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LAW LETTER

In this issue

Local Government Procurement: When is Sole Sourcing Acceptable?

Procurement of goods and services by local governments is usually carried out through public tenders or proposal calls, which offers better value for money and transparency in procurement. However, there are situations where it may be in the interests of a local government to purchase from a vendor (commonly referred to as 'sole sourcing'). Unless such a situation falls within a narrow set of exceptions, sole sourcing could violate procurement law and result in monetary penalties being imposed on the local government. This article discusses the considerations that a local government should bear in mind when deciding whether to sole source a procurement.

The legal obligation for local governments to use public procurement arises from trade agreements entered by the Province of British Columbia and Canada. Perhaps surprising to some readers, there is no provincial statute in British Columbia which obligates local governments to use public tendering or proposals, nor does the case law require it. Aside from external obligations, some local governments may have internal policies to guide procurement and procurers should see if any such policy exists in their organization.

The trade agreements relevant here are the Canadian Free Trade Agreement ('CFTA') and the New West Partnership Trade Agreement ('NWPTA'). The CFTA is a pan-Canadian trade agreement entered into among all provinces, territories and Canada to remove barriers to domestic trade, investment and labour mobility. The NWPTA is a regional agreement among British Columbia, Alberta, Saskatchewan and Manitoba with essentially the same goals as the CFTA. Dispute resolution bodies created under either agreement have the power to issue monetary penalties against parties in violation of the agreements. Local governments are expressly covered by the obligations of both CFTA and NWPTA.

It should be noted that the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) also applies to most Canadian municipalities. However, the monetary

thresholds at which CETA is engaged are significantly higher than the thresholds provided in domestic trade agreements. As a practical matter, this article is limited to discussion of the domestic trade agreements, but local government procurers should familiarize themselves with CETA provisions related to procurement.

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To this discussion, the most important provision in both the CFTA and NWPTA is the requirement that government procurement should be open. "Open procurement" means that the invitation for proposals or tenders should be published electronically such that any qualified vendor can have an opportunity to respond. By its very nature, sole sourcing is not open procurement since it does not allow equal opportunities to all potential vendors. Thus, sole sourcing is not generally an acceptable form of procurement under CFTA or NWPTA. However, both agreements provide a narrow set of exclusions in which open procurement is not required. It is these exclusions (discussed below) that you should consider in deciding whether to sole source a procurement.

A procurement is covered by CFTA if the amount involved is $100,000 or greater for goods or services, or $250,000 greater for construction. The thresholds for NWPTA are different; a procurement is covered if the amount involved is $75,000 or greater for goods or services, or $200,000 or greater for construction. Therefore, your first question should be whether the value of the procurement is estimated to be greater than the threshold amounts. If not, the procurement can be sole sourced without either trade agreement being engaged. Note that both agreements provide criteria for calculation of threshold amounts.

Additionally, both agreements provide limited exclusions based on the nature or circumstances of procurement. For example, procurement related to Aboriginal peoples and procurement of certain financial, legal, social and health services are excluded from coverage of the agreements. Situations where only one particular supplier can provide goods or services (e.g., a contract for spare parts for a previously purchased product which only one vendor produces) are exempt, and so are situations where an unforeseen urgency makes it unreasonable to employ public bidding (e.g., emergency road repair following a landslide). Purchasing from governmental enterprises and not-for-profit organizations is also an exempt form of procurement. The examples noted here only represent prominent exemptions and are not meant to be an exhaustive list. Local government purchasers should review all exclusions in CFTA and NWPTA to determine if the goods or services they plan to procure are excluded from open procurement rules.

In sum, the general principle applicable to procurement by local governments is that procurement should be through an open process. Procurement can be sole sourced only when the estimated value of procurement is below the applicable thresholds or when the nature or circumstances of procurement fall under one of the exclusions under the agreements. In determining whether sole sourcing is appropriate for a procurement, local government procurers should look at the monetary thresholds and exclusions under CFTA and NWPTA.

~ Rahul Ranade

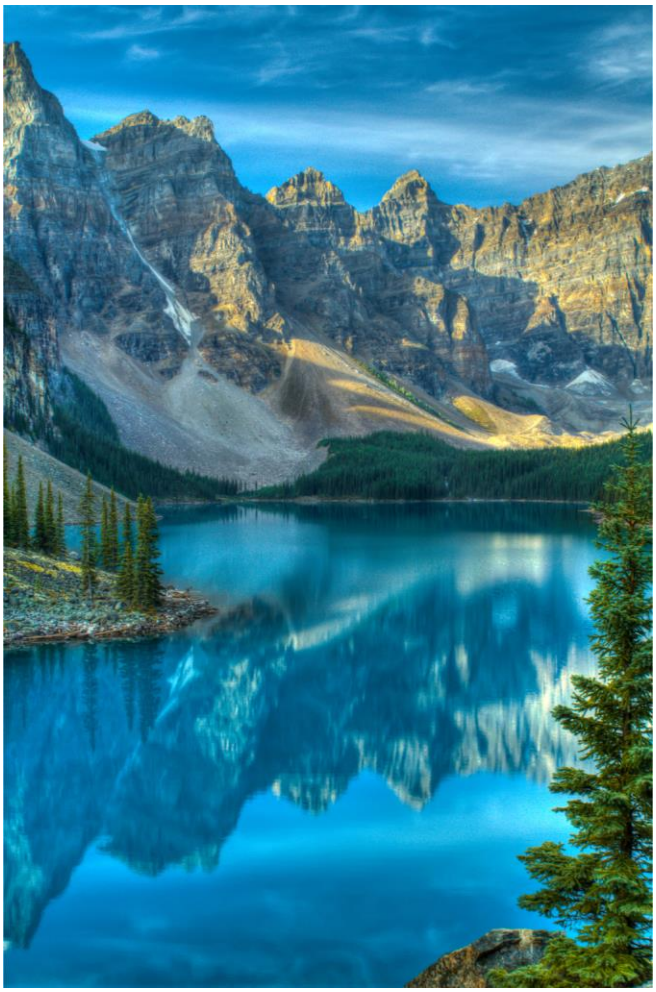
Trust Variation: Local Governments Can Consider the Best Interests of the Municipality

Section 184 of the *Community Charter* provides local governments with a special mechanism to vary trusts that are no longer in the best interests of a municipality. The court recently released a decision applying section 184 in a case we argued on behalf of the District of West Vancouver. Prior to *West Vancouver*, courts had not considered or applied section 184. *West Vancouver* establishes that, thanks to section 184, municipal trustees have greater flexibility than most other trustees to vary the terms of their trusts—including park land trusts

A trust is a relationship in which a party (the trustee) agrees to manage property that benefits another party (the beneficiary) in accordance with terms established by the party who set up the trust (the settlor).

In some cases, the "beneficiary" is a charitable *purpose* rather than a specific party—these are called charitable purpose trusts. Local governments are often trustees of charitable purpose trusts, and *West Vancouver* is about a charitable purpose trust.

Specifically, the District is a trustee of a property that was given to it to be used for park purposes. Decades after the property was given to the District, the District decided that the



community's interests would be better served by selling a portion of the property and using this income to purchase parkland in a more accessible location, while still maintaining most of the original park.

Using section 184, the court varied the terms of the trust to allow the District to carry out this plan. In deciding to exercise its discretion to allow the variation, the court accepted that the variation would serve the community by improving the allocation of resources:

> *[T]he District has presented detailed and cogent evidence that the best interests of the municipality have been considered following extensive consultation. . . The underlying rationale for the District's application is that the resources of the trust could be better allocated elsewhere in the park system by prioritizing the development of a waterfront park rather than maintaining the entirety of the neighbourhood park that currently exists.*

This is significant because under other trust variation mechanisms the court cannot vary the terms of a trust to *better* allocate resources—it can generally only vary the terms of the trust if the existing terms are impossible or impractical to implement. Essentially: if it is not very broken, do not fix it.

There are good reasons for this strict approach generally. If potential donors of park land subject to a trust are concerned that their wishes will not be followed strictly, they may be less likely to set up charitable trusts. However, there are also compelling reasons to allow local governments slightly more flexibility than the average trustee. As the court explained in *West Vancouver*, local governments must consider their obligations to the community as a whole:

> *The role of a municipality as a trustee is somewhat different than that of many other trustees, as the municipality by its very nature is tasked with representing the best interests of its community. . . There are compelling public policy grounds to allow a municipality to consider the best interests of its community in managing trust assets under its charge.*

When seeking to vary a trust that is no longer in the best interests of the municipality, local government trustees must carefully respect the intent of the original settlor as much as possible—in part to avoid deterring future donors. In *West Vancouver*, the court found that the District struck an appropriate balance between its obligations to the settlor and the community as a whole:

> *[I]n the circumstances of this case. . .a reasonably informed person would not be unduly deterred from leaving a gift in trust to a municipality if the proposed variation were ordered.*

While applying to vary a trust under section 184 has been an option for local governments for some time, without any case law it was difficult to know how a court would treat such an application. *West Vancouver* clarifies the test for trust variation under section 184 and confirms that it may be used to ensure the terms of trusts held by local governments are truly in the community's best interests.

~ Kate Gotziaman

Downzoning Powers Upheld

(a) Introduction

In *G.S.R Capital Group Inc. v The City of White Rock*, the Supreme Court of British Columbia upheld the City of White Rock's (the "City") decision to withhold a building permit for a condominium tower despite already granting a development permit for the property. The court applied the new approach to judicial review—established by the recent Supreme Court of Canada decision of *Canada (Minister of Citizenship and Immigration) v Vavilov*—and determined that the 'reasonableness' standard was the appropriate standard to review the City's decisions in this case.

(b) Discussion of the GSR case

In September 2017, the City amended its OCP and zoning bylaws to create a "Lower Town Mixed Use" area. G.S.R owned property in this area. The City issued a development permit to G.S.R for the construction of a 30 unit, 12-storey residential building, which complied with the new zoning requirements. On November 7, 2018,

with an electoral "mandate" to consider reducing or eliminating towers in key areas, the newly elected Council passed a resolution to pursue further OCP and zoning amendments for G.S.R.'s property that would reduce the permitted density and reduce the permitted height to 6 stories. Under section 463 of the *Local Government Act (LGA)* a local government can withhold a building permit for 30 days if there is a conflict between the proposed development and an official community plan or zoning bylaw that is under preparation. Section 463 does not apply unless the local government has passed a resolution to begin the preparation of the bylaws at least 7 days before the building permit was submitted. A letter was sent to G.S.R advising them of the 7-day window to submit a building application. However, G.S.R was not able to complete the application within this timeframe.

When G.S.R submitted the building permit application, the City exercised their right to withhold the permit for 30 days under section 463 of the *LGA*. The City ended up adopting the amended OCP and zoning bylaws and decided that G.S.R would now have to comply with the new requirements.

G.S.R brought the decision for review under section 623 of the *LGA* and section 2(2) of the *JRPA.* G.S.R claimed that the court should apply the standard of correctness in reviewing the City's decision for two reasons. First, section 623 of the *LGA* allows local government bylaws to be challenged in court and G.S.R. argued this should be considered an appeal mechanism that would require the court to review the decision on a correctness standard.

Second, G.S.R. argued that some of the City's decisions under review involved jurisdictional questions that pre-*Vavilov* case law established was reviewable on a correctness standard. G.S.R. submitted that *Vavilov* did not change this case law.

(c) Decision and Implications

The Honourable Madam Justice Forth delivered the decision, which upheld the City's refusal of the building permit. The court affirmed that the standard of reasonableness is the correct

standard to review the City's decision and none of the exceptions to this standard were applicable. The court clarified that while section 623 of the *LGA* does explicitly provide a procedure for local government decisions to be *reviewed* in court, it does not actually provide a right to *appeal* the decision. Appeals are brought to a court to challenge the decision. A review generally focuses on the process leading up to the decision, not the decision itself. Section 623 only recognizes that all local government decisions can be reviewed in court and serves the

same function as section 2(2) of the *JRPA.* The first exception to the standard of reasonableness does not apply. In addition, the court found *Vavilov* did change the previous case law on the appropriate standard of review for jurisdictional questions.

After resolving the applicable standard, the court applied the reasonableness standard to the case. The Court found the City's decision to withhold the building permit in consideration of the proposed bylaw amendments satisfied the reasonable standard. The City exercised section 463 of the *LGA* in response to public concerns regarding the permitted density. The bylaws were found to be *under preparation* in compliance with section 463*,* as work on the bylaws started immediately following the November 7 resolution.

The City also met the requirements of procedural fairness. This requires decisions to be made using a fair and open procedure, providing an opportunity for those impacted by the decision to give their input. Throughout the process, G.S.R had opportunities to attend council meetings, submit letters or video submissions to express their concerns.

The City in no way acted in bad faith in withholding the building permit. Rather they acted to pursue the public interest using the legislative tools available to them. Lastly, the court rejected G.S.R.'s claim that the proposed development was considered a non-conforming use under section 528 of the *LGA.* Section 528 allows for the continuation of land uses that do not comply with land use regulation bylaws if the use predates the adoption of the bylaw. Section 528 requires that the building either existed prior to the adoption of the bylaw or was appropriately permitted and under construction. Since G.S.R had not received a building permit nor started construction this was not applicable.

G.S.R. has applied for leave to appeal to the BC Court of Appeal. Stay tuned.

- Janae Enns

Leasing Issues

A local government likely does not require elector approval to lease its property for a term of more than 5 years, unless the lease expressly provides for a capital expenditure by the local government during the term of the lease (for example, to add a new elevator during the term).

Local governments often enter leases with terms greater than 5 years for practical reasons such as financing and certainty. These leases should provide expressly that the lease does not impose liabilities of a capital nature, and the document should be reviewed carefully to ensure there is no capital liability incurred if the term exceeds 5 years, including with extensions or renewals.

Although section 175(2) of the *Community Charter* requires elector approval to take on liabilities under an agreement whose term is greater than 5 years, sections 6 and 7 of the *Municipal Liabilities Regulation* (the "Regulation") modify this. Section 6 only requires elector approval under s. 175(2) for "liabilities of a capital nature" and loan guarantees. Section 7 further exempts agreements that do not raise the Town's liability servicing costs over a prescribed threshold. Either of these will exempt a lease beyond 5 years lease from elector approval.

A lease will not normally be of a capital nature. While not defined, 'liabilities of a capital nature' generally refers to liabilities used to fund a municipality's tangible capital assets (e.g. purchase of equipment or building improvements). Further, a lease will not generally add to liability servicing costs under s. 7 of the Regulation and therefore fall within the approval free liability zone. This will depend on the specific terms of any lease, however, and we

recommend confirmation in each case that the terms of a contemplated lease do not trigger the elector approval requirement under section 175(2).

A lease of land is a 'disposition' of land that will trigger notice requirements under s. 26 of the *Community Charter*. Notice under s. 26 of the *Community Charter* is required for a renewal term. Section 26(3)(c) requires the notice include "if applicable, the term of the proposed disposition". If the original notice of disposition stated something like "a term of X years, with an option to renew for Y additional years" then an additional notice for the renewal would not be needed. If the original notice did not clearly provide notice of a renewal term, then the safest approach would be to provide notice of the renewal.

Many local government lease templates do not have adequate provisions for addressing environmental matters, indemnification of the local government, insurance obligations of the tenant, or dispute resolution. These issues are significant in any matter involving a commercial tenant, given the potential for loss, injury, or environmental contamination.

~ Will Pollitt

COVID-19 Assumption of Risk Forms

Many local governments are considering assumption of risk forms instead of or in addition to waivers. These assumption of risk forms are often based on MIABC precedents. MIABC has advised these are not intended to function as binding waivers of participants', or participating children's, legal rights. Waivers require specific language that is not present in these forms. These forms are intended to show participants are aware of potential risks regarding COVID-19 transmission and agree to take part despite those risks. They will not provide the same level of legal risk reduction as waivers.

These forms are intended to strike a balance between mitigating legal liability and not discouraging participation in services through legally imposing waivers. Assumption of risk forms will often be a suitable balance. In reaching this conclusion, the following would

tend to minimize legal risk regarding COVID-19 and in some cases reduce the need for waivers:

- The prevalence of community COVID-19 transmission in BC is moderate now.
- Many local governments are developing policies and procedures to minimize transmission risks that would

tend to show they met the standard of care.

- Proving a negligent act or omission of the local government caused a person to contract COVID-19 could be legally and factually challenging.

A local government may want to consider developing waivers if the above points change, if a local government is aware of a specific situation where participants are at an elevated and significant risk of COVID-19 transmission, or if there is a group of participants for whom COVID-19 would pose elevated risks (e.g. the elderly or immunocompromised).

Injurious Affection: Unreasonable Interference Test

The British Columbia Court of Appeal in *Gautam v. South Coast British Columbia Transportation Authority* considered TransLink's appeal of a decision regarding the construction of TransLink's Canada Line along Cambie Street in Vancouver. Property owners in 2008 brough a class action for injurious affection under s. 41 of the *Expropriation Act*. The class was certified in 2010 and certain issues common to the class were heard in 2015 (the "2015 Judgment").

Three plaintiffs from the class then applied for damages by way of summary trial. The Supreme Court found that neither of three claims were time-barred and that each of the three plaintiffs had proven losses for various amounts. TransLink appealed.

The BCCA found that the trial judge erred in his interpretation of the limitation period under s. 42(1) of the *Expropriation Act* and in his analysis of unreasonable interference. A new trial was ordered for two plaintiffs, while the third plaintiff's action was found to be time-barred.

Limitation period

Under s. 42 of the *Expropriation Act*, a claim for injurious affection may only be made within one year of the time that damage was sustained or became known to the person making the claim.

The Court first concluded that, following the established law on the application of limitation periods to continuing civil wrongs, the plaintiffs were only entitled to claim damages where those damages were suffered within one year of the filing of the claim. The trial judge had found that the one-year period under s. 42(1) does not begin to run until all interference with the land has ceased and no further damage is being suffered. Thus, the Court found that the trial judge had misinterpreted how the limitation period operates.

Based on this analysis, the Court found that the action of one of the plaintiffs was time-barred since all his damages were sustained more than a year before the action was filed.

> ***"While substantial interference is one that is more than slight or trifling, unreasonable interference is one in which, considering all the circumstances, it is unreasonable to expect the claimant to bear the interference without compensation."***

Unreasonable interference

The Court noted that the applicable principles were those set out by the SCC in *Antrim Truck Centre Ltd. v. Ontario (Transportation)* under which 'substantial interference' and 'unreasonable interference' are conceptually distinct and are to be considered separately. While substantial interference is one that is more than slight or trifling, unreasonable interference is one in which, considering all the circumstances, it is unreasonable to expect the claimant to bear the interference without

compensation. A two-step analysis is followed to evaluate each of these concepts.
The Court found that the first step of the analysis had been properly performed in the 2015 Judgment where the court had found that the interference was substantial. The question of whether it was unreasonable was left for a later trial (the judgment from which was now under review). However, the Court found, the reasonableness analysis was never done in the decision under review. The judge had only found that, in general, the construction of the Canada Line caused a significant and prolonged interference for all businesses in the area. This was not sufficient; the judge should have assessed the unique circumstances of each business and arrived at a specific finding on when the unreasonable interference began and ended for each plaintiff. That was a critical omission.

Kennel Business Licence Refusal Upheld

In *Hamilton v. Prince George*, the BC Supreme Court found a dog breeding business could be deemed to be a "kennel" for purposes of a business licence if the characteristics of the business meet the dictionary definition of a "kennel."

This case involved a judicial review that arose out of the City's refusal to grant the applicant a business licence for their dog-breeding business. Upon reconsideration of staff's decision to deny the licence, Council upheld it. It was Council's reconsideration decision that was the subject of the review.

The owner carried out breeding of dogs in their residential property since 1998 without a business licence. At the time the business was started, the governing zoning regime was the 1980 Zoning Bylaw. The 1980 bylaw did not expressly address dog-breeding or kennels in the residential zone but provided that any allowable use "shall not generate…noise…beyond what normally occurs in the applicable zoning district." Further, the bylaws provided that

kennels were allowed in a rural residential zone (which was not the owner's zone). In 2007, a new zoning bylaw expressly prohibited dog breeding in the owner's zone.

The City received complaints about the property in 2018 and the owner was served a notice of bylaw violation. However, an adjudicator found in the owner's favour. Subsequently, the owner tried to obtain a business licence unsuccessfully in 2018 and 2019. The 2019 application was denied on grounds that the use was not allowed per the 2007 bylaw. The owner applied for reconsideration on grounds that her use was a lawful non-conforming use since before 2007. The Council upheld the denial.

On judicial review, the Court found Council had met the duty of procedural fairness. As to substantive review, the key issue was whether Council had unreasonably failed to deem the business a legal non-conforming use. The City argued that since 'kennels were expressly allowed in another zone, it meant that they were not allowed in the owner's zone. The owner argued that the dog-breeding business was not a kennel under the dictionary definition of the word prevalent at the time of the 1980 bylaw. No party provided a definition from 1980, but the Court did assess the dictionary meaning as far back as 1995 and found no basis to challenge the reasonableness of Council's interpretation. Therefore, the Court found, the use was not conforming even under the 1980 bylaws and the Council's decision was reasonable.

Private Agreement Affecting Public Property Not Subject to Judicial Review

The Ontario Supreme Court has held that a media company's decision to remove offensive bus shelter ads and the City's refusal to compel the reposting of the ads under its lease contract were not subject to judicial review.

People for Ethical Treatment of Animals, Inc. ("PETA") placed advertisements on four bus shelters in Toronto targeting the coat manufacturer Canada Goose. The ads included a modified Canada Goose logo with an animal in a trap and the words "Boycott Canada Goose." The bus shelters are built, owned, and maintained by Astral Media Outdoors ("Astral") who leases the space from the City of Toronto, for a part of the advertising revenue. PETA's agreement with Astral included a term that allowed Astral to remove any material it deemed unacceptable, subject to providing PETA a refund.

Astral's agreement with the City required it to comply with Canadian advertising standards and prohibited ads that are offensive to the public. The agreement allowed the City to review any ads Astral had concerns about prior to posting and gave the City power to require Astral to remove ads.

The day the ads were posted, Canada Goose complained to Astral, who then removed the ads. When PETA was notified that the ads were taken down, they sent a letter to the City requesting it to compel Astral to run the ads, which the City refused.

PETA brought Astral's decision to remove the ads and the City's decision not to compel Astral to run the ads for judicially review. PETA claimed both decisions were procedurally unfair and in breach of its freedom of expression 2(b) *Charter* rights.

Air Canada Test

The Court clarified that the first threshold question to address is whether the case can proceed for judicial review. The factors to determine whether a dispute falls within the scope of public law was provided in *Air Canada v Toronto Port Authority and Porter Airlines Inc,* 2011 FCA 347 ("Air Canada"). These factors include: whether the matter is private commercial or is of broader import to the public, if the decision-maker is public in nature, the extent the decision is shaped by law as opposed to private discretion, the suitability of public law remedies, and the existence of compulsory power.

Decision

In its application of the *Air Canada* factors, the Court found the decisions were not subject to judicial review and that it had no jurisdiction over the disputes between the parties. The application was dismissed.

Since Astral is not "government" and the advertisements were located on bus shelters owned and managed by Astral there was not sufficient public law character to make it susceptible to judicial review. The *Charter* only

applies to activities of private actors when they are furthering a government program. The advertising on bus shelters is not akin to a municipal program, it is a contractual relationship between Astral and the City that is a matter of private commercial law. For this reason, the case was distinguished from case law in which advertising on public buses had been found to be subject to *Charter* rights *(Greater Vancouver Transportation Authority v Canadian Federation of Students,* 2009 SCC 31).

Similarly, the City's decision not to compel Astral to run the ads is a matter of private law. It is a contractual dispute and is not related to its public responsibilities.

Court Finds ALC Road Refusal Unreasonable

The BC Supreme Court in *Dhanoa v. British Columbia (Agricultural Land Commission)* held the Agricultural Land Commission cannot refuse a road development primarily on the basis that the road would facilitate a use that is allowed by the ALC statute and regulations, even if the ALC's motivation is to preserve agricultural land for agricultural purposes.

Dhanoa is a judicial review of an ALC decision to refuse permission to construct a road on an undeveloped road right of way in the Agricultural Land Reserve (the "ALR"). The proposed road would provide access to parcels that were subdivided before the creation of the ALR. The court found the ALC's decision was not reasonable.

The ALC's refusal was partly based on its concern that the proposed road development would increase the likelihood of residential development on the properties accessed by the road. The court found that the residential development the ALC was concerned about was precisely the type of development allowed under the ALC Act, and therefore the decision was unreasonable. The court remitted the matter back to the ALC because the decision may have significant policy implications for parcels that were historically subdivided before the ALR was created.

The key takeaway from *Dhanoa* is that the ALC cannot refuse road development primarily on the basis that it would facilitate a use that is allowed by the ALC statute and regulations, even if this is a non-farm use:

> [T]he Commission [does not] have discretion to refuse residential development that otherwise complies with the restrictions in the Act and regulations. The statutory scheme from which the

> Commission derives its power permits the construction of a single-family residence on a parcel of land within the ALR. The **panel has conflated its concerns with non-farm uses that it has the discretion to refuse, and a use that it has no discretion to refuse**, and refused the former for the purposes of the latter. (para 60, emphasis added)

Restricting Visitors During Pandemic

The Ontario Supreme Court in *Sprague v. Her Majesty the Queen in Right of Ontario* addressed whether hospital visitor restrictions due to COVID-19 violate the *Charter of Rights and Freedoms*. Specifically, the decision considers a memorandum from Ontario's Chief Medical Officer recommending hospitals only allow essential visitors during COVID-19 (the "Memorandum") and a visitor policy from a specific hospital (the "Visitor Policy"). The court dismissed the application.

Sprague was brought as a judicial review, but the court decided to also consider whether to declare the Memorandum or Visitor Policy violated the *Charter*. The court found neither was subject to judicial review because they do not involve an exercise of statutory authority and do not have a sufficiently public character. Although the Applicant did not apply for a declaration of a breach of the *Charter*, the court "considered it appropriate not to dispose of this application solely on the threshold question but to consider the *Charter* arguments on their merits as well" to avoid perhaps leaving "an open question on the point".

The Applicant is the substitute decision-maker for his father, who was admitted to the hospital in March of this year, is elderly, and has a disability. The Applicant's father is medically stable but requires a gastrostomy tube to receive nutrients and restraints to prevent him from removing the tube. The Applicant consented to the use of the restraints. They are released when the Applicant or a personal support worker is present.

Because of the Visitor Policy, the Applicant has not been able to visit his father (except on one occasion to discuss end of life plans). The hospital provided phone and video communication options that allow the Applicant to fulfil his role as a substitute decision-maker, but they do not allow his father a respite from the restraints.

The Applicant argued the visitor restrictions violated sections 7, 12, and 15 of the *Charter*. The court found the visitor restrictions do not violate the *Charter*. The court's reasons may provide some helpful guidance for local governments wishing to restrict access to their facilities. However, this decision concerns a significantly different context—a hospital—and the pandemic situation varies between locations and over time. Therefore, it is necessary to consider whether any visitor restriction policy adopted by local governments may violate the *Charter* based on its own context—*Sprague* does not establish that all visitor restriction policies are *Charter* compliant.

One key takeaway from *Sprague* is the importance of including considerations of exceptions in a policy to avoid creating overly broad restrictions that could violate *Charter* rights. In *Sprague*, the court noted that the following exceptions helped the Visitor Policy not violate the *Charter*:

> *[T]he Visitor Policy is tailored to consider exceptions to (1) low risk groups where the visitors are involved in care on wards where the risk to other patients is not as severe and (2) for patients at end-of life, as a matter of compassion, even though this does expose staff to an increased risk of infection.*

Again, this is based on a specific context. *Sprague* highlights the importance of making evidence-

based and context-specific decisions regarding visitor restrictions.

PPA Refusal Upheld

In *0940460 BC Ltd v. Burnaby (City),* the BC Court of Appeal held that the City could consider the entire building's conformity to zoning in assessing a preliminary plan approval ("PPA") application, even if the proposed development is unrelated to the zoning violation and a previous permit was issued for the building feature that is violating the zoning.

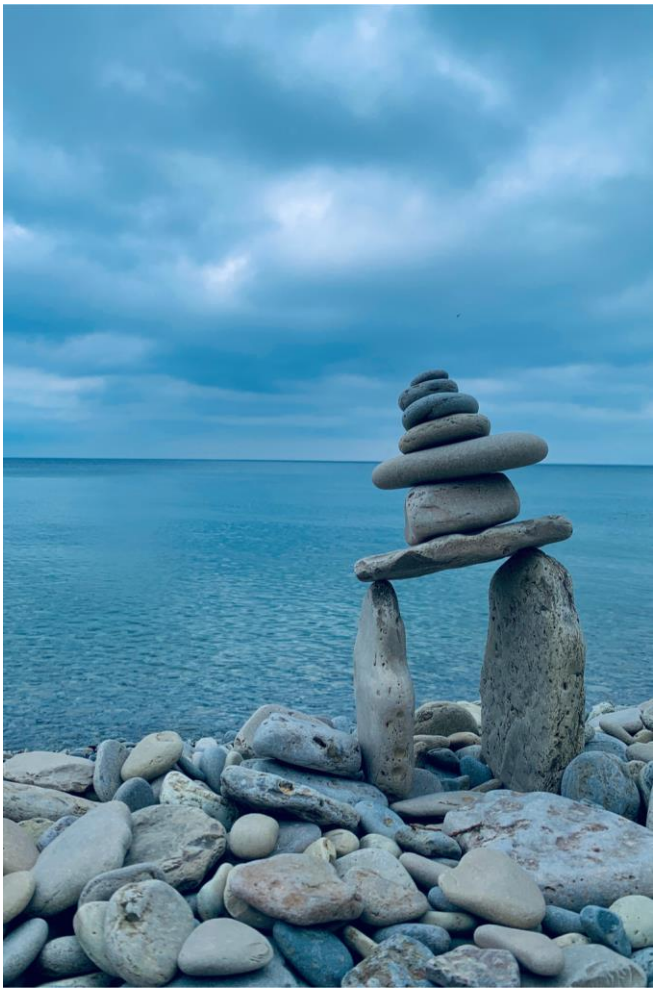
(a) Background

09040460 BC Ltd and Crescent Beach Properties Ltd (the "appellants") run a restaurant on the subject property that was damaged by a fire. After the fire, the Chief Building Inspector issued a "fast-tracked" building permit for the relocation of the pizza oven. In accordance with the permit, the appellants re-located the pizza oven, causing it to extend outside the pre-existing building. When the appellants applied for PPA for the construction of an enclosed patio, the City found the pizza oven violated the zoning's lot-coverage, density, and parking requirements. The City tied the zoning issues related to the pizza oven to its rejection of the patio PPA.

(b) City reliance on pizza oven's bylaw violations when rejecting the PPA

The Court affirmed that the general law of municipal government and the language of the Zoning Bylaw allow the City to retract the authority of a previously issued building permit without the risk of estoppel.

However, the City's position that the pizza oven increased the density was not reasonable. The definition of density provided in *Society of Fort Langley Residents for Sustainable Development v Langley (Township),* 2014 BCCA 271, was used to determine that there was no increase in the number of people or things in relation to the relocation of the pizza oven.



(c) Parking issues

The appellants do not meet the bylaw off-street parking requirements and formed an agreement with a neighbouring vacant property owner to use their parking spaces. Since the neighbouring property is vacant, the City took the position that the agreement would turn the sole use of the property into parking, which is not permitted under the zone. The Court found this to be reasonable and concluded the parking agreement is not an option to cure parking deficiency.

(d) Patio coverage can be considered in lot coverage

The appellants argued that the proposed patio falls under a "canopy," which is exempt from lot coverage calculations in the Zoning Bylaw. The City included the patio in the lot coverage calculations because a "canopy" does not require structural supports to the ground. The Court found the City's understanding of the word "canopy" to be reasonable, and it was reasonable to include the proposed patio in the lot coverage calculations.

The City has not fettered the discretion of the Chief Building Inspector by requiring approval by the Director of Planning for the PPA as a step to obtaining a building permit

The City's PPA process requires approval from the Director of Planning before a building permit can be issued. The appellants argued that this usurps the powers of the Chief Building Inspector. The Court determined that the PPA process does not fetter the Building Inspector's discretion. It merely requires that the application conforms with planning regulations prior to a building permit application being submitted.

(e) Conclusion

The Court concluded that (1) it was reasonable for Burnaby to include issues with the pizza oven in deciding whether to grant the PPA for the patio cover, (2) the pizza oven results in the building surpassing the permitted lot coverage, and (3) the building permit for the pizza oven does not determine compliance with the Zoning Bylaw. Therefore, it was reasonable for the City to refuse a PPA for the patio.

Municipal Bylaw Evidence of Foreseeability of Harm

In *Abdi v. Burnaby (City),* the BC Court of Appeal held that a municipal bylaw addressing potential harm may be relevant to show foreseeability of that harm occurring when negligence is claimed against the municipality.

The case arose from an accident at a party around a backyard fire pit that caused severe burns to the plaintiff. The plaintiff was a guest at the home where the fire pit was located. The home's tenants poured motor oil into the fire pit, causing a flare up and the plaintiff's injuries.

The tenants, who had rented the home from the City of Burnaby, had a history of using outdoor fires in violation of a City bylaw. At least once, City firefighters had been called to extinguish such a fire. The City did not follow up on this incident to compel compliance with the bylaw or the tenancy agreement.

The plaintiff brought a claim against the tenants and the City in negligence. The trial judge determined that both defendants were liable and assigned 29% liability to the City. Particularly, the City owed such duty under three heads of liability: *Occupiers Liability Act*, *Residential Tenancy Act*, and the common law duty as landlord.

On appeal, the City's primary argument was that no duty of care was owed because the tenant pouring motor oil on the fire was so remote that the injury to the plaintiff was not reasonably foreseeable. The Court of Appeal found that the precise mechanism or events that caused the injury was not required to be specifically foreseen. Rather, under *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19, it is only the *type of harm* that must be foreseeable.

Here, all that was necessary for the City to foresee was the harm caused by an outdoor fire. The City prohibited fires under its own bylaw and the City had specific knowledge that the tenants had previously disregarded that bylaw; therefore, the accident was reasonably foreseeable.

The City also argued that there was no causation between the City's lack of action to have the fire pit removed and the accident. The City argued that the accident would have occurred even if the City had ordered the tenants to remove the fire pit. The Court found that there was sufficient evidence to show that the injury-causing accident would not have occurred if the City had acted reasonably to fulfil its duty of care after receiving notice of the unsafe fire in the past, had inspected the property and demanded removal of the fire pit.

Building Permits Subject to Architects Act

In *Architectural Institute of British Columbia v. Langford (City)*, the BC Supreme Court held that if a building bylaw bases issuance of a building permit on "any enactment respecting health or safety," then the building official is obligated to consider the *Architects Act* in their decision making.

The City of Langford granted a building permit for a building that was not designed by a licensed architect. The building was then built and granted an occupancy permit. The AIBC petitioned the Court for a declaration that the City's decision to issue the permit despite non-compliance with the *Architects Act* and the City's bylaw provisions was unreasonable.

The relevant enactment and bylaw provisions were as follows:

- Section 27(2) of the *Architects Act* prohibits persons from practising architecture unless they are registered to do so under the *Act*, except in a narrow set of circumstances (the City conceded that the exception did not apply in this case).
- Langford's Building Bylaw s. 2.3.9 provides that a building inspector "may refuse to issue any permit…where the proposed work does not comply with the *Building Code*, a City bylaw…or <u>any enactment respecting health or safety</u>" (emphasis added).
- Bylaw s. 2.3.6.1 provides that "where in the opinion of the Chief Building Inspector the site conditions, the size or complexity of the building, part of a building or building component warrant, the Chief Building Inspector, may require design and field review by a registered professional."

The City's defence with respect to s. 2.3.9 was that the *Architects Act* is "is not "an enactment respecting health and safety" and, hence, the decision-maker was under no obligation to consider the *Act*. The Court concluded, based on

jurisprudence related to the *Architects Act*, that the only reasonable interpretation is that the Act is an enactment respecting health or safety. Having concluded that, the Court found that "it is not a rational or acceptable outcome that a municipal building permit could be issued for a building which has clearly been designed in contravention of a relevant provincial statute respecting health and safety, that is, the *Act*."

Thus, it was unreasonable for the building inspector to issue the permit without considering the *Act*.

With respect to s. 2.3.6.1, the City's building inspector deposed that in reviewing building permit applications, the City considered the *Building Code* (which does not require an architect for a building such as the one in question) but not the *Architects Act*. The Court found that the *Building Code* is a regulation under the *Building Act*, and cannot take precedence over the *Architects Act*, a statute.

"It is fundamental to the concept of reasonableness that relevant factors be taken into account in the exercise of the discretion" and, consequently, the failure to consider the *Architects Act* made the building inspector's decision unreasonable.

There was also a preliminary issue in this case related to standing. The City claimed the AIBC had no private interest standing in the matter.

The Court held it was unnecessary to decide if AIBC had private interest standing because it did have public interest standing under *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*.

With respect to remedy, AIBC only sought a declaration and did not seek a setting aside of the City's decision. The declaration was granted.

Third Party Occupants Have Standing in Proceeding Against Local Government Landlord

In *Metro Vancouver (Regional District) v. Belcarra South Preservation Society,* the BC Supreme Court held that a local government leasing property to an institutional tenant for residential purposes

may be subject to legal action by individuals living in the premises who are not in privity with the municipality.

This was a petition for judicial review from a decision of the Residential Tenancy Branch ("RTB") in which Metro Vancouver was the landlord and Belcarra South Preservation Society (the "Society") was the tenant. The property consists of 7 cabins in the Belcarra

Regional Park which were leased to the Society in 1976. The Society, in turn, allowed some of its members to live in the cabins. In 2017, Metro Vancouver decided to convert the property to public use and served a Notice to End Tenancy on the Society.

An application for dispute resolution was filed with the RTB by occupants of the cabins; the Society itself was not a party. At the RTB hearing, Metro Vancouver disputed the applicants' standing to file for arbitration on behalf of the Society.

The RTB arbitrator decided in the Society's favour and allowed the arbitration to continue based on the occupants' application. The RTB found that Metro Vancouver did not prove compliance with the requirements for ending the Society's tenancy under section 49 of the *Residential Tenancy Act* ("*RTA*").

Upon judicial review, Metro Vancouver pleaded that the arbitrator's decision to grant standing to the occupants was patently unreasonable. It argued that, under the *Societies Act*, the Society could not authorize the occupants to act contrary to the Society's purpose which is to "is to maintain the surroundings in the area [of Belcarra Park] in order that the natural beauty of the area be preserved for the present better enjoyment of its residents, and the future enjoyment of the general public."

The Court found that under s.7(2) of the *Societies Act*, an act of a society is not invalid merely because the act is contrary to the society's purpose. Therefore, the RTB's finding was not patently unreasonable.

The Court set aside the RTB's decision on substantive grounds related to the *RTA*; however, only the standing issue has been discussed here because of relevance to local governments acting as landlords.

Emergency Orders Authorized

The provincial government has enacted legislation to confirm and phase out the emergency orders made under the *Emergency Program Act.* Attorney General David Eby introduced Bill 19 – 2020, the *COVID-19 Related Measures Act*, for First Reading on June 22 and it received royal assent on July 8. Two of the various orders validated by the legislation are

the M098 which suspends limitation periods and allows local governments (and other statutory decision-making bodies) to alter mandatory time frames in relation to their powers and M139 which exempted local governments from requirements for meetings, hearings and bylaw adoption. M139 was replaced on June 17 by M192.

Although the provincial Ombudsperson reported on June 22 that these two orders M098 and M139 exceeded the authority of the Minister of Public Safety under the EPA, local governments may rely on the validating legislation which has retroactive effect to make it clear that the orders were valid from the date they were issued.

Accordingly, in our view the actions of municipalities and regional districts taken *in accordance with these orders* are valid and decisions made *in accordance with these orders* may not be attacked based on the validity of the orders. In this regard, section 3(1) of the Bill provides that the orders are enacted as a provision of the Act and section 3(3) renders the orders in force and effect as of the date of the relevant provincial declaration of a state of emergency in the case of M139 and as of the date the order was made in the case of M098 and M192. Section 3(11) expressly provides that all of section 3 is retroactive to the extent necessary to give full force and effect to its provisions.

The Bill also provides for the extension of the legal effect of orders made under the EPA in case there is a resurgence of the pandemic in the province, and further provides for unwinding of the orders.

Welcome to Janae Enns

Janae is our 2020 summer law student and will be working with us again next summer before her final year of law school. She is currently a law student at Thompson Rivers University.

Janae holds a bachelor's degree in geography with a concentration in planning and a master's degree in community planning. Janae has spent several years working in local government in planning and economic development.

In her roles, she has worked on a variety of economic strategies, organized, and facilitated community engagement initiatives, provided technical planning advice, and processed land use applications. Her education and work experience has provided a valuable foundation for local government procedures and influenced her decision to pursue a career in municipal law.

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