YOUNG ANDERSON
BARRISTERS & SOLICITORS

SEPTEMBER 2012, VOLUME 23, NUMBER 2

NEWSLETTER
UBCM CONFERENCE ISSUE

No-Fee Emergency Calls (Taxes Apply)

The recent BC Supreme Court decision in Canadian Wireless Telecommunications Association v. Nanaimo (City)*, 2012 BCSC 1017, has highlighted the difficulty local governments face in distinguishing between fees and taxes. The distinction between these forms of levies is critical because, while local governments have fairly broad authority to charge fees for municipal services, they have much narrower powers in relation to taxes. In* CWTA*, the Court found that a $30 "fee" charged to wireless telecommunication service providers ("WSPs") for individual calls by WSP subscribers to a local government operated 911 emergency call centre was in fact a tax. The Court held that the City of Nanaimo was not authorized to collect such a tax to fund its emergency call centre.*

At common law, a tax is a levy that is enforceable by law, imposed under the authority of the legislature, levied by a public body, and intended for a public purpose. For local governments, this generally means a financial levy authorized by the *Local Government Act* or *Community Charter* that may be used to fund general operations or a local area service. A tax on property value is a classic example of a municipal tax.

In contrast, a fee is an authorized charge to a user of a service for which there is a nexus between the amount charged and the cost of providing the service to the user. An example would be an application fee calculated to offset the average cost of each development permit application. Although a municipality may charge a fee to people who apply for development permits in order to offset the costs associated with processing those applications, a municipality may not, for example, increase the fee in order to raise general funds. In the latter case, the municipality would be taxing applicants in a manner not authorized by the Legislature.

In the CWTA case, the identity of the person being charged and the purpose for which the revenue was being collected were critical to the Court's determination that the emergency call centre levy was a tax. The service being offered to the WSPs was the technical capability necessary to allow their customers to contact the call centre. However, the WSPs were obliged to pay $30 each time one of their subscribers dialled the emergency call centre. Although the WSPs could negotiate an alternate arrangement under the City's governing bylaw, the court found that WSPs were being charged as if they were the ultimate user of the emergency call centre and not merely connecting subscribers to the call centre. Mr. Justice Ehrcke noted:

> It might be, for example, that one of the WSPs would have ten customers calling 911 while the other had twenty making such calls. In that event, the first WSP would be liable under the Bylaw to pay $300 in Single Call Fees for that month, whereas the other WSP would have to pay $600. Despite the discrepancy in the amounts levied against each WSP in this example, the supposed service that each WSP received is the same, namely the ability to offer its customers the possibility of accessing Central Island 911 during that month.

Nanaimo's purpose in funding an emergency call centre was to provide a greater service than simply the ability to dial 911. The emergency call centre responded to each call and requested the appropriate police, fire, or ambulance response, and it was the provision of this service that was used to calculate the $30 levy. The court found this emergency call centre was for a public purpose, and that the service was generally for the benefit of the residents of the area. Because of this general public benefit, rather than user benefit, the Court found that the service was unsuitable for user fees. Not only might a victim of a crime be served by calling 911, an injured person or a property owner at risk of being burgled might also benefit from someone else calling 911. The $30 levy imposed on WSPs for calls to the emergency call centre was consequently an unauthorized tax on WSPs to fund a general public service.

The *CWTA* case serves as a reminder that, in addition to ensuring that the amount of a fee is sufficiently connected to the cost of the service, local governments should also ensure that the person who pays the fee is in fact the recipient of the service. For example, a person hosting a large festival could be charged a fee for dedicated policing. However, regular policing and bylaw enforcement are services provided for general public benefit and are not amenable to fees charged to a person on a "when used" basis.

Michael Moll

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

WWW.YOUNGANDERSON.CA

1616 - 808 Nelson Street, Box 12147, Nelson Square, Vancouver, BC V6Z 2H2
tel: 604.689.7400 | fax: 604.689.3444 | toll free: 1.800.665.3540

#201 - 1456 St. Paul Street, Kelowna, BC V1Y 2E6
tel: 250.712.1130 | fax: 250.712.1180

It's Party Time!

The Provincial government recently amended the British Columbia Land Title Act *to provide for the registration of party wall agreements. The new sections are 223.1 and 223.2 of the Act. This is a legally significant development because, until now, the* Land Title Act *only provided authority for negative, or restrictive, covenants to be granted as between neighbouring property owners. The amendment now allows neighbouring fee simple property owners to register positive covenants on title to their properties in relation to party walls. The aim of this legislative amendment is to provide developers of row housing with a legal framework other than stratification that will provide for the division of common wall maintenance responsibilities.*

A negative covenant is a promise not to do something, for example: "I agree not to build a fence exceeding six feet in height." Traditionally, common law covenants between two neighbours had to be "restrictive" in this sense. Note that there is nothing in the language of the negative covenant that requires the grantor of the covenant to build a fence; the covenant grantor is only bound to ensure any fence will, if built, not exceed six feet in height.

Conversely, a promise such as "I will build a fence" is a positive covenant that obligates the covenant grantor to build a fence. A positive covenant requires the covenant grantor to take positive steps in order to fulfill the promise. Section 219 of the *Land Title Act* has long provided local governments, along with other public bodies, with authority to accept positive obligations from land owners in respect of use, construction, and subdivision of land. However, until now, there has been no authority to enable owners of neighbouring fee simple parcels to accept registrable positive covenants from each other in respect of party walls, common fences, or other shared amenities.

"Party wall" is defined in the *Land Title Act* as a shared supporting wall that is in a building or between two adjoining buildings and is situated on any part of the common boundary shared by adjoining parcels. The recent amendment to the *Land Title Act* provides that party wall agreements are now registrable against title to one or both of the adjoining parcels. Positive covenants can now be granted in relation to: maintenance and repair of party walls; the location of utilities within or near party walls and their repair; inspections; allocation and payment of costs; and insurance relating to the party wall.

For many years, the *Strata Property Act* has provided a legal framework for allocating responsibilities between owners of common buildings and facilities, provided they strata subdivide their property. Sections 223.1 and 223.2 of the *Land Title Act* now allow adjoining fee simple owners to share a common wall and, to a limited extent, allow for the allocation of responsibilities in respect of the wall. In theory, this will eliminate one of the legal hurdles to the development of non-strata row housing, making it more like detached housing ownership, without the complications of strata ownership, such as strata corporations, bylaws, and strata fees. Developers and planners in your community may find this to be an attractive housing option.

Bryan Jung

WorkSafe BC to Adjudicate Claims of Harassment and Bullying in the Workplace

Recent legislative changes have expanded the scope of what constitutes mental stress for the purposes of WorkSafe BC claims. Prior to these changes, WorkSafe BC only compensated employees for mental stress that was an acute reaction to a sudden and unexpected traumatic event in the workplace. Therefore, claims of harassment and bullying in the workplace were generally denied by WorkSafe.

These recent legislative changes have broadened an employee's entitlement to file claims for mental disorders that are predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors. Therefore, employers need to be aware that employees who feel that they are being harassed or bullied in the workplace and suffer a mental disorder as a result can now file WorkSafe BC claims.

Stress that an employee may suffer as a result of workplace supervision such as discipline or change in working conditions will continue to be excluded from WorkSafe BC coverage. However, where an employee files a claim in these circumstances, the employer will likely need to satisfy WorkSafe BC that the employer's exercise of its management rights was legitimate and reasonable. As well, the employee will need to show that he or she has a mental disorder that has been diagnosed by a psychologist or psychiatrist.

WorkSafe BC has published a discussion paper and draft occupational health and safety policies on workplace bullying and harassment and is currently soliciting feedback from stakeholders. As well, WorkSafe BC is developing a workplace tool kit to assist employees and employers in understanding, preventing, and addressing bullying and harassment in the workplace. This tool kit is expected to be published this fall. As well, WorkSafe BC has created a team to adjudicate and manage these types of claims.

Local government employers should continue their commitment to harassment-free and bully-free workplaces.

Accordingly, local government employers should continue their commitment to harassment-free and bully-free workplaces. All employers should have harassment policies in place and provide regular training to their employees, particularly supervisors. As well, employers need to take seriously any complaints of harassment or bullying and undertake an investigation where necessary to determine whether there is any merit to the concerns raised by an employee. By addressing issues of harassment and bullying in a consistent and pro-active manner, employers lessen the risk that employees will file claims with WorkSafe BC, other tribunals, and the courts.

Carolyn MacEachern

Province Wins a First Nations Consultation Case

Since the Supreme Court of Canada's 2004 decision on the Crown's duties to consult and accommodate First Nations (Haida Nation v. British Columbia (Minister of Forests), *2004 SCC 73), the Province of B.C. has been on the losing end of numerous cases in which First Nations have alleged inadequate consultation processes. One such case arose from the Province's decision to incorporate Sun Peaks Mountain Resort Municipality in 2010* (Adams Lake Indian Band v. B.C. (Lieutenant-Governor in Council), *2011 BCSC 266). Local governments took particular interest in that case because, in asserting its claim that the incorporation of the new municipality was a decision that had the potential to infringe as-yet-unproven aboriginal rights and title, the Adams Lake Indian Band argued that the municipality would have no constitutional duty to consult it on such matters as the enactment of local bylaws, and the incorporation decision therefore deprived it of future opportunities for consultation and accommodation of its interests. This argument was contrary to the position that many First Nations have been taking with municipalities around the province – a position on which the B.C. Court of Appeal will have an opportunity to make a ruling in its decision in* Neskonlith Indian Band v. Salmon Arm (City), *which was reserved following the appeal hearing that occurred on August 14 and 15. (The B.C. Supreme Court has held in that case that municipalities owe no duty to consult or accommodate under the* Haida Nation *line of cases.)*

In the *Adams Lake* case, the B.C. Supreme Court concluded that the Province had failed to consult adequately with the Band. The incorporation of the municipality was held to be one act by the Crown in a series of activities that had the potential to affect aboriginal rights and title in the area, including the activities of the resort developer both before and after municipal incorporation pursuant to a "master development agreement" with the Province. The Supreme Court did not, as the petitioners had requested, quash the new municipality's letters patent. Instead, it ordered the Province to conduct further consultation with Adams Lake, and to approach consultation on the incorporation of the mountain resort municipality in the context of ongoing consultation regarding the amendment of the 1993 master development agree-

ment between the Province and the ski resort developer, and the delegation of authority in respect of timber administration under the *Resort Timber Administration Act* that was underway within the provincial government, a matter in which Adams Lake also had an interest.

The key point on which the Court of Appeal differed from the B.C. Supreme Court in this case arises from a comment of the Supreme Court of Canada in *Rio Tinto Alcan v. Carrier Sekani Tribal Council*, 2010 SCC 43, to the effect that the duty to consult aboriginal people concerns "the specific Crown proposal at issue" and not the "larger adverse impacts of the project of which it is a part". Adams Lake's petition to the Supreme Court had made no specific complaint about the adequacy of ongoing consultation regarding the amendment of the Sun Peaks master development agreement or the transfer of timber administration within government, so the Court of Appeal found that the only matter that was properly before the Court was the adequacy of consultation regarding the incorporation decision itself. However, the B.C. Supreme Court had gone beyond considering the adequacy of that consultation by including in its analysis the positions advanced by Adams Lake on the past development of Sun Peaks and ongoing issues related to the master development agreement and timber administration. As regards the incorporation decision itself, the Court of Appeal was satisfied that the impact of incorporation on the Band's claims to aboriginal rights and title was "insubstantial". The incorporation of Sun Peaks Mountain Resort Municipality merely substituted one form of local government for another, and left the Province with the same bundle of obligations to the Band as existed prior to incorporation. The Court of Appeal found that the Ministry of Community and Rural Development had provided sufficient information to the Band about the proposed structure of the municipality and the legal effects of incorporation, and gave the Band "more than sufficient opportunity to respond". The Province had also accommodated the Band's interests by requiring the new municipality to form a First Nations advisory committee, something that had not existed prior to incorporation. Overall, the Province had met its constitutional duties to consult and accommodate.

The duty to consult aboriginal people concerns

"the specific Crown proposal at issue" and

not the "larger adverse impacts of the project of which it is a part".

A minor aspect of these decisions that will be of particular interest to rural municipalities concerns a firearms bylaw that the new Sun Peaks municipality apparently enacted in 2010. (Firearms bylaws are often cited as examples of municipal bylaws that can clearly have an impact on aboriginal rights, and in respect of which municipalities ought to consider consulting with local First Nations regardless of whether they have a constitutional duty to do so.) The B.C. Supreme Court cited this bylaw as an example of adverse impact on aboriginal rights and title resulting from the incorporation, in that such a bylaw requires no provincial approval. The Court of Appeal observed that there was no evidence of such adverse impact before the Supreme Court and that the bylaw

had been repealed since the Supreme Court hearing, but that even if the bylaw remained in force and was enforced against members of the Adams Lake Band, such members could seek a constitutional exemption in the enforcement proceedings, based on their aboriginal rights. Thus the Court of Appeal appeared skeptical that the mere enactment of such a bylaw could constitute an infringement of aboriginal rights.

It is also interesting to note the Court of Appeal's acknowledgement of evidence that the resort municipality was "prepared to exempt Band hunters from the bylaw". While not a finding that such an exemption would be a lawful form of discrimination in a municipal bylaw, this comment at least identifies another potential approach to accommodating aboriginal rights in regulations that have actual potential to impact the exercise of such rights.

Bill Buholzer ✍

News from the Firm

On August 14 and 15, **Reece Harding** and **Gregg Cockrill** argued the Neskonlith Indian Band v. Salmon Arm case before our Court of Appeal. The result will be of interest to all local governments as the First Nation seeks to apply the Crown's duty to consult to local governments. The Court of Appeal has reserved its reasons for judgment.

For the Record: The Importance of Accurate and Complete Council Minutes

The case of Sechelt Golf & Country Club Ltd. v. District of Sechelt, *2012 BCSC 1105, addresses a number of common law contract issues relating to leases, including estoppel and relief from forfeiture. These issues fall within the scope of lease law, regardless of the nature or identity of the parties to the dispute. There is, however, one very interesting issue in the case that is wholly local government in focus and this article addresses that issue only.*

The District of Sechelt was the landlord, and it had terminated a golf course lease on the basis of a number of defaults, the most important one being failure to pay rent in the amounts required by the lease. Rent was calculated in part based on a percentage of revenue generated by operation of the golf course. There were certain time-limited exclusions from revenue used to calculate percentage rent and the tenant took the position that, despite the time limitations in the lease, the Council of the District had passed a resolution extending the revenue exemptions until 2051. The District took the position that there was no such resolution, and that the tenant was thus not paying the full rent due.

The minutes of the Council meeting at which the tenant asserted the rent exclusion resolution had been passed did not record any such resolution. However, the Court went behind the minutes of the meeting and heard evidence from the Mayor, the then CAO, and the tenant that such a resolution had indeed been passed. Evidence of other staff and Council members was to the effect that "they could not recall such resolution". The latter evidence was of course not as definite and thus was weaker than the evidence of the Mayor and the CAO. The Court noted:

> "The fact that there were no council minutes which reflect the resolution as being passed is not determinative ... Minutes are only prima facie evidence of the record ... and [matters dealt with] at a meeting but not recorded can be proved by viva voce evidence ... the passage of a resolution or any proceeding may be shown to have happened by means of oral evidence although no record of it appears in the minutes".

The Court applied a legal presumption "of regularity", putting the onus on the District to prove that the lease rent exemptions had not been passed, and thus to show that the rent in the lease had not been reduced. In this regard, the Court quoted from an earlier case of the B.C. Court of Appeal:

> "It would be nonsensical for a municipality to be in a position of keeping shoddy records and benefiting therefrom – i.e., being permitted to avoid the effect of apparently regular contracts by making it difficult or impossible for outside parties to locate proof of proper authorization."

In choosing the definite evidence of the Mayor and the CAO that rent had actually been reduced over both the Minutes (which were silent), and the evidence of other Council members who swore only that they "could not recall", the Court held that the District had not met the burden of proof sufficient to engage the presumption of regularity. The Court also considered it noteworthy that the District had acted for some lengthy period after the disputed Council meeting as if such a resolution had been passed. It was only later, under a new CAO and Council who noticed that no such resolution appeared on the record, that the District took the position it did in respect of rent default.

Interestingly, there is nothing in the Reasons for Judgment that refers to any subsequent Council meeting at which the Minutes of the earlier meeting were "read and finally adopted" as being an accurate record. Since the judgment is silent on this aspect of normal Council procedure, it might be useful in the future for Councils, when adopting Minutes of earlier Council meetings, to use a fuller resolution such as:

> "Moved and seconded that the minutes of the Council meeting of _____(date) be adopted as read on this day and that such Minutes as read set out all the business before Council that day and fully and properly record all of the resolutions and bylaws passed and adopted by Council at that meeting."

Ray Young and Joe Scafe

Completely Paperless: Final Implementation of E-Filing at the LTO

The Land Title and Survey Authority has announced the third and final phase of mandatory electronic filing of land title documents and plans. This third phase comes into force November 1, 2012 and it encompasses all Land Title Act *and* Strata Property Act *survey plans that require local government or provincial Approving Officer approval. This final phase will require electronic filing of all subdivision, statutory right of way, posting, reference, and explanatory plans. Any mylar/paper survey plans must be fully signed before November 1, 2012 or they will need to be re-prepared in electronic format.*

When a surveyor prepares a survey plan in the new electronic format, the plan will show a pre-assigned plan number, and the image will be locked by attachment of the surveyor's certification form in PDF format. There are no signatures on the face of the plan; rather all signatures will be shown on the "Application to Deposit a Plan" form, which is related to the certification form by the plan number and a unique control number. All local government staff dealing with survey plans should be checking the application form to ensure the plan number and unique control number match those shown on the survey plan.

Local governments continue to be exempt from electronic filing requirements when they are the owner of the charge or interest in respect of which the application is made, and they are the applicant for registration. Agents, land surveyors, and lawyers (even those acting for local governments) are not eligible for this exemption. The Land Title and Survey Authority is considering an end date for this local government exemption.

Although local governments are currently exempt from electronic filing requirements, local government staff should be familiar with the new electronic forms, including how Approving Officer approval of electronic survey plans and applications is documented.

Electronic filing of Form A Freehold Transfers of Fee Simple, Form B Mortgages, Form C Charges (with and without survey plans), and some strata subdivision plans became mandatory earlier this year. This third and final phase has the effect of requiring nearly all documents and plans to be filed in the new electronic format.

Young Anderson is fully able to prepare and file electronic documents and forms. We are happy to help your organization at any and every stage of electronic document preparation, signature, and filing.

For more information on the Land Title and Survey Authority's mandatory electronic filing rules, please visit:
http://www.ltsa.ca/electronic-filing-system

Christina Reed

Pre-Public Hearing Document Disclosure: Procedural Pitfalls

Often viewed by planners as a procedural minefield, public hearings are required for bylaws adopting official community plans, zoning bylaws, heritage designation bylaws, and heritage revitalization agreements that change permitted use or density. The purpose of the public hearing is to allow all persons who believe that their interest in property is affected by a proposed bylaw to make representations to the local government respecting matters contained in the bylaw. Failure to strictly comply with the strict procedural requirements for public hearings can result in the bylaw being quashed.

The procedural requirements as stated in the *Local Government Act* concerning public hearings seem fairly straightforward. However, as local government staff members are well-aware, the requirements are anything but. Past court decisions have resulted in considerable changes to the procedural rules associated with public hearings: the hearing must be "fair", the council or board must be "impartial", and the parties being heard must know the "case" they have to meet. The B.C. Court of Appeal's recent decision in *Fisher Road Holdings Ltd. v. Cowichan Valley (Regional District)*, 2012 BCCA 338, has also emphasized the onerous procedural requirements for pre-public hearing document disclosure.

Strict compliance with these and other requirements, attention to detail, and contact with your legal counsel regarding pre-hearing disclosure procedures will prevent a successful challenge to a bylaw on grounds of insufficient document disclosure.

In light of the *Fisher Road* decision, when navigating through the public hearing procedural requirements, local governments should keep several things in mind:

1. The purpose of the public hearing notice is to permit members of the public to examine the bylaw to determine whether they

wish to make representations. Referring to "other relevant materials" in the notice may result in expanded obligations on the part of the local government with regard to the disclosure of other documents. Local governments should also ensure that the bylaw is not revised between the time a copy is made available for inspection pursuant to the notice and the time it is given further readings by the council, except to give effect to representations made at the hearing.

2. According to several leading B.C. Court of Appeal decisions, documents disclosed in advance of the public hearing must include all of the material that has been or will be considered by council in determining whether to adopt the bylaw. The Court in *Fisher Road* took this requirement one step further, holding that disclosure may extend to all materials that are relevant to the bylaw, whether or not council specifically turns its mind to those materials in relation to the bylaw under consideration. The test for disclosure has thus become such that materials that may be relevant, and not simply those that have in fact influenced the decision, must be disclosed prior to the hearing.

3. Information that is technical in nature must be made available sufficiently in advance of the hearing to permit members of the public to prepare their public hearing submissions.

4. Information on related land use applications should be made available for inspection, including development permit and variance applications, as well as previous OCP amendment and rezoning applications for the same property if those materials may be relevant to the decision.

5. The Court in *Fisher Road* also clarified that the fact that the person complaining of non-disclosure knew of the content of undisclosed material is no answer to the local government's failure to disclose the materials. Similarly, whether a person affected by the bylaw has suffered prejudice from non-disclosure is not determinative of whether the local government has fulfilled its duty of procedural fairness in the steps that led to the passage of the bylaw.

The above list is by no means exhaustive of the rules and requirements local government staff must keep in mind when preparing for a public hearing. Strict compliance with these and other requirements, attention to detail, and contact with your legal counsel regarding pre-hearing disclosure procedures will prevent a successful challenge to a bylaw on grounds of insufficient document disclosure.

Jay Lancaster ✍

Mark Your Calendars!

On November 30, Young Anderson will be hosting its annual **Client Seminar** at the Hotel Vancouver.

No Private Law Duty of Care Owed to Applicants in Council Meetings

On July 25, 2012, the BC Court of Appeal dismissed the appeal in P.S.D. Enterprises Ltd. v. New Westminster (City)*, 2012 BCCA 319, and clarified that, although a bylaw establishing council procedures creates a public law duty on the municipality to follow its provisions and ensure procedural fairness, the failure to implement those provisions does not give rise to a private law duty of care.*

In 2006, P.S.D. Enterprises agreed to sell its hotel property so that the City could redevelop the area. The appellant's obligation to complete the sale was subject to the City giving third reading to a zoning amendment bylaw for the property to which the appellant wished to relocate its business. While the appellant's lawyer had advised it to make the sale subject to fourth reading of the zoning amendment bylaw, the appellant alleged that it relied on a representative of the City, who told P.S.D. that third reading was the stage at which the substantive decision was made by Council and that Council had never turned down a bylaw at fourth reading, as a basis for making the sale subject only to third reading.

A public hearing of the rezoning application was held, Council gave third reading to the zoning amendment bylaw, and the purchaser gave P.S.D. notice that it was now waiving all conditions precedent and considered the sale agreement binding. Before fourth reading, P.S.D.'s principal attended a council meeting and made additional submissions to Council with respect to the zoning amendment application. His remarks violated the City's procedure bylaw, which provides that Council cannot hear substantive further submissions from a proponent of a bylaw change after the public hearing has been held. The City was obliged to rescind third reading and hold another public hearing, to ensure procedural fairness to others interested in the bylaw. Ultimately, the zoning amendment bylaw application was defeated.

P.S.D. brought a claim against the City for negligent misrepresentation, negligence, and failure to warn. The BC Supreme Court dismissed the claim, finding that the City had a private law duty of care with regard to following its own policies and bylaws, but that it was following its standard practice in executing its policy, which included written warnings to applicants not to make submissions to Council after the closure of a public hearing, and so had not breached the standard of care. P.S.D. appealed the decision.

Although the appeal was dismissed, the majority of the Court found that the trial judge erred when she held that the City owed P.S.D. a private law duty of care to follow its own policies and bylaws regarding the council meeting process. The trial judge had found that the City Clerk's apparent failure to stop the applicant from speaking at the council meeting was operational, and not part of the City's legislative function. On appeal, the City argued that the failure occurred in a quasi-judicial context, and that the judge failed to apply settled law regarding the immunity from tort liability that attaches to such functions.

The Court of Appeal held that the trial judge took an overly narrow view of the question, eliminating the proper context of Council's consideration of the application, which was in fact quasi-judicial. The Court of Appeal went on to note that Council has a public law duty to follow the provisions of its procedure bylaw, but held that a private law duty should not be superimposed on that public duty. To do so would have the effect of unduly encumbering the City's quasi-judicial function with the threat of private tort liability.

Melania Cannon

Conflict of Interest: Dos and Don'ts

Earlier this year, two Salt Spring Island Local Trust Committee trustees were found not to be in a conflict of interest when they voted in favour of a $4000 grant to the Local Water Council Society, of which they were both directors. While we await the November appeal of the B.C. Supreme Court's decision in Schlenker v. Torgrimson*, 2012 BCSC 41, now is a good time to review the conflict of interest rules by looking back on a few notable conflict of interest decisions, some of which made the front page of newspapers throughout the country:*

- In 2001, former Premier Glen Clark was found to be in a conflict of interest when he accepted renovations to his home for less than their value. The renovations were performed by Dmitrios Pilarinos, a family friend. Pilarinos later submitted a proposal for construction of a new casino, and Clark was involved in the approval process with Minister Michael Farnworth, who was appointed by Clark. Although Clark did not promote Pilarinos' proposal over others, Farnworth testified before the Conflict of Interest Commissioner that his discussions with Clark indicated that Clark favoured Pilarinos' proposal. Although the Commissioner concluded there was insufficient evidence to establish that Clark sought to influence the approval process, Clark was found to have improperly accepted a benefit that was directly or indirectly connected with his office when he accepted home renovations for less than their value.

- In *Fairbrass v Hansma*, 2010 BCCA 319, the Mayor of Spallumcheen was found not to be in a conflict of interest when he participated in an OCP amendment that affected land his sons owned, and had the potential to affect land owned by the Mayor. A group of electors alleged that Mayor Hansma had a direct conflict of interest in the OCP amendment because it could lead to an increase in the value of his land. The petitioners also alleged he had an indirect conflict of interest, because the amendment could increase the value of his sons' land. The Court rejected both allegations as being too remote. With respect to his own land, Mayor Hansma would have had to acquire more land and then subdivide it in order to benefit from the OCP amendment. In the case of his sons' land, the Court found that a familial relationship, without more, is insufficient grounds to establish an indirect pecuniary interest.

- In 1999, Stockwell Day was sued for defamation after sending a letter to a local newspaper criticizing a lawyer and school board trustee for defending a person accused of possessing child pornography. Day, who was Alberta's Provincial Treasurer and MLA for Red Deer-North at the time, inquired among his staff whether the Province's insurance fund would cover his defence. It was later alleged that Day attempted to use his position in order to influence the decision of whether his legal costs would be covered. The Alberta Ethics Commissioner found that Day had not sought to influence the decision to provide coverage. In compliance with the rules, Day had handed over decision-making authority on the matter to another minister,

albeit only after the matter was fully before the public. Furthermore, Day's staff vehemently denied that they were influenced to provide coverage because Day was their superior.

- In *Conibear v. Tahsis (Mayor)*, 2010 BCSC 985, the B.C. Supreme Court held that Mayor Dahling was not in a conflict of interest when she voted on a proposal to hold a music festival in Tahsis. The festival's proponent, Amber McGrath, was the mother of Mayor Dahling's granddaughter, and the petitioners alleged that Mayor Dahling had an indirect pecuniary interest in the matter because Dahling's granddaughter would benefit from any funds that Ms. McGrath received from the festival. After considering the evidence, notably that Mayor Dahling had no personal or business relationship with Ms. McGrath, and had seen Ms. McGrath only twice in the past 14 years, the Court held that the link was too remote and that the Mayor was not in a conflict of interest.

Local government officials must always keep the *Community Charter* conflict of interest rules in mind, in particular the obligation to disclose conflicts, restrictions on participation, and restrictions on inside and outside influence. Conflict of interest decisions are always useful to highlight the importance of these rules, and the results of the *Schlenker v. Torgrimson* appeal will be the subject of a future newsletter article.

Joe Scafe

Mayor, There's a Shark in My Soup

Recently the City of Richmond gained national (and even international) attention for its decision to ban the sale of dogs in pet shops within the City. While a few municipalities in the United States preceded Richmond in this legislative change, Richmond was considered by many to be the first to do so in the context of a business community that included three retail stores that were actively selling puppies at the time of the bylaw. Indeed, it was the first to have such a bylaw challenged, and the first to successfully defend it.

The case, *International Bio Research dba Pet Habitat, et al. v. Richmond (City)*, 2011 BCSC *("Pet Habitat")* has since been cited as breaking ground for similar bylaws in North America. *Pet Habitat* has even been identified in the media as a precedent for the City of Toronto's recently adopted ban on the possession, consumption, and sale of shark fin soup, a move now contemplated by a number of BC municipalities.

In the *Pet Habitat* case, Mr. Justice Savage found that Richmond's bylaw regulates businesses that sell pets and pet supplies, but does not prohibit them, and is authorized pursuant to the City's power to regulate in relation to business under s. 8(6) of the *Community Charter*.

Applying the same reasoning to a ban on the sale of shark fins, in soup or otherwise, there

is likely no class of business that would be prohibited by such a ban. While there are a number of businesses where the provision of shark fin products may be important to their profitability, there are many businesses in the same class that do not rely on that product. Thus, there is a strong basis to believe that a ban on the sale of shark fins would be within a municipality's jurisdiction to regulate business.

However, even if a challenge on the basis of a municipality's limited jurisdiction to regulate and not prohibit in relation to a business is unlikely to succeed, a further issue remains: What is the municipal purpose?

In *Pet Habitat* the court found that the City had "at least" one valid purpose in enacting the bylaw that could be rationally or reasonably connected to the bylaw itself: the reduction of the number of unwanted and abandoned dogs in Richmond through a limitation on impulse puppy purchases in retail stores. However, the decision in *Pet Habitat* falls short of endorsing the broader purpose of improving the conditions of dogs sold as pets in Richmond, and the alleged purpose of ending puppy mills outside of Richmond as valid municipal purposes. If anything, the reasons of Mr. Justice Savage indicate in *obiter* that Richmond may not have the power to prohibit the sale of dogs if its sole purpose is to drive puppy mills out of business.

Overall, the *Pet Habitat* case reaffirms that the wisdom of a decision of Council is not a matter for the court to reconsider in matters of policy. Nevertheless, questions of proper municipal purpose are likely to continue to pervade business bylaws, as Councils are asked to respond to broader concerns previously thought to be reserved to the provincial and federal governments. Puppy sales and shark fin soup may be just the beginning.

Francesca Marzari ✍

This article is an excerpt from the 2011 Young Anderson Seminar Paper on regulating business. Find the full article at http://www.younganderson.ca/publications/seminars/

News from the Firm

Ray Young and **Bill Buholzer** have each received a 3 year faculty appointment to UBC's School of Community and Regional Planning. **Sukh Manhas** and **Gregg Cockrill** have been reappointed to the UBC Faculty of Law as adjunct professors, teaching Municipal Law.

Francesca Marzari has recently published an article on nuisance, negligence, and injurious affection in the Digest of Municipal and Planning Law.

On August 16, **Reece Harding** attended at the University of Victoria to teach Introduction to Local Government Law and Bylaw Drafting to a group of 45 MATI students.

Sukh Manhas will be giving a general municipal law update at the Thompson-Okanagan LGMA Fall Chapter Meeting on September 14 in West Kelowna. **Carolyn MacEachern** will be giving a labour relations update at the Vancouver Island LGMA Fall Chapter Meeting on September 19 in Sooke.

On September 18, **Ray Young** and **Sukh Manhas** will be presenting an all-day Province-wide Board of Variance Seminar, hosted by the City of Surrey.

Ray Young and **Alyssa Bradley** will be presenting a session on "Greening Planning" at the Canadian Institute of Planners Annual National Conference in Banff, Alberta on October 10.

In late October, **Ray Young** will be speaking on the impact of First Nations claims on BC municipalities at the International Municipal Lawyers Conference in Austin, Texas. **Sukh Manhas** and **Francesca Marzari** will also be speaking at IMLA, Sukh as part of a taxation panel, and Francesca on the boundaries of business regulation, including puppy sales and shark fin soup.

Bill Buholzer will be speaking on The Approving Officer as a Statutory Decision-Maker at the MATI School for Approving Officers in Kamloops on October 29, and providing a legal update for the Association of Regional District Planning Managers in November.

Bill Buholzer will be chairing the rescheduled Municipal Law Continuing Legal Education (CLE) seminar on November 8 in Vancouver. **Pat Kendall** will be presenting a paper on elections issues and **Melania Cannon** will be presenting a paper on animal control issues.

In the Spring of 2013, **Ray Young** is invited to present a series of lectures on Growth Management and Planning, as Visiting Professor in the Faculty of Law at Georgia State University in Atlanta.

After the success of last year's session, **Ray Young** and **Alyssa Bradley** have been invited to propose another planning law session at the prestigious Rocky Mountain Land Use Institute's 21st annual symposium, to be held in Denver, Colorado in early 2013.