restrictions on business, and these conditions may go so far as to make it uneconomic for the business to continue.

In light of this statutory authority and the court's interpretation of that power, it is our view that gas pump labelling requirements could be validly incorporated into a municipality's business regulation bylaw, forming part of a larger body of rules within which a person may operate a gasoline retail business. Although not considered here, other statutory provisions may also provide authority for such a requirement. We also note that a municipality can impose a regulatory fee to off-set the cost of a licensing or regulatory regime.

Despite the statutory authority to impose labelling requirements, there are several general considerations to keep in mind when doing so. In addition to a requirement for local government bylaws to be imposed reasonably, in good faith and in accordance with legislative authority, bylaws must also be sufficiently connected to the municipality. The recent decision of an Ontario court regarding shark fin bans highlighted this issue. In *Eng v. Toronto (City)*, 2012 ONSC 6818, the court found that the ban on the possession and sale of shark fin products was outside of the jurisdiction of the City because it sought to affect matters outside the boundaries of Toronto and did not have any identifiable benefit for inhabitants of the City itself. While this decision represents a narrow view of the scope of municipal powers that is questionable in light of other decisions, the imposition of a gas pump labelling requirement can be distinguished in any event due to the clear benefit that such a requirement could provide to the local environment. Provided Council enacts labelling requirement for the purpose of benefitting the residents of the municipality, the fact that it may take into account issues beyond its boundaries in enacting the bylaw should not render its decision *ultra vires*.

An additional concern that arises in the context of mandatory labelling is whether such a requirement could offend the guarantee of freedom of expression in the *Canadian Charter*, which includes the right to say nothing. As noted above, gas pump labelling is analogous to cigarette labelling, and the decisions of the courts on that issue are instructive. In *Canada v. JTI-MacDonald Corp*., 2007 SCC 30, the Supreme Court of Canada found that although the cigarette labelling requirements infringed on freedom of expression by compelling speech, the infringement was justified due to the pressing and substantial goal of the labelling, that the labelling was rationally connected to Parliament's goal of reducing smoking and related diseases, and that the requirement for warning labels was minimally impairing in that it fell within a range of reasonable alternatives that the government could take to address the issue. Importantly, the inclusion of the phrase "Health Canada" on the labels minimized the infringement by ensuring

that the forced speech was attributable to the government and not cigarette manufacturers. Anticipating a similar challenge from gasoline companies, mock labels prepared by Our Horizon Society, a non-profit advocating for gas pump labelling requirements, include a similar attribution to municipal government.

In conclusion, municipalities can view the requirement for gas pump labelling as another tool in the fight against climate change. While the likelihood of such a requirement being challenged is high given the potential effect on gasoline retailers and wholesalers, it can be an effective way to put climate change quite literally into the consumer's hands.

Rachel Vallance

Game of Drones

Recently, a municipality asked us if they have the power to regulate the use of drones near an airport. Since drones are increasingly entering the public consciousness and our airspaces, local governments will likely be asking more questions about how to regulate these futuristic flying machines.

Municipalities cannot regulate drones near airports because the regulation of this type of activity at airports falls exclusively within federal jurisdiction. However, municipalities can validly regulate the use of drones in other areas such as public parks and school grounds under their public place powers in the *Community Charter.* Local government bylaws would have to be drafted in a way that does not interfere with Transport Canada's regulation of drones.

What is a Drone?

Drones are also called Unmanned Air Vehicle (UAV), Unmanned Air System (UAS) or Remote Piloted Aircraft Systems (RPAS).[1] Some drones look like mini helicopter or mini airplanes with fixed wings and alarmingly, some even look like birds or other animals.[2] They can be as large as traditional manned aircraft, or small enough to fit in a backpack. Large drones can fly at high altitudes and some can even remain airborne for several days. Some drones are so small and quiet they could be undetectable to a person being surveilled.[3]

Regulation of Drones near Airports

The federal government has jurisdiction over matters relation to air travel under its general power "to make Laws for the Peace, Order, and good Government of Canada", also knows as the "POGG" power.

In 2010, the Supreme Court of Canada firmly recognized this exclusive federal jurisdiction in aeronautics matters. In *Quebec (Attorney-General) v Lacombe* 2010 2 SCR 453, the Court dealt with a municipal zoning bylaw that prohibited the operation of an aerodrome on a lake within the municipality. The bylaw specifically prohibited the operation of a floatplane business that was licenced under the federal *Aeronautics Act* and that had recently relocated to the lake. The Court found that the bylaw was in relation to aeronautics and not a bylaw dealing with land use management, which would have fallen under provincial and local jurisdiction.

The tendency of the court decisions has been to deny the application of provincial and local laws to airports and related activity even where the federal Parliament has not acted.[4] In *Lacombe,* Chief Justice McLachlin said that even if the bylaw

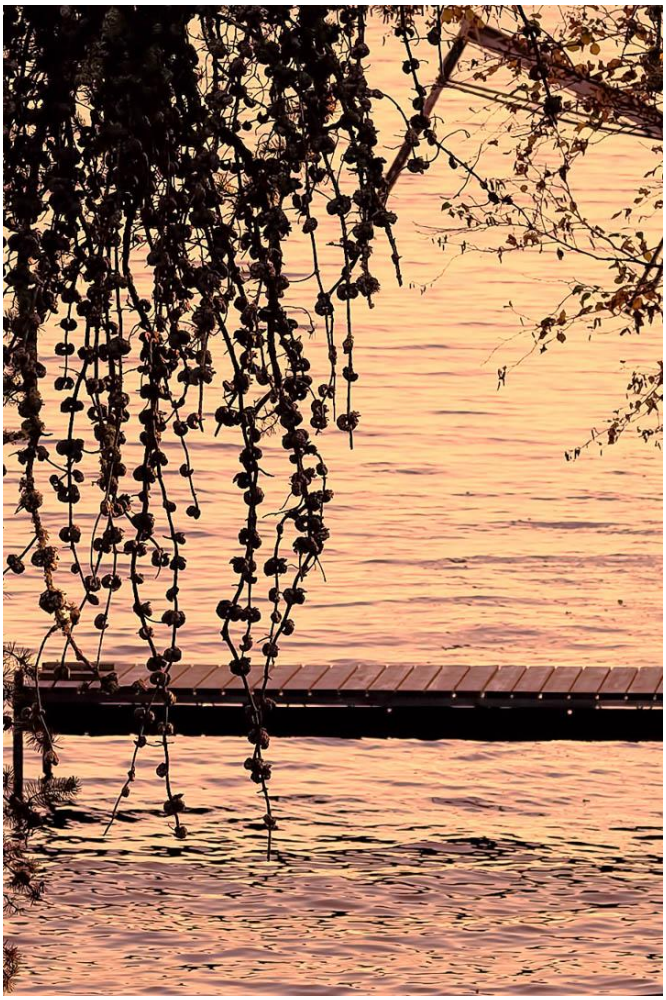
[1] Office of the Privacy Commissioner of Canada, "Drones in Canada" (March 2013) online: http://www.priv.gc.ca/information/research-recherche/2013/drones_201303_e.asp#heading-002-1
[2] *Ibid.*
[3] *Ibid.*
[4] Peter W. Hogg, Constitutional Law of Canada, loose-leaf, (Toronto, Ont.: Thomson Reuters Canada Ltd.) p. 22-25.

had been a valid law in relation to land use, the bylaw would have been inapplicable to the water aerodrome by virtue of the doctrine of interjurisdictional immunity. The doctrine of interjurisdictional immunity means that where a provincial or local law affects the "core" of a federal undertaking (i.e. aeronautics), then that law is inapplicable to the federal undertaking. However, the court will only apply this doctrine where the provincial law or local bylaw impairs the federal exercise of the core competence.[5] The bylaw would have to significantly or seriously intrude into the federal sphere.[6]

The location of an airport, its design and its operation are all considered an integral part of aeronautics from which provincial/local power is excluded.[7] The use of UAVs is also included in this aeronautics sphere, and is regulated by Transport Canada under the *Aeronautics Act: Canadian Aviation Regulations* (CARs). It is clear from previous case law that municipalities which attempt to regulate drones at airports will not likely succeed if challenged. The extent to which municipalities can regulate drones in other public spaces is less clear.

Municipal Regulation of Drones in Public Spaces

Under the *Community Charter*, municipalities can regulate, prohibit, and impose requirements in public places and this includes persons, property, things and activities that are in, on or near public places.[8] Municipalities can also regulate nuisances and other objectionable situations including "noise, vibration, odour, dust, illumination or any other matter that is liable to disturb the quiet, peace, rest, enjoyment, comfort or convenience of individuals or the public".[9] This power falls squarely within provincial constitutional jurisdiction.[10]



In *R. v. De Havilland Aircraft of Canada Ltd.*, a company which tested aircraft on land it owned in the City of North York, Ontario, was subject to the wrath of irate neighbours who could no longer tolerate the noise and fumes from the testing.[11] The company did not own or operate an airport. The court agreed that the noise far exceeded the City's bylaw requirements pertaining to noise and fumes. However, the noise bylaw conflicted with

[5] *Quebec (Attorney General) v. Canadian Owners and Pilots* Association 2010 SCC 39 ["COPA"].
[6] *Ibid.*
[7] Hogg, p. 22-27
[8] *Community Charter* SBC 2003 c. 26, s. 8(3)(b) and s. 62.
[9] *Community Charter* SBC 2003 c. 26, s. 8(3)(h) and s. 64.
[10] *Constitution Act, 1867*, s. 92(13) "Property and Civil Rights in the Province" and s. 92(16) 16 "Generally all Matters of a merely local or private Nature in the Province".
[11] 129 D.L.R. (3d) 390 (Ont. Prov. Ct.).

the company's obligations to conduct testing of aircraft as per the regulations under the federal *Aeronautics Act*. Because the company could not comply with both laws, the federal law prevailed and the bylaw was declared suspended and inoperative with respect to the company.

In *Lake Country (District) v. Kelowna Ogopogo Radio Controllers Association*, a model aircraft club was operating on ALR land in the District's agricultural zone. The question was whether the flying model aircraft was a compatible use complementary to agriculture. The BC Court of Appeal said it was compatible in light of the bylaw wording, which allowed unpaved airstrips and helipads. The constitutionality of the bylaw was not addressed in this case.

Transport Canada differentiates model aircraft from UAVs. A model aircraft is aircraft not exceeding 35kg that is mechanically driven or launched into a flight for recreational purposes; whereas a UAV is a power-driven aircraft, other than a model aircraft, that is designed to fly without a human operator on board.[12] While Transport Canada generally regulates flying machines in air however they are defined, this does not preclude municipalities from regulating things and activities that are in, on or near public places or other matters liable to disturb the public.

But as the case law illustrates, a bylaw the seeks to regulate whether, where and how drones can be operated in and near public space would likely be found valid under its public place powers in the *Community Charter* provided that is does not substantially interfere or conflict with federal authority or laws. The case law also indicates that a municipal bylaw that regulate activities such as the use of drones near airports would not fly.

Transport Canada is currently updating the regulations under the *Aeronautics Act* to address the existing gaps around UAVs. Part of the changes contemplate expanding the distance in which small UAVs would be prohibited from operating near airports, for example, one suggested approach is to prohibit the operation of small UAVs within 11 nm (20 km) of any aerodrome.[13]

If the public or local government observes drones flying too closely to an airport or aircraft, then the police and Transport Canada should be notified. There are provisions in the *Criminal Code* which make it an offence to endanger the safety of aircraft.

In the meantime, the law will likely continue to evolve as all levels of government seek to regulate drones under their respective jurisdictions.

Carrie Moffatt

Case Law Review

True Construction Ltd v Kamloops (City), 2015 BCSC 1059

This case concerned the bid instructions for the City of Kamloops' invitation to tender for a fire hall. The instructions required a bid form and Appendices A through E to be delivered in a sealed envelope. After delivery, the instructions allowed for additions or subtractions to bid amounts through a faxed Appendix F. The plaintiff firm's bid failed to include two appendices in their envelope, but they faxed in their missing appendices prior to the bid process closing, after the envelope had already been opened.

While the plaintiff's bid was the lowest, Kamloops rejected it as materially non-compliant. In supporting the City's decision, the Court held that the bid defect was more than a mere irregularity. More generally, the Court reinforced that the principal objectives of tendering law are the

[12] *Canadian Aviation Regulations*, s. 101.01.
[13] Transport Canada, "Notice of Proposed Amendment – Unmanned Air Vehicles" (May 28, 2015) online: http://www.apps.tc.gc.ca/Saf-Sec-Sur/2/NPA-APM/actr.aspx?id=17&aType=1&lang=eng

avoidance of providing advantage to a non-compliant bidder and the maintenance of procedural integrity. In the Court's opinion, Kamloops did not have to prove that the plaintiff intended to obtain advantages over the other bidders. Instead, the test is objective and limited to whether the bidder obtained advantages that affected the integrity of the bidding process.

Applying this test, the Court found that the plaintiff did obtain benefits not available to other bidders as they were able to continue to negotiate with their suppliers. By failing to properly complete the appendices, the plaintiff's scope of risk was reduced as they could avoid a contract "incapable of acceptance" should their negotiations with subcontractors demonstrate that the project would be unprofitable.

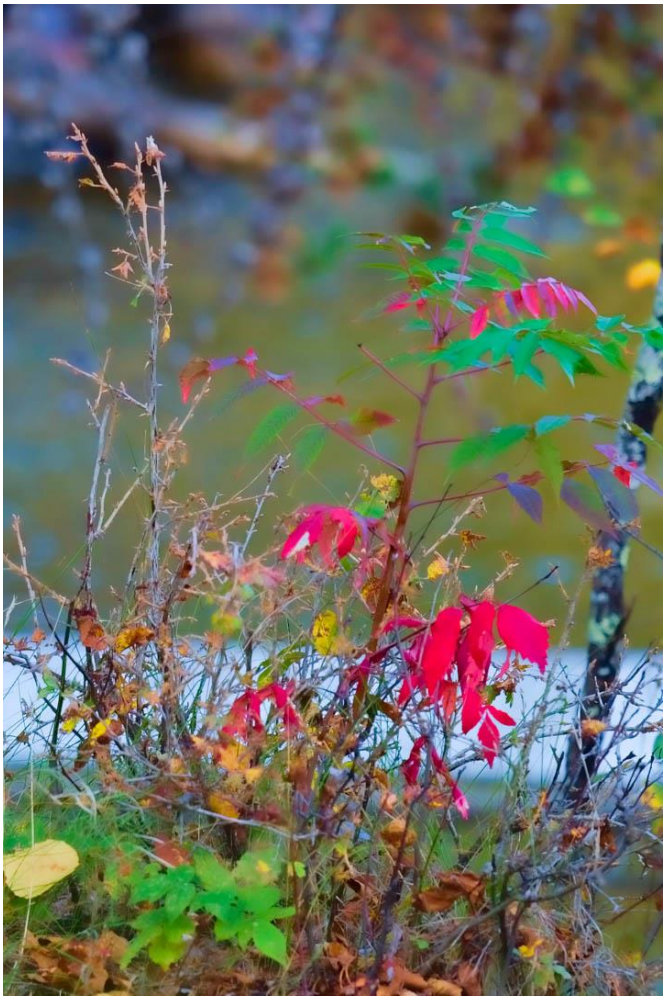
The Court went on to reason that a municipality must ensure that "the bidding process on a particular bid is not only fair, but perceived to be fair." In the facts of the matter, the City's acceptance of a higher bid was the fair course of action.

***Thompson-Nicola Regional District v 0751548 BC Ltd*, 2015 BCSC 1205**

At issue here were costs arising out of an action concerning whether the defendant's use of their property violated the Regional District's bylaws concerning manufactured home parks and whether those bylaws themselves were within the authority granted by the *Local Government Act*.

The dispute centred on the use of one of two adjacent lots owned by the defendant. The lot in question was zoned to permit accommodation of "manufactured homes" or "mobile homes" but not "recreational vehicles" or camping. The Regional District argued that the lot's use for overnight tenting and to accommodate certain trailers that the defendant claimed were recreational vehicles, was in violation of bylaw.

The trial judge found that the trailers were "recreational vehicles" and thus a contravention of the zoning bylaw, but that the limited tenting did not suffice to demonstrate an unpermitted campground use.



On the subject of costs, since the plaintiff Regional District was substantially (if not completely) successful, the Court found no reason to depart from normal cost rules on the basis of the defendant being a public interest litigant. In regard to success, the plaintiff obtained the declaratory and injunctive relief it sought. The lack of evidence on the tenting issue did not detract from the comprehensive relief awarded or conclusion that the defendant was in violation of a valid bylaw.

While the defendant perceived there were legitimate grounds for believing that their use of the property did not contravene the zoning bylaw, and the issue of the interpretation of the zoning bylaw was an issue that could be of significance to other parties, the defendant's challenge to the zoning bylaw did not fall within the category of public interest litigation that could justify a departure from ordinary costs rules. Notably, the significance of the issue would be confined to a narrow group of people, and the defendant had a pecuniary interest in the outcome of its challenge to the bylaw.

This case is more generally useful to consider where a local government may be legally successful in pursuing a matter, but the prospect of uncertain legal cost recovery is causing hesitation at moving forward with the action in the first place.

***Okanagan Indian Band v Canadian National Railway Company*, 2015 BCSC 1365**

This injunction application concerned the allegation from the Okanagan Indian Band that certain lands were part of a reserve established in 1877. At the time, the province did not accept the creation of the reserve and auctioned the lands, a substantial share of which was acquired by the defendant rail company's predecessors. In 2013, the defendant published notice that it was discontinuing the rail line. The City of Kelowna agreed to purchase the lands with the intention of using them for recreational trails and transferring part of their purchase to two other local governments to complete the trail system. The Band took the position that the rail corridor had never been surrendered and thus the defendant rail company had never properly acquired the lands.

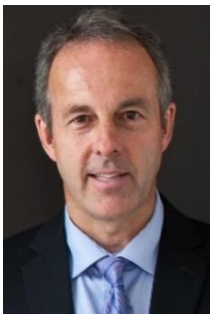
In dismissing the application, the Court held that the plaintiff Band could not show that it would suffer irreparable harm if the injunction was not granted as the land use would not be meaningfully altered – there was not much difference between using the lands as a railway and as a trail system. Other than as members of the public, Band members had not used the lands since their transfer to private hands in 1893 and the lands did not have present reserve status. Thus if the Band ultimately succeeded in their larger action, their ability to recover the lands as a reserve would not be diminished by the sale to Kelowna.

Robert Sroka

Lidstone & Company *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.

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 also advocates 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.

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 Moffatt is a research and opinions lawyer in the areas of municipal law, land use, administrative law 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.

Rachel Vallance provides legal opinions, agreements and bylaws on all local government matters. She completed her degree at the Unversity of Victoria, where she participated in the law co-op program. Rachel has worked at the Ontario Securities Commission in Toronto, The Ministry of Justice in Victoria, Chimo Community Services in Richmond, and Chandler & Thong-Ek, a business law firm with offices in Thailand and Myanmar. During law school, Rachel received awards both for academic performance and involvement in student affairs. Prior to her law degree, Rachel completed an Honours BSc in Psychology and Ethics, Society & Law at the University of Toronto.

Robert Sroka provides legal opinions and drafts agreements on all local government matters with an active interest in land use planning and real estate development. Robert came to Lidstone & Company from The City of Calgary Law Department, where he served as a bylaw prosecutor, drafted real estate transactions, and advised on planning issues. Robert obtained his JD from The University of British Columbia and spent two summers as an Ottawa intern in the offices of federal cabinet ministers. He is currently a LLM Candidate at the University of Calgary, where his work on urban brownfield redevelopment financing has been presented at several law conferences.