YOUNG ANDERSON
BARRISTERS & SOLICITORS

JUNE 2015, VOLUME 26, NUMBER 2

NEWSLETTER
LGMA CONFERENCE ISSUE

Tempest in a TeaPOT? Letters of Intent, Business Licensing and the ALR

By now, most local governments in British Columbia have probably received one or more Letters of Intent under the federal Marihuana for Medical Purposes Regulations (MMPR). While not unexpected to most in BC, it appears to have been a surprise to Ottawa that more than a dozen or two businesses would be interested in becoming "licensed producers" of marihuana under the MMPR. In fact, more than a hundred times that many have applied, while only a couple dozen have been approved so far (Health Canada was reporting about 1,200 applications earlier this year). There appears to be nothing in the MMPR that would limit the number of licensed producers that may ultimately be approved.

As we have noted previously, the MMPR does not require, or even contemplate, local government review or confirmation that a proposed medical marihuana production facility location is zoned to permit the use. However, s. 38 of the MMPR does require that an applicant must provide a "written notice" to the local government, local fire authority, and local police force or RCMP detachment, stating:

> (a) the name of the applicant;
>
> (b) the date on which the applicant will submit the application to the Minister;
>
> (c) the activities referred to in subsection 12(1) for which the license is to be sought, specifying that they are to be conducted in respect of cannabis, and
>
> (d) the address of the site and, if applicable, of each building within the site at which the applicant proposes to conduct those activities.

Once approved, s. 40 of the MMPR requires the licensed producer to also provide a written notice of the issuance of the license (or amendment, renewal, suspension, or reinstatement of a license) to the same parties, with the name and address of their site and some details of their license, including the effective date.

So, if the local government has no right to object on the basis that a proposed location is not zoned to allow this type of agricultural and industrial use, what do communities expect their local governments to do with this knowledge and these written notices? How is it relevant to land use decisions and regulations,

business licensing, and public demands to know where these facilities plan to locate or are located?

First, while the MMPR does not appear to authorize the Minister to consider local land use regulations, bylaws that zone land for agricultural and industrial uses in some areas and not in others are still generally valid, and in our view, applicable to this type of plant-based pharmaceutical production.

Constraints with respect to local government zoning of medical marihuana production facilities include the ordinary constraints that zoning must be done for municipal purposes related to compatability of land uses.

Another constraint relates to land use regulation in the ALR. After a bulletin from the ALC advising that medical marihuana production and accessory uses are a farm use that is permitted in the ALR, the Province has now enacted a regulation specifically listing medical marihuana production as a farm use under the applicable Regulation. As a result, bylaws that prohibit these facilities in the ALR have no force or effect. Local governments that passed bylaws that permit but regulate medical marihuana production facilities in the ALR can continue to rely on those regulations.

Medical marihuana production facilities that are licensed by the federal government may also be the subject of local government business license requirements, just like any other lawful business operation. While the MMPR contains a number of health and safety regulations that licensed producers are required to comply with, local governments may also wish to consider imposing or incorporating business license terms or requirements that relate to good business practices and that are consistent with federal licensing requirements.

The licensing of medical marihuana dispenseries and compassion clubs under municipal business licensing powers is also being considered in a number of communities. Although the federal Minister of Health has raised objections to this possibility, it is well established that local governments must generally consider municipal purposes and issues, and not criminal law or morality, in making these licensing decisions. While medical marihuana dispensaries are not authorized by the MMPR (or even the previous MMAR, which authorized home growing and small scale production and sale) the legal status of these businesses under federal law does not necessarily preclude their regulation for municipal purposes as well.

The legal status of those earlier personal production licenses is still an open question, and the federal court just finished hearing a case in relation to the constitutional status of the repeal of the regulations that permitted personal and small scale production.

In the interim it can be expected that Health Canada will continue to process and issue licenses to large scale pharmaceutical medical marihuana producers, and that local governments will continue to receive written notices advising of the location of these facilities. Individuals that want access to these notices likely have that right under BC's *Freedom of Information and Protection of Privacy Act*. Indeed, a Council receiving these written notices must do so at a public meeting, as there is no provision in the MMPR or the *Community Charter* for these notices to be provided to local governments in camera.

It remains to be seen whether Health Canada will approve a location that is not in the ALR or zoned for this use in BC. In the interim, local governments should feel free to advise the Minister of any objections they have to the location of a proposed facility based on the application of their zoning bylaws, or other health, safety, or community concerns.

Francesca Marzari

WorkSafe Claims Statistics – Mental Disorders

In July 2012, changes to WorkSafe legislation allowed for workers to file claims for mental disorders that are predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors. This effectively broadened the scope of what constitutes mental stress for the purposes of WorkSafe BC claims.

WorkSafe BC created a specialized team to deal with these types of claims and has recently published claim statistics dating from July 1, 2012 to August 31, 2014:

- 5,237 claims received (approximately 220 per month)
- 311 of these claims were from the Public Administration sector
- 773 claims were allowed
- 2362 claims were denied
- 1355 claims were suspended because the claim could not be further investigated (usually due to lack of continuing participation by the worker)

These statistics confirm that a very low percentage of claims based on a mental disorder are successful. Two reasons contribute to this. First, workers are required to demonstrate that they have a mental disorder that has been diagnosed by a psychologist or psychiatrist, and that the mental disorder was predominantly caused by a work-related stressor, such as bullying or harassment. Second, stress that an employee may suffer as a result of legitimate and reasonable workplace supervision, such as discipline or changes in working conditions, will not fall within the scope of mental disorder for the purposes of these claims.

Given these requirements, it is unlikely that this percentage will greatly increase over the next few years. That being said, the best way to ensure that workers do not file these types of claims in the first place is to create a workplace culture in which bullying and harassment are not tolerated. In addition to the requirement under WorkSafe legislation to have a policy in place to prevent bullying and harassment, regular training for employees can go a long way to creating a respectful work environment.

Carolyn MacEachern

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Land Use Contracts: The End is in Sight

When s. 914.1 of the Local Government Act *terminates all land contracts on June 30, 2024, one chequered chapter in BC's ongoing experiment with contract zoning will finally close. Land use contracts, first introduced in 1972 by amendments to s. 702(A) of the* Municipal Act*, were authorized for just six years. In 1977, shortly before the provisions authorizing land use contracts were repealed, following earlier attempts at repair, one MLA lamented the unintended effects of the regime:*

> The land-use contract has evolved, unfortunately, into an often confusing, counterproductive roadblock. Its original purpose as a special device for controlling exceptional types of developments has been lost in the shuffle. It is now in general use as a substitute for zoning and as an arbitrary revenue producer. Uncertainty, unnecessary costs and excessive delay are the penalties that it has imposed on the community, consumer and developer alike.

Despite the brief period during which they enjoyed legislative imprimatur, land use contracts have had lasting physical, legal, and administrative impacts in communities all over the province. Thousands of parcels are still charged with a land use contract, and courts and local government officials alike have grappled with their precise legal status and the proper interpretation of their terms. In one case a local government was held liable for losses attributable to its failure to register a land use contract in the Land Title Office; in another case a local government was found in breach of a land use contract because, as a result of improperly interpreting the contract, it failed to issue licenses for businesses permitted by the contract.

Local governments may therefore welcome the termination of land use contracts, but should be alert to their duties under ss. 914.1 – 914.4 of the *Act*, which plot two courses to termination.

The default regime under s. 914.1 is automatic termination of all land use contracts in the province on June 30, 2024. Local governments with jurisdiction over land subject to a land use contract must adopt, by June 30, 2022, a zoning bylaw that will apply to the land on June 30, 2024. The other route is early termination, which local governments can effect by bylaw under 914.2. An early termination bylaw cannot come into force until a year after adoption and must not be adopted unless the local government has adopted a zoning bylaw that will apply to the land on the date the termination bylaw comes into force.

In most cases, land that is currently subject to a land use contract was also subject to a zoning bylaw when the contract took effect. Although land use contracts operate notwithstanding any bylaw, many explicitly provide that certain zoning regulations continue to apply and the legislation never prevented a local government

from exercising the zoning power with respect to land use contract lands. These facts create some ambiguity with respect to the duty of local governments to adopt zoning that will apply to land when a contract terminates, and unless the legislature sees fit to rejig the termination provisions, this ambiguity will remain. In those rare cases where there is no zoning at all in place with respect to these lands, there is no ambiguity: the zoning power must be exercised.

The prudent course in any event is a careful review of each contract, any pre-existing or subsequently adopted zoning that may apply to the land, and any applicable official community plan designations. In the case of early termination, a public hearing is required for the bylaw, so a zoning bylaw could be heard at the same time. There is no requirement under automatic or early termination for the zoning that will apply on termination to describe what is actually built on the land, but as with any zoning bylaw it must be consistent with the applicable official community plan. If any development on the land does not meet the requirements of the zoning that applies on termination, it will become non-conforming and will be protected by s. 911 of the *Act*.

If a land use contract will terminate automatically by the operation of s. 914.1, the local government must, by June 30, 2022, give written notice of termination to owners of lands that are subject to the contract. In the case of early termination by bylaw, the deadline for notifying owners is 10 days after adoption of the bylaw. (This is in addition to any notice of public hearing to which the owner may be entitled.) Local governments must also, within 30 days after adopting a termination bylaw, notify the land title office for each parcel of land subject to a land use contract that will be terminated. The notification requirements, both to the land title office and to owners, are detailed in the legislation and may prove time-consuming for local governments with numerous contracts covering hundreds or thousands of parcels in their boundaries.

Finally, an owner of land subject to a contract that a bylaw under s. 914.2 will terminate, may apply to a board of variance on hardship grounds for an order that the land use contract continues to apply, until a date that is no later than June 30, 2024.

Local governments may welcome the termination of land use contracts, but should be alert to their duties under ss. 914.1 – 914.4 of the Act*, which plot two courses to termination*

In addition to the new termination provisions of the *Act*, s. 930 continues to permit amendments to land use contracts by bylaw, development permit, or development variance permit, or in the manner specified in the contract. However, local governments wishing to discharge a land use contract under s. 930 may only do so by bylaw with the agreement of the owner of any subject parcel.

Guy Patterson

National Issues in Municipal Law

Is "National Municipal" some kind of contradiction in terms? As a member of the Executive of the National Municipal Law Section of the Canadian Bar Association, I've been asked that question a few times. While generally speaking it's true that municipal law issues are particular to provinces, there are some municipal law issues that transcend provincial boundaries. Often this results from the operation of federal legislation, like the Aeronautics Act, *that impinges on municipal powers right across the country. After a particularly informative round-table discussion during our last National MLS conference call, I thought some commentary on the potpourri of issues that my colleagues are dealing with in the other time zones would be worthwhile. (Surprisingly, Health Canada's medical marihuana production licensing program didn't come up!)*

Council Prayer

Earlier this year the Supreme Court of Canada ordered the City of Saguenay, Québec and its mayor to cease reciting a prayer prior to the commencement of council meetings and to pay to the citizen who challenged the validity of the bylaw that required the prayer $15,000 in compensatory damages and $15,000 in punitive damages for discriminatory interference with his freedom of conscience and religion. While the decision was based on the Québec *Charter of Rights and Freedoms*, it's generally believed that the same result would flow from the *Canadian Charter of Rights and Freedoms*, and those municipal councils across the country that had not yet abandoned this practice have been doing so, reluctantly it seems in some cases. A Saskatchewan municipal lawyer commented that he had just attended a council meeting preceded by the usual prayer, but recited without explicit references to any particular deity – a manoeuver that I think few of us considered a fulsome response to the SCC decision, given that the complainant in the Saguenay case was an atheist. The Québec lawyer on the call indicated that the *Saguenay* decision had caused little municipal angst in Québec, and placed that non-reaction within the broader context of the electorate's rejection of the PQ "Charter of Values" in the last provincial election – the common theme being religious neutrality on the part of the state.

Historically, the purpose of prayers recited at the commencement of legislative deliberations at all levels has been to obtain, or at least solicit, the assistance of a higher power in reaching wise decisions. While there are likely a few council procedure bylaws in BC that still call for the recitation of a Christian prayer at the beginning of the meeting, most such bylaws were amended well before the *Saguenay* decision. In view of the Supreme Court's decision on council prayer, the prudent course for those local governments who wish to enable elected officials to seek this type of assistance in their deliberations would be to allow a few moments of silence so that they

may do so privately. Other members who prefer to rely entirely on their own judgment in legislative matters may use this private time to silently rehearse their speeches, or check out who's in the public gallery.

Prostitution

Last November, Royal Assent was given to Bill C-36, the federal government's response to the Supreme Court's decision in *Canada (Attorney General) v. Bedford*, the case that dealt with the constitutionality of *Criminal Code* provisions related to prostitution. The Court held that laws prohibiting keeping a brothel, living on the avails of prostitution, and communicating in public for purposes of prostitution placed sex workers in significant danger and thereby infringed on their right to security of the person under the *Charter of Rights and Freedoms*. The overriding principle behind Bill C-36 is that prostitution is a form of sexual exploitation that needs to be eliminated from Canadian society entirely, and its centrepiece is the criminalization of the purchase (but not the sale) of sexual services – essentially, cutting off the demand for these services. The Canadian Bar Association made submissions to the government last fall, criticizing aspects of Bill C-36 that in its members' view continued to suffer from the same constitutional defects as the legislation it was replacing. Other critics of the Bill have argued that sex workers will not truly be safe until they can provide sexual services legally, in licensed brothels.

It's probably just a matter of time before municipal sales taxes are debated generally in BC

Sex work has not historically been subject to overt local government regulation in Canada, but it's likely that local governments could come into the regulatory picture by virtue of their longstanding jurisdiction over land use and business regulation. For example, in a paper published in 2013 by the Canadian Women's Foundation on "Sex Trafficking" laws, the authors note that in New South Wales, "responsibility for regulating the industry lies with municipalities who use a range of licensing and business and zoning bylaws and apply occupational health and safety codes and inspections". In Christchurch, New Zealand, the Christchurch City Council Brothels (Location and Commercial Sexual Services Signage) Bylaw has been enacted to "restrict the location of brothels to certain parts of the district, with no restriction on the location of small owner-operated brothels", "provide for specified existing brothels to remain in their current locations", and "control signage that advertises commercial sexual services that is in, or visible from, a public place". The bylaw, including maps of "brothel allowed areas" and the addresses of existing and therefore lawfully non-conforming brothels, can be reviewed on the Christchurch City Council website.

Sales Tax Revenue Sharing

The use of provincial sales tax revenue to fund regional transit infrastructure is currently before the court of public opinion in the TransLink referendum. If voters approve, the Province might enact legislation temporarily increasing the provincial sales tax in Metro Vancouver by ½ of 1% to fund a specific list of regional transit improvements costing around $7.5 billion. This is the first time that the use of sales tax revenue to fund local infrastructure has been under serious consideration in British Columbia. In U.S. jurisdictions, local sales taxes contribute heavily to municipal revenues, and I was surprised to learn from a member of the municipal bar in Saskatchewan that his

province has for some time been earmarking for its municipalities a significant share (currently 1/5 of about $1.4 billion) of provincial sales tax revenues. This is equivalent to a 1% municipal sales tax. In the period leading up to the release of the most recent provincial budget, the prospect of a provincial claw-back of this revenue had been raised, but in the end the Province decided to leave the revenue sharing formula undisturbed. It's probably just a matter of time before municipal sales taxes are debated generally in BC, given the limitations of the property tax system, and the real question may be whether the Province will, like Saskatchewan, be willing to vacate tax room in favour of the municipalities to which it has steadily been devolving responsibility to provide government services, or insist (as in the TransLink initiative) that any sales tax for local purposes be incremental to the existing provincial sales tax rate.

While regulations under the Canada Post Corporation Act *clearly authorize Canada Post to install mail receptacles on public highways, it is not at all clear that the federal government's exclusive jurisdiction over the postal service entitles the corporation to do so without obtaining municipal highway use permits*

PILT

Another point of financial contact between senior and local governments, that seems to cause more friction in the eastern part of the country, is federal payments in lieu of property taxes (PILT). Likely this is because a greater number of federal institutions are located in Ontario and eastward, than in the west, though there are federal installations such as Canadian military bases and lands, and airports, in the west as well. A long-running dispute between the federal Minister of Public Works and Halifax Regional Municipality over the valuation of the Halifax Citadel National Historic Site for the purposes of PILT is nearing its conclusion, and will likely have significant consequences across the country. Canada unilaterally reduced the assessed value of the property for PILT purposes about 20 years ago from $20 million to $5.25 million, abandoning its previous practice of following the assessment determined by the provincial assessment authority. HRM exercised appeal rights under the federal *Payment in Lieu of Taxes Act*, culminating in a successful 2011 appeal to the Supreme Court of Canada which ordered the federal officials to make a proper value determination. A dispute advisory panel convened under the federal Act has recently made a recommendation to the Minister of Public Works on the resolution of the dispute between Public Works and HRM on the value of the property, and the municipality awaits the Minister's decision. Principles established in the Citadel litigation, meanwhile, will inform the administration of the *Payment in Lieu of Taxes Act* throughout the country.

The Continuing Saga of Mayor Ford

For those who have been missing their regular media reports on the activities of Toronto ex-mayor Rob Ford, there is now available on the website of the Ontario Ombudsman an April 2015 report entitled "An Investigation into Toronto City Hall Security". To give the flavour of the incidents that led to the Ombudsman preparing this report, the summary notes the following (under the heading "Security Guard or Bodyguard"):

> *Security had a practice of assigning escorts on a rotating basis. Over time, the Mayor's office began asking for a particular guard, who was soon publicly*

identified as the Mayor's security guard. Security did not enforce the existing practice, as they did not want to say no to the Mayor.

The mayor to whom the security staff did not want to say "no" was, of course, Mayor Ford. The Ford era's demands on Toronto civic staff in various fields were without precedent, and are unlikely to be duplicated; few municipal solicitors, for example, are likely to have their in-council advice filmed and broadcast on the CBC National News. Toronto's City Manager in his response to the Ombudsman's report referred discreetly to the Ford era as an "unprecedented time". We have in our practice come across situations where elected officials have lost sight (though perhaps in a less spectacular way) of the fact that civic staff are there to perform public functions only, and not to perform political functions for members of council. Thus the Ontario Ombudsman's key recommendation, "that Security ensure its personnel are properly subject to management's direction and not that of elected officials", is a useful reminder to local governments throughout Canada.

CMBs

An issue of national scale that we *didn't* have time to discuss during the call is Canada Post's "community mailbox" program. As this program penetrates into urban areas, new conflicts are arising with municipalities regarding locations and physical standards for these facilities and the related roadway improvements. The City of Hamilton has recently passed a highway use bylaw (No. 15-091, for those who'd like to take a look online) that effectively establishes a moratorium on these installations, provoking Canada Post into an application to the Ontario Superior Court to quash the bylaw. While regulations under the *Canada Post Corporation Act* clearly authorize Canada Post to install mail receptacles on public highways, it is not at all clear that the federal government's exclusive jurisdiction over the postal service entitles the corporation to do so without obtaining municipal highway use permits, without complying with municipal location criteria for such facilities, or without complying with municipal standards as regards the lay-bys and parking areas that are required to allow safe and convenient access to the mailboxes. The outcome of the Hamilton case will therefore be of great interest to municipalities across Canada.

Bill Buholzer

News from the Firm

We are pleased to announce that **Guy Patterson** was called to the bar in March, and is now an associate lawyer with Young Anderson. Guy is a former planner with the Resort Municipality of Whistler and his planning experience has already proved to be an invaluable asset to the firm.

This August **Rosie Jacobs** will be joining the firm as our new articling student. We know she will make a great addition to our team.

Council Deliberations: Bad Faith, Good Questions

The legal doctrine of "misfeasance in public office" and how it might apply to voting behaviour of members of council raised some interesting issues in a recent decision of the BC Supreme Court. In Rodgers v. Sechelt (District), *2015 BCSC 687 the Court considered the allegation that three councillors acted in bad faith in deciding to vote against the rezoning of a property to permit a new bistro. The rezoning application attracted significant attention in the District because the proponent intended to obtain a Provincial liquor-primary license for the proposed bistro. Such a liquor license would allow the proponent to open an affiliated liquor store on Sechelt Indian Band land.*

With respect to two councillors who ultimately opposed the rezoning, the Court found that even though they had voted in favour of the bylaw on second and third reading, there were valid reasons that would have justified the subsequent removal of their support. There was also no direct evidence of the two councillors' mindset. Consequently, there was no basis to conclude that those councillors' votes in the 2(for)-4(against) vote should be reviewed by the Court. The Court did find that another councillor's public (and inflammatory) statement potentially did reveal that his vote against was improperly motivated by an intention to prevent aboriginal Canadians from selling alcohol.

At the heart of the unsuccessful claim was a branch of the tort of misfeasance in public office known as "knowledge/reckless indifference". This branch of the tort occurs when: (a) a public officer exercises an official power that the officer knows is, or is recklessly indifferent to the fact that it is, both illegal and likely to harm the plaintiff; (b) the exercise of power causes loss; and (c) the plaintiff has sufficient interest to have standing to sue. The other branch, known as "targeted malice", has the same elements except that rather than knowledge or reckless indifference to the illegality of the action, the public official uses an official power that can be exercised lawfully but the officer uses the power with the improper and ulterior motive of intending to harm the plaintiff.

Applied to this case, the "knowledge/reckless indifference" allegation was that the dominant purpose of three councillors in casting negative votes was to express their opposition to the proponent setting up a liquor store on the Band's land. District staff had advised the Council that this was not within Council's jurisdiction to consider and the Court's judgment does not analyze this position. Council did hear submissions from members of the public who had a vested interest in preventing a liquor store on Band land from competing with established liquor stores in Sechelt. The proponent asked the Court to find that, but for the alleged misfeasance, the objecting councillors would have voted in favour of the rezoning (5-1) or that the vote should have passed 2-1 with the three

impugned councillors' votes quashed.

The Court accepted that that there was circumstantial evidence suggesting an apparent shift in District staff and Council sentiment towards the rezoning between the adoption of third reading and the failed vote on final adoption of the bylaw. However, the Court also found that each vote on reading is a new vote, and members of Council were entitled to change their minds. Council heard a number of submissions from the public, both for and against the rezoning, that were based on a wide variety of grounds. The proponent did not have access to the inner thoughts of the members of Council, so only the inflammatory statement of one councillor provided any direct evidence. Consequently, the Court held that the proponent's claim, which relied on limited and circumstantial evidence, was bound to fail. The claim was dismissed by the Court before the District led any evidence.

The Court also found that each vote on reading is a new vote, and members of Council were entitled to change their minds

Although the *Rodgers* decision shows that members of council might be liable for their improperly motivated votes, the decision raises a wide variety of questions that are left unanswered. May a council consider the extra-jurisdictional effect of a zoning application? The trend in the case law suggests that it may. Is protecting local businesses from new competition an improper consideration? Municipalities set up such protections from 'too much competition' whenever they cap taxi licenses.

There are also questions as to what the Court would do with multiple improper votes against a bylaw. Did the proponent have any chance of the Court reversing the 'no' votes as requested? Could the Court strike votes and consider a 2-1 count to be sufficient to adopt a bylaw despite the lack of quorum? It is also unclear how much loss the proponent could claim was caused by the 'no' votes. Would the subsequent grant of a Provincial liquor license be presumed?

The summary dismissal of the *Rodgers* case means that it does not provide a full consideration of a number of issues raised by the tort of misfeasance of public office as it applies to council members. The tort is unlikely to be successful with regard to council deliberations, but generally this should be because of the good faith performance of councils, rather than because the tort is difficult to prove with regard to councillor intention or consequent loss.

Michael Moll

Brenhill Decision Overturned

Local governments and developers alike breathed a collective sigh of relief on April 23 when the B.C. Court of Appeal overturned the lower court's January decision in Community Association of New Yaletown v. Vancouver (City) & Brenhill Developments Ltd. *2015 BCSC 117. That decision had set a new benchmark for procedural fairness in the context of statutory public hearings, imposing on local governments onerous disclosure requirements for rezoning bylaws.*

In a unanimous decision of the Court of Appeal, the Chief Justice of B.C. Robert Bauman (himself a former municipal lawyer) gave the parties oral reasons for judgment on April 23 and released written reasons on May 21.

The original case was a challenge by a group of residents in Vancouver to various development approvals by the City for two properties in the Yaletown neighbourhood. A very simplified explanation of the project is as follows: City-owned land at 508 Helmcken Street, currently the site of a social housing facility, was rezoned to permit a 36 storey mixed-use development with 448 residential units and commercial and institutional uses on the lower levels. In exchange for that rezoning, Brenhill was to construct on its property across the road at 1099 Richards Street, at a cost of $25 million, a 13 story tower with social housing units. Upon completion, Brenhill would transfer that building to the City in exchange for the Helmcken Street property.

The lower court found the City, in holding the public hearings for the rezoning of the Helmcken Street property, had failed to adequately disclose the details of the project, including the specifics of the land exchange agreement between the City and Brenhill. In the reasons for judgment, the lower court raised the bar from established case law, stating that the City must not only disclose all relevant documents, but must also provide an explanation to the public in simple and direct terms as to the meaning of that information. The lower court held that the public hearing in this instance was more than an opportunity for the community to make representations about the proposed building or land use; it was a chance for the public to evaluate the City's business dealings with Brenhill. The lower court quashed the rezoning bylaw (among other approvals), thereby stopping ongoing construction, and ordered a new public hearing on the rezoning bylaw. Both the City and Brenhill appealed.

In allowing the appeal, the Court of Appeal stated that the lower court judge failed to consider relevant case law, and overturned the judgment. Bauman C.J. held that in holding the public hearing the City more than met its legal obligations.

With the Court of Appeal's ruling the new benchmark imposed by the lower court is no more. Pending successful leave to appeal to the Supreme Court of Canada (which this writer thinks is unlikely), the Brenhill chapter of public hearing case law is over.

Jay Lancaster

OIPC Report Highlights Privacy Obligations

In March, 2015, the Information and Privacy Commissioner for British Columbia released Investigation Report F15-01, Use of Employee Monitoring Software by the District of Saanich. The Commissioner initiated the investigation after receiving a complaint that "spyware" had been installed on computers. The report concludes that the collection of personal information through a program, Spector 360, violated the privacy rights of employees and elected officials.

Spector 360 was installed for the stated purpose of identifying, investigating, and remediating threats to IT infrastructure. Spector 360 recorded, among other things, a log of all websites visited, all email and messaging activity, every keystroke, and took screenshots of user activity every 30 seconds. Since incidental personal use of computer workstations was permitted, Spector 360 was also recording the personal information of users generated from personal emails, online banking activity, messaging and social media applications and websites visited.

A public body may only collect personal information in accordance with the *Freedom of Information and Protection of Privacy Act*. The Commissioner focused her analysis on subsection 26(c) of the Act, which permits collection of personal information related to and necessary for a program or activity of a public body.

In determining whether the personal information collected was necessary, the Commissioner considered the sensitivity and amount of the personal information collected in light of the purpose for collection. Citing the Supreme Court of Canada's decision in *R v. Cole*, [2012] 3 SCR 34, the Commissioner held that, when an employer permits incidental personal use of work computers, users have a reasonable expectation of privacy in the personal information contained on those computers. She considered that expectation of privacy as relevant in assessing the sensitivity of information when determining necessity.

The Commissioner concluded that logs of websites visited, file transfer data, the tracking of files created, deleted, renamed and copied, and records of network activity were "necessary" for IT security because they would assist in identifying actions that resulted in security breaches and would enable IT staff to more efficiently respond to breaches. However, the data collected from screenshots, keystroke logs, program activity logs, log in/log out times and all email activity could contain highly sensitive personal information and offered limited value in protecting IT security. For those reasons, the Commissioner concluded that collection of that personal information was not necessary and was therefore prohibited by FIPPA.

The report is a good reminder to local governments of some of their privacy obligations under FIPPA. First, a local government may only collect personal information if the collection is specifically authorized by the Act. Second, if a local government collects personal information, it generally must notify the individuals affected and disclose the purpose and legal authority for collection. Third, a local government should not collect personal information that is not "necessary" for the local government's purposes. Some personal information, including that collected through screenshots and keystroke logging, is highly

sensitive and its collection is likely prohibited except when the local government reasonably suspects wrongdoing and only when other less intrusive measures have been exhausted.

The Commissioner also recommended that local governments implement a comprehensive privacy management program based on the guidelines set out in her office's "Accountable Privacy Management in BC's Public Sector" publication. That publication, which is available from the OIPC website, recommends the appointment of a privacy officer, a comprehensive audit of all activities for compliance with FIPPA, and the carrying out of privacy impact assessments before new technology, programs, and activities are implemented. Finally, the Commissioner announced that in the near future her office will release a set of employee privacy guidelines which should help local governments navigate this complex and evolving area of the law.

Joe Scafe

Urban Agriculture: Local Governments' Role in Encouraging Growth

Urban agriculture is not a new concept. City dwellers have always turned to urban agriculture as a solution to the high costs of fresh food in densely populated areas, and to alleviate the pressure of feeding families on low wages. What is new are the issues farmers face in complying with complex legal regulations. In many cities, ambiguity exists in almost every facet of urban agriculture, ranging from where it is allowed to whether existing regulations will be enforced. Rural agricultural land has protection through the Right to Farm Act *and the* Agricultural Land Commission Act*, but municipal policy promoting urban agriculture has not yet translated into statutory language.*

Legally or not, modern urban agriculture projects are cropping up all over British Columbia. De facto agreements control these operations: from unspoken agreements that residential restriction bylaws will not be enforced to handshake land sharing arrangements. The informal approach to urban agriculture is indicative of the public's interest, but is inadequate to address the biggest obstacle effective urban agriculture programs face. Scanty arable land is available for urban agriculture, and even if a parcel can be cultivated, land costs are often prohibitively expensive. In addition, while policy directives generally support urban agriculture, the reality is that municipal bylaws on the subject are unclear or nonexistent, leaving regulatory questions open to interpretation on a case by case basis.

Municipalities have been hesitant to commit to bylaws, either from a perceived lack of need or because the breadth of regulation required is daunting. But the reality is there is a role for local governments to play in promoting urban agriculture outside of regulatory bylaws.

Facilitation is an important component of encouraging urban agriculture. Limited land availability means urban farmers often do not have the resources to acquire their own land or the resources to create legal agreements

preserving their rights on the land they farm. Consequently, farmers often have limited rights to retain capital investments when property is sold. Trust arrangements satisfy some land-sharing requirements for now, but as urban agriculture projects develop, there is a clear role for local governments.

Facilitating urban agricultural by providing pro forma leases and guidance on how to determine lease terms between the lessee and lessor offers a private solution without requiring direct local government intervention. These leases do not have to be sophisticated documents, but they can still provide a level of confidence that will allow future arrangements between those who have the land and those who are willing to farm it. Providing template leases establishes a foundation for both sides to discuss sometimes contentious terms, such as cost and income sharing. Using leases addresses the competing concerns of owners, such as future marketability and property assessment value, and those of farmers, creating stability and allowing future planning without binding either side too restrictively. The hope would be that such leases will eventually allow farmers to develop arrangements with contiguous parcels, amassing larger acreage on which to farm and offering a solution to the limited availability of arable land while providing secure tenure.

Local governments can also play a more robust role through defining lease arrangements for urban agriculture on government owned property. Allowing urban agriculture projects on public land is an evolving practice. The City of Vancouver has allowed urban agriculture on park lands since 2005, and issued a draft updated policy in 2015. Other municipalities in British Columbia have also allowed urban agriculture on public lands, such as the Nanaimo Community Gardens Society greenhouse, which is located on the same property as the Greater Nanaimo Pollution Control Centre.

Vancouver's draft policy illustrates common concerns for both sides. The policy requires partnership with a nonprofit, a business license, and $2 million in liability insurance before farming can commence. For well-developed organizations, these requirements are no hindrance; for a single farmer or nascent farm, they pose significant barriers. The issue of insurance is particularly problematic, as in order to acquire insurance farmers must supply a business license, but most municipalities do not offer business licenses for farming uses. If a farm intends to sell its products, it may not wish to operate under a nonprofit business license. In addition, Vancouver's policy provides for a revocable license, which limits a farm's security of tenure while providing greater flexibility to the City. In contrast, a lease would give the farm an interest in the land, and strong leasing language could be used to clarify when and how the arrangement would terminate.

As modern urban agriculture evolves, there is a facilitation role for municipalities to play, even before drafting bylaws to address the specific needs of each population.

Emily McClendon

Welcome!

The firm welcomes **Emily McClendon** to the firm as our summer intern. Emily has a BSc in Biology and a Master's Degree in City and Regional Planning from Georgia Tech, as well as a law degree from Georgia State University with a specialization in Environmental and Land Use law. Over her law school terms, Emily interned in the Office of the California Attorney General and with the Natural Resource Committee of the Georgia State Legislature. Most recently she interned with the City of Atlanta, drafting a new zoning ordinance promoting urban agricultural uses. We are thrilled to have her with us.

Look for your Lawyers

On April 15, **Carolyn MacEachern** spoke on the topic of whistleblowing at the Lancaster House 2015 Human Rights and Accommodation Conference in Vancouver.

Ray Young, Gregg Cockrill, Jay Lancaster, and **Emily McClendon** will be attending a number of PIBC chapter events over the coming months to present their "2015 Planning Brown Bag Legal Seminar". In May they spoke at chapter meetings in Terrace and Fort St. John, and they'll be heading to Kelowna later this summer.

On May 8, **Alyssa Bradley, Bill Buholzer, Guy Patterson,** and **Emily McClendon** hosted a day-long seminar on Vancouver Island on bylaw drafting and land use management. A similar seminar was held in West Kelowna on June 4.

Christina Reed presented a session entitled "Development Cost Charges" at the GFOA Conference held in Penticton from May 27-29. **Christina and Elizabeth Anderson** also spoke about Reserve Funds and Tax Sales, and **Reece Harding** presented a session entitled "Tips in the PILT World".

On May 28, **Barry Williamson** presented the first CLE-TV Municipal Law Update, providing a concise update on the latest legal developments in municipal law.

Don Howieson and **Michael Moll** presented on a variety of topics related to bylaw enforcement at the Licence Inspectors and Bylaw Officers Association conference at Sun Peaks Resort on June 4.

Bill Buholzer will be speaking at the Approving Officer's Seminar on June 16 at the Local Government Management Association Conference in Prince George. Bill will also be moderating a session entitled "Auditor General" on June 17. **Sukh Manhas** will be presenting a session entitled "Have you Been Defamed?" and **Francesca Marzari** and **Alyssa Bradley** will be presenting a session on "The Tough Issue of Homelessness".

On August 11, **Reece Harding** will be teaching "Introduction to Local Government Law and Bylaw Drafting" at the Municipal Administration Training Institute (MATI) at the University of Victoria.

Sukh Manhas will be presenting a legal update at the Local Government Management Association Corporate Officers Forum being held in Richmond from October 14-16.