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NEWSLETTER

Best Practices for C2C Meetings

Community to community ("C2C") meetings, where local governments and First Nations gather to discuss topics of mutual interest and build relationships, have been jointly funded by the Ministry of Municipal Affairs and Indigenous Services Canada since 1999 (Union of BC Municipalities at https://www.ubcm.ca/c2c.). In that time, more than 680 C2C forums have been held across the province. Although these meetings are nothing new, there can be confusion around whether or not they are subject to the open meeting rules under the Community Charter.

As a quick refresher, the aim of the open meeting rule is to promote transparency, accessibility, and accountability at the local government level (London (City) v RSJ Holdings Inc, [2007] 2 SCR 588, at para 38). Elected officials, however, often participate in less formal workshops or "shirtsleeve sessions" for training, planning, briefings or other purposes, that do not trigger the open meeting requirements. Thus, it can be a challenge for local governments to determine the point at which an informal gathering becomes a formal meeting, and this line can become even more blurred at a C2C meeting.

While local governments are subject to the open meeting requirements set out in the Community Charter and the Local Government Act, First Nations are not. Rather, First Nations are protected under section 35 of the Constitution Act, 1982 (the "Constitution"), which entrenches three basic forms of rights: (1) Aboriginal rights, (2) Aboriginal title, and (3) treaty rights. Treaty rights refer to negotiated rights that are set out in either historic treaties or land claims agreements between a First Nation and the Crown, and they are specific, negotiated rights. Regardless of whether or not a neighbouring First Nation is a treaty First Nation or not, there will be two different governance models between the parties at a C2C meeting.

So – are C2C meetings subject to the open meeting rules? The answer is (as always) it depends!

A basic rule of thumb is that if the local government and First Nation meet and discuss a matter such that it is moved along the spectrum of decision-making toward a decision, then the meeting is a formal meeting that requires notice, minutes, and public openness (subject, of course, to the section 90 matters which may or must go in closed). There are several factors that should

be considered by local governments when determining whether a gathering is indeed a meeting: (1) the nature of the group; (2) the nature of the discussion; and (3) the nature of the gathering. Essentially, the analysis must be done as usual, and independent of the fact that a First Nation will also be present.

Best Practices

For a C2C meeting to be considered a gathering as opposed to a meeting, we recommend the following:

1. Ensure that no quorum of Council/ Board Members is present. If this is not desirable or possible, then extra care should be taken to implement the remaining recommendations, as this is one of the easiest ways to establish a gathering as opposed to a meeting.

2. Do not deal with any matters in a way that moves them toward the possible application of the Council or Board's decision-making process of that matter within the local government's jurisdiction.

3. Ensure that no voting takes place at a C2C meeting. This is another crucial component, as any vote will indicate that it is a meeting as opposed to a gathering.

4. C2C meetings should take place at a neutral location, and not where the regular Council/Board meetings take place.

5. Finally, ensure that the C2C meetings are conducted in an informal manner and do not follow the formal rules of procedure that a regular Council or Board meeting would follow.

Please note that these are general recommendations, and legal advice should be sought for any specific concerns. Ultimately, whether a C2C meeting is a gathering or a meeting will be a contextual analysis, but local governments should always be mindful of the different governance frameworks in the planning and execution of a C2C meeting.

Amy O'Connor ✍

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Riparian Area Protection Powers Rolled Back by the Court of Appeal

Twenty-five years ago, the provincial government enacted legislation intended to protect fish habitat in and adjacent to freshwater bodies frequented by migratory fish species. The chosen approach was to mandate local governments to use existing land use management tools in what is now Part 14 of the Local Government Act to protect these habitats from damage that could result from most types of development, to a standard that meets or exceeds a protection standard prescribed by the government. The Fish Protection Act (now the Riparian Areas Protection Act) established the mandate, and a protection standard involving the use of third-party, qualified environmental professionals (QEPs) is prescribed in the Riparian Areas Protection Regulation.

None of this legislation materially changed the scope of development permit powers dating back to 1977, which many local governments had already been using to protect environmentally sensitive land, including riparian land, from the impacts of development. The scope of the relevant development permit area designation power was tweaked slightly in 1997 to expressly include the protection of ecosystems and biological diversity. The power to impose development permit conditions was amended to expressly include requiring "protection measures, including that vegetation or trees be planted or retained in order to preserve, protect, restore or enhance fish habitat or riparian areas". Authority to "specify areas of land that must remain free of development, except in accordance with any conditions contained in the permit" was not changed. Neither was the enforcement of the development permit regime addressed; local governments were not given authority to directly enforce the key Local Government Act prohibitions that support the development permit system (s. 489), or to enforce development permit conditions by measures other than costly and time-consuming injunction proceedings in the BC Supreme Court. These enforcement gaps continue to frustrate the achievement of this important local government mandate.

The BC Court of Appeal has now had two opportunities to consider the detail of the government's rather complicated riparian area protection regime. The first case, Yanke v. Salmon Arm (City) 2011 BCCA 309 addressed attempts that the provincial government had been making at the administrative level to deal with some significant gaps in the legislation: the fact that many sensitive riparian habitats had already been damaged by development, and the fact that many vacant parcels of land don't afford practical building envelopes lying outside the sensitive riparian area. In Yanke, the development permit applicant had insufficient site area to construct a dwelling

outside the SPEA that their QEP had identified, but the QEP had also certified that development would not harm fish habitat if located outside a significantly smaller SPEA. The City was willing to issue a development permit premised on the SPEA boundaries being "flexed", a procedure endorsed in administrative directives that the Province had issued provided that Fisheries and Oceans Canada approved; DFO was withholding its approval. Finding that the applicant was nonetheless entitled to receive a development permit, the Court noted first of all that the government's administrative directives dealing with "flexing" had no legal force. In a key passage, Justice Groberman wrote "I do not read s. 4 of the regulation as prohibiting development within a streamside protection and enhancement area where an assessment report states that there will be no HADD resulting from the development".

The more recent case is Wilson v. Cowichan Valley (Regional District) 2023 BCCA 25. Here, the local government had adopted a very strict OCP policy that discouraged development within any streamside protection and enhancement area (SPEA) that had been identified by a QEP, even if the QEP's opinion was that development in that area wouldn't harm fish habitat. The DP applicants, working with a developed site adjacent to Shawnigan Lake, had already constructed a new garage in the portion of their lot lying outside the identified SPEA. They then proposed to construct their new dwelling largely inside the SPEA – a project that their QEP advised wouldn't harm fish habitat. (This appears to have been the same R. P. Bio whose assessment report had been the focus of the Yanke decision 12 years earlier.) The regional board applied its policy and denied the application, the applicants sought judicial review of the decision, and in 2021 the BC Supreme Court quashed the decision as unreasonable and ordered the issuance of the development permit. The Regional District appealed.

In dismissing that appeal, the Court of Appeal focused, as had the BC Supreme Court, on the scope of the authority in s. 491(1)(a) to "specify areas of land that must remain free of development, except in accordance with any conditions contained in the permit", and whether that authority could reasonably be interpreted to enable the local government to prohibit development entirely in those areas of land, in circumstances where a QEP has indicated that development in that area wouldn't harm fish habitat. The negative answer that both Courts gave to that question has been a surprise to many local governments and their legal counsel. (The Court of Appeal did allow the Regional District's appeal in relation to the issuance of the development permit, on the basis that the QEP had not provided an assessment report that complied with the RAPR.)

On the face of things, it would seem viable to prohibit development in these areas entirely despite a "no HADD" conclusion from a QEP, because local governments are mandated to either meet or exceed the level of protection afforded by the RAPR, and reliance on the opinion of a QEP is part of the RAPR regime. However, the Court of Appeal found that regardless of the "meet or beat" option in the RAPA, the Regional District was still limited in dealing with the permit application to the authorities contained in s. 491, including the authority to specify development-free areas under s. 491(1)(a). What is surprising about the Court of Appeal's decision is that it then goes on to interpret s. 491(1)(a) as if it had been enacted only to confer authority in relation to riparian area protection directives made from time to time by way of the RAPR.

In reviewing the reasonableness of the regional board's interpretation of the scope of the section in its context, the regulatory scheme and the object of the enactment in which the section appears, as the relevant judicial review case law requires, the Court of Appeal makes

reference exclusively to RAPA and the RAPR, rather than to the Local Government Act itself (which contains an identically-worded power in respect of hazard lands). To the same effect, the Court refers to the Yanke decision as binding authority for a general proposition that the Legislature intended to empower local governments to prohibit development in a SPEA only where HADD would result. The Court expressly rejected the proposition that a local government may "operationalize a philosophical approach to the protection of fish habitat that is at odds with the harm-based approach that lies at the core of the provincial scheme", without appearing to take into consideration whether, prior to 1997, such a precautionary approach to the protection of the natural environment would have been available to a local government exercising the development permit power, and if so why the riparian area protection legislation should now be interpreted as limiting that power. By this course of reasoning the Court of Appeal has effectively "read down" the scope of this longstanding local government environmental protection power, as a result of the Legislature enacting the riparian area protection legislation in 1997.

The Court of Appeal found that regardless of the "meet or beat" option in the RAPA, the Regional District was still limited in dealing with the permit application to the authorities contained in s. 491, including the authority to specify development-free areas under s. 491(1)(a).

What are the consequences? Wilson may be a case that can be (as lawyers say) "limited to its facts" – if the scope of the authority in s. 491(1)(a) excludes the designation of any area that must remain simply "free of development", that must be only in cases where the power is being exercised to protect fish habitat in a watershed that is subject to the RAPR. This is because the Court of Appeal's reasons for so limiting the power derive entirely from the provincial riparian area protection legislation and the Yanke case. If that is so, then it may still be possible to prohibit development in an environmentally sensitive area that has been designated to protect the habitat of some species (animal or plant) other than fish – which suggests that single-purpose fish habitat protection DP area designations and guidelines should be avoided. By the same reasoning, it may be possible to specify hazard lands that must remain entirely "free of development" under s. 491(2). (Concerns about the effect of any such prohibitions on development entitlements are specifically addressed in ss. 490(3) and 491(3) – permits may not vary permitted use or density except on hazard lands.)

Be that as it may, it would seem worthwhile for the government to amend both ss. 491(1) and (2) to make it clear that there are indeed two options: specifying areas of land in which development must not occur at all, and specifying areas in which development may occur subject to conditions specified in the permit. Many local governments would appreciate a package of amendments that also addresses the enforcement gaps mentioned earlier.

Bill Buholzer

Misfeasance in Public Office – Identifying the Office Holder

A claim that a public servant has committed the tort of misfeasance in public office, also known as abuse of office, has the potential to wreck a career and irredeemably tarnish the person's reputation. For that reason, the courts have fashioned procedural protections for public servants caught up in this type of lawsuit. The basic protection and the rationale for it were summarized by Justice D. Smith in J.P. v. British Columbia (Children and Family Development), 2017 BCCA 308 ("J.P.") as follows:

> **The tort of misfeasance in public office is an extremely serious claim. Finding someone liable for such egregious conduct requires, at the very least, that the individual be a named party in the Notice of Civil Claim so that they may defend the claim against them.**

Since J.P. it has been understood that a plaintiff's failure to name the particular office holder as a personal defendant would be fatal to the claim. In other words, the plaintiff could not assert a claim for abuse of office simply against the government body and claim it was liable for the tortious actions of its office holder; the office holder had to be made a party defendant. That was the apparent result in Wu v. Vancouver, 2019 BCCA 23 ("Wu"), where the plaintiff sought to convert the trial judge's finding that the City's planning officials had acted in bad faith into a finding that the City was liable for misfeasance in public office. After referring to J.P., the appeal court in Wu set out its understanding of the requirement to name public officials as individual defendant(s) in fairly clear terms:

> The effect of these cases is that in an action alleging misfeasance in office or abuse of office the plaintiff(s) must name as defendant(s) the public official(s) who are alleged to have abused their office. That was not done here. The finding that the City acted in bad faith is a finding that those officials who handled the development permit together with the Council

The recent decision of the Court of Appeal in British Columbia v. Greengen Holdings Inc., 2023 BCCA 24 has now determined that these earlier decisions should not be understood as establishing a rule that it is always necessary that the individual official whose conduct is at issue must be named as a party in the notice of civil claim.

> engaged in egregious conduct. If such a claim were to be advanced, those officials (and councillors) should have been named. Findings of fact against those officials ought not to have been made, as they implicitly were, because they were not parties. The failure to name them is fatal to the claim.

The recent decision of the Court of Appeal in British Columbia v. Greengen Holdings Inc., 2023 BCCA 24 ("Greengen") has now determined that these earlier decisions should not be understood as establishing a rule that it is always necessary that the individual official whose conduct is at issue must be named as a party in the notice of civil claim.

Greengen involves a claim of misfeasance in public office against two provincial ministers for the conduct of officials in their ministries in denying approval for a run-of-river power project that had been awarded an energy purchase agreement with BC Hydro in 2006 but was denied a water licence and Crown land tenure as it was determined that the power project was inconsistent with a land use agreement the Province had entered into with the Squamish Nation for protection of cultural sites. The individuals in the ministries had not been named as defendants. However, the plaintiff Greengen had provided particulars of the individual public officers whose conduct was alleged to constitute misfeasance in public office. The appeal court found this was sufficient to satisfy the "pleadings" requirement to provide the defendant with knowledge of the case to be met.

The other purpose identified by the Court that requires a plaintiff to identify the office holder is the fairness requirement. The individual office holder must understand that their conduct is being impugned "so that they may take whatever steps they consider appropriate to defend their actions." However, the Court went on to say that this does not necessitate the individual be named as a party defendant; it is only where the claim is made against individuals alone (and not against the government body that employs them) that they must be named as defendants.

The decision in Greengen may seem an abrupt about face from the same court's earlier decisions in J.P. and Wu. However, the appeal court undertook a thorough review of the misfeasance in public office jurisprudence from other Canadian court levels, as well as in the UK, where it has been considered sufficient for a plaintiff to advance a misfeasance in public office claim against a public authority without naming the individual office holder(s) as a defendant.

While the Greengen appeal court decision removes one potential defence against poorly pled abuse of office claims, individual office holders will not likely complain if they do not have to contend with the additional stress of being personally named as a defendant in this type of litigation. The reputational stakes are still serious but the requirement that the plaintiff give fair notice as to the office holder who is alleged to have abused their office should provide adequate opportunity to fairly defend the claim.

Barry Williamson

DRIPA Update

When the Declaration on the Rights of Indigenous Peoples Act (Declaration Act), SBC 2019, c 44 ("DRIPA") was adopted in 2019, it contained an ambitious promise in section 3: In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.

Recently, and presumably further to the promise in section 3 of DRIPA, the Legislature made two interesting amendments to the Interpretation Act, RSBC 1996, c 238 and Judicial Review Procedure Act, RSBC 1996 c 241. Section 8.1 of the Interpretation Act now states:

> **8.1** (1) In this section:
>
> **"Declaration"** has the same meaning as in the Declaration on the Rights of Indigenous Peoples Act;
>
> **"Indigenous peoples"** has the same meaning as in the Declaration on the Rights of Indigenous Peoples Act;
>
> **"regulation"** has the same meaning as in the Regulations Act.
>
> (2) For certainty, every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the Constitution Act, 1982.
>
> (3) Every Act and regulation must be construed as being consistent with the Declaration.

The Interpretation Act, as its name suggests, is meant to aid in statutory interpretation. As those who have spent any time with legislation – be it bylaws, regulations, or provincial or federal laws – knows well, uncertainty and ambiguity are ever-present. This is in part because, no matter how precise the drafter intends to be, language can never perfectly anticipate every situation to which an enactment may apply. Section 8.1, therefore, should help to resolve any ambiguities that may exist in interpreting Acts and regulations that might otherwise be interpreted as diminishing the constitutionally protected aboriginal and treaty rights of Indigenous peoples.

When it was enacted, DRIPA also created a process by which a member of the Executive Council, acting under the authority of the Lieutenant Governor in Council, may enter into a decision-making agreement with an Indigenous governing body in relation to the exercise of a statutory power jointly by the Indigenous governing body and the government or another decision-maker. Section 22 of the Judicial Review Procedure Act now clarifies that, where such a decision-making agreement requires that a statutory power be exercised only with the consent of the Indigenous governing body, the decision whether to give consent is subject to judicial review:

> **22** (1) If under an enactment the consent of

an Indigenous governing body is required to be sought or obtained in accordance with an agreement entered into under section 6 or 7 of the Declaration on the Rights of Indigenous Peoples Act before the exercise of a statutory power,

a) subject to subsection (2), this Act applies in relation to the decision whether to give consent as if that decision were a statutory power,

(b) the Indigenous governing body is deemed for the purposes of section 15 (1) of this Act to be one person,

(c) section 15 (2) of this Act does not apply in relation to the decision whether to give consent, and

(d) service, if required to be made on the Indigenous governing body, is effectively made by a person if made in accordance with the agreement relating to the consent of the Indigenous governing body before the exercise of the statutory power, as if the person were a party to the agreement.

(2) If under an enactment the consent of an Indigenous governing body is required to be sought or obtained in accordance with an agreement entered into under section 7 of the Declaration on the Rights of Indigenous Peoples Act before the exercise of a statutory power of decision, this Act applies in relation to the decision whether to give consent as if that decision were a statutory power of decision.

Section 22 of the Judicial Review Procedure Act now clarifies that, where such a decision-making agreement requires that a statutory power be exercised only with the consent of the Indigenous governing body, the decision whether to give consent is subject to judicial review

These amendments confirm that a decision-making agreement requiring the consent of an Indigenous governing body does not grant that Indigenous governing body a true veto over the exercise of a statutory power. Rather, that decision to withhold consent will be subject to the court's supervisory jurisdiction on judicial review, meaning that it must be made reasonably and fairly.

Nick Falzon

Foreign Ownership Ban Now in Force

On January 1, 2023, the federal Prohibition on the Purchase of Residential Property by Non-Canadians Act came into force. The Act prohibits non-Canadians from purchasing residential

property, directly or through a corporation, in Canada. Unless extended, the Act will be in force for two years. Contracts of purchase and sale entered into prior to January 1, 2023 are unaffected.

The Act applies to "non-Canadians". These include: (1) individuals who are neither Canadian citizens nor permanent residents; (2) foreign corporations; and (3) corporations formed in Canada the shares of which are not listed on a stock exchange and are controlled by the persons described in (1) and (2). Some non-Canadians, including refugees and diplomats, are exempt from the Act (meaning that they can purchase residential property). Also exempt are students and temporary foreign workers who meet prescribed criteria and non-Canadians who are spouses of persons not prohibited from purchasing residential property under the Act.

Again, the Act prohibits non-Canadians from purchasing "residential property", which is defined to include houses, units in multi-family buildings and, interestingly, land that does not contain a dwelling but that is zoned for residential use or mixed residential use. In addition, the Act does not apply to the purchase by non-Canadians of residential property located outside of "census agglomeration" and "census metropolitan" areas, as those terms are defined by Statistics Canada. Maps of these areas can be found on Statistics Canada's website.

While the Act is undoubtedly aimed a prohibiting the acquisition of fee simple interests by non-Canadians, it provides that a purchase also includes the acquisition, with or without conditions, of a legal or equitable interest or a real right in a residential property. However, a purchase does not include the acquisition of real property resulting from death, divorce, separation or gift, nor does it include the acquisition of a right to occupy under a residential tenancy agreement.

Every person who contravenes the Act, and every person who helps a person contravene the Act, is liable on conviction to a fine not exceeding $10,000. In addition to this monetary penalty, the minister responsible for the Act may apply for court-ordered sale of the property. If the property is sold pursuant to a court order following an application by the minister, the federal government is entitled to the proceeds of the sale that exceed the amount paid by the non-Canadian for the residential property.

Since local governments rarely sell dwellings, at first blush it appears unlikely that the Act will have a significant effect on local government operations. That said, the Act also applies to vacant land zoned for residential or mixed-residential use, which likely includes land that is rezoned to residential use as a condition of the transaction completing. If a local government proposes to sell land residential property that is subject to the Act, it should require the prospective purchaser to provide evidence that the proposed purchase would not contravene the Act.

Joe Scafe

Applying the "Remedial Tool in the Commissioner's Armoury": Section 43 of FOIPPA

In Order F22-61, the City of New Westminster successfully applied to the Office of the Information and Privacy Commissioner ("OIPC") to disregard nine access requests from an applicant on the basis that the requests were frivolous or vexatious. The decision serves as a useful reminder of the purpose and limited circumstances in which the remedy under section 43 of the Freedom of Information and Protection of Privacy Act ("FIPPA") applies.

Legislation

Pursuant to section 43 of FIPPA, the OIPC may authorize a public body to disregard an access request in certain limited circumstances. That section provides:

43 If the head of a public body asks, the commissioner may authorize the public body to disregard a request under section 5 or 29, including because

(a) the request is frivolous or vexatious,

(b) the request is for a record that has been disclosed to the applicant or that is accessible by the applicant from another source, or

(c) responding to the request would unreasonably interfere with the operations of the public body because the request

(i) is excessively broad, or

(ii) is repetitious or systematic.

Local government officials should be aware of the purpose and confined scope of section 43 of FIPPA, as summarized in Order F22-61 as follows:

> FIPPA gives individuals a "significant statutory right" to access information under the custody or control of a public body, including one's own personal information. However, that right of access should not be misused or abused. When someone abuses their access rights under FIPPA, it can have serious consequences for the access rights of others by overburdening a public body and impacting the public body's ability to respond to those other requests. It can also harm "the public interest" by unnecessarily adding to a public body's costs of complying with FIPPA.
>
> Therefore, s. 43 serves as "an important remedial tool in the Commissioner's armoury to curb abuse of the right of access." It allows the Commissioner or their delegate "to grant the extraordinary remedy of limiting an individual's right to access information under FIPPA." For that reason, the Commissioner's authority under s. 43 should be exercised

after careful consideration since it can limit or take away a person's statutory right to access information.

Background

In January 2022, the applicant contacted the City to request personal information related to a particular topic. Simultaneously, the applicant also submitted an access request under FIPPA for a list of payments made by the City to a particular individual during a specified time period. The City withheld all of the requested records under section 22 of FIPPA.

From March to July 2022, the applicant made sixteen further access requests. In their correspondence with the City personnel who processed the applicant's requests during this time, the applicant was routinely argumentative and frequently made serious and unfounded allegations about the City's interpretation of FIPPA.

The applicant made further access requests to the City in response to a letter from the City with a reminder to the applicant to be respectful in their correspondence with City personnel. The City notified the applicant of its intention to apply for authorization under section 43 of FIPPA to disregard six FOI requests. After receiving this notice, the applicant made three additional access requests.

Analysis

The City applied to disregard the applicant's nine access requests under section 43(a) of FIPPA, on the grounds that the access requests were frivolous or vexatious. The Adjudicator canvassed various non-exhaustive factors from previous Orders of the OIPC in determining whether an access request is frivolous or vexatious, and particularly emphasized the following four factors in her analysis of the applicant's requests:

a) Type of information

The Adjudicator noted that the information the applicant sought in the access requests targeted people who either refused to answer the applicant's questions or disagreed with the applicant's views about FIPPA.

The applicant claimed in their submissions that they sought the records to hold the City accountable, and to uncover any potential wrongdoing by City officials or employees in refusing to grant access to the requested records. However, the Adjudicator was not persuaded that the applicant's motive was plausible, as the City's refusal to provide access to past records does not imply that the City officials should be suspected of wrongdoing. Further, there was no evidence that suggested that any of the named individuals in the requests should be suspected of wrongdoing or financial misconduct to justify the applicant's access requests for expense reports or payroll information.

b) Timing of requests

The Adjudicator also held that the timing of the access requests supported the City's position. Specifically, six of the nine access requests were made shortly after the applicant received a letter from the City, and the remaining three requests were made on the same day the applicant received notice of the City's section 43 application. According to the Adjudicator, the timing and rapidity of the requests strongly suggests that the applicant made them as a way to express their displeasure with the City's actions rather than a sincere desire in obtaining the records.

c) Repetitiveness

Another factor highlighted by the Adjudicator was the repetitiveness

of the applicant's access requests, specifically, the repetitive subject matter of the requests, as well as the repetitive grouping of six requests followed by three further requests."

d) Genuine Interest in Records

The Adjudicator further noted that, while the applicant claimed to have genuine interest in the initial subject matter of the requests, none of the nine access requests at issue related in any way to that initial issue. As such, the OIPC found that the applicant had used FIPPA for an improper purpose rather than a good faith desire to access the records requested.

Conclusion

In light of the above evidence, the Adjudicator found that the applicant had an "ulterior purpose" in making the nine access requests, and that the access requests were vexatious. The City was authorized to disregard the nine access requests.

Local governments should be reminded that the remedy in section 43 of FIPPA is an extraordinary remedy that is granted in fairly extreme and limited circumstances, such as the case at issue. The reasons in Order F22-61 demonstrate the careful and contextual approach that the OIPC takes in evaluating section 43 applications.

Julia Tikhonova and Carolyn MacEachern


Elections Corrections – Recent Case Law

General local elections were held throughout B.C. on October 15, 2022. As anyone who has worked in local government during an election cycle can attest, even the smoothest elections will have bumps in the road. It is unsurprising, then, that this past election cycle resulted in a few court decisions. The three decisions canvassed in this article illustrate some of the issues that can arise from events occurring both before and after votes have been tallied.

1. **A Recount Required - City of Port Moody**
   Lubik v. The City of Port Moody, 2022 BCPC 239; Lubik v. The City of Port Moody, 2022 BCPC 240

The race for City councillor in Port Moody came down to something like a photo finish. A preliminary count of ballots on election day saw David Stuart winning the City of Port Moody's sixth and final councillor position with 3,596 votes, with Amy Lubik coming in seventh with only two fewer votes (3,594). After a recount by the City's Chief Election Officer, the results were 3,595 votes for Mr. Stuart and 3,593 for

Ms. Lubik: each candidate lost one vote, so Mr. Stuart maintained his two vote advantage.

Ms. Lubik successfully applied for a judicial recount under s. 148 of the Local Government Act, arguing that the ballot account did not match the number of valid votes recorded for a candidate. The judge found that the change in vote tabulation from the initial recount, however small, did raise a concern that the ballot account did not accurately record the number of valid votes for a candidate, and therefore a judicial recount was in order.

Following the judicial recount (which was the third time the ballots were counted), Mr. Stuart and Ms. Lubik were tied with 3,597 votes each. In baseball a tie goes to the runner; in hockey it's a shootout; in local government elections the answer lies in s. 151 of the Local Government Act. In the event of a tie between two candidates following a judicial recount, the result of the election is to be determined by randomly drawing one of the two candidates by lot. The judge directed the Chief Election Officer to draw the lot, and Ms. Lubik's name was drawn. After initially coming in seventh by two votes even after an initial recount, Ms. Lubik was declared to have been elected to the sixth and final councillor position. In other words, fourth time lucky.

2. **A Recount not Required - District of Saanich**
   Sharma v. Saanich (District), 2022 BCPC 257

As in the City of Port Moody, the council race in the District of Saanich was incredibly close. Eight councillor positions were up for election in the District, with candidate Rishi Sharma coming in ninth with 9,207 votes. The eighth-place finisher received 9,218 votes – a margin of only 11 votes.

Mr. Rishi applied for a judicial recount under s. 148 of the Local Government Act, presenting evidence regarding potential issues with the automated vote tabulators used during the election. He argued that given the small difference in votes between eighth and ninth-place, and the margin of error inherent in the automated system (as no one purported that the automated vote tabulation was infallible), it was possible his loss was due to machine error. Mr. Rishi also argued that the automated vote tabulators may not register a mark on a ballot that would otherwise conform with the District's voting bylaw.

The court dismissed Mr. Rishi's application, finding that the abstract possibility of machine error was not enough to prompt a recount, and that under the bylaw a properly marked ballot was defined as one that could be read by the automated vote tabulators. The judge found that the only real reason advanced for the recount was the close margin of the results, but that this was not by itself grounds under which the court could order a judicial recount. A close election, no matter how razor thin the vote difference, is not a sufficient reason for a recount on its own.

3. **No Vote-Buying Found – Village of Pouce Coupe**
   Michetti v. Veach, 2023 BCSC 43

In Village of Pouce Coupe, Danielle Veach won the race for mayor, with 84 votes. Lorraine Michetti came in second, with 79 votes. Both candidates had a history in Village politics: Mrs. Veach was a councillor and Ms. Michetti was mayor before the 2022 elections.

Ms. Michetti brought a petition to court to invalidate the election, claiming that Mrs. Veach had breached the Local Government Act by, among other things, hosting a "Tea and Talk" during her campaign. Ms. Veach said the "Tea and Talk" event was intended to be a meet and greet event where residents of the Village could meet her, learn about her plans for the Village if she was elected as Mayor, and ask her questions. At the event, Mrs. Veach had paid for coffee, tea, and cinnamon buns for attendees. for the evidence was that she spent $44.50 on the

food and drinks, plus an additional $50 as a tip to the venue given the lack of a room rental fee. Ms. Michetti alleged that Mrs. Veach's actions constituted vote-buying, and that Mrs. Veach had engaged in voter intimidation by making misrepresentations, contrary to ss. 161 and 162 of the Local Government Act, respectively. Plainly, these were serious allegations.

After a multi-day hearing, the judge found that Mrs. Veach's had not engaged in vote-buying or intimidation, and that the election was therefore valid. For both offences, the judge noted that subjective intention of the candidate to commit the offence was a necessary element of the offence, and found the evidence did support a finding that Mrs. Veach's intended to buy votes or intimidate voters. Leaving aside Ms. Veach's intent, on the topic of the alleged vote-buying, the judge found that "no reasonable voter would be induced to vote differently by the mere provision of a cup of caffeine or a cinnamon bun… [and that] Mrs. Veach's purpose for supplying the very limited refreshments here was simple human decency and politeness….".

James Barth & Serge Grochenkov

Look for Your Lawyers

We are pleased to welcome two new associates, **Serge Grochenkov** and **Eman Jeddy**, to Young Anderson. Serge, who received his juris doctor from UBC in 2020, joins us from a personal injury and estate litigation firm. Eman, who completed his juris doctor at the University of Ottawa in 2019, most recently practised at a large regional firm, where he specialized in corporate and commercial law. Both Serge and Eman will maintain broad practices, with Serge focusing on land development and Eman focusing on litigation.

In addition to Serge and Eman, we are excited to welcome back **Jordan Adam**. After practising with Young Anderson from 2018 to 2021, Jordan worked until recently as a staff lawyer at a non-profit legal clinic, advising low-income clients on a wide range of legal issues. Jordan is available to assist clients out of our Kelowna office.

Sukhbir Manhas and **Carolyn MacEachern** will be presenting a session entitled "Dealing with the fall-out: Legal Considerations and Projections" at the Local Government Management Association CAO Forum on February 16, 2023 in Kelowna.

Mike Quattrocchi will be presenting "Local Government Law 101" at the Association of Kootenay and Boundary Local Governments on March 9 in Kimberley.

Kathleen Higgins and Elizabeth Anderson will be speaking at PBLI's Local Government 2023 on March 10, 2023, presenting a session entitled "Difficult People".

Joe Scafe will be presenting a session entitled "Local Government Law 101" at the Northern Central Local Government Association Elected Officials Seminar being held March 16, 2023 in Prince George.

Sukhbir Manhas will be presenting a session entitled "Legal Update" at the Regional District CAO Forum being held in Victoria March 28-29, 2023.

Guy Patterson & Elizabeth Anderson will be presenting an "Annual Legal Update with Young Anderson (Housing)" at the PIBC CPL Webinar #3 on March 29, 2023.

Carolyn MacEachern and Sukhbir Manhas will be presenting a session entitled "Risk Management Issues in Employment Law" at the Municipal Insurance Association of BC 2023 Conference being held on April 5, 2023.

Reece Harding will be member of the panel at the Lower Mainland Local Government Association conference on "Code of Conduct for Local Governments in BC" being held on May 3-5, 2023.

Mike Quattrocchi will be presenting a session entitled "Legal Update" at the Rocky Mountain/ West Kootenay Boundary Local Government Management Association 2023 Conference being held in Kimberley on May 17, 2023.

Guy Patterson & Timothy Luk will be presenting a pre-conference session entitled "The Legal Side of Zoning: Foundations, Principles and Recent Developments" as part of the 2023 PIBC Annual Conference being held in Sun Peaks on May 30, 2023.

Timothy Luk will also be a co-presenting another session at the 2023 PIBC Annual Conference in Sun Peaks, beginning May 31st, 2023, entitled "Housing Agreements - A Community Approach to a Powerful Tool".

Mike Quattrocchi will be presenting a session entitled "Trusts & Why They Matter to Municipalities & Regional Districts" at the GFOA Conference in Whistler from May 31-June 2, 2023.

Elizabeth Anderson and Nick Falzon will be presenting a session entitled "Case Law Update" at the Licence Inspectors and Bylaw Officers Association Conference and AGM being held in Nanaimo May 30 to June 2, 2023.

Sukhbir Manhas will be presenting a session entitled "Cybersecurity: The Legal Issues" at the Local Government Management Association Annual Conference being held June 13-15, 2023 in Nanaimo.

Kathleen Higgins & Elizabeth Anderson will be presenting a session entitled "Waterworld: Impacts of Rising Seas and Rivers" at the Local Government Management Association Annual Conference being held June 13-15, 2023 in Nanaimo.

STAY CONNECTED

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