YOUNG ANDERSON
BARRISTERS & SOLICITORS

SEPTEMBER 2015, VOLUME 26, NUMBER 3

NEWSLETTER
UBCM CONFERENCE ISSUE

Canada Post Superboxes: Signed, Sealed, Delivered and Yours?

If you follow our bulletins on twitter @YoungAndersonBC, or have read the stories in the paper regarding municipal challenges to Canada Post's decision to place superboxes on municipal property, then you are likely aware of the first court decision in the volley of litigation that has sprung up on this issue: Canada Post Corp v. Hamilton (City), 2015 ONSC 3615.

In that case, Canada Post successfully challenged a bylaw of the City of Hamilton that modified the City's pre-existing street and traffic bylaw to specifically impose a moratorium on the processing of all street and traffic permits related to community mail boxes for 4 months until the City could develop standards and policies for considering them.

The Ontario Superior Court found that the bylaw amendments were invalid and inapplicable to Canada Post on a number of bases. Some of the Court's reasons are confined to Hamilton's bylaw, such as the finding of vagueness (the delegation of an approval authority to the Director of Engineering Services without standards to guide the Director's discretion), and the implicit finding that the City's purpose in enacting the bylaw was to thwart a Canada Post policy to remove door-to-door delivery, rather than a primary concern for the use and function of City streets.

However, some of the Court's reasons for the finding of invalidity or inapplicability can be expected to have much greater implications, particularly the Court's findings that the *Mail Receptacles Regulations* authorize Canada Post to place superboxes on any public property, including property vested in the Province and its municipalities; that the bylaw "impaired" and "frustrated" the core of the federal interest in the postal service; that Canada Post was immune from all enactments, including the bylaws, as an agent of the federal Crown; and even that the street and traffic bylaw amendments were not within the jurisdiction of the City.

The City of Hamilton is appealing the decision, and we are happy to see it. This decision goes further than any other that we are aware of in negating rights to own and control property constitutionally vested in the provinces, and

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granted by most provinces to municipalities. Indeed, the case does not even appear to consider the constitutional dimensions of this federal assertion of property rights over provincial and municipal land under sections 92(5), 92(13) and 108 of the *Constitution Act 1867*.

Even the highly problematic CRTC decision in *Ledcor v. Vancouver*, CRTC 2001-23 (affirmed [2003] 3 FC 379), confirmed that local government consent is required for the use of public roads for federal utilities, and that permits, processing fees, and "causal costs" could be recovered for the use of municipal roads under the federal *Telecommunications Act*. The *Canada Post Act* provides no similar rights to erect structures on lands vested in the Crown in the right of the Provinces, and in our view the Ontario Court's interpretation that the *Mail Receptacles Regulations* are constitutionally capable of doing so warrants significant further consideration.

We would suggest that a reading of the *Canada Post Act* and the *Mail Receptacles Regulations* as a whole, and in light of the constitutional vesting of proprietary and regulatory rights over property in the provinces, does not clearly authorize Canada Post to erect permanent structures on municipally owned public property without the consent of the landowner. While it is possible that the federal government might enact laws that would grant Canada Post this power, any such exercise of power would generally require clear language, establish that the land was absolutely necessary for the federal purpose, and go through due process. The validity and effect of the *Mail Receptacles Regulations* in light of the core areas of the provincial ownership of public lands in the province (except those lands expressly reserved to the federal government pursuant to s. 91(1A)), and the jurisdiction to manage property rights and public lands in the province, is worthy of further consideration and argument.

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Furthermore, it would appear from the *Hamilton* case that neither the federal government nor Canada Post has passed any enactments or regulations requiring Canada Post to place community mail boxes on public property or in any specific location. The *Hamilton* case simply refers to a policy of doing so in order to attain the economic goals of the corporation, and a regulation made by Canada Post authorizing the corporation to place receptacles on public roads, among other places. However, nothing in that regulation appears to bind or require the property owners affected to permit permanent structures on their land. In this instance, there may not even be a conflict between federal laws and provincial laws sufficient to engage the

constitutional analysis of the paramountcy of federal law. Certainly, Canada Post can apply for permits or obtain contractual permission to use municipal roads and parks within the scope of its regulatory authority.

An analysis of Canada Post's authority to erect structures on provincial and municipal land that it does not own or control is wholly lacking in the *Hamilton* case, and indeed there is no indication that the provincial or federal governments participated or were involved by way of constitutional notice. We hope this will change on appeal.

There are other obstacles to the City of Hamilton's success in this case, including weaknesses in its bylaw, the finding of improper purpose made against it, a less clear vesting of proprietary rights over roads in the Ontario *Municipal Act* than what we have under s. 35 of the *Community Charter*, and s. 14 of the Ontario *Municipal Act*, which makes municipal bylaws ineffective "to the extent of any conflict with a provincial or federal act or regulation... or an instrument of a legislative nature, including an order, license or approval made or issued under a provincial or federal act or regulation." It is also possible that Canada Post might accept the limitations of its authority to install superboxes on property it does not own without permission, but then simply refuse to deliver mail in the absence of such a permission (as they do in apartment buildings), leaving municipalities that do not issue permits in a quandary.

There is no doubt that mail receptacles are an integral part of the postal network, that the national postal service is within the jurisdiction of Parliament, and that Canada Post faces significant financial pressure to find efficiencies. The comment of the Court in the *Hamilton* case that "I have the distinct impression that the practical effects of city council's opposition to [community mail boxes] were thrust upon the beleaguered city employees" may well be equally applicable to Canada Post's current administration and staff.

Overall, however, the assumption that Canada Post has the lawful right to use property that it does not own without permission, property that is constitutionally vested in the provinces and municipalities, requires much more scrutiny by the courts than has been accomplished so far in the *Hamilton* case.

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Putting a Price on Groundwater

The new price for water under the Water Sustainability Act *that comes into force in 2016 may change in the coming months as Premier Christy Clark announced on July 14 that the Province will review the proposed water rental rates to be charged in the new* Water Sustainability Regulations.[1] *The Premier's promise followed public pressure from a successful petition lead by SumOfUs, an online organization that uses the internet to campaign for change globally, which collected over 200,000 signatures to request that the Province charge private businesses more to use water in BC.*[2]

Under the current proposal, municipalities and regional districts are expected to pay the same annual water rental rate for water as most industrial users, so any change in the rate for businesses will have a major impact on local governments in BC.

The proposed regulations will currently require water users to pay a one-time application fee for a license and an annual water rental rate for the use of both surface water and groundwater. The rates proposed are between $0.02 to $2.25 per 1,000 million litres of water, which fluctuates depending on why the water is used.[3] The proposed rate will be one of the lowest rates in Canada. Quebec currently charges up to $70 per 1,000 million litres of water and Nova Scotia charges $140 per 1,000 million litres for some water uses.[4]

Among other policy considerations, the proposed rates are intended to ensure that users of water for similar purposes are charged the same rate, and to ensure businesses operating in BC remain competitive. The rate is intended only to cover the costs to implement the new water system, and not to influence the behavior of water users. The rates do recognize, however, that some water uses benefit the public since water used for conservation or storage are charged a lower rate to recognize the ecological and recreational value of such uses. Water used for agriculture is charged a lower rate to protect food security.[5]

[1] Rob Shaw, "B.C. to review rates charged to bottled-water companies after Nestle backlash," The Vancouver Sun (14 July 2015). Retrieved from: http://www.vancouversun.com/review+rates+charged+bottled+water+companies+after+Nestl%C3%A9+backlash/11211358/story.html.

[2] SumofUs, website, Nestle is about to suck BC dry—for $2.25 per million litres to be exact, online: Sumofus.org, http://action.sumofus.org/a/bc-bottled-water/13/2/?sub=homepage.

[3] BC Ministry of Environment, News Release (5 February 2015) "Fee changes to ensure long-term protection of B.C. water." Retrieved from: https://news.gov.bc.ca/stories/fee-changes-to-ensure-long-term-protection-of-bc-water.

[4] Maude Barlow, Blog Post (11 February 2015) "Council of Canadians opposed to BC's new Water 'Sustainability' Act." Retrieved from: http://canadians.org/blog/council-canadians-opposes-bcs-new-water-sustainability-act. [3]

[5] BC Ministry of Environment, News Release (5 February 2015) "Fee changes to ensure long-term protection of B.C. water." Retrieved from: https://news.gov.bc.ca/stories/fee-changes-to-ensure-long-term-protection-of-bc-water.

Yet overall the rates do not distinguish between water used for public purposes and water used for private for-profit purposes. The base rate for municipalities and regional districts to use water will be the same price that the Province will charge most private businesses in BC, even though municipalities and regional districts use water to serve the public interest. The only exception for local authorities is that their rental rates will be based on an estimate of the water actually used rather than the volume specified in the licence.[6]

Municipalities can expect to pay, for instance, the highest rate for water used for public facilities, road maintenance, sewage disposal, and waterworks—$2.25 per 1,000 million litres of water. Water supplied for domestic uses will also be charged the highest rate. This is the same rate the Province will charge private business, such as Nestlé, to bottle fresh water for profit. It is also more than the rate that the Province will charge golf courses to water their courses, which is only $0.85 per 1,000 million litres of water.[7]

If the Province recognizes the value of conservation and agricultural uses, perhaps the Province should consider the difference between water used for the public good as opposed to private profit, or perhaps the Province was correct to charge all users the same rate so that it encourages public bodies to use water more efficiently. However, when the price of water is already so low, it is questionable whether the current rates will actually encourage anyone to use water more efficiently.

Regardless, municipalities may want to watch out for any changes to the rates that will be charged under the new *Water Sustainability Regulations* and prepare for the potential that these rates may go up before January 1, 2016. An information bulletin released by the Ministry of Environment appears to suggest that water pricing will be reviewed in an upcoming separate process, but it is unclear at this point whether the process will be open for public comment.[8]

Overall the rates do not distinguish between water used for public purposes and water used for private for-profit purposes

Rosie Jacobs

[6] BC Ministry of Environment, News Release (5 February 2015) "Fee changes to ensure long-term protection of B.C. water." Retrieved from: https://news.gov.bc.ca/stories/fee-changes-to-ensure-long-term-protection-of-bc-water.

[7] BC Ministry of Environment, information table, (February 2015) "Detailed Fees and Rental Schedule to be implemented in 2016." Retrieved from: http://engage.gov.bc.ca/watersustainabilityact/files/2015/02/F-R-fees-Table-Feb-4-Final.pdf.

[8] BC Ministry of Environment, Information Bulletin (30 July 2015). "Proposed water policies available for public comment." Information Bulletin. Retrieved from: https://news.gov.bc.ca/releases/2015ENV0046-001193.

Water Law: 150 Years of Rights and Rates

Lawyers, as members of a species apparently oblivious to the perils of sounding pretentious, love to say "at common law" and then recite an archaic, inscrutable, and long-defunct proposition or rule. For example, "at common law, the right of a riparian proprietor is not a mere privilege, but a right incident to his ownership of the land".[1] *Whatever that phrase means, the extent to which it rings true in British Columbia has been arguable at least since 1859 when Governor Douglas introduced a scheme of water licensing and rates in an attempt to quell unrest in the gold fields.*[2] *The Province's introduction in 2014 of the new* Water Sustainability Act *is thus only the latest in more than 150 years of legislative tinkering with common law water rights. The use of surface water has long been subject to provincial fees; the* Water Sustainability Act *introduces a similar scheme of licensing and rates for non-domestic groundwater use. The longstanding distinction between the Province's treatment of these "hydrogeologically connected"*[3] *resources has its origins, of course, in the common law.*

At common law, the doctrine of riparian rights meant that if a stream flowed over, past, or even underneath your land, you were entitled to the ordinary use and flow, undiminished, of that water.[4] The practical implication of this right was that you could sue someone who interfered with it. Riparian rights, which applied to water flowing in a stream, did not apply to "water percolating through underground strata, which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates"[5] – also known as groundwater.

At common law, groundwater was seen as "a common reservoir or source to which nobody has any property, but of which everybody has, as far as he can, the right of appropriating the whole."[6] This characterization of groundwater had a curious, almost counterintuitive, upshot. Unlike in the case of riparian rights, which were limited by the ordinary use doctrine, there was no common law limit to the volume of groundwater an owner could extract, even if that meant her neighbour's well would run dry. Yet the unlimited right to use or appropriate did not imply or confer a right to contaminate,

[1] Esquimalt Waterworks Co v Victoria (City) (1907), 12 BCR 302 at 322 [Esquimalt].
[2] Maureen Boyd Clark (1990) "Water, Private Rights and the Rise of Regulation: Riparian Rights of Use in British Columbia, 1892 -1939," 48 Advocate 253.
[3] Halalt First Nation v British Columbia (Environment), 2011 BCSC 945 [Halalt].
[4] Swindon Waterworks Company Ltd v The Proprietors of the Wilts and Berks Canal Navigation Company (1875) LR 7 HL 697.
[5] Chasemore v Richards (1859), 7 HL Cas 349 cited in Halalt at 505.
[6] Ballard v. Tomlinson (1885), 29 Ch D 115 (CA) cited in Steadman v Erickson Gold Mining Corp (1989), 56 DLR (4th) 57 at para 7.

so while a landowner with a dry well was left without remedy, a landowner with a dirty well could sue the polluter in nuisance.

Why this distinction? Because at common law, "nuisance is not based exclusively on rights of property",[7] so a plaintiff could sue in nuisance if a defendant muddied oozing waters in which the plaintiff held no rights of property, but was entitled to extract from the ground.

Even at common law these rules, while easy to state, were hard to apply. And their application became even murkier when meddled with by the Legislature. By 1897 the Legislature had already interfered "in a most substantial way" with "pre-existing riparian rights".[8] Yet while those rights may have been "curtailed and suspended" courts were reluctant to declare them abrogated:

> The legislative history of the present *Water Act* and its predecessor statutes points to the conclusion that at least since 1939 the so-called riparian rights to the use of water no longer exist in British Columbia, but I need not decide that matter.[9]

Thus the doctrine of riparian rights permeated judges' reasons long after the Legislature arguably abolished it, in the *Water Privileges Act* of 1892, by vesting "the right to the use of all water at any time in any river, water-course, lake, or stream" in the Crown.

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This sweeping statement, which left British Columbia local governments at the centre of many disputes over water rights and water use, laid the foundation for a longstanding regime of provincial water regulation. That regime now includes, for the first time in this province, a system of fees and licensing for groundwater which will require "irrigators, industries, waterworks and others who use groundwater for non-domestic purposes... to obtain a water license and to start paying water fees and rentals".[10] For these users the Act promises "defined water rights, and greater clarity regarding their priority use." The new groundwater scheme is designed to integrate with existing stream water regulations "to enable management of water as one resource".

Guy Patterson

[7] Steadman at para 8.
[8] Esquimalt at 323.
[9] Schillinger v H Willimason Blacktop and Landscaping Ltd (1977), 4 BCLR 394.
[10] "Licensing Groundwater Use Under British Columbia's Water Sustainability Act," http://engage.gov.bc.ca/watersustainabilityact/files/2015/07/LicensingGroundwaterUse-Web-Copy.pdf

Province set to regulate sale and use of e-cigarettes

The Tobacco Control Amendment Act*, SBC 2015 c. 11, which received royal assent on May 14 of this year but is not yet in force, is set to impose the same Province-wide restrictions on the sale of e-cigarettes as conventional tobacco products and the same restrictions on use as tobacco products that are smoked.*

E-cigarettes are hand-held devices that contain a battery and a liquid that may contain nicotine. When a user inhales, the device vaporizes the liquid. Since the liquid is vaporized and not burned, advocates claim that users do not inhale many of the chemicals contained in tobacco smoke.

The Act will prohibit the sale of e-cigarettes to minors, prohibit their sale in certain places, and impose restrictions on the display of e-cigarettes in the places in which they are sold. It will also prohibit the use of e-cigarettes in buildings or structures that are workplaces or to which the public normally has access, as well as within 3 metres of any doorway, window, or air intake.

The Act follows the October 1, 2014 enactment by the City of Vancouver of two bylaws that regulate the sale and use of e-cigarettes in the same manner as tobacco products that are smoked. Vancouver's bylaws impose restrictions similar to those in the Act, but like Vancouver's smoking restrictions, they prohibit the use of e-cigarettes within 6 metres of any doorway, window, or air intake.

Vancouver's bylaws were passed following a presentation to council from Vancouver Coastal Health's Chief Medical Officer. The Chief Medical Officer presented the results of a literature review on the safety of e-cigarettes. The literature review raised concerns regarding the harmful effects of second hand vapour and the potential for e-cigarettes to re-normalize smoking, especially among youth.

However, an independent review published on August 19 by Public Health England, which studied the risks of e-cigarette use in the United Kingdom where e-cigarette use is widespread, concluded that while e-cigarettes are not completely risk free, they are approximately 95% less harmful than smoking and second-hand vapour is much less harmful than second-hand smoke. The author of the review also stated that there is no evidence that e-cigarettes are undermining England's falling smoking rates or acting as a "gateway" to smoking for children.

Although the Province is now set to regulate the use and sale of e-cigarettes in the same manner as tobacco products that are smoked, it remains open to local governments to impose, by bylaw, further restrictions on sale and use. Note that regulations in respect of health are an area of concurrent provincial jurisdiction, and as such, further restrictions on use will require ministerial approval. Local governments may also explore imposing restrictions on the location of e-cigarette vendors and their business via zoning and business regulation powers.

Joe Scafe

Constructive Dismissal Update

*The Supreme Court of Canada issued a decision earlier this year that clarified the scope of constructive dismissal (*Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10). A constructive dismissal occurs when an employer unilaterally changes a fundamental term of an employment contract. In the face of a constructive dismissal, an employee can choose not to accept the change and resign. If the employee is successful in a claim for constructive dismissal, the employee will be entitled to reasonable notice as if his or her employment had been terminated on a without cause basis.*

The analysis of whether a constructive dismissal has occurred depends on the circumstances of each case. This case involved the indefinite suspension with pay of an employee who was in negotiations with the employer for a buyout of his employment contract. The suspension occurred when the employer advised the employee not to return to the workplace after the conclusion of his sick leave. The employee commenced an action for constructive dismissal. The employer then took the position that the employee had resigned and it was not required to provide any pay in lieu of notice to the employee.

The Court began its analysis with the traditional test for constructive dismissal as follows:

> "When an employer's conduct evinces an intention to no longer be bound by the employment contract, the employee has the choice of either accepting that conduct or changes made by the employer, or treating the conduct or changes as a repudiation of the contract by the employer and suing for wrongful dismissal."

This test involves consideration of two steps: the first is whether the employer's unilateral change is a breach of the employment agreement; the second is whether such a breach substantially alters an essential term of the employment agreement. The second part of the test is based on a reasonable person standard. The Court also confirmed a flexible approach in determining whether there has been a constructive dismissal given the dynamic nature of employment contracts as compared to commercial contracts.

The Court then went on to state that an employer's conduct will also constitute constructive dismissal "if it more generally shows that the employer intended not to be bound by the contract." In this case, the Court found the employer's conduct constituted a constructive dismissal.

The Court found that the employer had no implied right to suspend the employee and even if it did, such an authority is subject to the requirement of business justification. In other words, the employer must be able to justify the reasons for the suspension, which it was not able to do in this case since it failed to give the employee any reason for the suspension. The Court further noted that employers are required to act in good faith in relation to contractual dealings, which means being "honest, reasonable, candid and forthright".

Also central to the Court's analysis was the fact that the employer had taken steps to have the employee terminated for just cause in the middle of its negotiation for a buyout, which was unknown to the employee. The termination ultimately did not proceed but it was a factor that led the Court to finding that the employer's conduct constituted a constructive dismissal.

A further point made by the Court was that employers do not have an unfettered discretion to withhold work, which is what occurs during a suspension, even if the suspension is with pay. The Court was clear that an employer may not withhold work in bad faith or without justification.

While the facts in this case are unique, we recommend that local government employers tread carefully in suspending exempt employees who are subject to individual contracts of employment. Suspensions should be brief and with pay. An employer will need to be able to justify the business reasons for the suspension, even if it is with pay, and will need to ensure that it meets its obligation to act in good faith in its contractual dealings. The employer must also be forthright with the employee and clearly communicate the reasons for the suspension.

Carolyn MacEachern

Get Uber It! Regulating the Sharing Economy

In the last few years, the sharing economy has become increasingly popular. Largely facilitated through peer-to-peer smartphone apps and websites, individuals can share everything from their homes (AirBnB), to their backyards (have a garden but hate gardening?), to bicycles and cars. The regulation of the sharing economy poses unique challenges for local governments, as current bylaws do not necessarily contemplate the activities permitted by new technologies. Two examples of the sharing economy, Uber and Rover, demonstrate this disconnect.

Uber operates through a smartphone app, allowing passengers to request a ride from a private car owner/operator. Both rider and driver can see each other's picture and profile on the app, which requires both parties to accept one another before any ride is arranged. The app then uses GPS to guide the driver to the rider and onto the rider's destination. While Uber currently operates in over 60 countries and 300 cities worldwide, the regulatory challenges faced by the company and the backlash from the taxi industry have been considerable.

Uber operated within the Lower Mainland for a brief period of time in 2012, however the company ceased operations when the B.C. Passenger Transportation Board, an independent tribunal established under the *Passenger Transportation Act*, required the company to apply for a limousine licence and to charge customers a minimum of $75 per trip. In Toronto and Edmonton however, Uber has withstood legal challenges from those municipal governments.

In July 2015, the City of Toronto brought an action against Uber Canada (and its Netherlands-based parent company) related to Uber's activities in the City. The City alleged that Uber had breached the City's business licencing bylaws, as it failed to obtain a licence as a taxicab broker or limousine service company based on the aspect of Uber's business related to accepting calls or requests from prospective passengers. The City sought an injunction restraining Uber from operating in the City without the appropriate licence.

The Court dismissed the City's application, finding that Uber's peer-to-peer process operates, "as a super-charged directory assistance service". The Uber app conveys information between smartphones, ultimately resulting in a match between a rider and a driver, a process in which Uber does not play an actual active role besides licensing the app to an end user. The Court found that the limited activity of licensing the app was insufficient to come under the definition of a taxicab broker or limousine service company in the City's bylaws. Furthermore, the Court held that none of the ancillary aspects of Uber's business (e.g. recruiting drivers, marketing, billing, customer relations) is subject to a requirement to obtain a licence.

In April 2015, a challenge by the City of Edmonton to Uber's activities resulted in a similar ruling, in which the Court found that Uber was not operating business in Edmonton. In that decision, the Court opined that the City may have named the wrong party, in that the individual drivers providing the taxi services were operating without the required licences, but that the City had made minimal effort to enforce its bylaws against those persons.

While Uber is relatively well-known, Rover is brand new, having been developed and released earlier this year. Referred to as the "AirBnB of parking", the Rover app matches drivers who want to rent, by the hour, unused parking spaces on private property such as residential driveways or garages. The app allows property owners to post available parking spaces, which drivers can then search, book, and pay for using their phones.

However, renting out parking spaces on residential property may run afoul of municipal bylaws. In Toronto, where the Rover app has been introduced, some City officials have taken the position that such an activity may constitute a commercial parking use, which is not permitted in residential zones, and that such use may therefore be subject to fines under the City's bylaws. With Rover in its infancy, it remains to be seen what regulatory challenges this new sharing app will face.

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Uber and Rover are just two examples of the sharing economy that do not fit well with current (and sometimes outdated) regulations. Moving forward, local governments may need to get creative and figure out how to force the square peg into the round hole - or learn how to share.

Jay Lancaster

Municipal Council Meetings and Defamation – What Can I Say?

The Ontario Court of Appeal has confirmed that municipal councillors can be sued in defamation for statements made during council meetings. In doing so, the Court rejected the argument that municipal council chambers should be treated the same as the parliament and legislatures, where defamatory comments are immune from liability pursuant to the doctrine of absolute privilege.

Speech that is absolutely privileged is based on the venue of the speech, not the content. Absolute privilege protects comments made by legislators and parliamentarians in session, as well as statements made in court, from liability in defamation. Qualified privilege, a lesser immunity from liability, is also venue dependent, but it is not absolute. It can be overcome by showing the speaker knew or should have known they were making a false statement. Until now, court commentary has supported only applying qualified privilege to municipal officials in council chambers, but a claim of absolute privilege had not been directly raised.

> *"If the Legislature had felt it important to extend absolute privilege to the speech of municipal councilors, it could have done so"*

In *Gutowski v. Clayton* [2014] O.J. No. 6168, the Ontario Court of Appeal considered and rejected the application of absolute privilege to comments made in Council. The Court referred to the Supreme Court of Canada's 2002 reasoning in *Prud'homme v. Prud'homme* [2002] S.C.J. No. 86, in support of limiting councillors' freedom of speech where such expression would impinge another's reputation. The Court's analysis was premised on the fact that the good reputation of the individual is a core component of upholding individual dignity; a concept which underlies all *Charter* rights.

In *Gutowski*, the parties were all elected members of the County of Frontenac. The defamatory action occurred when one of the defendants introduced a motion, which was seconded by another defendant and approved by two more, alleging that fellow Councillor Gutowski was engaged in corruption, the "peddling of political favors", and had lost the trust of Council. In response to Ms. Gutowski's defamation claim, the Councillors asserted absolute privilege. The Councillors argued that: 1) courts have assumed absolute privilege does not apply at the municipal level without truly analyzing the claim; 2) freedom of expression in public discourse is an underlying *Charter* freedom; and 3) members of Parliament and the legislatures are entitled to absolute privilege, so elected members of municipal councils should be as well, given the similar nature of their duties.

The Court considered the Councillors' arguments in light of the competing interests of fair comment on matters of public interest, and the right of the individual to be protected from harm resulting from false and derogatory remarks about their person.

The Court rejected the Councillors' arguments for two reasons. First, the absolute privilege afforded legislators is recognized through

legislation and the statutory language does not explicitly extend protection to municipal legislators. The Court stated: "[m]unicipal councils are creatures of the Legislature. If the Legislature had felt it important to extend absolute privilege to the speech of municipal councilors, it could have done so. But it has not." Second, the Court reiterated the requirement for a full evidentiary record before determining that privilege should be extended. The Court found no compelling argument for extending privilege in the absence of such record.

The Councillors relied on American jurisprudence to support their argument, a strategy that proved unsuccessful. In discussing the cases cited by the Councillors, the Court supplied an equal number of cases in supporting only qualified privilege in the U.S., and further reminded the parties that the Canadian approach to defamation does not mirror that of the United States.

The Ontario Court of Appeal's decision makes absolute privilege an even more improbable defence to slanderous attacks made in council meetings.

Emily McClendon

FOI Update: Public Interest Disclosure and Employee Privacy

This summer, the Office of the Information and Privacy Commissioner for BC released two important guidance documents to remind public bodies of their obligations under the Freedom of Information and Protection of Privacy Act*. One is a guidance document outlining issues that employers, including public bodies, should consider before implementing IT security tools that collect employee personal information. The other is an investigation report published in response to the Mount Polley Mine tailings pond dam failure in August 2014, which clarifies (or some might say modifies) the interpretation of the public interest requirement under s.25(1)(b) of FIPPA.*

Establishing a Culture of Privacy: IT Security and Employee Privacy Guidelines

Employers commonly allow employees to use workplace information technology systems for some personal use, and once employers grant such permission, employees are afforded certain privacy rights related to that use. While employers have the right to regulate how employees are using workplace computers, they must ensure that an employee's reasonable expectation of privacy is respected.

Under FIPPA, "personal information" is generally defined as recorded information about an identifiable individual other than the individual's contact information at a place of business. When employees use their workplace computers to access their bank accounts or send personal emails, that information is considered personal information under FIPPA.

Public bodies have an obligation to collect, use, or disclose the personal information of employees only in strict accordance with FIPPA. Before engaging in any type of collection, public bodies must establish that the collection of personal information is necessary to their operations as described in section 26 of FIPPA. To ensure an employer's IT security system is not running afoul of privacy laws through the unauthorized collection of personal information of employees, the OIPC provides the following tips in its guidance document:

1. Complete a privacy impact assessment in the early planning stages of considering new security tools to assess privacy risks of any program, policy or software.

2. Ensure IT and procurement staff consult the local government's privacy officer or legal counsel in the early planning stages, as well as throughout the implementation process.

3. Select IT security tools carefully and ensure that all technologies used meet the legal threshold for collection of personal information.

4. Provide notice to employees about the following information:

   (a) the purpose of the IT security program;

   (b) the statutory authority for the collection of personal information;

   (c) contact information of the privacy officer to ask questions;

   (d) how the technology works;

   (e) the extent of the personal information that will be collected; and

   (f) what will be done with the personal information.

5. Stay away from continuous, real-time collection of personal information about employees (e.g. keystroke logging or screen capturing), except in cases of targeted investigations and even so, only when other less-intrusive measures have been exhausted.

6. Do not collect more personal information than is needed.

7. Have clear, written policies in place about how the security programs will be operated and train IT staff on their legal obligations to protect personal information collected by the system.

8. Implement and periodically review audit logs that track when the system was accessed, what data was accessed, and whether any changes were made.

9. Evaluate the effectiveness of the IT security programs on an annual basis, at a minimum.

10. Seek assistance from the OIPC regarding compliance challenges or problems.

In light of the OIPC's recent investigation regarding the use of employee monitoring software by a public body (Investigation Report F15-01), it is important for local governments to be proactive and review their IT security system and policies rather than waiting to fix those issues when they become the subject of a complaint or investigation by the OIPC. As

the Commissioner emphasizes, "employees do not check their privacy rights at the office door."

FIPPA Section 25 Public Interest Requirements Clarified

In response to the Mount Polley disaster, the OIPC conducted an investigation into whether the provincial government had information in its possession about the risk posed by the dam which it should have released prior to the failure, and released Investigation Report F15-02. In the Report, the Commissioner concluded that s.25(1)(b) of FIPPA should be re-interpreted so as to no longer require an element of temporal urgency for the disclosure of information that is clearly in the public interest.

Section 25(1) of FIPPA requires a public body to disclose information to the public, without delay, where there is (a) a risk of significant harm to the environment or to the health or safety of the public or a group of people, or (b) where that disclosure is clearly in the public interest. The OIPC has historically interpreted that this section and the phrase "without delay" require that there be an element of temporal urgency to the risk of harm or to the public interest in order to trigger an obligation to disclose information. In other words, there had to be both an urgent or compelling need for the disclosure, as well as a clear public interest.

However, the Commissioner revisited this section in the Report and found that it is possible to assess whether disclosure of information is in the public interest without necessarily accounting for, or requiring, an element of temporal urgency. She clarified that the requirement for disclosure "without delay" relates only to the timing of the disclosure duty itself. As for what is captured under the term "public interest", the Commissioner provided a few examples, such as those involving the interest of the public in relation to matters of public finance or financial management, or relating to proper public administration. In the Commissioner's view, this new interpretation accords with the plain meaning of the language and is consistent with FIPPA's statutory purpose of making public bodies more accountable to the public.

In light of the revised interpretation, the Commissioner recommends that all public bodies in BC promptly evaluate whether they currently have information that must be disclosed pursuant to s.25(1)(b), where "a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest." Public bodies are also encouraged to develop policies that provide guidance to employees and officers about the public body's obligations under s.25 of FIPPA, including specific steps an employee should take to bring relevant information to the attention of the head of the public body. It is important to remember that this s.25 disclosure duty applies despite any other provisions, including the access exceptions found in Part 2 of FIPPA.

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Maria Kim

Look for your Lawyers

Sukh Manhas will be presenting a session entitled "Council Relations" at the Thompson Okanagan Local Government Association Annual Conference being held in Osoyoos from September 9 to 11.

Look for us at the UBCM Annual Convention in Vancouver from September 21 to 25. **Francesca Marzari** will be presenting on a panel entitled "Marijuana: Legalization, Legislation and Access" on September 21. Our lawyers will be around the Convention and otherwise available for meetings upon request.

Michael Moll and **Don Howieson** will be guest instructors for the Justice Institute's Bylaw Compliance, Enforcement and Investigative Skills Program on September 14 and 28 and November 2.

On September 28, **Jay Lancaster** and **Bill Buholzer** will be conducting a planning law seminar for Yukon planners in Whitehorse.

Francesca Marzari will be presenting a session entitled "Planes, Trains and Postboxes? The Federal Enclave at the End of the Block" at the International Municipal Lawyers Association Annual Conference being held in Las Vegas from October 3 to 7.

On October 19, **Bill Buholzer** will be speaking at the MATI School for Approving Officers. Bill will also be doing a seminar with Jay Wollenberg on community amenity contributions at SFU City Program in Vancouver on October 23.

Sukh Manhas will be presenting a legal update at the Local Government Management Association Corporate Officers Forum being held in Richmond from October 14 to 16. Sukh will also be presenting a legal update at the Vancouver Island Local Government Association Annual Conference in Nanaimo from November 18 to 20.

Mark your calendars! On November 27, we will be hosting our annual **Client Seminar** at the Fairmont Hotel Vancouver. For those clients unable to attend the Vancouver session, we will be hosting a second seminar on February 5 at the Westin Bear Mountain Resort in Victoria.

We are pleased to announce that **Sukh Manhas** has been reappointed to the UBC Faculty of Law as an adjunct professor, teaching Municipal Law. Beginning in January 2016, **Bill Buholzer** will be teaching the core planning law course, Legal Concepts for Professional Planning, at UBC's School of Community and Regional Planning.

In August **Rosie Jacobs** joined the firm as our new articling student. Her energy and enthusiasm for municipal law are already making her a great addition to our team.