YOUNG ANDERSON
BARRISTERS & SOLICITORS

JUNE 2021 VOLUME 32, NUMBER 2

NEWSLETTER
LGMA CONFERENCE ISSUE

WHADDAYAMEAN? - A Ramble Through the BC *Interpretation Act*

Artisans of all sorts have a go-to tool that they find themselves using more often than any other. For chefs, it's likely the so-called chef's knife; for carpenters, perhaps a try square or marking gauge; for barbers, a particular pair of scissors. For many public law lawyers, it's the Interpretation Act*. A quick stroll through the BC* Interpretation Act *viewed through a local government lens will give an idea of how important this tool is to lawyers in our firm. (There's also an* Interpretation Act *applicable to federal enactments, that we consult less frequently.)*

We start with **section 2**, which says that the *Interpretation Act* applies to every *enactment*, unless a contrary intention appears in the enactment; this takes us to the *Interpretation Act*'s definitions of enactment, meaning an Act of the Legislature or a *regulation*, and regulation, meaning (among other things) a bylaw or other instrument enacted in execution of a power conferred under an Act. So, the *Interpretation Act* applies to local government bylaws unless a contrary intention appears in the bylaw. Note that *other instrument* would include a council or board resolution, to the interpretation of which we rarely see the *Interpretation Act* actually being applied.

Section 4 says that an enactment must be interpreted as commencing at the beginning of the day on which it comes into force. Thus, all bylaws enacted at a council or regional board meeting between 7 and 10 in the evening came into force at least 19 hours previously, and they all came into force at the same moment. (Who knew?) Of course, if the bylaw specifically says that it comes into force 60 days after the date of adoption, that's a contrary intention that defeats the beginning-of-the-day rule.

Thus, all bylaws enacted at a council or regional board meeting between 7 and 10 in the evening came into force at least 19 hours previously, and they all came into force at the same moment. (Who knew?)

Section 7 says that every enactment must be interpreted as *always speaking*. This means (for example) that a bylaw entitling the members of council to remuneration of $100 per meeting applies not just to the members of council who enacted the bylaw, but to the members

in office twenty years later as well. The bylaw "speaks" continuously to create a remuneration entitlement until the council of the day shuts it up by repealing it. If the bylaw says that the remuneration is available only until the current term of office ends, that's a contrary intention, the bylaw is silenced at the end of the term of office, and the new council has to address its own remuneration entitlement.

According to **section 11**, a head note to a provision in a bylaw that appears after the end of the previous section is not part of the enactment and must be considered to be a reference aid only. Local government bylaws often have head notes; a ubiquitous example is the head note "Permitted Uses" before a list of uses in a zoning bylaw. Courts have, many times, found a contrary intention in the zoning bylaw in order to let this particular head note perform a critical task – giving the following list some regulatory force.

Section 14 is the rule (notorious in planning departments) that says that enactments bind the provincial government, but then goes on to say that actually, they don't bind the government if they have to do with the government's use or development of land or the construction of improvements. (We doubt that this exception can be made inapplicable to a local zoning bylaw simply by expressing an intention in the bylaw that it doesn't apply and that the bylaw is binding on the provincial government after all.)

Authority under an enactment to appoint a public officer includes, according to **section 22**, authority to appoint another person to act in his or her place and appoint a person as the public officer's deputy. (Yes, the *Interpretation Act* still says *his or her*.) Thus, a municipal council may appoint a deputy approving officer and an approving officer to act in place of the approving officer when they're out of town, even though such positions aren't mentioned in the Land Title Act.

Local governments are often given minimum periods of time, expressed in days or weeks, for doing certain things, and **section 25.2** deals with the interpretation of such provisions. There's way too much confusing verbiage to quote here; suffice to say that "three days" means "three clear days", and so forth. According to **section 25.5**, if a day specified in an enactment for doing something falls on a *holiday* (see below), the act must be done on the next day that isn't a holiday. **Section 26** deems references to time in this province to be references to Pacific Standard Time, and says that it's 8 hours behind Greenwich Mean Time. This section allows the Cabinet to substitute Pacific Daylight Saving Time (7 hours behind GMT) which it has done, from 2 am on the second Sunday in March to

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2 am on the first Sunday in November of each year. Northeastern BC, however, rolls on Mountain Time year-round, including while Alberta is on DST, while southeastern BC is on Mountain Time but observes DST with Alberta. All of this Albertaphilia is permitted by a special rule in the Schedule to the *Local Government Act*. (Adoption of DST in Canada early in the last century was, by the way, enacted by municipal bylaw, first in Port Arthur, Ontario and a bit later in Regina, Winnipeg and Brandon.)

A subsection of the *Interpretation Act* that is probably undergoing a deep rewrite even as you read this is **subsection 28(2)**, which says that gender specific terms include *both* genders. No plausible interpretation of *both* could confidently capture more than two genders. It will be interesting to see how the drafters deal with what has come to be called "gendering". Whatever the provincial response, be thankful that **section 2** of the *Interpretation Act* makes it unnecessary for local governments to amend their bylaws to address the issue and that the "contrary intention" option allows local governments to come up with their own response if they dislike the Province's. **Subsection 28(3)** says that words in the singular include the plural and vice versa. Thus, it's generally not necessary to use phrases like "dwelling or dwellings" or formulations like "dwelling(s)" in a bylaw. However, care should be taken to indicate a contrary intention to displace this rule in appropriate circumstances; listing "single family dwelling" as a permitted use in a zoning bylaw without elsewhere stipulating a density rule could be risky.

Section 29 contains definitions of 88 expressions, many of which are used regularly in local government bylaws – nouns like *municipality, newspaper, holiday, land, peace officer and property,* and verbs like *shall* and *must*. (*Will* is defined, by the way, as a will as defined in the *Wills Estates and Succession Act*, so don't use it in a bylaw.) Since all of these definitions automatically apply in the interpretation of bylaws and resolutions unless a contrary intention is indicated, corporate officers (and local government lawyers) should keep a list of these terms at their elbow when drafting. Skipping to section 40, such a list should also include terms defined in the Schedule to the *Community Charter* (86 more terms) and section 1 of the Schedule to the *Local Government Act* (85 more terms), which (so far as the terms defined can be applied) section 40 makes applicable to "all enactments relating to municipal and regional district matters". This would seem to include both provincial statutes and regulations and local government bylaws and resolutions. (It's likely just a coincidence that the number of terms defined in each of these places is so similar.)

> ***Section 14*** *is the rule (notorious in planning departments) that says that enactments bind the provincial government, but then goes on to say that actually, they don't bind the government if they have to do with the government's use or development of land or the construction of improvements.*

Section 38 deals with newspaper notices. If no newspaper is published in a place (municipality, district, county, jurisdiction or otherwise) where an enactment requires a notice to be given in a newspaper, at the time when the notice is to be given, then the notice may be published in a British Columbia newspaper published *nearest* to that place at the required time. The *Interpretation Act* does not specify how *nearest* is to be interpreted (as the crow flies, or otherwise).

For corporate officers drafting internal references within bylaws, it's useful to know that according to **section 42** a section of an Act is divided into subdivisions known in descending order as subsections, paragraphs, subparagraphs and clauses. (The related numbering is 1(1)(a)(i)(A)). In this case the *Interpretation Act* defines Act as an *Act* of the Legislature so the application of these terms to a local government bylaw is not automatic, but there seems no good reason not to use the same terminology and numbering for the parts of bylaws (which can simply be a matter of practice). Corporate officers should also be aware that under **section 43** an Act may be cited by reference to its title, with or without reference to its chapter number. Local government bylaws frequently contain references to provincial Acts, and drafters often get mired in references to the Revised Statutes of British Columbia (R.S.B.C., last published in 1996), the annual Statutes of British Columbia (S.B.C.), and chapter numbers (the *Local Government Act* was chapter 323 of the R.S.B.C. but is now chapter 1 of S.B.C. 2015). **Section 43** indicates that within a bylaw, it can simply be called the *Local Government Act*.

We don't recall having ever been asked whether a local government can adopt an Interpretation Bylaw that's applicable to all its other bylaws. Setting aside for a moment all the confusion that would ensue from the enactment of such a bylaw after a municipal lifetime's worth of other bylaws have already been enacted, there seems no reason that they could not. In fact, in relation to the "municipal codes and other general bylaws" authority in s. 138 of the *Community Charter*, one could easily imagine that Chapter 1 of a Municipal Code would contain interpretation rules for all that follows. However, given the automatic application to local bylaws of the basic rules in the provincial *Interpretation Act* and the fact that particular terms might for very good reason be given different meanings in different local government bylaws (consider for example the definitions of "building" for the purpose of permit requirements in a building bylaw and for the generally broader purpose of siting restrictions in a zoning bylaw), the usefulness of a local government interpretation bylaw containing standard definitions may be questionable.

Bill Buholzer ✍

Courts Confirm Local Government Powers to Protect Tenants

In two recent decisions, released only one month apart, the BC Court of Appeal and BC Supreme Court gave local governments two big wins in relation to their ability to protect tenants.

In *VIT Estates v. New Westminster*, 2021 BCSC 573 the BC Supreme Court confirmed that the residential rental tenure zoning power at section 481.1 of the *Local Government Act* ("RRT Zoning") could be used to preserve existing rental units. In that case, the City applied an RRT Zoning Bylaw to six stratified buildings which were wholly owned by various corporate entities. The Bylaw specified that those units – which had always been occupied by tenants – could henceforth only be occupied in that same manner. No owner of any such unit would be able to occupy it while the Bylaw was in force.

The owners challenged the RRT Zoning Bylaw, arguing that it was outside of the City's legislative authority to apply such zoning to an existing and stratified building. They argued that those units already had a "form of tenure", which was based on their fee simple ownership interests, such that they could escape the City's RRT Zoning Bylaw. The existing and vested rights of owners to occupy units that were already stratified, they argued, could not be captured by RRT Zoning.

The BC Supreme Court found that the interpretation advocated by the owners would serve "no remedial purpose" and that the legislation was clear. Further, there was no conflict between the City's Bylaw and the *Residential Tenancy Act* (the *"RTA"*). The Legislature's intention in enacting the RRT Zoning power, the Court found, was clearly to grant local governments the ability not only to use RRT Zoning bylaws to encourage the creation of *new* rental stock, but also to apply such bylaws to preserve *existing* rental units.

While *VIT* addressed a very specific *Local Government Act* power in relation to rental units, the Court of Appeal's decision in *1193652 B.C. Ltd. v. New Westminster (City),* 2021 BCCA 176 took on the broad powers found at section 8 of the *Community Charter*. The City's Bylaw that was challenged in this case targeted the practice of "renoviction", whereby the owner of a non-stratified rental building displaces tenants by acquiring vacant possession to substantially renovate the building. Once the building is renovated, the *RTA* requires the owner to offer the units back to those tenants who previously occupied them. The key point, however, is that the *RTA* is silent about the rent an owner may charge in such a situation. Many landlords substantially increase the rent, leaving tenants to find new units in a difficult rental market.

The Bylaw targeted this practice by, among other regulations, requiring landlords to offer those units back to tenants without any rent increases other than those specifically contemplated in the *RTA*. The owner of a purpose-built rental building argued that the Bylaw was unauthorized because it related to the landlord-tenant relationship, which it argued was an area comprehensively addressed by the *RTA* and beyond municipal authority.

The Court of Appeal found that the City had the authority to pass the Bylaw under two provisions in the *Community Charter* – sections 8(6) (the power to regulate business) and 8(3)(g) (the power to protect persons or property in relation to rental units). The matter was not, as argued by the owner, one that was already governed by an "all-inclusive scheme" set up by the *RTA*. Municipal regulation in this area did not create statutory disharmony, as the *RTA* included no "statutory right to charge market rent" following a renoviction.

While these two cases deal with different powers, found in separate legislation, they both reflect an understanding that local government powers require broad interpretation and, as reflected by the opening provisions of the *Community Charter*, that local governments have the power to address existing and future community needs. Where rental stock may not have been an issue in decades past – and therefore is not an area in which local governments legislated – these decisions are a recognition from the courts that the rental market is a pressing community need over which local governments do have jurisdiction.

Nick Falzon ✍

Supreme Court of Canada Finds Duty of Good Faith in Exercise of Contractual Discretion

If you think your contract gives you truly unlimited discretion to make decisions on a particular subject because the contract states that you may do so in your "absolute discretion", think again. A recent decision of the Supreme Court of Canada has determined that there is a duty of good faith in the exercise of contractual discretion. The discretionary authority must not be exercised unreasonably in a manner unconnected with the purpose underlying the discretion.

This principle emerges out of the long-running dispute between Metro Vancouver and its waste haulage contractor over the contractor's claim for additional compensation. The dispute was finally concluded with the recent decision of the Supreme Court of Canada in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District,* 2021 SCC 7. In 2011 Metro decided to reallocate waste from its landfill at Cache Creek to facilities in the Lower Mainland. In February 2015, an arbitrator decided that Metro's reallocation decision breached the contractual duty of good faith and awarded compensation of $2,888,162 for Metro's breach. Metro was successful in obtaining leave to appeal the arbitral award to the BC Supreme Court and in overturning the award on the merits in 2018. Subsequent appeals by Wastech to the BC Court of Appeal and to the Supreme Court of Canada were dismissed.

The dispute arose out of a 20-year contract for the operation and management of solid waste for Metro. Wastech hauled garbage to either the Vancouver landfill, the Burnaby incinerator or the Cache Creek landfill, with higher long-haul rates applicable to waste trucked to Cache Creek. The agreement gave Metro the "absolute discretion" to determine and amend the minimum amount of waste transported to the Cache Creek landfill for any given year. The agreement also established a target operating ratio ("Target OR"), with operating costs projected to be 89% of total revenues, resulting in a projected 11% profit to Wastech. The agreement provided for certain adjustments. If the Actual OR deviated from the Target OR by 0.3 or less, that is, it fell between 0.86 and 0.92, Wastech would either make, or receive, a retroactive payment of 50% of the difference between the Actual and Target OR. Another section of the agreement provided for adjustment to the haulage rates annually if the Actual OR was less than 0.86 or greater than 0.92 of the Target OR.

Metro's reallocation of a greater amount of waste to its Lower Mainland facilities, resulted in the volume transported to Cache Creek in 2011 dropping by 31%. Before adjustment payments, Wastech operated at a loss, with an operating ratio of 1.045. After the adjustment payments, Wastech achieved an operating ratio of 0.96, or a profit of 4% of total revenues. The arbitrator accepted that Metro's reallocation decision was "guided by the objectives of maximizing the [Burnaby incinerator's] efficiency, preserving remaining site capacity at the [Cache Creek Landfill], and operating the system in the most cost-effective manner." However, by doing so, Metro acted in furtherance of its own business objectives and

without regard to Wastech's interests. If viewed only from Metro's perspective, Metro's conduct was honest and reasonable, but by failing to have "appropriate regard" to Wastech's interests under the agreement, the arbitrator ruled that Metro's exercise of the contractual right to reallocate waste between facilities was "dishonest" because it was "wholly at odds with the legitimate contractual expectations of the other party."

The arbitrator grounded his ruling in the Supreme Court of Canada's 2014 decision in *Bhasin v. Hrynew* which had recognized good faith as an "organizing principle" of contract law. *Bhasin* involved a breach of the good faith duty of honesty in contractual performance. The Supreme Court of Canada has described this duty to "mean simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract." Given the discretionary authority under the contract that Metro had to reallocate waste between the three facilities, the arbitrator's finding of dishonesty was unlikely to survive on appeal. Indeed, the BC Supreme Court allowed the appeal of the arbitrator's ruling. The BC Court of Appeal then held the arbitrator was wrong in finding dishonesty by the exercise of contractual rights simply because it was inconsistent with the legitimate expectations of the other party. Finally, the Supreme Court of Canada agreed that the duty of honest performance set out in *Bhasin* was not breached by Metro.

There was no guidance beyond this general statement with respect to the purposes underlying the discretion given to Metro to determine the amount allocated. This did not mean, however, that Metro was free to reduce the volume of waste directed to Cache Creek to zero.

The Supreme Court of Canada went on to consider whether Metro had breached another good faith duty: the duty to exercise a discretionary power in good faith. This was a distinct duty, separate from the duty of honest performance addressed in *Bhasin*. In *Wastech* the Court set out to identify the considerations that determine whether the good faith duty relating to the exercise of discretionary authority has been breached.

Wastech's contract with Metro gave the latter the "absolute discretion" to determine the amount of waste that would be transported to the Cache Creek landfill; unlike previous agreements between the parties, there was no guaranteed minimum volume of waste allocated to Cache Creek. The minimum amount of waste was to be determined by reference to the seasonal variation of waste flows and "other factors which influence the [waste volume] being delivered to the Cache Creek Landfill during a calendar year." There was no guidance beyond this general statement with respect to the purposes underlying the discretion given to Metro to determine the amount allocated. This did not mean, however, that Metro was free to reduce the volume of waste directed to Cache Creek to zero. The Court reasoned that it would be absurd to think the parties intended that Metro would have such "untrammelled power" as it would leave Wastech subject to Metro's "uninhibited whim". (At what point between a "zero" allocation and the 31% reduction would have been characterized as capricious or

arbitrary, and therefore not in good faith, the Court offered no hints.) The Court turned to the recitals at the beginning of the agreement which described the parties' intentions to "incentivize each other to 'maximize efficiency and minimize costs', to provide for the 'maximization of the municipal solid waste disposal capacity of the Cache Creek Landfill', and to be 'sensitive to significant changes in operating standards, services or system configuration'".

The "absolute discretion" of Metro to determine waste allocations was meant to allow it "the flexibility necessary to maximize efficiency and minimize costs of the operation." In light of these purposes, Metro did not act unreasonably, in the sense of acting capriciously or arbitrarily; rather its discretion was exercised consistently with the purposes underlying the grant of contractual discretion. The Court rejected the standard of "substantive nullification" of the benefit of the contract to the one party by the other's exercise of a contractual discretion (applied by the arbitrator). That one party's exercise of discretion results in the other party losing some or all of its anticipated benefit is not determinative of whether a discretion is exercised in good faith. Metro was not required to subordinate its interests to those of Wastech. In this case the Court considered that Wastech was seeking an advantage that it had not bargained for. Both parties were said to have recognized the risk but had decided to leave the discretion respecting allocation in place. Metro's discretion was exercised "within the range of conduct contemplated by the purpose of the clause" and that was not done in bad faith or unfair.

One difference between the majority reasons and the separate concurring reasons of Justice Brown may prove to be important in subsequent cases dealing with allegations of bad faith in the exercise of contractual discretionary authority. Although the majority recognized that the determination of whether discretion is exercised unreasonably is "highly context-specific" and dependent upon the intention of the parties. The majority reasoned that contracting parties would rarely, if ever, expect that discretion given by a contract would be exercised in a manner inconsistent with the purpose for which it was conferred, therefore acknowledging a general duty to not exercise discretionary authority unreasonably should not be seen as interfering with freedom of contract. Contracting parties then may contract out of the implied undertaking that discretionary power will be exercised in good faith. By contrast, Justice Brown stated that the purpose of a discretion is always determined by the parties' intentions as shown in the contract, and thus, with careful drafting, it would be possible to immunize an exercise of discretion from judicial review for want of good faith.

To summarize the impact of the *Wastech* decision, it is significant in confirming that the general "organizing principle" of good faith extends to the exercise of discretion conferred in contracts, including to agreements that are unconstrained on their face by granting an "absolute discretion" to one contracting party. Parties cannot say that the absence of any limiting wording gives them completely unlimited discretion but instead must appreciate that their exercise of discretion must not be unreasonable in light of the purpose for which the discretion is given.

Barry Williamson

Regional District did not Discriminate When it Denied Services to a Mentally Disabled Resident

Local government employees often face anger and frustration from members of the public; they may even face behaviour that rises to the definition of harassment. In AB v. Regional District, *2021 BCHRT 59 (Chen), the BC Human Rights Tribunal found a Regional District did not act in breach of the* Human Rights Code *when it denied services to a member of the public with a mental disability after she harassed employees over several years.*

Ms. B moved to the District in 2003 and began to make repeated Freedom of Information requests related to the District's finances. She made repeated complaints about barking dogs, then made FOI requests about her complaints. The District found most of her complaints were unsubstantiated. When she was dissatisfied with the District's response, she called District staff and swore at them or called them names.

The District informed her it would no longer answer her letters, but said she could speak to the CAO in person.

Ms. B then made several complaints about smoke coming into her yard. Her complaints were investigated by a member of the fire department, Mr. S. Ms. B was dissatisfied with the results, and called him names.

There was evidence that Ms. B's calls to the District in 2016 and 2017 numbered in the hundreds, if not thousands. She would frequently swear at employees, call them names, and sometimes blew an airhorn into the phone.

There was evidence that Ms. B's calls to the District in 2016 and 2017 numbered in the hundreds, if not thousands. She would frequently swear at employees, call them names, and sometimes blew an airhorn into the phone.

In 2016, the CAO wrote to Ms. B to tell her she would only be allowed to communicate with him during a set 15-minute block each week. She did not stop her calls to other employees. She was then blocked from contacting the District at all for a period of several months.

In 2017, Ms. B confronted a fire department employee, Mr. S, on the street while he was riding his bike with his children. She filmed them and called him names. She called Mr. S repeatedly with complaints about smoke.

Ms. B was engaged in conflict with many neighbours about their dogs. The RCMP

held a public meeting about Ms. B. The CAO attended and spoke. At this meeting, the RCMP encouraged people to submit complaints about her. The employee, Mr. S, submitted a complaint about her phone calls to him. Ms. B was charged with criminal harassment, and was convicted, but had her conviction overturned. The judge who overturned her conviction said she was "goading" government employees into doing their jobs.

In September 2017, the CAO wrote to tell her she was permanently banned from contacting the District.

Ms. B was later diagnosed with bipolar disorder. While the BCHRT found the District did not know of her diagnosis, it did know Ms. B had a mental disability. The BCHRT also concluded that the bylaw enforcement services denied to Ms. B were services customarily available to the public, and that she suffered an adverse impact with respect to those services.

However, the BCHRT found the District proved that they had non-discriminatory reasons for denying services to Ms. B. The first was the District's limited resources to address Ms. B's large number of complaints. The second was their obligation to provide a safe and harassment-free workplace to their employees. The Tribunal said:

> There may be a fine line between taxpayers goading government employees to do their jobs and harassing those employees. It is to be expected that people, such as Ms. B, may experience anger or frustration when they feel like staff are not doing their jobs. However, that does not mean employees have to accept harassing or abusive behaviour on a regular basis while doing their jobs.
>
> I accept that in this situation, Ms. B's behaviour did cross the line into harassing and abusive behaviour that the District is entitled to protect its employees from. This Tribunal has held that local governments have an obligation to provide its employees with a workplace that is free from harassment: *Colbert v. District of North Vancouver*, 2018 BCHRT 40 at para. 48. Goading government employees to do their jobs cannot be interpreted so broadly as to permit people to use harassment in their goading.

This decision confirms that local governments have an obligation to protect their employees from harassment on the job, including by members of the public. In this case, the local government was justified in denying services because Ms. B's conduct was extreme; it took place over a number of years; and alternative measures had been attempted (investigating her complaints; limiting contact to the CAO; and offering a meeting, which she refused to attend). The Tribunal found it was reasonable for employees to experience her conduct as harassment, and for the District to take steps to ensure a harassment-free workplace. For these reasons, Ms. B's complaint was dismissed.

Pam Costanzo ✍

Gender-Inclusiveness: Updating BC laws and practices

The gender-neutral drafting style that previously evolved in the 1980s included both males and females, but it did not account for persons who identify as neither male nor female. Since the enactment of Bill C-16: an Act to amend the Canadian Human Rights Act and the Criminal Code, *conversations about gender identity and expression, as well as pronoun use, have become an important subject of discussion in Canada. British Columbia is following suit and making changes to ensure that the language used in its laws is gender inclusive for all.*

Recent Legislative Changes

Bill C-16, which received royal assent on June 19, 2017, added "gender identity or expression" to the list of prohibited grounds of discrimination in the *Canadian Human Rights Act* and the list of characteristics of identifiable groups protected from hate propaganda in the *Criminal Code*. It further provides that evidence that an offence was motivated by bias, prejudice or hate based on a person's gender identity or expression constitutes an aggravating circumstance for a court to consider when imposing a criminal sentence.

More recently in British Columbia, on March 11, 2021, Order-in-Council No. 140 replaced more than 600 instances of gendered language in 70 provincial regulations, with the aim of ensuring gender inclusivity and avoiding any bias towards gender. These updated regulations include the *Employment Standards Regulation*, the *Freedom of Information and Protection of Privacy Regulation*, and the *Land Title Act Regulation*. Pronouns such as "he" and "she", have been replaced with gender-neutral alternatives. These changes have started a process of replacing the outdated language in BC laws, and the provincial government is planning to review and remove all remaining instances of gendered language in regulations and legislation.

In line with these legislative changes, BC courts introduced new practice directions in December 2020 regarding the use of pronouns and forms of address in court proceedings. This new mandate is meant to allow for a court system that is more inclusive and improves the experiences of gender-diverse people in the legal system.

Gender Neutral Drafting

Gender-neutral drafting is a way to ensure clarity and precision in legislation, while also enforcing anti-discrimination and inclusiveness values. "Inclusive language" is free from words, phrases and tones that reflect prejudiced, stereotyped, or discriminatory views of particular people or groups. It is also language that acknowledges diversity in all of its forms, conveys respect to all people, is sensitive to differences, promotes equitable opportunities, and does not deliberately or inadvertently exclude people from feeling accepted.

Canada's Department of Justice proposes the following drafting techniques to avoid using gender-specific language:

- Use the singular "they" and its other grammatical forms ("them", "themselves", and "their") to refer to indefinite pronouns and singular nouns.
- Replace a possessive pronoun with a

definite article. A definite article can often replace a possessive pronoun with no loss of meaning.

- Replace gender-specific terms with gender-neutral terms that have the same meaning (e.g., "chairman" to "chairperson").
- Repeat the gender-neutral noun instead of using personal pronouns.
- Rewrite the sentence to eliminate the pronoun.
- Use the plural.
- Use a neutral word or phrase such as "person", "any person", "every person", or "no person".

Although local governments have broad autonomy to choose the language they will utilize in their bylaws and policies, they should consider using gender-neutral language to be more inclusive of all.

Amy O'Connor & Alexandra Greenberg ✍

Council Authority Over Internal Procedures for Censure and Sanction Upheld in Recent Decision

The recent decision in Dupont v. Port Coquitlam (City), *2021 BCSC 728, involves disclosure of confidential information, sanctions and censure, and concerns over a tree. The decision comes from the BC Supreme Court and involves a petition for judicial review of a resolution adopted by the Council of the City of Port Coquitlam declaring that Councillor Dupont had disclosed confidential information and formally censuring her, imposing restrictions on her access to confidential information, and removing her from certain committees and roles. In her petition, Councillor Dupont sought to quash this resolution, expunging any reference to the resolution, the censure, and the sanctions from the City's records.*

The background to the proceeding was a proposed development of City owned land, which would have the potential to impact trees on that land. When considering the development, Council had only ever considered the matter *in camera*, i.e. in a meeting closed to the public. The City alleged Councillor Dupont disclosed confidential information regarding these discussions to the public. Prior to advancing these allegations, the City retained a senior lawyer to investigate the matter. The investigator's conclusion, outlined in a report to Council, was that Councillor Dupont had breached confidentiality on 3 occasions. The first was on February 10, 2020, when the councillor met with a consultant the City had retained to assist with the proposed development. At this meeting, Councillor Dupont invited a third individual who had no official capacity with the City. The second occasion was on April 2,

2020, when the councillor forwarded copies of emails sent to Council by that same consultant to certain members of the public. The third incident was on April 5, 2020, when Councillor Dupont again forwarded an email to certain members of the public. This time, the email, containing sensitive commentary regarding the impact of tree retention on the marketability of the units, included the note "late closed item on the agenda".

Upon receiving the investigator's report, Council began considering the motion of censure and the sanctions which would remove Councillor Dupont from her appointed roles on various committees as well as restrict her access to confidential information. It is from this decision that the councillor brought the petition for judicial review.

Ultimately, the Court addressed this petition by setting out two central points: was the resolution by Council reasonable and did they have the jurisdiction (i.e. the authority) to censure and sanction one of its own members; and in taking these actions, was Council acting in a procedurally fair way.

With regard to the jurisdictional question, while Councillor Dupont argued that the analysis should centre on the question of whether or not Council was correct in what it did, the Court concluded that the correct standard in this case is reasonableness. That means, the City Council was to be given deference in interpreting their own enabling legislation (the *Community Charter*) and in determining that it has the authority to pass resolutions of censure and sanctions. The Court's conclusion was then that the Council reasonably (and also correctly) concluded it had the authority to censure its own member. The Court also concluded that Council has the authority to remove discretionary appointments (as inherent in the authority to make such appointments), set procedures for accessing confidential materials, and that it reasonably determined it had the authority to adopt the resolution that censured Councillor Dupont and imposed those sanctions.

The next issue was whether the censure and sanctions were themselves reasonable. Here the Court noted that the reasons set out in the resolution, and importantly the detailed investigative report before council, provided a "robust set of reasons that exceed what would ordinarily be expected or required of a municipal council, even for this more adjudicative type of decision". This provided a transparent, intelligible, and coherent path to Council's conclusion. All of this allowed the Court to come to the conclusion that the Council's decision to censure and sanction was reasonable.

While this decision is consistent with previous cases as authority for local governments to interpret their own procedures and control their own members, there was one piece of this petition that was left without conclusion; procedural fairness. Unlike the substantive questions posed by Councillor Dupont in her petition, the issue of whether the City had been fair in how it was conducting this review was only brought forward at the oral argument before the Court. In the end, the Court concluded that failure to bring claims of procedural justice in the written pleadings meant that they were not properly before the Court and would not be considered. This leaves open the possibility that in similar situations, despite the reasonableness of a Council's actions, if the process is unfair a court could quash the resolution. As such, it may be advisable for councils considering such actions to consult with legal counsel regarding issues of procedural fairness before moving ahead with such action.

Timothy Luk ✍

Farm Practices Immunity

Under the British Columbia Farm Practices Protection (Right to Farm) Act (the "FPPA"), *a person conducting a farm operation as part of a farm business is protected against civil liability for nuisance and against the enforcement of certain municipal bylaws if they are conducting the farm operation in accordance with "normal farm practices" and provided certain other conditions specified in the Act are satisfied. Accordingly, it is important for local governments to understand what a "normal farm practice" is, what protection the* FPPA *affords, and how the* FPPA *impacts local government bylaw powers.*

What is a "normal farm practice"?

Only "normal farm practices" are protected under the *FPPA*. A "normal farm practice" is defined under the *FPPA* as "a practice that is conducted by a farm business in a manner consistent with (a) proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, and (b) any standards prescribed by the Lieutenant Governor in Council, and includes a practice that makes use of innovative technology in a manner consistent with proper advanced farm management practices and with any standards prescribed under paragraph (b)." In the *FPPA* "farm business" means "a business in which one or more farm operations are conducted, and includes a farm education or farm research institution to the extent that the institution conducts one or more farm operations." As well, the *FPPA* lists the activities involved in carrying on a farm business that are a "farm operation".

Under the *FPPA*, the jurisdiction to determine whether or not a particular activity giving rise to the disturbance is a "normal farm practice" rests with the British Columbia Farm Industry Review Board (FIRB). In *Lubchynski v. Farm Practices Board*, 2004 BCSC 657, the Court found that a determination of whether or not a particular practice is a "normal farm practice" is a factual determination to be made by the FIRB and not a matter of statutory interpretation.

In determining whether a practice is a "normal farm practice", the FIRB looks to whether it is consistent with "proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances". This evaluation may include factors such as the proximity of neighbours, their use of their lands, geographical or meteorological features, types of farming in the area, and the size and type of operation that is the subject of the complaint.

Protection under the FPPA

The *FPPA* provides that where the farm operation is conducted in accordance with normal farm practices and on certain lands, farmers are protected from nuisance actions and interference with their farm operations by injunctions or court orders. The *FPPA* only applies to land that is in the agricultural land reserve, land where farm use is allowed under the *Local Government Act*, land licensed for aquaculture, and Crown land designated as a farming area.

The *FPPA* also provides that before the "right to farm" protection under *FPPA* can be invoked, a farm operation must be in compliance with the *Public Health Act, Integrated Pest Management Act, Environmental Management Act*, the regulations under those Acts and any land use regulation.

The *FPPA* gives immunity to farmers from exposure to certain bylaws and overrides local government powers related to nuisance from prescribed farm operations. In particular, sections 2(2.1) and (3) of the *FPPA* illustrate

circumstances in which farmers are exempted from municipal bylaws when conducting farm operations.

In the recent decision in *Squamish (District) v. 0742848 B.C. Ltd.*, 2021 BCSC 301, the Court analyzed whether the defendants who had cut trees on their property without a proper permit fell within the protection found in the *FPPA*. The Court found that there was no evidence that the tree cutting was done as part of a farm business and, further, a tree bylaw passed under s. 8(3)(c) of the *Community Charter* was not one of the bylaws excluded from the definition of "land use regulation". The Court found that the tree cutting activity engaged in by the defendants was not a protected activity under the *FPPA*.

Local governments bylaw power over farm land

To obtain bylaw and injunction immunity under section 2(3) of the FPPA, the farm operation must be conducted on land that is in an agricultural land reserve, on land that is the subject of an aquaculture licence, or Crown land designated as a farming area.

Whether immunity is available on other land "on which, under the *Local Government Act*, farm use is allowed" under section 2(2)(b)(ii) of *FPPA* is less clear. In the *Squamish (District)* case the Court found that the immunity did apply to land for which farming was a permitted land use. In contrast, the Court in *Alberni-Clayoquot Regional District v. Durmuller,* 2013 BCSC 2533 appears to have given section 2(3) a more careful reading and concluded that immunity did not apply to land that was only captured by section 2(2)(b)(ii).

In addition to the *FPPA*, the *Local Government Act* imposes restrictions on local governments zoning authority in relation to farming. The case of *Windset Greenhouses (Ladner) Ltd. v. The Corporation of Delta,* 2007 BCCA 126, revealed the conflict between the municipal bylaw powers and the powers of the province under the *FPPA* regarding farming and zoning. Windset acquired a parcel of land in Delta to develop a large-scale greenhouse facility. Delta enacted a business licence bylaw that required an applicant to execute restrictive covenants related to wildlife habitat enhancement, lighting glare, and the heating of the greenhouses as a condition for obtaining building permits. Windset challenged the validity of the bylaw. It was declared *ultra vires* because it was a farm bylaw which had not been approved by the Minister of Agriculture.

When enforcing nuisance bylaws, it is recommended that local governments consider the "right to farm" protection provided under the *FPPA*, in particular, considering whether a particular activity is a "normal farm practice" and the type of land where the farm operation is being conducted.

Alexandra Greenberg ✍

Miscellaneous Statutes: Did You Know?

Did you know that under section 19 of the Hydro and Power Authority Act*, BC Hydro has the power to expropriate property devoted to public use and property owned by another expropriating authority? This is a statutory exception to the common law rule that an expropriating authority cannot expropriate the property of another expropriating authority. However, BC Hydro cannot expropriate municipal property that may be used for the generation or supply of power.*

Joe Scafe ✍

Look For Your Lawyers

Carolyn MacEachern, **Michelle Blendell** and **Pam Costanzo** will be presenting a session on “Issues for the Post Pandemic Workplace” at the Lower Mainland Local Government Association 2021 AGM and Conference being held virtually May 12-14, 2021.

Bill Buholzer and **Guy Patterson** will be presenting a Planning and Zoning Refresher course at the SFU City Program Course (virtual) on May 19.

We wish **Inder Biring** and **Steven Shergill** all the best as they join the ranks of Dentons LLP. We will miss Inder and Steven’s enthusiasm, intellect and penchant for organizing fun firm social events.

This year’s GFOABC annual conference (virtual) will feature a presentation by **Michael Moll** on “Collections – ‘Other’ Remedies” as part of the Collector’s Forum on May 26 and session on “Reserve Funds – Refresher & Review of Pandemic Implications” presented by **Kathleen Higgins** and **Amy O’Connor** on May 27.

On June 9, 2021, **Guy Patterson** and **Timothy Luk** will be presenting a legal update at the LGMA Approving Officers’ Workshop (virtual).

Guy Patterson will be participating in a panel discussing phased stratas at the LGMA Approving Officers’ Workshop being held virtually on June 10, 2021.

The Planning Institute of British Columbia’s Annual Conference being held this year in Whitehorse, YT will feature a number of speakers from Young, Anderson. On June 15, **Guy Patterson** and **Nick Falzon** will be presenting on “Consultation and the Duty to Consult”. On June 16 and 17, **Bill Buholzer** and Coralee Breen will be presenting a session titled “Floodplain Bylaws in BC – the Agony and the Agony” and **Reece Harding**, Lisa Spitale and Emilie Adin will speak on “Residential Rental Tenure Zoning & Renoviction Bylaws: The New Westminster Experience”.

Sukhbir Manhas & Jan Enns (Jan Enns Communications) will be presenting a session entitled “The Challenges of Social Media Require Resiliency” at the Local Government Management Association Annual Conference (virtual) on June 16.

STAY CONNECTED

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

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