LIDSTONE & COMPANY

Law Letter

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Air BnB Regulations

The popularity of vacation rental websites like Airbnb and VRBO continues to grow as travelers seek alternatives to traditional types of accommodation. The accommodations available on these websites are preferred by many due to the uniqueness, price, and the ability to stay in neighbourhoods free of hotels or hostels. Short-term rentals are also a hit with property owners, as they offer a source of rental income without the need to commit to long-term tenants.

Despite these benefits, short-term vacation rentals can cause conflict in communities due to the disruption caused by irresponsible property owners and renters, the impact on neighbourhood character, as well as the effects on housing cost and supply that result from the removal of units from the housing market. Hotel operators generally oppose short-term vacation rentals as well, finding it difficult to compete with unregulated accommodations while complying with local government bylaws and paying hotel and sales taxes.

Many local governments are facing pressure to regulate short-term vacation rentals, and local governments across North America have taken a variety of approaches to dealing with the practice. While each local government must consider the pros and cons of short-term vacation rentals in the context of its own community, the following is a summary list of options for local governments to consider:

Zoning: Many local governments have enacted land use regulations that prohibit vacation rentals entirely or in some zones (often residential), while others permit the use widely. All of these options are permissible, but as is the case with zoning generally, local governments should ensure that the wording of the bylaw clearly reflects the

intention of the Council or Board. In *Okanagan-Similkameen (Regional District) v. Leach*, 2012 BCSC 63, the Court concluded that short-term vacation rentals were not permissible as a principal use in a zone that permitted the use of single detached dwellings for "residential" uses, as renting to short term paying guests was not a normal and customary residential use. However, the Court did find that short-term vacation rentals were permitted as a secondary use, despite the fact that the Regional Board appeared to have intended the "private visitor accommodation" use to be limited to bed and breakfast operations.

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Thanks to our editor Kylie Wittmann.

If short-term vacation rentals are a permitted use and a local government wishes to amend its land use bylaws to prohibit that use, it will likely be faced with issues of lawful non-conformity. In those cases, business licensing may still offer a mechanism by which to regulate short-term vacation rentals.

Temporary Use Permits: Some local governments in British Columbia have chosen to prohibit vacation rentals and permit the use only in individual cases pursuant to temporary use permits ("TUPs"). TUPs offer the benefit of allowing local governments to experiment with permitting short-term vacation rentals, as TUPs can allow a use not permitted under zoning for a term set by the local government, up to a maximum of three years plus one three year renewal period. Local governments can also impose conditions on the issuance of TUPs, including requirements for security, and can revoke TUPs upon default.

Local governments are required to provide public notice prior to the issuance of a TUP, and may receive useful feedback from neighbours as a result. However, a public hearing is not required unless a TUP is issued by bylaw in accordance with section 493(1)(b) of the *Local Government Act*.

Business Licensing: Municipalities can regulate and impose conditions on operators of short-term vacation rentals pursuant to their authority under sections 8(6) and 15 of the *Community Charter*. Although section 8(6) only authorizes municipalities to regulate (and not prohibit or impose requirements on) business, the courts have held that the regulation of business necessarily involves restrictions on businesses, including setting out rules regarding what cannot be done: *International Bio Research v. Richmond (City)*, 2011 BCSC 471.

Some municipalities in British Columbia have chosen this option as a way to permit short-term vacation rentals while reducing the potential negative impacts of the practice. Regulatory and licensing regimes may include terms and conditions that must be met for obtaining and continuing to hold a business licence and could

include a requirement that a person provide security as a condition of a licence.

As noted above, this is only a summary list of the options available to local governments wishing to regulate short-term vacation rentals. In addition, these tools can be utilized in a variety of different ways, depending on the unique circumstances in each community.

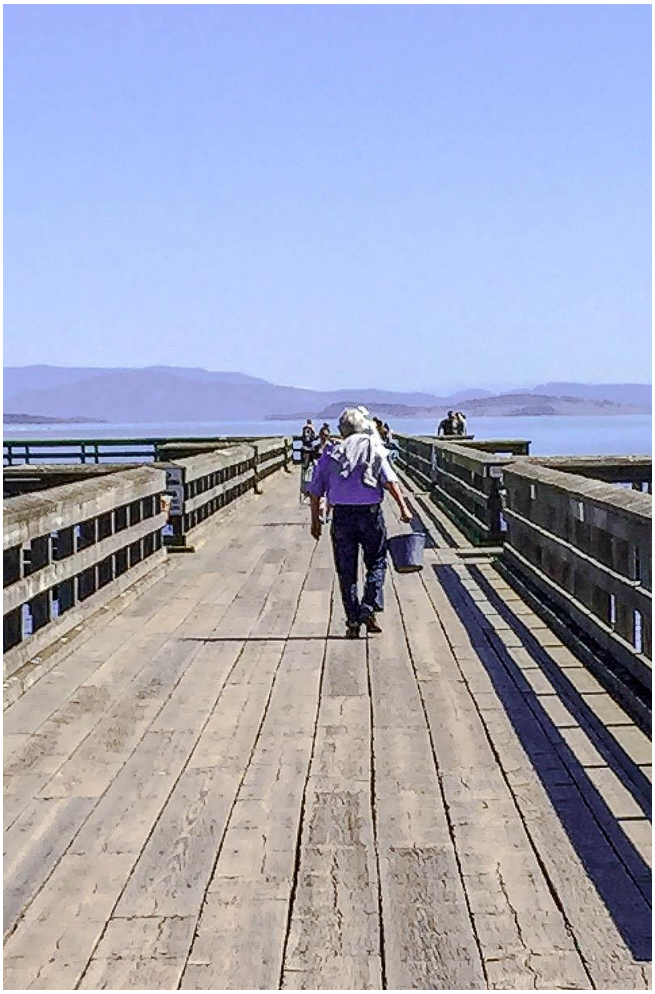
Given the fact that this is likely to be an area of significant interest to residents, we encourage local governments to seek public input in developing their vacation rental policies. A well thought-out policy, consistent with community values, can minimize the potential negative impacts of short-term vacation rentals while allowing your community to capitalize on the benefits of this growing practice.

Rachel Vallance

Municipal Authority to Regulate and Remove Encroachments From Road Allowances

Under the *Community Charter*, SBC 2003, c. 26 (the "***Community Charter***"), municipalities have broad authority to regulate and remove encroachments from municipal highways and road allowances, subject only to the potential application of s. 36 of the *Property Law Act*, RSBC 1996, c. 377 (the "***Property Law Act***"). Under s. 35 of the *Community Charter*, the soil and freehold of every highway in a municipality is vested in the municipality, and under s. 35(11), council may grant a licence of occupation or an easement, or permit an encroachment, in respect of a highway that is vested in the municipality.

In cases where a licence of occupation or an easement is not granted by the municipality, s. 46(1) of the *Community Charter* prohibits any person from excavating in , causing a nuisance on, obstructing, fouling or damaging any part of a highway or other public place, except as permitted by bylaw or another enactment. Under s. 46(2), council may, by bylaw, authorize the seizure of things unlawfully occupying a portion of a highway or public place, establish fees for such seizure that



are payable by the owner of the thing, and provide for the recovery of those fees from the owner of the thing, including by sale of the thing if the owner refuses to pay or cannot be identified after reasonable efforts. Furthermore, under s. 46(3), if a thing is seized under subsection (2), by a municipality, neither the municipality nor a person to whom the thing is disposed of is liable, in damages or otherwise, for or in respect of any claim that may arise in respect of the thing after

its disposal in accordance with the *Community Charter*.

These powers are supplemented by the various bylaw enforcement powers detailed in s. 260 of the *Community Charter* and the power to obtain a statutory injunction in accordance with s. 274 of the *Community Charter*. In addition to these powers, s. 17 of the *Community Charter* provides that the authority of council to require that something be done includes the authority to direct that, if a person subject to the requirement fails to take the required action, the municipality may fulfill the requirement at the expense of the person, and recover the costs incurred from that person as a debt.

The powers granted to a municipality under the *Community Charter* should be read with reference to s. 36 of the *Property Law Act* which provides as follows:

> **36**(1) For the purposes of this section, **"owner"** includes a person with an interest in, or right to possession of land.
>
> (2) If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application:
>
> > (a) declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached on or enclosed,
> >
> > (b) vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines, or
> >
> > (c) order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.

The interplay of s. 36 of the *Property Law Act* with the powers granted to municipalities in respect of highway encroachments under the *Community Charter* was considered by the BC Court of Appeal in *District of West Vancouver (Corporation of) v. Liu*, 2016 BCCA 96 ("***West Vancouver v. Liu***"). In that case, West Vancouver sought a statutory injunction for the removal of certain private works constructed in a municipal road allowance. The property owner in turn sought to invoke s. 36 of the *Property Law Act* for the encroachment. With respect to the municipality's request for a statutory injunction in *West Vancouver v. Liu*, the majority of the court ruled that statutory injunctions to require removal of encroachments from road allowances may not necessarily be issued in circumstances where there is no pressing public interest and the hardship to a landowner would outweigh the public interest in issuing the injunction. On this issue, the majority ruling provided the following comments:

> "[66] While courts will be reluctant to refuse a statutory injunction on equitable grounds, there is a residual discretion not to grant the relief. The scope of this discretion is, however, very limited. In *Burnaby v. Pocrnic*…, this Court said:
>
> > …The better view I think is that there is a discretion but, because the right to an injunction is created by statute and because the public interest must be weighed against any hardship which the order may impose on the defendants, the scope of the discretion is narrow…
>
> [67] …As a general rule, municipal rights, duties and powers, including the

duty to carry out the provisions of a statute, are of such a public nature that they cannot be waived or lost by mere acquiescence or laches: *Langley (Township) v. Wood*, 1999 BCCA 260 ...

[68] Even though the discretion of the Court to refuse the statutory injunction sought by the District is limited, it is, in my view, at least premature to grant an order that would entail destruction and removal of a large portion of Ms. Liu's home...

[69] First, the hardship such an order would visit upon Ms. Liu is considerable. She would be obliged to demolish a considerable portion of her home.

[70] Second, I question the utility of such an order in this case. While I accept that the public interest will almost always outweigh a countervailing private hardship, I am hard pressed to identify the public interest that would be served by granting the District this injunction. Although I do not doubt that the District acts in the public interest in addressing encroachments on dedicated highways within its jurisdiction, the encroachments in this case neither interfere with any easily identifiable public right, nor have they been shown to interfere with any future plan the District has for the

property. The encroachments do not impede the footpath on the road allowance that has long been used by the public to access the waterfront and the District has, by its past conduct, shown it is perfectly content to sell to Ms. Liu the land on which the encroachments sit. In fact, the injunction petition was only brought by the District when the parties were unable to agree on a sale price."

The court of appeal then turned to the issue of whether s. 36 of the *Property Law Act* could be invoked against public lands and in particular public lands dedicated as highway and the majority of the court ruled that relief could be granted under s. 36 against public lands in appropriate but limited circumstances. On this issue, the majority ruling quoted approvingly from an earlier decision of Mr. Justice Barrow of the Supreme Court of British Columbia in *Osoyoos (Town) v. Nelmes*:

> "[80] Counsel were unable to identify a case squarely addressing the question of whether the *PLA* applies to public lands. In *Osoyoos* at para. 22, Barrow J. said this about the reach of the *PLA*:
>
> > This section provides a method by which encroachments may be regularized. On its face, it is not limited to encroachments involving two private property owners, although I am not aware of any instance in which it has been invoked to regularize an encroachment on public property. In applying s. 36, the court is to take a "broad, equitable approach"... Among other things, the court is to consider the expense of removing the encroaching structure and whether, if not removed, the structure would adversely affect the use or value of the land on which it encroaches... Assuming, without deciding that s. 36 is available to the court to remedy an encroachment on public property, it should not, in my view, be applied in a manner that would enlarge the limited discretion the court has to decline statutorily authorized injunctive relief. Rather, the approach should be to first determine whether the

> injunction should be issued, and if it is determined that it should not, then s. 36 may be invoked to address the encroachment. By proceeding in this manner, the public interest which constrains the discretion to refuse an injunction will be respected. Resorting to s. 36 first, and in the manner that it is usually applied, would not give the public interest its due.
>
> [Emphasis added.]…
>
> [82] I agree with Barrow J. that s. 36 of the *PLA* is not, on its face, limited to encroachments involving two private property owners. I see no reason to read in limiting language to the provision that is not there. But that does not end the matter.
>
> [83] In my view, the Court must be very cautious about making an order that eliminates both a public consultation process and discretionary decisions made by elected municipal representatives about the future of public land."

It can be supposed that the special circumstances in *West Vancouver v. Liu* mean that s. 36 of the *Property Law Act* will only apply in factual situations that are at least similar to those in *West Vancouver v. Liu*. Those circumstances include the fact that the encroachments were longstanding, constituted a valuable part of the improvements of the adjacent property and would have been very costly to remove. Furthermore, there was some question concerning whether or not the improvements had been approved or tolerated by governmental authority in the past. Finally, there was evidence before the court that the municipality had no pressing immediate need for the right of way and was prepared to consider selling the public lands on which the improvements were located to the owner at fair market value. For all of these reasons, the BC Court of Appeal ruling in *District of West Vancouver (Corporation of) v. Liu* is probably distinguishable from most of the situations where private works have been built on municipal road allowances.

Given the relevant provisions in the *Community Charter* regarding municipal rights and obligations for removal of private works on municipal road allowances and the ruling in *West Vancouver v. Liu*, the legal principles that are relevant to municipalities in respect of their ability to regulate and remove encroachments from municipal road allowances may be summarized as follows:

(a) owners are prohibited by s. 46 of the *Community Charter* from installing or constructing private works on municipal road allowances;

(b) a municipal council may, by bylaw, authorize the seizure of things unlawfully occupying a portion of a municipal road allowance, establish fees for such seizure that are payable by the owner, and provide for the recovery of those fees from the owner, including by sale of the thing if the owner refuses to pay or cannot be identified after reasonable efforts;

(c) a municipality's authority to enforce its bylaws includes a power under s. 17 of the *Community Charter* to direct that, if an owner subject to a requirement fails to take the required action, the municipality may fulfill the requirement at the expense of the owner, and recover the costs incurred from that owner as a debt;

(d) under authority granted by s. 260 of the *Community Charter*, a municipality can also utilize a full range of enforcement

mechanisms for its bylaws in respect of encroachments on municipal road allowances;

(e) the municipality is empowered by s. 274 of the *Community Charter* to obtain statutory injunctions to require owners to remove private works from municipal road allowances; however, the BC Court of Appeal's ruling in *West Vancouver v. Liu* supports the proposition that statutory injunctions will only be granted in circumstances where there is a pressing public interest, such as construction of a highway or related improvements, and the public interest outweighs the burdens imposed on an owner as a result of the injunction;

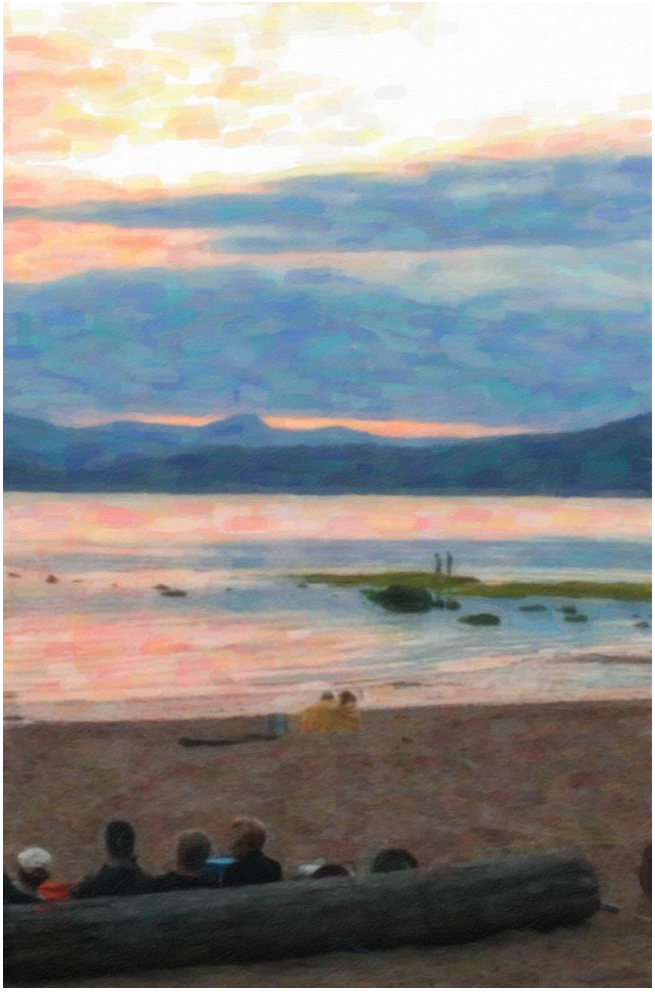
(f) when a statutory injunction is not issued, s. 36 of the *Property Law Act* may apply in certain limited circumstances where the equities favour it; however, the facts in *West Vancouver v. Liu* support the notion that s. 36 may only be a reasonable possibility in circumstances that are at least similar to the facts in *West Vancouver v. Liu.*

Lindsay Parcells

Service provision to First Nations: the duty to continue providing a service

Questions from our clients have suggested that a brief summary would be helpful addressing local government obligations with respect to providing services to First Nations communities.
The common law does not create a duty to provide services, but it does govern the obligation to ***continue*** providing services.

This principle was articulated by the B.C. Court of Appeal in *Tsawwassen Indian Band v. Delta (Corporation)* [1997] 9 W.W.R. 626, which also addressed the related case of *Adams Lake Indian Band v. Salmon Arm et al*. The *Tsawwassen* decision has been followed by courts across Canada—and not just in the context of servicing



First Nations—for this principle: "Reasonable notice to discontinue utility services is notice sufficient to allow the disconnected party/entity to arrange for alternative supply of that service. A municipality that terminates utility services without providing sufficient notice has acted unlawfully" (see e.g. *Long Lake Cottage Owners Assn. v. Thorhild (County No. 7*), 2011 ABQB 337).
The Court of Appeal in *Tsawwassen* also made clear that during the period in which the local government was required to continue providing

services, the First Nation is under a corresponding legal obligation "to pay a reasonable sum for the services until the termination date, whenever that may be held to be" (para. 106).

It is important to note that the time required at common law within which to continue to provide servicing is not determined by the serviced party ***actually*** arranging alternate service (see e.g. *Long Lake*, supra). That would in practice amount to compelling a local government to provide services indefinitely, which is not the legal requirement.

Rather, the courts will look at several factors to determine what is sufficient time to allow for alternative servicing arrangements. The courts contemplate a range of relationships: on one of the range are individual property owners, who effectively have an indefinite right to uninterrupted utility service—in part because an individual property owner would never be in a position to arrange reasonable alternate service. On the other end of the range would be two "equivalent municipal or other government entities. Each has similar ability to raise funds, and organize and operate utilities. One of these two entities could, lawfully, terminate provision of utilities to the other, provided the disconnected party had reasonable notice" (*Tsawwassen,* para. 48).

Reasonable notice is determined as a question of the capacities of the relative parties, including "the relative size of the parties; the resources available to each of the parties including the ability to raise revenue; the ability to implement or maintain new and existing infrastructure; the experience each party may already have in providing the services in question; and the length of time over which the service has already been provided by one of the parties."

Note that where notice has been given by a First Nation under the provincial *Indian Self Government Enabling Act*, there may be a one year minimum in which a municipality must continue to provide services. However, this *Act* will apply in only limited circumstances.

In *Burns Lake Indian Band v. Burns Lake (Village)*[1], a case that followed *Tsawwassen*, a common law relationship was also found but given that the band had the capacity to become self-sufficient in obtaining services due to its ability to generate tax revenue and the availability of quick and inexpensive service alternatives, the municipality was entitled to terminate services upon reasonable notice. In that case, termination was permitted 5 months after judgment, but the Band had had informal notice for a period of time before the case went before the court.

It is important to note that the obligation to continue to provide services does not inherently include an obligation to ***expand*** the services provided. For example, an obligation to continue to service a group of residential homes for a period of time would not bring with it a legal obligation to extend services to a new commercial development on reserve.

Local governments are cautioned against beginning to provide new or expanded services without having satisfactory servicing agreements in place. Once the supply of a service begins, it will generally be subject to the common law duty to continue the service provision until the sufficient time is allowed for the serviced party to arrange an alternative service supply.

Maegen Giltrow

Personal Information: Does Information about Property Count?

We regularly receive requests for advice as to how to respond to freedom of information requests that on their face seek information about

[1] *Burns Lake Indian Band v. Burns Lake (Village)* (2000), 13 M.P.L.R. (3d) 63 (BCSC)

property, but could be argued to contain personal information. Although it is critical to determine whether such requests solicit access to personal information (as this significantly affects whether the public body may disclose them) it can be difficult to do so. A recent decision of the Alberta Court of Appeal, while not binding in British Columbia, sheds light on this very issue.

In *Edmonton (City) v. Alberta (Information and Privacy Commissioner),* 2016 ABCA 110, the central issue was the meaning of the term "personal information" contained in the *Freedom of Information and Protection of Privacy Act*. An applicant made an FOI request of the City, consisting of "*all* records, regardless of format, relating to myself or my property that may be held by the City of Edmonton". She subsequently narrowed the request to copies of complaints, and records generated in relation to complaints, in relation to how she dealt with her property.

As earlier decision of the Alberta Court of Appeal, *Leon's Furniture Ltd. v. Alberta (Information and Privacy Commissioner),* 2011 ABCA 94, which was decided in the context of Alberta's *Personal Information Protection Act*, ruled (at paragraph 48) that:

> Information that relates to an object or property does not become information 'about' an individual, just because some individual may own or use that property.

Although there was some debate about the applicability of this earlier decision in light of the fact that it related to separate legislation, the Court in *Edmonton* reiterated that in order to qualify as personal information, "personal information has to be essentially "about a person", and not "about an object", even though most objects or properties have some relationship with persons." (para. 25). The Court went on to recognize that the distinction between personal information and property information may not always be clear, and held that information related to property that also has a personal dimension may properly be classified as personal information in some circumstances.

Applied to the facts in issue in this case, the Court held that the applicant's request for records containing complaints and opinions expressed about the applicant, related to directly to her conduct and it was thus reasonable for the adjudicator to have characterized this information as "personal information" rather than information about property, even though some of the conduct that gave rise to the complaints related to the applicant's property.

Sara Dubinsky

Ins and Outs of Reserve Funds

Many local government statutory reserve funds were created by bylaws enacted prior to 2004 when the *Community Charter* came into force. Before 2004, there were different procedural and content requirements for reserve funds, so there are now a number of reasons for communities to review the status of their funds (including to take advantage of the current liberal authority, to ensure reserve fund borrowing and expenditures will comply with the legislation, to eliminate unnecessary reserve funds, and to review antiquated policies).

This is also important because a Council member who votes in favour of an unlawful expenditure in regard to a reserve, or in some cases a staff member who acts contrary to the legislation, may be found personally liable for the amount of the reserve transfer or loan unless the amount is repaid to the reserve promptly and before the Court hears the matter.

Classes of Reserves

Generally, in British Columbia, there are three classes of reserve funds:

1. statutory reserve funds established under section 188 of the *Community Charter* (established for a specified purpose, or for a statutory purpose including development cost charge collections, money received from the sale or disposition of parkland, money received from disposition of highway property that provides access to water, parking space requirement funds and money received from disposition of land or improvements);

2. legacy reserves (being reserve funds established under section 935 of the prior existing *Local Government Act* or under the previous *Municipal Act* for purposes such as utility funds or sinking funds);

3. notional reserves, being reserve funds to hold monies from general revenue or other sources (including operating surpluses, contributed surplus or external funds received), which funds are used for other purposes not listed in section 188 of the *Community Charter*.

One unique category of notional reserves is to hold monies collected from developers for capital expenditures on the construction and installation of works and services or for holding amenity contributions derived from density bonusing under section 482 or phased development agreements under section 515 of the *Local Government Act*. These funds can be established in the form of a statutory reserve for a specific purpose under section 188 (1) of the *Community Charter* or held as notional reserves described above. Under the Public Sector Accounting Board (PSAB) rules, these may be booked as deferred revenues (liabilities to complete future works).

Applicable Law

Section 191 of the *Community Charter* and section 377(1)(f) of the Local Government Act set out the legal consequences of a council or board member voting for a bylaw or resolution authorizing the expenditure, investment or use of money contrary to the *Community Charter* or the *Local Government Act*:

(1) A council member who votes for a bylaw or resolution authorizing the expenditure, investment or other use of money contrary to this Act or the Local Government Act is personally liable to the municipality for the amount.

(2) As an exception, subsection (1) does not apply if the council member relied on information provided by a municipal officer or employee and the officer or employee was guilty of dishonesty, gross negligence or malicious or wilful misconduct in relation to the provision of the information.

(3) In addition to any other penalty to which the person may be liable, a council member who is liable to the municipality under subsection (1) is disqualified from holding office

> *(a) on a local government…*

(4) Money owed to a municipality under this section may be recovered for the municipality by

> *(a) the municipality,*
>
> *(b) an elector or taxpayer of the municipality, or*
>
> *(c) a person who holds a security under a borrowing made by the municipality.*

Provisions of statutes imposing personal liability on Council members must be strictly construed: *Gook Country Estates Ltd. v. the Corporation of the City of Quesnel 2006 BCSC 1382* (affirmed British Columbia Court of Appeal). Nonetheless, if there is an illegal expenditure, then section 191 applies.

In *Orchiston v. Formosa 2014 BCSC 1080*, Mr. Justice Skolrood stated at paragraph 21:

> In my view, properly construed... section 191 (1) is intended to

> provide a municipality, and its taxpayers, with a measure of security in the event that municipal councillors spend public money in a manner that is not authorized by statute where that money is not recovered. It is, in effect, a form of indemnity; the councillors are personally liable for the amounts improperly paid while the funds remain outstanding...

A member of a council or board may establish a good defence if there is evidence that the Council member who voted on the illegal expenditure relied upon information provided by a municipal officer or employee who is guilty of dishonesty, gross negligence or malicious or wilful misconduct in relation to the provision of the information [section 191(2)]. There is also a common law good faith defence where the Council member relies upon the advice of a municipal solicitor who has expertise in respect of the subject matter (*Orchiston*, at paragraph 59).

Despite the absence of a reference to officers or employees being liable under section 191 of the *Community Charter*, nonetheless an action may be brought against a municipal officer or employee in relation to an illegal expenditure. The principal defence is found in section 738 of the *Local Government Act* which provides that no action for damages lies or may be instituted against a municipal officer or employee for anything said or done or omitted to be said or done by that person in the performance or intended performance of the person's duty, or the exercise of the person's power, for any alleged neglect or default in the performance or intended performance of that person's duty or exercise of that person's power. However, this does not provide a defence if the officer or employee has, in relation to the conduct, been guilty of dishonesty, gross negligence or malicious or wilful misconduct.

There are two additional defences for officers and employees. First, section 739 of the *Local Government Act* provides that it is a good defence to any action brought against the local government finance officer for unlawful expenditure of local government funds if it is proved that the individual gave a written and signed warning to the Council that, in his or her

opinion, the expenditure would be unlawful. As well, the defence of good faith applies if the officer or employee has relied upon a legal opinion of a municipal law expert (*Orchiston*, at paragraph 59).

Despite these defences, it is recommended that before council or board members vote on a financial matter, including a transfer or borrowing from a reserve fund, staff ought to provide Council

with a staff report setting out the grounds for the validity of the expenditure or other financial measure.

Statutory Reserve Funds

Statutory reserve funds must be established by bylaw, not resolution, under section 188 of the *Community Charter*. Statutory reserve funds *must* be established for the following:

1. Deposit of money received from imposition of development cost charges [section 188(2)(a) *Community Charter* and section 566 *Local Government Act*];

2. Deposit of money received from the sale of park land, the disposition of park land under section 27 (2) (b) of the *Community Charter*, or cash in lieu of provision of park land on subdivision under section 510 of the *Local Government Act* – – these monies may only be used for the purpose of acquiring park land;

3. Deposit of money received the disposition of Highway property that provides access to water under section 41(1)(d) of the *Community Charter* – – these monies may only be used for highway access to water in accordance with that section;

4. Deposit of Money received as cash in lieu of on-site parking under section 525 of the *Local Government Act* – – these monies may only be used for providing off-street parking or transportation infrastructure in accordance with section 188;

5. Deposit of money received from the sale of land and improvements, except for the proceeds of any tax sale, under section 188(2)(e) of the *Community Charter*.

As well, Council may, by bylaw, establish a reserve fund for any specified purpose and direct that the money be placed to the credit of the reserve fund for the specified purpose. For example, Council could by bylaw establish a reserve fund for the replacement of infrastructure, the anticipated capital requirements associated with provincial or Commonwealth games, or a future swimming pool fund.

The principal differences between statutory reserve funds and notional reserves are as follows:

1. Statutory reserves must be established and used in accordance with section 188 wherever that section requires money to be deposited to reserve funds in accordance with that section;

2. Money in statutory reserves may only be expended for the purposes set out in section 188 and in accordance with the procedures stipulated under section 189;

3. The financial plan, and accordingly the accounting that is presented to Council, must make provision for transfers to or between funds which are set out and separate amounts for each statutory reserve fund and separately for other reserve funds, noting the provisions of section 165 of the *Community Charter*.

Don Lidstone, Q.C.

Accommodating Temporary Disabilities

Section 13 of the *Human Rights Code* prohibits discrimination in employment on the basis of several enumerated grounds, one of which is physical disability. "Disability" is not defined in the *Human Rights Code* and the question often arises as to what exactly it encompasses. For example, is a broken arm considered a disability? Is the flu?

Generally speaking, Canadian law mandates that human rights legislation is to be interpreted broadly in furtherance of its important purposes. In the employment context in particular, one of the purposes of human rights protections is to remove obstacles to an employee's full participation in the workforce. Therefore, the BC Human Rights Tribunal tends to take a broad view of what constitutes a physical disability. However, it is clear that not every medical problem faced by an employee will constitute a physical disability which is granted the protection of the *Human Rights Code.* In *Boyce v. New Westminster (City),* 1994 B.C.C.H.R.D. No. 33, at para. 50, the Tribunal stated that the concept of physical disability generally indicates "a state that is involuntary, has some degree of permanence, and impairs a person's ability, in some measure, to carry out the normal functions of life". In *Schodra v. Vancouver Axle & Frame and Miller,* 2009 BCHRT 173, the Tribunal stated that factors commonly taken into account in determining whether a given illness or medical condition amounts to a disability include whether the condition entails a certain measure of severity, permanence and persistence (at para. 214).

Given the reference to "permanence" in numerous decisions, it may not be surprising to hear that normal and transitory ailments such as the common cold, strep throat or the flu are generally excluded from the definition of physical disability. The Tribunal has stated that "normal ailments" do not create the kind of impediments for which the *Code's* protection is intended.

The law is a little different when it comes to temporary injuries. Generally, most jurisdictions in Canada extend human rights protections to employees for temporary injuries such as broken limbs or during the recovery time following a surgery. For example, in *Pierce v. 856660303 Ontario Ltd. o/a Chair Cover King Ltd.,* 2015 HRTO 1456, the Ontario Human Rights Tribunal held that a broken ankle was a disability within the meaning of the *Human Rights Code* of that Province. The employer in Pierce was found to have discriminated against its employee on the basis of physical disability when it required her to drive a delivery vehicle against the advice of her doctor at a time when she had a broken ankle. The Tribunal cited an earlier decision which had stated that in providing the necessary level of accommodation to an employee with temporary or time-limited restrictions, the threshold for finding undue hardship is higher. In such circumstances, employers may be required to provide modified duties which otherwise would not be sustainable on a permanent basis. For example, an employer might be required to let an employee work from home during the time that they can't operate a car to drive to work, notwithstanding that attendance at its offices is important to the type of work its employees do.

However, there are limits in terms of finding that a temporary injury constitutes a disability. For example, in *Li v. Aluma Systems and another,* 2014 BCHRT 270, the complainant had suffered a minor injury as a result of work performed as a scaffolder. The Tribunal described the injury as being in the nature of swelling in both hands and a popped vein in one hand. The complainant sought medical attention and was told to rest his right hand for one to two weeks. He worked light duties at work for two days, but the pain in his hand and the swelling had then dissipated. His employer noticed that he had continued to ride his motorcycle to and from work as well. The complainant was then laid off on the basis that there was a shortage of work. He alleged, in part, that he had been terminated on the basis of disability. The Tribunal found that the symptoms were "transitory and not permanent in nature" and that the medical condition lacked the severity, permanence or persistence which would qualify it as a physical disability.

In many instances, employees with temporary ailments will rely on sick leave entitlements so the issue of accommodation may not arise. However, if an employer does not provide sick leave, an employee's sick bank is empty, or the injury in question doesn't reasonably require an employee to refrain from working altogether, it may be important to consider whether a particular ailment or injury attracts the protections of the *Code* and in what ways it can best be accommodated. At risk of sounding like a broken record, the best course of action in any scenario is to consult an employment lawyer to assess the risks and plot a course forward that ensures the objects of the *Human Rights Code* are met.

Marisa Cruickshank

The Regulation of Bouncy Castles

As summer approaches, communities host all kinds of outdoor festivals or fairs on public lands. To make these events family friendly, the event organizer will often rent rides or attractions such as the bouncy castle, an inflatable structure that children, and sometimes adults, jump around in.
As these festivals are often situated on municipal or regional district property, local governments should be aware of the regulatory requirements when hosting an event that will use a bouncy castle.

Amusement rides are regulated by the BC *Safety Standards Act* ("SSA") and associated regulations. Under the *SSA*, a person is required to be licenced by a provincial safety manager before managing or directing individuals doing work that is regulated under the Act, or doing any regulated work for an unlicenced contractor (s. 23). Regulated products under the *SSA* are also required to have an operating permit (s. 28).

Amusement rides are defined in the *Elevating Devices Safety Regulation* as "a combination of components that carries, conveys or directs an individual over or through a fixed course or within a defined area for the purpose of amusement or entertainment, and includes a recreational railway." Section 18(2) of the Regulation exempts certain classes of amusement rides, other than stand alone air supported structures:

> **18** (2) The following amusement rides are exempted from the application of this regulation:
>
> **…**
>
> (e) soft contained play systems conforming to ASTM Standard F 1918-98, <u>other than stand-alone air-supported structures</u>;

This means that bouncy castles are <u>not</u> exempt from the licencing and permitting requirements under s. 23 and 28 of the *SSA* and associated regulations.

The BC Safety Authority (BCSA), an independent non-profit organization established by statute, is delegated the authority to administer most parts of the *SSA*, including issuing licences, certificates, and permits.[2] The BCSA considers bouncy castles to fall within the definition of amusement rides under the *SSA.*

According to the BCSA, when bouncy castles are used at public events such as school fairs, church events, or any venue where the general public has access, they must be operated by licensed contractors with the required permits from BCSA.[3] For liability reasons, we do not recommend allowing unlicensed or unpermitted bouncy castle operators to participate in events on local government lands.

The BCSA maintains a list of licenced contractors for amusement rides on its website: http://www.safetyauthority.ca/contact/find-

[2] Administration Delegation Regulation BC Reg 136/2004.
[3] http://www.safetyauthority.ca/safety-information/safety-playleisure/bouncy-castle-safety

contractor. As noted on this list, several municipalities have also become licenced so that they may operate amusement rides.

A good practice is to include the requirement in a parks bylaw or other relevant bylaw that persons applying for a special event permit using a bouncy castle must supply proof that they have a valid licence and operating permit under the *SSA.*

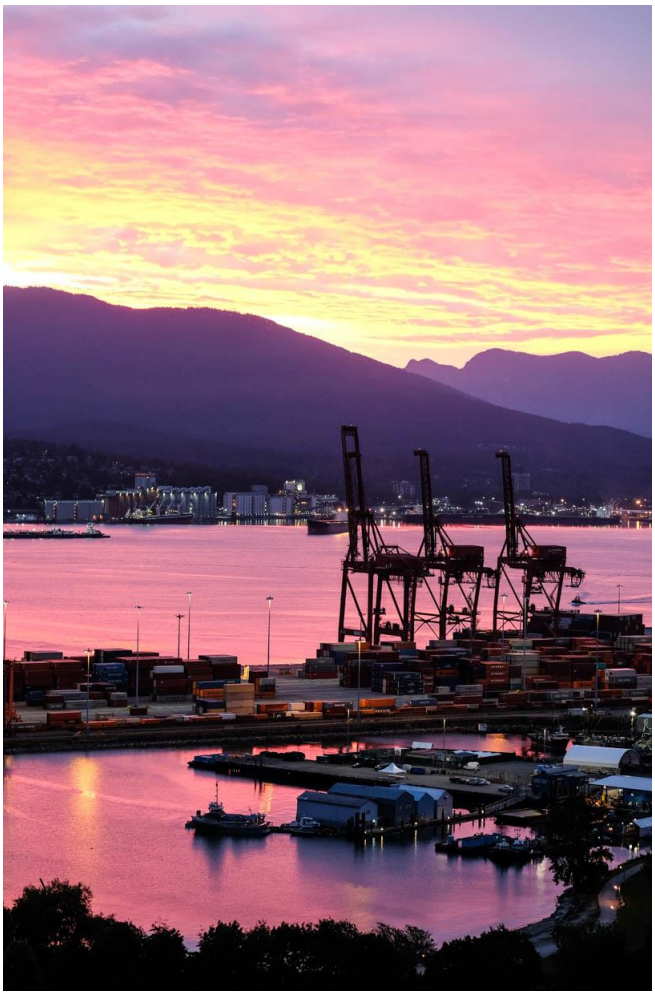
Carrie Moffatt

Rogers Communications Inc. v. Châteauguay (City), 2016 SCC 23

Last week the Supreme Court of Canada ruled on the constitutionality of the City of Châteauguay's (the "City") authorization notice of a reserve prohibiting all construction on property upon which Rogers Communications Inc. ("Rogers") had received permission from the federal Minister of Industry to install an antenna system.

The City had formally opposed the project at the site in question and provided three alternatives, none of which was acceptable to Rogers. The City eventually issued a building permit, but the permit lapsed prior to the commencement of construction. After the permit issuance, the City, spurred by a citizen petition, took issue with the potential health and environmental impacts. While the Ministry of Health advised that there was adequate public protection in the applicable safety code, the Ministry of Industry reopened the consultation after finding some flaws in Rogers' process. Following the successful conclusion of this second process, the City attempted expropriation proceedings. With the expropriation issue still unresolved, the City served its notice of a reserve on the property in question after Rogers rejected the City's offer to delay work until a final decision on the expropriation.

In an 9-0 disposition, the Supreme Court overturned the Court of Appeal for Quebec's ruling for the City, with eight members of the Court instead holding that the City's notice of reserve was ultra vires, due to its exercise of exclusive federal communications powers. In



analyzing the pith and substance of the measure, the Court outlined that the purpose of the City's notice was to preclude the installation of Rogers' system through restricting prospective locations. The majority further found that no "double aspect" was present, setting out that the powers of health and "harmonious development of the territory of Châteauguay" had no equivalence to the federal powers over communications. Citing

[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

the precedent in *In re Regulation and Control of Radio Communication in Canada*, [1932] AC 304 that the siting of communications infrastructure is the exclusive jurisdiction of the federal government, the Court found that a ruling affirming a double aspect in this respect would be contradictory.

While the pith and substance analysis was in itself sufficient grounding to rule in Rogers favour, the Court also clarified the application of interjurisdictional immunity in the communications siting context. Here the Court highlighted that the City's notice of reserve "significantly impaired the core of the federal power over radio communication", providing a further blow to prospective future local government arguments in this area based on this line of reasoning. ***Robert Sroka***

Conflict of Interest Exceptions Regulation, BC Reg 91/2016

This Regulation, made effective April 15th, provides further clarification of section 104(1)(e) *[exceptions from conflict restrictions]* of the *Community Charter*. The Regulation outlines that an exemption applies where a pecuniary interest in relation to the appointment of a representative of a governing body (a municipality, regional district, greater board or trust council), in the nature of a specified interest, arises from the attendance, participation or voting of the representative at a meeting where specified interest is at issue. A "specified interest" is defined as "an expenditure of public funds of an entity", "an advantage, benefit, grant or other form of assistance to or on behalf of an entity", "an acquisition or deposition of an interest or right in real or personal property that results in an advantage, benefit or disadvantage to or on behalf of an entity" or an agreement that respects any of the three foregoing specified interests. An "entity" refers to a society or a non-society corporation of a public authority that provides a service to a governing body where a councillor or regional district director is appointed to the board of the corporation.

In practice, the regulation is apparently designed to address the Court of Appeal's decision in *Schlenker v Torgrimson*, 2013 BCCA 395, where it was found that the fiduciary duty to a Society by a director created a conflict through the public being "disadvantaged" by the failure to have "the undivided loyalty of their elected officials", despite there being no potential personal gain. However, the exemption is limited to the specific boundaries outlined above. ***Robert Sroka***

Building Act update

The new *Building Act*, SBC 2015, c 2 is being phased in over time. The so-called "consistency" sections are in force: under section 5, the Province has the sole authority to create standards for the construction, alteration, repair and demolition of buildings. Section 43 establishes an accompanying two-year timeframe for transition, where any local government building requirements implemented by bylaw will be void on December 15, 2017. Despite the restrictions on building requirements, local governments may still adopt building bylaws dealing with administrative and regulatory unrestricted matters remaining within their scope of authority.

The Province recently published a bulletin suggesting the Province may enact regulations to designate "unrestricted matters", and confirming that building requirements may still be included in covenants or incentive programs, and pursuant to statutes not listed under section 5(2) of the *Building Act* (such as grease interceptor requirements made by a local government under the *Environmental Management Act).* Potential unrestricted matters include fire access route design, parking for the disabled, the form/character (and design where allowed) of

buildings where permitted under the authority for a development permit, and noise abatement.

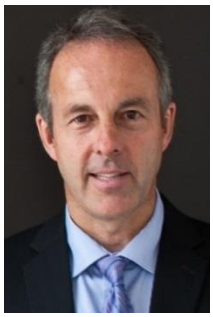
Section 7 allows local governments to make variation requests to the Province for matters that concern the subject matter of section 5 (standards for building construction, alteration, repair and demolition). However, instead of a local bylaw, any successful requests will be enacted via provincial regulation and multiple local governments can be included under the purview of such a regulation. In reviewing applications pursuant to section 7, section 9 of the Act allows the minister to retain or hire the assistance of outside technical experts.

The Province is in the process of preparing regulations to carry out the intent of the *Building* Act. The Province also intends to provide further guidance for local governments in the form of a guide coming imminently, including the application for variance process and accompanying form.

Robert Sroka

Lidstone & Company Lawyers

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.



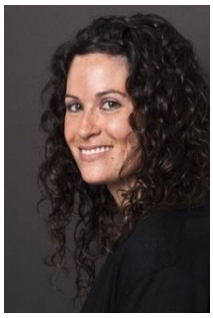
Lindsay Parcells practices municipal law with a particular interest in land use, real property, corporate, commercial, mediation and environmental matters. Lindsay has 20 years of legal experience. He was called to the Alberta bar in 1992 and the British Columbia bar in 1995. Lindsay completed a Masters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

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