YOUNG ANDERSON
BARRISTERS & SOLICITORS

MAY 2011, VOLUME 22, NUMBER 1

NEWSLETTER
LGMA CONFERENCE ISSUE

How much is that doggie in the window? He's not for sale anymore

In November 2010 the City of Richmond was the first city in Canada to pass a bylaw prohibiting the sale of dogs in retail stores. The purposes of the ban were to improve the conditions of dogs sold in Richmond (both in relation to the conditions in the stores and the wholesale suppliers of puppies to stores), as well as to address a perceived problem of impulse buying contributing to a high number of abandoned dogs. The prohibition was enacted through an amendment to the City's Business Regulation Bylaw that added puppies and dogs to the list of the types of animals that cannot be sold in the City. The Business Regulation Bylaw preserved the sale of dogs from licensed hobby kennels and commercial kennels in the City, which are also closely regulated as to the condition of the dogs raised within them.

Unlike other cities in the United States where similar prohibitions have been enacted, the City of Richmond had three pet stores actively involved in the sale of dogs at the time the bylaw was enacted in November 2010. The bylaw provided approximately six months before it came into force on April 30, 2011.

The Court found that the City had a proper purpose in addressing the issue of impulse buying of dogs in pet stores.

In the intervening period, three pet stores that sold puppies and dogs challenged the validity of the bylaw on numerous grounds, including on the basis that it amounted to a prohibition of business rather than mere regulation, that it was passed for an improper purpose, that it was discriminatory, and that it was unreasonable. The B.C. Supreme Court upheld the bylaws on all counts. In particular, the Court found that the City had a proper purpose in ad-

dressing the issue of impulse buying of dogs in pet stores. The Court found that the prohibition of one kind of animal, even in combination with other animals, was not prohibitory of business *per se*, and that numerous pet stores specializing in pet food and supplies operated in the City without the sale of live animals at all.

Ultimately, the Court found that it is within the jurisdiction of a local government in the Province of British Columbia to prohibit the sale of dogs in retail stores, and found that it was not the Court's role to judge the reasonableness of Council's decision given the substantial record before the City upon which Council made its judgment. While the City of Richmond may be the first city in Canada to consider this issue, it is unlikely to be the last. Expressions of interest with respect to this issue have been received across the country.

Francesca Marzari

Between a rock and a hard place: Court orders City to complete tax sale

In Saini v. Grand Forks*, a decision released in March, the B.C. Supreme Court considered the effect of an escheat of a tax sale property to the provincial Crown. This decision highlights some of the inherent risks and complexities associated with tax sales.*

A numbered company owned the property, which had an assessed value of $199,000 and in respect of which $10,240 in taxes were owing. The City auctioned the property at the 2008 tax sale and the Sainis were the successful purchasers. Afterwards, the City tried to notify the company of the tax sale and the date of expiry of the redemption period, sending four letters over 11 months using the address shown on title to the property. All of these letters were returned unopened. The City also made unsuccessful attempts to find correct contact information for the company. However, it appears that the City did not apply to Court for a substituted service order under s. 414 of the *Local Government Act*. Further, when the property was not redeemed the City did not immediately file the notice of non-redemption.

About one month after the expiry of the redemption period, the City learned that the company had been dissolved shortly before the tax sale for failing to file the required annual corporate reports. At that time, the City advised the tax sale purchasers, the Sainis, that it would not complete the tax sale, taking the position that the tax sale was invalid as the property had escheated to the provincial Crown prior to the tax sale. The Sainis refused to accept a refund of the purchase price and commenced Court proceedings seeking an order that the City complete the tax sale. The company, having been restored as a company in good standing, also commenced legal proceedings seeking compensation from the City on the basis that it was not notified of the tax sale and redemption period. Accordingly, the City was in the unenviable position of either completing the tax sale and possibly having to compensate the company for its losses, or refusing to complete the tax sale if it had some legal basis for so refusing. The City took the latter position, arguing that

the tax sale was a nullity due to the escheat.

Under the *Business Corporations Act* a company that is dissolved ceases to exist for all purposes and its land escheats to the Province under the *Escheat Act*. Importantly, a dissolved company may subsequently be restored. The Court noted that "while a dissolved corporation has been compared to a dead person, the analogy is not entirely apt: short of the miraculous, a man once dead remains so, while a corporation once dissolved is routinely revived". The Court referred to s. 364(4) of the *Business Corporations Act*, which provides that "a company that is restored is deemed to have continued in existence as if it had not been dissolved" and to s. 4(4) of the *Escheat Act*, which provides that the restoration of a corporation "has effect as if the land of the corporation had not escheated to the government, and [...] the land vests in the corporation". Based on these provisions, the Court held that the temporary escheat at the time of the tax sale did not nullify the sale. The Court ordered the City to complete the sale to the Sainis.

Failure to provide notice by personal service, registered mail or in accordance with a Court order leaves the municipality vulnerable to compensation claims from an owner or charge holder.

This case reinforces the importance of carefully reviewing a title search and possibly other searches before the tax sale and of taking prompt steps following a tax sale to notify owners and charge holders of the redemption period. Information from title searches and other searches, such as corporate registry searches, can help to identify possible issues with the tax sale and whether legal advice is needed. Further, a municipality has only three months to provide the redemption period notice either by personal service or registered mail. If notice cannot be given by one of those two means, the *Local Government Act* permits the municipality to apply to Court for a substituted service order. Failure to provide notice by personal service, registered mail or in accordance with a Court order leaves the municipality vulnerable to compensation claims from an owner or charge holder. Accordingly, prompt attempts to provide notice need to be made so there is sufficient time to obtain and comply with a substituted service order within the three month period following the tax sale.

While the circumstances surrounding the City's actions in this case are not entirely clear from the Court's decision, a search of the B.C. Company Registry would have revealed that the Company had been dissolved. If the City had obtained this information before the tax sale, the City may have been in a better position to consider its options and to obtain legal advice. In light of the uncertainty as to the effectiveness of serving or mailing notice to a dissolved company, a prudent course of action would have been to apply to Court in a timely manner for a substituted service order.

Mike Quattrocchi

The future is here: electronic filing at the LTO

The Land Title and Survey Authority has encouraged the electronic submission of documents to the B.C. Land Title Offices for over five years. Currently, the LTSA can accept almost all types of land title transactions in electronic form, and it is up to the parties to decide whether to file plans, forms, and agreements in either paper or digital format. Last month, the LTSA set target dates for mandatory electronic filing of some applications.

The following 'low complexity applications' must be filed electronically starting January *16, 2012:*

- Form A Freehold Transfer of Fee Simple
- Form B Mortgage
- Form C Charge, such as a covenant, easement, or statutory right of way (when it does not include a reference to a survey plan for that charge)
- Form C Release of Charge

The above applications are exempted from mandatory electronic filing if they are:

- tendered for submission by a 'government applicant', including local governments, where the government is identified as the applicant for registration and is the owner of the charge or interest;
- part of a package including other applications, such as a survey plan or a Form 17; or
- signed prior to the January 16, 2012 start date.

We expect that the first exemption will only apply if a local government officer puts his or her own name and local government contact information in item 1 of the Form A, Form B, or Form C. Because the LTSA has stated that it intends to shift to nearly total electronic filing within the next few years, we also expect that these exemptions will be phased out eventually. The LTSA will announce subsequent phases for required electronic filing this autumn, likely setting timelines for the filing of electronic subdivision plans, strata plans, Form C charges with accompanying survey plans, and Form 17 applications.

All parties and stakeholders in the B.C. land registration process are facing a time of transition. Documents and plans prepared for electronic filing look different than the paper versions that local government officials and employees have become used to seeing. Approving officers and planning staff will be at the vanguard of this change. As most B.C. surveyors prefer electronic survey plans over paper plans, local governments will need to understand and work with all land title documentation in electronic format.

Young Anderson is able to prepare and file electronic documents and forms. We are happy to help your organization at any and every stage of electronic document preparation, signature, and filing.

Christina Reed

Employee's personal emails not subject to FOI

A recent court case involving the City of Ottawa considered the issue of whether a municipal employee's personal emails, which were sent and received using a workplace email address but completely unrelated to his work, are subject to disclosure under the Ontario Municipal Freedom of Information and Protection of Privacy Act. *In this case, the City permitted incidental personal use of its email system by its employees, subject to certain conditions. The employee in question was a City Solicitor and, in his spare time, he volunteered for a non-profit society. There was no connection between the employee's volunteer work and his work for the City. The employee stored these emails on the City's email system but segregated them in a separate file folder. The Court was clear that there was no connection between the City and the emails in question and there was nothing improper in the employee's use of his work email for this purpose.*

The applicant made an access request for all "emails, letters and faxes" sent or received by the employee to and from anyone at the non-profit society. The City, not surprisingly, took the position that these communications did not fall within the scope of the legislation as they were not related to the employee's duties as City Solicitor.

The applicant appealed the City's response to Ontario's Information and Privacy Commissioner and a hearing was conducted before an Adjudicator. The Adjudicator concluded that the emails were within the custody and/or control of the City given that the City had physical possession of the emails on its server, the City had the authority to regulate the email system and the City had the right to monitor the emails on its system for unauthorized use. The City appealed this decision to the Ontario Superior Court of Justice.

The Court noted that while the City had physical possession of the emails, there was no requirement for the employee to use the City's email server and that the employee could have deleted the emails at any time.

The Court disagreed with the Adjudicator's conclusion and determined that the records in question were not within the custody or control of the City and, therefore, did not fall within the scope of the legislation. The Court noted that anything created by the employee was outside the context of his role as an employee of the City. As well, the documents were never intended to be used by the City or for any municipally-related purpose. The Court noted that

while the City had physical possession of the emails, there was no requirement for the employee to use the City's email server and that the employee could have deleted the emails at any time. The Court further noted that the seizure of these records by the City and the delivery of them to a third party would conflict with the employee's privacy rights, the protection of which is another key goal of the legislation.

We are not aware of a similar issue arising under the *Freedom of Information and Protection of Privacy Act* in this Province. We are of the view that this court decision would be persuasive if a similar issue was being considered by the Office of the Information and Privacy Commissioner for B.C. While this may be the case, local government employees should regularly delete their personal emails from local government servers. As well, local government employers should adopt clear policies on the extent to which, if any, the local government will allow employees to use their work email for personal purposes.

Carolyn MacEachern ✍

Public nuisances examined in two cases

Two recent cases involving nuisance activities in public places yielded markedly different results. An application to require the Vancouver police and the Attorney General to enforce certain laws was dismissed while an action in nuisance aimed at the raucous actions of users of a closed road end was successful, with the court giving the Province an opportunity to take steps to abate the nuisance before a further court hearing scheduled for the fall.

In *Myer Frank Agencies Ltd. v. City of Vancouver*, the plaintiff, a commercial landlord, claimed that an informal labour exchange known as "cash corner" had developed on Ontario Street near its property. Persons gathering at cash corner waiting to be hired allegedly obstructed vehicle and pedestrian traffic, fought, consumed alcohol and drugs in public and used the area as an open toilet. The landlord claimed that as a consequence of this behavior it was difficult to find tenants and that rents for the commercial space had to be reduced. The landlord's position was that complaints to City officials and the police failed to produce results and that there were no plans to do anything about the situation. The City's response was that it had investigated the landlord's complaints adequately.

In the context of a common law claim, the landlord applied for an interlocutory injunction to prevent people from creating nuisances by soliciting and obstructing the free passage of pedestrians and vehicles. However, in addition to a common law remedy, the landlord also sought an order directing the Vancouver police to enforce the free passage provisions of the City's Street and Traffic Bylaw and the anti-soliciting section of the provincial *Safe Streets Act*. These two remedies might have had a similar effect from the landlord's perspective, but the judge was alive to the fact that they were based on differing legal principles. The injunction stemmed from a civil claim for damages to the landlord's economic and property interests. On the other hand, the enforcement order was essentially a public remedy compelling a public authority to perform its legal duty.

In order to grant the public remedy, the Court had to be satisfied that the police and City were under a duty to act because there were breaches of the bylaw or *Safe Streets Act*. It concluded that there

was no unlawful solicitation as the only persons solicited were the prospective employers who went to cash corner precisely for that purpose. The Court accepted, though, that the landlord might be able to make out a case of loitering that could interfere with or obstruct traffic.

The Court next determined whether there was a public duty to enforce the bylaw or whether there was only a discretionary power to do so. The *Vancouver Charter*, in permissive language, authorizes the City to enforce its bylaws through Supreme Court proceedings. The Court confirmed the well-established principle that a local government's exercise of its discretion to enforce its bylaws is not reviewable by a court, absent bad faith, of which there was no evidence in this case. Decisions about whether, when and how the City should enforce the *Street and Traffic Bylaw* were to be left to the elected members of City council.

The Court confirmed the well-established principle that a local government's exercise of its discretion to enforce its bylaws is not reviewable by a court, absent bad faith, of which there was no evidence in this case.

In *Myer Frank Agencies* the Court took a restrained approach, leaving decisions about enforcement of the bylaw to the discretion of the City and the police department. A much less restrained approach was demonstrated by the Court in *Mynott v. British Columbia (Ministry of Transportation)*. In that case, the Court rejected a similar argument advanced by the Province that its decisions in respect of addressing nuisance activities on public lands were policy decisions not to be reviewed by the Court.

The Mynotts owned property near Goat River outside Creston. When a bridge crossing the river was removed, the remaining road right-of-way next to the Mynotts' property became overgrown and impassable to vehicle traffic. In the summer months crowds of transient cherry pickers gathered to party at a beach area at the foot of the road.

In response to the Mynotts' complaints about the users of this right-of-way, the Province said that the issue was a law enforcement matter for the RCMP and a community land use matter for the regional district to resolve. The Province also led evidence that the cherry growers association had distributed cards setting out a code of conduct for users of the beach and had undertaken the occasional clean-up of the beach. Police witnesses also spoke about the limited resources available to the Creston RCMP detachment and patrol officers' concerns about personal injury when attending the site. The Province argued that it was not responsible for the behavior on the right-of-way because it had done all that was reasonable to do by way of mitigation.

The Mynotts framed their case as a common law nuisance action. They asserted that the Province, as the owner of the road right-of-way, was responsible for the nuisance activities of persons using the right-of-way.

The Court was satisfied that the impact on the Mynotts constituted a nuisance:

> [W]hat remains is still the equivalent of a six week unsupervised party involving up to 200 people on premises without plumbing. The plaintiffs are confronted with daily examples of combinations of public drinking, littering, drug use, indecency, mischief and unlawful disturbances. [....] This lawless atmosphere is exemplified in the willful damage to the parking signs, and to the temporary toilet that was placed on the site.

In response to case law that held owners liable for the obnoxious behaviour of third parties using the land, the Province argued that the scope of its duty must be modified to take into account that it is a government with responsibility for numerous similar rights-of-way throughout British Columbia. The Province also asserted the right, on policy grounds, to determine the "reasonable steps" that should be taken to respond to nuisance activities based on policy considerations such as the availability of financial and other resources.

Mr. Justice McEwan was withering in his rejection of the Province's policy argument:

> [...] Where the behavior of invitees amounts to a nuisance a duty is cast upon the landowner to control the behavior or to put an end to it.
>
> The presence of the itinerant workers has led to obnoxious and illegal behavior which is a nuisance to the Mynotts. There can be no immunity for "policy making" that amounts to setting a chain of events in motion and completely ignoring the predictable consequences. The standard of what is reasonable is objective. It cannot be altered by the circular notion that government spending is policy, so under-spending is "reasonable", because spending decisions are policy.

The Court adjourned the case until September to see what steps the Province takes this summer to abate the nuisance. The decision hints that a "supervisory presence" at the site capable of preventing mischief and reporting unlawful behavior during the cherry picking season would likely be sufficient to resolve the problem.

The differing outcomes in the *Myer Franks and Mynott* cases can, in part, be explained by the relatively weak evidence that the activities of persons gathering at cash corner amounted to an unreasonable interference in Myer Franks' enjoyment of its property compared to the evidence of the impact of cherry pickers' raucous partying on the Mynotts. However, it was Myer Franks' public law claim seeking enforcement of bylaws and statutes that ultimately doomed its case. The *Mynott* decision, on the other hand, stands as a reminder of the separate nature of a government's private law responsibilities as a landowner. While the courts may afford substantial latitude to local governments in how they discharge their law enforcement responsibilities, their private duty to neighbours to ensure that public lands do not become venues for nuisance causing activities is less likely to be watered down by policy considerations.

While the courts may afford substantial latitude to local governments in how they discharge their law enforcement responsibilities, their private duty to neighbours to ensure that public lands do not become venues for nuisance causing activities is less likely to be watered down by policy considerations.

The right-of-way in the *Mynott* case was provincially owned but there are many similar rights-of-way and road ends within municipalities that can become popular sites for drunken partying and other nuisance behaviour. In light of the result of *Mynott*, a common response—that any nuisance behaviour should be handled by police agencies—is unlikely to be sufficient to discharge the local government's duty to affected neighoburs.

Barry Williamson

Tax sale purchasers and remedial action requirements

In Prince George v. Columbus Hotel*, the Court of Appeal considered the interplay between the provisions of the* Local Government Act *relating to annual municipal tax sales and the provisions of the* Community Charter *relating to the imposition of remedial action requirements, where those requirements are imposed by a municipality during the one-year redemption period after a tax sale.*

In September 2007, the City sold Columbus' property at tax sale and the City was the default purchaser. Columbus continued to operate its hotel on the property until August 19, 2008, when the hotel was damaged by fire. On September 8, 2008, the City, having received an engineer's report that the fire-damaged building created a significant safety risk to the public, declared the building to be unsafe and imposed remedial action requirements on Columbus to demolish it and remove debris from the property. On September 10, 2008, the City notified Columbus of the remedial action requirements, and on September 16, 2008, the City performed the remedial action requirements in Columbus' default. On September 24, 2008, the one-year redemption period expired in respect of the tax sale and, on October 2, 2008, the City registered a transfer of the lands to itself. The City subsequently invoiced Columbus for the cost of performing the remedial action requirements and commenced legal proceedings against Columbus to collect those costs. The Court had to determine which party in the tax sale was liable for the costs incurred by the City to perform the remedial action requirements: Columbus or the City?

The Court had to determine which party in the tax sale was liable for the costs incurred by the City to perform the remedial action requirements: Columbus or the City?

Under the *Community Charter*, remedial action requirements may be imposed on either the owner or occupier of lands on which an unsafe condition exists. The local government may perform the remedial action requirement at the expense of the person on whom the requirement was imposed if he or she defaults, and collect its costs from that person.

In the Supreme Court, the justice held that the "owner" of lands sold at tax sale during the redemption period is the tax sale purchaser, and that ultimately the tax sale purchaser (including the local government as default purchaser) may be liable for the costs of performing remedial action requirements during the redemption period.

The Court of Appeal held that interpretation of the *Community Charter* and the *Local Government Act* was inconsistent with the express language in those Acts, and was inconsistent with the purposes of municipalities. The Court of Appeal concluded that, as ownership and occupation of the property remained with Columbus at the time of the fire, the remedial action requirements fell on Columbus as both owner and occupier. The City was granted judgment against Columbus to recover its costs of completing the remedial action requirements.

Sukhbir Manhas

The simple truth about emergency preparedness

If anything positive can come of unprecedented disasters such as the earthquake, tsunami and subsequent nuclear breakdown in Japan this spring, it is this: emergency preparedness is the talk of the town. Canadians are looking to their families, their neighbours, and their work colleagues and asking themselves, "what if that happens here?"

Indeed, we do not need to look across the Pacific ocean to see headline-worthy natural disasters. In 2003, nearly 50,000 hectares of land in the southern interior and McLure-Barriere areas were affected by forest fires, with nearly 40,000 people evacuated and hundreds of homes destroyed. In 2005, a landslide in a residential neighbourhood in North Vancouver resulted in several homes being damaged or destroyed. In 2007/2008 the Nechako river ice jam and flooding in Prince George lasted in excess of two months, causing significant human and industrial displacement. Wildfires in the Lilloeet region in 2009 and the Kamloops area in 2010 involved thousands of firefighting professionals from across Canada battling some of the most volatile forest fire conditions reported. These are only some of the many examples of major emergencies in British Columbia, and undoubtedly readers will have their own local emergencies in mind.

Local governments have been at the forefront of emergency planning and response in all of these cases. This is no coincidence, as local emergency planning is mandatory in British Columbia. The Provincial *Emergency Program Act* requires local governments to prepare local emergency plans and to establish and maintain emergency management organizations to develop and implement plans for emergency preparedness, response, and recovery. It applies to both natural and other emergencies and disasters, whether caused by "accident, fire, explosion, technical failure or the forces of nature". The Act authorizes a local board or council to issue a declaration of a state of local emergency, which then triggers a statutory duty to "do all acts and implement all procedures that [the local government] considers necessary to prevent, respond to or alleviate the effects of an emergency or a disaster". Some of the specifically contemplated powers are, not surprisingly, quite extraordinary:

- to evacuate people and livestock, pets and personal property
- to acquire or use any land or personal property
- to enter into any building or onto any property without a warrant
- to remove structures, trees and crops
- to authorize or require any person to provide assistance
- to control or prohibit travel
- to fix prices for or ration essential items like food, clothing, fuel and medical supplies

The exercise of powers under the Act is always subject to Provincial oversight, and the minister has the power to rescind a local declaration and to override operational decisions made by a local government. In practice, most local emergency and disaster responses are closely coordinated with the Provincial Emergency Program (PEP), which also oversees the Disaster Financial Assistance program for victims of certain emergencies and disasters.

In the wake of local and international disasters, local governments are also encouraging residents and local businesses to make a person-

al commitment to emergency preparedness. Many excellent local government websites provide information about things like how to prepare home and workplace disaster survival kits, and volunteer recruitment campaigns are being prioritized to ensure communities have well-trained response teams at the ready.

Charles Dickens considered that "there is nothing so strong or safe in an emergency of life as the simple truth." The truth, while perhaps simple, is nonetheless disconcerting. The truth is that we cannot prevent most emergencies, only plan for them.

Stephanie James

Constitutional duty to consult First Nations

In Adams Lake Indian Band v. British Columbia*, a B.C. Supreme Court decision released in early March, our court for the first time expressly addressed the issue of whether local governments are bound by the constitutional duty to consult First Nations. The Province has now announced that it is appealing the decision; the Band has also filed a cross-appeal.*

In *Adams Lake*, the Band sought to have the Court set aside the Order in Council incorporating the new Sun Peaks Mountain Resort Municipality on the basis that the Province failed to meet its constitutional duty to consult with the Band in respect of the decision to incorporate the Municipality.

Before the Municipality was incorporated, three local government bodies had jurisdiction at Sun Peaks: the Sun Peaks Resort Improvement District, the Thompson Nicola Regional District, and the Province itself. With the incorporation of the Municipality, the Improvement District was dissolved and the Municipality took over its jurisdiction. The Municipality became a member of the Regional District, continuing as a participant in a number of area-wide services and functions and assuming jurisdiction over all of the local services and functions previously performed by the Regional District. Further, the Municipality assumed some of the Province's jurisdiction.

The Band argued that the incorporation of the Municipality had a potential for immediate and future adverse impacts on the Band's aboriginal title and claim to Sun Peaks. The Band characterized the Municipality as having a distinct influence and authority over the nature of the development at Sun Peak and the process by which decisions about development will be made and implemented. The Band also argued that the incorporation impacted the Band's ability to consult with government about issues that affect the Band's interests because the Municipality now has jurisdiction over a broad range of matters, only one of which is land use. In this regard, the Band itself advanced the legal proposition that a municipality has no constitutional duty to consult First Nations.

The Court accepted the Band's arguments and held that the Province had a constitutional duty to consult with the Band in respect of the incorporation of the Municipality. Agreeing that local governments do not have a constitutional duty to consult First Nations, the Court stated:

> [...] Section 879 of the *Local Government Act* requires the Municipality to consider whether consultation with First Nations is required when developing its official community plan. Pursuant to the letters patent, the Municipality's official com-

> munity plan and interim land use by-laws must also be approved by the Province. However, there is no requirement to consider whether it is necessary to consult directly with aboriginal groups on issues other than land use and the municipality has no independent constitutional duty to consult with the Band.
>
> [...]
>
> The Attorney General argues the change in local government does not interfere with the Province's obligation to consult with the Band and it will also have a duty to assess the Municipality's consultations with the Band to ensure they meet the standards set by the Province. However, in practical terms this division of responsibility creates a number of additional hurdles for the Band. First, as outlined above, the Municipality now exercises control over many aspects of local government that are not subject to a duty to consult with First Nations and that are beyond any supervisory jurisdiction exercised by the Province. Second, if the Municipality decides to consult with First Nations in regard to its official community plan, the Band will be required to expend its own resources to carry out the consultation because the Municipality has no authority to provide funding to aboriginal groups for this purpose. Third, if the Band is dissatisfied with the consultation afforded by the Municipality, it would then be required to compel the Province to commence consultations pursuant to its constitutional duty. This two tiered system of consultation creates obvious impediments to the exercise of the Band's right to consult. [...]

The finding that local governments do not have an independent constitutional duty to consult directly with First Nations was a fundamental underpinning to the Court's conclusion that the Province had a constitutional duty to consult the Band in relation to the incorporation of the Municipality. In the absence of this finding, the Court would not have been in a position to accept the Band's argument that incorporation might have a serious impact on the Band's aboriginal rights. The Court's decision, unless overruled by the Court of Appeal, will be binding on future cases to be decided on this issue. In this regard, it is ironic that it was the Band that argued that local governments do not have an independent constitutional duty to consult directly with First Nations; this position is the opposite of that taken by other First Nations in at least two other cases currently before the Supreme Court, and in numerous demand letters that have been received by local governments over the past several years.

Sukhbir Manhas

WWW.YOUNGANDERSON.CA

1616 - 808 Nelson Street, Box 12147, Nelson Square, Vancouver, BC V6Z 2H2
tel: 604.689.7400 | fax: 604.689.3444 | toll free: 1.800.665.3540

201 - 1441 Ellis Street, Ricco Plaza, Kelowna, BC V1Y 2A3
tel: 250.712.1130 | fax: 250.712.1180