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The Land Conservancy Selling Heritage Properties to Pay Debts

It has been almost a year since The Land Conservancy of BC (TLC) announced that it would be seeking creditor protection. In October 2013 it obtained an order protecting it from creditors so that it could restructure, with the primary goal of selling many of its properties in order to pay back debts and mortgages that it could not meet.

The first properties slated for sale were the 7 heritage properties held by TLC; properties that were donated to TLC or bought through campaigns to permanently protect the cultural value of the property. These properties include the Binning House in West Vancouver (a National Historic Site), the Abkhazi Gardens in Victoria, Monk's Point Park in Tofino, the Hardy Mountain Doukhobour Village near Grand Forks, and the Historic Joy Kogawa House in Vancouver. In addition, TLC has grouped its environmental conservation properties into primary conservation lands, which it plans to retain in the near term, and secondary conservation lands, which have been earmarked for private sale. These properties include the Eagle Bluffs burrowing owl property in the Okanagan, and the wildwood eco-forestry site south of Nanaimo. A full list is included below, with properties having a higher market value listed as higher priority for sale.

TLC has advised that it needs to sell most of these properties in order to continue as an entity. TLC's continuation will be of particular concern to local governments that have relied on conservation covenants held by TLC against private lands, the enforceability of which will be in serious question if TLC is unable to continue financially.

The financial cost of TLC's continued operation, however, risks costing TLC its credibility and goodwill if it comes at the expense of the preservation of properties that donors to TLC care deeply about. Many properties, like Monk's Point Park and the Binning House, were donated to TLC at no cost, for the purpose of their preservation, rather than being sold to benefit their owner's families and beneficiaries. Other properties were the subject of significant donation drives and campaigns that saw individual donors and supporters making significant financial donations for the preservation of specific properties which are now on the auction block.

To date, TLC's first attempt to sell one of its heritage homes was met by stiff opposition from the heritage community and the District of West Vancouver, who, with the assistance of the Attorney General of BC, established that the Binning House was donated to TLC for the specific charitable purpose of its preservation for heritage and educational purposes. While TLC was held to have legal ownership of the property, the beneficial ownership was found

to have been dedicated to the charitable purpose of the preservation of the house for the benefit of the public. That decision has been appealed by UBC, who, as the main beneficiary of the Binnings, argues that TLC never properly obtained the Binning House under Jessie Binning's Will. The appeal will be heard in early June, but regardless of the result, it has signaled to TLC that the sale of properties to private owners that were donated or obtained for the charitable purpose of preserving the property for the benefit of the public is far more complex than an ordinary corporate creditor protection proceeding. In the case of the Binning House, if the lower court judgment is upheld, the house will likely only be transferable to another charitable entity (or local government) to preserve it for the same purposes.

In this regard, it is worth noting that most BC local governments are recognized by the Canada Revenue Agency as having charitable status, which allows them to provide charitable tax receipts for property donations and contributions made for public heritage and conservation purposes.

Since the Binning House decision, TLC has accepted offers for sale of the Eagle Bluffs, the Keating Farm Estate near Duncan, and Lot 2 of the Abkhazi Gardens, all of which were subject to court approval. Court orders have approved the sale of the Eagle Bluffs to the society already operating on the site to protect burrowing owls, and the Keating Farm has been sold to private purchasers at market price who wish to, but are not obliged to, maintain the farm as an operating organic farm. The City of Victoria has opposed the sale of part of the Abkhazi Gardens and the matter is still to be heard in court.

Local governments with heritage or conservation properties held by TLC, who wish to see those properties continue to be preserved for the benefit of the public, would do well to reach out to members of their community with knowledge of the circumstances of TLC's acquisition of the property to determine if there is any basis for a determination similar to that made in the case of the Binning House, in order to prevent its private sale. It should not be assumed that TLC has access to, or is even aware of, this important information, which may critically affect whether the property is subject to a charitable trust that would restrict its sale for purely private purposes. Local governments may also wish to consider making offers to purchase these properties; if a trust exists, the value of the property will be negligible, and if not, TLC has signaled that it is still willing to consider offers that may be below market value, but that will preserve TLC's mandate to preserve these special places forever, for

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everyone. The creditor protection process for approval of these sales can move very quickly, and local governments must be pro-active if they wish to have a voice in the process.

HERITAGE PROPERTIES
Abkhazi Garden
Binning House
Hardy Mountain Doukhobour Village
Keating Farm Estate
Joy Kogawa House
Monk's Point
Ross Bay Villa
SECONDARY CONSERVATION LANDS
Abkhazi Lot #2
Chemainus River
Clearwater
Cowichan River Cabin-Pearson College
Cowichan River
Cusheon Cove
Eagle Bluff
Kindwood
Madrona Farm
Malby Lake
Nimpo Lake
Qualicum Bat House
Sechelt Lands
Sooke Potholes
Squitty Bay
Todd Road
Wildwood

Francesca Marzari ✍

***Francesca Marzari** was counsel for the District of West Vancouver in the Binning House sale proceedings, and immensely enjoys her office view of B. C. Binning's mosaic work on the top of the former BC Hydro building in downtown Vancouver.*

Bill 17: Sweeping Changes to Ministerial Approval Requirements and Land Use Contracts

On March 10, 2014, the Attorney General and Minister of Justice introduced Bill 17, the Miscellaneous Statutes Amendment Act, *2014, in the Legislature. Despite its nondescript name, the Bill in its current form proposes to amend sections of the* Local Government Act, *the* Community Charter, *and the* Vancouver Charter. *If passed (and it is likely to have been passed at the time of publication of this article), many ministerial approvals for regional district land use planning and development bylaws will no longer be required, unless each individual minister takes steps to enact regulations to maintain their powers over these functions. The Bill also proposes to terminate existing land use contracts.*

The Bill proposes changes to four major categories of matters affecting local governments: soil removal and deposit bylaws; regional district bylaws under Part 26 of the LGA; development cost charge bylaws; and land use contracts.

Soil Removal & Deposit Bylaws

The Bill proposes to repeal Section 195(3) of the *Community Charter* and section 723(7) of the *Local Government Act.* These sections require local governments to seek the approval of the Minister of Community, Sport and Cultural Development when enacting bylaws that impose fees in relation to soil removal and deposit. This approval will no longer be necessary.

However, ministerial approval from the Minister of Energy, Mines and Petroleum Resources will still be required for bylaws that prohibit soil deposit and removal. Approval of the Minister of Environment will continue to be required for bylaws that reference soil quality or contamination.

Part 26 Regional District Bylaws

Similar changes will be made to Part 26 of the *Local Government Act*, which deals with Planning and Land Use Management. Sections 882(4), (6)(b) and (7), and 913, which require ministerial approval in relation to adoption or amendment of official community plans, zoning bylaws, subdivision servicing bylaws, temporary use permit bylaws and land use contract amendment bylaws, will be repealed, effectively removing the approval requirement. A new section 873.2 is being added, however, which will enable the Minister of Community, Sport and Cultural Development to establish policy guidelines to govern the content and the process of developing and adopting the above types of bylaws that currently require ministerial approval. (Land use contract termination bylaws, also provided for in Bill 17, are not included.) A new section 874.1 would also allow the Minister of Community, Sport and Cultural Development to make regulations that would continue the requirement for ministerial approval of these bylaws in specific cases. This reverses the current situation, which requires ministerial approval of all these bylaws unless a regulation exempts them from approval. Section 938(3.1) will be amended in a similar fashion. The request for the approval of the Minister of Transportation and Infrastructure before the adoption of a regional district bylaw establishing subdivision servicing requirements for rural areas will be removed, unless the Minister enacts a regulation to require approval in a specific case or area.

Under Part 26 and the *Transportation Act*, ministerial approvals will still be required with respect to the following:

- prohibition or restriction of the use of land for a farm business in a farming area designated by regulation (ss. 903(5) and 917(3); Minister of Agriculture); and
- development near controlled access highways (s. 924(2) and s. 930(4) and s. 52(3) of the *Transportation Act*; Minister of Transportation and Infrastructure).

Bill 17 does not affect the requirement for the approval of development cost charge bylaws by the Inspector of Municipalities.

DCC Bylaws and In-stream Applications

Bill 17 also expands the types of “in-stream” applications that are exempt (for one year) from amended or replaced development cost charge bylaws to include development permit applications and zoning amendment applications. Under the current legislation, only subdivision applications and building

permit applications enjoy such protections. The new section 937.001 proposed in Bill 17 would require a developer to submit a development permit application plus the applicable fee, or a rezoning application and applicable fee, in accordance with the procedures set out in the local government's s. 895 (development application procedures) bylaw, to qualify for exemption from a new DCC bylaw or rate. The application and fee must be submitted to the "designated local government officer", which refers to an officer designated in the local government's officer bylaw or, in the absence of such a designation, the corporate officer. Like the 2011 amendments dealing with subdivision and building permit applications, this reference may result in developers who are aware of an upcoming DCC increase attempting to file their development permit applications with the corporate officer, since officer bylaws rarely bestow an officer designation on the planning officials who typically receive development permit applications.

Land Use Contracts

Bill 17 also proposes to terminate all existing land use contracts on June 30, 2024. Local governments are required to have replacement zoning in place for the affected lands by June 30, 2022, and to advise all owners in their jurisdiction whose land is subject to a land use contract that this contract will be coming to an end and that zoning regulations will begin to apply. This will give owners who have not yet "built out" the projects authorized by their land use contract about ten years to do so before the general termination occurs.

The changes will also allow local governments to unilaterally terminate any land use contract before 2024 by adopting a bylaw under new enabling provisions before June 30, 2022. A land use contract termination bylaw will require a public hearing with the usual public notification, and cannot be adopted unless zoning regulations have been adopted for the land in question. The "in force" date of such a bylaw must be at least one year after the adoption date. Owners will also be able to apply to the board of variance within 6 months of the adoption of such a bylaw, on grounds of hardship, to extend the "in force" date of the bylaw to an even later date (but not later than June 30, 2024). Local governments will have to file notice of these bylaws in the Land Title Office, and provide individual notices to affected owners.

The changes will allow local governments to unilaterally terminate any land use contract before 2024

Related amendments include changes to Section 911 of the *Local Government Act* to afford lawful non-conforming status to development that occurred under the terms of a land use contract but that does not conform to a zoning bylaw. Section 914 is also being amended to make the "no compensation" rule applicable to a local government bylaw that unilaterally terminates a land use contract. The existing land use contract amendment and discharge provisions in s. 930 will continue in effect alongside the new unilateral termination provisions.

Elizabeth Anderson ✍

***Elizabeth Anderson** has a pedigree in municipal law, with knowledge of many miscellaneous matters.*

Judicial Interference in Matters of Municipal Policy

*In a recent municipal decision (*Seanic Canada Inc. v. St. John's (City) *2014 NLTD(G) 7), the Newfoundland Supreme Court held that, in voting on a discretionary rezoning application, a city councillor was not entitled to follow the views of his supporters amongst the electorate. The Court found:*

> *"The evidence satisfies me that [the councillor voted with a closed mind]. In this case, the situation is more troubling since, in my assessment, the [councillor's] mind was closed primarily because of the opposition of those who elected him and not because of legitimate planning considerations ... traffic, safety and amenities."* [para 69]

In the leading case on this issue, *Save Richmond Farmland Association v. Richmond*, a case arising from BC and decided by the Supreme Court of Canada in 1990 (see case summary on opposite page), various judges were split as the case proceeded from the British Columbia Supreme Court to the Court of Appeal and on to the Supreme Court of Canada. Along the way, 8 judges held that, even on broad planning policy questions, councillors may not vote with a closed mind or a decided point of view. 5 judges held otherwise.

The latter judges distinguished broad planning policies (e.g. whether land should be rezoned, say, from agriculture to residential) from specific quasi-judicial decisions (e.g. a licensing refusal or a remedial action order), finding that broad policy decisions are highly political and legislative in nature, while licensing and remedial action orders are quasi-judicial and specific to a particular instance. It would be wrong to refuse a business license based solely on popular sentiment, but that is not so clear in a decision to refuse a rezoning where, for example, the issue is agricultural land retention versus urban sprawl, even in a site specific application.

These types of court decisions are troubling because they cross a line between judicial decisions and political decisions.

These types of court decisions are troubling because they cross a line between judicial decisions and political decisions. For example, a majority may be elected to council on an issue of not allowing a particular shopping centre to be rezoned. They may defeat the candidates running for office who were in favour of the shopping centre, only to find their votes disqualified because the court finds they have a closed mind. Those who were elected in the minority would find their pro-shopping centre votes sufficient to ultimately form the majority, solely because of a judicial finding of bias disqualifying the democratically determined policy position of the majority of council.

This type of attack on the validity of a bylaw is particularly troubling given that the councillor

in question in Newfoundland expressed concerns about traffic, the steepness of the terrain, the safety of seniors in the proposed project, and the proliferation of senior's projects in the concentrated area absent services and amenities focused on seniors. The councillor had stated that he would not vote for the rezoning and felt it was "just crazy", but he would vote for it if residents were in favour of it. This seems to be a normal and well-balanced approach, in which he made up his mind based on his reading of the position of residents in his community.

This type of judicial interference in the political policy realm should not be welcome unless some constitutional *Charter* right has been breached. The ordinary rules as to common law bias relating to decision-making with an open mind should be limited to quasi-judicial decisions of elected local government politicians and not applied to democratically determined legislative choices.

Ray Young, Q.C. ✍

Ray Young *was counsel for the City of Richmond in the Save Richmond Farmland case and knows a thing or two about apprehension of bias, conflict of interest, and appearing before the Supreme Court of Canada.*

The seminal cases of *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 and *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213 were decided by the Supreme Court of Canada in late 1990. Both cases remain the leading cases on reasonable apprehension of bias on the part of a municipal councillor.

In *Save Richmond Farmland*, a councillor who campaigned for re-election on a platform favouring residential development of certain agricultural lands was reported to have stated publicly that he would not change his mind regardless of what was said at the public hearing. In a subsequent statement he said that he favoured the rezoning and that it would take something significant to change his mind. During the public hearing, objections were raised to the councillor's continued participation on the grounds that he had predetermined the issue. The councillor subsequently participated in the vote, which passed by a five-to-four margin. In considering whether the councillor should have been disqualified, the Court concluded that a member of council is not disqualified by reason of his or her bias unless he or she has prejudged the matter to be decided to the extent that he or she is no longer capable of being persuaded. The Court considered whether the councillor in fact had a closed mind, and came to the conclusion that he had not reached a final opinion which could not have been dislodged, and accordingly, he was not disqualified for bias.

In the companion case, *Old St. Boniface*, the Court determined that the appropriate test to be applied for disqualification on the basis of bias was whether a council member was no longer capable of persuasion. A party seeking disqualification on the basis of prejudgment must establish that any representations at odds with the councillor's view would be ineffective and futile.

Capital Procurement in Rossland: The Auditor General Weighs In

Since its establishment several years ago, the office of the Auditor General for Local Government has initiated several audit projects, including an audit of six local governments' capital procurement and asset management programs. As announced in her 2014/15 to 2016/17 Annual Service Plan, AGLG Basia Ruta has separated out for earlier reporting her audit of the City of Rossland, and has also separated her report on Rossland's capital procurement practices from her report on asset management, which will be issued later this year. The reason for the special treatment: her conclusion that capital procurement matters in Rossland involve "serious unresolved issues … that require urgent and prompt steps by the City". The AGLG has concurrently released the first of a series of "Perspectives" documents, entitled "Oversight of Capital Project Planning and Procurement", the contents of which are obviously geared to some of the deficiencies that are described in the first Rossland report. Both of the documents mentioned in this commentary can be accessed on the AGLG website, and have likely already been perused by most senior local government staff and many elected officials in the province.

The nub of the AGLG's findings with regard to capital procurement in Rossland is that the City is not immune to the "value for money" problems in procurement that plague the federal government (think: pretty much any Department of National Defence equipment procurement over the last while, beginning with those British nuclear submarines), the provincial government (think: fast ferries, Coquihalla Highway construction, a certain high-school graduate report on the Finnish teacher education system, etc.), and the private sector (think: Aquilini Investment Group's procurement of 2013/14 coaching services for the Vancouver Canucks).

In particular, Rossland is found to have failed to obtain value for money in two projects: a $1.2M arena complex roof replacement and a $7.2M downtown revitalization project. Neither does the City enjoy any special protection from the types of unethical internal practices that have embarrassed the federal government (think: Senate expense allowances, sponsorship program, etc.), the provincial government (think: BC Rail privatization, Portland Hotel Society, etc.), and the private sector (think: mortgage-backed securities, General Motors ignition switches, etc.).

Specifically, the City was ill-served by a building official who, placed in charge of the arena roof project, awarded a $28,500 contract, without tender, to a contracting firm owned by that same building official, and eventually authorized payment of more than $180,000 to this contractor, including payment for work that was not properly done. The downtown revitalization project drew adverse comments regarding a possible post-employment conflict of interest for a former City employee, failure to follow public tendering policies, and

inadequate project administration practices, including payments to suppliers without written contracts or change orders in place.

The fact that spectacularly more costly (to the taxpayer) procurement boondoggles can be found in the reports of the federal and provincial Auditors-General shouldn't divert the attention of local government officials in BC from the real problems that can arise in local capital procurement, or from the prescriptions that the AGLG offers for curing them. The prescriptions are voluminous. The "Perspectives" document on capital procurement, running to 40 pages, deals only with oversight of the procurement process by councils and regional boards, in turn the topic of only one of several recommendations that the AGLG makes regarding the Rossland situation (others address conflict of interest, documentation, the role of the finance department, payment processes, project management, staff capacity and leadership).

The City of Rossland has issued a feisty media release that suggests BC taxpayers may be entitled to a "value for money" audit of the AGLG's office, citing the amount of civic staff time that had to be allotted to servicing the office's audit information requirements. The release, and the AGLG's own report, indicate that the City has already taken steps to address her recommendations before issuing its "sauce for the goose" message to the media.

Two aspects of the AGLG's Rossland report are likely to particularly frustrate seasoned local government officials. One is the AGLG's embrace of MBA-speak in describing the steps in the ideal procurement process that Rossland should have followed, and in particular the presentation to Council of a "business case" for the projects being undertaken. This language appears to come from the same source as the reference to citizens and taxpayers as "clients" or "customers" in recent municipal plans and reports, a description that many public servants tune out because they add nothing to the role of local governments providing public goods and services. If a true "business case" could be made for anything that a local government is considering doing, the business community would already have done it. It turns out, however, that a "business case" is simply a presentation of project scope, schedule, and budget, with details on a recommended procurement approach and project management structure and performance measures to assist in later evaluation. In other words, it's only the jargon that doesn't resonate with many experienced public sector decision-makers at the municipal level, but the message is well accepted.

The AGLG's emphasis on the importance of staff competence and leadership ability may be a source of frustration as well. She notes the absence of a full-time Rossland CAO during the period under audit and the fact that the acting CAO was handling up to three other senior management jobs as well, and queries the capacity (not the competence) of Rossland's "small core of senior staff". Municipal councils in BC are notoriously under pressure from business lobbies, newspaper columnists and taxpayers to keep costs under control – the pressure that led to the establishment of the AGLG's office in the first place – and (unlike the federal and provincial governments) local governments are not allowed to run annual deficits. When municipal revenues shrink for whatever reason, salary costs are usually the easiest to trim to keep the budget in balance. It takes a particularly courageous council to stand up to those pressures in the interests of attracting and retaining well-qualified, experienced staff to operate and administer local programs and projects.

Bill Buholzer ✍

Bill Buholzer *is the author of other valuable (though perhaps less opinionated) texts and books, such as BC Planning Law and Practice (Butterworths), Local Government in British Columbia (CLE) and the Planning and Zoning volume of Halsbury's Law of Canada.*

Lessons Learned: Expropriation of a Statutory Right of Way

On March 27th the BC Supreme Court released its decision on Atco Lumber Ltd. v. Kootenay Boundary (Regional District)*, 2014 BCSC 524.*

The Regional District had expropriated two statutory rights of way over Atco's land: one for a water line and one for access over Atco's existing private road to the Regional District's water treatment plant on adjacent land. The Court agreed with the Regional District that these two expropriations could be combined into a single expropriation.

Part of the Court decision involved the Minister's refusal to grant Atco's request for an inquiry under the *Expropriation Act* into the access SRW, since the Minister considered the expropriation of the access SRW to be for a "linear development", as that term is defined in the *Act*. The Court considered the scope of linear developments as well as the basis for the decision given by the Minister and, in the end, the Court concluded:

> "It would have been preferable for the Minister to have provided reasons for her decision ... [However] I am able to discern the "why" of the Minister's decision ... Although the Minister's decision is not necessarily one I would have reached had I been the decision-maker, I conclude that the Minister's decision is a possible and acceptable outcome."

The Court next considered whether Atco was too late to challenge the validity of the expropriation. The *Expropriation Act* prohibits proceeding after the SRW "vests" in the expropriating body. The Regional District had filed the vesting notice in the Land Title Office on March 22, 2013, but, due to difficulties with electronic filing, the Regional District needed to submit a corrective filing, which it did on April 11 – the same day Atco commenced the court proceeding. On April 18, the Land Title Office confirmed the corrected filing was acceptable and the statutory rights of way were shown registered as of March 22. However, the Court ruled that the resulting ambiguity should be resolved in favour of Atco, and concluded that its court challenge was not out of time.

Finally, Atco argued – and the Court agreed – that the statutory rights of way were invalid because they attempted to impose positive obligations on Atco and future land owners. The Court confirmed that, unlike a covenant under section 219 of the *Land Title Act*, a statutory right of way, being a type of easement, could not impose a positive obligation on the "servient tenement" (i.e. the burdened land). In this case, the SRWs required Atco, and future owners, to indemnify the Regional District, to reimburse the Regional District for its costs of correcting owner breaches, to execute further documents, etc. The Court also found that the right of the Regional District to use Atco's road, without any obligation on the Regional District to repair it, placed a positive obligation on Atco to repair the road. In the end, the expropriation notice was set aside.

This case is a useful reminder to local governments that positive obligations in statutory rights of way will only be binding on the land owner who signs the SRW and not on future owners. If a positive obligation on the land owner is needed, the SRW agreement should also include a 219 covenant, since section 219 of the *Land Title Act* expressly confirms that a covenant "may be of negative or positive nature".

Patricia Kendall ✍

***Pat Kendall** is a solicitor with 28 years of practice and experience. She has drafted more covenants and statutory rights of ways than the entire population of South Pender Island.*

Medical Marihuana Update

The Marihuana for Medical Purposes Regulation *replaced the* Federal Marihuana Medical Access Regulations *on April 1, 2014, and was intended to fundamentally change the regulatory regime in relation to medical marihuana.*

Under the old regulatory regime, where an individual had obtained an Authorization to Possess Marihuana for Medical Purposes, Health Canada either issued that individual a personal use production license to grow marihuana for his own medical purposes, or issued a designated person production license to another individual to grow marihuana for the individual that was authorized to possess marihuana for medical purposes. With the coming in to force of the MMPR on April 1, 2014, all personal use production licenses and designated person production licenses under the MMAR came to an end, and all production and distribution of medical marihuana is now to be done by facilities licensed by Health Canada under the MMPR.

In a previous paper and earlier presentations on this issue, we cautioned that there may be a lack of sufficient provision in the MMPR for the transition period between when personal use production licenses and designated person production licenses under the MMAR came to an end and when medical marihuana production facilities licensed under the MMPR were in a position to supply the needed amounts and strains of medical marihuana. In this regard, we raised the possibility that there might be legal challenges to the MMPR by users of medical marihuana arguing that their rights under section 7 of the *Canadian Charter of Rights and Freedoms*, the right to life, liberty and security of the person, are violated by the MMPR on the basis that it failed to provide practical access to medical marihuana.

There are now a number of Charter challenges to the MMPR before both the Federal Court of Canada and the British Columbia Supreme Court. In one of those cases, *Allard et al. v. Her Majesty the Queen in Right of Canada*, the Federal Court held that there was a serious issue to be tried as to the constitutional validity of the MMPR, and granted the four plaintiffs in that case, each of whom were authorized to grow and use medical marihuana under the MMAR, an interim injunction exempting them from the application of those portions of the MMPR that are inconsistent with the MMAR. The Federal Court's decision in this case is limited to these four particular plaintiffs and was based on the particular evidence before the Court. It does not provide an across-the-board exemption to every individual who was authorized to grow and use medical marihuana under the MMAR from the coming in to force of the MMPR. That being said, the case does set a precedent for other individuals who were authorized to grow and use medical marihuana under the MMAR to bring similar legal proceedings to allow them to continue to produce their own medical marihuana until there has been a final decision by the courts as to the constitutionality of the MMPR.

For local governments, the Federal Court's decision in *Allard* introduces a degree of uncertainty into the manner in which local governments address issues relating to medical marihuana production under the MMAR. In particular, local governments must be cautious when enforcing their bylaws in relation to such operations, as enforcement may trigger individuals to bring legal challenges similar to the one in *Allard* in order to obtain an injunction allowing them to continue to operate under the MMAR until the courts address the constitutionality of the MMPR.

Sukh Manhas ✍

***Sukh Manhas** has a great deal of knowledge in the areas of marihuana regulation and control, though he swears he has never inhaled.*

Accommodation of Childcare Obligations

Two recent arbitration decisions deal with the issue of whether employers are required to accommodate employees who have childcare obligations that conflict with their workplace obligations. In BC, the Court of Appeal found that general childcare duties will not fall within the scope of "family status" under the Human Rights Code*. This means that employers in BC are not required to accommodate employees who have regular childcare obligations. There has to be a serious interference with a substantial parental or other family duty or obligation in order to trigger the requirement to accommodate an employee.*

The Canadian Human Rights Tribunal, on the other hand, has determined that federal employers do have an obligation to accommodate conflicts that result from regular childcare obligations. The decisions in these two arbitrations signal that arbitrators in other provinces are taking this broader view in assessing employee requests for accommodation based on childcare issues.

In an arbitration from Alberta, the employee was a single mother of two young children. She was employed as a welder and was required to work rotating night and day shifts. On the weeks she was required to work nights, she had to either look after her children herself and sleep only a few hours each day before her night shift began, or spend extra money for additional childcare while she slept. The employee was also troubled by the idea of her children spending over 20 hours per day in the care of a third party for seven straight days, if she sent them to daycare while she slept during the day. The fathers of her children were not involved in the children's lives and the employee had no extended family living nearby.

The employee asked to work exclusively day shifts and found another employee who was prepared to work exclusively night shifts. The employer rejected her request for accommodation. The employer argued that the employee had to prove that she had taken all reasonable steps to "self-accommodate", such as pursuing legal remedies against the children's fathers for financial support, before claiming discrimination.

The arbitrator concluded that the employer was required to accommodate the employee by permitting her to work straight day shifts. The adverse effects for the employee (i.e., going sleepless or spending additional money for childcare while she slept) were directly the result of the employer's rule requiring her to work night shifts and her responsibilities as a single mother to care for her children. The arbitrator also noted that the employee was working a non-traditional job (female welder) on a non-traditional shift (nights) in a non-traditional pattern (rotating), and these were not the circumstances of "ordinary" working parents.

This also was not a case about self-accommodation. The employee had undertaken efforts to try to reconcile her family obligations with her work obligations before

seeking accommodation from the employer. The employer's rule requiring welders to work night shifts had the effect of imposing a burden on the employee due to her family status, and limited her ability to fully participate in the workforce. The Union established a prima facie case of discrimination on the basis of family status. Since the employer called no evidence to justify the rule requiring the employee to work rotating shifts, it did not establish that the rule was a bona fide occupational requirement.

The Canadian Human Rights Tribunal has determined that federal employers do have an obligation to accommodate conflicts that result from regular childcare obligations.

In another arbitration from Manitoba, an employee requested flexibility in his start and finish times to accommodate his joint custody arrangements. The arbitrator noted the different approaches to this issue in the BC and federal cases. In the end, the arbitrator decided that there was no discrimination because the employee did not provide sufficient evidence to demonstrate that he could not make reasonable arrangements for his children's care. While the arbitrator found no discrimination, the arbitrator did conclude that the employer's refusal to change the employee's start and finish times was unreasonable in the circumstances. The collective agreement in this case did provide a "flexible hours of work" clause designed to assist employees in balancing work and home life. The arbitrator found that the employer's refusal of the employee's request was the result of a misapprehension that his job duties required him to start at a particular time and ordered the employer to grant the employee's request.

While the law in BC is still that employers are not required to accommodate conflicts resulting from general childcare issues, these cases illustrate the broader view taken by decision makers in other provinces in relation to requests for accommodation based on childcare obligations.

Carolyn MacEachern ✍

***Carolyn MacEachern** specializes in labour, employment, and human rights and knows how to juggle a tee-ball and an iphone.*

Estoppel and Municipal Bylaw Enforcement

The Supreme Court of Canada has now confirmed that the doctrine of estoppel will not constitute a defence in the context of a prosecution alleging breach of a zoning bylaw.

In *Immeubles Jacques Robitaille inc. v. Québec (City)*, 2014 SCC 34, the appellant company was the operator of a non-conforming parking lot in the City of Quebec. The company was convicted of a breach of the City's zoning bylaw in the Municipal Court where its argument, based on acquired rights (legal nonconforming use), was rejected as it was based on hearsay

evidence. In its appeal to the Superior Court, the company was successful on the basis of estoppel, but that decision was overturned in the Quebec Court of Appeal.

The company appealed to the Supreme Court of Canada on the issue of estoppel. The company based its argument on a number of actions of the City, including the payment of compensation by the City for the loss of some of the parking spaces as a result of road work, and the installation of a sign on the road allowance by the City acknowledging the existence of the parking lot. The company argued that, since estoppel could lead to an exercise of discretion to refuse relief in civil proceedings, it would be unfair if it could not be raised in penal proceedings to allow a judge to exercise a similar discretion.

While a municipality cannot be compelled to enforce its bylaws, it cannot grant citizens the right to a non-conforming use.

Justice Wagner, delivering the unanimous decision of the SCC, noted that promissory estoppel requires, first, a clear and unambiguous promise in order to induce a citizen to perform certain acts and, second, that the citizen must have relied on that promise and acted on it. He found, however, that the doctrine had no application to the enforcement of an express legislative provision.

After acknowledging that zoning bylaws are adopted in the public interest, the Court noted that, while a municipality cannot be compelled to enforce its bylaws, it cannot grant citizens the right to a non-conforming use. In the words of Justice Wagner:

> "the authorization by a municipal employee or elected official of a use that violates a provision of a by-law cannot create rights or oust the applicable standards set out in the by-law."

Justice Wagner also noted that the rejection of estoppel as a defence also applied to civil, as well as penal, proceedings to enforce a municipal bylaw.

The Court also rejected the argument that the possibility that a court might exercise its discretion in a civil proceeding (for injunctive relief) raises a reasonable doubt in a penal proceeding. The Court noted that while it might be an abuse of process, it was still open to a municipality to charge a bylaw offender where a court had refused relief in a civil proceeding. Justice Wagner noted that while estoppel would not provide a defence in proceedings to enforce a municipal bylaw, the appellant may have recourse by way of an action for damages if it relied on representations made by the City and suffered injury as a result of those representations.

Don Howieson ✍

***Don Howieson** is a former marathoner. Don qualified for the Moscow Olympics but was estopped from participating due to Canada's boycott of the Games.*

Look for your Lawyers

On May 6, **Carolyn MacEachern** presented an update on human resources issues at the Vancouver Island Chapter of the LGMA 2014 Annual Conference in Sidney.

On May 8, **Don Howieson** and **Elizabeth Anderson** presented a session entitled "Stories from the Trenches (and Furrows and Fields): Legal Issues in the Agricultural Land Reserve" at the Lower Mainland Local Government Association 2014 AGM and Conference in Whistler.

On May 9, **Bill Buholzer** presented a session entitled "Controlling Councillor Conduct" on the final day of the North Central Local Government Association AGM and Convention in Fort St John.

On May 9, **Carolyn MacEachern** and **Francesca Marzari** presented a session entitled "Aging populations, people with disabilities and homelessness: What Local Governments need to know about their regulatory powers and human rights" at the Lower Mainland Local Government Association 2014 AGM and Conference in Whistler.

Young Anderson was proud to be the Platinum Sponsor of the 2014 BC Land Summit, held in Vancouver from May 14-16. **Sukh Manhas** presented a pre-conference session on "Trends, Innovations, and Issues in Planning Law", and **Bill Buholzer** presented a conference session entitled "Medical Marihuana Production". Bill also presented a joint session with Lois-Leah Goodwin, entitled "Community Amenity Contributions and Land Use Approvals".

On May 28, **Bill Buholzer** and **Pat Kendall** presented a session entitled "Development Cost Charges and More" at the Government Finance Officers Association of British Columbia Conference in Nanaimo.

On June 3, **Don Howieson** presented a session entitled "Community Policing Initiatives and the BC Policing and Community Safety Plan" with Lee Elliott at the Licence Inspectors and Bylaw Officers Association Conference and AGM in Summerland. Don and **Elizabeth Anderson** also presented a session entitled "Bylaw Enforcement Trends in the BC Courts".

Look for us at the Local Government Management Association Conference being held in Vancouver from June 10-12. On June 10, **Bill Buholzer** will be speaking on "Access to Subdivided Parcels Public Interest" at the Approving Officer's Seminar and, on June 11, **Carolyn MacEachern** will be presenting a session entitled "Personal Options for Dealing with Workplace Bullying". Our lawyers will be around the Conference and otherwise available for meetings upon request.

Sukh Manhas will be speaking at the Thompson Okanagan Local Government Management Association Conference being held in Osoyoos from September 10-12.

Pat Kendall and **Sukh Manhas** will be attending the Local Government Management Association Corporate Officers Forum being held in Kelowna from October 15-17. Pat will be presenting a session on Elections, and Sukh will be presenting a case law update as well as a session entitled "Contracts and Agreements".

On October 20, **Bill Buholzer** will be speaking on "The Approving Officer as a Statutory Decision-Maker" at the Municipal Administration Training Institute (MATI) School for Approving Officers, being held in Kamloops from October 19-24.

We are pleased to announce that **Maria Kim** was called to the bar in May, and is now an associate lawyer with Young Anderson. Maria was born in Korea and grew up in Sydney, Australia and Abbotsford, BC. Maria completed her Bachelor of Arts in Asian Studies and Sociology at the University of British Columbia.

Maria Kim