LIDSTONE & COMPANY
ALBERTA MUNICIPAL LAW LETTER

In this Issue

Articles

Local procurement and the global supply chain crisis

It would be an understatement to say that the global supply chain is facing a crisis. What started out with local shortages as a result of the COVID-19 emergency in 2020 soon blossomed into an endemic issue across the global supply system. By the end of 2021, supply issues have hit every step on the stairway of commerce, from raw materials to consumer retail. The reasons for the failure of the supply chain are complex and, like the financial crisis of 2008, it may take years for us to get the full story of what is happening currently.

Local governments, like any other sector of society and the economy, rely on the global supply chain for all its material needs - from personal protective equipment for its staff to raw material for infrastructure projects. Indeed, the crisis has hit local government hard in the form of unavailability of goods, delayed supplies, and rising costs of procurement.

What should local government purchasers do differently in the face of global supply chain issues? This article discusses some such measures that purchasers can consider. While

each procurement is different, these measures have general applicability across many types of procurement.

The first measure that can be considered is structuring procurements to be *time sensitive*. With global uncertainty about how the supply chain will behave in the coming months and years, if a buyer looks for a three- or five-year commitment for supply of certain goods, guess what a reasonable vendor will do? They will inflate their bids or quotes, not knowing what their own supplies will look like in coming years. To control prices, purchasers should consider structuring procurements so that the "look ahead" period for pricing is as short as practically possible. Because vendors have certainty about their supplies in the shorter term, they would be likely to offer better prices. The longer the period over which prices are expected to be fixed, the more "padded" they are likely to be.

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Another potential structural adjustment to procurement arrangements also pertains to *time*. It is well known that traditional purchasing processes (e.g., tender or request for quotations) take a long time, as long as several months.

In such procurements, because prices are "locked in" at the time of tendering, there is an incentive for bidders to inflate their prices to make up for future uncertainty. To avoid this perverse incentive, purchasers can consider alternatives to this traditional procurement that are nimbler and may offer better price control.

One such alternative is to create pre-qualified lists of vendors (without price being a consideration). Once such a list is in existence, the local government can get quotes from this pool of vendors with relative rapidity, without again resorting to open tendering. If the local government finds quoted prices to be outside its budget, it can simply withhold the purchase for some amount of time, without setting itself back in the procurement journey. Because the validity of such pre-qualified lists can be several years (subject to trade agreement requirements about re-advertising), it allows local governments' buyers to time the market instead of being timed *by* the market (as it happens in traditional tendering processes).

The final potential measure we will discuss pertains to *contracting*. Contract templates typically used in local government procurement contain 'force majeure' clauses which protect the parties from being obligated to perform their side of the deal when conditions outside their control occur. With respect to the supply chain issues, force majeure clauses tend to favour vendors and, indeed, vendors across Canada and the world have relied on such clauses in the past two years to be excused for delayed performance. From a purchaser's selfish perspective, the simplest thing would be simply to delete such a clause. But doing so would be neither fair not economical, because vendors will then simply inflate their bids to make up for the loss of flexibility.

Instead, local governments could consider a genuine risk-sharing arrangement with vendors, which distributes the risk of additional cost or time if the global supply chain gets strained further in coming months of years. One way to objectively define a "strain" on the supply chain is to establish a commonly understood baseline for the contract, such as the Consumer Price Index (CPI) published by Statistics Canada. If, at the time supply chain issues are claimed by the vendor, the CPI is at or lower than the baseline CPI, then the vendor would take all risk. On the other hand, if CPI is higher, then the risk would be split between the vendor and the local government. This is just one example of how risk-sharing arrangements can be structured in the contract.

The above discussion only covers some of what could be many creative approaches to reducing the adverse impact of the global supply chain crisis on local government procurement. Whichever approach is chosen, the key is to be prepared and face the crisis in a proactive rather than reactive fashion (do take note that supply chain commentators are predicting that the health of the supply chain may be no better in 2022 than it was in 2021!).

~ Rahul Ranade

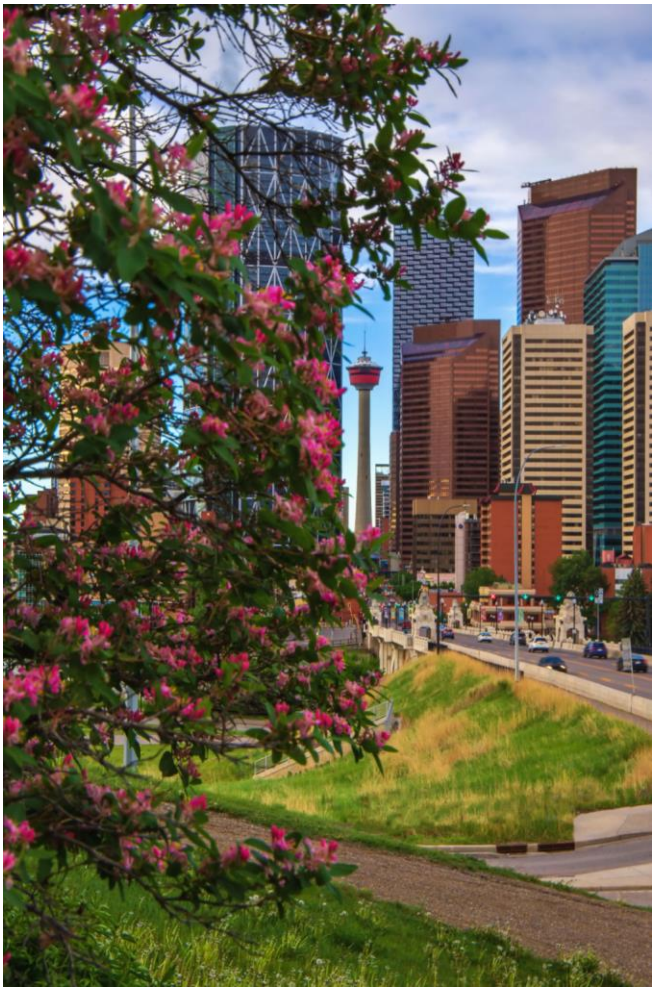
Responding to Due Diligence Requests from Prospective Purchasers in Real Estate Transactions (Part 2)

As noted in the previous edition in our article "*Scope of the Municipality's Obligations under s. 350 of the MGA in Responding to Due Diligence Requests from Prospective Purchasers in Real Estate Transactions*", municipalities often receive due diligence search requests from law firms representing purchasers in real estate transactions ("Due Diligence Searches"). Municipalities may respond to these requests in a variety of ways and sometimes, the response includes the documents requested or expresses an opinion as to the contents of the records.

This article expands on last month's article by considering fees, potential liability and best practices for Due Diligence Searches.

Fees for responding to applications under FOIP Act

Section 93 of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 ("FOIP Act") authorizes public bodies to require applicants to pay fees. The fees an applicant can



be charged for searches under the FOIP Act are set out in s. 13(1) of the *FOIP Act Regulation*, AR 186/2008 (the "Regulation") as follows: the time and cost to search for, locate and retrieve a record; the cost of computer processing and related charges to produce the record from an electronic record; the time and cost for computer

programming to produce the record from an electronic record; the cost to produce a copy of the record; the time and cost for preparing and handling the record for disclosure; the time and cost to supervise an applicant who wishes to examine the original record; and, the cost of shipping the record or a copy of the record. Schedule 2 of the Regulation sets out the maximum amounts that can be charged for each of those services.

A local public body's ability to set fees under section 95(b) does not override the prohibition in section 93(6) against charging more than actual costs. The exact calculation of this fee can be complicated and is often scrutinized on review. However, centralizing the processing of Due Diligence Searches may help the FOIP department to gather the type of evidence that may be required to substantiate the amount of fees charged.

Fees for services (compliance certificate or tax certificate)

The amount of fees that can be charged for the services of providing compliance certificates and tax certificates is not limited by the *Municipal Government Act* ("MGA"). The legal requirements for fees for services are far more flexible than the requirements in the FOIP Act. In the case law, user fees should be related to the cost of providing the service. In determining whether the necessary nexus between the fee and the cost of the service exists, courts will not insist that fees correspond exactly to the cost of the relevant service. The courts have held that it is sufficient for the amount of the fee to reflect a reasonable approximation of the costs.

Potential liability and best practices

Municipal employees may sometimes evaluate documents and provide an opinion or conclusion to a request for a Due Diligence Search. In some cases, the practice of providing conclusions or opinions in response to Due Diligence Searches may result in potential liability for the local government as a claimant may argue that they relied on the evaluation by the local government employee. A finding of liability with respect to potential causes of action such as negligent misrepresentation or potential defences to municipal enforcement such as officially induced error will depend on the specific circumstances of a matter. Regardless of the outcome of the litigation, significant time and expenses may be spent defending such claims.

In terms of best practices, there are a couple of different practices that could be incorporated to ensure that the risk is minimized. Our recommendations are as follows:

- Refrain from providing any opinion or conclusions on the content of the records;
- Design and implement a standard process for receiving, reviewing, processing, organizing and disclosing records that have been requested;
- Set up internal procedures so that the process is consistently applied and provide ongoing training for staff so that they understand their roles and the limits of their roles;
- Consider whether it would be appropriate to create standard form documents for responses to common Due Diligence Searches and whether these documents can incorporate waivers of liability and disclaimers that have been reviewed by legal counsel;
- Advise any requestor that the records are being provided for informational purposes only and that the requestor is responsible for seeking their own independent professional advice in order to interpret and understand the contents of the records; and
- For compliance certificates, ensure that information is readily available online and provided to the requestor setting out in detail the scope of the information that is being verified through the compliance certificate.

Internal protocol for processing, organizing and disclosing documents for Due Diligence Searches

As noted in part 1 of this article in last month's newsletter, there may be some limited searches that can be performed by the tax or financial administration departments; however, the vast majority of Due Diligence Searches should be processed, organized and disclosed by the local government's FOIP department.

~ Alison Espetveidt

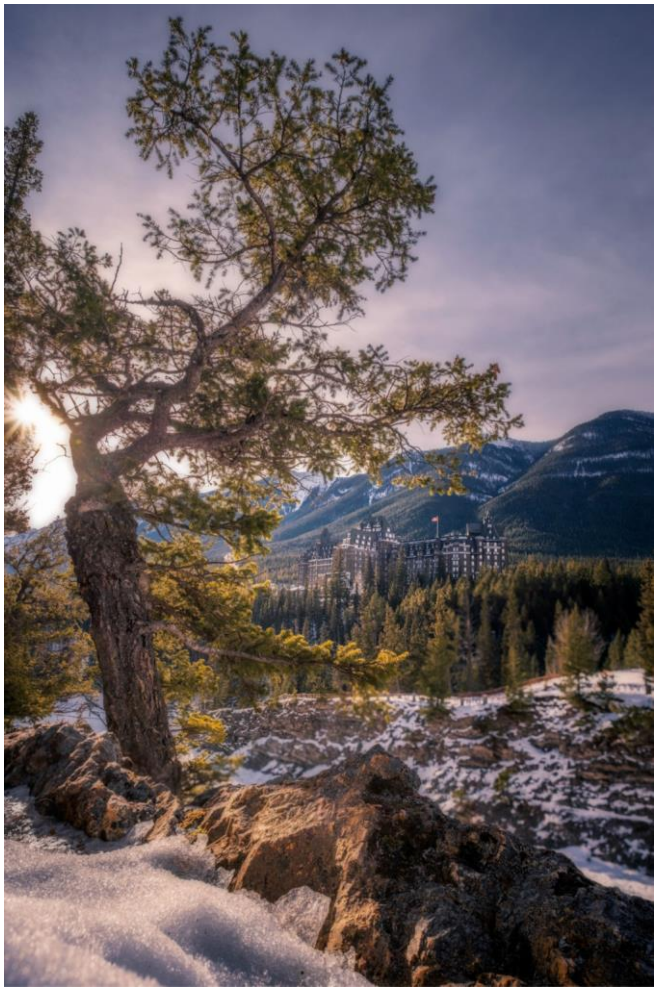
Municipal Councillors' and Employees' Duty of Confidentiality

The improper sharing of confidential information, breaches of privacy, or communications that may be unlawful can undermine municipal operations or expose a municipality to potential liability. Municipal council members are subject to a statutory duty under s. 153(e) of the *Municipal Government Act* ("*MGA*") to keep in confidence matters discussed in private at a council or council committee meeting until they are discussed at a meeting held in public. However, the *MGA* does not create an offence for breaching confidentiality or otherwise set out consequences for a Council member who breaches confidentiality.

Council members are also subject to duties of confidentiality under a municipality's Code of Conduct Bylaw ("Code of Conduct"). A Code of Conduct is required by s. 146.1 of the *MGA* and the *Code of Conduct for Elected Officials Regulation, Alberta Reg. 200/2017* which applies to all councilors equally and which may also apply to council committees and other bodies established by the council who are not councilors.

Section 1 of the *Code of Conduct for Elected Officials Regulation* (the "Regulation") provides that the code of conduct must include a number of topics, including confidential information. The Regulation also sets out sanctions that may be imposed against a councilor for breaching a code of conduct. As such, an individual who breaches confidentiality requirements is subject to the complaint process set out in the Code of Conduct Bylaw and may be subject to the sanctions imposed under that bylaw. Under s. 5 of the Regulation, sanctions in the code of conduct may include:

(a) a letter of reprimand addressed to the councillor;



(b) requesting the councillor to issue a letter of apology;

(c) publication of a letter of reprimand or request for apology and the councillor's response;

(d) a requirement to attend training;

(e) suspension or removal of the appointment of a councillor as the chief elected official under s. 150(2) of the *MGA*;

(f) suspension or removal of the appointment of a councillor as the deputy chief elected official or acting chief elected official under s. 152 of the *MGA*;

(g) suspension or removal of the chief elected official's presiding duties under s. 154 of the *MGA*;

(h) suspension or removal from some or all council committees and bodies to which council has the right to appoint members; or

(i) reduction or suspension of remuneration as defined in s. 275.1 of the *MGA* corresponding to a reduction in duties, excluding allowances for attendance at council meetings.

Municipalities may also enact policies which set out the expectations and standards of ethical behaviour that all municipal employees must follow in their work-related activities. For example, a policy should provide that employees must respect the confidentiality of information of the municipality. They will also be prohibited from using confidential information for the purpose of furthering any private, personal or other prescribed interests. A policy will also provide for the management, safeguarding or maintaining of the confidentiality and privacy of information that comes into the possession of employees or which they may gain knowledge of in their role with the organization in order to meet the municipality's legislative, financial and legal obligations as a public body.

Breaches of confidentiality involving personal information

If the breach of confidentiality involves the unlawful disclosure of "personal information" within the meaning in the *Freedom of Information and Protection of Privacy Act* ("FOIP"), it is possible the Council member could be subject to prosecution under that Act. Section 92(1) of FOIP creates an offence for willfully collecting, using or disclosing personal information in contravention of Part 2 of the Act. Subsection (2) states that a person liable of an offence under s. 92(1) can be subject to a fine of up to $10,000.

We are not aware of any municipal council members in Alberta having been convicted under FOIP. However, a council member in the City of Prince George, B.C., was convicted under BC's *Freedom of Information and Protection of Privacy Act* for the unlawful disclosure of a confidential workplace investigation report to the CBC. He was fined $500.00. We think it is possible a council member could be similarly prosecuted under Alberta's FOIP.

Breaches of confidentiality involving email or electronic devices

From time to time, confidentiality issues may arise regarding improper use of municipal email or electronic devices by municipal councillors or staff. The ubiquity of cell phones and lap top computers may occasionally result in circumstances where a municipal councillor or employee unintentionally, or perhaps intentionally, breaches these duties in their electronic communications. The duty to protect municipal information may extend to electronic media or devices and continues to apply after the employment ends.

A municipal policy may give management the right and discretion to review all information and communication stored on municipal computer, networks and servers. This right must be exercised reasonably and judiciously. A municipal policy may also regulate municipal staff and council members' use of the municipality's email systems whereby employees and council members are expected to comply with the procedure and other email procedures of the municipality including maintaining strict confidentiality when

distributing information via email. Inappropriate use under the procedure may include but not be limited to using email in any way that violates municipal policies, rules, administrative procedures and policies, as well as forwarding email messages from one's municipal email account to a personal or non-municipal email address.

Responding to a breach of confidentiality

With respect to investigating the conduct or communications of council members, as noted above, the Council Code of Conduct Bylaw will govern complaints, investigations and potential penalties. If a councillor discloses confidential information to the public, including former employees, or even to current employees, a complaint can be made under the municipality's Code of Conduct Bylaw and the councillor would then be subject to the procedures and potentially the sanctions set out in the Bylaw. In these circumstances, the Chief Administrative Officer ("CAO") and senior management can also exercise their reasonable management rights and the authority given to them to implement and enforce compliance with the municipality's procedures, guidelines and standards. This is the case so long as the policies and directives are properly known to the employees, are distributed to them, are reasonable, clear and unambiguous, are consistently enforced and that the employees in question are aware of the consequences should they breach the policies.

For a breach involving email or electronic devices, we would first recommend a meeting with the alleged offenders to put the allegations to them and hear their responses. Then, depending on the answers and information provided, decide whether it will be necessary to conduct a more invasive review of the municipality's email, servers and networks as part of an investigation into any wrongdoing. So long as the municipality's basis for reviewing employees' communications on its technology assets satisfies the requirements of reasonableness and necessity, the municipality may do so at its discretion by relying on its policies and administrative directives. The review of employee's emails ought to be as narrow as possible and only to look for any evidence of relating to the allegations of inappropriate disclosure and not for any other purpose.

Should a breach of a policy or policies be determined, appropriate disciplinary measures up to and including termination from employment may be imposed. The degree and extent of the discipline ought to be proportionate to the breach in consideration of all the circumstances.

~ Marisa Cruickshank & Andrew Carricato

Case Law

Top v Foothills (Municipal District No. 31), 2022 ABCA 62

Background

The appellants (referred to as the "Tops" in the judgement) appealed a chamber judge's decision dismissing their challenge to a bylaw enacted by the Municipal District of Foothills No. 31 (the "County") that prohibited signage on stationary vehicles and trailers under its *Land Use Bylaw*. The *Land Use Bylaw* defines "vehicle signs" in section 9.24.1 as follows:

> "Vehicle Sign: a sign that is mounted, affixed or painted onto an operational or non-operational vehicle, including but not limited to trailers with or without wheels, Sea-cans, wagons, motor vehicles, tractors, recreational vehicles, mobile billboards or any similar mode of transportation that is left or placed at a location clearly visible from a highway."

Vehicle signs are prohibited under s. 9.24(10)(a) of the Land Use Bylaw unless the vehicle is:

> "i. is a motor vehicle or trailer;
>
> ii. is registered and operational; and
>
> iii. used on a regular basis to transport personnel, equipment or goods as part of the normal operations of that business."

The appellants consisted of individuals and an entity seeking to enforce their rights of personal as well as commercial expression, those who had their own signage on semi-trailers expressing personal and religious views, those who are in the business of renting trailers for advertisement for profit, and those who allow semi-trailers and commercial signage to be displayed on their property for profit.

The Trial Judgement

At trial, the appellants argued that the signage restriction breached their rights of free expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The County conceded this point but argued that the s. 2(b) *Charter* breach was saved by s. 1 of the *Charter* which provides that protected *Charter* rights are subject to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

At trial, the judge reviewed the case law from the Supreme Court of Canada and other appellate courts and concluded as follows at paragraph 85:

> "In summary, the Canadian jurisprudence on regulation of outdoor advertising recognizes protection of the visual environment as a pressing concern and grants municipalities considerable leeway in determining what is the right level of permissible signage in their community. It will countenance sharp restrictions on the size of permitted signs and even a total prohibition in select locations that have elevated historic or natural significance. It has not, however, found blanket bans on third-party advertising, or actual or de facto total bans on outdoor display advertising, to be proportionate or justifiable absent special circumstances."

On a review of the record before him, the trial judge was satisfied that Foothills Country proved that numerous alternative forms of signage existed and that the restriction on stationary vehicle was within the reasonable range of minimally impairing options available to it. As the trial judge concluded at para. 99:

> "In the case of outdoor display advertising, acts of expression always come at the cost of visual peace for other members of the community. The law recognizes that our visual environment is a resource all citizens are entitled to enjoy, and that it can and should contain personal and commercial messages of a quantity and quality that do not despoil it. By analogy, regulation in this area

> seeks to hold the line between being occasionally spoken to and constantly shouted at. Insisting that large roadside signs are modest in number, and are as complimentary to the overall nature and aesthetics of the community as possible, is a constitutionally appropriate balance."

The Appeal

The appellants argued that the chambers judge erred by: 1) failing to meaningfully and substantively consider and balance the personal and political expression of the appellants; 2) by finding that the *Land Use Bylaw* was rationally connected to the County's objective of maintaining rural aesthetics; 3) by determining that the *Land Use Bylaw* minimally impaired freedom of expression; and 4) by determining that the benefits of the *Land Use Bylaw* were proportionate to the deleterious effects of the *Land Use Bylaw*'s limitation of freedom of expression. The court of appeal confirmed the decision of the chambers judge on all grounds.

On the first ground of appeal, the appeal court concluded that the chambers judge had correctly canvassed the law and meaningfully and substantively considered and balanced the personal and political expression of the appellants. The appeal court noted that appellants still had several compliant ways in which they could continue to advertise while complying with the *Land Use Bylaw* and there was no evidence that compliance would increase the cost, or reduce the efficacy of their expression that would cause constitutional concern. The appeal court concluded that no error has been shown with the chambers judge's weighing of the evidence regarding freedom of expression under s. 2(b) of the *Charter*.

On the second ground of appeal, the appeal court also confirmed the chambers judge's finding that the *Land Use Bylaw* was rationally connected to the County's objective of maintaining rural aesthetics. As the court noted, whether the actual physical differences between vehicle signage and billboard signage or other purpose-build signage are material was for the chambers judge to decide on the evidence. As the appeal court noted at para. 43:

> "By prohibiting vehicle signs along roadways, the consolidated *Land Use Bylaw* removes at least one type of unnatural imagery from the rural landscape. This limit furthers the respondent's objective of maintaining the

> rural aesthetic. As the appellants conceded in their factum '[o]bviously, reason and logic point to the removal of signage generally contributing to the reduction of non-natural features and therefore the elimination of all Trailer Signs is, prima facie, rationally connected to improved rural aesthetics'."

The appeal court also confirmed the chambers judge's determination that the *Land Use Bylaw* minimally impaired freedom of expression. The court noted at para. 49 that:

> "[t]here is no question that there are several other signage options available to the appellants or others who want to express political, religious, commercial or any other type of views outside on rural property: billboards, fascia signs attached to buildings, free standing signs, roof signs, and even portable signs…The consolidated *Land Use Bylaw* also permits residents to make applications for exemptions from its requirements…"

The appeal court further observed at para. 50:

> "Additionally, there is an exception for certain types of vehicle signage – those on registered and operational motor vehicles or trailers used on a regular basis for the normal operation of the business, which contain advertising for the business for which the vehicle is being used. Finally, vehicle signage is permitted on roads that do not constitute a "highway" under the consolidated *Land Use Bylaws*."

The appeal court also confirmed the decision of the chambers judge on the fourth and final ground of appeal by concluding at para. 64:

> "The prohibition in the consolidated *Land Use Bylaw* seeks to improve the visual aesthetic of the municipality and does so by placing a restriction on the use of one type of medium for outdoor signage without creating any limits on the content of signs. We agree with the respondent that freedom of expression protects the messages on signs, which the appellants are permitted to erect subject to obtaining the necessary approvals, but it does not protect the parking of trailers, the strapping of vinyl to steel, or the ability to make money."

The Canadian Historical Arms Society v Leduc (County), 2022 ABCA 46

Background

The applicant, The Canadian Historical Arms Society (the "Society"), operates a gun range on two quarters of land. It sought permission to appeal a decision of the Subdivision and Development Appeal Board for Leduc County (SDAB) dated October 29, 2021, as it relates to restrictions on the Society's shooting activities on one of the quarters (the southwest quarter).

The Society has five existing development permits from Leduc County which permit it to operate a rifle range (1987 permit), to construct berms, concrete pads, and shelters (2014 permit), and to operate a pistol range (2015 permit). The 1987 permit approves the rifle range use and permits shooting activities subject to the condition that "[n]o firearms discharge shall take place outside of the designated area"; however, the 1987 permit does not contain a site plan or specify the location of the "designated area." Site plans were included in the 2014 and 2015 permits, but they are not to scale and provide general descriptions of improvements including berms, concrete pads, shelters, and a pistol range in the "northwest" and "southwest" areas of the southwest quarter.

Leduc County received complaints that the Society was operating the gun range outside of approved areas. Leduc County investigated and following an investigation, issued a stop order on August 31, 2021, requiring the Society to immediately cease all shooting activities in the gun range facility, submit a real property report, and disclose details about its gun range operations. The stop order stated Leduc County's opinion that the gun range was not operating in accordance with permit approval conditions because the shooting activities in the "North Westerly area" of the Society's quarters were outside the approved area, and therefore the Society was in violation of a Leduc County land use bylaw. The Society appealed the stop order

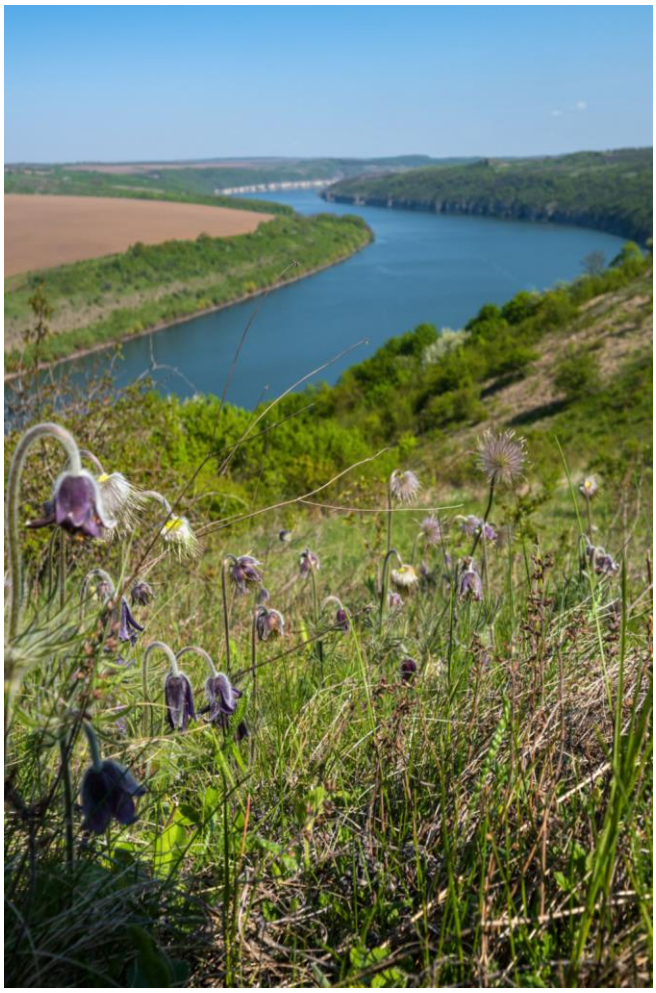
to the Subdivision and Development Appeal Board ("SDAB").

The SDAB Ruling

On the appeal to the SDAB, the SDAB amended the stop order by removing the prohibition on all shooting activities and the other requirements imposed by Leduc County, and instead restricting shooting activities to areas with an existing backstop. The SDAB identified areas with an existing backstop using a 2018 contour map.

The SDAB accepted evidence from Leduc County that shooting was occurring on the southwest side of the southwest quarter. Leduc County provided an opinion at the SDAB hearing that current shooting activities were outside of the approved areas for the gun range, based on its site inspection, neighbour complaints and the applicant's advertising on its website.

The SDAB recognized that the Development Permit that was issued in 1987 only authorized shooting in a "designated area" (condition 5), which was presumably less than the entire parcel or the condition would be without purpose, and that further expansions must be approved by the County (condition 7). While neither party identified the "designated area" on which shooting was permitted, subsequent development permit applications submitted by the Society for the infrastructure and structures necessary to safely allow shooting to occur (such as backstops) identified where shooting was to occur. This was also consistent with the Society social media posting stating that there were six ranges at the site. A contour map which accompanied the application by the Society in 2018 demonstrated where shooting was occurring (with the required infrastructure and structures). The Board did not interpret the Development Permit that was issued in 1987 as permitting shooting without the infrastructure and structures necessary to safely allow shooting to occur. Therefore, shooting was only authorized within the [the southwest quarter] in the areas identified on the Contour Map which accompanied the application by the Society in



2018 as having an "existing backstop".

The SDAB did not receive any information from the Society identifying where shooting was occurring, despite the Society being in possession of that information. The SDAB concluded that the best information about where shooting was actually occurring on the lands was shown on the contour map which accompanied the application by the Society in 2018 (in the easterly half).

The Appeal

The Society appealed on the grounds that: 1) the SDAB erred in law or jurisdiction by finding that the Society had contravened the County's *Land Use Bylaw* or its existing development permits without requiring the County to satisfy its burden of proof and/or by misinterpreting the existing development permits; 2) the SDAB erred in law or jurisdiction by rendering a decision which revoked, amended, or added conditions to previously approved development permits; and 3) SDAB erred in law or jurisdiction by failing to provide a fair hearing, including finding non-compliance not identified in the Stop Order or imposing a remedy not set out in the Stop Order.

In ruling on the appeal, the appeal judge noted that s. 688(3) of the *Municipal Government Act* sets out a three-part test for leave to appeal a decision of the SDAB. A single judge of the Court of Appeal may grant leave to appeal if satisfied the appeal: i) involves a question of law, ii) is of sufficient importance to merit a further appeal and iii) has a reasonable chance of success.

On the first proposed ground of appeal, the appeal judge found that there was no inherent error by the SDAB in looking beyond a development permit to interpret its meaning. When evidential sources are used, the resulting interpretation is a finding of mixed fact and law and the SDAB was permitted to accept any evidence it considered proper, provided it is of some probative value. (para 20)

The appeal judge noted that the Society had not provided any information on where shooting was occurring on the southwest quarter and the SDAB was entitled to accept the 2018 contour map as evidence and to decide how much weight it should carry. Furthermore, the appeal judge confirmed that interpretation of a single development permit will generally not be of sufficient importance to merit a further appeal. Whether an appeal is of sufficient importance usually depends on whether an appeal is jurisprudentially significant or has implications that go beyond the dispute between the parties. In exceptional cases, an SDAB decision may have such an adverse effect on applicant that a further appeal is warranted; however, the appeal judge was not satisfied this was an exceptional case. The interpretation of the 1987 permit was not jurisprudentially significant and was of importance only to the parties. (para. 22)

On the second proposed ground of appeal, the appeal judge found that it did not have a reasonable chance of success. The SDAB's amended stop order did not conflict with the 2014 and 2015 permits and did not have the effect of revoking them. The 2014 and 2015 permits authorized construction, not shooting. They were silent on the use that could be made of the new structures, except that the 2014 permit prohibited shooting outside undefined "designated areas". Further, the second proposed ground of appeal did not raise a question of sufficient importance to merit a panel hearing. (para. 26)

On the third proposed ground of appeal, the appeal judge also concluded that the Society's allegations of procedural unfairness by the SDAB did not have a reasonable chance of success. The appeal judge noted that the SDAB decides appeals de novo, meaning it may hear evidence and argument that was not before Leduc County. The SDAB has the authority to confirm, revoke, or vary a stop order, or to impose its own order. The appeal judge also noted that the Society received a report from Leduc County about a week before the scheduled SDAB hearing date and was granted a four-week adjournment. The Society attended the SDAB hearing, made submissions and did not object or ask for additional time to respond new evidence or arguments during the hearing. It took the opportunity to respond to arguments on defining the designated area and the use of the 2018 contour map. The appeal judge relied on the judgement of the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817* and *Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC* to conclude that the content of

a duty of procedural fairness is "eminently variable" and highly contextual and she was not satisfied there was merit to the Society's proposed third ground of appeal that the procedures followed here were unfair in context.

Dimant v Calgary (City), 2021 ABCA 396

Background

The appellant sought permission to appeal the decision of the Calgary Development Authority (the "CDA") to approve the construction of a distribution building (the "Development"). The appellant owned a recycling business approximately 1.2 kilometres from the Development and was concerned that the Development would create traffic safety issues and would negatively impact access to his business.

The appellant unsuccessfully appealed the decision of the CDA to the Calgary Subdivision and Development Appeal Board (the "Board"). The Board denied the appellant's request for a rehearing and struck his appeal on the grounds that he was not an "affected person" and therefore did not have the right to appeal the decision.

Relevant Legislation

Section 688(3) of the *Municipal Government Act* (the "*MGA*") sets out when an applicant may appeal a decision of the CDA. Permission to appeal will be granted if the issue: (i) raises a question of law or jurisdiction; (ii) is of sufficient importance to merit a further appeal, and; (iii) has a reasonable chance of success on appeal. Section 685(2) states that any person affected by an order, decision, or development permit may appeal the decision. If the person cannot demonstrate that they are an affected person by establishing an injurious affection or a relevant nexus greater than that of an ordinary member of the public, then the application to appeal will be dismissed.

Court of appeal decision

The court of appeal first addressed whether the appellant was an affected person under the *MGA*.

For the appellant to be an affected person, he must demonstrate that he is genuinely and relevantly or seriously affected by the

Development. The Board had previously rejected this characterization, noting that the appellant's concerns were the same as the other businesses in the vicinity and that his business was not sufficiently close to the Development to conclude that there would be an adverse impact. The court held that the Board had correctly applied this

test, and that the appellant was therefore not an affected person.

The court then denied the appellant's argument that the Board erred by determining he was not an affected person prior to the appeal. It was reasonable for the Board to hear jurisdictional issues before expending resources to have a full merits hearing. Finally, the court held that the Board had acted in a procedurally fair manner. Specifically, it rejected the appellant's argument that one of the Board members had a reasonable apprehension of bias.

As the appellant was not an affected person, the application to appeal was dismissed.

Alberta March for Life Association v Edmonton (City), 2021 ABQB 802

Background

The City of Edmonton (the "City") operates a lighting display on a city-owned bridge as part of a community-funded project to celebrate and build community spirit. The City's "Light the Bridge" program allows individuals and groups to apply to have the bridge lit in a combination of colours to celebrate an event, cause, or individual. Applications are subject to City approval. In March 2019, the Alberta March for Life Association ("AMLA") applied to light the bridge during their annual pro-life march. The City denied the request, citing a policy reserving the right to refuse requests that risked polarizing the community.

Issues

AMLA brought an action against the City arguing that the bridge lighting policy unjustifiably infringed their s.2(b) *Charter* right to freedom of expression. Further, they raised the following issues for judicial review:

1. Did the City deny AMLA's request due to bias?
2. As a matter of procedural fairness, should the City have supplied reasons for denying AMLA's request and provided an opportunity to respond?
3. Was the City's decision unreasonable?

AMLA was claiming a positive right to expression

The City argued that AMLA sought to protect a positive right to expression falling outside the scope of s. 2(b). The lighting installation was owned by the City and used solely for the purpose of communicating its public support for approved events, causes, and people. It was a government messaging platform analogous to a website or social media platform, not a personal advertising space. By seeking public access to the bridge for the purpose of conveying a personal message, AMLA was claiming a positive right to expression. No exception permitting a positive right to expression applied. Therefore, the claim fell outside of s. 2(b) protection and was not justified under s. 1 of the *Charter*.

The bridge was not a location protected by s. 2(b)

In the alternative, the court analysed whether the bridge lights were a location excluded from s. 2(b) protection. The appropriate test was whether the bridge lights were a public place where one would expect constitutional protection for free expression on that basis that it does not conflict with the values of s. 2(b). Historically, the bridge was not a place of expression. The addition of the bridge lights did not change this as the lights were intended solely for government communication. If the bridge lights were a place of personal expression it could create a false impression regarding the City's position on causes represented by the lights, compromising the s. 2(b) value of democratic discourse. The court also considered the fact that AMLA could use nearby public land

for expression. Overall, the bridge lights were not a place protected by s. 2(b).

Reasonable apprehension of bias

The court found no evidence that the City denied AMLA's request due to bias against pro-life expression. A previous denial of a similar bridge lighting request in 2017 did not establish bias, nor did the City's repeated approval of bridge lighting for LGBTQ+ themed events.

Fair opportunity to engage with decision-maker

AMLA argued that the City should have provided them with reasons for denying the request and allowed them an opportunity to respond. The court disagreed, finding that the requirements for procedural fairness were on the lower end of the spectrum. In arriving at this conclusion, they considered that the policy permitted applicants to reapply, did not establish a process requiring applicants to be heard, and gave no assurance that any particular request would be granted.

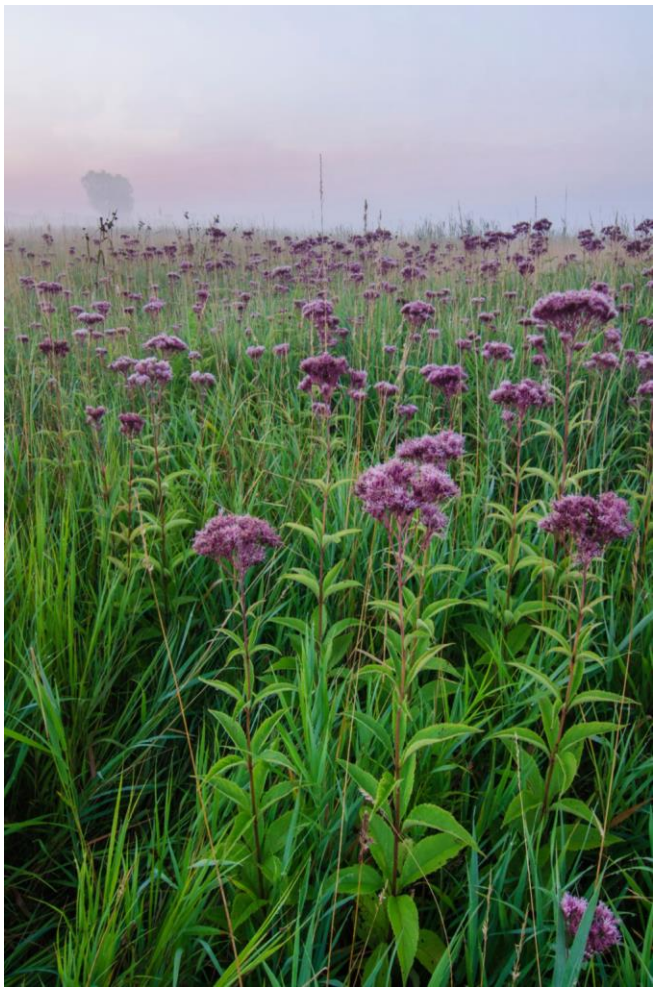
Reasonableness of the decision

The standard of review was reasonableness. The stated rationale for denying the request was the polarizing nature of the subject matter. The subject matter was clearly the abortion debate, and its characterization as polarizing was justifiable. The denial of the request was reasonable based on this rationale.

Sutton v Regional Municipality of Wood Buffalo, 2021 AHRC 77

Background

The complainant was employed at the Regional Municipality of Wood Buffalo ("RMWB"). For two years, she displayed a pattern of absenteeism that she attributed to migraines. RMWB implemented accommodations as prescribed by a physician. When the complainant's absences continued, RMWB placed her into an absence management program. RMWB undertook significant reorganization, laying off around 60 employees. At this time, they terminated the complainant's employment, offering her a choice of receiving severance or bumping a more junior employee.



Issues

The complainant alleged discrimination in employment based on physical and mental disability. Specifically, she contended that RMWB failed to adequately accommodate her disability, harassed her for absenteeism related to her disability, and that her disability played a role in her termination.

Statutory Deadline

This complaint came before the court as a Request for Review. The court rejected RMWB's argument that the request fell outside of the statutory deadline for filing.

No evidence of discrimination

The complainant's allegation that her disability was insufficiently accommodated fell outside the one-year time limit for filing a complaint pursuant to the *Alberta Human Rights Act*. The court considered these events only for context, noting that RMWB had acted according to the prescribed accommodations on an ongoing basis.

RMWB's absence management program was an appropriate exercise of its authority as an employer. The evidence did not establish that the oversight of the complainant's attendance related to her disability.

There was no evidence that the termination was related to the complainant's disability. She was laid off as part of corporate reorganization along with 60 others. This process occurred in alignment with the Collective Agreement's terms and the complainant was provided with the same options as other terminated employees. The complainant's Union was available to provide support and did not raise any issues.

The Director of the Commission's dismissal of the Complaint was upheld.

Pyke v Calgary (City), 2022 ABQB 198

Background

On a cold morning in February 2014, when the roads in some places were slick with ice, the driver of a Ford F150 pick-up truck traveling westbound on Glenmore Trail lost control. The truck swerved back and forth before careening into the median and vaulting the barrier in the middle of the median, crossing into oncoming traffic. The truck collided head on with a Honda Accord traveling eastbound. One passenger in the Honda Accord was killed and three others suffered serious injuries.

Two claims were brought against the City of Calgary ("City") as a result of the accident. First, there was a claim that the City made an unsafe road available to the public. The road was alleged not to meet applicable engineering safety standards. Specifically, it was argued that the road was unsafe because of the placement of the barrier relative to the curb. Second, there was a claim that the road was not kept in a reasonable state of repair by reason of a build-up of dirt and gravel against the barrier. It was argued that this reduced the functional height of the barrier and served as a ramp to launch the pick-up track over the barrier. The claims were advanced as both common law negligence claims and statutory claims pursuant to s 532 of the *Municipal Government Act* ("*MGA*"), RSA 2000, c M-26.

The question before the Court was whether the City was liable in any way for the accident. The Court concluded that the City had some liability for the accident.

What is the Scope of the City's Statutory Duty to keep Roads in a Reasonable State of Repair?

The court noted that the City's statutory duty to keep roads in a reasonable state of repair is found in s. 532 of the *MGA*:

> (1) Every road or other public place that is subject to the direction, control and management of the municipality, including all public works in, on or above the roads or public place put there by the municipality or by any other person with the permission of the municipality, must be kept in a reasonable state of repair by the municipality, having regard to
>
> > (a) the character of the road, public place or public work, and

(b) the area of the municipality in which it is located.

(2) The municipality is liable for damage caused by the municipality failing to perform its duty under subsection (1).

The court also ruled that the duty to keep roads in reasonable repair extends to a general duty to provide a safe road. Relying on precedents from Ontario, Alberta and the Supreme Court of Canada, the court concluded that the plaintiffs could advance their claims.

What is the Scope of the City's Prima Facie Common Law Duty of Care?

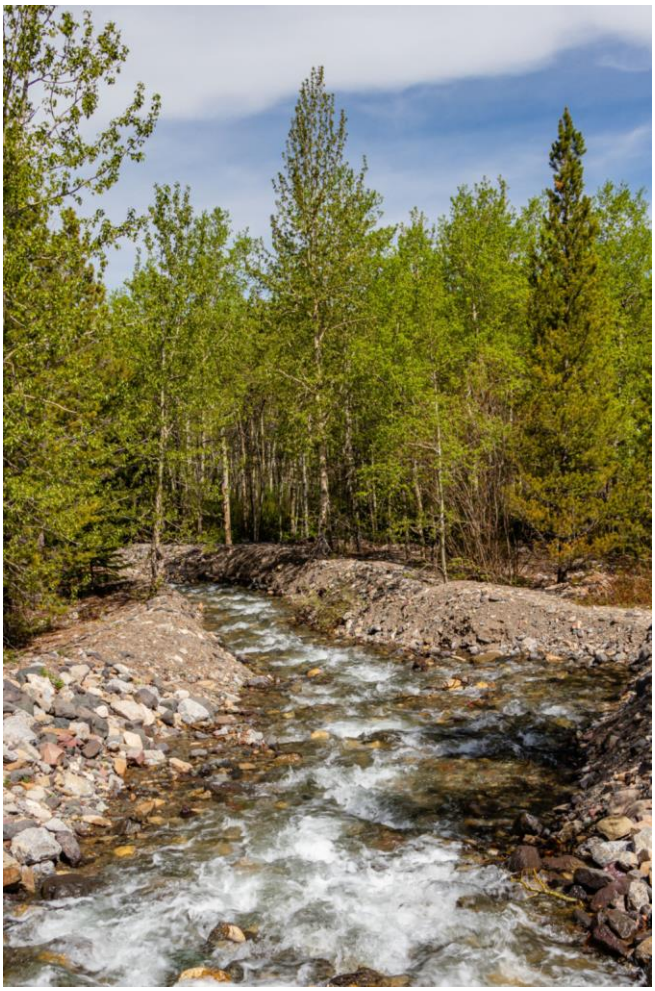
The court noted that, while originally at common law municipalities had no duty of care to road users even where the municipality had a statutory power to repair and maintain roads, subsequent judgements have extended a duty to provide a reasonably safe road. In this regard, the court said the following:

> "The question of whether a road is reasonably safe includes an assessment of the permanent features of the road and the upkeep of the road. Duties to ensure that the road is reasonably maintained or kept in a reasonable state of repair are components of the general duty to provide a reasonably safe road. What in any given case constitutes a reasonably safe road and what must be done to create or maintain a reasonably safe road are questions of the standard of care." (para. 21)

Are the Municipality's Duties Negated by Policy Considerations?

Relying on the Supreme Court of Canada's decisions in *Kamloops v Nielsen*, [1984] 2 SCR 2 and affirmed in *Nelson v Marchi*, 2021 SCC 41, the court considered whether the City's liability would be limited because the matter in issue is one of policy rather than one of operations. Municipalities generally have a level of protection from liability in cases where the matter is a result of a policy decision, rather than an operational decision. Accordingly, it was necessary to determine whether the unsafe road was a result of a policy choice or an operational decision or omission.

The court concluded that the implementation of the inadequate median barrier occurred at an operational level. Once the decision to build a



median barrier was made, the implementation of that decision through the design and construction process has all the hallmarks of a routine operational activity. Similarly, the ongoing failure to address the shortcomings of the median and median barrier while continuing to invite the public to use the road was an operational decision or, more accurately, an

operational omission. Since the matters in issue were operational in nature, there was no reason to relieve the City from its *prima facie* duty of care.

What is the Applicable Standard of Care?

Relying on *Partridge v Rural Municipality of Langenburg,* [1929] 3 WWR 555 (Sask CA) the court concluded that the "general rule" is that "the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety. What is a reasonable state of repair is a question of fact, depending upon all the surrounding circumstances…." (para. 31). This inquiry involves consideration of the character and population of the area, the amount of traffic using the road, and whether the road is a low-traffic rural roadway or a higher-traffic thoroughfare or highway.

As well, the court noted that the "[s]tandard of care may be established by reference to other 'indicators of reasonable conduct including professional standards and internal policy'" (para. 37). To this end, the court looked to the City's internal policies and the standards expressed in its key messages to the media following the accident.

The court concluded that the City's standard of care was amply provided for in its own policies and statements. The City had a duty to ensure that its roads, including medians and median barriers, were reasonably safe. The standard for this duty was stated by the City itself to involve regular examination of road infrastructure to ensure that it is in compliance with safety standards. The City's standard of care for keeping roads in a reasonable state of repair was found in the City's policies which provided in mandatory terms for the cleaning and maintenance of medians every year. (para. 43)

What Caused the Accident?

The court concluded that the driver of the F150 was not travelling at an unsafe speed at the time of the accident and that black ice caused the driver to lose control of the F150. The court also accepted expert evidence in the field of highway design that the City's traffic barriers were improperly designed and placed creating a risk that a vehicle would hit the curb and vault over the barrier and the risk that dirt and gravel could build up on the median and impair the functioning of the barrier. Further, relying on expert evidence, the court concluded that a safer design would not have been materially more expensive after taking into account savings from reduced maintenance costs.

Finally, the court determined that the City had failed to remove the build-up of dirt and gravel that had accumulated against the barrier and this created the conditions for the accident to occur. Weighing all of the evidence, the court found that the F150 was travelling well under the speed that the barrier should have contained and that but for the ramp of compacted dirt, gravel, and snow, the F150 would not have overcome the barrier. The court concluded that the build-up of dirt and gravel was not an issue of intrinsic safety of the road, but rather an issue of maintenance or repair and the accident was caused by the failure to keep the road in a reasonable state of repair.

City's Knowledge of Danger

The court found that the City knew or ought to have known that the dirt and gravel ramp on the Glenmore Trail median was a safety hazard and that the City's summer maintenance plan made the cleaning of medians mandatory for safety reasons. As the court noted:

> "Quite apart from anything else, including accident data, the presence of the dirt and gravel ramp was easily observed without technical assistance and common-sense dictates that a ramp before a barrier,

> especially one that materially lowers the functional height of the barrier, creates the hazard of launching vehicles over the barrier."(at para. 74)

City's Arguments that Claim Statute Barred

In defense, the City argued that its liability was negated by the *Limitations Act*, RSA 2000, c L-12 and ss. 530 and 533 of the *MGA*.

The City asserted that it had no liability because the ultimate limitation period in the *Limitations Act* barred any claims relating to the original design of the median and barrier. In response, the court determined that the cause that gave rise to the accident was an ongoing issue with the City having an ongoing duty to provide a reasonably safe road. This was "because its invitation to the public to use the road is open-ended; this duty is evergreen and the limitation runs from the time that the injury occurred. Accordingly, the claim is not barred by the ultimate limitation." (para. 87)

The City further contended that s. 530 of the *MGA* insulated the City from liability. Section 530 limits the liability of a municipality for damage caused by a system of inspection or maintenance and the manner in which inspections or maintenance are performed, including the frequency, infrequency, or absence of inspections. Relying on the Supreme Court of Canada's judgements in *Rizzo & Rizzo Shoes Ltd (Re)*,1998 CanLII 837 (SCC), [1998] 1 SCR 27 and *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19, the court concluded that "provisions in the *MGA* granting municipalities powers to promote public safety should be interpreted broadly and provisions exempting municipalities from liability for endangering public safety should be construed narrowly." (para. 94)

Noting apparent contradictions in the *MGA* between ss. 530 and 532, the court concluded that:

> "a narrow reading of *MGA* s 530 that gives full effect to *MGA* s 532 is consistent with a larger purpose of the *MGA* which is to promote and maintain safe communities. *MGA* s 530 accordingly does not exempt municipalities from liability for failing to keep roads and public places in a reasonable state of repair. Such an interpretation does not render the *MG* s 530 exemption from liability for lack of maintenance meaningless as it still applies to municipal property other than roads and public places and to anything else to which a municipality may have a power or responsibility to inspect or maintain." (para. 98)

The court also considered the City's argument that s. 533(a) of the *MGA* limited any liability associated with the median barrier. On this issue, the court again found against the City by concluding that *MGA* s 533(a) functions to exempt municipalities for decisions with respect to the installation and type of road infrastructure; it does not exempt municipalities from their duty to keep that same road infrastructure in a reasonable state of repair. The present case was not about the presence of a barrier, but about its state of disrepair. Section 533(a) did not relieve the City of liability for the negligent upkeep of the barrier.

The City also argued that s. 533(b) precluded any liability associated with the buildup of dirt and gravel on the median. The court found that like *MGA* s 533(a), s. 533(b) does not exempt municipalities from the duty to keep roads and road infrastructure in a reasonable state of repair under *MGA* s. 532. The issue "[was] not the buildup of dirt and gravel on its own, it is that the buildup of dirt and gravel rendered the median barrier ineffective" and "caused the median barrier to be in a state of disrepair" (para 112). The court stated that:

> "Nothing in *MGA* s 533(b) gives any indication that it is intended to negate liability for failure to keep road infrastructure in a reasonable state of repair

as provided for in *MGA* s 532. Indeed, to interpret s 533(b) broadly to apply to the buildup of dirt and gravel that reduces the effectiveness of a median barrier would undermine an important purpose of the *MGA* and unduly limit the scope of *MGA* s 532." (para. 112)

Conclusion

The court concluded that the City had some liability to the plaintiffs for the accident. Specifically, the City was liable for a failure to keep the median and median barrier in a reasonable state of repair pursuant to its common law duty and *MGA* s 532.

News

Unpaid oil and gas property taxes continue to climb and Province promises to address issue

In January and February the Rural Municipalities of Alberta ("RMA") conducted a survey of its 69 members and found that, since 2021, there has been a 3.3-per-cent increase in the overall amount of unpaid oil and gas taxes.

At their Spring convention, RMA members voted to lobby the province for more help in collecting the unpaid taxes. The RMA wants to partner with the Alberta Energy Regulator to ensure they can consider payment of property taxes when reviewing licence approval and transfer applications between companies. Rural communities want the ability to provide the regulator with real-time data as it relates to these unpaid property taxes.

At the convention, the Premier, Minister of Energy, and Minister of Municipal Affairs each expressed support for addressing the issue. The RMA has promised to follow up with the province and will provide updates to RMA members as they become available.

Province announces plan to match federal cash for transit systems hurt by COVID-19

Alberta Transportation Minister Rajan Sawhney announced in a statement on March 11, 2022 that the province is offering $79.5 million for municipal transit systems across Alberta hurt financially during the pandemic. That money is a requirement for the province to get matching funds from Ottawa announced in February.

The minister indicated that "barring any questions from the federal government on our approach, we will be moving quickly to advance grant agreements with municipalities and get cheques out the door." According to the minister's press secretary, details of the funding package are still being finalized and will be shared "in the weeks ahead."

The Rural Municipalities of Alberta have formally opposed the move toward a provincial police force

The Rural Municipalities of Alberta ("RMA") has formally opposed a proposed move toward a provincial police force by submitting a report to the Ministry of Justice and Solicitor General.

The Government of Alberta has been exploring a recommendation of the Fair Deal Panel to replace the RCMP with an Alberta provincial police service ("APPS"). The Province has been engaging with stakeholders across Alberta to gather their opinions on the proposed policing model.

The statement from the association representing 69 different counties and municipal districts said the information shared by the Province "has left significant questions unanswered regarding how an APPS will increase policing service levels in

rural areas, decrease overall policing costs, or increase local input into policing."

The RMA's response follows opposition from Alberta Municipalities members, who voted against the proposal in March.

Bill 21 proposes amendments to the *Municipal Government Act*

Bill 21, otherwise known as The Red Tape Reductions Statutes Amendment Act, was introduced on April 25, 2022 and proposes to amend 13 statutes, including the Municipal Government Act ("*MGA*"). If passed, the *MGA* would be amended in the following ways.

1) Two or more municipalities could establish an intermunicipal business licence program by adopting a bylaw of each participating municipality.

2) The Minister can currently dismiss council, a member of council, or the CAO of a municipality where an order of the minister from a viability review is not being carried out. The proposed amendments would give the Minister additional powers to enforce compliance with such ministerial orders.

3) The Minister would be allowed to approve Community Revitalization Levy bylaws and amendments. Such bylaws and amendments currently have to be approved by the Lieutenant Governor in Council.

4) Specific rules for the assessment and taxation of non-residential property would be moved from the Matters Relating to Assessment Sub-Classes Regulation directly into the *MGA*.

The Government of Alberta is proposing changes to the *Condominium Property Act*

Bill 19 proposes amendments to the *Condominium Property Act*, including changes to voting rights and damage chargebacks to owners. These changes are expected to strengthen the self-governance of condominiums, reduce financial risk for owners and corporations, and increase clarity for volunteer boards.

The proposed voting method shifts to a simple, owner-based model in addition to the existing model. Currently, a unit-factor voting structure exists, where owners' votes are weighted based on the number and size of units owned. While owners can still request a unit-factor vote, the option of utilizing a one-vote-per-owner approach will provide a less complicated voting method for simple matters.

The proposed amendments would allow a condominium corporation to charge back costs related to repairs and damages as a result of an owner, an occupant, or the person for whom the owner or occupant is responsible, as set out in regulation, without having to go to court. This is expected to reduce the likelihood of increased condo fees to cover repair costs and associated legal or court costs. **~ Charlotte Kelso**

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