LIDSTONE & COMPANY

LAW LETTER

THE MERGED FIRM OF LIDSTONE AND MURDY & MCALLISTER

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Changes to the Labour Relations Code and Employment Standards Act

The increase to the minimum wage is not the only employment-related change in effect in British Columbia this spring. The government has also made substantive changes to both the *Labour Relations Code,* which governs unionized workplaces, and the *Employment Standards Act,* which sets out minimum standards and requirements for non-unionized workplaces.

The amendments to the *Labour Relations Code* were given third reading and received royal assent on May 30, 2019, meaning they are now law. The amendments to the *Employment Standards Act* were also given third reading on May 30, 2019 and most received royal assent the same day. Some of the amendments we think may be of most interest to local governments are summarized below.

PART ONE

The Labour Relations Code

1. **Restrictions on Right to Communicate**

Previously, s. 8 of the *Labour Relations Code* enabled employers to express their views on any matter, provided they did not use intimidation or coercion. Section 8 provided a broad defence to complaints a union might otherwise make pursuant to s. 6 of the *Code,* which prohibits employers from interfering in the formation, selection or administration of a union.

Section 8 has been amended to limit what employers can permissibly communicate to their employees. Going forward, employers are only permitted to communicate statements "of fact or opinion reasonably held with respect to the employer's business."

2. Appointment of a Mediator regarding an Adjustment Plan

Section 54 of the *Code* sets out notice and meeting requirements if an employer introduces or intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees covered by a collective agreement. After giving notice, the employer and the union must meet, in good faith, and endeavor to develop an adjustment plan.

Section 54 has been amended to allow either the employer or union to apply to have a mediator appointed if the parties have been unable to agree on an adjustment plan. Although the mediator does not have the authority to impose binding requirements, the mediator may make recommendations for the terms of an adjustment plan for consideration by the parties.

3. Case Management Conferences

There is now a requirement for an arbitration board to conduct a case management conference within 30 days of its appointment. Section 88.1 provides that the purpose of the case management conference is to schedule the exchange of information and documents, schedule hearing date and encourage settlement of the dispute. This amendment has the potential to expedite the grievance arbitration process.

4. Expedited Arbitrations

The provisions of the *Code* dealing with expedited arbitrations have also been amended. In order to refer a matter for expedited arbitration, the grievance procedure under the collective agreement has to have been exhausted and the application must be made within 15 days of the completion of the grievance procedure (reduced from the previous time limit of 45 days).

An arbitrator appointed to conduct an expedited arbitration previously had to set the matter down for hearing within 28 days. Now, the arbitrator must conduct a case management conference within 7 days of the appointment and conclude the arbitration within 90 days after the matter was referred to expedited arbitration. The arbitrator also has expanded powers to make procedural orders governing the hearing.

After the conclusion of the hearing, if jointly requested by the parties, the arbitrator must issue an oral decision within one day after the conclusion of the hearing. If an oral decision has been issued and the parties agree that written reasons are not required, the arbitrator does not have to issue written reasons. Otherwise, the

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arbitrator must issue a decision with written reasons not exceeding 7 pages within 30 days after the conclusion of the hearing.

5. **Display or Provision of Information**

Section 123 of the *Code* now requires the Labour Relations Board to make available to the public information about rights and obligations under the *Code.* It also gives the Board the authority to direct an employer to display information in the workplace about rights and obligations under the *Code* or to otherwise make available or provide such information to employees.

PART TWO: Employment Standards Act

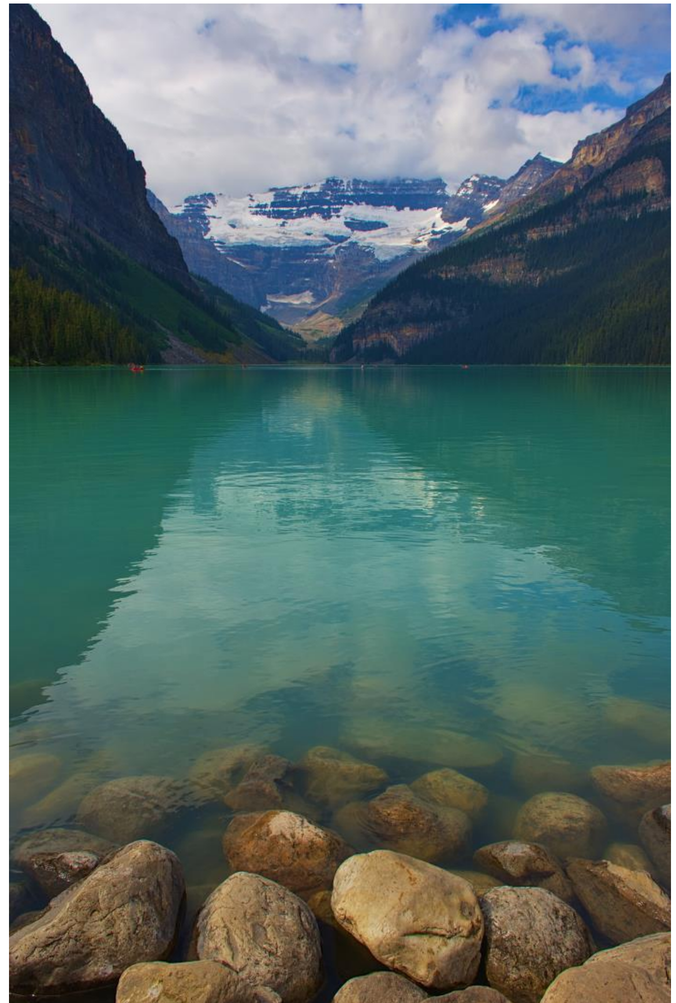
1. **Collective Agreements must meet or exceed *ESA* minimums**

Previously, if a collective agreement contained provisions respecting various matters (including hours or work and overtime, vacation, vacation pay, and statutory holidays), the provisions in the *ESA* would not apply and the collective agreement would govern. Now, all collective agreements will be required to include provisions that either meet or exceed the minimum requirements set out for specified matters in the *ESA,* including those matters listed above. It is important to note this amendment will not impact collective agreements that are currently in force but will impact new collective agreements being negotiated.

2. **New Statutory Leaves**

The *ESA* amendments introduce new statutory leaves for employees. Now, employees will be permitted to take up to 36 weeks of unpaid leave to provide care or support to a family member who is under 19 years of age and up to 16 weeks of unpaid leave to provide care or support to a family member who is 19 years of age or older. There is also the possibility of extending the leave if certain conditions are met.

There is also now a new leave respecting domestic or sexual violence. Employees are entitled to leave of up to 10 days to seek medical attention, to obtain victim or other social services, to obtain professional counselling, to relocate, or to seek legal or law enforcement



assistance relating to domestic or sexual violence. Eligible employees are also entitled to an additional leave of up to 15 weeks for the same purposes. Employees are also entitled to the leave if they are seeking the same services for an eligible person, defined to include the employee's child.

3. **Termination Pay**

While many employment contracts contemplate what will happen if an employee gives notice of

resignation and the employer elects to forgo the notice period the employee would have otherwise served, the *ESA* was previously silent as to what would happen in such circumstances. Now, if an employee gives notice of resignation to an employer after at least 3 consecutive months of employment, and the employer terminates the employee during that notice period, the employer must pay the employee an amount equal to the lesser of either the wages the employee would have earned for the remainder of the notice period or the amount the employer would have otherwise been liable to pay upon termination pursuant to the *ESA*.

4. **Extended wage recovery period**

Previously, if an employer was subject to an order to pay an employee unpaid wages, it was limited to the amount that became payable in the preceding 6 months. That time period has now been extended to 12 months, with the possibility of extension for a further 12 months by the Director.

5. **Other**

Some other amendments that may be of interest to employers include the following:

- Employers will now be required to retain payroll records for 4 years rather than two years;

- Employees will no longer be required to complete the 'self-help kit' prior to filing a formal complaint; and

- The Director now has discretion to waive penalties for employers in certain circumstances.

Please feel free to contact us for more details on the amendments to the *Labour Relations Code* or the *Employment Standards Act.*

~ Marisa Cruickshank

Climate Emergency Declarations in BC

As of June 18, 2019, the councils and boards of at least 19 local governments across BC had issued or endorsed "climate emergency declarations." Joining hundreds of local governments across Canada and throughout the world, as well as Canada's House of Commons, these declarations have sought to elevate the urgency of climate action. But what is a climate emergency declaration? And what legal effect does it have?

What is a climate emergency declaration?

BC local government climate emergency declarations have generally taken the form of a resolution adopted by a municipal council or regional district board setting out in preambular clauses the risks posed by climate change, locally and globally, as well as the costs the local government may already be incurring as a result of climate change.

Declarations to date have included some or all of the following actions:

1. a declaration that a climate emergency exists locally and throughout the world;

2. a direction to staff to report back with an action plan for meeting the greenhouse gas emission reductions needed to prevent the irreversible changes described in the IPCC's 2018 report on the consequences of surpassing 1.5°C of warming;

3. a commitment to carbon neutrality within the local government by 2030;

4. a direction to staff to incorporate more urgent climate action into strategic and financial planning processes; and

5. a direction to the head of the local government to communicate on behalf of the local government to the Province, the

federal government, UBCM, and/or FCM in order to advocate for more urgent action, solidarity, funding, and/or legislative authority.

A climate emergency declaration is *not* a declaration of a state of local emergency

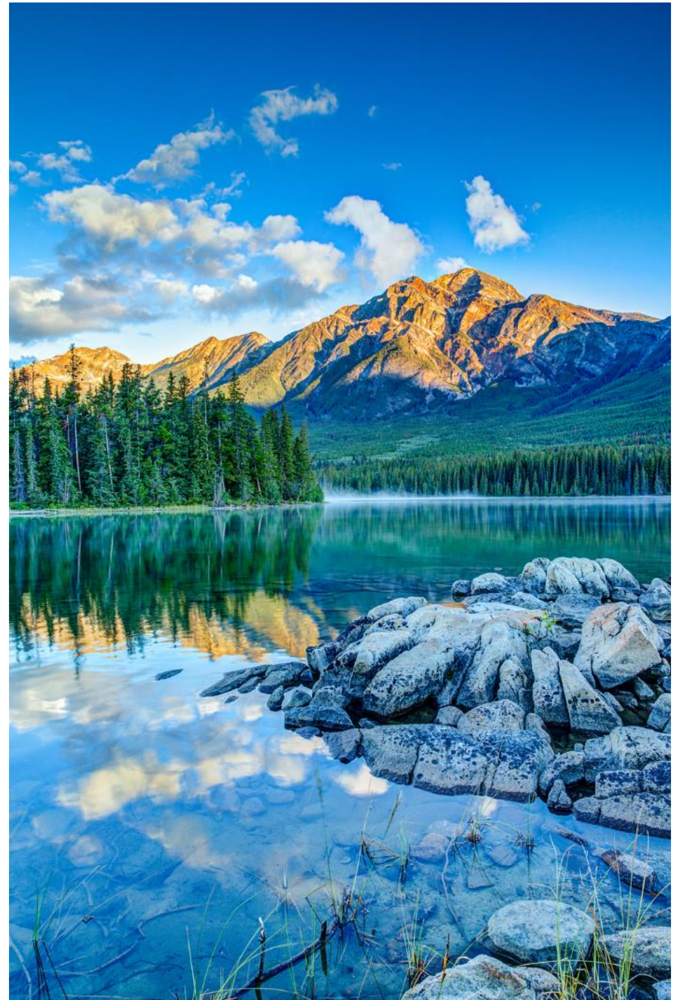
It is important to note a climate emergency declaration is *not* the same as a declaration of a state of local emergency under BC's *Emergency Program Act* ("EPA" or "Act"). Under the EPA, local governments may, by bylaw, resolution, or order of the head of the local government, declare that an emergency exists within all or part of their boundaries. As a result of this declaration, the declaring local government acquires temporary additional powers to implement its local emergency plan, as well as a number of other powers such as the ability to issue evacuation orders.

Importantly, the EPA's additional powers are only available where the situation on the ground reasonably fits the Act's definition of "emergency." Under the EMA, "emergency" is defined as "a present or imminent event or circumstance that (a) is caused by accident, fire, explosion, technical failure or the forces of nature, and (b) requires prompt coordination of action or special regulation of persons or property to protect the health, safety or welfare of a person or to limit damage to property." Along these lines, while natural disasters (e.g. interface fires and floods) that may have some correlation to climate change could justify a lawful declaration of a state of local emergency, the wider context of climate change could not.

"Another form of emergency?"

Under section 20 of the *Community Charter* and section 295 of the *Local Government Act*, municipal councils and regional district boards, respectively, can declare that a form of emergency other than one within the meaning of the EPA exists and, as a result, exercise the necessary additional powers to deal with it.

There is legal uncertainty, however, around whether these provisions can empower a local government declaring a climate emergency with the additional powers necessary to address it.



On the one hand, while no case law has considered the current provisions, a decision from 1992—*Kuypers v Langley (Township)*—held that the predecessor provision in the *Municipal Act*, which did not at that time reference the EPA, was limited to granting emergency powers only where there was "a sudden and unexpected event…about to take place." Along these lines, if the current provisions are interpreted in the same way, a climate emergency would not fit the bill. Indeed, such an

argument may align with how the courts have interpreted the federal government's emergency powers.

But on the other hand, climate change poses a critical threat of a different nature than an emergency as contemplated by the EPA. As emphasized by the IPCC report mentioned earlier, the cumulative nature of greenhouse gas emissions (i.e. emissions that are emitted now will stay in the atmosphere for hundreds to thousands of years) means that society only has until 2030 to prevent irreversible, catastrophic changes from occurring. Accordingly, although some of the effects of climate change are not yet imminent, it is arguable that section 20 of the *Community Charter* and section 295 of the *Local Government Act* should be interpreted differently than their predecessor provision. Indeed, these provisions arguably would not make sense in the context of climate change if they were only relevant to a local government after certain ecological thresholds had already been irreversibly surpassed.

Why would a BC local government want to declare a climate emergency?

While it is unclear whether a climate emergency declaration can grant the declaring local government additional legislative powers, these declarations may nevertheless be valuable for other reasons.

First, a declaration allows a local government to publicly communicate its view of the importance of local climate action.

Second, a declaration may be able to be leveraged for additional government funding or private funding opportunities.

And third, a declaration could be used to either (1) clarify whether section 20 of the *Community Charter* and section 295 of the *Local Government Act* can empower declaring local governments with additional emergency powers or (2) encourage the Province to provide additional powers that may be necessary to meet the challenge. Along these lines, it is interesting to note that Ontario's current *Municipal Act* expressly provides single-tier municipalities in that province with the general power to adopt bylaws for the "economic, social and environmental well-being of the municipality, *including respecting climate change*" (emphasis added).

~ Ian Moore

Making your Workplace Respectful Can Reduce the Risk of a Constructive Dismissal Claim

In a recent decision, the BC Supreme Court provided a helpful refresher of the law on poisoned workplaces and constructive dismissal.

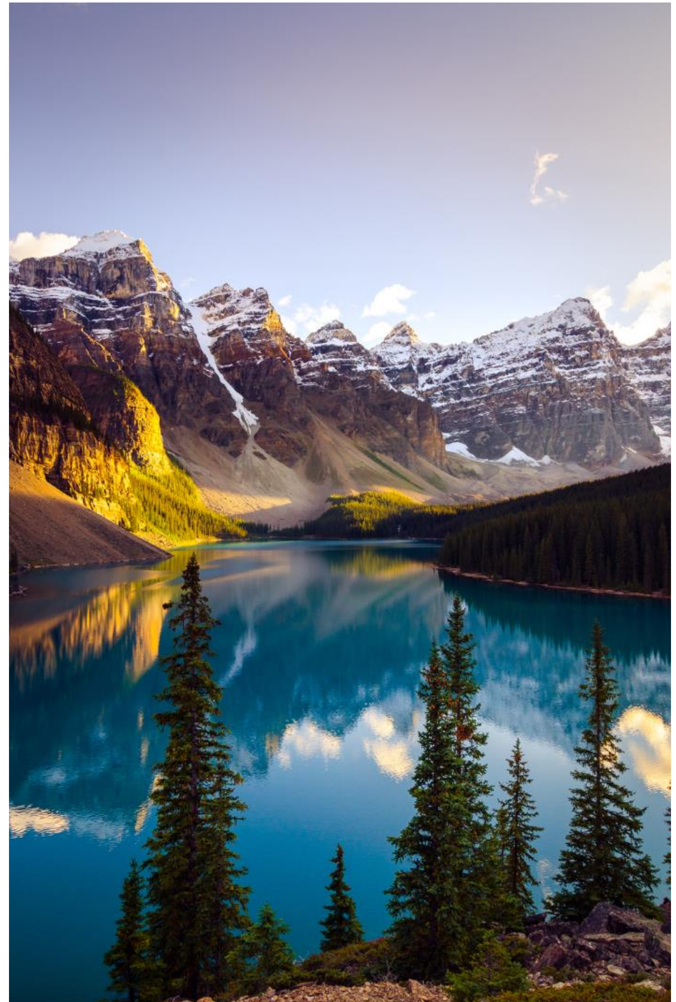
The Juicy Details

Mr. Baraty, the plaintiff and the company's chief estimator, had a difficult relationship with his subordinate employee, Chris Corilla. Over time, Mr. Baraty complained to management that Mr. Corilla was, among other things, often insubordinate and subjected Mr. Baraty to physical intimidation, verbal abuse and harassment. The employer investigated the claims and found that many of the accusations were unfounded. However, where discipline was warranted, discipline was imposed. The investigation also concluded both men were to blame for the poor working relationship. The employer even hired a business coach to help resolve their differences, but to no avail. As the only two employees in the estimation department, it was impossible for them not to work together and their relationship deteriorated to the point where they primarily communicated by email.

Around the same time, the company explored the possibility of integrating the estimations and sales departments. Mr. Baraty became convinced that a decision had been made to demote him. Frustrated by management's failure to terminate Mr. Corilla and convinced that the employer was going to demote him, Mr. Baraty resigned and claimed constructive dismissal.

The Law on Constructive Dismissal

The BC Supreme Court followed the two branch test confirmed by the Supreme Court of Canada[1]. Constructive dismissal will be established. One, where there is a single unilateral act that breaches an express or implied term of the employment contract, and/or two, where, when taken together, a series of acts amounts to the employer no longer intending to be bound by the contract. For example, an employer has a broad responsibility to ensure to that the work environment does not become so hostile, embarrassing or forbidding to employees. Courts have held that an employer's failure to prevent an intolerable or toxic workplace caused by abusive or harassing behaviour of a co-worker may amount to constructive dismissal.[2] However, the Nunavut Court of Appeal held that occasional interpersonal conflicts which make a relationship difficult may fall short of what is required. The NUCA noted that "[a] hostile working environment can form the basis for constructive dismissal if characterized by conflict that goes well beyond interpersonal conflicts, workplace disagreements, or criticism. Conflict will not amount to constructive dismissal if it does not prevent the employee from doing her work."[3] The test for an intolerable workplace is whether a reasonable person in the circumstances should not be expected to persevere in the employment. Therefore, an individual's subjective perception of the work environment where there is some unfriendliness, occasional confrontations, employees, and even some hostility between employees will not be enough.



The Decision

In Mr. Baraty's case, the Court did not find an intolerable work environment amounting to constructive dismissal. The Court did not find repeated insulting behaviour that was tolerated or condoned by the employer. In fact, the employer treated the complaint seriously; disciplined Mr. Corilla when deserved and

[1] *Potter v. New Brunswick Legal Aid Services Commission,* 2015 SCC 10 (CanLII)

[2] *Stamos v. Annuity Research & Marketing Service Ltd.*, 2002 CanLII 49618 (ON SC); *Morgan v. Chukal Enterprises Ltd.*, 2000 BCSC 1163 (CanLII)

[3] *Kucera v Qulliq Energy Corporation*, 2015 NUCA 2 (CanLII); See also *Danielisz v. Hercules Forwarding Inc.*, 2012 BCSC 1155 (CanLII)

arranged for the two to work with a career coach. And no final decision had been made with respect to any demotion or any change to Mr. Baraty's remuneration, title, or core responsibilities. Therefore, the claim for constructive dismissal was premature.

Take Away for Employers

The employer in this case did everything right and was able to successfully defend itself as a result. Here is what this case reminds employers of the importance of:

(1) Constructive dismissal can occur if you fail to prevent or correct an intolerable or toxic workplace.

(2) Implement a respectful workplace policy and follow it.

(3) Treat complaints seriously and investigate them either informally or formally, depending on the circumstances, in a timely and confidential manner.

(4) Treat all employees under the policy equally and fairly.

(5) Enforce your policy by taking action when it is appropriate to do so.

(6) Reaffirm and remind employees of your commitment to a respectful workplace.

(7) When changing conditions of employment, exercise great care and due regard. It is also prudent to get legal advice before modifying conditions of employment in order to avoid triggering a constructive dismissal.

~ Andrew Carricato

The Addition to Reserve Process for Indigenous Peoples

What is an Addition to Reserve?

An Addition to Reserve ("**ATR**") occurs when a parcel of land is added to the existing reserve land of a First Nation or a new reserve is created. Land can be added adjacent to the existing reserve land (contiguous) or separated from the existing reserve land (non-contiguous). An Addition to Reserve can be added in rural or urban settings. According to the Indigenous and Northern Affairs Canada ("**INAC**") website, an Addition to Reserve "enables Canada to fulfill legal obligations established by specific claim and treaty settlement agreements, contributes directly to advancing reconciliation and improving the treaty relationship, can improve community access to land and resources and can increase community and economic development for First Nations."[4]

Additions to Reserves may arise in three different circumstances:

1. When legal obligations arise or commitments or agreements are created between the Government of Canada and a First Nation for reserve creation;

2. When a First Nation with an existing reserve needs additional reserve land to accommodate community growth; or to use/protect culturally significant sites; and

3. When an Addition to Reserve is awarded by a Specific Claims Tribunal. (Specific Claims Tribunals were established in 2008 as part of the Federal Government's "Justice at Last policy" and joint initiative

[4] See https://www.aadnc-aandc.gc.ca/eng/1332267668918/1332267748447 .

with the Assembly of First Nations aimed at accelerating the resolution of specific claims and providing certainty for government, industry and citizens).[5]

How Are Additions to Reserve Made and Completed?

The ATR process is governed by Chapter 10 of INAC's *Land Management Manual* (detailed in the next section of this article). There are four stages to the ATR process. The four stages are:

1. Initiation: the First Nation submits a Band Council Resolution and Reserve Creation Proposal to the INAC regional office;

2. Assessment and review: INAC reviews the proposal and advises the First Nation in writing of the results, issuing a letter of support to First Nations with successful proposals;

3. Proposal completion: INAC and the First Nation work together to create and execute a work plan to complete the proposal; and

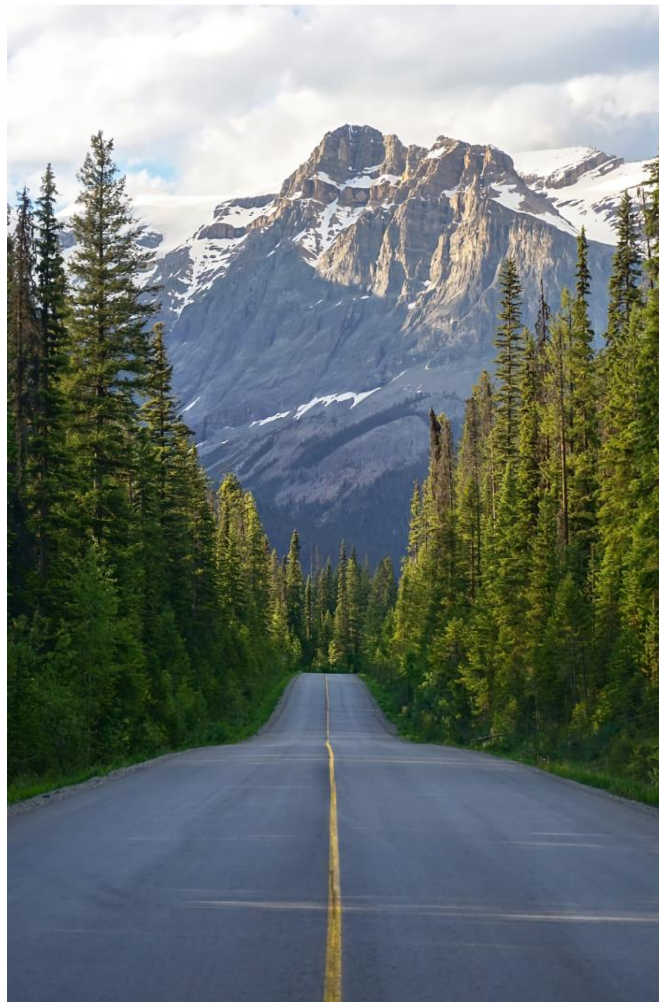
4. Approval of the ATR application.

In order for an ATR proposal to be approved, the following criteria must be satisfied:

1. There are no significant environmental concerns;
2. Best efforts have been made to address any concerns of municipal and provincial or territorial governments;

3. The proposal is cost-effective and any necessary funding has been identified within operational budgets;

4. Third party issues, such as leases and licenses have been identified and addressed; and



5. Public access concerns have been addressed.

When the ATR application is approved, the Minister of Indigenous and Northern Affairs approves proposals by Ministerial Order or recommends approval by the Governor in Council for Order in Council proposals.[6]

[5] See https://www.aadnc-aandc.gc.ca/eng/1332267668918/1332267748447 .

[6] See https://www.aadnc-aandc.gc.ca/eng/1332267668918/1332267748447 .

Addition to Reserve Policy

The *Addition to Reserve Policy* was created by the Government of Canada in 1972 to provide details as to how ATR applications should be made, assessed and processed. The 1972 Policy was deemed necessary because ATRs were not addressed in the *Indian Act* or other federal legislation. The 1972 Policy was updated in 2001 and then replaced in 2016 by a new policy directive effective July 27, 2016 (the "**Policy**") which now applies to all ATR applications. The Policy comprises Chapter 10 of INAC's *Land Management Manual* and it includes all directives contained in Chapter 10, including their annexes. The Policy replaces all prior policies, interim policies, directives, standards, procedures and guidelines relating to Reserve Creation, including Additions to Reserve.

Significant provisions of the Policy as they relate to local governments include the following (with reference with specific sections in the Policy and with capitalized terms as defined in this article of the Policy):

- 5.1 - The authority of the Governor in Council to grant Reserve status flows from the Royal Prerogative, which is a non-statutory authority. There is no statutory authority under the *Indian Act* to set apart land as a Reserve.

- 6.0 - Reserve Creation may be used to fulfill Canada's legal obligations and may further serve a broader public interest by supporting the community, social and economic objectives of First Nations by expanding a First Nation's Reserve land base.

- 7.0 - The Policy is intended to: a) provide clear policy direction for Reserve Creation; b) promote consistent assessment, acceptance and implementation of Reserve Creation Proposals where possible; c) consider the interests of all parties and find opportunities for collaboration where possible; and d) streamline the process for Reserve Creation Proposals.

- 8.0 - The principles upon which application of the Policy include the following:

  - a) Nothing in the Policy constitutes a guarantee that any Reserve Creation Proposal will ultimately result in a particular parcel of land being set apart as Reserve. The final decision to set apart land as Reserve rests with the Governor in Council or the Minister of INAC.

  - b) INAC will consider the potential or established Aboriginal or Treaty rights of First Nation, Métis and Inuit peoples before setting apart lands as Reserve.

  - c) The views and interests of provincial, territorial and Local Governments will be considered, and collaboration between the First Nations and those governments are encouraged on issues of mutual interest and concern.

  - f) The environmental condition of land proposed for Reserve Creation must be acceptable for its intended use, and must comply with applicable federal requirements.

  - i) INAC encourages accountability and transparency through the entire ATR process. This can be achieved by communicating key milestones and decision points, where appropriate, to community

members using tools such as the *First Nations Gazette*.

- 10.0 - The Proposed Reserve Land should normally be located within a First Nation's Treaty or Traditional Territory. Where there is an Agreement under the legal obligations and Agreements category of the Policy, Proposed Reserve Land may be outside the First Nation's Treaty or Traditional Territory, but within the province or territory where the majority of the First Nation's existing Reserve land is located.

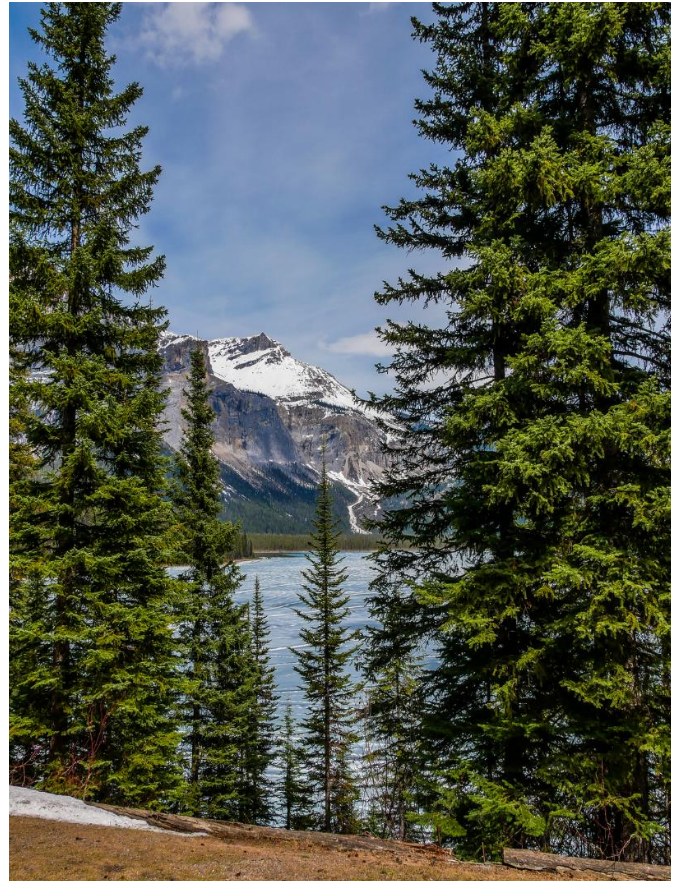
- 11.1 - For Reserve Creation to be considered under the Policy, a First Nation must provide a Reserve Creation Proposal that satisfies the minimum proposal requirements set out in Directive 10-2 "Reserve Creation Process" of the Policy.

- 11.2 - All Reserve Creation Proposal Criteria identified in a Letter of Support must be met before INAC will submit a Reserve Creation Proposal to the Governor in Council or to the Minister for approval.

- 12.1 - Before issuing a Letter of Support for a Reserve Creation Proposal, INAC will fully review and assess the Reserve Creation Proposal in accordance with Directive 10-2, "Reserve Creation Process". This includes considering the Reserve Creation Proposal put forward by the First Nation, the Reserve Creation Proposal Criteria required to complete the Reserve Creation and the responses from provincial, territorial and Local Governments.

- 12.2 - In providing advice to the Minister of INAC or the Governor in Council on the merits of the Reserve Creation Proposal, INAC will comment on the social and economic prosperity of the First Nation and describe any other impacts or benefits flowing from the Reserve Creation, which may include any of the considerations listed in Section 12.2.

- 12.5 - If a proposal will be supported, INAC will identify in the Letter of Support any relevant criteria (including criteria



set out in Annex A or B, where applicable, of the Policy) that must be satisfied before INAC will recommend that the Proposed Reserve Lands be set apart as a Reserve.

- 12.6 - If a proposal will not be supported, INAC will provide a written explanation to the First Nation.

- 15.1 - INAC promotes a "good neighbour" approach that encourages effective relations when First Nations and Local

Governments, provinces, territories, or third parties are seeking to resolve issues relating to Reserve Creation. INAC encourages discussions on issues of mutual interest and concern that are conducted with good will, good faith and reasonableness, and within reasonable timeframes.

- 15.3 - It is expected that the parties to a dispute will attempt to resolve disputes on their own, both during and after the negotiation of any required agreements. Where appropriate, INAC encourages the use of non-binding dispute resolution processes, such as:

  - a) Conciliation: The parties may try to work out the issues by themselves such as at a joint meeting between the First Nation council and the other party. In the alternative, the parties may work out the issues with the assistance of a third party;

  - b) Facilitation: The parties may request assistance from neutral third party for facilitation of a joint meeting to support discussions that assist the parties to identify issues, and develop options to resolve disputes; and

  - c) Mediation: Pursuant to this process, a third party assists in working out a solution to the dispute. A decision is reached by consensus, which may or may not be binding depending on the terms of the mediation.

- 15.6 - Where there are outstanding issues or concerns arising from negotiations between First Nations and Local Governments, provinces or territories, or third parties, and all dispute resolution options (including mediation) have been explored, the Regional Director General or Deputy Minister may nonetheless agree to support the Reserve Creation Proposal, or may withdraw support. In this instance, INAC will discuss the decision with the First Nation, and the Reserve Creation Proposal will be forwarded to the Minister for review.

The *Additions of Lands to Reserves and Reserve Creation Act*

In addition to the Policy noted above, the *Additions of Lands to Reserves and Reserve Creation Act* was given royal assent on December 12, 2018. The Act sets out several actions that can be taken by the governing body of a First Nation to affect the land requested to be set apart as reserve either prior to the lands or their administration and control having been transferred to the federal Crown or before the lands have been set apart as reserve:

- Section 5: a conditional or unconditional interest or right in or to the lands (including replacing an existing interest or right in or to the lands) may be designated by the First Nation governing body

- Section 6: the Minister may authorize, by permit, a person or entity to occupy, use, or reside on the lands or exercise any other right on them (including to replace an existing interest or right in or to the lands)

- Section 7: This section bridges section 35 of the *Indian Act*, which outlines the process for an expropriating entity to expropriate reserve land, with the powers of an expropriating entity vis-à-vis privately held land. Essentially, interests or rights in or to lands requested to be set aside as reserve may be transferred to an expropriating entity

with the authorization of the Minister and the consent of the First Nation governing body. The Minister may also impose terms on the transfer.

Conclusion

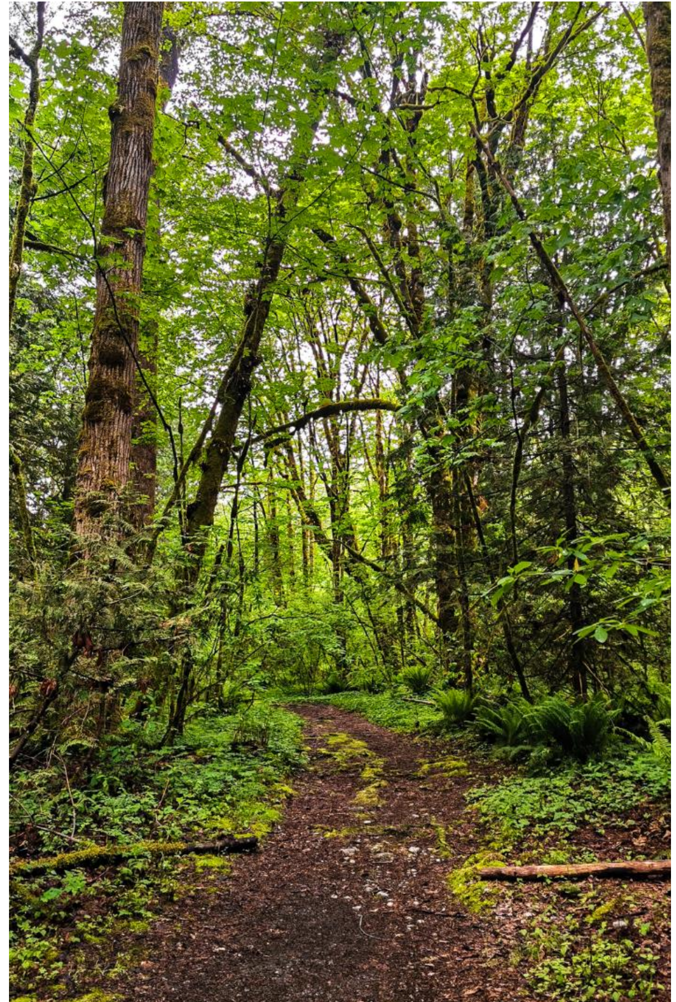
Local governments should be proactive when they become aware of an ATR application that may affect their interests. Issues that will affect both the local government and the First Nation should be considered as soon as possible, including the provision of services, land use planning, bylaw enforcement and property taxation in order to ensure that they are properly resolved. Addressing these issues will frequently include negotiation of a services agreement between the local government and the First Nation. As detailed above, the interests of local governments are considered as part of the ATR process, but local governments do not have a veto over the ATR process. Local governments should therefore focus on finding reasonably practical solutions that strike a fair balance between the interests of the local government and the First Nation.

~ Lindsay Parcells

Update on Cannabis Production in the ALR

On May 8, 2019 the ALC released an update to its Information Bulletin 04: Cannabis Production in the ALR. This guidance document advises of a significant change to the ALC's interpretation of the requirements that apply to producing cannabis in the ALR.

By way of background, until 2015 there were no special regulations governing cannabis production in the ALR. This changed in June 2015 when the production of marihuana in accordance with the *Marihuana for Medical Purposes Regulation* was added as a designated farm use in the *Agricultural Land Reserve Use, Subdivision and Procedure Regulation.* From that point



forward, local governments could not prohibit this use in the ALR, except via a farming area bylaw approved by the minister. In July 2018 the ALRUSP Regulation was amended, to substitute "lawful production of cannabis" as the designated farm use, subject to specific criteria listed in s. 2 (2.5) of the ALRUSP Regulation. From that point forward, cannabis production was a designated farm use, that could not be prohibited (except via a farming area bylaw approved by the minister) if grown outside, in a soil-based building, in a building constructed prior to July 13, 2018 for growing crops, or a building under construction as at that date.

The ALC released Information Bulletin 04: Cannabis Production in the ALR in its original form on August 15, 2018. The Bulletin set out the ALC's position that any form of cannabis production that fell outside the ambit of s. 2 (2.5) of the ALRUSP Regulation was a non-farm use, that required ALC approval in order to be permitted in the ALR.

On February 22, 2019 two new regulations, the *Agricultural Land Reserve General Regulation* and the *Agricultural Land Reserve Use Regulation* were approved. Although the Use Regulation contains similar language to the ALRUSP Regulation, it no longer "designates" a sub-set of cannabis production as a "designated" farm use but lists a subset of cannabis production as a "farm use" that may not be prohibited by a local government bylaw, except a farming area bylaw adopted with ministerial approval.

The ALC has now updated its position on cannabis in the ALR. In the May 8, 2019 revision to Information Bulletin 04, the ALC explains that the change in wording in the Use Regulation means that all forms of cannabis production are a farm use, and do not contravene the ALC Act even if engaged in without ALC approval. The Bulletin also notes that local governments are at liberty to prohibit forms of cannabis production that do not fall within the "farm use" specified in s. 8 of the Use Regulation.

The implication of this change is that any local governments who do not wish to allow the construction of new concrete-based cannabis production facilities on their ALR lands, or any other form of cannabis production that falls outside the s. 8 "farm use", should ensure their zoning bylaws prohibit the use, as the ALC is no longer overseeing this type of activity.

~ Sara Dubinsky

Water versus Rail: a tale of a crossing

Two recent decisions by the Canadian Transportation Agency (the "CTA") involving the Greater Vancouver Water District and BC Rail should assist local governments in their dealings with railways.

Municipal infrastructure often needs authorization to cross railway lines, usually by way of a crossing agreement with the railway. The railways typically insist on their standard form agreement and frame the process as if the local government is the "applicant" applying for a "permit" from which there is no appeal. It may seem the only option is to agree to whatever terms the railway seeks. However, local governments do have the option of applying to the CTA under s. 101 of the *Canada Transportation Act* to have the CTA authorize the crossing.

In this BC Rail matter, the Water District applied in April 2018 to the CTA for authorization of a watermain crossing under a BC Rail track in the City of Delta. The crossing was part of a large water infrastructure project, and the District agreed it would pay the costs of constructing and maintaining the crossing. There was no dispute that the proposed crossing was suitable, but the District argued that it should not be subject to the various terms and conditions being sought by BC Rail in its standard form agreement.

BC Rail first applied to dismiss the Water District's application on the basis that the CTA did not have jurisdiction due to an old agreement related to a nearby watermain that was being replaced. The previous agreement did in one place use the word "renewal", which BC Rail argued meant the old agreement applied to the new works. The CTA disagreed with BC Rail and based on a full reading of the old agreement held that it did not apply to the new watermain.

BC Rail then sought to have the CTA impose a variety of terms and conditions on the Water

District as part of the crossing authorization, including terms related to relocating the watermain, decommissioning the watermain, liability, and environmental obligations. In March 2019, the CTA authorized the crossing and then in May 2019 released its reasons. The CTA reviewed the applicable legislation and determined that it did not have jurisdiction to impose any terms and conditions whatsoever related to a crossing. That is, the CTA could and did authorize the crossing for the local government, but it could not impose terms related, for instance, to liability.

There are three main lessons from these CTA decisions. First, if a railway argues that replacement works are covered by an old agreement (and the agreement is prejudicial to the local government), a careful reading of the agreement may show it does not prevent the matter going to the CTA.

Second, if a railway seeks unreasonable terms and conditions, an application to the CTA is likely to result in a crossing authorization without any such terms and conditions, if the crossing is "suitable".

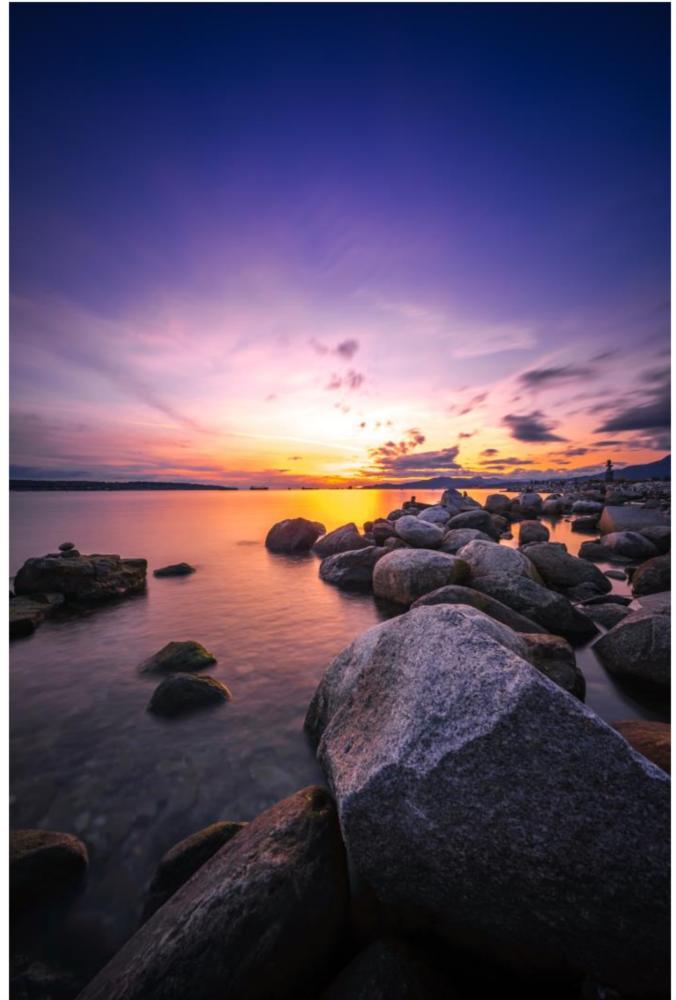
Third, the CTA process does not result in an immediate decision, so consideration of this option should include enough time in view of the construction timelines of the project.

In the proceedings before the CTA, the District was represented by Anthony Price and Lynda Stokes of Lidstone & Company.

~ **Anthony Price**

What is a meeting and why does it matter?

For many years it has been well known in the local government field that from a strict legal perspective municipal councils and regional boards are required to comply with the statutory formalities in order to hold a lawful meeting of the municipal council or regional board, as the case may be. This rule has been reinforced by the



provisions in the *Community Charter* which sets out much clearer parameters for the right to close a meeting to members of the public.

The general rule is relatively simple to state but can be difficult in practice. Simply put, in order to conduct business in a lawful manner, that business must be conducted at a lawfully held meeting and a meeting is generally understood to be a gathering of the members which "moves materially along in the decision making process".

If challenged at law, a court could consider an informal get-together as a "meeting" - especially if discussion among elected officials results in any decisions being made related to their official role, or even if discussion can be reasonably viewed as "moving matters materially along *toward* a decision (of Council)".

If the court finds that the gathering *does* amount to a "meeting" at law - and this *has* happened in the past with "workshop", "shirtsleeve" and "retreat" sessions that were intended to encourage frank discussion or good communication – decisions are at high risk of being declared legally invalid, for not having met statutory prerequisites for a meeting.

Court Decisions

There have been some important judicial rulings in the area, including the following:

Southam Inc. v. Hamilton-Wentworth (1988)

The Ontario Court of Appeal held that a "meeting" means "any gathering to which all members of the statutory body are invited to discuss matters within their jurisdiction".

Southam Inc. v. Ottawa (1991)

The Ontario court established a test, frequently cited ever since, for the validity of decisions made at meetings: Would the public be deprived of its opportunity to observe a material part of a decision making process?

Yellowknife Property Owners Association v. Yellowknife (City) (1998)

Staff briefing sessions were found to have gone beyond updating council members to issues that were to be considered at regular meetings, because the discussions held at these sessions were said to "move the issues materially along in the overall spectrum of Council's decision". Following *Southam v. Ottawa*, the court declared the "meeting" was improperly held.

London v. RSJ Holdings 2007 (Supreme Court of Canada)

The courts tend to be vigilant in ensuring that any council discussions that could influence decision making are either transparent to the public or authorized to be discussed in camera.

Any applicable statutory conditions must be fully observed before taking various subjects in camera.

In this case, a bylaw was struck down as invalid, because the discussion of it (although not the vote itself) was entirely in closed session, and that was not clearly authorized in the relevant municipal statute. This case may be read online at: http://scc.lexum.org/en/2007/2007scc29/2007scc29.html .

The Risks

This issue therefore has legal implications for local government in several important different ways.

Challenges to Decisions

Firstly, if an action is initiated or pursued outside of a lawful meeting, the ultimate decision is vulnerable to legal challenge and may be set aside as invalid.

While this remains a live issue and a legitimate concern, it has not been a cause of a significant number of legal challenges.

Perhaps the rationale for that is that it is likely the case that knowledgeable local government officials know that actually conducting business or making decisions outside of a meeting setting will cause issues.

Loss of Confidentiality

Secondly, however, and perhaps more importantly in some respects, there is a potential significant risk of loss of confidentiality if meeting procedures are not properly followed.

Any confidentiality that would otherwise be available under the *Community Charter*_section 90 (grounds for closing a meeting] is potentially lost when the meeting is not convened in accordance with statutory conditions. The procedure for closing a meeting is found in section 92. Not following it has resulted in minutes and associated records losing the privileged status that might otherwise apply under the *Community Charter* and the *Freedom of Information & Protection of Privacy Act*, section 12 (3)(b). See *Inquiry Order No. 13-10, District of North Saanich* (Office of the Information and Privacy Commissioner).

The fact that the meeting is being held in an irregular forum, means anything said there, may be open to disclosure and sharing with anyone, including the media.

On the other hand, where a meeting conforms with all the statutory and bylaw procedures, including those for closed meetings – as set out in Community Charter sections 90 through 92 – the validity of decisions will be robust against a legal challenge, and confidentiality of the discussion is protected under section 117 of the *Community Charter* and *Freedom of Information & Protection of Privacy Act*, section 12 (3)(b).

Where this can arise is that often more informal meetings of elected officials take place for the very reason that sensitive or confidential issues are to be discussed outside of the public scrutiny. From a legal perspective such matters, including issues such as personnel or land acquisition or disposition could in the ordinary course be held in a closed meeting setting where the public is not present, and confidentiality may be preserved.

However, if a meeting takes place which is not a lawful meeting then by logical extension the meeting could not have been lawfully closed to the public and there is no confidentiality

whatsoever that attaches to that gathering and in the event of litigation or other dispute resolution any records from such gatherings or questions which may be posed to those present at such

gathering are not protected and may be fully disclosed.

Thus, it is critical for elected officials to know that if they stray over the line into an area where the discussion ought to have occurred at a proper

meeting , anything they say or do at that meeting apart from being open to a challenge if it moves materially along in the decision making process is also fully disclosable under either a litigation setting or under the *Freedom of Information and Protection of Privacy Act*.

Technology Considerations

One evolving area of the law is that which involves the intersection between technology and social media and the way communications or discussions now take place on a variety of subjects including of course the local government context.

It is well known that when people communicate by electronic means there appears to be a degree of informality where things are often said that might not have been said in paper communications or verbally.

Elected officials must be sensitive to the fact that these communications will have no privilege or protection attached to them as might have been the case in a lawful closed meeting setting and may ultimately be fully disclosable in litigation or under the FOI legislation.

Alternatives

There have been a variety of techniques developed over the years as an attempted work around to this rule to reflect the fact that very often informal or casual discussions amongst elected officials and appointed officials may help build relationships and encourage the exchange of information.

Those have for example involved different structures for meetings, such as where an appointed official is nominally the chair and it is purely an information or update matter or more informal briefings which are intended simply to exchange information, but not move along at all in the decision making process.

Can we meet for Coffee?

Understandably, elected officials will find it challenging in terms of where the lines are to be drawn and where the problems may lie.

The intent here is not to prevent engagement on public issues but to try to recognize just how important a role elected officials play and the need for transparency and openness that is a keystone of local government legislation.

There are a variety of factors that may be relevant, such as:

1. Is the gathering primarily social or related to local government business?

2. What is the topic - is it a land-use or similar matter where there are procedural fairness considerations and rights of third parties that may be impacted?

3. Is there any formality to the gatherings - i.e. is it like a meeting - are the gatherings regular? Are all members present or invited?

Purely social gatherings are not likely to be an issue and the reality is that if several elected officials are at the same event it would not be surprising for a chat to evolve into aspects of local government issues.

The members should however be sensitive in such situations to the discussion becoming more focussed on a potential decision where the discussion ought to be held at the council or board table in a formal setting, even if that is a closed meeting.

Perhaps the rule we learned as school children is apropos – if it walks like a duck, and talks like a duck, it is probably a duck - if the meetings are regular, focussed on local government business and are in the nature of a discussion that ought to be at the council or board table in an open

meeting or a closed meeting after following the correct process, then problems could arise.

Summary

These various approaches have value and on their own do not create legal issues directly but, once again, elected officials do have to be reminded from time to time that informal meetings at someone's house , a local coffee shop or indeed simply by means of electronic communications do create some risks for the local government and its officials.

Everyone needs to be aware that if something is so sensitive that it would be damaging to the local government or its officials if it became public, then that is probably a very clear warning sign that in fact what should occur is for the matter to be dealt with at a lawfully closed meeting in order to maintain that confidentiality.

While informal gatherings are usually positive in an ordinary social context, as a matter of municipal law and safe practices, it is strongly recommended that,

- whenever members of an elected local government body come together to discuss matters that relate to the local government's business, or
- where discussions could be *perceived* as related to or moving along some decision that the members could or will make *as* that body,

the gathering should be arranged for and treated as a formal meeting.

~ Christopher Murdy

Recent Cases of Interest

1139652 BC Ltd v. Whistler (Resort Municipality), 2018 BCSC 1806)

In this decision, the BC Supreme Court confirmed the discretionary nature of the approval process for development variance permits (DVPs), and that councils may take a wide variety of factors into account when considering DVP applications. The petitioner in the case owned a steep,

triangularly shaped property that had been created as a result of road dedication. The petitioner wished to construct a residence on the property, which was allowed by zoning. However, while the density provisions of the bylaw would have permitted a residence of 1,620

square feet, plus basement, the required setbacks reduced the building footprint to only 197 square feet, which meant that a house of only 600 square feet could be built.

An application by the petitioner to the Board of Variance to permit a 1,621 square foot house with basement was denied on the basis that the variances were not minor and there was no hardship.

The petitioner then applied to Council for various relaxations to the setbacks to permit the 1,621 square foot house that was sought. The application was supported by municipal staff but was opposed by neighbouring property owners on grounds that included impacts on the environment, the precedent that would be established, and impacts on road access.

The DVP application was denied by a unanimous Council. While no written reasons for the denial were provided, an audio recording noted numerous concerns including the "accidental" creation of the parcel, its small size, its low assessed value, the magnitude of the variances sought, poor road access, the precedential nature of an approval, the impact an approval would have on land speculation, and neighbourhood opposition.

The petitioner then sought a court order overturning the rejection of the DVP on the basis that Council did not act with procedural fairness and the decision to refuse the DVP was unreasonable.

The court dismissed the petition. On the procedural fairness issue, the court ruled that the petitioner was not entitled to an opportunity to orally present the DVP application to Council. In reaching that conclusion, the court noted that while the *Local Government Act* required public hearings for several types of acts, no such requirement was included for DVP applications. The court also concluded that the process for considering a DVP application was closer to the "legislative" than the "judicial" end of the decision-making spectrum, which supported a reduction in the required level of procedural fairness.

With respect to the reasonableness challenge, the court considered the "reasonableness" standard for judicial review from the oft-cited decision in *Dunsmuir v. New Brunswick* and the contextual approach to bylaw review from *Catalyst Paper Corp. v. North Cowichan* and then ruled that the decision of a municipal council to issue a DVP involves the exercise of "open-ended statutory discretion", and that while the focus of a DVP application is on a single application, that application "legitimately engages the Council in consideration of the broader interests of the community in the granting of a variance". That is, it is within Council's powers to identify and assess factors that are relevant to the interests of the community and, in the absence of evidence that Council considered irrelevant considerations or made erroneous assumptions, the refusal of the DVP fell within a range of reasonable outcomes.

Chase Discount Auto Sales v. Waugh and Village of Chase, 2018 BCSC 2014.

A useful summary of the relationship between local government bylaw powers and the authority to impose remedial action requirements (RARs) was provided in the recent decision of the BC Supreme Court in *Chase Discount Auto Sales Ltd. v. Waugh and Village of Chase*, 2018 BCSC 2014.

The petitioners owned and leased land and were in the business of selling vehicles, RVs and boats. The Village's bylaw enforcement officer, Mr. Waugh, sent the petitioners a letter which ordered their compliance with the Village's property maintenance bylaw, citing an accumulation of discarded materials such as derelict motor vehicles and unsightly growth.

The Village's zoning bylaw permitted the petitioners' land to be used for "automobile, boat, trailer, and recreation showroom and sales", and "vehicle storage yards". The property maintenance bylaw defined "refuse" to include "unlicensed, unused or stripped automobiles, trucks, trailers, boats, vessels, machinery, tools, equipment".

The petitioners sought a court order to set aside (1) the order in Mr. Waugh's letter on the basis that neither the Village nor Mr. Waugh had the authority to impose RARs and (2) the property maintenance bylaw on the basis that it was, in effect, a zoning bylaw that had been passed without the appropriate procedures. The petitioners argued that the effect of the order in the letter was to prohibit the use of the land as provided for in the zoning bylaw because of the inclusion of "unlicensed, unused or stripped automobiles" in the definition of "refuse".

In dismissing the petition, the court elaborated on the nature of local government bylaw enforcement powers in the *Community Charter ("CC")*. The court started by noting the existence of

- The "fundamental powers" set out in section 8 of the *CC* , which include the power in s. 8(3)(h) for a council to pass a bylaw that regulates, prohibits and imposes requirements in relation to nuisances, disturbances and other objectionable situations;
- The power of a municipality by its staff to enter onto property and to take action authorized by section 17 of the *CC*;
- the "ancillary powers" set out in Division 3 of Part 2 of the *CC*, which includes in section 17 "of a council under [the *CC*] or another Act to require that something be done"; and
- the power in section 72 of the *CC* for a council to impose RARs.

The court then concluded that the power of a council to issue a RAR under section 72 was not a "complete code" in all circumstances, but only in the three specific circumstances set out in sections 73, 74 and 75 of the *CC* (i.e., with respect to buildings or structures, openings in the ground, trees, wires, cables or similar things, matters or things attached to structures, drains, ditches or watercourses, dikes). Since the unsightliness at the petitioners' land did not come within the scope of sections 73-75, the RAR requirements in section 72 did not apply to limit the effect of Mr. Waugh's latter. The court further concluded that the powers specified in sections 73-75 of the CC did not limit the "fundamental powers" provided by section 8 of the *CC*, but added to them, and that Mr. Waugh's letter was authorized by the powers given to municipal staff by section 16 of the *CC*.

The court then rejected the argument that the property maintenance bylaw amounted to zoning since it was directed at regulating unsightliness and did not govern or purport to govern use within a zone.

The decision of the court in this case should be helpful for local governments. First, it shows that municipal powers to deal with objectionable properties are not limited to the matters set out in sections 73-75 of the *CC*. Second, it supports the exercise by staff of RAR type powers in instances where the matter being enforced falls outside of the scope of sections 73-75 of the *CC*. Combined, this should provide greater flexibility for local government bylaw enforcement practices.

Raif Holdings Ltd. v. Lake Country (District), 2018 BCCA 469

Helpful guidance on the local government power to regulate business was provided by the BC Court of Appeal in *Raif Holdings Ltd. v. Lake Country (District)*, 2018 BCCA 469.

Raif owned and operated the Lakeside Airport Inn, which was kindly described by the Court of Appeal as "a number of distinct buildings of some vintage". A stop work order was posted by the District when mould, water leaks and unsafe storage of combustible material was observed during an inspection of renovations that were being undertaken without a permit.
When the time came for Raif's business license to be renewed, District staff declined to renew it and referred the matter to Council, which resolved that the license not be renewed.

Raif then challenged the refusal before the BC Supreme Court, which concluded that the District was permitted to consider "all of the relevant circumstances" when determining whether to renew a business license, and that those circumstances included compliance with regulations related to building, zoning, health, sanitation, nuisance and business regulation.

On appeal, Raif argued that Council acted unreasonably and did not provide it with procedural fairness, and that the business regulation bylaw had not been adopted with proper notice, that it allowed impermissible delegation, and that it discriminated between businesses.

The Court concluded that the District acted reasonably in refusing to renew the license and provided the required procedural fairness. It also held that notice under section 59 of the *Community Charter* of intent to pass a business bylaw complies with that provision even though the notice was given before third reading of the bylaw.

While many of the issues in the decision in Raif were specific to the facts of the case, the decision is helpful for its acceptance about the broad range of issues that a council may consider with respect to the denial of a business license.

~ James Yardley

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The topics are:

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