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NEWSLETTER

BC Supreme Court Upholds New Westminster Renoviction Bylaw

In 1193652 B.C. Ltd. v. New Westminster (City), *2020 BCSC 163, released on February 11, 2020, Chief Justice Hinkson dismissed a petition challenging the City of New Westminster's* Business Regulations and Licensing (Rental Units) Bylaw No. 6926 *(the "Bylaw"). The petition was filed by the owner of a multi-family residential building seeking to evict tenants and perform renovations. This practice of "renoviction" has created widespread concern, as lower-income tenants are displaced in favour of those who can pay the heightened rents imposed by landlords on completion of renovations.*

The Bylaw created a scheme intended to protect tenants from renoviction. To summarize, the Bylaw imposed the following regulations:

1) An owner is prohibited from evicting a tenant unless the owner has every building permit, plumbing permit, development permit, special development permit, or heritage alteration permit required by the City, and has:

    a. entered into a new tenancy agreement with the tenant on the same terms as the tenancy agreement pertaining to the rental unit being renovated, or terms more favourable to the tenant, in respect of a rental unit in the same building; or

    b. made other arrangements in writing for the tenant's temporary accommodation during the renovation as well as for their return to the rental unit under the terms of the existing tenancy agreement;

2) An owner may not, having completed a renovation that required vacant possession, increase the rent payable upon the tenant's return to the unit except as an "additional rent increase" under Part 3 of the *RTA*; and

3) An owner may apply to City Council for an exemption from the above requirements on the grounds that the owner's proposed renovation or repair plans cannot be safely implemented without vacant possession.

The petitioner had originally made several arguments about the Bylaw's validity, including that it was unreasonable, impermissibly vague, and was in direct conflict with the *RTA*, but restricted its arguments at the hearing to one ground – that the Bylaw was *ultra vires* the jurisdiction of the City to enact. Within this broader issue, there were two main arguments:

(1) that the Bylaw was, as a matter of statutory interpretation, outside of the powers of the City as set out in ss. 8(6) and 8(3)(g) of the *Community Charter*; and (2) that the Bylaw was "in pith and substance" an attempt to regulate in the area of landlord and tenant law, an area in which the Province had already enacted the comprehensive *Residential Tenancy Act [RTA]*.

Dealing with the statutory interpretation argument, the Court reminded itself of first principles when dealing with municipal legislation, noting that, in addition to the modern approach to statutory interpretation, s. 4 of the *Community Charter* mandates that municipal powers be construed broadly. Further, the Court confirmed the principle from prior caselaw that municipal bylaws are presumed to be validly enacted until proven otherwise.

Following *Koslowski v. West Vancouver (Municipality)* (1981), 26 BCLR 210, the Court confirmed that in looking to the question of the municipality's power to pass the Bylaw, it need not determine the Bylaw's "pith and substance" or "dominant character". Rather, a municipal council need only have one lawful purpose in order for a bylaw to be valid. The Court did not accede to the petitioner's argument invoking the framework from *West Kelowna (City) v. Black Crow Herbals Association*, 2019 BCSC 1082. *Black Crow*, the Court found, was distinguishable as a case that turned on the division between federal and provincial powers, rather than provincial and municipal powers.

The Court also distinguished *Canadian Plastic Bag Association v. Victoria (City)*, 2019 BCCA 254 *[Canadian Plastic Bag]* on which the Petitioner had relied. There, the issue was whether the City of Victoria's business regulation bylaw had been adopted under s. 8(3)(j) – the power to regulate in relation to the protection of the environment – or under the business regulation power at s. 8(6). While a bylaw adopted under s. 8(3)(j) requires ministerial approval, a bylaw under s. 8(6) does not. The key difference, the Court found, was that s. 8(3)(j) is a head of concurrent authority with the Province pursuant to s. 9 of the *Community Charter*:

> [49] The City contends, and I agree, that the pith and substance, or dominant purpose, analysis as a means of limiting the scope of municipal power, is only appropriate where there is an applicable legislative direction that precludes overlap between the municipal power at issue and another specified power where the legislative regime at issue expressly provides for

WWW.YOUNGANDERSON.CA

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

#201 - 1456 St. Paul Street, Kelowna, BC V1Y 2E6
tel: 250.712.1130 I fax: 250.712.1180

> a division of powers. That is not the circumstance in this case.

In interpreting s. 8(6) of the *Community Charte*r, the Court considered two elements. First, it was uncontested at the hearing that the petitioner was a "business" in the context of the *Community Charter*. While the Court did note that the caselaw gives the term "business" a broad meaning, it spent more analysis on the second element – whether the Bylaw fit within the definition of the term "regulate". The petitioner argued that the Bylaw was not a regulation because it "imposed requirements." The Court did not accept this argument. It found that while the Bylaw imposed requirements in the broad sense, it still fit within the definition of "regulate." The Bylaw only established what "must or must not be done" as part of an "authorization," "control," "inspection," "limit," or "restriction."

The Court found that the Bylaw established rules in relation to the "protection" of tenants from the consequences of eviction from their rental units, which are subject to tenancy agreements under the RTA, *and was therefore authorized.*

Along with being authorized under s. 8(6) of the *Community Charter*, the Court also found that the Bylaw was authorized under ss. 8(3)(g) and 63(f). These two sections, read together, allow a municipality to regulate in relation to the health, safety or protection of persons or property in relation to rental units and residential property that are subject to a tenancy agreement under the *RTA*. The Court found that the Bylaw established rules in relation to the "protection" of tenants from the consequences of eviction from their rental units, which are subject to tenancy agreements under the *RTA*, and was therefore authorized.

The Court also dismissed the second larger argument, that the Bylaw should be "read down" because it frustrated the purpose of an all-inclusive scheme set out in the *RTA*. The Court acknowledged the petitioner's argument on the basis of *Seignoret v. Bakonyi Holdings Ltd.*, 2019 BCCA 105, in which the Court of Appeal found that the RTA was an all-inclusive scheme that describes the circumstances in which a landlord may terminate a lease, but noted that s. 49(6) of the *RTA* specifically contemplates a landlord having "necessary permits and approvals required by law" before they can terminate a lease.

More importantly for municipal bylaws generally, and aside from the express direction in the *RTA*, the Court noted that s. 10 of the *Community Charter* contemplates overlap between municipal and provincial regulations. Section 10 specifies the only way in which a municipal bylaw can be inconsistent with a provincial enactment:

> ...s. 10 of the *Community Charter* contemplates overlap and provides that a bylaw is inconsistent with a provincial enactment only if it requires contravention of the enactment. The petitioner has not demonstrated how the Impugned Bylaw would result in a contravention of the *RTA*. In the result, I find that the City has exercised municipal power in respect of a subject area governed by the *RTA*, but has done so in a way that is consistent with the Act.

The Court further agreed with the City that there is no general rule that municipal bylaws cannot legislate in respect of matters that are

otherwise regulated by the Province. Section 10 of the *Community Charter* precludes the existence of such a rule. The Court therefore dismissed the petition in its entirety.

This decision is a confirmation of the broad and general powers of municipalities set out in the *Community Charter* and the ability of municipalities to "determine the public interest of their communities and to respond to the different needs and changing circumstances of their communities". The Court broadly construed the powers of the City to regulate in relation to business as well as for the protection of persons and property. While the Court of Appeal's decision in *Canadian Plastic Bag* left it open to the petitioner to argue that a "pith and substance" analysis should be applied to a *vires* challenge, the Court confirmed that, absent a legislative direction to do so, there is no reason to import such an analytical tool into a challenge to municipal jurisdiction. In *Canadian Plastic Bag*, the Court found that legislative direction in s. 9 of the *Community Charter*.

Indeed, the petitioner's argument went further, alleging that the legislature could implicitly give such a direction by creating a comprehensive "code". To adopt a "pith and substance" analysis based on judicial demarcation of a certain subject-area as exclusively provincial jurisdiction flies in the face of the legislative intent evident in the *Community Charter*, which sets up a scheme of concurrent, rather than exclusive, authority. Furthermore, the Court recognized that where the legislature wishes to carve out such a zone of exclusive jurisdiction, it does so explicitly and with language that is sufficient to displace s. 10 of the *Community Charter*.

Nick Falzon

Who, in Law, is 'The Government'?

The list of rules about applying local zoning bylaws to land uses that involve the provincial government, based on s. 14 of the Interpretation Act *and relevant case law, just got lengthier.*

Until late last year, the rules were these:

1. Local bylaws are binding on the provincial government (s. 14(1) of the *Interpretation Act*)
2. Except local bylaws that would affect "the government", including agents of the government, in the use or development of land (s. 14(2) of the *Interpretation Act*)
3. But that exception doesn't include bylaws that would affect a third party operating business assets owned and maintained by a provincial government agency (*B.C. Lottery Corporation v. Vancouver* (1999))
4. Or bylaws that would merely affect a third party lessee of provincial government land (*Squamish v. Great Pacific Pumice Inc.* (2000))

As a result of the B.C. Supreme Court's November 6, 2019 decision in *Beuchler v. Island Crisis Care Society*, we have a further rule:

5. But the exception does include a bylaw that would affect a non-government entity that is using the government's land at the behest of the government in furtherance of government objectives

To make sense of this latest rule it's useful to consider the facts out of which the *Beuchler* decision arose. The City of Nanaimo had, late in 2018, obtained a Supreme Court injunction requiring the removal of an encampment of homeless persons from City lands in downtown Nanaimo. The Province, through the B.C. Housing Management Commission, an agent of the government, and the City of Nanaimo had, in anticipation of the injunction being issued, moved quickly to create a 78-unit temporary modular housing project on land purchased by the Provincial Rental Housing Corporation, another Crown agent. The land was not zoned for such development. Presumably to give comfort to the City, which was faced with the problem of issuing permits for buildings that its zoning bylaw did not allow, B.C. Housing issued a letter to the City indicating that it would be "exercising paramountcy" on the housing sites, but that for any permanent development it would be going through municipal rezoning and development permitting processes. The modular housing was in place and occupied by the time that the Supreme Court heard the petition of Janet Beuchler and other citizens who would have been entitled to receive a notice of public hearing if the City had required the site to be rezoned. The citizens sought a declaration that the zoning bylaw applied to the PRHC lands, relying on the *Great Pacific Pumice* case to attack BC Housing's "paramountcy" notion.

While taking note of that case, the BC Supreme Court found in the relationship between BC Housing and the non-profit society that was operating this temporary housing project reflected sufficient BC Housing involvement that it could conclude that BC Housing was the user of the land, and as an agent of the provincial Crown did not have to comply with Nanaimo's zoning bylaw. Fundamental to this conclusion was the Court's characterization of the provision of housing for homeless persons as a provincial government policy objective, in pursuit of which the government had funded the construction of the project, established the operating budget and provided most of the operating funds. The Province had also, through the Island Health Authority, arranged for the provision of health care services to residents of the project. This aspect of the decision invites comparison with the Court of Appeal's reasoning in the *B.C. Lottery Corporation* case, leading to the opposite conclusion. In that case, one might similarly have characterized the generation of gambling revenues as a provincial government policy objective, in pursuit of which the government had purchased slot machines and directed BCLC to install them in casinos. (The government has also caused BCLC to establish "healthy gambling" programs in its facilities.) Despite some apparent similarities, the BCLC case wasn't referenced in the Supreme Court's *Beuchler* decision.

This conclusion picks up on an observation of the Court of Appeal in the Great Pacific Pumice *case to the effect that Crown immunity might extend to land users that are neither the Crown nor Crown agents, where the land is being used "at the behest of the Crown in furtherance of Crown objectives".*

Going further, the Supreme Court indicated that even if it had found that BC Housing was not the user of the land, it would have held that the Island Crisis Care Society was eligible for the immunity from City bylaws afforded by s. 14(2) of the *Interpretation Act*. This conclusion picks up on an observation of the Court of Appeal in the *Great Pacific Pumice* case to the effect that Crown immunity might extend to land users that are neither the Crown nor Crown agents, where the land is being used "at the behest of the Crown in furtherance of Crown objectives". This aspect of the *Beuchler* decision could cause some turbulence in an area of planning law that has been relatively calm. The part of the Court's formulation that refers to "Crown objectives" seems superfluous and incapable

of limiting the possible reach of this new rule in any meaningful way, since any arrangement that the Crown initiates or participates in would presumably be in pursuit of some Crown objective or other. "Crown objectives" are not formally set out in an Act of the Legislature or anywhere else, but are usually established from time to time only implicitly as the government of the day decides what activities to undertake. That leaves "at the behest of the Crown", a phrase that could encompass myriad arrangements in the realms of public-private partnerships and the contracting out of services traditionally provided by the government. Once the focus comes to rest on the governmental nature of the activities that s. 14(2) is potentially shielding from local government bylaws and the policy to which that legislation is directed, it seems immaterial whether the land in question is owned by the government, as it was in Beuchler, by the party that is using the land at the behest of the government, or by someone else. Nor is there anything in this recent decision that suggests that the development of permanent government-funded housing on this site would be subject to Nanaimo's zoning bylaw, BC Housing's letter to the City notwithstanding.

The potential for turbulence in this area of the law is heightened by the fact that in *Beuchler*, the difficulty with complying with the City zoning bylaw may have merely been one of timing: as the Court noted, "compliance with municipal zoning bylaws … was incompatible with the Crown objective of very quickly constructing and making operational a temporary supportive housing facility for a large number of homeless people in the fall of 2018" [underlining added]. These days, few permit applicants fail to mention to their local government that their project could easily collapse in the event of any delays in issuing approvals. From a local government perspective, it's to be hoped that the Province will recognize the potential for disruption that the *Beuchler* decision creates, by expressly requiring compliance with local government bylaws when it enters into arrangements with third parties for the provision of services that might in other jurisdictions, or at other times, have been provided directly by the government.

Bill Buholzer

Drug Testing of Employees - Balancing Employee Privacy and Public Safety

Arbitrators continue to struggle with balancing an employee's right to privacy versus public safety where an employee has tested positive for drugs. In the case of British Columbia Rapid Transit (Company)*, 2019 CanLII 101858, the Arbitrator granted an interim order to suspend a one-year random drug monitoring requirement imposed on a SkyTrain attendant who tested positive for cannabis during a periodic medical examination.*

The attendant's position mostly involved "on the ground" operations but it was designated as safety-critical. While the Employer's drug policy did not require abstinence from cannabis, it did require that employees be fit for work and must not consume drugs or alcohol while on duty. It was never suggested that the employee was ever impaired on the job.

The Chief Medical Officer appointed by the employer under the railway safety legislation took a conservative approach to interpreting the clinical data and, in light of the importance

of public safety, the Chief Medical Officer decided that ongoing drug testing was necessary. The factors considered by the Chief Medical Officer included that the employee had not been initially honest about his use of cannabis, he used cannabis 3-4 times weekly, and the doctor who assessed the employee concluded that he should be monitored for one year with random drug testing. However, that doctor also concluded that the employee did not have a substance use disorder. In addition, the Union provided an expert report during the arbitration process that challenged the conclusions of the doctor who had initially assessed the employee and upon whose findings the Chief Medical Officer relied when making the drug testing order.

In these circumstances, the Arbitrator granted the Union's interim application that the drug testing requirement be suspended pending the final decision in arbitration. In coming to this conclusion, the Arbitrator noted that the grievor had taken counselling, remained abstinent and complied with the monitoring agreement as had been initially directed by the employer. The Arbitrator also made the following comments:

> "I find that even if testing is now suspended as the Union seeks, the CMOs safety plan has been substantially completed. It would be reasonably safe to uphold the grievors [sic] privacy and dignity rights at this point in time."

[W]here an employee does not have a substance use disorder and there is no evidence that they have been impaired at work, it will be difficult to justify any kind of ongoing random drug testing, particularly where the drug at issue is cannabis (which is legal).

Local governments also have many positions that are safety-sensitive. However, where an employee does not have a substance use disorder and there is no evidence that they have been impaired at work, it will be difficult to justify any kind of ongoing random drug testing, particularly where the drug at issue is cannabis (which is legal). Therefore, local governments will need to carefully consider what is the appropriate response if they are in a situation where an employee tests positive for drugs. This will include the circumstances surrounding the reasons for the drug test (i.e., a safety incident or accident), the types of drugs that are detected, and medical evidence of whether there is a substance use disorder.

Carolyn MacEachern

Housing Agreements: A Few Pointers

Many local governments are very familiar with housing agreements, but can be forgiven for misunderstanding some key features, and constraints, of these important legal instruments. We have recently been involved in the development of a housing agreement guide for local governments in Metro Vancouver. This article offers a few observations motivated by the bold ambition of helping readers to use housing agreements more effectively.

1. A housing agreement, although it can only be entered into by bylaw under section 483 of the *Local Government Act*, is not a bylaw. It is an agreement between a local government and an owner of land. This means that unlike a bylaw, which a local government can adopt unilaterally, a housing agreement requires the cooperation, and ultimately the signature, of the owner of land on which the housing units that are subject to the agreement are, or will be, located. It also means a local government cannot enforce a housing agreement in the same manner as a bylaw: no tickets, no *Offence Act* prosecutions for breaches, and possible defences against enforcement on the basis of longstanding non-enforcement.

2. Because a housing agreement is an agreement, there will likely be negotiations required with the owner before the terms of agreements are settled and the owner is willing to sign. This doesn't mean a local government can't insist on certain terms, and as land use regulators local governments might have significant bargaining power when negotiating housing agreements, but it does mean that starting by sending the owner a sample agreement from a different project is almost certainly an ill-conceived strategy, especially when the sample agreement is largely comprised of boilerplate language that's not relevant to the key terms the parties really care about. Generally speaking, when parties to a contract are making a deal, it's more effective to focus on the substance of the deal or the key terms, rather than getting bogged down in minutiae at the outset. With housing agreements this means focusing on the terms in the agreement that address the occupancy of housing units (section 483 doesn't define or limit the meaning of "occupancy", but specifically mentions form of tenure; availability of housing to identified classes of persons; administration and management; and pricing, including price escalation).

3. Because a housing agreement is an agreement, it can include almost any terms, as long as the parties "agree" to those terms. However, the key question for most local governments is whether the terms of the original deal will be enforceable against future owners, or others who, in the words of section 483, "acquire an interest in the land". The starting point for most contracts is that the contract is not enforceable except as between the original parties. The extension of this principle in the world of housing agreements is that only terms authorized by section 483 of the *Local Government Act* will be enforceable against strangers to the original agreement, who acquire an interest in the land that is subject to the agreement, and again, those are the terms respecting the occupancy of housing units.

4. In our experience, the key elements of a housing agreement (most often the terms authorized by section 483, to which all those who acquire an interest will be bound) can usually be reduced to a draft term sheet, in plain language, of no more than two pages. This kind of document is likely a much more useful starting point for negotiations between the parties, and communication with elected officials, various staff members and others interested in the agreement, than an actual draft form of agreement, which can easily end up being ten or fifteen pages, plus appendices.

5. As it turns out, the kind of term sheet suggested above can also be a much more efficient means of providing instructions to lawyers who might be assisting in drafting the actual agreement than attempting to cut and paste from previous agreements which, almost without a doubt, will have been created for different projects. Even small distinctions can render precedents unhelpful.

6. Local governments interested in regulating matters outside the scope of the occupancy provisions authorized by section 483 have other options, such as: (a) zoning for affordable and special needs housing under section 482 of the *Local Government Act*, which, like a housing agreement, requires the consent of the owner; (b) rental tenure zoning, which doesn't require owner consent; and (c) covenants under section 219 of the *Land Title Act*, which like housing agreements are contracts, but which can include provisions in respect of the use of land, and, importantly for rental-only projects, can prohibit subdivision, including subdivision by the deposit of a strata plan creating individual titles for housing units, which to us seems an obvious prohibition to consider when trying to secure what is often referred to as "purpose-built rental housing".

7. A final word on enforcement, which is often the Achilles heel of housing agreements, at least in part because for local governments used to enforcing bylaws, enforcing agreements may be uncharted territory. The two remedies for breach of an agreement are damages, which simply means a money payment to make up for some loss or harm suffered as a result of a breach, and specific performance, which means an order to do something to comply with a contract, or refrain from acting in a manner that doesn't comply. It's not clear a local government ever suffers a loss that can be compensated by damages in the event of a housing agreement breach, and there is a further question whether a local government really wants to go to court for an injunction to enforce compliance that might result in someone being asked to leave their home. All of this means self-reporting, to encourage voluntary compliance, seems to be the preferred approach to enforcement, or more accurately to avoid enforcement. The most common method for self-reporting is to include in a housing agreement an obligation on owners to make a statement or declaration at some regular interval, or on demand, attesting that a given housing unit is in fact being occupied in accordance with the agreement.

8. Another final word on enforcement: many local governments like to include "rent charge" provisions in housing agreements, when the housing agreement also includes provisions authorized by, and is registered on title under, section 219 of the *Land Title Act*. Rent charges are specifically authorized by section 219, but are not mentioned in section 483 of the *Local Government Act*, so an amount payable for the breach of an occupancy provision in a housing agreement probably can't be collected as a rent charge.

Guy Patterson

Read the Contract!

A 2019 case from the Supreme Court of B.C., 1050438 B.C. Ltd. v. Penguin Enterprises Ltd.*,*

is a good reminder of the issues that can arise in a purchase and sale.

The parties entered into a standard form contract for the purchase and sale of a hotel in North Vancouver. In accordance with the contract, the buyer made an initial deposit of $50,000 which was later increased to a total of $500,000. The contract contained a "time is of

the essence" clause which provided that if the balance of the purchase monies were not paid on the closing date the seller could terminate the contract and the deposit would be forfeited to the seller. The contract also contained three "subject to" conditions, which were immediately followed by an obligation to deliver several reports, including an environmental report. The obligation to deliver the reports was not prefaced with "subject to" language. The deal collapsed when the buyer did not advance the balance of the purchase monies on the closing date. The seller terminated the contract and brought an action claiming the buyer's $500,000 deposit.

The seller argued that it was ready, willing and able to close, and as a result of the buyer's repudiation of the contract it was entitled to terminate the contract and retain the deposit. The buyer submitted that the seller breached the contract by failing to deliver the environmental report. The seller responded that it had notified the buyer that it did not have the report, that the buyer had waived the obligation when it removed the other subjects, or in the alternative, the buyer had waived the obligation by its conduct.

The court first held that the absence of the "subject to" language in relation to the environmental report indicated that the obligation was not a condition of the sale and was not satisfied when the buyer indicated that the subjects had been removed. The court next addressed the seller's argument that the buyer had waived the obligation. A party alleged to have waived a right under a contract must express an unequivocal intention to relinquish that right. After examining the parties' communications, conduct and intentions, the court held, notwithstanding that the seller had advised the buyer of not having the report and the buyer had indicated that it intended to secure the report on its own accord, that the seller failed to establish any waiver of the obligation to provide the report. The court found that at most the buyer's indication that it would obtain its own report was an act of indulgence and not a waiver.

Since the seller had not provided the report and the buyer had failed to advance the purchase monies on the closing date, the court held that neither party was ready, willing and able to close on the closing date and thus both were in breach of the contract. However, the seller was not entitled to terminate the contract for the buyer's failure to close: in a purchase and sale contract in which time is of the essence only a party not in breach may terminate for the other party's failure to close on time. Since the seller unlawfully terminated the contract, it was not entitled to retain the buyer's deposit. Having made the findings it did, the court ordered that the $500,000 deposit be returned to the buyer.

The case provides an illustration of how routine terms of a purchase and sale contract, such as conditions, waiver and time being of the essence, come into play when a transaction collapses. It is also a cautionary tale of the perils of not carefully reviewing contract language. It is relatively unusual for a seller to agree to provide a report which it does not already possess – obtaining such reports are typically part of a buyer's due diligence investigations of the property. If the seller had reviewed the contract more carefully, it likely would have revised the language to make it clear that the obligation applied only to reports in its possession. Had it done so, the seller would likely have been entitled to retain the deposit when the buyer failed to close.

Joe Scafe & Prince Arora ✍


Lawfully Constructed vs. Lawfully Non-Conforming

The recent decision of Thompson-Nicola (Regional District) v. Cade, *2019 BCSC 1644 considered the issue of how building permits affect a determination of legal non-conforming use of a property.*

The Regional District sought an injunction to restrain the owners of two neighbouring properties from using their cottages for short-term rentals. The previous zoning bylaw allowed for a use, Holiday Home or Recreational Cottage ("HHRC"), which the owners claimed permitted short-term rentals. While the previous zoning bylaw was in force, the property owners substantially completed the construction of two cottages and operated them as year-round short-term rentals. A few years later, the Regional District adopted the current zoning bylaw, and both parties agreed that the current zoning bylaw prohibited all short-term rentals on the properties.

The court found that the use of the cottages for short-term rentals did not fall within the previous zoning bylaw's permitted use as HHRC. The court turned to the zoning bylaw's purpose, which was to "permit low density lake oriented residential developments" and concluded that the Bylaw did not allow for any commercial aspect such as short-term rentals. The court found that because the use of the cottages for short-term rental was not permitted under the previous zoning bylaw, there was no lawful non-conforming use under the current zoning bylaw.

Although the decision was based on the interpretation of the previous zoning bylaw, the court still considered other arguments raised by the Regional District, including the claim that the cottages were still under construction when the current zoning bylaw was adopted. The Regional District said that the cottages were subject to section 528(4) of the *Local Government Act*, which provides:

> A building or other structure that is lawfully under construction at the time of the adoption of a land use regulation bylaw is deemed, for the purpose of this section, (a) to be a building or other structure existing at that time, and (b) to be then in use for its intended purpose as determined from the building permit authorizing its construction.

The Regional District argued that under section 528(4) the cottages could only be used for single-family dwelling as that was the approved use under the building permits. The Regional District further argued that when the building permits expired, the cottages ceased to be lawfully under construction and were therefore not lawfully used.

The court found that this section did not apply, as the cottages were already constructed (with the exception of a missing handrail). The court stated that "[i]t is not logical to deem a building to be in existence and to deem a property to be in use, when in this case, the cottages were in fact already in existence with some minor deficiencies and were in fact already being used".

Further, the court commented on what is encompassed in "lawful use" under section 528: "While zoning and building bylaws may have overlapping subject areas, I am not persuaded that this is sufficient to import compliance with building bylaws into the concept of lawful use for the purposes of s. 528(1). The plaintiff has remedies available if it

wishes to enforce the Building Bylaw".

The court's commentary clarifies that a completed building which is lawfully used (under zoning and land use regulations) is not subject to section 528 (4), rather, section 528(1) would be the applicable section to determine legal non-conforming use. The court agreed with the property owners' position that "lawful use in s. 528(1) refers to the previous zoning and land use bylaws and not separate building bylaws".

Steven Shergill

Do You Want to Build a Snow...Removal Policy?

Not unexpectedly, the evening of January 4, 2015 brought a heavy snowfall to Nelson, BC. The City's work crews were out early the next morning to plow, and cleared the streets by creating snowbanks along the streets' edges. Two days later, Ms. Marchi was seriously injured crossing one of those snowbanks. While Ms. Marchi attributed her injury to an inadequate clearing of snow by the municipality, the trial judge disagreed, calling Ms. Marchi "the author of her own misfortune." In Marchi v. Nelson (City of)*, 2020 BCCA 1, the BC Court of Appeal quashed the trial judge's decision and now a second slip and fall trial has been ordered to determine liability.*

THE POLICY DEFENCE

In negligence law, the "duty of care" refers to an obligation to uphold a certain standard of care when engaging in actions that could foreseeably harm others. Generally speaking, a municipality does not owe a duty of care for "true policy decisions" involving financial, economic, social and political factors. As noted by the Supreme Court of Canada in *Just v. British Columbia*, [1989] 2 SCR 1228 (*"Just"*):

> [...] the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. On the other hand, complete Crown immunity should not be restored by having every government decision designated as one of "policy". Thus the dilemma giving rise to the continuing judicial struggle to differentiate between "policy" and "operation".

Cory J., in *Just*, considered guidelines adopted by the Australian High Court, which provided that "...the dividing line between them *[policy and operational factors]* will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints." Cory J. concluded that the "duty of care should apply to a public authority unless there is a valid basis for its exclusion" and that a "true policy decision undertaken by a government agency constitutes such a valid basis for exclusion." With that said, a municipality does owe a private law duty of care in carrying out operational decisions made on the basis of administrative direction, expert opinion, technical standards or

general standards of reasonableness, meaning the implementation of policy decisions may be subject to tort liability. Confused? You're not alone.

THE TRIAL

Ms. Marchi's initial action for damages against the City of Nelson was dismissed when the trial judge held that the City owed her no duty of care, since its decisions with respect to snow removal were *bona fide* policy decisions. The judge reviewed the City's "Streets and Sidewalks Snow Clearing and Removal Policy", and concluded that the City's actions were the result of policy decisions, the City followed its policy decisions and, accordingly, owed no duty of care to Ms. Marchi. The trial judge went on to consider whether, if he was wrong and the City did not have a policy defence, it would be liable if its conduct were subjected to the "standard tort analysis". He found that, in the alternative, if the decisions were operational in nature, negligence was not made out under the standard tort analysis regardless. Ms. Marchi appealed these decisions.

The Court of Appeal therefore characterized the complaint relating "not to the City's priorities or budget decisions but, rather, to the manner in which its work crews dealt with the accumulation of snow, given the available resources"

THE APPEAL

In its first reported decision of 2020, the BC Court of Appeal held that, among other things, the trial judge erred in the manner in which he addressed the City's duty of care and failed to identify the types of governmental decisions that were insulated from judicial scrutiny. The Court further held that it was an error to characterize Ms. Marchi's conduct as the proximate cause of her injury, as such reasoning was clearly precluded by s. 8 of the *Negligence Act*.

Ms. Marchi had argued that pedestrian access should have been created from the street to the sidewalk. The snow removal policy, on the other hand, said nothing about whether openings should be left in snowbanks. The Court of Appeal therefore characterized the complaint relating "not to the City's priorities or budget decisions but, rather, to the manner in which its work crews dealt with the accumulation of snow, given the available resources", and said it was arguable that the decision not to leave access through the snowbanks may properly be characterized as operational in nature. Since some of the impugned decisions of the street clearing crew might be operational, the Court of Appeal found that it was an error for the trial judge to accept the City's submissions that all decisions made with respect to snow removal were policy decisions without engaging in the analysis called for by *Just*. Accordingly, the appeal was allowed, and a new trial ordered.

WHAT NOW?

While it is settled law that a municipality does not owe a duty of care for true policy decisions, the difference between "policy" and "operation" is not always clear. The jurisprudence lacks clear standards for the predictable application of the policy defence, and it remains to be seen whether leave to appeal will be sought or what the new trial may determine.

Amy O'Connor

Building Permit Restored after Unreasonable Cancellation

The recent case of Mullany v. Squamish-Lillooet*, 2019 BCSC 1581, provides an interesting example of the court reversing an "unreasonable" building permit cancellation. In this case the petitioners owned a property located in electoral area C of the Squamish – Lillooet Regional District ("SLRD") and the Agricultural Land Reserve and planned to alter an existing farm building on their property to grow medical marihuana. The SLRD granted the petitioners a building permit authorizing the construction of a new concrete foundation, interior walls and ceiling within the existing farm building on December 17, 2014, with an expiry date of December 17, 2016. In accordance with section 13.4 of the SLRD's building bylaw, the permit included the conditions that it would expire if the work authorized by the permit was not commenced within 12 months from the date of issuance of the permit or if was discontinued for a period of 12 months.*

In September 2016, Health Canada notified the petitioners that their application for a licence to grow medical marihuana was proceeding, and in November 2016 the petitioners applied to BC Hydro to connect the farm building to the electrical supply. After correspondence regarding the status of the building permit between the petitioners and SLRD staff, SLRD renewed the Building Permit to December 17, 2018. On January 10, 2018, the SLRD planning department sent a letter to the petitioners advising: that the building permit would expire on December 17, 2018; that the petitioners had not, to that point, ordered any inspections since the issuance of a building permit, reiterating that the permit would expire if work was discontinued for a period of 12 months and that if the petitioners didn't order any inspections from the SLRD by December 17, 2018, no further renewal offer for the building permit would be sent.

In March 2018, the petitioners finalized their plans with BC Hydro to provide power to the property, took immediate steps to finalize financing of the project and advised their consultants to begin construction. In or about mid-June 2018, the petitioners advised the building inspector that the project was proceeding and expected to complete by December 17, 2018.

On July 12, 2018, the SLRD revoked the petitioner's building permit via letter, noting that the petitioners had made no contact with the SLRD nor requested any inspections for the property since January 10, 2018. The letter also excerpted section 13.4 of the SLRD building bylaw. The letter concluded by stating that the petitioners were not compliant with the building permit conditions because no one had ordered an inspection since the initial building permit issuance of December 17, 2014, and that the building permit was being terminated for non-compliance.

Upon judicial review, the court noted that reasonableness is the correct standard to apply to its review of the SLRD's decision to terminate the building permit and categorized the SLRD's decision as follows:

after four and a half years with no progress on the construction the SLRD determined that the building permit had expired. Ultimately, the court found that the decision to cancel the permit was unreasonable. First, it noted that a reasonable decision would have required the SLRD to, at least, provide "notification of the intended result", and that, had the situation been clearly set out in the SLRD's letter of January 10, 2018, there "may have been no objection to the steps taken". While the phrase "notification of the intended result" isn't entirely clear, it may suggest that the SLRD should have provided notice to the petitioners that the permit was in jeopardy of being cancelled and the reasons why that was the case.

The SLRD's last communication with the petitioners prior to cancelling the permit was the January letter indicating that the permit would expire on December 17, 2018, and it made no mention of any deadlines or requirements aside from a reference to the conditions contained in the original permit. As a result, the petitioners had no opportunity to discuss the SLRD's concerns regarding the permit prior to it being cancelled, nor potentially any idea that the District believed the petitioners were not fulfilling the permit requirements.

The court's use of the phrase "may have been no objection to the steps taken" also seems to indicate that the court believed that the SLRD should have been more transparent with the petitioners about what its expectations were under the permit, as that may have allowed the parties to come to an understanding about how construction under the building permit would proceed. Second, the court held that the suddenness of the election to end the permit was unreasonable, particularly in light of the fact that the petitioners indicated that they were prepared to complete the project by December 17, 2018. Ultimately, the court's finding of unreasonableness seems to stem from lack of communication by the SLRD regarding their requirements and expectations under the permit.

Jordan Adam

Inconsistent Enforcement does not Trigger a Duty to a Neighbour

The case of Suncourt Homes Ltd. v. Cloutier*, 2019 BCSC 2258 is a recent example of a negligence claim arising from the failure to enforce a municipal bylaw regarding land development in circumstances that cause harm, or at least displeasure, to a neighbour. The court is regularly asked to deal with claims made by private individuals that seek a remedy on the basis that the construction on a neighbouring property was done in contravention of a local government's bylaw. Such claims will typically target both the person doing the development and the local government that regulates the development. Claimants often fall short because they cannot show a duty of care.*

In the *Suncourt Homes* case, the plaintiff claimed that the City of Kelowna was negligent in failing to enforce a soil removal bylaw as it applied to the construction of retaining walls on a residential property by two other defendants, the Cloutiers. The retaining walls, in particular a steep rock wall reaching 5.9m at its highest, raised nuisance and safety concerns for the plaintiff, a neighbouring property owner. The City had issued a building permit to the Cloutiers for construction on the property, but had not required the Cloutiers to obtain a soil removal permit despite the plaintiff alleging such a permit was required. Among other unsuccessful claims, the plaintiff suggested that because the City knew about the Cloutiers' development through the building permit process, it had a duty of care to the plaintiff to enforce the soil removal bylaw.

In dismissing this particular argument, Madam Justice Watchuk repeated the general rule that "the relationship between a public regulator and an individual member of the regulated public does not generally give rise to sufficient proximity to ground a private duty of care". Something more is required, such as a self-imposed duty under the bylaw or an instance of the local government stepping outside of its regulatory role to act as an advisor to a party. In the *Suncourt* case, the court found that even if the building inspector issuing the building permit knew and allowed a contravention of the soil removal bylaw to occur, that potential dereliction in a public duty does not create a private law duty of care to a neighbour or other person who might feel aggrieved. The court also noted that the City's discretion to enforce a bylaw in any particular case gave it the benefit of a policy defence to immunize it from the imposition of a duty of care. In assessing whether overlooking a contravention can actually result in liability for a local government, a critical question will be: is this an exceptional instance in which a local government owed a duty of care to enforce a bylaw? The *Suncourt* case was not one of those instances.

Michael Moll

No Leave from the SCC for Big Local Government Cases

Canada's highest and final court of appeal, the Supreme Court of Canada, hears appeals from decisions of the highest courts of all the provinces and territories, where the case involves a question of public importance. For a case to be heard before the SCC, a party must obtain leave to appeal (permission) from the SCC. While there are cases that are heard by the SCC "as of right", in many cases, the SCC decides not to grant leave to appeal and does so without giving reasons for its decision.

Recently, a number of notable cases pertaining to local governments have **not** been granted leave to appeal by the SCC.

These include:

1. *Calgary (City) v. McAllister*, 2019 ABCA 214
   In this case, the lower court found the City of Calgary owed a "duty to detect" crime and that it could be liable for failing to maintain adequate security measures enabling the City to respond to crimes in a timely manner. The Alberta Court of Appeal affirmed the finding of this duty, but adjusted the City's reasonable response and detection time to ten minutes. This resulted in the City only being liable for damages incurred more than ten minutes after an incident.

2. *Caring Citizens of Vancouver Society v. Vancouver (City)*, 2018 BCCA 87

   In this case, the British Columbia Court of Appeal dismissed an appeal made by the Caring Citizens of Vancouver Society concerning the manner by which the City of Vancouver temporarily "relaxed" the provisions of zoning bylaws relating to the use of property and how it notified impacted residents.

3. *Edmonton (City) v. Alvarez & Marsal Canada Inc.*, 2019 ABCA 109

   In this case, the Alberta Court of Appeal held that claims for fees and costs incurred by a court-appointed receiver, including borrowing costs, had priority over the City of Edmonton's claim for unpaid property taxes in relation to property owned by a company that had been placed in receivership. The Court of Appeal reversed a finding by the lower court that the City's claim for taxes should not be subordinate to any costs incurred by the receiver.

4. *Victoria (City) v. Canada Plastic Bag Association*, 2019 BCCA 254

   In this case, the British Columbia Court of Appeal quashed a business regulation bylaw enacted by the City of Victoria that prohibited businesses from providing plastic shopping bags to its customers. The Court held that the bylaw was related to the protection of the environment and was not a bylaw regulating in relation to business. This decision is significant for municipalities as the Court adopted a very restrictive interpretation of section 9(2) of the *Community Charter* regarding concurrent authority with the Province, which has major implications on the exercise of municipal powers generally under section 8 of that Act.

5. *Santics v. Vancouver (City) Animal Control Officer*, 2019 BCCA 294

   To read more about the British Columbia Court of Appeal's decision regarding dangerous dog destruction applications please refer to our Bulletin dated August 12, 2019, which is available on our website.

6. *Wu v. Vancouver (City)*, 2019 BCCA 23

   To read more about the British Columbia Court of Appeal's decision regarding a claim of negligent permit processing please refer to our Newsletter of March 2019, Volume 30, Number 1.

7. *J. Cote & Son Excavating Ltd. v. Burnaby (City)*, 2019 BCCA 168

   To read more about the British Columbia Court of Appeal's decision regarding tender reprisal clauses please refer to our Bulletin dated December 12, 2019, which is available on our website.

Inder Biring

No Such Thing as a Free Launch: City Must Pay for Event Planning Services Despite No Contract

The Supreme Court of Canada decision of Montréal (City) v. Octane Stragégie Inc.*, 2019 SCC 57 provides a reminder to local governments of some of the problems that can arise from a failure to follow municipal purchasing protocols. In the* Octane Stratégie *case, the plaintiff Octane was a public relations firm that was hired (or so it thought) by the City of Montreal to create, produce and organize an event for the launch of a new municipal transit plan. The event was apparently a great success, and the City paid the plaintiff approximately $52,000 for its creative services when invoiced. However, when Octane invoiced the City for the production costs, almost $83,000, the City claimed that it had no contractual obligation to pay.*

The contractual dispute arose from the fact that Octane had designed and produced the event following a series of meetings at City Hall. These meetings resulted in a final estimate prepared by Octane, but did not result in the execution of a contract between the City and Octane. Furthermore, a Quebec statute required that a municipal contract over $25,000 only be awarded through a call for tenders.

Octane sued the City for the unpaid amount and also sued a City official who made the verbal request for the services, a request made with the agreement of the other City officials who were present. Through appeals, Octane's claim eventually reached Canada's highest court. The Supreme Court of Canada concluded that there never was a contract between the City and Octane. Consequently, the issue was whether Octane was still entitled to compensation from the City for the event that City officials asked Octane to produce.

The Court found that the City could not simply "bypass" an obligation to restore Octane because the City was a municipality. The majority of the Court noted that restitution was discretionary and that a claimant could be denied full recovery in some cases.

The Court decided this question with reference to Quebec's civil code, a legal framework that is distinct from the common law applied in British Columbia. Rephrased for the British Columbia context, the issues before the Court would be:

(a) Can a claim for unjust enrichment be made against a municipality?
(b) Was there unjust enrichment in this particular case?
(c) Is the municipal official personally liable?

Under the common law, "unjust enrichment" is a restitutionary claim that is made when the defendant receives a benefit, the claimant is correspondingly deprived and there is no legal reason for the transfer of the benefit.

Unjust enrichment claims are likely to arise when both parties are mistaken as to the existence of a contract, but only realize this mistake after some benefit has been conferred.

In deciding the appeal, the Supreme Court of Canada considered the conflicting effect of Quebec legislation that, on one hand provides for claims of unjust enrichment, and on the other prohibits municipalities from entering into large contracts except in accordance with prescribed procedures. The Court found that the City could not simply "bypass" an obligation to restore Octane because the City was a municipality. The majority of the Court noted that restitution was discretionary and that a claimant could be denied full recovery in some cases. This risk of non-recovery presumably discourages a practice of using exchanges in kind to avoid formal contracts.

The Court also concluded that Octane was entitled to compensation in this particular case. Octane believed, mistakenly but in good faith, that it was obliged to provide the City with the services. The City was therefore obliged to pay for the services that it received at its officials' request.

The Court ultimately did not decide whether the municipal official was personally liable, because the Court found this issue to be moot given that the City was obliged to fully restore Octane. The majority of the Court did include in their reasons a general warning that municipal officials "may be liable if they make undertakings or provide assurances claiming that they are doing so on the municipality's behalf, while knowing full well that this is not the case."

The specific legal conclusions of the decision may not be directly applicable to British Columbia given the different legal framework in Quebec, but the Supreme Court of Canada's decision in the *Octane Stratégie* does indicate the Court's support for two legal principles: the absence of a binding contract does not necessarily mean that a local government can get stuff for free and a deliberate misrepresentation by a municipal official of a municipality's ability to contract can lead to a claim against the official.

Michael Moll

Miscellaneous Statutes: Did You Know?

Did you know that under section 5 of the Provincial Court Act *a municipal council may appoint a family court committee? The committee must meet at least 4 times a year to consider and examine the resources of the community for family and children's matters, provide community resources and other assistance to the court, make recommendations to the court and the Attorney General when it considers advisable, and report to the municipality and the Attorney General on its activities annually. Committee members serve without remuneration and must include persons with experience in education, health, probation or welfare.*

Joe Scafe

Look for Your Lawyers

David Loukidelis will be facilitating a session entitled "Acting with Integrity - Speaking Truth to Power" at the LGMA CAO Forum in Victoria on February 26, 2020.

Young, Anderson is excited to welcome **Pam Costanzo** as a new associate. Pam was called to the bar in 2007 and holds a masters degree in Occupational Health and Safety. Pam has practiced exclusively in the areas of labour, employment and human rights and has conducted workplace investigations for clients in the public and private sector. Pam takes a practical approach to solving employment problems and has advised employers, employees and unions.

Elizabeth Anderson and **Michael Moll** will be guest speakers at the Justice Institute of BC's Bylaw 101 course in New Westminster on March 9 and May 4.

This year's Pacific Business and Law Institute's local government seminar includes a presentation by **Kathleen Higgins** on "Hot Topics in Planning Law" on March 11 in Vancouver.

Carolyn MacEachern and **Ethan Plato** will be presenting a FOIPPA update at the annual North Central Local Government Management Association conference in Prince George on April 2.

Attendees to the MIABC 2020 Risk Management Conference in Vancouver will see two Young, Anderson presentations on April 8: **Carolyn MacEachern** and **Michelle Blendell's** session called "Human Rights Complaints - A Guide to Navigating the Human Rights Tribunal and Avoiding Complaints" and **Sukhbir Manhas'** presentation on "Emergency Management".

The West Kootenay Boundary/Rocky Mountain LGMA annual conference in Kimberley on April 15-17, 2020 will include presentations by **Carolyn MacEachern** and **Mike Quattrocchi**.

Kathleen Higgins will be presenting a session on "Connecting with your Community" at the AVICC annual convention on April 17 in Nanaimo.

AKBLG's 2020 convention in Radium Hot Springs on April 24-26 includes a presentation by **Reece Harding** and **Amy O'Connor** on "Collaboration and Reconciliation between First Nations and Local Governments".

May is the beginning of articling student season and Young, Anderson is looking forward to **Sarah Strukoff's** return and to welcoming **Alexandra Greenberg** and **James Barth**.

Reece Harding will be among the presenters of the CBA's online seminar called "Local Power to the People: Municipal Jurisdiction in Leading Change" on May 12.

The North Central LGA annual conference on May 15 includes a presentation by **Kathleen Higgins** in Prince George.

Kathleen Higgins and **Inder Biring** will present a session on community amenity contributions at the GFOABC Annual Conference in Kamloops on June 3-5.

Elizabeth Anderson and **Michael Moll** will present a caselaw update to attendees of the 2020 Licence Inspectors and Bylaw Officers Association annual conference on June 4 in Whistler.

This year's LGMA conference in Kelowna, includes presentations by **Sukhbir Manhas** and Jan Enns on "The Challenges of Social Media" (June 10) and **Barry Williamson**, **David Loukidelis** and **Ethan Plato** on public hearings (June 11).

STAY CONNECTED

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