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Some Observations on the Municipal Auditor General

In announcing its intention to appoint a municipal auditor general ("MAG"), the Province has promised that the MAG would not have any more authority than provincial or federal auditors-general to probe into matters of government policy. That promise must be disappointing to the B.C. Chamber of Commerce, whose January 18, 2011 news release commented that "the addition of a Municipal Auditor General is an important part of the BC Chamber's policy on creating equity in the property tax system". Taking that promise at face value, one is left contemplating the function of a MAG.

Organizations like the Canadian Federation of Independent Business say "value for money" auditing ought to be occurring at the local government level in B.C.. In this regard the first and most obvious point that comes to mind is the point correctly made in UBCM's Context Paper on the MAG – that under s. 171(3) of the *Community Charter*, both the Inspector of Municipalities and every municipal council already have authority to require the municipal auditor to provide reports in addition to the annual financial statements. Under the *Charter*, the municipal auditor has the power and duty to conduct the examinations necessary to prepare all such reports. This includes reports on, to use the language of the provincial *Auditor-General Act*, "whether the government ... is operating economically, efficiently and effectively" in relation to any particular municipal program or project, or generally. If the Province is willing to order these types of audits on particular municipalities or particular local government programs or projects, it already has ample authority to do so. If it simply wishes to provide a resource for municipalities

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wishing to order their own "value for money" audits, it is unclear why the Province would set up a new provincial office to compete for such work with the many private audit firms that are already familiar with municipal finances.

In addition, municipal councils have authority to appoint select committees to inquire into any matter and report their findings to the Council, and such committees have authority to summon witnesses and compel them to give evidence under oath respecting the matter. Such committees may include persons who are not council members, including persons with financial or procurement expertise, and could easily be used to investigate municipal expenditures after the fact to determine whether value was obtained for money spent. Such committees could even be used to make recommendations to the Council on the most cost-effective way to carry out a proposed program or project before any expenditures are made.

Finally, local governments in BC are in a very different position than senior levels of government that have auditor generals in that deficit financing is statutorily prohibited at the local government level; municipalities and regional districts cannot budget for a deficit. Meanwhile, the Province has been free to accumulate debt in the order of $45 billion, with a current fiscal year deficit in the $300 million range. Similarly, the federal government has racked up more than $550 billion in debt, around $35 billion of which was accumulated in the current fiscal year alone. Which level of government has the greatest built-in incentive to obtain "value for money" in its spending: the level of government that has to make its books balance every single year, or the level of government that can put its expenses on a credit card that has no minimum payment or payment deadline?

At the consumer level, it seems reasonable to assume that a shopper with a credit card, even one with a minimum payment requirement, is likely to do less comparison shopping than a consumer who can spend only the cash they have in their pocket. That is to say, the prohibition on local government deficit financing is perhaps the most powerful "value for money" incentive that a Province could possibly impose, and it is already in place in B.C. The threat of a MAG audit would likely have an incremental impact on local government financial affairs, if any at all.

Perhaps there is a larger picture to consider when thinking about the potential function of a MAG. For a generation now, local governments in Canada have been asking for a greater share of revenue from all types of taxation. Instead of being limited to the property tax and user fees, local government are asking for a greater share of all revenue to enable them to deal with the greater share of governmental responsibility they have been assuming from the Province. For example, cities and towns in the U.S. have access to sales tax revenues that, in Canada, accrue only to senior levels of government. The Gas Tax Fund that is being used to apply federal gasoline tax revenues to municipal infrastructure projects in B.C. via an agreement with UBCM seems implicitly to acknowledge that municipal taxation powers are no longer congruent with the extent of their financial responsibilities. However, the GTF provides only a temporary solution.

If the establishment of a MAG were part of a broader provincial approach to local government finance, putting it on a footing more similar to that of the other levels of government, then having an auditor-general similar to the auditors-general dealing with provincial and federal financial matters would make much more sense. As matters stand, however, establishing a largely redundant office to examine expenditures that are already under the discipline of pay-as-you-go financing may be a purely symbolic provincial gesture.

Bill Buholzer

Provincial Consultation Requirements "Aspirational"

*The Court of Appeal has upheld the decision to strike part of the Greater Vancouver Regional District's claim that a provincial act transferring lands in Pacific Spirit Regional Park from the GVRD to the Musqueam Indian Band is invalid (*GVRD v. BC (A.G.), *2011 BCCA 345). The GVRD claimed that the Province did not consult with the GVRD as required by section 3(c) of the* Local Government Act*, which states that one of the principles of "the relationship between regional districts and the Provincial government in relation to the [LGA]" is that "notice and consultation [are] needed for Provincial government actions that directly affect regional district interests."*

The Court of Appeal agreed that the GVRD could argue that it had not been consulted by the Province and that the GVRD's interests had been directly affected. However, the Court of Appeal held that section 3(c) of the *LGA* does not provide a basis for consequently invalidating Provincial acts in such situations. The Court of Appeal found that the reference to a "need" to consult in relation to "Provincial government actions" in section 3(c) of the *LGA* is vague and does not create any legally enforceable obligation on the part of the Province. Section 3(c) of the *LGA* only expresses the principle that "notice and consultation is needed." It does not employ imperative language such as "must" or "shall," in order to create any actual legal obligations. The Province's position in the litigation was that Section 3 was merely an "aspirational" provision in the legislation, with no legal force, leading the Court of Appeal to suggest that "the technique of including aspirational goals in statutes should be reconsidered, and statements of this kind should return to preambles where they are clearly differentiated from substantive and enforceable statutory obligations".

> *"The technique of including aspirational goals in statutes should be reconsidered, and statements of this kind should return to preambles..."*

The GVRD's case confirms that the principles espoused in s. 3 of the LGA do not have any binding effect unless those principles are supported by express legislative requirements. The case is also a general reminder to all levels of government of the problems that can be caused when mere statements of principle or "aspiration" that are not intended to bind anyone are incorporated into the body of a law or bylaw. In order to create legally enforceable obligations, imperative rather than "aspirational" language must be used and vagueness must be avoided.

Michael Moll

Spotlight on Elections

Elections are the cornerstone of our system of governance. It should be no surprise that running and managing the electoral system is a complex task for your local government staff and equally so for candidates participating in the electoral process. It is the rules and the regulations that guarantee a fair, open and accountable election. Breaches of election rules that are not upheld strike at the heart of public confidence in the entire governance structure.

Courts are alert to any such erosion of the system and are clear that candidates themselves bear a primary responsibility in abiding by the rules and overseeing those who work on their campaign. This month in *Heed v. Chief Electoral Officer of BC*, 2011 BCSC 1181 the BC Supreme Court relieved a Provincial MLA who unknowingly exceeded the expense limit under the *Elections Act* from the penalty of disqualification from office, but refused to excuse him from the financial penalty for this breach. The comments of the Chief Justice in this respect apply generally to the responsibility of a candidate in any election:

> [29] I also agree with the Chief Electoral Officer that in the circumstances here, granting relief from the s. 217(1)(b) penalty would run counter to the need to impose some responsibility on the candidate for the conduct of his campaign and the actions of those whom he chose to run it. Regardless of Mr. Heed's inexperience in campaigning and his personal good faith in the conduct of his campaign, that campaign has apparently seen a serious breach of a critical provision in the Act. Responsibility for the conduct of the campaign rests ultimately with the candidate. Section 199(1)(b) talks of a limit for expenses "incurred by a candidate"; s. 209(1) requires a Financial Agent to file the Election Financing Report "on behalf of the candidate". In this case, at least, it is necessary to bring home to the candidate responsibility for the mistakes made, without his knowledge, but on his behalf. That can be done in a measured way by granting the relief I have noted, but declining to do so in the case of the penalty under s. 217(1)(b).

Ray Young

Elections Errors @#$?%!

The Local Government Act *election provisions contain many deadlines for the publishing of notices and other technical requirements with respect to elections (we recommend reference to the calendar of elections deadlines in the LGMA Elections Manual). Despite the best efforts of election officials, these timing and technical requirements can be missed. In this respect, election officials should be aware of section 155 of the* Act, *which provides:*

> (1) If the minister considers that special circumstances regarding an election require this, the minister may make any order the minister considers appropriate to achieve the purposes of this Part, including an order providing an exception to this Act or a bylaw or regulation under this Act.
>
> (2) Without limiting subsection (1), the minister may make an order extending a time period or establishing a new date in place of a date set under this Act and giving any other directions the minister considers appropriate in relation to this.

Accordingly, where there is a failure to comply with an election timeline or other election provision, the chief election officer may wish to contact the Ministry of Community, Sport and Cultural Development to see if the Minister would be willing to consider an extension or exemption, in order to avoid a possible challenge to the election. Note the Minister has authority to make an order not only in respect of the Act, but also election regulations and bylaws.

As you might expect, it is best to comply with the *Act*, regulations and bylaws to the letter and not rely on the Minister to provide some relief. However, if you find you have inadvertently missed a deadline or technical requirement, it is important to keep this section in mind.

Bryan Jung and Mike Quattrocchi ✍

Every election year on general voting day Young Anderson runs an election hotline for all your @#$%! moments. Watch for an upcoming client bulletin advising who will be tending the phones this year, or contact Pearl Ng at ng@younganderson for the roster of lawyers and their contact information.

Election Cases of Interest

Every three years we have an election and we learn something from the issues, recounts, challenges and court decisions that arise. Here are a few lessons learned the hard way from the 2008 elections by those who ran for office, both successfully and unsuccessfully.

In *Vicktor v. Lanktree* [2008] B.C.J. No. 2424, the B.C. Provincial Court considered an application by Mr. Vicktor, who unsuccessfully ran for mayor of the District of Hope. The successful candidate received 829 votes; Mr. Vicktor received 810 votes. The difference, 19 votes, was approximately 1% of all votes cast. This was the first election for which the District used voting machines, and Mr. Vicktor submitted material to support his position that voting machines are unacceptably unreliable. He argued that where votes are close, there should be a manual recount.

The court considered the grounds on which a recount is available under section 138 of the *Local Government Act* and concluded that the legislation did not permit a recount in these circumstances. The court commented that "no method of vote counting is totally accurate" and "democracy is always an approximation". The court noted that the District was permitted by bylaw to authorize the use of voting machines and if the Legislature had wished to permit recounts when voting machines indicated close results, it could have done so.

Accordingly, candidates and elections officials should be aware of when vote recounts are available under section 138 of the *LGA*

and the process to apply for a recount. In the *Vicktor* case, he had apparently not given the notice required by section 138, but the other parties did not object for that reason.

In *Stow v. British Columbia (Attorney General)* [2009] B.C.J. No. 2835 (B.C.S.C.), [2010] B.C.J. No. 1789 (B.C.C.A.), the courts answered yes to the long-standing question of whether a candidate must pay the $500 late filing penalty at the same time as a late disclosure statement is filed.

Section 90(1) of the *LGA* requires each candidate (whether elected or not) to file a disclosure statement about his/her election finances within 120 days after general voting day. However, under section 90.2 the penalties for not doing so do not apply "if the disclosure statement is filed within 30 days after the time period established by section 90(1) and a late filing penalty of $500 is paid to the municipality or regional district".

Mr. Stow argued that the strict grammatical interpretation of section 90.2 does not require the $500 to be paid within the 30 day time frame. Despite this, the court applied a purposive interpretation to the wording and held that both the filing of the late disclosure statement and the payment of $500 must be completed within the 30 day time period.

In light of this case, candidates for the 2011 elections can no longer rely on the ambiguity in section 90.2 to avoid paying the $500 within the 30 day time limit.

Finally, in *Todd v. Coleridge* [2009] B.C.J. No. 1029, the B.C. Supreme Court declared that the election of Mr. Coleridge was invalid and ordered him to pay the City of White Rock the sum of $20,000 toward the cost of running a by-election.

Section 143 of the *LGA* allows the court to declare the election of a candidate to be invalid on the basis that the candidate has by fraudulent means persuaded a person to vote or refrain from voting for a particular candidate. In this case, Mr. Coleridge learned that his wife had sent, under a pseudonym, an email referencing a pro-development slate of candidates, including Mr. Todd. Mr. Coleridge then responded to that email indicating his support of the fictitious writer. When asked by the press about the emails, Mr. Coleridge could have told the truth, but didn't. When later confronted with evidence that his home was the source of the first email, he claimed he had been the victim of identity theft.

The court decided the question to be answered was "whether Mr. Coleridge persuaded or caused anyone to vote for him by stating in his campaign material that he was someone the electorate could come to for a straight answer, i.e. that he was someone you could trust. Mr. Coleridge ran on his reputation that he was a candidate who could be counted on to tell the public the truth."

The court concluded:

> "Mr. Coleridge displayed a willingness to continue to lie and deceive the public despite being presented with a number of occasions when he could have told the truth. In my opinion, if a candidate puts his character in issue and runs on his integrity and honesty, then his character, including his integrity and honesty, is a material fact. In my view, Mr. Coleridge fraudulently misrepresented a material fact - that he was straightforward - when he was anything but..."

Mr. Coleridge then argued that the court should declare the next runner-up as elected, but due to the length of time since the election and the large gap between votes, the court held that it was appropriate for a by-election to be held.

This case is recommended reading for all 2011 candidates and elections officials in order to gain a sense of the line that must not be crossed - as the court said, "freedom of speech, even political speech, knows some limits".

Patricia Kendall

Refusal of Unsafe Work

Employees who are concerned that they are being asked to perform work that is unsafe are entitled to refuse or stop performing such work under the Occupational Health and Safety Regulation*. Section 3.12 of the* OHS Regulation *provides that an employee must not carry out any work or operate any tool, appliance or equipment, if that employee has a "reasonable cause to believe that to do so would create an undue hazard to the health and safety of any person". This is an objective test based on the judgment of the average worker using reasonable judgment. The training and experience of the employee is taken into account in this assessment of what the average worker would believe.*

An employee who refuses to perform work the employee believes is unsafe must report the circumstances to the employee's supervisor. The employer is required to immediately investigate the concerns and either address the safety concerns if they are valid or if the employer is of the view the concerns are not valid, advise the employee of the employer's views. If the employee still continues to refuse to perform the work, the employer must investigate the matter in the presence of the employee who made the report and in the presence of a worker member of the joint health and safety committee or a worker selected by the union representing the employee.

If the further investigation does not resolve the issue and the employee continues to refuse to perform the work, the employer and the employee must notify a prevention officer of Worksafe BC and the officer will investigate the matter and issue whatever orders are deemed necessary. The prevention officer will also inform the parties if the officer concludes there is no undue hazard present.

It is important that local governments follow the requirements in section 3.12 of the *OHS Regulation* even if they do not believe there is any basis to the employee's concerns. It is clear in section 3.13 of the OHS Regulation that a worker must not be subject to discriminatory action as defined in section 150 of the *Workers Compensation Act* because the employee has acted in compliance with section 3.12 or an order made by a prevention officer. Discriminatory actions under section 150 include suspension, lay-off, dismissal, demotions, discipline and the like. However, section 3.13 (2) of the *OHS Regulation* makes it clear that temporary assignment to alternative work with no loss of pay until the matter is resolved is not considered a discriminatory action. Local governments should also consult any collective agreements to determine whether there are any relevant provisions setting out the obligations of the employee and employer with respect to refusal of unsafe work.

It is important that local governments follow the requirements in section 3.12 of the OHS Regulation *even if they do not believe there is any basis to the employee's concerns ...*

Carolyn MacEachern

Is Nuisance the new Negligence? Why the rest of BC should care about the Canada Line case

In February of this year, the Court of Appeal reversed the decision to award $600,000 to a business owner who had suffered significant business losses during construction of the new rapid transit line linking downtown Vancouver with Richmond and the airport. Heyes v. South Coast B.C. Transportation Authority (Translink) *is significant not only for the parties, but for every other local government or statutory decision maker that undertakes major infrastructure work that disrupts businesses and other uses of property. Leave to appeal to the Supreme Court of Canada is currently being sought by the business owner, and, if the matter is granted leave, any consideration of this case at that level may have ramifications for local governments across Canada.*

At issue is the development of the law of nuisance and, in particular, government liability, where the source of the nuisance rests in a policy decision made pursuant to a statute. A finding of nuisance does not require any finding of fault, negligence, improper purpose or lack of statutory authority to act in order to prove damages. Nor does it provide for the policy defence available in negligence cases, where the evaluation of policy decisions made in good faith by a government body are considered beyond the proper role of the Courts in awarding damages. Instead, a finding of nuisance is purely based on the reasonableness of the interference with a person's enjoyment of their property, and may require compensation for business losses as well as property damage.

While there is no distinction between policy decisions and operational decisions in a claim for nuisance, there is a defence known as the "statutory authority defence" that is available to both government actors and private actors when they are complying with legal requirements. The defence is very limited with respect to private parties, as their nuisance-causing activity is only defensible if it is the inevitable result of a statutory requirement. If the law provides for a range of options or actions, then the defence does not assist.

With respect to discretionary decisions of government bodies, the application of the defence is more complex, and raises the issue of when a decision made pursuant to a governing statute (such as a bylaw or resolution made pursuant to the *Community Charter*) constitutes statutory authority in its own right, and when it does not. Where a bylaw or other decision of a local government does constitute statutory authority, the decision is immune from a claim of nuisance. However, where the decision does

not create or constitute statutory authority in its own right, any losses related to that decision will be subject to a nuisance claim, and the decision may be further evaluated by the court for its social utility and reasonableness.

This difficulty was clearly illustrated in the BC Supreme Court and Court of Appeal decisions in *Translink*. In that case, the decision that led to the creation of the nuisance, and the loss of business income, was a decision by Translink passed by resolution to first consider a rapid transit line between downtown Vancouver and Richmond, and a further policy decision passed by resolution to accept a particular proposal for that line, that included a specific route, cost, and method of construction.

These decisions had all the hallmarks of policy decisions that would be immune from a damages award if a negligence action was brought: they were quintessentially decisions that required considerations around planning and growth patterns in both municipalities, the location of transit, and cost to the public. In a more typical law suit based in negligence, these decisions would have been immune from liability on the basis that the Courts have said they will not attach liability to governmental policy decisions made in good faith in order to avoid interference with democratic decision making processes.

However, both the BC Supreme Court and the Court of Appeal found that Translink's resolution to proceed with a specific proposal regarding cost, route and method of construction did not have sufficient policy and legislative hallmarks to constitute statutory authority in its own right.

Therefore, the burden on Translink was much higher because it had to prove that the nuisance caused was the inevitable and necessary result of the much broader discretion granted in the *GVTAA* to consider a transit line between Vancouver and Richmond. Essentially, Translink had to prove that it had no other options that were viable on a practical level (not simply financially) and that would not have caused an equal amount of nuisance.

The Court of Appeal's decision in Translink *opens the door for private actions in nuisance that arise from the myriad policy decisions made by delegated statutory decision makers every day ...*

Even though Translink was ultimately found to have acted reasonably in making decisions pursuant to its authority, the Court of Appeal's decision in *Translink* opens the door for private actions in nuisance that arise from the myriad policy decisions made by delegated statutory decision makers (ie local governments) every day. There is a very big difference between the strength of a policy defence in negligence and a statutory authority defence in nuisance, if major policy decisions are not considered by the Courts to constitute statutory authority. Local government exposure to damage claims in nuisance may one day outpace claims in negligence.

We can only hope that, if this matter is granted leave at the Supreme Court of Canada, that Court will go further than our Court of Appeal has done, and will recognize the substantial breadth of policy decisions made by local governments as constituting statutory authority in their own right.

Francesca Marzari

An Officer and a Councillor

The firm's June 3rd Client Bulletin provided a brief summary of the May 24, 2011 Provincial Court decision in R. v. Skakun*, in which the court found a Prince George councillor guilty of breaching section 30.4 of the* Freedom of Information and Protection of Privacy Act ("FOIPPA") *by improperly disclosing personal information. This article will explore a few aspects of the decision that were beyond the scope of that brief client bulletin.*

In order to find that Councillor Skakun had contravened FOIPPA proscription on release of personal information, the trial judge had to conclude that he was an "employee, officer or director of a public body", as it is those persons described in s. 30.4 of *FOIPPA* who must not disclose personal information. The trial judge was satisfied that Councillor Skakun was an "officer" for the purpose of the section and therefore contravened the provision through the disclosure of a harassment investigation report to the media.

In reaching this conclusion, the trial judge considered section 120 of the *Community Charter*, dealing with oaths or affirmations of office, and section 121, dealing with resignation from office. The trial judge reasoned that the holder of an office could be reasonably considered to be an "officer". Further support for this conclusion was found in section 287 of the *Local Government Act*, in which the definition of "municipal public officer" includes "a member of council." Noting that the release of personal information under *FOIPPA* is tightly regulated, the trial judge held that the policy behind *FOIPPA* did not support a restricted interpretation of officer as excluding municipal councillors.

The question that has been raised since this decision is whether a councillor should now be considered an "officer" under those provisions of the *Community Charter* that define the roles and entitlements of municipal officers. In considering that question, it is important to note that statutory interpretation is a contextual exercise, and the same or similar terms in different legislation may have different meanings. The context of *FOIPPA* differs significantly from that of the *Community Charter*. *FOIPPA* applies to a broad spectrum of public bodies, local governments being only one category. In that context, the prohibition against disclosure of personal information, to be effective, must apply to a broad spectrum of public body actors.

How does the broad interpretation of officer under the FOI Act square with the structure of the *Community Charter*? Division 6 of Part 4 deals with conflict of interest and Divisions 1 and 2 of Part 5 deal with council roles and responsibilities and council proceedings. Those sections speak to the obligations and authority of "council members". Division 5 of Part 5 deals with officers and employees. It is clear that the roles of appointed officers on one hand and elected council members on the other hand are carefully separated in the *Community Charter*. Considering that separation, it is difficult to conclude that the legislature intended for the broadly worded interpretation of the term "officer" under *FOIPPA* to apply across the board and override the careful distinction found in these parts of the *Charter*.

It is also worth noting that, while there is a provision in the *Interpretation Act* that terms defined in the *Community Charter* and the *Local Government Act* extend to all other enactments relating to municipal and regional district matters, there is no provision in *FOIPPA* or in the *Interpretation Act* that would extend the meaning of terms in *FOIPPA* beyond the scope of that statute.

The trial judge's interpretation of the term "officer" in *FOIPPA* to include municipal councillors is one of the grounds that has been raised in the *Skakun* appeal. It will be useful to have a judgment from the appeal court on this issue, hopefully affirming the trial judge's view. A contrary conclusion would leave municipal councillors able to disclose personal information without fear of prosecution under *FOIPPA*, a result that could never have been intended.

The *Skakun* decision is also significant for its consideration of the "whistleblower" defence in the case of an elected official. Councillor Skakun attempted to justify his disclosure of the harassment investigation to the media as advancing a "legitimate public interest". Section 30.3 of *FOIPPA* contains a whistleblower protection provision which prohibits employers from taking disciplinary actions against employees in defined circumstances. However, the trial judge found that Councillor Skakun, being an "officer", could not be an "employee" as well, and thus the statutory protection could not assist him. The trial judge did not consider the question of whether prosecution by the Crown could ever be characterized as employer discipline.

The common law whistleblower cases largely deal with employer/employee relationships. Employees owe a duty of loyalty to their employers which may limit the ability of the employee to speak publicly on matters concerning their employer. That duty of loyalty may be overridden for the purposes of exposing an illegal act, or if the employer's actions or policies jeopardize the life, health of safety of others. In Councillor Skakun's case there was no evidence of any such threat to health or safety and the trial judge was satisfied there no evidence to suggest that the City of Prince George administration had engaged in any illegal conduct.

The trial judge applied a further qualification in the case of a public body subject to *FOIPPA*, finding that a legitimate public interest in disclosure of information is accommodated within the legislation, which balances the interest in favour of disclosure against other interests, such as personal privacy. *FOIPPA* provides a process by which disclosure may be authorized by the public body. The trial judge found it was significant that Councillor Skakun took no steps to bring the disclosure of the report before Council. Instead, he acted secretively and unilaterally. Within the whistleblower jurisprudence a failure to exhaust internal processes for disclosure is generally fatal to any whistleblower defence.

Within the whistleblower jurisprudence

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Council members are subject to a duty to respect confidentiality under s. 117 of the *Community Charter*, which includes any records kept in confidence. Although the trial judge mentioned s. 117 earlier in his reasons, he did not address its provisions in the context of the discussion of the whistleblower defence. Hopefully, the effect of s. 117 in relation to alleged whistleblower conduct will be addressed more fully in the upcoming *Skakun* appeal.

Barry Williamson

What's Next for Riparian Areas?

With its July 5, 2011 decision in Yanke v. Salmon Arm (City) *dealing with the involvement of officials of the Ministry of Environment (MOE) and Fisheries and Oceans Canada (DFO) in local government land use approvals, the B.C. Court of Appeal has, one hopes, driven the senior governments back to the drawing board in terms of riparian area protection legislation. In written reasons concurred in by the other two Court of Appeal Justices hearing the case, Mr. Justice Groberman wonders why there is such "dissonance" between the actual statutory provisions dealing with riparian area protection and the conduct of MOE/DFO officials that led to the Salmon Arm litigation.*

To review, s. 12 of the *Fish Protection Act*, which has been in force since 2001, requires local governments in specified parts of the Province to protect riparian areas in one of two ways: by including riparian area protection provisions in their zoning and rural land use bylaws in accordance with provincial directives, or by ensuring that their bylaws and permits under Part 26 of the *Local Government Act* provide a level of riparian area protection that, in their opinion, is comparable to or exceeds that established by provincial directives. The "provincial directives" were, initially, the Streamside Protection Regulation, replaced in short order by the Riparian Areas Regulation (RAR). The RAR indicates that impact assessments must consider at least a 30-metre area above the natural boundary of streams and lakes.

According to the RAR, a local government may allow development to proceed in a riparian area after the following have occurred:

- a "Qualified Environmental Professional" (QEP) has conducted an impact assessment in accordance with prescribed assessment methods, has delineated on the subject land a streamside protection and enhancement area (SPEA) on the basis of criteria set out in the assessment methods, and has either certified that the development will not result in harmful alteration, disruption or destruction (HADD) of fish habitat or that it will not result in a HADD if streamside protection and enhancement areas identified in the report are protected through measures identified in the report, and
- the local government has been notified by MOE that MOE and DFO have been provided with a copy of the QEP report and found it satisfactory.

There is an alternative scenario where DFO has issued a permit under the *Fisheries Act* to expressly allow a HADD, which does not come into play very often.

At the same time as s. 12 of the *Fish Protec-*

tion Act was enacted, the Legislature amended Part 26 of the *Local Government Act* to enhance development permit powers in relation to development permit areas designated for the protection of the natural environment. The amendments added authority for DP conditions requiring riparian area restoration and enhancement, and authority to require development applicants to provide "development approval information", or what is known outside the precincts of the Legislature as "impact studies". It is a reasonable interpretation of s. 12 that the "bylaws and permits" option contemplated the use of development permit area designations and guidelines, development approval information and development permit conditions to protect these areas.

Local governments became the meat in the riparian area protection sandwich ...

Unfortunately, the legislation does not address a basic limitation of development permits of this type: they cannot be used to diminish land use and density entitlements established in a zoning bylaw. The only type of development permit that can do so is a permit dealing with development on hazard lands, where development rights might be required to give way to safety concerns. This problem is particularly acute where development or redevelopment is occurring deep within "riparian assessment areas". In many areas of the Okanagan, for example, residential subdivisions approved years ago created parcels located entirely within 30 metres of lakes. It is typically impossible to develop or redevelop these lots without disturbing riparian areas that fisheries biologists would prefer be left alone, or without continuing to occupy portions of the land that fisheries biologists would prefer had never been disturbed in the first place. Thus, local governments became the meat in the riparian area protection sandwich: on one side the property owner's right to develop their land in accordance with the applicable zoning entitlements, and on the other side the requirement that, before land use approvals are given, a QEP certify that the use of such entitlements, either partially or entirely within a SPEA, will not result in a HADD.

The problem that led to the *Yanke* litigation has its origins in the publication of an MOE riparian area protection "Implementation Guidebook" for local governments. The Guidebook, which has no legal status, together with an MOE publication entitled "Variances to the BC Riparian Areas Regulation", suggested a variance procedure based on hardship, by which DFO officials may vary the boundaries of a streamside protection and enhancement area identified by a QEP in a riparian area assessment report, to enable development to proceed in those areas. In other words, senior government officials interpreted the legislation as enabling them to second-guess QEPs who certify that development may occur in these areas without creating a HADD. The mechanism by which they enforced their interpretation of the legislation, which came to light in the *Yanke* case, was a refusal to provide a notification that a satisfactory QEP report had been received, until the developer had applied for and obtained a DFO variance. Evidence presented at the Supreme Court hearing of this matter indicated that the Salmon Arm City Council found itself passing resolutions addressed to DFO supporting the owner's request for a "SPEA variance", rather than exercising its own regulatory powers in respect of the development.

The Court of Appeal allowed the Province's appeal and overturned the B.C. Supreme Court's declaration that the RAR had been complied with and that the City could proceed to allow

the development. However, the Court of Appeal unanimously agreed with the reason that the Supreme Court had made the declaration, being that the variance process that the senior governments had required the development applicant to go through had no basis in law.

The Court of Appeal also allowed the City's appeal on another issue and overturned the Supreme Court's decision that a s. 219 covenant granted to the City and DFO while the Streamside Protection Regulation was in force had established a SPEA on the property, such that the owner's subsequent development application was covered by the transitional provision in s. 8 of the Riparian Areas Regulation. The Court of Appeal did not accept that the covenant had anything to do with the protection of the riparian area from development, holding that it appeared to have been granted to address flood control concerns.

Despite the fact that the Province succeeded in having the declaration that had been made in favour of the developer set aside, it failed in its attempt to "have the regulatory regime interpreted in a manner that accords with the practices that have been adopted" by MOE and DFO, and the Court of Appeal ordered it to pay the developer's costs of the appeal.

In the immediate aftermath of the *Yanke* decision, local governments that are relying on the RAR notification procedure as part of their riparian area protection strategy can now expect that MOE will provide the appropriate notification when a satisfactory QEP report has been submitted, regardless of whether development is proposed to occur within an identified SPEA. Senior governments may shift to a more critical evaluation of the QEP's application of the assessment methods, if they do not believe that the development can occur in a SPEA without creating a HADD, in which case notifications might continue to be delayed until the issue is sorted out at the technical level. These notifications, however, have recently taken the form of simple acknowledgements that QEP reports have been uploaded to a provincial database, subject to audit on a random basis. If variances are required in relation to local government zoning bylaw setbacks applicable to a riparian site, in order to allow development to proceed in the manner recommended by a QEP, local governments might wish to seek the opinion of MOE or DFO staff as to whether such variance optimizes riparian area protection at the site. However, the Court of Appeal decision makes it clear that no such consultation is legally required and the opinions of senior government staff on these matters are not binding on local governments. The local government remains in legal control of the variance process.

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In the longer run, the Province may re-think its entire riparian areas protection initiative, especially if the Cohen Commission makes recommendations regarding the habitat protection piece of the sockeye salmon fishery puzzle. If that occurs, there are several aspects of the initiative that probably warrant another look, including these:

- whether it makes sense to rely on the use of local government OCPs and zoning regulations to protect riparian areas, when in many rural areas with important fish habitat there are no bylaws in place and local residents want nothing

to do with OCPs, development permits or zoning regulations;

- whether local governments have an adequate information base (that is, watercourse mapping) on which to rely in making development permit area designations for riparian area protection with the degree of precision required by the Local Government Act and the case law;

- whether the enforcement powers related to the DP provisions in the *Local Government Act* are adequate to deal with typical contraventions that damage fish habitat (altering land without a DP, failing to comply with a DP condition);

- whether it is an efficient use of local government resources for each affected local government to take on specialized staff to deal with environmental protection matters, including drafting DP guidelines, processing permit applications, and monitoring compliance with permit conditions, instead of the Province dealing with riparian area protection at the provincial level;

- whether it would be more effective and efficient to direct the Province's existing land use agency, the Agricultural Land Commission, which has development application review and approval machinery in place, to deal with subdivision and development in designated riparian areas, and in so doing to resolve the significant conflicts between agricultural land uses and riparian area protection; and

- if riparian area protection remains a local government responsibility, whether riparian area protection ought to be placed on the same footing as protection of development from natural hazards, in terms of whether development permit conditions may interfere with land uses and density permitted by zoning regulations.

There are other problems with the RAR that should be addressed in any reconsideration of the legislation, including an incomprehensible reference to the non-conforming use provisions of the *Local Government Act*, and the fundamental question of whether the RAR merely establishes a benchmark for local government riparian area protection measures, as the wording of s. 12 suggest, or a mandatory development approval procedure that must be followed in all cases.

Bill Buholzer

News from the Firm

Ray Young will be speaking at the National Roundtable on Development Impact Fees annual conference in San Diego in October. **Mike Quattrocchi** will be teaching a session on bylaw drafting at the NCMOA Conference in Terrace on September 7. **Don Howiesen** will be presenting a practical guide to dangerous dog applications, from seizure to destruction, to members of LIBOA in Sechelt on September 16, 2011. This will be the fourth presentation of the topic to LIBOA members in locations across B.C. **Francesca Marzari** will be teaching the introduction to tort liability (negligence and nuisance) at the Capilano College PADM course in Parksville on September 23, 2011. **Carolyn MacEachern** will be speaking and presenting a paper on Discrimination in the Provision of Services at the Human Rights CLE in November. **Bryan Jung** will be speaking on recent municipal cases at the CBA Municipal Subsection meeting in October. **Alyssa Bradley** will be speaking at the LGMA 2011 Clerks and Corporate Officers Forum in Victoria on October 27, 2011. **Jay Lancaster**, our summer student from 2010, has completed his PLTC and joined our firm for his articling year. **Joe Scafe**, our 2011 summer student, has agreed to return for his articles with Young Anderson in 2012.

It is with great fondness that we bid farewell to **Stephanie James** who has accepted a position as in house counsel for the City of Coquitlam. Her keen intelligence and insight are missed at the firm, not least as the editor of this Newsletter. We know she will be a great asset in her new role and will find and meet the new challenges she seeks.

For additional copies of this newsletter or to be added to the mailing list, contact **YOUNG** ANDERSON:

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