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Recitals ≠ Reasons

The Supreme Court of Canada's decision in Canada (Minister of Citizenship and Immigration) v Vavilov, *2019 SCC 65 [*Vavilov*] can be seen as a bit of a double-edged sword: it favours administrative bodies by significantly limiting the kinds of decisions that are reviewable on a standard of correctness. On the other hand, the Supreme Court suggested a more rigorous approach to reasonableness review by affirming the need to develop and strengthen a "culture of justification" in administrative decision making.*

Vavilov was a case where the decision maker was required to provide written reasons. The Supreme Court's adoption of a principled approach to reasonableness review that puts reasons first depends, of course, on whether reasons are required in the particular circumstances. It is difficult to analyze a decision for reasonableness by considering, as *Vavilov* instructs, whether it is based on "an internally coherent and rational chain of analysis" where the decision maker has not provided reasons. The Supreme Court acknowledged a different approach to reasonableness review is required in cases where formal reasons have not been provided. In three short paragraphs within the 197-paragraph majority decision, the Supreme Court said that for bodies, like a municipal council passing a bylaw, where decisions are rendered by vote and not through the production of reasons, reasonableness review must necessarily focus on the outcome rather than on the decision maker's reasoning process. Nevertheless, the reasons for enacting a bylaw, for example, may be deduced from "debate, deliberations and statements of policy." Reviewing courts are invited to review the record and context to determine whether a decision is reasonable in terms of the relevant constraints.

This duality of reasonableness review methodology, depending on whether or not there are reasons, creates an incentive for judicial review applicants to be creative in framing local government decisions as "reasons-based", which can then be subjected to the much more probing form of reasonableness analysis. This is what occurred in *Ferguson Point Restaurants Inc. v Vancouver Board of Parks and Recreation*, 2021 BCSC 1888, where the petitioners challenged a Parks Board resolution that prohibited vehicle traffic on Stanley Park Drive, turning it into a temporary bike path until October 31, 2021. *Vavilov* describes faulty reasons for a decision as exhibiting clear logical fallacies, such as "circular reasoning, false dilemmas, unfounded generalizations or an absurd premise". The petitioners argued that statements in the recitals of the Board's resolution that the temporary bike path would reduce carbon emissions were unsupportable and "almost certainly false" and, further, that the format of a survey designed to gauge user satisfaction with the temporary lane closure was flawed, producing unreliable

results which did not take into account the negative impact of the lane closure.

The chambers judge, Justice Tucker, gave a brief commentary on the role of recitals:

> It is fair to generally describe a set of recitals as a statement of reasons. However, statements of reasons and reasons for decision are not interchangeable: all reasons for decision state reasons, but not all stated reasons are reasons for decision.
>
> Recitals may fulfill various functions. The purpose of a particular recital or set of recitals must be ascertained by considering context and content.

Clear enough. The judge then noted that the text of a legislative decision is unlikely to include reasons for decision because reasons for decision would be "incredibly challenging to draft in the legislative context, but also because no explanation is owed."

The judge reviewed a transcript of the debate that occurred at the Board, observing that the record disclosed a "vigorous, multi-faceted debate of the kind generally associated with legislative decision-making." In finding that a "plenitude" of factors had been raised in the debate for and against the resolution, the judge concluded that neither of the two bases cited by the petitioners for setting aside the resolution had been central or significant considerations in the Board's deliberations. That alone was sufficient to dismiss the petition.

The judge described the purpose of the recitals in the decision-making process as identifying the circumstances in which the Parks Board was contemplating the exercise of its statutory authority. The recitals were not reasons for decision, rather:

> To the extent the Recitals are explanatory, they serve to set the scene for the debate, not to rationalize the Directives [the operative sections of the resolution]. By way of analogy, the Recitals are a prologue, the Directives are an epilogue, but the May 10th debate is the decision-making narrative that connects and informs them.
>
> The Recitals are not reasons for decision. No reasons for decision were owed in respect of the Resolution, and none were provided.

The decision is helpful in rejecting the petitioner's approach of simply equating recitals with reasons. The fact that the Board had engaged in a fulsome debate on the merits

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of the resolution accorded with the observation in *Vavilov* that a municipal council's reasons are traditionally deduced from the "debate, deliberations and statements of policy".

While it is tempting to conclude that challenges to bylaws or resolutions based on allegedly faulty premises in recitals will not be successful, that is probably too broad an assertion. What do we make of the situation where there is little, if any, debate to provide an insight into council's rationale for enacting a bylaw or passing a resolution? Where there is no meaningful debate or deliberation, judicial review applicants may nevertheless urge the court to consider recitals as evidence, albeit second-best, of a council's rationale. As with much of the residue flowing from *Vavilov*, there are still questions that remain for consideration in subsequent court decisions.

Barry Williamson

Building Permit Requires Tenant in Common's Consent

The BC Supreme Court has recently issued a decision which will be of interest to municipal building inspectors and councils alike. In Este v District of West Vancouver*, 2022 BCSC 584, a property owner applied for judicial review of two decisions – one by the District's building inspector to refuse to accept a building permit application, and one by District Council to impose a remedial action requirement on the property and its owners.*

The property in question was located within a single-family residential area on West Vancouver's waterfront. The house on the property was seriously damaged by a fire in 2015, and had been uninhabitable ever since. One of the two registered owners wished to demolish the fire-damaged residence and rebuild a new house, while the second owner wished to sell the property.

The building inspector advised the owner who wished to rebuild that she needed the consent of the second owner. The second owner expressly advised the building inspector that she did not consent. The first owner had originally applied to the BC Supreme Court in a separate action to compel the second owner to provide the necessary consent for a rebuild; the Supreme Court granted that order, but before a building permit was issued, the Court of Appeal overturned that decision (*Este v Esteghamat-Ardakani*, 2020 BCCA 202).

The first owner then sought judicial review of the building inspector's decision that the consent of the second owner was required. She alleged that the language of the District's building bylaw ought to be interpreted so that the consent of a single owner was sufficient; that the District was bound to issue a permit because it had permitted a renovation in 2009; and that the building bylaw should be interpreted so as to be consistent with the common law governing the relationship between tenants in common.

The court found that the decision to refuse to accept the permit application was reasonable. The applicable section of the bylaw required that "every owner" consent to the issuance of a permit; the court found that the plain meaning of these terms was consistent with a requirement that both the first and second registered owners must give their consent, especially in light of the fact that the bylaw imposed liabilities on the owners of properties where permitted work was being done. The court also found that it was an acceptable practice for the District to presume consent of all registered owners to a building permit application in the absence of express notice otherwise, given the administrative and practical burden and expense for building department staff and associated administrative procedures; accordingly, the 2009 renovation permit, which was issued under such an implied consent, was not a binding precedent.

The applicable section of the bylaw required that "every owner" consent to the issuance of a permit; the court found that the plain meaning of these terms was consistent with a requirement that both the first and second registered owners must give their consent, especially in light of the fact that the bylaw imposed liabilities on the owners of properties where permitted work was being done.

The court also found that, notwithstanding that the common law of tenants in common requires that each tenant in common has the right of use over the entire property and that there is no right as between tenants in common to compel property uses, these principles could not bind the District's decision regarding a request for regulatory permission. Such a request must be assessed in light of its own governing statutory scheme, rather than being constrained by the common law of private property rights between owners. The court wrote that "the building permit "legalize[s]" the activity, as it is presumptively not allowed [due to the bylaw prohibition on construction being carried out without a building permit]... The regulatory role municipalities play in this regard is a well-established limit on private rights over property."

The court referred to the decision in *Yestal v New Westminster (City)*, 2012 BCSC 925, as analogous in principle. In that case, the petitioners also sought to overturn the respondent City's decision not to grant a building permit. The petitioners had applied for a permit to renovate a limited common space. The strata, who held legal title to the common property and retained some rights under the relevant statute, did not consent to the application. Because the strata had not agreed to the application, the City refused to grant a permit. In finding that the strata corporation was a proper party to the judicial review, the court held as follows: "I am satisfied that where, as here, the bundle of ownership rights is divided as between two parties, the position taken by the applicant and by the City in interpreting the Building Bylaw as requiring the consent of the Strata Corporation for a building permit application is apt."

The court also upheld the decision of the District's council to impose a remedial action requirement under the *Community Charter*, which compelled the owners to demolish and remove the fire-damaged structure as being a nuisance and in a hazardous condition, as both reasonable and procedurally fair.

Elizabeth Anderson

Did You 'Notice'? Municipality Ordered to Pay Over $350K in Damages for No-Notice Tax Sale

Where property taxes are delinquent, the Local Government Act *(the* 'LGA'*) requires a municipality to sell parcels of land at an annual tax sale. Property owners or chargeholders affected by the sale are ordinarily given one year from the day the tax sale began to redeem their property. If the property is not redeemed within the redemption period, the property transfers to the party that purchased the property at the tax sale.*

The power given to municipalities under the *LGA* to sell private land for the non-payment of delinquent taxes is an extraordinary remedy. Where a municipality takes steps to exercise this power, it must ensure that it strictly complies with certain conditions. These conditions include giving notice to the property owner and chargeholders as required under the *LGA*.

The BC Supreme Court's recent decision in *Morgan v Spallumcheen (Township of)*, 2022 BCSC 752, illustrates how the failure to give proper statutory notice may jeopardize a tax sale and impose significant liability consequences on a municipality. In *Morgan*, the court ordered the Township of Spallumcheen to pay $352,316.28 in damages to the property owner for failure to give proper notice. This amount was calculated based on the assessed value of the property as at trial. The property owner was also awarded costs in accordance with the *Supreme Court Civil Rules*.

The Facts

In January 2011, Mr. Morgan became the registered owner of a 9.37-acre property located west of Armstrong, British Columbia. A year later, his family moved into a trailer on the property where they lived for approximately nine months until a bylaw officer told them to leave because there was no septic system or permit for the trailer. Following this request, Mr. Morgan and his family moved into rental accommodation in Vernon.

While in Vernon, Mr. Morgan's business began to fail. He had difficulty paying the property taxes on his property. Mr. Morgan owed approximately $6,700 in property taxes when the Township of Spallumcheen sold the Property at an annual municipal tax sale on September 24, 2017. The assessed value of the Property at the time of tax sale was $159,000. The Property was sold for $11,300 and the redemption period for the property ended one year later. Mr. Morgan remained unaware of the tax sale or the redemption period until after the redemption period expired on September 24, 2018.

Notice Requirements for Municipalities

Section 657(1) of the *LGA* imposes stringent requirements on collectors to give written notice to certain persons that a particular property has been sold at tax sale and the date when the redemption period expires. This notice must be given within three months following the tax sale.

Municipalities must strictly adhere to the statutory requirements imposed in section 657(1) to fulfill the collector's duty to ensure that the property owner or chargeholder has been given timely notice of the sale, or at least deemed notice where a substituted service order is issued.

Damages to be Assessed and Awarded

After the redemption period expires and the tax sold property is registered in the

name of a purchaser, an aggrieved owner or chargeholder may bring an action for damages against a municipality for failure to give notice of the sale. Under section 669(3) of the *LGA*, a municipality must indemnify a property owner or chargeholder for "any loss or damage" sustained as a result of the municipality's failure to notify them in accordance with the requirements set out above.

Section 669(3) of the *LGA* does not specify the date on which a property owner or chargeholder's loss or damage is to be assessed and very few cases have considered this provision of the Act. In *Morgan*, the court concluded that the date for the assessment of damages in each case should be determined based on the circumstances of the case. The ultimate award of damages is one that is "fair on the facts" and that "does justice to the parties".

Drawing on the Supreme Court of Canada's decision in *Semelhago v Paramadevan*, [1996] 2 S.C.R. 415, the court in *Morgan* confirmed that every piece of property is generally considered to be unique. Assessing damages to be awarded to the aggrieved property owner based on the property's value at the end of the redemption period may not be adequate to compensate for the loss of the property. In *Morgan*, the property at issue was Mr. Morgan's only piece of property; it was the property upon which he intended to build a business and eventually retire. When the Property was sold at tax sale, Mr. Morgan had no ability to purchase a replacement at the end of the redemption period. He also missed out on the significant increase in property values that had occurred in the area since 2018.

Taking these factors into account, the court held that damages should be calculated based on the value of the property as at the date of trial. This date, rather than the date of tax sale or the end of the redemption period, is the day Mr. Morgan was actually made whole. As a result, the Township of Spallumcheen was ordered to pay almost twice the assessed value of the property at tax sale given the increase in property values between 2018 and 2022. This finding illustrates the significant liability imposed on municipalities to compensate an aggrieved party for the increase in value of their property when proper statutory notice is not provided.

Does the *LGA* allow an aggrieved property owner to recover full indemnity for legal fees?

Morgan provides interesting insight into the interpretation of the term "indemnify" under section 669(3) of the *LGA*. At trial, Mr. Morgan argued he should be fully indemnified for the legal fees he incurred to bring his claim. In light of the contingency fee agreement he had with his lawyer, Mr. Morgan would be unable to afford an equivalent piece of land and would not be made whole without full indemnity for legal fees.

The relevant section of the *LGA* is silent on the right of an aggrieved party to recover other expenses such as legal fees or costs. In *Morgan*, the court found that, had the legislature intended to include legal fees in s.669(3), it could have done so explicitly as it did in other provisions of the Act. The court held that the correct interpretation of s.669(3) did not entitle Mr. Morgan to be indemnified for his legal fees and costs. Rather, only the loss or damage caused by the municipality's sale of property could be recovered by way of an indemnity. The court relied on the *Supreme Court Civil Rules* to award costs to Mr. Morgan as the successful party. These costs are not intended to cover the full expense of legal fees actually incurred. Mr. Morgan's costs entitlement was limited to partial indemnity for legal fees in the form of party and party costs at Scale B.

Julia Turner

Erosion vs. Avulsion and Ownership of Land

The recent decision in Fipke v Kelowna (City)*, 2022 BCSC 417 provides local governments with useful guidance on navigating the interesting and unique topic of property rights over those portions of waterfront lands that have submerged underwater due to erosion or avulsion. Of significance, the court found that in making a decision such as whether to issue a development permit, it was reasonable for the local government to utilize the professional reliance model by relying on expert opinions—in this circumstance, of professional surveyors—to understand the application of concepts of erosion or avulsion that are outside of a council's expertise.*

Background

On June 22, 2021, the City of Kelowna (the "City") issued a development permit and a development variance permit (the "Permits") to Aqua Resort Ltd. ("Aqua") for the construction of a significant development on the shore of Okanagan Lake. The petitioner, who owned property adjacent to the development site, challenged the City's decision to issue the Permits to Aqua. He alleged that the City had inaccurately calculated the density of the development for the purpose of the City's Zoning Bylaw No. 8000, which sets a maximum permissible density for parcels in the zone.

In 1938, Aqua's land was identified in a survey that was subsequently registered in the Land Title Office in 1939. Since then, the shore of Okanagan Lake has moved inland, and a portion of Aqua's land as shown on the 1939 plan is currently underwater. The City's density calculation for Aqua's proposed development proceeded on the assumption that the submerged portion of land had still remained Aqua's land. The petitioner challenged the City's inclusion of the submerged land into the density calculation on three grounds: first, he alleged that Aqua no longer owned the submerged land; second, he claimed that when Aqua subsequently surrendered the submerged area to the Province, it was improperly interpreted as the subject of a "taking" pursuant to section 1.8.1 of the Zoning Bylaw; and third, that the City had misinterpreted section 2.2.1 of the Zoning Bylaw.

Ownership of Submerged Lands: Avulsion and Erosion

The determination of whether Aqua had owned the submerged portion of land was dependant on whether the movement of the shoreline had been caused by *erosion* or *avulsion*. Justice Gomery explained these concepts as follows, in para 25:

> The heart of the distinction between erosion and avulsion lies in the idea that, while both involve the loss of land into water, erosion involves a gradual, imperceptible loss, whereas avulsion is rapid and dramatically obvious. Where land is lost by erosion, the property line shifts at common law, and also under the *Land Title Act* in cases where the boundary of a lot is defined by reference to a shoreline or a river. Where land is lost by avulsion, the property line remains where it was.

Aqua retained three licensed land surveyors

to provide opinions on whether the movement of the shoreline after 1938 was attributable to avulsion or erosion. If the shoreline had retreated due to erosion, the property line would have moved and Aqua would not have owned the submerged lands; however, if avulsion was the cause, the property line would have remained the same. Following historical research, all three surveyors concluded that the movement of the shoreline was a result of avulsion, due to a significant flood in 1948.

This issue was initially put before Council in January 2018, after Aqua's first development permit application. Before coming to a decision of whether to issue the permit, the City's planning staff requested and reviewed the materials that were mentioned in the surveyor's opinion. At the Council meeting, the City's planning manager explained that the shoreline had retreated due to avulsion, not erosion, and that Aqua therefore did in fact have development rights over the submerged land. In relying on the professional opinions that had substantiated the case for avulsion, the City's Council followed the professional reliance model that is used in municipal decision-making. Council therefore approved the issuance of Aqua's development permit in 2018.

When Aqua failed to commence construction by the deadline set in the 2018 permit, Aqua reapplied for the Permits in 2021 on substantially the same basis. Accordingly, on June 22, 2021, the City made the decision under review to issue the Permits.

The petitioner argued that the materials before the City could not support a finding that the shoreline had moved due to avulsion rather than erosion.

First, he argued that the loss of land to water resulting from the flood in question could not be considered "sudden" for the purposes of the common-law definition of avulsion. On this point, Justice Gomery found, on the contrary, that the surveyors' opinions were consistent with decisions such as *Boyle Concessions Ltd. v Yukon Gold Co.* and *Ontario (Attorney General) v Shanks*, which stand for the authority that avulsion can result from flooding that occurs over a sustained period of time, rather than only from one sudden flooding episode.

Second, the petitioner alleged that the surveyors had ignored the evidence of a further loss of land prior to and after the avulsive flood event of 1948. On this point, Justice Gomery found, at para 37, that "the surveyors had expertise in the interpretation of such matters", and as such, "it was reasonable for the City to rely upon them and not undertake its own forensic investigation." Given that all three surveyors came to the same conclusion about the cause of the movement of the shoreline, there was no reason for the City to doubt their expertise.

Last, the petitioner alleged that the surveyors engaged in a results-oriented reasoning for Aqua's benefit. Honourable Justice Gomery rejected this argument, as it constituted an attack on the surveyor's credibility that was unsupported by any evidence in the record.

In short, Justice Gomery found that it was reasonable for the City to rely on the expertise of the professional surveyors who had all investigated the matter and come to the conclusion that the shoreline had moved as a result of avulsion, resulting in the property line remaining unchanged. Therefore, it was reasonable for the City to find that the submerged land was owned by Aqua, and could be factored into the density calculation required under the Zoning Bylaw.

Statutory Interpretation

The remaining grounds on which the petitioner challenged the City's decision were based on its interpretation of the Zoning Bylaw. Earlier in the decision, Justice Gomery prefaced the analysis of these issues with the following well-known

interpretive principle relevant to municipal legislation:

> To the extent that a decision engages a question of the interpretation of municipal legislation, it is always important to bear in mind the words of Chief Justice Bauman mandating a broad and purposive approach in *Society of Fort Langley Residents for Sustainable Development v Langley (Township)*, 2014 BCCA 271 at para. 18:
>
> > Frankly, the Court can take the hint – municipal legislation should be approached in the spirit of searching for the purpose broadly targeted by the enabling legislation and the elected council, and in the words of the Court in *Neilson*, "with a view to giving effect to the intention of the Municipal Council as expressed in the bylaw upon a reasonable basis that will accomplish that purpose".

First, the petitioner challenged the City's interpretation of a section 1.8.1 of the City's Zoning Bylaw. That provision states:

> Where a lot is reduced in size as a result of a taking by public use by the City, Provincial or Federal Government, ... by dedication, expropriation, or purchase, the lot shall be considered to exist as it did prior to the taking for the purpose of further development ...

By way of background, in 2019, Aqua offered to surrender the submerged potion of its land to the Province. The City agreed, as it wanted the submerged area to be returned to the Province in order for the land to be protected. To accomplish this, upon obtaining the Surveyor General's agreement for the transfer, Aqua's submerged land was dedicated as a "return to Crown" by way of a new subdivision plan. Aqua was assured that the dedication would not affect the density calculation for its proposed development.

The petitioner argued that the City improperly interpreted Aqua's 2019 surrender of the submerged land to the Crown as a "taking" under section 1.8.1 of the Zoning Bylaw. He argued that the dedication could not be interpreted as a "taking" in the context of section 1.8.1, as, in his view, this section contemplates a compulsory acquisition of property, such as an expropriation. The court disagreed with the petitioner's interpretation, finding that a "taking" in the context of the Zoning Bylaw is not necessarily compulsory, particularly when read in light of the City's official community plan provisions relating to voluntary negotiation of density transfers in aid of civic objectives or protection of environmentally sensitive areas. The court found that a more restrictive interpretation of "taking" would "constrain the City's ability to negotiate for the achievement of its planning objectives" (at para 56).

The petitioner's final ground for challenging the City's decision was based on section 2.2.1 of the Zoning Bylaw, which reads:

> Where a zone boundary is shown as approximately following the edge, shoreline, or high water mark of a river, lake, or other water body, it follows that line. In the event of change, it moves with the edge or shoreline. [emphasis added]

In relation to this provision, the petitioner argued that despite the property line being fixed by avulsion, the relevant C9 zone boundary nevertheless had moved inland, and the submerged land consequently fell outside the C9 boundary and could not benefit from the higher permitted density of the zone.

The court disagreed, and made reference to a 2019 zoning map that identified the submerged land as part of the C9 zone. The court further found that, first, regardless of whether the submerged land had fallen outside zone C9, it

was reasonable and common practice for the City to calculate the density within the area in which the development was taking place; and second, the phrase "in the event of change" in section 2.2.1 refers to a change in *a property boundary* that results from the movement of the edge or shoreline, such that the section is inapplicable (and the zone boundary does not move) where avulsion occurs and the edge or shoreline moves but the property boundary does not.

Julia Tikhonova

Real Estate And Other Money Transactions: Two Important Considerations

When entering into a real estate or other transaction involving the payment or receipt of monies, there are two important considerations that should not be overlooked. The first is the form in which the monies are to be paid or received, and the second is whether deposits should be held in an interest-bearing trust account.

Form of Payment

Over quite some time, the risk of cyber and other fraud has been front of mind for the financial sector. With this, that sector has taken a closer look at the processes relating to the clearing of financial instruments, resulting in uncertainty as to when a financial instrument can be relied upon. This uncertainty means that attention should be paid when negotiating a real estate or other money transaction to the manner in which monies are to be paid or received.

The most secure manner of payment or receipt of monies is by wire transfer (not to be confused with electronic funds transfers). With a wire transfer, the monies appear in the receiving party's account immediately, and clear automatically such that the transaction cannot be reversed by the paying party. The only manner in which a wire transfer can be reversed is where the wire transfer instructions contain an error (e.g., the wire transfer instructions contain the receiving party's account information, but attribute ownership of that account to the paying party). This reversal usually occurs within 24 hours of the monies being paid, and results in the monies being removed from the receiving party's account. To minimize the risk of such a result, agreements specifying that monies be paid by wire transfer should require that the paying party provide a copy of the wire transfer instructions to the receiving party so that they can be reviewed for accuracy. Our policy for receiving monies from clients by wire transfer is that they be received at least one clear day in advance of when they must be paid out (e.g., if payout is to be on Thursday, the monies have to be received on Tuesday) and that we be provided with a copy of the wire transfer instructions. Our policy for paying out monies received by wire transfer is that they will only be paid out one clear day after they have been received.

The next most secure manner of payment or receipt of monies is by bank draft. With a bank draft, the monies are guaranteed, save and except where the bank draft is fraudulent. Where a bank draft is fraudulent, it can be reversed up to 30 days after it has been cashed. Previously,

a financial institution that issued a bank draft would provide confirmation when asked that a bank draft was valid. However, more recently, financial institutions have abandoned that practice due to liability concerns. While the risk of fraud cannot be wholly avoided, there are steps that can be taken to limit that risk. At the very least, agreements specifying that monies be paid by bank draft should require the paying party provide a copy of the cheque used to purchase the bank draft bearing the paying party's information along with the bank draft itself. With respect to the direct deposit of bank drafts into our trust account, we only permit direct deposit by our local government clients or by lawyers. In the latter case, we require that the lawyer provide us with a copy of their cheque used to purchase the bank draft along with a copy of the bank draft itself and a copy of the deposit slip. Our policy for paying out monies received by bank draft depends on the circumstances. In general, we hold the monies for five clear days before we pay them out.

Certified cheque is similar in risk to a bank draft depending on the financial institution involved. While many financial institutions will set aside the monies associated with the certified cheque, making the funds guaranteed (save and except for fraud), others do not. In the latter case, the certified cheque simply represents a statement by the financial institution that, at the time the cheque was certified, there were sufficient funds in the account. Our policy for paying out monies received by certified cheque depends on the circumstances. In general, we hold the monies for fifteen clear days before we pay them out.

Lastly, cheques, whether a lawyer's or real estate agent's trust cheque or a personal cheque, and electronic funds transfers are not guaranteed funds. Our policy for paying out monies received by cheque or electronic funds transfer is that we hold the monies for thirty clear days before we pay them out.

When negotiating a real estate or other money transaction in which monies are to be paid or received, attention should be paid to the manner of payment. Certainly, in all cases where significant funds are involved, or payment is required in a timely manner, wire transfer should be specified.

Interest Bearing Trust Accounts

It is common, where monies are to be held pursuant to an agreement for the agreement to specify whether the monies are to be held in an interest-bearing trust account and to whose benefit the interest is. An interest-bearing trust account was usually specified where monies were to be held for a long period of time, or where the sum of money was significant.

Recently, the Federal Government has indicated that all interest-bearing trust accounts, including one held by a lawyer on behalf of their client, will be subject to the filing of a trust return. With this new policy of the Federal Government, when negotiating a real estate or other money transaction where monies are to be held, the requirement to file a trust return should be factored into the decision of whether an interest-bearing trust account is appropriate. We understand that the filing of a trust return would involve accounting and other fees of approximately $1,250.00. This cost may eliminate or diminish any benefit from the requirement that monies be held in an interest-bearing trust account, especially as these accounts usually require the deposit to be for a minimum of 30 days before any interest is paid. In any event, the agreement should provide that the cost of the trust return be firstly paid out of the interest earned, and should specify which party is responsible for any shortfall.

Sukh Manhas

Damages and Notice to a Municipality

Whenever claims are made against local governments (municipalities and regional districts) in BC, those who defend against such claims know that the first step is to reach for certain trusted tools. One such example is section 736 of the Local Government Act. *If you are unfamiliar with this section, or in need of a refresher, section 736 requires a party intending to claim damages from a local government to provide that local government with notice within two months of the date in which the damage was sustained.*

While the *Local Government Act* is explicit that failure to provide such notice is not a bar to an action, it has nonetheless become a go-to tool for municipalities to discourage parties from making certain types of claims. In *Ladouceur v Forbes*, 2022 BCSC 549 the BC Supreme Court examined the scope of section 736 (technically section 286 under the earlier revision of the statute, *Local Government Act*, R.S.B.C. 1996, c. 323) by addressing whether the notice requirement applies to third party claims for contribution. A third party claim for contribution arises when a plaintiff sues a defendant for damages, and the defendant then claims that another (third) party should contribute to the payment of some or all of the damages.

The court then discussed two interwoven purposes of this notice provision; to ensure that municipalities are given a timely opportunity to properly investigate and to protect municipalities from stale claims that might upset budgetary planning.

The facts in the main action in *Ladouceur* involved a collision which occurred on 3 August 2010 between the Plaintiff, Erika Ladouceur, and defendant, David Forbes, a Canada Post employee operating a Canada Post vehicle. At the time of the collision, Ladouceur was cycling on the Galloping Goose Regional Trail on Vancouver Island. The collision itself occurred at the point where the trail intersected with Kelvin Road in the District of Saanich (the "Municipality"). The Plaintiff filed an action against David Forbes and Canada Post, but not against the Municipality or the Capital Regional District, who were jointly responsible under an agreement between them for signage on the trail.

The defendants filed their response to civil claim on 24 January 2017 and provided notice to the Municipality on 5 December 2017. The third party claim was filed, with leave from the court, on 26 June 2018. The Municipality subsequently made an application for summary dismissal of the third party claim on the basis that the defendants failed to provide notice pursuant to section 736 (s. 286 at the time).

In considering the Municipality's application for summary dismissal, the court began its analysis with the basic premise that there is no general requirement that notice be given in a claim for damages, and hence this provision is the "rare exception to that general rule" (citing *Thauli v Delta (Corporation)*, 2009 BCCA

455 at para. 1). The court also noted the Law Reform Commission in 1990 wrote that the provision appears to only apply to damages, not other types of claims such as contribution and indemnity. It would seem then, that from the beginning the court wished to acknowledge that this provision should be understood as being limited to only what has been granted in the legislation, rather than connecting to a greater common law rule. The court then discussed two interwoven purposes of this notice provision; to ensure that municipalities are given a timely opportunity to properly investigate and to protect municipalities from stale claims that might upset budgetary planning.

In reviewing some of the caselaw on the subject, the court concluded that this particular question has not yet been addressed by the courts in BC. The court in *Ladouceur* also provided a reminder that when performing statutory interpretation, the starting point will be the grammatical and ordinary sense of the words in the context of the legislative scheme as a whole, having regard to the intent of the legislature (citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21).

In interpreting the notice provision, the court noted that the language used in section 736 includes the use of "defendant", at s. 736(3)(b): "the defendant has not been prejudiced in its defence by the failure or insufficiency." After having been unable to identify a clear definition of defendant in the *Local Government Act* or the *Interpretation Act*, the court turned to additional provisions for assistance and noted that section 737 of the *Local Government Act* (s. 291(3)(c) at the time) includes the use of "defendants" and reads as follows:

> (3) The municipality is only entitled to the remedy over if
>
> (a) the person referred to in subsection (1) is made a party to the proceeding, and
>
> (b) it is established as against that person that the damages were sustained because of an obstruction, excavation, cellar or opening placed, made, left or maintained by the person added as a defendant or third party. (emphasis added)

The addition of "third party" to section 737 settled the matter for the court. Quoting *Sullivan on the Construction of Statutes* (6th ed.) the court states "... one assumes that, in drafting one clause of a bill, the draftsman had in mind the language and substance of other clauses and attributes to Parliament a comprehension of the whole Act". By specifically using "defendant" and "third party" in section 737, the court concludes that the legislature must have intended for the notice provision to only apply to a municipality when it is a defendant to a civil claim. The court considered three opposing arguments (absurd consequences, derogation from legislative purpose, and differing results depending on the process chosen) against this conclusion, but in each case dismissed the argument as non-applicable. The court again noted that this is a rare exception provided by the Legislature, and therefore should be understood as narrow in interpretation.

For those who skipped to the end, what are the main takeaways? Two things, the first is that section 736 of the *Local Government Act* does not apply to a third party claim for contribution, specifically those made under Rule 3-5 of the Supreme Court Civil Rules. Second, while section 736 continues to be one of the first things to consider when a claim for damages is alleged against a local government, the courts will likely take a narrow view of its applicability.

Timothy Luk

Lawful Non-Conforming Uses under Strata Bylaws?

Land use bylaws in British Columbia are typically the domain of municipalities and regional districts. Strata corporations, however, will sometimes adopt bylaws under the Strata Property Act *that regulate how land may be used within a strata plan. These strata bylaws may potentially seek to prohibit a use of a strata lot that is already existing on that strata lot and otherwise permitted under the local government land use bylaw. Owners of affected strata lots would likely want to assert that their uses are "grandfathered", however they must seek protection under the* Strata Property Act*, not the* Local Government Act*. Recent court decisions show that that these disputes may play out differently than disputes involving land use bylaws and questions of 'commitment to use' and 'lawful non-conformity'.*

An example of this mid-use prohibition was considered in *Omnicare Pharmacy Ltd. v The Owners, Strata Plan LMS 2854*, 2017 BCSC 256. The case involved a strata council that purportedly amended its strata bylaws to prohibit all nonresidential strata lots in the complex from being used as a pharmacy. At the time, one of those strata lots was being used as a pharmacy dispensing methadone and problems with the pharmacy's clientele were causing "friction" within the strata. The question of whether the existing pharmacy had been "grandfathered", as the pharmacy owner alleged, and was therefore not subject to the prohibition was not answered by the court. This was because the court struck down the prohibitory amendment for not being passed in accordance with procedural requirements under the *Strata Property Act*.

A similar issue was more recently considered in *Kunzler v The Owners, Strata Plan EPS 1433*, 2020 BCSC 576 and 2021 BCCA 173. The background to the case was that the petitioners had purchased a bare land strata lot on Salt Spring Island with the intention of opening a(n otherwise) lawful medical use cannabis production business. The petitioners obtained a regional district building permit and began applying for the necessary federal permits, at which point the other owners within the strata plan moved very quickly to hold a special general meeting to consider amending the strata's bylaws to prohibit various uses, including "the commercial production of cannabis plants or cannabis-based products". The bylaw received the necessary super-majority of votes at the special general meeting and was duly passed.

The petitioners challenged the amendments in the BC Supreme Court and asked the court to use its power under section 164 of the *Strata Property Act* to remedy strata corporation decisions that are "significantly unfair". In considering the issue of fairness, the lower court judge first noted that:

> While a strata corporation is different from a municipality in its private nature and governance, some assistance is to be found in municipal non-confirming use authorities regarding the retroactive effect of bylaws on properties already put to a particular use, particularly with respect to the concept of fairness and its application in this case.

Before commenting:

> In this case, the petitioners had taken initial preparatory steps to establish the Cannabis Business on the Property, including hiring an architect to help design the Facility and obtaining a CRD building permit. However, they have not started

> construction of the Facility. While they have applied for the necessary licence through Health Canada, they have not yet obtained such approval. By analogy to the above authorities, I am satisfied there has been no actual use nor commitment to use the Property for the Cannabis Business.

While obtaining a building permit might have provided protection from a land use bylaw amendment, it did not, apparently, mean that the petitioners were safe from a prohibitive strata bylaw amendment.

The petitioners appealed to the BC Court of Appeal and challenged the lower court's use of the municipal analogy. Justice Grauer, for the Court of Appeal, said:

> The appellants submit that this was a wholly inapt analogy based on the proposition that if the governing body (municipal council or strata council) rushes to enact its prohibition before the parties affected get their shovels in the ground, then the prohibition is not oppressive. In this, the appellants contend, the judge lost sight of the concept of "fairness", and the role of the court in protecting owners from the tyranny of the majority.
>
> I disagree. The judge was alive to this issue, observing at para 116 that the concept of "fairness" in the context of a strata corporation is different from in the municipal context. Moreover, this was but one aspect of the judge's analysis, relating to an evaluation of the burdensomeness of the respondent's conduct in passing the new bylaws. Consequently, while municipal law principles concerning non-conforming use would not be determinative, they provide useful guidance, and I cannot agree that the analogy, as employed by the judge, was inapt. I see no palpable error here.

The Court of Appeal did find some other errors in the lower court's decision regarding the application of the "significantly unfair" test, but did not change the result. The petitioners were left subject to the amendments in the bylaw.

The *Kunzler* decision illustrates that the questions of whether a strata lot's use is lawfully non-conforming under a local government land use bylaw and whether it is sufficiently established such that it would be significantly unfair if it was prohibited by a strata bylaw are assessed using different factors applying a different test under different statutes. The Court of Appeal's emphasis in the *Kunzler* decision that the success of strata developments "depends largely upon whether an equitable balance is struck between the independence of individual owners and their interdependence as members of a cooperative community" suggests that there is more scope for a strata bylaw to impact an existing or committed-to use than a local government land use bylaw.

Michael Moll

Miscellaneous Statutes: Did You Know?

Did you know that under section 6.1 of the Industrial Roads Act *the Minister may, on application of a municipality, order an industrial road administrator to construct water, sanitary or storm sewer pipes within an industrial road? An industrial road is a permanent road on Crown or private land that is not open to the public and is used for the transportation of natural resources, machinery, materials and personnel.*

Joe Scafe

Look For Your Lawyers

The CLEBC online seminar on Subdivision Regulation and Discretion being held on May 26, 2022 will include a presentation by **Mike Quattrocchi** on "The Subdivision Application Process, Statutory Considerations and the Broad Powers of the Approving Officer" and a presentation by **Guy Patterson** on "Subdivision Regulation Under the *Strata Property Act*".

Young Anderson is excited to welcome **Julia Turner** as our new summer articling student. Prior to law school, Julia worked as a legal assistant in both criminal and family law. Julia joins us following her second year of law school, and having recently represented TRU Law School at the Kawaskimhon Moot in Montreal. The Kawaskimhon Moot is unique among moot competitions in that it's a consensus-based, non-adversarial moot that incorporates Indigenous legal orders alongside federal, provincial and international law.

Congratulations are also in order to **James Barth** on being called to the bar. We are pleased to announce that James will be staying on with the firm as our newest associate.

The GFOABC Annual Conference in Penticton will feature a bumper crop of YA lawyers. **Michael Moll** will be co-presenting a pre-conference workshop on tax sales with Doug Stein on May 31, **Joe Scafe** will be presenting on "Liabilities under Agreements" and **Mike Quattrocchi** and **Nick Falzon** will be presenting on "Local Government Interests in Land – Property Taxes and Exemptions" during the main conference running from June 1 to 3.

The LIBOA Annual Conference resumes after a two-year hiatus (fingers crossed) and will include a case law update to be presented by **Elizabeth Anderson** and **Michael Moll** on June 2 in Whistler.

On June 16 in Penticton, **Bill Buholzer** and **Guy Patterson** are presenting "Pertinent Topics in Land Use Planning Law" to the Okanagan Interior Chapter of the PIBC.

The Local Government Management Association Annual Conference in Penticton will feature two YA presentations on June 23. **Reece Harding** and **Julia Tikhonova** will be presenting a session called "First Nations and Local Governments: The Future of Collaborative Governance" and **Kathleen Higgins** and **Nick Falzon** will be presenting a session called "What's the Problem with Bias?"

Guy Patterson and **Timothy Luk** will be presenting a session called "Official Community Plan Boot Camp" at the 2022 PIBC Annual Conference in Whistler being held July 5 to 8.

Carolyn MacEachern will be presenting a session on risk management at the Western Cities Human Resources Conference on October 6 in Kelowna.

STAY CONNECTED

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