YOUNG ANDERSON
BARRISTERS & SOLICITORS

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NEWSLETTER

Let's Talk About Tax Sales

In December 2021, the Ombudsperson of British Columbia released a report with the dramatic title "A Bid for Fairness: How $10,000 in Property Tax Debt Led to a Vulnerable Person Losing Their Home". The report focused on the challenging situations and potential for unfairness that can occur in the outer edges of tax collection, specifically the mandatory tax sale of properties belonging to people who may not understand the significant risk of loss. The report made a number of recommendations related to helping owners understand tax sales, but also suggested that legislative amendments were necessary to address the unjustness of the statutory regime. Municipal collectors should be on the lookout for new measures that could impact their dealings with all owners, not just the vulnerable.

For context, the vast majority of ratepayers pay their municipal property taxes and pay on time. These ratepayers presumably recognize the statutory debt is owing, can afford to pay, and wish to avoid penalties and interest that might accrue if they do not pay on time. A much smaller group of ratepayers, whose share represents less than 3% of all the municipal taxes owing in the province, pay late, but eventually pay within a year or two of the taxes being imposed. These ratepayers may have had a cashflow problem, may have forgotten about the tax due date or may have made the financial calculation that incurring a 10% penalty in the first year and paying interest at a rate of Prime+3% the following year was preferable to leaving a credit card bill or some other high interest rate debt unpaid. An even smaller fraction of ratepayers miss property tax payments such that taxes become delinquent and their property is sold at tax sale. Despite the tax sale, a significant majority of tax sold properties are redeemed within a year, usually because the owners have rustled up the money or a financial chargeholder redeems to preserve their equity.

Nevertheless, a fraction of this fraction of ratepayers do not know to redeem or are unable to redeem their tax-sold properties even though non-redemption will cause them significant financial loss. It is the plight of this type of ratepayer that is the focus of the Ombudsperson's report. A broader review of tax sales would include the impact that the statutory regime has on the remainder of ratepayers in ensuring that they pay their property taxes without the municipal collector having to pursue the expensive and time-consuming collection remedies that other creditors must rely on. The Ombudsperson's report acknowledges that the tax sale process is the most efficient option for property tax collection, but does not

make clear that this statutory process is in fact mandatory for delinquent property taxes which have not been otherwise collected – meaning that municipalities cannot choose not to impose this process on its ratepayers in order to avoid the identified unjust results, many of which are aspects of the statutory scheme itself.

The Ombudsperson's report considered the unfortunate situation of a property owner in Penticton who fell behind on her property taxes despite having the funds to pay them. This resulted in her property being sold at tax sale and going unredeemed—one of just three non-redemptions in the municipality in the last 32 years. Very unfortunately, the property owner was evicted from the property and the surplus payable to her was less than half the equity that she had held in her home.

The Ombudsperson's report was critical of the content of the various notices sent to the property owner, finding that many notices should have more clearly communicated the risk of loss of the property if taxes are not paid. Specific recommendations included providing an estimate of the upset price, and express notification that the starting bid for the property at tax sale would be that upset price amount. The Ombudsperson was also critical of minor errors in the letters sent to the owner. While it is not clear that these errors had any impact on the sale in questions, the report emphasizes the importance of updating municipal template notification letters each year to ensure that the correct and current section of the *Local Government Act* is referenced, and the applicable deadlines are properly stated. Calculation of redemption deadlines in the tax sale process can be complicated and collectors may wish to consult legal counsel to confirm their interpretation of the annual statutory deadlines if they have any doubts.

Ratepayers across the province no doubt have a diversity of understandings of how property taxes work, and it would clearly be a benefit to them—and to efficient tax collection generally—if everyone understood the significant consequences if property taxes go unpaid. The Ombudsperson's report noted that the health concerns of the property owner "made it hard for her to understand the tax notices sent to her home, and to respond appropriately". Collectors should also be mindful of the possibility that an owner who is not paying property taxes might lack the capacity to understand property taxes and tax sales and that the Public Guardian and Trustee may need to be involved.

The Ombudsperson suggested that this particular property owner be fairly compensated, and also made a number of recommendations of more general application. These include suggestions that the Ministry of Municipal Affairs develop plain language

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template letters, develop guidelines for notifying property owners before a tax sale occurs and develop best practices for how to help protect vulnerable people involved in tax sales. The Ombudsperson also recommended that the *Local Government Act* be amended to require personal service or registered mail delivery of notice of impending tax sale and, possibly, to set higher minimum bid prices.

The Ombudsperson also recommended that the Local Government Act *be amended to require personal service or registered mail delivery of notice of impending tax sale and, possibly, to set higher minimum bid prices.*

Collectors might note that most people who are sent notice of an impending tax sale pay the delinquent taxes, and that it is not clear whether sending registered mail to those vulnerable or hard-to-locate owners will have any significant impact on redemptions. Such a requirement would also oblige municipalities to obtain a court order for alternative service where personal service or registered mail delivery cannot be effected. This process is currently necessary in some cases for post-tax sale notification, and the need to attend court twice in respect of a single tax sale could markedly increase the financial burdens of the collector's administrative tasks in the tax sale process. However, if permission for alternative service of notices both before and after the tax sale could be obtained with a single court order in advance of the sale, this would alleviate some of the problems municipalities are currently faced with when attempting to obtain and carry out alternative service orders during the December holiday season after the tax sale when the courts and other service providers may have limited availability. Also, higher minimum bid prices will mean that redeeming owners will pay more in interest and the municipality will more often be the default purchaser.

An alternative suggestion that was not included in the Ombudsperson's report would be for legislative changes that would allow the Province to pay the property taxes on 'delinquent' properties, with the Province's recovery of such amounts, plus interest, being secured by a special charge against the land with the highest priority. The Province's payment of delinquent taxes could be very similar to the payment of seniors' taxes under the *Land Tax Deferment Act*, but presumably with a much higher interest rate to discourage opportunistic borrowing by ratepayers. This centralized and uniform regime could address many of the Ombudsperson's concerns, while also relieving hundreds of municipal collectors in BC of the challenges associated with giving appropriate notice to those relatively few ratepayers whose properties are sold at auction. The Province could also let its financial charge grow for many more years than a purchaser at tax sale who effectively lends to a redeeming owner for just one year. After that the Province could sell the property using a standard single Province-wide process, which might generate higher bids. Since the present statutory regime provides for over a hundred different tax sales to be conducted by municipalities, both big and small, there is great risk of variability. When it comes to tax sales, there is a lot to talk about.

Michael Moll & Elizabeth Anderson

YOUNG, ANDERSON **is very pleased to announce that on January 1, 2022, Guy Patterson joined the firm's partnership.**

Guy joined the firm as an associate lawyer in March 2015. Over the past 8 years, he has been an invaluable resource both to the firm's clients and to the firm's other lawyers. Guy advises the firm's clients on all aspects of local government law. Being a registered professional planner and member of the Canadian Institute of Planners, with experience as a planner for local governments and non-profit organizations in British Columbia, uniquely qualifies Guy for his practice emphasis on planning, land use management, and subdivision matters. Having clerked at the British Columbia Supreme Court, Guy also enjoys the opportunity to advocate for the firm's clients before the courts.

Outside the office, Guy spends most of his time with his wife and their four children.

Recent Decisions on Employers' COVID-19 Vaccination Policies

*A recent Ontario Labour Arbitration award was decided on the reasonableness of an employer's mandatory vaccine policy (*Bunge Hamilton Canada*, [2022] O.L.A.A. No. 15 (Herman)). The Arbitrator upheld the company's vaccination policy, finding it reasonable given federal requirements and the balancing of health and safety considerations.*

The Union filed a grievance against the vaccination policy issued by Bunge Canada, an Ontario oilseed company (the "Company") on the basis that it violated the privacy rights of employees. The Company's operations included facilities on land leased from the Hamilton Oshawa Port Authority ("HOPA"), a federally-regulated organization. Transport Canada established a requirement, effective as of October 31, 2021, that all employees of companies located on federal port lands must be fully vaccinated by January 24, 2022. HOPA subsequently issued a vaccination policy for its contractors and tenants which reaffirmed that requirement.

In response, the Company implemented its own vaccination policy (the "Policy"), which required its employees, both at the port facilities and elsewhere, to be fully vaccinated in line with the federal timeline. Employees that did not comply with the Policy would not be allowed on-site and would be placed on unpaid leave until they provided proof of full vaccination status. The Policy also contained a medical and religion/creed exemption application process.

The Union argued that the Policy should only apply to the property on HOPA land, not to all operations of the Company. The Union also argued that the Policy was an intrusion into employees' private personal health information. The Company argued that the Policy must apply to all its facilities, as they are integrated in their operations, and isolating unvaccinated employees in select facilities would be impractical, and result in breaches of the seniority and job posting provisions of the collective agreement. The Company also argued that vaccine status is not private medical information protected by law.

The Arbitrator decided in favour of the Company, finding that the Policy was reasonable. The Arbitrator found that regardless of whether HOPA's policy applied to all of the company's facilities, their operations were integrated to such a degree that it was reasonable that the Policy apply to all facilities. The Arbitrator also found that both the requirement to disclose vaccine status and the requirement for employees to be fully vaccinated or be placed on unpaid leave were reasonable. In order to comply with the HOPA policy and continue to operate its business, the Company was required to put the Policy in place. The Arbitrator also gave weight to the necessity of such a policy given the ongoing health and safety risks posed by the COVID-19 pandemic.

The Union also raised concern over references in the Policy to possible discipline or termination in the event that the Policy was not complied with, or employees submitted falsified reports. The Arbitrator found that these concerns did not undercut the validity of the Policy, as discipline or termination were merely possibilities. In the event these possibilities were realized and the Union had concerns, future grievances could be filed.

While a decision on the merits of an employer's vaccination policy has not yet been issued in BC, a recent arbitration considered an application by several unions for an interim stay of the implementation of an employer vaccine policy. An interim decision was issued in *Richmond (City)*, [2022] B.C.C.A.A.A. No. 3 (Noonan). In *Richmond*, the unions sought an interim stay of the implementation of the City's vaccine policy, pending the resolution of several grievances filed in relation to it. The unions argued that the safety measures the City had put in place prior to the vaccine policy had been largely effective in mitigating the risk of transmissions in the workplace, making the policy unnecessary. They also suggested introducing rapid testing requirements for unvaccinated members in the interim period.

The Arbitrator in *Richmond* did not order a stay of the City's vaccination policy. The Arbitrator found that the health and safety risks posed by denying the implementation of the policy during the interim period outweighed any intrusion into privacy and bodily integrity rights of employees who were noncompliant with the policy. The Arbitrator noted that this decision did not involve an analysis of the merits of the Union's grievances.

While these decisions are important, arbitrators will assess the merits of a mandatory vaccine policy based on the particular circumstances of each employer and the specific policy. We will continue to provide updates as the law develops with respect to mandatory vaccine policies and are available to assist local governments who want to consider implementing these policies.

James Barth &
Carolyn MacEachern


Worth the Effort? Requiring "Best", "Reasonable", and "Commercial" Efforts under Contract

If you were to sign a contract that required you to use your "commercially reasonable best efforts" to fulfill an obligation, exactly what would you be signing up for? This is the question the BC Court of Appeal recently considered in the decision Sutter Hill Management Corp. v Mpire Capital Corp, 2022 BCCA 13*. At first blush, the phrase "commercially reasonable best efforts" may sound like word salad or, as the lower court suggested, "the victim of over-drafting". However, when viewed in light of previous decisions of the courts, the phrase is a specific standard of accepted contractual obligation, built off of three pre-existing and interlocking standards. These are to use one's "best", "reasonable", and "commercially reasonable" efforts to fulfill a contractual duty. But what exactly do each of these standards require, and how is this new phrase distinct?*

1. Best and Reasonable Efforts:

The principles for distinguishing between "best efforts" and "reasonable efforts" are set out in the case *Atmospheric Diving Systems Inc v International Hard Suits Inc.* (1994), 89 BCLR (2d) 356 (SC). The dispute in *Atmospheric Diving Systems* centred around a purchase and sale agreement for two "Newtsuits", a new form of deep-sea diving suit. The contract included a clause specifying that, at the purchaser's request, the vendor would use its "best efforts" to find a new purchaser for the resale of the suit, as well as its "best efforts" in obtaining full purchase price for said resale. After the initial sale of the suits, the purchaser was unable to find potential customers interested in leasing the suits as they had intended, and decided to invoke the resale clause. The purchaser and vendor began taking steps to sell the suits to another prospective customer. However, this process was hampered by a number of the vendor's actions, such as not responding to the seller's requests for information in a timely or thorough fashion; not discussing the resale offer price with the purchaser; and not disclosing the discounted resale price resulting from a negotiated package deal. After attempts to resolve these matters were unsuccessful, the purchaser eventually resold the suits for a higher price than the vendor had negotiated.

To determine whether the vendor had fulfilled their contractual duty to use its best efforts, the court first had to establish what the "best efforts" standard required. After reviewing existing case law on the subject, the court set out seven principles defining "best efforts", paraphrased here for clarity. The court found that the "best efforts" standard:

1. Imposes a higher obligation than a "reasonable effort".
2. Means taking all reasonable steps to achieve the objective, leaving no stone unturned in the process.
3. Includes doing everything usual, necessary and proper for ensuring the success of the endeavour.
4. Is not boundless, and must be understood in light of the contract's language, parties, and purpose.
5. Is subject to obligations of honesty and fair dealing, but doesn't require proving that the defendant acted in bad faith.

6. Can have reduced damages if failure was inevitable, but inevitable failure does not excuse the defendant from their duty to use best efforts.
7. Can be shown not to have been met if evidence indicates the defendant could have satisfied the "best efforts" test had they acted diligently.

Considering the facts in light of these principles, the court held that the vendor had not used its best efforts to resell the suits. While the vendor had taken some steps, the court viewed these as merely "[going] through the motions of offering the plaintiff's suits to its next available customer", a far cry from leaving no stone unturned.

So what does it take to "leave no stone unturned"? An example can be found in the recent case *Stewart v Stewart*, [2021] B.C.J. No. 1366. The parties in *Stewart* were required by a court order to use their best efforts to negotiate and conclude several transactions in order to broker a settlement agreement. The plaintiff alleged that the defendants had not used their best efforts to pursue the wind-up of certain companies, and that generally "the defendants have not used their best efforts to press forward the timetable to implement the settlement agreement".

The court applied the *Atmospheric Diving Systems* principles, providing a helpful summary of the standard, which requires:

> ... best efforts, not second-best efforts. The element of reasonableness is judged objectively. The fact that the failure was inevitable does not excuse a party from the obligation to use best efforts. The onus to show that failure was inevitable rests on the respondent.

The court found that the defendants had exercised their best efforts. Evidence indicated that assets from the company were sold as soon as possible, and the plaintiff was informed of each step of each sale in a timely fashion. Any delays to the winding-up related to lawsuits and contract disputes that were outside the defendants' control.

If "best efforts" require leaving no stone unturned, then what do "reasonable efforts" require? As the *Atmospheric Diving Systems* principles suggest, it is often defined in opposition to "best efforts" – it requires taking sensible steps towards fulfilling one's requirement, but does not require taking all possible steps. *Bank of Montreal v Tomyn* (1989), 73 SaskR 126 (QB), notes that what constitutes a reasonable effort must be determined "with regard to the means and ability [the obliged party] had to meet the obligation in question, along with other legitimate obligations required to be met at the same time and the need to live in health at the same time". Even more so than "best efforts", the sufficiency of "reasonable efforts" depends on the unique facts and context of the particular parties and contract.

2. Commercially Reasonable Efforts:

A close relative to the "reasonable efforts" standard is the "commercially reasonable efforts" standard. This standard also requires sensible steps, not all possible steps, but with the further gloss that whether a step is sensible will be considered from a business perspective. A foundational interpretation of "commercially reasonable efforts" can be found in the Ontario Court of Justice case *364511 Ontario Ltd. v Darena Holdings Ltd.*, [1998] O.J. No. 603, which states that:

> Reasonable implies sound judgment, a sensible view, a view that is not absurd. Commercial means having profit or financial gain as opposed to loss as a

> primary aim or object. These words impose a standard of reasonable commercial efforts, not one of the best efforts or bona fide efforts.

The "commercially reasonable efforts" standard was addressed in British Columbia in *Nelson v 535945 British Columbia Ltd.*, 2007 BCSC 1544. *Nelson* dealt with the purchase and sale of two apartment buildings in the City of North Vancouver. The buildings were sold with the intent to develop densified rental and market housing, which would require an amendment to both the City's zoning bylaw and OCP. The contract required that the purchaser use "all reasonable commercial efforts" to achieve the highest overall project density through rezoning by the closing date. The purchaser met with City planning officials and presented their redevelopment plan, and were given strong indications that the City would not support amendments to the OCP or zoning bylaw for the building site. As a result, the purchaser decided not to proceed with a formal application to council.

The court found that the purchaser had fulfilled its obligation to exercise all reasonable commercial efforts to have the apartments rezoned. In considering whether the purchaser had exercised "reasonable commercial efforts", the court noted that the standard in this case did not require the purchaser to:

> ... make all possible efforts. They were not required to make all efforts short of those that would be doomed to certain failure. The standard of reasonable commercial efforts allowed them to make reasonable business decisions in which they would weigh the cost of proceeding beyond the first stage of discussions with City planning staff against the cost of preparing a formal application to City Council.

Evidence indicated that the political climate surrounding density and development in the City was contentious. A recent application for similar rezoning that had already passed third reading had been subject to strong public opposition, and Council decided to rescind third reading. The court held that the purchaser's decision to not invest funds into an application to Council was commercially reasonable, as the chance of such an application's success was exceedingly low.

3. Commercially Reasonable Best Efforts:

What are we to make of the phrase "commercially reasonable best efforts" then, given that it seems to contain several different standards nested together? The phrase has appeared in passing in previous court decisions, but has not been interpreted until the recent case of *Sutter Hill Management Corp. v Mpire Capital Corp*.

The decision in *Sutter Hill Management* concerned the purchase and sale of a care home. The contract required that the purchaser obtain all relevant licences and funding agreements from the Fraser Health Authority. An additional clause stipulated that the purchaser had to "use commercially reasonable best efforts" to fulfill this obligation as soon as possible. The purchaser took a number of steps towards obtaining the necessary licences and agreements. However, a lengthy delay occurred due to miscommunication between the purchaser and their solicitor, and the solicitor's lack of relevant expertise. The delay was eventually resolved, but it was too little too late, and the deal eventually fell through.

The trial judge held that the purchaser had fulfilled their contractual obligations, finding that they were not responsible for the delays. This was due largely to the trial judge's interpretation of the phrase "commercially

reasonable best efforts". The trial judge was of the view that the phrase could not be interpreted in a way that incorporated the meanings of both "best" and "reasonable", finding instead that "'best' does not add anything significant to the phrase 'commercially reasonable best efforts'; an effort is either commercially reasonable or it is not".

This interpretation was not accepted by the Court of Appeal. The court found the phrase created a standard midway between "commercially reasonable" and "best". It requires the exhaustive nature of leaving no stone unturned as required by "best efforts", but with the added proviso that this excludes commercially unreasonable steps. As applied to the specific facts of the case:

> ... the parties intended that the purchaser would do everything it reasonably could to obtain the necessary approvals as soon as possible, excepting only such steps as would be commercially unreasonable.

In light of this rearticulated standard, the court found the purchaser had not exercised "commercially reasonable best efforts". Strict timelines were becoming increasingly crucial as the deal progressed, and the purchaser failed to take any steps to address a significant delay when it occurred. The purchaser had argued that they should not be held responsible, as this delay was caused by their solicitor's inaction. The court however found that the standard imposed on the purchaser required them to actively take steps to resolve that inaction during the several weeks of delay.

4. Takeaways:

As the case law demonstrates, a seemingly minor change in the wording around contractual efforts can make a world of difference in what is required of the parties. When reviewing your obligations under a potential contract, it is important to consider what lengths you are willing to go to in order to fulfill a certain provision. Agreeing to exercise your "best efforts" may commit you to taking many steps that would not be required under a "reasonable" or "commercially reasonable" standard. When in the drafter's seat, it is important to remember that every word in a contract will have weight and meaning. As seen in *Sutter Hill Management*, using a phrase like "commercially reasonable best efforts" is not merely additive of all the pre-existing standards, but rather provides for a specific pinpoint standard resting between "best" and "commercially reasonable" efforts.

It is also important to remember that each standard, in differing ways, accounts for the unique context and circumstances of the parties, the contract, and the contract's purpose. Steps that are sufficient in one context may not be so in another. When party to these kinds of provisions, local governments' unique position will be considered, but it is not the sole determinative factor. While local governments' public interest duties to the general populace will be given weight, a local government is not inherently fettering its discretion if it agrees to exercise "best efforts" to fulfill a contractual obligation (see for example the Alberta case *Wentworth Developments Inc v Calgary (City)*, 1998 ABQB 158). As much as any contracting party, local governments must be prudent and mindful of what exactly they are signing up for when they agree to exercise best, reasonable, or commercial efforts of any variety.

James Barth & Kathleen Higgins ✍


Can Societies Challenge Municipal Decisions? Guidance from Recent Caselaw

Pursuant to sections 425 and 623 of the Local Government Act ("LGA"), *electors have the right to apply to the Supreme Court of British Columbia to challenge a bylaw, resolution or order passed by a municipal council or regional board. However, they must do so quickly, as sections 425 and 623 require that notice generally be served not more than one month after the adoption of the bylaw or other instrument, and that the application be heard within two months of its adoption. The time limit for challenging a regional district security issuing bylaw under section 425(2) is even tighter. In that case, notice of the application must be served not more than 10 days after adoption of the bylaw. Where electors have failed to meet these strict criteria, they can file a judicial review, relying on the court's supervisory jurisdiction to review administrative action.*

In some circumstances, aggrieved residents may choose to collectively form societies or associations for the purpose of filing a judicial review. There may be many perceived advantages of forming a society, including the avoidance of multiple lawsuits and the expense of personally paying court costs if unsuccessful. However, a common issue that arises in these circumstances is whether such societies have legal standing to challenge a bylaw or resolution. While the *LGA* does grant standing to certain parties automatically who meet the above criteria, the *Judicial Review Procedure Act ("JRPA")* does not. Rather, under the JRPA, courts have held that before exercising their supervisory jurisdiction, the commencing party must show that they have a special interest that has been affected by the bylaw resolution or other instrument at issue.

Two recent decisions of the Supreme Court of British Columbia give local governments a better idea of how courts respond to this threshold issue, as well as how to determine whether such societies have a genuine interest, or are mere intermeddlers regarding the bylaw or resolution they are challenging.

***Gonzales Hill Preservation Society v Victoria (City) Board of Variance*, 2021 BCSC 2091**

The petitioner, the Gonzales Hill Preservation Society (the "GHPS") applied for judicial review, under section 2 of the *JRPA*, of a decision made by the City's Board of Variance (the "BOV"). Notably, a s. 623 application was not available, given that the underlying decision was by the BOV. With that decision, the BOV had granted a minor variance that effectively reduced the rear setback of a private property by about seven metres. The property was located adjacent to the City's Gonzales Hill Regional Park (the "Park").

According to the constitution of the GHPS, its purpose was to preserve the Park for the enjoyment of visitors. However, the society had been formed only a month prior to the Board's decision. In challenging the decision, the GHPS alleged that the BOV had improperly granted the variance and expressed concerns that the extended house would impede the view from the Park and damage the nearby Garry Oak meadow.

To be granted private standing, a petitioner must be "aggrieved," "affected" or suffer "exceptional

prejudice" as a result of the impugned administrative decision. The petitioner must demonstrate that his or her private right has been infringed by the impugned administrative decision, or which may cause special damage extending beyond that suffered by the general public. Since there was nothing in the statute that granted the GHPS an automatic right of standing (i.e., nothing analogous to section 623 of the *LGA*), and the Society had failed to meet the test for private interest standing, the court found that the GHPS lacked standing to bring their petition for judicial review and dismissed the petition. The court's reasoning for its decision is interesting.

Firstly, the court found that the statutory regime under which the BOV operates—Part 14, Division 15 of the *LGA*, and the City's Board of Variance Bylaw No. 07-097—expressly limits the individuals who must be given notice of minor variances and who have a right to be heard. This, in turn, consequently limits the individuals who may challenge decisions of the BOV by way of judicial review to the persons to whom notice must be given under section 541 of the *LGA*. The legislative intent in this statutory regime was distinguished from the regimes at issue in the decisions of *Saanich Inlet Preservation Society v Cowichan Valley (Regional District)* (1983), 44 BCLR 121 (CA) and Alberta Liquor *Store Association v Alberta (Gaming and Liquor Commission*), 2006 ABQB 904, where the broad language of the underlying legislation expressly gave "any person" the right to challenge the instrument in question.

Secondly, the court held that, as a society, the GHPS is a legal entity with a separate identity from its members. Consequently, there was no identity of interest between adjacent landowners and the petitioner. In other words, the GHPS was not sufficiently directly affected or aggrieved by the decision of the BOV and had not suffered any harm beyond that of the general public.

Lastly, on evaluating the purpose of the society, the court found that the GHPS had been created solely for the purpose of disputing the variance at issue. It said the following about that tactic:

> The circumstances here suggest that the reason behind the incorporation of GHPS was simply to maximize the number of submissions that could be made to the board and to give the impression of widespread public opposition to the variance. This is not a tactic to be encouraged in relation to a minor variance and raises the status of GHPS to one of a 'busybody'.

The court's comprehensive reasoning for its decision provides useful guidance for local governments when faced with a challenge to decisions by the BOV. Additionally, while the above quote refers to the unique circumstances of the GHPS in this case, it also applies more widely toward any society that incorporates for the purpose of challenging a municipal bylaw or resolution.

***Force of Nature Society v City of Surrey,* 2021 BCSC 2511**

The petitioner society, the Force of Nature Society ("FNS"), along with two individual petitioners who were residents of Surrey, challenged a resolution of the Surrey City Council that authorized construction contracts for building a connector road (the "Resolution"). The connector road would encroach upon a number of land parcels that created the southern portion of Bear Creek Park, but would be built along an existing right of way. Invoking both section 623 of the *LGA* and section 2 of the *JRPA*, the FNS alleged that these encroachments were inconsistent with use restrictions on the lands ("Use Breaches") and were breaches of charitable trusts applying to the lands ("Trust Breaches").

To determine the threshold issue of whether the FNS had standing, the court referenced the principle in *Gonzales Hill Preservation Society* that standing may be determined by the language of the underlying statute, performing an analysis

of both the *LGA* and the *JRPA*. Applying the common law test for standing set out in *Gonzales Hill Preservation Society*, the court held that the FNS could neither show that the Resolution interfered with its private rights, nor prove that the harm it suffered extended beyond that suffered by any member of the general public. Therefore, the court found that the FNS lacked standing under the *JRPA*.

However, the court recognized that the restrictions on who may challenge a local government bylaw, resolution or other instrument by way of the *LGA* are different. In relation to section 623 of the *LGA*, which gives "an elector" or "any interested person" the right to challenge a bylaw, resolution or other instrument, the court found that the petitioners' standing to challenge the Resolution as "interested persons" was undisputed. The petitioners' claim proceeded under this statutory provision.

Implications

These decisions provide guidance for local governments that face a challenge to a bylaw or resolution by a society. They highlight the importance of reviewing the language of the statutory scheme at issue when assessing whether a person has standing to challenge the instrument at issue, given that the relevant statute may either narrow or broaden the rights of challenge otherwise available under the *JRPA*. Additionally, an analysis of the motivations and timing of a society's creation may be instructive. As the *Gonzales Hill Preservation Society* case demonstrates, this evaluation can assist in determining whether the society has a genuine interest in the decision or is acting merely as a "busybody" or "intermeddler" in local government decisions.

Julia Tikhonova & Nick Falzon


Land Owner Transparency Act Requirements and Deadline for Pre-Existing Owners to File a Transparency report

The deadline for pre-existing owners of certain interests to file a transparency report with the Land Owner Transparency Registry is November 30, 2022. Local governments, corporations incorporated by a municipality under section 185 of the Community Charter, *and corporations incorporated by a regional district under section 265 of the* Local Government Act *are exempt from the filing requirement. However, societies of which a local government may be a member and some other corporations related to a local government may be captured by the definition of a "reporting body" and, therefore, responsible for filing a transparency report by the prescribed deadline.*

What is the Land Owner Transparency Registry?

The Land Owner Transparency Registry (the "LOTR") is created by the *Land Owner Transparency Act* (the "*LOTA*") and is a registry of beneficial interest holders in land in British Columbia. The LOTR is administered by the

Land Title and Survey Authority of British Columbia (the "LTSA"). It should be noted that the LOTR does not guarantee the information contained in it.

Brief overview of the *LOTA*

The *LOTA* is intended to enhance the transparency of the ownership of land in British Columbia, eliminate hidden ownership, and combat money laundering. The *LOTA* requires an owner who holds, directly or indirectly, beneficial interests in land in British Columbia to file a transparency declaration and if the owner is a reporting body, a transparency report with the LOTR. Only lawyers and notaries in British Columbia who have accounts with the LTSA are able to submit the transparency declaration and transparency report with the LOTR.

When is an LOTR filing required?

Under the *LOTA*, an LOTR filing is required if a new interest in land is registered, a reporting body has an interest in land acquired before November 30, 2020, an interest holder has changed, a registering owner becomes or ceases to be a reporting body, or a reporting body needs to complete or correct information in the transparency report.

What is a transparency declaration?

A transparency declaration sets out whether the transferee registering an interest in land is a reporting body and, if so, what kind of reporting body.

A transparency declaration is required unless the land being registered is part of the treaty lands of a Treaty First Nation, the land of a self-governing First Nation (Sechelt, Nisga'a, Maa-nulth, Tla'amin, or Tsawwassen) or land on a reserve. In this case, a Declaration of Exclusion under the *Land Owner Transparency Act* is required.

What is a transparency report?

A transparency report discloses information about a reporting body and each person who is the indirect owner of the interest in land (interest owner and settlor), information about the land, the individual certifying the report, and any additional information required in the regulations.

A transparency report is only required if the person who is or will be the registered owner of the land after the application has been filed is a reporting body.

What is an interest in land?

An interest in land is any of the following:

(a) an estate in fee simple;
(b) a life estate in land;
(c) a right to occupy land under a lease that has a term of more than 10 years;
(d) a right under an agreement for sale to occupy land, or require the transfer of an estate in fee simple; or
(e) a prescribed estate, right or interest

What is a reporting body?

Under the *LOTA*, the term "reporting body" means:

(a) a relevant corporation (including limited liability companies, incorporated associations and societies, but does not include a municipality or a corporation sole);
(b) a trustee of a relevant trust (including express trusts, bare trusts, and prescribed trust); or
(c) a partner of a relevant partnership (including general partnerships, limited partnerships, limited liability partnerships and professional partnerships).

The *LOTA* provides some exclusions to what constitutes a reporting body. For example, Schedule 1 of the *LOTA*, lists the following entities as not relevant corporations and, therefore, not reporting bodies:

(a) a local public body within the meaning of the *FIPPA*;
(b) a corporation incorporated by a municipality under section 185 of the *Community Charter*; and
(c) a corporation incorporated by a regional district under section 265 of the *Local Government Act*.

What is an interest holder?

An interest holder is an individual who is a beneficial owner or other indirect owner of an interest in land. The *LOTA* and the Land Owner Transparency Regulation, BC Reg 250/2020, provide guidance as to who qualifies as an interest holder.

Transparency report filing by existing owners

If, as of November 30, 2020, a reporting body was a registered owner of an interest in land, the reporting body must, by November 30, 2022, file a transparency report with the LOTR. If a reporting body owns or leases more than one property, one transparency report may be used for all the properties.

The registered owner will have no obligation to file a transparency report if the registered title to the interest in land was transferred before November 30, 2022, or the registered owner otherwise ceases to be a reporting body before November 30, 2021.

Penalties for non-compliance

An owner who fails to file a transparency report or who provides false or misleading information in a transparency report may be subject to a fine of up to the greater of (a) $50,000 for a corporation or $25,000 for an individual, and (b) 15% of the assessed value of the property to which the transparency report relates. The *LOTA* also sets out other offences which may attract a fine of up to $100,000 for corporations or $50,000 for individuals for non-compliance with the *LOTA*.

Local governments should seek legal advice in determining whether they are required to file a transparency report.

Impact on Local Governments

The *LOTA* provides a limited number of exclusions as to what constitutes a reporting body. Specifically, as discussed above, it excludes local governments and corporations incorporated by local governments under section 185 of the *Community Charter* or section 265 of the *Local Government Act*. The exclusions do not apply to societies and corporations that are not covered by section 185 of the *Community Charter* and section 265 of the *Local Government Act*. Therefore, if a local government is a member of such a society or is related to such a corporation, a local government may have to comply with the *LOTA*'s pre-existing owner's filing requirements. Again, local governments should seek legal advice in determining whether they are required to file a transparency report.

Alexandra Greenberg & Kathleen Higgins


Employment Required COVID-19 Testing: Who Must Pay?

In recent months, more and more employers have been implementing policies requiring their employees to be vaccinated against COVID-19 or to be tested regularly for COVID-19. A question to be considered when developing such policies is who should pay for the COVID-19 testing? An Ontario arbitrator has now confirmed that if an employer requires its employees to either be vaccinated or be tested, the employer must pay for the COVID-19 test kits, but that the employer can require its employees to perform the tests on their own time. The arbitrator also indicated that the employer could place unvaccinated employees who refused to participate in the testing program on an unpaid leave of absence, and that if it subsequently dismissed the employees for their continued refusal, the dismissals would likely be upheld at arbitration.

Arbitrator John C. Murray considered these issues in his decision in *Ontario Power Generation and The Power Workers Union*, November 12, 2021, unreported, OPG-P-185. The employer had adopted a policy requiring its unvaccinated employees to complete two rapid antigen COVID-19 tests per week. The employer provided the employees with the test kits, and required them to complete the tests on their own time at home and submit the results. The employer also charged the employees $25 per week to cover the costs of the test kits and the administration of the testing program. If employees did not want to have that amount deducted from their wages, they would be required to obtain their own test kits. The union argued that the employer should pay for the testing program, and that the tests should be performed during work time.

Arbitrator Murray noted the employer's obligation under the Ontario *Occupational Health & Safety Act* to take every reasonable precaution for the protection of a worker, and held that testing unvaccinated employees for COVID-19 was reasonable. In respect of the issue of who should bear the costs of the testing program, the Arbitrator held that as the employer requires the testing, it should pay the cost of the tests. However, Arbitrator Murray also held that the employees were to continue to perform the tests at home on their own time. There were benefits to having employees complete the tests on their own time. The employer would know before the employee reported for work if they tested positive, and could bar the employee from entering the workplace. Arbitrator Murray also considered that having the employees test at home rather than the workplace was more efficient than having an employee test at work. Employees would take about 15 minutes to test at home, whereas if they tested at work, it would take them between 30 and 45 minutes to leave their post, take the test, and return. The Arbitrator was also concerned that compensating employees for their time in taking the tests at home could act as a disincentive for the employees to get vaccinated.

Another issue in the case was whether the employer could place an unvaccinated employee who refused to undergo COVID-19 testing on an unpaid leave of absence. The employer's policy also provided that if an employee did not agree to participate in the testing program within 6 weeks of being placed on an unpaid leave of absence, their employment would be terminated for cause. The union argued that the employer could not place an employee on an unpaid leave of absence pending termination. It relied on an article of the collective agreement stating that disciplinary penalties resulting in a

suspension without pay could not be imposed until a final decision (agreement between union and management, or an arbitrator's judgment) had been reached.

Arbitrator Murray held that unvaccinated employees who refused the reasonable alternative of regular rapid antigen COVID-19 testing could be sent home on unpaid leave pending completion of the discipline process. He considered such employees to be refusing to take the necessary and reasonable step of taking a minimally intrusive test that would demonstrate that they were fit to work, and did not present an unnecessary risk to their coworkers during the global pandemic. The Arbitrator also noted that it was completely within the control of the employee to decide when to come back to work, by agreeing to participate in the testing program. Arbitrator Murray viewed the unpaid leave of absence for employees refusing to comply to be a sensible and necessary part of a reasonable voluntary vaccination and testing program. He held on a without precedent basis that the collective agreement provision relied upon by the union did not apply.

Arbitrator Murray held that unvaccinated employees who refused the reasonable alternative of regular rapid antigen COVID-19 testing could be sent home on unpaid leave pending completion of the discipline process.

Arbitrator Murray also gave the preliminary view that in the context of the global pandemic, when the lives of fellow employees were at risk, the termination of unvaccinated employees who refuse to participate in reasonable testing was very likely to be upheld at arbitration. They were in effect refusing of their own choice to present as fit for work, and to reduce the potential risk they present to their fellow employees. They were making a decision to end their career with the employer.

In British Columbia, Section 21 of the *Workers Compensation Act* requires an employer to ensure the health and safety of all of its employees, as well as any other workers present at its workplaces. At the time of writing this article, there have been no British Columbia arbitration decisions considering the reasonableness of an employer's COVID-19 vaccination policies.

As discussed in Young, Anderson's November 19, 2021 client bulletin regarding two other Ontario decisions addressing the enforceability of mandatory COVID-19 vaccination policies, the assessment of the enforceability of employer vaccination policies will be highly fact driven. Nevertheless, it is likely that British Columbia arbitrators will follow the lead of Arbitrator Murray and find in general that employer COVID-19 vaccination policies that contain a testing option are reasonable, given employers' obligations under the *Workers Compensation Act* for the health and safety of their employees. British Columbia arbitrators will also likely require employers to pay for the COVID-19 tests that they give their unvaccinated employees the option to take instead of becoming vaccinated. However, a British Columbia employer can likely require its employees to take the COVID-19 tests at home on their own time.

The law around COVID-19 vaccination policies will continue to evolve, so local government employers should seek legal advice before adopting a COVID-19 vaccination policy, or a vaccination and testing policy.

Michelle Blendell

The Flood Gates Are Open – Drainage Control

In the past year, British Columbians have seen and experienced significant weather events. The recent floods in the province illustrate the importance of having adequate drainage works in place. As these extreme weather events become more common with climate change, drainage systems may also need to be updated, and therefore, it is important for municipalities to be aware of and understand their powers in respect to drainage.

While municipalities already have a suite of drainage control powers associated with providing drainage services, these municipally-owned and operated works are unlikely to be able to address all drainage issues that a community may face. Where private property is concerned, municipalities may consider section 70 of the *Community Charter* as another way to address drainage issues.

Section 70 of the *Community Charter* provides municipalities with the authority to enter onto property for the purpose of undertaking drainage works if a municipality believes it is in the public's interest that either (1) the drainage of surface water from outside the municipality into or through an area inside the municipality should be prevented, diverted, or improved, or (2) the drainage of or from an area in the municipality should be prevented, continued beyond the municipality, diverted, or improved. Section 70 can also provide for the coordinated construction of drainage works where multiple properties are involved.

Before a municipality may enter onto property to undertake proposed drainage works, section 70(2) of the *Community Charter* requires a municipality to serve notice of its intention on all land owners and any other local governments whose land may be affected by the proposed works, and provide those persons who consider themselves to be affected by the proposed works an opportunity to make representations to council. The *Community Charter* does not explicitly require that oral submissions be available, and so, unless the circumstances truly call for it, an opportunity for the provision of written submissions should satisfy the statutory requirement.

After a municipality has provided notice and an opportunity to those affected to make representations, the municipality may enter onto property, including property outside the municipality, for the purposes of undertaking the proposed drainage works. It is worth noting here that by exercising this authority a municipality may be required by section 33 of the *Community Charter* to compensate a property owner for loss or damage caused by the exercise of this power. In theory, some types of loss or damage may be offset by the nature of the work being undertaken, given that the authority under section 70 is meant to address circumstances for which council considers there is a public interest, and therefore, a need for the work to be undertaken. If the works produce a benefit to the property owner, such as by addressing an issue they would otherwise need to correct, this could conceivably compensate the owner for the loss they have experienced. It is unlikely this offset would apply to property damage resulting from negligence on the municipality's part.

When a municipality exercises the authority to undertake drainage work under section 70 the work is then overseen, paid for, and completed by the municipality. This is in part what differentiates section 70 of the *Community Charter* from a remedial action requirement under section 74(1)(c). A similarity that both

sections have is that once the work is complete, the drainage works become the property of the owner of the land on which they rest. While that may be the intended outcome, it is worth reminding municipalities to consider ownership and maintenance in respect of drainage works. If the circumstances call for it, a municipality may wish to consider a legal agreement with the property owner outlining various rights and responsibilities. This could take many forms and the best choice will be dependent on the relationship between the parties and the desired outcome.

While drainage is a complicated issue, it is important for municipalities to have sufficient systems in place to adequately address it. The best approach for addressing any particular drainage concern will depend on the circumstances surrounding it, and legal counsel is available to examine the options and assist municipalities in choosing which route to take. The earlier that legal counsel is involved, the earlier counsel can help assess and strategize how to best resolve the legal side of drainage issues.

Sarah Strukoff & Timothy Luk ✍


Enforcement of the *Architects Act*

In The Architectural Institute of British Columbia v Langford (City)*, the Architectural Institute of British Columbia (the "AIBC") sought a declaration that the issuance of a building permit was unreasonable as the building had been designed by a non-architect in contravention of the* Architects Act*.*

In the proceedings, the City took the position that the *Community Charter* and the City's Building Bylaw did not require the City to enforce the *Architects Act* through the denial of a building permit for a building that was designed by a non-architect in contravention of the Act. The City argued that the *Community Charter* and the Building Bylaw gave the City a discretion in the issuance of building permits and that the City's exercise of that discretion could not be interfered with by the court as it was reasonable.

The Court of Appeal confirmed the lower court's declaration that the City's issuance of the building permit was unreasonable. In dismissing the City's appeal, the Court stated:

> [64] In my view, the provisions of the Building Bylaw are of limited, if any, assistance in determining whether the safety standard set out in the *Architects Act* constrains the discretion conferred on building inspectors to approve plans. This appeal does not turn on an interpretation of the Bylaw.
>
> ...
>
> [68] What is left is a relatively straightforward question: is the mandatory safety standard set out in the *Architects Act* a statutory constraint on the exercise of the building inspectors' discretion, irrespective of the terms of the Bylaw or the interpretation of those terms? The City says that the answer is "No" for a number of reasons.
>
> ...
>
> [69] I cannot agree that these submissions provide a reasonable basis

> for concluding that the requirements of the *Architects Act* can simply be ignored by building inspectors exercising their discretion. ....

The Court of Appeal's decision raises two significant concerns for local governments as it relates the *Architects Act*.

First, the Court's statement that "the provisions of the Building Bylaw are of limited, if any, assistance in determining whether the safety standard set out in the *Architects Act* constrains the discretion conferred on building inspectors" clearly indicates that the Court views it to be part of the role of local government building inspectors to ensure compliance with the Act when issuing building permits, regardless of the language of the building bylaw being administered by them.

Second, the Court's reference to the *Architects Act* as setting out a "safety standard" raises the potential risk of liability to local governments where their building inspectors issue building permits without appropriate regard to compliance with the Act.

In light of the Court's decision, local governments should consider amendments to their building bylaws addressing compliance with the *Architects Act* as part of the permit application process. Regardless of whether those amendments are made, building inspectors should incorporate consideration of compliance with the Act in their checklist for issuance of building permits.

Since the Court's decision, the AIBC has written to at least one local government raising concerns that the local government issued a form and character development permit on the basis of design drawings that were prepared by a non-architect. While the AIBC had expressed similar concerns to other local governments before the Court's decision, the AIBC never pressed that issue. With the Court's decision, the AIBC seems to be emboldened in its assertion that the issuance of a development permit on the basis of a design by a non-architect is contrary to the *Architects Act*. It remains to be seen whether the AIBC will seek to press this issue before the courts. If it does, we would expect that the argument before the courts will be around whether the "mandatory safety standard set out in the *Architects Act*" is a relevant consideration to the issuance of a form and character development permit, which, unlike the issuance of a building permit, is not directed at health and safety matters.

Sukh Manhas

Miscellaneous Statutes: Did You Know?

Did you know that the Minister under the Railway Act *may, upon the application of a municipality pursuant to section 138, order that the tracks of two railways that intersect or run through the municipality be connected in a manner that permits the safe and convenient transfer of engines, cars and trains between the tracks and that the connection be maintained?*

Joe Scafe

Look For Your Lawyers

Reece Harding will be speaking at the Canadian Bar Association's municipal law webinar on "Tackling Homelessness" on March 9, 2022.

Also on March 9, **Elizabeth Anderson** will be a guest lecturer on administrative law for Capilano University's "Municipal Law in BC" course.

Kathleen Higgins will be presenting on the "Law of Highways" at the PBLI's Local Government 2022 Seminar to be held on April 8 in Vancouver.

Carolyn MacEachern will be presenting a session on "Best Practices for Responding to Complaints of Bullying and Harassment" at the Municipal Insurance Association of BC's Risk Management Conference to be held in Vancouver on April 12 and also at the Association of Kootenay Boundary Local Governments 2022 Conference being held in Nelson on April 22-24.

Amy O'Connor is on parental leave with an anticipated return scheduled for December. We pass on our hearty congratulations to Amy and her growing family!

The GFOABC Annual Conference in Penticton will feature a bumper crop of YA lawyers. **Michael Moll** will be co-presenting a pre-conference workshop on tax sales with Doug Stein on May 31. **Joe Scafe** will be presenting on "Liabilities under Agreements" and **Mike Quattrocchi** and **Nick Falzon** will be presenting a session on "Local Government Interests in Land – Property Taxes and Exemptions" during the main conference running from June 1 to 3.

The LIBOA Annual Conference resumes after a two-year hiatus (fingers crossed) and will include a case law update to be presented by **Elizabeth Anderson** and **Michael Moll** on June 2 in Whistler.

Guy Patterson and **Timothy Luk** will be presenting a session called "Official Community Plan Boot Camp" at the 2022 PIBC Annual Conference in Whistler being held July 5 to 8.

We wish **Pam Costanzo** all the best as she brings her great talent, interest and experience in workplace investigations and other matters of employment law to her new role at Roper Greyell.