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BARRISTERS & SOLICITORS

CASELAW UPDATE

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CASELAW UPDATE

This paper summarizes some of the cases of interest from the past 12 months. This paper does not include any comments on the recent, landscape changing First Nations cases, nor upon recent planning law case of significance. While these cases are certainly of interest (and would be lengthy to summarize), they are covered in papers contained elsewhere in this seminar book. As such, this paper summarizes some perhaps lesser known cases. While some might refer to these cases as 'leftovers', we hope these case comments are of interest to those working for local governments, as they cover a diverse range of topics, such as the taking of land without consent, illegal breaks to business (and the personal liability of councilors therefor), the arcane art of statutory right of way drafting and leaky water lines (and the denial thereof).

I. EXPROPRIATING LAND FOR PRIVATE DEVELOPMENT – UNLAWFUL ASSISTANCE TO BUSINESS?

Vincorp Financial Ltd. v. Oxford (County), 2014 ONSC 2580

In late 2004, Toyota Motor Manufacturing North America Inc. commenced to search for a 1000 acre site for a new manufacturing plant. It identified a number of sites, including one in Woodstock, in the County of Oxford. In 2005, Oxford began to assemble the 28 properties comprising the 1,000 acre site. It was able to negotiate the purchase of 27 sites, but was unsuccessful in negotiating the last piece (the "mall lands") and, as a result, it expropriated the mall lands. After the expropriation, Oxford transferred the 1000 acres to Toyota and Toyota proceeded to build a new manufacturing plant. Oxford offered the plaintiffs $4.2M compensation for the mall lands, but the plaintiffs did not accept the offer. Oxford and Toyota had entered into various agreements with respect to the development and the transfer of the site. One of the agreements dealt with the mall lands and stated that Oxford would sell the mall lands to Toyota for the amount Oxford pays to acquire or expropriate the mall lands. The agreement also provided that if Oxford could not purchase the mall lands, it would consider expropriation and in the event of expropriation would proceed "diligently, expeditiously and cost effectively" and keep Toyota informed as to progress. This agreement was eventually amended to provide that Toyota would pay Oxford the $4.2M offered to the plaintiff in expropriation, along with any additional compensation awarded or settled under the expropriation process.

The plaintiffs alleged that the transfer of the mall lands to Toyota was unlawful because the transfer "conferred a bonus" on Toyota at the expense of the plaintiffs contrary to the provisions of the Ontario Municipal Act. Section 16 of that Act provides that a "municipality shall not assist a manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose" and that a municipality "shall not grant assistance by, selling any property of the municipality at below fair market value". The *Expropriations Act* required that the intended use of the mall lands for the Toyota plant be ignored in determining the market value of the property and, as noted above, Toyota was only required to pay Oxford the amount Oxford was required to pay under the expropriation process. The plaintiffs argued that Oxford should not have simply sold the mall lands to Toyota for the expropriation amount but, rather, should have increased that price to account for the development of the Toyota plant and that by failing to do so, Oxford had sold the lands to Toyota for less than market value.

The Court first examined whether it was lawful for Oxford to use its expropriation power in the circumstances. The Court stated, "It is not disputed that a municipality…can expropriate lands and in turn sell them to a private party so long as the expropriation is in pursuit of the public interest". The Court noted that the *Municipal Act* provided broad authority to deal with the "economic, social and environmental well-being of [the] municipality" and that a municipality could pass bylaws with respect to matters within its "spheres of jurisdiction" including "economic development services". The Court concluded that economic development was exactly what the expropriation was intended to address and that the Toyota development "was indisputably in the best interests of Oxford". The Court held that "Oxford used its power of expropriation as a tool to tackle the challenge of economic well-being, a matter within its jurisdiction".

On the issue of selling the mall lands for less than market value, the Court noted that it was an agreed fact that the fair market value of the lands taking into account the development of the Toyota plant "outweighs" the fair market value of the mall lands without taking into account the plant. However, the extent of that differential was not known and there was no evidence that Toyota would have paid more than the expropriation market value. The Court also stated that Toyota would not have built the plant in Oxford without the mall lands.

The Court referred to the B.C. Supreme Court's decision in *Nelson Citizen's Coalition v. Nelson (City)*, [1997] B.C.J. No. 138, which examined whether the City of Nelson had provided unlawful assistance under an agreement with a developer for the construction of a waterfront hotel/motel/marina complex. The Court stated with reference to the *Nelson* decision:

> At para. 65, the court concluded that "assistance" within s.292 of the Municipal Act "implies the conferring of an obvious advantage. In determining whether the development plan conferred an obvious advantage to the developer, the court concluded at para. 56 that the development plan did not demonstrate that the developer received "something for nothing". To reach this conclusion the court stated at para. 65 that the "complicated matrix of covenants, viewed as a whole, do not clearly confer a benefit on [the developer] unsupported by any concomitant obligation benefitting the City.

The Court also referred to *Friends of Landsdowne Inc. v. Ottawa (City)*, 2012 ONCA 273 wherein the Ontario Court of Appeal had stated "Interpreting "bonus" to prohibit ordinary contracts, or specific provisions of a contract, would clearly lead to an absurd result. Thus, the granting of an advantage is to be anticipated; the granting of an obviously undue advantage is prohibited".

Applying the reasoning in these decisions, the Court held that Oxford had not provided an unlawful bonus or assistance to Toyota. The Court stated that accepting the plaintiffs' position would require the Court to "ignore the value of the significant benefits that the Toyota Plant brought to the community" and that "the net benefits to the County, including but not limited to the increased tax assessment, far outweigh any differential between the fair market value of the mall lands, calculated taking into account the Toyota Plant on the one hand, and the fair market value of the Mall Lands calculated without taking into account the Toyota Plant".

This decision reinforces the judicial approach of deference to local government decision making in respect of land transactions. A strict interpretation of market value might have necessitated a consideration of the Toyota plant development. However, because Oxford had a significant economic development interest in seeing the Toyota plant proceed, and this was the sole motivation for expropriating the mall lands and transferring them to Toyota, the Court found that the rule against disposing land for less than market value did not operate to invalidate the transaction on the basis that Oxford might have been in a position to charge more to Toyota than Oxford paid to acquire the lands.

II. STATUTORY RIGHTS OF WAY – INVALID OWNER OBLIGATIONS

Atco Lumber Ltd. v. Kootenay Boundary Regional District, 2014 BCSC 524

Atco challenged the Regional District's expropriation of two statutory rights of way over Atco's lands, one for the purposes of operating and maintaining a water line and the other to provide access over an existing private road to a water treatment plant on adjacent lands.

The Regional District initiated an expropriation of the statutory rights of way over a portion of Atco's lands. Following the Regional District's service of the expropriation notice upon Atco, Atco wrote to the Minister of Justice requesting an "inquiry" under the provisions of the Expropriation Act. Under that Act, an owner whose land is being expropriated may request an inquiry into whether the proposed expropriation "is necessary to achieve the objectives of the expropriating authority with respect to the proposed project or work, or whether those objectives could be better achieved by (a) an alternative site, or (b) varying the amount of land to be taken or the nature of the interest in the land to be taken". Importantly, this right to an inquiry is not available where the expropriation is for a "linear development", which includes a "highway, a railway, a hydro or other electric transmission or distribution line, a pipeline or a sewer, water or drainage line or main". The Ministry asked for submissions from Atco and the Regional District as to whether this was a "linear development". The Regional District provided submissions to the Ministry and on the same day the Regional District served Atco with a cheque for its advance payment to Atco under the expropriation, along with related expropriation documents, including a certificate of approval of the expropriation. Subsequently, the Ministry wrote the parties advising of its conclusion that the expropriation was for a linear development and that no inquiry was available. To complete the expropriation, the Regional District then filed its vesting notice. However, the land title office rejected the notice because the Regional District had submitted the incorrect fee and selected the wrong drop-down menu regarding the nature of the charge to be registered. One week later, the Regional District submitted a corrective declaration to the land title office. On the same day, Atco filed its petition to challenge the expropriation. One week later, the vesting notice package was determined to be completed, although rights of way were ultimately shown as registered on the date the original package was submitted to the land title office.

Atco sought judicial review of the Minister's decision in respect of the access right of way and also challenged the validity of the expropriation notice.

As to the Minister's decision, the Court held that the standard of court review was to be on the deferential standard of reasonableness. The Court stated; "It could be said that the Beaver Water Treatment Plan, as part of the Regional District's water utility system, forms part of the linear development – the water system" and that the expropriation of a right of way to provide access to that development could be considered to be "an extension of the linear development". On that basis, the Court concluded that "although the Minister's decision is not necessarily one I would have reached had I been the decision maker, I conclude that the Minister's decision is a possible and acceptable outcome".

The Court then turned to the challenge to the expropriation itself and first examined whether the challenge was statute barred by virtue of s.51 of the *Expropriation Act*, which provides that "legal proceedings to challenge the validity of an expropriation must not be brought after the land vests under section 23". In this case, the Regional District had corrected its mistake with respect to the filing of the vesting notice on the same day as Atco commenced legal proceedings, however, the vesting notice package was not determined to be complete for another week. The Court held that the proceedings were not statute barred, stating, "as a result of some errors in the filing [of the vesting notice], a degree of ambiguity arises" as to the application of s.51 and "that ambiguity is properly resolved in favour of the petitioner".

The Court then examined the argument that the right of way agreement included impermissible positive and person covenants, incapable of forming an interest in land. These terms included a provision allowing the Regional District to use the road unimpeded by Atco's existing gate and obligations on Atco to maintain the road, to allow the Regional District to perform certain acts and pay the Regional District costs and to indemnify the Regional District.

The Court reviewed the common law principle that when an owner grants an easement over their property, the easement cannot place any positive obligations on the granting owner to perform any act, such as to maintain or repair the easement area or to indemnify the grantee of the easement. If an easement includes such an obligation, the obligation will not run with the land to bind future owners. The Court concluded that s.218 of the *Land Title Act*, which provides for the granting of an easement without a 'dominant tenement' to be known as a statutory right of way, did not alter the common law rule against positive covenants on the owner of the servient tenement.

The Court agreed with Atco's position and set aside the Expropriation Notice on the basis that the Regional District had exceeded its powers of expropriation by purporting to impose "impermissible" positive covenants upon Atco. In reaching this conclusion, the Court summarized the common law principle that an easement cannot impose a positive obligation on the owner of the land that is subject to the easement (which land is referred to as the 'servient tenement', in contrast to the land that benefits from an easement, which is referred to as the 'dominant tenement').

This decision serves as a reminder of the common law limitations on the inclusion in easements of positive obligations on the servient tenement owner and clarifies that this rule applies equally to statutory rights of way under s.218 of the *Land Title Act*. It is worth noting that in this case, the rights of way were set aside because the Court held that it was unlawful to expropriate a right of way that includes such obligations. This does not mean that these types

of obligations would not be binding on an owner who voluntarily grants a right of way. The obligations would not run with the land to bind a future owner. However, they may be binding upon the owner who grants the easement. For instance, it can be useful to obligate the granting owner to cause the right of way to be granted priority over financial encumbrances or to execute further instruments in order to give effect to the right of way. Lastly, it may also be possible to secure certain obligations upon an owner and successors in title through the granting of a covenant under s.219 of the *Land Title Act*.

III. NEVER ASSUME – A CASE STUDY IN MUNICIPAL NEGLIGENCE

0731989 B.C. Ltd. v. Hope (District), 2013 BCSC 2315

The facts of this decision are instructive. Silverhope, the owner of a mobile home park sued the District for damages in negligence and negligent misrepresentation in relation to a water leak in the municipal water system. A resident brought to the District's attention that water was flowing in the area of a culvert located across the road from the Silverhope property. The District's utilities foreman investigated and developed the initial belief that a line under the road was leaking. In order to test that theory, he shut off the municipal water line at a nearby connection and water stopped flowing. Suspecting that the leak was to the water line immediately adjacent to the culvert, he then pushed a new smaller pipe through the existing pipe to tie into the main water supply line. When he activated the new line, the leak continued. Based on this 'fix', the foreman concluded that the source of the leak was an underground spring. However, he never tested this conclusion by again shutting off the water supply to the pipe. This took place in May 2008.

In June 2008, Silverhope noticed the leak, which was initially no bigger than a saucer of water and he notified the District. The utilities foreman advised that it was spring water and had nothing to do with the municipal water system. Over the next several months, Silverhope observed that the leak increased in size. At the same time, Silverhope's water bills began to rise, while water pressure decreased. An old house on the property began to suffer from water seepage and a septic tank flooded. Silverhope expended funds as a result, including to install a sump pump and to pump the septic tank. Throughout 2009, the water bills continued to rise, while water pressure continued to fall. Prior to the problems, the average water bill was $125 per month, while the 2009 quarterly billings were $1270, $2808, $2990 and $4049. Silverhope continued to raise these matters with the District. The District continued to advise that these problems were not related to the increasing water adjacent to the property and that this was caused by a spring, and that Silverhope's problems were likely caused by a leak in

Silverhope's own water system. Based on this advice, Silverhope checked all on site water connections and retained (at the advice of the utilities foreman) a company to check for leaks. That company did not observe any leaks but indicated that there might be pinprick leaks in Silverhope's system. Silverhope then replaced all onsite water lines. In order to then connect the new system to the municipal water system, it was necessary to shut off the water flowing from the municipal system. At that point, the leak immediately dried up. The utilities foreman testified that there was likely a second line connected to the Silverhope system and that this second line was the source of the leak.

The Court found (i) that the utilities foreman knew the leak was coming from the municipal system and was not from a natural spring, (ii) that the foreman had made a false representation to Silverhope in advising that a natural spring was the cause of the leak and that Silverhope's problems were related to a leak in Silverhope's system and (iii) that Silverhope relied on that advice to its detriment, expending time and money in an effort to identify and address the problem.

The Court held:

> In these circumstances, I find that the District had an obligation, given its knowledge that the leak's source was the municipal water system, when faced with the difficulties that Silverhope was occurring, to investigate the matter. It chose not to. Rather the District advised Mr. Fourchalk [Silverhope's owner and directing mind] that it was his responsibility to find the leak and charged Mr. Fourchalk ever increasing amounts for water use. If the District had conducted further investigations, it would have quickly determined the source of the leak. In the circumstances, I find the District is liable in both negligence and negligent misrepresentation for the damages that Silverhope incurred as a result of the leak.

The Court awarded $26,164.30 in damages.

This case serves as a useful example of municipal negligence (the failure to locate and fix the leak) and negligent misrepresentation (the failure to properly advise Silverhope) and the potential consequences to a third party who suffers harm as a result of municipal conduct and reliance on statements made by municipal staff.

IV. TIME – ONE LOCAL GOVERNMENT'S ENEMY (IN ENFORCEMENT AGAINST LONGSTANDING ENCROACHMENTS)

West Vancouver (District) v. Liu, 2014 BCSC 1230

The District sought to have part of a dwelling (including a living room), retaining walls, decorative ponds and hedges removed from an unimproved District highway. In response, the owner applied under s.36 of the *Property Law Act* for an easement for the encroaching structures. The road allowance was undeveloped and had never been passable for motor vehicles. It did contain a foot path to access Burrard Inlet. A survey indicated that the encroaching structures were located almost entirely within the road allowance and there was a chain link fence and hedge separating the foot path from the encroaching structures. The District's evidence was that no building permit had been issued for a structure to encroach on the highway and that no encroachment permit had been issued permitting the encroaching structures. This evidence was based on searches and reviews of District files. Also, before the Court was correspondence between the District and the previous owners of the property and with the current owner regarding the encroachment beginning in 2005.

Notwithstanding the District's position, the Court found the District's building permit records were incomplete and that there was no record or permit for the initial construction of the original house or garage on the property. The Court also noted that the District's employees were a constant presence maintaining the foot path alongside the encroachment and that the District's employees had carried out many inspections without concerns or complaints. As such, the Court held that there was no factual basis for the District's position that the District had never issued a permit for the encroaching structures. The Court held: "Over the course of no less than 51 years these encroachments remained in place without apparent complaint or action from the District despite how obvious [the District's affiant] says the encroachment is. I conclude that these encroachments were neither unauthorized nor unlawful". The Court held that the encroachments had been authorized and granted the owner an easement for the life of the encroaching structures.

This case illustrates the difficulties a municipality faces when attempting to deal with longstanding encroachments and, ironically, that the difficulties may be greater with more significant structures, where the impact of removal on the owner is greater. In such circumstances, a court is likely to be sympathetic to an owner and reluctant to order the removal of significant structures such as dwellings, unless the municipality is able to clearly establish that the construction was never permitted or tolerated.

V. TIME – ANOTHER LOCAL GOVERNMENT'S FRIEND (IN SEEKING A S.42 DECLARATION OF A LONGSTANDING HIGHWAY)

452195 B.C. Ltd. v. Abbotsford (City), 2013 BCSC 2055

For many years, a portion of privately owned land had been used as part of Clearbrook Road. Historical maps and photographs showed that the area had been part of Clearbrook Road going back to 1905. However, prior to October 2010, neither the City, nor the registered owner of the property, was aware that the disputed area had not been dedicated as highway. Clearbrook Road, including the disputed area, was travelled by the public since its establishment to present day. There had been significant public expenditures on Clearbrook Road over the years. The City alleged that in such circumstances, the disputed area was a highway pursuant to s.42(1) of the *Transportation Act*. Section 42(1) of the *Transportation Act* provides "…if public money is spent on a travelled road that is not a highway, the travelled road is deemed and declared to be a highway".

The landowner sought a declaration that the disputed area was not a highway under s.42(1) and an order that the City cease using the area and pay occupation rent, or alternatively that the City purchase the area or repay property taxes in relation to the area. The owner conceded that over the years the public had used the disputed area and public money had been spent on the disputed area, but argued that the consent of the owner was also required in order for s. 42 to operate.

The Court referred to various cases that had considered whether some kind of owner 'acquiescence' is required under s.42 and which generally indicated that owner acquiescence could be inferred from the circumstances. While the Court did not actually hold that owner acquiescence was a necessary ingredient, the Court stated:

> It is clear from the case authorities cited that the issue of acquiescence by the adjacent owner or dedication by the owner is not to be concluded by only the evidence of the current owners or even immediately preceding owners, but rather it is to be decided by the historical public use of the roadway and whether that historical public use was acquiesced by an owner in the past allowing the disputed area to be incorporated into Clearbrook Road, or dedicated by that owner.

The Court went on:

> If consent of the owner who originally acquiesced in the incorporation of the Disputed Land into Clearbrook Road is a requirement for application of s.42(1) of the Transportation Act, or if that owner's actual dedication to public use as an additional fact is required to be proven before s.42 can apply, in order to deem and declare the Disputed Land to be a "highway" or part of a "Highway", then I so infer that such consent or acquiescence or dedication was given a long time ago by the owner of the Property and the Disputed Land when Clearbrook Road in its present form was established for travel by the public.

The Court declared the area to be a highway and refused to order that any compensation be paid to the owner.

This case is of benefit to local governments faced with longstanding highways over private lands. To the extent that the operation of s.42 may include an implied requirement for owner consent or acquiescence, this case shows a judicial willingness to infer acquiescence where there is clear evidence of public expenditures together with long-term public use. This was the case even though neither party was aware of the lack of highway dedication and, presumably, that the owner (and perhaps previous owners) had not been, in fact, aware that its property had been taken for highway.

VI. GOOD INTENTIONS MAY NOT ALWAYS LEAD TO HELL

Orchiston v. Formosa, 2014 BCSC 1080

This case was in the form of a petition by certain City of Powell River residents and electors for a declaration that the Mayor and City councillors were personally liable for a loan made to a development corporation, and that they be disqualified from holding local government office until September 15, 2014.

Powell River incorporated a wholly owned municipal corporation, the Powell River Waterfront Development Corporation ("PRWDC"), to act as a facilitator of land development along the City's waterfront.

In February 2004, the City and PRWDC entered into a Memorandum of Understanding ("MOU") regarding waterfront development. Subsequently, Council adopted a resolution to proceed with a plan for the acquisition, development and operation of certain lands by way of joint venture among PRWDC and certain other independent companies, and to lend PRWDC up to $200,000 by way of a shareholder loan. Various amounts were advanced by the City as shareholder loans, in 2006 and 2008. After the respondents in this case were elected to Council,

they approved an extension of the existing $51,000 loan and a further loan of $12,000. In making these resolutions, Council relied on advice from staff and the City solicitor that shareholder loans to PRWDC were not inconsistent with either the Articles of PRWDC or the *Community Charter*.

In April 2013, PRWDC requested a further loan; at that time, it came to light that the prior loans were in fact in contravention of the *Community Charter*. Council immediately resolved to enter into a partnering agreement with PRWDC instead. The company repaid the entire amount of the loans, plus interest, in June 2013, and the Council resolutions approving the loans were rescinded.

Section 191 of the *Community Charter* makes a council member "who votes for a bylaw or resolution authorizing the expenditure, investment or other use of money contrary to this Act or the *Local Government Act* personally liable to the municipality for the amount". In addition, the council member is also disqualified. However, section 191 does not apply "if the council member relies on information provided by a municipal officer or employee and the officer or employee was guilty of dishonesty, gross negligence or malicious or wilful misconduct in relation to the provision of the information".

The petitioners took the position that the resolutions in 2011, approving the five year extension to the $51,000 loan and approving an additional loan of $12,000, were in breach of the *Community Charter*. They argued that the only exception to this liability is as set out in s. 191(2), where a council member relies on information provided by a municipal officer or employee who is guilty of dishonesty, gross negligence or malicious or wilful misconduct. This exception could not arise in the circumstances of this case, where council members relied on advice from City staff and the municipal solicitor that was simply wrong.

The respondents argued that s. 191 was not engaged, as the improper loans had been repaid and the issue was therefore moot, and because the loans were ones which could have been made had a partnering agreement been entered into. They argued that s. 191 is concerned with the use of municipal funds for purposes outside of the municipal council's authority or jurisdiction, which was not the case here. The respondents also claimed that s. 191 should be interpreted to include a defence of good faith, and that they should not be held liable given their reliance on advice from City staff and from the municipal solicitor.

The Court confirmed that, under the *Community Charter*, a municipal council may not provide assistance, including in the form of lending money, to a business – even a wholly-owned corporation – unless the assistance is given under a partnering agreement. The City's loans to PRWDC prior to 2013 were in breach of the *Community Charter*.

The Court found that, although the loans to PRWDC approved prior to 2013 were made in the absence of a partnering agreement and therefore in breach of the *Community Charter*, s. 191(1) was intended to provide a municipality and its taxpayers with security in the event that

municipal councillors improperly spent public money. Therefore, although councillors were personally liable for the amounts improperly paid while the funds remained outstanding, upon repayment this liability ceased. Since the councillors in this case had secured repayment of the loans and were no longer liable to the municipality, they were not disqualified from holding office.

To hold that councillors are liable after the funds have been recovered would transform the section into a penalty under which councillors would be fined for voting in favour of an expenditure that resulted in no financial loss to the municipality. The Court confirmed that statutes that impose personal liability on council members must be strictly construed. An interpretation of section 191 that would permit a council member to escape personal liability when he or she relies on advice or information from a municipal employee who is found to have been dishonest or grossly negligent, but not when the councillor relies on an employee's honest but mistaken advice, would lead to an absurdity. Such a result, the Court concluded, would "weaken our municipal government structure by serving as a substantial disincentive to individuals who are considering serving their communities by running for municipal office."

This case serves as a reminder that interactions between municipalities and businesses, even wholly-owned businesses, are fraught with special considerations, but there may be good faith exemptions available where swift action is taken to remedy failures to comply with the statutory requirements.

VII. AS LONG AS THEY DON'T GIVE YOU MONEY…

Chernen v. Robertson, 2014 BCSC 1358

Several resident electors of Vancouver brought a petition seeking to disqualify Gregor Robertson, the mayor of Vancouver, from office and to repay the City for costs incurred in relation to a lease of City-owned property to an election campaign supporter of Mr. Robertson's for below market value.

During his election campaign, Mr. Robertson received support from HootSuite Media Inc., a company specializing in social media management, marketing and analysis. The assistance consisted of: a promotional kit, distributed at a conference on April 24, 2011; technical assistance; the use of a venue; free software support during a "town hall" meeting on November 17, 2011; and free marketing assistance for Mr. Robertson.

After Mr. Robertson was re-elected, HootSuite offered to purchase a City property which was available for sale. The proposal was below market value, as were all the other offers the City received. Instead of selling the property at a loss, the City chose to enter into negotiations with HootSuite for a lease of the property with an option to purchase. The City's real estate department prepared an agreement, which Council voted to approve. Mr. Robertson

participated in this vote. The final lease contained a 7-month rent-free period, a $700,000 tenant improvement allowance and a $17 per square foot cost.

After the lease was entered into, HootSuite assisted Mr. Robertson in delivering and hosting a further "town hall" meeting in 2013. HootSuite also entered into a contract for social media management and tracking services with the City, that was not put out to tender and bid.

As a result, the petitioners sought a declaration that Mr. Robertson failed to disclose a direct, or indirect, pecuniary conflict of interest contrary to sections 141 and 145.3 of the *Vancouver Charter*, or in the alternative that he failed to disclose an "other interest" contrary to sections 141 and 145.3 of the *Vancouver Charter* and a declaration that Mr. Robertson attended a meeting, participated in discussions, attempted to influence voting, and voted on a matter contrary to sections 141 and 145.3 of the *Vancouver Charter*. As a result, the petitioners sought orders that Mr. Robertson be disqualified and his respective office of Mayor of the City of Vancouver be declared vacant, and that any expenditure authorized by Mr. Robertson in relation to the Lease of City-owned property to HootSuite Media Inc. was authorized contrary to the *Vancouver Charter*, so Mr. Robertson must repay those amounts.

The petitioners pled in the alternative that Mr. Robertson was in a position of common law conflict of interest, and should be removed from office on those grounds.

The Court found that the mayor of any large city will invariably interact with a wide variety of individuals and corporations during his or her tenure. Such interaction is a necessary part of the mayoral role, and is hoped to be of benefit to the city's residents and voters. It is also unlikely to be the sort of activity that will create a direct or indirect pecuniary interest or an interest that constitutes a conflict of interest within the ambit of the *Vancouver Charter*.

The Court held that there was insufficient evidence to show that Mr. Robertson had a direct or indirect pecuniary interest in HootSuite's lease, such as to constitute a conflict of interest. In the result, the application to dismiss the petition was granted.

This case indicates that a considerable amount of leeway is still being granted when it comes to potential conflicts of interest engaged by the receipt of election support, especially in-kind support.

VIII. WHEN A ONE-MAN SHOW CAN OVERRIDE YOUR BYLAWS

Holt v. Farm Industry Review Board, 2014 BCSC 1389

This dispute began in 2009 when Ms. Holt constructed a new barn on her Kelowna farm property to accommodate an equestrian business. Her neighbours brought a complaint pursuant to s. 3 of the *Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996, c. 131 (FPPA), claiming that they were aggrieved by noise, light, flies and odour emanating from the farm.

In 1995, the BC legislature enacted the FPPA to protect farmers' rights in BC. The FPPA specifically relates to nuisances such as odour, noise, dust or other disturbances. Under the FPPA, if a farmer uses normal farm practices and does not contravene any other legislation, the farmer is not liable to any person for nuisance and cannot be prevented from operating a farm by an injunction or court order. The FPPA strikes a balance with those who might be affected by farm operations by providing a complaint mechanism for individuals who suffer nuisances created by farms.

The Farm Industry Review Board ("FIRB"), an independent administrative tribunal that administers the FPPA, dismissed the noise and light complaints and concluded that the appellant's manure management practices were a normal farm practice. But it found that the location of the livestock run outs were not consistent with normal farm practices as defined under the FPPA, because the livestock run outs were not set back from the neighbours' property line at least 15 feet.

Before building the barn, Ms. Holt had consulted with Kelowna and made modifications to her barn layout based on the city's feedback. These modifications satisfied Kelowna that the need for any setback had been obviated, and that the farm buildings complied with its bylaws.

Ms. Holt appealed the FIRB decision to the courts on the basis that the FIRB order exceeded the FIRB's jurisdiction, since the order amounted to a municipal bylaw ruling and purported enforcement. She contended that the FIRB had no authority to interpret and apply the bylaw in the manner it did, and that individuals in her circumstances should be able to rely on Kelowna's interpretation and opinion as evidence of an accepted standard of a normal farm practice to govern their affairs. Kelowna's advice to the farm owner on its interpretation of its own bylaw represented some evidence of the City's view of farm practice complying with its bylaw.

The Court found that the FIRB did not exceed its statutory authority when it examined the bylaw, nor did its bylaw interpretation infringe on Kelowna's right to interpret its own bylaw or intrude into the field of municipal governance, since Kelowna does not have the authority to create bylaws that restrict normal farm practices. Nor does it have the authority to insulate farmers whose practices are not normal farm practices from the application of the FPPA.

The Court wrote that the FIRB retains the sole authority to determine whether a practice is normal or not, and this authority extends to reviewing and interpreting zoning bylaws that may permit or deny an activity in conflict with the FPPA. Assessing normal farm practices necessarily includes a broad review of all relevant evidence, including city bylaws, to assess whether those bylaws regulate activity that conforms with or offends normal farm practices.

The FIRB decision was overturned in the result, due to evidentiary issues. However, the court's approach to FIRB interpretation of municipal bylaws remains instructive, in that it indicates that no deference will be given to municipal interpretations of their own bylaws when it comes to farm practice matters, and no assurances can be provided to landowners in that regard.

IX. ALWAYS EQUIVOCATE

Seanic Canada Inc. v. St. John's (City), 2014 NLTD(G) 7

This case was an application by a property developer, Seanic Canada Inc. ("Seanic") for judicial review of the denial of its rezoning application. Seanic owned land in the City of St. John's, upon which it wished to develop a seniors' assisted living residence facility. The property was in a residential low density zone and, as a result, required rezoning in order to accommodate the proposed facility.

Seanic applied to the City to rezone the property, and was encouraged by the City's Planning and Housing Standing Committee to develop plans, to perform studies and to bring forward its proposal concerning the property. The Director of Planning later required Seanic to undertake a land use assessment on terms of reference which were dictated by Council. Drafts of this assessment were forwarded to the City for review, and the final version was amended in accordance with City feedback.

Following the receipt of the final land use proposal, the City scheduled a public meeting regarding the development. A number of citizens objected to the proposed development, citing obstruction of views, traffic issues and possible reduction in property values. As a result, Seanic asked that the rezoning vote be deferred until it completed the traffic study. Council refused this request, and rejected the rezoning application. Seanic applied for judicial review of this decision, and was successful in having the decision quashed and the matter remitted to Council, on the basis that Council had not provided Seanic with reasons for refusing to defer the vote on the rezoning application.

The City held a second public meeting before Council reconsidered the rezoning application. After debate and discussion, a majority of Council voted to reject the application. The majority voted to reject the application due to the increase in traffic (although the traffic study indicated there would be no such increase), and because they believed the area was inappropriate for a seniors' residence due to a hill and lack of services. Throughout the process, the Mayor was actively involved with area residents and allegedly aligned himself early on with those that opposed the project. His daughter's parents-in-law lived in the area in a home that had a backyard view of the property and their company contributed to the Mayor's campaign.

One Councillor who voted to reject the application indicated that he had made up his mind prior to the meeting and that he had assured residents he would be voting against the application. His supporters who had elected him to office had made known their views against the application, and he had indicated that he would represent their views. The transcript of the meeting showed this councillor as saying that he was "dead set against" the proposal and that "you would have to hate your grandmother to put her up on that hill". However, he also noted that had the residents been in favour of the development, he "probably" would have voted for the proposal.

Seanic applied for judicial review of the second refusal, citing conflict of interest, bias, prejudgment and inadequacy of reasons.

The Court allowed the application, finding that the one City councillor had a closed mind on the rezoning application, in that he had prejudged the application to the point that by the time Council convened to debate and decide the matter, any representations seeking to persuade him to vote for the rezoning were futile. The other grounds advanced by Seanic, however, lacked merit. The reasons for Council's decision to reject the application were adequate as, although Council provided no written reasons, the vote took place at a public meeting, Councillors were presumed to be aware of the Municipal Plan and various staff reports on the issue and the record of the meeting showed Council was alive to the question at issue. The reasons as reflected in the record did not demonstrate an absence of procedural fairness.

The Court also found that the Mayor was not in a conflict of interest. He was not personally interested in the development and the fact that his daughter's parents-in-law lived close to the area did not amount to personal interest. Furthermore, the Mayor was not present at the meeting and did not vote. The matter was remitted to the City for reconsideration with comment on the future participation of the councillor in question.

This case raises the troubling issue of councillor decisions which straddle the line between judicial decisions and political decisions. Where councillors are elected based upon expressed campaign views regarding hot-button local issues, cases such as this one raise the spectre that their votes on this very issue are disqualified because the Court finds they have a closed mind. In the result, the vote of those remaining councillors might well be enough to implement the opposite of the wishes of the citizens they were elected to represent, since a judicial finding of bias could disqualify the democratically determined policy position of the majority of council.

In this case, the finding of a closed mind is particularly troubling given that the councillor in question in Newfoundland expressed concerns about traffic, the steepness of the terrain, the safety of seniors in the proposed project, and the proliferations of senior’s projects in the concentrated area absent services and amenities focused on seniors, and indicated that his vote could be changed if his supporters were in favour. This would not seem to be an intractable position.

In the result, this case embodies concerning aspects about judicial interference in the political policy realm, which should be limited to quasi-judicial decisions of elected local government politicians (such as specific license applications) and not applied to democratically determined legislative choices (such as broad public policy matters like zoning bylaws).

X. WHEN AN OFFICER IS (OR ISN'T) AN OFFICER

R. v. Skakun, 2014 BCCA 223

Mr. Skakun, a municipal councillor in the City of Prince George, was convicted in BC Provincial Court under s. 30.4 of the *Freedom of Information and Protection of Privacy Act* ("FOIPPA") of making an unauthorized disclosure to the CBC of personal information that included a copy of a confidential workplace harassment report he had received during a closed restricted city council meeting.

In order to find that Councillor Skakun had contravened the *FOIPPA* proscription on release of personal information, the trial judge concluded that he was an "employee, officer or director of a public body", as it is those persons described in s. 30.4 of FOIPPA who must not disclose personal information. The trial judge was satisfied that Councillor Skakun was an "officer" for the purpose of the section, and therefore contravened the provision through the disclosure of the harassment investigation report to the media.

The trial judge considered municipal legislation, including section 120 of the *Community Charter*, dealing with oaths or affirmations of office, and section 121, dealing with resignation from office, and reasoned that the holder of an office could be reasonably considered to be an "officer". Further support for this conclusion was found in section 287 of the *Local Government Act*, in which the definition of "municipal public officer" includes "a member of council." Noting that the release of personal information under *FOIPPA* is tightly regulated, the trial judge held that the policy behind *FOIPPA* did not support a restricted interpretation of officer as excluding municipal councillors.

Councillor Skakun was granted leave to appeal from the dismissal of his summary conviction appeal on the legal issue of whether a municipal councillor is an "officer" of a public body under s. 30.4. He argued that the plain and ordinary meaning of the term "officer" in s. 30.4 is not evident when read in its immediate context and that the dictionary meaning of "officer" does not shed light on the legislators' intended meaning. He pointed to other internal provisions of *FOIPPA* that refer separately to the term "officer" and "elected official"; these terms are also used separately from references to municipal councillors in the *Local Government Act* and the *Community Charter*. He contended, given these discrepancies, that if the Legislature had intended to include municipal councillors in s. 30.4, it would have done so explicitly.

Councillor Skakun addressed the issue of giving elected municipal councillors freedom to disclose unauthorized personal information to the public with impunity by pointing to s. 117 of the *Community Charter*, which also prohibits such disclosure, with specific reference to a "council member or former council member".

The Crown argued that the quasi-constitutional status of FOIPPA mandates a "broad, liberal, and purposive interpretation" of s. 30.4 in order to advance fundamental Canadian values of access to information and the protection of privacy of personal information in the control of public bodies, and that the definition of “officer” must therefore include elected municipal councillors.

The Court considered the purposes of the *FOIPPA* legislation, to make public bodies more accountable to the public by providing the public with access to their records and to protect personal privacy by preventing the unauthorized collection, use or disclosure of personal information by public bodies that would unreasonably invade the privacy of individual members of the public. This object, along with the ordinary and grammatical meaning of "officer" in s. 30.4, based on its dictionary definition (both legal and non-legal), when read in the context of the broadly-stated purposes of the legislation and the wide scope of its targeted public bodies and organizations, evinced a legislative intention to include elected municipal councillors within the ambit of the provision.

The Court found that the meaning of "officer" must be ascertained in its proper context and not by resorting to definitions in other statutes, in the absence of any indication that incorporation of those definitions was intended. Both the *LGA* and the *Community Charter*, although treating officers and elected officials differently, are sector-specific enabling statutes that cloak municipalities and regional districts with the legal authority to govern their communities. In contrast, *FOIPPA* is a complete code for the implementation of its dual objectives of access to information and protection of personal information in the control of public bodies. It is not sector specific but targets a wide range of public bodies and organizations. Therefore, to import the meaning of "officer" from narrowly-focussed municipal/district-related legislation into the broad regime of *FOIPPA* would unduly restrict its application and result in an inconsistent and piecemeal approach that is contrary to the legislative intent.

The Court dismissed the appeal, confirming that elected officials will be considered officers under *FOIPPA* and are subject to the duties and responsibilities imposed by that legislation.

NOTES