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Win for North Saanich on Ability to Tax Nav Canada for Airport Lands is a Win for All Local Governments

The Reasons for Judgment of the British Columbia Court of Appeal recently released in Assessor of Area #01 – Capital et al. v. Nav Canada*, 2016 BCCA 71, represent a significant victory for local governments in relation to recovering property taxes on publicly held land and improvements.*

In the Appeal, the Court had to consider the appropriate method for valuing federally-owned airport lands and improvements that were occupied by Nav Canada for the sole permitted use of providing civil air navigation services.

The District of North Saanich was involved in the Appeal because the Appeal dealt with federally-owned lands and improvements occupied by Nav Canada at the Victoria International Airport, which is located in North Saanich. Historically, those lands and improvements were assessed by the Assessment Authority using the replacement cost approach, with their value being approximately $1.4 million. Nav Canada appealed that assessment for the 2011 and 2012 taxation years to the Property Assessment Appeal Board, arguing that the lands and improvements should be assessed at nominal value on the basis that there is no market for them. Nav Canada argued that:

1. Pursuant to federal legislation, it had a monopoly on the provision of civil air navigation services in Canada;

2. As the use of the land and improvements was restricted to use for the provision of civil air navigation services, no one other than it had any use for the land and improvements;

3. There being no one else that had any use for the land and improvements, there was no market for the land and improvements; and

4. There being no market for the land and improvements, the land and improvements had only nominal value as Nav Canada would not pay any more for the land and improvements than anyone else would.

In making its argument, Nav Canada relied on the decision of the Court of Appeal in *Southam Inc. (Pacific Newspaper Group Inc.) v. British Columbia (Assessor of Area No. 14 – Surrey/ White Rock)*, where the Court held that the replacement cost approach to valuing land and improvements was not available where the evidence does not establish that there is a purchaser for the property being assessed other than the current owner of the property. On the basis that the *Southam* decision was binding authority on the issue, the Property Assessment Appeal Board accepted Nav Canada's argument and ordered that the land and improvements be assessed at $20.

North Saanich had not appeared or made argument before the Property Assessment Appeal Board. Once North Saanich became aware of the Board's decision, North Saanich joined with the British Columbia Assessment Authority to have the Board state a case to the British Columbia Supreme Court for the Court's consideration of the issue. The Supreme Court upheld the Board's decision, again on the basis that *Southam* was binding authority on the issue. North Saanich and the Assessment Authority then brought the Appeal.

In the Appeal, North Saanich and the Assessment Authority sought to have the Court of Appeal reverse its previous decision in *Southam*. In order for the Court of Appeal to do so, the Court was asked to, and did, sit as a five-member panel. North Saanich and the Assessment Authority argued before this five-member panel of the Court of Appeal that its previous decision in *Southam* was incorrect in that it failed to follow binding authority from the Supreme Court of Canada and the Privy Council. The five-member panel of the Court of Appeal agreed and held that, where there is no market for land and improvements, one must take into account the sum that the owner would pay for the land and improvements or for replacement land and improvements suitable for the owner's purposes.

As a result of the Court of Appeal's decision, the replacement cost approach to valuing land and improvements is once again a significant tool that can be used by the Assessment Authority in valuing properties that do not trade or rarely trade in the market. One can expect that the Court of Appeal's decision will be relied upon by the Assessment Authority when valuing such properties, including the land and improvements used by the British Columbia Ferry Corporation at its major ferry terminals, which were previously the subject of proceedings before the Board that resulted in them being valued at a nominal value.

The five-member panel of the Court of Appeal agreed and held that, where there is no market for land and improvements, one must take into account the sum that the owner would pay for the land and improvements or for replacement land and improvements suitable for the owner's purposes.

Nav Canada is in the process of seeking leave to appeal the Court of Appeal's decision to the Supreme Court of Canada, and North Saanich has committed to represent the interests of British Columbia local governments before that Court. North Saanich will be seeking the support of the UBCM and other local governments for its role in the proceedings.

Sukh Manhas

New Conflict of Interest Exception Regulation Helpful, But Does Not Go Far Enough

The Ministry of Community, Sport and Cultural Development has finally provided a partial remedy to the effects of Schlenker v Torgrimson*, 2013 BCCA 9, a case which held that elected officials who also acted as directors of a society had an indirect pecuniary interest when the governing body considered the financial matters of the society. The* Conflict of Interest Exceptions Regulation *marks the first time the Minister has prescribed a general class of exceptions to the conflict of interest rules under section 104(1)(e) of the* Community Charter*. However, the* Regulation *only goes part way in addressing the concerns raised by the* Schlenker *decision.*

The Schlenker Decision

In *Schlenker*, two trustees of the Salt Spring Island Local Trust Committee acted as directors on two different societies. One society raised awareness regarding potable water issues on the island and the other society provided a forum to discuss climate change action. Both societies were formed to formalize pre-existing intergovernmental working groups, and in part to facilitate discussions and coordinate activities of different local government bodies, such as the LTC, the regional district, and the local waterworks district. While the two trustees were directors of these societies, they participated in meetings and voted in favour of resolutions to provide public funds to these societies.

Following one of these meetings, a petition was brought to court to seek a declaration that these trustees be disqualified from office as having both a pecuniary and non-pecuniary conflict under the *Community Charter*. In the BC Supreme Court, the chambers judge determined that the trustees did not have a conflict, either pecuniary or non-pecuniary, because none of the evidence established that the trustees had a *personal* pecuniary interest in these matters, and the purposes of the societies were related to common public interests.

The Court of Appeal overturned this decision, however, and determined that, because directors have a duty to put the interests of their society first, while elected officials have a duty to put the public interest first, the trustees had "divided loyalties" between the societies and the public. Therefore, they had an indirect pecuniary interest when the governing body considered the financial matters of the societies. The Court held that "it makes no difference that they put no money into their own pockets."

Implications of the Schlenker Decision

The *Schlenker* decision was of great concern to many local governing bodies since it significantly expanded potential disqualifying conflicts of interest for elected officials. Before *Schlenker*, a disqualifying pecuniary interest under the *Community Charter* was limited to when there was sufficient evidence to establish a personal pecuniary interest for the elected official. However, the *Schlenker* decision at the Court of Appeal incorporated a consideration of divided loyalties into the test of whether an elected official had a pecuniary interest, regardless of whether that conflict of loyalties would also result in a financial benefit to the elected official. This "divided loyalties" test has had significant implications for numerous local governments and, in particular, those

that incorporated societies and wholly-owned corporations to provide a public benefit for the local government. For example, elected officials placed on the boards of societies such as CREST on Vancouver Island, or local economic development corporations, have had to recuse themselves when the very matters that they were appointed to influence are up for discussion.

In addition, post *Schlenker*, not just voting, but also discussing the needs of the society with staff (s. 102 of the *Community Charter*) or lobbying other governmental bodies (s. 103 of the *Community Charter*) on matters where an elected official is a director of a society or a board, could lead to disqualification where the matter is financial in nature.

Impact of New Regulation

In response to the *Schlenker* decision, and numerous calls from our office and the UBCM among others, the Province enacted a new regulation on April 14, 2016. The *Regulation* addresses some, but not all, of the difficulties facing local governments after the *Schlenker* decision. Most significantly:

- The *Regulation* does not appear to apply to the activities proscribed by sections 102-103 of the *Community Charter* regarding inside and outside influence; and
- The *Regulation* does not (and perhaps could not) address the potential non-pecuniary conflict that arises when elected officials are directors of societies and corporations, and which the *Schlenker* decision has also arguably expanded.

In order for the *Regulation* to apply, several conditions must be met.

First, the exception created by the *Regulation* only applies to council members, board members, greater board members, or island trustees that are appointed by their local governing body to be the governing body's representative on a society or corporation. It does *not* apply to private societies or corporations with public service goals, where the elected official is not specifically appointed by resolution of the local government to represent the local government. So, for example, the Regulation does not authorize directors of local rotary clubs, chambers of commerce, art museums, etc., to vote as councilors, board members, or trustees on grants, budgets, or other advantages or disadvantages to those societies. The *Regulation* is aimed at the types of societies that are created by local governments, or which local governments directly participate in by appointing their own director.

Second, the exception for conflict only applies to certain types of organizations, since the organization must be either a society under the *Society Act* or a corporation that was incorporated by a public authority to provide a service to a local government.

Third, the exception is only triggered when certain "specified interests" of the society or corporation are considered by the local government. These specified interests are:

- the expenditure of public funds to or on behalf of the society or corporation;
- the provision of an advantage, benefit, grant, or other form of assistance to or on behalf of the society or corporation;
- the acquisition or disposition of interests in property that may benefit or provide an

advantage or disadvantage to the society or corporation; or

- agreements related to these interests.

This list will have to be interpreted in relation to any matter coming before the local government's council or board or committee, as to whether the interest is covered by the *Regulation*. For example, it is not obvious whether a process such as rezoning of land at the request of a society, or the approval of a 5 year plan related to the society or corporation that does not involve financial approvals, would be captured as a specified interest where the elected official, who is also a director, could participate.

Fourth, the exemption only applies to participation and voting in meetings (including various committee meetings). However, as mentioned above, the exception does not appear to apply to the inside and outside influence rules in sections 102-103 of the *Community Charter*. This means that elected officials can attend meetings and vote without being disqualified in the circumstances laid out in the *Regulation*, but cannot have discussions with staff in which they try to inform a recommendation without risking disqualification for inside influence under section 102 of the *Community Charter*. Similarly, elected officials who are directors of societies as representatives of their local government also cannot attempt to use their position to lobby or influence outside agencies, such as the Province, in relation to the funding or other purposes of the society.

Only where the above four conditions are met, does the *Regulation* deem an elected official not to have a pecuniary interest, thereby allowing the elected official to attend, participate, and vote in a meeting in which the financial interests of the society or corporation are considered, without risking disqualification.

The *Regulation* does not address the existence of common law and non-pecuniary conflicts that may arise in the same circumstances where elected officials participate in meetings related to societies and corporations upon which they sit as a representative director. These conflicts do not give rise to a risk of disqualification under the *Community Charter*. However, they still would generally disentitle an elected official from participating in a meeting under section 100(2)(b) of the *Community Charter* where a reasonable and well-informed person would conclude that their interest in the society might influence their duties to the local elected body.

In *Schlenker*, the Court of Appeal essentially imported this "reasonable person" test into the test for a pecuniary interest, and applied the law related to divided loyalties under the *Society Act* to find that the elected officials were in a pecuniary conflict. This suggests that non-financial interests would also give rise to a common law conflict, but would not be exempted by the *Regulation*. It may be that where an elected official is appointed directly by their elected body to be its representative on a society board or corporation, the reasonable person would not conclude that they had a conflict as between their personal interests and that of the local government. However, the reasoning of the Court of Appeal in *Schlenker*, which equates personal interests with the interests of a non-profit society, raises significant concerns in this regard. Non-pecuniary common law conflicts of interest do not lead to disqualification, but they can lead to the invalidity of local government decisions.

In short, elected officials and local governments still need to be cautious if they are a member of a society or wholly-owned municipal corporation, and pay careful attention to the limits of the *Regulation*.

Francesca Marzari & Rosie Jacobs

5 Examples of when not to use a Section 219 Covenant

Section 219 covenants are extremely useful tools that local governments can use to achieve a great number of goals. Under section 219 of the Land Title Act, *a covenant may be granted in favour of the Crown, a Crown corporation or agency, a municipality, a regional district, the South Coast British Columbia Transportation Authority, or a local trust committee. Such covenants may be registered against the title to the land subject to the covenant and they are then enforceable against the current owner of the land and all subsequent owners. Section 219 covenants can be positive ("thou shalt do something") or negative ("thou shalt not do something") in nature, and may include provisions respecting the use of land and buildings, the building on land, the subdivision of land, the separate sale of parcels of land, or the preservation, protection, and restoration of land and specified amenities in relation to land.*

However, while some may assume that section 219 covenants are capable of achieving any and all of a local government's goals with respect to development and land use control, there are limits on how this tool may be used. Below are 5 examples of where a section 219 covenant is not the appropriate tool, and local governments should dig further into their tool boxes to find the right instrument for the job:

1. Granting Access

While section 219 covenants enable local governments to restrict an owner's use of its land or require that land be used in a certain way, they cannot enable the local government to enter on or use that land or allow others to enter and use it. For example, if a local government wishes to require that an owner build and maintain a trail on its property, a section 219 covenant is the right tool; but if the local government also wishes to ensure that the public can use that trail, then it must also obtain a statutory right of way for public access.

2. Providing Notice

Generally speaking, a section 219 covenant is an agreement between a local government and the owner of land, in which the owner's rights to use, build on, or subdivide the land are limited in furtherance of some public purpose. They are not a place for local governments to merely give notice to future owners of a certain set of facts. The Land Title Office tells us time and time again that they are not a "notice board", so if the sole purpose of filing a s. 219 covenant is to provide notice to future owners, for example that the property is located in a floodplain or adjacent to a noisy railway, that covenant is unlikely to be registrable in the LTO.

3. Regulating User

Under section 219, a covenant can include provisions respecting the use of land and buildings. Section 219 covenants are not, however, the best tool for regulating or restricting the users of land and buildings. That power lies in section 483 of the *Local Government Act*, which authorizes local governments to enter into housing agreements to deal with matters of occupancy that are beyond the scope of section 219. Housing agreements can include terms and conditions respecting the form and tenure of housing units, and the availability of those housing units to certain classes of person, among other things. For example, where a local government

wishes to ensure that certain housing units are available only to seniors, or that certain housing units are restricted to rental housing, a housing agreement is the better mechanism to achieve those goals.

4. Prohibiting a Sale

Although section 219 covenants may provide that designated parcels of land are not to be sold or otherwise transferred separately, section 219 covenants cannot prohibit the sale of land generally. For public policy reasons, the courts have consistently held that conditions that operate as absolute restrictions on the alienation of ownership are void. If a local government wishes to ensure that certain obligations (e.g. heritage revitalization) are met before an owner can benefit from a subdivision of land, the local government should consider either requiring that the obligations are met before subdivision, or prohibiting the separate sale of subdivided lots.

5. Requiring a Transfer

Although section 219 covenants may be positive in nature, they are not the best tool to compel a property owner to transfer land (or an interest in land) to the local government. A transfer of land is not a "use of land" under section 219, and therefore an obligation to transfer land may not run with the land and bind future owners. For example, a highway reservation covenant may prohibit an owner from building on or obstructing a portion of land in order to reserve it for highway purposes, but if a municipality actually wants to compel the owner to dedicate that land to the municipality as highway at some point in the future, it is prudent to include an option to purchase in favour of the municipality. That option to purchase should outline how the transfer will be triggered and completed, and will be subject to the approving officer approving a road dedication plan.

While section 219 covenants are powerful tools in a local government's arsenal, there are often times when other tools are more appropriate and effective for achieving a local government's goals. It is important to remember that section 219 covenants have their statutory limitations and local governments should be careful to ensure that they are the right tool for the job.

Joanna Track

Opening the Doors to the In Camera Meeting

In March of 2016, the Supreme Court of Canada issued an interesting decision in Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval, *2016 SCC 8, regarding the extent to which the governing board of a public body may rely on deliberative secrecy rules, or the inscrutability of public body motives, to shield* in camera *deliberations regarding an employee's right to know the reasons for his dismissal.*

The employee in question worked for the Commission scolaire de Laval ("Board"). The Board became aware that the employee had a prior criminal record, including weapons possession and drug trafficking charges. Upon becoming aware of the employee's record,

the Executive Committee of the Board met privately with him and a Union representative. After this meeting, the Executive Committee held an *in camera* meeting from which the employee and union representative were excluded. Following these two meetings, the Executive Committee publically adopted a resolution which terminated the employment contract.

The employee's Union filed a grievance with respect to his dismissal, alleging that the procedure for dismissal provided for in the collective agreement had not been followed. The collective agreement stipulated that the employment relationship could be terminated "only after thorough deliberations at a meeting of the board's council of commissioners or executive committee called for that purpose".

Decisions regarding employees, made in councils' capacity as employers, are not shielded from in camera *review based on principles of unknowable motives of council or deliberative secrecy.*

An inquiry into the grievance was held before an arbitrator. The Union summoned three members of the Executive Committee, who had been present for the *in camera* deliberations, as witnesses. The Board objected to them testifying in regards to the *in camera* proceedings, arguing that "the motives of individual members of the committee were irrelevant and that deliberative secrecy shielded the members from being examined on what had been said *in camera*". The arbitrator decided to allow the examination of the members of the Executive Committee in order to determine in particular whether the committee's deliberations had been "thorough", as required by the collective agreement.

The Board sought judicial review in the Quebec Superior Court of the arbitrator's decision to allow testimony on the *in camera* proceedings. The Superior Court judge cited *Tremblay v. Quebec (Commission des affaires sociales)*, to the effect that deliberative secrecy is the rule for administrative tribunals, though it can be lifted if a litigant presents valid reasons for believing that the tribunal's process was tainted by procedural errors. The judge also referred to *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, in which a land developer was contesting the validity of a resolution adopted by a municipal council to commence a judicial inquiry into transactions involving the developer. The developer sought to summon as witnesses certain members of the municipal council who had voted for the resolution. The SCC rejected that attempt, finding that "the motives of a legislative body composed of numerous persons are 'unknowable' except by what it enacts", and the personal motives of the councillors were therefore not relevant and could not form part of the permissible scope of the developer's case.

After considering those cases, the Superior Court judge found that the Executive Committee's decision to deliberate *in camera* had rendered its deliberations confidential, so the examination in the arbitration proceedings could not concern "the underlying reasons or the development of those reasons in the minds of the executive committee's members", but only the "formal process that led to the decision made in the public meeting".

The Superior Court's decision was appealed to the Quebec Court of Appeal. The Court of Appeal held that, in light of *Wells v. Newfoundland* and *Dunsmuir v. New Brunswick*, a decision with respect to dismissal of an employee by

a public body falls under employment law, not public law. The Court concluded that the rule in *Clearwater* – that the motives of the members of a council or executive committee are irrelevant when determining whether a decision of a legislative, regulatory, policy or purely discretionary nature is valid – was not applicable in this case, because the decision of a public body to dismiss an employee is not of that nature. The Court of Appeal also held that deliberative secrecy did not apply, since the Executive Committee was not an authority that performed adjudicative functions.

On appeal to the Supreme Court of Canada, the SCC clarified that *Clearwater* does not establish a rule of relevance that applies to every collective decision made by a decision-making body by means of an official document. Rather, the 'unknowable' motives in question are limited to those that led a legislative body to adopt provisions of a legislative nature, that is, to carry out acts of a public nature. Whether the motives of the body that makes a decision are relevant depends on the nature of the decision itself. The SCC ultimately dismissed the appeal in *Commission Scolaire*, finding that even though the Board is a legal person established in the public interest, it was acting as an employer when it decided to dismiss the employee by way of a resolution of its Executive Committee. The decision was not of a legislative, regulatory, policy or discretionary nature, but rather was made in the context of a contractual relationship governed by an employment contract, which provided for a process for resolving disputes by arbitration. The arbitrator correctly applied the principles of employment law applicable to any dismissal.

Regarding deliberative secrecy, the SCC acknowledged that deliberative secrecy extends to the deliberations of administrative tribunals, but held that this did not relieve the members of the Executive Committee from testifying, because when the Executive Committee decided to dismiss the employee, it was not performing an adjudicative function and was not acting as a quasi-judicial decision maker. Rather, it was acting as an employer dismissing an employee. Its decision was therefore one of a private nature that falls under employment law, not one of a public nature to which the constitutional principles of judicial independence and separation of powers would apply. This was the case even though the Executive Committee had relied upon statutory provisions regarding the permissibility of individuals with criminal records continuing to teach.

Municipalities will be interested in the principle arising from this case, that decisions regarding employees, made in their capacity as employers, are not shielded from *in camera* review based on principles of unknowable motives of council or deliberative secrecy. Even when holding *in camera* meetings regarding the discipline or dismissal of employees, council members should be aware that they may be called upon to reveal the substance of such deliberations and should ensure that the decision-making process, whether public or *in camera*, meets any and all requirements imposed by the employment contract, and applicable employment and labour laws more broadly, to ensure that the decision to discipline or terminate the employee can be upheld if subject to review. It will also be interesting to follow how the law develops in terms of distinctions between council decisions of a legislative, regulatory, policy or purely discretionary nature, and decisions made in other capacities such as employer or property owner. Wherever a matter being discussed *in camera* may not fall into one of the above categories, municipalities should be alive to the possibility that Council's private discussions may not be as private as they assume.

Elizabeth Anderson

Privacy & Access: Challenges for Local Governments

There has been a major shift in how the Office of the Information and Privacy Commissioner approaches privacy and FOI enforcement, and this has had significant implications for BC's local governments. A number of significant FOI appeal decisions also present challenges. Space does not allow a comprehensive survey of recent developments, so this article touches on only the most significant recent developments for local governments.

Systematic approaches to privacy and FOI compliance

Perhaps the most significant development is the OIPC's new emphasis on pro-active privacy management. Last spring, Commissioner Elizabeth Denham issued Investigation Report F15-01, in which she recommended that the District of Saanich implement an across-the-board privacy management framework. This was foreshadowed by her 2013 guidance, where she stated that, in assessing compliance with the *Freedom of Information and Protection of Privacy Act*, she would look for a comprehensive program to pro-actively manage privacy.

This case demonstrates that to be onside with regulatory expectations—and public sentiment—local governments need to actively assess their privacy readiness. Local governments collect, use, and disclose considerable amounts of personal information across a diverse range of services. This information—information of citizens and employees alike—should be assessed in a comprehensive way.

What is the OIPC looking for? An organization-wide inventory will help local governments be sure that they have the legal authority to collect, use, and disclose personal information. An assessment of existing privacy-related policies and procedures will tell local governments if they have what they need. Do they have a policy for handling privacy complaints? Do they have policies on how to respond rapidly and effectively to privacy breaches? What are the policies on acceptable employee use of email, internet, and social media? What administrative and technological measures do they have to protect personal information from misuse? What training is offered, or required, for employees and service providers? Are they effectively assessing the privacy impact of new or revised programs or services, so that they can mitigate the impact? Is there a privacy officer who is empowered to oversee privacy in the local government, with senior management buy-in?

These are all questions that the OIPC will ask when, not if, it comes calling. The OIPC may become involved in response to a privacy complaint, or on its own initiative.

We can expect similar attention from the OIPC on the FOI front. Just months ago, the Commissioner announced an investigation into the City of Vancouver's processing of FOI requests. Public pronouncements make it clear that this is an in-depth, comprehensive review of how the City is managing its legal obligations in responding to FOI requests. Consistent with the Commissioner's findings on the provincial government's compliance with its duty to assist FOI requesters, the review will consider the time taken to respond to requests, the charging of fees, and more. This investigation is almost certainly not going to be the last.

Local governments face many demands and scarce resources, but taking the time to assess where they stand in systematically complying with privacy obligations and FOI duties, may

well save money, and grief, down the road.

Radical change to the test for mandatory public interest disclosure

Another major shift by the OIPC is its new interpretation of section 25 of the Act, the so-called public interest override. This requires all public bodies to pro-actively release, even if no FOI request has been made, any information the disclosure of which is in the public interest. This section creates two separate tests, but the big change is in the OIPC's interpretation of when the public interest will be triggered. This section can now apply to a wider range of information, including information about geotechnical hazards, flood risks, and site contamination.

Local governments face many demands and scarce resources, but taking the time to assess where they stand in systematically complying with privacy obligations and FOI duties may well save money, and grief, down the road.

In Investigation Report F15-02, the Commissioner rejected the 22-year-old OIPC view that the public interest disclosure duty only arose in urgent cases, where the information had to be released without delay, due to an imminent concern or risk. She ruled that what is intended is pro-active, mandated, and timely disclosure of information the disclosure of which is clearly in the public interest. The test now is whether "a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest". What this means in practice will have to await developing case law. It is nonetheless clear the OIPC expects public bodies to assess their information holdings to prioritize what kinds of information must be disclosed in the public interest. Whether local governments have the resources to do this is, of course, another question. But they should consider looking at geotechnical hazards, flood risks, and site contamination as areas ripe for re-assessment.

Substance of in camera deliberations

Perhaps one of the most important grounds on which local governments might wish to withhold information is the clause protecting *in camera* deliberations of council (section 12(3)(b)). Over the last year, OIPC decisions have applied the test for this protection. In Order F15-56, the OIPC ruled that the City of New Westminster could withhold the minutes and related reports about a developer's withdrawal from a project with the City. Disclosure of these could reasonably be expected to reveal the "substance" of council's deliberations. The City could not, however, withhold the agenda topic, because this would not reveal the substance of deliberations, directly or by inference. This is consistent with other decisions in this area.

This order also underscores, however, that local governments need to be able to prove that there was statutory authority under the *Community Charter* to hold the meeting *in camera*. They also have to show that the meeting was properly constituted, i.e. that all procedural steps to get there were properly taken. Only if they can establish these things, in evidence before the OIPC, do they have a shot at showing that disclosure of the records would reveal the substance of the *in camera* deliberations.

This same decision is newsworthy because it illustrates a major shift in the OIPC's handling of FOI appeals. In the past, a number of decisions at least implicitly accepted that public bodies can withhold from their FOI responses material that is considered "non-responsive" to the request's scope. Last year this changed, and the OIPC now requires public bodies to go through all of the materials to assess whether they can, or must, withhold portions. If portions of a record—even one page out of a 300-page record—fall within the scope

of the request, the whole document must be reviewed and vetted.

Clearly, this can have major resource implications for some public bodies. Faced with a request that might impose this burden, it is helpful to work pro-actively with the requester to narrow the scope. Can the requester focus on the real goal, what it is they are really after? Explain that the request may otherwise take more time, and cost the taxpayer more, to process. And as a last resort, remember that public bodies are allowed to charge certain processing fees, as set out in the Act.

Another OIPC decision, Order F15-20, also confirms that attempts to protect the names of meeting attendees, the dates and times of the meeting, the date the minutes were adopted and signed, and who certified the minutes as correct, are usually going to fail. This reinforces the goal of section 12(3)(b), which is to protect the substance of deliberations, not everything to do with an *in camera* meeting. The clause is not intended to offer complete secrecy about *in camera* meetings.

Protecting contracts and other financial information

In Order F16-05, the OIPC rejected the Capital Regional District's attempt to withhold pricing information from a consulting agreement for a sewage treatment plant. The CRD argued that disclosure of the consultant's pricing information would harm the regional district's ability to negotiate future contracts in that specialized area. In essence, the OIPC held that mandatory disclosure under the Act could not reasonably be expected to cause this or other consultants to not want to do business with the CRD. This concern was found to be speculative, again showing that public bodies need to support such concerns with persuasive evidence, not opinion.

This same decision is one of many over the last year that shows how hard it is to protect pricing and other financial information of suppliers. The three-part test for protecting third-party commercial or financial information in contracts is very hard to satisfy, as Order F16-17 also illustrates. There, the OIPC ordered the City of Vancouver to disclose the entire agreements between it and two developers for the sale of strata units in the Olympic village (only some third-party personal information was withheld). It found that the three-part business information test had not been satisfied.

When it comes to protecting the identity of residents who oppose development applications, Order F16-14 shows that local governments may be required—not just permitted—to protect this information. Here, a development applicant sought access to records related to his application. The OIPC held that the District of Oak Bay had properly decided that section 22, which protects personal information, required it to withhold the names of neighbours who had signed a petition opposing the application. The petition had never been made public, and there was evidence of ongoing neighbourhood tension. Although the facts again matter a great deal, it is interesting that the OIPC came down, in the circumstances, in favour of personal privacy. This case illustrates the need to set some ground rules ahead of time and have a policy on confidentiality or public disclosure of petition signatories' identities.

This is only an overview of some of the many key FOI and privacy developments over the past year or so, but they show that this remains a dynamic and ever-changing area that carries many challenges for BC's local governments.

David Loukidelis, Q.C.

Recent Family Status Cases

An area of human rights law that has received a lot of attention in the past few years is discrimination on the basis of family status and, in particular, childcare obligations. In BC, the Court of Appeal found that general childcare duties will not fall within the scope of "family status" under the Human Rights Code*. This means that employers in BC are not required to accommodate employees who have regular childcare obligations. There has to be a serious interference with a substantial parental or other family duty or obligation in order to trigger the requirement to accommodate an employee.*

The Canadian Human Rights Tribunal, on the other hand, has taken a broader view of what constitutes discrimination on the basis of family status in regards to accommodating childcare obligations. The Tribunal has determined that federal employers do have an obligation to accommodate conflicts that result from regular childcare obligations.

Two recent cases highlight the limits on employers' obligations to accommodate employees on the basis of family status. The Federal Court of Appeal issued a decision late last year regarding an employer's refusal of an employee's request to telework in order to continue breastfeeding her third child. In that case, the employee requested to telework full-time for a year following her maternity leave so she could continue breastfeeding. The employer denied this request on the basis that it was not operationally feasible.

The parties discussed other arrangements but were not able to come to an agreement. The employee ultimately requested that she be able to telework from home two days a week and, on the other three days, she would work in the office part of the day and telework from home the remainder. In response, the employer offered three options:

1. Work from home one day a week;
2. Work part-time; or
3. Continue on a leave without pay until completing nursing her child.

When the employee refused to agree to any of the above, she reverted to her original request to telework from home on a full-time basis, which the employer again refused. The employee's Union filed a grievance on her behalf alleging discrimination on the basis of sex and family status.

The Arbitration Board considered the following test in concluding that the employer had not discriminated against the employee:

1. The child must be under the care and supervision of the employee;
2. The childcare obligation at issue must engage the employee's legal responsibility for that child, as opposed to a personal choice;
3. The employee must make reasonable efforts to meet

those childcare obligations through reasonable alternative solutions, and no such alternative solution is reasonably accessible; and

4. The workplace rule at issue must interfere in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

The Board found that the employee did not meet the second and third factors listed above. The Union appealed the Board's decision but the Federal Court agreed with the arbitration decision. The employee argued that the "legal obligation" at issue was to "nourish her son by breastfeeding him". The Court accepted that there could be cases where breastfeeding is seen as part of a mother's legal obligation to care for and feed her child. However, in this case, the Court determined that the employee was breastfeeding her child "out of a personal choice". The employee had not submitted any medical evidence to support the need to continue breastfeeding. The Court also noted that the employee had not made a reasonable effort to find a viable solution.

In a recent case decided by the BC Human Rights Tribunal, one of the issues was whether an employer had discriminated against an employee by not accommodating the employee's childcare needs. The employee alleged she had not been paid statutory holiday pay in circumstances where she could not fulfill the requisite amount of hours due to her childcare obligations. She also alleged that her employer scheduled training during hours she was unable to attend because of childcare responsibilities. Finally, she alleged she was scheduled for graveyard and afternoon shifts, which she was unable to work.

The parties disagreed with the test to be applied. The employer argued that a previous BC Court of Appeal decision, requiring a change in the terms and conditions of employment causing interference with a substantial parental or other family duty in order to establish discrimination based on family status, was applicable, while the employee requested that the Tribunal reconsider that test. The Tribunal determined that it was not necessary or appropriate to reconsider the BC Court of Appeal decision and ultimately concluded that, on the evidence, the employer had not discriminated against the employee. The employer had entered into a series of accommodation agreements with the employee in respect of the employee's childcare needs.

... where an employer is reasonable in its response to a request for accommodation, it is more likely that any complaints of discrimination will be unfounded.

While the law in BC relating to accommodation of childcare obligations appears to remain settled for now, we still recommend that employers carefully consider any requests by employees for accommodation based on childcare obligations. The above cases are also a reminder that, where an employer is reasonable in its response to a request for accommodation, it is more likely that any complaints of discrimination will be unfounded.

Carolyn MacEachern

Landfill in Drinking Watershed Prohibited Under Zoning Bylaw

On March 21, 2016, in Cowichan Valley Regional District v. Cobble Hill Holdings et al., *2016 BCSC 489, the British Columbia Supreme Court held that the permanent encapsulation of imported waste material (including contaminated soils) in engineered cells on a property is a landfill, and is not a permitted use on a property under the Cowichan Valley Regional District's zoning bylaw.*

The case focused on the commercial importation of contaminated waste to a quarry operation within the Shawnigan Lake watershed, which is a source of drinking water for thousands of people.

In 2006, the Ministry of Mines issued a permit to operate a quarry on the property. In 2013, the Ministry of Environment issued a permit to allow the discharge of up to 100,000 tonnes per year of "refuse" consisting of contaminated soil and ash below hazardous waste standards from a proposed "landfill facility" and "contaminated soil treatment facility" on the property. The works described in the MOE permit for the landfill facility include:

> landfill, engineered lined landfill cells, perimeter ditches, erosion and sedimentation control infrastructure, primary and secondary containment detection and inspection sumps and associated cleanout ports, catch basins, groundwater monitoring wells, management works and related appurtenances.

In 2014, the MOE permit was the subject of a 31-day hearing before the Environmental Appeal Board, in which the CVRD, the Shawnigan Residents Association, and some residents were appellants. The EAB rendered its reasons on March 20, 2015 and upheld the MOE permit. Earlier this year, the EAB decision was the subject of a 21-day judicial review hearing before the BC Supreme Court, filed by the Shawnigan Residents Association. That decision is still pending.

> While the CVRD cannot prevent the respondents from excavating the quarry, the CVRD can restrict other activities even if the Mines permit expressly authorizes such activities.

In the CVRD's zoning enforcement case, the quarry owner and waste disposal operators argued that the activities constitute "mine reclamation" and that the CVRD has no jurisdiction to control such activities, which are "core" or "integral" to mining. The respondents further argued that sections of the CVRD's zoning bylaw were not validly enacted as the CVRD did not receive ministerial approval under section 9 of the *Community Charter* (relating to the deposit of soil or other material). Furthermore, the respondents argued that the activities are permitted under the zoning bylaw as the activities fit within the term "extraction", which is a permitted use on the property, or the activities are accessory to "extraction".

The matter was heard over 11 days and included two experts who testified regarding mine reclamation. The CVRD argued that the activities authorized by the MOE permit are not related to mining at all because the respondents are undertaking a completely separate and highly lucrative landfill business on the property under the guise of mine reclamation. The landfill is a permanent land use on the property and is not permitted by the CVRD's zoning bylaw.

The Court agreed, finding that the respondents are operating a landfill on the property, which is within the CVRD's land use jurisdiction under section 903 (now section 479) of the *Local Government Act*, and is not a permitted land use under the zoning bylaw. The Court further found that it was entirely possible for the respondents to reclaim the quarry without carrying on the present activities, and that reclamation must restore the land to the potential land uses permitted by the zoning bylaw.

The Court concluded that there was no conflict with relevant provincial legislation, and that the enactments are capable of existing together harmoniously as an integrated regulatory scheme. While the activities undertaken by the respondents are authorized by the MOE permit until such time as the operation of the zoning bylaw is suspended by the Lieutenant Governor Council pursuant to section 37(6) of the *Environmental Management Act*, the use of the property for these activities is subject to the CVRD's zoning bylaw. Furthermore, provincial mining legislation does not take priority over the municipal zoning power. While the CVRD cannot prevent the respondents from excavating the quarry, the CVRD can restrict other activities even if the Mines permit expressly authorizes such activities.

The respondents have appealed the decision and sought a stay of certain injunctions issued by the BC Supreme Court prohibiting them from operating the landfill. On April 15, 2016, the BC Court of Appeal granted a limited stay of the injunctions to the extent necessary to permit the operator to complete contracts it was contractually committed as of March 21, 2016, the date the BC Supreme Court's decision was rendered. The limited stay is on the condition that the respondents provide an undertaking that they will remove any waste material imported to the property after March 21, unless otherwise ordered by the Court, if they are not successful on their appeals. The appeal is scheduled to be heard the week of August 15, 2016.

Alyssa Bradley

Did You Know?

Section 83 of the Public Health Act requires every local government to designate a member, officer or employee as the local government's liaison with the regional health board and to notify the regional health board of the designation. The designated person must liaise with health officers when the local government becomes aware of a public health hazard or health impediment. Have you designated your liaison yet?

Authorizing Encroachments: West Vancouver (District) v. Liu

Whether due to the age of structures, changes in municipal record-keeping practices, or the simple passage of time, there may be gaps in municipal records that present challenges in court proceedings to enforce bylaws or deal with unauthorized encroachments. The Court of Appeal's recent decision in West Vancouver (District) v. Liu, *2016 BCCA 96, dealt with this type of challenge. The case also raised the issue of how to reconcile the statutory process for road closures under the* Community Charter *with the court's discretionary authority under the* Property Law Act *to vest title to property in favour of an owner whose building encroaches on a neighbouring property.*

The District sought the removal of part of the family room of the owner Liu's dwelling, as well as a carport, patio, retaining walls, decorative ponds, hedges, and a fence that encroached onto a dedicated road allowance. The road allowance had never been passable for motor vehicles but contained a foot path providing access to Burrard Inlet. Intermittently, over a period of several years, the District had sought to deal with the encroachment by offering to sell a portion of the road allowance to Liu or the previous owner. The negotiations apparently foundered over the proposed sale price, which led to the District seeking an injunction under section 46 of the *Community Charter* dealing with highway obstructions.

The original residence was constructed at an undetermined date (1930's or 40's). The earliest building permit records were for the 1961 construction of an addition to the existing building, to be constructed entirely on the property. The District's affidavit evidence included statements that building permit records had been reviewed but that no record existed authorizing the construction of the encroachments. All of the building permit history cards, applications, and variance appeal records from 1961 that the District had for the property were placed in evidence. Despite this, the chambers judge ruled that statements in the affidavits from two officials that they had "determined" the District had never granted a building permit to encroach on the road allowance were improper and inadmissible given what he found to be the incomplete state of the District's records.

In rejecting the District's injunction application, the chambers judge noted the following:

- the failure of the District to produce a building permit, inspection reports, or other records for the 1961 construction;
- the lack of disclosure of any plan or permit disclosing when the encroaching carport and family room were constructed;
- the lack of production of any inspection reports, records, or documents relating to the 1961 addition or later construction of a fish pond;
- the earlier owner's correspondence that described inspections and the "constant presence"

of District employees without apparent complaint regarding the encroachments;

- the absence of an explanation of how District employees overlooked an obvious encroachment for many years; and
- the lack of documents to explain the District's apparent inaction over various periods.

From these various documentary and explanatory gaps in the District's evidence, the lower court judge rather surprisingly came to the positive conclusion that the encroachments were in fact authorized by the District. He granted Ms. Liu an easement for the life of the buildings. As a consequence of finding the encroachments were authorized, the judge did not have to deal with the application of section 36 of the *Property Law Act*.

Section 36 of the Property Law Act *may provide relief in the case of encroachments onto public highways, to allow adjacent owners to obtain an order vesting title to a portion of the road in their favour, but the court should be cautious in exercising its authority to respect both the mandatory public consultation process and the discretionary nature of council's decision-making powers to close roads.*

As the decision was based on factual findings and inferences, which are generally accorded a high degree of deference, to succeed on appeal the District had to show that the lower court judge made "palpable and overriding errors" in his factual findings. Inferences must be drawn from proven facts and cannot be dependent on "speculation or conjecture to bridge an inferential gap." Here, the Court of Appeal concluded, there was no evidence that would have enabled the chambers judge to draw the factual inference that the encroachments were authorized. The appeal court noted that the District's building records were in evidence and that none of them supported authorization of the encroachments. It was unreasonable for the chambers judge to conclude the District had failed to prove the encroachments were unauthorized. The appeal court was then required to address the District's entitlement to a statutory injunction and whether the owner could obtain relief under the *Property Law Act* for the unauthorized encroachments.

The courts are reluctant to refuse a statutory injunction on equitable grounds but there is a residual discretion to refuse relief. It is a very limited discretion. In this case, the hardship to the owner was significant, involving having to demolish a considerable portion of her home. The court questioned the utility of a removal order for the District, given that its end objective had been to sell the portion of the road allowance where the encroachments were situated. These were exceptional circumstances which persuaded the appeal court not to grant the injunction at this time.

With respect to section 36 of the *Property Law Act*, no previous case had addressed squarely the question of whether the act applied to public lands. The Court of Appeal indicated it would have had no hesitation, however, in concluding that the balance of convenience favoured making an order under section 36 to vest the land on which the building encroached in favour of Ms. Liu on payment of compensation. However, the court had reservations about doing so, given the public consultation process mandated by section 40(3) of the *Community Charter* and the discretionary nature of council's decision ultimately whether or not to permanently close a road and remove the dedication of a highway. The court sought to strike a balance by ordering

that the District proceed with the road closure process and offer to sell the area of land on which the encroachments were situated for fair market value. If Ms. Liu did not acquire the lands within 90 days of the process, the District could renew its application for an injunction for the removal of the encroachments. The Court of Appeal's order does not appear to take into account the possibility that council may receive submissions in opposition and decide not to close the road, which may be an unlikely outcome given the longstanding presence of the encroachments without apparent opposition from the public.

One of the appeal judges dissented, concluding that the owner was not entitled to equitable relief, as before purchasing the property the owner was aware of the encroachments, had made inquiries with the District and been told to contact the land agent. The owner ignored this advice and went ahead with the purchase of a property worth several million dollars, claiming that she was not aware of the reason to speak with the land agent. This evidence was characterized by the dissenting judge as disingenuous. The dissenting judge regarded Ms. Liu's failure to discuss the status of the encroachments with the land agent as showing a willful blindness as to whether the encroachments were authorized. However, he too would have delayed the injunction to allow for the road closure process to complete and the owner to have an opportunity to purchase the encroachment land.

The Court of Appeal's decision is a useful reminder that the basic constraints of the law of evidence apply no less in municipal enforcement litigation. Trial judges, despite sympathy for a landowner, do not have the authority to create a "hypothetical narrative", as the appeal court found the lower court judge had done in this case, and theorize that an authorization may have been given where there is no evidence to support that conclusion. The decision also supports the position that section 36 of the *Property Law Act* may provide relief in the case of encroachments onto public highways, to allow adjacent owners to obtain an order vesting title to a portion of the road in their favour, but that the court should be cautious in exercising its authority to respect both the mandatory public consultation process and the discretionary nature of council's decision-making powers to close roads. While the circumstances in this case can be seen to justify the court's ultimate order, it is not clear that the order itself recognizes the possibility that public opposition and council's discretion might result in the road allowance not being closed and thus no offer of sale being made to the encroaching owner. A future case may require another court to deal with this question more directly.

Barry Williamson

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Look for your Lawyers

On May 12, **Michael Moll** sat on a panel discussing "How Do We Deal with Uber?" and **Alyssa Bradley** presented a session on "Dispensaries in the Age of Legalization" at the Lower Mainland Local Government Association Conference in Whistler.

On May 27, **Reece Harding** presented a session entitled "Do BC Local Governments Need an Integrity Commissioner?" at the Powell River Regional District – South Coast Regional Seminar held in Powell River.

On June 1, **Elizabeth Anderson** presented a Part 2 continuation of last year's session entitled "Tax Sales and Debt Collection" and **Joe Scafe** presented a session entitled "Put the Baseball Bat Away - Collect the Debt the Legal Way" at the GFOABC Conference in Whistler.

Michael Moll will be presenting a session entitled "Discretion vs. Duty to Enforce" at the Licence Inspectors and Bylaw Officers Association conference in Vernon on June 16.

On June 21, **Bill Buholzer** and **Guy Patterson** will be presenting a session entitled "Easements and Statutory Covenants" at the Approving Officers Workshop at the Local Government Management Association Conference in Nanaimo. On June 22, **Francesca Marzari** and **Michael Moll** will be presenting a session entitled "The Sharing Economy: Uber and Beyond" and **Sukh Manhas** and **Carolyn MacEachern** will be presenting a session entitled "Local Government Governance: Anatomy of a Respectful Workplace".

Reece Harding will be teaching "Introduction to Local Government Law and Bylaw Drafting" at the Municipal Administration Training Institute (MATI) Foundations course in Kelowna on August 9.

We are pleased to announce that **Rosie Jacobs** was called to the bar in May and is now an associate lawyer with Young Anderson. This August, **Stefanie Ratjen** will be joining the firm as our new articling student. We look forward to welcoming her to the team.

Farewell

It is with great fondness that we say farewell to **Don Howieson**, who has been with Young Anderson since 2008. We will especially miss his wild anecdotes, both from the courtroom and from his rich and interesting life. We wish him all the best!

Don Howieson