YOUNG ANDERSON
BARRISTERS & SOLICITORS

SEPTEMBER 2026, VOLUME 37, NUMBER 3

NEWSLETTER
UBCM CONFERENCE ISSUE

Public Expression and Elected Officials: A Trio of Cases under the *PPPA*

In 2019, the Protection of Public Participation Act *("PPPA") came into force, creating a mechanism for the summary dismissal of proceedings arising from expressions relating to matters of public interest. Most commonly, but not always, the PPPA is engaged by the defendants to defamation claims. The PPPA provides that, where a proceeding arises from an expression that relates to a matter of public interest, the proceeding will be dismissed unless the plaintiff can demonstrate: (1) grounds to believe that the proceeding has substantial merit; (2) grounds to believe that the defendant has no valid defences; and (3) that the public interest in protecting the plaintiff's reputation outweighs the public interest in protecting the expression.*

Municipal elected officials have found themselves on both sides of PPPA applications in recent months, as illustrated by a trio of recent BC Supreme Court decisions. In all three of these decisions, courts dismissed the underlying defamation action, showing what a powerful tool the PPPA can be.

(i) *Besler v. Holmes*, 2026 BCSC 1169

In *Besler v. Holmes*, the Mayor of the District of Summerland successfully defended a defamation claim under the PPPA arising from a number of statements, three of which were made during District Council meetings. The three Council meeting statements all related to Mayor Holmes' perception of the behaviour of the plaintiff, Mr. Besler, during the public comment period portion of those meetings. In all three instances, Mayor Holmes was addressing the level of decorum he expected in the meetings.

While certain parts of the plaintiff's claims failed at each of the three stages of the PPPA test, the Court made broad comments, as part of the final 'public interest balancing' stage, on the nature of the Mayor's speech. The Court placed significant weight on the governmental context in which the statements were made, writing:

> [75] ...The expression is political speech by an elected official about the conduct of public meetings and the operation of local government. Speech of this kind lies near the core of the value that the *PPPA* protects. Mayors are statutorily required to conduct council meetings and are required to ensure the degree of decorum necessary to do so.

Further, the Court found that the plaintiff's own conduct had been inconsistent with his allegation that he had been harmed by Mayor Holmes' words, as the plaintiff had re-posted each alleged instance of defamation with the caption "MUST-SEE TV":

> [74] Mr. Besler has extended the reach of the statements he says are defamatory, by posting video clips taken from council's YouTube broadcast on The REAL Summerland Facebook page. His Facebook page has an audience of 1,500 subscribers. Their attention is drawn by post titles like, "Five Minutes of MUST-SEE TV." Posting video clips of the allegedly defamatory statements goes far beyond what would be necessary to present a denial. The posts were not a denial, they were a repetition. That conduct is inconsistent with a finding that the statements were harmful to him or are likely to be harmful to him. It is consistent with a finding that Mr. Besler was in a political competition with the mayor and members of the Summerland Council.

The decision underscores the protection afforded to expression by elected officials concerning the operation of public meetings, particularly where that expression is made in the course of the meeting itself.

(ii) *Baker v. France*, 2026 BCSC 1169

Baker v. France involves the inverse situation: a sitting Mayor sued a member of the public (a former CAO) for defamation arising from statements the former CAO made on a forum criticizing the Mayor. In particular, the defendant had made certain online statements regarding complaints that the Village of Sayward had received about Mayor Baker. The alleged 'sting' of the defamatory statements was related to the fact that the defendant, Mr. France, had used the term 'sexual harassment' both in relation to the complaints and in relation to conduct by Mayor Baker more broadly.

The Court dismissed Mayor Baker's defamation action pursuant to the PPPA. Here, the claim failed at the second stage of the PPPA analysis, with the Court finding that Mr. France had a valid defence of justification. In a defamation trial, the defendant would have been required to prove the substantial truth of each defamatory statement. The defendant was not required, at the PPPA stage, to prove the truth of his statements. It was enough that the defence tended to weigh in favour of the defendant.
The Court also considered the relative

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public interests in protecting reputation and expression. It characterized the statements as free expression concerning substantive issues of local politics and matters of clear public importance:

> [128] … Political engagement is a core concept in a democracy. The strength of the democratic process is the opportunity for individuals to hold elected officials to account. My concern is that the defamation action had a chilling effect not only on Mr. France's freedom of expression but others in the Village of Sayward and surrounding area.

(iii) *Hamer-Jackson v. Neustaeter*, 2026 BCSC 155

While the *Besler* and *Baker* cases involved the interaction between elected officials and members of the public, *Hamer-Jackson v. Neustaeter* involved a dispute between two elected officials. In particular, Mayor Hamer-Jackson alleged that three statements made by Councillor Neustaeter in City of Kamloops Council meetings, as well as one statement made at a press conference, were defamatory. The underlying facts relate in general to a dispute between the two elected officials regarding interactions between Mayor Hamer-Jackson and Councillor Neustaeter's father, a former member of the Legislative Assembly of British Columbia. Among other things, Councillor Neustaeter's statements, alleged to be defamatory by Mayor Hamer-Jackson, were a comment on Mayor Hamer-Jackson's references to her father in the course of City Council business.

The Court dismissed Mayor Hamer-Jackson's defamation action, finding that Councillor Neustaeter had a valid defence of qualified privilege, and that the alleged harm to Mayor Hamer-Jackson was not outweighed by the public interest in protecting her speech. In terms very similar to those expressed in *Baker* and *Besler*, the Court commented on the public interest in protecting political speech:

> [139] I agree with the defendant that this case is fundamentally one about political speech. Her assertion that the plaintiff is using this litigation to target her as a political adversary for speech that she made, which was critical of his conduct and governance in his role as Mayor, is supported on the record before me.
>
> [140] Political discourse is central to the constitutional guarantee of freedom of expression: *Prud'Homme* at para. 41. In a defamation action against a municipal official, freedom of expression takes on singular importance because of the intimate connection between the official's role and the preservation of municipal democracy: *Prud'Homme* at para. 42.

(iv) Conclusion

The PPPA is a very powerful piece of legislation in relation to defamation actions. In the local government context, it takes on an additional

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dimension. These three cases show that the PPPA can protect both an elected official's ability to participate in political discourse and the public's ability to criticize elected officials. Even where a dispute has private aspects, or shows a profound interpersonal disagreement, the public interest aspect of speech by elected officials will be given substantial weight by a court asked to adjudicate a PPPA application.


Nick Falzon & Jack Wells ✍

Bike Lanes on Trial: *Cycle Toronto v. Ontario (Attorney General)*, 2026 ONCA 582

Following up on an article from a previous edition of this newsletter, which was entitled "Legislating Within Limits: Recent Case Law on Provincial Authority", the Firm (other than Guy Patterson, Mike Quattrocchi, and Serge Grochenkov, who are avid and skilled, but still dangerous, cyclists) is pleased to report that the Ontario Court of Appeal has now confirmed that there is in fact no Charter *right to a bike lane. In* Cycle Toronto v. Ontario (Attorney General)*, the Court found that Premier Doug Ford's provincial government is permitted to remove some 19 kilometres of bike lanes in Toronto, overturning the lower Court's decision.*

While the City of Toronto has invested heavily in bicycle infrastructure since 2016, the provincial government has taken the view that bike lanes have contributed to undesirable vehicle congestion in downtown Toronto. As a result, the legislation that precipitated this decision was adopted by the Ontario legislature in 2024: the *Reducing Gridlock, Saving You Time Act* (the "Act"). Along with a pithy name, the Act introduced section 195.6 to the Ontario *Highway Traffic Act*, which required the removal of bike lanes from three major streets in Toronto: Bloor Street, Yonge Street, and University Avenue.

In response, Cycle Toronto, an advocacy group, and several other parties brought an application for a declaration that section 195.6 violates section 7 of the *Charter of Rights and Freedoms* in January 2025.

In order to demonstrate a violation of section 7 of the *Charter*, an applicant needs to show that the legislation at issue interferes with, or deprives them of, their life, liberty, or security of the person. Once such an interference is shown, the applicant then needed to prove that the violation is not in accordance with the principles of fundamental justice.

The lower Court found that the decision to remove bike lanes and replace them with lanes for cars will make those roads less safe for both cyclists and other road users, and that therefore section 7 of the *Charter* was engaged by the Act. The lower Court, relying on expert evidence tendered by academics, further found that section 195.6 was arbitrary, stating that "the evidence shows that restoring motor vehicle lanes will not achieve the stated objectives of relieving congestion and making roads safer." Finally, the lower Court stated that section 195.6 was grossly disproportionate in balancing the safety of bike lane users against the public interest in "saving some drivers of cars a few minutes of travel." As a result, the lower Court declared section 195.6 to be of no force and effect for its inconsistency with section 7 of the *Charter*.

The Ontario Court of Appeal disagreed with the lower Court. Before addressing section 7, the Court was emphatic in pointing out that while the *Charter* does safeguard Canadians from legislation that is inconsistent with it, it does not entitle them to benefits provided by legislation. In other words, in the Canadian system of parliamentary supremacy, a legislature may repeal legislation without engaging the *Charter*: "as long as the prior legislation was not mandated by the *Charter*, undoing it by amendment or repealing it altogether is necessarily *Charter*-compliant, regardless of how beneficial or important the prior legislation may be thought to have been." Applying that principle to the facts of the case, even if bike lanes promote section 7 of the *Charter*, it would be incorrect to conclude that no future legislature could remove them – otherwise, the legislature would be held to a new "constitutional baseline" created by prior legislation, and be denied the authority to change policy course. Ultimately, the appeal was allowed, and section 195.6 was upheld as valid.

The *Cycle Toronto* case reinforces a key principle in relation to constitutional law: while the language of the *Charter* may be aspirational, it does not obligate federal, provincial, or indeed local governments to adopt or maintain legislation that may uphold or further the values it protects. This is related to the notion that no legislature can bind its successors – it is always open to government to change course from a direction taken by a previous administration, regardless of whether laws created in the past promoted a *Charter* value. As stated by the Ontario Court of Appeal, "this is a bedrock principle of parliamentary sovereignty, a principle that was not altered by passage of the *Charter*".

> "…no legislature can bind its successors – it is always open to government to change course from a direction taken by a previous administration, regardless of whether laws created in the past promoted a Charter value."

Additionally, it confirms a fact of municipal government that is often forgotten. Municipal councils are elected, and pass laws of their own, but ultimately, they are the product of provincial statutes, and it remains open to the provincial government to adopt legislation that contradicts or overrules a municipal bylaw. Toronto can continue to invest in bicycling infrastructure elsewhere, but for now, it appears that Bloor Street, Yonge Street, and University Avenue will have their bike lanes removed.

Nate Ruston

Local Government Authority to Regulate Cannabis Production: *Delta v. Nardi*

On August 18, 2026, the Supreme Court of British Columbia released its decision in Delta (City) v. Nardi, *2026 BCSC 1555, confirming that in Canada's post-legalization cannabis regime, local governments' land use regulation powers can apply to limit the permissible locations for federally authorized personal medical cannabis production.*

The *Cannabis Act*, S.C. 2018, c. 16 was enacted by the federal government in 2018, in part, to provide for the legal production of cannabis and to provide access to a quality-controlled supply of cannabis. The *Act* permits authorized persons to produce cannabis for medical purposes, both for themselves and other registered users. Until recently, Canadian courts had not opined on the extent to which local governments may regulate where that production takes place.

In *Delta (City) v. Nardi*, 2026 BCSC 1555, the main respondent was producing medical cannabis for himself and several others on his own property, in compliance with a federal medical authorization issued under the *Cannabis Act*. However, he had not obtained the appropriate building permits from the City of Delta to modify his facility for that use, and was producing cannabis in a residential zone, contrary to the City's Zoning Bylaw. When the respondent refused to cease his production, the City applied for an injunction to restrain the respondent from breaching both its Zoning Bylaw and Building Bylaw. The respondent defended the claim by arguing that the City lacked jurisdiction to regulate his cannabis production. He also argued that such regulation would frustrate the purpose of the federal *Cannabis Act* and violate his *Charter* rights.

The Court found that the City was within the limits of its jurisdiction to regulate where cannabis production could occur within City limits. The City's Zoning Bylaw permitted cannabis production in certain zones but prohibited it in the residential zone where the respondent had chosen to operate. The purpose of the Zoning Bylaw was not directed at limiting access to medical cannabis; rather, it regulated the locations where cannabis could be grown, as an element of broader land use regulation. The Court held that section 479(3) of the *Local Government Act* gave the City statutory authority to prohibit cannabis production in particular zones. The Court stated:

> [82] Allowing certain uses in certain zones, and prohibiting the same uses in other zones, is a fundamental feature of land use bylaws such as the Zoning Bylaw. These limitations are the means chosen to achieve the purpose of land use regulation. The Zoning Bylaw's limitations on cannabis production are no different; this activity, as a land use, is restricted to zones which Council has determined are appropriate areas to locate such activities.

The Court further held that the Zoning Bylaw did not frustrate the purpose or operation of the *Cannabis Act*. Nothing in the *Cannabis Act* or its accompanying regulations created a positive right to possess and cultivate medical cannabis plants in residential zones. Accordingly, prohibiting that use in residential zones could not frustrate the application of the *Act*.

The Court also found that the federal regulatory scheme contemplated cooperative regulation by multiple levels of government.

This was reflected in the Personal Production Registration certificates issued by Health Canada to the respondent, which stated that "production should be conducted in accordance with all other relevant federal, provincial and municipal laws". The fact that the certificates identified the respondent's property as an authorized production site did not immunize that site from compliance with municipal bylaws. The respondent did not lead sufficient evidence to demonstrate that his cannabis production had to occur at his chosen site, rather than on a property where cannabis production was a permitted use.

With respect to the *Charter* argument, the Court found that the evidentiary record did not support a conclusion that the Zoning Bylaw infringed the respondent's *Charter* rights. The City had specified certain zones in which cannabis production could lawfully take place, and did not prohibit that use entirely. However, the Court noted that, on a different factual record, a zoning bylaw could potentially infringe a person's section 7 *Charter* rights by "unreasonably" restricting access to medical cannabis.

The Court ultimately declared that the respondent was in contravention of the Building Bylaw and Zoning Bylaw, issuing injunctions in favour of the City that required the respondent to comply with the Bylaws.

What is the takeaway from this decision? The *Cannabis Act* has created a federal framework for legal cannabis production, but that framework does not change the fact that cannabis production remains a use of land, no different than running an autobody repair shop or operating a day care. This decision confirms that local governments may regulate where those uses occur within their boundaries. However, cannabis production is somewhat unique in that such regulation must not unduly restrict access to medical cannabis. While lack of access was not made out on the facts in *Nardi*, the Court did not foreclose the possibility that land use restrictions on permissible locations for cannabis production could, in some circumstances, be too stringent, such that they may unreasonably limit a person's access to medical cannabis and thereby infringe their *Charter* rights.


Elizabeth Anderson & Ramon Dabiryan ✍

Recent Changes in Freedom of Information and Privacy Law

A number of interesting developments to freedom of information and privacy law in British Columbia have occurred in the last few months, many of which impact local governments. Some of these developments come from recent amendments to the Freedom of Information and Protection of Privacy Act *("FIPPA"). Others come from policy and procedural updates from the Office of the Information and Privacy Commissioner for BC (the "OIPC"). Together, these changes provide subtle but potentially significant tools for local governments dealing with an influx of increasingly complex and voluminous FOI requests.*

Legislative Changes

On May 28, 2026, the Legislative Assembly of British Columbia passed Bill 9 – 2026 *Freedom of Information and Protection of Privacy Amendment Act, 2026* (the "Amendment Act"). The Amendment Act provides the most significant changes to FIPPA since the major amendment of the Act in 2021. While a number of these amendments relate to the Province, or to the OIPC's powers and procedures, there are three which are of particular note for local governments.

First is the amendment to section 5 of FIPPA, which sets out the basic rule allowing an applicant to make a request for records of a public body. A request for records under FIPPA must provide, as set out in section 5(1)(a), "enough detail to enable an experienced employee of the public body, with a reasonable effort, to identify the record sought". The Amendment Act adds language to this section, which now states that the request must provide enough detail to enable the public body to identify the record "with a reasonable effort <u>and in a reasonable amount of time</u>". It should be noted however that this amendment is not yet in effect, and will be brought into force by future regulation.

Second is the amendment to section 43 of FIPPA. A public body may apply to the OIPC for an order under Section 43 to disregard an FOI request or requests. In order to obtain a section 43 order, the OIPC must determine that the request(s) in question meets one of the grounds listed in the subsections of section 43. The Amendment Act adds two new grounds to section 43. The OIPC may now authorize a public body to disregard a request where "the behaviour of the applicant is abusive or malicious", or if "responding to the request would unreasonably interfere with the operations of the public body". Other conceptually similar grounds already a part of section 43, which relate to "frivolous and vexatious", "systematic", and "excessively broad" requests, remain in place. Notably, in respect of the latter two categories, the "unreasonable interference" criterion that is now its own basis for disregarding a request has been de-coupled from "systematic" and "excessively broad".

Third is the amendment to section 67(5.4) of FIPPA. Previously, this section required non-Ministerial public bodies – including local governments – to submit a privacy impact assessment ("PIA") to the OIPC when they were developing a common or integrated program or activity, which as defined in Schedule 1 of FIPPA, involves the provision of service(s) by public bodies working collaboratively, or one public body working on behalf of another. Section 67(5.5) further stated that the OIPC must be notified of the development of a common or integrated program or activity at an early stage of said development. The Amendment Act revised section 67(5.4) and repealed section 67(5.5). As a result, non-Ministerial public bodies are now only required to notify the OIPC of the development of the proposed common or integrated program or activity at some point in its development, rather than early in the process. Furthermore, rather than requiring that a PIA be submitted to the OIPC, a PIA now only must be submitted if the OIPC specifically requests it.

OIPC Guidance

Subsequent to the passing of the Amendment Act, the OIPC also published a number of new and updated policy and guidance documents in June 2026. These guidance documents both clarify the OIPC's intended approach to the amended sections of FIPPA, and set out new procedural guidelines.

The OIPC published its "Guidance on applications to disregard requests under Section 43(a.1)", which sets out guidelines for public bodies for applying a section 43 order where an applicant has behaved in an abusive or malicious manner. The OIPC recommends that public bodies establish or revise policies which outline their expectation of FOI applicants' behaviour, which can define and describe abusive or malicious behaviour, and outline the process and consequence if an applicant breaches said policy. The OIPC provides examples of potential definitions of abusive and malicious behaviour, which could include "a pattern of behavior that is offensive, mistreats others, or involving threats, insults, put downs, criticism, intimidation, or humiliation", "actions intended to cause pain or cost a public body resources or time", and "retaliatory statements like 'I am going to keep making requests until I get what I want'". Crucially, the guidance document also notes that, prior to applying to the OIPC for relief under this section, the public body should first "provide a written warning to the applicant or complainant, specifically identifying the conduct and warning that a further breach of the policy will result in the public body seeking relief under s. 43(a.1) from the OIPC."

The OIPC also released an updated version of its "Guide to OIPC processes (FIPPA)" guidelines. Included in this updated version is guidance on the use of generative AI tools (such as ChatGPT or CoPilot) by individuals submitting complaints to the OIPC. The guidelines note that these tools should be used with caution, and that complainants should carefully double check sources cited in AI generated materials.

Also updated is the "OIPC Policy, Procedures, and Criteria for Declining to Investigate", which outlines the OIPC's deliberative process for when they will and will not investigate a complaint. The updated policy introduces a three-file limit per applicant, meaning an applicant may only have three active complaints open with the OIPC for all public bodies, across all areas of the OIPC (i.e., the intake, investigation or adjudication stage). Journalists, researchers from academic institutions and advocacy organizations are exempt from this three-file limit.

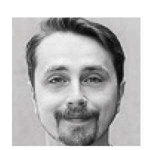
Takeaways

These changes provide some new avenues of aid to local governments who are dealing with an ever-increasing volume of FOI requests. The amendment to section 5(1)(a), once it comes into force, means that a local government may require more detail and clarification from an applicant's request, if identifying records responsive to the request as worded would take an unreasonable amount of time. The amendments to section 43 open new avenues for receiving authorization to disregard unmanageable FOI requests. Historically, section 43 orders have been very difficult to obtain. While this is likely to remain the case, the expanded grounds on which a local government may seek a section 43 order would appear to open doors to obtaining such an order in circumstances where that would not have been previously possible.

The changes to OIPC procedure and policy are welcome ones for public bodies. For the time being, the OIPC's guidance on the use of generative AI is limited to discussion on complaints to their office. However, this discussion shows that the OIPC is live to the issue of generative AI usage in the FOI request process, and aware of the impact this new technology is having in the privacy and FOI world. The three-file limit on complaints to the OIPC also provides a much-needed safeguard against "frequent flyer" applicants who are inclined to submit a complaint to the OIPC about every aspect of a public body's processing of their FOI requests.

As these legislative and policy changes are still fresh, it remains to be seen exactly how they will play out in OIPC and court decisions. But at the outset, these changes appear to provide some positive developments for local governments.

James Barth ✍



Keeping on the Right Track - Why Exceptions & Reservations for the Esquimalt and Nanaimo Railway Company Appear on Property Titles

If you've ever reviewed property titles on Vancouver Island you've probably come across a notation in the charge, lien and interests section of the title that seems a little out of place:

Charges, Liens and Interests
Nature:
EXCEPTIONS AND RESERVATIONS
Registration Number:
M76300
Registered Owner:
ESQUIMALT AND NANAIMO RAILWAY COMPANY
Remarks:
INTER ALIA
AFB 9.693.7434A, SECTION 172(3)
FOR ACTUAL DATE AND TIME OF REGISTRATION, SEE ORIGINAL GRANT FROM E & N RAILWAY COMPANY

At first glance, this charge can raise questions for property owners, purchasers and local government staff. Does the railway still have rights over the property flowing from the exceptions and reservations? Could it affect land use regulation by the local government or any development related approvals sought for lands? Is it a legal issue that requires action? In most cases, the answer is no, however for local government staff involved in planning, development, engineering, real estate, or legislative services, understanding this common title notation will help answer questions from residents, developers, and colleagues alike that may arise when dealing with properties on which this charge appears.

I. A Legacy of One of British Columbia's Largest Land Grants

The exceptions and reservations that Esquimalt and Nanaimo Railway Company owns date back to the early 1880s and an agreement between Canada and the Province of British Columbia that was ratified and embodied in federal and provincial legislation pursuant to which the Province incorporated the Esquimalt and Nanaimo (E&N) as a body corporate and politic for the purpose of facilitating the construction of a railway between Esquimalt and Nanaimo. The Province granted a significant portion of southeastern Vancouver Island to the Dominion of Canada to aid in the construction of the railway.

Canadian Pacific Railway acquired E&N in 1905. Over the course of several years, the federal government granted approximately 800,000 hectares of southeastern Vancouver Island to E&N. The grant to the E&N Railway Company rail corridor, encompasses large portions of what are now Victoria, the Cowichan Valley, Nanaimo and the Comox Valley. As the railway company sold parcels from the grant over the following decades, it retained certain rights in the land, that was subdivided and sold off to other owners through the exceptions and reservations which are contained in the instrument by which E&N conveyed a particular parcel to a purchaser. Typically, the exceptions and reservations that E&N reserved to itself fall into three categories:

(1) the right to harvest timber from these lands for railway purposes;

(2) rights relating to railway

infrastructure and rights-of-way on some parcels; and

(3) undersurface mineral rights.

These reserved interests in the lands became part of the historical record and continue to appear on many modern property titles on Vancouver Island. The phrase *inter alia* simply means "among other things" or "among other lands," indicating that the reservation formed part of a much larger parent grant that has since been subdivided many times as the lands have been sold off and changed for the purposes of development and other land uses. Following the enactment of the *Mineral Land Tax Act* in 1973, when E&N surrendered its mineral interests under certain lands to the Crown, it is not possible to determine mineral ownership by reviewing E&N's "original grant" to purchaser.

II. Why Does It Still Appear on Land Titles Today?

E&N was acquired by Canadian Pacific Railway in 1905. However, the exceptions and reservations remains on title to properties because it reflects the wording of E&N's transfer or "grant" of ownership to a subsequent purchaser. What E&N reserved to itself depended on what it secured pursuant to the original Crown grant. At law, property comprises a "bundle of rights"; ownership is a collection of separate privileges such as possession, control, exclusion, enjoyment and disposition which can be held, shared, transferred or limited. Historical interests in land that remain on title do not automatically disappear when companies merge, are sold, or dissolve. Some rights may have been transferred, modified by legislation, forfeited, or reverted to the Crown over time, while others may technically continue to exist.

III. What Are the Implications of the Exceptions and Reservations?

For the majority of properties on Vancouver Island, the exceptions and reservations associated with M76300 are unlikely to affect land use regulation or development. Lawyers, notaries, lenders, and title insurers encounter it regularly throughout southern Vancouver Island and it is considered a standard historical exception that rarely affects financing, title insurance, or the ability to buy or sell a property. From a local government perspective, it also rarely influences day-to-day development review or permitting for development projects.

These are, however, circumstances where the historical reservation deserves closer attention, particularly for:

(1) land adjacent to existing or former rail corridors where historical rights-of-way or railway-related interests may intersect with proposed development or infrastructure improvements;

(2) significant excavation or quarrying projects where work extends well below the surface and could raise questions about historical subsurface rights; or

(3) resource extraction where ownership of mineral rights becomes materially important to the proposed use.

In these situations, it may be advisable for the proponent to undertake a deeper dive into the status of the exceptions and reservations. In these circumstances, the issue is not necessarily that the historical reservation will prevent development or restrict land use. Rather, the proposed activity may involve property rights that do not belong to the fee simple owner of the land.

Similarly, when municipalities acquire land for parks, transportation corridors, utilities, or other public works, legal counsel routinely examine title records to identify any historic interests, statutory rights-of-way, easements, or reservations that could affect future use or construction. Determining the status of the E&N exceptions and reservations may be undertaken as a matter of due diligence.

For most residential transactions and development applications, however, the exceptions and reservations remains exactly what it has become over more than a century: a historical interest that is unlikely to present a practical obstacle to owning, using, or developing land.

IV. Takeaways

For most property owners and purchasers, seeing "Exceptions and Reservations — Esquimalt and Nanaimo Railway Company" on a title is not a cause for concern. It is a historical remnant of one of British Columbia's largest land grants and has become a routine feature of many Vancouver Island property titles. The enduring presence of the E&N reservation illustrates how decisions made more than a century ago continue to shape today's communities. While the notation itself rarely affects municipal approvals, it serves as a reminder that local governments operate within a landscape influenced by historic Crown grants, Indigenous rights, infrastructure corridors, and longstanding property interests. Appreciating that history supports more informed land use planning and stewardship of public assets.

David Giroday

AI Concerns Relating To Employment

With the proliferation of artificial intelligence (AI), it is no surprise that this new technology has given rise to various issues in the context of employee relations, including AI use during recruitment, onboarding, during the relationship, and at termination.

Most AI technology that is utilized in the employment context is generative, meaning that it can create original text, images, videos, and other content based on prompts provided by users. Risks associated with generative AI relate to data privacy leaks, false information, embedded bias, and intellectual property violations.

Recruitment

Employers invest significant time and money to recruit appropriately qualified candidates for their organizations. It is becoming more common for employers to utilize AI in hopes of reducing recruitment costs and streamlining the recruitment process. This can be done, for example, by having AI generate job postings and filter candidates.

While it might save time, using AI during the recruitment process can create significant risks when done without appropriate oversight.

AI-generated job postings may not account for jurisdictional requirements. For example, the *Pay Transparency Act* requires job postings to include the expected pay range in all public job postings to promote transparency and fairness. If this information is not included in a job posting, the employer may be in breach of the *Pay Transparency Act*'s requirements.

Employers have also begun using AI to filter candidates. Even where an employer has included significant guidance with the intent to remove biased factors, generative AI can still select desirable candidates based on biased traits. Selecting candidates in this way can breach the *Human Rights Code* (the "Code"). For example, if an employer prompts AI to "select candidates with strong employment backgrounds", AI may remove applicants with extended periods of unemployment due to illness or childcare. In these circumstances, it is at least arguable that AI has removed individuals on the basis of grounds that are protected by the Code. The employer remains responsible for any breaches and can be held liable under section 13(1) of the Code.

Onboarding

There has also been an increase in employment contracts drafted by AI. Although municipalities may see an initial reduction in cost related to drafting employment contracts, this often proves to be an ineffective cost saving measure. AI-generated contracts can overlook significant legal requirements and may impose improper restrictions on employees. Employers may see increased costs throughout the life of the contract and at termination.

In January of this year, the Ontario *Employment Standards Act* was amended to require some employers to disclose the use of AI during screening, assessment, or selection of candidates. Although this is not a requirement in British Columbia, it is indicative of the kind of change available to governments looking to respond to the proliferation of AI in the employment context.

During the Employment Relationship

When a municipality uses AI to monitor employee efficiency, the municipality should be aware of three basic concerns: (1) AI can create hallucinations (false or misleading information presented as fact) that incorrectly portrays employee performance; (2) AI may capture data outside the initially contemplated scope; and (3) AI may create records that the municipality did not intend, and which could have implications for the municipality as a public body under the *Freedom of Information and Protection of Privacy Act*. Employers using AI to monitor employee efficiency should seriously consider the implications of relying on AI to monitor their employees and its ability to draw accurate conclusions based on its perceived observations. The employer is the ultimate decision-maker, regardless of the prowess of the AI which they have relied on.

Termination

AI may cause or contribute to the breakdown of the employment relationship if it is misused by an employee, or if the use of AI substantially alters the employee's job description and responsibilities.

One way an employee may misuse AI is by uploading confidential information to an open data source, such as ChatGPT. If an employee breaches significant confidentiality requirements or if the issue is ongoing, this may lead to discipline or even termination. Assessments of this nature must be done on a case-by-case basis.

The employment relationship may also be at risk when the employee's role is fundamentally changed by incorporating AI to the extent that the position has effectively been outsourced. This can lead to a claim for constructive dismissal. It is likely that in assessing whether a position was outsourced, a court would consider whether: (1) the employer can demonstrate a *bona fide* business need to use AI; (2) that the need was effectively satisfied by implementing AI; (3) that the use of AI was minimally intrusive; and (4) that the use of AI was proportional to the need. It is important to understand that if a less intrusive method were available, the employer will likely fail this assessment.

Conclusion

Although British Columbia law contains limited reference to AI, and therefore a dearth of legal obligations for employers, now is a great time for each municipality to take stock and implement policies, bylaws, and culture that supports how the organization will interact with AI now and in the future. These policies should include provisions relating to monitoring, data collection, quality of work product, and consequences for the misuse of AI.

Although AI can help municipalities, it is important to always have well-trained human oversight. The best advice is to sometimes use it **but never trust it.**

Amanda Scott

Disturbance Damages: *O'Brien v. Grand Forks*

A common issue in expropriation matters is that of compensation: the types of losses or expenses that a property owner is entitled to when a local government uses the Expropriation Act *(the "Act") to compel a transfer of ownership. The Act sets out the compensation that an owner must receive in this scenario, but questions can still arise, particularly with respect to so-called "disturbance damages". The recent decision of* O'Brien v. Grand Forks (City)*, 2026 BCSC 900 provides helpful guidance in that regard.*

In this case, a one-in-200-year flood in 2018 significantly damaged the neighbourhood in which the plaintiff property owner lived. As a result of the extensive damage, the City of Grand Forks decided to rezone the area to non-residential and restore it as a flood plain rather than rebuild the neighbourhood to its previous state.

The City undertook a Land Acquisition Program to purchase properties in the neighbourhood from their owners at a premium. However, the plaintiff property owner refused to participate, causing the City to expropriate the property according to the procedure set out in the Act. The plaintiff was given $64,000 based on the property's appraised value, plus an additional 5% payment as required by the Act and interest on both.

The plaintiff subsequently sued the City, claiming disturbance damages for loss of utility of the property, rental costs, moving expenses, and costs incurred in pursuing litigation.

With respect to loss of utility of the property, the plaintiff sought an additional $116,000. He claimed the property was actually worth $180,000, based on the cost of replacing the home that was located on it. The judge disallowed this part of the claim, as: (a) the plaintiff had provided no expert evidence contradicting the appraised value of $64,000; and (b) it is well established that the amount required by an owner to acquire a replacement home in excess of the market value paid by an expropriating body in an expropriation does not amount to disturbance damages under the Act.

The plaintiff sought rental costs from when he was required to move from the property to the time of trial. The judge allowed the rental costs as disturbance damages, but pursuant to the Act the claim was limited to a period of six months after the date of expropriation.

Regarding moving expenses, the plaintiff sought expenses that he incurred as well as amounts for his own time spent. The judge rejected the latter, as claims for an owner's time have routinely been rejected as a basis for disturbance damages unless there is an actual corresponding loss. However, the judge did allow the moving expenses that the plaintiff actually incurred.

Finally, the plaintiff was not entitled to compensation for costs incurred by him in pursuing his court case (which again included the value of his own time) as this was a costs issue, not a disturbance damage.

This decision serves as a relatively straightforward example of the varied types of compensation that a property owner might pursue following an expropriation. In each case, the Act's parameters will dictate which of those claims can succeed and which ones cannot.

Piers Fibiger ✍

After-Acquired Cause: Not a Cure-All

It is not uncommon for an employee's misconduct to be discovered after that individual has been terminated without cause. Where this situation arises, the doctrine of after-acquired cause allows employers to rely on that misconduct to justify termination retrospectively. An employer can rely on after-acquired cause where there is misconduct that would have justified termination for cause if the employer had been aware of that conduct prior to termination on the basis that an employer ought not to be punished for the mere timing of their discovery. Where after-acquired cause exists, a court may require the terminated employee to repay severance money.

One recent example is the case of *Brito v. Ecora Engineering & Environmental Ltd.*, 2025 BCSC 2047. There, Ms. Brito worked as an engineer from February of 2021 until her termination without cause on October 19, 2023. Alleging that she was approved by Ecora to work overtime (and be paid accordingly), she sought $46,892.79 against Ecora to remedy her unpaid wages, RRSP contributions, statutory holiday pay and vacation time, plus court ordered interest. Ecora responded that:

(1) Ms. Brito was not entitled to accrue overtime until January 1, 2023;
(2) Ms. Brito was paid in full for her overtime (confirmed by a letter she signed in November of 2023); and
(3) Ms. Brito was actually overpaid $28.75, considering statutory holidays, vacation, RRSP contributions, 2023 overtime, and her severance pay (she received ten weeks instead of the eight she was entitled to).

Ecora also counterclaimed for repayment of the severance money paid to Ms. Brito, relying on after-acquired cause and the allegation that Ms. Brito made inappropriate comments to clients that would have led to her termination of employment with cause.

On the initial issues, the Court found that Ms. Brito was entitled to overtime during the entire course of her employment at Ecora, accepted Ms. Brito's calculations of the amount of overtime owed to her, and also accepted her calculations for the residual amount that she was owed for statutory holidays, vacation pay, and RRSPs. Further, the Court held that Ecora's counterclaim was meritless and made in bad faith and intended to deter Ms. Brito from proceeding with her claim.

Ecora alleged that Ms. Brito made inappropriate comments to clients, particularly that she wrote inappropriate song lyrics and passed them on to clients. According to Ms. Brito, the song lyrics were written by drillers at the work site; the Court agreed, specifically noting that the lyrics were about drilling, "clearly written in fun with no intent to offend anyone", and Ecora was not mentioned within.

It is important for employers to be aware that after-acquired cause is not a cure-all, and *Brito* is a prime example. While it can be a powerful defence, there is risk in raising the doctrine of after-acquired cause if the employer's case is not strong. The Court in *Brito* notably commented that allegations such as the one made by Ecora are troubling since they can be harmful to a professional's reputation and ordered Ecora to pay additional amounts as punitive damages to Ms. Brito. Let *Brito* be your after-acquired cause cautionary tale: always lead with credible evidence of alleged misconduct and, most importantly, good faith.

Jaia Manhas ✍

Look For Your Lawyers

We wish our summer articled student **Jaia Manhas** all the best as she returns to the Peter A. Allard School of Law (UBC) for her third and final year of law school. We are please to announce that, upon completion of her third year, Jaia will be returning to the Firm for her articles.

In a similar vein, we are very happy to welcome our 2026-2027 articled student, **Ramon Dabiryan**, back to the firm.

Reece Harding will be speaking at the UBCM Annual Conference on September 15, 2026 on a panel entitled "Understanding DRIPA: Opportunities, Challenges and Implications for BC Communities".

Guy Patterson and **Jordan Adam** are presenting on "Current Topics in Planning Law" for the PIBC Interior Chapter on September 17, 2026.

On September 24, 2026, **Guy Paterson** is presenting a legal update to the PIBC Fraser Valley Chapter entitled "The Evolving Legal Landscape After Cowichan Tribes".

On October 1, 2026, **Nick Falzon** is presenting "An Introduction to British Columbia Local Government Law" for LGMA's 2026 MATI Foundations Course.

Also on October 1, 2026, **Guy Patterson** and **Alyssa Bradley** are presenting "Current Topics in Planning Law" for the PIBC North Island Chapter.

On October 26, 2026, **Nick Falzon** will be teaching a session called Administrative Law 101 for PADM 203 students at Capilano University.

On November 25, 2026, **Reece Harding** will be giving a presentation at the 2026 LGMA Corporate Officer Forum dealing with proposed legislation on Elected Official Conduct.

Young, Anderson, picking up on the Firm's longstanding reputation as a basketball powerhouse, is entering a team in the Hooplaw charity basketball tournament which, this is year, is supporting the following charities: **Children's Hearing & Speech Centre of BC (CHSC), Night Hoops, Girls Who LEAP, Mackie's Place and the Rotary Club of Vancouver Hoop-A-Thon.**

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