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No Liability in Mistaken Up-Zoning Case

In the recent case of 0956375 B.C. Ltd. v. Okanagan-Similkameen (Regional District)*, 2020 BCSC 743, the Regional District of Okanagan-Similkameen avoided liability in claims of negligence, negligent misrepresentation and abuse of public office that related to a mistaken rezoning and subsequent downzoning of lakefront property. The case re-confirms the principle that a local government owes no private law duty of care when exercising legislative and quasi-judicial powers.*

The case concerned a 3.2 hectare property on the western shore of Osoyoos Lake. Until 2008, the property had been zoned "Large Holdings," which permits a single dwelling. In 2004, a data entry error in the Regional District's zoning database, from which zoning maps were created, resulted in the property being designated as zoned RM1, which permits multiple dwellings on a property. The error remained latent until 2008 when for administrative purposes the Regional District repealed and re-enacted its zoning bylaw. At that time, the zoning designations from the database were used to create the zoning map which formed part of the re-enacted bylaw, with the result that the property was inadvertently up-zoned to RM1.

The owner of the property discovered the change in zoning and, despite suspicions that the zoning change was an error, took steps to develop the property including by making applications for development permits. The development permit applications alerted Regional District staff to the error, and in 2014 the property was downzoned. The plaintiff commenced proceedings against the Regional District soon thereafter.

During the 20-day trial, 16 of which featured oral testimony, the Court considered whether the Regional District was liable in negligence, negligent misrepresentation and abuse of public office, and also considered issues of standing and solicitor client privilege which I will not discuss here. The plaintiff's negligence claim alleged that the Regional District failed to conduct a fair and transparent process in relation to the downzoning, mainly by failing to disclose legal advice it received prior to the rezoning. The negligent misrepresentation claim alleged that the Regional District owed the plaintiff a duty to provide correct zoning information, and that by negligently representing that the property was zoned RM1, which the plaintiff relied upon in purchasing a 7/8 share of the property from a related company for $3.7 million, the plaintiff incurred damages.

A necessary element to both claims is a duty of care owed by the Regional District to the plaintiff. The Court, relying on the Supreme Court of Canada's decision in *Welbridge Holdings Ltd. v. Winnipeg (Greater)*, [1971] SCR 957, recently reiterated by the British Columbia

Court of Appeal in *Wu v. Vancouver (City)*, 2019 BCCA 23, held that a local government does not owe a private duty of care when exercising legislative or quasi-judicial functions. In such cases, a plaintiff's remedy is not a claim for damages but to seek judicial review of the decision. The Court went on to opine that even if the existence of the duty had not been rejected in previous jurisprudence, it would have refused to establish the duty for a number of reasons, including that there was insufficient proximity between the Regional District and the plaintiff, the proposed duty to a private party would conflict with the local government's duty to zone in the public interest, and the existence of judicial review as a remedy for the plaintiff.

Lacking the necessary duty of care, the Court rejected the plaintiff's negligence and negligent misrepresentation claims. In respect of the negligent misrepresentation claim, the Court also held that the Regional District had not misrepresented that the property was zoned RM1, as it was validly zoned RM1 at the time of the plaintiff's purchase, nor had the Regional District misrepresented that the property was "correctly zoned RM1" as the plaintiff alleged, as no such representations were made to the plaintiff.

The Court went on to state that even if it had found a duty of care and that a misrepresentation was made to the plaintiff, it would have found reliance, another key element of the negligent misrepresentation claim, lacking. The Court held that there was strong evidence that the plaintiff could not have reasonably relied on the mistaken up-zoning of the property. The plaintiff had sent its agent to the Regional District's offices to seek documents providing explanation for the up-zoning. Finding none, the plaintiff sent its agent to the Regional District's offices a second time, with specific instructions not to make direct inquiries of Regional District staff concerning the reason for the up-zoning. The Court inferred that the plaintiff knew or strongly suspected that the property had been rezoned in error and did not want to bring the error to the attention of staff before commencing development applications, thus the plaintiff could not be said to have reasonably relied on the bylaw in its purchase of the property.

Lastly, the plaintiff alleged that the Regional District had committed the tort of misfeasance of public office in relation to the plaintiff's attempt to subdivide the property by allegedly imposing impossible and unlawful conditions. Upon being informed by the Regional District of its plans to down-zone the property, the developer applied to subdivide the property in order to take advantage of what is now section 511 of the *Local Government Act*, which provides that a bylaw that would affect a subdivision in

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process has no effect for 12 months following the adoption of the bylaw. The 1-year period expired before the subdivision was complete, as a result of the required parkland dedications proposed by the plaintiff being rejected. The Court dismissed this claim as well, holding that a claim for misfeasance in public office cannot name only the government body as a defendant – it must also name as a defendant the public official allegedly guilty of the wrongdoing.

Joe Scafe

City Liable after Tenant's Illegal Backyard Fire

On May 4, 2020, the BC Court of Appeal upheld the City of Burnaby's partial liability for damages resulting from its tenant's backyard fire in Abdi v. Burnaby (City)*, 2020 BCCA 125, serving as a reminder to all local governments to be continually mindful of their private law obligations.*

In *Abdi v. Burnaby*, Ms. Abdi suffered severe burns after attending a party on May 14, 2014, at the home of Mr. and Mrs. Bottomley – a home that was owned by, and rented from, the City of Burnaby. The house rental was based on a written tenancy agreement, which specified that the tenants would comply with all City bylaws. One such bylaw prohibited outdoor fires, but the Bottomleys had a long history of fires in their backyard. On one occasion in 2008, a neighbour reported a fire with 20-foot flames, which the City's fire department attended to extinguish. The City also had a policy to conduct full safety inspections annually of its tenanted residential properties, but the City did not have sufficient staff assigned to perform those inspections. No inspection was conducted on the Bottomley's home from the time their tenancy began in 2005 through to the incident in 2014. As such, and despite the 2008 fire, the Bottomleys were not instructed to cease having fires or to remove their fire pit at any point prior to the 2014 accident.

Ms. Abdi brought a claim against the Bottomleys and the City in negligence and under the *Occupiers Liability Act*. The cause of action against the City was based on its role as landlord, and breach of its statutory duties arising under section 6 of the *Occupiers Liability Act* and section 32 of the *Residential Tenancy Act*, as well as the common law duty of care. As landlord, the City had a duty of care under the *Occupiers Liability Act* to those on the premises when it was responsible for maintenance and repairs and an obligation under the *Residential Tenancy Act* to make repairs to ensure that the premises met safety standards required by law.

At trial, the judge determined that both the Bottomleys and the City owed a duty of care to Ms. Abdi. The questions of whether the standard of care was breached and whether this caused the damage were put to a jury, which answered in the affirmative and assigned 71% liability to the Bottomleys and 29% to the City. The Court of Appeal upheld the decision, finding that the statutory framework supported the finding of a duty of care, stating (at para 88):

> This duty of care was informed by the City's knowledge that there had been a dangerous outdoor fire held on the premises. Its duty was to take reasonable

> steps to care for the reasonable safety of persons on the premises. These reasonable steps included taking steps to inspect the property in question for safety, in particular regards to the ability to hold outdoor fires, and upon inspection, taking steps to require the Bottomleys to remove the fire pit.

While the particular facts of this case may be unique, it suggests that where a local government manages property as a landlord, it must be alive to its dual role as both property owner and regulator. The key issue was the City's failure to ensure the safety of its tenanted properties. The evidence was that the tenant had a history of breaching the no-fires bylaw, and by extension the tenancy agreement, and the City as landlord did nothing to prevent or even discourage those breaches. The failure to enforce the tenancy agreement does not seem to be a failure that could be excused by a policy decision not to enforce, although given the evidence of the Bottomleys' behaviour it's not clear what the City could have done to prevent Ms. Abdi's injuries short of terminating the tenancy.

Perhaps the most difficult aspect of the decision is what seems to be the Courts' willingness to consider the City's public law authority to enforce its bylaws in deciding that the City failed to meet the standard of care for a landlord. As a regulator, the City could have adopted a policy of non-enforcement in respect of the no-fires bylaw. But the availability of the "policy defence" to negligence liability is cold comfort if a local government as landlord is held to a higher standard just because as a regulator it has separate enforcement powers and perhaps resources to enforce.

The lesson from this case seems to be twofold: a local government as landlord cannot rely on a policy of non-enforcement as an excuse to be less diligent than a private landlord, but local governments as landlord may be held to a higher standard of care to ensure the safety of tenanted properties, if the local government has enacted bylaws that would give the local government extra authority as compared to any other private landlord to ensure compliance with terms of a tenancy agreement.

Amy O'Connor

Existential Questions in Planning Law

It's no secret that section 479 of the Local Government Act *authorizes local governments to regulate, by bylaw, "the use of land, buildings and other structures" and "the density of the use of land, buildings and other structures". These are significant powers, and lie at the heart of most local land use regulation schemes, also known as zoning bylaws. But what is "use", what is "density", and what, for that matter, is a "zoning bylaw"? This article tries to answer the last of these three vexing questions, and explain briefly why answers to the first two remain elusive.*

Diligent readers of this newsletter may recall that in 2014 the BC Court of Appeal considered, for the first time, the meaning of the word "density" as it is used in Part 14 of the *Local Government Act*. The question arose following a challenge to the issuance

of a heritage alteration permit varying lot coverage. Because heritage alteration permits, like development variance permits and most development permits, cannot be used to vary density, our Province's apex court had to first consider the meaning of "density," in order to decide whether or not the impugned heritage alteration permit in fact varied density. To paraphrase the definition provided in the *Local Government Act* itself, "density means ... density". The Court, unsurprisingly, found this definition "most unhelpful". But with the greatest respect for the Court, the more closely one examines its reasons, the less helpful they become too. Indeed, on the facts before it, the Court's reasons might be taken as leaving the definition of "density" up to the local government exercising the power to regulate density in the first place. So, if you are the kind of person who lies awake pondering the definition of the word "density," your insomnia may not be cured anytime soon.

The next question section 479 raises: what is the meaning of the "use" of land? This is another important inquiry, because the answer defines the scope of the zoning power itself. But again, it's an unanswered quandary, with scant assistance from our superior courts, at least until recently. In another Court of Appeal decision canvassed in this newsletter, just months ago, the Court was sidetracked by a focus on the longstanding question of whether or not zoning bylaws can regulate "users" of land. But the case wasn't so much about the use/user debate as it was about the meaning of the word "use" itself, in section 479. More specifically, is a hotel subdivided into individual strata lots a different "use of land" than an un-subdivided hotel? The Court's answer seemed to be that if a municipal council decides these two things are different uses, then they are. In other words, the terms "density" and "use", so central to the zoning power, are, at least for now, largely left to be defined by the bodies exercising that power. Another way of saying this is that courts defer to a local government's own interpretation of the powers the Province has granted to it.

Unlike the undefined term "use" and the unhelpfully defined term "density", the meaning of the term "zoning bylaw" is much easier to pinpoint. The *Local Government Act* defines "zoning bylaw" as a bylaw under section 479, which as noted above is the section that authorizes bylaws regulating use and density, as well as the siting, size and dimension of buildings and other structures, and uses, and the location of uses on the land and within buildings, and the shape, size, dimensions and area of parcels that may be created by subdivision. If an official community plan designates development permit areas, a zoning bylaw can also include the guidelines that apply to those development permit areas, which guidelines are more often found in the official community plan itself.

Many bylaws styled "zoning bylaws" also include regulations other than those authorized by section 479, such as works and services standards under section 506, minimum parcel frontage rules under section 512, runoff control requirements under section 523, floodplain specifications under section 524, parking regulations under section 525, sign regulations under section 526, and landscape and screening rules under section 527. This is all fine, as long as there is some authority for the regulation in question, but in answering the existential "what is a zoning bylaw" question, nothing authorized by provisions other than section 479 counts. Why is this distinction between zoning bylaw regulations, and all other kinds of regulations that commonly appear in a bylaw that is called a zoning bylaw, important?

One reason is that development variance permits, which can be used to tweak many of the kinds of regulations that often appear in a zoning bylaw (other than use and density), cannot be used to vary a flood plain specification under section 524. So just because flood

plain specifications are included in a bylaw that says "zoning bylaw" on the front page, doesn't mean a development variance permit is the mechanism for authorizing a variance to those specifications. The proper approach is an exemption under section 524(7) of the Act, and unlike in the case of a development variance permit, there's no need to give notice in advance of a council or board authorizing such an exemption.

Similarly, if an applicant for subdivision requires an exemption from a minimum parcel frontage rule under section 512 of the *Local Government Act*, that application need not be dealt with as if it were a development variance permit, and unlike development variance permits, the authority to exempt can be delegated (but only to an approving officer).

A final reason why attention to the statutory definition of a "zoning bylaw" is more than just a matter of semantics relates to public hearings, or more specifically, how to avoid them. Most local government planners, whether by instinct or indoctrination, acknowledge the value of public participation in community decision-making. Nevertheless, for many working in BC, "public hearing" is a four-letter word. The spectre of a public hearing on a contentious land use management decision is enough to provoke anxiety, frustration and ire in even the most hardened practitioners, not to mention their colleagues in the clerk's ("legislative services") department. Pre-hearing notice requirements can be finicky and the event itself sometimes fractious, while in its aftermath planners may be required to navigate the murky waters of post-hearing representations, and in some cases litigation over any number of alleged procedural missteps. And all of this for what might not actually result in better plan. Some might even argue most of the good planning work is over long before the hearing.

For planners who might have been harbouring clandestine hopes for relief from public hearings in light of the health risks associated with public gatherings these days, the recent authorization of hearings by "electronic or other means" is perhaps a welcome development, although one that may not go far enough. The sharper focus the pandemic has put on the longstanding option for waiver of hearings where a proposed zoning bylaw is consistent with an official community plan probably isn't a bad thing either. But keep in mind that where a public hearing is being held prior to the adoption of a "zoning bylaw" amendment, the hearing is only required if the amendment in question is to a provision of the bylaw authorized by section 479 of the *Local Government Act*.

So a bylaw amendment to reduce the required number of parking stalls so that an owner of land can create an outdoor seating area, or to add a landscaping requirement to screen that seating area from adjacent uses, probably doesn't require a public hearing, even if the provisions being amended are contained within a bylaw that includes the words "zoning bylaw" in its title. And remember that even for true zoning bylaw provisions, if there is no change to use or density (whatever those words mean), a bylaw amendment might not even be required, and so again, the statutory obligation to provide an opportunity for the public to make representations on the bylaw between first and third readings does not apply.

None of the above should be taken to suggest that public engagement is not important, meaningful or worthwhile, but in many cases it can occur in a forum other than the procedural minefield known as a "public hearing". Pandemic or not, that should be a compelling reason to consider three existential questions before proceeding with your next "zoning bylaw" amendment: what is use, what is density, and what is a zoning bylaw?

Guy Patterson ✍

Former Conservation Officer Wins Appeal Five Years after Discharge for Insubordination

Employers sometimes face litigation from self-represented employees who pursue complaints in multiple forums. The amount of paper this involves can be overwhelming, and it may be tempting to disregard some of it. In Casavant v. BC Labour Relations Board*, 2020 BCCA 159, the Court of Appeal recently issued a decision that emphasizes the care employers (and their lawyers) must take in these circumstances.*

Mr. Casavant was a conservation officer and member of the BCGEU. In 2015, he was suspended and transferred after refusing an order to kill two bear cubs. His union grieved, then signed a settlement agreement with the employer. Mr. Casavant also signed the settlement. The grievances were withdrawn. Mr. Casavant later applied to overturn the settlement, independently of his union. An arbitrator refused to reopen the settlement.

Mr. Casavant filed two appeals at the Labour Relations Board, both unsuccessful, and a judicial review application in the Supreme Court of British Columbia, which was also unsuccessful. Before the Supreme Court, he argued, for the first time, that conservation officers are Special Provincial Constables, and that the allegations should have been investigated under the *Police Act* and the Special Provincial Constable Regulation. He alleged that the failure to do so meant the Labour Board and the arbitrator had no jurisdiction over his grievances and their rulings should be overturned. The Supreme Court found judicial review is not a forum for raising new arguments or introducing new evidence; it is a review of the record before the decision maker below. It therefore refused to consider the jurisdictional argument.

Mr. Casavant appealed again, to the British Columbia Court of Appeal. The Court of Appeal issued its decision on June 4, 2020, almost five years after Mr. Casavant's suspension. It found that although he had not made the jurisdictional argument before the arbitrator or the Board, he had referenced the issue in letters and meetings. For example, he copied the Board on letters to the Deputy Minister to the Premier which raised the issues under the *Police Act*. This was enough to place the argument on the record.

The Court of Appeal's decision was clearly influenced by Mr. Casavant's status as a self-represented litigant: "Mr. Casavant was self-represented.... He did not emphasize or frame the ... process as a foundational jurisdictional issue. Instead, he complained of an 'unfair and wrong process', raising the issue as but one of a myriad of complaints ...." The Court of Appeal paid careful attention to those complaints, and apparently expected his employer and union to do the same.

The decisions of the arbitrator and the board were declared a nullity, and the employer ordered to pay costs. The practical outcome was left to the parties to sort out: "the best that can be done in these circumstances is....to leave the parties to sort out the consequences of those declarations, if any, on the settlement agreement." Mr. Casavant has publicly stated that he has now retained counsel, to help him sort out those consequences.

Pam Costanzo

Community Charter, s. 184: Court-ordered Trust Variations

In West Vancouver (District) v. British Columbia (Attorney General)*, 2020 BCSC 966 the Supreme Court of British Columbia recently considered section 184 of the* Community Charter *for apparently the first time. This decision provides some insight into a statutory provision that seeks to balance the enduring objectives of terms of trust and the changes in public interest objectives that municipal councils are elected to pursue.*

For those unfamiliar with the provision, section 184 provides:

> 184 (1) All money that is held by a municipality and is subject to a trust must be invested in accordance with section 183 until it is required for the purposes of the trust.
>
> (2) If, in the opinion of a council, the terms or trusts imposed by a donor, settlor, transferor or will-maker are no longer in the best interests of the municipality, the council may apply to the Supreme Court for an order under subsection (3).
>
> (3) On an application under subsection (2), the Supreme Court may vary the terms or trusts as the court considers will better further both the intention of the donor, settlor, transferor or will-maker and the best interests of the municipality.
>
> (4) Section 87 [*discharge of trustee's duty*] of the *Trustee Act* applies to an order under subsection (3).

This provision was engaged in the *West Vancouver* case because in 1990 an owner of a 2.4 acre residential property had, through her will, given the property to the District of West Vancouver in trust on condition that it be used and maintained for public park purposes. In her will, the owner also expressed the wish that trees and natural growth on the property "be preserved as far as may be practical."

If the legislature's intention to expand the scope of possible variations is to be given effect, that inherent risk cannot be an impediment to any variation outside of existing trust law principles.

The District did not do much to develop the property into a park and, by 2017, the District's council had decided that the public interest would be better served if 50% of the property was sold for private development and the proceeds used to purchase waterfront land that the council had identified as better suited for park. The District applied to the Court to vary the terms of trust applicable to the property. The Court noted that the application is a mechanism by which the court may address a conflict between the terms of trusts and the best interests of the municipality. This conflict is one that presumably arises some time after the gift in trust is accepted. The Attorney General of British Columbia, who exercises an overseeing role for charitable purposes trusts, opposed the District's application claiming that the proposed

course of action was contrary to the purpose of the trust.

In deciding to allow the variation of the trust, the Court noted that although the variation was not consistent with the specific charitable purpose of the trust, the purchase of the waterfront lands to be used as park was consistent with the broader charitable purposes of the trust. The Court also acknowledged that it should be generally deferential to the District Council's assessment of the public interest. The Court accepted that the resources of the trust could be better allocated elsewhere in the park system and that since the creation of the trust, there had been a substantial increase in the cost of land in more popular waterfront locations. The variation would therefore further both the intention of the will-maker and the best interests of the municipality.

The Court also considered claims by the Attorney General that if section 184(3) of the *Community Charter* has a low threshold for allowing trust variations that would risk creating a chilling effect on charitable donations. The Court noted that the legislation enabled a municipality to apply to vary a trust in a manner unavailable to other trustees and held that:

> if the legislature's intention to expand the scope of possible variations is to be given effect, that inherent risk cannot be an impediment to any variation outside of existing trust law principles. The court should seek to strike an appropriate balance in demonstrating respect for the terms and trusts established by the settlor in the context of an expanded scope for variation.

Municipalities may be valued as trustees of property held for a charitable purpose because they are enduring corporations with a public purpose. However, municipalities are also political entities whose councils are elected by residents to pursue evolving public interest objectives. Section 184 of the *Community Charter* enables a council in certain circumstances to vary a trust to respond to changes in the public interest rather than be completely fettered by historic terms of trust.

Michael Moll

Family Status Discrimination in the Workplace

Two questions often asked by employers are whether an employer can implement work schedule changes if doing so will interfere with an employee's family obligations and does an employer have to accommodate an employee's childcare schedule? Under section 13 of the Human Rights Code, *an employer must not discriminate against a person regarding employment or any term or condition of employment because of various factors, including family status. Two recent cases in British Columbia affirm that employees must meet a fairly high standard to succeed on a family status discrimination complaint.*

The test for family status discrimination remains that set out in *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*, 2004 BCCA 260 . In this case, the court established a two-part test to determine whether an individual has been discriminated on the basis of family status. In order to succeed on a family status discrimination claim, the applicant must (1) establish that the employer changed a term or condition of their employment, and (2) that the change has seriously interfered with a substantial parental duty or obligation. In other words, the Court of Appeal in *Campbell River* found that general childcare duties will not fall within the scope of "family status" under the *Human Rights Code*. This means that employers in British Columbia are not required to accommodate employees who have regular childcare obligations. The *Campbell River* test was recently affirmed by *Envirocon Environmental Services ULC v. Suen*, 2019 BCCA 46.

In *Ziegler v. Pacific Blue Cross (No. 2)*, 2020 BCHRT 125, Ms. Ziegler alleged that her employer, Pacific Blue Cross, discriminated against her on the basis of family status by implementing a rotating shift system that would sometimes keep her at work until 5:00 pm. Prior to this change, Ms. Ziegler finished work by 4:30 pm. Ms. Ziegler informed Pacific Blue Cross that she could not work until 5:00 pm because she needed to pick up her son from a daycare in Langley by 6:00 pm, and with traffic it could take anywhere between 45 to 90 minutes to get from Pacific Blue Cross' Burnaby office to the daycare in Langley. Pacific Blue Cross suggested that Ms. Ziegler look at alternative daycare options and provided her with an extension of time to allow her to find suitable arrangements.

The Tribunal applied the *Campbell River* test and concluded that Pacific Blue Cross did not discriminate against Ms. Ziegler on the basis of family status. Although there was a change to the terms and conditions of Ms. Ziegler's employment initiated by Pacific Blue Cross, the change did not amount to a serious interference with a substantial parental duty or obligation. The Tribunal noted that Ms. Ziegler made insufficient efforts to ascertain whether she could arrange alternative daycare that would allow her to work the altered shift schedule.

Even more recently, the Tribunal applied the *Campbell River* test in *Tumber v. FlexiForce Canada*, 2020 BCHRT 132. In this case, Mr. Tumber's shift was changed from afternoons to mornings, which meant that he was sometimes unable to accompany his elderly parents to appointments. In applying the *Campbell River* test, the Tribunal concluded that there was no serious interference with a substantial family duty or obligation when Mr. Tumber's shift was changed. Further, Mr. Tumber had been offered an alternative position within the company that would allow him to continue working afternoon shifts, but he had declined.

These decisions re-affirm that general child and family care obligations will not fall within the scope of family status under section 13 of the *Human Rights Code*. Therefore, local government employers are not generally required to accommodate employees who experience conflicts between work and family obligations, unless there is some substantial parental or family obligation that is outside the normal challenges all parents face in balancing work and childcare. That being said, we recommend that employers ensure they have sufficient information to determine whether there is a substantial parental or family obligation before making a decision about whether to accept or deny an accommodation request in relation to childcare.

Sarah Strukoff

Commissioning Land Title Instruments

Local governments deal with a variety of land matters, such as buying or selling property or entering into land-specific agreements with property owners such as section 219 covenants or statutory right of ways. In many cases, for these agreements and documents to be fully effective, they must be submitted to the Land Title Office for registration on title to the affected land using specific forms, or instruments, such as a Form C for covenants and statutory right of ways. The Land Title Act *governs the form of* Land Title Act *instruments and, along with the Land title Survey Authority, imposes requirements on the execution of the instruments. Namely, such instruments must be witnessed and certified by an individual who qualifies as an "officer" under the* Land Title Act*, which serves to verify the signature and identity of the individual executing the document.*

Given the requirements around officer witnessing, organizations that regularly deal with land title instruments may find it helpful to have an employee that qualifies as an officer on staff. Who can be an officer? The *Land Title Act* dictates that an officer is a person before whom an affidavit may be sworn under the *Evidence Act*. Section 59 of the *Evidence Act* sets out the powers of a commissioner for taking affidavits, which, not surprisingly, includes the power to administer oaths and take affidavits, declarations and affirmations. Section 60 of the *Evidence Act* provides a list of individuals who are commissioners for taking affidavits in British Columbia because of their office or employment. This list includes practicing lawyers, notaries public, and perhaps most relevant to the reader, a local government corporate officer and that person's deputy. Individuals may also apply to be appointed by the Province as a commissioner for taking affidavits. Usually, these commissioner appointments are limited as to purpose, such as the witnessing of a particular person's signature, or the witnessing of signatures on a particular type of document and are limited to three years' duration, although they can be renewed.

Once an individual is in a position to act as an officer, it is important that they are aware of the specific requirements they must meet when witnessing a signature. Under sections 43 and 44 of the *Land Title Act*, in order to properly witness and certify a signature, an officer will:

- except in certain circumstances outlined below, meet with the signatory or signatories to the document in-person,

- if the signatory is signing on his or her own behalf, require the signatory to identify themself and acknowledge that he or she is the person named in the instrument,

- if the signatory is signing the document on behalf of a corporation, require the signatory to acknowledge that:

  o the individual is an authorized signatory of the corporation,

  o the individual was authorized by the corporation to execute the instrument,

o the corporation existed at the time the instrument was executed and is legally entitled to hold and dispose of land in British Columbia; and

- observe the individual sign the document.

By signing the instrument, the officer is certifying that the individual appeared before them, made the proper acknowledgements, and that they witnessed the individual sign the agreement.

Once an officer has signed the instrument, he or she must insert his or her professional capacity and address below their signature. Failure to include this information will lead the Land Title Office to reject the registration of the instrument. As a result, we recommend that officers obtain an ink stamp with their name, the designation "A Commissioner for Taking Affidavits for British Columbia" and the expiry date of appointment if time limited.

When an officer applies his or her signature, they are certifying that the signatory "appeared before" them. Does this mean that the signatory must physically appear before the officer when signing? The Court considered this question in *First Canadian Title Co. v. Law Society of British Columbia*, 2004 BCSC 197. In that case, an officer witnessed the execution of *Land Title Act* instruments via interactive videoconferencing. When reviewing the validity of the officer's certification, the Court held that any process permitting documents executed at one location to be sent to another location for completion would provide increased opportunities for fraud, and that, in order to satisfy the requirements associated with signing *Land Title Act* instruments, a signatory must physically appear before an officer while signing. As you may expect, the COVID-19 pandemic has led to in-person appearances being less feasible, and, in some case, impossible. As a result, the Land Title Survey Authority has amended the in-person signing requirement for affidavits used in support of Land Title Office applications by allowing British Columbia lawyers and notaries who are acting for one of the parties executing the document to witness signing using video technology following the procedures outlined in LTSA Practice Bulletin No. 01-20.

By signing the instrument,

the officer is certifying that

the individual appeared

before them, made the proper

acknowledgements, and that they

witnessed the individual

sign the agreement.

Local governments may benefit from having one or more staff members who qualify as officers under the *Land Title Act* who are able to witness the execution of *Land Title Act* instruments, but such employees should ensure they are well aware of the formalities associated with witnessing and execution in order to avoid issues with Land Title Office registration. If you have any questions about witnessing signatures, please call us.

Jordan Adam

Foul Ball!

In Rivers v. North Vancouver (District) , *2020 BCSC 1050, the Supreme Court of British Columbia dismissed a claim brought by an injured plaintiff against the District of North Vancouver (the "District"). In this case, the plaintiff suffered a serious head injury when he was struck by a foul ball at a baseball game played at Inter River Park. As a result, the plaintiff brought an action against many parties, including the District who owned the park. The plaintiff alleged the District failed to take reasonable steps to ensure his safety by not providing adequate protective fencing, not having warning signs of foul balls, not having the bleachers at a safer location, and not having protective netting installed over the bleachers.*

At the time the plaintiff suffered his injury, he was watching his son play on one of the two baseball diamonds at the park. The two baseball diamonds had a basic "back to back" layout, which the court held was consistent with the industry standard. This layout ensures that spectators sitting at one set of bleachers while watching a game on one diamond will have their backs completely turned to the action on the other diamond. In this case, the foul ball that struck the plaintiff came from a game that was being played on the other diamond.

In the context of providing spectator safety at baseball games, the court held that the standard of care generally has been to include the installation of protective fencing in appropriate areas to minimize the risk posed by foul balls leaving the field of play (*Dyke v. British Columbia Amateur Softball Associatio*n, 2005 BCSC 1422 at para. 13, aff'd 2008 BCCA8). In this case, the court found that the District did have protective fencing in appropriate areas and had met the standard of care required of a municipal occupier of a baseball diamond park. In coming to this conclusion, the court considered whether the District should have taken the extra steps as argued by the plaintiff. However, the court found that doing so would hold the District to a standard of near perfection. Rather, the District was only required to take reasonable steps to render the premises reasonably safe. Moreover, the court stated that even if such signs were used, they would not have prevented the injury to the plaintiff.

The court also considered the likelihood of harm and gravity of harm in assessing the evidence of foul balls leaving the field of play and landing in the area of bleachers on another diamond. The court found that the likelihood of a spectator being struck while seated in the south bleachers was small. And the risk of being injured even if struck was also small as balls at the point of strike have exhausted all momentum caused by the swing of the bat and are simply obeying the law of gravity in their downward trajectory. The court went on to state that "an ordinary person in the shoes of the plaintiff, using common sense, would have been aware of the risk of foul balls leaving the adjacent diamond and landing in the South Bleachers in these circumstances."

The court ultimately concluded that the incident was an accident and it did not amount to a breach of a duty of care or any actionable negligence.

Inder Biring

Freedom of Information: Reminders From a Recent OIPC Decision

A recent decision from the Office of the Information and Privacy Commissioner (OIPC) is worth a mention because it affirms existing principles, while recalling some key considerations.

Order F20-31, *Town of Gibsons (Re)*, is interesting because it reminds us that, although reports and other materials provided to council for consideration may be protected as "advice or recommendations" under the *Freedom of Information and Protection of Privacy Act* (FIPPA), related expert materials may not be so protected.

The Town had submitted staff reports and related material to council, for its consideration of a development permit application. This material was accompanied by reports prepared by "hydrogeological and geotechnical engineers". The OIPC adjudicator held that these other reports could not be withheld under section 13(1) as "advice or recommendations". He decided these reports qualified as "an environmental impact statement or similar information", and section 13(2)(f) says these kinds of material cannot be withheld as "advice or recommendations" under section 13(1).

Another useful reminder this decision offers is that you can help the OIPC reach the right decision by making sure your freedom of information decision file contains notes, for reference on appeal, about the evidence you will need for the appeal.

Another useful reminder this decision offers is that you can help the OIPC reach the right decision by making sure your freedom of information decision file contains notes, for reference on appeal, about the evidence you will need for the appeal. Let me explain why.

The applicant for access to the reports had relied on an Ontario decision to argue that records cannot contain "advice or recommendations" unless there is evidence that they are connected "to a deliberative process". The adjudicator accepted the Town's evidence that the staff reports were linked to a deliberative process of the Town, making them "advice or recommendations developed by or for" the Town. It is not clear if the adjudicator intended to formally endorse the Ontario requirement for a "deliberative process". If he did mean to suggest there must be evidence of a link with a "deliberative process", that view is very hard to square with numerous other OIPC decisions that do not require this link. Still, where section 13(1) is in play, it would help you to submit evidence—certainly where material goes to your council or board for deliberation on an application or any other matter requiring deliberation—that the material is linked to that deliberation.

This decision also reminds us that the OIPC will want to see evidence that you have considered disclosing records even though you could withhold them under section 13(1). Like many other FIPPA exemptions from disclosure—though not all of them: some are mandatory because they say you "must" refuse disclosure—

section 13(1) says you "may" refuse to disclose records. This gives you discretion to disclose records even though you could refuse to.

The adjudicator accepted the Town CAO's evidence that he had considered whether the Town should disclose the records even though they were exempt. The adjudicator acknowledged that his role was limited to assessing whether the CAO considered only relevant factors and concluded that the CAO had done that. This aspect of the decision is worth remembering because it is the latest of several recent decisions where the OIPC is looking for evidence that a discretion to disclose has been considered, and using only relevant, permissible, factors.

This aspect of the decision is worth remembering because it is the latest of several recent decisions where the OIPC is looking for evidence that a discretion to disclose has been considered, and using only relevant, permissible, factors.

This aspect of the decision underscores that, although the OIPC has always declined to substitute its own discretion for a public body's, when you are responding to an access request you should paper your file with evidence that you assessed whether to exercise your discretion under section 13(1) (or any other applicable discretionary exemption under FIPPA). Otherwise, you run the risk of an embarrassing decision, chastising you for failing to do your homework and sending it back to you for a do-over that could easily have been avoided.

David Loukidelis, Q.C. ✍

Miscellaneous Statutes: Did You Know?

Did you know that under section 40 of the Athletic Commissioner Act*, a bylaw enacted under section 59(1) of the* Community Charter *prohibiting a professional sports contest or exhibition is of no effect unless the bylaw was adopted before the event permit under the* Athletic Commissioner Act *was issued?*

Joe Scafe ✍

Look For Your Lawyers

Bill Buholzer and **Guy Patterson** will be presenting a planning and zoning law refresher online for the City Program at SFU Continuing Studies on October 6, 2020.

Sukhbir Manhas will be presenting a legal update session at the LGMA Corporate Officers Forum being held virtually on October 8-9.

CLEBC has just published the 2020 Edition of **Bill Buholzer's** book: *Local Government: A British Columbia Legal Handbook*. Copies are available for purchase at the CLEBC's online store.

On October 20, **Guy Patterson** will be presenting a webinar called Latecomer and Frontender Agreements for Approving Officers offered by the LGMA.

Ethan Plato has taken a leave of absence from Young, Anderson to take on a temporary role as a Policy Analyst at the Office of the Information and Privacy Commissioner. We look forward to Ethan rejoining the firm in August 2021.

The LGMA Approving Officers Workshop being held virtually on October 23 includes a legal update session presented by **Guy Patterson**.

Audio presentations by **Elizabeth Anderson** and **Michael Moll** will be part of the Justice Institute of BC's new online Bylaw Compliance, Enforcement & Investigative Skills 1 course.

The LGMA is offering an introduction to the role of approving officer as a statutory decision presented online by **Guy Patterson** on October 27.

Kathleen Higgins will be part of a panel discussing "the Resource Guide and Housing Agreements in general" at the BC Non-Profit Housing Association Conference being held in Vancouver on November 15-17.

Subject to COVID-19 restrictions Young, Anderson will be presenting its **Annual Local Government Law Seminar** on November 27, 2020 at the Fairmont Hotel Vancouver, 900 Georgia Street, Vancouver.

Bill Buholzer will be teaching a course on planning law for the Master of Community Planning program at Vancouver Island University beginning in January 2021.

STAY CONNECTED

COVID-19 – COVID-19 LEGAL UPDATES Go to **www.younganderson.ca** to access all the latest information that Young, Anderson has posted in relation to COVID-19.

If you are keen to receive client bulletins and updates to the firm blog by e-mail, go to **www.younganderson.ca** and click on the "**STAY CONNECTED**" button at the top of the webpage.