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LAW LETTER

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In this issue

Standard of Review Under Vavilov: A "Holistic Revision" and a "Delicate Balance", or "An Encomium for Correctness" and a "Eulogy for Deference"?

The recent decision by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*") marks yet another shift in the direction taken by Canada's highest court with respect to the law governing the standard of review to be applied by courts undertaking judicial review of administrative decisions, including those of local governments.

Standard of review is a key legal aspect of judicial review as it sets out the principles that are to be used by reviewing courts, including the extent to which those courts are to defer to the decision maker whose decision is being challenged. One notable aspect of the law concerning standard of review in recent years is that it has been in a continual state of flux as courts try to develop an approach that is sound in theory and effective in practice. For example, in the late 1980s, the approach accepted by the Supreme Court of Canada to standard of review changed from a "formalistic analysis" of the jurisdiction of a decision maker to a "pragmatic and functional" approach in which the applicable standard could range from correctness (in which no deference is to be shown by a court to a decision maker), to patent reasonableness (where significant deference is to be shown to a decision maker), to reasonableness *simpliciter* (which is between correctness and patent unreasonableness).

However, it was often difficult to determine which standard of review under this approach should apply to the review of a given decision. As the conceptual basis for the patently unreasonable standard became increasingly

difficult to explain, the Supreme Court of Canada issued its 2008 decision in *Dunsmuir v. New Brunswick*, in which it abandoned the use of patent unreasonableness in standard of review, leaving instead only reasonableness and correctness.

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The approach from *Dunsmuir* also became subject to much criticism, including that it lacked simplicity and predictability, and that debate over which standard of review was applicable to the review of a decision often overshadowed the consideration given by a court to the underlying dispute.

Accordingly, the Supreme Court of Canada concluded that the time was ripe to again clarify the law on standard of review. It did so in three judgments issued in December 2019, with the main statement of the governing principles being given in *Vavilov* (the other two cases concerned whether the CRTC was correct to allow American commercials to be shown during a Super Bowl broadcast, and whether routes used by letter carriers were workspace under the control of Canada Post for the purpose of workplace inspections).

The underlying facts in *Vavilov* were unusual, if not unique, and concerned whether it was lawful for the government to cancel the Canadian citizenship of Canadian born children of Russian spies after the parents had been arrested in the United States and returned to Russia.

The majority of the court held that reasonableness shall now be presumed to be the standard of review in judicial review proceedings. Further, the reasonableness standard is to apply to not only the merits of the decision but also to aspects of decisions that previously might have led to the application of the correctness test, including questions of law and the interpretation of statutes.

The main rationale given by the majority of the court for adopting the reasonableness standard is that legislatures that grant enabling powers to decision makers intend those decision makers to fulfill their respective mandates, including with respect to interpreting applicable laws.

However, the majority of the court also identified two instances in which the presumption of reasonableness can be overcome. The first is if there is a statutory appeal clause in the statute that governs the making of the decision. The second is "where the rule of law requires that the standard of correctness be applied". Examples of the latter cited by the majority include constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies.

The majority of the court then stated that in determining whether a decision is reasonable, "a reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable". Drawing upon earlier decisions of the court, the majority held that this requires consideration by a reviewing court of whether "the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision".

The burden in any case to show that a decision is unreasonable will be on the party making that assertion by showing that there are "sufficiently serious shortcomings" in the decision. The majority identified two types of fundamental flaws upon which such shortcomings can be found. The first is a lack of internally coherent reasoning. While the majority said that a court is not to conduct a "line-by-line treasure hunt for error", a court should still be able to "trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic", and that an irrational chain of analysis or the lack of a rational chain of analysis will make a decision unreasonable.

The second type of fundamental flaw identified is if the decision is not justified "in relation to the constellation of law and facts that are relevant to the decision". This "constellation" includes the governing statutory scheme, other applicable law (including the common law), principles of statutory interpretation, the evidence that was before the decision maker, the submissions of the parties before the decision maker, past practices and decisions of the decision maker, the impact of the decision on the affected individual, and the lack of formal reasons for the decision where such reasons are required by statute or procedural fairness.

In what may be one of the more significant practical outcomes of the decision of the judgment, the majority stated that where a decision cannot be upheld on the reasonableness standard, "it will most often be appropriate to remit the matter to the decision maker to have it

reconsider the decision, this time with the benefit of the court's reasons".

That is, the majority stated that rather than quashing a decision found to be unreasonable, the matter should instead be sent back to the decision maker to be reconsidered in light of the reviewing court's comments.

There was a spirited dissent in *Vavilov* by a minority of the court which, while agreeing with the majority on the outcome of the case and that it should be presumed that the proper approach to judicial review is a test based on reasonableness, also criticized the majority for

abandoning the deference that had previously been provided to decision makers, especially those who have specialized expertise.

In that connection, one aspect of *Vavilov* that bears noting is the relatively strong commentary directed by the majority and minority of the court to each other's reasons. This includes the majority's statement that the minority's characterization of the majority's decision as "an encomium for correctness" and a "eulogy for deference" is a "gross exaggeration", and the statement by the majority that the minority's statement that the majority adopted a "formalistic, court-centric view of administrative law" is counter to the "delicate balance" that the majority says is accounted for in the new framework.

While this language suggests a marked lack of agreement by the majority and the minority in this matter, it also identifies a potential issue that may have to be addressed in judicial review, which is that the approach accepted by the majority may invite greater intervention by the courts in the judicial review process in the sense that reviewing courts are being invited to examine the entire process and context concerning the decision under review. Whether this will result in more administrative decisions being overturned remains to be seen, but it could make cases involving judicial review lengthier, more complex, and more costly to litigate.

The decision in *Vavilov* has implications for local governments.

- The court has provided a comprehensive and arguably expansive explanation of what makes a decision reasonable which gives greater certainty to decision makers about what needs to be addressed when making a decision. However, it may also increase the number of things that need to be considered by decision makers that might not have been part of the decision making process until now, such as past practices and decisions of the decision maker, and the impact of the decision on the affected individual. In turn, this may increase the potential for a decision to be found to be unreasonable because it failed to meet the broad set of factors that the court says can be relevant.

- The continued emphasis of the court that decision makers provide reasons for decisions may not always be in accord with the practices of local governments. In that regard, the majority observed that requiring reasons may be difficult for bodies such as municipalities, whose decision making processes for matters such as passing bylaws does not easily lend itself to producing a single set of reasons. While the majority stated that in such instances "a reviewing court must look to the record as a whole to understand the decision", and referred to its decision in *Catalyst Paper Corp. v. North Cowichan,* 2012 SCC 2 for the proposition that the reasons for a municipal bylaw "are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw", this approach may create problems in instances where such a record does not exist, or it is minimal. At a bare minimum, local governments should consider whether a sufficient record will be created to help explain the basis for a decision, and that the record show that the decision has internally coherent reasoning and addresses the "constellation" of issues that may be relevant to the decision.

Ultimately, the evolution to date on the law governing standard of review in judicial review proceedings suggests that the decision in *Vavilov* will not be the final statement on the matter, and that whether it arises from the criticisms made by the minority of the court, or some other basis, it would not be surprising to see a further

restatement of that law by the court in the not so distant future.

~ James Yardley

Case Update: Carbon Pricing Reference at Supreme Court of Canada

This Spring the Supreme Court of Canada will hear two appeals regarding the federal *Greenhouse Gas and Pollution Pricing Act*. The Supreme Court's decision will determine whether the federal government has the constitutional authority under its "Peace Order and Good Government Power" to impose minimum national pricing standards for greenhouse gas emissions. The case includes two appeals, one from the Ontario Court of Appeal and one from the Saskatchewan Court of Appeal, and it has already made headlines across the country as people in every province have followed its progress. Climate change, and governments' willingness to mitigate and adapt to it, is the most pressing issue of our time, and this case will determine the extent to which the federal government can require minimum emissions pricing in all provinces.

It all started in Saskatchewan. On April 25, 2018, the Saskatchewan Provincial Government referred the following question to the Saskatchewan Court of Appeal:

> The *Greenhouse Gas Pollution Pricing Act* was introduced into Parliament on March 28, 2018 as Part 5 of Bill C-74. If enacted, will this Act be unconstitutional in whole or in part?

In the Majority's final decision, Chief Justice Richards and Justice Jackson and Justice Schwann held that the *Greenhouse Gas and Pollution Pricing Act* is valid and constitutionally enacted by the federal government. With regards to the impacts of climate change in Canada, Chief Justice Richards stated:

> [17] Climate change impacts affecting Canada and Canadians include thawing permafrost, increases in extreme weather and extreme weather events such as forest fires, degradation of soil

> and water resources, increased frequency and severity of heat waves, and expansion of the ranges of vector-borne diseases. Predictions show that Canada's temperature, particularly in the Arctic, will warm at a faster rate than that of the world as a whole.

On the validity and constitutionality of the legislation, Chief Justice Richards wrote:

> [11] … Parliament does have authority over … the establishment of

> minimum national standards of price stringency for GHG emissions. This jurisdiction has the singleness, distinctiveness and indivisibility required by the law. It also has a limited impact on the balance of federalism and leaves provinces broad scope to legislate in the GHG area. The *Act* is constitutionally valid because its essential character falls within the scope of this POGG authority.

Saskatchewan appealed this decision, as a right, to the Supreme Court of Canada.

Then came the Ontario reference. On July 31, 2018, the Ontario Provincial Government referred its own reference question to the Ontario Court of Appeal:

> Is the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c. 12, unconstitutional in whole or in part?

The Majority reasons, written by Chief Justice Stathy and concurred with by Justice Hoy, also held that "the *Act* is constitutionally valid under the national concern branch of the POGG power contained in s. 91 of the *Constitution Act, 1867*" (para 139). The Court reiterated that the environment is an area of shared constitutional responsibility and that the *Greenhouse Gas and Pollution Pricing Act* "is Parliament's response to the reality and importance of climate change while securing the basic balance between the two levels of government envisioned by the Constitution" (para 138).

Ontario then also appealed the decision to the Supreme Court of Canada.

In both cases, the result was the same: the *Greenhouse Gas Pollution Pricing Act* was held to be constitutional by a majority in both courts, with each Court's Chief Justice upholding the federal legislation.

The cases are due to be heard on consecutive days, currently scheduled for March. But what really is the issue before the Supreme Court? Is it whether climate change is real? Is it a debate on the best measures to tackle climate change, or the most equitable way to pay for adaptation? Ultimately, the question at issue is, predictably, a relatively dry legal question: does the federal government have the power under the *Constitution Act, 1867* to impose minimum pricing standards on greenhouse gas emissions across all provinces? Or is the federal government imposing on provincial powers and treading on provincial toes?

Under the *Constitution Act, 1867* nearly all "matters" to legislate were divided between the provincial and federal governments. The framers were attempting to take a Westminster, centralized model of government and yet also recognize the diversity, size, and scope of the new country. Provincial powers are listed under section 92 and include a host of matters including:

> Local Works and Undertakings
> Property and Civil Rights in the Province
> Municipal Institutions in the Province

Likewise, section 91 lists a host of federal powers, including:

> Sea Coast and Inland Fisheries
> Navigation and Shipping
> The Criminal Law

In order to ensure that all matters, subjects, and issues were given to one head of government or another, the *Constitution Act 1867* includes two important catch all provisions. Under section 92(16), the Provinces are granted a catch-all for "generally all Matters of a merely local or private Nature in the Province". The federal government, under section 91, was then granted the residual power to "make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of

Subjects by tis Act assigned Exclusively to the Legislatures of the Provinces".

However, determining when a matter, which is not expressly listed under either section 91 or 92 is either a "Matters of a merely local or private Nature in the Province" or whether it is a "Laws for the Peace, Order, and good Government of Canada" which falls outside of a matter assigned to the Provinces is a complex and much discussed issue before the Courts.

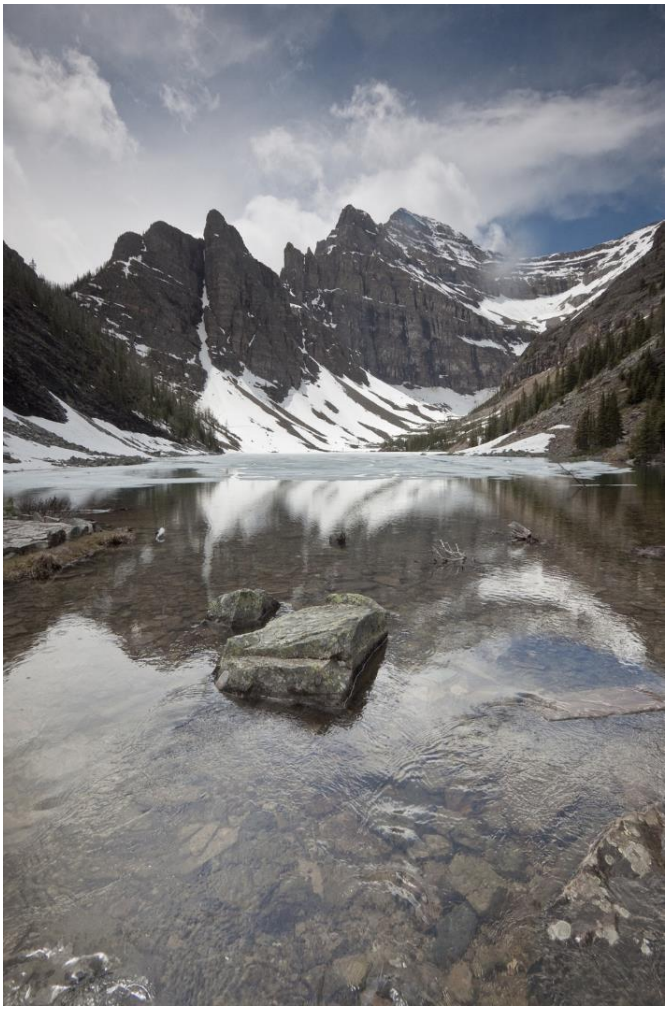
The first step in any constitutional analysis is to determine the "pith and substance" or "true character" of the law at issue.

> This step of the analysis requires an examination of the purpose and effects of the law to identify its "main thrust"…. The purpose of a law is determined by examining both intrinsic evidence, such as the preamble of the law, and extrinsic evidence, such as the circumstances in which the law was enacted…. The effects of the law include both its legal effects and the practical consequences of the law's application. (para 70 of the Ontario Decision)

Once the pith and substance of the law at issue has been identified, it must then be determined whether that matter falls under any of the existing powers set out in sections 91 and 92 of the *Constitution Act, 1867*. Canada is arguing that the pith and substance or true matter of the *Greenhouse Gas and Pollution Pricing Act* is properly framed as an issue of "national concern" and is housed under the Peace Order and Good Government (or POGG) powers of the federal government.

The current test for determining whether a matter is an issue of national concern and as such falls under the federal government's POGG, was articulated in the Crown Zellerbach case. The Ontario Court of Appeal summarized the principles from Crown Zellerbach as follows:

> [T]he court considers first whether the matter has a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. In this regard, the court



> considers the effect on extra-provincial interests of a provincial failure to regulate the "matter". Second, the court considers whether the scale of impact of the federal legislation is reconcilable with the constitutional distribution of legislative power. (para 102)

So, what is the "pith and substance" of the *Greenhouse Gas and Pollution Pricing Act*? As it turns out, no one can seem to agree. The Saskatchewan Court of Appeal stated it is: ""the establishment of minimum national standards of

price stringency for GHG emissions" (para 125). The Minority in the Saskatchewan Court of Appeal found the pith and substance to be either taxation or regulating greenhouse gas emissions (generally). The Ontario Court of Appeal stated it is: "establishing minimum national standards to reduce greenhouse gas emissions." (para 77). In concurring reasons at the Ontario Court of Appeal, Justice Hoy found the pith and substance is: "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions" (para 166 and 175). And the minority found that the pith and substance was simply regulating greenhouse gas emissions. In addition to the Courts' deliberations, all parties have also had various formulations of what the pith and substance truly is and no one can quite seem to pin it down.

Next up, the Supreme Court of Canada will have a shot at defining the pith and substance. And this articulation matters because based on the articulation of the pith and substance is the determination of whether the matter properly falls within the scope of federal power. If the *Greenhouse Gas and Pollution Pricing Act* is held to be constitutional, the federal scheme will continue to apply in those provinces which do not have a substantially equivalent system. In British Columbia, the carbon tax which has been in place for years has already been held to be equivalent, so we will not see any on the ground changes here.

Finally, to add one more layer of complexity to this case, the Alberta government also referred a question regarding the constitutionality of the *Greenhouse Gas and Pollution Pricing Act* to the Alberta Court of Appeal. The Alberta Court found the federal carbon pricing legislation unconstitutional. That decision will be considered by the Supreme Court of Canada with the Ontario and Saskatchewan appeals, likely in June.

~ Olivia French

Riparian Areas Protection Regulation

Amendments to this Regulation, in force since November 1, 2019, have not only added "protection" to the title, but also a variety of detailed provisions, some of which that may affect local governments to which it applies.

The revisions clarify the role of local government in protecting fish habitat within certain areas on either side of a stream that provides fish habitat to protected fish. "Fish habitat" is now defined consistently with the federal *Fisheries Act:* it means "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". "Protected fish" is defined to include all life stages of salmonids, game fish, and fish that are listed in Schedules 1, 2 or 3 of the federal *Species at Risk Act*.

Local governments under the Regulation are still prohibited from approving a "riparian development", meaning a residential, commercial or industrial development that is proposed to occur in a "riparian assessment area", unless:

- the developer provides a copy of an authorization for the development from Fisheries and Oceans Canada under the *Fisheries Act* (in which case the Regulation does not apply); or

- the local government has received from provincial ministry of Forests, Lands, Natural Resource Operations and Rural Development (FLNRO) an assessment report by a qualified environmental professional (QEP) that has not expired (5 years after date a copy is provided by the Province).

The Province now has clear power to reject a QEP assessment report if the minister considers

the assessment was not carried out in accordance with technical manuals published by the minister; was not prepared according to Part 4 of the Regulation or was incomplete. Addressing deficiencies in a report may result in time delays that, in some cases, may affect local government plans as well as those of the developer.

Other provisions appear intended to formalize as regulation certain requirements and protocols for hardship variances, that have been applied in practice but, according to our Court of Appeal in *Yanke v. Salmon Arm,* only as guidelines and without the force of law. Section 11 (2) provides that a site (parcel or strata lot) is subject to "undue hardship" for the purposes of the Regulation if the site

- was created by subdivision in accordance with applicable laws,

- developer has sought and received a decision on every variance under the *Local Government Act* s. 542 (board of variance) or s. 498 (development variance permit) that would reduce the "legally restricted area" of the site; and
  - the "developable area" (i.e., *other* than the SPEA and the naturally and legally restricted areas) is less than the "allowable footprint" for the site.

The "allowable footprint" for such a site is established at subsection 11 (3):

- 30% of the site area, if the "area of human disturbance" is 70% or less of the site area;
- 40% of the site area, if the "area of human disturbance is greater than 70% of the site area.

Section 10 sets out the regulatory standard for riparian protection. This includes provisions as to how a site that is subject to undue hardship may meet the standard.

The Regulation continues to allow for repairs and non-structural alterations to buildings and structures within their existing footprints, as long as they are not damaged beyond 75 percent of their above-foundation value. It now also grandfathers some other "areas of human disturbance" to allow for maintenance, and, on sites subject to undue hardship, for some development within an allowable footprint.

Criteria for QEPs now include certification that the professional has completed, within the past 5 years, a provincially approved course of study relating to riparian assessments and reports. Whether a report is simple or detailed, it must identify the "streamside protection and

enhancement area (SPEA) in accordance with a technical manual published by FLNRO.

The local government must now require, as a condition of approval, that the development proceed as proposed in the assessment report and comply with any measures recommended in the report: section 5 (b). The Regulation is silent as to whether local government must also actively check for compliance. Unless the development is only to subdivide a parcel or strata lot, however, the QEP report itself must include a plan to monitor the development during construction.

Note that the *Fisheries Act* continues as prevailing federal law, applying to all works, undertaking or activity, that potentially may cause harmful alteration, disruption or destruction of fish habitat.

~ Colleen Burke

Nominal Land Transfers: Revisiting Prohibition against Assistance to Business

Municipalities in British Columbia have the capacity, rights, powers and privileges of a natural person of full capacity. In theory, that means that a municipality should be able to make any deal a natural person can. But, this broad power is subject to statutory limits, one of the most significant of which is that a municipality must not provide assistance to a business.

Section 25 of the *Community Charter* states that: "unless expressly authorized under this or another Act, a council must not provide a grant, benefit, advantage or other form of assistance to a business." This includes, among other things, disposing of land or improvements below market value.

This restriction has not limited the ability of municipalities to leverage their land base to advance socio-economic goals; and courts have generally been supportive of this. Consider the following examples:

- In *Nelson Citizen's Coalition v. Nelson (City),* (BC,1997), the City entered into an agreement with the developer committing (among other things) to build a dyke, build servicing infrastructure and transfer City lands to the developer for $1.00. In return, the developer committed to building a certain type of waterfront development, including an interpretive centre (delivered back to the City). The court said that the entire deal had to be viewed together – the agreement was an attempt to coordinate public objectives with private enterprise. It fit with the City's policy of encouraging economic development. As such, despite the nominal payment for the lands, there was no unauthorized assistance to business.

- In *Nowak v. Fort Erie (Town)* (ON, 2012), the Town also wished to redevelop its waterfront. It entered into a set of agreements with a developer whereby the Town would transfer to the developer some land (valued at over $1,600,000). There would be no cash payment for the land. But, the development would (in the Town's estimation) generate positive impacts for the community: substantial economic input, labour income and numerous full-time equivalent jobs during the construction phase. A community benefit agreement was struck setting out the works and public amenities that the developer would be obligated to build. Similarly, to *Nelson*,

the court found that there was no unauthorized "bonus" to the developer.

- In *Vincorp Financial Ltd. v. Oxford (County),* (ON, 2014), the County was working with a few adjacent communities and the provincial government to attract Toyota to build a new motor manufacturing plant. Toyota required property measuring at least 1,000 acres in size. The County acquired most of the lands, but one owner refused to sell. The County expropriated the lands and sold these lands to Toyota for expropriation value. Toyota entered into a set of agreements with the County promising to build the plant within a certain time, failing which the County could buy the land back at the price paid by Toyota. The owners of the expropriated lands challenged the expropriation (all the way to the Supreme Court of Canada) and lost. The lower court and the Ontario Court of Appeal both found that the expropriation was in pursuit of public interest and the net economic benefits to the County outweighed any difference between fair market value of the lands and their expropriated value. The Supreme Court of Canada refused to hear the appeal.

Based on the above, a nominal transfer of land is not likely to be "assistance to a business" if the municipality is getting tangible or intangible benefits in return.

Let's take a hypothetical scenario. A municipality wants to encourage the development of child-care facilities in the community. A developer approaches the municipality with a proposal whereby the municipality sells certain land to the developer at below market value; and the developer builds childcare spaces as part of the project. This would advance the municipality's socio-economic policy at the cost of selling land below fair market value, to a business. Based on the examples above, it is likely that the municipality would be able to make this deal.

But caution would be prudent when valuing and securing the benefits. In *Vincorp,* in return for the land, Toyota agreed to build the plant within a certain time, to certain specifications, and granted an option to purchase to the County (securing compliance). The courts have expressly found that the economic benefit of the Toyota plant was significant and one of a kind. In *Nelson*, the municipality acquired an interpretive centre in return for the land. And, in *Nowak*, a community benefit agreement valued and secured the developer's obligations.

While the courts have been deferential, it would be risky to assume that any inchoate benefit

would be enough to justify a nominal land transfer. If land is bargained for socio-economic benefits, a careful analysis of the deal would be prudent: what is the relative value of the benefits to the lands; what compels the developer to deliver these benefits; how can the municipality enforce the developer's compliance. If the deal is to proceed, a mix of agreements, covenants, options to purchase – and possibly partnering agreements – can be used to paper the transaction, secure the delivery of the benefits, and minimize the semblance of giving something for nothing.

~ Olga Rivkin

Addressing Environmental Contamination Issues in the Disposition of Property

Local governments frequently acquire or dispose of property as part of their natural person powers and municipal functions. Acquiring or disposing of property with potential or real environmental contamination issues may cause the local government to incur potential liability. It is important to be aware of legal obligations and potential liability for these issues.

Environmental contamination of land in British Columbia is governed by the *Environmental Management Act*, SBC 2003 c. 53, as amended (the "**Act**") and the Contaminated Sites Regulation, B.C. Reg. 375/96, as amended (the "**Regulation**"). Under the statutory regime established by the Act and the Regulation, a local government becomes a "responsible person" upon acquiring real property and is bound by all of the requirements of the Act for contaminated sites, subject to the obligations of the current and previous owners who were responsible for the contamination. The determination of obligations by responsible persons, including past and present owners of the property is fraught with uncertainty and local governments should not acquire or dispose of real property until such time as the status of any site contamination is confirmed and clean-up costs and responsibility for those costs is clearly established.

If site contamination is a possibility, the local government or another party with responsibility for the property should undertake a site investigation. A site investigation is the primary method used for gathering detailed information about potentially contaminated sites. The site investigation can be conducted without government involvement, but it should be carried out by experienced consultants. Under the Regulation, the Director of Waste Management at the Ministry of Environment can order a site investigation when prompted by a site profile (described in greater detail below) or by other information.

There are usually one or two stages to a site investigation, consisting of a preliminary investigation and if warranted, a more detailed investigation. A preliminary investigation involves searching existing records for information about a site, interviewing people who are or have been involved with the site and determining the general location and degree of any contamination. If the preliminary investigation suggests possible contamination, a more detailed investigation should be undertaken with the involvement of professionals who are able to determine the location, extent and impact of contamination. Information from this phase is usually sufficient to develop a remediation plan, or a human health and environmental risk assessment.

As part of the site investigation process, s. 40 of the Act imposes a general duty on an owner of land to prepare a site profile in prescribed circumstances when an owner knows or reasonably should know the land is or was used for an industrial or commercial activity that is listed in Schedule 2 of the Regulation. The prescribed circumstances for which a site profile must be completed and submitted are when land

is: 1) being decommissioned; 2) subject to foreclosure proceedings; 3) subject to local government applications or permits; or 4) being sold. A local government dealing with land in any of those circumstances will need to ensure that a site profile is prepared and provided in accordance with the Act.

Upon submission of the site profile, the site profile is assessed by the persons designated in the Regulation and then submitted to the director in accordance with s. 6 of the Regulation. Under s. 7 of the Regulation, the director reviews the site profile and may order a site investigation in prescribed circumstances if the director reasonably suspects on the basis of the site profile, or any other information, that the site may be contaminated or contain substances that may cause or threaten to cause adverse effects on human health or the environment. The order for a site investigation is made against an owner or operator of a site, at the owner's or operator's own expense, to undertake a preliminary site investigation or a detailed site investigation and to prepare a report of the investigation in accordance with the regulations and any applicable protocol.

After a site is investigated, the findings are analysed and compared with the environmental quality standards set out in the Regulation. The legislation categorizes standards using both numerical standards and risk-based standards. The numerical standards prescribe acceptable concentrations of contamination in soil, surface water, groundwater, vapour and sediments while the risk-based standards prescribe acceptable risk levels from exposure to contamination at the site. These standards are used to determine if the site is contaminated, when the site has been adequately cleaned up, when soil relocation is required and identify potential safety hazards.

Under s. 45 of the Act, once a determination is made that a site is contaminated, the Act designates “responsible persons” who are responsible for remediation of the site.

Responsible persons include current or previous owners or operators of the site; and persons who produced or transported a substance, and by contract or otherwise caused the substance to be

disposed of or handled or treated in a manner that caused the site to become contaminated. Under s. 47 of the Act, a responsible person is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site. Under s. 47(3), the "costs of remediation" means all costs of remediation and includes, without limitation, costs of preparing a site profile, costs of carrying out a site investigation and preparing a report,

legal and consultant costs associated with seeking contributions from other responsible persons, and fees imposed by a director, a municipality, an approving officer or the commission under Part 4 of the Act.

Under the current statutory regime for contaminated sites, the person that caused contamination is typically held responsible for cleaning it up under the principle of "polluter pays." Liability may be apportioned among responsible persons by a court in a legal action commenced under s. 47(5) or by an allocation panel under s. 49 of the Act. The BC Court of Appeal has stated that "the statutory objective is to require polluters to pay the cost of the clean-up of contamination from which they have benefitted in the past…. This is so even where their polluting activities had not been prohibited or had been authorized at the time they occurred." Notwithstanding the "polluter pays" principle, if the polluter is judgement proof, deceased, or the no longer exists, other current and past owners of a property may be held liable for remediating contamination.

If a local government is involved in the remediation of a contaminated site or contemplating the development, purchase or sale of contaminated property, a certificate of compliance ("**CoC**") should be obtained under s. 53 of the Act. Under s. 53(3), the director, in accordance with the regulations, may issue a certificate of compliance with respect to remediation of a contaminated site if the site has been remediated in accordance with numerical or risk- based standards prescribed in the Regulation or in accordance with an order, remediation plan or requirements under the Act or approved or imposed by the director. A CoC is based on the intended use for the contaminated site and another CoC may be required in circumstances where the use changes. A certificate of compliance is an effective means of preserving the value of a contaminated property that was remediated and may also exempt the responsible person from future responsibility for remediation of a contaminated site. Under s. 46(1)(m) of the Act, upon issuance of a CoC to a responsible person, the responsible person is no longer responsible for any future remediation of the contaminated site if the remediation is required because of a change of land use from the use for which the CoC was issued.

In addition to obtaining a CoC, a local government should also protect itself from liability by including release and indemnity provisions in the contract of purchase and sale or development agreement whereby the other party releases and indemnifies the local government for any issues related to site contamination. A covenant under s. 219 of the *Land Title Act* may also enhance protection from liability by prohibiting uses that may incur future liability. A local government should utilize all statutory and contractual tools at its disposal to minimize the risk of liability for site contamination.

~ Lindsay Parcells

Tools for Regulating Land and Buildings in Flood Hazard Areas

In British Columbia, the authority to regulate development and construction in flood hazard areas rests exclusively with local governments (the term 'flood hazard area' is used in its general sense to mean areas where a flooding hazard exists, whether or not the area is formally designated as a floodplain). While the provincial government played a role in designating floodplains and establishing conditions of subdivision approval for designated floodplain areas until 2003, the authority to do so was transferred to local governments through the *Flood Hazard Statues Amendment Act*.

Local governments' power to regulate flood hazard areas can be found in various provisions of the *Local Government Act* (*LGA*), *Land Title Act* (*LGA*), and *Community Charter*. This power is

articulated through the ability to place conditions on development permits, subdivision approvals, and construction permits, and the ability to adopt floodplain bylaws. There are significant overlaps between the tools available under different statutory provisions, which the following discussion will demonstrate, and governments may choose to leverage one or multiple statutory provisions to meet the same goal.

DPAs and development permits

The *LGA* provides in s. 488(1)(b) that local governments may designate development permit areas (DPA) in Official Community Plans for protection of development from hazardous conditions. Once a DPA is designated, a local government may prohibit the subdivision of land and construction of buildings within the DPA unless a development permit is obtained (s. 489). The development permit thus becomes an important tool to impose conditions on subdivision of or construction on lands in flood hazard areas.

As part of the development permit process in a flood hazard DPA, a local government may require the applicant to provide a report to assist the local government in determining what conditions or requirements it can impose under the development permit (s. 491(4)). Such a report is to be provided by the applicant at their own expense and is to be certified by a professional engineer with experience relevant to the applicable matter (s. 491(5)). The report is known, in practice, as 'Flood Assessment Reports' (FAR) and the professional engineer certifying the report is known as a Qualified Professional (QP). Engineers & Geoscientists British Columbia has published a guideline, 'Legislated Flood Assessments in a Changing Climate in BC,' which provides a useful overview of the duties of local governments, applicants, and QPs in the context of the FAR.
The conditions recommended by the QP may be adopted by the local government as conditions precedent to approval of a development permit. Typically, such conditions pertain to the protection of structures against flooding, such as setting back the building from the watercourse and elevating floors above a certain level.

Subdivision approval

Section 86(d) of the *LTA* authorizes approving officers to establish certain conditions for consent if the land proposed to be subdivided could reasonable be expected to be subject to flooding. These conditions could be either or both of the following: (1) the property owner submitting a report by a QP certifying that the land may be used safely for the intended use, and (2) the property owner entering into a covenant under s.219 of the *LTA*. Typically, such covenants

pertain to structure setbacks and floor elevations.

In rural subdivisions where an approving officer has not been designated by the regional district, a provincial Approving Officer appointed by the Ministry of Transportation and Infrastructure would act as the approving officer under s. 77(2) of the *LTA*.

Along similar lines as the *LTA*'s subdivision provisions, the *Bare Land Strata Regulation* (*BLSR*) provides under s. 3(e) that an approving officer considering an application for a bare land strata plan may refuse to approve the plan if the land has inadequate drainage or is subject to flooding. For such lands, the approving officer may premise approval on the condition that the owner-developer enter a restrictive covenant under s. 182 of the *LTA*.

Building permits by municipalities

While municipalities are fully entitled to use the powers discussed above, s. 56(2) of the *Community Charter* further provides that if a municipal building inspector considers that the proposed construction would be on land that is subject to flooding, the building inspector may require the property owner to submit a report certified by a QP that the land may be used safely for the use intended. Further, the building permit may be conditioned on the owner entering into a covenant under s.219 of the *LTA* to use the land only in the manner certified by the QP and to reimburse the municipality for any expenses that may be incurred by the municipality as a result of a breach of the covenant (s. 56(5)).

Floodplain bylaw

Another regulatory tool is the floodplain bylaw provision of s. 524(2) of the *LGA* which allows local governments to designate land as floodplain (before 2003, this power was reserved with the Province). Once lands are so designated, the local government can specify a flood level, require buildings to have floors elevated higher than the flood level, and require structures to be set back from the watercourse (s. 524(3)).

The minimum elevation at which building floors could be established is known, in practice, as the Flood Construction Level (FCL). Under s.524(6), a local government can grant an exemption from FCL requirements as long as the exemption is consistent with the Flood Hazard Area Land Use Management Guidelines issued by the Province and is supported by a QP's certification that the land may be used safely for the use intended. As a condition for such an exemption, a local government may require that the property owner enter into a covenant under s.219 of the *LTA*.

~ Rahul Ranade

Prayers at Council/Board Meetings and the Duty of Neutrality

We have recently had multiple requests for advice regarding the practice of starting a meeting with a prayer.

Some municipalities have been receiving emails from an organization stating that:

a) in 2015, the Supreme Court of Canada ruled that it was unconstitutional to begin a municipal council session with a sectarian prayer as it violated the state's duty of religious neutrality,

b) the organization had reviewed minutes of a Council meeting at which a religious representative provided an invocation or prayer, and

c) the organization asked for confirmation that the Council would ensure future meetings

complied with the Supreme Court of Canada's ruling.

The email refers to *Mouvement laïque québécois v. Saguenay (City)* 2015 SCC 16.

In that case the Supreme Court of Canada heard an appeal regarding the municipal council of the City of Saguenay's practice of starting each public meeting with the mayor making the sign of the cross while saying "in the name of the Father, the Son and the Holy Spirit" before and after reciting a prayer. Other councillors and City officials would cross themselves at the beginning and end of the prayer as well. In one of the council chambers there was a Sacred Heart statue. In another, there was a crucifix hanging on the wall.

A resident felt uncomfortable with the practice and asked the mayor to stop. The mayor refused, and so the resident invoked Quebec's human rights complaint process, asking that the recitation of the prayer cease and that all religious symbols be removed from council chambers.

Quebec's human rights tribunal found that the prayer was religious, and by reciting it, the City was showing a preference for one religion to the detriment of others. This was a breach of the state's duty of neutrality, as well as a discriminatory interference with the complainant's freedom of conscience and religion. The tribunal granted the relief sought and awarded $30,000 in damages to the complainant.

The Quebec Court of Appeal disagreed: in its view the prayer expressed universal values that could not be identified with any particular religion, the religious symbols were devoid of religious connotation and were works of art.

The Supreme Court of Canada overturned the Court of Appeal and upheld the Tribunal's decision. It ruled that reciting a prayer at council meetings was above all else a use by the council of public powers to manifest and profess one religion to the exclusion of all others. Reciting the prayer turned the meetings into a preferential space for people with theistic beliefs, who could participate in municipal democracy in an environment favourable to the expression of their beliefs. Although non-believers could also participate, the price for doing so was isolation, exclusion and stigmatization.

The Supreme Court articulated the following key principles with respect to what is colloquially known as the separation of church and state:

a) A state authority cannot make use of its powers to promote or impose a religious belief,

b) The state has a duty of religious neutrality: it must neither favour nor hinder any particular belief, or non-belief,

c) A neutral public space free is one that is free from coercion, pressure and judgment on the part of public authorities in matters of spirituality,

d) The state is required to encourage everyone to participate freely in public life, regardless of their beliefs: the state may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others, and

e) Religious expression under the guise of cultural or historical reality or heritage breaches the duty of neutrality.

A breach of the duty of neutrality is established by proving that the state is professing, adopting or favouring one belief to the exclusion of all others in a manner that resulted in interference with the complainant's freedom of conscience and religion.

Given the Supreme Court's ruling and the principles articulated above, and in particular, that religious expression cannot be justified under the guise of cultural or historical reality or heritage, local governments should consider whether they are engaging in practices that, although customary, might breach their duty of neutrality. We suggest a review of existing policies and practices not just with respect to prayers at the start of meetings, but also with respect to holiday decorations and use of funds to support events associated with only one religious group, to ensure that local governments are complying with their duty of neutrality. The full decision is available at: https://www.canlii.org/en/ca/scc/doc/2015/2015scc16/2015scc16.html?resultIndex=1

~ Sara Dubinsky

The Clock is Ticking for Land Use Contracts

It seemed like a long time into the future when back in 2014 the Provincial Government enacted changes to part 14 of the Local Government Act providing a time horizon for replacement of land use contracts ("LUK"). At the time it was easy to ignore a potential issue which was not likely to cause a problem or become a priority, in view of the 10-year notice of termination.

After all, if a LUK had another 10 years of life it was not an obvious immediate priority and indeed many local governments continued to ignore the death sentence for this instrument and continue to utilize existing land use contracts as the tool of choice for some projects where there was an existing LUK that could be amended.

The *Local Government Act* in section 546 contains a comprehensive code for amendment including modification, varying or discharging existing land use contracts with notification and public hearing process requirements that mirror the typical rezoning process. What is perhaps unique or interesting about this section is that the bylaw amendment is to be made with the agreement of the local government and the owner of any parcel described as being covered by the amendment, which reflects the contractual nature of this land use control instrument.

The LUK was a popular tool in many local government jurisdictions and widely used to enact or replace typical zoning provisions in development and the contractual nature of the instrument allowed for a more robust exercise of authority on zoning matters, including perhaps acting as a precursor to the phased development agreement with respect to the provision of amenities .

The proof of the popularity is evidenced by the fact that the authority for these instruments was repealed in the *Municipal Amendment Act, 1977* and it took over 35 years for the Province to enact legislation compelling the phase out over a ten-year period!

When the legislation was changed it stipulated that land use contracts would cease to have any effect in 2024 and compelled replacement in the following terms:

Termination of all land use contracts in 2024

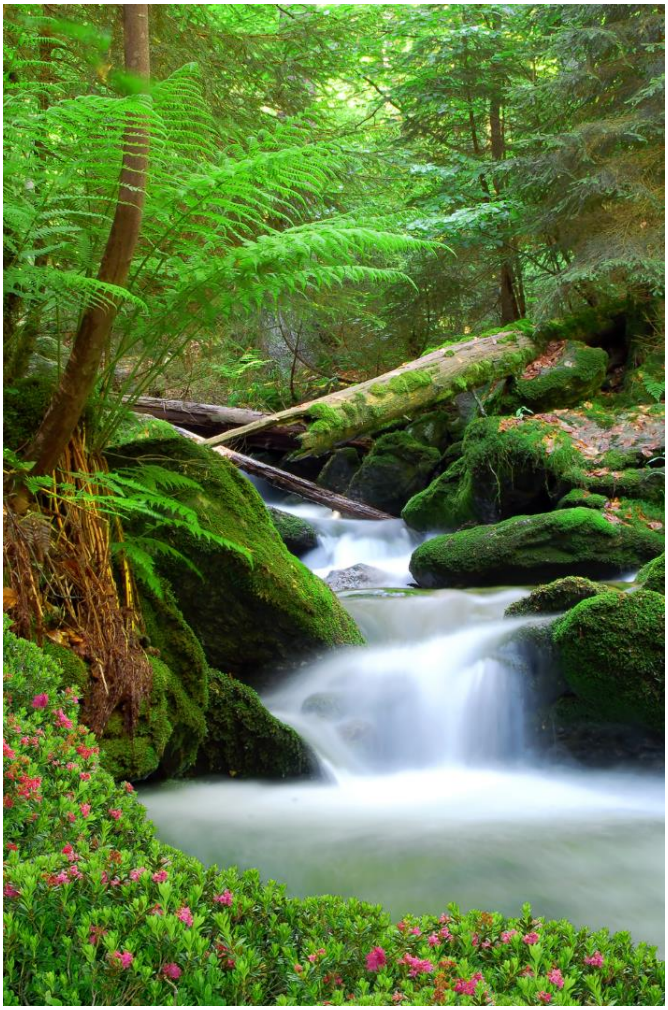
> 547 (1) All land use contracts are terminated on June 30, 2024.
>
> (2)A local government that has jurisdiction over land subject to a land use contract must, by June 30, 2022, adopt a zoning bylaw that will apply to the land on June 30, 2024.

While many local governments have created a business plan for complying with this legislative provision, others have faced the typical issues in planning and development departments in local government of the shifting sands of council priorities where longer term projects are left to linger until time is available .

This brief article is intended simply as a caution that the clock is ticking and this is a matter which must be addressed before too long and the 2 years or so left will slip by quickly.

A particular concern relates to the fact that if there is any controversy or difficulty the last minute compliance with this legislation may be more problematic given that it will occur in an election year and so it would be prudent I think to try to get these matters addressed or at least prioritized and a plan put in place before too long.

The starting point is a simple one - to just identify what land use contracts exist in your jurisdiction and this may of course be slightly more complex in the case of boundary extensions or adjustments where inherited land use contracts may exist.



Thereafter once the issues are identified, it becomes a question of determining how to replace a land use contract.

Where, as in most cases, the lands have completely been built out it will simply be a question of identifying how to rezone these lands and whether there is an existing zone which can fit the project with or without parcel specific variations as are permitted or if some form of a comprehensive development zone will be necessary to spot zone these areas .

In either instance consideration will often have to be given to whether lawful non-conforming uses will be created through enactment of zoning bylaws to replace the LUK.

Where this might become even more difficult is where lands have not been built out and the land use contract remains the provision under which lands over time are being developed.

This will create the twin issues of rezoning the portion of the lands which have been developed and turning the mind of the planners to how to create an amendment to the zoning bylaw to reflect the future build out of aspects of the project that have not been completed .

One particularly complex aspect of this will be identifying elements of the LUK which go beyond the extent of a local government's zoning authority under section 479 of the Local Government Act and trying to determine how that may be addressed, perhaps through some form of covenants or other instruments.

Again the sooner we can advance these types of projects for staff consideration the better because the impending deadline compelling local governments to enact a bylaw may adversely impact the ordinary form of negotiation or discussion with developers which can lead to the voluntary contribution of amenities, to address these elements.

In the absence of an agreement with a developer/owner, consideration may have to be given to some form of "soft" down zoning to ensure that there is an ongoing basis to negotiate and obtain those elements of amenity contributions which have been embedded in the historical land use regulations, but which will disappear in 2022.

It should also be noted that there is no obligation to wait out this deadline as section 548 of the *Local Government Act* includes a process for early termination of a LUK that stipulates that a bylaw terminating a LUK may come into force from at least one year after the date of adoption but not later than June 30, 2024.

The legislation also sets out notice and land title office filing requirements with respect to the termination of a LUK.

None of these issues are insurmountable, but they will take time, they will compete for staff resources if not perceived to be an imminent need, and so may ultimately create problems if not resolved prior to the 2022 election year.

~ Chris Murdy

The Structure of Contracts

Although the structural elements of an agreement are less important than its substance, understanding formal elements can help a reader understand an agreement's substance. We receive questions about different structural components of agreements, and in response have prepared this very brief guide to distinguishing three structural elements that may appear to be similar.

Perhaps the most important takeaway is that structure alone does not create an enforceable contract. This can be deceiving because a document can *look* like an agreement and include all the structural elements identified below, and yet not be legally binding. Conversely, even a verbal agreement can be a legally binding contract despite having none of these structural elements set out in writing. The structure of an agreement matters because it impacts whether the agreement's substance is clearly communicated or not, but—in the words of a wise colleague—the key is to "never let the tail wag the dog".

With that background, here are some common structural elements of an agreement:

Recitals

Identification: recitals can often be spotted near the beginning of an agreement after the names of the parties. This section generally begins with the word 'background' or 'whereas', and then the recitals follow in a list of lettered sentences (e.g., "A. The…").

Purpose: recitals provide background information. They do not establish legal obligations or rights. Enforceable terms should not be in the recitals.

If someone found a physical copy of an agreement lying on the street and knew absolutely nothing about it, the recitals should give them basic background information such as who the parties are (e.g. "x is a local government…") and why they decided to enter into a contract (e.g. "x wishes to purchase…").

During litigation about an agreement, courts may use recitals to help them interpret contracts. In this way, recitals may impact the legal obligations or rights of the parties.

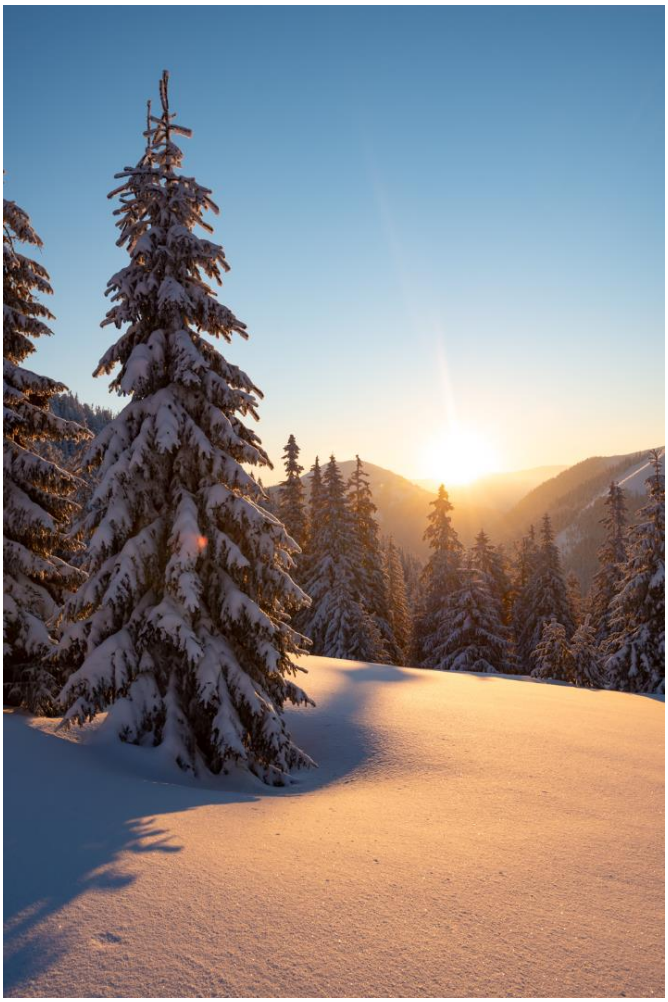
Body

Identification: the body of an agreement is usually introduced by a line stating, "the parties agree as follows". The space between this introductory line and the signatures of the parties is the body of the agreement.

Purpose: the body of the agreement is the core of the agreement. It establishes rights and obligations of the parties, as well as other substantive provisions that the parties have agreed to.

Attachments

Identification: attachments are found after the signatures of the parties. Each attachment will generally have a title (e.g., "Schedule A") which makes it easy to identify. The body of the agreement must refer to an attachment in order to incorporate it into the agreement.



Purpose: whether to include material in an attachment instead of the main body of the agreement is a strategic decision. Unlike recitals, attachments may contain enforceable provisions. In addition, attachments may be used to provide a reference copy of a stand-alone document that is relevant to the agreement (such as a plan, a *Land Title Act* form, or a different agreement).

Conclusion

In addition to these three structural elements, agreements have other standard structural elements such as the title, names of parties, and signature line. Different types of agreements may require unique structural features. The

overriding concern is always whether the structure serves the substance of the agreement.

~ Kate Gotziaman

Meetings Under COVID-19 Order M83

M083 states that municipal councils and regional district boards are not required to allow the public to attend open meetings.

M083 also enables municipal councils and regional district boards to conduct meetings by electronic means, whether their procedure bylaws contemplate this process.

Lastly, M083 enables municipalities and regional districts to adopt bylaws on the same day they receive third reading. Regional districts normally require 2/3 of the votes cast to adopt the bylaw on the same day. Under M083, they only require a majority of votes cast.

M083 applies to meetings of municipal councils, regional district boards, the Vancouver Council and their respective committees or bodies. It does not apply to meetings of local improvement districts.

M083 also does not address public hearings required in connection with zoning bylaws. We are not aware of any current order or directive in respect to conducting public hearings.

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The topics are:

- Conflict of Interest
- Roles of Local Government Officials
- Personal Liability
- Land Use and Hearings
- Cannabis Regulation
- Workplace Policies

The videos are located halfway down the landing page, after "PUBLICATIONS" and before "SAMPLE PROJECTS". The viewer need only click on the desired title and play the video.

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