YOUNG ANDERSON
BARRISTERS & SOLICITORS

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CLIENT BULLETIN

Court of Appeal Scuttles Riparian Area "Variance" Procedure

The B.C. Court of Appeal has held, in a unanimous judgment in *Yanke v. Salmon Arm (City)*, that a hardship-based "variance" process that the Ministry of Environment and Fisheries and Oceans Canada have been using to authorize development in streamside protection and enhancement areas, lacks any legal foundation. The decision will be of significant interest to local governments that are subject to s. 12 of the *Fish Protection Act* and have been struggling to deal with the redevelopment of riparian properties that are wholly or partially within SPEAS identified by qualified environmental professionals following the methodology prescribed by the Riparian Areas Regulation. The senior governments have been purporting to prevent local governments from approving such development, even though the QEP has certified that the development will not harmfully alter, damage or destroy fish habitat, until the property owner obtains a "variance" or "flexing" of the SPEA based on hardship. Such variances have in some cases been made conditional on the owner carrying out habitat enhancement or replacement works. The simple reason for the Court's conclusion is that such a "variance" process is inconsistent with the provisions set out in the Riparian Areas Regulation, which allows local governments to approve so-called "non-HADD" development adjacent to watercourses and lakes regardless of the opinions of senior governments.

The mechanism that the senior governments had been using in the *Yanke* case to prevent the City from approving development in the SPEA, was refusal to notify the City pursuant to the RAR that an acceptable QEP report had been received. The Court of Appeal did not consider that the City could simply ignore such a lack of notification in cases where it was being used improperly to force the owner to apply to senior governments for a "variance". Rather, the Court suggested quite strongly that the obligation of the Ministry of Environment to provide such a notification could be enforced by a *mandamus* order if the Ministry was withholding it for the purpose of operating an invalid variance procedure.

Local governments that are dealing with development applications in relation to which a QEP has prepared a report indicating no HADD, even though the development would occur in a streamside protection and enhancement area, are now entitled to expect senior government notifications in respect of those reports without any further involvement of MOE or DFO personnel in the application, if the reports comply with the RAR and the prescribed riparian area assessment methodology. It seems clear that, if the senior governments wish to maintain a hands-on role in development approvals, either the Riparian Areas Regulation or the *Fish Protection Act*, or both, will have to be amended.

We will provide a more detailed analysis of the *Yanke* decision in a future client newsletter.

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