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Whose Stairs are They Anyway? Permit Issuance Issues for Local Governments

One recent case presents a unique approach to a situation where a local government received a development permit application from someone other than the registered owner of the fee simple parcel of land affected by the permit.

The *Local Government Act* authorizes local governments to establish development permit areas ("DPAs") in which certain activities are restricted unless the local government issues a development permit ("DP"). This includes restrictions on the subdivision of land or construction of buildings. Take, for example, a landowner who wishes to construct a house on their parcel of land that sits within a DPA. That owner would need to apply for and obtain a DP from the local government or else run afoul of the LGA. DPs may only be issued in accordance with, and set conditions for the build which relate to, the guidelines in the local government's OCP or zoning bylaw which establish the special objectives for which the DP area has been created (for example, protection of the natural environment or protection of development from hazardous conditions. But how should a local government deal with a DP application made by someone who is not the registered owner of the fee simple of the land parcel subject to the DP? The District of North Saanich was faced with such a situation which made its way to court as outlined in *Armstrong v. District of North Saanich*, 2024 BCSC 1844 (*"Armstrong"*).

In *Armstrong*, the petitioners (the "Land Owners") owned a waterfront parcel that had an easement registered on the title. This easement affected a small portion of their property and permitted the neighbouring property's owners (the "Neighbours") to cross through the Land Owner's parcel, through the easement area, to access the waterfront. There was a steep descent through the easement area, and the Neighbours constructed stairs on the easement area to descend the slope. However, it was not until after construction finished that the Neighbours realized they needed a DP for the stairs. The Neighbours subsequently applied for a DP from the District. The Land Owners, who disagreed that the terms of the easement allowed for the construction of stairs, challenged the District's jurisdiction to process and issue a DP for a structure constructed on the Land Owner's fee simple parcel of land without an application from, or authorized by, the Land Owners. The LGA provides that it is an "owner" who can make an application for a DP.

One of the questions before the court was whether it was reasonable to treat the Neighbours as "owners" for the purposes of processing the DP for the stairs. The Land Owners argued that the *Community Charter* and the *Local Government Act* define an "owner" as including "the registered owner of an estate

in fee simple" but make no reference to the holder of an easement. The District argued that in processing the DP application, it was interpreting and following its own Development Application Procedures Bylaw, which defined "owner" by reference to the *Land Title Act*. The LTA definition, in turn, specifically includes the registered owner of a charge. The District relied on this connection in deciding to process the DP application brought by the Neighbours, even though the Neighbours were not owners as defined by the *Local Government Act*.

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The BC Supreme Court decided that the District acted reasonably in processing the DP application from the Neighbours as though they were "owners". The Court considered this to be a practical solution, since prohibiting the District from considering the DP application would have left the stairs in limbo, without the ability to address regulatory or environmental considerations. Further, the permit only purported to authorize the staircase in respect of the regulatory restrictions within the DPA. It did not purport to address the dispute between the parties as to whether the stairs were permitted under the easement (the Court separately concluded the stairs were permissible under the easement). In other words, the Land Owners' purported objection to the DP was collateral to their real dispute, which was with the Neighbors, not the District.

The Land Owners argued that, even if it was reasonable to treat the Neighbours as owners, it was unreasonable for the District to proceed without the Land Owners' consent. The Land Owners relied on the case of *Este v. West Vancouver (District)*, 2022 BCCA 445. In *Este*, two individuals were the registered owners of land – the petitioner and her mother. The petitioner applied for a building permit, but the District of West Vancouver refused to issue the permit because the mother, as a fellow registered owner tenant in common, expressly advised the District she did not consent. In *Este*, the Court found that the terms of the District Building Bylaw required all registered owners to consent to the issuance of the permit. Because one of the registered owners – the petitioner's mother – did not consent, the District of West Vancouver refused to issue the permit. The court found the District of West Vancouver's

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interpretation of its building bylaw as a whole to be reasonable.

In *Armstrong*, the court noted that, unlike in *Este*, there was no statutory provision, regulation, or bylaw that expressly required the signature of every owner in relation to processing a DP application, and there was no basis to read in an implicit requirement.

There is some question as to whether the District of Saanich in *Armstrong* can be said to have issued a complete development permit in this case. The DP contained an unusual provision, stating that it was only valid until the Land Owners consented to the stairs or were ordered to permit them. Further, the subject DP was not registered on title to the land, as is required by the LGA. This suggests that perhaps what occurred was a contingent permission short of a full DPA, the final completion of which awaited the resolution of the private dispute between the neighbors regarding the privileges granted by the easement terms.

While this case does not stand for the proposition that neighbours may apply for development permits on adjoining land, it does support the authority for local governments to interpret and apply their own bylaws in a purposeful manner in order to achieve policy and governance objectives. It is also a good reminder of the impact definitions can have on bylaws and how the implications of their use should be carefully considered.

This case has been appealed to the BC Court of Appeal and is awaiting reasons.

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Serge Grochenkov, Timothy Luk & Elizabeth Anderson

Alternative Approval in the Courts: Recent Guidance on Public Notice Requirements

Where specified by the applicable legislation, local governments must obtain approval of the electors before a municipal council or regional district board can proceed with a decision. If approval of the electors is required, it may be obtained by the local government in one of two ways. First, there is the option to select the assent voting process and seek approval by referendum. Second, the local government may conduct an alternative approval process (AAP). In an AAP, approval is deemed to have been granted if the local government issues

proper notice, provides electors with an opportunity to object, and receives elector objection responses from fewer than 10% of eligible electors in the affected area. Because AAPs are often used for decisions of heightened public importance, they have been recently subject to some consideration by the court system. Two recent British Columbia Supreme Court decisions offer insight into how courts approach such challenges. Both cases involved the use of AAPs for loan authorization bylaws.

(1) *Bartlett v. Capital Regional District*, 2024 BCSC 2564 ("*Bartlett*")

In *Bartlett*, the Capital Regional District (the "CRD") sought to increase its borrowing authority through a loan authorization bylaw and chose to proceed by means of an AAP. The petitioners challenged the bylaw, arguing that the CRD failed to comply with the notice requirements under the *Community Charter*.

In particular, the petitioners contended that the interplay between sections 86(3) and 94.2 effectively required the CRD to provide at least 37 days' notice before the deadline for receiving elector responses. They argued that the "matter" referenced in s. 94.2(5)(b) was the start of the 30-day period for receiving electoral responses.

Section 86(3) of the *Community Charter* mandates that the deadline for elector responses must be at least 30 days after the second publication of notice. By default, notice must be published in a newspaper once a week for two consecutive weeks. However, section 94.2 permits local governments to use alternative publication methods by bylaw, provided the notice is published at least seven days before the date of the matter for which notice is required.

The CRD argued that the seven-day requirement in section 94.2(5)(b) only applies where no other notice period is specified. Since s. 86(3)(a) expressly sets a 30-day notice period for AAPs, they argued that this provision superseded the general requirement under s. 94.2(5)(b).

The court noted where issues of statutory interpretation are at play on judicial review, a reviewing court's role is to determine whether the decision maker applied the principles of statutory interpretation and arrived at an interpretation that is reasonable. Where there are two competing interpretations of relevant legislation, and a statutory decision maker chooses one, so long as it is a reasonable interpretation, even if not the only reasonable interpretation, the court will not interfere. Ultimately, the court found the CRD's interpretation to be consistent with the text and structure of the legislation and declined to find the bylaw to be illegal on this basis.

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(2) *Wunderlich v. Kamloops (City)*, 2025 BCSC 555 ("*Wunderlich*")

In *Wunderlich*, the City of Kamloops conducted

an AAP under s. 86 of the *Community Charter* to approve two loan authorization bylaws. The petitioner argued that the City's use of its website as an alternative means of publication was improper because the website had already been designated as a "public notice posting place." This, the petitioner argued, rendered the notice process defective and invalidated the subsequent approval of the bylaws.

The City defended its approach, noting that it had consulted other municipalities, considered British Columbia's high internet access rates, and reasonably concluded that website publication was a viable substitute for newspaper publication which was no longer practicable.

The court found the City's interpretation and use of the website reasonable and consistent with the *Community Charter*. Although it had acknowledged that the City had "doubled up" its use of the website, there did not appear to be a prohibition under s. 94.2 of the *Community Charter* against doing so. Ultimately, on balance, the court found that the City had engaged in enhanced publication, and the petitioners did not provide convincing evidence that this was unreasonable.

(3) Takeaways for Local Governments

In both of the above-mentioned cases, the courts were careful to limit their review of these decisions to the text of the statute, noting that it was not their role to opine on the wisdom of the particular policy decisions that were being made by the decision makers at issue. The decision as to whether to borrow funds and amortize payment over a lengthy payment schedule is highly policy-laden. There is little that a court can or should do, while performing a supervisory function on judicial review, to interfere with such a decision, so long as the decision-maker has complied with the requirements of the statute.

Jack Wells

Transmission Lines and 5G Towers – Who has Jurisdiction?

A thorny issue for local governments often arises when telecommunications companies seek to install infrastructure either on public or private property. Since such installation requests are often subject to jurisdictional disputes, it is important to understand the nuances amongst the different federal enactments and processes at issue with respect to radio/telecommunications equipment.

The Constitution

Beginning from first principles, local governments are empowered to regulate land use in their territorial jurisdiction only through delegated provincial powers, given to local governments pursuant to section 92 of the *Constitution Act, 1867*. The power to regulate

radiocommunication, however, is a power that is reserved to the federal parliament under section 91. Almost a decade ago, in *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, the Supreme Court of Canada confirmed that this reservation of authority is exclusive, meaning that local attempts to regulate land radiocommunications must fail as a constitutional matter.

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Private Land

With the power to regulate the placement of towers and other radiocommunications equipment reserved to federal parliament, how do local authorities and, indeed, their residents, get a say? As regards the placement of such equipment on private lands, Innovation, Science, and Economic Development Canada (ISED) is the key player.

Where a proponent wishes to place radiocommunications equipment on private lands that they own or lease, they must get approval under the Federal *Radiocommunication Act*, which involves going through a process created by ISED, which ultimately makes a recommendation to the Minister responsible for administering the *Act*. ISED has adopted the Radiocommunication and Broadcasting Antenna Systems process document (CPC-2-0-03).

The minutiae of CPC-2-0-03 are beyond the scope of this article. However, we note that it includes a process in which proponents contact a land use authority to determine local requirements for antenna systems, undertake notification and address relevant concerns, whether by following the land use authority's requirements or Industry Canada's default process, as is required and appropriate.

While the ultimate decision on the siting of radiocommunication equipment lies with ISED, CPC-2-0-03 allows for a public consultation process that is specific to individual local governments that may go beyond the default process created by ISED. Therefore, while local governments do not retain any specific authority in relation to the siting of radiocommunication equipment, they can work to incorporate the input of their citizens through the adoption of their own public consultation procedures.

Importantly, however, local governments must adopt procedures that are "reasonable, relevant, and predictable". Such processes should be developed before a dispute arises, and should be developed in consultation with ISED. A dispute with ISED would ultimately be subject to judicial review in the Federal Court.

Public Land

A dispute about radiocommunications equipment on public lands was recently considered by the Supreme Court of Canada in *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15. There, another federal tribunal, the Canadian Radio-television and Telecommunications Commission (the "CRTC"), had determined that it did not have jurisdiction over access to municipal infrastructure for the installation of 5G "small cell antennas". The case arose from circumstances in which four mobile carriers had asked the Court to declare that "transmission lines" as set out in the applicable legislation included "small cell antennas" needed for 5G transmission.

Whether the CRTC was empowered to determine access to municipal infrastructure was important in this instance because, under the *Telecommunications Act*, telecommunications companies have a right to access municipal infrastructure to maintain, construct, and operate their "transmission lines" on public property. The CRTC is empowered to determine the terms of access where a local government cannot come to an agreement with the company. Where older telecommunications infrastructure relied on 13,000 large cell towers, 5G connectivity across Canada would require an estimated 250,000 to 300,000 small cell antennas, which would be mounted largely on public property such as telephone poles, lamp posts, bus shelters, or municipal buildings.

The Court found that the term "transmission lines" as used in the *Telecommunications Act* referred to "wireline transmission infrastructure only", meaning that the *Act* did not grant carriers a qualified right of access for the installation, maintenance, and operation of 5G antennas.

Absent legislative change from Parliament, telecommunications companies must negotiate agreements with individual local governments in order to install 5G antennas on public property. This decision gives local governments a much stronger negotiating position than they would have otherwise.

Nick Falzon

Routine Release Gets a Routine Check-Up

The Office of the Information and Privacy Commissioner for British Columbia ("OIPC") released Investigation Report 25-01 earlier this year on local governments' disclosure of records under the Freedom of Information and Protection of Privacy Act *("FIPPA"), identifying four specific issues and providing corresponding recommendations to improve upon freedom of information ("FOI") processes. One of the issues identified was in relation to the proactive disclosure of records, a type of routine release where records are publicly disclosed outside of a formal FOI request.*

Pursuant to section 71 of FIPPA, public bodies must establish categories of records that are available to the public without making an FOI request. The OIPC previously considered this section in Investigation Report 20-01, finding: (1) categories of records are not compliant with section 71 when they are not documented, are overly broad or non-descriptive, or are limited to a single record, publication or website; (2) categories must have meaning and value in the

overall context of the legislation; (3) records must be made available in an "established" manner, with a stability and continued presence; (4) as a structured and organized approach is required, records posted online in an ad hoc manner do not suffice; and (5) using records tables indicates that a public body has identified and documented which records are available in a manner compliant with section 71.

Further to these Investigation Reports, which helpfully detail both common pitfalls and best practices in relation to proactive disclosure, the OIPC has developed additional guidance for public bodies to support their compliance with FIPPA, recommending the following four steps:

1. establish and document meaningful categories for routine release, in a fixed and reliable manner;

2. publish categories of records, along with the records themselves, on the public body's website;

3. draft policies and procedures on proactive disclosure and train staff on them; and

4. regularly review the categories of records.

While it may take some time and effort at the front end, it is important to remember that, in addition to supporting openness and transparency, having effective proactive disclosure programs can ultimately save significant time and resources in the long run.

Amy O'Connor

Security: Common Issues for Local Governments

The Local Government Act *and the* Community Charter *grant local governments the authority to require that security be provided by persons undertaking certain activities such as the subdivision of lands or seeking a land use permit to develop property. This security can be taken by a local government in a number of different forms prescribed in the applicable statutory provisions, including through letters of credit, cash deposits, or, in certain circumstances, an alternative security arrangement. There are also statutory requirements that govern how local governments must hold the security, what it can be used for, and how it is to be returned.*

In this article we will examine a number of common issues in security that local governments deal with when requiring that persons post security.

I. In What Circumstances Can Security be Taken?

Where a bylaw imposes a requirement for a person to provide a municipality with security, section 19 of the *Community Charter* governs the type of security that may be provided and how the municipality may deal with the security. The authority of a municipality to require security is broader than what is permitted for regional districts under the *Local Government Act* and permits security to be taken for any system of licence, permits, or approvals for which a municipality has the power to regulate. Regional district security requirements are narrower and specifically prescribed under section 300 of the *Local Government Act* with respect to building regulations, and section 502 for land use permits. Security can also be taken for the purposes of a development works agreement under section 570 of the *Local Government Act*.

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Security for Building Permits & Land Use Permits

Under section 300 of the *Local Government Act*, a regional district may take security for the issuance of a building permit or to authorize the moving of a building under section 298 of the Act. Similarly, section 502 of the *Local Government Act* permits local governments generally to require security for land use permits. This security can be used in a number of circumstances. For building permits, the security taken can be used to repair or replace highways, including sidewalks and boulevards, public works or other regional district property that has been damaged by the activities undertaken under the building permit (section 300(4) of the *Local Government Act*). In the case of land use permits, the security taken can be used to correct deficiencies including where a condition in a permit respecting landscaping has not been satisfied, an unsafe condition has resulted as a consequence of a contravention of a condition in a permit or damage to the natural environment has resulted as a consequence of a contravention of a condition in the land use permit (section 502(2) of the *Local Government Act*).

Development Works Agreements

Under section 570 of the *Local Government Act*, a local government can enter into, by bylaw, a development works agreement requiring a property developer to construct services to lands including sewage, water, drainage, fire protection, police, highway and solid waste and recycling facilities as a condition of subdivision approval, the issuance of permits or a rezoning for the lands subject to the agreement.

For these agreements, local governments can require the property developer to provide security pursuant to subsection 570(3)(c) of the *Local Government Act*. When taking security under these agreements, a local government must be cognizant of whether the amount taken is sufficient to ensure that if the property developer were to fail to complete the required servicing works that the money posted as security would be in an amount satisfactory to pay for the completion of the work.

II. Amount of Security

The amount taken should be approximated with reference to the estimated construction costs of the servicing works to ensure that there is

adequate security. Typically, local governments take 120% to 150% of the value of the works in an effort to ensure that sufficient funds are available to complete the servicing works if that becomes necessary.

III. Forms of Security

For land use permits, section 502(1) of the *Local Government Act* permits local governments to require that security to be paid through an irrevocable letter of credit or such other deposit of securities in a form satisfactory to the local government. For regional district building permits, section 300(2) of the *Local Government Act* requires the security to be provided either through a cash deposit, irrevocable letter of credit, or another form of security satisfactory to the local government.

In situations where a local government is considering alternative security arrangements other than cash deposits or letters of credit it must assess whether the alternative form of security will be sufficient to secure the performance of the obligation for which it was taken. Local governments should also consider whether the form of security is sufficiently liquid so that if the security is needed to fulfill the obligation that the funds will be readily available.

IV. Returning Security

For security taken for building permits any amount of the security that is not required to fulfill the obligation for which it was taken must be returned to the person who provided the security along with any interest earned on the security (section 300(3) & (5) of the *Local Government Act*). In contrast, security taken for a development permit, along with interest earned on it, must be returned to the permit holder (section 502(4) of the *Local Government Act*). This means in the case of a land use permit that the person who pays the security may not be the person who the security will be returned to if the land to which the permit applies is sold and subsequent property owner assumes ownership of the permit.

V. Conclusion

While not touched upon in considerable detail in this article, section 19 of the *Community Charter* appears to provide broader powers for a municipality to take security in a greater number of circumstances through a bylaw that establishes a security requirement as a condition of a licence, permit, or approval. There is some debate as to how the fundamental powers listed in section 8 of the *Community Charter* may limit the ability to impose a security requirement and whether these can only be imposed for provisions enumerated in section 8 that expressly state that the municipality may "impose requirements" (for example, signs and advertising (section 8(4)). This is opposed to other fundamental powers where it is only stated that a municipality may "by bylaw, regulate and prohibit" (for example, the regulation of business (section 8(6)).

Notwithstanding the above, the licencing standard provisions found at section 15 of the *Community Charter*, along with the requirements for security in section 19, suggest that security can be required for a system of licences, permits or approval regulated under the *Community Charter* or *Local Government Act*. This appears to affirm that the authority of a municipality to require security is quite broad especially when compared to the narrower circumstances in which a regional district can require security established under the *Local Government Act*.

David Giroday

Floating Bus Stops and Human Rights Complaints

Floating bus stops, also known as island bus stops, are becoming more common as local governments increase cycling infrastructure. These bus stops feature a bike lane between the sidewalk and the bus stop, offering cyclists safety by separating them from vehicle traffic and ensuring buses do not obstruct the bike lane. However, these designs can create challenges for people with sight loss, as the quietness of bicycles and the surrounding road noise make it difficult to safely navigate to the bus stop.

BC has developed the *Design Guide for Bus Stops Adjacent to Cycling Infrastructure* to provide planning guidelines to construct floating bus stops. The 2019 iteration of this guide did not specifically consider people with sight loss, whereas the 2024 iteration of this guide specifically contemplates accommodating people with sight loss in response to the *Belusic* case discussed below.

There are two recent Tribunal decisions concerning issues related to floating bus stops and sight loss. In these cases, the BC Human Rights Tribunal (the "Tribunal") addressed these complaints under Section 8 of the *British Columbia Human Rights Code* (the "Code"). This section prohibits discrimination in public services based on physical or mental disabilities.

To establish discriminatory conduct, the complainant must prove that:

1. They have a protected characteristic (such as sight loss);
2. They faced an adverse impact while accessing a service; and
3. Their disability was a factor in that impact.

If proven, the burden shifts to the respondent to show a reasonable justification for the discrimination. The respondent must demonstrate that:

1. the respondent adopted the standard for a purpose or goal rationally connected to the function being performed;
2. the standard was adopted in good faith, believing it is necessary for the fulfillment of the purpose or goal; and
3. the respondent cannot accommodate persons with the characteristics of the complainant in the adoption of the standard without incurring undue hardship, such as impossibility, serious risk, or excessive cost.

***Belusic obo Canadian Federation of the Blind v. City of Victoria and another (No. 4)*, 2020 BCHRT 197 ("Belusic")**

In *Belusic*, a class action was filed against the City of Victoria for relocating bus stops from the curb to an island across a two-way bike lane. The Tribunal found that people with sight loss were significantly impacted by the design, as they could not safely determine when cyclists were approaching or stopping. This led to fear and

discomfort when using the floating bus stops.

The Tribunal ruled that the service of public buses was a service covered by the Code and that the design of the bus stops created a discriminatory impact on individuals with sight loss. Despite the Tribunal's finding that the city's goal to increase cycling was adopted in good faith, the Tribunal found that Victoria failed to consider the safety of pedestrians with sight loss during the design process, despite meeting provincial design standards, and therefore did not accommodate to the point of undue hardship.

The Tribunal decisions emphasize that adhering to standards may not be satisfactory in all situations and local governments must consult with their community in the design and implementation of floating bus stops.

The Tribunal acknowledged the lack of a full solution to protect people with sight loss and cyclists, but found that pedestrian-activated flashing yellow lights with audible signals to be a reasonable accommodation. The Tribunal also noted that the reasonable accommodation would depend on the specific circumstances of each floating bus stop. However, advocacy groups argued that these measures did not fully solve the problem.

***Kovacs v. City of Maple Ridge (No. 2)*, 2023 BCHRT 158 ("Kovacs")**

In *Kovacs*, a complainant with total sight loss filed a complaint against Maple Ridge, claiming that a bus stop design which required pedestrians to cross a mixed-use pathway for pedestrians and cyclists to access the bus stop discriminated against her.

The Tribunal conducted a similar analysis to *Belusic* and found that even though the design met provincial guidelines, the city failed to remove this barrier without undue hardship and ordered the city to redesign the area to make it a pedestrian-only space where cyclists must dismount. This effectively reverted the floating bus stop back into a standard bus stop.

The Tribunal also discussed the roles the city and complainant had in the accommodation process:

a). The law did not require the city to provide the complainant with an ideal or preferred accommodation if that accommodation was not reasonable.

b). The law required the complainant to participate in her own accommodation, but this does not always mean suggesting specific solutions. The city was in the best position to suggest solutions to accommodate the complainant.

c). The complainant's role in this accommodation process was more about learning to work around accommodations that were not ideal, but may be reasonable. However, it was not reasonable to expect the complainant to fundamentally change how she navigated to participate in an accommodation.

Key Takeaways

These decisions highlight several important points for local governments:

1. Public bus services can be subject to Section 8 of the Code.

2. Evidence of discomfort or fear, even without injury, is sufficient to show discrimination.

3. Compliance with the BC *Design Guide for Bus Stops Adjacent to Cycling Infrastructure* does not guarantee accommodations provided by the local government will be adequate.

4. Local governments do not need to provide a complainant with their ideal or preferred accommodation where that accommodation is not reasonable.

5. The complainant must participate in their own accommodation, but is not required to suggest specific solutions.

While floating bus stops can benefit cyclists, local governments must also ensure that they are designed inclusively, taking into account the safety of pedestrians with disabilities. The Tribunal decisions emphasize that adhering to standards may not be satisfactory in all situations and local governments must consult with their community in the design and implementation of floating bus stops.

Emma McCann

What Are We? Defining the Employment Relationship

The purpose of the Employment Standards Act *(the "ESA") is twofold: (1) to ensure employees in British Columbia receive basic rights that promote open communication within the employment relationship; and (2) to provide fair and efficient procedures for resolving disputes. In setting out minimum standards and promoting fair and efficient dispute resolution processes, the ESA works to balance power between the employee and employer.*

Establishing whether a working relationship is that of employee/employer or contractor/employer is significant, as it has many statutory and common law implications. In particular, the ESA does not apply to independent contractors, because there is a presumption that a power imbalance between the parties is much smaller, and independent contractors are not entitled to reasonable notice under the common law if they are dismissed. However, dependent contractors may be entitled to common law reasonable notice upon dismissal, because dependent contractors do not have the ability to walk away from the working relationship as quickly or easily as independent contractors. The extension of these rights to dependent contractors acknowledges the financial dependence tied to the working relationship, like that of an employee.

Analyzing the Relationship

In determining whether a relationship is governed by the ESA, there are several common law tests used to establish whether an individual is an employee. While the analysis is simple in theory, it may nonetheless be difficult to conclude with any degree of certainty. The

common law tests are interpreted in light of the definitions contained in the ESA:

"employee" includes

(a) a person, including a deceased person, receiving or entitled to wages for work performed for another,

(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,

(c) a person being trained by an employer for the employer's business,

(d) a person on leave from an employer, and

(e) a person who has a right of recall.

"employer" includes a person

(a) who has or had control or direction of an employee, or

(b) who is or was responsible, directly or indirectly, for the employment of an employee.

In addition to the ESA's definitions, the test used by the Employment Standards Tribunal (the "Tribunal") is summarized as "whether the relationship of the putative employee and employer can be found within the relevant provisions and purposes of the ESA." *In Cove Yachts (1979) Ltd.*, BC EST #D421/99, the Tribunal set out a non-exhaustive list of factors that are considered when determining whether a worker was an "employee" within meaning of the ESA:

1. the language of the contract;
2. control by the employer over the "what and how" the work is completed;
3. ownership of the means of performing the work e.g. tools;
4. chance of profit/risk of loss;
5. remuneration of staff;
6. right to delegate;
7. control over discipline/dismissal/hiring;
8. right to work for more than one employer;
9. perception of the relationship;
10. integration into the *Business Corporations Act*;
11. intention of the parties; and
12. whether the work is for a specific term or task.

Courts have also developed several similar tests to determine the status of a worker under common law. The most common are:

1. Control Test
2. Four-Fold Test
3. Two Part Test
4. Entrepreneur Test
5. Organization Test
6. Employee or Dependent Contractor Test

The Control Test

This is the test most frequently referenced; it focuses on the degree to which the employer has substantial control over the worker's operations. More control will lead to a finding of an employment relationship. Many of the factor's considered for this test are similar to

the test used by the Tribunal to determine if a worker is an employee under the ESA.

The Four-Fold Test

The Four-Fold Test considers: (1) the level of control; (2) the ownership of the tools; (3) the chance of profit; and (4) the risk of loss.

The Two-Part Test

The first step in this test is subjective and asks whether there is a mutual understanding or common intention between the parties regarding the relationship. This step considers any written contract and the parties' behaviour throughout the relationship. The second step is objective and asks whether the facts support that the worker is providing a service as a business on their own account. Again, these factors are similar to those considered under the test used by the Tribunal to determine if a worker is an employee under the ESA.

The Entrepreneur Test

The Entrepreneur test focuses on whether the services performed are on the worker's own account, or as a part of the employer's business. The assessment will require evaluating the facts of the situation, and not merely titles, labels, and terminology created by the parties.

The Organization Test

The Organization Test focuses on whether the work performed by the worker is an integral part of the business, or whether it is only an accessory to it.

The Employee or Dependent Contractor Test

A worker's status is often described as being on a continuum. If the worker is a contractor, they can be considered either a dependent or independent contractor, where a "dependent contractor" lies between employee and independent contractor on the employment spectrum. Where a contractor is dependent, they are "dependent" on the income from the employer. The nature of the relationship and in particular, the economic vulnerability of dependent contractors may require the employer to provide reasonable notice under common law when services of the contractor are terminated.

...dependent contractors may be entitled to common law reasonable notice upon dismissal, because dependent contractors do not have the ability to walk away from the working relationship as quickly or easily as independent contractors.

Conclusion

The tests canvassed above demonstrate that, in determining the status of a worker, limited consideration is given to written contracts and more emphasis is placed on the parties' actions throughout the relationship. However, failure to properly define an independent contractor relationship can be costly to the organization and may lead to inconvenient and expensive results. Therefore, it is still wise to have a contract in place, and employers should ensure that the actual structure of the relationship expresses the true nature of the relationship and the parties' intentions.

Amanda Scott

Look For Your Lawyers

We are pleased to congratulate **Jack Wells** and **Aishling Carson** on completing their articles here at Young, Anderson and being called to the BC Bar.

We would like to welcome to the firm two new articled students, **Rubal Kang** and **Peter Mate**, as well as summer student **Ramon Dabiryan**.

Mike Quattrocchi & **Alexandra Greenberg** will be presenting a session entitled "Long Term Borrowing - A Short Story" at the Government Finance Officers Association of British Columbia (GFOABC) Conference in Vancouver from May 27-29, 2025.

Joe Scafe & **Lynda Stokes** will also be presenting a session entitled "Securing Local Government Infrastructure" at the GFOABC Conference in Vancouver from May 27-29, 2025.

Guy Patterson will be presenting a session entitled "Beyond Housing Supply" at the 2025 Planning Institute of British Columbia Annual Conference being held in Vancouver June 10-13, 2025.

Reece Harding & **Christopher Gallardo-Ganaban** will be presenting a session entitled "Local Governments and the TRC Calls to Action: A Legal Overview" at the Local Government Management Association Annual Conference being held June 10-12, 2025 in Kelowna.

Sukhbir Manhas & **Carolyn MacEachern** will be presenting a session entitled "A Step-by-Step Guide to Managing Complaints of Bullying & Harassment" at the Local Government Management Association Annual Conference being held June 10-12, 2025 in Kelowna.

Sukhbir Manhas will be presenting a session entitled "Legal Update" at the Local Government Management Association Corporate Officers Forum being held in Penticton on October 1-3, 2025.

Carolyn MacEachern will be presenting a session entitled "Workplace Bullying and Harassment Investigations – Lessons Learned" at the Western Cities Excel HR Conference, taking place October 7-10 in Nanaimo.

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