LIDSTONE & COMPANY

LAW LETTER

THE MERGED FIRM OF LIDSTONE AND MURDY & MCALLISTER

In this issue

Those who don't take risks don't have ocean views: the duty to warn

Many areas of British Columbia may be impacted by what we typically refer to as "natural hazards" – landslides, floods, forest fires and the like. Many of these "hazardous" areas also have beautiful views and coveted natural features. The possibility of a hazard does not always deter property owners, purchasers and developers who want to take their chances. Individually and collectively, we tolerate and accept some risks. Who is to say when the risk outweighs the benefit?

In the context of land use and development in British Columbia, the unenviable role of deciding when risk becomes intolerable falls on local governments.

The *Local Government Act* requires that, if a local government has adopted an official community plan, the official community plan must include a description of hazardous areas. The *Community Charter* enables local governments to require remedial action by owners of hazardous properties. Neither the *Local Government Act* nor the *Community Charter* prescribes what level of natural hazard is intolerable.

Establishing the level of risk tolerance is a policy decision of a local government. For example, the most-often quoted approach in respect to landslides is that of the District of North Vancouver. The District requires that, in the context of development, the proponent must demonstrate that the probability of fatality per year resulting from a landslide is limited to 1 in 10,000 to 1 in 100,000, depending on the scope of the project (*District of North Vancouver Natural Hazard Risk Tolerance Criteria*).

Courts are likely to defer to local governments in their characterization of tolerable risks. In *Cleveland Holdings Ltd. v. British Columbia*

(Department of Highways), [1973] BCJ No. 226, the approving officer refused to approve a subdivision due (among other things) to the risk of catastrophic landslide. There was evidence to suggest that a slide could occur in the next

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10,000 years. Experts for the approving officer said that the risk was real enough that they would not want to live in the subdivision.

Experts for the developer said that they would have no misgivings about living in the subdivision. They felt there would be no risk at all.

The question became whether the risk identified by the approving officer was sufficient cause to refuse subdivision. The Court upheld the approving officer's decision to reject subdivision, finding that:

> … The Approving Officer is entitled, bearing in mind changing concepts of community planning and development, to insist upon a higher level of protection against flooding than he did before. To that extent he is entitled to formulate policy….
>
> … there is a sufficient possibility of a catastrophic slide during the life of the community … to justify his refusal to approve the subdivision. He was not, in taking into account the possibility of a slide, being "too paternalistic and unreal". The risk is there. I cannot say he was wrong in holding that the development … would be "against the public interest".

In *Madaninejad v. North Vancouver (District)*, 2015 BCJ No. 1089, a property owner applied for judicial review of the District of North Vancouver decision to issue a remedial action order against his property. The order was grounded in the DNV's risk tolerance threshold policy. The Court upheld the remedial action order as reasonable. Among other things, the Court made the following statements:

> *To the extent that the Owners dispute where the District "has drawn the line" regarding the Property and the risks associated with a possible landslide in the context of ordering remediation, the proper inquiry is as to the reasonableness of its decision. …*
>
> *Landslide risk assessment and amelioration of risk is clearly an area of decision-making for which elected municipal councils such as the District are particularly well suited. In matters such as*

> *this, municipal councils are required to "balance complex and divergent interests*
>
> *in arriving at decisions in the public interest"…. Given that the decision in the present case is clearly intra vires the District, it is entitled to considerable deference upon judicial review….*

Notably, professional engineers and geoscientists do not opine on the level of tolerable risk. In the *Guideline for Legislated Landslide Assessments for Proposed Residential Developments in BC* (May 2010), the Association of Professional Engineers and Geoscientists of BC writes to that effect:

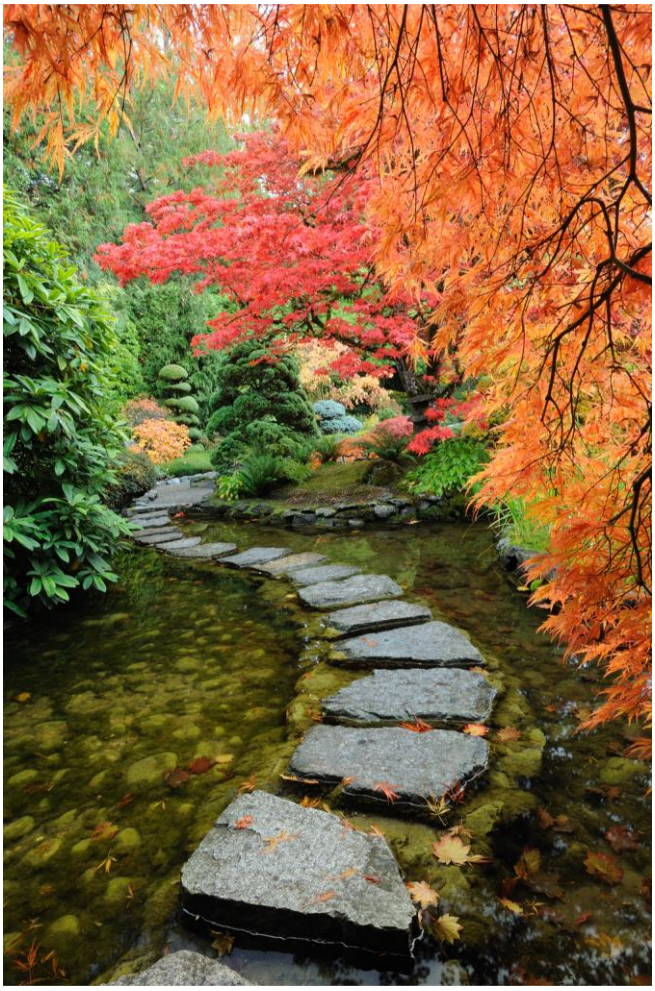
> *Levels of landslide safety are determined by society, not individuals. Therefore, for residential development, the levels must be established and adopted by the local government or the provincial government after consideration of a range of societal values. Some Land Owners may feel a government-adopted level of landslide safety is too high, while others are willing to live with an 'unacceptable' level of landslide safety. A Qualified Professional should not be expected to establish a level of landslide safety, although he/she may provide a useful role in advising the local or provincial government that wishes to do so.*

In summary, there is no universal approach to risk tolerance. Local governments should assess what is acceptable and practicable natural hazard risk tolerance in their community. This may differ between new developments and existing developments. Local governments should also pay careful attention to professional reports and ensure that what the report defines as "safe" is consistent with the view of the local government. **Olga Rivkin**

Remedial action requirements – best practices

The Statutory Authority for Remedial Action Requirements

Under s. 72(1) of the *Community Charter*, council may impose remedial action requirements



("**RAR**") in respect of buildings, structures, erections or any similar matters or things (collectively "**Property**") that create hazardous conditions or declared nuisances. Under s. 72(2), RARs may be imposed on one or more of the owner or lessee of the Property and the owner or occupier of the land on which it is located. The RAR may require the person to remove or demolish the Property, fill it in, cover it over or

alter it, bring it up to a standard specified by bylaw, or otherwise deal with it in accordance with the directions of council or a person authorized by council. In order to impose an RAR, council must consider that Property is or creates an unsafe condition or contravenes provincial regulations or a building regulation under s. 73 *[hazardous conditions]*. Alternatively, council may also impose an RAR under s. 74 *[declared nuisances]* if a nuisance is declared in respect of any Property, natural or artificial opening in the ground, drain, ditch, watercourse, pond, surface water or other similar matters or things or any such things are so dilapidated or unclean as to be offensive to the community.

> ***"Provided there is sufficient equity in the Property, the municipality will also recover any expenses it incurs if it is necessary for the municipality to complete the remedial action work itself"***

Evidence Required

Although ss. 73 and 74 do not impose any requirement for specific inspections to have been carried out or specific evidence to be amassed before Property is found to be in an unsafe condition or a nuisance, there must be evidence to support the grounds set out in the resolution Council passes. For example, in *Sahota v. Vancouver (City)*, 2010 BCSC 387, aff'd 2011 BCCA 208, the City of Vancouver passed a resolution under provisions of the *Vancouver Charter* declaring a building to be both a hazard and a nuisance. The provisions were analogous to ss. 73 and 74 of the *Community Charter*. The factors that led to the City's determination in that case were unkempt premises, numerous responses by police, squatters living in the building, and the fact that the City had to board up the premises on a number of occasions. The evidence amassed by the City included pictures of the interior and exterior of the property, affidavits of residents describing the property as unkempt and a nuisance, and a report of a Building Inspector. The Court determined that the City's decision to declare the building a nuisance and a hazard was reasonable in the circumstances.

It is therefore very important for local governments to gather a reasonable body of evidence to support an RAR. Examples of such evidence can include the following:

- A report from a fire and/or the building inspector, following inspection of premises, which identifies how the Property is unsafe and/or contravening building regulations. In connection with this evidence, We note that a fire inspector or building inspector would be authorized to enter onto Property pursuant to s. 16 of the *Community Charter;*
- A staff report detailing the conditions of the Property and any actions the municipality has taken to remedy the issues (i.e. attempting to get in touch with the owner, but being unable to);
- Photos of the exterior and interior of the Property (i.e. to show the unsafe conditions); and
- Copies of all documentation detailing the unsafe conditions, the municipality's efforts to have the unsafe conditions rectified and the Property owner's responses.

Time Limits

Section 76 of the *Community Charter* deals with time limits for compliance with RARs. Subsection (1) provides that a council resolution must specify the time by which the required action

must be completed. Subsection (2) provides that, unless council imposes a shorter time limit because of urgent circumstances (governed by s. 79), the time limit specified under subsection (1) must not be earlier than 30 days after notice of the RAR is provided to affected persons (as required by s. 77). Council is also entitled to extend the time limit for completing the required action even if the previous time limit has expired: s. 76(3).

We generally suggest that Council impose a time limit of somewhere between 60 and 90 days within which the owner must comply with the RAR. However, if council considers there is a significant risk to health or safety if the remedial actions do not take place sooner, s. 79 provides that council may set a shorter time limit than the one set out in s. 76. Time limits should be considered on the basis of the reports by provided by fire or building inspectors.

Notice Requirements

The requirements for providing notice of an RAR to affected persons are set out in section 77 of the *Community Charter.* Under s. 77(1), notice of an RAR must be given by personal service or by registered mail to the person subject to the requirement and the owner of the land where the required action is to be carried out. Under s. 77(2), notice of the RAR must also be mailed to every person who is an occupier of the land subject to the RAR and to each holder of a registered charge in relation to the Property whose name is included on the assessment roll, at the address set out in that assessment roll and to any later address known to municipality's corporate officer. "Occupier" is defined in the Schedule to the *Community Charter* to include a person "who is qualified to maintain an action for trespass" and a person "who simply occupies the land".

Under s. 77(3), the notice must advise that the person subject to the RAR, or the owner of the land where the RAR is to be carried out, may request a reconsideration by council in accordance with section 78 *[person affected may request reconsideration]*. The notice must also indicate that if the action required by the RAR is not completed by the date specified for compliance, the municipality may take action in accordance with section 17 *[municipal action at*

defaulter's expense] at the expense of the person subject to the requirement.

We recommend that notice be sent out as soon as possible following council's imposition of the RAR. As noted above, the Property owner must be given information regarding the action that must be taken and must be given at least 30 days to complete it. If the municipality simply wishes to carry out the remedial action work itself, it could request the owner's approval and

authorization to proceed prior to the expiry of the notice period as well as the owner's agreement they are responsible for the municipality's costs (discussed further below).

Recovery of costs for Remedial Action Requirements

Section 17(1) of the *Community Charter* provides that the authority of a council under the *Community Charter* to require that something be done includes the authority to direct that, if the person subject to the requirement fails to take

> ***"The advantage of imposing an RAR is that it imposes a specific timeline on the Property owner for completion of the remedial action work and enables the municipality to complete the remedial action work itself if the Property owner does not comply"***

the required action, the municipality may fulfil the requirement at the expense of the person and recover the costs incurred from that person as a debt. Section 17(2) provides that Division 14 [*Recovery of Special Fees*] of Part 7 [*Municipal Revenue*] applies to an amount recoverable under subsection (1) that is incurred for work done or services provided in relation to land or improvements. Division 14 consists of sections 258 and 259 of the *Community Charter*. Section 258(2) provides that special fees may be collected in the same manner and with the same remedies as property taxes and that if the fees are due and payable by December 31 and are unpaid on that date, they are deemed to be taxes in arrears. Section 259 provides that special fees are a charge or lien on the land and its improvements in respect of which the charge is imposed; that the charge or lien has priority over any claim, lien, privilege or encumbrance of any person except the Crown; and, that the charge or lien does not require registration to preserve it.

Given s. 17 and ss. 258 and 259, if the Property owner does not carry out the remedial action work within the time set by council resolution, the municipality would be within its rights to undertake the remedial action work itself. The municipality could then collect the amount incurred from Property owner in the same manner and with the same remedies as property taxes. If the taxes are unpaid, they are deemed to be taxes in arrears. Further, the unpaid taxes (i.e. the "special fees") would constitute a charge or lien on the land and have priority over any other claim, lien, privilege or encumbrance of any person except the Crown. This priority includes priority over any mortgages registered against title to land or Property.

The advantage of imposing an RAR is that it imposes a specific timeline on the Property owner for completion of the remedial action work and enables the municipality to complete the remedial action work itself if the Property owner does not comply. Provided there is sufficient equity in the Property, the municipality will also recover any expenses it incurs if it is necessary for the municipality to complete the remedial action work itself.

Lindsay Parcells

The End of Correctness? New Directions Mulled for Judicial Review

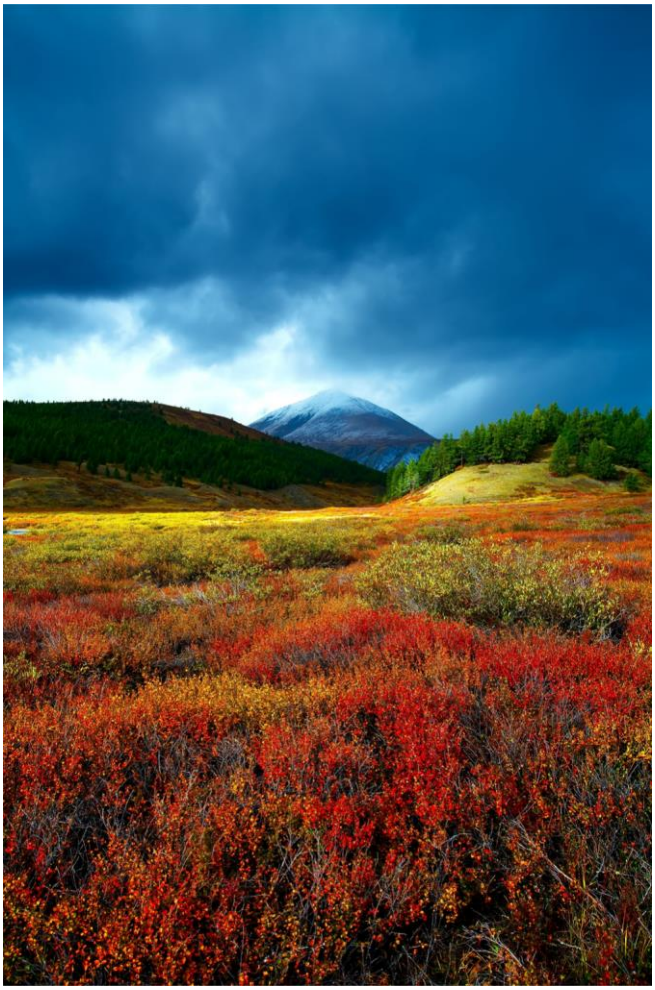
In what is becoming a recurring theme in Canadian administrative law, the Supreme Court of Canada has announced that it will jointly hear three appeals in which it is inviting parties to "consider the nature and scope of administrative law" as set out in its 2008 decision *Dunsmuir v. New Brunswick*. While the *Dunsmuir* case involved a review of the process by which an

employee of a government employee was dismissed, it has been during the last decade the leading case in Canada on judicial review of administrative decisions generally, including those of local governments. According to online databases, *Dunsmuir* has been cited in over 1,000 decisions of courts in British Columbia, including many challenges of decisions of local governments.

The decision in *Dunsmuir* is notable for holding that the standards of review to be used by courts when assessing decisions of administrative bodies (including local governments) are to be based on either the "correctness" or the "reasonableness" of the decision. According to *Dunsmuir*, correctness is to be used by a reviewing court to determine if a decision was within the jurisdiction of the decision maker, and also when considering questions of law. In those instances, the reviewing court is not to show any deference to the decision maker. The reasonableness test is to be used by the court to assess the qualities of a decision that make it reasonable, such as its justification, transparency and intelligibility, with one of the hallmarks of whether a decision was reasonable being whether it fell within "a range of possible, acceptable outcomes" that are defensible with respect to the underlying facts and law. In contrast to the correctness test, a reviewing court is supposed to show deference to the decision maker on matters that come within the reasonableness test.

While it was hoped that *Dunsmuir* would provide clarity that would reduce amount of effort in court directed to determining the standard of review, and thus simplifying the process of judicial review, it is arguable that this has not occurred and that *Dunsmuir* has just provided another issue for parties (and their lawyers) to argue about.

Thus, the predictability that would be expected from *Dunsmuir* has proven to be elusive. Further, it is arguable that courts sometimes reach inconsistent results in their application of the *Dunsmuir* test, with two recent decisions of British Columbia courts providing one such example. In *Fraser Mills Properties Ltd. v. City of Coquitlam*, our Court of Appeal considered an



appeal of a decision of a municipal building official to not grant an exemption to the appellant developer from development cost charges that had been set on a city-wide basis. In considering the standard of review should be applied, the Court of Appeal started with what it described as a "presumption" established in another decision of the Supreme Court of Canada in a case called *Alberta v. Alberta Teachers Association* that an administrative body interpreting its "home statute" in a matter closely related to its functions is to be granted deference, which means that a reasonableness standard is to be applied by a court reviewing the decision. In

confirming that a reasonableness standard applied in that case, the court in *Fraser Mills* case distinguished two recent decisions by it in cases called *Zongshen (Canada) Environtech v. Bowen Island Municipality* and *Qterra Properties Ltd v. Delta*, which, it said "taken out of context, may suggest that the correctness standard of review applies when municipal legislation or bylaws are being interpreted".

By contrast, in a decision released one day after the release of the decision in the *Fraser Mills* case, the BC Supreme Court in *0826239 BC Ltd v. City of Richmond* held that the correctness standard of review applied to decisions of city officials to refuse to lift a stop work order and not issue building permits for the construction of a proposed cannabis production facility. After reviewing other cases on standard of review, the court in *082639 BC Ltd* cited the *Qterra* case for the proposition that "the interpretation of municipal bylaws in this province is generally reviewed on a correctness standard". The court in *0826239* then went on to find that the decision by the City of Richmond to not lift the stop work order was "incorrect", and thus unlawful.

The point being made here is not so much whether the decisions in *Fraser Mills* and *0826239 BC Ltd.* are or are not correct as that they come to opposite conclusions about the appropriate standard of review for local government decisions when, it seems, the issue being considered should, according to *Dunsmuir*, have resulted in the use of the same standard of review. As the choice of standard of review that is used plays a major, if not decisive, role in the outcomes of the cases, the issue is significant. That is, had the court in *Fraser Mills* decided the standard of review was correctness, the City is more likely to have lost the case, and if the court in *0826239 BC Ltd.* had decided the test was reasonableness, the City of Richmond is more likely to have won that case.

The need to even have a test based on correctness has been called into question in some recent decisions of the courts, including by members of the Supreme Court of Canada. While the outcome of the upcoming consideration of *Dunsmuir*-based judicial review remains unknown, it will likely have a significant effect on the process and outcome of judicial review proceedings involving local governments.

James Yardley

Bad Body Odours in the Workplace

One of the most difficult issues in managing a workplace is confronting an employee with a dirty demeanour or bad body odour. Confronting an employee with hygiene issues or body odour can be like walking into a virtual minefield full of legal risk. While you may be able to ignore it for a while, once others begin to notice the odour or complain about it, you will have to get involved.

What might be the problem?

There are many reasons why a person may have what another person perceives to be bad body odour. Some of these may be culturally related. For example, a person who eats certain foods, such as garlic, meat or some spices, may have a body odour which a person who does not eat those foods may find offensive. The choice of the foods one eats is a result of many factors, including one's cultural heritage. Alternatively, a person may have bad body odour as a result of inadequate hygiene. Inadequate hygiene may be the result of many factors, including personal choice (smoking tobacco or cannabis, not washing their clothes or their body often enough), mental disability, or poverty resulting in lack of access to cleaning facilities and personal hygiene products. A person may also have what is perceived to be a bad body odour due to certain medical conditions. [*Radek v. Henderson Development (Canada) and*

Securiguard Services (No. 3), 2005 BCHRT 302 (CanLII) at paras 583-585.]

What are your legal obligations?

Employers need to be aware that, depending on the workplace, a person's poor personal hygiene or body odours can either pose a potential health and safety risk, or take a toll on the workplace culture and morale. There is always going to be tension between the rights of the individual and the rights of the group.

For example, poor personal hygiene can pose a public health risk where the employee is responsible for food preparation, providing recreational activities or using a pool. Strong smelling body odour can also be very unpleasant where the employee works in close proximity to those they are providing a service to, for example at reception, in a classroom or assisting the public at close proximity. Not only may it affect the local government's reputation with the public, but also make for an unpleasant and difficult workplace to function in for other employees. Employees have a right to a healthy and safe workplace under the *Workers' Compensation Act* legislation and regulations.

A study from the Employment Office found that 75% of employees struggle to work alongside a colleague with bad body odour, with 64% saying they would find it even more difficult if that worker had bad breath. Having foul body odour was ranked as the #1 problem in the office, with 43% of employees naming it as the worst crime in the office.

Under BC's *Human Rights Code,* an employer has a duty to accommodate an employee to the point of undue hardship. It also has an obligation to inquire into a possible relationship between a disability and an employee's performance, or in this case, bad body odour or poor personal hygiene, before an employer makes an adverse decision based on performance. If the inquiry discloses a relationship, then the employer has a duty to reasonably accommodate the employee's disability to the point of undue hardship. [*Southwell v. CKF* Inc., 2017 BCHRT 83 at para 22] Failing to get to the bottom of a bad body odour problem may end up in a complaint of discrimination for failing to accommodate a disability.

What can employers do?

Consider this: A Director of Parks and Recreation frequently smells of cannabis. The smell is so pungent that it permeates the offices and can be smelled by everyone in the immediate surroundings. At first, employees try to ignore the smell, they close their doors or use air fresheners to mask the smell. The daily smell of cannabis in the office on the Director's clothes makes it difficult for other employees to concentrate at work, they are experiencing

headaches and are generally more and more disgruntled. As a consequence of their body odour, the Director is feeling more and more isolated and not part of the team. No one feels comfortable saying anything to them.

You are responsible for human resources, what can you and should you do?

1) Poor hygiene and body odour can be a real problem in the workplace and it can be effectively managed.

2) Canvass whether the individual has a disability or another underlying problem. Give the employee ample opportunity to disclose any medical condition. For example:

    a. inquire to see if there is a medical condition causing the cannabis odour, or if the body odour is related to any other protected grounds;

    b. if the individual is not sure, ask them to visit their doctor and bring back a medical note;

    c. If it is related to an illness, it will give rise to the duty to accommodate.

3) If the poor hygiene or body odour is not related to a medical condition or another protected ground, the employer is at liberty to ask the employee to take steps to address the body odour and warn them that changes are required and discipline may be applied if improvements do not occur.

4) Address the issue respectfully but directly, and remember to document any discussions and/or resolutions.

Andrew Carricato

Local Government: Lessons Learned from the Kinder Morgan Proceedings

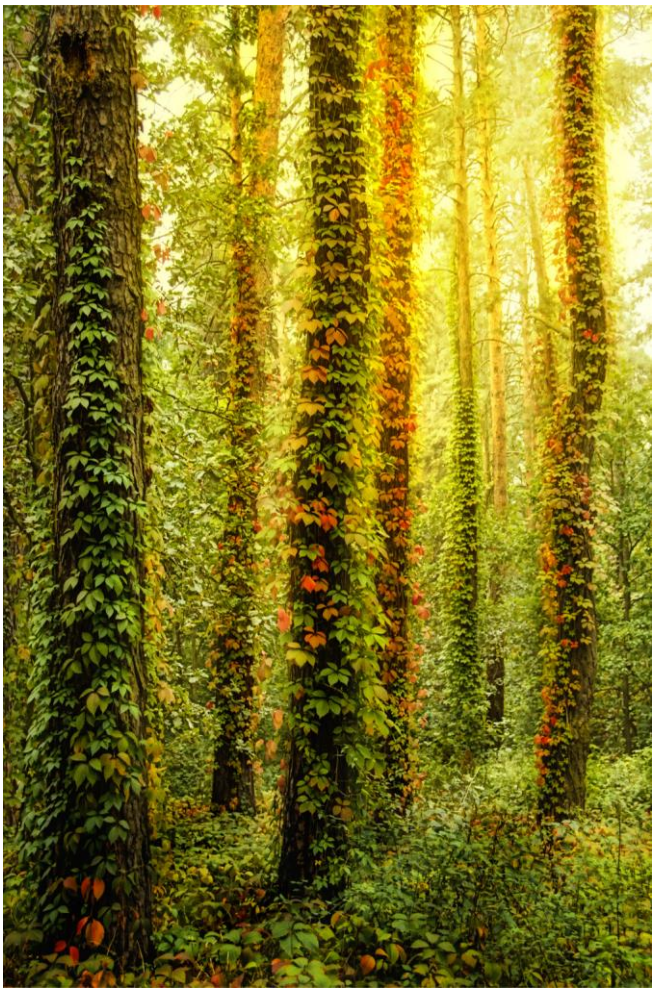
Among the various court challenges to government approval of the Trans Mountain Pipeline Expansion Project, two decisions involving municipal petitioners are notable for their similarities and distinctions in regard to judicial tests for statutory compliance and procedural fairness. While government approvals may reflect policy choices that invoke a deferential approach to judicial review, a court may still insist on careful adherence to statutory conditions in determining whether such a decision is lawful, reasonable and constitutionally valid.

In *Vancouver v. British Columbia (Environment)*, 2018 BCSC 843, the city applied to the B.C. Supreme Court to set aside a provincial decision to issue an environmental assessment certificate under B.C.'s Environmental Assessment Act (EAA) for the Trans Mountain Project. The challenge was based on conditions set out in the EAA and the *Consultation Regulation* and on rules of procedural fairness. (Being interprovincial and in the national interest the project is regulated federally; but the Province may impose regulatory conditions as long as they do not impair a vital aspect or frustrate the purpose of the project as a federal undertaking). The director of BC's Environmental Assessment Office had determined that an environmental assessment certificate was required, and so was obliged to make an order setting out the scope of the assessment and the procedures and methods for conducting the assessment. The Regulation requires the director to consider "general policies respecting public consultation set out in this regulation and ensure that they are reflected in the assessment". The policy requirements included specific notice conditions for this purpose.

Under provisions of the EAA that allow for agreements to be entered between provincial and federal entities, the Province could accept a federal environmental assessment as being equivalent to a provincial assessment. In this case, the provincial ministers and the National Energy Board (NEB) had entered an equivalency agreement in 2010. This agreement being in place, and the NEB having conducted a separate assessment of the project, effectively no further assessment was needed. The EAA certificate was issued by the ministers of Environment and of Natural Gas Development in January 2017, based on a report prepared by the director, with 37 conditions added to the 157 conditions included by the NEB in its report to the federal Government.

Vancouver argued that the director could not require an assessment and certificate merely by accepting the NEB assessment, and also that the process was flawed because the director had not complied with the Consultation Regulation by not including public notice procedures in his order. Until the statutory and procedural fairness requirements were met, the city claimed the ministers did not have jurisdiction to issue the certificate. Questions of jurisdiction invoke the judicial review standard of "correctness": if the court decides the decision was not within the scope of the decision maker's authority, whether under the applicable legislation or constitutional law, it can declare the decision invalid. In this case, Mr. Justice Grauer read the EAA as not precluding the director from accepting the NEB assessment as an equivalent assessment under the provincial regime. Further, he held that the EAA required the director to do so under the terms of the equivalency agreement.

A growing body of case law indicates that the 'correctness' standard applies to procedural fairness. Mr. Justice Grauer noted that the content of a duty of procedural fairness depends on the particular legislative and administrative context and reasoned that "the issue ultimately turns on the question of what 'fairness' required in the circumstances." He concluded that fairness did not require the director to offer Vancouver and the public in general the consultation opportunities contemplated in the Regulation - it could have done so, but was not obliged to do so. While the Crown has a



constitutional duty to consult with Indigenous groups before engaging or allowing activity that could affect Aboriginal rights, there is no such duty to consult the general public. Despite the mandatory language of the Consultation Regulation, and its quite specific requirements for public notice, the court interpreted the Regulation as meaning that its "general policy requirements" need only be "taken into account", which it found the director had done.

If an administrative decision is within jurisdiction, assuming no duty or absence of

procedural fairness, the court will then apply the more relaxed standards of "reasonableness": was the decision within a range of reasonable outcomes, defensible on the facts and at law? In *Vancouver*, Justice Grauer found the director had acted reasonably in concluding that public consultation requirements were satisfied through the NEB hearings and its assessment, which became the assessment of the provincial office. While the judge clarified that this case was not to determine whether the NEB process was adequate, but only whether B.C. had

> ***"For local governments, ensuring decisions are made within the scope of its authorizing legislation, complying with conditions established in statute and with common law standards of procedural fairness, can be crucial to upholding their validity under court scrutiny"***

complied with rules of administrative law and its own legislation, he stated that the reasonableness of the director's action was based in part on the comprehensive nature of the NEB process. By the extent of consultation in the federal sphere, as described by Justice Grauer, one might assume the NEB assessment was reasonable in every respect.

The more recent decision of the Federal Court of Appeal in *Tsleil Waututh Nation v. Canada*, 2018 FCA 153 held otherwise. The court applied the rules for judicial review similarly to those cited by Justice Grauer in *Vancouver*. This court, however, held that while the NEB was within its jurisdiction in determining its hearing procedures, and had not breached procedural fairness, it acted unreasonably in excluding the environmental impacts of project-related marine traffic from its definition of 'designated project', and thus from its review under the federal Canadian Environmental Assessment Act. The NEB report did acknowledge that these impacts would adversely affect the habitat and survival of an endangered species under the *Species at Risk Ac*t, these being the Southern Resident Killer Whales whose habitat is in the shipping routes. But the report did not include measures to reduce and mitigate those impacts, as required under that Act.

As the NEB report itself was a condition precedent to a valid decision of the federal government, it was not immune to review. Being found deficient, it did not qualify under federal legislation as a fully legitimate report, the federal Governor in General (Cabinet) could not reasonably rely on it. As well, the Federal Court of Appeal found that the Crown had not met its constitutional duty to consult and where appropriate, accommodate various First Nation groups in addressing their concerns about potential impacts of the project on Indigenous rights. The federal Cabinet appeared so intent on accepting the advice and recommendations of the NEB that the court was not satisfied that its consultations were meaningful.

For local governments, ensuring decisions are made within the scope of its authorizing legislation, complying with conditions established in statute and with common law standards of procedural fairness, can be crucial to upholding their validity under court scrutiny. The extensive hearings and supplementary steps taken by the federal government towards its decision to accept the NEB report and order it to issue the certificate could not save it from a judicial finding of invalidity, not only on constitutional grounds relating to consultation with Indigenous nations, but also because a single statutory requirement that was not met.

Colleen Burke

Balancing act: freedom of religion includes freedom from religion

***Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32**

A recent Supreme Court of Canada decision, *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, affirmed the reasonableness of the Law Society of British Columbia's decision not to accredit a proposed law school; the Court found that the Law Society's decision represented a proportionate balance between the Charter rights of equality and religious freedom. In arriving at its conclusion, the Court made several important statements about freedom of religion.

The case sprung from a judicial review of the Law Society of British Columbia's decision not to accredit the Trinity Western University law school ("TWU"). Under the Law Society rules, enrolment in the bar admission program requires proof of academic qualification, which is met with a law degree from an "approved" common law faculty of law. A common law faculty of law is "approved" if it has been approved by the Federation of Law Societies of Canada "unless the Benchers [of the Law Society] adopt a resolution declaring that it is not or has ceased to be an approved faculty of law" (at paras. 13-14). The Benchers of the Law Society of British Columbia passed such a resolution in 2014. The Law Society's decision was judicially reviewed on the grounds that it did not properly take into account freedom of religion protected under s. 2 of the *Charter of Rights and Freedom*.

Central to the decision to deny accreditation was TWU's Community Covenant Agreement (the "Covenant"). TWU would have required its law students to sign and adhere to the Covenant, a religiously-based code of conduct with a prohibition on "sexual intimacy that violates the sacredness of marriage between a man and a woman" (at para. 6). All TWU students and faculty must abide by the Covenant as a condition of attendance or employment. Failing to abide by the Covenant may give rise to disciplinary measures, including suspension or permanent expulsion (at para. 7).

In upholding the Law Society's decision as reasonable, the SCC made a significant comment about freedom of religion, and the fact that

> ***"An administrative decision that engages the Charter must reflect a proportionate balancing between the Charter protections at issue and the decision-maker's statutory mandate. A decision that has a disproportionate impact on Charter rights is not reasonable"***

freedom of religion includes freedom *from* religion (at para. 101). The SCC noted that it had previously held that religious freedom can be limited where an individual's religious beliefs or practices have the effect of "injur[ing] his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own" (at para. 101; citing *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 346). The Court went on to observe that being required to behave contrary to one's sexual identity due to the religious beliefs of another is degrading and disrespectful.

The SCC accepted that the Law Society of British Columbia's "refusal to approve TWU's proposed law school prevents *concrete*, not abstract, harms to LGBTQ people and to the public in general" (at para. 103) The Court noted that the Law Society's decision not to accredit the TWU law school "ensures that equal access to the legal profession is not undermined and prevents the risk of significant harm to LGBTQ people who feel they have no choice but to attend TWU's proposed law school" (at para. 103). The Court

also commented on the need for public confidence in the legal community and that such confidence "could be undermined by the LSBC's decision to approve a law school that forces LGBTQ people to deny who they are for three years to receive a legal education" (at para 103).

The SCC observed that the Law Society's enabling statute requires consideration of the overarching objective of upholding and protecting the public interest in the administration of justice. In the Court's view

> …it was reasonable for the LSBC to conclude that promoting equality by ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means by which the LSBC could pursue its overarching statutory duty: upholding and maintaining the public interest in the administration of justice, which necessarily includes upholding a positive public perception of the legal profession (at para. 40).

For local governments, this decision may provide comfort and support for certain policies and decisions; this case confirms that in Canadian society, freedom of religion does not rank in supremacy to other important rights and values. The Charter provides both freedom of religion and freedom from it. The TWU decision, however, does not stand for the notion that freedom of religion can be overlooked or ignored.

Moreover, in a local government context, freedom of religion may arise in connection with other Charter rights, such as freedom of expression. An administrative decision that engages the Charter must reflect a proportionate balancing between the Charter protections at issue and the decision-maker's statutory mandate. A decision that has a disproportionate impact on Charter rights is not reasonable.

Robin Phillips

Trans Mountain Pipeline Ruling

On August 30, 2018, the Federal Court of Appeal hit the brakes, at least temporarily, on the Trans Mountain pipeline expansion project. The Court nullified the project's approval for two reasons: (1) the National Energy Board's ("**NEB**") environmental assessment of the project was fundamentally flawed; and (2) the federal government failed in its duty to consult with and, if necessary, accommodate First Nations before approving the project.

The project dates back to 2013, when Trans Mountain applied to the NEB for a certificate of public convenience and necessity to twin its existing pipeline system. The project involves the construction of nearly 1,000 kilometres of new pipeline, spanning between Edmonton, Alberta to marketing terminals and refineries that are primarily in the central region and lower mainland area of British Columbia. The project would increase the overall capacity of Trans Mountain's existing pipeline system from 300,000 barrels per day to 890,000 barrels per day.

After receiving Trans Mountain's application, the NEB undertook its assessment of the project and issued its report on May 19, 2016, recommending that the Governor in Council approve the project. This recommendation was based in large part on the NEB's finding that the project was not likely to cause significant adverse environmental effects. On November 29, 2016, the Governor in Council accepted the NEB's recommendations and issued Order in Council P.C. 2016-1069 ("**OIC**") directing the NEB to issue Trans Mountain a certificate of public convenience and necessity.

On judicial review, the Court found that, as a matter of law, only the Governor in Council's decision to issue the OIC could be reviewed. This did not render the NEB's report or assessment process irrelevant. Because the Governor in Council could only reach a decision when informed by a "report", if the NEB's report was "materially deficient" (as the applicants alleged), it would be unreasonable for the Governor in Council to rely upon it.

To prepare for the public hearings, the NEB had identified the issues it would consider and set the parameters for its environmental assessment. Importantly, when deciding how to define the project, the NEB did not include marine shipping activities as part of the "designated project". The NEB justified this decision, in part, on the basis that it has no regulatory authority over marine shipping.

The definition of "designated project" from the *Canadian Environmental Assessment Act, 2012*, includes all "physical activity that is incidental" to the pipeline component of the project. Because the project could result in an increase from 5 to 34 tankers per month, and the gravest environmental risks of the project relate to spills, the Court found the exclusion of marine shipping was a "critical error". This error led to "successive, unacceptable deficiencies" in the NEB's assessment of the environmental impact of the project. Specifically, had marine traffic been included in the definition of the project, the NEB would have had to apply the *Species at Risk Act* and consider the effects the project would have on the Southern resident killer whale.

The Court concluded the NEB report submitted to the Governor in Council recommending the approval of the Project was deficient "and was not the kind of 'report' that would arm the Governor in Council with the information and assessments it required to make its public interest determination." The Court directed the project approval to be remitted to the Governor in Council for redetermination, which would require a reconsidered report from the NEB.

The Court also found that Canada had failed in its duty to adequately consult with First Nations before approving the project. Canada had delegated part of its consultation obligations to the NEB. After the NEB issued its report, the Canada entered "Phase III" of its consultations with First Nations, which was to focus only on outstanding concerns and any incremental accommodation measures that Canada should address. This was the first direct communications First Nations had with Canada regarding the project. The Court found Canada was required to do more than receive and understand the concerns of the Indigenous applicants. Canada was required to engage in a considered, meaningful two-way dialogue. Instead, for the most part, Canada's representatives limited their mandate to listening to and recording the concerns of the Indigenous applicants and then transmitting those concerns to the decision-makers.

The effect the decision will have on the project is unclear. While the Court described its decision as possibly resulting in a "short delay", on August 31, 2018, the day after the decision was released, the NEB issued an announcement that it has ceased its ongoing hearing processes regarding the project (which include the detailed route hearings).

Rebecca Coad

The Development Moratorium

After the 2018 elections, several local governments are considering the slowing of development or reduction of existing permitted density in some neighbourhoods. If a Council or Board complies with an official community plan and the procedural requirements of the *Community Charter,* S.B.C. 2003, c. 26, and the

Local Government Act, as applicable, and is acting reasonably for proper local government purposes in good faith, the Council or Board has a broad discretion to amend any zone it sees fit. This includes the power to "spot zone" a single parcel of land or area or to "downzone" a parcel or area (*Wall & Redekop Corp. v. Vancouver (City)* (1976), 16 N.R. 435 (SCC); *Pacific National Investments Ltd. v. Victoria (City)* (2000), 15 M.P.L.R. (3d) 1 (SCC); *Scarborough v. Bondi* (1959) SCR 44).

Rezoning or spot zoning is valid because no previous Council or Board can bind itself to a future Council or Board by contracting or acting to prevent a future Council or Board from exercising its valid zoning or legislative powers or its ability to act in accordance with the public interest (*Pacific National Investments v. City of Victoria,* 2000 SCC 64) [subject to the application of a valid phased development agreement].

The applicable statutory provisions regarding the procedure for downzoning are *Local Government Act*, sections 464 (public hearing), 466 (notice of public hearing,470 (procedure after a public hearing), 479 (zoning bylaws) and 463 (withholding of permits).

If a Council or Board, acting reasonably and in good faith, wishes to seize an opportunity to review its land use bylaws in order to consider the slowing of development or reduction in density, it should be noted that an owner has the right to a building permit if it its application is complete and complies with the current applicable zoning and other bylaws. If the local government refuses a building permit (for example, for a multi storey high rise residential tower) where the permit application is complete and consistent with applicable bylaws, the local government must issue the permit, failing which the owner may apply to court for an order in the nature of mandamus for issuance of the permit (*Boyd Builders v. Ottawa*). This is subject to the existence of a valid "moratorium" commenced by a proper resolution under section 463(2) of the *Local Government Act*.

Note: this must be a section 463(2) resolution, and not a mere policy resolution to declare a moratorium. Although a Council or Board may consider proceeding with a mere moratorium resolution, if it is done by resolution and not by a section 463(2) resolution plus subsequent zoning amendment bylaw, then the mere resolution without a definitive follow-up zoning amendment to put the moratorium in effect has no binding legal effect on land that is subject to the mere resolution, or on the development rights of owners of the land: see *Grenier v. Piney (Rural Municipality)* (2003) and section 460 (2) of the *Local Government Act*.

In *Piney*, the municipal Council passed a resolution to establish a "moratorium" on permit applications contrary to the existing regulatory bylaw. Subsequently, the Council lifted the moratorium but passed a new resolution to limit development. This was also contrary to the existing bylaw in force. The court set aside the two "moratorium" resolutions of the Council. The court found that the existing regulatory bylaw was valid, but the resolutions that purported to limit development, despite the bylaw, were invalid because they did not carry out the power by bylaw as required under the statute.

Accordingly, in order to establish a valid moratorium to allow for a thoughtful review of the applicable heights, densities and land uses, the local government must first pass the resolution under section 463(2) to commence the preparation of a zoning amendment bylaw and official plan amendment bylaw that would have the effect if enacted of being in conflict with subsequent building permit applications that violate the bylaws under preparation under the proposed development regime.

The purpose of the section 463(2) resolution would be to establish that a bylaw is under preparation so that the owners could not get a

building permit for any portion of the affected lots before the Council or Board has had an opportunity to carefully review the facts and consider its options. If a building permit application is received after the section 463(2) resolution is passed, the Council or Board then has 30 days to withhold the permit then an additional 60 days to withhold, but if it fails to adopt during the 60 day period then the owner may claim damages arising from the withholding.

"In order to establish a valid moratorium to allow for a thoughtful review of the applicable heights, densities and land uses, the local government must first pass the resolution under section 463(2) to commence the preparation of a zoning amendment bylaw and official plan amendment bylaw that would have the effect if enacted of being in conflict with subsequent building permit applications that violate the bylaws under preparation under the proposed development regime."

The resolution itself would not irrevocably take away the density and height rights of the owners but would give the Council or Board an opportunity to consider the matter carefully. The Council or Board ought to inform the affected owners of the resolution the same or next day (in light of the seven day rule under section 463(2) under which the affected owners have a head start of seven days to apply for a building permit before section 463(2) takes effect).

The Council or Board should also, when it passes the resolution, pass a resolution to request staff to prepare a report regarding the proposed bylaws. The report should consider good planning principles regarding matters such as traffic, parking, water use, environmental concerns, viewscapes, access to sunlight, support, servicing and other things. The Council or Board may consider passing a resolution to invite the owners to attend to speak to the matter and to provide the owners with the report to be prepared by staff, noting that the subject bylaws are at that point under preparation.

Before the Council or Board considers any bylaw at first reading stage in relation to any downzoning, it may wish to give the affected owners an opportunity to meet with Council to discuss the resolution, any other resolutions passed, the staff report, public input, any proposed zoning amendment bylaws and related matters.

Timing is important, as the initial section 463(2) resolution must be passed by Council at least seven days prior to the application for a building permit (*Cheung v. Victoria (City)* (1994), 100 B.C.L.R. (2d) 235 (BCCA)). The resolution must commence the preparation of a plan or bylaw that conflicts with what turns out to be the application for a building permit. The resolution should identify a conflict between an attribute of the development proposed in any future application for a building permit and a particular provision of the zoning bylaw that is under preparation.

Don Lidstone, Q.C.

Mega Mansions in the ALR

The Province of British Columbia has enacted Bill 52 - 2018, being the *Agricultural Land Commission Amendment Act, 2018* (the "Act").

Section 55 of the Act provides that it comes into force by regulation of the Lieutenant Governor in Council. In other words, cabinet may bring any one of the provisions of the Act into force by Order in Council at any time of the choosing of the Lieutenant Governor in Council.

Although the "mega mansion" provisions are not in force at this time, the Agricultural Land Commission (ALC) issued a media release dated

December 4, 2018 stating that the Act will not have force and effect until new regulations are adopted. According to the media release, the provincial government is currently working on these regulations and anticipates they will be adopted next year.

The ALC has offered an opinion, which is likely an informed opinion, that the following transition provisions will likely apply: if a proposed primary residence is more than 5000 m^2 in total floor area, then the owner must receive a building permit before the new regulations are adopted and construction must substantially begin by November 5, 2019. Otherwise, the size of the primary residence will be restricted to 5000 m^2 in total floor area or less.

It will not be necessary for a Council or Board to consider amending the zoning bylaw governing the size of homes in the ALR in order to implement the mega mansion controls, even if there is currently no maximum size in the zoning bylaw.

This is because the enactment of the Bill 52 provisions governing mega mansions is *not* an order or regulation of the ALC which coexists with the zoning bylaw but *is* a provincial statutory provision enacted by the provincial government which would supersede the zoning bylaw.

The zoning bylaw would have no effect on allowing houses exceeding 5000 m^2 after the transition process has expired, but a zoning bylaw may be amended to restrict the size of such houses to less than 5000m^2.

Don Lidstone, Q.C.

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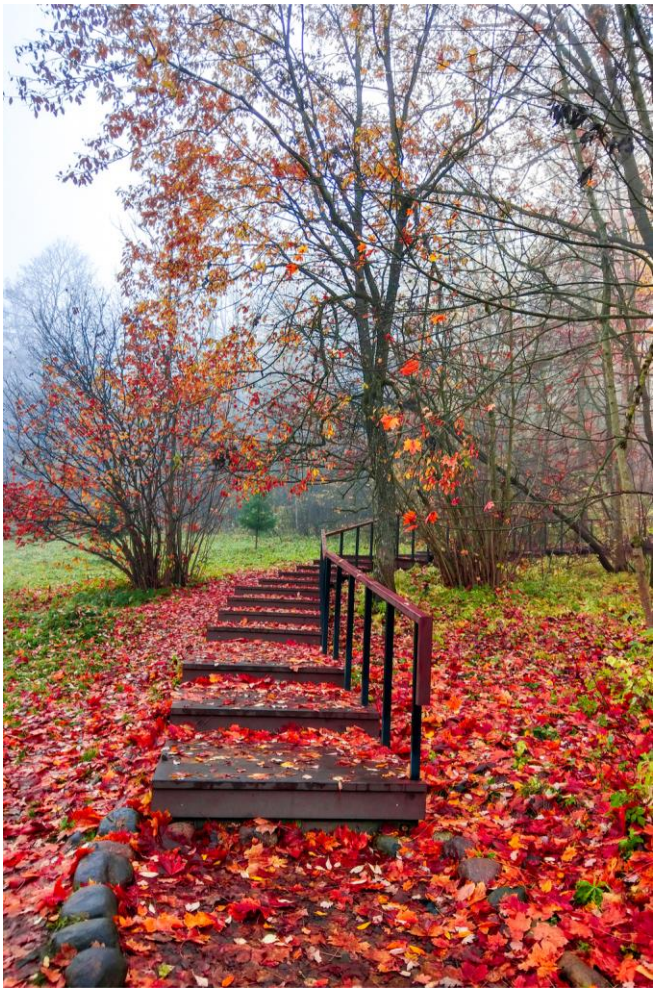

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