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NEWSLETTER

B.C. Court of Appeal Upholds Whistler Tourist Accommodation Bylaws

In 1120732 B.C. Ltd. v. Whistler (Resort Municipality), *2020 BCCA 101, the B.C. Court of Appeal dismissed an appeal challenging a zoning amendment bylaw and a business regulation bylaw as well as a restrictive covenant. The bylaws and covenant collectively require that strata units in hotel and hotel-type accommodations in Whistler, such as the Cascade Lodge, be placed in a rental pool operated by a single professional rental pool manager providing integrated booking, reception, cleaning, laundry and other services. The appellants argued, in part, that the zoning amendment bylaw is invalid because it regulates the "users" of land rather than the "use" of land under s. 479 of the* Local Government Act *in requiring that the strata units in the Cascade Lodge be used only by means of a rental pool arrangement with a single professional rental pool manager. In the alternative, the appellants argued that the use of the strata units in the Cascade Lodge for tourist accommodation outside a single rental pool arrangement is a lawful non-conforming use under s. 528 of the* Local Government Act.

The Court rejected the appellants' argument that the Court is to interpret the zoning power to regulate the "use" of land in s. 479 of the *Local Government Act* and decide whether the adoption of the zoning amendment bylaw exceeded the statutory authority given to Whistler. If the Court were to itself interpret s. 479 to determine whether the zoning amendment bylaw exceeded the authority of that section, it would be applying a correctness standard of review, as the lower court judge had felt compelled to do in accordance with previous case authority. However, the Court held that the landscape of judicial review has undergone a major shift as a result of the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (decided after the lower court decision). There is now a presumption that reasonableness is the applicable standard of review and that the presumption can be rebutted only in limited situations. Jurisdictional questions are no longer recognized as a distinct category attracting correctness review. The result is that the jurisdictional power of a local government is now to be reviewed on a reasonableness standard (unless there is a competing administrative body that may have jurisdiction).

With respect to the application of the reasonableness standard to questions of statutory interpretation and local government bylaws, the record before council is to be looked at to understand the decision. In cases such as this case, where the record does not indicate the reasons why Whistler Council concluded it had the statutory authority to enact the zoning amendment bylaw, the Court noted it is to determine whether the decision to enact the bylaw is reasonable by "examin[ing] the decision in light of the relevant constraints on the decision maker". To this end, it is necessary to consider whether there are any reasonable interpretations of s. 479 of the *Local Government Act* that would have authorized Whistler Council to adopt the zoning amendment bylaw.

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The appellants main ground of appeal was that Whistler Council's decision to enact the zoning amendment bylaw was unreasonable because the bylaw regulates the "users" of land rather than the "use" of land contrary to established precedent. The Court therefore reviewed in detail the cases dealing with the issue including the Supreme Court of Canada's decision in *R. v. Bell*, [1979] 2 S.C.R. 212 and its decisions in *Faminow v. North Vancouver (District)*, (1988), 61 D.L.R. (4th) 747, *North Vancouver (District) v. Fawcett*, (1998) 162 D.L.R. (4th) 402, *School District No. 61 v. District of Oak Bay*, 2006 BCCA 28, *Qterra Properties Ltd. v, Delta (Corporation)*, 2016 BCCA 504 and *Bulkley-Nechako (Regional District) v. FRC Holdings Inc.*, 2019 BCCA 122. The Court concluded that, contrary to the appellants assertion, it is not well-settled law in British Columbia that a zoning bylaw may not regulate users and "there is no general principal that all [zoning] bylaws that have the effect of regulating users in any respect are beyond the power of municipalities to adopt".

The Court concluded that it would have been reasonable for Whistler Council to conclude that s. 479 of the *Local Government Act* permits the adoption of zoning bylaws regulating users as long as they are not unreasonably

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discriminatory in their effect. It would have also been reasonable for Whistler Council to conclude that there was a valid land use management rationale for the Cascade Lodge lands to be zoned for use as an integrated hotel operation and that the zoning amendment bylaw did not go beyond the s. 479 zoning power. Lastly, it would have been reasonable for Whistler Council to conclude that the requirement for a single professional manager of the rental pool was not a regulation of users because the manager was not the user of the units. Given that there were at least three ways in which Whistler Council could have reasonably concluded that s. 479 of the *Local Government Act* gave it the power to adopt the zoning amendment bylaw, the Court concluded Whistler Council's decision to enact the zoning amendment bylaw was reasonable. The significance of *Vavilov* is evident here; under the previously applicable correctness standard, the Court would itself have determined whether, as a matter of providing the singular, definitive interpretation of the statutory provision, the bylaw was a lawful exercise of the local government's statutory authority. Now, the Court looks to whether the bylaw could be reasonably supported, which could be in a multiple of ways, without the court having to determine which is the "correct" one.

The Court's rejection of the appellant's alternative non-conforming use argument is discussed in Bill Buholzer's review of recent non-conforming use decisions beginning at page 5.

Alyssa Bradley

Contractual Obligations and COVID-19: Force Majeure Clauses and the Doctrine of Frustration

The uncertainty associated with the COVID-19 pandemic and related fallout may lead to parties finding it more difficult, or impossible, to fulfil their contractual obligations. This article explores two possible sources of relief for such impacted parties: "Force Majeure" clauses and the legal doctrine of frustration.

"Force Majeure" clauses are commonly included in contracts. As they are contractual clauses and not a legal doctrine, determining if a force majeure clause applies in a given situation depends largely on the language of the clause itself. However, while the exact language of the clauses differ, they should share the following essential elements:

1. First, the clause provides for the occurrence of a triggering event. The clause itself will indicate what constitutes a triggering event, and may include a specific list of events as well as a catch clause such as "any event beyond the control of the parties". Specific events include acts of god, labour strike or lock-out, war, civil commotion, fire, and earthquake. Some clauses also include reference to epidemics, pandemics, public health emergencies, and orders, laws

and regulations of government, all of which are especially relevant during the current pandemic. The triggering event must fall within the events outlined in the clause in order for the clause to operate.

2. Next, the clause indicates that the triggering event disrupts the ability of a party to fulfill its contractual obligations. The clause determines level of disruption that the triggering event must cause in order for the clause to operate. Some clauses require that a triggering event prevents a party from fulfilling its obligations while others require a party only be hindered or delayed in its performance.

3. Finally, when both the triggering event has occurred and sufficiently disrupted the relevant party, the affected contractual obligation is suspended. Again, the clause dictates the extent of the suspension; it may last as long as the triggering event persists or it may allow the disrupted party to terminate the contract entirely.

In addition to the three main criteria above, for a force majeure clause to operate, a party's non-performance must be due to events or circumstances beyond its control, and it must be unable to prevent or mitigate the effects of the triggering event.

While determining if a force majeure clause is applicable in a given situation is largely an exercise in contractual interpretation, the courts have provided some principles to guide the analysis. In *Domtar Inc v. Univar Canada Ltd,* 2011 BCSC 1776, the court noted that a change in market conditions or circumstances affecting the profitability of a contract or the ease with which a parties' obligations can be performed is generally not regarded as a force majeure event. Further, the court noted that force majeure is resorted to where an event beyond the control of a party makes performance of that party's obligations under the contract impossible, and it isn't appropriate to resort to the clause where an event makes performance of that party's obligations "commercially impractical" unless the parties have expressly agreed to this.

If a force majeure clause doesn't apply to a specific triggering event, a party may seek to rely on a frustration of contract argument to excuse its inability to perform contractual obligations. Unlike force majeure, frustration is a legal doctrine, meaning it may apply to a contract regardless of the language of the contract, provided the elements of the doctrine are present. It is important to note, however, that a contract cannot be frustrated by an event if such event and its consequences are contemplated by a force majeure clause within the contract.

The criteria for succeeding in a frustration argument are outlined in *Wilkie v. Jeong*, 2017 BCSC 2131, which holds that a contract is frustrated if:

1. a qualifying supervening event (one for which the contract makes no provision, which is not the fault of either party, which was not self-induced, and which was not foreseeable) occurs, which

2. causes a radical change in the nature of a fundamental contractual obligation.

Determining the fundamental nature or purpose of a contract is crucial to determining if a given situation meets the criteria in part two of the test. In some cases, the nature and purpose of the contract is simple. For instance, in *Wilkie* the supervening event (the imposition of the Foreign Buyer's Tax), imposed a significant additional financial burden on a purchaser of land, raising her tax burden on closing from $58,040 to $458,240. The court found that, despite the steep tax increase, the

fundamental purpose of the contract, which was to transfer title of the property in exchange for the purchase price, was entirely unaffected. Explaining its decision, the court noted that while lack of money may affect a party's *ability* to perform a contractual obligation, it does not normally alter the *nature or purpose* of the contractual obligation itself.

On the other hand, the purpose of a contract may be situation specific and informed by the circumstances of the deal. In *KBK No. 138 Ventures Ltd. v. Canada Safeway Limited*, 2000 BCCA 295, prior to the completion of a purchase and sale, the subject lands were rezoned and the floor space ratio was changed from 3.22 to 0.3. Instead of finding that the purpose of the contract was simply the sale and purchase of the subject land, the court concluded, aided by contract terms and other circumstances surrounding the transaction, that the buyer was purchasing the land to develop it as prime commercial and residential property. As the change in floor space ratio rendered the land essentially useless for commercial and residential use, the contract was found to be frustrated.

As demonstrated by these two cases, determining if a contract is frustrated requires a thorough analysis of the contract itself, the circumstances which have resulted in a party seeking relief from obligations, and the relevant case law.

Jordan Adam

Recent Lawful Non-Conforming Use Cases

One of the murkiest areas of local government law, for professional land use planners and laypersons alike, is the law pertaining to lawful non-conforming uses. The basic idea is simple: zoning laws are not retroactive, so land and buildings that are 'lawfully used' may continue to be used despite the enactment of a new zoning law that makes that category of land use unlawful. In British Columbia, the basic idea is fleshed out in what is now Division 14 of Part 14 of the Local Government Act. *Most of this Division is concerned with limits on the basic principle, dealing with the effect of discontinuance of the use, change in scale or extent of the use, structural changes in buildings, and the consequences of building damage. A few sections enlarge the scope of the protection from new bylaws, deeming buildings 'lawfully under construction' to be already in use and therefore lawfully non-conforming, and permitting the extension of non-conforming uses throughout a building in which a lawful non-conforming use had been established. Lawful non-conformity has also been addressed in relation to the new rental tenure zoning power: lawful non-conforming forms of tenure in multiple-family*

residential buildings may continue. From the bylaw administration perspective, a lawful non-conforming use has status similar to a lawful conforming use in that business licences must be issued for non-conforming commercial uses, and building permits have to be issued as well as long as they are not authorizing new construction or (without a board of variance order based on hardship) structural alterations or additions to existing buildings intended to accommodate the non-conforming use.

Because lawful non-conforming status can be a complete defence in zoning bylaw enforcement, it's raised in many such proceedings, in some cases seeking to take advantage of the tendency of older zoning bylaws to be less particular in distinguishing between permitted and prohibited land use, or at least less well-drafted in doing so. Judges have thus had many opportunities to interpret Division 14 and its predecessors, and to fill in perceived gaps in the legislation to achieve what's thought to have been the Legislature's intention in providing this form of protection for vested property rights. One of the more vexing products of the resulting jurisprudence is the 'commitment to use' principle, which extends this limited form of immunity from land use regulations to uses that weren't actually operating when they became unlawful, but to which an owner had an 'irrevocable commitment'. Invoking the principle of fairness that is presumed to underlie the enactment of Division 14, courts opened the door to new arguments in cases where there is neither an apparent use nor a building 'lawfully under construction' but an owner is still asserting vested rights. Lacking any foundation in the actual wording of Division 14, this principle has been of concern to planners and local government lawyers because it seems too elastic and unpredictable.

Perhaps it's best to start with an aspect of non-conforming use law that is reasonably clear: 'lawfully used' means used lawfully in relation to the zoning scheme prior to its amendment. That the use may lack lawfulness in relation to other applicable regulatory schemes is immaterial. Thus, the lack of a business licence doesn't disqualify an operator from claiming lawful non-conforming status for a commercial use that requires such a licence. Neither does the fact that the use in question contravenes a federal or provincial law. The B.C. Supreme Court recently held for the first time that contravention of a s. 219 covenant disentitles an owner from claiming lawful non-conforming status (*1114829 B.C. Ltd. v. Whistler (Resort Municipality)* 2019 BCSC 984). To the extent that local governments tend to use zoning regulations and s. 219 covenants as complementary land use management tools and both tools may deal with the 'use of land', this conclusion seems sound in principle, but it should be noted that, in the Whistler decision noted below, the owner's failure to meet the evidentiary burden of proving the existence of the use in question on the relevant date, whether it was lawful or not, made it unnecessary for the Court of Appeal to address the covenant issue.

A lawful non-conforming use argument was in play in *Sierra Club of Canada v. Comox Valley (Regional District)* 2010 BCSC 74 in relation to the Regional District's issuance of a development permit concurrently with the enactment of zoning regulations that prohibited the gas station use for which the permit authorized the construction of a building. The B.C. Supreme Court held that the development permit had been properly issued but also that the permit holder had, based on its extensive planning work for the site, established a commitment to use the land, notwithstanding that no site alteration had occurred (such work not being allowed before the development permit was issued). The Court of Appeal dismissed the Sierra Club's appeal on the validity of the development permit and found it unnecessary

to deal with the non-conforming use argument, but the Court of Appeal indicated that it wouldn't likely have agreed with the Supreme Court on that issue, noting that no precedent had been cited where a non-conforming use was established in the absence of physical work on the site (2010 BCCA 343). This observation was critical to the Supreme Court's subsequent decision in *Zongshen (Canada) Environtech Ltd. v. Bowen Island (Municipality)*, 2016 BCSC 2058, where the owner had similarly prepared detailed plans and studies for a dock but had undertaken no actual site work. The Supreme Court in *Zongshen* noted the Court of Appeal's statement in *Sierra Club* and remarked that "the weight of authority clearly requires some degree of physical work on the subject property before the 'commitment to use' doctrine can be successfully invoked".

In addition to usefully addressing what it means for an issued development permit to bind the local government, this case seems to confine the 'commitment to use' possibility to cases where site alteration can be carried out without permits.

A more recent 'commitment to use' decision that will likely give comfort to many planning departments is *G.S.R. Capital Group Inc. v. White Rock City* 2020 BCSC 489, in which the City had exercised its building permit withholding powers while reversing the effect of a spot rezoning for a large multiple-unit residential building following a civic election. The developer was not able to submit a complete building permit application inside the 7-day window following initiation of the new zoning amendment. Under the original rezoning the developer had obtained a development permit, which according to s. 501(3) of the *Local Government Act* is binding on the permit holder and the local government, and had spent hundreds of thousands of dollars advancing the project to the building permit stage. Nonetheless, the Supreme Court considered that to succeed in its 'commitment to use' argument, the owner had to show actual construction work on the site. In addition to usefully addressing what it means for an issued development permit to bind the local government, this case seems to confine the 'commitment to use' possibility to cases where site alteration can be carried out without permits.

Finally, a 'commitment to use' argument was recently advanced in *1120732 B.C. Ltd. v. Whistler* 2020 BCCA 101, which dealt with the enactment of zoning regulations that distinguished in the operation of short-term vacation rental uses of strata hotel units between STVR uses managed as part of a rental pool for the entire building and STVR uses managed by individual unit owners or groups of owners. In these circumstances no physical alteration of the unit is required to undertake a different form of the STVR use, much less an alteration that requires a development or building permit. While historically the operation of the building in question had generally been consistent with the new regulations, certain owners claimed to have advertised their units for rental outside the rental pool on the day before the bylaw amendment was adopted, and thereby have established a commitment to the now prohibited form of the STVR use. The Court of Appeal held that the owners' evidence was insufficient to establish that they had an unequivocal commitment to use the units in a manner that was no longer allowed by the zoning bylaw.

Meanwhile, lawful non-conforming use arguments have continued to be made on the basis of the actual statutory language in Division 14. In *Newton v. Victoria City* 2018 BCSC 728, the City amended zoning regulations for

multiple-unit residential buildings to prohibit short-term vacation rental use. In regard to a building that was lawfully under construction when the bylaw amendment was enacted, the owner argued, successfully, that STVR uses could be lawfully undertaken in the residential units because the building permit application had specified (in addition to describing the proposed building as a 'residential complex') the current zoning of the site, which at the time permitted STVR uses. (In a comment that we don't recommend to local governments as legal advice, the Court stated that if the City had intended to rule out STVR use of the building, it could have stipulated in the building permit that no such use was being authorized.) This decision goes one better (for property owners) than the 'commitment to use' principle by making it unnecessary for the operator to have formed an intention to establish the use; it's sufficient that the owner *could have* formed such an intention to the extent that the use was permitted prior to bylaw amendment. Since there is no compelling reason to require building permit applicants to state the zoning of their property on their application form, since staff will presumably be confirming the zoning information anyway, the easiest work-around for this decision is to permit only the use actually proposed for the building to be specified on the application; this is the use for which occupancy requirements under the Building Code must be ascertained.

A case law review on any land use regulation topic cannot, in 2020, fail to deal with cannabis. In *West Kelowna (City) v. Black Crow Herbals Association* 2019 BCSC 1082, a licensing bylaw enforcement case, the City's position was that cannabis retail use was not within the scope of a permitted 'retail sales' use category prior to zoning bylaw amendments that winkled out cannabis retail from the general retail sales category, permitting it in only a few locations. Thus, Black Crow's premises were not 'lawfully used' for cannabis retail when the bylaw was amended and they didn't qualify for a business licence. The City argued that 'retail sales' could not have been interpreted as including activities that were unlawful under federal drug laws at the time the operator established the use, and the Court agreed, drawing a parallel (as regards land use impact) with the sale of stolen goods at retail in a 'fencing' operation. While this argument seems, on the surface, to depart from the previous case law indicating that 'lawfully used' in Division 14 of Part 14 of the *Local Government Act* means lawful in relation to land use regulations, a close reading of the decision suggests that the reference to federal drug laws was simply part of the analysis of the scope of the retail sales use category permitted by the City's zoning bylaw.

In law schools, students are introduced to the notion of the law as a 'seamless web' of enduring principles that is revealed, strand by strand, in the decisions of common law judges. Under this theory, we have no reason to be surprised by the results in any of these cases; rather, we're meant to simply go forward with a more complete understanding of the law, better-equipped to anticipate how novel factual situations will play out and advise our clients accordingly. For the time being, then, it seems relatively safe to consider that in B.C. land use law 'lawfully used' means lawfully as regards land use regulations, and 'commitment to use' requires some sort of physical alteration of the site in question, including where such alteration cannot occur lawfully without a development permit, building permit, or both. In circumstances where establishing a use in the face of an oncoming bylaw amendment may entail simply carrying it out in an existing building or perhaps on land outside a building, the law on 'commitment to use' requires the actual operation of the use or at least some alteration of the land for it in addition to any preliminary activities such as planning and advertising.

Until a court instructs us otherwise.

Bill Buholzer

Caution Employers, Danger Ahead: Temporary Layoffs of Exempt Staff during the Time of COVID-19

The COVID-19 pandemic has disrupted the normal operation of employers around the world. To meet the requirements of social distancing, many businesses and local government facilities have been temporarily shut down. As most collective agreements contain procedures for the temporary layoff of unionized staff, such layoffs are relatively straightforward. The same cannot be said in respect of the layoff of exempt, non-union staff.

Local governments may be considering laying off their exempt staff temporarily, with a genuine intention of recalling the employees back to work once the COVID-19 crisis is over. However, it is questionable at law currently whether a local government can do so without fundamentally breaching its employment contracts, thereby engaging the common law principle of constructive dismissal and potentially the requirement of reasonable notice of dismissal. Temporary layoffs also remain unavailable to employers under the *Employment Standards Act*, RSBC 1996, c. 113 (the *"ESA"* or the *"Act"*) except in limited circumstances.

Constructive Dismissal

Constructive dismissal occurs when an employer unilaterally breaches an essential term of an employment contract. If a court finds, in a wrongful dismissal action, that the employer constructively dismissed an employee, the court will generally award the employee damages of pay in lieu of notice of dismissal. If a written employment contract contains a valid termination clause, damages will generally be awarded pursuant to that clause. In the absence of such a clause, the damages awarded will be based on the principles of reasonable notice of dismissal, taking into account such factors as the character of the employee's position, their length of service, their age, and their efforts to find similar replacement employment.

In pre-COVID-19 times, the Courts had generally held that if an employment contract does not expressly or impliedly permit the temporary layoff of the employee, and the employee does not agree to a temporary layoff, the layoff constitutes constructive dismissal. The BC Supreme Court has stated the following in that regard.

> *If a court finds, in a wrongful dismissal action, that the employer constructively dismissed an employee, the court will generally award the employee damages of pay in lieu of notice of dismissal.*

... There is nothing more fundamental to a contract of employment than that the employee be employed and that he be paid for his services. Doman unilaterally changed those

> fundamental terms. One can appreciate the need for employers to cut down on management or supervisory staff during economic downturns but the employee, subject to contractual arrangements, is still entitled to reasonable notice or payment in lieu of notice.
>
> *Archibald v. Doman-Marpole Transport Ltd.*, [1983] B.C.J. No. 1284, at para. 4 (S.C.)

It is not possible to know whether, after the current COVID-19 crisis is over, the courts will amend the principles of constructive dismissal to permit the temporary layoffs that occurred due to COVID-19, or those that may occur in future similar emergency situations outside of an employer's control. However, it is also important to keep in mind that employees must quit in order to make a constructive dismissal claim, which may reduce the number of such claims.

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Employment Standards

While the term "temporary layoff" is defined in Section 1 of the *ESA*, and appears in various sections throughout the *Act*, the BC Courts and the Employment Standards Branch have held that the *ESA* does not grant employers the right to temporarily lay off employees. Rather they have interpreted the *Act* as simply permitting the temporary lay off non-union employees, if the right already exists expressly or impliedly in the employment contract, or if the employee agrees to the temporary layoff (*Hooge v. Gillwood Remanufacturing Inc.*, 2014 BCSC 11 (CanLII)). Recent changes made by the Provincial Government to the meaning of "temporary layoff" in respect of a layoff due to COVID-19 do not alter that interpretation.

The *ESA* does not contain any provisions expressly stating that an employer has the right to temporarily lay off an employee. Section 1 of the ESA defines "temporary layoff" to mean, in the case of an employee who does not have a right to recall under a collective agreement, a layoff of up to 13 weeks in any period of 20 consecutive weeks. The term "termination of employment" under the *Act* includes a "temporary layoff". For the purposes of determining the date of termination, and the amount of an employer's liability for length of service on termination of employment under Section 63 of the *ESA*, Section 63(5) of the *Act* provides that an employee will be deemed to have been terminated on the first day of a layoff that exceeds the permitted length of a temporary layoff. An employer and its employees can, however, apply to the Director of Employment Standards for a variance of the standards regarding the length of a "temporary layoff".

On May 4, 2020, the Provincial Government by Order in Council amended the *Employment Standards Regulation*, BC Reg. 369/95 (the *"Regulation"*) to add Section 45.01. According to that new section, if an employee, that does not have a right of recall under a collective agreement, is laid off and COVID-19 is a cause of all or part of the layoff, the definition of

"temporary layoff" in Section 1 of the Act does not apply. Instead, the layoff can be extended to up to 16 weeks in any period of 20 consecutive weeks, before the liability for length of service requirements of Section 63 of the Act may be triggered.

The amendment to the *Regulation* in respect of the temporary layoff of employees due to COVID-19 did not include any provisions granting employers the right to temporarily layoff employees because of the COVID-19 crisis. As a result, temporary layoffs of non-union employees due to COVID-19 can still only be made if the employment contract expressly or impliedly permits temporary layoffs, or the employee agrees to a temporary layoff.

The Provincial Government's news release regarding the changes to the *Regulation* state that the changes were intended to align BC's temporary layoff provisions with the 16-week federal Canada Emergency Response Benefit period. The news release also indicates that the new COVID-19 emergency temporary layoff provisions are not permanent changes to the legislation and will be repealed when they are no longer needed.

We note further that if a temporary layoff due to COVID-19 exceeds the maximum 16-week period, it may still be possible for an employer to rely on section 65(1)(d) of the *ESA* to avoid the application of section 63. Section 65(1)(d) provides that sections 63 and 64 of the *Act* do not apply to an employee employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, an action under the *Bank Act (Canada)*, or a proceeding under an insolvency act. The Provincial Government's Guide to the Employment Standards Act & Regulation states the following regarding the application of section 65(1)(d) in relation to the COVID-19 crisis:

> If a business closure or staffing reduction is directly related to COVID-19 and there is no way for employees to perform work in a different way (for example, working from home) the exception may apply to exclude employees from receiving compensation for length of service and/or group termination pay.
>
> This exception is not automatic in all situations during the pandemic. If an employer terminates an employee for reasons that are not directly related to COVID-19 or if the employee's work could still be done (perhaps in a different way, such as working from home) the exception would not apply. Decisions on whether this exception applies are made by the Director on a case-by-case basis.

Conclusion

If a local government decides that it is necessary to take the risk and issue temporary layoffs to exempt staff because of the COVID-19 crisis, we recommend that the local government carefully document the reasons for the layoff, and clearly advise the employee that they will be returned to their employment as soon as possible on the same employment terms. We also strongly recommend that local governments seek legal advice before taking such actions.

Michelle Blendell

Bylaw Offence Notice Adjudication – Reasonable Expectations for Reasons

With the 2003 enactment of the Local Government Bylaw Notice Enforcement Act *(the "Act"), local governments were given another enforcement tool allowing for bylaw enforcement disputes to be decided by adjudicators instead of Provincial Court Judges or Judicial Justices. The adjudicative process under the Act was intended to create a process described as "less complex and expensive that better serves the needs of municipalities and potential offenders." Proof was no longer to the criminal standard of beyond a reasonable doubt; adjudicators would determine whether an offence occurred on the civil standard of proof on a balance of probabilities. Instead of the formality of normal criminal court procedures, adjudicators were required to simply provide both parties with an opportunity to be heard in a process where the technical and legal rules of evidence did not apply and an adjudicator could make a determination on written materials alone.*

Section 22 of the Act states that an adjudicator's determination is final and conclusive and not open to appeal. However, a decision may be reviewed on a question of law or jurisdiction but will only be overturned if the adjudicator's determination is found to be unreasonable. An adjudicator's reasons may well provide a basis for a judicial review of the decision of a bylaw adjudicator as being unreasonable.

The first of three 2018 bylaw adjudication reviews involving the Township of Langley provide some insight. The failure of an adjudicator to consider an issue at the core of the dispute was cited by the judge in *Leaf v. Langley* as the basis for overturning an adjudication determination. The disputant operated a kennel and was charged under the Animal Control Bylaw with permitting disturbing noise from the dogs under his control. Regulatory offences (including municipal bylaw offences) are a type of offence which does not require the prosecution to prove intent. The offence is considered complete if the prohibited act or conduct is proved to have taken place. However, a person charged with a regulatory offence may avoid conviction if they can show they took all reasonable steps, or were duly diligent, to avoid the commission of the offence.

However, a person charged with a regulatory offence may avoid conviction if they can show they took all reasonable steps, or were duly diligent, to avoid the commission of the offence.

The adjudicator in the *Leaf* case correctly dismissed Mr. Leaf's challenge to certain provisions of the Animal Control Bylaw because

s. 16 of the Act expressly provides that a challenge to the validity of a bylaw is outside the jurisdiction of an adjudicator. However, Mr. Leaf listed a number of steps he had taken to ensure that the bylaw was not contravened. Without describing it as such, in substance his argument was that he had been duly diligent. The adjudicator described the dispute as being based on a question of law that she "was not allowed to rule on". However, so long as the legal question did not amount to a challenge to the validity of the bylaw, the adjudicator had the jurisdiction to decide the question, which in the context of this case translated into an obligation to consider the due diligence defence as it was an issue at the core of the dispute. The judge found the adjudicator's decision was unreasonable in failing to address Leaf's due diligence defence. The case was remitted back to the adjudicator to determine the due diligence of Mr. Leaf.

While the bylaw notice system is intended to be a more efficient and less costly enforcement option than Provincial Court prosecution, it still must meet certain minimal legal standards. The due diligence defence is a central concept in regulatory enforcement but may not be familiar to some adjudicators, many of whom do not have legal training. This adds to the bylaw officer's responsibility in presenting a case to an adjudicator to ensure that, where the case requires, to remind the adjudicator of the need not only to address the direction in s. 21 (2) of the Act to determine whether the contravention alleged in the bylaw notice occurred but also to specifically consider whether a disputant has or has not made out a defence of due diligence.

Greater scrutiny of adjudicator reasons by reviewing courts can be expected following the Supreme Court of Canada's December 2019 decision in *Vavilov*. In *Vavilov* the Supreme Court provided guidance on how to conduct reasonableness review in practice. It stated that a principled approach to reasonableness review requires putting the decision-maker's reasons first. A reviewing court looks not only to the outcome but also to the reasoning process; a reasonable decision in based on internally coherent reasoning which is both rational and logical. In *Leaf v. Langley* the adjudicator's reasons were found to be unreasonable, due to a clearly expressed legal error in stating the due diligence defence was beyond the adjudicator's jurisdiction. The Act does not require that adjudicators provide reasons and in the 2018 decisions involving Langley the judges recognized that adjudicators may state their conclusions with an "economy" of reasons. However, the same degree of deference shown by the judge in *Romegioli v. Langley* to the adjudicator's reasons should not be expected following *Vavilov*.

Greater scrutiny of adjudicator reasons by reviewing courts can be expected following the Supreme Court of Canada's December 2019 decision in Vavilov.

For example, in *Romegioli* the reasons recorded by the adjudicator on the Determination form referred to the bylaw officer's allegations and concluded shortly thereafter with the statement that the evidence demonstrated that the bylaw contraventions occurred. Both the bylaw officer and Romegioli filed conflicting affidavits regarding the adjudicator's oral reasons. The court dismissed Romegioli's judicial review petition, noting that the court's task was to decide whether the outcome is supported by the law and evidence, concluding that the adjudicator's reasons need not address every argument

advanced by a party (the primary argument advanced by Romegioli was that merely being the covenantor on a lease to a company operating a cannabis dispensary he could not be legally responsible for bylaw contraventions). The judge followed existing case law guidance that a reviewing court pays attention to the reasons offered "or which could be offered [but weren't] in support of a decision." There was certainly evidence before the adjudicator from which it could be concluded that, despite Mr. Romegioli's submission he was no more than a covenantor on the lease, his presence on the premises and alleged representations to the officers that he was in charge provided a basis to find he had contravened the bylaw. But again, the adjudicator's recorded decision simply referred to the bylaw officer's allegations, followed by the finding the contraventions occurred; there was no reasoning to speak of, only the prospect of reasons that might have been provided to support the adjudicator's conclusion. However, the Supreme Court in *Vavilov* has instructed reviewing courts that they must not fill in fundamental gaps in reasoning; if the decision-maker's rationale fails to address an essential element of the decision, it fails to meet the standard of justification, transparency and intelligibility and must be set aside as unreasonable.

Post-*Vavilov* the expectations for an adjudicator's reasons have been raised. As for the implications for bylaw officers, they can of course continue to proceed as they have and hope that the adjudicator is conscientious and endeavours to articulate reasons which provide logical support for their conclusion. But bylaw officers should give consideration (where the issue or issues are known in advance of the adjudication) to assisting the adjudicator by providing a written outline that summarizes the evidence and the legal basis by which the adjudicator can conclude the contravention took place. That may not be necessary where the dispute relates to, for example, expired meter parking but in the less routine cases where more is at stake (*Romegioli* involved 500 bylaw notices totalling $270,000 in fines and costs), but providing an outline an adjudicator can use in providing reasons should put the local government in a better position to defend any judicial review of an adjudicator's determination.

Barry Williamson

Court Grants City Tax Exemption for Land Purchased by Agreement for Sale

For those avid readers of the Young, Anderson newsletter seeking a reprieve from the constant stream of COVID-19 related news, here is an article on another topic that is as relevant or as interesting – the tax exemption provisions of the Community Charter*. Buckle up.*

In the recent decision *Coquitlam (City) v. British Columbia (Assessor of Area #10 – North Fraser Region)*, 2020 BCSC 440 ("Coquitlam"), Mr. Justice Skolrood considered whether the City should receive a tax exemption under s. 220(1)(b) of the *Community Charter* for lands purchased pursuant to an agreement for sale ("AFS"). Under an AFS, as distinct from the much more common agreement for *purchase* and sale, the purchaser pays the purchase price in installments, with possession and rights

of use of the lands usually transferred at the front end of the agreement. The vendor's name, however, remains on title. An AFS is registered in the Land Title Office and remains a charge on the vendor's title, which can only be discharged via foreclosure proceeding. In *Coquitlam*, the City was in the process of developing the lands acquired pursuant to an AFS into a public park. While the vendor's name remained on title, the lands were in the City's total control.

The Assessor took the position that the exemption at s. 220(1)(b) did not apply, as the lands were not "vested in or held by" the City:

> 220 (1) Unless otherwise provided in this Act or the *Local Government Act*, the following property is exempt from taxation to the extent indicated:
>
> ...
>
> (b) land, improvements or both vested in or held by
> (i) the municipality, or
>
> (ii) the municipality jointly with another municipality or a regional district

The Assessor argued mainly that the Court was bound by prior legal precedents, including the hoary old case of *City of Vancouver v. Attorney-General of Canada*, [1944] S.C.R. 23 and a more recent decision of the Court in *City of White Rock v. Assessor of Area #14-Surrey/White Rock*, 2006 BCSC 1143. On the basis of those two cases, the Assessor argued that "vested in or held by" was a term of art that only referred to a form of ownership akin to fee simple.

One of the peculiarities of this case was the standard of review that the Court applied. Coming by way of a stated case (statutory appeal clause) under the *Assessment Act*, had the Court heard this case more than two months earlier, it would have owed deference to the Property Assessment Appeal Board. Had the interpretation of s. 220(1)(b) employed by the Property Assessment Appeal Board been within the range of reasonable outcomes, the Court would have been bound to uphold it. However, after the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, which designated statutory appeal clauses as attracting a standard of correctness, the Court in *Coquitlam* was free to perform its own statutory interpretation exercise and choose its own interpretation of the impugned provision.

The Court engaged in an in-depth treatment of both the *Vancouver* and *White Rock* cases mentioned above, ultimately distinguishing both. Also of note was the fact that the Court referenced both ss. 3 and 4 of the *Community Charter*, which recognize that municipal powers must be interpreted broadly and that municipalities are to be given "the flexibility to determine the public interest of their communities and to respond to the changing circumstances of their communities". The key passage though, was the following statement interpreting the plain wording of s. 220(1)(b):

> The interpretation adopted by the Board also ignores the use of the word "or" in the phrase "vested in or held by" a municipality. The "or" is disjunctive and intended to capture two different categories of property, i.e. property that is "vested in" or property that is "held by" a municipality. Both "vested" and "held" connote an

> element of control over property by the municipality and again reflect the fact that a municipality may exercise such control through different legal mechanisms. (para 53)

Here the City was able to come to court with favourable facts; it showed that it was fully in control of the lands after the execution of the AFS. Further, the City certainly benefitted from a common sense interpretation of the plain meaning of the applicable exemption provision. How could land that is already being developed as a public park, acquired pursuant to a legal vehicle removable only by foreclosure, not be "held" by the City?

How could land that is already being developed as a public park, acquired pursuant to a legal vehicle removable only by foreclosure, not be "held" by the City?

While replete with technical legal arguments, this case has some very real effects on local governments purchasing land, recognizing an AFS as a valid method through which local governments can purchase that land and retain a tax exemption. Local governments seeking to acquire land should carefully consider the legal effects of the various methods of acquisition and their respective tax consequences. For example, land leased by local governments is likely still taxable pursuant to both the *Vancouver* and *White Rock* cases.

The Assessor has sought leave to appeal this decision.

Nick Falzon

Keeping Up with Lobby Laws – From Registration to Transparency

Lobbying laws support transparency and accountability in the lobbying of Provincial public office holders by imposing a requirement to register in an online public registry, so members of the public can learn who is attempting to influence government decisions, and on which issues. In British Columbia, the lobbying laws changed once again on May 4, 2020, when the Lobbyist Transparency Act *(LTA) replaced the* Lobbyist Registration Act, *and a new BC Lobbyists Registry replaced the former registry.*

Key Elements of Lobbying

There are four key elements to lobbying – to lobby means to (1) communicate (2) for payment (3) with a public office holder (4) in an attempt to influence: the introduction, amendment, passage or defeat of any legislation; the development,

establishment, amendment or termination of any program, policy or decision; or the awarding, amendment or termination of any contract, grant or financial benefit, outside established procedures.

A "public office holder" is defined to include a number of individuals in addition to elected officials, such as a member of the Legislative Assembly, their staff, and officers or employees of the government of British Columbia, among others. Since local governments do not fall within the definition of public office holders, a person who lobbies a local government is not required to register their activity.

Lobbying on Behalf of Local Governments

There are two types of lobbyists under the LTA – an "in-house lobbyist" is an employee, officer or director of an organization who receives payment for performance of his or her functions, and a "consultant lobbyist" is an individual who undertakes to lobby on behalf of a client for payment. Members and staff of local governments are exempted from the LTA by section 2, so are not required to register, but any individuals hired by a local government to lobby on its behalf, including lawyers, are consultant lobbyists and will be subject to the LTA.

Registration & Monthly Returns

Consultant lobbyists were previously required to register within 10 days of entering into an agreement to lobby on behalf of a client, regardless of when the lobbying activities took place. Now, the LTA requires consultant lobbyists to complete and submit a registration within 10 days of actually beginning to lobby. When registering, a consultant lobbyist must include information about the lobbying target, the intended outcome of each lobbying activity, and the client, including details about funding received or requested by the client from any level of government in the preceding 12-month period, such as government grants or non-repayable contributions or funding arrangements.

Additionally, the LTA now requires monthly returns for each month where lobbying activity has occurred, which must be filed by the 15th day of every month after the registration return is filed, and will also be available online and searchable by the public. The monthly return requirement includes a "lobbying activity report" that must be individually filed for each lobbying activity (phone calls, emails, letters and meetings) that took place in the previous month with "senior public office holders", a subset of Provincial Government public office holders that includes the Premier, Ministers, MLAs and their staff, among others.

Enforcement

The online registry is maintained by the Office of the Registrar of Lobbyists, an independent officer of the Legislature, appointed by a unanimous motion of the Legislative Assembly. The LTA designates the Information and Privacy Commissioner for BC as the Registrar of Lobbyists, who has a responsibility to report non-compliance, including failure to register, late registration, or providing inaccurate information. If a lobbyist is found to be non-compliant, the Registrar may issue an administrative monetary penalty of up to $25,000.

Amy O'Connor

Uber's Ridesharing App(lication for an Injunction) and *Quia Timet* Injunctions

In Uber Canada Inc. v Surrey (City), *2020 BCSC 173, a recent British Columbia Supreme Court decision, the ridesharing platform Uber was granted a* quia timet *injunction preventing the City of Surrey from issuing tickets against Uber drivers who did not have a business licence. Uber filed its application for an injunction before any ticket had been issued. By the time of the hearing of Uber's application, Surrey Bylaw officers had issued dozens of $500 tickets to Uber drivers. Surrey had also said that it would not issue business licences to drivers even if they applied.*

The Supreme Court issued the injunction after finding that:

(a) Uber would suffer irreparable harm in the form of unquantifiable losses if the injunction was not granted;
(b) There was serious question as to whether the Uber had a right that would be breached by the anticipated ticketing activity by Surrey given that the *Passenger Transportation Act* immunized ridesharing services from certain municipal regulations; and
(c) The balance of convenience favoured the granting of the injunction, including because of the public interest reflected by the *Passenger Transportation Act*.

The *Uber* case provides an example of a *quia timet*, or "anticipatory", injunction that seeks to prevent future harm that is about to occur. Although in *Uber* it was a local government that was resisting a claim for an injunction, local governments may consider seeking a *quia timet i*njunction when there is an expectation that a contravention of a statute or bylaw is imminent.

A party seeking a *quia timet* injunction is required to meet the three-part test for an interlocutory injunction.

First, there is a preliminary assessment of whether there is a high probability that if an injunction is not granted, the anticipated activity will occur imminently or in the near future and will harm the plaintiff.

Second, the plaintiff must show that, on preliminary assessment, there is a right that would be breached by the activity.

Third, the court assesses whether the balance of convenience, weighing the likelihood of irreparable harm to the plaintiff, favours granting the injunction. Several factors are considered by the courts. However, these are not exhaustive. The factors are as follow:

- the adequacy of damages as a remedy for the applicant plaintiff if the injunction is not granted and for the respondent defendant if an injunction is granted;
- the likelihood that damages, if awarded, will be paid;
- whether there is a need to preserve contested property;

- other factors affecting whether harm from granting or refusal of the injunction would be irreparable;
- which of the parties has acted to alter the balance of their relationship and so affect the *status quo*;
- the strength of the plaintiff's case;
- any factors affecting the public interest; and
- any other factors affecting the balance of justice and convenience.

The court also does an in-depth analysis of which of the parties would suffer more significant harm. The plaintiff must show irreparable harm to obtain the injunction; it is usually critical that the plaintiff applies for an injunction quickly after learning of the defendant's conduct.

Prince Arora

Bylaw Contraventions Can Now Come at a Heftier Price

As of March 5, 2020, municipalities have been able to impose a significantly higher maximum fine amount for an offence prosecuted by long form under the Offence Act*. Amendments to section 263(b) of the* Community Charter *and section 333 of the* Vancouver Charter *have increased the maximum fine amount from $10,000 to $50,000 that municipalities may impose for bylaw contraventions. This increase also applies to continuing offences such that a person can be fined every day that they are found to be in contravention of a bylaw. Maximum fine amounts for offences prosecuted by municipal ticket informations or bylaw notices remain the same.*

The City of Vancouver appears to have been the first municipality to exercise the power to set a higher maximum fine. On March 19, 2020, in the face of the emerging COVID-19 pandemic, Vancouver City Council voted in favour of amending its state of emergency bylaw adopted under the *Vancouver Charter* to allow City staff to enforce state-of-emergency orders. Pursuant to this bylaw, the City of Vancouver ordered the shut down of all dine-in options at local restaurants. Any business in breach of this order may be fined up to $50,000.

Bylaw prosecutors must seek a fine which is proportional to the contravention, taking into consideration the municipality's interest in deterring and denouncing the offender and the public from committing that offence in the future. The presiding judge will ultimately decide the appropriate fine amount. Since the new maximum is substantially higher, bylaw prosecutors will not have precedent to rely on when seeking a fine amount which has not been previously sought. This may make it more difficult to convince the Court that a fine significantly above $10,000 is appropriate.

Steven Shergill

Miscellaneous Statutes: Did You Know?

Did you know that under section 2 of the BC Firearm Act*, the chief provincial firearms officer may issue a permit authorizing a person to establish and maintain an indoor shooting range despite a bylaw adopted under the* Community Charter *prohibiting the discharge of firearms? The permit may be subject to conditions, including restrictions on the types of firearms and projectiles that may be discharged. Note that the definition of "firearm" under the* Firearm Act *includes any gun that uses compressed air or gas, as well as explosives, as a propellant.*

Joe Scafe

Look for Your Lawyers

Reece Harding will be speaking at the Canadian Bar Associate webinar on the "Local Power to the People: Municipal Jurisdiction in Leading Change" on May 12, 2020.

Alyssa Bradley and **Guy Patterson** will be presenting a webinar called "Legal Update: Local Government, Legal Obligations and Public Engagement in the Age of COVID–19" to PIBC on May 27.

Kathleen Higgins and **Inder Biring** will be presenting a session on "Community Amenity Contributions: Community Planning & Development" at the GFOABC virtual Annual Conference on June 3.

Audio presentations by **Elizabeth Anderson** and **Michael Moll** will be part of the Justice Institute of BC's new online Bylaw Compliance, Enforcement & Investigative Skills 1 course.

In case you missed them the first time, or want to watch again, LGMA has made a number of recent LGMA webinars available for rebroadcast including two presentations by **Carolyn MacEachern** on Freedom of Information and Protection of Privacy (General and Advanced) and a presentation by **David Loukidelis** and **Ethan Plato** on FOI Advancements.

STAY CONNECTED

COVID-19 – COVID-19 LEGAL UPDATES Go to **www.younganderson.ca** to access all the latest information that Young, Anderson has posted in relation to COVID-19.

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