UBCM Conference Edition
Sept 2009

YOUNG, ANDERSON

NEWSLETTER

Volume 20 • Number 3

Councillor charged with privacy offence

In what appears to be the first prosecution under the Freedom of Information and Protection of Privacy Act*, a Prince George councillor is facing a fine of up to $2,000 if convicted for disclosing an* in-camera *document containing sensitive personal information. contrary to the Act's protection of personal privacy provisions.*

The councillor allegedly leaked the document, which ended up on CBC's website for a brief period of time, contrary to section 30.4 of the Act. Section 30.4 prohibits officers, employees and directors of public bodies, such as local governments, from disclosing personal information in the public body's custody or under its control unless the disclosure is expressly authorized under the Act.

Newspaper reports indicate that a labour lawyer prepared the document in question for the City. It apparently summarized the lawyer's findings with respect to a personal relationship between a senior member of the R.C.M.P. detachment in Prince George and a civilian City manager working at the detachment. Reports suggest the document was considered by Council at an *in camera* meeting, presumably pursuant to subsection 90(1)(c) [consideration of labour relations or employee relations matters] or perhaps subsection 90(1)(i) [receipt of advice subject to solicitor-client privilege] of the *Community Charter*.

The prosecution is a striking reminder to elected officials and staff of the seriousness of their individual responsibilities and their local government's corporate responsibilities under both the Act and the *Community Charter*. The Act restricts local governments' ability to collect personal information in the first place. Once that information is collected, the Act places stringent restrictions on what local governments can do with the information, where and how it must be stored, and to whom or in what circumstances it may be lawfully disclosed.

> *When Council may or must meet in camera under the* Community Charter*, disclosure of personal information from those meetings may very well violate both section 30.4 of the Act and section 117 of the* Community Charter.

The Act does permit local governments to disclose personal information in several situations, including if another statute authorizes or requires that it be disclosed. Given the general principles of openness and transparency in governance embodied in the open meeting rules in sections 89-93 of the *Community*

Charter, personal information in documents considered by Council at public meetings is generally subject to disclosure under the Act. However, when Council may or must meet in camera under the *Community Charter*, disclosure of personal information from those meetings may very well violate both section 30.4 of the Act and section 117 of the *Community Charter*, which imposes on councillors a duty to respect Council confidentiality.

The consequences of privacy breaches can be serious. People whose personal privacy has been violated may initiate complaints before the Privacy Commissioner, who has the power to investigate and issue orders. Further, individuals like the Prince George councillor face quasi-criminal prosecution under the Act with a maximum fine of $2,000. The local government may also be prosecuted under the Act with a maximum fine of $500,000. If a councillor breaches section 117 of the *Community Charter* and the local government suffers damage because of that breach, the local government can sue the councillor for its damages.

Stephanie James

Candidate fraud invalidates election

In a recent case, Mr. Justice Gerow of the B.C. Supreme Court declared the election of a municipal councillor invalid due to fraud in the election campaign. In Todd v. Coleridge*, the petitioner, Todd, was an unsuccessful candidate for council in the City of White Rock. The respondent, Coleridge, was a successful candidate for council. During the election campaign, Coleridge's wife sent a mass e-mail linking Todd with a pro-development slate of candidates for council, using an assumed name. Later that day, Coleridge purported to respond to his wife's e-mail, and an e-mail chain ensued in which Todd was criticized. Coleridge's e-mail was written in a way that made it seem as if he was responding to one of his supporters. When asked by members of the media if he knew who sent the original e-mail, Coleridge lied, said he had no idea and, when pressed, sketched a vague picture of a shadowy character no one had ever met. The media discovered that the e-mail had in fact originated from Coleridge's home, whereupon Coleridge claimed that he was a victim of identity theft.*

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In court, Coleridge admitted that his wife had sent the e-mail, and said that he lied to the media about the e-mail's origins because he wanted to protect his wife, who was pregnant and had suffered miscarriages in the past. Todd argued that Coleridge's actions violated section 152(3) of the *Local Government Act* because he had used fraudulent means to persuade persons to vote for him. (Section 152(3) makes it an offence to, by fraudulent means, persuade or otherwise cause a person to vote or refrain from voting for a particular candidate, and under section 110(1)(e) of the *Community Charter* an elected councillor is disqualified if they are disqualified under s. 66(2) of the *Local Government Act*, which disqualifies elected officials for election offences.) In response, Coleridge argued that, while he had been dishonest, he did not lie about an issue "material" to the election, an element that had been identified in previous cases as necessary to establish a violation of s. 152. That is, Coleridge claimed that his lie did not go to a political issue and therefore he should not be found in violation of s. 152(3). He also argued that any criticisms of Todd in the e-mail were a matter of opinion and were fair comment.

The Court found that while the e-mail's origin may not have been material to the election, Coleridge had campaigned on a pledge that he was a straightforward, honest person. The Court found that Coleridge made his integrity an issue material to the election by campaigning on the strength of it, and that his feigned ignorance about the e-mail's origins, and, perhaps most damagingly, the creation of a fictional supporter, constituted fraud within the meaning of section 152(3). Moreover, the court found that the fraudulent conduct led people to vote for Coleridge.

The remedies awarded by the court were harsh for Coleridge. The court declared his seat vacant and ordered him to pay $20,000 to the City to help cover the costs of a by-election. It was open to Coleridge and Todd to run in the by-election. Further, Coleridge was ordered to pay for Todd's costs in bringing the petition.

Todd v. Coleridge presents an interesting contrast to *Viktor v. Lanktree* and *Sadler v. Town of Gibsons*, two other cases arising from the 2008 local government elections. In *Viktor and Sadler* the courts declined to interfere with the results of the election. However, each of those cases concerned judicial review of the machinery of the electoral process, such as the counting of ballots and the recording of votes. In *Sadler*, in particular, the court was willing to overlook deviations from the requirements set out in the *Local Government Act* so long as the election results accurately reflected the votes cast. If Todd is any indication, courts may not be so willing to defer to candidates who test the boundaries of the *Local Government Act*.

Coleridge made his integrity an issue material to the election by campaigning on the strength of it.

Bryan Jung

OCP consistency rule hardened?

The Yukon Court of Appeal has recently revisited the OCP "consistency" rule that underpins the planning system in both Yukon and British Columbia, tweaking a judicial approach to the rule that has been in place for more than 25 years. In doing so, the Court may have lowered the bar for litigants seeking to set aside local government bylaws for inconsistency with an official plan.

In *McLean Lake Residents' Association v. City of Whitehorse*, the Association sought to quash a zoning amendment bylaw that permitted a concrete batch plant on land designated "Natural Resource" in the City's official community plan. The plan indicated that quarry activity including the extraction, crushing and hauling of gravel or minerals may be permitted in such areas, but that upon abandonment or termination of resource extraction operations, quarry sites were to be reclaimed. The Yukon Supreme Court found that the zoning amendment did not conflict with the OCP, the new zoning designation being consistent with the OCP policy allowing resource use and related activities, and concrete plants plainly being related to sand and gravel extraction (even though the operator did not intend to use sand or gravel extracted from the batch plant site to make concrete). The Association appealed to the Yukon Court of Appeal. Since Justices of the B.C. Court of Appeal comprise the Yukon Court of Appeal, and the governing legislation is very similar in the two jurisdictions, the decision in this case will inevitably be cited in British Columbia courts whenever the consistency rule is being addressed.

The decision in this case will inevitably be cited in British Columbia courts whenever the consistency rule is being addressed.

A Yukon council may not, according to the Yukon *Municipal Act*, enact a bylaw that is "contrary to or at variance with" its official community plan, wording that is identical to that formerly found in the B.C. *Municipal Act and Local Government Act*. Since 1985 the *Local Government Act* has required subsequently enacted bylaws of regional districts and municipal councils other than Vancouver's to be "consistent with" the relevant official community plan. (The B.C. *Islands Trust Act* still prohibits the adoption of any bylaw that is "contrary to or at variance with" the Islands Trust Policy Statement, and the *Vancouver Charter* prohibits the Council from authorizing, permitting or undertaking any development "contrary to or at variance with" an official development plan of the City.)

The meaning of these prohibitions has been relatively settled since 1983, following the B.C. Supreme Court's decision in *Re Rogers and District of Saanich*. That case dealt with the rezoning of land from Rural to Detached

Housing, in relation to official community plan objectives and policies addressing, generally, the urbanization of agricultural land and the location of Saanich's urban containment boundary. In a passage that has been cited in virtually every subsequent case dealing with the consistency rule, the Court applied the "contrary to or at variance with" test as follows:

> [T]he written efforts of planners are really objectives and unless there is an absolute and direct collision … , they should be regarded generally speaking as statements of policy and not be construed as would-be acts of Parliament …."

The Court of Appeal commenced its own analysis by inquiring into the intent of the Legislative Assembly in enacting the rule that a bylaw may not be contrary to or at variance with an official community plan.

Because the wording of the plan is inherently soft and vague, the Court seemed to be saying, it may permit a broader range of regulatory measures than would be permissible if the plan were expressed with more precision. The effect of the Court's approach can be seen in the following passage, wherein the typically equivocal language used in plans seemed to prevent the Court from finding the kind of collision that would render a bylaw invalid:

> It was conceded by counsel for Saanich that the [urban containment] policies were intended to have legal effect insofar as the official Community Plan was concerned but the plaintiffs could not show any policy with which the rezoning was in direct collision which did not have a saving clause either embodied in the policy or else one which is generally applicable. Typical examples are the words in the Official Community Plan in Policy 1.2 requiring the Council to establish buffers "where appropriate". It would also seem from the Official Community Plan that in fact not only the [rezoned] area but the other areas demonstrated on Map 1-B outside the urban containment boundary are eventually destined for serious reconsideration and perhaps extinction.

By 1991, the wording of the legislation had changed to require subsequently adopted bylaws to be "consistent with" the OCP rather than prohibiting the adoption of bylaws that were "contrary to or at variance with" the OCP, and the B.C. Court of Appeal in *Brooks v. Courtenay* held that the "absolute and direct collision" test formulated in *Rogers* continued to apply notwithstanding the wording change. In that case the Court refused to set aside a bylaw rezoning land for residential development on the basis of an OCP policy indicating that parcels of land along the Puntledge River ought to be linked into a "riverway" system "if at all possible" (note again the equivocal language). The City defended the bylaw successfully on the basis that the zoning amendment did not settle a form of development for the land in question, which would be dealt with by means of a development permit, and it could

not therefore be said that the bylaw was in collision with the OCP policy.

In the *McLean Lake Residents' Association* appeal, after noting that the Yukon Supreme Court had applied the "absolute and direct collision" test from the 1983 *Rogers* decision but had found no absolute or direct collision, the Court of Appeal commenced its own analysis by inquiring into the intent of the Legislative Assembly in enacting the rule that a bylaw may not be contrary to or at variance with an official community plan. Citing the "modern approach to statutory interpretation" which requires the words of a statute to be read in their entire context and in their grammatical and ordinary sense, the Court turned immediately to the *Concise Oxford English Dictionary* for meanings of the words "contrary" ("opposite in nature, direction or meaning") and "variance" ("the fact or quality of being different or inconsistent"). Reading the section in question in the context of the Territory's *Municipal Act* as a whole, the Court saw "nothing that warrants giving the expressions 'contrary to' and 'at variance with' any meanings other than their ordinary meanings". Under this approach, the meaning of the consistency requirement is informed entirely by the words that the Legislature used in expressing the rule, the nature of the language in the plan playing no role in the formulation of the consistency test as it did in *Rogers*. (Whether intentionally or not, the Court's approach is in harmony with the fact that, generally speaking, official plans contain more specific policies than was the case 25 years ago.)

In the key passage in the judgment, the Court of Appeal observes in relation to the *Rogers* decision that it is "unhelpful to use terminology such as 'absolute and direct collision'", such terminology suggesting "that the line a municipal council cannot cross is higher than it actually is, as it implies that a council is authorized to act in a manner that is incompatible with an OCP, provided what it does is not too incompatible". In other words, the Court of Appeal implies that the B.C. Supreme Court in *Rogers* had reformulated the statutory requirement, instead of merely interpreting it, and in doing so had established a softer consistency requirement than the Legislature had intended. Applying the consistency requirement properly interpreted, the Court addressed whether permitting a standalone concrete plant via the new quarry zoning on land designated Natural Resource, was contrary to or at variance with that designation as set out in the OCP, and concluded, contrary to the decision in the Yukon Supreme Court, that it was.

The Court saw "nothing that warrants giving the expressions 'contrary to' and 'at variance with' any meanings other than their ordinary meanings".

The Court of Appeal observed that the Natural Resource designation in the Whitehorse OCP was concerned primarily with the extraction of gravel, a time-limited activity given that gravel is a non-renewable resource, that the OCP's long-term vision for land from which gravel is extracted is that the land be returned to its natural state once the gravel has been depleted, and that when gravel extraction comes to an end, so will any related activities (such as, in this case, the making of concrete). The OCP did not, in the Court's view, contemplate the continuation of related activities unconnected to any gravel extraction in the area. Thus, the

zoning amendment bylaw did not "conform with the OCP" (note that the word "conform" does not appear in the statute or in either of the dictionary meanings cited by the Court of Appeal), because it did not contain a temporal limitation requiring the concrete plant to cease operations once all quarrying activity in its area has stopped.

The Court of Appeal acknowledges at the end of its judgment that, given the lawful non-conforming use provisions of the Yukon *Municipal Act*, the Council could not effectively bring concrete manufacturing activity to an end following the exhaustion of local gravel resources by further amending the zoning bylaw, suggesting that the only zoning amendment that would not have been contrary to or at variance with the OCP would have been some kind of time-limited zoning. The Court does not point to any powers of the Whitehorse council under the *Municipal Act* that would have authorized such a regulation, but in the absence of any such powers the Court would presumably be of the view that the Council was simply unable to authorize uses of a non-temporary nature derived from gravel extraction in areas designated "Natural Resource" in the OCP. (In the context of Part 26 of the B.C. *Local Government Act*, a temporary use permit would have been permissible, but note that such permits are issued by Council resolution and the consistency rule addresses only the adoption of bylaws and the execution of public works and not the issuance of permits.)

This case is important for planning practitioners in both Yukon and British Columbia, because it may demand a higher level of consistency between OCPs and subsequently adopted bylaws than was suggested by the B.C. Supreme Court's 1983 requirement for an "absolute and direct collision" with the OCP before a bylaw would be set aside for this reason, particularly where the OCP is written with a high degree of specificity. From now on, any sort of collision should be considered very seriously, since (to use yet another analogy, of which the Court of Appeal would likely not approve), a mere bump may be enough.

Bill Buholzer

The zoning amendment bylaw did not "conform with the OCP" because it did not contain a temporal limitation requiring the concrete plant to cease operations once all quarrying activity in its area has stopped.

Human Rights Tribunal curbs grow-op enforcement

Kenneth James and Peter Moynan recently filed a human rights complaint against the City of Salmon Arm alleging that it discriminated against them in respect of a service on the basis of their sexual orientation, marital status, and Mr. James' physical disability, contrary to the Human Rights Code. *In early 2007, the City had adopted a Controlled Substance - Safe Premises Bylaw to discourage the use of properties in the City for illegal marijuana cultivation. (The City's bylaw was a slightly modified version of a UBCM draft bylaw.) Under the City's bylaw, where there is reason to believe that a parcel is a "controlled substance property", the Building Official and Fire Chief have authority to post a "Do Not Occupy" notice, and the City may discontinue providing water service to that parcel. In this case, the RCMP notified the City that they had identified a "grow operation" at the complainants' property. Pursuant to its bylaw, the City ordered the complainants to vacate their residence, and disconnected the water supply.*

Mr. James had a debilitating disability and had been granted Health Canada permits to produce and possess marijuana for personal use. At the time the City enforced its Controlled Substance Bylaw against the complainants, James' permits had expired, and he was awaiting renewal permits, which had been delayed due to staffing shortages at Health Canada. James received his renewal permits three months after the order to vacate.

Bylaw enforcement is a service customarily provided by a municipality to a subset of the general public: City residents and property owners, including the complainants.

The B.C. Human Rights Tribunal found no evidence of discrimination on the basis of sexual orientation or marital status, and the Tribunal concluded that the bylaw itself was not discriminatory. However, it did conclude that the City's decision to enforce the bylaw against the complainants discriminated against Mr. James based on his physical disability. In order to establish a prima facie case of discrimination under section 8 of the *Code* on the grounds of physical disability, Mr. James had to establish that he had such a condition. The complainants then had to establish that they were denied a service, or were discriminated against regarding a service customarily available to the public, and that it was reasonable to infer from the evidence that Mr. James' disability was a factor in that treatment.

The Tribunal found that bylaw enforcement is a service customarily provided by a municipality to a subset of the general public: City residents and property owners, including the complainants. The City was also providing a service to the complainants, as property owners, when it determined how to exercise its discretion, if at all, in the application of this bylaw. The provision of water was also a service provided by the municipality.

The Tribunal found that the City failed to recognize that it had discretion in the application of the Controlled Substance Bylaw, and it failed to take into account Mr. James' physical disability, and his resulting need to produce and possess marijuana for treating that disability, when it decided to enforce the bylaw as it did. The Tribunal found that the City ought to have known that it was frustrating the ability of a very ill individual to provide himself with an important medication when it applied in the bylaw as it did. Although the bylaw was neutral on its face, and applied equally to all residents, Mr. James was adversely affected by the application of the bylaw because of his physical disability. The City failed to consider whether Mr. James might require accommodation. The Tribunal concluded that the City discriminated against Mr. James when it rigidly enforced the bylaw against him, while failing to take into account his disability - the very reason he was growing marijuana in his residence in the first place.

The City discriminated against Mr. James when it rigidly enforced the bylaw against him, while failing to take into account his disability

The Tribunal then considered its remedial powers. Under section 37(2) of the *Human Rights Code*, if the Tribunal member determines that a complaint is justified, the member must order the person that contravened the *Code* to cease the contravention and to refrain from committing the same or a similar contravention, and the member may also make a declaratory order that the conduct complained of is discrimination contrary to the *Code*. In this case, the Tribunal ordered the City to cease its contravention of the *Code* and to rescind the Do Not Occupy notice in relation to Mr. James' residence. The Tribunal also ordered the City to reconnect the complainants' water supply, and to cancel all costs sought by the City in relation to enforcement of the bylaw against the complainants.

Although this is an unexpected forum in which to find a challenge to a "grow-op" bylaw, it appears from this decision that, where the enforcement of any bylaw has an adverse affect on an individual because of a physical disability, and the local government fails to accommodate that individual by exercising discretion with respect to enforcement, the Human Rights Tribunal may be willing to find that the application of the bylaw is discriminatory contrary to the *Human Rights Code*. Under its remedial powers, the Tribunal can order the municipality to cease such discriminatory enforcement of the bylaw.

Joanna Track

Spallumcheen conflict allegation fails

A recent decision of the BC Supreme Court may remind mayors and councillors of the importance of considering issues of conflict of interest before participating in council meetings and votes. In Fairbrass v. Hansma*, 39 electors brought a petition for an order that the mayor of Spullumcheen be disqualified from office. The electors alleged that the mayor had participated in a council meeting despite the fact that he had a direct or indirect pecuniary interest in the issue under discussion.*

The council meeting concerned rezoning approximately 60 of the 2100 properties in the Township to a designation that would allow them to be more easily subdivided into lots of no less than 2.5 acres. The mayor and his two sons separately owned parcels of land that would be affected by the proposed rezoning. While the sons owned parcels large enough to permit subdivision, the mayor's parcel, at 4 acres, was too small to take advantage of the rezoning.

The mayor sought a legal opinion to determine whether he was in conflict of interest regarding the proposed zoning amendment bylaw. After receiving the legal opinion, the mayor concluded that he was not in a conflict of interest and proceeded to attend the council meetings and vote on the bylaw. At the meeting some of the electors present expressed their opinion that the mayor had a conflict of interest in the matter. These electors later commenced the petition to have the mayor disqualified under the conflict of interest and disqualification provisions of the *Community Charter*.

Mr. Justice Rogers of the B.C. Supreme Court found that since the mayor's lot was too small to be subdivided under the new zoning, he was not in a direct pecuniary conflict of interest. The court found that the pecuniary interests of the mayor's sons would have been affected by the rezoning, and therefore the question was: "by virtue of his relationship with his sons, did the mayor have an indirect pecuniary interest?" The court considered many cases on indirect pecuniary conflict of interest and concluded that one cannot conclude there is such a conflict in the absence of evidence to support it. Since the petitioners in this case failed to show that the mayor would benefit from the rezoning of his sons' lands, the court found that the mayor did not have an indirect pecuniary conflict of interest. (In other jurisdictions such as Ontario, the pecuniary interests of family members are deemed to be those of councillors for the purpose of conflict of interest legislation, so evidence of such an interest is not required.)

Since the petitioners in this case failed to show that the mayor would benefit from the rezoning of his sons' lands, the court found that the mayor did not have an indirect pecuniary conflict of interest.

In his closing comments on the matter, Mr. Justice Rogers stated that he would have found that the mayor did not act inadvertently in attending and voting at the council meeting if he

had been found to have a conflict of interest, but that the mayor was entitled to rely in good faith upon his solicitor's opinion. This decision highlights the importance of obtaining a legal opinion when potential conflict of interest issues arise.

Taryn Eyton

Transit construction brings nuisance award

In May 2009 the B.C. Supreme Court awarded damages of $600,000 to Susan Heyes Inc., a company that operated a clothing store under the name Hazel & Co. at the corner of 16th Avenue and Cambie Street in Vancouver. Cambie Street was the route chosen for the Canada Line transit link. The Hazel store is adjacent to an underground portion of the line. The public was told that this underground portion would be completed using bored tunnel construction, which would not disrupt the surface of Cambie Street at 16th Avenue. On the basis of this information, the company renewed its lease for five years.

In fact, construction of this underground portion of the line was completed using "cut and cover" construction. Cambie Street merchants were told that the tunnel trench would not be open at any particular location for more than three months, but the court found that much of the route was affected by the cut and cover construction from the fall of 2005 until October 2008. During this time sales at the Hazel store dropped significantly.

The court did, however, find liability in nuisance. There was substantial and unreasonable interference with the company's use of its premises.

The company sued a number of entities - including the City of Vancouver, Canada and the Attorney General. The court found liability only on the part of the South Coast British Columbia Transportation Authority, its subsidiary Canada Line Rapid Transit, and the transit operating entity InTransit BC., in the amount of business losses sustained by the company during the construction - $600,000.

The lawsuit claimed liability on three bases - misrepresentation, negligence, and nuisance. The court dismissed the claim in misrepresentation, finding that statements made about the intended construction were not untrue, inaccurate or misleading at the time they were made. Those representations only became inaccurate later when the construction method was changed. The company's claim in negligence was also dismissed, since the court found no negligent execution of the selected method of

construction, and since the company's economic loss did not flow from any injury to person or property.

The court did, however, find liability in nuisance. There was substantial and unreasonable interference with the company's use of its premises. Parking was eliminated on Cambie Street and the pedestrian crossing was restricted or curtailed. This interference with business outweighed the social or public utility associated with construction of the transit line. The three liable companies did not have any immunity under the law of statutory authority and even if they did, there was an alternate method of construction that would not have caused a nuisance.

Canada and the Attorney General were held not liable, as they had simply provided funds for the project. The City of Vancouver, although it was the owner of Cambie Street and had approved the use of the street for the construction, was found not liable because there was no evidence it knew construction would proceed in a manner that would cause nuisance. It did not have sufficient involvement with or knowledge of the specifics of the project.

This case is under appeal. Depending on the outcome of the appeal, the many other Cambie Street merchants who also sustained business losses during the Canada Line construction are likely to commence lawsuits as well.

This court decision has raised concerns that B.C. local governments will be liable for business losses resulting from their own road construction and other civic projects. Certainly, to avoid liability in negligent misrepresentation, even though the intent may be to describe a project in the most favourable light, information about a project must not be untrue, inaccurate or misleading. To avoid liability in negligence, the project must not be carried out in a negligent fashion. It should be mentioned that local governments can be liable to pay business losses under the law of injurious affection, but that claim arises from losses resulting from the works once constructed (such as construction of a highway median that affects access to a business), not losses resulting from the construction process itself.

In respect of claims in nuisance, local governments have the potential defence of statutory authority, but this will succeed only if the nuisance is an inevitable consequence of the work.

In respect of claims in nuisance, local governments have the potential defence of statutory authority, but this will succeed only if the nuisance is an inevitable consequence of the work. Local governments need to be wary of making construction choices that save money for the taxpayers, but shift the cost of that choice onto nearby property owners. As the court stated in Heyes, ".. the use of cut and cover construction was endorsed because it was cheaper and, in combination with some other aspects of the [successful] proposal, reduced cost by more than $400 million so as to permit construction within the range of public funding commitments. The reduction in cost was achieved by imposing an unacceptable burden on Hazel & Co."

We will advise as to the results of the appeal of this important decision.

Patricia Kendall

GVTA bus ad policy unconstitutional

The Supreme Court of Canada decision in Greater Vancouver Transit Authority v. Canadian Federation of Students – British Columbia Component*, delivered on July 10, 2009, bears serious consideration by local government, as well as other bodies empowered by local government to fulfill their responsibilities, particularly where these entities allow for third party advertisement in their operations. The Court held that such activities will render these operations public places where the right to expressive communication will be protected by the* Charter of Rights and Freedoms*, unless the government entity can show that such communication detracts from the operations in a way that imposes a significant burden.*

The CFS sought a declaration that certain GVTA advertising policies are unconstitutional and on no force and effect. The CFS and the BC Teachers Federation had attempted to purchase ad space on the sides of BC Transit buses during the months leading up to the 2005 provincial election. The content of the proposed ads related to the upcoming election. The GVTA rejected the ads on the basis that its policies did not permit political advertising. The three policies in question were as follows:

- Advertisements, to be accepted, shall be limited to those which communicate information concerning goods, services, public service announcements and public events.
- No advertisement will be accepted which is likely, in the light of prevailing community standards, to cause offence to any person or group of persons or create controversy.
- No advertisement will be accepted which advocates or opposes any ideology or political philosophy, point of view, policy or action, or which conveys information about a political meeting, gathering or event, a political party or the candidacy of any person for a political position or public office.

Mr. Justice Halfyard, at the British Columbia Supreme Court, dismissed the action. While both BC Transit and Translink were "government" within the meaning of the *Charter*, and therefore subject to it, the side of a bus was not a public place required to afford a means of expression under the *Charter*, because there was no history of permitting political or advocacy advertising on the side of buses.

The Court of Appeal, in a majority decision, reversed the decision of the Supreme Court on the grounds that the historical use of the sides of buses was not a determinative pre-requisite for being a "public place" but simply being a potential indicator of such status. There was a history of advertising in general on buses, and therefore expression on the sides of buses could not be inimical to the operation of transit.

At the Supreme Court of Canada, the decision delivered by Mr. Justice Deschamps affirmed the decision of the Court of Appeal. There were four issues in the appeal: were the enti-

ties that operate the public transit systems in the GVRD and elsewhere in BC subject to the *Charter*; did the policies adopted by these entities infringe the respondents' right to freedom of expression; were the policies imposed "reasonable limits prescribed by law" within the meaning of s. 1 of the *Charter*; and could the Court make a declaration with respect to the policies. In regard to the first issue, the Court characterized the types of entities subject to the *Charter* as follows:

> There are two ways to determine whether the *Charter* applies to an entity's activities: by enquiring into the nature of the entity or by enquiring into the nature of its activities. If the entity is found to be "government", either because of its very nature or because the government exercises substantial control over it, all its activities will be subject to the *Charter*. If an entity is not itself a government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the *Charter*.

Both BC Transit, by virtue of its statutory creation, and Translink, by virtue of its accountability to the GVRD, were held to be government entities. Governments cannot, therefore, avoid the *Charter* by conferring their powers onto another entity.

On the second issue, the Court held that the right to freedom of expression in public places is broad, but not unlimited. Expression may not be protected where it detracts from the function of the public place, and where it conflicts or detracts from the underlying values of freedom of expression, which are democratic discourse, truth finding, and self-fulfillment. In addressing this issue, the Court will take into consideration the historical and existing function of the public place in question. The Court held that the current and historical existence of advertising on buses indicated that free expression through that form of communication does not impede the function of the bus, nor detract from the underlying values of freedom of expression.

The court found that the policies in question satisfied both criteria to be considered "prescribed by law", but were not reasonable prescriptions on the basis that they were not rationally connected to the stated objective of providing a safe and welcoming transit system.

In addressing the third issue the Court set out the criteria under which a limitation would be held to be "prescribed by law". This is essentially broken down into two questions, in reference to the BC Transit situation: were BC Transit and Translink authorized to enact the policies in question, and were the policies binding rules of general application. The key conclusion is as follows:

> So long as the enabling legislation allows the entity to adopt binding rules, and so long as the rules establish rights and obligations of general rather than specific application and are sufficiently accessible and precise, they will qualify as "law" which prescribes a limit on a *Charter* right.

The court found that the policies in ques-

tion satisfied both criteria to be considered "prescribed by law", but were not reasonable prescriptions on the basis that they were not rationally connected to the stated objective of providing a safe and welcoming transit system. The scope of the limitations contained in the policies, which was the exclusion of all political messaging, was also not proportionate with that stated objective.

On the final issue, the Court held that a declaration of invalidity in respect to these policies could be made because the policies in question were rules of general application that came within the meaning of "law". As a result s. 52(1) of the *Charter* allows for the invalidation of these policies, rather than the invalidation of government action resulting from these policies. Such a decision has a more general impact.

Local governments and their various authorized agents must ensure that any restrictive policies relating to third party access to public spaces in their control for expressive purposes, are narrowly focused on a clear and valid objective in order that such policies will survive scrutiny under the Charter of Rights and Freedoms.

David Wells

Independent contractor or employee?

Most local governments contract out at least some of their services because of the advantages and flexibility that such arrangements can provide. Often, these services are contracted out to an individual in their personal capacity. The issue of whether these individuals are independent contractors is an important one for local governments for many reasons, including the fact that local governments have certain obligations with respect to employees that are not present in a relationship with an independent contractor. While written agreements that explicitly state that an individual is an independent contractor are helpful, they are by no means determinative.

The issue of the distinction between independent contractor or employees often arises when the Canada Revenue Agency questions the legitimacy of an independent contractor relationship, or when the relationship between the individual and local government breaks down. Employers are required to deduct Canada Pension Plan contributions, employment insurance premiums and income tax from the remuneration paid to employees. Employers must also make their own contributions to CPP and EI. If the CRA determines that an individual is an

employee rather than an independent contractor, the employer must pay both the employer's and the employee's share of the contributions and premiums owing, and often a penalty.

The CRA considers various factors in an assessment of whether an individual is an independent contractor or employee, including level of control, ownership of tools and materials, financial risk and opportunity for profit. The CRA's website contains further information about these factors and its assessment process. Local governments should assess these factors when deciding whether to contract out a service.

If the relationship between an independent contractor and local government ends badly, a disgruntled contractor may take the position that he or she was actually an employee. Such individuals may make claims to the Employment Standards Branch, the Human Rights Tribunal or the courts. Often, the individual has filed income tax statements claiming business income and deductions and has signed an agreement stating that the individual is an independent contractor. While this may be evidence considered by a tribunal or a court, the entire relationship will be examined to determine whether the individual was, in law, an employee. Tribunals and the courts look at factors similar to those examined by CRA, and any other factors relevant to the particular relationship at issue.

Therefore, a local government should be concerned where a supposed contractor is subject to a great degree of control and direction, does not supply their own tools and materials, is integrated into the operations of the local government, and where there is no financial risk or opportunity for profit. As well, the nature of an independent contractor relationship can change over time, particularly where the relationship between the local government and the independent contractor spans many years. Accordingly, local governments need to assess on a regular basis the services that they are contracting out.

Carolyn MacEachern

NEWS FROM THE FIRM

Mark your calendars - our annual **client seminars** will be presented at the Fairmont Hotel Vancouver in Vancouver on November 27, 2009 and the Westin Bear Mountain Hotel in Langford on January 29, 2010 (Vancouver Island clients, please note the change of venue). **Reece Harding** taught the Municipal Law course at MATI at the University of Victoria on August 13. **Ray Young** and **Bill Buholzer** spoke at Surrey's day-long Board of Variance Seminar on September 16, which was attended by around 100 Board members and local government staff from around the province. **David Wells** has successfully completed the Law Society's Professional Legal Training Course and returned to complete his articles at the firm. **Don Howieson** is the 2009-2010 chair of the Municipal Law Section of the B.C. Branch of the Canadian Bar Association. **Michael Moll** has been chosen by the International Municipal Lawyers Association to present his paper on smut, smoking and skinny-dipping (prepared with **Bryan Jung** for our 2008 client seminar) at IMLA's annual conference in Miami, Florida in October.