LIDSTONE & COMPANY

LAW LETTER

The Merged Firm of Lidstone and Murdy & McAllister

In this issue

Say Goodbye to the NEB and Hello to the CER

The National Energy Board (the "NEB") is no more.

On August 28, 2019, upon the enactment of Bill C-69, the NEB was replaced by the Canadian Energy Regulator (the "CER").

Bill C-69 (which is titled "An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts") did a number of things that included:

- repealing the *National Energy Board Act* ("*NEBA*") and thus the authority for the NEB;
- establishing the CER through the new *Canadian Energy Regulator Act ("CERA")*;
- repealing the *Canadian Environmental Assessment Act, 2012* (the "*CEAA, 2012")*;
- enacting the *Impact Assessment Act* (the "*IAI*") which establishes the Impact Assessment Agency of Canada (the "IAAC");
- making consequential amendments to several other statutes including the *Navigation Protection Act*, which was renamed the *Canadian Navigable Waters Act*; and
- establishing transitional provisions.

According to the federal government, Bill C-69 was introduced and enacted for reasons that included a desire to increase public confidence in the regulatory system for energy projects, promoting reconciliation with Indigenous peoples, and to provide more transparency and

certainty in the regulatory process for energy projects.

Bill C-69 is lengthy and complex. Its constituent enactments provide a comprehensive scheme for the regulation of energy projects from cradle to grave that appears to go beyond the level of detail contained in the predecessor legislation.

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Lidstone & Company
Barristers and Solicitors

The Merged Firm of Lidstone and Murdy & McAllister

Telephone: 604.899.2269
Toll Free: 1.877.339.2199
Facsimile: 604.899.2281

lidstone@lidstone.ca
www.lidstone.ca

While the *CERA* parallels the regulatory regime formerly found in the *NEBA* in areas such as the approval of tolls, tariffs, and export authorizations, the regulation of liability for unintended or uncontrolled releases, and the setting of financial requirements, the *CERA* also includes significant changes that, according to the federal government, are based on five "themes":

1. Modern and effective governance. A board of directors has been established that is to provide "oversight, strategic direction and advice on operations" to the CER, and which is to include at least one Indigenous person. Likewise, CER panels that hear project applications are to have expertise in Indigenous knowledge, rather than just the more traditional matters that have been considered in energy project regulation such as engineering, economics and environmental issues.

2. Enhanced certainty and timely decisions. The *CERA* provides for deadlines that vary by circumstance, but which also include potential exceptions. According to the federal government, the application process under the *CERA* is intended to balance predictability and timeliness with public consultation, Indigenous reconciliation and environmental stewardship. Environmental impact assessments are to be carried out by the IAAC in collaboration with the CER, and the final report for each reviewable project is to include the IAAC impact assessment and a recommendation from the CER.

3. More inclusive public engagement. Unlike the practice before the NEB, which required persons to establish legal "standing" to participate in an application hearing, the *CERA* permits "any member of the public" to make representations with respect to an application for a project certificate. Further, the CER is required to consider a broad range of matters. While some of those factors include traditional considerations for energy project regulators such as the environmental impacts of a project, the availability of the commodity being transported, and the economic feasibility of the project, other factors are less

traditional in the regulation of energy projects such as "health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors", and "the extent to which the effects of a pipeline hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change".

4. Greater Indigenous participation. This is reflected throughout Bill C-69 and includes commitments to early and ongoing engagement and collaboration, the requirement for consideration of Indigenous knowledge by CER hearing panels, enhanced funding for Indigenous participation, and the involvement of Indigenous peoples in project lifecycle oversight.

5. Strengthened safety and environmental protection. This includes updated powers for inspection officers, requirements for increased protection, and authorizing the CER to cease the operation of facilities whose owners are in receivership, insolvent or bankrupt.

Bill C-69 contains transitional provisions that include the following:

- While members of the NEB cease to hold office, at the request of the Lead Commissioner of the CER, they may continue to hear matter that were before them while with the NEB. This provides for continuity of decision makers.

- Every decision or order made by the NEB is considered to have been made under the *CERA* and, unless suspended or revoked under *CERA*, every certificate, license or permit issued under the *NEBA* will remain in force for the remainder of time it would have been had the *CERA* not come into force. This "grandfathers" decisions of the NEB unless otherwise varied by the CER pursuant to the *CERA*.

- Applications that were pending before the NEB immediately before the enactment of the *CERA* are to be taken up by the CER and continued in accordance with the *NEBA*. This has the effect of preserving the law and process before the NEB for applications that were before it on August 27, 2019, including environmental assessments under the *CEAA, 2012* for which a decision statement had not been issued under the *CEAA, 2012*.

Like the NEB, the CER will continue to be based in Calgary, although it is reported that it will also

have regional offices, including one in Vancouver.

Notwithstanding the scope of change that the federal government apparently intended to bring about with Bill C-69, the extent to which it will actually change the substantive outcome and procedure of the regulatory process remains unclear. At this early stage, what may to be the most immediate changes are the separation of the project approval and impact assessment processes with the CER and IAAC, and the broader scope provided for participation in hearings for project certificates. The former is intended to address the potential structural conflict faced by the NEB as both facilitation energy projects and protecting against their impacts. The broader scope for standing is noteworthy when one considers that the NEB denied standing to over 450 applicants for intervenor status in the hearing for the Trans Mountain Expansion Project. However, the *CERA* provides some leeway for the CER to control its process by providing that representations may be "in a manner specified by the [CER]", which means that the CER may, for example, still place limits on hearing procedure.

At this time it is unclear if Bill C-69 will have any significant implications for local government involvement in the federal energy regulatory process. For example, while the list of factors that may be considered by a CER panel arguably broadens the scope of issues that are to be considered to include matters that are often of interest to local governments, such as local social, economic and environmental impacts of projects, in practice those issues tended to be considered by the NEB. Likewise, as local governments tended to be granted standing when they sought it from the NEB, the broadened standing provided for by the *CERA* will arguably have little impact on local governments.

The one thing that does seem certain is that the interest and controversy created by large scale energy projects in Canada will likely result in the enactments brought about by Bill C-69 being tested both by the newly established regulators and the courts, as parties seek to further their interests in promoting and opposing those projects.

~ James Yardley

"High lights": New Regs for Cannabis Edibles, Extracts and Topicals

On June 26, 2019 the Federal Government published the final version of the amendments to the *Cannabis Regulations,* to regulate the legal production and sale of edible cannabis, cannabis extracts and cannabis topicals. Also finalized are accompanying amendments to the *Cannabis Act.*

The amendments take effect on October 17, 2019. As of that date, Schedule 4 of the Act will be amended to add three new classes of cannabis that an authorized person may sell:

- **Edible cannabis:** products containing cannabis that are intended to be consumed in the same manner as food (i.e. eaten or drunk);
- **Cannabis extracts:** products that are produced from cannabis using extraction processing methods or by synthesizing phytocannabinoids (to be ingested or inhaled); and
- **Cannabis topicals:** products that include cannabis and that are intended to be used exclusively on external body surfaces (e.g. skin, hair, and nails).

In addition to adding new classes of legal cannabis, additional amendments to the Regulations will address production practices, packaging and labelling, promotion, and record keeping.

Upon legalization, edible cannabis, cannabis extracts, and cannabis topicals must all be

packaged in plain, child resistant packaging, which must contain: a health warning message; THC/CBD content; the ingredient list; and the equivalency to dried cannabis (so that purchasers ensure they remain below the possession limit of 30 grams). In addition, the newly legal forms of cannabis must not be appealing to youth, make health or cosmetic claims, or associate the product with alcoholic beverages, tobacco products or vaping products. Cannabis topicals are only permitted for use on skin, hair and nails.

Edible cannabis may have a maximum of 10 mg of THC per package. Cannabis extract for ingesting may have a maximum of 10 mg of THC per unit and 1000 mg per package. Cannabis extract for inhaling and cannabis topicals will be limited to a maximum of 1000 mg of THC per package. The new products are also subject to various further regulations regarding added vitamins, minerals, nicotine, alcohol, caffeine, sugars, sweeteners, and colours, as well as package size.

Newly legal cannabis products are not anticipated to become available for purchase until mid-December 2019. In part, the delay will occur because Federal licence holders are required to provide 60-days' notice to Health Canada of their intent to sell new products.

No major amendments to the licensing scheme are contemplated. Intended producers will be required to obtain a new processing license (standard or micro), or amend an existing one, to authorize the production of edible cannabis, cannabis extracts and cannabis topicals, and to package and label these types of cannabis products for sale to consumers.

~ Sara Dubinsky

"Toot toot! – Some practice points when trying to stop train whistling

Train whistling can be great fun for small children but quite annoying for communities (and parents trying to sleep). Local governments should be aware that there is

federal legislation which sets out how to stop whistling at crossings (the *Railway Safety Act*, *Grade Crossings Regulations,* and *Grade Crossings Standards*). Depending on the crossing, the requirements may include a warning system with gates and possibly fencing if there is a history of trespass on the tracks. If such "technical" requirements are met, and council passes a resolution with the required wording and advance notice, the legislation requires the whistling to stop. The process however is a bit

vague and railways may seek to take advantage of that at the risk and expense of the local government. The following practice points may assist.

First, the requirements for whistling cessation are quite specific, but the railway may seek to lump in with those requirements additional work it wants done at the crossing, probably at the cost of the municipality. The railway may also seek to add on requirements after the municipality believes the necessary work is complete, creating a "moving target" of preconditions for whistling cessation. Therefore, before construction commences, we suggest being specific about all of the requirements, confirming the regulatory basis for each requirement, and emphasizing that the regulations and not the railways set the requirements.

Second, the railway may seek to enter into an agreement with the municipality with respect to the construction needed for whistling cessation. However, such agreements will likely include clauses (perhaps hidden away as subclauses) purporting to make the municipality responsible forever for all maintenance at the crossing, including for items that have nothing to do with whistling cessation. It is important to read such agreements closely and we suggest seeking legal advice before signing anything.

Third, if the railway and municipality do not agree about whether the requirements have been satisfied, there is an avenue for appeal to Transport Canada. This appeal process will likely take several months and ultimately Transport Canada may not approve whistling cessation. However, such an appeal may be preferable to the frustration of repeatedly following up with a non-responsive railway.

Fourth, the railway's initial position will likely be that the municipality should pay for the whistling cessation crossing upgrades. Pre-existing agreements or orders setting out cost responsibilities are likely determinative, and sometimes is may take some archival digging to identify such agreements/orders.

If nothing exists, and if you are unable to reach a new agreement, an application to the Canadian Transportation Agency may allow for some costs to be apportioned to the railway as railways are responsible under the *Grade Crossing Regulations* for many aspects of a crossing. With that said, the Canadian Transportation Agency does not appear to have yet determined this specific issue of cost apportionment for whistling cessation upgrades.

Finally, construction costs for upgrades may be less expensive if done by a contractor directly retained by the municipality, as compared to agreeing to whatever quote or invoice is issued by the railway. This is of course dependent on the availability of such contractors, but this is an option to at least consider, particularly given that railways sometimes add a significant mark-up to their quotes.

~ Anthony Price

RARs: Debt Collection Powers

Local governments are increasingly using remedial action requirements (RARs) to obtain compliance with building, nuisance, and unsightly premises bylaws. As discussed below, the two main reasons for this trend are: (a) the speed by which local governments can bring properties into compliance with bylaws; and (b) the ability to recover the costs incurred in completing remediation on behalf of uncooperative owners.

The most common situation we have come across in recent months is where property owners have abandoned buildings and permitted them to fall into significant disrepair. In addition to being unsightly, these buildings often pose serious risk and hazard due to

inclement weather or fire, occupation by homeless persons, and use by local youth as party central. Local governments also often receive a large volume of complaints about these properties.

For the uninitiated, a Council or Board may impose RARs if they consider that the matter or thing creates an unsafe condition or contravenes the Provincial Building Code or a local government building bylaw (s. 72 CC; s. 305 LGA). Local governments also have the ability to impose RARs for declared nuisances or harm to drainage or dikes (ss. 74, 75 CC).

The procedure for imposing an RAR is straightforward. Staff should present a report to Council setting out the concerns with the property and the hazards posed by lack of remediation. If a building or structure contravenes the Building Code or Fire Code, the building inspector should attest to this fact.

The Council/Board should consider the staff report, and adopt a resolution:

1) Receiving the staff report;

2) Declaring that the building/structure creates an unsafe condition within the meaning of s. 73(2)(a) of the *Community Charter*;

3) Directing the owners to remedy the infraction by a date not less than 30 days from the date of notice of the RAR (s. 76 CC) unless there are urgent circumstances (s. 79 CC);

4) Requiring that all work must be done in compliance with all applicable bylaws and enactments respecting safety;

5) Directing staff to give notice of the RAR to all persons entitled to notice under s. 77 of the *Community Charter*;

6) Advising that if any or all required actions are not completed by the deadline, that the local government may undertake any or all of the required actions at the expense of the owners; and

7) Giving the person affected the right to reconsideration by council/board (s. 78 CC).

If an RAR is not completed within the timelines set out in the RAR, the local government may enter onto the property and fulfill the requirement at the expense of the owner (s. 17 CC; s. 418 LGA). Most importantly, the costs incurred by fulfilling an RAR are fully recoverable from the property owner.

The hang up we often encounter is where clients believe that the expenses incurred by a local

government to fulfill an RAR do not become due and owing until December 31 of that year, when they are deemed to become taxes in arrear (s. 258(2) CC). This is incorrect.

While it is true that if the expenses remain unpaid as at December 31 they are deemed taxes in arrear, section 259 of the *Community Charter* provides that unpaid expenses incurred when fulfilling an RAR form a special charge or lien on the impugned land and improvements. This lien has priority over any claim, lien, privilege of any person except the Crown, and does not require registration to preserve the lien. For this reason expenses are due and owing immediately when they are incurred by the local government, and the special lien is formed at that time.

In some cases, a property owner will wait until the local government remediates the property in question and then attempt to sell the property without first paying the costs incurred by the local government in fulfilling the RAR. This often occurs between the date of remediation and the date on which the unpaid expenses are deemed to be taxes in arrear and show up on the subsequent tax notice and statement of outstanding taxes (s. 237(2)(c) and 248 CC). This often causes confusion for financial officers as to which owner (the new or old) is liable for the unpaid fees.

In our view, it is advisable for a local government to immediately make a notation on the property tax certificate for a property indicating that special fees are owing pursuant to section 258 - arising from work performed pursuant to an RAR. While not yet deemed 'taxes in arrear', taking this step allows a local government to ensure that these fees are paid along with any outstanding property taxes if a property is sold in the interim.

~ Matthew Voell

Emotional Support Animals

Guide dogs (trained to assist people who are blind or visually impaired) and service dogs (trained to assist people with other disabilities) are regulated and certified pursuant to the *BC Guide Dog and Service Dog Act* ("*GDSDA*") and they and their handlers are entitled to protections under that Act, including the right to enter and use public places. Most local governments are familiar with the need to accommodate service and guide dog teams. But what obligations do local governments have with respect to uncertified emotional support animals ("ESAs") assisting people with mental disabilities?

What are ESAs?

While there is no legal definition of the term in British Columbia, Emotional Support Animal generally refers to a companion animal that provides support or comfort for a person with a mental disability. An ESA may be required by an individual generally or for certain activities, such as being in public or flying in an airplane, and ESAs may include dogs as well as other animals, such as goats, pigs, chickens and horses. ESAs are not regulated or certified in British Columbia or federally.

What are local governments' legal obligations with respect to ESAs?

While people who do not have a certified service or guide dog cannot claim the protections under the *GDSDA*, they are entitled to the protections under the *Human Rights Code* (the "Code") if their need for an ESA results from a mental or physical disability. Under s. 8 of the Code, a person must not, without a bona fide and reasonable justification, deny to a person or class of persons (a) access to any accommodation, service or facility customarily available to the public, or (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the

public because of the person's physical or mental disability or a number of other enumerated grounds.

If a person has or is perceived to have a mental or physical disability, experiences an adverse impact with respect to a service customarily available to the public (such as bylaw enforcement or access to a public facility), and can establish that their disability was a factor in the adverse impact (i.e. that there was a link or nexus between their disability and the adverse treatment), the person will be able to establish a prima facie case of discrimination under the Code. The onus will then shift to the local government to establish that it has a bona fide and reasonable justification for its treatment of the person. This will require the local government to establish, amongst other things, that it is impossible to accommodate the person without incurring undue hardship.

Municipalities are also subject to the *Canadian Charter of Rights and Freedoms* which provides various protections, including the right, subject to reasonable limits, to equal benefit of the law without discrimination based on a number of protected grounds including mental or physical disability.

What can local governments do?

The first step is to be aware. Local governments and their staff should be sensitive to the fact that general rules and policies may inadvertently result in discrimination against a person who requires an ESA as a result of a disability. Situations of possible discrimination may arise where, for example, a local government only permits certified service and guide dogs in public facilities or prohibits the keeping of livestock in residential zones.

If a situation arises where a person is claiming the need for an ESA, local governments may reasonably request medical information regarding the person's disability that is related to the request for accommodation and necessary to assess and understand the local governments' obligations.

The person requesting accommodation should also be able to provide information relating to the nature of the accommodation and how it ties to the disability (e.g. why they need a goat as an ESA instead of a dog). While undue hardship is a high standard, factors such as the cost associated with the requested accommodation and the competing needs of others in the community may be relevant. Accommodation is a two-way street which requires efforts by both the local government and the person requesting the accommodation. We recommend that local governments document their efforts.

Local governments may also want to consider adopting bylaws or policies respecting ESAs. As

an example, the City of Calgary recently adopted amendments to its Responsible Pet Ownership Bylaw respecting livestock emotional support animals. These amendments allow residents to keep livestock on their property if they meet the requirements of the Bylaw, including that the animal is required as part of treating a diagnosed mental health condition.

~ Rachel Vallance

Land Development: Letter of Credit v. Bonding

Over the years, I have occasionally been asked whether local governments have a choice whether to accept bonding or letters to credit to secure a land developer's obligations to complete site servicing or other obligations of that land developer.

The answer is yes, local governments have a choice in choosing the form of security. The form of the security may be set by bylaw, or if not in a bylaw then the security must be in a form satisfactory to the approving officer or building inspector.

Having confirmed that there is a choice, a letter of credit is, by far, the better option. To understand why a letter of credit is better than a bond, I have below set out the difference in general terms.

Bond

A bond is issued by a surety company. While a bond is not insurance, trying to collect on a bond, is often like trying to collect on an insurance policy. You must prove your loss and your entitlement to draw on the bond. You may even have to sue the surety company. This onus includes an obligation to demonstrate that the developer has breached its obligations under the development agreement or servicing agreement. Putting aside this proof onus, the process can take months and sometimes years.

Letter of Credit

A letter of credit is generally issued by a financial institution. If properly drafted, a letter of credit is payable by the financial institution to the local government on demand, without the need for the local government to prove the right to do so. In this respect, the properly drafted letter of credit is often compared to cash.

Speaking of cash, it should be noted for completeness that cash is the best form of security. Not all developers have the credit rating or relationship with a financial institution to obtain a letter of credit. In such case, cash may be the only appropriate form of security.

Discussion

This issue often comes up when a developer comes to the local government and states, "I want to secure my obligations with a bond" and then notes that "local governments accept bonds in the context of local government procurement". What I generally advise clients in this scenario is that:

1. There is a fundamental distinction between local government procurement and land development.

2. Local government procurement starts with the local government seeking bidders for a job that the local government needs done. In such a context, bonding is the accepted process.

3. A land development project starts with the developer seeking approval of a for profit project.

4. Should the developer not complete its servicing obligations affected people, including purchasers will, almost without exception, turn to the local government to

fix the problem. In such a context, a local government needs to be able to access the security as quickly as possible. This can only be accomplished by using a properly drafted letter of credit.

5. The development or servicing agreement should clearly establish the right of the local government to use the called-on letter of credit to complete the developer's obligations.

Properly Drafted Letter of Credit

I have throughout this paper referenced to the term "properly drafted letter of credit". In very simply terms, this means that the letter of credit:

1. must be unconditional (payable on demand, without need of proof of the right to make the demand);

2. should be automatically renewing or if not, it should not be allowed to lapse;

3. should be issued by a recognized financial institution; and

4. may be called on at a local branch.

~ Michael McAllister

Section 219 Covenants – The Swiss Army Knife of Land Use Planning Tools

For many years now when local governments are looking to implement or reinforce land use decisions for various purposes the answer often is that issues or concerns can be managed or controlled at the very least to some extent through use of this very flexible and powerful tool.

At common law covenants were intended to attach rights to specific parcels of land but that is not the case with a section 219 covenant which may be granted pursuant to Section 219 to local governments and various other entities:

(1) A covenant described in subsection (2) in favour of the Crown, a Crown corporation or agency, a municipality, a regional district, the South Coast British Columbia Transportation Authority, or a local trust committee under

the Islands Trust Act, as covenantee, may be registered against the title to the land subject to the covenant and is enforceable against the covenantor and the successors in title of the covenantor even if the covenant is not annexed to land owned by the covenantee.

The general use of such covenants is set out in Section 219(2) in the following terms:

(2) A covenant registrable under subsection (1) may be of a negative or positive nature and may include one or more of the following provisions:

(a) provisions in respect of
(i) the use of land, or
(ii) the use of a building on or to be erected on land;

(b) that land
(i) is to be built on in accordance with the covenant,
(ii) is not to be built on except in accordance with the covenant, or
(iii) is not to be built on;

(c) that land
(i) is not to be subdivided except in accordance with the covenant, or
(ii)is not to be subdivided;

There are numerous important aspects to this including the fact that the covenant may be of a negative nature (in other words stopping something from happening) or positive (requiring something to happen) and may cover land use, building on land and subdivision matters.

This is a remarkably flexible instrument which will allow local government to require that certain things be done or not be done as a condition of development approval such that representations, promises or assurances made by developers throughout the development approval process can be memorialized in a form of agreement which will run with the land as a condition of use .

In addition, the covenants can address aspects of phasing of land development, such as requiring at certain development milestones steps to be taken, amenities to be provided or further instruments to be granted as a condition of further development.

Often times in the course of a development approval process a rezoning to a general commercial or industrial zone for example may have some support but there may be concerns about certain uses within that zone and so rather than creating a new zone or spot zoning, the application can be accompanied by a covenant that would prohibit the use or uses that are a particular concern .

Another important aspect of covenants is the ability to address amenities in the following terms:

(4) A covenant registrable under subsection (3) may be of a negative or positive nature and may include one or more of the following provisions:

(a) any of the provisions under subsection (2);

(b) that land or a specified amenity in relation to it be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state in accordance with the covenant and to the extent provided in the covenant.

*(5) For the purpose of subsection (4) (b), **"amenity"** includes any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land that is subject to the covenant.*

Again, the language here is very broad and allows not just preservation of amenities but in addition, that they be maintained, enhanced, restored or kept in their natural condition.

One other useful aspect of section 219 covenants is Section 219(2)(d) which allows for the requirement that lots not be sold separately:

(2) A covenant registrable under subsection (1) may be of a negative or positive nature and may include one or more of the following provisions:

> *(d)that parcels of land designated in the covenant and registered under one or more indefeasible titles are not to be sold or otherwise transferred separately.*

Particularly in rural areas or perhaps where development has occurred prior to a more comprehensive or sophisticated land use regime, we find buildings built across parcel lines which cause problems with respect to both land use bylaws and building code issues where renovations, repairs or extensions are desired.

Here, the lot binding covenant is a useful tool to allow for such buildings to cross parcel boundaries so long as the two parcels are bound together such that they cannot be separately sold.

One other interesting aspect to the section 219 covenant is the ability to include within the instrument a statutory indemnity to protect local governments from various matters, including any need to enforce same, in the following terms:

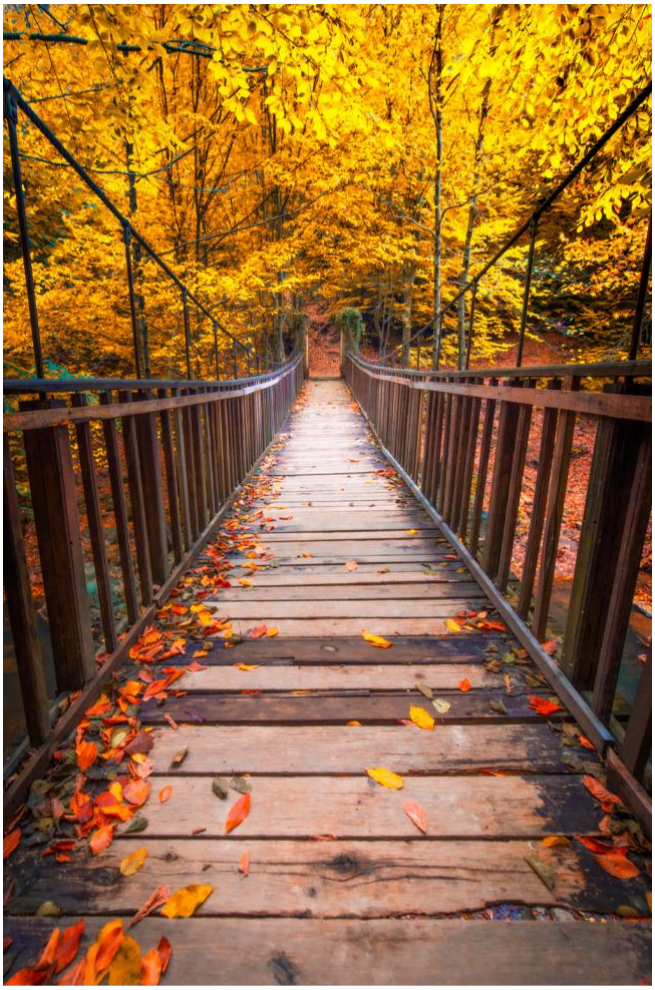
(6)A covenant registrable under this section may include, as an integral part,

> *(a)an indemnity of the covenantee against any matter agreed to by the covenantor and covenantee and provision for the just and equitable apportionment of the obligations under the covenant as between the owners of the land affected, and*
>
> *(b)a rent charge charging the land affected and payable by the covenantor and the covenantor's successors in title.*

It is almost always advisable to include within a covenant a form of this statutory indemnity to protect local government and to address in particular the risks that may be managed or restricted by the topic of that covenant, be it flooding, geotechnical or some other hazard.

One point of warning with respect to covenants is that these are statutory instruments and so they must be carefully drafted to ensure that they fall within section 219 of the Land Title Act.

The legislation makes it clear that the mere fact that a document is registered does not ensure that it will actually be enforceable:



(10) The registration of a covenant under this section is not a determination by the registrar of its enforceability.

In addition, there are other issues to be aware of when utilising section 219 covenants and they are certainly not meant to be a panacea to solve all problems or address all issues, but they are certainly one of the most flexible tools available in the local government

~ Christopher Murdy

Climate Caucus: What is it?

Climate Caucus is a non-partisan network of elected local leaders across Canada, who are taking action to fight climate breakdown. The leaders have come together to create policy and political will to fight climate change and build resilience and adaptability in communities across the nation.

Climate Caucus began in January 2019, and since then it has been steadily gaining momentum. Climate Caucus' network includes 250 elected officials, with over 70 communities and 30 million citizens represented. So far, CC has hosted four successful events. The first was at FCM, where CC overflowed the room with leaders from across the country. The second was the first annual Climate Summit in August. There, the caucus formed working groups for some of the big dial turning actions municipalities can take to lower their carbon emissions. Some examples of the groups include building retrofits, active transportation, and smart growth land use. Ultimately, the working groups will develop policies for their topics, which can be implemented in municipalities across the country.

Climate Caucus is excited to continue to build on this momentum at UBCM, as well as through some other upcoming projects such as webinars and work surrounding the federal election. Climate Caucus is also grateful for all of our NGOs, academics, and individual specialists in the climate field within its network, as their expertise and experience are invaluable to the local leaders throughout this process.

The Climate Caucus has 4 main objectives: 1) it is a meeting place, which connects local leaders across the country. 2) It is a grassroots force, which strives to build political will and drive change at a local level. 3) It is a lever for change, as leaders strive to use collective power to lobby provincial and federal governments. 4) Finally, it is a central brain, where it can share policy information, best practices and experience.

Climate Caucus is an important resource for local leaders because local governments in Canada are at the forefront of the climate emergency. Local governments are leaders in climate action and policy, and they are the closest order of government to those most affected by climate disasters, such as wildfires, flooding, heat, and storms. With the ability to influence more than half of greenhouse gas emissions, including 60% of carbon dioxide, local governments now have the capacity and tools to stop runaway climate change.

~ Alex Lidstone

Fisheries Act Amendments

Recent amendments to the federal *Fisheries Act* may be of interest to local governments that are involved in activities involving riparian areas, as well as those to which the provincial Riparian Areas Regulation ("RAR") applies.

Federal Bill C-68 was enacted and became law on June 21st this year by Royal Assent. Certain provisions dealing with the protection of all fish species and fish habitat, along with related regulations, came into force on August 28th.

In particular, development in areas that may include fish habitat are now subject to an amended section 35 (1) of the *Fisheries Act* which reinstates the basic level of protection that existed previous to November 25, 2013. The legislation currently provides that

> 35 (1) No person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat.

This replaces an amendment made to the *Fisheries Act* through Bill C-38, 2012, whereby section 35 (1) had been revised to prohibit

"work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery". "*Serious harm to fish*" was defined in section 2 (2) to mean "the death of fish or any *permanent* alteration to, or destruction of, fish habitat." The meaning of "permanent" was undefined and along with other elements of the prohibition, created some uncertainty and perhaps challenges for prosecution. Presumably showing a harmful alteration or disruption will be less onerous, and a higher level of protection may result.

Section 2 (2) now provides that "For the purposes of this Act, the quantity, timing and quality of the water flow that are necessary to sustain the freshwater or estuarine ecosystems of a fish habitat are deemed to be a fish habitat".

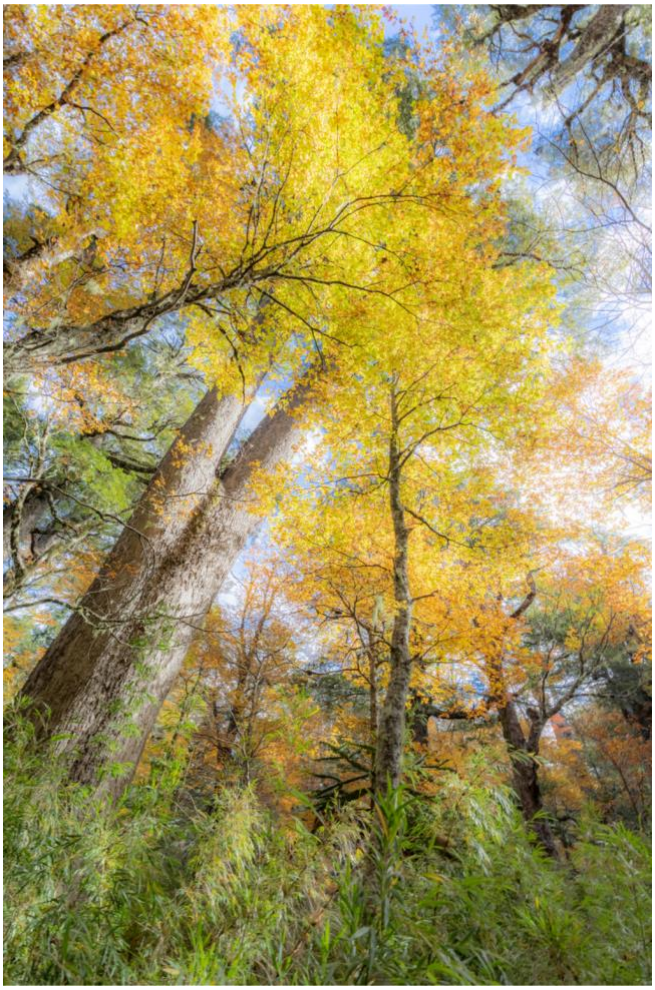
Section 35 (2) continues to list exceptions to the prohibition to allow for works, undertakings or activities that are prescribed by regulation, specifically authorized, or in accordance with a permit issued under (newly added) section 35.1.

A related regulation, *Authorizations Concerning Fish and Fish Habitat Protection Regulations* (SOR/2019-286) also came into force on August 28, 2019, replacing the *Applications for Authorization under Paragraph 35 (2) (b) of the Fisheries Act*.

Transitional provisions are included in both the Act and Regulations to deal with applications submitted and authorizations issued before August 28, 2019.

The definition of "fish habitat" which under the 2012 amendments was defined as "spawning grounds and any other areas including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes" is now defined somewhat differently, to mean

"*water frequented by fish* and any other areas on which fish depend directly or indirectly to carry out their life processes, including spawning grounds and nursery, rearing, food supply and migration areas".



As part of a joint effort with Canada to balance the protection of salmon habitat with the rights of land owners, the Province enacted the *Fish Protection Act* in 1997. This Act included a definition for "fish habitat" that was similar to the *Fisheries Act* previous to the 2012 amendments. Along with the provincial Act being renamed the *Riparian Areas Protection Act* by Bill 18, 2014, its definition of "fish habitat" was repealed effective February 29, 2016. It was not separately defined in the former *Streamside Protection Regulation* or the current RAR. However, the RAR definition of "stream" continues to incorporate "fish habitat", and one

might assume reflects that as defined in the *Fisheries Act*.

Section 4 of the RAR directly prohibits local governments from approving or allowing any "development proposal" to proceed in a "riparian assessment area" unless in accordance with either subsection 4 (2) or 4 (3).

The subsection 4 (2) condition is that the local government is notified by the provincial ministry that Fisheries and Oceans Canada *and* the ministry have been notified of the development proposal, and provided with an "assessment report" prepared by a qualified environmental professional.

The alternative condition of subsection 4 (3) is that the federal Minister of Fisheries and Oceans or a regulation under the *Fisheries Act* authorizes the "harmful alteration, disruption or destruction of natural features, functions and conditions that support fish life processes in the riparian assessment area that would result from the implementation of the development proposal." Such "harmful alteration, disruption or destruction" is commonly referred to as a "HADD".

Whether or not a local government is subject to the RAR, it should be kept in mind that another Bill C-68 amendment, now in force, was added (some would say, restored) at section 34.4 (1):

> 34.4 (1) No person shall carry on any work, undertaking or activity, other than fishing, that results in the death of fish.

A contravention of section 34.4 (1) or 35 (1) is an offence, and liability arises for penalties that are potentially significant.

As with the section 35 protection for fish habitat, a number of exceptions are made for prescribed and authorized works, undertakings and activity, and those carried out in accordance with the regulations or a permit.

The *Fisheries Act* now includes a statement of purpose, that is to provide a framework for "the proper management and control of fisheries" and for "the conservation and protection of fish and fish habitat, including by preventing pollution." In making regulations and issuing authorizations and permits, among other things, the Minister must take into account certain factors that presumably support these purposes. Among them are productivity levels of fish and fish habitat to relevant fisheries; measures and standards to avoid, mitigate or offset HADDs; cumulative effects; fish habitat banks; and Indigenous knowledge provided to the Minister.

The Minister also, when making decisions under the Act, *may* consider precautionary and ecosystem approaches, sustainability of fisheries, scientific information, community knowledge, provincial and Indigenous cooperative arrangements, and social, economic and cultural factors in fisheries management.

The provisions of the old *Fisheries Act* might be said to have returned in force. Hopefully, so will the salmon, to find their original spawning and nursery grounds as habitable as when they left them.

~ Colleen Burke

Solid Waste Management: Monopoly or Regulation?

On July 25, 2019, the Province refused to approve two of Metro Vancouver's recent solid waste management bylaws. It was not an outright rejection. Rather, the Province indicated that they were delaying the final decision until the current waste management plan has been renewed (the plan is due for review in 2021).

In advance of the Province's decision, industry and the Canadian Bureau of Competition raised concerns that the proposed bylaws would create a waste management monopoly in the Metro Vancouver area. In 2014, the Province cited the same concern as one of the reasons for rejecting Metro Vancouver's solid waste management Bylaw 280.

The Province did not raise "monopoly" as the reason for delaying the decision on the recent bylaws. But, these concerns by the industry could not have gone unnoticed. Without clear guidelines, the Province can use the argument of "monopoly" to limit the scope of regional districts' regulatory authority over solid waste.

Overview of regulatory regime

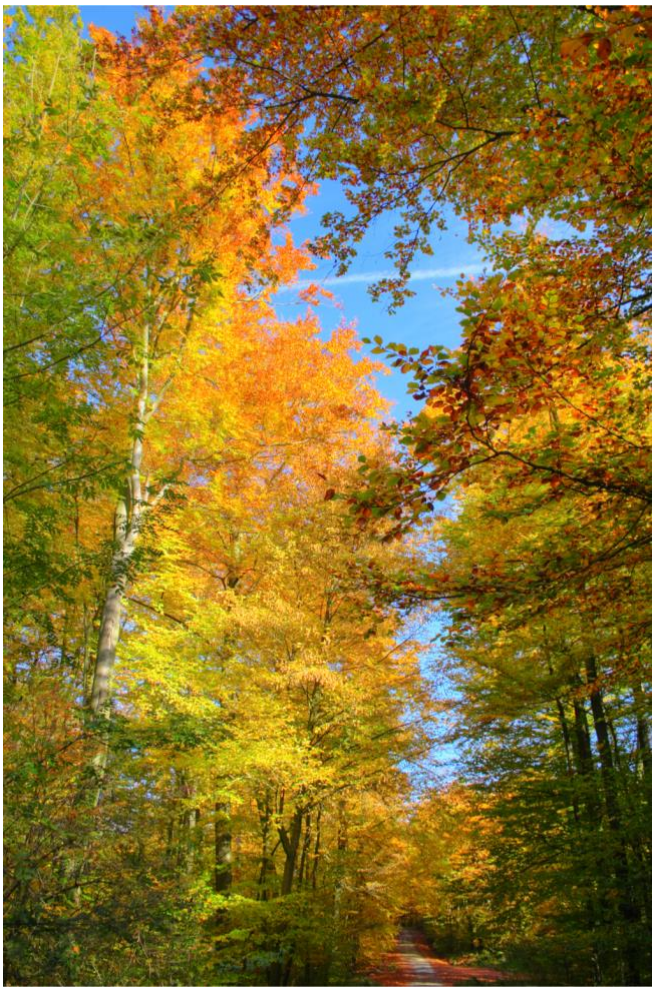
In BC, municipal waste management is primarily governed by the *Environmental Management Act*. Under this Act, regional districts have the authority to prepare and implement solid waste management plans. As part of this authority (without being exhaustive), regional districts have the power to regulate and prohibit the transport of waste within their jurisdictions, require licensing for facilities and haulers, direct what can and cannot be disposed at any given facility, and impose tipping fees.

The province has retained a significant level of oversight over regional districts' waste management programs. The waste management plan and the bylaw implementing the plan must receive provincial approval before it can come into effect.

Bylaw 280, 2013

Metro Vancouver's current solid waste management plan was approved by the Province in 2011 and has been administered by a set of bylaws, including Bylaw 181, 1996 regulating private facilities.

In 2013, Metro Vancouver proposed to replace Bylaw 181 with Bylaw 280, 2013. Among other things, Bylaw 280 proposed that residential, commercial and institutional waste would not be removed from the geographical area of Metro Vancouver and would be delivered to one of the regional facilities or to a strictly regulated



private facility.

From Metro's perspective, waste flow control was necessary to ensure that regional facilities did not lose revenue and that disposal bans were consistent across the region. For waste management industry, this was problematic. BC Chamber of Commerce called on the Province to reject Bylaw 280, stating that the Bylaw would dismantle a market-driven waste management system and install a monopoly, with the fees to go with it.

Ultimately, the Province rejected Bylaw 280 stating, among other things, that the Bylaw would suppress competition and have a destabilizing effect on business.

Bylaws 307, 308 and 309, 2017

In 2017, Metro Vancouver proposed a set of bylaws that the Province again deemed to have competition concerns. Namely:

- Bylaw 307 would require large commercial haulers to obtain a license to haul waste within Metro Vancouver. This bylaw required Provincial approval.

- Bylaw 308 would implement a generator levy, to be collected by haulers, or payable at disposal. This has been also referred to as a "split-fee". For disposal at regional facilities, the generator levy would form part of the tipping fee. For waste delivered elsewhere, the generator levy would be a separate payment collected by haulers from their customers and delivered to Metro Vancouver. This bylaw did not require Provincial approval and was adopted on November 24, 2017, effective January 1, 2018.

- Bylaw 309 would amend Bylaw 181 by, among other things, updating the types of facilities requiring licensing, and clarifying that regional facilities were exempt from these licensing requirements. This bylaw required Provincial approval.

On May 3, 2019 (at the request of the Province), the Competition Bureau of Canada (CBC) provided its views on the bylaws, stating that "at least one objective of [Bylaw 308] is to restrict or minimize haulers' use of non-Metro Vancouver transfer stations…. In the Bureau's view, the continued application of [Bylaw 308] is likely to achieve the result that the Ministry of Environment feared in 2014 [in respect to Bylaw 280] (i.e., a monopoly on waste management in the Metro Vancouver area)." Ironically, Bylaw 308 did not require Provincial approval and has been adopted. CBC did not appear to have as much of a concern with the other two bylaws.

Despite the fact that Bylaw 308 was already adopted and Bylaws 307 and 309 were consistent with the approved waste management plan and Metro's legislative authority, the Province did not approve these bylaws. Rather than issuing a rejection, the Province delayed its decision on Bylaws 307 and 309, ostensibly on the basis that it would "allow" Metro Vancouver time to renew the waste management plan and to ensure that the (future) plan and bylaws are aligned with the provincial perspective.

Where are the goal posts?

Competition and monopoly concerns in waste management are not unique. There are numerous practices in the waste management industry that get the attention of the Canadian Bureau of Competition (CBC). Most of these arise in the commercial context of mergers and acquisitions. For example, in 2015, the Supreme Court of Canada considered the case of *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, when Tervita acquired three out of four secure landfills in Northern BC. After a lengthy and detailed analysis, the Supreme Court found that Tervita's acquisition of three out of four secure landfills would stifle competition but was defensible based on gains in efficiency (a defence available under the *Competition Act*).

In the instance of Metro Vancouver bylaws, the issue is not a corporate merger; it is whether a lawful regional regulation makes it difficult for business to compete. Parameters of what is and is not acceptable in this context are murky. In its comments, CBC clearly stated that it was basing its opinion only on publicly available information and the opinion did not predetermine the

position of the Commission of Competition in any current or future investigation.

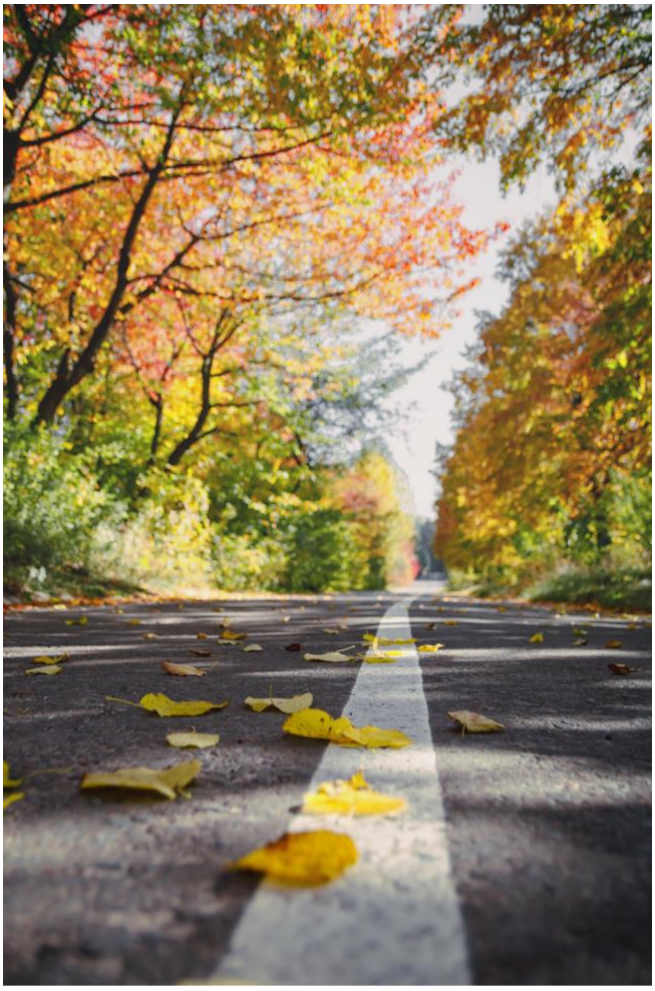
Ultimately, whether and to what extent regulation may stifle competition is a question of policy (consider the example of taxi industry in BC, which also attracted CBC's recommendations for greater competition). In the case of waste management, it is unclear if the goal posts of this policy are the prerogative of regional districts or the Province, and in the case of the latter, it is unclear what the goal posts are. Some guidance from the Province would be prudent to ensure that competition-based concerns do not inadvertently limit regulatory authority of regional districts.

~ Olga Rivkin

Santics v. Vancouver (City) Animal Control Officer

For more than a decade, both the BC Provincial Court and BC Supreme Court have made conditional orders to rehabilitate dangerous dogs. This provided an alternative to making a binary choice between ordering a dog be destroyed or be released without conditions. The BC Court of Appeal's decision in *Santics v Vancouver (City) Animal Control Officer*, 2019 BCC 294 ["*Santics"*] means this is no longer possible; courts must chose between destruction and release if a dog poses an unacceptable risk to the public. While *Santics* limits the discretion of the court, it in no way limits the discretion of animal control officers to craft individualized remedies.

In *Santics*, the appellant owner of a dog—"Punky"—appealed an order requiring the destruction of Punky that had been made by the BC Provincial Court and upheld on an earlier appeal to the BC Supreme Court. Punky frequently bit or acted aggressively towards people. An animal control officer applied for a destruction order after Punky ran towards a woman at a public park and bit her. The BC Provincial Court judge found Punky was a dangerous dog as defined in section 324.1(1) of the *Vancouver Charter*, and ordered that he be euthanized.



The appellant owner argued that the dangerous dog provisions in the *Vancouver Charter* (which are identical to provisions in the *Community Charter*) allow the court to find that a dog meets the definition of a 'dangerous dog' without ordering destruction. The appellant submitted that an animal control officer must establish not only that a dog is dangerous, but that it is dangerous *enough* to warrant destruction. If an animal control officer proves a dog is a dangerous dog but does not prove it is dangerous enough to warrant destruction, the appellant

submitted the court could make other orders such as for adoption or training. The BC Provincial Court largely accepted this understanding of the law, but still found that Punky was dangerous *enough* to warrant destruction.

The BC Court of Appeal found the BC Provincial Court did not err in its conclusion (ordering destruction) and therefore dismissed the appeal. Although the conclusion was not an error, the lower courts' interpretation of the relevant legal framework was incorrect because courts do not have the authority to make an order other than destruction. The BC Court of Appeal used *Santics* as an opportunity to clarify this framework by substantively addressing the dangerous dog provisions in the *Vancouver Charter* and *Community Charter* for the first time since their enactment.

Following *Santics*, the interpretation of these provisions is as follows. Section 324.1 of the *Vancouver Charter* (and section 49 of the *Community Charter*) empowers the BC Provincial Court to order the destruction of a dog that poses an unacceptable risk to the public. If the court finds that a dog poses an unacceptable risk to the public, it has no discretion to make any order short of destruction. If the court finds that a dog does not pose an unacceptable risk to the public, it may return the dog to the owner even if the dog satisfies the statutory definition of 'dangerous dog'. Every dog that poses an unacceptable risk to the public is a dangerous dog (the requirement for seizure), but not every dangerous dog poses an unacceptable risk to the public (the requirement for destruction).

The key takeaway from *Santics* for local governments is that every application for the destruction of a dog will now either result in the dog's release or destruction. However, animal control officers maintain their substantial discretion to craft alternative remedies (such as adoption or training) instead of applying for a destruction order.

Ocean Wise Conservation Association v Vancouver Board of Parks and Recreation

Local governments are generally not able to fetter their legislative powers unless expressly authorized to do so by legislation. In general terms, fettering means allowing a government's past actions to bind their future actions. Fettering is a relatively turbulent area of local government law, but in *Ocean Wise Conservation Association v Vancouver Board of Parks and Recreation*, 2019 BCCA 58 ["*Ocean Wise*"], the BC Court of Appeal dove in to reaffirm that limiting a local government's legislative power is a very serious matter that requires express permission.

Ocean Wise is a response to the Vancouver Board of Parks and Recreation's (the "Board") decision to pass a bylaw amendment to prohibit cetaceans (for example, whales and dolphins) from being brought to or kept in city parks. This bylaw amendment impacted the Vancouver Aquarium, which is managed by the Ocean Wise Conservation Society (the "Aquarium"). The Aquarium commenced a judicial review of the bylaw amendment. The BC Supreme Court held the Board was fettered by a license agreement with the Aquarium and, as a result, the bylaw amendment was outside the powers of the Board and void to the extent that it applied to the Aquarium's operations.

On appeal, the BC Court of Appeal overturned the BC Supreme Court's decision. The BC Court of Appeal held the judicial review judge erred by reversing the anti-fettering presumption established by the leading case on this topic: *Pacific National Investments Ltd. v Victoria (City)*, 2000 SCC 64 ["*Pacific National*"].

Pacific National establishes the court must presume that a local government is generally not able to fetter its legislative powers, but this presumption can be rebutted by evidence that

legislation provides the local government with express permission. The judicial review court's reasoning in *Ocean Wise* suggested that if a local government has the authority to enter a contract, it is implied that the local government can fetter its legislative powers by contract unless the legislation expressly provides an exception. By failing to identify an express *permission* to fetter and instead looking for an express *exception*, the judicial review court applied the *Pacific National* presumption backwards and the BC Court of Appeal overturned its decision on this basis.

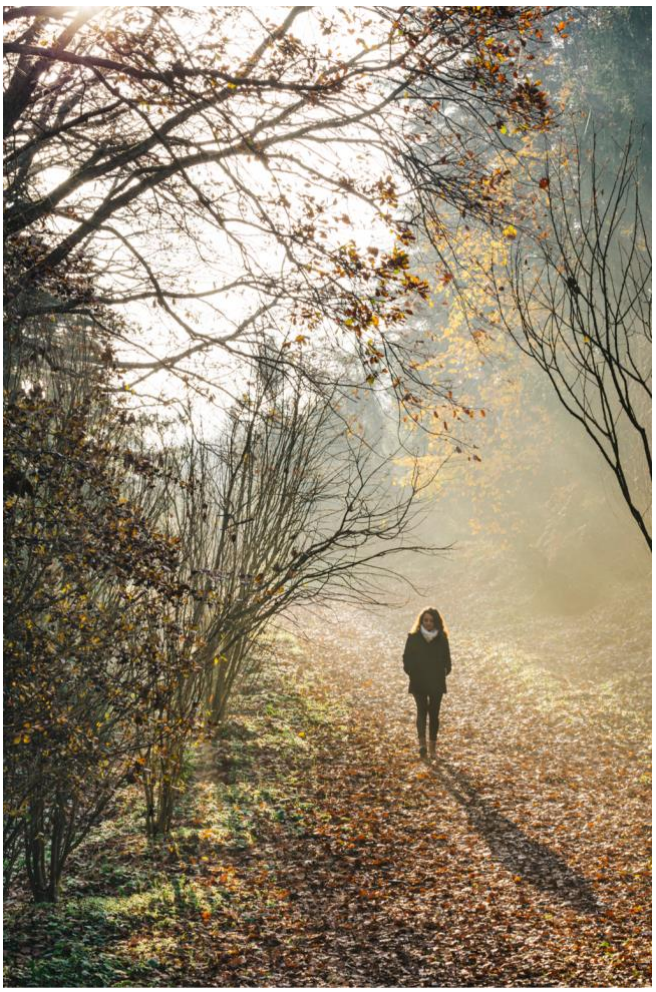
In addition to clarifying how *Pacific National*'s anti-fettering presumption should be applied, the BC Court of Appeal also provided helpful examples of what would constitute a sufficiently clear authorization to fetter legislative powers, which are found at paragraph 66 of *Ocean Wise* and may be of interest.

It is important to note that *Ocean Wise* concerns the authorization required to fetter a local government's *legislative* powers—their by-law making powers—and therefore cannot be applied broadly to all types of local government powers.

Ocean Wise confirms that fettering a local government's legislative powers requires express permission, and a general authority to enter agreements is not sufficient authority to fetter a local government's legislative powers.

Canadian Plastic Bag Association v Victoria

Prior to *Canadian Plastic Bag Association v Victoria*, 2019 BCCA 254 ["*Canadian Plastic*"] local government bylaws only required one proper purpose to be valid, and additional purposes did not detract from a bylaw's validity. *Canadian Plastic* introduces a new, more stringent requirement for determining the validity of bylaws that could be enacted under a concurrent sphere of authority. A concurrent sphere of authority is an area where a local government requires the approval of the



provincial government to enact a bylaw, unless a regulation provides otherwise. *Canadian Plastic* establishes that if a bylaw's 'dominant purpose' falls under a concurrent sphere, the bylaw requires provincial approval even if it also has a purpose that could be enacted under a non-concurrent sphere.

Canadian Plastic is a response to the City of Victoria's (the "City") enactment of a bylaw concerning the ability of businesses to sell or provide plastic bags to customers. A non-profit advocacy group representing the plastic bag industry (the "Association") sought judicial review of the bylaw, and then appealed to the BC Court of Appeal after the judicial review court upheld the bylaw. The BC Court of Appeal

overturned the judicial review decision and held the bylaw was invalid in the absence of provincial approval.

The City argued the bylaw fell within its authority to regulate business established by section 8(6) of the *Community Charter*. This is not a concurrent sphere of authority. The Association argued the bylaw was enacted under section 8(3)(j) of the *Community Charter*, which provides local governments with the authority to regulate, prohibit, or impose requirements in relation to the protection of the natural environment. This latter sphere of authority is concurrent, and therefore since the City did not obtain provincial approval the Association argued the bylaw was invalid.

In reaching its conclusion that that bylaw was invalid, the BC Court of Appeal held it was necessary to determine the 'true character' or 'dominant purpose' of the bylaw. The court found the bylaw's dominant purpose was to protect the environment, and therefore it was irrelevant that the bylaw could also have the purpose of regulating business. If a bylaw's 'dominant purpose' falls under a concurrent sphere of authority, it must meet the requirements for enacting a bylaw under a concurrent sphere (as set out in section 9 of the *Community Charter*) even if it has other purposes that would otherwise allow a local government to enact it under a non-concurrent sphere.

If a bylaw does not have a purpose that falls under a concurrent sphere, it appears that the existing approach (considering whether there is *a* valid purpose, rather than considering whether the bylaw's 'dominant purpose' is valid) likely still applies.

Following *Ocean Wise*, local governments must consider a bylaw's 'dominant purpose'. If the dominant purpose requires the bylaw to be enacted under a concurrent sphere of authority, the bylaw needs provincial approval (unless a regulation provides otherwise).

~ Kate Gotziaman

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