LIDSTONE & COMPANY

LAW LETTER

In This Issue

Policy v. Operational Decisions

Supreme Court of Canada: Nelson v Marchi

The City of Nelson (the "City") received a heavy snowfall in the beginning of January. The City cleared snow from angled parking spots in the downtown core by ploughing snow to the top of the parking spaces, which created a snowbank along the curb and separated the parking stalls from the sidewalk.

Ms. Marchi parked in one of the angled parking stalls, and then tried to cross through the snowbank to access the sidewalk. When she stepped onto the snowbank, she dropped through the snow and seriously injured her leg. Consequently, Ms. Marchi sued the City for negligence, with both parties agreeing that she suffered $1 million in damages.

As part of its defence, the City claimed policy immunity. The policy immunity defence applies to exempt a local government from liability notwithstanding the finding of a duty of care, if the actions giving rise to the plaintiff's damages

resulted from a "core policy decision". In *Just v British Columbia*, the SCC outlined the rationale for this defence, stating that:

> "[t]he need for distinguishing between a governmental policy decision and its operational implementation is thus clear. True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort."

A court faced with an allegation of negligence by a local government must determine whether the alleged negligence arose from a policy decision, thus negating the duty of care and exempting the local government from liability, or the operational implementation of that policy, in which case the exemption does not apply, a duty of care remains and the normal negligence principles regarding standard of care will apply.

The Supreme Court of Canada, in *Nelson (City) v. Marchi* ("*Nelson*") reaffirmed the

policy/operational distinction, and drew from prior jurisprudence to find four factors that assess whether a decision is a policy or operational in nature:

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1. The level and responsibilities of the decision-maker;
2. The process by which the decision was made;
3. The nature and extent of budgetary considerations; and
4. The extent to which the decision was based on objective criteria.

Two clarifications were also offered in relation to this framework.

First, budgetary, financial and resource implications do not necessarily mean that a decision is policy, as these restrictions are just one among many factors to be reviewed.

Second, the policy defence only applies to 'true' or 'core' policy, meaning that the mere presence of the term 'policy' on a document is not sufficient to invoke this defence. Instead, the focus is to remain on the nature of the decision itself, not the label or the format of the decision.

Our comments on each of the four factors identified in *Nelson* follow.

The level and responsibilities of the decision-maker

The key factor here is how closely related the decision-maker is to a democratically accountable official who bears responsibility for public policy decisions. The higher the level of the decision-maker within the executive hierarchy, or the closer the decision-maker is to an elected official, the higher the possibility that judicial review for negligence will raise separation of powers concerns or have a chilling effect on good governance.

Similarly, the more the job responsibilities of the decision-maker include the assessment and balancing of public policy considerations, the more likely this factor will lean toward core policy immunity. Conversely, decisions made by employees who are far-removed from democratically accountable officials or who are charged with implementation are less likely to be core policy and more likely to attract liability under regular private law negligence principles.

Therefore, when formulating and enacting the policy, we would recommend that municipalities ensure that high-level officials, including elected officials or statutory officers, are involved in the decision-making process. Additionally, evidence indicating that the municipality engaged in a fulsome, balanced approach will assist in determining that a policy document is 'core policy.'

The process by which the decision was made

The government decision is more likely to be one of policy if the process to reach that decision was: deliberative, required debate, possibly in a public forum, involved input from different levels of authority, and was intended to have broad application and be prospective in nature.

In contrast, the more a decision can be characterized as a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no sustained period of deliberation, the more likely it will be reviewable for negligence.

The nature and extent of budgetary considerations

Nelson made an explicit point of stating that budgetary considerations alone will not deem a decision to be core policy. However, there is a distinction between 'high-level' budgetary considerations, such as budgetary allotments for departments and government agencies versus lower level, day to day budgetary considerations made by individual employees.

For this reason, we recommend that the policy formulation, and the policy itself, reference the budgetary restrictions in how the municipality chooses to handle a particular issue (e.g., cost of policy choice, enforcement mechanisms, etc.).

The extent to which the decision was based on objective criteria

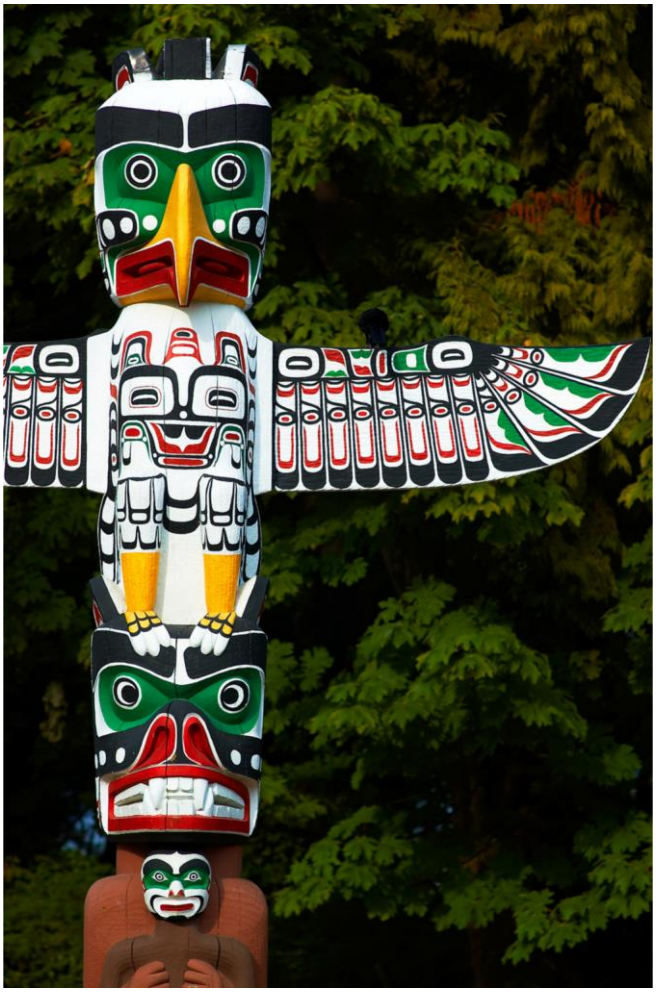
The final factor states that the more a government decision weighs competing interests and requires making value judgments, the more likely separation of powers will be engaged because the court would be substituting its own value judgment.

Conversely, the more a decision is based on "technical standards or general standards of reasonableness", the more likely it can be reviewed for negligence. Those decisions might also have analogues in the private sphere that courts are already used to assessing because they are based on objective criteria. Therefore, we recommend explicitly addressing the risks and benefits being weighed by the municipality in creating its policy regarding this issue.

~ Katie Dakus

UNDRIP and Local Government

In 2007, the United Nations adopted the *Declaration on the Rights of Indigenous Peoples* ("UNDRIP"). This followed a lengthy drafting



process stretching back to the 1980s. UNDRIP recognizes Indigenous rights in several areas, ranging from educational rights to self-determination and control of lands.

The most frequently cited aspect of UNDRIP is "Free, Prior and Informed Consent" or "FPIC." FPIC is not a standalone component of UNDRIP but occurs throughout.

For example, Article 19 of UNDRIP provides states must cooperate in good faith to obtain FPIC where legislative or administrative action may affect an indigenous community:

Article 19: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them".

In 2019, BC enacted Bill 41 – the *Declaration on the Rights of Indigenous Peoples Act* ("DRIPA"). This affirms UNDRIP and commits BC to bring its laws into harmony with UNDRIP. The legislation also contemplates procedural matters, like regular update reports on its progress to harmonize laws with UNDRIP

Bill 41/DRIPA does not substantively alter BC laws or give legal force to UNDRIP. The legislation is intended as a foundation for a long-term roadmap for reconciling BC laws with UNDRIP or "framework for reconciliation."[1] In the short term, it has no immediate legal impact.

It is the first example of legislation of this kind in Canada. A similar Federal bill, C-262, made it to third reading but was not enacted. Similar federal legislation is pending.

There are three main parts to DRIPA

- Affirmation of UNDRIP - Section 2 of DRIPA "affirm[s] the application of the Declaration to the laws of British Columbia."
- Harmonization with UNDRIP - Section 3 of DRIPA commits BC to bring its legislation in line with UNDRIP. DRIPA also includes various procedural requirements related to this. For example, section 4 requires the province create an action plan to accomplish this purpose. Section 5 requires the province to prepare annual reports regarding its progress.
- Joint Decision Making – Section 7 of UNDRIP allows for the creation of joint-decision making agreements. These would allow an administrative decision maker to issue decisions jointly with an Indigenous governing body, or on consent of the Indigenous governing body.

Since adoption, there has been one brief update report in March 2020. COVID-19 has presumably diverted a great deal of provincial and Indigenous administrative capacity away from this field.

DRIPA Impact on Local Governments

In the short run, there is no immediate impact. The Province has been explicit - this is only intended as a framework for future changes. Substantive changes will require changes to provincial legislation (e.g., amendments to the LGA, *Community Charter*).

There is some argument as to whether local governments, in interpreting their legislative framework, ought to consider DRIPA and promotion of reconciliation. There are two issues:

a. UNDRIP and DRIPA are broadly worded and general in nature. UNDRIP is "is too general in nature to provide real guidance to courts": Snuneymuxw First Nation v. Board of Education – School District #68, 2014 BCSC 1173 (CanLII), <https://canlii.ca/t/g7rrd>, para. 59.

b. DRIPA does not allow administrative bodies to read words into their

governing statute: British Columbia (Health) (Re), 2020 BCIPC 66 (CanLII), <https://canlii.ca/t/jcbrw>

In the medium-to-long run, expect changes to provincial legislation that would require more engagement with Indigenous communities. It is currently impossible to say what this will look like. However, DRIPA suggests future amendments will feature more joint decision making with Indigenous governing bodies.

It is also possible that there may not be a 'one-size-fits-all' answer to this. Indigenous governing bodies have a range of capacities and priorities. The Province is currently consulting to determine what Indigenous communities' priorities are. It may come to rely on more joint decision making agreements on a case by case basis.

UNDRIP and Local Governments

Some are taking steps to improve municipal-Indigenous communications and relationships, typically though a framework or protocol agreement of some sort.

Some municipalities are adopting "Principles" of Reconciliation. These generally affirm the municipality's commitment to work toward reconciliation. They are almost always broadly drafted, though, and do not commit the municipality to specific policy programs.

Each Indigenous community will have distinct priorities. As a result, there is no one size fits all answer to what works in each case.

Recommendations around UNDRIP applying to Local Governments

A local government can endorse UNDRIP or commit itself to the values in UNDRIP. However, conflicts can arise where UNDRIP does, or could, conflict with a local government's establishing legislation.

A local government is a creature of statute. Generally, this means you are constrained to the powers and matters delegated you under the *Community Charter* and LGA.

In fields where a local government enjoys broad or nearly unfettered discretion, it is easier to incorporate UNDRIP and consultation with the First Nation into a local government's decision making process. For example, an area like street naming. Exercises of a local government's corporate powers are also easier to 'apply' UNDRIP. For example, servicing agreements, purchasing policies or hiring/human resources policies.

Applying UNDRIP is more complex in areas where a local government's discretion is limited by its enabling legislation or common law. In such circumstances, a local government unilaterally applying UNDRIP to itself and purporting to require consent of impacted first

nations may be unreasonable and may fetter discretion, resulting in invalid bylaws.

This is a potential concern in land use planning and development matters. Generally, municipal powers in those fields are subject to greater legislative parameters. Further, land use and development matters typically involve a private, commercial party who has a financial interest in challenging adverse decisions. Matters here are therefore subject to a greater risk of judicial review. For example:

- A local government can only designate development permit areas for the reasons set out in s. 488 of the *LGA*. Broadly, these grounds do not permit you to designate a DP Area to reflect Indigenous cultural, spiritual, or economic development concerns.

- A local government's building official can only refuse to issue a building permit for the reasons set out in section 54 of the *Community Charter*. These generally reflect health and safety concerns: they do not allow the building official to withhold building permits or occupancy permits based on objections from an Indigenous community.

A further issue is that UNDRIP, and by extension DRIPA, are generally worded. UNDRIP is a declaration; it is intended to function as a normative statement about how states should interact with Indigenous communities. It is not intended to impose substantive legal obligations.

You therefore cannot simply 'apply' UNDRIP.

Case Law: UNDRIP

There is some international jurisprudence on FPIC/UNDRIP. There is however limited Canadian case law. As a result, it is difficult to apply it with any certainty.

In *British Columbia (Health) (Re)*, 2020 BCIPC 66 (CanLII), <https://canlii.ca/t/jcbrw>, the Information and Privacy Commissioner considered and rejected the submission DRIPA should inform their interpretation of FIPPA. The Commissioner Essentially concluded the legislature could have amended the relevant statutory scheme if it intended to:

[34] If the Legislature were to conclude, through legislative review and renewal processes established under DRIPA, that such an evidentiary burden should exist, it could amend FIPPA to expressly create it. I acknowledge the complainants' point about rights to self-government, and Indigenous rights more generally, and take these matters very seriously, but I cannot read words into FIPPA that create a positive burden on a public body – the Ministry in this case – to disprove what the complainants have said.

In *Servatius v Alberni School District No. 70,* 2020 BCSC 15 (CanLII), <https://canlii.ca/t/j4fvx>, the BCSC commented on DRIPA. This was part of a broad review of socio-political factors in the context of *Charter* litigation. The comment did not appear to inform the court's construction of any statutory provision or substantive legal right or duty.

Prior to DRIPA, BC courts often expressed difficulty in aplying UNDRIP. These often remarked on its vague and general nature. In. *Snuneymuxw First Nation v. Board of Education – School District #68*, 2014 BCSC 1173 (CanLII), <https://canlii.ca/t/g7rrd>, the court found:

[59] At the outset, I must state that I am unable to accept the reliance placed by the petitioners

upon the Declaration. The Declaration has not been endorsed as having legal effect by either the Federal Government or the Courts. Canada is a signatory to the UNDRIP but has not ratified the document. The Federal Government, in announcing its signing of the Declaration, stated that the Declaration is aspirational only and is legally a non-binding document that does not reflect customary international law nor change Canada's domestic laws. This fact has been recognized by Canadian courts in considering the application of the Declaration, as well as the fact that the document is too general in nature to provide real guidance to courts.

~ Will Pollitt

5G Municipal Deployment

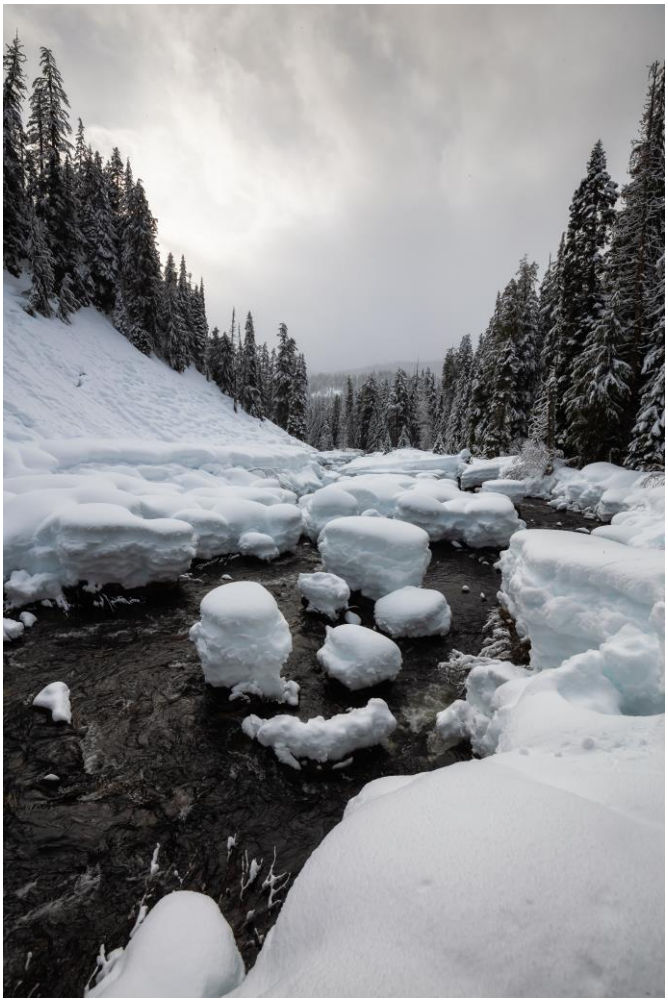
A decision by the Canadian Radio-television and Telecommunications Commission (the "CRTC") affirms the rights of municipalities to maintain and manage municipal right of ways ("ROWs") and public spaces in relation to the deployment of 5G technology.

BACKGROUND

In January 2019, the CRTC launched a national public inquiry to review mobile wireless services in Canada. One of the issues addressed in this inquiry was the role of municipalities in the deployment of 5G technology, including the degree to which municipal involvement and consent is required for the deployment of 5G infrastructure. As part of this process, the CRTC invited written submissions from interested parties and held a public hearing.

PARTY SUBMISSIONS

Several wireless carriers argued that the CRTC should not require municipal consent to install 5G infrastructure, claiming that such consent creates a significant time-barrier to 5G deployment. As evidence for this point, some wireless carriers referenced access delays experienced in prior deployments. Further, wireless carriers argued that the CRTC's jurisdiction should be expanded to regulate access to existing municipal infrastructure and ROWs. In contrast, parties such as the Federation



of Canadian Municipalities (the "FCM") argued that municipalities play an unique and important role in the deployment of 5G technology, and that municipalities are the only entities capable of ensuring that municipal ROWs operate effectively and efficiently for all users over the long-term. Further, the FCM countered the submission that municipalities have impeded deployment of network technologies.

DECISION

In its recent decision, the CRTC has rejected the assertion that municipalities create a significant

time-barrier to the deployment of technologies. While some wireless carriers experienced delays in receiving municipal approvals, these delays do not rise to the threshold of establishing a pattern of denial that would require the CRTC to intervene.

Next, the CRTC has addressed the question of its general jurisdiction in relation to providing access to municipal infrastructure. While Canadian wireless carriers have a qualified statutory right of access, this right is contingent on municipal consent to that access. While the CRTC may use its authority to allow a wireless carrier to bypass certain permit requirements or to provide access, this only occurs in the context of an active dispute between individual parties. In other words, the CRTC's function as an adjudicator does not give it the authority to eliminate the municipal consent requirement on a broad scale. Elimination of this right would require a legislative amendment, meaning that the CRTC does not have a general authority to impede or limit a municipality's right to manage its infrastructure and ROWs.

Finally, the CRTC has held that sections 43 and 44 of the *Telecommunications Act* (the "Act"), which authorize the CRTC to regulate and approve the construction of transmission lines in public places, do not apply to the infrastructure used in 5G deployment. This decision hinged on the definition of "transmission line" which the CRTC defined as meaning wired or cabled lines. Since the infrastructure used for 5G deployment are wireless antennas, these apparatuses are therefore excluded from the definition of "transmission lines."[2] Consequently, these apparatuses are beyond the scope of sections 43 and 44, meaning the CRTC does not have jurisdiction to regulate where 5G infrastructure is placed, nor can it resolve disputes in relation to these apparatuses.

[2] The wireless antennas used in 5G deployment are instead caught in the definition of "transmission facility."

IMPACT

The CRTC decision reinforces the right of a municipality to regulate access to public space and ROWs. Additionally, this decision affirms the role of municipalities in minimizing costs and construction disruptions associated with the use of municipal ROWs for telecommunications services. This decision will allow municipalities to continue to manage their ROWs in the public interest, and to create mutually beneficial agreements with wireless carriers in the deployment of 5G infrastructure.

RESOURCES

The CRTC announcement of the national public inquiry is here: https://crtc.gc.ca/eng/archive/2019/2019-57.htm
The CRTC decision is here: https://crtc.gc.ca/eng/archive/2021/2021-130.htm
The FCM has published a guide for municipalities to help prepare for 5G deployment, available here:

https://data.fcm.ca/documents/resources/guide/getting-it-right-preparing-for-5g-deployment.pdf

~ Katie Dakus

Lessons from the Prince George Parkade

In December 2017, a private developer, A & T Project Developments Inc. (the "Developer") announced plans with the City of Prince George (the "City") to build high-end condos (the "Housing Project") on City owned lands (the "Lands") adjacent to City Hall. The Housing Project was greeted as the "missing piece of the puzzle" for the city's downtown redevelopment plan, which had long called for people to live in

the neighbourhood to help sustain more shops and restaurants. To make the Housing Project happen, the City entered into an agreement with the Developer for the City (the "Parkade Agreement") to assume the costs of building a 290-vehicle underground parkade for the condo (the "Parkade"), with 130 spots rented to developers at a reduced rate over 50 years and the remainder available to other customers. The Parkade Agreement was structured as a "cost plus" agreement whereby the City agreed to reimburse the Developer for its costs of building the Parkade, plus a specified percentage of those costs.

Cost overrun issues arose with respect to the building of the Parkade and the cost of the Parkade ballooned from an original budget of $12.6 million in 2018 to a projected $34.1 million in just over two years. Under the terms of the Parkade Agreement, the City was obligated to pay all of those additional costs. Legal counsel was retained to undertake a detailed independent review of the Parkade project (the "Review"). The Review provides lessons for all local governments in undertaking major construction projects.

The Review concluded that that major issues associated with the Housing Project and Parkade arose as a result of the City pressing forward without first having undertaken appropriate due diligence, both in terms of design for the Parkade and consideration of the appropriate allocation of risk – namely the cost of the project. The City's longstanding desire for the revitalization of the Downtown, and its strong belief that the Housing Project and Parkade were much-needed development to spur on that revitalization, led the City to press forward with negotiations with the Developer, and enter into significant financial commitments, without having first undertaken sufficient design work to fully understand the costs associated with the commitments that the City was making in agreeing to pay the costs of construction of the Parkade and the costs of off-site works necessary for the construction of the Parkade. While the costs incurred by the City were not necessarily

unreasonable, the City did not do sufficient due diligence in advance of moving forward to fully understand the costs it agreed to incur, and the risks associated with moving forward in the proposed manner with the Parkade.

The Review also concluded that the City did not undertake any public competition to identify and evaluate possible partners for the Housing Project. A public competition would have provided the City with a better sense of potential design and cost alternatives and also provided

more leverage to the City with respect to contract negotiations and award.

> In addition, the Review concluded that the Parkade Agreement that the City executed with the Developer was a significant factor in the cost overrun problems that subsequently arose. The Parkade Agreement was a standard form CCDC3 2016 Costs Plus Contract. The Parkade Agreement was prepared by the Developer, was not vetted by City staff responsible for procurement matters, and was not brought to the City Council for consideration or approval. Among other things, the Parkade Agreement provided a preliminary budget for the Parkade construction to be $12,012,054, but did not include any limit on the maximum amount payable by the City to the Developer, plus 5% profit and GST. The Parkade Agreement also obligated the City to pay to the Developer the actual costs of construction of the Parkade, plus 5% on account of the Developer's overhead costs, plus an additional 5% on account of profit.

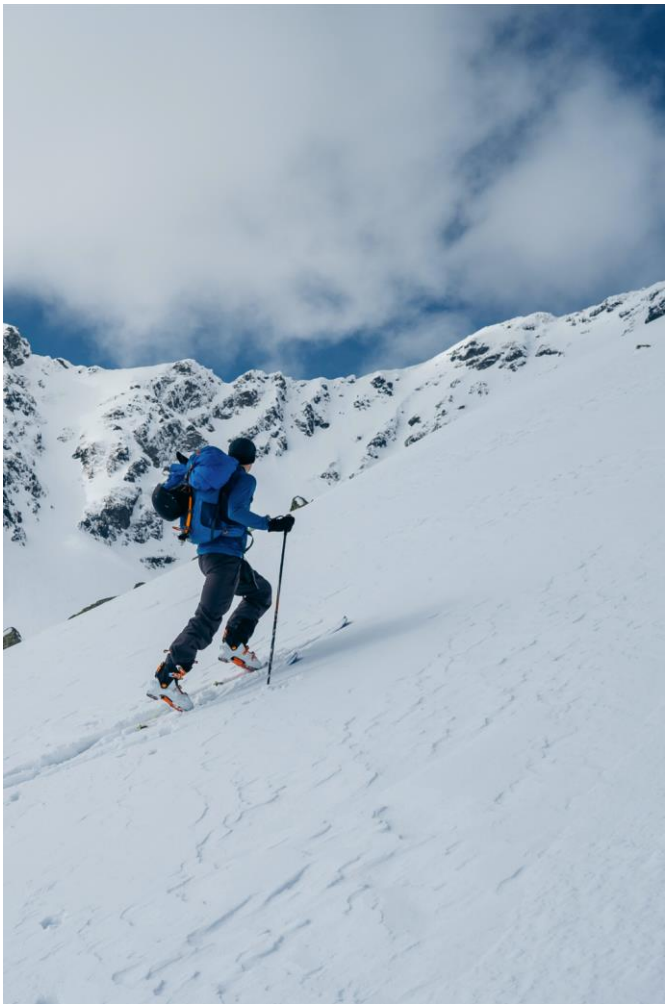
Finally, the Review identified significant issues with council overview of the Parkade Agreement. Other than in a single staff report to the City's Finance and Audit Committee, at no time did staff bring the escalation in the costs of construction of the Parkade to the attention of City Council. In addition, to the extent that the costs escalation was, in part, reflected in the staff report, the report addressed a broad range of projects and the costs escalation for the Parkade was not expressly brought to the Committee's attention, nor was it readily apparent in the report. This lack of disclosure was addressed through the latest amendments to the City's Sustainable Finance Guidelines which now provides that the City manager may only approve budget amendments in a calendar year or transfers equal to the lower of 5% of the capital projects budget, or $100,000 per project and that budget amendments in a calendar year exceeding those amounts must be approved by Council. The Review concluded that the amended policy is consistent with other similarly sized local governments in British Columbia. While many local governments only provide for a single cap on the value of a budget amendment or transfer that may be approved by the chief administrative officer, a cap that is the lesser of a percentage of a particular capital project budget or $100,000.00 is prudent.

Lessons learned from this Review include the following:

1. Lesson 1: Always do your due diligence from a technical, financial and legal viewpoint before proceeding with any project. This is necessary in order to understand and address all potential risks associated with the project.
2. Lesson 2: Most projects and services should be procured through a public procurement project in accordance with applicable trade agreements (NWPTA and CFTA). The exceptions to this general rule may be in circumstances where the project is low value or an exception exists under the trade agreements, but in most cases, a public procurement process is recommended. There are several reasons for this, including the following:
    a. A public procurement process encourages transparency and value for money spent;
    b. A public procurement process enables the local government to draw on the expertise and creativity of proponents and identify a range of possible arrangements to complete the project. This is particularly advantageous when the project is complex and there are significant uncertainties.

c. A public procurement process increases the number of options for delivering the project or services and increases the leverage of local governments with potential contractors;
d. A public procurement process provides additional information to the local government with respect to technical, financial and legal issues; and
e. A public procurement process will preclude a legal challenge under the trade agreements.

3. Lesson 3: Among other key provisions, contracts should always include provisions:
   a. that specify costs, or anticipated costs, including either stipulated or maximum costs. This would have provided the City with cost certainty and allocated risk to the Developer.;
   b. that enable the local government to review and scrutinize costs; and
   c. that shift risks of cost overruns to contractors or that enable the local government to amend or exit the contract if there are cost overruns.
4. Lesson 4: Understand the risk associated with different forms of contracts.
   a. Generally speaking, a cost plus contract (as was the type of contract used for the Parkade Agreement) will usually provide the lowest estimated price for a project; however, it will also impose the greatest risk on the local government with the local government carrying the risk of higher than anticipated costs. In contrast, a stipulated price contract will provide higher specified costs, but the burden of cost overruns is shifted to the contractor.
5. Lesson 5: Local governments should undertake a detailed review of their project management processes, beginning with the planning/due diligence phase, through to procurement, and ending with the actual administration of the contract. A review should include consideration of the following issues:
   a. Ensuring a sufficient level of due diligence and identifying and addressing all issues before embarking on a project;



b. Ensuring that all procurement is consistent with best practices and trade agreement requirements;
c. Ensuring accountability by senior staff and council oversight, including requirements that all contracts, or at least those above a specified threshold are approved by council and that any changes in budget, or at least those above a specified threshold, are subject to council approval.

No local government wants to find itself in a similar situation and adopting these measures will help you prevent that from happening.

~ **Lindsay Parcells**

English v Richmond (City)

The BC Court of Appeal held recently that the City's refusal to issue a building permit was unreasonable, considering statutory interpretation and extrinsic evidence.

The owner applied to the City for a building permit to construct a greenhouse and grow cannabis hydroponically within the ALR. At the time, cannabis production in the ALR was regulated by s. 8 of the *ALR Reg.*

The City interpreted s. 8 as only authorizing cannabis production in the ALR if the production was soil-based *or* in a structure constructed before s. 8 came into force, so the City denied the BP.

The court rejected the City's argument that the provincial literature on the subject was extrinsic evidence and inadmissible. An 'absolute prohibition' on materials not before the decision-maker would deprive the court of the full legal and factual context behind the decision, as well as ignore potential constraints on the decision maker's exercise of authority.

The court found the City's interpretation was unreasonable for several reasons. First, the City's interpretation did not read the sub-sections harmoniously, and further did not support a broad, remedial approach to statutory language as mandated by the *Interpretation Act*. Second, a stated purpose of the *ALC Act* is to encourage local governments to enable and accommodate farm use of land in the ALR. The City's interpretation reduced the ability of cannabis production on ALR land and was therefore inconsistent with this fundamental objective. Third, the words 'subject to subsection (2)' were additive, not restrictive, and functioned to allow grandparented structures to be constructed on ALR lands.

Finally, the *Regulation* is not the home statute, meaning that the building inspector for the City did not bring a specialized expertise or insight to the interpretation of the *Regulation*.