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Liability in the Era of Privacy Breaches and Cyberattacks

The scope of the legal responsibility that British Columbia public bodies, such as local governments, have in relation to a breach of privacy has been the source of no small amount of judicial consideration. The recent decision by the British Columbia Court of Appeal in G.D. v. South Coast British Columbia Transportation Authority, *2024 BCCA 252 ("GD v. TransLink") has added to this judicial consideration, creating potential liability for an organization that collects and holds third party personal information, and does not take adequate steps to protect that information from improper access and breach.*

Background

The British Columbia Court of Appeal has considered the extent of privacy breach-related claims several times prior to *GD v. TransLink*. Two of these decisions, *Ari v. Insurance Corporation of British Columbia*, 2015 BCCA 468 ("*Ari 1*") and *Insurance Corporation of British Columbia v. Ari*, 2023 BCCA 331 ("*Ari 2*"), arose out of the same facts. An ICBC employee had improperly accessed and sold the private information of about 65 ICBC customers.

In *Ari 1*, the BCCA held that the customers' two claims that ICBC was liable for negligence should be struck, as it would require a new duty of care to be recognized. The BCCA did however find that it was arguable that ICBC was vicariously liable for its employee's breach of the *Privacy Act*. Following *Ari 1*, the ICBC customers successfully advanced their vicarious liability claim at the Supreme Court of British Columbia.

On appeal, the BCCA upheld the finding of vicarious liability against ICBC in *Ari 2*, holding that the information that was improperly accessed was private, and that the affected customers had a reasonable expectation of privacy. The Court of Appeal noted that it was necessary to look at the complaining person's reasonable expectation of privacy, incorporating both objective and subjective elements, which means expectations that are reasonable, and the person's own circumstances and expectations. The Court also held that it was appropriate for ICBC to be held vicariously liable for its employee's actions, as ICBC had created a situation of risk by giving its employee unlimited access to private information without sufficient safeguards.

In *Tucci v. Peoples Trust Company*, 2020 BCCA 246 ("*Tucci*"), a trust company suffered a data breach arising from a cyber attack. Affected clients sought to bring a class action against

the company on a number of grounds, including breach of privacy. The BCSC found that there was no cause of action for breach of privacy, and the clients did not seek to appeal on this point. As the issue of whether the common law tort of breach of privacy was not before the BCCA in this case, the Court could not adjudicate on the matter, but the Court nevertheless expressed its view that it may be time for such a tort to be recognized at law in BC.

GD v. TransLink

The recent decision in *GD v. TransLink* stems from a cyber attack on TransLink, in which employees' personal information, as well as the personal information of other third parties, was compromised. Former TransLink employees filed a proposed class action, which was dismissed by the BCSC as being bound to fail. The BCSC held that the claim should be against the cyber-attackers, not the organization that held the information.

The BCCA disagreed, finding that the employees' claim was not bound to fail, noting that the purpose of the *Privacy Act* is to protect privacy interests, by ensuring harms to those constitutionally recognized interests do not go without a remedy.

The BCCA concluded that it is arguably a violation of a person's privacy when an organization does not take reasonable steps to safeguard against a breach of private information that it collects. The Court commented that a reasonable expectation of privacy could arguably include an expectation that when someone gives their personal information to an organization, that the information will be protected. The Court therefore determined that, depending on the facts found at trial, it was possible for a judge to find that TransLink, due to its reckless conduct in enabling the data breach, willfully violated the reasonable expectations of privacy of the class members within the meaning of the *Privacy Act*.

...the purpose of the Privacy Act is to protect privacy interests, by ensuring harms to those constitutionally recognized interests do not go without a remedy.

The Court also found that a negligence claim could succeed at trial. The employer-employee relationship in this case is a sufficiently close relationship in which the employee is vulnerable to the employer's demands to provide the

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personal information and the care with which they treat that information. The information that was allegedly stolen in this case was sensitive personal information, which the Court commented could lead to significant harm by way of identity theft and fraud, and would require ongoing monitoring.

The BCCA held that it was not plain and obvious the former employees' negligence claim would fail, due to the sufficient proximity in the employer-employee relationship, the novelty of the cause of action, and the sensitivity of the information breached. The Court consequently sent the certification application back to the trial court.

> GD v. TransLink *opens the door for claims of breach of privacy and negligence to be advanced against that public body by persons affected by the breach.*

Takeaways

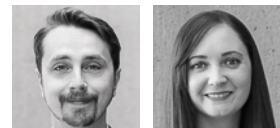
In the event of a privacy breach of a public body, the decision in *GD v. TransLink* opens the door for claims of breach of privacy and negligence to be advanced against that public body by persons affected by the breach. However, readers should temper their concern with the understanding liability must still be proven.

Although *GD v. TransLink* has cleared the way for a potential finding of breach of privacy or common law negligence, the claim in that case has not yet been successfully made. The decision states that such claims are not obviously bound to fail, saying nothing on the actual merits of the claim. If the matter is a class action proceeding and is certified, only then will the claims for common law negligence and breach of privacy under the *Privacy Act* be adjudicated.

Additionally, this decision does not suggest that public bodies are to be held to a higher standard with regards to safeguarding against a data breach. The same obligations that exist under the *Freedom of Information and Protection of Privacy Act* remain applicable, which are for public bodies to make reasonable security arrangements – proportional to the sensitivity of the personal information in question – against unauthorized collection, use, disclosure or disposal of information in the public body's custody or control. This decision is a good reminder to local governments of the importance of taking proactive steps to prevent data breaches, and of mitigating the harm if such an event should occur.

As seen in the previous decisions of *Ari 1*, *Ari 2*, and *Tucci*, the availability of claims of statutory tort of breach of privacy and common law negligence against the organization subject to a privacy breach has been an unsettled matter of law in British Columbia for some time. While *GD v. TransLink* appears to move the needle further towards allowing these types of claims, only time will tell how the law in this area will continue to evolve.

James Barth & Aishling Carson



Procurement & Local Governments: A Refresher on the Requirements for Open, Non-Discriminatory and Transparent Tendering in the CFTA and the NWTPA

*The province of British Columbia is subject to a number of trade agreements that set out rules for how procurement competitions must be conducted by the provincial government, crown corporations and other public authorities. These trade agreements also apply to local governments, requiring regional districts and municipalities to procure goods, services and construction over certain monetary thresholds through an open, non-discriminatory, and transparent tendering process. This article provides an overview of some of the procurement requirements applicable to local governments, as set out in the Canadian Free Trade Agreement ("**CFTA**") and the New West Trade Partnership Agreement ("**NWTPA**").*

Canadian Free Trade Agreement & New West Trade Partnership Agreement

Coming into force on July 1, 2017, and replacing and repealing the Agreement on Internal Trade, the CFTA is an agreement between the federal, provincial and territorial governments of Canada (referred to in the CFTA, collectively, as the "Parties" or individually as a "Party") intended to eliminate barriers to internal mobility for trade, investment and labour within Canada. Under Article 103 of CFTA, each Party is responsible for complying with this agreement, and under subsection 103(b), ensuring its regional, local, district and other forms of municipal government comply with the agreement. Under Chapter Five – Government Procurement, a framework is established that requires transparent, fair and open access to government procurement opportunities for all Canadian suppliers. For local governments across Canada, including regional districts and municipalities in British Columbia (and entities owned or controlled by them, such as a local government corporation), the CFTA's procurement rules apply at the following monetary thresholds between January 1, 2024, and December 31, 2025:

(1) $133,800 or greater for goods or services, excluding construction; or

(2) $334,400 or greater for construction.

Similar to CFTA, NWTPA is an internal trade agreement between the provincial governments of British Columbia, Alberta, Saskatchewan, and Manitoba intended to reduce obstacles to trade, investment and labour mobility between its signatories and other covered entities. Under Subsection 14(c) of Article 14 – Procurement, regional, local, district and other forms of municipal government are required to engage in open and non-discriminatory procurement where the procurement value is:

(1) $75,000 or greater for goods or services; or

(2) $200,000 or greater for construction.

The application of both the CFTA and the NWTPA to governmental procurement gives rise to the potential for overlap and conflict between the provisions of these agreements. To address this challenge, and as provided for under Article 1 of the NWTPA, where there is an inconsistency between the CFTA and the NWTPA, the provision that is more conducive to liberalized trade, investment, and labour mobility prevails (and where it is found that a provision of the CFTA is more conducive to the foregoing it is to be incorporated into and made a part of the NWTPA). As a result, where a British Columbian local government is procuring goods or services with a value of $75,000 or greater or construction with a value of $200,000 or greater, the requirements for open, non-discriminatory and transparent procurement apply to the competition.

Openness, Non-Discrimination & Transparency

The CFTA and the NWTPA contain similar provisions setting out what constitutes open, non-discriminatory, and transparent procurement under these trade agreements. These require local governments, along with other entities covered by these trade agreements to:

(1) establish a procurement method that permits all interested suppliers to submit bids, including by publishing a tender notice for each covered procurement on a tendering system designated by its provincial government (BC Bid);

(2) accord suppliers in all jurisdictions covered by the trade agreements treatment that is no less favourable than the treatment the procuring entity accords to suppliers within its own jurisdiction; and

ensure that measures respecting a covered procurement are readily accessible, provided that they do not require a procuring entity to disclose information that would

(1) impede law enforcement;

(2) involve a waiver of privilege;

(3) prejudice the legitimate commercial interests of a third party;

(4) be exempt from disclosure under another law (such as privacy legislation) or

(5) otherwise be contrary to the public interest.

Consequences of Non-Compliance

Local governments should be mindful that they may be subject to financial penalties when they do not comply with the requirements of the trade agreements. The NWTPA contains a bid protest mechanism that permits an aggrieved supplier to have a procurement decision of a procuring entity reviewed through a two-stage process: first, a consultation between the supplier and procuring entity and second, where the complaint is not resolved at the first stage, through an arbitration. An arbiter may award a cost award to cover the cost of the arbitration up to $50,000 as well as a recoupment award up to $50,000 to help a successful complainant recoup the costs spent in preparing a bid for the disputed procurement. The bid protest mechanism also allows for tariff cost awards of up to a maximum of $5,000 per disputant. Notably, the bid protest mechanism established under the NWPTA can be invoked in respect of breaches of both the NWPTA or the CFTA.

Takeaways for Local Governments

Trade agreements such as the NWTPA and the CFTA apply to local government procurement.

When structuring a procurement competition, it is incumbent on local governments to ensure compliance with the requirements of these agreements. Where uncertainty exists, legal counsel can assist in identifying these obligations.

David M. Giroday

Court Orders Disclosure of Workplace Investigation Records: A Primer on the Application of Privilege

Employers often proceed with workplace investigations with the intention of claiming privilege over the investigation report and other investigation documents. In the recent decision from Alberta's Court of King's Bench, Prosser v. Industrial Insurance*, 2024 ABKB 87 ("Prosser"), the Court ordered the disclosure of various documents collected by an investigator during a workplace investigation for which the employer had claimed privilege. The Court disagreed with the employer that either litigation privilege or solicitor-client privilege applied to the documents at issue. While the decision in Prosser comes from outside BC, it may influence BC courts and serves as a useful reminder that privilege does not automatically apply to all workplace investigation records. Rather, the application of privilege depends on the circumstances of each case, including the purpose of the investigation and how the records are subsequently used.*

Facts

In *Prosser*, the defendant employer retained an external consultant to investigate allegations of harassment by the plaintiff employee in the workplace. Following the investigation, the employee was terminated for cause. In the employee's subsequent wrongful dismissal action, the employee applied for disclosure of various records collected during the workplace investigation, including interview transcripts and recordings, notes, and information regarding a second complaint (but not the investigation report itself). The employer refused to disclose the investigation records on the grounds that the records were subject to either litigation privilege or solicitor-client privilege, taking the position that the investigation had been undertaken in anticipation of litigation and for the purpose of obtaining legal advice.

Findings

The Court held that the workplace investigation

records sought by the employee were not created for the dominant purpose of litigation or for obtaining legal advice. Rather, the investigation had been conducted for the purpose of gathering information in accordance with the employer's obligations under its internal respectful workplace policy, which the Court characterized as a "non-privileged corporate operational" purpose. The wording of the employer's policy did not mention that investigations are privileged, and in fact expressly stated that investigations may be disclosed where required by law, and if the outcome of an investigation was termination or discipline, the responding party would expect to have access to the case against them in the event they wished to challenge the decision. The Court concluded that the employer did not meet their onus to prove that the investigation records were subject to either litigation privilege or solicitor-client privilege.

The Court went on to determine that even if the investigation records had been privileged, that privilege would have been waived in any event, given that the employer relied upon specific information in the workplace investigation records in their defense pleadings. For example, rather than merely denying the employee's allegations, the employer expressly relied on the sufficiency of the evidence obtained in the investigation and the findings of the investigation. As such, the Court required the employer to disclose the workplace investigation records in order to permit the employee to challenge the issues raised in the employer's defense pleadings.

Prosser *serves as a reminder for local government employers that privilege does not automatically extend to workplace investigation records in all circumstances.*

Key Takeaways

Prosser serves as a reminder for local government employers that privilege does not automatically extend to workplace investigation records in all circumstances. Whether privilege applies is a contextual determination, depending on the facts and purpose of each investigation.

Relatedly, although not directly discussed in *Prosser*, the involvement of legal counsel in a workplace investigation also does not guarantee that privilege will apply to the workplace investigation records or report. The application of privilege will depend on the role of the lawyer. As a general guideline, if a lawyer is retained solely for the purpose of conducting the investigation, then privilege will likely not extend to the investigation records. On the other hand, if a lawyer is retained for the purpose of conducting the investigation and subsequently providing legal advice on the investigation, then privilege will likely extend to the investigation records.

As a best practice guideline, the purpose of an investigation should be determined at the outset of an investigation, and legal advice should be sought relating to privilege concerns and disclosure obligations on an ongoing basis.

Julia Tikhonova

Going Global – Commencing & Enforcing Construction Claims Against Non-BC and International Entities

In light of the post-pandemic supply issues and the challenging task in securing availability of specialized materials to be sourced within provincial borders, local governments are occasionally left with having to source materials from other provinces or across the border for their construction projects. Sometimes, it is because local supply issues would cause delays in development project timelines. In other cases, it may be that certain materials are only available from American or international distributers. Furthermore, even products that are sourced in Canada may have been designed and manufactured by a non-Canadian company.

When a non-local company has breached its contract or acted negligently, their location outside of British Columbia can pose certain challenges in advancing litigation. Some examples of cases include product failure, defective products, deficient design of products, delays by suppliers, and warranty disputes.

Commencing a Claim

Commencing and serving a claim in the Supreme Court of British Columbia can be fairly straightforward when the defendants are individuals located in British Columbia, or are companies incorporated in British Columbia – a Notice of Claim is drafted, filed, and served to the defending parties. When the defendant is not located in BC though, additional steps are necessary. In order for a court to assume jurisdiction over a claim where the defendant is based outside of the court's provincial jurisdiction the plaintiff must establish at least one of four presumptive connecting factors as established in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17:

(a) the defendant is domiciled or resident in the province;

(b) the defendant carries on business in the province;

(c) the tort was committed in the province; and

(d) a contract connected with the dispute was made in the province.

The four listed factors are not a closed list, and the courts may determine new connecting factors which also presumptively entitle a court to assume jurisdiction over a matter against a non-resident defendant. Relevant considerations may also include:

(a) similarity of the connecting factor with the recognized presumptive connecting factors;

(b) treatment of the connecting factor in the case law;

(c) treatment of the connecting factor in statute law; and

(d) treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

The defendant may then challenge the presumption of jurisdiction by proving the link between the lawsuit and the province is trivial and/or another jurisdiction is more appropriate. This could be related to where the contract was formed, terms related to jurisdiction, the location of the parties, or where factual events took place.

Service of a Non-Canadian Party

Certain challenges exist for service of pleadings as well. The Supreme Court Civil Rules provide that the court's leave is required for service outside of Canada unless the matter is listed under Section 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. For service of pleadings to defendants that are not located in Canada, service may be effected in the manner provided by the Supreme Court Civil Rules (i.e., with leave of the court, or without leave if it is a matter listed under Section 10 of the *Court Jurisdiction and Proceedings Transfer Act*), or in a manner permitted by the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, signed at the Hague on November 15, 1965 (the "Service Convention").

The Service Convention provides that service of legal documents can be effected between entities located in different jurisdictions, when the entities are located in states that have signed onto the Service Convention, such as Canada and the United States. Service may be effected under the Service Convention by completing the model form under the Service Convention.

Enforcement of a Judgment

Even if a plaintiff is successful in obtaining a judgment against a non-Canadian defendant, additional steps may be necessary in order to properly enforce the judgment.

For example, the legal framework in the USA to enforce foreign judgments is subject to the local laws of each individual state. In order to enforce a judgment from a British Columbia court in the USA, an individual would need to apply to a competent court in the applicable state for enforcement. That court would then decide whether to recognize and enforce that judgment.

Key Takeaways

If contracting with entities that are not primarily based in British Columbia (for example, service contracts, purchase orders, contracts for ordering materials), a local government should, when possible, include a provision that laws of British Columbia apply, and that the courts of British Columbia will have jurisdiction to hear a proceeding in matters relating to the contract. These steps may help resolve issues of jurisdiction and satisfy requirements for service set out in the Supreme Court Civil Rules.

When disputes arise between local governments and companies or individuals not located in British Columbia, we recommend consulting with a lawyer at the earliest opportunity, as these disputes involve questions of jurisdiction which can create complex challenges that might affect the resolution of that dispute.

Christopher Gallardo-Ganaban & Aishling Carson

Housing Needs Reports: New Legislation Expands Use and Requirements

Top of mind for many planners in British Columbia is housing – how much is needed and how to get more of it. As it happens, those same questions are being asked by the provincial government, and on June 18, 2024 the Province issued Order in Council 353/2024 (the "OIC") which is focused on this very subject. Among other things, the OIC amends the Housing Needs Report Regulation (B.C. Reg. 90/2019), a Local Government Act *(the "Act") regulation first introduced in 2019, with which many readers of this newsletter will already be familiar (the OIC also amends the Vancouver Housing Needs Report Regulation, B.C. Reg. 91/2019). Generally speaking, the Regulation tells local governments what is required to be included in a housing needs report. The OIC introduces formulas into the Regulation for calculating the total number of housing units needed over the next 5 years and the next 20 years, which local governments must include in their housing needs reports.*

As a refresher, the housing needs report legislative requirements require local governments to collect data, analyze trends, and present reports describing present and projected housing needs in British Columbia. Housing needs reports must include qualitative and quantitative information about local demographics, household incomes, housing stock, and other factors. Local governments are required to consider housing needs reports when developing a regional growth strategy and official community plan or amending them in relation to housing matters.

Amendments to the Act now require that local governments must receive an interim housing needs report by January 1, 2025, and the first regular housing needs reports are required to be completed by December 31, 2028, and every five years thereafter. Regular housing needs reports must include statements about seven key areas of local need, including affordable housing, rental housing, special needs housing, seniors housing, family housing, housing in proximity to transit, and shelters and housing for people at risk of homelessness.

Local governments must receive a housing needs report by resolution, at a meeting that is open to the public. As soon as practicable after receipt, the local government must publish the housing needs report on an internet site that is publicly and freely accessible and is maintained by the local government or authorized by the local government to be used for publishing the report. Provincial guidelines state that this public reporting is intended to allow the public, First Nations, and stakeholders such as non-profit organizations, private developers, and other government agencies access to better information when making housing investment decisions.

Recent amendments throughout part 14 of the Act have made housing needs reports more relevant to the exercise of other planning and land use management powers (and obligations). For

example, section 481.7 requires municipalities to exercise their zoning powers (under section 479) to permit the use and density necessary to accommodate at least the 20-year total number of housing units required to meet the anticipated housing needs identified in the most recent housing needs report.

Additionally, section 481.8 of the Act requires that conditional density rules must not be used to establish the minimum number of housing units required under section 481.7 of the Act. This means that while density bonusing schemes can continue to be used by municipalities, they must not risk hindering a community achieving the minimum levels of housing that are anticipated in a housing needs report. Consideration of the housing needs report is also explicitly required when adopting or amending an affordable or special needs housing zoning bylaw under section 482.7 of the Act.

The newly-minted world of amenity cost charges will also be influenced by housing needs reports. In a similar vein to conditional density rules, when setting an amenity cost charge, the local government must take into consideration whether the charge will deter development or discourage the construction of reasonably priced housing. It seems reasonable that the housing needs report could be a resource the local government may draw on to help make this consideration.

As the legislation related to housing needs reports has evolved, we have observed an expanding of the housing needs report's integration and effect on planning legislation, as well as increased details as to what information must go into a housing needs report. These shifts have included expanded use of these reports in zoning requirements as well as increased reliance on housing and population growth information generally. It remains to be seen what future amendments, if any, may bring, but as long as the provincial government considers there is an affordable housing problem to be tackled, it seems likely that housing needs reports will continue to play a role in local government planning and land use management legislation.

Jacob Lewin & Timothy Luk ✍

Managing Mobile Homes

Mobile homes and mobile home parks are a common feature in communities across the province. They can be an affordable and accessible housing solution, they can be used to house those displaced by natural disasters, and they feature prominently in one of Canada's greatest television series. However, from a local government perspective, they can present unique challenges when imposing remedial action requirements ("RARs"), collecting property taxes, or charging service fees.

Where an RAR is not complied with by a property owner, the local government may carry out the requirements in default at the owner's cost. Unpaid service fees and costs incurred as a result of performing default work for an RAR may be recovered from real property owners as part of the property tax bill. If these taxes become delinquent, the municipality is generally obliged to sell the property at the annual tax sale to recover the costs. Obviously, tax sales are an extreme result, but they are the cornerstone of a system of incentives and deterrents that allow local governments to function – property owners must pay their taxes and service fees and maintain their properties in accordance with the applicable bylaws, or they could ultimately lose the property.

The process is less straightforward for mobile homes within mobile home parks (i.e., where the owner of the mobile home does not own the underlying land). For example, imagine a mobile home park tenant who has conducted unpermitted renovations on their mobile home resulting in hazardous conditions on the site. Worse, they continuously fail to pay for sewage and wastewater services for their site. A local government may issue an RAR against them, requiring them to remedy the hazardous conditions and bring the home into compliance with the safety standards set out under applicable bylaws. If they fail to perform the work, the local government can go on to the property and remedy the hazardous conditions directly pursuant to section 17 of the *Community Charter*. The cost of that work and the unrecovered service fees are recoverable as property taxes in arrears.

However, due to the *Manufactured Home Tax Act*, their property taxes are assessed against the mobile home directly, rather than the underlying real property. As such, the tax sale remedy is not available should they leave their property taxes unpaid. Instead, the local government may take less direct routes to recovery such as registering the unpaid property tax as a lien against the mobile home pursuant to the *Personal Property Security Act*, and may need to contend with other security interests that may be registered against the home.

Often, mobile homes with such liens end up abandoned and derelict – their owners lack the money, the interest, or the desire (or some combination thereof) to bring the home back into a liveable condition. Moreover, because the mobile home has fallen into such a state of disrepair, any effort to recover the cost of performing an RAR by seizing and selling the mobile home itself is unlikely to be successful. In such cases, an ounce of prevention is worth a pound of cure –it is important to initiate bylaw enforcement early and often when unpermitted activities are occurring within a mobile home. RARs should be a last resort.

...effectively managing mobile homes and parks involves a blend of preventative measures, strategic coordination with park owners and tenants, and diligent enforcement of bylaws to navigate the unique challenges associated with property taxes and fee collection against mobile homes.

However, dealing with abandoned mobile homes is occasionally unavoidable, and the focus will move from obtaining bylaw compliance and recovering unpaid fees and taxes to simply getting rid of the mobile home so as to prevent the continued existence of a hazard and nuisance that cannot be dealt with in any other way. In those circumstances, local governments can instead issue an RAR for the removal or demolition of the home. The local government should still seek to issue the RAR against the owner of the home, wherever possible. When the owners are difficult or impossible to locate,

the RAR can be issued against the mobile home park owner, but this method of proceeding is more complicated because the Manufactured Home Park Tenancy Regulation requires the park owner to take steps to determine the status of the mobile home as well as post notice of the intended disposition.

As noted above, there are often taxes owing on these homes, so land owners may need a letter from the local government consenting to the transport of the home despite the unpaid taxes, pursuant to section 15(3) of the *Manufactured Home Act*. Until the landlord has taken the required statutory steps, the mobile home and any other property remaining on the site legally belongs to the tenant, and improper removal or disposal could give rise to legal action. As such, in circumstances where the prospect of recovering unpaid property taxes seems remote, it is ideal where possible to work with park owners in order to allow them to legally take possession of the derelict mobile home and have it removed from the park.

An additional wrinkle that incentivizes dealing with abandoned mobile homes is that unless preventative measures are taken, BC Assessment may continue to assess property taxes against the mobile home and consider those taxes when accounting for municipal revenues. Eventually, these unpaid taxes can create issues in the annual budget. As such, local governments may consider the possibility of coordinating with the park owner and BC Assessment to ensure that any abandoned homes are removed from the assessment roll before January 1st of any given year.

In summary, effectively managing mobile homes and parks involves a blend of preventative measures, strategic coordination with park owners and tenants, and diligent enforcement of bylaws to navigate the unique challenges associated with property taxes and fee collection against mobile homes. Mobile homes are here to stay, so local governments need to stay informed regarding the appropriate measures that may be used in relation to them. Please reach out to our office for any further questions or advice.

Nate Ruston ✍

Dismissal Upheld for Failure to Provide Medical Information

In the recent labour arbitration decision, Fernie (City) v. Canadian Union of Public Employees, Local 2093 *(Ubell Grievance), [2024] BCCAAA No. 48, the Arbitrator confirmed that the consequences of an employee's failure to provide medical information to their employer to justify their absence from work can include dismissal.*

In this case, the employee sent an initial email to her supervisor stating that due to "medical reasons" she would not be at work that day and later provided a note from someone at a hospital which said "Off work for medical reason until assessed by MD". The employee also applied for weekly indemnity.

Her employer, the City of Fernie, emailed the employee a medical certificate and a physician's statement for her physician to complete. The medical certificate was for the City's use in determining the reason for the employee's need to be absent from work, whether she could perform any of the duties of her position, and whether any accommodation was required upon the employee's return to work. After the employee's appointment with her physician, she sent the City an email stating that her physician had completed the physician's statement and sent it to the weekly indemnity insurer, and that the insurer would provide the City with all the information it needed once there was a plan in place for her return to work.

The City responded by directing the employee to have the medical certificate completed by her physician and warned that if she refused to provide the information within a reasonable time, she may be subject to discipline up to and including dismissal for just cause. The employee sent the City the completed medical certificate, but it contained very little information. The physician referred the City to the insurer for further information and indicated on the form that the information sought was confidential and that the employee may or may not want to disclose it.

This case confirms the requirement for employees to provide reasonable medical information to support a claim for sick leave.

The City advised the employee the medical certificate provided was incomplete, it could not access the information provided to the insurer, and that if her physician refused to properly complete the medical certificate that the City was prepared to send her for an independent medical examination at her cost or she could go to another physician. The City also warned that if the employee did not provide the information requested, her employment would be terminated for cause.

After the employee again failed to provide the requested information, the City wrote to the Union seeking to arrange an accommodation meeting pursuant to the Collective Agreement. The Union responded that it did not agree to the meeting and that it would not agree to meet until the employee was cleared medically by her physician to fully participate in the discussions.

The City terminated the employee's employment for just cause for her failure to provide the requested medical information to justify her absence from work, and for failing to work with the City to consider how to deal with her continued absence. The Union grieved the termination claiming that the dismissal violated the Collective Agreement and the *Human Rights Code*.

The Arbitrator held that the employee was required to provide the requested medical information. While recognizing that a person's medical information is deserving of significant protection to safeguard their privacy rights, the Arbitrator held that employers are entitled to know the nature of an employee's medical condition and prognosis so that they can determine whether a claimed medical absence from work is justified. Employers are also entitled to have enough information to determine whether the illness or injury is a disability that can be accommodated. An employer is not required to accept the employee's word or a vague medical note that merely states that the employee has a disability and requires a specific accommodation.

The Arbitrator also held that the medical

information provided by the employee was not adequate in the circumstances. The first medical note had merely said that she was "Off work for medical reason until assessed by MD" and did not provide any information as to the nature of the medical reason or when she might return to work. The medical certificate completed by the employee's physician did not provide that information either and essentially referred the City to the insurer to obtain the requested information, and was for those reasons inadequate.

The Arbitrator further found that the employee was not blameless in her failure to provide the City with the medical information to which it was entitled. The Union argued that the employee was a victim of her physician's failure to provide adequate information. However, the Arbitrator rejected that argument as the City had provided the employee with three alternatives which she did not pursue: have her physician complete the medical certificate properly, attend an independent medical examination, or see another physician of her choosing. Based on the medical records in evidence, the Arbitrator considered it unlikely that the physician would have refused to fill out the medical certificate properly if the employee had told him that her employment was in jeopardy.

The Arbitrator also held that the employee was required to participate in the accommodation process. There was clear collective agreement language requiring her to do so, and the Union had not produced any evidence to show that she was not medically fit to attend the meeting or to show that the employee ever asked her physician whether she was fit to attend the meeting.

Importantly, the Arbitrator further held that even in the absence of a collective agreement provision requiring an accommodation meeting, an employee who is absent from work for a lengthy period of time cannot avoid either providing medical information or discussing possible accommodations by simply advising their employer that they are not seeking an accommodation at that time.

Finally, the Arbitrator also concluded that dismissal was not an excessive disciplinary response in all of the circumstances of the case. In the Arbitrator's view, the employee's failure to provide the medical information requested and to participate in the accommodation meeting constituted serious misconduct. The employee had been away from work for almost two months, had not provided medical information to justify her absence, and was clearly advised that her failure to provide the information could result in her dismissal. The employee had also only worked for the City for approximately two years, which was not long enough to be a significant mitigating factor.

This case confirms the requirement for employees to provide reasonable medical information to support a claim for sick leave. It will be helpful to local government employers dealing with employees who refuse to provide adequate medical information or to participate in the accommodation process.

Michelle Blendell

Look For Your Lawyers

We are pleased to welcome **David Giroday** to the firm as an associate. David is a solicitor whose practice is focused on working with local governments, local government corporations and other public authorities. He completed his Juris Doctor in Ontario at the University of Windsor in 2018 and has worked exclusively in the field of local government law since 2020. David is particularly fond of working with local government owned economic development corporations where he assists his clients in meeting their business objectives and delivering services to their rate payers and the general public.

We would also like to welcome to the firm our two articled students, **Aishling Carson** and **Jack Wells**.

Aishling Carson returns to the firm having been the summer articled student in 2023. Aishling has a BSc in Zoology from the University of Galway, a BSc in Veterinary Nursing from the Atlantic Technological University, and an MSc in Animal Behaviour and Welfare from Queen's University Belfast. Aishling received her Juris Doctor from the Peter A. Allard School of Law at UBC in 2024. While at UBC, Aishling participated in several legal clinics including the Law Student's Legal Advice Program as a clinic head, providing free legal advice to low-income clients and the UBC Criminal Law Clinic, where she acted as co-defence counsel on two trials at the Provincial Court.

Jack Wells received his Juris Doctor from the Peter A. Allard School of Law at UBC in 2024. During his time at law school, Jack worked with the Law Students' Legal Advice Program and the Access Pro Bono Society of BC, providing free legal services to lower-income individuals. Outside the office, Jack can be found at the pickleball courts, catching a movie, or cheering on the Vancouver Canucks.

Sukhbir Manhas will be presenting a session entitled "Legal Update" at the Local Government Management Association Corporate Officers Forum being held in Kelowna on October 2-4, 2024.

Sukhbir Manhas will also be presenting a session entitled "Caselaw Update" at the Thompson Okanagan Local Government Association Annual Conference being held in Penticton October 23-25, 2024.

Young, Anderson will be presenting its Annual Local Government Law Seminar on November 8, 2024 at the Fairmont Hotel Vancouver, 900 Georgia Street, Vancouver.

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