YOUNG ANDERSON
BARRISTERS & SOLICITORS

MARCH 2025, VOLUME 36, NUMBER 1

NEWSLETTER

Arbitrator Awards Union $30,000 for District's Discrimination Against Union President, Interference in the Administration of the Union, and Privacy Breach

In West Vancouver (District) v. Amalgamated Transit Union, Local 134 (Privacy Grievance), *2024 CanLII 124405 (BC LA), the Union alleged that the District discriminated against the Union's President based on his role in the Union contrary to the Collective Agreement, breached the* Labour Relations Code, *RSBC 1996, c. 244 (the "*Code*") by interfering in the Union's administration, and breached the* Freedom of Information and Protection of Privacy Act, *RSBC 1996, c. 165 ("*FIPPA*"), when the District accessed a confidential video message from the Union President to the Union's members, and investigated and disciplined the Union President in relation to the content of the video. The Arbitrator agreed with the Union and ordered the District to pay the Union $30,000 in damages among other orders.*

The confidential video was posted to YouTube in an "unlisted" manner so that it would not appear in searches by the public and could only be accessed if the viewer knew the specific URL for the video. A link to the video was then placed on the Union's website that could only be accessed by the Union's members. The District accessed the video when someone left a post-it note with the URL for the video on a manager's office door with a note that the content was of concern to the District. The manager watched the video despite warning messages on the Union's YouTube channel and on the video itself to the effect that the video content was confidential and intended solely for the Union's members. The Arbitrator did not describe the content of the video in his reasons.

After the District management personnel viewed the video, the District investigated the Union's President for a potential breach of the District's Harassment and Respectful Workplace Policy based on the District's concerns about the video. The District then disciplined the Union

President for certain statements he made in the video. That discipline was not the subject of the grievance at issue before the Arbitrator, as a separate grievance in respect of the discipline had already been resolved when the District withdrew the discipline.

The Arbitrator held that the District had breached a Collective Agreement provision that prohibited the District from discriminating against any employee based on the employee's membership in the Union. The content of the video was found to be protected union speech, meaning that the Union President should not have been investigated in relation to the comments he made in the video. The Union President had not engaged in malicious statements, did not propose that the Union's members act illegally or harass management or engage in any other conduct that would vitiate the need to preserve an assumption of union privilege. The Arbitrator held that but for the Union President's role in the Union, and his communication with the Union's members, the Union President would never have been subject to the unreasonable investigation by the District. The Arbitrator concluded that the District had discriminated against the Union President because of his membership in the Union and therefore violated the Collective Agreement.

The Arbitrator also held that the District's actions breached Section 6 of the *Code*, which prohibits an employer from interfering in the administration of a trade union. The Arbitrator noted that the BC Labour Relations Board uses a balancing of interests approach to the competing interests of an employer and a union in its analysis under Section 6. Not every employer act that affects a union adversely constitutes a violation of Section 6. If an employer is acting in furtherance of a legitimate business interest and the adverse effect on the union is incidental, the conduct at issue may not be a breach.

If an employer is acting in furtherance of a legitimate business interest and the adverse effect on the union is incidental, the conduct at issue may not be a breach.

The Arbitrator held that in the case before him, the Union's interest in protecting its independence and the Union President's right

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

WWW.YOUNGANDERSON.CA

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

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

to union speech outweighed any legitimate business interests of the District in relation to what the Union President said in the video. The Union President's comments were internal to the Union and were confidential information deserving of a high level of protection. The Union had also taken reasonable steps to preserve that confidentiality. There was no substantive evidence from the District that the Union President's comments had any impact on the employees' performance of their jobs. There was no legitimate business interest for the District to investigate the Union President based on the advice he provided to Union members in the confidential video.

The video constituted

protected union speech by the Union President

and did not intrude upon

the District's legitimate business interests.

The Arbitrator also noted that the District's investigation and subsequent discipline of the Union President had caused Union members to be fearful that they could face retaliation from the District for engaging in legitimate Union activity. While the District had repealed the discipline following a separate grievance, the District's actions had chilled the willingness of employees to engage with the Union and become involved with it. For all of those reasons, the Arbitrator held that the District had breached Section 6 of the *Code*.

Leaving aside the *Code*, the District was also not authorized under Section 26(c) of *FIPPA* to collect and retain the YouTube video, which the parties agreed constituted the personal information of the Union President. That Section provides that a public body may only collect personal information if the information relates directly to and is necessary for a program or activity of the public body. The Arbitrator held that that requirement was not met. The video constituted protected union speech by the Union President and did not intrude upon the District's legitimate business interests. In addition, the Union President had an objectively reasonable expectation of privacy in the video as the Union's website was only available to Union members and there were strong confidentiality warnings on the website and the video itself. Finally, the Arbitrator considered the District's intrusion on the Union President's privacy rights to be significant. In all of those circumstances, he concluded that the District's collection of the video was not "necessary" and was therefore in breach of Section 26(c) of *FIPPA*.

The Arbitrator awarded the Union damages in the amount of $30,000 and ordered the District to destroy all copies of the video and all associated notes, and other documents related to the video.

This case serves as a warning to local government employers that unions are entitled to confidentiality in their communications with their members, and that an employer that accesses such communications and then without legitimate reason investigates and disciplines a union official for their confidential comments, may be subject to a significant damages award in favour of the union.

Michelle Blendell

Take Notice: Builders Lien Act Notices of Interest

When reviewing title to property that a local government owns or wishes to acquire, it is understandable that seeing the words "Builders Lien" may cause concern. However, digging further into the nature of that interest in the land may calm those feelings. Such a notation on title may not, in fact, relate to a claim of builders lien from an unpaid claimant.

While a claim of builders lien would be shown on title under the heading "Charges, Liens and Interests", there is an entirely different type of filing called a "Notice of Interest, Builders Lien Act (S.3(2))" that, when registered, is shown on title under the heading "Legal Notations".

Legal notations are registered for informational purposes. However, their impact on a property can be substantial. In the case of Builders Lien Act Notices of Interest, these notices serve as a benefit to the property owner. The basis for this is section 3 (in particular, section 3(2)) of the *Builders Lien Act* (the "*Act*"), which states:

> **3**(1)An improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner.
> (2) Subsection (1) does not apply to an improvement made after the owner has filed a notice of interest in the land title office.
> ...

The *Act* defines "notice of interest" as follows:

> **"notice of interest"** means a notice in the prescribed form warning other persons that the owner's interest in the land described in the notice is not bound by a lien claimed under this Act in respect of an improvement on the land unless that improvement is undertaken at the express request of the owner;

The effect of these provisions is that, while typically an improvement made by a tenant is deemed to be at the owner's request (so long as the owner knew about the improvement), thereby subjecting the owner's interest in the land to lien claims, that is not the case after the owner has filed a Builders Lien Act Notice of Interest in the land title office. Accordingly, once an owner has filed such a notice, prospective lien claimants have been warned that those lands are not bound by a lien claim unless that claimant's work was undertaken at the owner's request.

It is not difficult to think of examples where this type of notice might benefit a local government. One such example would be a facility on government-owned land that is leased out to a community-based non-profit society for their programming. If that tenant society independently engages a contractor during the course of their lease term to perform renovations in the facility and then fails to pay, that could result in the contractor filing a claim of builders lien against the local government's title to the property. However, in reviewing a copy of the title search, the contractor may discover that the prudent local government has filed a Builders Lien Act Notice of Interest, and realize that they should have, prior to carrying

out the work, confirmed that it was at the local government's request.

Bearing all of this in mind, local governments that own land that they lease or intend to lease should consider registering Builders Lien Act Notices of Interest against title to protect themselves from lien claims related to tenant improvements not performed at their request. If you require assistance with this, we are happy to help.

Jacob Lewin

Camera Shy? VPD Video Surveillance Deemed Lawful

The BC Supreme Court's recent decision in Papenbrock-Ryan v. Vancouver (City)*, 2024 BCSC 2288 sheds light on the evolving legal landscape regarding video surveillance in policing. This decision addressed the legality of the Vancouver Police Department (VPD) using a video surveillance system in a public space. Although the Court noted that the decision was limited to a civil claim alleging, in a specific factual context, that the use of the video surveillance violated the plaintiff's privacy rights under the* Privacy Act *and the* Canadian Charter of Rights and Freedoms (Charter)*, this decision serves as a helpful reminder to local governments that it is important to maintain a careful balance between public safety objectives and effective law enforcement on the one hand, with individual privacy protections and civil liberties on the other.*

The context, in short, is that the VPD deployed surveillance in 2020 at the Chinese Cultural Centre in response to racist graffiti in the area containing serious threats of violence. The Court accepted the VPD's evidence that its primary purpose was to deter any further similar criminal activity, and a secondary purpose was to address the public's safety concerns by creating the perception of police presence.

Although the Court accepted that the plaintiff had a subjective expectation of privacy, it held that this subjective expectation was not objectively reasonable in the circumstances.

The plaintiff was able to establish, on a balance of probabilities, that the surveillance would have recorded her at least once. It was also established, however, that any image of her would have been deleted within four days, and there was no evidence that images of the plaintiff were accessed or reviewed by the VPD.

The *Privacy Act* makes it a tort to violate the privacy of another individual, but the Court found that a violation could not arise from the recording itself. A tort may be established if footage of an individual was disclosed or published without their consent, but the VPD did not even access the footage in this case.

The plaintiff also alleged that the VPD violated section 8 of the *Charter*, which guarantees "the right to be secure against unreasonable search or seizure". The Court ultimately concluded that there was no "search" of the plaintiff, and as such the VPD did not invade her reasonable expectation of privacy. Accordingly, the Court found there could therefore be no violation. Although the Court accepted that the plaintiff had a subjective expectation of privacy, it held that this subjective expectation was not objectively reasonable in the circumstances. The Court noted that the VPD configured the system so as to minimize intrusion on the public and that it had no intentions of monitoring the footage.

The Court's findings in this case do not preclude the possibility of a surveillance system giving rise to a reasonable expectation of privacy in other situations, such as where the duration, scope or nature of the surveillance makes it more intrusive. However, the Court will consider the evidence before it when making a determination as to whether an expectation of privacy is reasonable, rather than hypotheticals.

Amy O'Connor

Caselaw Update: *Chippewas of Saugeen First Nation v. Town of South Bruce Peninsula*

In a decision issued on December 9, 2024, the Ontario Court of Appeal upheld the lower court's finding that a First Nation retains a treaty right to lands which were erroneously excluded from a reserve that was established pursuant to a treaty between the Crown and the First Nation in 1855. The breach of this treaty right could not be compensated by ordinary damages, and so the Court declared that the lands erroneously excluded from the reserve was and continue to be reserved for the sole use and benefit of the First Nation – effectively erasing fee simple ownership over the disputed lands.

The lands at issue were a beach, now known as Sauble Beach, which is part of a larger peninsula called the Saugeen Peninsula. In 1854, the imperial Crown and the Chippewas of Saugeen First Nation (the "Saugeen") entered into a treaty regarding the Saugeen Peninsula. Under the treaty, the Saugeen surrendered the majority of the Saugeen Peninsula, barring a reserve that was carved out on the west edge of the peninsula. According to the terms of the treaty, the eastern boundary of the reserve ran northwards for 9.4 miles to a "spot upon the coast" along Sauble Beach.

However, in 1855, when the imperial surveyor set out to demarcate the eastern boundary,

he found that a portion of the boundary ran across wet sand due to the concavity of Sauble Beach. To remedy this, he moved the northern terminus of the boundary approximately 1.4 miles southwards to allow the boundary to run across dry land for its entire length.

This 1.4 mile stretch of waterfront (the "disputed beach") was the subject of the Saugeen's claim. Parties to the action included the Saugeen, the federal and provincial governments as successors to the imperial Crown, the local municipality, and the owners of three lots located on the disputed beach (the "Landowners"). Notably, the Landowners' properties constituted inland cottages that were not within the disputed beach – the land that was within the alleged reserve land was used commercially as parking for tourists.

In a lengthy decision, the lower court made much of the fact that treaties are not ordinary contracts – they are an exchange of "solemn promises" between First Nations and the Crown. When interpreting these documents, courts are to choose from among the possible interpretations of common intention the one which "best reconciles the interests of both parties at the time the treaty was signed". Courts are obligated to identify the intentions of both the Crown and First Nations when interpreting the text of a treaty.

The imperial surveyor adjusted the northern boundary of the reserve southwards to account for a "latent ambiguity" that arose while surveying the reserve boundaries. He made this adjustment in accordance with ordinary surveying practices at the time, but the Court found that making such an adjustment, for those reasons, ran contrary to the terms of the treaty and the intentions of the parties, resulting in an outcome that was inconsistent with the treaty as interpreted by the court. In other words, his adjustment breached the terms of the treaty and was inconsistent with the Crown's duty to the Saugeen.

The Landowners argued that regardless of whether the reserve had been improperly demarcated, their fee simple ownership as *bona fide* purchasers of the land extinguished any treaty right to the disputed beach. The lower court rejected this argument, finding that the surrender and subsequent sale of fee simple interests on the disputed beach resulted from the Crown's misapprehension regarding the northern terminus, rather than a "clear and plain intention" on the part of the Crown to extinguish the Saugeen's treaty right to the disputed beach. In other words, the disputed beach was only and had only ever been reserve land, and any proprietary interest in the disputed beach to the contrary was invalid.

... the Landowners noted that the lower court's decision was the "first time in Canadian history that a court has dispossessed an innocent third party as a remedy for historical wrongs committed by the Crown alone."

On appeal, the Landowners noted that the lower court's decision was the "first time in Canadian history that a court has dispossessed an innocent third party as a remedy for historical wrongs committed by the Crown alone." Therefore, the Landowners argued that they were unfairly bearing the brunt of the Crown's misdeeds, and that as *bona fide* purchasers of the lots on the disputed beach, they should be entitled to keep their property and some other remedy be imposed against the Crown.

The Court of Appeal disagreed, upholding the lower court's finding. Its decision acknowledged that in most cases, a *bona fide* purchaser's

interest is almost always immune to challenge, but that "when an Indigenous land interest is competing against later acquired legal rights, it is incumbent on the court to… consider the conscionability of upholding the legal rights of the *bona fide* purchaser in the circumstances." The Saugeen's "constitutionally-protected, spiritual connection… to its unceded Reserve land" outweighed the commercial interests of the Landowners in the disputed beach, and the decision noted that it remained open to the Landowners to seek compensation against the Crown for their losses.

It is difficult to predict how this decision may be applied in British Columbia. Unlike the rest of Canada, most of the province is not governed by any treaty between the Crown and a First Nation. One might argue that the *Saugeen* decision is strictly limited in its application to circumstances where lands that are subject to an established treaty right erroneously or wrongfully pass into fee simple ownership contrary to the terms of the treaty. If that were the case, *Saugeen* would be of limited application in British Columbia. However, while the facts of the case were unique, it is easy to see how courts might continue to apply its larger principles – for example, regarding *bona fide* purchasers – in future decisions.

Nate Ruston

Subsection 13(1) of FIPPA: Broader Than Public Bodies Might Expect

This article highlights the application of section 13 of the Freedom of Information and Protection of Privacy Act *("FIPPA") as a reminder that this section may apply to a broader scope of records than one might expect on first pass.*

Subsection 13(1) of FIPPA lets a local government refuse disclosure of information that would reveal policy advice or recommendations developed by or for the local government, except the types of information or classes of records listed in sections 13(2) and records that have been in existence for over 10 years, per section 13(3).

Section 13(1) protects the integrity of a public body's internal decision-making processes by allowing the public body to engage in full and frank deliberations, including requesting and receiving advice, in confidence, free of disruption from outside parties, and unhindered by the spectre of potential disclosure.[1]

Below, we take a closer look at some portions of subsection 13(1) that expand its scope:

"information that would reveal"

Subsection 13(1) applies not only to records that expressly contain advice or recommendations, but also to records that contain information which would allow a third party to accurately *infer* the content of the advice or recommendation (*Qualicum Beach (Town) (Re)*, 2024 BCIPC 1, para 10). For example, factual information that has been compiled and selected as background to providing advice, and which is an integral component of the advice, could be withheld under section 13(1), as it may enable a reader to infer the content of the advice (*Provincial Health Services Authority v. British Columbia (Information and Privacy Commissione*r), 2013 BCSC 2322, at para 94). This is true despite subsection 13(2)(a), which provides that

a local government must not refuse to disclose any factual material under section 13(1).

"advice or recommendations"

"Advice" is not defined in FIPPA, but it is widely accepted that advice, for the purposes of section 13, includes opinions about an existing set of circumstances and facts, when those opinions are intended to help inform a local government's decision-making processes. In other words, a recommendation to take a particular course of action is *not* necessary to bring information within the scope of section 13(1).

In *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, the Court of Appeal rejected an argument made by the Office of the Information and Privacy Commissioner ("OIPC") that section 13(1) does not apply unless the opinion at issue provides recommendations regarding *future* courses of action. Instead, the Court interpreted advice more broadly, saying it "should be interpreted to include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact" (para 113).

"by or for"

Section 13 applies not only to records authored directly *by* staff of local governments, but also to policy advice or recommendations developed *for* local governments.

In light of the above, below are some examples of the types of records that generally are encompassed by the scope of section 13:

- Opinions or advice on a set of facts or a policy option authored by local government staff using their specialized expertise;
- Expert opinions, such as in the form of a report, on matters of fact authored by external consultants and provided to a local government for its consideration;
- Communications or meeting minutes by committees or working groups that make recommendations to the local government; and
- Drafts of reports or other correspondence containing editorial comments or recommendations (e.g. records with tracked changes).

While not the direct subject of this article, we note that there are a number of limitations on section 13's scope set out in subsections 13(2) and 13(3), including that a local government must not refuse to release public opinion polls, statistical survey, appraisals or environmental impact statements. As always, case law and OIPC decisions provide additional guidance that may be relevant to specific types of records and information.

The OIPC has generally expressed dissatisfaction with the courts' broad view of section 13(1), going so far as to suggest it is inconsistent with the intent of FIPPA. In a 2022 report, the OIPC claimed: "[o]ver time, in response to public body arguments and court decisions, this provision has been interpreted in a manner that has eroded the public's right of access".[2] Although the OIPC may be advocating for a narrower interpretation, they cannot overturn or get around the case law. So for now, the "policy advice and recommendations" exception to disclosure remains broader than some may expect or even prefer. Of course, since section 13 is a discretionary exemption to disclosure, local governments can always opt to disclose a record, regardless of it being captured by this exemption.

Julia Tikhonova

[1] *Insurance Corporation of British Columbia v. Automotive Retailers Association,* 2013 BCSC 2025, *at para 29*.

[2] *Submission to the Special Committee to Review the Freedom of Information and Protection of Privacy Act, March 2022, page 6.*

BC Court of Appeal finds use of MEVA to deem rezoning valid was unconstitutional

As anyone working in the municipal world is well aware, the interplay between powers and responsibilities of the local and provincial levels of government is complex and manifold. One unique and less frequently seen avenue for this interplay is found in Municipalities Enabling and Validating Acts ("MEVAs"). As the name suggests, an MEVA allows the Province to enable and validate an act of a local government, rendering the act legal despite any prior procedural or legal defects. While MEVAs are powerful legislative tools, the recent decision by the BC Court of Appeal in Kitsilano Coalition for Children & Family Safety Society v. British Columbia (Attorney General), 2024 BCCA 423 *("*Kitsilano*") demonstrates that there are limits to when and how an MEVA may be used.*

Background

The decision in *Kitsilano* arises from a 2021 amendment by the City of Vancouver (the "City") to its zoning bylaw. The City planned to construct a 12-storey housing development. In order to move forward with this proposed development, the City was required to amend its zoning bylaw. One of the requirements to passing such an amendment, per section 566 of the *Vancouver Charter*, is that the City hold a public hearing in advance of adopting the amending bylaw.

The Kitsilano Coalition for Children & Family Safety Society (the "Coalition") formed shortly before the public hearing for the zoning amendment and opposed the development and amending bylaw. Following six days of public hearings, the City gave approval in principle to the zoning amendment. The Coalition filed a petition for judicial review of the City's decision, asserting that the hearing had breached the City's procedural bylaw, and that the decision to rezone was unreasonable.

Before the Coalition's petition for judicial review had been heard by the courts, the Province – concerned that the housing development would be delayed by the pending litigation – passed the *Municipal Enabling and Validating Act (No. 5)* ("MEVA 5"). MEVA 5 deemed the public hearing that occurred for the rezoning to have been validly held, and the bylaw validly adopted, notwithstanding section 566 of the *Vancouver Charter*, the City's procedure bylaw, or any subsequent court decision.

In response, the Coalition filed a petition, seeking a declaration that MEVA 5 was contrary to section 96 of the *Constitution Act, 1867* (which prohibits the provinces from passing laws that would infringe on the superior courts protected adjudicative function), and of no force and effect. A detailed summary of the BC Supreme Court's decision on this matter can be found in the March 2024, Volume 35, Number 1 edition of the Young Anderson Newsletter. In brief, the Court upheld MEVA 5, finding that "although [MEVA 5] deems a particular state of affairs to be true, it does not directly dispose of any legal proceeding". The Coalition appealed this decision, which brings us to the recent decision in *Kitsilano*.

Kitsilano

The core question on appeal was whether the trial judge had erred in law by finding that MEVA 5 created a "legislated exception" (i.e., a substantive amendment to an existing law), rather than purporting to deem or direct a particular legal outcome under existing law (and thus unconstitutionally interfering with the adjudicative role of the courts). In other words, the Court had to determine whether MEVA 5 existed solely to dismiss the Coalition's pending judicial review, or to create a legislated exception to other extant legislation.

The Court found that MEVA 5 was not, in practice, a legislated exception. It did not purport to amend an existing law which the courts could then apply when exercising their adjudicative function:

> … what law was actually amended by MEVA 5, and what is the 'new' law that the Court is left to "apply in its adjudication"? … It does not remove — retroactively or otherwise — the authority of the City Council to do anything; nor does it create an exemption from the necessity for public hearings under s. 566 or the requirements of the procedural bylaw. It does not "suspend" any of the (public) rights created by the *Vancouver Charter* and bylaws. No particular legislative provision, including a bylaw, has been amended or come into force retroactively.

Instead, the Court found that MEVA 5 had the effect of deeming a specific set of facts – namely, that the public hearing was validly held, and the bylaw validly passed – to be true, for the purpose of directing the outcome of the Coalition's legal challenge. The Court found this intended direction of the courts' future adjudication on the validity of the zoning bylaw infringed on the courts' adjudicative role. As such, the Court found MEVA 5 to be contrary to section 96 of the Constitution, and therefore of no force and effect.

Takeaways

The decision in *Kitsilano* is an important indicator of the limits of MEVAs as a tool of provincial intervention of behalf of local governments. The Court makes clear that an MEVA which deems a specific state of facts to be true for the purpose of dictating the outcome of future litigation will be held unconstitutional.

However, the decision in *Kitsilano* should not be taken to suggest that MEVAs are now toothless. It is important to note that the Court's decision appears to turn specifically on the fact that MEVA 5 did not functionally amend a law which the courts could then apply. The Court may even be suggesting that had MEVA 5 been drafted in a different form, in which it exempted the public hearing from the requirements of the City's procedure bylaw and section 566 of the *Vancouver Charter* (rather than directly deem that the public hearing had been validly held, and the bylaw validly passed), it would have been upheld as constitutional.

At the end of the day, perhaps the most immediate and salient point for local governments to take from this decision is the importance of ensuring that they continue to meet the requirements imposed on them by governing legislation and their own bylaws. While an MEVA may be a solution of last resort in some circumstances, *Kitsilano* tells us that even an MEVA is not an ironclad failsafe.

James Barth

Approving Officers' Corner: Providing Relief from the Requirement for Highway Access

When it comes to the subdivision of land, approving officers likely know the default rule for highway access under section 75 of the Land Title Act (the "LTA"*): "to the extent of the owner's control, there must be a sufficient highway to provide necessary and reasonable access" to all new parcels. However, an approving officer may grant relief from this requirement in certain circumstances, which this article will review.*

The *LTA* defines "subdivision" as "the division of land into 2 or more parcels, whether by plan, apt descriptive words or otherwise". Before a subdivision plan is filed, s. 83 of the *LTA* requires that it be examined and approved by the local government's approving officer. Section 86 of the *LTA* gives the approving officer the ability to refuse to approve a subdivision plan for various reasons, including, under s. 86(1)(c)(ii), if they consider that "the plan does not comply with the provisions of this Act relating to access and the sufficiency of highway allowances shown in the plan, and with all regulations of the Lieutenant Governor in Council relating to subdivision plans".

"[T]he provisions of this Act" include s. 75 of the *LTA*, cited above. In addition to the default requirement for highway access to new parcels, section 75 also requires a highway access "through the land subdivided to land lying beyond or around the subdivided land".

Section 76(1),

however, allows the approving officer

to grant relief from compliance with

section 75(1) (a) in circumstances

prescribed by the Land Title Act Regulation

Section 76(1), however, allows the approving officer to grant relief from compliance with section 75(1)(a) in circumstances prescribed by the *Land Title Act Regulation* (the "*Regulation*"). Section 8 of the *Regulation* first requires an approving officer to conclude that a given access alternative is "consistent with good land use planning" and "not contrary to the public interest". More specifically, the subdivision must fit into one of the scenarios described in s. 8(a) through (d): it must affect land outside a system of highways; land having access only by air or water; land where the only connection to highway is by tram, cable car, gondola, or forest service road; or the subdivision must be tendered by the Crown.

If the proposed subdivision satisfies at least one of these requirements, then the approving officer may grant relief as set out in ss. 9-12 and 15 of the *Regulation*.

Section 9 of the *Regulation* allows the approving officer to grant relief from the requirement of highway access if the subdivision creates a single parcel that does not abut a highway, but the subdivider proposes to grant an easement of access or a private road to that parcel. Under this section, the subdivider would also have to submit a survey plan outlining the easement or private road.

Planners and approving officers in particular should be mindful of the ability to grant relief from the requirement for highway access in the context of subdivision so that they are aware of the tools at their disposal and how they work.

S. 10 allows the granting of relief where the subdivision affects land having practical access only by air or water, in which case the approving officer would have to include a statement to that effect in their approval.

Ss. 11 and 12 operate somewhat similarly, allowing for relief in circumstances where any lot that does not have highway access is contiguous with another lot that does have highway access. These sections have several specific requirements that would have to be satisfied for the approving officer to be able to grant relief.

With ss. 13 and 14 of the *Regulation* having been repealed, that leaves s. 15, which allows for relief where the only connection between the land and a highway is by a forest service road established under the provincial *Forest Act*. The approving officer may grant relief if the forest service road meets certain dimensions set out in the section, but would also need certification and consent from an engineering officer of the provincial Ministry of Forests.

Planners and approving officers in particular should be mindful of the ability to grant relief from the requirement for highway access in the context of subdivision so that they are aware of the tools at their disposal and how they work. This ability permits subdivision in circumstances that otherwise would not allow for it, but it can only be used if certain criteria are met. This article provides only a summary of the requirements, so it is vital that planners and approving officers read the specific wording of each relevant section in the *LTA* and the *Regulation* if they are dealing with a subdivision application that requests such relief.

Serge Grochenkov

The Danger of Offer Letters

When hiring a new employee, many local government employers will provide the successful candidate with an initial "offer letter", that sets out the details about their position, such as compensation, benefits, and hours. After the "offer letter" has been accepted, the employer will then provide the candidate with a full employment contract that includes clauses on termination, confidentiality, and intellectual property. While this course of action is not unusual, it is often ill advised, as demonstrated in the recent decision of Madeline Adams v. Thinkific Labs Inc., *2024 BCSC 1229 ("*Adams*").*

In *Adams*, the defendant, Thinkific Labs Inc., had emailed the plaintiff with an offer of employment which outlined details such as compensation, bonus, stock options, health and wellness benefits, vacation and leave entitlements, and work hours. The offer of employment did not include any provisions on termination, non-competition, or other restrictive terms. The plaintiff accepted the offer of employment and shortly after, the defendant sent the plaintiff a formal letter agreement, which included a termination and non-competition clause as well as other restrictions and obligations required of the plaintiff. These additional terms were never discussed with the plaintiff beforehand, nor were they mentioned in the initial offer of employment. The plaintiff signed the letter agreement and returned it to the defendant.

A few years later, the defendant terminated the plaintiff's employment without cause and relied on the termination clause in the subsequent letter agreement that was signed. The plaintiff argued that she was entitled to common law reasonable notice as the initial offer of employment that she signed did not contain a termination clause that limited her entitlements.

The subsequent letter agreement imposed new and burdensome terms on the plaintiff, to which she did not receive any fresh consideration or value.

The BC Supreme Court held in favour of the plaintiff, finding that the plaintiff had accepted the terms and conditions of employment as per the initial offer of employment. The subsequent letter agreement imposed new and burdensome terms on the plaintiff, to which she did not receive any fresh consideration or value. The court did not accept that the ability for the plaintiff to keep her job if she agreed to these additional, onerous terms was proper consideration and cited the following passage in approval from a BC Supreme Court decision of *Krieser v. Active Chemicals Ltd.*, 2005 BCSC 1370:

> [28] Having found the Contract introduced new provisions detrimental

to the plaintiff, what does the law require as adequate consideration for such changes to an ongoing employment relationship?

[29] *Watson* makes it clear that continuing employment alone is not enough. The Court found that there must be forbearance or some other incentive to constitute good consideration...

[30] The Ontario Court of Appeal expressed this even more strongly in *Hobbs v. TDI Canada Ltd.* (2004), 2004 CanLII 44783 (ON CA), 246 D.L.R. (4th) 43 at para. 32:

> Francis makes it clear the law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment relationship as the consideration for the new terms.

Given the lack of fresh, proper consideration (i.e., something of value to the plaintiff), the Court in *Adams* found that the letter agreement, including the termination clause, was unenforceable and the plaintiff was entitled to reasonable notice at common law.

This decision serves as a cautionary tale to employers when sending offer letters to potential new employees. If the offer letter is accepted, that letter becomes the employment contract between the parties and any further additions or changes to the offer letter, such as a termination clause limiting severance entitlement, must include "fresh consideration" like a signing bonus or some other new benefit, in order for those additions and changes to be enforceable.

Accordingly, local government employers should avoid sending bare-bone offer letters that only discuss things such as compensation and job title. Ideally, employers should send out the full employment contract with all the terms and conditions at first instance. If a basic offer letter must be sent first, such letters should at least mention any crucial clauses that puts a limitation or obligation on the employee, such as termination, confidentiality, and non-competition/non-solicitation. If employers have sent a basic offer letter which is later followed up with a more comprehensive and formal written employment contract that includes onerous terms and conditions that were not in the offer letter, this subsequent written employment contract must provide for new or fresh consideration, such as a signing bonus, increased compensation, or some other benefit to be enforceable. As noted by *Adams*, the ability for the employee to keep their job in exchange for agreeing to the subsequent employment contract is not good consideration.

Ideally, employers should send out the full employment contract with all the terms and conditions at first instance.

Lianna Chang

Look For Your Lawyers

Sukhbir Manhas will be presenting a session entitled "Legal Update" at the Local Government Management Association CAO Forum being held February 18-20, 2025 in Victoria.

Young, Anderson will be presenting its Annual Local Government Law Seminar on February 28, 2025 at the Vancouver Island Conference Centre, 101 Gordon St, Nanaimo.

Sukhbir Manhas will be presenting a session entitled "Legal Update" at the Vancouver Island Local Government Association Annual Conference being held in Parksville April 2-4, 2025.

Elizabeth Anderson & Christopher Gallardo-Ganaban will be presenting sessions entitled "The Power of Contempt: Enforcing Court Orders" and "Case Law Update" at the Local Government Compliance & Enforcement Association Conference being held in Richmond April 8-11, 2025.

Nick Falzon & Christopher Gallardo-Ganaban will be presenting a session entitled "Local Governments and the TRC Calls to Action: A Legal Overview" at the Association of Vancouver Island and Coastal Communities (AVICC) 2025 AGM and Convention being held April 11-13, 2025 in Nanaimo.

David Giroday will be co-presenting a session entitled "Community Housing Solutions" at the Association of Vancouver Island and Coastal Communities (AVICC) 2025 AGM and Convention being held April 11-13, 2025 in Nanaimo.

Sukhbir Manhas will be presenting a session entitled "Common Law Procedural Fairness: Dos and Don'ts" at the Municipal Insurance Association of BC 2025 Conference being held in Vancouver on April 23-24, 2025.

Timothy Luk will be presenting a session entitled "Introducing Amenity Cost Charges: The Revenue Source You Didn't Know You Needed" at the Association of Kootenay Boundary Local Governments 2025 Conference being held in Kimberley on April 25-27, 2025.

Guy Patterson will be presenting virtual sessions entitled "Legal Update, Part 1 – Caselaw" and "Legal Update, Part 2 – Procedural Update" at the Local Government Management Association Approving Officers Virtual Workshop held May 8-9, 2025.

Timothy Luk will be co-presenting a virtual session entitled "Financial Tools" at the Local Government Management Association Approving Officers Virtual Workshop held May 8-9, 2025.

Guy Patterson will be presenting a session entitled "Beyond Housing Supply" at the 2025 PIBC Annual Conference being held in Vancouver June 10-13, 2025.

Reece Harding & Christopher Gallardo-Ganaban will be presenting a session entitled "Local Governments and the TRC Calls to Action: A Legal Overview" at the Local Government Management Association Annual Conference being held June 10-12, 2025 in Kelowna.

Sukhbir Manhas & Carolyn MacEachern will be presenting a session entitled "A Step-by-Step Guide to Managing Complaints of Bullying & Harassment" at the Local Government Management Association Annual Conference being held June 10-12, 2025 in Kelowna.

STAY CONNECTED

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