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Delegations to Council – A *Charter* Right?

For many civic election candidates and electors, the main event in an election campaign is the all-candidates meeting or forum, at which members of the public are invited to pose questions on civic matters and candidates are expected (and often eager) to provide fulsome answers. For some candidates, a preferred forum is an 'open house' at which the candidate makes a speech and fields questions, perhaps providing refreshments (cinnamon buns and coffee are apparently popular) to boost attendance. These events are often portrayed as hallmarks of electoral democracy.

Small wonder, then, that once the campaign is over and the successful candidates take office, electors may show up at city hall with expectations that the accountability that was on display scant weeks earlier remains in operation, particularly when the local government has provided in its procedure bylaw for "delegations" to be heard at council meetings. If a candidate can be grilled in the pre-election period, surely they can be grilled after the election, especially since they may now have actual decisions to make, and to answer for. But in a recent Ontario Superior Court of Justice decision, a frustrated elector has learned that local elected officials aren't obliged to answer questions in such a forum. In law, local electors aren't even entitled to pose the questions, except to the extent that a local bylaw might permit them to do so. The decision provides an interesting refresher for elected officials, civic staff and citizens on the transformation that occurs when a candidate for civic election becomes a member of a local legislative body.

The Court had to determine whether Mann's

Charter right to freedom of expression

included a right to ask questions

in a council meeting

The facts in *Mann v. Town of Saugeen Shores*, 2023 ONSC 1025 were not unusual, except perhaps in regard to the persistence of the elector. The Town had embarked on an RFP process to refurbish certain properties at Port Elgin, and Mann had numerous issues with the process. He made 24 delegation requests pursuant to the

Town's procedure bylaw, of which 11 were denied. (On those occasions he made written representations directly to Council members anyway.) When he was permitted to make submissions at Council meetings, questions he posed to members of Council went unanswered. Mann petitioned the Court for declarations of invalidity respecting portions of the procedure bylaw. (He was a member of the legal profession who represented himself in the court proceedings.)

The key basis for Mann's application was his right to freedom of expression, guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The *Charter* is, of course, applicable to local legislation like a municipal council procedure bylaw, but the Court had to determine whether Mann's *Charter* right to freedom of expression included a right to ask questions in a council meeting and, as he claimed, a right to receive a response. If it did, then the question would be whether the limitations on those rights prescribed in the procedure bylaw were, as permitted by s. 1 of the *Charter*, demonstrably justified and reasonable limits.

On the first issue, Mann advanced his *Charter* right to freedom of expression as a right to "meaningful communication", including a right to make submissions in open council meetings on any matters he chose as well as a right to receive answers to his questions. The Court had little difficulty determining that s. 2(b) of the *Charter of Rights and Freedoms* affords a right to communicate with elected officials. However, there was no basis in the *Charter* or relevant jurisprudence for the proposition that there was a reciprocal obligation on elected officials to engage with the person who's exercising their freedom of expression. (It's difficult to conceive of any such obligation without reckoning with its interference with the elected official's own right to freedom of expression, which must include a right to remain silent.) Notably, the Town's procedure bylaw itself barred council members from making statements or entering into debate during delegations, except to ask questions or make "congratulatory or appreciative comments" – an exception of which Saugeen Shores council members had apparently not availed themselves in Mann's case.

The Court then moved on to consider whether the bylaw's provisions limiting the subject-matter of delegations were justified and reasonable limitations on Mann's freedom of expression. The evidence was that the 11 denials of Mann's delegation requests were based on rules specifically set out in the procedure bylaw: the delegation must provide new information to the council, must not be a repeat of a delegation heard in the previous 6 months, must not be related to litigation or potential litigation, and

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must not contain indecent or insulting language. In its justification analysis, the Court found that the bylaw's objective in balancing a resident's right to communicate with elected officials with the Town's right to conduct its business in an effective and efficient manner was of sufficient importance to justify infringement of a *Charter* right. The bylaw, which was typical of procedure bylaws of Ontario municipalities, was rationally connected to the objective of allowing the Town's business to be conducted efficiently. Mann's *Charter* right was impaired as little as was necessary to achieve that objective; in this regard the Court noted that he was, after all, allowed on 13 other occasions to communicate with Council regarding the Port Elgin development. In dealing with this aspect of the justification analysis, the Court made the point regarding the delegations provisions in the procedure bylaw that the Town "was not obliged to create such a forum and the forum does not replace other manners by which for the public can communicate with the elected officials [*sic*]".

Finally, the Court was satisfied that the limits on delegations enumerated in the bylaw were proportional to the objective of facilitating efficient conduct of the Town's business. The requirement for delegations to present only "new information" was reasonable because "repetitive submissions do not make the submissions any more true or believable". While the Court observed that "on some occasions the Town might grow a 'thicker skin'", the business of the Town should be conducted in a civil manner, and the bylaw's restrictions on "indecent or insulting language, resorting to name calling, personal attacks, or condemning the motives of others" were appropriate. As well, the restriction on subject-matter relating to legal matters was reasonable given that the Council was statutorily authorized to deal with such matters in meetings that are not open to the public at all.

In British Columbia, local government procedure bylaws commonly establish a relatively brief period within board or council meetings during which members of the public may (usually by prior arrangement) be permitted to speak. There are two aspects of the *Mann* decision that should provide some comfort to local governments that are attempting to deal with abuses of this speaking privilege, the first being the Court's observation that it is indeed a privilege for a member of the public to speak at a council meeting, rather than a right. While BC local governments must adopt procedure bylaws, there is (as in Ontario) no obligation to provide in such bylaws a speaking opportunity for anyone who is not an elected official. The second is the Court's approval of subject-matter restrictions, and requirements for civility in expression. The procedure bylaw guide published last year by the BC Ministry of Municipal Affairs contains a reasonable list of matters on which delegations should be restricted. (For local governments reviewing their procedure bylaws, consideration should be given to expanding the guide's suggested exception for "bylaws where a public hearing is to be held" to include bylaws for which the local government has decided to proceed without a public hearing.)

Bill Buholzer

[i] https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/local-governments/governance-powers/procedure_bylaw_guide_for_bc_local_governments.pdf

The Growing World of First Nations Heritage Conservation Permit Regimes

Local government staff in British Columbia that work in land development are likely aware of the Heritage Conservation Act *(the "*HCA*"), which seeks to encourage and facilitate the protection and conservation of heritage property in British Columbia. The* HCA *protects objects and sites with heritage value, meaning they are historically, culturally, aesthetically, scientifically or educationally worthy or useful to British Columbia, a community or an Aboriginal people.*

The *HCA* prohibits the removal, damage, desecration, and alteration of heritage sites and objects. Additionally, in order to excavate or alter land to do archaeological research or search for aboriginal artifacts, a land owner must obtain a permit. After doing so, the land owner can inspect and investigate the land prior to beginning excavation or construction to determine if the lands themselves have any heritage value or if they contain any heritage objects. If the investigation reveals heritage value of some kind, the owner can determine if development is still possible, and, if it is, apply for further permits under the Act as required to allow the development to proceed in accordance with the *HCA*.

The *HCA* is comprehensive and meant to govern all issues related to heritage sites and heritage objects in British Columbia. While the Act specifically protects heritage objects and sites that are valuable to Aboriginal peoples, it does not explicitly indicate that Aboriginal input is part of the permitting process, and although it allows the Province to enter into formal agreements with a First Nation with respect to the conservation and protection of heritage sites and objects, these agreements are not mandatory.

In an attempt to be more involved in the protection of heritage sites and objects, several First Nations in British Columbia have created their own permitting systems governing heritage investigations, archaeological studies, and the alteration of heritage sites. The University of Victoria's Environmental Law Centre indicates the Stó:lō, Sts'ailes, Tsleil-Waututh, Musqueam, Shíshálh and Katzie Nations have all developed such permitting systems.[1] The legal basis for these permits, as well as their enforceability, is uncertain, given that they are not grounded in Provincial legislation. Despite this, some of these permitting systems have had success. The Stó:lō Research and Resource Management Centre, for instance, indicates that they issue approximately 400 permits per year and have a high level of compliance with permit conditions.[2]

For its part, the Provincial Government acknowledges, at least internally, that applications for permits under the *HCA* can potentially impact Aboriginal rights and title and that they therefore trigger the Province's duty to consult and accommodate.[3] Given this, a First Nations' permitting process can theoretically happen in tandem with the *HCA* process. Compliance with the First Nations' permitting process may speed up the Province's own consultation process, which could result in an applicant receiving permits more quickly.

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[1] Protecting Indigenous Cultural Heritage Resources on Private Land: Potential Strategies and Tools for Nations, prepared, University of Victoria Law Centre, published January 2023, accessed at: https://elc.uvic.ca/publications/protecting-indigenous-cultural-heritage-resources-on-private-land/; at page 15

[2] *Ibid* at page 38.

[3] Heritage Conservation Act Permitting Process Policy Guide, last updated April 20, 2020, accessed at: https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/archaeology/permits; at page 23.

Despite the fact that the First Nations' and *HCA* processes may complement each other, tension still exists between the two processes. While a particular permit application may trigger the Province's duty to consult, the Province is not necessarily required to implement the feedback it receives from the Nation as part of that consultation, nor is it always required to obtain the Nations consent to issue a permit. As a result, it is possible that an applicant could receive an *HCA* permit from the Province while being denied a permit from a First Nation, leaving that applicant in an awkward position.

Ultimately, it will be interesting to see how First Nations' permitting programs develop and proliferate, especially in the context of the *Declaration on the Rights of Indigenous Peoples Act*. Until the Province provides some direction, there will be on-going challenges for land owners, First Nations, and local governments.

Jordan Adam

Limits on Liability: Recent Court Decision Considers Public Body's Liability in the Wake of Privacy Breach

The British Columbia Supreme Court's ("BCSC") recent decision in G.D. v. South Coast British Columbia Transportation Authority*, 2023 BCSC 958 ("*G.D. v. TransLink*") provides a window into the ongoing development of privacy law in BC. The BCSC was tasked with determining whether to certify a class action proceeding against South Coast British Columbia Transportation Authority ("TransLink") by several former TransLink employees. The plaintiffs wanted to bring an action against TransLink in relation to an external data breach of TransLink's computer network.*

The BCSC rejected the plaintiffs' certification application. The Court found that the plaintiffs' claims were all bound to fail, finding that TransLink's conduct had not willfully violated the plaintiffs' privacy, and that there was no private law duty of care engaged by a breach of section 30 of the British Columbia *Freedom of Information and Protection of Privacy Act* ("FIPPA").

The Facts

The catalyst for *G.D. v. TransLink* was a security breach identified in December 2020. TransLink's information technology team discovered ransomware on TransLink's network that had been inserted following a successful phishing attempt on a TransLink employee. TransLink took steps to respond to and contain the threat, and submitted a breach report to the Office of the Information and Privacy Commissioner for British Columbia (the "OIPC"). In June 2021, TransLink's internal investigation confirmed that the cybercriminals who had perpetrated the ransomware attack had accessed files and folders containing sensitive personal information about current and former TransLink employees and other third parties. TransLink also confirmed that some of this information had been extracted by the perpetrators, but were unable to determine what specific information had been extracted.

In February 2021, TransLink notified individuals whose personal information had been accessed

by cybercriminals in the breach. The notification outlined what sensitive information had been accessed, and provided a complimentary two-year credit monitoring and fraud protection service for affected individuals. In response to the breach, several former TransLink employees filed a proposed class action on their own behalf and on the behalf of all other persons whose personal information was impacted by the breach.

The Decision

In order to have their class proceeding certified, the plaintiffs had to meet the requirements set out in section 4(1) of the *Class Proceedings Act*. Section 4(1) lists a number of requirements, but only the first step – whether the plaintiffs' pleadings disclose a cause of action – was considered, as the Court found that the plaintiffs' application did not meet this first requirement. The Court held that the plaintiffs' pleadings did not disclose a cause of action due to it being plain and obvious that the plaintiffs' claims would not succeed. The plaintiffs asserted four causes of action: violation of privacy, negligence, conversion, and unjust enrichment. The BCSC found that each claim was bound to fail.

The plaintiffs' claim for violation of privacy was grounded in section 1 of the *Privacy Act*. To successfully establish a claim under section 1 of the *Privacy Act*, a plaintiff must establish that a defendant violated the privacy of the plaintiff wilfully and without a claim of right. The plaintiffs argued that TransLink had failed to follow its own stated privacy policy standards and implement and maintain proper security safeguards, and as a result had enabled the data breach.

In considering the violation of privacy claim, the Court looked to previous consideration of the *Privacy Act* by the BC Court of Appeal in *Hollinsworth v. BCTV*, [1998] B.C.J. No. 2451, and *Ari v. Insurance Corporation of British Columbia*, 2022 BCSC 1475 ["*Ari*"]. In these earlier decisions, the Court of Appeal noted that the word "wilfully" does not apply to all intentional acts that have the effect of violating privacy, but rather applies narrowly to intentional acts where the person knew or ought to have known their action would violate another person's privacy. The term "without a claim of right" has been defined by the Court of Appeal as "an honest belief in a state of facts which, if it existed, would be a legal justification or excuse".

In light of the Court of Appeal's prior reasoning, the BCSC in *G.D. v. TransLink* found that TransLink's conduct was not the kind of wilful violation of privacy that is subject to section 1 of the *Privacy Act*:

> On my consideration of the combination of "wilfully" and "without a claim of right", it is clear that the target of that statutory tort in a database breach context can only be the hacker, and not the database defendant. This is consistent with treatment of intentional torts by the courts, even if the defendant was reckless in failing to prevent the breach.

In considering the negligence claim, the Court found that the plaintiffs' claim did not pass the first step in the negligence analysis: establishing that the defendant owed a duty of care to the plaintiffs. The plaintiffs argued that section 30 of FIPPA – which requires public bodies to make reasonable security arrangements against the risk of data breaches of personal information in their custody or control – established a duty of care owed by TransLink to the plaintiffs (and the class members they applied to represent) to safeguard their sensitive personal information.

The Court disagreed, finding that section 30 of the FIPPA did not establish a duty of care, and that no other duty of care should be recognized in the circumstances. The Court again cited the Court of Appeal's decision in *Ari*, which found that there is no private law duty of care based on the breach of section 30 of FIPPA because

FIPPA contains a comprehensive statutory framework for dealing with breaches of section 30 and does not create a separate cause of action in damages for breach of its provisions. The Court of Appeal had further concluded in *Ari* that a duty of care should not be imposed in such circumstances, as it would result in the looming possibility of indeterminate liability on every public body collecting personal data.

The BCSC also summarily dismissed the plaintiffs' claims of conversion and unjust enrichment, as these claims were likewise contingent on TransLink being liable for a breach of section 30 of FIPPA outside of the statutory remedies set out in FIPPA itself.

Key Takeaways

The Court's decision in *G.D. v. TransLink* offers some reassurance to local governments that, in the event of a privacy breach perpetrated by a malicious third party, public bodies appear to be protected against claims of violation of privacy and negligence by persons affected by the breach. This decision continues in line with the judicial reasoning of *Ari*, upholding the finding that public bodies are not liable for violation of privacy or negligence in the event of a data breach, even where the public body may not have fulfilled its obligations under FIPPA.

However, this does not mean that public bodies are immunized from repercussions in the event of such a breach. Instead, the Courts make clear that the procedure and remedies for a failure to meet FIPPA requirements are contained within FIPPA itself. A public body that fails to meet its FIPPA section 30 obligations will still be subject to the oversight of the OIPC.

James Barth

Putting Your Money Where Your Mouth is: The Centrality of Locality in Municipal Litigation-Funding

Without action (read: money) behind it, a municipality's political expression will tend to have solely symbolic meaning. And what better way to take action than by supporting (an) action? While Canadian courts recognize that modern local governments require broad latitude to act in the interest of their communities, local governments' actions must serve municipal purposes grounded in their enabling legislation. A recent Ontario decision reminds municipalities that their rightful concerns are local concerns and that "giving voice to values" is shaky grounds on which to pass substantive bylaws.

In *Labrecque v. City of Toronto*, 2023 ONSC 4616 ("*Labrecque*"), the applicant, a resident of Toronto, sought to set aside a city bylaw that contributed up to $100,000 to a legal challenge against Quebec's Bill 21. Officially titled *An Act respecting the laicity of the State*, Bill 21 bans certain Quebec public employees from wearing religious symbols such as crosses, veils,

turbans, and kippot at work. The applicant argued that the bylaw was not permitted by the *City of Toronto Act* ("*COTA*") because providing such funding did not serve a valid municipal purpose.

Readers may be familiar with *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC) ("*Shell*"). The case concerned resolutions passed by the City of Vancouver – to express its citizens' "repugnance and moral outrage" – not to do business with Shell until its parent company ceased its operations in Apartheid South Africa. In a five-four split, the Supreme Court of Canada held that the resolutions were not validly exercised for a municipal purpose, as they were aimed at influencing Shell's business abroad. As the majority writes, "[n]o doubt Council can have regard for matters beyond its boundaries in exercising its powers but in so doing any action taken must have as its purpose benefit to the citizens of the city".

In spite of Toronto's significant authority to determine what is in its public interest, the bylaw did nothing to promote the health, welfare, safety, or good government of the city

Drawing on principles established in *Shell*, the Court in *Labrecque* agreed with the applicant and quashed the part of the bylaw that provided the funding. Citing *Eng v. Toronto (City)*, 2012 ONSC 6818, the Court affirmed that the test of a bylaw is not whether it gives voice to the values of city residents, but whether it has a municipal purpose actually related to the city's – social, in this case – wellbeing. In spite of Toronto's significant authority to determine what is in its public interest, the bylaw did nothing to promote the health, welfare, safety, or good government of the city. Bill 21 is an act of the National Assembly of Quebec, it has no application outside of Quebec, and the challenge against it has been brought in Quebec's courts. The Court made its finding even though the *COTA* permits the city to make grants "to any person, group or body… within or outside the boundaries of the City for any purpose that council considers to be in the best interest of the City". Such grants, the Court held, may only be made for purposes of economic development.

The Court did not accept the City's argument that the bylaw could validly aim at protecting *Charter* rights for all Canadians, including Torontonians, and assuring residents and visitors of their religious freedoms. As well, it rejected the speculative argument that, because the legal challenge engages the nation's constitution, a negative result could precede the enactment of similar legislation in Ontario, which would affect Toronto residents. However, the Court did leave open the door to the potential validity of a similar bylaw aimed at an Ontario statute, as that bylaw might indeed serve Torontonians' social and economic interests.

As much in BC as in Ontario, *Labrecque* serves to remind local governments that, despite courts' adoption of a deferential and benevolent approach to review in recent decades, there are geographic limits to local government authority. As such, local governments must carefully consider the validity of financial expenditures in support of legal action that may not have direct impacts within their territories.

Aidan Andrews

Solicitor-Client Privilege Meets the OIPC

A new BC court decision provides a helpful example of the interplay between solicitor-client privilege, the Office of the Information and Privacy Commissioner ("OIPC") and the Freedom of Information and Protection of Privacy Act *("FIPPA") as it relates to public interest disclosure (section 25) and the OIPC's ability to compel records from a public body (section 44). Spoiler alert: public bodies can be required to disclose solicitor-client privileged records pursuant to section 25, and the OIPC can compel those records from a public body pursuant to section 44 to determine whether or not disclosure is required.*

In *British Columbia (Children and Family Development) v. British Columbia (Information and Privacy Commissioner*), 2023 BCSC 1179, the Minister of Children and Family Development ("MCFD") sought to quash a decision made by an OIPC Adjudicator compelling the MCFD to produce certain records to the OIPC that were subject to solicitor-client privilege. The dispute arose out of an access to information request made by IndigiNews for records between June 2019 and September 2020 relating to "birth alerts", a discontinued MCFD practice that flagged pregnant women that the MCFD considered would pose a risk to their children. It enabled the MCFD to apprehend those children as soon as they were born, and was a practice that disproportionately affected Indigenous and marginalized women.

IndigiNews argued that the public interest override in section 25 of FIPPA required disclosure, but the MCFD declined to disclose some of the requested records due to solicitor-client privilege. The Adjudicator decided that she did not have sufficient evidence to determine whether or not section 25 required disclosure of the records, and, as such, made an order under section 44 requiring the MCFD to disclose the records to the OIPC.

The MCFD applied for judicial review of that decision, the issues being whether section 25 of FIPPA can compel disclosure of information protected by solicitor-client privilege and whether section 44 permits the OIPC to compel production of solicitor-client privileged records.

On the first issue, the question was whether the language of section 25(2) was sufficiently clear, explicit and unequivocal to abrogate the solicitor-client privilege exception to disclosure in section 14. The Court held that a purposive and contextual reading of section 25(2) demonstrates that it does compel disclosure of solicitor-client privileged information. Section 25 is a public interest paramountcy provision, and it differs from the rest of FIPPA by imposing a direct and overriding obligation on public bodies to disclose a narrowly-defined category of information, even in the absence of any request for it. Thus, the Court held that solicitor-client privileged records are subject to section 25, though we note that this does not affect the high bar that is required for a section 25 disclosure.

On the second issue, the Court then found that the OIPC can compel documents subject to solicitor-client privilege pursuant to section 44. This is because subsection 44(2.1) directly addresses this situation, by expressly stating that compliance with the OIPC's order does not waive the privilege.

The petition was ultimately dismissed, and the matter remitted back to the Adjudicator to continue the OIPC inquiry to determine whether section 25 requires disclosure of the records. Stay tuned!

Amy O'Connor

Is It Too Late To Litigate? Relying on Limitation Defenses to Seek Dismissal of Court Actions

Time and time again, the following question comes up – was a claim commenced too late? If statutory requirements prescribing deadlines to file an action are not met, the courts may deem a court action statute-barred. Said another way, if a provincial statute sets a deadline for a claim to be filed (known as a limitation period) and a claim is filed after that deadline, then a court may dismiss that claim, regardless of its merits. For matters in which a local government is a defendant, this question can give rise to a complex analysis to determine the proper statutory source for determining what limitation periods apply to the given situation.

In British Columbia, broadly speaking, there are two statutory sources that provide for limitation periods that might affect actions commenced against local governments – the *Limitation Act* and the *Local Government Act*.

The *Limitation Act* at section 6(1) provides:

Basic limitation period

> ***6*** *(1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.*

The *Local Government Act* at section 735 provides:

Limitation period for certain actions

> ***735*** *All actions against a municipality or regional district for the unlawful doing of anything that*
>
> > *(a) is purported to have been done by the municipality or regional district under the powers conferred by an Act, and*
> >
> > *(b) might have been lawfully done by the municipality or regional district if acting in the manner established by law*
>
> *must be commenced within 6 months after the cause of action first arose, or within a further period designated by the council or board in a particular case, but not afterwards.*

While the *Limitation Act* provides for a 2-year period in which claims may be commenced, the *Local Government Act* provides a shorter period for claims against a local government to be commenced. A 6-month limitation period is prescribed for claims commenced against a local government for issues relating to powers conferred by an Act. When these limitation periods commence is a separate issue, and one we will not discuss in length here, other than to note the 2-year period begins when the claim is discovered, which is not necessarily when the loss first occurs but rather when certain requirements set out in the legislation are met.

When a claim is commenced against a local government, it gives rise to the following question – does the *Limitation Act* 2-year

limitation period apply, or does the *Local Government Act* 6-month limitation period apply? This determination is factually and legally specific.

This very issue was recently considered by the BC Supreme Court in *Mema v. Nanaimo (City)*, 2023 BCSC 1189. The Plaintiff, Mr. Mema, commenced his claim against the City of Nanaimo (the "City") for breach of contract, breach of the duties of good faith and honest performance, intentional infliction of mental suffering, and wrongful dismissal.

Mr. Mema was terminated with cause from his employment with the City on May 14, 2018. He commenced an action in the BC Supreme Court on May 13, 2021. The City raised by way of summary judgment a limitation defense because Mr. Mema failed to commence his claim for termination in the timeframes provided by the above statutes. The Court was faced with determining what claims would fall under the 6-month limitation period under the *Local Government Act*, which would fall under the 2-year limitation period under the *Limitation Act*, and whether Mr. Mema's claims meet the requirements under these statutes for limitation periods.

The Court determined that in order for the 6-month limitation period to apply to a matter alleging wrongful termination, the following circumstances must be answered in the affirmative:

1. Was the termination unlawfully done?
2. Was it purported to have been done under the powers conferred by an Act?
3. Might it have been done lawfully if it had been done in the manner established by law?

The core issue for wrongful termination here is whether the City complied with requirements under s. 152 of the *Community Charter* and the City's Management Bylaw, which both provide a local government with procedures and policies for terminating employees. In other words, were these procedures properly followed by the City? The Court determined that the above three conditions were met, and that the 6-month limitation period applies to wrongful termination in this case.

With respect to the allegations of a breach of a duty of good faith and honest performance, and intentional infliction of mental suffering, the Court determined that the legislation does not provide any lawful means or process in which the City could have done these acts lawfully. As such, the conditions above that are required to trigger the 6-month limitation period cannot be met, and the shorter limitation period does not apply to these types of claims.

This court application resulted in a dismissal of Mr. Mema's claim for wrongful termination, and for the remaining issues to be determined at a trial as they could not be addressed by way of summary judgment. While the 2-year limitation period was deemed to apply to the remaining issues, the facts were unclear as to when the claim was discovered, which would trigger the start of the 2-year limitation period.

In summary, for local governments with actions commenced against them, section 735 of the *Local Government Act* and the *Limitation Act* can serve as a useful tool to have claims dismissed if the actions were not commenced in time. These issues can be argued, as above, by way of summary judgment, which means that a claim could be dismissed early on to avoid incurring further litigation expenses.

Christopher Gallardo-Ganaban

The Duty to Inquire about the Need for Accommodation

The recent decision of the BC Human Rights Tribunal (the "Tribunal") in Dorman v. Kamloops (City), *2023 BCHRT 62, highlights the importance of an employer's duty to inquire when an employee provides information that could indicate that they have a disability for which the employer must provide accommodation. In this case, the complainant alleged the employer had a duty to inquire about the need for accommodation in the context of a job competition.*

As held by the Tribunal, generally an employee is expected to tell their employer about their disability and their need for accommodation in order to enable the employer to fulfill its duty to accommodate. However, in some situations the responsibility shifts to the employer to ask an employee if they need accommodation even if the employee has not explicitly disclosed a disability and requested accommodation. The duty to inquire is triggered if something reasonably alerts the employer that the employee may have a disability that requires accommodation.

In *Dorman*, the complainant alleged that his employer, the City of Kamloops (the "City"), discriminated against him on the basis of physical and mental disability when it refused to accommodate him when he was required to take a computer test on Microsoft Word and Excel in order to advance in a job competition. The complainant asserted that the employer should have accommodated him by allowing him to forgo the computer test, or to take a course before taking the computer test. The complainant had applied for a promotion and objected when informed that he would have to take the computer test. He initially requested to move past that section of the job competition process without taking the test. The complainant also alleged that he later spoke with the City's Human Resources Advisor about having anxiety about the test and then emailed her refusing to take the test, again mentioning anxiety. The email also mentioned that the complainant had not had the opportunity to take a course before taking the computer test. The complainant did not specifically advise the City that his anxiety was a disability, or that he needed an accommodation in relation to the job competition. Following receipt of the email, the City screened the complainant out of the job competition.

The City denied discriminating against the complainant and filed an application to dismiss the complaint which was based on physical disability, pursuant to section 27(1)(b) of the *Human Rights Code*, RSBC 1996, c. 210 (the "*Code*"), before a hearing. The City also applied to dismiss the complaint which was based on mental disability, pursuant to 27(1)(c) of the *Code*. This article focusses on the section 27(1)(c) application. Under section 27(1)(c), the Tribunal can dismiss a complaint without a hearing when there is no reasonable prospect that the complaint will succeed. That gate-keeping function allows the Tribunal to dismiss complaints that do not warrant the time and expense of a hearing.

In a complaint alleging discrimination, a complainant must show that they have a characteristic protected from discrimination, they have experienced an adverse impact with respect to an area protected by the *Code*, and the protected characteristic was a factor in the adverse impact. In a section 27(1)(c) application, a complainant needs to show that the evidence takes the three elements of

their claim out of the realm of conjecture. If the complainant meets that test, then for the respondents to succeed with their application to dismiss, they have to show that they are reasonably certain to establish a defence at a hearing.

The Tribunal declined to dismiss the complainant's claim based on mental disability under section 27(1)(c) of the *Code*. The Tribunal started its analysis by assessing whether the City had shown that there was no reasonable prospect that the complainant would succeed in establishing the three elements of his case at a hearing, and held that the City had not done so. The City had not persuaded the Tribunal that the complainant had no reasonable prospect of proving his health conditions met the definition of mental disability for the purposes of the *Code*, or that he was suffering from a mental disability at the material time. The complainant had proffered medical evidence in the form of a physician's letter that referenced a diagnosis of anxiety and depression. There was also evidence that the complainant's anxiety and depression were exacerbated by a heart attack which had occurred several months before the job competition. There was thus evidence that the complainant's anxiety had a degree of persistence which when coupled with the diagnosis took the matter out of the realm of conjecture.

The City did not dispute that the complainant had taken his allegation that he experienced job related adverse impacts out of the realm of conjecture, and the Tribunal held that he had done so. The adverse impacts asserted by the complainant included "loss of promotion; lost wages; reduced lifetime pension as well as loss of self-respect, dignity and loss of worth within the department".

The Tribunal also held that the City had not persuaded it that the complainant had no reasonable prospect of proving that his alleged mental disability was at least one factor in the adverse impacts he experienced when the City screened him out of the job competition. The complainant submitted a letter from his doctor stating that "with regard to taking a surprise test, this did cause him increase in anxiety and panic". The complainant also asserted that he had spoken with the Human Resources Advisor about his anxiety in relation to the test and then emailed her about the same.

As the complainant took his case out of the realm of conjecture, the next step was for the Tribunal to determine whether the City was reasonably certain to prove at a hearing that it had no duty to accommodate the complainant. The City argued that there was no reasonable prospect that the complainant could establish that it knew or reasonably ought to have known that he had a mental disability at the material time. The Tribunal rejected the City's claim. It could not find that the City was reasonably certain to prove that it did not have information that triggered the duty to inquire into whether the complainant may have had a disability that required accommodation during the job competition.

The issue in this case was that at the time of the alleged discrimination, the complainant had not previously disclosed any disabilities to the City and had not explicitly requested an accommodation in respect of the job competition. The City submitted that a passing reference to anxiety was not enough to trigger the duty to inquire. The Tribunal held that while a passing reference to anxiety may not trigger the duty to inquire, the complainant alleged that he made more than a passing reference. He alleged that he informed the City of his anxiety issues in the conversation with the Human Resources Advisor and his follow up email to her. The Tribunal also held that as there were competing versions of the extent to which the complainant and the Human

Resources advisor spoke about his anxiety, there was an issue as to credibility on facts that were fundamental to the determination of whether the City had a duty to inquire. That foundational issue of credibility could only be resolved at a hearing where evidence would be given and subjected to cross examination. The Tribunal found that the complainant had taken his allegation that the employer had a duty to inquire out of the realm of conjecture. It held that without a clearer understanding of what the complainant and the Human Resources Advisor spoke about, it was not persuaded that the complaint based on mental disability had no reasonable prospect of success, and denied the City's application to dismiss that complaint under section 27(1)(c) of the *Code*. As a result, the case is proceeding to a hearing.

In light of this case, local government employers should take care to inquire further if an employee provides information that could potentially indicate they have a disability and they require an accommodation. Failure to do so can mean an employee's need for accommodation is missed, which may result in a human rights complaint being filed against the local government employer.

Michelle Blendell

A Cautionary Tale for Election Candidates

An election candidate will not be charged after unwittingly violating election laws in New Westminster. In October 2022, Gurveen Dhaliwal was running for re-election to the New Westminster School Board. She remained at the voting place for approximately 20 minutes after casting her ballot, to act as a scrutineer. A scrutineer represents a candidate at a voting place, observing the conduct of the voting and counting proceedings at the voting station to ensure fairness. The Local Government Act *states that candidates can only be present at the polling station for the purpose of voting. It is an offence under the* LGA *sections 163(5)(d) and 120(4) for a candidate to stay at the polling station after they have voted. There are no exceptions to these rules that would allow a candidate in an election to act as a scrutineer for another candidate.*

The British Columbia Prosecution Service ("BCPS") put Special Prosecutor John M. Gordon KC in charge of the investigation. Special Prosecutors are appointed in British Columbia to avoid any appearance of improper influence over the administration of justice in cases involving elected officials or government appointees. When the BCPS is deciding whether to approve charges and initiate a prosecution, they will use a two-part test. The prosecutor must independently, objectively and fairly measure all available evidence and determine: (1) whether there is a substantial likelihood of conviction; and (2) if so, whether the public interest requires a prosecution. In the context of this test, "likelihood" requires that a conviction according to law is more likely than an acquittal, and "substantial" refers not only

to the probability of conviction but also to the objective strength or solidity of the evidence. This basically means that there must be a strong and substantial case to present to the court.

The Special Prosecutor identified two defences that Ms. Dhaliwal could potentially argue if the case against her was brought forward to prosecution. First, Ms. Dhaliwal did properly present a candidate representation form to the Presiding Election Official ("PEO") to be authorized to act as a scrutineer. However, when the PEO reviewed the document presented by Ms. Dhaliwal, and had her sign a scrutineer's declaration, he did not ask her if she was a candidate, nor did he check her name against the list of candidates in the election. This oversight means Ms. Dhaliwal could have argued: (1) that her wrongful act was a consequence of the PEO's mistakes; or (2) that she was "permitted to be present by the presiding election official" under section 120(2)(e) of the *LGA*. The Special Prosecutor did not think it was necessary to evaluate the likelihood of these defences being successful, because happily for Ms. Dhaliwal, the charge assessment standard was not met due to public interest factors, or step 2 of the test.

There were several public interest reasons why the Special Prosecutor decided not to pursue charges against Ms. Dhaliwal. First, as mentioned above, when Ms. Dhaliwal presented her candidate representation form to act as a scrutineer, the PEO neglected to let her know she could not stay in the area. Ms. Dhaliwal also told the investigating police she was unaware she was prohibited from being present at the voting place for any purpose other than casting her own ballot. The Special Prosecutor consequently decided that Ms. Dhaliwal had simply made a genuine and honest mistake.

Second, according to security camera footage, Ms. Dhaliwal was only at the community centre where the voting was taking place for 20 minutes. Nothing out of the ordinary happened while she was acting as a scrutineer and only approximately 6 voters used the ballot box during this time; hardly a number that would have vastly affected the results of the election. While the voters would have been the potential victims in this scenario, no real harm to the legitimacy or fairness of the election was alleged. This was a single minor incident and it was determined there were no reasonable grounds for believing Ms. Dhaliwal would repeat this offence.

Lastly, the Special Prosecutor considered Ms. Dhaliwal's character and reputation. She had no history of prior criminal behaviour, and no previous history of criminal allegations or convictions. Ms. Dhaliwal had a commendable background in community involvement, and considering she was re-elected for a second term, the Special Prosecutor took this as evidence of a good reputation.

The Special Prosecutor found the incident was an isolated one, and the Chief Elections Officer subsequently took steps to notify all parties to ensure there would be no recurrence. Ms. Dhaliwal did not demonstrate a willful or repeated non-compliance with the Act and the integrity of the electoral process was not adversely affected. Accordingly, the Special Prosecutor decided not to approve any charges.

As guidance to other election candidates in the future, the Special Prosecutor recommended that the forms, guides and statutory declarations used in the candidate representation process, contain a statement advising candidates that they are not eligible to act as scrutineers.

Aishling Carson

Look For Your Lawyers

We are pleased to welcome **Christopher Gallardo-Ganaban** to the firm as an associate. Chris's practice is focused on litigation, with particular interest in employment, contract, negligence, bylaw enforcement, construction, and constitutional issues. Prior to joining Young Anderson, Chris had a varied practice in litigation at a medium sized regional boutique firm, specializing in matters involving insurance, bodily injury, property damage, construction, and subrogation. He has appeared on behalf of clients in the British Columbia Provincial Court, the Supreme Court of British Columbia, and the British Columbia Human Rights Tribunal. He received his law degree from the University of Alberta in 2019, and completed a Bachelor of Arts degree in Communications in 2014 from Simon Fraser University.

We wish our summer articled student, **Aishling Carson**, a happy and productive year as she returns to UBC to complete her JD. We are excited to announce that Aishling will be returning to the firm in 2024 as an articled student, upon completion of her degree.

Guy Patterson and **Bill Buholzer** will be presenting a session entitled "Planning Law Update" at the PIBC Okanagan Chapter legal seminar on September 22, 2023.

Sukhbir Manhas will be presenting the caselaw update at the Thompson Okanagan Local Government Association Annual Conference on September 7, 2023.

Nick Falzon will be teaching "An Introduction to British Columbia Local Government Law" at the Municipal Administration Training Institute (MATI) – Virtual - on October 5, 2023.

On October 6, 2023, **Sukhbir Manhas** will be presenting a session entitled "Legal Update" at the Local Government Management Association Corporate Officers Forum.

Guy Patterson will be speaking at the MATI School for Approving Officers on October 23, 2023, presenting a session entitled "The Approving Officer as Statutory Decision Maker".

Bill Buholzer will be presenting a session entitled "Planning and Zoning Refresher" for the SFU City Program on November 20, 2023.

Guy Patterson will be presenting a session entitled "Planning and Zoning Refresher" for the SFU City Program on November 21, 2023.

We want to wish **Kathleen Higgins** the very best in her retirement. All those who have worked with Kathleen over her five years with Young Anderson know her to be an exemplary lawyer and a fantastic person. We will truly miss all of her contributions to the firm.

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