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No *Charter* protection for sidewalk encroachments

In Vancouver v. Zhang*, the British Columbia Supreme Court recently granted an injunction against some modest structures that were part of the long-standing Falun Gong protest outside the Chinese consulate near 16th and Granville in Vancouver. In so doing, the Court affirmed the power of municipalities to regulate in relation to obstructions, encroachments and nuisances on their streets and sidewalks. It also underlined that individuals will only be able to exercise their constitutionally-protected freedom of expression in a public place if the form of their expression is compatible with the principal function or intended purpose of that public place.*

A protest vigil has been maintained 24 hours per day, seven days per week since 2002 to draw attention to alleged religious persecution of members of the Falun Gong in China by the Chinese government. Protesters erected a wooden meditation hut, which they occupied around the clock. The hut was built on a sidewalk and grass boulevard in front of a retaining wall on the Granville Street frontage of the Chinese consulate. The protesters also hung a hundred-foot long billboard on that wall, upon which they posted pictures and messages promoting their protest. The billboard encroached 11 to 18 centimetres onto the highway, and the hut encroached by nearly a metre.

Under the *Vancouver Charter*, the City of Vancouver is the owner in fee simple of all streets and sidewalks within its boundaries. It has the authority under the *Vancouver Charter* to protect its streets from nuisances and encumbrances and to prohibit unauthorized encroachments and obstructions on the streets. Vancouver's power with regard to regulating obstructions and encroachments on streets is quite similar to the power granted to other municipalities under sections 35(11) and 46 of the *Community Charter*. The City's *Street and Traffic Bylaw* prohibited construction, maintenance or occupation on any street of any structure, object or thing which is an obstruction to the free use of the street, or which may encroach on the street, except in accordance with any bylaw or with explicit approval of council.

The City commenced an action to enforce the bylaw and for an injunction to remove the structures and prohibit the protesters from placing any new structures on any portion of the street or sidewalk. The respondents conceded that the hut and billboard were located on, and encroached onto, the sidewalk, and were in technical breach of the Bylaw. However, they alleged that the structures did not obstruct the sidewalk nor interfere with pedestrian or vehicular traffic. The Court found

that under the wording of the Bylaw, it was not necessary that structures actually obstruct traffic to constitute an offence; it was enough that the structures occupied part of the sidewalk and made it unavailable for other public users.

The protesters then alleged that the Bylaw was not constitutionally valid under section 2(b) of the *Canadian Charter of Rights and Freedoms* because the structures had expressive content, the Bylaw infringed on the protesters' freedom of expression, and by enforcing the Bylaw for improper purposes the City was further restricting their freedom of expression. The Court agreed that the structures had expressive content, bringing them within the protection of section 2(b) of the *Charter* because the protest vigil, including the structures, was an integral component of the expressive content of the protesters' message. The vigil had been in place in one form or another for a long period of time and the hut and billboard helped convey their commitment to the cause.

The court then considered whether the method or location of the expressive structures contravened the function of the public street, removing them from protection under the *Charter*. On this issue, the court considered its 1991 decision in *Committee for the Commonwealth of Canada v. Canada* which established the principle that an individual will only be free to communicate in a place owned by the state if the form of expression used is compatible with the principal function or intended purpose of that place. Whether a particular piece of public property is one where expressive rights can be asserted depends on:

> (a)the historical or actual function of the place – is this a place where free expression has traditionally occurred? Or is this a public space that is in fact essentially private, such as a clerical office or a cabinet meeting room?
> (b)whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

The court considered the hut and billboard structures in relation to these factors, and found that they were located on a sidewalk abutting private property in a residential area. Madam Justice Stromberg-Stein then decided: "the particular method or form of expression at issue on this petition, namely the erection of permanent structures, is incompatible with the fundamental purpose of the street." While the protesters could convey their message through meditation and carrying signs that are protected by their freedom of expression, the construction of permanent structures in public property fell outside the protected sphere of section 2(b).

Madam Justice Stromberg-Stein then proceeded with the usual *Charter* analysis, finding that

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the while the Bylaw imposed upon the protesters' expressive freedom, the bylaw minimally impaired the respondents' freedom and was therefore justifiable under s. 1 of the *Charter*. The Bylaw prohibited unregulated construction of structures, but did not ban political expression generally. Because the protest could continue with equal effectiveness without the structures, the Bylaw was upheld.

Lastly, the respondents alleged that the City acted in bad faith or otherwise fettered its discretion in choosing to enforce the Bylaw. This argument was based on the history of pressure applied by the Chinese consulate upon all three levels of government with regard to its unhappiness with the ongoing Falun Gong vigil, as well as the 'soft' method that the City had used to incrementally enforce the removal of the structures from the sidewalk. The judge did not find this line of argument to have any evidentiary basis.

Upon being ordered to remove the structures from the sidewalk, the respondents promptly appealed the judgment and applied for an interim stay of the order. The Court of Appeal denied the stay application, finding that the protesters would not be irreparably harmed if the stay were not granted; at worst, the Court of Appeal found that while it may be more difficult for the protesters to maintain their protest, their freedom to express their political views was not impaired by the order. The billboard and the hut have now been removed, and the protesters continue to meditate on the sidewalk, under the shelter of umbrellas during inclement weather. The appeal will likely be heard in September.

Christina Reed

Municipal access agreements: CRTC allows road degradation fees

A recent decision of the Canadian Radio and Telecommunications Commission had both the City of Vancouver and Allstream MTS claiming victory to the media. Picking a winner may be tough, but it is clear that Telecom Decision CRTC 2009-85 is a mix of good and bad news for Canadian local governments. In the decision, the CRTC asserted broad authority to enable a telecommunications carrier access to local government property by finalizing the terms of a Municipal Access Agreement (MAA) under which a carrier is permitted to install its infrastructure under streets, lanes and highways. However, in exercising its authority in this case, the CRTC required Allstream to compensate Vancouver for its increased road repair costs that result from telecommunication carrier construction work.

The bad news for local governments can be found in Vancouver's failure to convince the CRTC that the Commission's jurisdiction is limited to disagreements over access to a specific highway or public place, and does not extend to determining carrier access under the terms of a city-wide MAA. Vancouver made this argument in response to Allstream's application to the CRTC to resolve abandoned negotiations over an MAA. The city argued that Allstream could only submit street-by-street requests for access to the CRTC until an MAA is agreed upon by the parties. Such narrow CRTC jurisdiction would increase Vancouver's bargaining power because a mutually-agreed MAA would offer an efficient

alternative to numerous applications to the CRTC. The CRTC disagreed with Vancouver's position and held that subsection 43(4) of the *Telecommunications Act* entitled the Commission to grant Allstream permission to access all of Vancouver under an MAA that had been mostly agreed to by the parties, but for which the CRTC would finalize the contentious terms.

This decision follows recent Federal Court of Appeal rulings on the CRTC's jurisdiction over MAAs. In *Federation of Canadian Municipalities v. AT & T* (2002), the court confirmed that the CRTC had the jurisdiction to resolve specific disputes over carrier access and municipal property rights, but did not have the authority to dictate principles of access that would apply to all MAAs. Local governments and carriers would therefore retain flexibility in their negotiations of MAAs, and a carrier could only apply to the CRTC on a case-by-case basis.

In *Toronto v. Allstream* (2006), the court confirmed that the CRTC could not be asked to alter an MAA already agreed to between a carrier and a local government, even where a carrier believed other carriers benefited from more favourable MAAs. The CRTC should therefore respect existing MAAs and not seek to standardize their terms post-agreement. However, in *Edmonton v. 360 Networks* (2007), the court did not interfere with the CRTC's decision to actively resolve a dispute over carrier occupation fees under an executed MAA after a carrier and the City of Edmonton disagreed over the application of the agreement. These decisions encourage the CRTC to find that it has wide jurisdiction to deal with disputes related to the formation and interpretation of MAAs.

This latest decision involving Vancouver and Allstream continues the trend towards wide CRTC jurisdiction as the CRTC finalized an MAA by setting or defining approximately 50 contentious clauses. Although it is unclear how close to a mutually acceptable MAA a local government and a carrier must be before the CRTC can define the final agreement, the CRTC exercised considerable intervention in seeking to ensure that Allstream benefited from a MAA with Vancouver. A local government may now find that offering the benefit of a mutually acceptable MAA is not as large an incentive in negotiations if a carrier need only achieve near-agreement to enable the CRTC to step in and complete the "negotiations".

The good news for local governments is that the CRTC incorporated a pavement degradation fee into Vancouver and Allstream's MAA. The fee could be as high as $50 per square meter of road surface. Vancouver had complained that asphalt resurfacing by telecommunication carriers resulted in premature road failures. The CRTC determined that the approved fee schedule most accurately reflects the increase in Vancouver's future road repair costs. The CRTC's acceptance of a pavement degradation fee in this decision is likely to make such fees common terms in both negotiated MAAs and future CRTC decisions granting carrier access.

Vancouver may still feel that it receives insufficient compensation as the pavement degradation fees were less than requested, and the City was refused compensation for parking meter revenue lost as a result of carrier construction. Vancouver will also have to bear the full cost of relocating any Allstream infrastructure within three years of installation, and bear a share of that cost on a sliding scale for up to seven years thereafter. This recent CRTC decision should nonetheless give hope to local governments negotiating MAAs that should the CRTC be called upon to adjudicate, the CRTC will require carriers to pay reasonable compensation to local governments for access to public property.

Michael Moll

Capital city enforces daytime park camping ban

The B.C. Supreme Court's 2008 decision (Victoria (City) v. Adams) *finding that sections of Victoria's Parks Regulation Bylaw and Streets and Traffic Bylaw infringed the rights of homeless people to life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice, contrary to s. 7 of the* Canadian Charter of Rights and Freedoms*, has been a considerable problem for Victoria city officials as homeless activists have used the decision to attempt to establish semi- permanent camps in city parks.*

At the heart of the decision was the severe shortage of shelter for homeless persons in Victoria, coupled with the threat of exposure faced by those who sleep outdoors without the benefit of some sort of temporary shelter. The court in *Adams* heard a considerable amount of statistical evidence with respect to the number of homeless people and the number of permanent shelter beds in Victoria, concluding that "the majority of homeless people in Victoria have no choice but to sleep on public property". The court also heard expert testimony from a specialist in general internal medicine on the threat of exposure, and concluded that the City's bylaw prohibition on the erection of temporary shelter in the form of overhead protection exposed the homeless "to a risk of significant health problems or even death". While all three levels of governments shared responsibility for the situation, the consequences rested mainly upon the local government, which owned and maintained the easily accessible urban public spaces to which the homeless resorted for shelter.

The City of Victoria has appealed the decision, which appeal should be heard in June of this year. Meanwhile, the City proceeded with two Provincial Court prosecutions of persons allegedly in violation of its Parks Regulation Bylaw. First, the City attempted a prosecution *(R. v. Woodruff)* based simply on a new City policy tolerating camping between 7 p.m. and 7 a.m., a policy that the B.C. Supreme Court had indicated could pass constitutional scrutiny. The Provincial Court dismissed the charges, holding that sections of the Parks Regulation Bylaw that had been struck down by the Supreme Court on constitutional grounds, however leniently enforced, could not support a prosecution of homeless persons. The second, undertaken after the City amended the bylaw to incorporate the new policy, succeeded *(R. v. Johnston and Shebib)*. The defendants were each convicted of four counts of breaching the bylaw by failing to remove their tents from the park between 7 a.m. and 7 p.m., the Court finding that the City's response to the decisions in Adams and Woodruff had "removed the taint of *Charter* breach from the governing legislation" in that the amended bylaw permitted anyone, homeless or not, to erect a temporary shelter in City parks in the nighttime hours.

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Don Howieson

Remedial action powers confirmed for unsightly premises

In Vernon v. Sengotta*, the B.C. Supreme Court has confirmed the power of municipal councils and regional district boards to address public nuisances through their remedial action powers. Adopting the standard of review of "reasonableness" to the exercise of these powers, the Court commented that:*

> [The] standard of deference… requires from this court respect for the legislative choices to leave some matters in the hands of elected municipal decision makers, for the processes and determinations that draw on their particular expertise and experience, and for the different roles of the courts and elected municipal bodies within the Canadian constitutional system.

The Court went on to find that a remedial action requirement passed by Vernon Council under Part 3 of the *Community Charter* to demolish a fire-damaged building was valid and enforceable.

The Court rejected the property owner's submission that a remedial order with respect to a nuisance does not extend to unsightly conditions. In response to the property owner's argument that there was a complete lack of evidence before council to declare the fire-damaged building a nuisance when the resolutions were passed, the Court found that there had been two complaints about the appearance of the building and that the City had an ongoing concern about certain properties in the City because of their appearance. The City's concern was reflected in a staff report, which advised Council that the property attracted the involvement of the City's enforcement staff.

The Court also noted "City Council had, as part of its Strategic Plan, the objectives of ensuring Vernon was a safe community, an attractive business destination, and a goal of community beautification". The Court concluded that Council's resolutions imposing the remedial action requirement were "reasonable in the circumstances and a decision to which this court should defer given the council's knowledge and experience with respect to its community's needs and requirements."

The Court concluded that Council's resolutions imposing the remedial action requirement were "reasonable in the circumstances and a decision to which this court should defer."

The property owner also submitted that it was entitled to notice and an opportunity to be heard before the resolutions ordering the removal of the fire-damaged building were passed, and that the City's failure to provide for these procedural steps invalidated the resolutions. The property owner argued that the "reconsideration" process required under the *Community Charter* does not satisfy the common law duty of procedural fairness, asserting that by the time of the reconsideration the Council has already made a decision and is less likely to undo the previous decision. The Court rejected this argument, finding that the reconsideration provisions of the *Community Charter* provide the affected party with a sufficient opportunity to be heard and respond to the imposition of the remedial action requirement.

Alyssa Bradley ✍

Part 26 participation agreements under attack

Part 24 of the Local Government Act *generally permits only those regional district directors who represent "participating areas" to vote on matters respecting regional district services. In relation to services provided under Part 26 of the Act to municipalities, being planning and land use management services, Part 24 allows regional districts to enter into cost-sharing agreements requiring municipalities to share in service costs to the extent set out in the agreement and in accordance with the terms and conditions for participation in the service that are set out in the agreement. Municipal directors may only vote on bylaws and resolutions in accordance with the participation agreement.*

In the Capital Regional District, which has only one electoral area involved in Part 26 matters (the other two electoral areas are within the land use planning jurisdiction of the Islands Trust), all regional directors would be entitled to vote on electoral area planning and land use management matters under the special rule in Part 24 dealing with voting rights where only one director would otherwise be entitled to vote. Several years ago, the Province provided a special regulation for the CRD, limiting the number of directors who could vote on such matters, in response to submissions from the Region that the default voting rules compelled directors to vote on local matters in which they had no particular interest. The special voting rules are inapplicable if the Region enters into Part 26 services participation agreements under Part 24. The Region subsequently entered into two participation agreements, with the Districts of Metchosin and Central Saanich. In exchange for a $100 annual contribution to the cost of services, the directors of these municipalities were entitled (along with the electoral area director) to vote on planning and land use management matters in the Juan de Fuca electoral area, and the special voting rules were displaced. Each of the two municipalities continued to provide its own services in relation to planning and land use management.

In 2008, the Region adopted bylaws for the electoral area limiting the development potential of private forest lands recently removed from tree farm licenses while the Region completed land use planning work. The affected owners challenged the bylaws, successfully, by attacking the validity of the participation agreements and the CRD's voting procedure: *Western Forest Products Ltd. v. Capital Regional District*. The B.C. Supreme Court found that the participation agreements were invalid, with the result that the special voting regulation had not been legitimately displaced and the wrong group of directors had voted on the bylaws.

In the Court's view, participation agreements for Part 26 services must be connected to the actual, ongoing costs of services under Part 26 that are incurred by all participants in the services and must have, at a minimum, terms relating to cost apportionment, valuation of services shared among the participants, service area and cost recovery. By contrast, the CRD's participation agreements related "solely to the payment of $100 for a vote on land use decisions in the Juan de Fuca Electoral Area". That amount had no connection to actual costs of Part 26 services, cost apportionment or recovery, and was in any event related entirely to services provided in the Electoral Area (because the Regional District provided no Part 26 services in the form of planning or land use management in Central Saanich or Metchosin).

The Capital Regional District has appealed the

decision, and applied to the Court of Appeal in February of this year for a stay of the Supreme Court's declaration of invalidity of the bylaws. The stay was granted, subject to the Region refraining from adopting any additional bylaws with respect to the lands affected by the quashed bylaws, and making all reasonable efforts to have the appeal heard before June 30.

The Supreme Court's decision in this case clearly indicates that Part 26 services agreements in regional districts must be about more than who votes on planning and land use management services in rural areas. That is, municipalities that contribute to the cost of Part 26 services must get more for their money than a vote in electoral area planning and land use management matters. To draw a simple parallel with services such as water supply, the regional district must be providing water to the municipality and not simply allowing the municipality to vote in electoral area water supply matters. Part 26 is about the preparation of official community plans, the enactment of various kinds of bylaws related to land use and development, and the operation of permit systems. Regional districts may, and have at various times in the past, provided these services in respect of areas within municipal boundaries, and the Court's decision in *Western Forest Products* indicates that these are the services in which municipalities may agree to participate under Part 26 participation agreements.

Bill Buholzer

B.C. Supreme Court strikes down provincial regulation of aquaculture

In Morton et al v. British Columbia (Agriculture and Lands)*, the British Columbia Supreme Court recently considered and struck down a number of provincial enactments regulating aquaculture, for constitutional reasons. Specifically, the Court found that specific provisions regulating aquaculture within the province were inconsistent with the exclusive federal jurisdiction over the management of fisheries under the* Constitution Act, 1867*, and as such, were* ultra vires *the Province. The Court suspended the declaration of invalidity for one year to allow the federal government to consider additional legislation to fill the regulatory gap.*

This case has significance for local governments in a number of respects. First, the decision struck down parts of the *Farm Practices Protection (Right to Farm) Act*, which prevents local governments from prohibiting nuisances arising from farming, including aquaculture. The case also raises issues with respect to the constitutional validity of other aspects of the provincial regulation of aquaculture. Finally, the case raises issues with respect to local government regulations that may affect aquaculture, as local governments derive their authority from the Province, and may not pass bylaws that interfere or conflict with federal fisheries regimes.

The petitioners in the *Morton* case were a group of individuals and societies specifically concerned with the impact of open net fish farms on the wild salmon fishery. Their challenge was targeted: they challenged section 13(5), 14 and 26(2)(a) of the British Columbia *Fisheries Act, the Aquaculture Regulation* B.C. Reg. 78/2002, sections 1(h) and 2(1) of the *Farm Practices Protection (Right to Farm) Act*, and the *Finfish Aquaculture Waste Control Regulation*, B.C. Reg. 256/2002. These provisions establish an aquaculture licensing

scheme under section 13(5) and section 14 of the *BC Fisheries Act*, as well as a management scheme pursuant to section 26(2)(a) of that Act through the creation of regulations for "safe and orderly aquaculture." *The Aquaculture Regulation* and *Finfish Aquaculture Waste Control Regulation* address the management of aquaculture farms, including inspections, regulation of escaped fish, drug treatments for farmed fish, standards for cages, and the discharge of waste into the ocean. (We note that there is also a regulation for the control of land-based finfish aquaculture waste that was not challenged in this case.) Finally, the provisions of the *Farm Practices Protection (Right to Farm) Act* that were challenged include the reference to aquaculture as a type of farm operation protected under the Act, as well as section 2(1) which provides immunity to farm operations with respect to nuisance liability for odour, dust, noise, or other disturbances, as well as the immunity from being prevented by injunction from conducting the farm operation. All of these provisions were struck down to the extent that they relate to fish and marine animals, with the exception of sections 13(5) and 14 of the B.C. *Fisheries Act*, which sets out the licensing regime for such operations. The Court found that it was acceptable for the Province to demand and collect licence fees for aquaculture, although it was not permissible for the Province to directly regulate the management of aquaculture. However, the declaration of invalidity was suspended for a period of one year to allow the Federal government to consider additional legislation to regulate these areas.

The decision leaves open the question of what other provincial or local regulations that affect aquaculture could be subject to challenge as unconstitutional incursions into a matter of exclusive federal jurisdiction.

The basis for the Court's decision to strike down these Regulations under the *Constitution Act*, 1867 is significant in determining how broadly this decision may apply to other provincial and local government regulations that affect aquaculture. The Court recognized that it is open to the Province (and therefore to local governments) to affect fisheries and other areas of federal jurisdiction, provided that such regulations are in substance related to a provincial area of jurisdiction, as opposed to a federal area of jurisdiction. This principle is known as the double aspect doctrine in constitutional law, and it permits both the Province and the federal government to regulate in respect of the same subject matter, provided that the regulations relate to their respective areas of legislative jurisdiction.

In this case, the Province argued that the aquaculture regulations were a matter of interest to the provincial government in relation to provincial jurisdiction over the management of lands, property and civil rights in the Province, and matters of purely local or private nature in the Province (sections 92(5), (13) and (16) of the *Constitution Act, 1867*), as well as agriculture pursuant to section 95. However, the Court found that the challenged provisions, except for the licensing requirement, did not properly relate to any of these provincial interests. Under these provisions, the Court acknowledged that the Province might regulate the "business of fishing", including fish processing, and labour relations applicable to the fishing industry, or the sale or disposition of fish once caught. However, the Court did not accept that the Province had any legitimate interest

in the actual management of a fishery, as the federal government has exclusive jurisdiction over "sea coast and inland fisheries" under section 91(12) of the *Constitution Act, 1867*. The Court furthermore concluded that marine aquaculture was by definition a "fishery," and not "agriculture".

Finally, the Court found that, in the event that the Province did have a legitimate interest in aquaculture, certain aspects of the challenged regulations, and in particular the permitting of fish farms in wild fish habitat, as well as the discharging of waste into the water, were in direct conflict with sections 35 and 36(1)(b) of the federal *Fisheries Act*. Therefore, even if they were proper regulations of agriculture or the management or use of land, the Provincial regulations that allow for the disruption of fish habitat are unconstitutional.

The reasons for judgment, while limited to the specific provisions that were challenged, have broader implications for other regulations not specifically considered; for example, the validity of provincial regulations that apply to land-based fish farms are now very much in question. While the language of the decision is limited to consideration of marine-based fisheries, and land-based fish farms raise significantly fewer issues in terms of conflict with federal regulation, the pivotal finding in the case is the conclusion that fish farms are fisheries and not agriculture. This conclusion might apply equally well to land-based fish farms.

In addition, the decision leaves open the question of what other provincial or local regulations that affect aquaculture could be subject to challenge as unconstitutional incursions into a matter of exclusive federal jurisdiction. For the most part, local governments have not been able to regulate the management of aquaculture, as the Province has specifically reserved that field to itself through the "Right to Farm" legislation. Local governments do regulate the location of aquaculture operations through their zoning bylaws. Land use regulation has recently been confirmed by the Supreme Court of Canada to be within the jurisdiction of the Province (and therefore local governments), in *Lafarge v. British Columbia*. Therefore, land use regulations should not be susceptible to the same argument made in *Morton* (that they have no valid provincial purpose). Nevertheless, by raising issues around the constitutional validity of provincial regulation of aquaculture, this case does raise the question of validity of local government regulation, without answering it.

Another question arising from the case is the validity of any specific provincial regulation of shellfish farms. The Province has been held to be without regulatory jurisdiction over any marine animals that are subject to regulation under the *Fisheries Act*, which could include shellfish. Even those provincial regulations not directly overlapping the *Fisheries Act* regime are called into question by this decision.

Finally, anyone considering or relying on this case must also consider whether it will ultimately be upheld, and if so, it will be for the same reasons as the B.C. Supreme Court has given in this case. While the Province has not indicated any intention to appeal the decision, members of the aquaculture industry have, and this case has all the hallmarks of a case that will go to the Supreme Court of Canada, meaning it may be several years before we have the final word on the validity of these provisions and the provincial regulation of aquaculture.

Francesca Marzari

Grow-op bylaw enforcement hits *Charter* snag

In Arkinstall v. Surrey*, a homeowner refused to permit a police officer to accompany Surrey's electrical fire safety initiative (EFSI) team in its inspection of his premises, which inspection flowed from B.C. Hydro's disclosure of unusually high electrical consumption records to the City under the* Safety Standards Act *as amended in 2006. As a result, the team did not enter the premises and the electrical service was disconnected on the basis of a presumed fire hazard. In the B.C. Supreme Court the petitioners challenged the Province's jurisdiction as to enact the 2006 amendment to the* Safety Standards Act *as an encroachment on the federal government's criminal law powers under s. 91(27) of the* Constitution Act, 1867 *and challenged the EFSI team's warrantless entry of the premises under the* Canadian Charter of Rights and Freedoms*.*

Mr. Justice Smart recognized in his reasons for judgment that "indoor marijuana cultivation is a matter of enormous public concern throughout this province" and noted the particular problems Surrey was encountering that led it to establish the EFSI team. He heard expert evidence on the various safety risks marijuana grow operations raised, including a risk of fire 24 times greater than the norm, and then moved on to consider the establishment and operation of the EFSI. team in Surrey as a pilot project. The 90-day pilot project had impressive results. Of the 126 residences inspected, 119 of them required some sort of remedial action and 78 warranted the discontinuance of the electrical supply. The court was informed that the EFSI team included an electrical inspector, a fire official, and two RCMP officers, and was supervised by a team coordinator. The RCMP members of the team were said to be involved only to provide security and to keep the peace, and not to gather evidence. While evidence presented at the hearing by the coordinator of the EFSI team indicated that the safety inspections did not result in criminal charges, counsel for Surrey advised the court in writing after the hearing that there may have been controlled substance prosecutions and convictions obtained in a number of instances.

The "essential character of the impugned provisions (of the Safety Standards Amendment Act, 2006) is directed at facilitating the identificatio and inspection of grow operations in the interests of public safety."

After an analysis of the safety standards legislation, Mr. Justice Smart considered the challenges brought by the petitioners. With respect to the contention that the 2006 amendments to the *Safety Standards Act* took it beyond the Province's powers, the Court applied the analysis set out in its 2000 decision in *Reference re: Firearms Act (Can.)* (in which Alberta had challenged the constitutionality of the federal firearms registry legislation) and found that the "essential character of the impugned provisions (of the *Safety Standards Amendment Act, 2006*) is directed at facilitating the identification and inspection of grow operations in the interests of public safety" and the amendments were therefore within provincial jurisdiction and not an unconstitutional encroachment into the criminal law.

Dealing then with the *Charter* issue raised by the petitioners (that a warrant should be required to conduct an inspection under the *Safety Standards Act* or that, in the alternative, that the

Safety Standards Act allowed for an unreasonable search because of its failure to specify in detail when an inspection can be demanded on safety grounds, and was therefore unconstitutional), the Court noted that a warrantless search is *prima facie* unreasonable, but that a more flexible judicial approach to regulatory "searches" is justified based on the need for increased expediency and efficiency, as well as the diminished expectation of privacy and lower level of state intrusion such searches generally entail. Considering a number of cases related to searches conducted in the context of electrical inspections, the Court then followed the 1986 decision in *R. v. Bichel* upholding a warrantless search of a residence for the purpose of investigating compliance with a municipal zoning bylaw, in finding that the inspections permitted under the *Safety Standards Act* were constitutional.

The petitioners also challenged Surrey's policy of requiring the presence of police officers at EFSI inspections, as nothing in the *Safety Standards Act* authorized police entry into a property. Mr. Justice Smart noted that the case raised "important questions regarding this 'critical juncture' in the context of police participation in electrical safety inspection and concluded, "the actions of the police, although carried out as members of the EFSI Team, constitute a search for the purpose of the *Charter* analysis". He then considered the common law and concluded:

> A police search of a private residence, even when conducted in aid of an electrical safety inspection, is intrusive. The search and police presence during the safety inspection add a significant stigma to the inspection, imbuing it with an aura of criminality absent from a typical electrical safety inspection. These factors must be considered together with the very high expectation of privacy that attaches to a private residence. Police intrusion into that privacy on the basis only of an operational policy that mandates a search without any assessment as to whether it is necessary in the specific circumstances at hand is not, in my view, a justifiable use of police powers. Accordingly, I conclude that police conduct pursuant to the EFSI Team's operational policy does not satisfy the second prong of the Waterfield test, and that it is therefore not justifiable at common law.

"Police intrusion into that privacy on the basis only of an operational policy that mandates a search without any assessment as to whether it is necessary in the specific circumstances at hand is not, in my view, a justifiable use of police powers."

The court observed that 275 of the *Community Charter* provided for the issuance of administrative warrants (a process that has been a routine part of at least one controlled substance property bylaw process in the province), which might be used to arrange police presence during electrical safety inspections if it were considered necessary on an individual basis.

While on the surface the *Arkinstall* decision may seem to be a victory for the petitioners, with the court finding that the participation of police officers in these inspections was unconstitutional, the decision has deflated the threat of a long-anticipated challenge to "controlled substance property" bylaws as an intrusion on the federal criminal law power.

Don Howieson

A.I.T.I.L.M.A.S.H.

Trade policy wonks and collectors of acronyms will recognize in the above headline the combined acronyms for the Agreement on Internal Trade (AIT), the Trade, Investment and Labour Mobility Agreement (TILMA), and the Municipal, Academic, School Board and Health and Social Service (MASH) entities identified in the agreements. This article is a brief reminder that this alphabet soup of trade agreements is out there, and that TILMA requirements in relation to procurement and certain other local government activities come into effect on April 1, 2009.

Briefly, the Agreement on Internal Trade (to which the federal and provincial governments and two of the territorial governments are parties) came into force in 1995. Generally speaking, the AIT commits the provinces and their various governmental entities, including local governments, the elimination of trade barriers within the country. There is no legal obligation on B.C. local governments to comply with the AIT, though other parties to the AIT and private parties who allege a contravention of the agreement by a B.C. local government may invoke the agreement's dispute resolution process, and the Province has written to local governments advising them that they are expected to comply. British Columbia and Alberta on April 1, 2007 entered in to the Trade, Investment and Labour Mobility Agreement, upping the ante by agreeing to more aggressive terms as between the two provinces than apply generally under the AIT. Because the impact of the agreement on entities in the MASH sector was still a matter of contention when the agreement was signed, the parties agreed that it would come into force two years later, giving them time to work out any required special arrangements for these entities (including consultations between British Columbia and U.B.C.M.). That has now been done, and in February of this year the government circulated information to local governments announcing the changes that are to be incorporated into the agreement for the MASH entities when it begins to apply to them on April 1 2009. The Province does not appear to be contemplating legislation requiring local governments to comply with TILMA, though it clearly expects them to do so.

Generally, the TILMA modifications that have been negotiated for local governments have to do with procurement. The AIT requires a public procurement process for goods, services and construction, with dollar thresholds at $100,000, $100,000 and $250,000 respectively. TILMA lowered these thresholds, as a matter of agreement between Alberta and British Columbia only, to $10,000, $75,000 and $100,000 respectively. The special MASH provisions under TILMA move the public procurement threshold for goods and construction undertaken by MASH entities back up to $75,000 and $200,000 respectively, leaving the threshold for procurement of services at the general TILMA level of $75,000.

Other special provisions negotiated for local governments are an exemption for land-use measures from the requirement to reconcile existing standards and regulations that restrict or impair trade, investment or labour mobility and refrain from establishing new such standards, provided the standards treat B.C. and Alberta residents similarly, and voluntary rather than mandatory reconciliation of business licensing requirements across the border. Additional information on trade agreements, including the entire text of TILMA, is available on the website of the Ministry of Small Business, Technology and Economic Development.

Bill Buholzer ✍

Do you have a *license* for that monkey?

Some of the more obscure powers granted to local governments under s. 8 of the Community Charter *are those pertaining to animals. Under s. 9, the concurrent authority regime applies to animals that are "wildlife" as defined in the* Wildlife Act*. "Wildlife" is defined in that Act to exclude "controlled alien species" with the result that the concurrent authority regime does not apply to local government regulation in respect of such species and local governments are free to exercise their s. 8 powers in relation to them. According to the* Wildlife Act*, if the Minister of Environment considers that a non-native species of animal poses a risk to the health or safety of any person or poses a risk to property, wildlife or wildlife habitat, the minister may make regulations designating the species as a "controlled alien species".*

The Spheres of Concurrent Jurisdiction – Environment and Wildlife Regulation permits local governments to regulate, prohibit and impose requirements under s. 8 in relation to the control and eradication of alien invasive wildlife species listed in the Schedule to the Regulation (such wildlife pests as bullfrogs, pigeons and starlings, rabbits and squirrels), and the control of wildlife species listed in Schedule B or C of the Designation and Exemption Regulation under the *Wildlife Act*. All such species are "wildlife" under the *Wildlife Act* definition.

The Regulation designates species set out in a Schedule to the Regulation as "controlled alien species" for the purpose of the Wildlife Act. It prohibits the possession of any member of such species within British Columbia unless the person possessing the animal operates a zoo or educational or research institution, or holds a permit issued by the Province

On March 16, 2009 the new Controlled Alien Species Regulation came into force. The Regulation designates species set out in a Schedule to the Regulation as "controlled alien species" for the purpose of the *Wildlife Act*. It prohibits the possession of any member of such species within British Columbia unless the person possessing the animal operates a zoo or educational or research institution, or holds a permit issued by the Province, but the permit requirement does not apply until April 1, 2010 to an animal that was in the province on March 16, 2009. The Regulation also prohibits the release of such an animal, and requires the person in possession of the animal to prevent it from breeding.

The new Regulation does not affect existing local government prohibitions and regulations pertaining to members of these animal species, such as monkeys, gorillas and chimpanzees and members of the subfamily *Pantherinae* (large cats such as tigers), because by definition these species are not "wildlife" under the *Wildlife Act*, being "controlled alien species", and local government powers to regulate, prohibit and impose requirements may be freely exercised in relation to animals that are not "wildlife" under that Act.

Bill Buholzer

Human rights: extraordinary remedies for workplace wrongs

Two recent decisions of the B.C. Human Rights Tribunal highlight the willingness of the Tribunal to expand the scope of the remedies it will order where it has been found that an employer has discriminated against an employee.

The first case deals with the dismissal of an employee who had both mental and physical disabilities. These disabilities arose in part because of the treatment the employee received by her supervisor prior to taking medical leave. In this case, the employee had been off work on long term disability benefits for two years when she was advised by e-mail that her employment was terminated. The employee had repeatedly advised the employer that she hoped to return to work, and the employer was aware that the employee was particularly vulnerable because of her disabilities.

The Tribunal was clearly not impressed with the employer's conduct in dismissing the employee. In particular, the Tribunal found that the employer was aware of the employee's circumstances and should have known that the e-mail would be devastating to the employee. As well, the employer never provided the employee with any advance notice that her employment was in jeopardy. It simply e-mailed her to advise her of her dismissal. The Tribunal also took the employer to task for not making any inquiries with the employee or with her doctors about whether she was or would be able to return to work within a reasonable period of time, either with or without modifications to her responsibilities. The Tribunal described the employer's conduct as a "callous act" that showed an "utter disregard" for the employee's circumstances.

The evidence showed that the termination and the manner in which it was done significantly worsened the employee's depression and anxiety. The Tribunal awarded the employee damages in the amount of $35,000 for injury to dignity, feelings and self-respect. This is the highest award to date by the Tribunal for injury to dignity. As well, the Tribunal ordered the employer to compensate the employee for her reasonable legal and other expenses incurred in pursuing her human rights claim, estimated to be $50,000.

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This case is important for two reasons, one being that the Tribunal is indicating willingness to award an increasing amount of damages for injury to dignity where the employer's conduct is found to be unacceptable. As well, the Tribunal acknowledged that it was unlikely that the employee would ever be able to return to work. However, the employer had not taken any steps to confirm whether this was, in fact, the case, and such conduct was found to be discriminatory. This case is a reminder that the process followed by the employer in determining whether to dismiss a disabled employee may be as important as the result.

In another case, the Tribunal ordered the reinstatement of an employee who alleged she was dismissed for reasons related to her gender. The Tribunal also ordered compensation for wage loss for approximately a two-year period. The employee alleged that she was dismissed because she was viewed as a troublemaker, as

a consequence of the efforts she made to be treated with basic respect and to have access to opportunities available to her male colleagues.

The employer argued that its decision to dismiss the employee was based on legitimate performance concerns and was not related to her gender. The Tribunal agreed with the employee that the reasons for her dismissal were, at least in part, related to her gender. In particular, the Tribunal found that there was a significant difference in the employer's process with respect to the discipline and dismissal of the employee, compared to that of her male colleagues. The Tribunal was satisfied that an inference could be drawn that the employee's gender was a factor in her dismissal.

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The complainant was a non-union employee, meaning that, at common law, she would not be entitled to reinstatement for wrongful dismissal. However, the Human Rights Tribunal has the power to order reinstatement as a remedy. Generally speaking, the Tribunal does not order reinstatement, but awards wage loss and damages where it finds an employer's conduct to be discriminatory. Reinstatement is obviously an extraordinary remedy, and particularly here where there was evidence of conflict in the workplace between the employee, her supervisors and her colleagues.

The Tribunal also ordered that the reinstatement take place immediately, and disagreed with the employer's position that the complainant should wait until the next applicable position became available. The Tribunal recognized that there might be an impact on others currently in the positions to which the complainant was to be reinstated, but still considered that immediate reinstatement was appropriate. The Tribunal further ordered that the employer retain an outside workplace facilitator acceptable to both parties to assist with issues arising from the complainant's reintegration into the workplace. This case is an important reminder to employers that reinstatement is a remedy available in the human rights context.

Carolyn MacEachern

NEWS FROM THE FIRM

Ray Young spent several weeks in March at the Georgia State School of Law in Atlanta, lecturing on comparative growth management law. **Bill Buholzer** and **Gregg Cockrill** will be presenting papers at a Continuing Legal Education Society course on local government law on April 3, and **Francesca Marzari** will be speaking at a conference on municipal liability in Vancouver on April 29. **Pat Kendall** and **Joanna Track** will be participating in the "Collectors' Forum" at the G.F.O.A. conference in Kelowna on May 28. Ray and Bill are both speaking at the B.C. Land Summit at Whistler in May, Bill is presenting a paper at the International Municipal Lawyers Association conference in Toronto on June 6, and Gregg and Ray will be speaking at the LGMA conference in Nanaimo on June 10. **Don Howieson** and **Michael Moll** will be scrambling to get from the **Young, Anderson** reception in Nanaimo on June 10 to the Licence Inspectors and Building Officials' Association conference in Summerland on the 11th, to speak on self-help remedies in bylaw enforcement.