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NEWSLETTER

First Nations Consultation: Local Government ≠ The Crown

The 2004 Supreme Court of Canada decision in Haida Nation v. B.C. (Ministry of Forests) *confirmed that the Province of B.C. is under a common law duty to consult with First Nations whose unproven but claimed aboriginal rights or title could be infringed by a pending government decision. Since that decision, First Nations around B.C. have asserted that local governments are under a similar common law duty in relation to their decisions, usually decisions on land use and development matters. It is certainly possible that development activities authorized by local government permits and approvals on private land could affect claimed aboriginal title or rights, in the same way that provincial government resource dispositions like timber harvesting permits could affect such rights. However, the application of the decision in* Haida Nation*, as it has been elaborated upon in subsequent court decisions, to local government land use management decisions would give rise to some very significant challenges:*

- Generally, local government land use decisions involve the use of private property. If aboriginal title exists in a particular location in B.C., any claim to such title would be "upstream" of the disposition by means of which the Crown granted a fee simple interest to a predecessor in title of the owner who is seeking the land use approval, and thereby would cloud the owner's title. The Crown's duty to consult may, in particular cases, go hand in hand with a duty to accommodate First Nations interests in the decision. If First Nations interests must be accommodated in local government land use decisions, the effect could be an apparent infringement of the property owner's rights to develop their land under the applicable local government bylaws. Thus, the impact of First Nations claims in respect of private property, which until now has generally been "off the table" in the negotiation of treaties to settle aboriginal rights and title, would be delivered by the local government.

- As part of the consultation process mandated by *Haida Nation*, the Crown must assess the strength of the aboriginal claim to determine how "deep" the consultation must be. Strength of claim analysis is a complex, potentially expensive process, particularly where there are overlapping claims, and senior governments have sometimes failed to perform this analysis to the standard required by the courts. Local governments are totally unequipped to undertake this process.

- First Nations frequently respond to Crown consultation initiatives by requesting financial resources to support their consultation activities. Local governments would have no resources to fund their own participation in a consultation process based on *Haida Nation* standards, let alone the participation of the First Nations with whom they are consulting.

The consultation and accommodation obligations described in *Haida Nation* arise in British Columbia from the Crown's assertion of sovereignty over aboriginal people who were never "conquered". In that decision, the Supreme Court of Canada made the following observations: the honour of the Crown is always at stake in its dealings with aboriginal peoples; where treaties remain to be concluded, the honour of the Crown requires negotiations leading to just settlement of aboriginal claims; and while that process continues, the honour of the Crown may require it to consult and, perhaps, accommodate aboriginal interests.

Cases decided after *Haida Nation* found that the Crown's common law duty to consult in respect of decisions that could infringe aboriginal rights exists equally <u>after</u> a treaty has been negotiated. Thus, if local governments also owe a duty of consultation and accommodation in relation to aboriginal rights that are merely claimed, that duty would not end when the local First Nation signs a treaty; rather, it would continue in relation to any aboriginal rights – such as rights to hunt or fish – that the First Nation continues to exercise pursuant to its treaty. There are nearly two hundred separate First Nations in B.C., and there may ultimately be nearly that many different treaties. Thus, the implications of a local government common law duty to consult and accommodate First Nations are profound.

The first B.C. case in which a Supreme Court judge was called upon to decide whether local governments are indeed under a common law duty to consult and accommodate First Nations in the course of issuing development approvals was decided in April in the local government's favour. In *Neskonlith Indian Band v. Salmon Arm (City)*, the Neskonlith sought an order quashing a "hazard lands" development permit on the grounds that the City had not consulted with the First Nation in the manner described in *Haida Nation*, nor accommodated its concerns. The City had not acceded to the First Nation's request that it engage in consultation as if the City were the Crown. The development permit authorized the construction of a large commercial building in the floodplain of the Salmon River, specifying a flood construction level (FCL) that was based on a report by a professional engineer as contemplated by s. 920(11) of the *Local Government Act*. The First Nation had engaged a consultant who advised that the FCL specified in the development permit was too low.

In the Supreme Court proceedings, the Neskonlith had to produce evidence that the development authorized by the permit had the potential to harm its interests. The alleged harm, in this case, was based on the possibility that the FCL specified in the development permit was indeed too low; that the Salmon River would flood so as to damage the building; that such flooding would likely lead to physical measures such as the construction of dikes or other flood control structures to protect the building from future flooding; and that the construction of such structures would exacerbate future flood damage to the First Nation's nearby reserve or otherwise harm the natural environment on which the First Nation depended for various resources.

The City argued that the case law on the issuance of development permits, which has consistently required local governments to confine permit conditions to those supported by the relevant DP guidelines, clearly prevented it from engaging in either consultation or accommodation of First Nations interests when considering a development permit application. The City's floodplain hazard area development permit guidelines did not require (and based on the development permit case law, could not have required) the permit applicant to accommodate unspecified First Nations interests in its development.

However, the Neskonlith argued that section 35 of the *Constitution Act, 1982* prevailed over that entire body of case law. Section 35 recognizes and affirms the existing aboriginal and treaty rights of First Nations throughout Canada. In a 1997 Quebec case involving a local government employee residency requirement, the Supreme Court of Canada confirmed that section 32 of the *Constitution Act*, which made the *Canadian Charter of Rights and Freedoms* applicable to the legislature and government of each province, should be interpreted to make it applicable to local governments as well. The Neskonlith First Nation argued that, for the reasons articulated in that case, section 35 was also applicable to local governments, and the constitutional recognition and affirmation of aboriginal rights required that Part 26 of the *Local Government Act*, which delegates land use management powers to local governments, be interpreted in such a manner that the Crown's duty to consult and accommodate First Nations went along with those powers. If it were not interpreted in that way, Part 26 – and, presumably, every other enactment of the Province that delegates governmental powers to local governments – would be unconstitutional.

There is nothing in Part 26 of the Local Government Act that either expressly or by implication delegates to local governments the duty or power to carry out consultation procedures on behalf of the provincial Crown in relation to the issuance of development permits.

Interestingly, the Neskonlith's arguments were at odds with the position that another local First Nation had taken in litigation concerning the incorporation of the Sun Peaks Mountain Resort Municipality (*Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*). In that case, Adams Lake argued successfully that the Province had a duty to consult with it regarding the incorporation because, once the territory in question was inside the boundaries of a municipality, bylaws affecting the First Nation's interests could be adopted without consultation because the municipality had no duty to consult.

The B.C. Supreme Court rejected the Neskonlith First Nation's arguments. In the first place, the Supreme Court of Canada had indicated in the *Haida Nation* case that "the honour of the Crown cannot be delegated". The Court had revisited the delegation issue in a subsequent case, *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, in which it held that the provincial Crown could delegate consultation procedures to the British Columbia Utilities Commission, either expressly or by implication. Mr. Justice Leask observed in *Neskonlith* that there was no reason that the Province could not similarly delegate consultation procedures to local governments, but held that there was nothing in

Part 26 of the *Local Government Act* that either expressly or by implication delegated to local governments the duty or power to carry out consultation procedures on behalf of the provincial Crown in relation to the issuance of development permits. Further, and significantly, Mr. Justice Leask held that local governments had no independent duty to consult First Nations.

The decision in *Neskonlith* does not affect the law on consultation regarding official community plans pursuant to section 879 of the *Local Government Act*. That section clearly obliges local governments adopting or amending their OCPs to consider whether and how they ought to consult a number of potentially affected parties, including First Nations, but has been interpreted such that the consultation principles in *Haida Nation* do not apply. Nor does the *Neskonlith* decision deal with consultation in which local governments are instructed to engage on the Province's behalf when the local government is seeking some sort of provincial government approval that is itself subject to the provincial Crown's duty to consult.

Nor does the decision suggest that local governments should not be engaged with local First Nations on such matters as harmonization of land use regulations, servicing agreements, and other government-to-government negotiations on matters of mutual interest. It does mean, however, that both local governments and First Nations can continue to engage, without importing into their relationship the notion that the local government stands in the shoes of the Crown and is therefore bound by the same duties as the Crown.

Bill Buholzer ✍

Index of Notable Cases

Below is a list of notable local government court decisions since August 2011.

SUPREME COURT OF CANADA

Catalyst Paper Corp. v. North Cowichan (District), **2011 SCC 2**
Counsel: Sukhbir Manhas & Reece Harding, Young Anderson

Catalyst's appeal of their industrial tax rate was dismissed. The S.C.C. held that, in reviewing bylaws for reasonableness, courts must respect the decisions of elected representatives, and should intervene only if the bylaw is one no reasonable body, informed by a myriad of factors, could have made.

BRITISH COLUMBIA COURT OF APPEAL

Peachland (District) v. Peachland Self Storage Ltd., **2011 BCCA 466**
Counsel: Sukhbir Manhas, Young Anderson

An interlocutory injunction prohibiting the removal of aggregates without a permit was upheld.

Central Saanich Society v. Central Saanich (District), **2011 BCCA 484**
Counsel: Ray Young, Q.C. & Alyssa Bradley, Young Anderson

The Court upheld a zoning bylaw, finding it only offends the consistency requirement in the Local Government Act if the bylaw is "in absolute and direct collision" with an Official Community Plan.

BRITISH COLUMBIA SUPREME COURT

Green Mountain Holdings Ltd. v. Merritt (City), **2011 BCSC 1183**
Counsel: Reece Harding, Young Anderson

A claim against the City, with respect to a latecomer agreement for sewer services, was dismissed on the basis of the 6 month limitation defence.

Fisher Road Holdings Ltd. v. Cowichan Valley (Regional District), **2011 BCSC 1540**
Counsel: Ray Young, Q.C., Young Anderson

An application for judicial review to quash the Regional District's zoning bylaw was dismissed on the basis that the public hearing was procedurally fair in the circumstances.

Vancouver (City) v. O'Flynn-Magee et al., **2011 BCSC 1647**
Counsel: B. Parkin & I. Dixon, City of Vancouver

The City obtained an injunction to enforce compliance with a bylaw and remove a "tent city" located on City lands.

North Vancouver (District) v. Guest, **2011 BCSC 1790**
Counsel: Francesca Marzari & Michael Moll, Young Anderson

The Court required the removal of a 10 x 10 shed on a property with dedicated but unimproved road access, finding it was open to the District to require and refuse a building permit for fire safety reasons.

Schlenker v. Torgrimson, **2012 BCSC 41**
Counsel: Ray Young, Young Anderson

The Court dismissed an application to disqualify elected officials sitting as directors of community based non-profit societies. No disqualifying conflict of interest was present where no financial loss or gain was established.

Central Saanich Society v. Central Saanich (District), **2012 BCSC 121**
Counsel: Alyssa Bradley, Young Anderson

A non-profit society that challenged a zoning bylaw was required to pay the District's costs, as the Society members who funded the litigation acted in their own personal interests.

Whistler (Resort Municipality) v. Whistler Aggregates Ltd., **2012 BCSC 151**
Counsel: R. Hordo & D. Volk, Hordo Bennett Monteer

Whistler's injunction was denied on the basis that an asphalt plant fell within the permitted use of processing of aggregates.

Baziuk v. Shelley, **2012 BCSC 295**
Counsel: C.S. Murdy, Murdy & McAllister

A newly elected councillor was disqualified from office because he received compensation as a volunteer firefighter for the municipality.

Neskonlith Indian Band v. Salmon Arm (City), **2012 BCSC 499**
Counsel: Reece Harding & Bill Buholzer, Young Anderson

Local governments do not have a constitutional duty to consult and accommodate First Nations when considering development permit applications.

Using Legal Services Effectively

This is the first of two articles on how to use legal services effectively. This first article deals with solicitor services – part two will address litigation services.

The efficient use of legal services may become even more top of mind for local governments if and when the *Auditor General for Local Government Act* becomes law. As stated in section 3, the purpose of that Act is increased local government "accountability to their communities for the stewardship of public assets and the achievement of value for money in their operations."

With that in mind, the most important step to using legal services effectively is to consult your legal counsel as a first step, not a last one. A primary purpose of legal review is to obtain legal guidance on the local government's authority to adopt the proposed bylaw or undertake the planned activity. Legal review will identify procedural requirements, approval and other statutory preconditions, and the timing for these steps. Legal review will also identify uncertainties and inconsistencies in a proposed bylaw or contract. It is often not an efficient use of local government resources for a proposal to be referred to a consultant, considered at public meetings, reviewed by committees, drafted into a bylaw or contract, and then sent for legal review at the end of the process, when legal issues are then raised.

Another important step to using legal services effectively is to send all possibly relevant information to your legal counsel at the time of the initial request. It is sometimes thought that sending all information will increase the legal cost because of the lawyer time needed to review the information. However, your lawyer will easily be able to determine if information is relevant or not, and having all information will enable your counsel to understand the facts of the question and identify the real legal issues. Sending limited information with the legal services request often results in additional time and cost delays since the lawyer must request additional information and adjust the scope of the issues as the information is received. It may also result in advice that would be different if all the facts were known.

Providing information to your lawyer in the form of a draft bylaw or draft contract may seem to be the most effective use of legal resources, but often it is not. In almost every case, despite the best efforts your consultant, the draft bylaw or contract is not well-prepared from a legal perspective and the reviewing lawyer must address drafting issues as well as the content and purpose of the document. In virtually every case it is preferable to send the lawyer a list of points that the local government wishes to have incorporated into the bylaw or contract. The preparation of this list will also ensure the local government truly understands all the essential points. Since engineering and other consultants are not lawyers or trained to draft bylaws, focusing their drafting involvement to the list of essential points will also be a more cost-effective use of their time.

Another tip for effective use of legal resources is the inclusion of information in email or telephone messages. A message asking the lawyer to call regarding the "Jones file" will not be as effective as a message asking the lawyer to call regarding "the disclosure at the Jones public hearing of the traffic consultant report". This additional information will increase the ability of your counsel to be prepared to answer your questions when they call you back.

Finally, the most important tip for effective use of legal services is to obtain legal review of a bylaw before it is adopted and a contract before it is signed. The cost of legal review of a proposed bylaw or contract is insignificant compared to the legal costs of litigation to defend a challenged bylaw or to settle a contractual dispute.

Patricia Kendall ✍

Volunteer Firefighter Disqualified from Holding Office

Under section 67 of the Local Government Act*, employees of a local government who want to run for office with their local government employer must take a leave of absence during the nomination period and election. If an employee is elected, the employee must resign from employment with the local government. However, election officials may recall that the Province enacted a new regulation prior to the 2011 municipal elections, specifying that certain classes of persons are not "employees" in the context of local government elections.*

The regulation, entitled "Volunteer Eligibility for Office Regulation", provides that volunteers who do not receive monetary compensation from a local government are not "employees" under section 67 of the LGA. It goes on further to specify certain things that do not constitute "monetary compensation", such as reimbursement of expenses directly related to the performance of the volunteer services for a municipality or regional district. We would have thought that true volunteers would never have been considered "employees" for the purposes of section 67 of the LGA and, as such, a regulation was not necessary to address the application of section 67 to them. Thus, the new regulation appears to be addressed at volunteers who are remunerated beyond reimbursement of expenditures, and is intended to clarify that they are in fact "employees".

In past elections, clients have sought advice as to whether volunteer firefighters are "employees" under section 67. Our general view has been that if a volunteer firefighter receives remuneration for attending practices, training, and call outs, then the individual is an employee and is subject to the requirements of section 67. The Court recently considered this very issue in the case of *Baziuk v. Shelley*, in which an unsuccessful candidate for councillor in a municipal election challenged the right of a successful candidate to hold office because he was an employee of the municipality and did not take the necessary steps to permit him to run for office. The successful candidate in this case was a member of the municipality's volunteer fire department.

The successful candidate argued he was not an employee of the municipality because he did not receive monetary compensation from the municipality. Although volunteer firefighters did receive remuneration for their services, after he was elected, the successful candidate requested that any remuneration to which he was entitled be donated to charities selected by the Fire Department Association. The Court did not accept this argument and found that the successful candidate did not fall within the scope of the above regulation because he received monetary compensation from the municipality at the time he was elected. Therefore, he was disqualified from holding office and the municipality was required to hold a by-election.

This case is a reminder that volunteers who receive remuneration, no matter how minor, may be considered employees of the municipality for the purposes of section 67 of the LGA, unless the remuneration falls within the listed exceptions in the Volunteer Eligibility for Office Regulation.

Carolyn MacEachern ✍

The Cull Controversy: How Can We Alienate Our Deer Without Alienating Our Residents?

Several communities in BC are currently dealing with an over-population of urban deer. The Provincial government has indicated that local governments should be responsible, financially and practically, for managing deer in their communities. The Province nonetheless provides guidance and in some ways oversees deer management.

In 2010 the BC Ministry of Environment produced an Urban Ungulate Conflict Analysis ("UUCA") – a 243-page document that reviews causes of and potential solutions to urban deer populations. Culling through trapping and euthanizing the deer is one commonly recommended method of population control, as it is relatively inexpensive and considered by its proponents to be effective and humane. However, many opponents to the culling method question both its humaneness and its efficacy.

The UUCA recognizes the potential for public opposition to culling and recommends that such opposition be considered when making decisions regarding deer population management. The Province recommends addressing the "human dimensions" of wildlife management through public consultation and engaging diverse stakeholders in the community.

However, non-lethal options are limited in availability and effectiveness. Some solutions, such as relocation and fertility control, are not currently considered viable by the Province due to cost and other practical considerations. Other solutions, such as "no feeding" bylaws, may contribute to a reduction of deer numbers, but may not be sufficient on their own to eliminate the problem.

Faced with arms-length involvement from the Province and a management model that both favours culling and recommends community involvement in the decision-making process, local governments may find it difficult to reconcile the anti-cull position of some residents with the conclusion that a cull is ultimately necessary. A concrete example of this is the recent trio of culls completed in Cranbrook, Kimberley, and Invermere. Those local governments followed the Province's guidelines and recommendations, but met with strong resistance from some members of the community. Many of those opposed to culling felt that they were not adequately informed or consulted about the process. The conflict resulted in vandalism, legal action, and a largely unsuccessful cull in Invermere.

Politically, it may be in Councils' best interests to go beyond their legal requirements of procedural fairness and involve the community through education initiatives and public consultation long before committing to a cull. Although there will always be those who are categorically opposed to culling, this approach may reduce conflict and help communities arrive at a solution that most can accept.

Melania Cannon

A Parcel Tax Primer

With tax season upon us, it is useful to review some of the fundamentals of the local government taxation scheme. While most local governments are very familiar with the requirements of their annual property taxes, many are less clear on the process that is required to levy parcel taxes each year.

In order to levy a parcel tax, local governments require three things:

1. A bylaw under section 202 of the *Community Charter* directing the preparation of a parcel tax roll, including the basis upon which the parcel tax is to be calculated;

2. An authenticated parcel tax roll; and

3. A bylaw under section 200 of the *Community Charter* imposing the parcel tax, and specifically stating the amount of the tax per parcel, frontage, or taxable area.

Bylaw Directing Preparation of a Parcel Tax Roll

A bylaw under section 202 of the *Community Charter* is required to direct the collector, and ultimately the parcel tax review panel, as to how to prepare the parcel tax roll. This bylaw must state whether or not the parcel tax is to be imposed as a single amount for each parcel, or on the basis of the taxable area or frontage of the parcel. If the parcel tax is to be based on the taxable area or taxable frontage, the bylaw must further set out how that taxable area or frontage is to be calculated.

Since the 2009 BC Court of Appeal decision in *O'Flanagan v. Rossland City*, many local governments have opted to impose parcel taxes for some local area services on a taxable area basis designed to capture the density potential of undeveloped or underdeveloped properties. In *O'Flanagan*, the Court of Appeal found that local governments may direct that the calculation of the taxable area may take into consideration the zoning of parcels and their development potential. However, drafting a parcel tax direction bylaw from which the collector can determine the taxable area that will hold up to review can be much more difficult. Analysis of development potential may take into account many factors, including the presence of covenants, development permit areas, and other obstacles to subdivision or development, and may become very complex. For a parcel tax imposed over a large portion of the municipality, more than one zone may come into play, with different rules for calculating or determining development potential in each zone. Ultimately, a formula based on the physical area of a parcel and zoning designations that can be easily determined by reference to the assessment roll and the zoning map may be the best option in many cases.

In some cases, local governments may attempt to both direct the preparation of a parcel tax roll, and impose the tax in the same bylaw. Generally, we recommend against such an approach, unless the parcel tax is on a per parcel basis and does not vary with the costs of the service or the number of participants each year. Where taxable area or taxable frontage are the basis for the parcel tax, the imposition of the tax amount will almost always have to be done by a separate bylaw.

Authenticated Parcel Tax Roll

The second element that every local government needs before it can impose a parcel tax, is an annually authenticated parcel tax roll. In the first year that a parcel tax is to be imposed, the collector must create the roll in accordance with the bylaw directing its creation, and then make it available for public inspection. Then, a parcel tax review panel must be convened to consider any complaints respecting the roll. At this stage, any member of the public, including one that is not subject to the parcel tax, may make complaints or seek corrections with respect to the roll. Ultimately, the parcel tax review panel must hear the complaints, direct the collector to make any changes warranted to the roll, and authenticate the parcel tax roll for use in that tax year. There is a very limited appeal to the B.C. Supreme Court from the directions of the review panel. Once this process has been completed, the process is much more straight forward in future years.

Before the parcel tax is imposed in any given year, local governments must publish a newspaper notice indicating that the parcel tax roll is available for inspection

After the inaugural year of the parcel tax roll authentication process, the collector may amend the parcel tax roll in relation to names or addresses on the roll, the inclusion or exclusion of a parcel, the taxable area or frontage of a parcel, or the application of an exemption. A person who owns a parcel included on the parcel tax roll may also request that the roll be amended and the collector may make those changes.

In addition, before the parcel tax is imposed in any given year, local governments must publish a newspaper notice indicating that the parcel tax roll is available for inspection and that a person who owns a parcel on the roll may request that the roll be amended. The collector must consider any such requests and a person who is unsatisfied with this decision may make a complaint in relation to their own property. If a municipality receives a complaint, they must re-establish the parcel tax roll review panel to deal with the complaint. The panel's decision is subject to the same rules of appeal as the inaugural roll. If no complaints are made, the parcel tax roll, as presented by the collector for public inspection, is deemed to have been authenticated for that calendar year. In any event, it may then be the basis of the bylaw that imposes the parcel tax for that year.

Imposition of Parcel Tax

Once a local government has an authenticated parcel tax roll for the current year, it may proceed to pass a bylaw to impose the parcel tax for that year. It will generally be premature for a local government to presuppose the number of parcels or the amount of taxable area or frontage stated on a roll before the authentication process is complete, so this step must take place after the authentication of the roll. Therefore, once the roll is authenticated, the calculation may be made as to the unit cost per parcel, frontage or area for that year, and stated in the tax imposition bylaw.

While property tax bylaws are clearly required to be passed before May 15 of each year, there is no clear rule with respect to the bylaw that imposes rates for parcel taxes. However, section 237(1)(2)(b)(iv) of the *Charter* states that the municipality's tax notice must include taxes imposed for that current year, including parcel taxes. Furthermore, the scheme set out in the *Community Charter* provides that all taxes are due on July 2 of each calendar year, unless an alternative scheme has been proposed, and that automatic penalties and interest will apply to any taxes paid past the due date. This applies equally to parcel taxes. Therefore, although section 200 of the *Community Charter* does not specify a specific time by which parcel tax rates must be imposed by bylaw, it is generally in a local government's interest to do so at or about the same time as it imposes its property tax rates. In fact, it may be convenient to do so in the same bylaw as the property tax rates are set.

Francesca Marzari ✍

Mandatory E-Filing: It's Here!

*Phase 2 of Mandatory E-Filing to the Land Title Office comes into effect on **May 7, 2012**. As of that date, many commonly used land title forms and documents must be filed electronically, including all covenants and statutory rights of way and their supporting plans. These applications are only exempt from mandatory electronic filing if:*

- they are submitted as part of a package that includes documents that are not required to be filed electronically (e.g. as part of a package containing a subdivision plan);
- they are tendered for submission by a 'government applicant', including a local government, where the government is identified as the applicant for registration and is the owner of the charge or interest;
- a paper copy of the document or plan was signed prior to the applicable effective date.

Clients awaiting signatures on LTO forms and plans prepared in paper format are well-advised to ensure those documents are signed prior to May 7, 2012. Any documents not signed by that date will have to be prepared again in electronic format prior to signing, unless being filed by the local government directly.

We anticipate subsequent phases later this year and perhaps into 2013, including eventual mandatory e-filing of subdivision plans and strata plans requiring approving officer approval.

Joanna Track ✍

FOIPPA meets Facebook, and other Updates

At the end of 2011, the Province amended the Freedom of Information and Protection of Privacy Act *in an attempt to modernize and clarify the legislation and enable the use of new communication technologies, including social media. This article highlights some of these recent changes.*

Scope of the Act

In Part 1, the scope of the Act has been revised so that it no longer applies to records that are available for purchase by the public (section 3(1)(j)). Previously, the head of a public body could refuse to disclose documents that were available for purchase by the public, but the Act now excludes such records. The hope is that, by simply excluding records that are available for purchase, rather than making refusal discretionary, this will reduce the costs of processing and responding to access to information requests.

Part 1 of the Act has also been amended to clearly state that the Act does not apply to a record of a service provider that is not related to the service being provided to the public body (section 3(1)(k)). Thus, local government service providers are not subject to the provisions in the Act, except with respect to the particular service they are providing to the local government.

Responding to Access Requests

In Part 2, if an applicant has asked for a copy of a record in electronic form and it is reasonable to provide the record in that form, a copy of the record must now be provided in electronic form with the response (section 9(2.1)). Additionally, where it is unreasonable for a record to be examined, the public body can now refuse to permit the examination under section 9(3)(a).

A public body may still refuse to disclose information that will be published or released to the public within 60 days of the applicant's request. However, if that information is not published or released within 60 days, the public body must now provide the information within 30 days of that date, and can no longer treat the request as if it were a new request (section 20(3)). In addition to information that will be released or published within 60 days, the head of a public body may now also refuse to disclose information that must be published or released to the public under an enactment (section 20(1)(c)). Again, the hope is that giving the head of a public body the discretion to refuse such information will help to reduce administration costs.

Under section 22, a public body must refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. This includes the personal privacy of a deceased person. When determining whether disclosure constitutes an unreasonable invasion of a deceased person's personal privacy, the head of a public body must now consider whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of that person's personal privacy (section 22(2)(i)).

The Act now also clarifies that provision of specified information is not an unreasonable invasion of a third person's personal privacy in respect of a licence, a permit, or any other similar discretionary benefit, including the person's name, what the item grants, the status of the item, the date it was granted, the period of time that it is valid, and when it expires (section 22(4)(i)). Thus, where there is an application to disclose a municipal licence or permit, the information referred to above should not be withheld under section 22 as being an unreasonable invasion of a person's personal privacy.

Protection of Privacy

Part 3 of the Act deals with protection of privacy, and there have been a number of significant changes to this part of the Act. Under section 26, a public body can now collect personal information by observation at a presentation, ceremony, performance, sports meet, or similar event that is voluntarily attended and that is open to the public. The usual rules requiring that a public body notify the individual from whom it collects the personal information of the purpose for collecting it and the legal authority for collecting it do not apply where the information is collected at such a public event. Under section 33.1(1)(q), a public body may freely disclose such information inside and outside of Canada. Although it is not specifically mentioned in the legislation, the Province has confirmed that this change is intended to allow for video recording of public events and the sharing of such video recordings online. For example, local governments can now record public hearings and post them on their websites, without giving notice to the individuals they are recording.

Changes to FOIPPA specifically enable engagement through the use of social media sites, such as Facebook and Twitter.

Another practical amendment is found in the new section 27.1, which says that personal information that is received by a public body is not considered "collected" by the public body if the information does not relate to a program or activity of the public body, and the public body has done nothing more than read it and then delete or destroy it, or read it and transfer it to the appropriate public body. Section 27 allows the appropriate public body to receive this information, despite the general rule that personal information must be collected directly from the person it is about. This allows public bodies who receive misdirected information to transfer that information to the appropriate public body, and allows citizens to avoid having to resend their communications to the correct public bodies.

Use of Social Media

Section 33.1(1)(r) now permits the disclosure inside and outside of Canada of any information that was disclosed on a social media site by the individual the information is about, so long as the information was obtained or compiled by the public body for the purpose of engaging individuals in public discussion or promotion respecting proposed or existing initiatives, policies, programs and activities, or respecting legislation relating to the public body, and so long as the disclosure is consistent with that purpose. This change to FOIPPA specifically enables engagement through the use of social media sites, such as Facebook and Twitter, allowing local governments to use those sites as places of open public discussion and participation with respect to local government matters. Information shared through those social media sites can be freely disclosed.

Access to Information without Request

Another significant change is found in section 71 of the Act, which now requires that all public bodies establish categories of records that are in their custody or under their control and are available to the public without a request for access under the Act. While the Act previously enabled a public body to prescribe categories of records available to the public without request, this provision is now mandatory. Local governments may wish to include bylaws, press releases, public financial records, and similar documents, but must ensure that no personal information in any document is made available without an FOI request.

Cloud Computing

The recent amendments to *FOIPPA* have not specifically addressed the recent trend in "cloud computing", though the Office of the Information and Privacy Commissioner has issued a set of guidelines to public bodies wishing to use this type of service. Cloud computing is the practice of using the Internet to process, manage and store data on remote network services. The recent trend in cloud computing has seen a great migration of information, once stored on the hard drives of personal computers, to remote servers in a domain controlled by online service providers. However, public bodies looking to store personal information "in the cloud" must first consider their obligations under FOIPPA, and how those obligations apply to the cloud.

Subject to specific exceptions listed in section 30.1 of *FOIPPA*, personal information, including information in computer logs and on backup tapes or drives, must be stored in and accessed only from inside Canada. One exception to this general rule is where the individual the information is about has consented, in writing, to the storage or access outside of Canada. While some organizations are offering cloud computing products that store personal information solely inside of Canada, public bodies should make appropriate inquiries to ensure that they can rely on the representations these organizations are making. Whether a public body stores personal information in its own offices, across the street, or in the cloud, all public bodies are required to protect that personal information. Reasonable security arrangements in the context of cloud computing will usually require a public body to review the security measures that the cloud provider has in place, including corporate policies, access management, infrastructure security, and encryption methods.

Public bodies looking to store personal information "in the cloud" must first consider their obligations under FOIPPA.

Joanna Track ✍

Going Paperless

Over the past few months, several local governments across British Columbia have switched to paperless council meetings. Rather than incurring the financial and environmental costs of printing, assembling, and then couriering agendas for council meetings, some local governments have abandoned a printed agenda in favour of an electronic agenda, and are using tablet computers, such as iPads, during council meetings. Councillors and staff are able to write notes directly on the electronic agenda, just as they would with a paper agenda. They are also able to flip directly to specific pages, and search entire documents by keyword. The switch to paperless council meetings represents a considerable savings in paper, as staff reports and meeting agendas, which can be hundreds of pages in length, are reduced to a single electronic file.

However, when making the switch to paperless council meetings, elected representatives and staff should keep in mind that notes saved on an electronic device will generally be subject to disclosure under the *Freedom of Information and Protection of Privacy Act*. Council members should be sure to keep personal files separate from local government files, and may wish to delete irrelevant notes from the device at the end of each meeting.

The paperless trend has further possibilities and implications for local governments beyond council meetings. In recent years, utilities, banking institutions, and some provincial government agencies have given their customers or taxpayers the option to receive notifications and invoices electronically. However, while the *Taxation (Rural Area) Act* has been amended to allow the Province to send its tax notices electronically, local government ratepayers do not currently have the option to receive their property tax notices electronically, as section 237(5) of the Charter requires that: "For the purposes of this section, the tax notice is to be mailed to the owner or other person at the address on the assessment roll". An amendment to this section is needed in order to allow local governments across BC to participate in this paperless invoicing trend, and there is some discussion among local governments and the UBCM of pursuing such an amendment.

Of course, going paperless represents a considerable upfront expense for some local governments, but in the long term eco-friendly local governments who go paperless should be able to save green by going green.

Jay Lancaster

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This newsletter is made with recycled paper.

Look for Your Lawyers

We are pleased to announce that **Melania Cannon** was called to the bar in March, and is now an associate lawyer with Young Anderson. Melania came to us after clerking at the BC Supreme Court for a year, and is already putting her court experience to work for us. Articling student and planner **Jay Lancaster** will be called to the bar in May and we are delighted to announce he has agreed to continue as our associate. Last year's summer student **Joe Scafe** will be returning to the firm in August as an articling student. All three of them have been an excellent addition to the firm.

Ray Young will be speaking on the role of the Municipal Auditor General at the Annual Conference of the Local Government Management Association of British Columbia (LGMA) in Victoria on May 16.

Pat Kendall and **Barry Williamson** will be presenting a legal update at the annual Government Finance Officers Association of British Columbia (GFOA) conference in Kelowna from May 30 – June 1.

Bill Buholzer will be speaking on the recent decision in *Neskonlith Indian Band v. Salmon Arm (City)* at the International Municipal Lawyers Association (IMLA) conference in Red Deer, Alberta on June 1. He will also be speaking on the Approving Officer as a Statutory Decision-Maker at the Municipal Administration Training Institute (MATI) School for Approving Officers on October 29 in Kamloops.

Michael Moll and **Don Howieson** will be speaking at the annual Licence Inspectors and Bylaw Officers Association of British Columbia (LIBOA) conference in Kelowna from June 12-15.

Bill Buholzer will be chairing the upcoming Municipal Law Continuing Legal Education (CLE) seminar on June 13 in Vancouver, and **Pat Kendall** will be presenting a paper on Elections issues. **Melania Cannon** will also be presenting a paper on animal control issues.

Ray Young and **Alyssa Bradley** will be speaking at the Canadian Institute of Planners (CIP) annual conference in Banff, Alberta from October 9-12.

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