YOUNG ANDERSON
BARRISTERS & SOLICITORS

MARCH 2024, VOLUME 35, NUMBER 1

NEWSLETTER

BC Court of Appeal Clarifies Law of Confidentiality and Indemnification

The BC Court of Appeal's recent decision in Anderson v. Strathcona (Regional District), *2024 BCCA 23 sheds some light on both the scope of the duty of confidentiality under section 117 of the* Community Charter *and the principles governing the indemnification of elected officials for their legal fees in connection with the exercise of their powers.*

The case arose from a decision of the Regional District Board to censure Director Anderson for disclosing confidential Board information to her legal counsel. The alleged improper disclosure occurred in the context of a proceeding that attempted to disqualify Director Anderson for allegedly accepting a gift. In the course of that proceeding, and also in relation to an investigation conducted by the Regional District in the same matter, Director Anderson disclosed certain confidential documents to her legal counsel for the purpose of seeking personal legal advice. While the disqualification proceeding was ultimately unsuccessful, the Board determined that the disclosure of the confidential documents was a breach of section 117 of the *Community Charter* and both censured Director Anderson and resolved not to indemnify her for her legal fees.

The Court held section 117 of the Community Charter *cannot be interpreted so as limiting solicitor-client privilege, which is a form of confidentiality between a lawyer and client that has a constitutional dimension as a "principle of fundamental justice"*

Director Anderson sought judicial review of both the Regional District Board's censure decision and its indemnification decision. The BC Supreme Court decided against Director Anderson on both issues. The Court adopted a very strict reading of section 117 of the *Community Charter*, holding that Director Anderson ought to have asked permission of the Board before sending any confidential materials to her legal counsel, even for the purpose of seeking legal advice. On the indemnification decision, the Court showed deference to the Board's interpretation of its

Indemnification Bylaw, whereby the Board had found that the disqualification proceeding was not "a claim, action or prosecution" as defined in the bylaw.

The BC Court of Appeal overturned both of these findings. The Court held section 117 of the *Community Charter* cannot be interpreted so as limiting solicitor-client privilege, which is a form of confidentiality between a lawyer and client that has a constitutional dimension as a "principle of fundamental justice":

> ...all citizens have an interest in full and ready access to meaningful legal advice in matters of personal importance. In my view, it is highly unlikely the legislature would intentionally limit that fundamental right in s. 117 by requiring officials such as Ms. Anderson to obtain prior authorization before they are entitled to exercise that right. Nor is it likely the legislature intended to limit the access of an official's lawyer to information needed to provide legal advice when ss. 100(4) and 104(2) are engaged, particularly in the absence of any express words to that effect.

With respect to the indemnification decision, while accepting that the Regional District Board's decisions were entitled to deference, the Court held that the only reasonable interpretation of the Indemnification Bylaw required that Director Anderson be indemnified by the Board. The bylaw was drafted such that it clearly provided for mandatory indemnification under prescribed conditions. Read as a whole, the bylaw clearly contemplated matters such as the disqualification proceeding when it used the words "claim, action or prosecution".

This case is important for local governments on multiple fronts. First, while the Court did not rule out that a disclosure of confidential records to a lawyer might be improper in some circumstances, it was clear that disclosure for the purpose of seeking legal advice about matters within the Regional District Board's jurisdiction was not improper, even where that legal advice relates to the elected official's personal interests. Second, this case underscores the need for local governments to have clear and precise language in their indemnification bylaws. In this case, when faced with imprecise language, the Court took a broad approach to the interpretation of the bylaw on the basis that indemnification of elected officials "is essential to the proper functioning of local governments". As issues

WWW.YOUNGANDERSON.CA

1616 - 808 Nelson Street, Box 12147, Nelson Square, Vancouver, BC V6Z 2H2
tel: 604.689.7400 I fax: 604.689.3444 I toll free: 1.800.665.3540

#201 - 1456 St. Paul Street, Kelowna, BC V1Y 2E6
tel: 250.712.1130 I fax: 250.712.1180

of indemnification often arise where an allegation is made that an elected official has acted outside of the scope of their duties (e.g., in relation to disqualification, code of conduct, and censure matters), it is advisable for local governments to expressly address such matters in their indemnification bylaws and make clear as to whether and in what circumstances indemnification is available in relation to them. Where a local government determines to not include mandatory indemnification in relation to such matters in its bylaw, it may nonetheless provide for indemnification by resolution on a case-by-case basis.

Sukh Manhas & Nick Falzon


Emergency And Disaster Management Act Update

On November 8, 2023, the new Emergency and Disaster Management Act *("EDMA") came into force, replacing the* Emergency Program Act*. EDMA is significant in two respects. First, it formally adopts a four-stage disaster management cycle (mitigation, preparation, response, and recovery), with different obligations, responsibilities, and powers for local governments (or "local authorities", as they are referred to in the legislation) and other stakeholders at each stage.*

Second, EDMA is a major step towards implementing the *Declaration of the Rights of Indigenous Peoples Act* for the provincial government. Among their obligations and responsibilities at the various stages of disaster management, local authorities are expected and required to consult and cooperate with Indigenous governing bodies within their borders, incorporate Indigenous knowledge, and obtain the consent of Indigenous governing bodies in some circumstances.

During the mitigation and preparation phases, local authorities will be required to prepare and maintain risk assessments and an emergency management plan. Risk assessments must identify all reasonably foreseeable hazards within a local government's jurisdiction, including the likelihood and consequences of an emergency. Emergency management plans must include information such as a description of the roles, powers, and duties of individuals during an emergency, resources required in case of an emergency, and measures to mitigate the adverse effects of an emergency upon disadvantaged and

vulnerable individuals. In other words, these plans set out a comprehensive response in case of an emergency occurring, and must incorporate all available risk assessments.

The term "hazard" is defined broadly under EDMA; it means "a circumstance, condition, process, phenomenon, activity or prescribed type of thing, whether natural or human-caused, that may give rise to an emergency." This means that local authorities will likely need to prepare multiple risk assessments, all of which must be accounted for in their emergency management plan, in order to be compliant with the legislation.

The response and recovery phases of disaster management are triggered by the occurrence of a disaster. Local authorities are authorized to declare a state of local emergency and exercise certain emergency powers, such as restricting access to hazardous areas, rationing goods or services, and ordering evacuations. Other stakeholders, such as the Province, enjoy similar or expanded powers to declare emergencies and exercise emergency powers.

An important restriction on emergency powers (not just those exercised by local authorities) is that they do not apply to an Indigenous governing body unless that Indigenous governing body consents to their application. This highlights the fact that the provincial government is clearly committed to ensuring that *Declaration of the Rights of Indigenous Peoples Act* is implemented in EDMA.

The Province is providing some assistance to both Indigenous governing bodies and local authorities in carrying out their efforts to consult and coordinate with one another, in the form of contribution agreements. Contribution agreements must include a description of proposed activities that will satisfy Indigenous engagement requirements to be fulfilled by the provincial funding contribution, and need to be returned to the Province before March 31, 2024.

... local authorities are expected and required to consult and cooperate with Indigenous governing bodies within their borders, incorporate Indigenous knowledge, and obtain the consent of Indigenous governing bodies in some circumstances.

There remains a lot to be seen in terms of how EDMA will be implemented in practical terms. At present, most of these obligations are not yet in force, and they will be fleshed out in regulations that are planned to be released over the course of 2024 and 2025. However, it is clear that the Province is moving quickly to roll EDMA out and is committed to doing so in a manner that promotes Indigenous involvement in emergency management and planning.

Nate Ruston

Legislation that would limit decriminalization subject to interim injunction

The British Columbia Supreme Court's recent decision in Harm Reduction Nurses Assn. v. British Columbia (Attorney General)*, 2023 BCSC 2290 (*"Harm Reduction Nurses*") is a significant development in the law surrounding decriminalization of certain prohibited substances in British Columbia. The Harm Reduction Nurses Association (the "Association") applied to the Supreme Court of British Columbia to temporarily suspend the effect of the* Restricting Public Consumption of Illegal Substances Act*, which would restrict the consumption of decriminalized substances in certain areas, and authorize police officers to respond to violations of the* Act*.*

The British Columbia Supreme Court granted the interim injunction, finding that the Association's arguments under section 7 of the *Canadian Charter of Rights and Freedoms* (the "Charter") presented a serious question to be tried, that it was highly probably that irreparable harm would occur to the Association and to people who use drugs ("PWUD") without the injunction, and that the balance of convenience favoured granting the injunction.

Background

The decision in *Harm Reduction Nurses* is the most recent chapter in the ongoing legal and policy response to the overdose crisis in British Columbia. On April 14, 2016, the Provincial Health Officer declared a Public Health Emergency due to a surge in overdoses and drug related deaths throughout British Columbia. The Public Health Emergency declaration has remained in place since this initial declaration.

As part of its response to the Public Health Emergency, the Province applied to Health Canada for an exemption from prohibitions against personal possession of small qualities of certain illicit substances under the federal *Controlled Drugs and Substances Act*. The federal government granted this exemption, providing the Province with a three-year exemption from January 31, 2023 to January 31, 2026 (the "Exemption Order"). The Exemption Order decriminalized personal possession of up to 2.5 grams of opioids, cocaine, methamphetamine and MDMA. The Exemption Order also contains certain limitations to its scope: for example, it does not apply on school or child care facility premises or within 15 metres of any play structure in a playground.

On November 8, 2023, the Province passed the *Restricting Public Consumption of Illegal Substances Act* (the "*Act*"), which would restrict where decriminalized substances could be consumed. While some restrictions mirror

the limitations established by the Exemption Order (e.g. no use within 15 metres of a play structure in a playground), other restricted areas are new (e.g. no use in any beach the public has access to). The *Act* also allows for additional restricted areas to be added subsequently by regulation.

The *Act* also authorizes police to take certain actions if a person violates these restrictions. Under the *Act*, a police officer may direct a person who is reasonably believed to be (or has recently been) consuming illegal substances in a restricted place to either cease consuming the substance or leave the restricted place. If the person does not comply with the officer's directions, the officer may arrest the person without a warrant, seize and remove the illegal substance, and destroy the illegal substance or submit it for analysis. Although the *Act* was passed in November 2023, it has yet to be brought into force by regulation.

The decision in

Harm Reduction Nurses

is the most recent chapter

in the ongoing legal and policy response

to the overdose crisis

in British Columbia.

The Association challenged the constitutionality of the *Act*, and sought an interim injunction suspending the operation of the *Act*. The Province, in defense of the *Act*, argued that the Association's application was brought prematurely as the *Act* was not yet in force, and that the requirements for an interim injunction were not met in the circumstances.

The Decision

The Court granted the interim injunction on the basis of the Association's arguments under section 7 of the Charter, which protects the right to "life, liberty and security of the person".

Despite the Province's argument that the *Act* could not properly be assessed in the absence of forthcoming regulations contemplated by the *Act*, the Court held that it could make its determination on the *Act* as it presently stood (without any regulations). The Court found that the section 7 concerns raised by the Association involved the interests of marginalized persons in safeguarding their lives and safety in the context of the Public Health Emergency, and posed a serious question to be tried.

The Court also found that the Association established a sufficient risk of irreparable harm, framing its determination within the larger context of the Public Health Emergency, and considering a number of potential harms. The Court considered evidence led by the Association of the following harms:

- Increased interactions with police and drug seizure: drug seizure by the police may result in withdrawal, or increased reliance on cheaper, unsafe drug supply to replace confiscated substance.

- Displacement: the movement, or threat of movement, of PWUD from the place they are using drugs would result in increased unsafe conditions

in isolated and out of sight areas, and a much higher risk of death from an unobserved or unreversed overdose.

- Imposition of Fines: the imposition of fines on those unable to pay them can result in financial hardship and an interminable cycle of criminal justice involvement.

- Detention, arrest and imprisonment: incarceration of PWUD results in a highly increased risk of fatal overdose in the first two weeks after release.

Finally, the Court found that the balance of convenience weighed in favour of granting the interim injunction. The Court found that:

> ...the applicable balance is as between the public benefit in suspending legislation that I am satisfied will cause irreparable harm, and allowing the legislation to persist and militate public benefits in diverting drug use from certain areas. In light of the evidence and in the instant circumstances, the balance must fall in the former direction.

The Court issued the requested injunction, staying the effect of the *Act* until March 31, 2024.

Takeaways

The Court's decision in *Harm Reduction Nurses* is a significant development in the regulating of decriminalization of substances in British Columbia, but it is certainly not the final development. The ultimate constitutionality of the *Act* has yet to be ruled on. The decision in *Harm Reduction Nurses* suspends the effects of the *Act*, but does not strike it down. The Court noted, and the Association acknowledged, that in the event that the *Act* is ultimately struck down, it nevertheless remains open to the Province to "re-legislate in a manner that meets constitutional standards ... [as] the Province has both legislative and policy alternatives that it could pursue".

Whatever the eventual outcome is for the *Act*, there will continue to be ongoing discussions on the implementation, monitoring and evaluation of decriminalization. Concurrent with the issuance of the Exemption Order, the federal government issued a "Letter of Requirements" to the Province, requiring them to undertake ongoing engagement with key stakeholders in decriminalization, including PWUD, law enforcement, Indigenous governments, and local governments. Minister of Public Safety and Solicitor General, Mike Farnworth, noted that one of the purposes of the *Act* was "to reduce the patchwork approach to addressing public drug use at the local government level". This need will remain, regardless of the ultimate fate of the *Act*.

James Barth

When is a claim too old to move forward?

Local governments are often involved as defendants in civil claims that eventually become inactive or dormant. After all, it is the role of a plaintiff who commences a claim to take steps to move it forward, and that does not always happen. Sometimes, the delay amounts to several years, burdening the local government's ability to defend against the claim. Such claims often also lead to added legal fees, the continued allocation of staffing resources to preserve and maintain evidence, and lingering uncertainty on the claim's outcome.

An application for want of prosecution is one tool available to defendants to have a claim dismissed for such delays. Want of prosecution, broadly speaking, refers to a failure by a litigant to adequately pursue or move their proceeding forward after instigating it. In the past, a successful want of prosecution application was very difficult to achieve, as courts were reluctant to strike out claims unless there was substantial delay and serious prejudice caused by that delay.

However, in a recent decision, *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS* 3173, 2023 BCCA 473 ("*Giacomini*"), the British Columbia Court of Appeal revised the test for a court to dismiss a civil proceeding for want of prosecution, which may make it easier for defendants to obtain dismissal orders.

Prior to *Giacomini*, the common law test established by courts for dismissing a proceeding for want of prosecution required courts to be satisfied that:

(i) there had been an "inordinate" delay in prosecuting the claim;

(ii) the delay was inexcusable;

(iii) the delay had caused, or was likely to cause, serious prejudice to the defendant's ability to defend the action; and

(iv) on balance, it was in the interests of justice to dismiss the proceeding.

For applicants seeking to dismiss a claim, proving the third criteria—the existence of "serious prejudice to the defendant"—proved difficult and was often the roadblock to a dismissal order. In recent years, this test has also been criticized for failing to account for other delay implications, such as the impact to defendant's professional or business interests, counsel's role in causing the delay, and the public's expectation that courts will provide timely and cost-effective justice.

In *Giacomini*, the Court of Appeal seemingly agreed with these criticisms. The case concerned a multi-party construction dispute over alleged defects in an HVAC system installed in a mixed-use real estate development. The respondent strata corporation commenced its action in August of 2019. In February of 2021, the appellants filed a notice of application seeking to strike the action for want of prosecution but subsequently adjourned their application on certain terms, including imposing timelines for each party to file amended pleadings and to

move the three related actions from Chilliwack to Vancouver. In the months that followed, the respondent did not amend its pleadings or take steps to move the action. The respondent also did not take any other steps to further its claim.

The appellants filed their second application to dismiss the action for want of prosecution in January 2023. The British Columbia Supreme Court found that the respondent's delay was inordinate and inexcusable. However, the Court dismissed the appellants' application because the delay had not caused serious prejudice to their ability to defend the action. The appellants had argued that the delays caused serious prejudice to their business operations given the stigma of the action, but the chambers judge, while accepting such a possibility, concluded that the relevant prejudice is "that which impacts the defendant's ability to defend the action." (*The Owners, Strata Plan EPS 3173 v. Intracorp S.W. Marine Limited Partnership*, 2023 BCSC 1003 at para 43)

... the British Columbia Court of Appeal revised the test for a court to dismiss a civil proceeding for want of prosecution, which may make it easier for defendants to obtain dismissal orders.

On appeal, the British Columbia Court of Appeal reaffirmed the principles governing the first two requirements of the test for dismissal for want of prosecution, the existence of an inordinate delay that is inexcusable, but dispensed with serious prejudice being a necessary condition. The Court reasoned that this element "prevents a court from giving appropriate weight to other factors relevant to the interests of justice". In its place, the Court imposed a revised question for courts to consider: is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay? The Court identified several factors for courts to consider in answering this question, including the impact of the delay on the defendant's professional, business, or personal interests, the context of the delay, and the merits of the action. The prejudice the defendant will suffer defending the case at trial was also identified as one of the factors for courts to consider, but it no was longer a prerequisite for a dismissal order.

On this revised test, the Court declined to dismiss the respondent's claim after concluding that delays had occurred within the context of a complex, multi-party action involving construction defects that required some time to investigate. While no longer required to show *serious* prejudice, the appellants had failed to show *any* prejudice to their ability to defend the action, or to their business interests. The Court also noted that the appellants had failed to press the respondents to commit to timelines for steps in the litigation.

It will be interesting to see how courts will interpret and apply the new test going forward. One potential impact is that more applications for dismissal orders will be sought as defendants may view the test as easier to satisfy. Whether that occurs, however, will remain to be seen.


Christopher Gallardo Ganaban & Eman Jeddy

Employee Dishonesty: Context, Not Quantity

In Mechalchuk v. Galaxy Motors (1990) Ltd., *2023 BCSC 635 [*Mechalchuk*], the plaintiff was the President of Operations of the defendant's used-car sales business. The Chief Administrative Officer of the defendant believed that the plaintiff had falsely claimed meals with his wife as a business expense. The defendant therefore terminated the plaintiff's employment for cause. The plaintiff claimed that the meals in question were with other employees of the defendant and had written his colleagues' name on the receipts.*

After examining the evidence, the Supreme Court of British Columbia found that the plaintiff was generally truthful but that his demeanour was different with respect to his evidence regarding the meals in question in that he became "noticeably uneasy and defensive" when questioned on cross-examination about the receipts for those meals. As such, the Court found that the plaintiff attempted to deceive his employer by claiming the meals were with his colleagues and not with his wife and then when confronted by his employer, he perpetuated his dishonesty.

The decision in Mechalchuk affirms that just cause for dismissal of an employee may be established even where the dollar value involved is relatively insignificant, if contextual factors, such as an employee's position of trust and level of dishonesty, strikes at the core of the employment relationship.

The Court confirmed that dishonesty is not automatically just cause for dismissal. Having found that the plaintiff had engaged in deliberate dishonesty the Court went on to assess whether his dishonest acts, when considered alongside contextual factors, warranted the plaintiff's dismissal by the defendant for just cause.

The Court found that the monetary amount involved in the plaintiff's deception was relatively small. However, the Court noted that, in his senior position, the plaintiff was afforded a great degree of trust and responsibility. The Court summarized its conclusion as follows:

> . . . Although the total amount of the Parksville restaurant dinner and breakfast receipts (approximately $250) was relatively small, the misconduct went to the very root of the plaintiff's employment relationship with the defendant. He was in the most

> senior management position at the defendant. His position commanded a high level of authority, responsibility, and trust. He breached that trust by submitting false expense receipts and thereafter being untruthful about them when given an opportunity to explain them on July 11, 2022. Moreover, he failed to "come clean" when he had a second opportunity to do so during the meeting on July 13, 2022. His conduct was such that the defendant's loss of faith and trust in him was justified.

The plaintiff appealed the above decision to the Court of Appeal. In dismissing this appeal (2023 BCCA 482), the Court made the following comments:

> In conclusion I am of the view that there is no principled basis upon which this Court could or should interfere with the judge's conclusions, in particular that Mr. Mechalchuk's conduct was such that Galaxy Motor's loss of trust and faith in him was justified. The judge correctly applied the contextual analysis which was required in considering Mr. Mechalchuk's position and level of responsibility. He assessed the severity of the misconduct, that is submitting false expense receipts and being untruthful when given a chance to explain and found that in all the circumstances, termination of employment for cause and without notice was a justifiable response by the employer.

The decision in *Mechalchuk* affirms that just cause for dismissal of an employee may be established even where the dollar value involved is relatively insignificant, if contextual factors, such as an employee's position of trust and level of dishonesty, strikes at the core of the employment relationship. This decision also confirms the importance of conducting a thorough investigation including providing an employee an opportunity to respond to the allegations.

Ayesha Ali

MEVAs: We Know They're Useful, But Are They Constitutional?

*Within the boundaries of the Constitution – and beyond them, to the extent that the Constitution may be amended, even repealed, in accordance with demanding procedural requirements – Canada's Parliament and legislatures are sovereign. As such, it is open to them to define not just what someone may lawfully do in future, but also to make lawful what they might have done in the past. In BC, the Legislature has, from time to time, carried out this latter exercise by passing a "*Municipalities Enabling and Validating Act*" ("MEVA"), insulating local government action from legal challenge, even after the fact. Of course, from time to time, these MEVAs are themselves challenged as improper or unlawful.*

In *Lambert v. Resort Municipality of Whistler et al*, 2004 BCSC 342, the Court declared that a Whistler zoning amendment bylaw – which would have permitted a large new hotel on lakefront land within plain view of the plaintiffs' property – was invalid, because it authorized additional *uses* in exchange for amenities, which is not permitted by the *Local Government Act* (as opposed to exchanging additional *density* for amenities, which is permitted). Two months later, the Province enacted a MEVA that retroactively validated the zoning bylaw and therefore authorized the hotel. After learning that Whistler staff had asked the Province to enact the MEVA days before trial, the plaintiffs brought an application for special costs, arguing that they would not have pursued their claim (to the tune of about $165,000) had they known what was going on "behind the scenes".

Not only does the Constitution impose substantive limits on the content of statutory enactments, but it also codifies the authority of superior courts to review legislation for constitutional compliance

The plaintiffs grounded their claim for special costs in the alleged inequity of Whistler seeking a MEVA, "a legislative remedy unavailable to private litigants[,] to undo the result of a successful challenge by an individual". They argued that this conduct, especially since Whistler had not informed the plaintiffs about its discussions with the Province, was deserving of rebuke or reproof through an award of special costs. The Court held otherwise, dismissing the application:

> In all the circumstances here, I am of the view that the plaintiffs should have anticipated the use of MEVA and governed themselves accordingly. Whistler was under no obligation to advise the plaintiffs of their legal/ legislative options. If Whistler had been guaranteed a MEVA by the Province prior to the hearing, the considerations might be different, but that was not the case.

The issue of the MEVA arose again more recently in *Kitsilano Coalition for Children & Family Safety Society v. British Columbia (Attorney General)*, 2023 BCSC 1999. This time, however, the plaintiff directly challenged the constitutionality of MEVAs on separation of powers grounds. The matter arose after Vancouver City Council gave approval in principle to a zoning amendment bylaw to allow a major social housing project in the City's Kitsilano neighbourhood, following six days of public hearings. In response to the plaintiff filing a petition for judicial review – but before any judicial declaration on the validity of the zoning amendment bylaw – the Province passed a MEVA that deemed the public hearing validly held and the bylaw validly adopted. The plaintiff then commenced an action against the Province, arguing that, in enacting the MEVA, it contravened s. 96 of the *Constitution Act, 1867*, "inasmuch as it unconstitutionally interfere[d] with a core function of [the] court in its adjudication of the plaintiff's pending application for judicial review".

In this case, the MEVA did not "legislate the dismissal of a case or direct a court to give a specific judgment" and was properly understood as amending the law that the courts must apply.

After explaining the basic concept of parliamentary sovereignty – "the legislature has the *exclusive* authority to enact, amend, and repeal any law as it sees fit, and… there is no matter in respect of which it may not make laws" – Mr. Justice Milman noted how it has been delimited in Canada's constitutional arrangement. Not only does the Constitution "impose substantive limits on the content of statutory enactments, but it also codifies the authority of superior courts to review legislation for constitutional compliance (an authority that had previously been only assumed to exist)". The independence of the judiciary is foundational to our constitutional order, as reflected in s. 96. As Justice Major writes in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49:

> [E]ven where the essential conditions of judicial independence [i.e., security of tenure, financial security, and administrative independence] exist… [t]he critical question is whether the court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the executive and legislative branches of government.

Mr. Justice Milman therefore assessed whether the MEVA impaired the court such that it could not play its role under s. 96. He surveyed relevant caselaw, including *5185603 Manitoba Ltd. et al* v. Government of Manitoba

et al, 2023 MBCA 47 where that province had purported to dismiss claims related to its termination of a lease, specifically naming the plaintiff's court file in legislation. Mr. Justice Milman noted that the MEVA did not go that far:

> Although it deems a particular state of affairs to be true, it does not directly dispose of any legal proceeding... Nevertheless, the plaintiff argues that *MEVA 5* is similarly problematic because the Legislature is seeking to do indirectly what it cannot do directly, namely, effectively dismiss an action currently before the courts. ... I do not find that argument persuasive.

He found support for his conclusion in a line of British Columbia caselaw, including *Barbour v. The University of British Columbia*, 2010 BCCA 63 in which the Court of Appeal considered:

> ... it clear in Canada that the Legislature may enact legislation that has the effect of retroactively altering the law applicable to a dispute. While a Legislature may not interfere with the Court's adjudicative role, it may amend the law which the court is required to apply in its adjudication. The difference between amending the law and interfering with the adjudicative function is fundamental to the proper roles of the legislature and courts in our parliamentary democracy.

In this case, the MEVA did not "legislate the dismissal of a case or direct a court to give a specific judgment" and was properly understood as amending the law that the courts must apply.

In answer to the question in the title, the Court in *Kitsilano* provides a resounding affirmative. Provided that MEVAs continue to take their usual form, focusing on reform of the law for the courts to apply and not control of the courts' fundamental processes, they will remain a tool for the Province to protect sufficiently important actions at the local level. How assured local governments can be of such help in a time of need – and whether they ought to seek what might be described as an assault on the principle of subsidiarity – is a question for another time and place.

Aidan Andrews

Check for Tenants Before Registering a Charge

Local governments often register charges on title, such as statutory rights of way, covenants, and easements. When a local government intends to register a charge, it should check whether the property is leased. If it is, then that lease – even if it's unregistered – might affect the local government's rights granted to it under the charge.

Before registering a charge on title, it is standard practice to perform a title search for the property against which the charge will be registered. This search serves several important functions, one of which is to check for any existing registered charges, especially "financial" charges such as mortgages, over which a local government may want to register a priority agreement. A priority agreement grants priority to a newly-registered charge over an existing charge, and is filed in the land title office alongside the new charge.

If the property is leased, a local government will want to consider how the lease may affect the charge it wishes to register on title. The nature of the charge and the obligations or privileges that it includes will dictate if and to what degree it conflicts with the existing lease. For example, if a lease gives a tenant exclusive use over the entirety of a parcel of land, but a local government's statutory right of way allows the local government to permit passage by the public over a portion of that land, then there is a conflict between the tenant's right to exclusive use and the local government's rights. On the other hand, if a residential lease gives a tenant access to only the basement of a house, and a local government's statutory right of way allows that local government to dig up a portion of the backyard to install and maintain utility works, there might not be a conflict.

If a lease is registered, which means that it will appear as a charge on title, a local government can get a copy of it from the land title office, and review for potential conflicts. If there are conflicts, the local government might insist on a priority agreement signed by the lessee, or tenant, which will then be registered at the same time that the local government's charge is registered. Afterwards, when performing a title search, one will see the lease, the local government's charge, and the priority agreement all registered on title.

An unregistered lease will not appear as a charge on title, but can still potentially affect a local government's rights under its registered interest. In the case of an unregistered lease for a term not exceeding three years and where the tenant is occupying the property – which is likely the case for most residential leases and at least some commercial leases – that lease may take priority over a subsequent charge even though the lease is unregistered. In this situation, the local government may want to obtain an agreement as between the local government and the tenant to address the potential conflict between the lease and the local government's charge. This written agreement could include the tenant acknowledging the local government's charge and, depending on the circumstances, agreeing either that there is no conflict or better yet that, if there is a conflict, then the local government's charge will take precedence over the tenant's lease.

What does this mean for a local government that wishes to register a charge? In addition

to performing the standard title search and checking for registered charges, a local government should check directly with the property owner to determine whether they have leased their property. Also consider performing a site visit and take a moment to see if the property appears tenanted. Further, consider adding a clause into the terms of the charge by which the property owner represents that their property is not subject to any leases, and that the owner will inform or receive acknowledgements from any future tenant that their lease is subject to the local government's charge.

Serge Grochenkov

What's that Covenant Called? Differentiating Restrictive Covenants from Section 219 Covenants

"Restrictive covenants" and "section 219 covenants" are entirely distinct charges. Though the terminology is frequently confused, local governments regularly require section 219 covenants, but infrequently encounter restrictive covenants.

Two terms that are frequently confused with each other are "section 219 covenants" under the *Land Title Act* (the "*Act*") and "restrictive covenants". After all, both of these contain the word "covenant", and both are registrable charges against land. This is made even more confusing by the fact that the word "covenant" means an agreement, and so it is possible to have terms (covenants) within an agreement that are negative (restrictive) in nature, even though that agreement does not form a charge known as a "restrictive covenant".

So, what makes "restrictive covenants" and "section 219 covenants" different from each other and why is the distinction important?

Restrictive covenants are a special type of common law (created by the courts rather than by statute) contract to restrict the use of land for the benefit of another property, and circumvent the limits of another common law rule that contracts are only enforceable as between the original parties. In BC, pursuant to the *Act*, restrictive covenants can only be registered on title if:

1. the obligation created is negative or restrictive (a promise not to do something, as opposed to a positive obligation which is a promise to do something);
2. they describe the lands that have the benefit of the restrictive covenant (the 'dominant tenement'), as well as the lands that are burdened by the restrictive covenant (the 'servient tenement'); and
3. title to the lands affected are registered under the *Act*.

For restrictive covenants to "run with the land", they must also "touch and concern" the benefitting lands. In other words, restrictive covenants must be imposed for the benefit

of lands belonging to the covenantee and be connected with the value, use or enjoyment of those lands, rather than for the benefit of the covenantee personally.

An example of where a restrictive covenant may be used is to restrict the use of properties located within a developer-owned strip mall in which all of the lots are made available for lease. In this example, at the time of development of a strip mall, if a coffee shop is going to be the anchor tenant and does not want other coffee shops in the development, as part of their lease negotiations they may ask that the developer (as the owner of all lots) register restrictive covenants against all lots in the strip mall other than the coffee shop lot (the servient tenements) in favour of the coffee shop lot (the dominant tenement), prohibiting other coffee shops on those lots. The effect of doing so would be to prevent competitor coffee shop businesses from operating within that strip mall. To be registrable, the restrictive covenant must not impose any positive obligations.

An example of where

a restrictive covenant may be used

is to restrict the use of properties

located within a developer-owned strip mall

in which all of the lots

are made available for lease.

Section 219 covenants, on the other hand, are created by statute (section 219 of the *Act*). Section 219 covenants can impose positive (in addition to negative/restrictive) obligations, and are enforceable against the covenantor (the party giving the covenant) and their successors in title even if the section 219 covenant is not connected to land owned by the covenantee (the party benefitting from the covenant). Positive obligations may include, for example, requirements to undertake maintenance or repairs, and to indemnify another party. Section 219 covenants are registrable only in favour of specified persons or groups (including municipalities, regional districts, and local trust committees), and their provisions must fall within what is permitted by section 219 of the *Land Title Act*. Broadly, those include the use of land and buildings, that land is to be or is not to be built on, that land is or is not to be subdivided, that parcels of land are not to be sold or otherwise transferred separately, and provisions for the conservation of land or an amenity.

Although a local government can give and take common law restrictive covenants in respect of land the local government owns, it is far more common for local governments to be the covenantee of a section 219 covenant.

Why does the distinction between restrictive covenants and section 219 covenants matter?

Some of the main reasons are to prevent confusion, improve accuracy, and to ensure local governments are preparing and registering the correct charges to meet their objectives. Submission to the Land Title Office of a purported "restrictive covenant" that fails to identify the benefitting lands and/or imposes positive obligations should be defected by the Land Title Office examiner, which will result in increased time consumption and cost to your organization.

Jacob Lewin

Lease versus License: A Primer and Practice Points for Local Governments

Local governments may grant individuals, companies, non-profits, and other organizations permission to occupy and use land owned by local governments for various purposes. Permission may be granted by different mechanisms, but two of the most common are leases and licenses. There are different benefits and limitations to each type of instrument, and understanding how these instruments function can help local governments choose the right one for each particular purpose. In this article, we highlight a few key differences between leases and licenses, and note some common situations in which local governments use them.

To begin with, a lease is an agreement whereby the exclusive right to occupy and use land is granted by the owner of land to another party on terms and conditions set out in the lease. This relationship is commonly known as a landlord-tenant relationship. The landlord grants the tenant the right to occupy specified land, or a portion of land, in exchange for rent. A lease has a few key components that must be included: the parties to the lease, a description of the premises being leased, the start date of the lease, the term (or duration) of the lease, and the rent payable. A lease typically includes terms and conditions which further govern the relationship of the landlord and tenant. These may include permitted uses of the land, dispute resolution, and the rights and obligations of the parties, such as who must maintain the property and who must provide insurance. Leases are typically divided into residential and commercial leases, though subvariants can and do exist.

On the other hand, under a license, a licensor (the party who owns the land) gives a licensee (the party wishing to enter and use the land) permission to use the licensor's land for a limited purpose, where using the licensor's land would otherwise constitute trespass and/or contravene a bylaw. A license is therefore a limited right to access and use land and can be less formal and have more flexibility than a lease. Since a license can have more flexibility, it can take on different forms, such as a contractual license or a bare license. A contractual license has many elements of a contract, including the exchange of some form of consideration – meaning the licensee has given the licensor something of value, such as a fee.

One of most important distinctions between these forms of instrument is that a lease grants an interest in land, while a license does not. A lease can run with the land - if the owner sells land subject to a lease, the new owner takes title subject to the lease and the tenant continues to enjoy the right to occupy the premises. This also means that a lease can be registered on title to the lands, whereas a license cannot. Registration is essentially notice to any person who may wish to acquire an interest in the lands, and can have the effect of binding future owners. As such, a lease is better suited to situations where the parties may wish to have the access and use granted in the lease continue for a long or indeterminant amount of time. This is typically desirable by a tenant who wishes to use the lease as a mortgageable interest in land. By registering the lease, the tenant can provide greater security to a lender that the interest

granted in the lease will be transferrable to another party. Local government leases should ensure that all costs associated with registration, including property transfer tax and, in the case of a lease of a part of a parcel, the preparation of a leasehold subdivision plan, are the responsibility of the tenant. Licenses, on the other hand, are typically meant for the license holder only, and will rarely be intended to pass to future, unknown parties.

Another notable distinction between these two instruments relates to exclusivity. A lease grants the tenant with *exclusive* possession of the specified land for a particular period of time. Conversely, a licensee's rights are non-exclusive, meaning that the owner of the land can give others permission to use the same portion of land at the same time as the licensee. Depending on the nature of the land, having exclusive access may be a benefit, or entirely unnecessary for the purpose of the rights being granted. A license to erect signage or set up a food truck at a community event does not require exclusive access, and therefore a lease would typically be unnecessary.

For local governments, a key distinction between a lease and a license is that before a local government grants a lease it must publish notice of the proposed disposition in accordance with section 26 of the *Community Charter*. No notice is required in order to grant a license. For this reason, a local government may wish to grant a license in circumstances in which the parties cannot wait for the public notice to run its course.

Finally, the term of the grant is another key consideration in differentiating leases and licenses. As mentioned above, leases are usually long-term agreements, often containing renewal options and/or conditions related to the obligations of the parties upon expiry or early termination of the term. Licenses, on the other hand, generally contemplate short term permission to use land. Accordingly, the terms of a license are typically less detailed, and often the licensor has the right to revoke the license at any time. When drafting a license, consideration should be given to revocation, as contractual license can lead to certain types of claims by a licensee. While this will not be the case for every license, some situations could lead to claims of damages where land has been improved by the licensee, or even estoppel where a licensee has acted on the reasonable expectations created by the license.

With these differences in mind, different circumstances favour the granting of leases and licenses. Some examples of where these instruments have been used in the past include:

- Leases: commercial tenants carrying on business activities on vacant land or in buildings; non-profits or other organizations carrying on programs or activities in municipal-owned buildings; residential tenancies in buildings owned and operated by local governments.

- Licenses: holding temporary community events or programs, public art, food trucks, erecting signs, posters, or other installations, or storing personal property or equipment.

Please note that the above are general examples of when leases and licenses may be used. Each circumstance is fact-specific, and it may be prudent for a local government to seek advice for particular situation.

Julia Tikhonova & Timothy Luk


Negotiating At Grade Road Crossings with Railway Companies

Railway companies have long enjoyed reputations for being difficult negotiators. Consider the use of "railroad" as a verb, meaning to rush, coerce or force someone into doing something or force something to happen, especially quickly or unfairly. Getting a railway company to respond to a municipality's concerns relating to the construction or improvement of road crossings or whistling cessation can be difficult and when they do respond, it will usually be on the railway company's terms.

The purpose of this article is to provide a basic understanding of municipalities' legal recourse and means to secure better terms for at grade-road crossings.

Grade Crossing Regulations

In 2014, the Canadian government repealed and replaced the *Railway-Highway Crossing at Grade Regulations* with the *Grade Crossing Regulations*. The *Grade Crossing Regulations* (the "*Regulations*") impose public grade crossing standards and deadlines for municipalities as road authorities and federal railway companies to meet those standards. The *Regulations* were amended in 2021 to extend the deadlines to meet the crossing surface, road approach, signs and warning system requirements for public grade crossings. November 28, 2022 was the deadline for high priority crossings, meaning those with an average of 10 or more annual daily railway movements and a railway design speed of 97 km/h (60 mph). For all other public grade crossings of federal railway lines, the deadline is November 28, 2024.

In 2020, British Columbia enacted regulations to adopt the *Grade Crossing Regulations* as they existed on September 20, 2020. An existing public grade crossing of a provincial railway must meet the requirements no later than January 1, 2028.

Whistling cessation requirements are prescribed in sections 104 to 107 of the *Regulations* and in Table D-1 of the Grade Crossings Standards. Ideally, the municipality and the railway company work together to assess whether or not the area (crossing or multiple crossings) meets the whistling cessation requirements. If the railway company fails or refuses to confirm that the area meets the requirements for whistling cessation, then the municipality may apply for a Ministerial Decision under subsection 23.1(2) of the *Railway Safety Act* (Canada).

Railway companies must ensure compliance with the requirements set out in subsection 3(a) of the *Regulations* and road authorities must ensure compliance with the requirements set out in subsection 3(b). Despite this allocation of responsibility for grade crossings, railways and road authorities are free to negotiate agreements relating to the construction, maintenance, or apportionment of costs and, if they file such an agreement with the Canadian Transportation Agency (the "Agency") pursuant to the *Canada Transportation Act*, then the agreement becomes an order of the

Agency authorizing the parties to construct or maintain the crossing, and apportioning the costs, as provided in the agreement.

Basically, municipalities are free to enter into bad bargains with railway companies.

Better Bargains and Agency Orders

Municipalities are not without legal recourse: the Agency has authority to authorize the construction of "suitable" road crossings and related works. British Columbia has delegated authority to the Agency through an administrative agreement with Canada and the enactment of regulations under the provincial *Railway Safety Act* and, as a result, the Agency has jurisdiction with respect to both federal and provincial railway crossings.

Basically, municipalities are free to enter into bad bargains with railway companies.

Under section 101(3) of the *Canadian Transportation Act*, if a municipality as road authority is unsuccessful in negotiating an agreement relating to the construction, maintenance, or apportionment of the costs of a road crossing, then the municipality can apply to the Agency for authorization to construct a suitable road crossing or related work and for an apportionment of the costs of construction and maintenance. The Agency will rule on any outstanding issues between the parties based on submissions from the parties.

A suitable crossing is one that is adequate and appropriate for the purposes for which it is intended and installed, meeting the needs of those using the crossing and those of railway operations (*Fafard v. Canadian National Railway Company*, 2003 FCA 243). The Agency will typically assess whether a crossing is suitable by referring the municipality's detailed design drawings to Transport Canada for comment pursuant to a Memorandum of Understanding between the Agency and Transport Canada, which allows for a coordination of efforts related to road, utility, and private crossings within federal jurisdiction. The Agency will consider whether the railway company disputes the suitability of the crossing, but that is not definitive and the railway company is expected to provide some evidence of technical restrictions or shortcomings with the municipality's proposal, not just cast aspersions.

When the Agency determines that a proposed road crossing is suitable and authorizes its construction, the Agency will typically authorize the construction and maintenance of the proposed works with:

- no compensation payable to the railway company for the use of its land
- no application fees payable to the railway company
- no limit on duration
- no release, indemnity or insurance requirements

In general, the Agency will not interfere in a contractual agreement entered freely by the parties. The Agency has expressed the opinion that an agreement binds the parties to the terms of an agreement they freely negotiated and entered into. Again, municipalities are

free to enter into bad bargains with railway companies.

Cost Apportionment for Construction and Maintenance

Under section 16(1) of the federal *Railway Safety Act*, the Agency is authorized to apportion liability for construction, alteration, operational or maintenance costs of a "railway work", which includes road crossing works, any structure supporting, protecting or providing drainage for a railway line, and any other structure built across, beside, under, or over a line of railway that facilitates railway operations.

Under subsection 16(4) of the *Railway Safety Act*, a municipality as a proponent of railway work or as a beneficiary of the work may refer the apportionment of liability for construction, alteration, operational, or maintenance costs to the Agency. The Agency will determine the proportion of the liability to be borne by each railway company and road authority having regard to:

- any federal grants under section 12 of the *Railway Safety Act* to improve safety etc. or under section 13 for the construction or alteration of a grade separation
- the relative benefits that each party stands to gain from the work
- any other factor that the Agency considers relevant such as which party created the need for the work to be done and whether the railway line or the road was there first

A municipality may seek fencing to secure whistling cessation. Although fences are not structures that are explicitly included in the definitions of "railway work" under the *Railway Safety Act*, where fencing along railway rights of way enhances safety by preventing trespassing, the Agency has determined that it has jurisdiction to apportion costs on the basis that the fencing constituted a "railway work" within the meaning of the *Railway Safety Act* as a "structure that protects the line of railway and facilitates railway operations."

Conclusion

When planning an at-grade road crossing project (or working with a developer that is planning such a project on behalf of the municipality), we suggest a municipality:

- consider whether the Agency has authority to authorize the work
- if the Agency has authority to authorize the work, consider what the municipality might expect if it were to apply to the Agency for authorization
- use the assessment of possible Agency involvement to inform negotiations and as leverage in them
- allow enough time to bring an application to the Agency

Lynda Stokes

Look For Your Lawyers

We are pleased to announce that **Elizabeth Anderson** and **Joe Scafe** have joined the partnership at Young, Anderson.

We are also pleased to announce **Kate Gotziaman**, **Jacob Lewin**, and **Lynda Stokes** as new associates at Young, Anderson.

Kate holds a law degree from the University of British Columbia and has a broad municipal law practice. As a student, she was introduced to municipal law through working as a research assistant on a project about 'smart cities'. She was a clinician at the UBC Indigenous Community Legal Clinic and worked at a regulatory body.

Jacob maintains a general municipal solicitor's practice, with a focus on real estate and development work. Jacob obtained his Bachelor of Arts in Psychology from the University of Victoria, and his Juris Doctor from the Schulich School of Law at Dalhousie University.

Lynda's legal practice consists mainly of solicitor and advisory work on behalf of local governments and greater boards with an emphasis on real property transactions, land use regulation and development, Indigenous relations, municipal services, environmental issues, bylaw drafting, utilities, public procurement and tendering and various contracts. Representative work includes road and park land exchanges and sales, complex First Nation service and land agreements, railway crossing agreements and Canadian Transportation Agency (CTA) authorizations.

We would also like to congratulate **Aidian Andrews** on his recent call to the bar and wish him the best of luck in his future endeavours.

Reece Harding is sitting as a panelist for a session entitled "Holding On To Your Ethical Life Preserver In The Eye Of The Storm" at the Local Government Management Association CAO Forum being held February 22, 2024.

Bill Buholzer will be participating in the PIBC's Peer Learning Network webinar on New Provincial Housing Legislation on February 23, 2024.

Young, Anderson will be presenting its Annual Local Government Law Seminar on March 1, 2024 at the Vancouver Island Convention Centre, 101 Gordon St, Nanaimo.

Nick Falzon will be guest lecturing on administrative law at Capilano University for the School of Public Administration on March 6, 2024.

Alyssa Bradley will be chairing and **Guy Patterson** will be speaking at the Continuing Legal Education Society Planning and Development 2024 webinar on March 7, 2024.

Guy Patterson will be presenting a session entitled "Making Sense of BC's New "Housing Supply" Legislation" at the Real Estate Institute of British Columbia webinar being held March 20, 2024.

Sukhbir Manhas will be presenting a session entitled "Risk Management: Relevant Procurement and Contract Principles and Strategies" at the Municipal Insurance Association of BC 2024 Conference being held on April 3-5, 2024 in Vancouver, BC.

Joseph Scafe will be presenting a session entitled "Open and Closed Meetings: Why Should You Care?" at the Association of Vancouver Island and Coastal Communities (AVICC) 2024 AGM and Convention being held April 12-14, 2024 in Victoria.

Guy Patterson will be presenting a session entitled "Collaboration and the Art of Development Review" at the 2024 BC Land Summit being held in Nanaimo May 8-10, 2024.

Bill Buholzer will be presenting a session entitled "Professional Ethics", also at the 2024 BC Land Summit.

Elizabeth Anderson & **Chris Gallardo-Ganaban** will be presenting a session entitled "Housing, Homelessness, and Bill 45" at the Licence Inspectors and Bylaw Officers Association Conference being held in Penticton May 14-17, 2024.

Bill Buholzer will be presenting a session entitled "British Columbia's Housing Supply Legislation: Reasserting Provincial Jurisdiction over Land Use Management" at the International Municipal Lawyers Association Annual Conference being held May 30, 2024 in Toronto.

Mike Quattrocchi & **Timothy Luk** will be presenting a session entitled "Introducing Amenity Cost Charges" at the GFOABC conference in Kamloops from June 5-7, 2024.

Guy Patterson will be presenting a session entitled "Legal Update" at the Approving Officers Workshop during the Local Government Management Association Annual Conference being held June 11-13, 2024 in Victoria.

We are pleased to be presenting four sessions at the LGMA Annual Conference this year. On June 12, **Guy Patterson** will be presenting a session entitled "New Housing Supply Legislation". On June 13 **Carolyn MacEachern** & **Amy O'Connor** will be presenting a session entitled "Freedom of Information & Workplace Investigations", **Guy Patterson** & **Chris Gallardo-Ganaban** will be presenting a session entitled "Short Term Vacation Rentals", and **Reece Harding** & **Nick Falzon** will be presenting a session entitled "The Declaration on the Rights of Indigenous Peoples Act and Local Government".

STAY CONNECTED

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