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NEWSLETTER

Wu v. Vancouver: When Making Permitting Decisions, Slow Doesn't Equal Negligent

If you own an old house in Vancouver's First Shaughnessy neighbourhood and you're thinking about tearing it down, city officials might ask you to think again. And again. And again. And again. And in the meantime, instead of designating your house as "protected heritage property" and compensating you for any loss in value caused by the designation, the City might establish a heritage conservation area to protect your house, along with others in the neighbourhood, without having to pay any compensation. Would it be negligent for the City to do such a thing? Not according to a recent decision of the BC Court of Appeal in Wu v. Vancouver (City)*, 2019 BCCA 23, in which the Court of Appeal overturned the trial judge's conclusion that a local government could be liable in negligence for unreasonable delays in making decisions whether or not to issue permits.*

The trial judge found the City had acted in bad faith by engaging in a circuitous course of delay that was deliberately and unlawfully intended to thwart the applicants' plans to demolish a house the City was anxious to preserve. The judge also said the City was obliged to process development permit applications within a reasonable time. Therefore, the trial judge decided the City wasn't just slow, it was negligent. That decision raised some troubling questions for local governments exercising their (formidable) heritage conservation powers, or for that matter exercising any power to make a decision on the issuance of a permit. Most obviously: what would be a reasonable time for processing a given permit, and what kinds of processing delays might be excusable, as opposed to negligent?

The Court of Appeal agreed that local governments, when presented with a complete application for a permit, cannot indefinitely delay a decision on whether or not to issue the permit. A local government has a statutory duty, also known as a public law duty, to make a decision without unreasonable delays. But the Court of Appeal was adamant that a local government failing to discharge this public law duty to make a decision in a timely manner is not, for that reason alone, liable for the private law tort of negligence. Negligence law applies to everyone, not just government or other public authorities exercising decision-making powers. Negligence law requires people to take care to ensure their actions don't harm others to whom they owe a duty of care, if there is a reasonable possibility that a failure to take

care might in fact cause harm. On the other hand, the public law duty to make a decision is just that: if you are obliged to make a decision, you must make a decision. The duty to decide exists as a result of having the power to decide; unlike the private law duty of care, the public law duty to decide exists regardless of whether or not a failure to decide might reasonably be expected to cause harm.

Why is this distinction – between a statutory or public law duty to make a decision, and the private law duty to take care that one's actions don't cause harm to others – so important? The distinction matters because the consequence for breaching the duties are different. Negligence, by definition, causes harm, and the law says a person harmed by the negligence of another is entitled to be compensated by the negligent party to make up for the loss suffered. On the other hand, even if a slow decision, or no decision, by a public body with the authority to make the decision causes harm to the person subject to the decision, the only remedy for breaching the public law duty to make a decision is an order to make a decision. And in most cases a court will not order a local government to make a particular decision (for example, to issue or refuse to issue, a permit), it will only order the local government to make a decision.

In *Wu*, the Court of Appeal acknowledged the breach of a public law duty might be evidence of negligence, but said the trial judge was wrong to find the City's failure to make a decision within a reasonable time could alone be grounds for holding the City liable in negligence. The Court also emphasized that the proposition that breaches of public law duties don't alone equal negligence is nothing new.

What, if anything, can local government decision-makers take from the new *Wu*? First, the case should not be taken as a licence to delay decisions. The Court of Appeal was clear applicants are entitled to decisions within a reasonable time. The only thing the trial judge got wrong was finding that the remedy for unreasonable delays could be damages. Instead, the remedy is an order to make a decision, and likely an order that the local government pay the applicant's court costs if the local government unsuccessfully resists the applicant's request for a decision.

Second, and perhaps more important, if local government officials engage in the kind of unsavoury delay tactics the trial judge had characterized as "bad faith", those individuals (rather than the City itself) can be sued for the private law tort of abuse of office (remember, the trial judge thought City staff deliberately delayed the permit decision in order to achieve heritage protection, without compensation). The Court of Appeal agreed with the trial judge that the abuse of office claim could not succeed because the plaintiffs failed to name

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any particular individuals whose conduct the plaintiffs were complaining about, and therefore the Court didn't need to decide whether or not such a claim could succeed.

The Court of Appeal's refusal to consider the abuse of office claim just because of the plaintiff's failure to name individuals might seem like a technicality, and perhaps even an injustice in light of the trial judge's critique of the City's alleged delay tactics. However, even though the failure to name individuals meant the Court of Appeal didn't need to decide the abuse of office question, the Court of Appeal did offer its view that on the basis of the limited evidence available it tended to favour the City's argument that the plaintiffs' development permit application was incomplete. On that basis, both a proper abuse of office claim and a request for the public law remedy that the City be ordered to make a decision would have been bound to fail.

Our advice in the wake of *Wu*? If you receive an incomplete permit application, tell the applicant what needs to be done to perfect it. And if you receive a complete application, make a decision on it within a reasonable time. In other words, business as usual.

Guy Patterson

Court Upholds Increased Fee for Building Permit Application Made After Construction Begins

A number of local government building bylaws include an increased building permit fee charge where an owner commences construction without having obtained a building permit. The validity of such a charge was recently considered, and upheld, by the Court of Appeal in Apartments Legacy One Ltd. v. Vernon (City), *2018 BCCA 447.*

In August 2016, Legacy submitted a building permit application for an apartment building. The City identified a number of engineering deficiencies with the application, which were communicated to the professional engineer retained by Legacy. The City issued a stop work order when construction work on the development was observed at the end of October and before a building permit had been approved. Legacy submitted a building permit application restricted to foundation work to allow it to pour concrete and install plumbing before the ground froze. The City declined to issue a foundation works building permit citing the same failure to address engineering deficiencies. When Legacy continued construction despite the absence of a building permit the City added a $10,000 charge to the building permit as provided for under its Building Bylaw. The additional charge was 25% of the permit fee, "or a maximum of $10,000" where work was commenced without a permit or contrary to a stop work order. Without the additional charge the building permit fee was still a substantial sum at $962,000.

The owner attacked the additional charge provision in the bylaw as being vague and unintelligible and claimed the City acted in bad faith in imposing the additional fee. The

Court of Appeal acknowledged that the bylaw provision would have been made clearer had it read "to a maximum of $10,000" instead of "or a maximum of $10,000." Nevertheless, the intent was clear; the additional amount was capped at $10,000. There is a heavy onus where a bylaw is challenged on the grounds of vagueness. Absolute precision is not required. A law will only be impermissibly vague where it is so lacking in precision it does not provide an adequate basis for legal debate, which after applying the accepted principles of statutory interpretation would leave a court unable to discern a meaning. Under this framework, the Court of Appeal found the additional charge provision was not unintelligible or vague.

The bad faith claim also failed. Legacy's argument that the stop work order should never have been issued as it was entitled to construct the foundation forms without a permit was held to be without merit. Its alternative argument that the City's refusal to issue a permit for the foundation work evidenced bad faith was also devoid of merit. The Court of Appeal accepted that no construction, even for foundation works, could be commenced without a building permit. The City's decision to issue a foundation permit was entirely discretionary; they were issued only in exceptional circumstances. As with the permit for the entire building, the City was entitled to withhold issuance of a foundation permit until the required engineering information was provided.

The facts did not provide a particularly good case for the developer so the result is hardly surprising. Nevertheless, the decision does validate increased building fee charges where construction is started without obtaining a permit or continued contrary to a stop work order. Local governments should be cautious in setting the amount of an increased charge due to a potential argument that, while not raised in this case, could prove problematic.

Building permit fees are a form of regulatory charge. As distinguished from a tax which can be set to raise revenue for general purposes, a regulatory charge can recover the costs of a regulatory scheme but should not be set at a level intended to generate a surplus that can go to general revenue. The $10,000 cap on Vernon's additional fee, particularly when measured against the regular building permit fee of $962,000, would be an effective counter to any claim that the additional fee was in substance a tax for general revenue. A relatively modest amount could be rationalized as recovery of the additional administrative or enforcement costs of local governments dealing with unlawful construction.

Barry Williamson

A Tale of 2 Court Cases, and 3 Invalid Local Elections

Pursuant to section 153 of the Local Government Act*, a candidate, the chief election officer or 4 electors may apply to the BC Supreme Court regarding the validity of a local government election. An election may be challenged on the basis that: (i) an elected candidate is not qualified to hold office, (ii) the election was not conducted in accordance with legislative requirements, (iii) there was a contravention of the* Local Government Act *provisions relating to vote buying or intimidation, or (iv) a person voted when not entitled to do so. Importantly, the court must*

not declare an election invalid "by reason only of an irregularity or failure to comply" with the Local Government Act *or a regulation or bylaw under the Act if the court is satisfied that "(a) the election was conducted in good faith and in accordance with the principles of this Act, and (b) the irregularity or failure did not materially affect the result of the election".*

Two recent BC Supreme Court decisions involved circumstances where people voted in 2018 local elections when they were not entitled to do so. In each case, the election outcomes were close and the number of miscast votes clearly had the potential to affect those outcomes.

In *Alberni-Clayoquot (Regional District) (Re)*, 2019 BCSC 20, the chief election officer applied to court for declarations in relation to the election of 2 electoral area directors, having discovered that 13 persons resident in Electoral Area B had voted in Electoral Area F. The successful candidate in Electoral Area B had 11 more votes than the next candidate, and the successful candidate in Electoral Area F had 7 more votes than the next candidate. The electoral areas are adjacent to each other and some of the erroneously cast votes were from electors residing on a road located in both elector areas. The court noted that there was no evidence of the interaction between election officials and these voters and that it was not possible to say whether the error was made by the electors or by the election officials.

In relation to Electoral Area F, the court found a clear violation of section 163(2)(a) of the *Local Government Act*, which prohibits a person from voting when not entitled to do so. Thirteen people, who were not resident of Electoral Area F and did not own property in Electoral Area F, voted in the Electoral Area F election. The court's conclusion on this point was not surprising.

As to Electoral Area B, the chief election officer submitted that there was no contravention of section 163(2)(a), because there were no votes cast in Electoral Area B that should not have been cast (rather, 13 Electoral Area B electors had mistakenly voted in the Electoral Area F election instead of the Electoral Area B election). Perhaps surprisingly, the court again found a violation of section 163(2)(a) and gave a very broad interpretation to section 163(2)(a), stating:

> These electors showed up to vote and did vote but voted in the wrong election areas. Since there is no evidence that this was deliberate, I conclude that they intended to vote in the correct electoral area. A narrow reading of s.163(2)(a) would, in effect, defeat these electors' right to vote as their votes would be invalidated without any remedial mechanism to re-cast their vote properly.

The chief election officer then submitted that the contraventions did not materially affect the election results because "although it is possible that the miscast votes would have changed the outcome, statistical analysis does not support such a conclusion". She submitted that there were 105 possible scenarios in which the 13 ballots could have been cast in Electoral Area B, with only 4 of those resulting in a different outcome, and 14 possible scenarios for Electoral Area F, with only 3 resulting in a different outcome. The chief election officer relied on the BC Supreme Court's previous decision in *Duperron v. School District No. 53 (Okanagan Similkameen)*, 2017 BCSC 20, to argue for such a "statistical analysis". In *Duperron*, the court upheld a school board trustee election, even though only one of the two statutorily-required advance voting opportunities was held for the election. In that case, the court was willing to speculate on the number of voters who would have voted at a second voting opportunity had

one been held, and on how those voters would have voted, in order to conclude that the failure to hold the second advance voting opportunity did not affect the outcome of the election. The court in *Alberni-Clayoquot* distinguished *Duperron* on the basis that in that case the court was "addressing a pure hypothetical: an advance poll that never took place. In this case, the votes in issue were cast. The number of erroneously cast votes compared to the number of votes that separated the successful candidates from the runners up are known". The court set aside both elections.

In *Drummond v. Powell River (City)*, 2019 BCSC 93, six people were elected as councillors to Powell River City council and the seventh-place finisher (Mr. Drummond) sought a court declaration setting aside the election of the sixth council member (Mr. Doubt). Mr. Doubt was elected with 1,766 votes, 2 more votes than Mr. Drummond. The court found that 4 people voted in the election who were not entitled to vote, as they were not Powell River residents or property owners. The court set aside Mr. Doubt's election, as the court was unable to conclude that the irregularity did not materially affect the result of the election. The court left little doubt, stating, "All I can say, having accepted the facts that I do accept, is that four people voted who were not entitled to vote, and the results between Mr. Doubt and Mr. Drummond is only two votes". Simple arithmetic.

Michael Quattrocchi

Scope of Family Status in Relation to Childcare Obligations Considered by BC Court of Appeal

In a recent decision, the BC Court of Appeal again considered the scope of what constitutes family status discrimination under the Human Rights Code *(*Envirocon Environmental Services, ULC v. Suen*, 2019 BCCA 46). In a previous decision in 2004, the BC Court of Appeal determined that in order to establish* prima facie *discrimination, an employee would have to show that a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee (*Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260).*

In other words, the Court of Appeal in *Campbell River* found that general childcare duties will not fall within the scope of "family status" under the *Human Rights Code*. This means that employers in British Columbia are not required to accommodate employees who have regular childcare obligations.

The issue in *Envirocon* was a discrimination complaint by an employee under section 13 of the Code on the basis of family status when, shortly after his daughter was born, the employer assigned the employee to a project that required him to be away from home for 8-10 weeks. The employer dismissed the

employee when he refused to accept this assignment.

The employer filed an application to dismiss this complaint, which was denied by the Human Rights Tribunal. In that decision, the Tribunal questioned whether *Campbell River* remained good law. The Court of Appeal in *Envirocon* confirmed that it was bound by the decision in *Campbell River*. On that basis, the Court of Appeal determined that the facts alleged by the employee in *Envirocon* would not satisfy the requirement in *Campbell River* that there be a substantial parental obligation of the employee. As noted by the Court of Appeal at para. 32:

> While Mr. Suen's desire to remain close to home to be with his child and to assist his wife in caring for the child outside of his normal weekday working hours and on weekends is understandable and commendable, he is no different than the vast majority of parents. There are many parents who are required to be away from home for extended periods for work-related reasons who continue to meet their obligations to their children. Nothing in Mr. Suen's complaint or affidavit suggests his child would not be well cared for in his absence.

This is an important decision and re-affirms that general childcare obligations will not fall within the scope of family status under section 13 of the Code, which prohibits discrimination in employment. Therefore, local government employers are not generally required to accommodate employees who experience conflicts between work and family obligations, unless there is some substantial parental or family obligation that is outside the normal challenges all parents face in balancing work and childcare. That being said, we recommend that employers ensure they have sufficient information to determine whether there is a substantial parental or family obligation, in regards to an employee's request for accommodation in relation to childcare, before making a decision about whether to accept or deny that request.

Carolyn MacEachern

Bringing in the Big Guns: The Remedy for a Refusal to Return Personal Information

In Attorney General (British Columbia) v. Fuller, *2018 BCSC 1981, the first reported decision applying section 73.1 of the* Freedom of Information and Protection of Privacy Act, *Mr. Justice Thompson rebuked three respondents who refused to comply with formal demands of the City of Nanaimo (the "City") to return or destroy personal information they wrongfully had in their possession. At the suggestion of the Privacy Commissioner, the City requested that the Attorney General of British Columbia commence a petition under section 73.1 of the Act which authorizes the Attorney General to seek the return of a record containing personal information*

from a person not authorized to possess the information. Two respondents, a former Nanaimo City Councillor and an individual the court described as "a citizen with a keen interest in civic politics", appeared on their own behalf. A third respondent did not file a response and the fourth respondent entered into a consent arrangement with the Attorney General.

Two records were at issue in this petition: a March 2015 email written by then Mayor McKay to a consultant, and two December 2015 letters written by a lawyer to the City. The court found that both of these documents contained personal information, and the respondents had published them on social media and otherwise caused the personal information to be circulated.

The court analyzed the requirements of s. 73.1 and determined that before an order can be made under that section, the petitioner needs to establish:

1) the material in question must be "personal information";
2) the personal information must be "in the custody or under the control" of a "public body";
3) the personal information must be in the possession of a person or entity "not authorized by law" to possess it;
4) a demand in writing for the return of the personal information (or destruction in the case of electronic records) must be issued; and
5) the recipient of the demand for return or destruction must fail to comply adequately.

With regard to whether the material in question contained personal information, the respondents argued that the email was not written in confidence and that the lawyer's letters were not private in nature. The court disagreed:

> Whether documents record private, personal, confidential or embarrassing information, on the one hand, or anodyne and perfectly mundane on the other, if information is recorded about identifiable individuals then the documents contain "personal information." The email and the lawyer's letters contain such information.

The court also confirmed that despite the fact that it could not determine with certainty if the documents in question originated from the City, they were still in the care and control of the City:

> The City possesses the email and the letters. The fact that the respondents have a copy of these documents does not detract from the City's custody of the documents and the personal information contained in them. I think it likely that the City was the source of the leak of this personal information, but I am not sure it matters. The City is a custodian of this personal information, and its privacy head had reasonable grounds to believe that it was in the possession of persons not authorized by law to possess it. In those circumstances, she was permitted to issue the s. 73.1 notices.

Justice Thompson found that the remaining three requirements of s.73.1 were met with no serious issue and ordered all personal information in the possession of the three respondents deleted under s.73.2(2) and further ordered that the respondents delete any copies of emails or letters they have transferred, published, or disseminated on social media platforms, and prohibited the respondents from any further such transfers under s.73.2(3).

This case is a good example of how there are multiple tools available for local governments when dealing with privacy matters, especially when individuals fail to comply with demands for the recovery of personal information. The Privacy Commissioner commended the City's Corporate Officer for their actions in reporting the breach and taking steps to demand the return of the private information. Ultimately, the *Act* functioned as it was intended and the appropriate relief was granted.

Ethan Plato

Yukon Goes Its Own Way Thanks to Exclusion of Liability Clause in Request for Proposal

In Mega Reporting Inc. v. Yukon*, 2018 YKCA 10, the Yukon Court of Appeal confirmed that, absent evidence of intentional breach or bad faith conduct, the courts will enforce a properly drafted exclusion of liability clause to protect a tendering authority from liability following a flawed competitive bidding process. The three-justice panel hearing the decision included two justices who sit on both the Yukon Court of Appeal and the British Columbia Court of Appeal.*

The lawsuit arose after the territorial government had issued a request for proposal for court reporting services. Only Mega and one other proponent responded. The government's proposal evaluation called for a two-stage process: envelopes containing the proponents' qualifications and references were evaluated first, and if a proponent met the minimum criteria the proponent's second envelope containing its price would be opened. The government's evaluation team determined that Mega did not meet the minimum criteria, so the government did not open the second envelope. The government awarded the contract to the other proponent.

Mega requested feedback from the government. Since the government's evaluation committee had not taken notes of its meetings, a representative of the government met with Mega and provided feedback based on his memory of the meetings and his handwritten notes, including a note that Mega had not provided letters of reference. The RFP did not require proponents to provide letters of reference and Mega sued the government claiming it breached its duty to evaluate Mega's bid fairly.

The trial judge determined that the government had acted unfairly by marking Mega down for not providing letters of reference and that the evaluation committee's failure to keep a record of its decision prevented it from refuting concerns regarding its decision-making process. The trial judge also refused to apply an exclusion of liability clause contained in the RFP on the basis that upholding the clause was against public policy. That clause read, in part:

> ... each proponent, by submitting a Proposal, irrevocably waives any claim, action, or proceeding against the Government of Yukon including ... or damages, expenses, or costs including costs of Proposal preparation, loss of profits, loss of

> opportunity or any consequential loss for any reason including: any actual or alleged unfairness on the part of the Government of Yukon at any stage in the Request for Proposal process.

The Yukon Court of Appeal allowed the territorial government's appeal, finding that the trial judge erred in concluding it was against public policy to apply the clause. The Court of Appeal applied the test from *Tercon Contractors Ltd. v. British Columbia*, 2010 SCC 4, in which the Supreme Court of Canada held that a court must consider three issues in deciding whether such a clause may be enforced: whether as a matter of interpretation the clause applies in the circumstances, whether the clause was unconscionable at the time the contract was made, and whether the court should nonetheless refuse to enforce the clause based on public policy concerns which outweigh the very strong public interest in the enforcement of contracts on their terms.

On the third consideration, the Court of Appeal quoted from *Tercon* that public policy concerns should only prevent the enforcement of exclusion clauses where the harm to the public is substantially incontestable, such as in cases of fraud or serious criminality. The Court of Appeal noted that the cases in which public policy has been held to prevent enforcement of an otherwise valid term, public policy has generally been invoked to uphold protections for the benefit of the non-breaching party. However, the Court of Appeal held that the public policy basis for refusing to uphold the exclusion clause in this case - the obligation to conduct a fair bidding process - is for the benefit of owners, bidders, and the public (and its tax dollars). Accordingly, the government's interest in the process which it created and in which it chose to include the exclusion clause must be respected. While Mega also had an interest in a fair bidding process, the Court of Appeal noted that a contractor who does not believe it is in its best interest to participate in a bidding process which contains an exclusion clause is free to decline to participate.

On those bases, the Court of Appeal determined that the harm to the public was not substantially incontestable and held that the exclusion clause applied to absolve the territorial government of liability. The Court of Appeal also noted that although government staff may have not followed best practices, their conduct was not found to amount to an intentional breach or bad faith.

The case appears to confirm that the inclusion of an exclusion of liability clause in a competitive bidding process is not against public policy, and a court will only refuse to uphold a properly drafted exclusion clause on public policy grounds where a tendering authority has conducted a significantly unfair tendering process, including by intentionally breaching its Contract A obligations or engaging in bad faith conduct.

Joe Scafe

Court Rejects Employer's Claim that Employee's Conduct After Notice of Dismissal Without Cause Gave It Grounds for Dismissal With Cause

A recent decision of the BC Supreme Court confirms the importance of the concept of proportionality in an employer's assessment of the existence of just cause for dismissal in the non-union context: Kerr v. Arpac Storage Systems Corporation, *2018 BCSC 704. In that wrongful dismissal case, the plaintiff was 70 years old, had worked for the employer for 22 years, and had a clean disciplinary record when the employer terminated his employment, initially on a without cause basis with just over 12 months of working notice. However, based on the plaintiff's conduct in the week following notice of the dismissal, the employer withdrew its offer of working notice and dismissed him with cause.*

The plaintiff was the employer's Occupational Health and Safety Manager, and in that role was responsible for ensuring that the employer's health, safety and certification documentation was accurate and in order. After the employer failed to pass, on the first try, an audit that could result in a major discount in WorksafeBC premiums, the employer decided to terminate the plaintiff's employment on a without cause basis.

On receiving notice of the termination, the plaintiff was very upset and left work early. Over the next few days, he advised the employer that he was unwell and provided a note from his doctor confirming that he was medically unable to work. During the same period, the plaintiff went to his office after hours on two nights and altered a master training spreadsheet so that the data did not correspond to the correct employee, forwarded some emails to his personal email address, and deleted all emails from his inbox, sent box, and deleted items folders. After the employer discovered his actions, he apologized and offered to fix the spreadsheet upon his return to work. The employer subsequently dismissed the plaintiff with cause for his conduct.

In its decision, the BC Supreme Court reviewed the following principles regarding the just cause assessment in wrongful dismissal cases:

1. The defendant employer bears the burden of establishing that it had just cause for termination.
2. Just cause is behaviour that is seriously incompatible with the employee's duties. It is conduct that goes to the root of the contract, and fundamentally strikes at the heart of the employment relationship. The test is an objective one, viewed from the perspective of a reasonable employer taking account of all relevant circumstances.
3. The analysis requires a contextual approach including an examination of the category and degree of misconduct and its possible consequences, all of the circumstances surrounding the misconduct, the nature of the particular employment contract, and the status of the employee.
4. There must be proportionality between the severity of the alleged misconduct and the sanction imposed, given the importance of a person's employment to his or her well-being and to society.
5. An employer, as part of the contextual analysis, must consider the suitability of alternative disciplinary measures to dismissal. Dismissal for cause is the most severe reprimand available.
6. An employer must act in good faith in the manner in which it dismisses an employee. The obligation of good faith imposes a requirement on employers to investigate allegations of misconduct, give employees the opportunity to

respond, and requires employers not to fabricate grounds for cause, maintain unfounded allegations of cause, or treat an employee in a humiliating manner.

7. An employer that does not conduct a sufficiently broad investigation to establish the full nature and circumstances of the misconduct runs the risk that it will not have gathered enough evidence to be able to prove the existence of just cause at trial.

In the case before it, the BC Supreme Court held that the plaintiff's conduct was deserving of serious discipline, but that the employer had not proved just cause for dismissal. It reasoned that:

1. The plaintiff's conduct caused no real harm. The emails that he deleted were backed up on the employer's computer systems, and he knew that when he deleted his copies. There was no evidence of harm from the plaintiff forwarding the work related emails to himself, and there was no suggestion that he intended to use them for personal gain. The employer was also able to reconstruct the spreadsheet that the plaintiff had altered. Although the reconstruction took considerable effort, the court held that the employer could have mitigated that impact if it had permitted the plaintiff to correct the spreadsheet, as he had offered.

2. The employer had failed to properly consider the role the plaintiff's medical condition played in his misconduct which had occurred during the period when his doctor said he was not able to function properly. The court held that that fact should have "created a greater scope for consideration of disciplinary measures short of termination" (para. 76).

3. The employer had also failed to consider the plaintiff's long record of good service (22 years without incident, discipline or warnings).

4. The employer had failed to conduct a proper investigation. It had already decided to terminate the plaintiff's employment with notice. After discovering his misconduct, the employer seized the opportunity to dismiss him without notice or payment in lieu of notice. The employer did not ask the plaintiff a single question about his misconduct or ask that the forwarded emails be returned or deleted. It did not seek any information about his medical condition and how that might have affected his actions.

5. The employer did not consider lesser forms of discipline for the misconduct.

The court awarded the plaintiff a 19 month notice period, taking into account that he was at an age in which it would be difficult to find new employment. The court ordered the employer to pay him 19 months' salary less actual mitigation earnings, 50% of the bonus he would have earned during the notice period, and RRSP and other benefits, all of which totalled approximately $112,000.

This case is a good reminder to local governments of their obligations to properly investigate alleged misconduct and to consider all relevant circumstances before deciding whether they have just cause to dismiss. A disciplinary response must be proportionate to the seriousness of the misconduct, and an employee's medical condition may be a mitigating factor in the just cause analysis. The failure to take a contextual approach to the analysis may result in a court order for the payment of significant wrongful dismissal damages.

Michelle Blendell ✍

Court Finds Municipality Liable for Slip and Fall on Icy Sidewalk

In a recent decision of the BC Supreme Court, Scheck v Parkdale Place Housing Society, 2019 *BCSC 48, the Court found the District of Summerland liable for injuries sustained by an elderly individual who slipped and fell on an icy municipal sidewalk. This case highlights the importance of consistency between a local government's bylaws, written policies and operational practices in relying on a policy defence against similar claims. Even where a bylaw places responsibility for snow and ice clearing on the owner of property adjoining sidewalks, a written policy requiring daily inspection by the municipality, which is not followed operationally by staff, can eliminate a local government's policy defence against liability in similar slip and fall cases.*

The plaintiff, Ms. Scheck, sustained injuries when she slipped and fell on a sidewalk in front of her seniors' residence. As is normally the case with slip and fall lawsuits, the plaintiff sued both the municipal owner of the sidewalk (the District of Summerland) and the owner of the abutting land (Parkdale Place Housing Society) claiming that the defendants were negligent in failing to clear an icy patch that was hidden under snow. In order to be successful, the plaintiff was required to establish that the plaintiffs owed her a duty of care, that they had breached the standard of care, and that the breach caused a compensable injury which was foreseeable.

Whether a defendant owes a duty of care to a plaintiff depends on whether the case fits within a pre-established category, and if no such category exists, whether the defendant has a sufficiently close and proximate relationship with the plaintiff that it is foreseeable that carelessness by the defendant could cause harm to the plaintiff. In this case, the Society successfully argued that it did not owe a duty of care to the plaintiff. Even though a municipal bylaw required the Society to clear the sidewalk in front of the Society's property, this did not translate into a duty of care to all third-party users of the sidewalk. Summerland, however, by virtue of being both the owner of the sidewalk and having possession and control over it, admitted it was an occupier under the *Occupiers Liability Act* and owed a statutory duty to ensure that third parties and their property are reasonably safe. Even if Summerland had challenged the application of the *Occupiers Liability Act*, previous case law has found that municipalities owe a duty of care at common law to users of their sidewalks to ensure that they are reasonably maintained.

Summerland nevertheless argued that it should be excused from liability on the basis of a good faith policy defence. This defence is applied when the Court grants an exemption from a duty of care if sidewalk maintenance is carried out in accordance with a municipal policy decision. The exemption does not apply if a municipality makes an operational decision that fails to carry out the policy. In this case, Summerland said that, by taking into consideration budget and available resources of the municipality and by placing the obligation for clearing snow and ice on the adjacent landowners through the bylaw, it was immune from liability. While the Court agreed that a bylaw requiring adjacent owners clean sidewalks amounted to a reasonable, rational, and *bona fide* policy decision by council, the

Court noted that there was also a companion policy adopted by Summerland's council which required daily inspections of all sidewalks during winter months. Contrary to this policy, the evidence before the Court established that, at the operational level, due to limited budget and staffing, staff had adopted a complaints-based system and did not carry out an inspection unless it first received a complaint. Summerland did not inspect on the day of the plaintiff's fall as it had not received a complaint. The Court ultimately found that the failure to follow the written policy of daily inspections was an operational decision, and as such, Summerland was not entitled to an exemption from a claim for negligence. The Court went on to find that Summerland's failure to inspect the sidewalk, and subsequent failure to take action as was also required by the policy, were sufficiently causative of the plaintiff's injuries to find Summerland liable for the injuries sustained by the plaintiff.

With respect to bylaws which place the onus of snow clearing on the abutting property owner, this case clearly raises the question of how far does a municipality have to go to ensure that obviously unsafe conditions are corrected once identified by a complaint or during an inspection? Is notifying or issuing a bylaw ticket to the responsible owner sufficient, or is the municipality required to do more? What is reasonable taking into account financial, economic, social and political factors? These are challenging questions which must be considered practically (what can reasonably be done, given the level of risk, in the given time frame with the resources available?)

At a general level, this case highlights the importance of ensuring consistency between bylaws, written policy, and operational reality. If a written policy is unachievable by staff, given time, budgetary or other reasonable constraints, it should be revised so that it is achievable and consistent with operational practice. Similarly, if a policy is adopted to inspect or to do some other act, these inspections or acts must be carried out in accordance with the policy in a non-negligent manner.

Curtis Jones

Dirty Deeds Done Dirt Cheap: Expropriating Contaminated Land

The recent decision of Tanex Industries Ltd. v. Greater Vancouver Water District*, 2019 BCSC 74, raised an apparently novel question about how to address contamination and associated remediation costs in determining the amount to be paid for land by an expropriating authority. At first glance, this does not appear to be a likely issue; the* Expropriation Act *requires that an expropriating authority must pay market value for expropriated land and the market value should incorporate the impact that contamination has on the price that buyers are willing to pay for the land. The* Tanex *decision nevertheless appears to have arisen from a couple of practical problems in the expropriation process and a potential intersection with the* Environmental Management Act.

The first problem is that there may be uncertainty as to whether a property is contaminated. In the *Tanex* case, Tanex complained that the expropriating authority, Greater Vancouver Water District, had no statutory authority to decide that the property owned by Tanex was contaminated. Second, if a property is contaminated, its value becomes more difficult to compare to similar uncontaminated properties. In this case, the Greater Vancouver Water District deducted what it estimated to be the remediation costs from its estimate of the market value for the property in an uncontaminated state. Tanex complained that it, or a subsequent purchaser, may not have to pay those remediation costs if they are recoverable from a previous owner under the *Environmental Management Act* and that the owner's right to recover remediation costs under that Act will be lost once the property has been expropriated.

In responding to these concerns, the court made one clear decision and left one question open. With regard to valuing properties, remediation costs to address contamination should be deducted from a calculation of market value for the 'clean' property as any developer of the property would be expected to incur those costs. If an owner believes that the property is not contaminated, they can challenge the amount of the advance payment by going to trial to seek additional compensation above the amount in accordance with the *Expropriation Act*.

With regard to the right to recover remediation costs from others under the *Environmental Management Act*, the Court commented that "it is not clear whether Tanex has lost the right". The court suggested that it was an issue for another day whether an owner can recover the remediation costs it indirectly incurred by having them deducted from the payment by an expropriating authority who later remediated. The Court did indicate that if the Greater Vancouver Water District or some other future owner made a claim against Tanex for remediation costs under the *Environmental Management Act*, then the court's consideration of "other factors relevant to a fair and just allocation" of recoverable costs should take into account that Tanex had already paid. The alternative approach, and the one that Tanex argued was appropriate, is for an expropriating authority to pay a higher price for the property on the assumption the property is clean, and if the authority later remediates any contamination, to seek recovery under the *Environmental Management Act*. This would appear unfavourable to expropriating authorities who see themselves overpaying more now with the chance of recovering some of the money later. The *Tanex* decision supports the much more advantageous approach of incorporating suspected contamination into a reduced payment under the *Expropriation Act*.

Michael Moll

Miscellaneous Statutes: Did you know?

Did you know that under section 53 of the Hospital Act, *a municipality may not expropriate land from the owner of a provincially designated hospital or a district incorporated under the* Hospital District Act *unless the municipality receives written approval from the Minister of Health? This restriction does not apply to the protection of a heritage site or heritage object under the* Heritage Conservation Act, *the* Local Government Act *or the* Vancouver Charter.

Joe Scafe

Look for Your Lawyers

The SFU Vancouver downtown campus City Program Course will include a presentation by **Bill Buholzer** and **Guy Patterson** on March 14, 2019.

David Loukidelis and **Ethan Plato** will be presenting webinars on FOI Advancements for the Local Government Management Association on April 4 and May 2.

Carolyn MacEachern and **Ethan Plato** will be presenting a session entitled "FOI Update" at the North Central Local Government Management Association 2019 AGM and Conference in Prince George on April 11.

Elizabeth Anderson and **Michael Moll** will be guest speakers at the Justice Institute of British Columbia's Bylaw 101 course on April 15 and June 3 in New Westminster.

Carolyn MacEachern will be co-chairing the Lancaster House Human Rights and Accommodation Conference being held in Vancouver from April 16-17. Presentations include **Michelle Blendell's** session called "The New Reefer Reality" on April 17.

Sukhbir Manhas will present a legal update to attendees of this year's Lower Mainland LGMA Conference on April 25 in New Westminster.

Carolyn MacEachern will be presenting on "Workplace Investigations and Indemnification" at the International Municipal Lawyers Association in Canada conference being held in New Westminster on April 25-26.

Bill Buholzer will be speaking on "Enforcement: The Pointy End of Regulation" during the 2019 BC Land Summit being held in Vancouver on May 8-9.

On May 30 at this year's GFOABC Conference in Victoria, **Kathleen Higgins** will be presenting on local service taxes and **Joe Scafe** will be presenting on permissive tax exemptions.

Mike Quattrocchi and **Guy Patterson** will be speaking at the Continuing Legal Education of BC's seminar on subdivision on May 30 in Vancouver.

At the Local Government Management Association Annual Conference being held June 11-13, 2019 in Vancouver attendees can see **Kathleen Higgins** and **Sabrina Spencer's** session called "The Cities We Need: Planning for Resiliency" and **Sukhbir Manhas** and **Elizabeth Anderson's** session entitled "Cannabis: The Lessons Learned so Far".

We are excited to welcome four talented lawyers to the fold. **Michelle Blendell** brings with her significant experience in labour relations law. **Jordan Adam**, **Inder Biring** and **Ethan Plato** are all starting out their legal careers with a broad municipal practice, with Jordan and Inder focusing on real estate and development and Ethan on freedom of information issues. All have proven themselves excellent additions to the firm.

We are also pleased to announce that **Nick Falzon** will be staying on with Young, Anderson as associate lawyer upon completing his articles in May.

We bid a fond farewell to **Rosie Jacobs** and **Stefanie Ratjen** as they pursue new opportunities. We expect Rosie's insight and enthusiasm will continue to be appreciated by her new colleagues at a litigation-focused firm in Kelowna. Stefanie's intelligence, compassion and sense of humour will no doubt make her a welcome addition to the Community Legal Assistance Society.

STAY CONNECTED

If you are keen to receive client bulletins and updates to the firm blog by e-mail, go to **younganderson.ca** and click on the "**STAY CONNECTED**" button at the top of the webpage.