LIDSTONE & COMPANY

LAW LETTER

THE MERGED FIRM OF LIDSTONE AND MURDY & MCALLISTER

In this issue

Back to Normal: Wu v Vancouver Reversed on Appeal

Overview

In a significant recent decision for local governments, the B.C. Court of Appeal has overturned the 2017 decision of the B.C. Supreme Court in *Wu v. Vancouver* (the latter is reported at 2017 BCSC 2072) in which the Supreme Court held that the failure of the City of Vancouver to make timely decisions about a development application breached a private law duty of care to the plaintiffs for which the City was liable to pay damages. In unanimous reasons reported at 2019 BCCA 23, the Court of Appeal held that no such duty of care exists and that the appropriate legal remedy for a permit applicant dealing with a public authority that is not meeting its statutory obligations is the administrative law remedy of *mandamus*. The significance of the Court of Appeal's decision is not so much that it represents a change in the law as that it is a return to previous principles. As such, the Court of Appeal has removed the uncertainty and potential new grounds for local government liability that arose from the Supreme Court decision.

Background

The facts in the case are convoluted and will be only briefly summarized. The plaintiffs had purchased a house in the First Shaughnessy area of Vancouver that they intended to demolish and replace. They learned from the City that the house was not on the City's heritage register but was on an inventory of houses that might have heritage value. The plaintiffs were also aware that if the house was put on the City's heritage register (which would prevent them from demolishing it), the City had to compensate them for any resulting loss in value. While the City encouraged the plaintiffs to retain the house, an architect hired by the plaintiffs told the City that

the owners wanted to replace it, including after a City panel recommended that the house be retained. In early 2013, after the plaintiffs applied for a development permit for a new house, the City asked the plaintiffs to provide a report on the heritage value of the house.

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The plaintiffs objected to providing the report on the basis that the City already had a recommendation on the house's heritage value from the City's panel, but the City held firm in its demand and a report was submitted in July 2013. In September 2013, after the plaintiffs again advised the City of their interest in replacing the house, the City said the plaintiffs could either retain the house with incentives from the City, or the City would put the house on the heritage registry. In December 2013 the City Council put the house under a 120 day protection order which lapsed without any decision from the City on adopting a designation bylaw for the house.

In May 2014 the plaintiffs sued the City, seeking an order of mandamus to compel issuance of a development permit, as well as monetary damages. The City then put temporary heritage control on all of First Shaughnessy, which prohibited demolition in the area for one year. In September 2015 the City designated First Shaughnessy as a Heritage Conservation Area ("HCA"), which prohibited demolition of homes in the area, including the plaintiffs', unless the City concluded a house had insufficient heritage value. Unlike the case with designated heritage properties, inclusion in the HCA did <u>not</u> provide for compensation for loss of value.

The Decision Under Appeal

The plaintiffs' lawsuit alleged abuse of public office, expropriation and negligence. The trial judge found that the City had engaged in numerous delaying tactics and had acted with bad faith including by requiring the heritage report when the City had already determined the heritage status of the house, making the plaintiffs prepare retention plans when it was clear they were not interested in retention, asking the plaintiffs to retain the house, failing to meet internal deadlines, giving inconsistent and contradictory advice about whether the house had heritage value, advising the plaintiffs that the City would seek heritage protection during the 120 day protection order but then not doing so, and not seeking to have the house declared as a heritage property when the City had already made such a determination in the permit pre-application process.

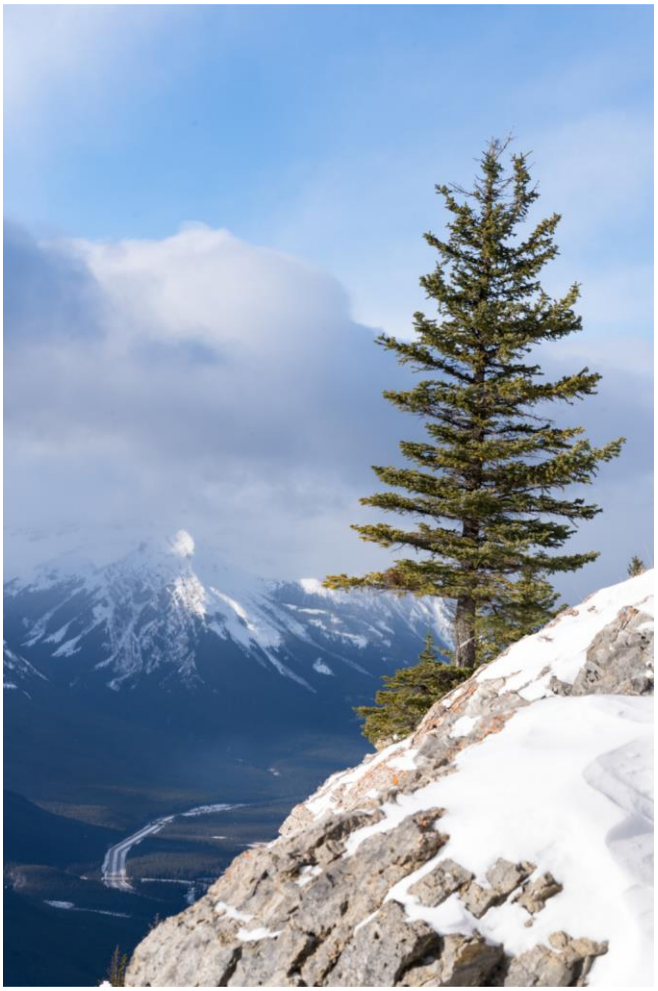
Ultimately, the trial judge concluded that "the only rational conclusion for the actions of the City is that they wanted to delay the [development permit application] until the [HCA] was passed . . . thereby avoiding the required compensation". The trial judge

dismissed the abuse of public office claim on what were essentially technical grounds, and also concluded that the City's actions did not amount to *de facto* expropriation.

The trial judge held that the City's development application process was operational in nature, rather than a policy decision, and thus not immune from review for negligence. The trial judge found that there was legal proximity between the plaintiffs and the City upon which a duty of care arose, that it was foreseeable that failure by the City to act in accordance with the standard of care of a reasonably prudent municipality deciding about the heritage status of the plaintiffs' house would cause the loss suffered by the plaintiffs and that conduct that amounted to bad faith can support a finding of negligence when the conduct involved the exercise of discretion. The trial judge also found that under the City's standards, determination by the City of the house's heritage status should have been made by June 2014 at the latest, and that the City's failure to act within that timeframe caused the plaintiffs to lose the compensation they would have otherwise received from the reduction in market value to their property from a heritage designation. The actual amount of damages was to be determined in a subsequent hearing.

The Decision of the Court of Appeal

The Court of Appeal disagreed with the trial judge and held instead that the administrative law remedy of mandamus was the appropriate remedy for a party to seek in cases where a decision maker has unreasonably delayed in acting, as had happened in this matter. The Court of Appeal concluded that the obligation for a local government to act within a reasonable period of time should not be made into a private law duty of care upon which a finding of negligence could be made (and upon which payment of damages could be ordered). The Court of Appeal noted that while a breach by government of a statutory duty "can be" evidence of negligence, "standing alone" a breach of a statutory duty is not generally sufficient to establish a breach of a private law duty of care. In reaching that conclusion, the Court of Appeal observed that Canadian law does not recognize an action for negligent breach of statutory duty and that "mere breach of a statute is not negligence".



The Court of Appeal also applied what is known as the *Anns/Cooper* analysis to determine that no previously unrecognized duty of care existed between the City and the plaintiffs that could lead to a finding of negligence. In reaching the latter conclusion, the Court of Appeal again noted the lack of a recognized tort in Canada for breach of statutory duty, and that the powers and duties of public officials generally exist to promote the public interest rather than to protect private interests. Thus, there was no proximity between

the City and the plaintiffs upon which a private law duty of care (and the potential for negligence) could arise.

However, the Court of Appeal also recognized that in certain instances public officials undertaking public law duties may owe a private law duty of care. Those instances can include where such a duty is established by statute. However, the Court of Appeal concluded that the regulatory scheme administered by the City was concerned with a general policy goal of protecting the heritage character of part of the City and promoting the public good, and thus did not create a duty of care. Likewise, a private law duty of care can arise where interactions between a public authority and a claimant create sufficient legal proximity to create the duty, such as where a public official has assumed responsibility over the interests of a private party, and in instances of negligent misrepresentation. In considering the latter point, the Court of Appeal noted the characterization by the trial judge that certain administrative documents from the City were "representations", but concluded that they just described the plaintiffs' expectation that the City would act in accordance with its obligations and that they did not show that the City was assuming a private law duty of care. While the Court of Appeal also stated that delay in processing an application in a timely manner could, in some circumstances, cause foreseeable economic harm, it then noted that reasonable foreseeability has become a "secondary factor" for finding a duty of care, and that the "primary emphasis" should be given to the legal proximity of the parties.

Along with the lack of proximity between the City and the plaintiffs, the Court of Appeal also concluded that there were policy grounds against finding a duty of care that included the potentially broad and open-ended nature of the duty found by the trial judge, the lack of a clear standard of care to be applied, and the availability of the alternate administrative law remedy discussed above.

The Court of Appeal did, however, agree with the trial judge that mandamus could not be ordered in this case because the order sought by the plaintiffs was for the issuance of a development permit, which was a matter within the City's discretion, and which could not be compelled.

Finally, the Court of Appeal held that the plaintiffs failed to properly plead their claim alleging misfeasance because they did not name the officials who were alleged to have acted wrongly.

Conclusions

The decision of the Court of Appeal is significant for its reversal of the novel duty of care found by the trial judge, and because of the clarity it provides on choice of remedies for aggrieved applicants. While it is probably hard to argue that the facts in *Wu* were favourable to the City, the decision of the trial judge seemed, with respect, to take significant short cuts and leaps in analysis to find the City liable. This included not only that there was sufficient proximity to establish a private law duty of care, but also (assuming that a duty of care existed) that there was evidence that showed a breach by the City of a relevant standard of care.

The decision of the trial judge created uncertainty for local governments because it created the potential for liability to be found in instances where most observers would probably not have previously believed liability could arise. Thus, if it was not overturned, the trial judgment could have led to claims seeking damages in other instances where administrative steps did not meet internally generated deadlines or otherwise resulted in foreseeable harm to an applicant.

As the decision of the Court of Appeal relied on well-established lines of authority, barring any

significant changes in those authorities it is unlikely that an outcome similar to the decision of the trial judge will occur in another case with "better facts". Thus, the decision of the Court of Appeal should provide relief and certainty to local governments.

However, the case does not detract from the desirability of local governments taking steps to avoid claims like the one from the Wu's, such as by ensuring that representations to applicants about timelines for processing applications or other similar steps be realistic and achievable, and that the representations are expressed in a suitably qualified manner.

Finally, it should be noted that the decision in *Wu* does not displace the previously identified private law duties of care faced by local governments, such as with plan review, building inspection, maintenance of works and property to avoid injury and damage, and negligent misstatement.

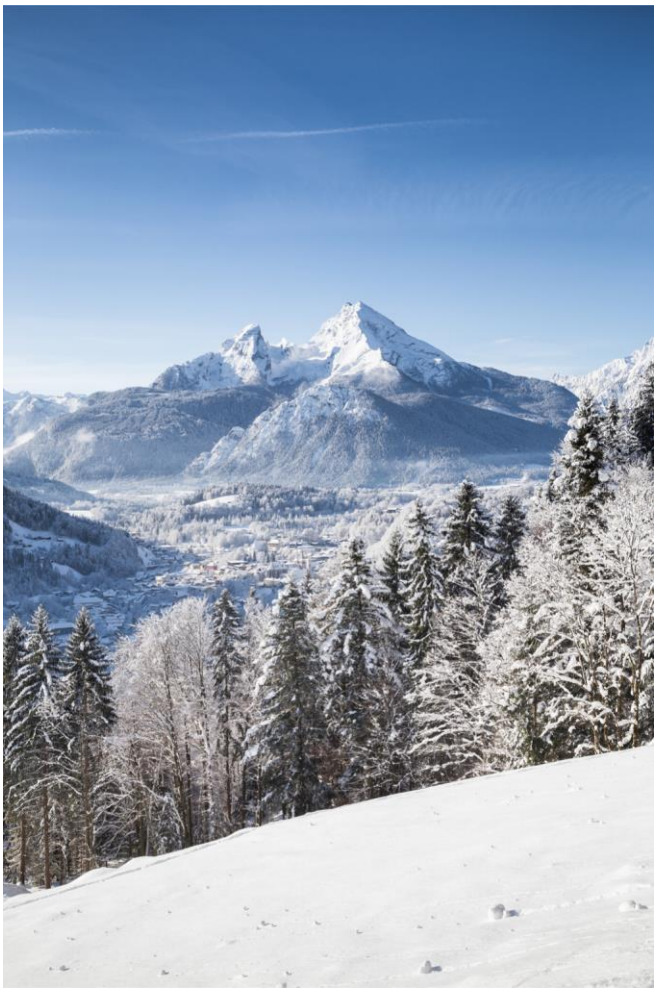
James Yardley

A Brief History of Censure Motions

A motion to censure someone is a political tool which derives from the earliest days of the English Parliament. It consists of a motion to condemn the government, a minister, or a private member for either a position they hold, or an action or inaction for which they are responsible. Today, it is used in varying levels of government around the world. According to *Robert's Rules of Order*, its purpose is 'to reprimand the member with the hopes of reforming [them] so that [they] won't behave in the same way again' [*Roberts Rules of Order* (11th ed, 2011, Da Capo Press) Ch 15].

Although the power is not written into any of the constitutional texts, Canada's Parliament derives its power to do so through Section 18 of the *Constitution Act 1867*, which reads:

> The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the



> Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

Some of the most famous incidents of censuring are at the Parliamentary level. For example, in 1874 Parliament called Louis Riel to be censured

for his role in the Red River rebellion, specifically regarding the murder of Thomas Scott. He did not attend and was subsequently censured by the House. However, the motion of censure is also frequently used in other levels of government, such as local government and even corporate settings, in which case a censure is used as a reprimand of a council member or board director in a formal setting.

Censure has been defined as an express severe disapproval of (someone or something), especially in a formal statement.[1] A censure is in law a symbolic action, and this can be illustrated by the Parliamentary procedure laid out for a censure in *Our Commons Procedure Book*. When individuals commit an offence against the dignity or authority of Parliament, they face censure and will be summoned to the bar. The procedure book explains, 'the summoning … of an individual to appear at the bar is an extraordinary event which places the member or individual under the authority of the House vested with its full disciplinary powers'.[2]

There have been several significant Parliamentary Censures over the years, most recently Ian Waddell from Port Moody in 1991 and Keith Martin from Esquimalt in 2002. Parliamentary Censures vary in their reasons and outcome; however, they all require the individual to stand up and address the House for their wrongs.

Robert's Rules explains the procedure required to censure an individual. First it requires a motion and a second. That motion is amendable and debateable. The individual being censured may attend under the doctrine of procedural fairness in order to come to their own defence. Fairness requires reasonable notice of the hearing opportunity, access to all records to be considered by the decision-makers, the right to be represented by legal counsel and generally the right to reasons for a decision. Next, it requires a majority vote, in which the individual may not participate. Once decided, a censure cannot be reconsidered under Roberts Rules, but can be brought back for reconsideration by the mayor or chair under section 131 of the *Community Charter* or by the council or board (subject to a procedure bylaw).[3]

There are two circumstances under which a motion to censure can occur. First, the mayor or chair may name the person as a result of their bad behaviour, and when asking for a penalty, a member can make a motion to censure. Second, if members are aware of the bad behaviour of an individual and they wish to bring it to the attention of the assembly, they can make a motion to censure.[4]

Although the BC *Community Charter* does not directly give council members the power to censure, it is commonly understood as one of their duties. In the event of a council member either inappropriately conducting themselves at meetings or conducting serious breaches of agreed performance, a motion of censure is a form of recourse for the other members. It should be noted that censure should not follow a simple error in judgment, which happened by inadvertence and in good faith. However, when a motion of censure is passed, while it carries no automatic fine or suspension of rights on the member, it is a punitive action which serves as a punishment for wrongful conduct.

In *Skakun v. Prince George* a councillor for the City of Prince George sought judicial review of a decision made by Council to consider censuring and possibly depriving him of some of the attributes of his office for misconduct as a councillor. Mr. Skakun admitted to having personally delivered a confidential and

[1] Oxford English Dictionary: "Censure"
[2] *House of Commons Procedure and Practice* (2nd. Ed, 2009) 291
[3] *Roberts Rules of Order* Ch 15
[4] *Roberts Rules of Order* Ch 15

privileged report to the CBC. Mr. Skakun received the report as part of the agenda package for an in-camera council meeting. He was found guilty of violating *FOIPPA* and was fined. The judge noted in the *Skakun* case that his conduct also constituted a breach of his oath of office and of s. 117 of the *Community Charter*.

The judge moved on to consider whether there was an express power to censure in the *Community Charter* and found there was not. But, such a power should be implied in circumstances where conduct may not rise to the level of disqualification (for other breaches such as conflict of interest, which are dealt with in the Act), but are still serious:

> [42] … it would be expected that council would not sit idly by when a council member has acted contrary to their own statutory obligations. The situation is, in my view, somewhat akin to a professional's obligation, such as a doctor or a lawyer, where his misconduct may attract court process, but it also attracts his professional body's internal discipline processes. …
>
> [43] By my reading of the *Community Charter*, it is reasonable to imply council have an obligation to regulate a councillor's misconduct when there is a substantial falling away from the expected standard.

The court did caution that the power of a council to censure (i.e. to "state the standard of expected conduct") should be "exercised with great care and great discretion. Far too easily, this could turn into an abuse of process for cheap political gain, and any council that sets out in this direction must be careful in what it is doing. But I do not see any such suggestion in the situation before me."

A case referred to by the Judge in *Skakun* is *Barnett v. Cariboo Regional District*. In that case, there was a proposal by the RD to deal with a director's conduct vis-à-vis the staff. They were proposing that he be confined to written communication with the staff. Judge dismissed the argument that the RD "had no jurisdiction" to govern the misconduct of Directors, stating: "the weight of the statutory and judicial authority suggests that a Regional Board has the ability to

determine its own internal procedures, which surely must include the ability to control misconduct by a Director".

A motion of censure is a commonplace political tool in all levels of government, and it is used to punish conduct which is against the dignity or authority of the body which they are sitting. Such a motion is largely symbolic, as there is no corresponding fine or disqualification, but it serves as a public reprimand (carefully

articulated to acknowledge protected privacy and personal information rights) for wrongful conduct and may be accompanied by a removal of rights. It is part of the duty of council members to monitor the behaviour and actions of other members, and in the event of breach of agreed performance or inappropriate conduct, members must make recourse to the available sanctions. Therefore, censure is a political tool to hold individuals accountable to their electorate and to other elected members.

Alex Lidstone – Student at Law

Railway Crossing Agreements – Cost Apportionment

Under section 101(3) of the federal *Canadian Transportation Act*, if a local government is unsuccessful in negotiating an agreement with a federally regulated railway relating to the construction, maintenance or apportionment of the costs of a road or utility crossing, then it can apply to the Canadian Transportation Agency **(the "CTA")** for authorization to construct a suitable road or utility crossing or related work.

The apportionment of construction and maintenance costs often arises with road grade separations, either overpass or underpass structures that allow railway and road traffic to cross each other at different elevations, but could also arise with respect to utility works that benefit the railway and local government, such as drainage works, in which case a local government may be able to claim that the railway should pay a portion of the cost of such works.

If a local government and railway are not able to negotiate an agreement on the apportionment of construction, alteration, operational or maintenance costs, then they may refer the issue to the CTA for a determination under section authority and 15% railway company. On projects due primarily to railway development, the apportionment for basic grade 101(4) of the Canadian Transportation Act and section 16 of the federal Railway Safety Act. The referral may be made either before or after construction or alteration of the work begins. For federal railways, the CTA has jurisdiction if no recourse is available under Part III of the Canada Transportation Act or the Railway Relocation and Crossing Act. The CTA considers, among other things, the benefits accruing to each party for the construction or reconstruction of grade separations, as well as the responsibility that each party bears to coexist at crossings.

The *Canadian Transportation Act* is federal legislation, but British Columbia has adopted certain provisions of that Act and made them applicable to provincial railways. The Province has delegated authority to the CTA to adjudicate railway crossing disputes pursuant to section 101(3) of the *Canadian Transportation Act* so that the CTA can make determinations on issues such as whether proposed works are a "suitable crossing" and whether the crossing should be subject to terms or conditions concerning liability, compensation or limits on the duration of the crossing. The province has not, however, delegated authority to apportion the cost of constructing or maintaining a road or utility crossing to the CTA. With provincial railways, authority to make such decisions rests with the Minister of Transportation.

The CTA has published a resource tool entitled "Apportionment of Costs of Grade Separations" (available online here: https://www.otc-cta.gc.ca/eng/publication/apportionment-costs-grade-separations-a-resource-tool) It sets out how the CTA will normally apportion construction and maintenance costs. For example, the construction costs of the basic grade separation on projects due primarily to road development, construction costs are normally apportioned 85% to the road separations is normally apportioned 15% to the road authority and 85% to the railway company.

Maintenance costs for an overhead bridge are normally apportioned so that the road authority pays all maintenance costs of the substructure, superstructure and retaining walls of an overhead bridge and the railway company pays all other maintenance costs of an overhead bridge, including the cost of maintaining the railway approaches, track structure, railway drainage and communication facilities.

Maintenance costs for a subway are normally apportioned so that the railway company pays all maintenance costs of the substructure and the superstructure of a subway and the road authority pays all other maintenance costs of a subway, including the cost of maintaining the road approaches, retaining walls, road surface, sidewalks, drainage and lighting.

Costs that would otherwise be incurred by the railway company or the road authority if the crossing did not exist are not to be included in the calculation of construction and maintenance costs for a basic grade separation.

The CTA will assess each application for a grade separation and cost apportionment on its own merits and the CTA determines whether and to what extent the Resource Tool should be applied.

In Decision No. 40-R-2018, the CTA considered an application by the Cities of Cambridge and Kitchener against the Canadian Pacific Railway Company under subsections 101(3) and (4) of the act and section 16 of the federal *Railway Safety Act* for authorization of an at grade road crossing and order for the apportionment of costs for the construction, alteration, operation or maintenance of the crossing. The railway company did not oppose the crossing but argued that a suitable crossing would be grade-separated. Construction of the road crossing was required for development of a business park development on land that was divided by the railway line.

The CTA decided against the Cities application for an at-grade crossing and authorized the construction of the grade separation.

In authorizing the construction, the CTA did not impose any indemnity, insurance, compensation requirements or limitations on the duration of the crossing. The CTA noted that the authorization did not relieve either the applicants or the railway of their obligations under the *Railway Safety Act*.

With respect to the cost of constructing the grade separation, the CTA considered the circumstances – that the road development was due to the applicants and that an at-grade crossing would have negative impacts on CP's operations – and found that the Cities and railway stood to benefit to a comparable degree from the construction of a grade separation at the proposed location. Consequently, the CTA found that the Cities should be responsible for 50 percent of the costs of construction of the grade separation and CP should be responsible for the

remaining 50 percent. The CTA applied the usual apportionment of maintenance costs in accordance with the Resource Tool.

Lynda Stokes

Statutory Rights of Way – Best Practices

A statutory right-of-way ("**SRW**") is a tool that is frequently used by municipalities or regional districts to secure rights of access or services for across private lands. The power to secure an SRW comes from section 218 of the *Land Title Act* which provides that a landowner may create, by grant or otherwise, an easement in favour of a local government for any purpose necessary for the operation and maintenance of the local government's undertaking. The SRW is registered against title to the land to which it applies and constitutes a charge in favour of the local government. It confers on the local government the right to use the land charged in accordance with the terms, conditions and covenants of the SRW instrument which are binding on and take effect to the landowner, the local government and their successors in title.

An SRW is typically created by an agreement between a landowner and a local government and may be granted by a landowner as a condition of subdivision or other local government permit or approval. An SRW may also be expropriated against an unwilling landowner under section 31 of the *Community Charter* or section 289 of the *Local Government Act*. Local governments may also grant SRWs over land that it owns under s. 18 of the *Property Law Act*. This is useful in situations where the local government intends to dispose of the land to a third party and it wishes to secure its rights under the SRW before the land is transferred.

An SRW should contain the following provisions:

- *The names of the parties to the SRW agreement* consisting of: the landowner, the local government and any financial charge-holder that must grant priority for the SRW over their financial charge.

- *A legal description of the lands on which the SRW is located*.

- *A description of the area of the lands where the SRW is to be located (the "**SRW Area**")*. The SRW may consist of the entire parcel, but in most cases, the SRW Area is limited to an area that is defined by survey plan. Where the SRW Area is defined by survey plan, it is good practice to attach a copy of the survey plan as a schedule to the SRW agreement.

- *A description of the intended purpose and works for the SRW*. For example, the stated purpose may be public access and the works may consist of such gravel, pavement or other surfacing as the local government deems necessary along with landscaping and lighting. Alternatively, the SRW might be intended for utility lines such as water or sewage with such pipes, valves and ancillary equipment, works and infrastructure as are required for the works. It is good practice to define the purpose and works as broadly as possible to ensure that the SRW Area permits all present and future anticipated uses. A broad definition will avoid the need to negotiate or expropriate additional purposes or works later.

- *Details of the parties respective rights and obligations*. The SRW agreement should obligate the landowner to permit the local government to use the SRW Area and to not disturb the SRW Area. Typically, the SRW will also obligate the local government to not unreasonably disturb the landowner's use of the remaining land. In many situations, the SRW will also obligate the landowner to undertake positive covenants such as maintaining

shrubbery or landscaping adjacent to the SRW Area or notifying the local government if the landowner intends to undertake certain prescribed activities on the remaining land. If the SRW includes any positive obligations for the landowner, then the SRW should include a Section 219 Covenant to ensure that the positive covenants bind future owners of the lands (see *Terasen Gas Inc. v. Utzig Holdings (B.C.) Ltd.* (2012)(BCCA)).'

- *Repair and maintenance obligations*. In most SRWs, the obligation to maintain and repair the SRW Area will rest with the local government. The SRW will also often include an obligation that the local government provide reasonable notice and in some cases, obtain consent from the landowner, if the maintenance and repairs will disturb the landowner's use of the remaining property. In some situations, maintenance and repair obligations will be imposed on the landowner at the expense of the local government. In those circumstances, the SRW should include language that obligates the landowner to obtain the consent of the local government before undertaking the maintenance or repairs. This will protect the local government from incurring expenses for unwanted or unnecessary repairs or maintenance (see *Central Coast Power Corp. v. BC* (1994)(BCSC)).

- *Insurance and indemnity provisions*. The SRW will typically require the landowner to insure their lands and indemnify the local government from any claims arising on the lands that are not caused by the local government or the SRW. Conversely, the SRW will typically require the local government to indemnify the landowner from any claims or losses arising from the SRW and the local government's use of the SRW Area.

- *Finally, the SRW must contain language that the SRW is "necessary for the operation and maintenance" of the local government's undertaking*. This language is required by s. 218(6) of the *Land Title Act* and it is typically included in the preamble of the SRW agreement.

Including these provisions in your SRW will help ensure that the SRW remains enforceable and achieves local government purposes for access or services.

Lindsay Parcells

Groundwater licensing transition has been extended to 2022

The province has extended the water license application transition period for entities using groundwater. The licensing requirement applies to institutional, agricultural, industrial and commercial groundwater uses, including suppliers of drinking water. Originally, the transition period was set to expire on March 1, 2019. On February 19, 2018, the province extended the transition period siting lower application volume than expected. **The new deadline is March 1, 2022.**

Despite the extension, local governments are encouraged to apply as soon as possible since groundwater users who apply under the transition provisions of the *Water Sustainability Act* ("WSA") must pay annual water rentals retroactive to February 29, 2016. The total retroactive water rental payment gets larger over time to the extent the applicant delays.

Section 6 of the WSA requires that, with few exceptions, all persons using water from an aquifer require a provincial license. A person with an earlier license date has a stronger water right than a person with a later license date. This concept is commonly known as "first in time first

in right" or "FITFIR." In instances of water shortage, license holders with a later license date may be asked to release water so that a license holder with an earlier license date has enough.

Under the old *Water Act*, the Province did not license groundwater use. Therefore, by the time the WSA came into effect, there were numerous persons already using groundwater, including local governments. A transition mechanism was put in place to allow pre-existing groundwater users to base their license on the date of first use, rather than the date of application.

Pre-existing groundwater users wishing to preserve their priority have until March 1, 2022 to apply for a groundwater use license. For these applicants, the license date is based on their date of first use. The applicant must supply evidence in support of their date of first use. This includes such items as the location of the aquifer, the location of the wells, the water use purposes, the history of the use, well reports, results of water quality testing, and the like. The province has the authority to determine the date of first use based on the evidence provided.

If a person fails to apply before March 1, 2022, their license will be considered as a new application, without taking historic use into account.

In addition to preserving priority of use, pre-existing groundwater users applying before March 1, 2022 are also exempt from considering environmental flow needs of streams hydraulically connected to the aquifer. The concept of "environmental flow needs" means the volume and timing of water flow required for the proper functioning of the aquatic ecosystem of the stream. In connection with a groundwater license application, the province must consider the environmental flow needs of streams hydraulically connected to the aquifer. The concept of hydraulic connectivity is imprecise and may require professional advice and analysis (which come at a cost).

Pre-existing groundwater users applying before March 1, 2022 are exempt from this requirement. For those missing the deadline, the environmental flow needs of connected streams may affect the quantity of licensed water and add to their application costs.

Lastly, March 1, 2022 is important for calculating fees. Those applying for pre-existing groundwater use before March 1, 2022 are exempt from paying license application fee. In respect to waterworks, application fees range from $1000 to $10,000, depending on the volume of use. Water rental fees (i.e., user fees) will be payable retroactively to February 29, 2016. Delaying the application will result in a larger retroactive water rental payment at the time of application.

In short, local governments that have been using groundwater, but who have not yet applied to license this use, should apply before March 1, 2022. Failing to do so will result in extra costs and – more significantly – the loss of priority of use and a larger retroactive water rental payment.

Olga Rivkin

A Doggie went A Courtin'

A. The Law

An ACO has grounds to make a destruction application if one of three conditions are met:

a. a dog has killed or seriously injured a person;
b. a dog has killed or seriously injured a domestic animal in a public place; or
c. the ACO has reasonable grounds to believe that a dog is likely to kill or seriously injure a person.

If one of these conditions are proven in Court on the balance of probabilities, the dog is considered a dangerous dog (the first part of the test on a s. 49 application).

The first two of these grounds require first person witness testimony in Court, for example, live testimony of the victim as to what occurred. The third ground simply requires that there be reasonable grounds to justify the ACO's opinion that the dog is likely to kill or seriously injure a person. As discussed further below, this may require live evidence of the ACO, or if allowed by the Court, may be admitted via an affidavit of the ACO.

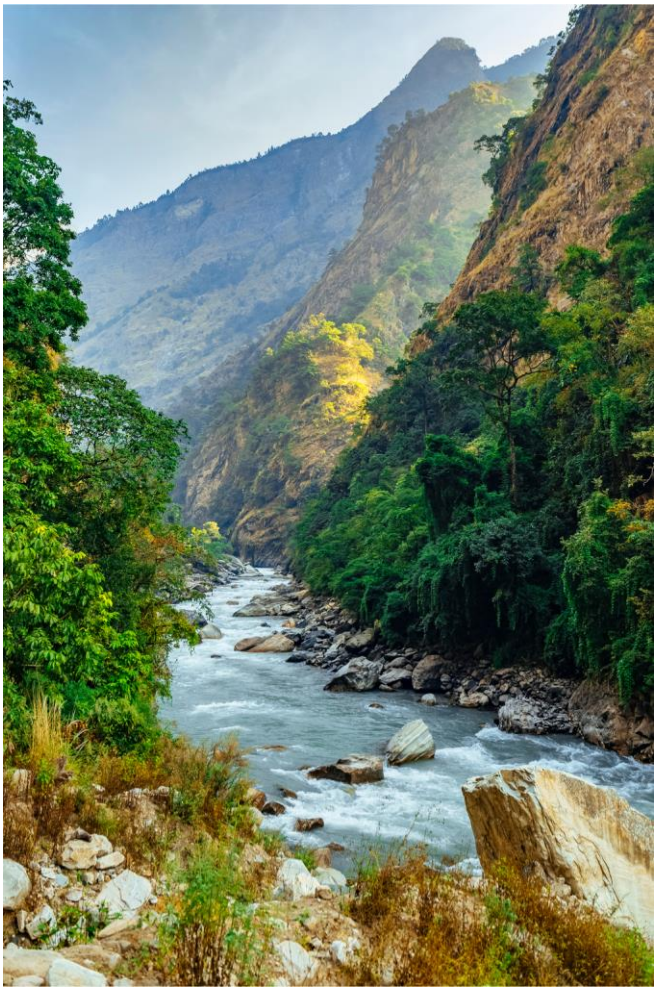
A successful destruction application also requires the expert opinion of an animal welfare consultant, which must conclude that destruction is appropriate given the dog's history, temperament and behaviour. This expert opinion may form part of the ACO's opinion with regard to (c) above and is a key part of any case (we recommend a local government obtain such an opinion even if relying on grounds (a) and (b) above).

Once it is determined by the Court that the dog is dangerous (in one of the 3 ways listed above), then it is incumbent upon the local government to prove that the appropriate order is for destruction, i.e. some other form of order short of destruction will not protect the safety of the public. This is usually proven with reference to: (a) the expert opinion; and (b) the dog's past behaviour, current state, and (c) an examination of the owner's care of the dog and ability to control it.

B. The Procedure

There is little to no clarity about the proper process by which to bring a s. 49 application to the Provincial Court. Some hearings are lengthy and require live witness testimony. Other applications are done by way of affidavit and are more streamlined. Often the applicable procedure depends on the particular judge's background (for example, if the judge used to be a criminal lawyer, they often prefer a criminal law approach – in fact, in one instance it is our understanding that a Provincial Court judge held a bail hearing for the dog!).

We recommend starting the application by way of completing and filing the "Application In the



Provincial Court of British Columbia (For use for Applications under the Local Government Act and Vancouver Charter), Form SCL 868 11/2011. In our opinion, this form is appropriate for applications made under s. 49 of the *Community Charter*. You must set out the basic facts on which the application is based in the spaces provided in the Application Form, list the affidavits on which you intend to rely, and set out the statutory basis for the application (s. 49).

The Application must be filed within 21 days of the date that the dog was seized.

We recommend filing at least two affidavits with the Application:

(a) the affidavit of the ACO, setting out the history of the dog, any incidents which have occurred, attaching as exhibits the ACO's file and notes, and containing a statement that on the basis of the information contained in the affidavit, the ACO has reasonable grounds to believe, and does believe, that the dog is likely to seriously injure a person, and presents an imminent danger to the public; and
(b) the affidavit of the Animal Welfare Expert, attaching her/ CV and Assessment Report as exhibits.

Once filed, the Application and supporting affidavits should be personally served on the owner. While there is authority for the proposition that an application made under section 49 may be conducted solely by way of affidavit evidence (for example, *Animal Control Officer for the City of Chilliwack v. Hall*, (23 April 2013), Chilliwack Provincial Court, No. 60900 (unreported)), because there is no clarity in any Rules or statute about the appropriate process, it is good practice to:

1) Provide the dog owner with copies of the filed affidavits;
2) In advance of the hearing, formally request whether the dog owner requires the local government's affiants to attend the hearing for cross-examination on their affidavits;
3) Bring authority to the hearing for the proposition that s. 49 applications may be made by way of affidavit evidence; and
4) Have all of the affiants attend the hearing in person, in case the judge wants them to go over their evidence in person on the witness stand or if the owner wishes to cross examine them on their affidavits.

While in some cases the parties may wish to conduct full trials on s. 49 applications, in our view: (1) this is not what is contemplated by the statute; and (2) is not in the interests of the local government, the dog, the dog's owners, or the interests of justice to prolong these kinds of hearings. For these reasons, we recommend running these applications (or at the very least, starting them), by way of affidavit evidence alone.

A final note – in our opinion the ACO's file, notes and history of a dog (which we recommend attaching as an exhibit to the ACO's affidavit), are business records within the meaning of s. 42 of the *Evidence Act*, and accordingly are admissible into Court provided they were made or kept in the usual and ordinary course of business.

Matthew Voell

Local Government Election Wrap Up

The end of 2018 marked the end of a very exciting and busy time for Lidstone's Local Government Election Team. Voting was very close and there was more than one tie in many local elections across British Columbia. We also saw the application of new legislation related to local election financing as well as the development of new case law relating to judicial recounts and challenges to the validity of elections. The following is some noteworthy decision and key take-aways for municipalities and regional districts.

Judicial Recounts

Who did not hear about **Peachland**'s grand tie between two mayoral candidates? It made national news when the court settled a tie during a judicial recount by drawing lots to declare the incumbent mayor elected. As staff and new

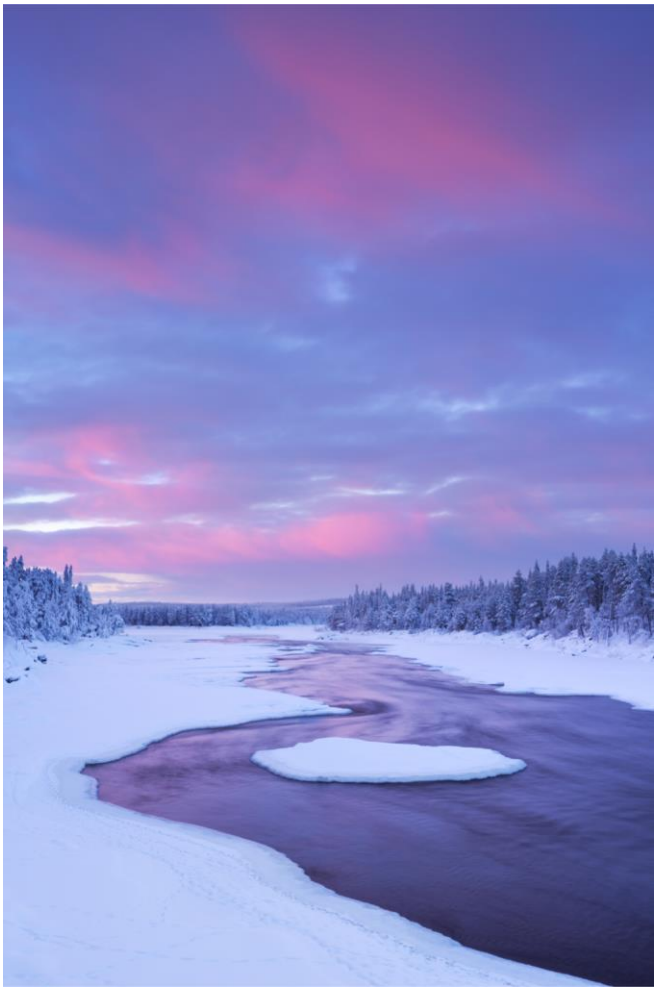
council members dodged questions about election procedure bylaws permitting "drawing lots", another judicial recount was settled that same way in Chilliwack for the election of Director for the **Fraser Valley Regional District**'s Electoral Area C. In that case, the Chief Election Officer ("CEO") reversed the decision of election officials who declared a ballot spoiled. Because the intention of the voter was clear on the hand marked ballot, the CEO accepted the ballot. The Court agreed with the CEO's decision, which resulted in a tie, and forced the Court to pick names from a box.

Take Away: *Local governments may wish to review their election procedure bylaws to consider how they want to deal with a tie following a judicial recount; either opting to draw lots or order a run-off election between the tying candidates.*

There were several applications for judicial recount following the election where only a handful of votes separated winners and losers. The court has narrow authority to grant a judicial recount pursuant to s. 148 (2) of the Local Government Act ("LGA") where either (a) that votes were not correctly accepted or ballots were not correctly rejected, (b) that a ballot account does not accurately record the number of valid votes for a candidate, or (c) that the final determination did not correctly calculate the total number of valid votes for a candidate.

In ***Jones v. Mumford and Chief Election Officer*, 2018 BCPC 300 (City of Chilliwack)**, an unsuccessful candidate for school board trustee brought an application for judicial recount where only 34 votes separated her from the winner. There was evidence before the court that some technical issues had arisen on general voting day, including a power outage and removal of a malfunctioning voting machine. The applicant argued that this evidence was sufficient to support a judicial recount per s. 148(2)(a) or (b). The evidence of the Chief Election Officer was that the results were not affected by these malfunctions.

The judge followed *Vicktor v. Lanktree*, 2008 BCPC 358, where the court held that it is not sufficient to order a judicial recount based solely on the fact that results are close (in that case there was 1 percent of the vote separating the



two top candidates) and there is some general concern or suspicion about the accuracy of voting machines. The court in *Lanktree* held that there must be evidence, beyond mere speculation, that the required basis for a recount set out in s. 148(2)(a)-(c) exist. In Jones there was a margin of 0.002 percent between the candidates as opposed to 1 percent in *Lanktree*. In addition, the judge noted that there had been a power outage, whereas in *Lanktree* there did not appear to have been any or technical

malfunction that would have elevated the application out of the realm of speculation. In light of the circumstances, the judge ordered a judicial recount.

In ***Smith and Finkbeiner v. The District of West Vancouver*, 2018 BCPC 326 (West Vancouver)** an unsuccessful candidate for councillor and the incumbent mayor applied for judicial recount of the mayoral and council races pursuant to ss. 148(2)(b) and (c) of the LGA. One central concern identified by the applicants was that there were apparently 68 valid ballots where there was no vote registered for a mayoral candidate. There were 21 votes separating the top two mayoral candidates. Citing *Lanktree*, and similarly to the court in Jones v. Mumford, the judge disagreed with the conclusion in *Lanktree* that the court is given discretion under the LGA to require an evidentiary basis to support one of the bases. The court held that the application need only allege that the request for a recount is related to the counting of valid ballots.

Take Away: *The Chilliwack and West Vancouver cases indicate that, going forward, judges may order a judicial recount where there is no clear evidence that any of the required bases set out in s. 148(2) are met. This seems particularly likely to occur where the margin between candidates is close. Unfortunately, there remains no clear cut off point for when results are too close. Further, while the courts have acknowledged the exception in s. 149(7)(b) (which allows the court to refuse to conduct a judicial recount if the court determines on the basis of the ballot accounts that the results of a recount of the ballots, if it were conducted, would not materially affect the results of the election), the courts have not expanded on this exception in detail.*

In light of the foregoing, Chief Election Officers will continue to be faced with uncertainty in the event of close election results. For now, the closer the results, the more likely a court will order a judicial recount. Amendments to s. 148 would be helpful to clarify the intent of the section. Another solution would be to include a threshold in s. 148 that if the margin separating the candidates falls below it, the CEO would be required to apply for a judicial recount. We note that such a provision is included in the provincial Elections Act, which requires the electoral officer to apply for a judicial recount if the difference between the votes received by the candidate declared elected and the candidate with the next highest number of votes is less than 1/500 of the total ballots considered.

Invalid Election Challenges

Two decisions relating to section 153 of the LGA, "Declaration of Invalid Election" highlight what can happen when the number of irregularities outnumber the number of votes separating a winning and losing candidate and the importance of issuing ballots only to those entitled to vote.

In ***Drummond v. Powell River (City),* 2019 BCSC 92**, the petitioner lost by two votes to the sixth-place finisher for the last councillor seat. After the election, Mr. Drummond reviewed the voting books and found six voters registrations where voters with addresses from outside the City boundaries were given ballots and voted. While the CEO was able to confirm the eligibility of two of the six irregularities, four remained unexplained. Given insufficient evidence to dispute the factual assertion made by the petitioner, the court found that on a balance of probabilities that four people voted who were not entitled to. Having found that the election was conducted in good faith and in accordance with the principles of the LGA and that there was no intentional inappropriate voting, the issue was whether or not the irregularities materially affected the result of the election.

In the Supreme Court of Canada decision in *Opitz v. Wrzesnewskyj*, 2012 SCC 55, the court held that where the number of irregularities equals or exceeds the winner's plurality then the result of the election is deemed affected and the election should be annulled (*also referred to as the

"magic number" test). Bound by the Opitz decision, and pursuant to section 155 (2) (c) of the LGA, the BC Supreme Court declared the election of the sixth city councillor invalid and the office vacant. A by-election is expected to be held in the Spring as a result.

Similarly, in ***Alberni-Clayoquot (Regional District) (Re)*, 2019 BCSC 20**, the regional district discovered that 13 voters erroneously cast votes all at a single voting place but in the wrong electoral area. Interestingly, the CEO brought the application under s. 153 (4) to seek the court's direction rather than a candidate as is usually the case. As in Powell River, there was insufficient evidence to explain the irregular votes, no bad faith or evidence of intentional improper voting.

The CEO sought to rely on a statistical analysis to assist the court in determining whether the erroneous votes materially affected the elections. However, the court found the analysis lacking in evidence and unhelpful in determining materiality. In the end, the court found no other cogent methodology useful. Applying the "magic number" test the court found that the improperly cast votes materially affected the result of the elections and declared the elections in in Electoral Areas B and F invalid pursuant to s. 155. (2) of the LGA.

Take Away: *The Powell River and Alberni-Clayoquot decisions serve as a helpful reminder to local elections officials of the importance of ensuring voter residency requirement are met and that proper voter registration procedures are followed so as to ensure that only voters who meet residency requirements vote.*

It is also clear that the "magic number" test confirmed by the Supreme Court of Canada is the test lower courts will follow when determining whether election irregularities materially affected an election. If a statistical analysis is to be tried in the future, it will have to be supported by evidence and argued before the court for it to be considered.

These cases and experiences are just the tip of the iceberg. In the future, the development of the case law on these and other election questions will continue to evolve and provide greater guidance for election officials and local

government. The issues that come up during elections are not always simply to work through and the LGA and the dearth of case law can be very unhelpful leaving election officials making judgment calls often in the moment which can be very unsettling. What may be helpful is for local governments to try and foresee, to the extent possible, some of the issues that come up and codify in their election procedure bylaws how they wish to address them rather than leaving it up for the courts to decide after the fact.

Rachel Vallance & Andrew Carricato

Adam v Insurance Corporation, 2018 BCCA 482

Can a sandbar be a highway? "Yes!", says a judge in 2016. "No!", says the Court of Appeal in 2018. "Whew!", say local governments all over the British Columbia.

Local governments are responsible for most "highways" within their territorial jurisdiction, but sometimes it can be uncertain as to what qualifies as "highway". In 2010, Mr. Adam, while on a popular sandbar on the Fraser River, was hit by an unidentified motor vehicle driven by someone who had just stolen his cooler of beer. In 2016, the BC Supreme Court found that the sandbar was a highway for the purposes of a "hit and run". The judge noted a history of people driving on the sandbar to go fishing and held that it was a "public way", and therefore a "highway". At the time, there were no submissions made by any local government, and the judge was not presented with the broader law concerning what makes a "highway".

The decision was appealed and at the appeal the City of Chilliwack, the District of Kent (both represented by Lidstone & Company's very own Paul Hildebrand), and the Attorney General of British Columbia made submissions as to what constitutes a "highway" and the adverse consequences of allowing the sandbar here to be a "highway".

The Court of Appeal reviewed the leading cases and held that the *Transportation Act* establishes a complete code as to how a highway can come into existence in British Columbia, for which there are four main mechanisms: (1) the deposit of the plan under s. 107 of the Land Title Act (2) the expenditure of public funds on a road travelled by the public (3) common law dedication by the owner (4) declaration by Gazette notice. Because none of these applied to the sandbar, the sandbar was not a "highway".

The Court of Appeal also held that the sandbar was not a "way", despite vehicles traversing it, as the sandbar itself was the destination, not the route to a different destination. This discussion may have a broader implication so that places traversed by vehicles but not as "routes" are now perhaps less likely to be a "highway".

The Court of Appeal, in making its decision, noted that "municipalities generally owe a duty of care to users of a highway in respect of the maintenance and repair of a highway...(t)he scope of these powers and responsibilities cannot be determined according to whether recreational motorists decide to drive on the sandbar."

Overall, this case is a useful reminder that determining what is a "highway" can be a nuanced process requiring a broad understanding of the applicable law. It is also a useful reminder to keep coolers of beer within reach whenever camping on sandbars.

Anthony Price

Chiovetti v Parksville (City), 2018 BCSC 2314

A petition was filed, naming the City as respondent, challenging a zoning amendment that would permit a social housing project to go ahead. The BC Housing Management Commission (BCHMC) and the Provincial Rental Housing Corporation (PRHC) applied under Supreme Court Rule 6-2 (7) to be added as respondents to the petition to enable them to defend the bylaw.

The Nanaimo Regional District had granted the City $700,000 to buy land for a modular housing site. The City then granted a long term lease to PRHC. BCHMC entered a $7 million design/build contract with a builder for 52 modular residential units and 3 shelter units. The zoning

amendment was adopted in May, the City obtained a development permit in September, and entered a contract with PRHC for construction, operation and maintenance of the project. It applied for a building permit in October, with expected completion to be May of the following spring.

This was prior to the 2018 local government elections. The court noted that the City never conceded that there was any defect in the public hearing process leading to the zoning amendment, but after the election, the City was prepared to consent to a court order, without a hearing, quashing the bylaw.

If the bylaw was quashed, BCHMC and PRHC would be liable under the design-build contract for about $300,000 in public funds, and PRHC would lose its rights under the lease with the City. Having recognized that the applicants had significant contractual, financial and proprietary interests in the bylaw, the court reasoned that it was in the interests of justice, and in the public interest, to add BCHMC and PRHC as respondents – so that they might defend the zoning amendment even if the City would not.

Some may recall that in Pacific *National Investments v. Victoria*, 2000 SCC 64, a decision to down-zone, contrary to an agreement with the developer that would have allowed a higher density during a second phase of development, was upheld by the Supreme Court of Canada on the basis that a legislative power cannot be fettered in advance by contract. Ultimately, however, in 2004 SCC 75, the same court applied the equitable doctrine of unjust enrichment to order the City to compensate the developer for public amenities provided in anticipation of the zoning being held in accordance with that agreement. The court reasoned that municipalities should not receive a "financial windfall" at the expense of a developer acting in good faith on a contractual commitment, even if the commitment is beyond municipal power.

Aside from leaving the zoning status uncertain and subject to judicial review, the recent decision in *Parksville* is interesting in that, in the context of a court challenge, a bylaw that a local

government is willing to have quashed might still be defended by another body having a substantial and public interest in its validity. Presumably, Council could amend or repeal a bylaw that it no longer considers to be in the best interest of the community. This case should be considered by local governments, however, before repealing, or allowing the defeat of a bylaw when that could result in the loss of committed funding either for public amenities or sourced by the public itself.

Colleen Burke

Expropriating Contaminated Sites

A recent decision has confirmed that it may be appropriate to deduct the reasonable, anticipated costs to remediate environmental contamination from the advance payment made to an owner upon expropriation.

In *Tanex Industries Ltd. v. Greater Vancouver Water District,* 2019 BCSC 74, Tanex challenged the Greater Vancouver Water District's ("**GVWD**") decision to pay the amount it determined represented market value less what it concluded to be the lower end of the range of anticipated costs to remediate the expropriated land. Tanex argued that the GVWD had no right to make a deduction for contamination and that the potential or actual presence of contamination, and associated remediation costs should, never be considered when determining compensation under the *Expropriation Act* (the "**Act**").

GVWD took the position that an expropriating authority may deduct the anticipated costs of remediation from the market value of a property. GVWD submitted that an owner of expropriated property remains free to challenge the compensation amount and may bring court proceedings to determine the ultimate compensation to be paid to an owner.

The facts of the case were not in dispute. Tanex was the registered owner of certain property, of which a portion was used for its mill working business. GVWD required the Property for a linear water works line. GVWD estimated the market value of the property; however, since it understood that the property was contaminated, it withheld the amount it viewed represented the low end of the range to remediate the land, based on advice from an environmental remediation expert. Notably, GVWD's determination of market value, that the property was contaminated and the remediation costs, were based on its own assessment guided by independent professionals. No determination had been made by a court or any regulatory authority that the property was, in fact, contaminated.

The Court considered the regulatory expropriation scheme in detail, with particular attention to the provisions addressing compensation to an owner and the determination of market value. The Court noted that market value is based on the 'highest and best use' of the property. A property's 'highest

> "A decision about whether it is appropriate to deduct remediation costs from an advance payment, and to what extent, will depend on the unique facts of each case."

and best use' may not necessarily be the use at the time of expropriation. If it is not, then the costs to elevate its use to that point can be considered in a compensation award.

The Court decided that the assessment and determination of the compensation to be paid to an owner is premised on market value, which must be determined on the facts of each case. The court held that the determination of whether to deduct remediation costs and, if so, the amount, depends on the specific evidence at play. If remediation costs affect or promote a property's market value, it may be appropriate to make a deduction for such costs. The Court concluded that

> [60] Under the *Expropriation Act*, compensation to an owner whose interest in land has been expropriated is based upon the property's market value. Remediation costs may be taken into account when the judge assessing a

> compensation award determines market value based in part on the property's highest and best use. To impose a rule of universal application that requires the judge to assess market value on the basis that the property is remediated without considering remediation costs is inconsistent with the *Expropriation Act* and would inappropriately fetter the judge's fact-finding role.

The Court noted that the specific point of law raised by Tanex was a case of first instance. This decision confirms an important point of law regarding compensation when expropriating contaminated lands. Compensation is based on the 'highest and best use' of the property. If property being expropriated would require remediation to be put to its 'highest and best use' it may be appropriate to deduct the anticipated costs of this remediation from the compensation paid to an owner.

The principles articulated in this decision provide guidance to local governments intending to expropriate contaminated lands, or lands reasonably believed to be contaminated. Of course, the court makes clear that there is no universal rule that applies to determining compensation where contamination is suspected. A decision about whether it is appropriate to deduct remediation costs from an advance payment, and to what extent, will depend on the unique facts of each case.

Robin Phillips

Cannabis Retail Stores and the Constitution

In December 2018, the British Columbia Supreme Court upheld the City of Vancouver's zoning and business licence regulations for retail cannabis stores. The Court granted Vancouver an order shutting down shops that had been operating without business licences. The reasons are indexed at *Vancouver (City) v Karuna Health Foundation*, 2018 BCSC 2221 ("***Karuna***").

In the last few years, there have been several court cases in which municipalities have successfully obtained injunctions to restrain the operation of cannabis dispensaries without business licences. See, for example: *Abbotsford (City) v. Mary Jane's Glass and Gifts Ltd*. 2017 BCSC 237, *Abbotsford (City) v. Weeds Glass & Gifts Ltd.*, 2016 BCSC 135; and *Delta (Corporation) v. WeeMedical Dispensary Society*, 2016 BCSC 1566.

The significance of the *Karuna* case is that, for the first time, the court considered the constitutionality of Vancouver's bylaws in the context of the recently recognized right to access medical cannabis and the federal legislation legalizing recreational cannabis.

The bylaws at issue in *Karuna* do not prohibit retail cannabis. Vancouver's Zoning Bylaw and Licence Bylaw require retailers to obtain business licences and comply with location restrictions for their stores. Specifically, the Zoning Bylaw requires retailers to be located in a commercial zone, and be at least 300 metres from:

- Schools
- Community Centres
- Neighbourhood houses
- Youth facilities that serve vulnerable youth
- Other cannabis businesses

While these regulations may not seem all that prohibitive, they would require a number of retailers to shut down; some of which retailers had been operating without licences for quite some time.

The Court upheld Vancouver's authority to enact these regulations and concluded that they did not violate the respondents' rights under the *Canadian Charter of Rights and Freedoms* ("***Charter***"). The key findings of the decision,

which may be of interest to other local governments, are as follows:

1. The court held that the right to access medicinal cannabis under the s. 7 *Charter* right to "life, liberty or security of the person" means there must be reasonable access, but not unrestricted access. The respondents had argued that restricting the number and location of dispensaries would result in their medical clients being forced to go without medical cannabis, turn to prescription medication that can be more harmful, or obtain cannabis from the black market. The court rejected these arguments, concluding Vancouver's bylaws do not infringe s. of the *Charter*:

   > [148] Access to cannabis under s. 7 does not mean access on every corner of a city. It does not mean access to a particular store or particular strain. Section 7 demands that individuals be given *reasonable* access to medical cannabis not *unrestricted* access. Individuals may be inconvenienced, but such inconvenience does not engage s. 7.

   The court's conclusion was based, in part, on its finding that "Cannabis is accessible through other locations and other means" (para. 147).

2. While local governments have no power to enact criminal law, the Court found that the purpose of the bylaws was to regulate businesses and land-use, and to facilitate community planning. These forms of regulations have consistently been found to be appropriate purposes for which local governments may regulate the use of land without stepping on the federal government's exclusive authority over criminal law. Consistent with previous case law, the Court in *Karuna* concluded that "Provincial governments—and therefore municipalities—have broad powers to legislate regarding matters that have incidental effects on federal criminal law power, such as the power to legislate in order to suppress crime" (para. 90).

3. The City's delay did not prevent the City from taking bylaw enforcement action against the dispensaries. While the Court acknowledged "there is no evidence of efforts on the part of the [Vancouver Police Department] to enforce any laws or bylaws with respect to [cannabis] dispensaries until sometime in 2016", the Court found that, as a general rule, local governments cannot waive, lose or vitiate their right to enforce their bylaws "by mere acquiescence, laches or estoppel" (paras. 158, 164). This is again consistent with the case law.

The *Karuna* decision will likely be appealed, so there may be more to report on this issue yet. At this point, the case is important because it places limitations on the constitutional rights of medicinal cannabis users and dispensaries. Even if the decision is upheld on appeal, we can expect there to be further discussion – and likely litigation – over what is meant by "reasonable access" to medical cannabis and how this may affect local governments' ability to regulate.

Rebecca Coad
