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Conflict of Interest or Community of Interest? Court Interprets the "Electors Generally" Exception

The recent decision of the BC Supreme Court in Redmond v. Wiebe, *2021 BCSC 1405 provides interesting insight into the interpretation of the "community of interest" exception to the conflict of interest rules in the* Vancouver Charter *and* Community Charter.

The respondent was a councillor and a part-owner of a restaurant and bar in the City of Vancouver. The petitioners, a group of electors, alleged that the respondent was in a conflict of interest position when he participated in and voted on a motion related to expanding patio seating to assist restaurants and bars during the COVID-19 pandemic (the "Temporary Patio Program"). The petitioners sought to disqualify Mr. Wiebe on the basis that he failed to disclose his conflict of interest and contravened the required restrictions on participation.

Section 145.3 of the *Vancouver Charter*, which is equivalent to section 101 of the *Community Charter*, restricts councillors from voting on matters in which they have a direct or indirect pecuniary interest. Section 145.6(1) of the *Vancouver Charter*, the equivalent of s. 104(1) of the *Community Charter*, identifies certain exceptions to these restrictions, including the "community of interest" exception at issue in this case.

The Court applied a two-step analysis, first considering whether the respondent did have a pecuniary interest in the Temporary Patio Program, and contravened s. 145.3(2) by participating and voting at the council meetings at issue. Having found that he did have such an interest, the second step of the analysis was whether the respondent's conduct fell into the exception under section 145.6(1)(a). Specifically, the inquiry was whether Mr. Wiebe's pecuniary interest in the Temporary Patio Program was "in common with the electors of the city generally."

To determine whether this exception applied, the Court analyzed the meaning and scope of "electors ... generally," a key phrase which is not defined in the legislation. The petitioners argued that the broad language of "electors ... generally" would refer to all 453,190 electors in the City. Therefore, as not all electors have a pecuniary interest in restaurants or bars, the respondent's pecuniary interest could not be held in common with the electors, and the exception could not apply. The respondent, on the other hand, argued that equivalence should be drawn between "electors ... generally" and the holders of 3,127 restaurant and bar licenses in the City, because only this group shared a general interest in the increased patio use proposed by the Temporary Patio Program.

The Court agreed with the respondent and concluded that the appropriate comparator group for the purpose of s. 145.6(1)(a) was the holders of restaurant and bar licenses. In the presiding judge's words:

> Focusing on the specific language in s. 145.6(1)(a), the petitioners' submission that the comparator is the 453,190 electors who voted in the 2018 election would have some appeal except for the addition of "generally" at the end of the phrase at issue. I must give some meaning to all the words used by the legislature and I cannot ignore that word as suggested by the petitioners at one point. It could perhaps be said that "generally" refers to all of the electors in Vancouver. However, that seems to be a very awkward way of saying something that would be true without having "generally" in the phrase at all. It also seems to me that the petitioners' approach creates a group so large and diverse that any pecuniary interest by a councillor would not be in common with the comparator group.

The Court held that the respondent's pecuniary interest was in common with the restaurant and bar operators, because there was no evidence that the respondent's interest from the Temporary Patio Program was distinct from the other owners of restaurants and bars. This approach was similar to that in the decision of *Stewart v. City of Yorkton*, in which two city councillors, one of whom was a manager of a store and the other a shareholder in another, voted on the regulation of store hours in their city. Although that case did not apply the *Vancouver Charter* or *Community Charter*, the applicable comparator group was found to be "all other owners and managers of stores in the area" that were governed by the bylaw. The Court held that the councillors were not disqualified from voting on the motion, since their interests were in common with this group.

Another decision considering the "community of interest" exemption is *Godfrey v. Bird*. In that case, the respondent councillor, who was also a realtor, voted on a zoning amendment application relating to a group of properties, one of which a client of his had an interest in. The Court found that the respondent's interest was not in common with the electors generally: the relevant property was one of less than 50 properties that were being considered by council. The Court held that in this particular case, the solicitors for the District were correct in concluding that 100 properties marked the appropriate boundary differentiating an interest in common with "the electors of the municipality generally" from an interest that is

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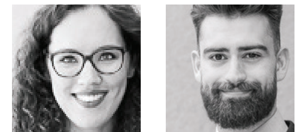
not "in common". The Court cautioned, however, that the boundary of "100 properties" cannot be assumed as a guideline for the community of interest exception in *all* communities, which suggests that such a guideline may vary with each community.

Therefore, in *Redmond v. Wiebe*, despite the respondent's financial interest in the Temporary Patio Program, the Court held that the participation restrictions in the *Vancouver Charter* did not apply to him. This decision was appealed on August 10, 2021.

This case highlights the context-specific nature of the conflict of interest analysis. The task for councillors voting on matters of wider importance, but which also affect them personally, is a difficult one. They must decide whether their interest is in common with "electors generally". It remains unclear in what circumstances the term "electors generally" will be equated to a smaller comparator group, such as owners of restaurants and bars, as was the case in *Redmond*. Perhaps the Court of Appeal will take the opportunity to provide greater clarity with respect to how broadly, or narrowly, the group of "electors generally" must be defined in order for a councillor to take the benefit of the interest in common exception.

Julia Tikhonova & Nick Falzon



The Concept of Merger: What Municipal Bylaw Drafters Should Know

One of the aspects of statutory interpretation that comes into play in the drafting and interpretation of local government bylaws, in particular amendment bylaws, is the concept of merger*. At the instant that an amending bylaw comes into force, each amendment that it makes* merges *with the bylaw that is being amended, with the result that the bylaw now reads as amended. The amending bylaw is at that instant "spent"; it has fully performed its task and has no further purpose or effect.*

Merger is codified in s. 34 of the BC *Interpretation Act* (which applies to the interpretation of municipal bylaws unless a contrary intention appears in the bylaw): "An amending enactment must be construed as part of the enactment that it amends." This has a number of important consequences for those of us who draft and administer municipal bylaws.

1. Except in regard to the time at which the amended provision comes into operation, the effect of merger is that the amended bylaw must now be interpreted as if it had contained the amended provision from the outset (though amended provisions have no retroactive effect). This legal fiction assumes that the drafter of the amendment turned their mind to how the amendments fit with the balance of the bylaw and included all amendments necessary to ensure the continuation of a seamless and coherent bylaw

scheme. This is why it is so important for amendment drafters to check any existing bylaw definitions, for example, for words and phrases that are being used in the amendment to ensure that the definitions make sense in these new provisions, and to ensure that the vocabulary used in the amendment is the same vocabulary that was used in the existing bylaw. Thus, if the zoning bylaw uses the term "duplex", a zoning amendment bylaw shouldn't use the term "two-family dwelling" to refer to the same type of building, regardless of the semantic preferences of the drafter.

2. Because an amendment bylaw is spent at the instant that it comes into force, one does not (with the single exception noted below) subsequently amend an amendment bylaw, and any such amendment would usually be of doubtful validity. The correct procedure is to once again amend the parent bylaw that the amendment bylaw amended. For example, if a fees and charges bylaw has been amended to increase the fee for a building permit application from $50 to $100, the correct procedure for further increasing the fee to $150 is to amend the building bylaw again rather than amending the amendment bylaw to enact a larger increase. According to the concept of merger, the first amendment bylaw is spent and cannot be amended. While enacting a further fee increase by amending a previous fee increase in this way may be rare, we have seen bylaws that purport to amend the text of zoning amendment bylaws that have already been adopted, are already in force and are therefore spent.

3. The *Community Charter* in s. 136 says that a bylaw comes into force on the later of the date it is adopted and any later date specified in the bylaw. If an amendment bylaw has been adopted but hasn't yet come into force, it can be amended. The provisions of the second amendment merge with the provisions of the first amendment on the effective date of the second amendment, and all of the amendments merge with the provisions of the parent bylaw on the in-force date of the first amendment.

4. The fact that an amendment bylaw is spent, by the way, doesn't mean that it can be discarded; like all bylaws it must be kept in a safe place and made available to the public for inspection as required by s. 97(1)(a) of the *Community Charter*. The corporate officer will have to consult these bylaws if an official bylaw consolidation (see below) is prepared.

5. One of the consequences of merger is that it is unnecessary to include in an amendment bylaw that will come into force upon adoption a provision establishing how the bylaw may be cited – the so-called "short title" of the bylaw (which in many cases is not short at all). No occasion to formally cite the bylaw will arise, at least in any other bylaw.

6. When a bylaw that has been amended is repealed, the repeal provision may simply refer to the bylaw by its designated name, rather than the bylaw "as amended". For example, if a zoning bylaw that has been frequently amended "may be cited for all purposes as Zoning Bylaw No. 2000", a new zoning bylaw that repeals it may simply indicate that Zoning Bylaw No. 2000 is repealed. The reference to the bylaw automatically includes every amendment that has merged with the original bylaw. (Any amendment bylaws

that have been adopted but have not yet come into force should, however, also be repealed. A bylaw may always be repealed before it comes into force.)

7. When a local bylaw that has been amended is referenced in another local bylaw (for example a zoning bylaw that defines "structure" as a structure as defined in Building Bylaw No. 1000), the zoning bylaw may simply refer to Building Bylaw No. 1000 rather than "Building Bylaw No. 1000 as amended from time to time". Again, the reference to the bylaw automatically includes all amendments that have merged with the original bylaw. If, however, the intention is to freeze the building bylaw definition for the purposes of the zoning bylaw so that subsequent building bylaw amendments will not have consequences for the zoning bylaw, the zoning bylaw must say so, by defining "structure" as "a structure as defined in Building Bylaw No. 1000 as of the date of first reading" of the zoning bylaw.

8. It follows from all of the above that a written version of the true contents of an amended bylaw, whether in hard copy or electronic format, might not exist at any particular time except as a legal notion. The contents of any amended bylaw may however, as of any date, be revealed in several different ways. The formal manifestation of the bylaw is an official bylaw consolidation prepared by the corporate officer in the manner permitted by s. 139 of the *Community Charter*, in which provisions added by amendment are included and from which repealed provisions are removed. These are quite rare. Unofficial consolidations of bylaws, on the other hand, are often prepared for publication on local government websites and are sometimes also printed for internal use by the local government. There are usually ongoing consolidations of frequently-amended bylaws such as zoning bylaws and fees and charges bylaws, with each amendment identified with a marginal notation which would not appear in an official consolidation. The corporate officer may also prepare and certify a copy of a local government bylaw for use in legal proceedings, as contemplated by s. 28 of the *Evidence Act*; this doesn't have to be a s. 139 consolidation. As a matter of law, however, at every point in time the merged bylaw actually exists, somewhat like an image that may be caught by a computer screen grab, even though no consolidation has ever been prepared or the official or unofficial bylaw consolidation is out of date.

Merger also operates in respect of provincial laws; when these laws are amended, the amendments merge with the provisions being amended and the law is interpreted as if the amendments had been included at the outset, except as regards the temporal operation of the amendments themselves (unless the legislature specifically made the amendments retroactive, something that local governments are generally not allowed to do). As a result, for example, a reference in a local government bylaw to the BC *Land Title Act* is automatically interpreted as a reference to the Act including all amendments that have merged with the Act. It's not necessary to refer to "the *Land Title Act* as amended from time to time". There is also a merger rule in the federal *Interpretation Act*.

Bill Buholzer ✍

One of These Torts is not Like the Other: Trespass, Nuisance and Negligence in Sewage Spills

*In a recent decision, the BC Supreme Court held the Cariboo Regional District liable for two floods of raw sewage that had occurred on the property of Bawnie and David Ward (*Ward v Cariboo Regional District *2021 BCSC 1495). In the event of a sewage spill, litigants may seek to hold the municipality liable through several distinct but interrelated torts, namely trespass, nuisance, and negligence. While nuisance and negligence have unique statutory and policy defences when brought against local governments, trespass does not. In* Ward*, the Regional District was found to be liable in nuisance, negligence, and trespass. This raises the question: if multiple torts are brought against a local government for a sewage spill and trespass is found, are defence for nuisance and negligence still relevant? Can you have a sewage spill that is a nuisance, but not a trespass?*

The Facts

Before turning to the successful tort claims in *Ward*, it's important to first understand the facts that led to this outcome. The Wards sued the Regional District for the flooding of raw sewage onto the Wards' land and family home in 2015 and 2020. These were the latest in a series of sewage outflows onto the Wards' property, with the Regional District taking responsibility and paying restoration for earlier floods in 2006 and 2010. While these earlier floods were comparatively minor, the 2015 and 2020 floods at issue in *Ward* were severe, with the 2015 flood in particular being the largest sewage spill in the history of the Regional District.

The Wards' evidence painted a picture of intense and lingering negative effects on their property and quality of life following the floods. This included extensive damage to the Wards' basement; contamination of the well that provided their drinking water; detrimental long-term effects on the property's vegetation; and the deterioration of their farm animals' health. Expert evidence led at trial also suggested that a litany of contaminants associated with sewage can remain in soil for a long period of time unless specific intervention is taken. The Wards argued that the Regional District was liable for the continuing negative effects of the floods, due to the Regional District's repeated inaction in addressing the aftermath of the flooding, and the inadequacy of the steps the Regional District did take. The Regional District admitted liability for the 2015 flood, but only for the day of the flood, not for any continuing effects, and denied any liability for the 2020 flood.

The Torts

The Court held the Regional District liable in trespass, nuisance, and negligence for both the 2015 and 2020 floods. Although each tort was assessed by drawing on similar facts and factors, there are some important distinctions in their analyses. In considering liability for trespass, the Court drew on the decision in *Peter Ballantyne Cree Nation v. Canada (Attorney General*), 2016 SKCA 124. *Peter Ballantyne* states that trespass requires an intrusion onto land that is direct, intentional, and physical, and notes that trespass can occur where there is a "discharge of some substance such as water or oil onto another's property". Trespass is

also actionable *per se*, meaning that proof of actual damage is not required so long as direct, intentional and physical intrusion is shown. *Peter Ballantyne* also notes certain limits on trespass, cautioning that "objects such as fumes, smoke, noise or odour do not fall within trespass". Additionally, the trespass action in *Ward* was for continuing trespass, where the offending intrusion on the plaintiff's land is not removed by the defendant and remains on the land. On this point, the Court of Appeal in *Peter Ballantyne* notes that flooding can constitute continuing trespass where water or any other substance is left on the land after the flood.

Claims in nuisance, on the other hand, must show a substantial and unreasonable interference with the plaintiff's use of the land. Like trespass, nuisance can be found through physical damage to the land. However, nuisance has an even broader scope than trespass, also applying where the interference is to the health, comfort or convenience of the plaintiff. As with trespass, the nuisance in *Ward* was also found to be on a continuing basis, with the substantial and unreasonable interference on the Wards being suffered long after the actual flooding events.

Negligence is the most conceptually distinct of the three torts in *Ward*. Where trespass and nuisance are dependent on the offending occurrence itself – the intrusion or interference of the sewage and its residue – negligence focuses on the sufficiency of the care and maintenance provided by the Regional District prior to the floods. It is uncontentious that local governments have the potential to be liable in negligence in this area, as local governments generally owe a duty to their residents to design, maintain and operate municipal sewer systems in a non-negligent manner. Therefore, the real questions when assessing this type of negligence is whether the local government showed the level of care that would be expected of a reasonable public authority in the same circumstances, and if the local government's insufficient care caused the spill.

The Court found the Regional District liable for all three torts. Continuing trespass was demonstrated through the Wards' circumstantial evidence of debris on the property and lingering effects on the vegetation and animals, along with the expert evidence of the persistence of contaminants left by the sewage. Continuing nuisance was found in relation to the prolonged interference to the Wards' use of their land and home, and the negative psychological effects of this interference. Negligence was established due to the Regional District's inaction in inspecting, maintaining, and repairing the inadequate portions of the sewer system that led to the floods. Although each tort has unique requirements that must be met, the facts in *Ward* were sufficient for all three to be found.

The Defences

Local governments can rely on specific defences in response to claims of negligence and nuisance for sewage spills. In negligence, a local government can argue policy justifications for the seemingly negligent behaviour or that the claimant was also contributorily negligent. The policy defence exempts local governments from liability for negligence where that liability would arise from a policy decision rather than an operational decision. While the distinction between these categories is not always self-evident, policy decisions are generally dictated by financial, social and political factors, whereas operational decisions are guided by administrative direction, expert opinion, or technical standards and requirements. In this case, the Regional District unsuccessfully argued that the insufficient sewer maintenance was the result of fiscal policy. If the Regional District had more compelling evidence of fiscal constraint guiding their sewer maintenance however, this could have provided a complete defence to the negligence claim.

Contributory negligence provides partial defence against negligence. Rather than entirely exempting the local government from liability, the damages that the local government must pay will be reduced if it can demonstrate that the claimant was partially responsible for their own harm. This was also argued unsuccessfully by the Regional District, with the Court finding that the Wards took all reasonable steps to avoid the floods or minimize their impact. Had there been evidence that the Wards failed to take reasonable effects to address foreseeable flooding, the finding of negligence against the Regional District may have been reduced.

A statutory defence for local governments against certain nuisance claims is provided by s. 744 of the *Local Government Act* (the "*LGA*"). Section 744 of the *LGA* states that local governments are not liable in nuisance if the damages in question arise, directly or indirectly, from the breakdown or malfunction of a sewer system. A local government will be immune to a claim in nuisance relating to sewage spills if it can prove that the spill resulted from a malfunction in the sewer system – such as a blockage cause by a build up of roots or plastic bags – rather than the ordinary and intended operation of the sewer. In *Ward*, the Regional District initially claimed *LGA* s. 744 immunity, but subsequently withdrew their reliance on this statutory defence and admitted liability in nuisance. While the applicability of s. 744 is not explored in the decision as a result, the Court notes that "even if [s. 744] were applicable to the nuisance claim … it does not apply to either the trespass claim or the negligence claim, which in my view are sufficient to ground the remedies granted in this case". The Court here directly suggests that a successful defence against nuisance may not shield a local government from paying damages for sewage spills. Even if the Regional District's arguments for immunity against nuisance and negligence had succeeded, the successful trespass claim would likely have led to the same outcome.

The Ramifications

As a result of *Ward*, should local governments now presume that defences against nuisance or negligence for sewage spills are ineffective given potential liability for trespass? While this case certainly encourages caution against overreliance on these defences, it need not be assumed that it renders them completely toothless for two reasons. First, *Ward* is notable in both the scale of its floods and the extensive pattern of inaction from the Regional District. The Court repeatedly emphasizes the extremity of the floods' effects and the extent of the Regional District's failure to take remedial action or follow its own policies on maintenance and cleanup. If local governments can demonstrate greater sufficiency and proportionality in their response to a sewage spill, courts may be willing to limit findings of trespass. A swift and thorough cleanup response may also address the issue of *continuing* trespass, restricting a finding of trespass to the initial flood event. Where the scope and duration of an alleged trespass are of a smaller scale than in *Ward*, defences for nuisance and negligence will still have their place as part of a holistic argument against liability.

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Secondly, just because trespass, nuisance, and negligence were all argued together in *Ward*

does not mean they are always a package deal. Given the conceptual differences in the analyses of the three torts, there may be instances in which a sewage spill gives rise to a claim in nuisance or negligence but not trespass. Trespass requires a physical intrusion, and cannot be rooted solely in the more ephemeral intrusions of odour, fumes, or noise. A property adjacent to a sewage spill that is subject to unpleasant fumes for instance may have a claim in nuisance, but not trespass. Depending on the nature of the harm caused by a sewage spill, there may not be grounding for an argument in trespass, and policy justifications for negligence or statutory immunity for nuisance may still provide a complete defence.

Ward v. Cariboo Regional District is a dramatic case with strong remedies provided in response. The successful trespass claim in this case does not necessarily signal the end for defences against negligence and nuisance. In future instances of sewer system breakdown however, local governments should be wary of potential liability for trespass bursting through even where defences for nuisance and negligence appear shored up.

James Barth ✍

E-signature Policies: Are They Necessary?

The use of e-signatures has increased in recent years in both the private and public sectors. However, many are still hesitant to move to e-signatures due to a misconception that the requirement for a signature refers to a wet signature on paper. The COVID-19 pandemic has prompted local governments to shift their customary practice towards electronic methods to support "contactless" interactions and accommodate staff and elected officials working remotely. This article will review whether the e-signature is acceptable in BC, what is an e-signature, what legal requirements apply to its use, and what local governments should consider when using or implementing e-signatures.

In 1958, the Court of Appeal of Ontario in *R. v. Fox*, [1958] O.J. No. 38 defined a signature as "the writing or otherwise affixing, a person's name, or a mark to represent his name, by himself, or by his authority, with the intention of authenticating a document as being that of, or as binding on, the person whose name or mark is so written or affixed." As such, the Court focused on the intent of the person signing the document rather than the signature itself.

The current legal framework in BC and Canada allows the use of e-signatures except where expressly excluded. In BC, the use of e-signatures is regulated by the *Electronic Transactions Act* (the "ETA"). Under section 3 of the ETA, a record "must not be denied legal effect or enforceability solely by reason that it is in electronic form". Further, under section 11 of the ETA, a legal requirement that a document is signed is satisfied by an electronic signature. The requirement in the legislation that a record be "in writing" is also satisfied if the record is in electronic form (section 5

of the ETA). The *Evidence Act* also permits reliance on electronically signed documents in legal proceedings provided that requirements regarding authenticity and integrity of the document are met.

The ETA provides some exclusions. The documents that cannot be signed electronically include:

1. wills;
2. trusts created by wills;
3. powers of attorney, to the extent that they concern the financial affairs or personal care of an individual;
4. documents that create or transfer interests in land and that require registration to be effective against third parties; or
5. other provisions, requirements, information or records prescribed in the regulations.

Section 2(1) provides that the ETA does not limit the operation of law that expressly authorizes, prohibits, or regulates the use of information or records in electronic form, or requires information or a record to be posted, displayed, or delivered in a specific manner. This section evidences a policy decision of the Province not to override prior or subsequent legislation that either imposes restrictions on an e-signature or provides schemes for their use. Therefore, the exclusion of the abovementioned documents does not necessarily mean that electronic signatures are prohibited on those documents. In order to determine whether an electronic signature is acceptable, it is necessary to look to the specific legislation.

What is an electronic signature? The ETA defines an electronic signature as "information in electronic form that a person has created or adopted in order to sign a record and that is in, attached to or associated with the record". Given this definition, an e-signature can take different forms and not be limited to an image of a handwritten signature and an e-signature may be in a separate document from the signed record provided that the connection between them is clear and that the person's intention was to sign. The intention for an e-signature is no different from a signature. Also, the fundamental purpose of the e-signature is the same as for a signature and is to link a person to a document and provide evidence of that person's intent to approve, consent, authorize, or be legally bound by the contents of the document.

In addition to the ETA, common law principles accept various forms of e-signatures. Canadian courts have decided that click-through contracts can be binding on the parties to them (*Rudder v. Microsoft Corp.* (1999), 2 CPR (4th) 474 (ON SC)), that a faxed proxy was satisfactorily signed (*Beatty v. First Exploration Fund* (1988) 25 BCLR 2d. 377), and that an arbitration clause on a website was enforceable (*Dell Computers Corp. v. Union des consommateurs* (2007), 2 SCR 801; *Kanitz v. Rogers Cable Inc.* (2002), 58 OR (3d) 299 (ON SC). Essentially, an e-signature can take any form of electronic representation that can be linked or attached to an electronic document or transaction.

Section 8 of the ETA provides legal requirements that apply to electronic records. An original record is satisfied by the provision of the record in electronic form if (a) a reliable assurance as to the integrity of the record in electronic form exists, and (b) this record is accessible by the person to whom it is provided and is capable of being retained by that person in a manner usable for subsequent reference. In addition, the law may impose specific requirements of form on particular kinds of documents before the legal effect can be given to them.

There is no legal standard for the reliability of an e-signature, and this is consistent with not having a reliability rule for a handwritten signature or any other form of the signature on paper. An e-signature does not need more reliability than a signature on paper. The

relying party takes the risk that the signature is not authentic; therefore, in the absence of requirements prescribed by law, that party gets to set their own standard and decide when they are satisfied that an e-signature is authentic. As a result, different users may have different standards, and different uses of information may require different levels of assurance.

To support the use of electronic signatures, some organizations implement an e-signature policy, which is a set of rules drafted into a single policy document that explains the terms and conditions under which an e-signature can be created, validated, and used. Appropriately developed policies also assist in supporting the validity and enforceability of an electronically signed document both when it is created and later in the event of a dispute.

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Considerations for local governments

Since the COVID-19 pandemic, many local governments have increased the use of e-signatures in their daily operations. While e-signatures are convenient, effective, and efficient for citizens, businesses, and local governments, there are certain considerations that should be taken into account. Local governments should consider the following:

1. Whether the *Community Charter, Local Government Act, Freedom of Information and Protection of Privacy Act, Land Title Act*, or other legislation impose any restrictions or regulations on the use of e-signatures?
2. Whether the signature is required?
3. Whether the implementation of e-signatures will improve workflow?
4. What is the cost of setting up the technology infrastructure to support an e-signature process?
5. What software to use?

Currently, the *Local Government Act* and the *Community Charter* do not prohibit or regulate the use of electronic signatures. However, sections 729 and 760(6) of the *Local Government Act* specify different forms of a signature that are required for certain securities and certificates. In particular, a signature may be "manual, engraved, lithographed or printed".

Local governments should consider developing a detailed e-signature policy, including when the e-signatures can be used, the minimum standard for the validity of an e-signature, and technology guidelines to establish a consistent practice. Since electronic signature technology keeps changing, and with that the legislation that applies to it will change, it would be prudent for local governments to regularly review their e-signature policies.

Alexandra Greenberg ✍

In the Green: Six Figure Fines for Unlawful Pot Shop

On June 1, 2021, the Provincial Court of BC issued reasons for sentencing in North Vancouver (City) v. Kevin Anderson dba Herban Art Collective*. Herban Art Collective was an unlawful retail cannabis dispensary in operation in the City of North Vancouver prior to federal legalization. When the City moved to enforce its zoning and business licensing bylaws against unlawful pot shops in its jurisdiction, Herban Art Collective was the only unlawful dispensary in the City which persisted in operation past the date of federal legalization on October 17, 2018. Herban Art Collective continued to operate despite its principal being served with warning letters, tickets, long form informations, and a petition by the City for a civil injunction.*

In the case of the prosecution by long form information under the *Offence Act*, Mr. Anderson, the principal of Herban Art Collective, pled guilty to 21 counts of carrying on business without a valid licence issued pursuant to the City's Business Licence Bylaw and 21 counts of using premises for a use not permitted by the City's Zoning Bylaw. He contested the amount of fines sought by the City, arguing that he had run the dispensary as a non-profit and was unable to pay any significant fines. However, Mr. Anderson ultimately led no evidence of his financial situation despite several adjournments to allow him to present such evidence. The Court imposed the maximum fines of $2,000 and $10,000, respectively, on each count, for a total fine amount of $252,000. The Court also ordered, pursuant to its additional sentencing powers in *Offence Act* prosecutions under the *Community Charter*, that Mr. Anderson was prohibited from operating, supplying, working for, or otherwise being involved with an unlicensed retail cannabis business for a period of one year.

The sentence in *North Vancouver (City) v. Kevin Anderson* is one of the highest fine amounts ever imposed in a long-form prosecution for breaches of a municipal bylaw, and is an important precedent for local governments seeking the imposition of higher court-ordered fine amounts that respond to contraveners who view lower fines or penalties imposed through municipal ticket informations or bylaw offence notices to be simply a "cost of doing business".

Elizabeth Anderson

Don't Forget about the Trade Agreements

When preparing to procure goods and services most of a local government's legal focus is on liability in contract. And rightly so: the vast majority of potential liability associated with a procurement arises from "Contract A", the implied contract between a tendering authority and a bidder that arises when a bidder submits a bid in response to a call for tenders. Breaching Contract A exposes a local government to a claim for damages that is typically quantified as the profits the aggrieved contractor would have earned on the job. The potential for significant

damages requires local governments and their advisors to pay close attention to procurement documents to ensure that a procurement limits damages arising from a breach of Contract A or even eliminates Contract A altogether.

Trade agreements constitute a second and often overlooked source of liability in local government procurement. These trade agreements are the Canada – European Union Comprehensive Economic and Trade Agreement (CETA), the Canadian Free Trade Agreement (CFTA), and the New West Partnership Trade Agreement (NWPTA). Notwithstanding that local governments are not signatories to these agreements, each of them is binding and enforceable against local governments.

The key things to know about the trade agreements are as follows: The agreements require, generally speaking, that local governments conduct open, transparent and non-discriminatory procurements. This means that procurements must be advertised on BC Bid and must not be structured in a manner that favours any particular supplier or class of suppliers. The agreements do not apply to every procurement; NWPTA applies only to procurements of construction services valued in excess of $200,000 and of goods and other services valued in excess of $75,000; CFTA applies only to procurements of construction services valued in excess of $252,700 and of goods and other services valued in excess of $101,100; and CETA applies only to procurements of construction services valued in excess of $9.1 million and of goods and other services valued in excess of $365,000.

The agreements exempt some procurements. For example, the CETA and CFTA permit sole sourcing in emergencies or when there is only one supplier of a good that is compatible with existing local government property. Under NWPTA, water and services related to water are exempt from the provisions of the agreement, as are health, social and legal services among other exemptions.

A supplier of goods or services who believes that a local government has conducted a procurement in contravention of the CETA, CFTA or NWPTA may launch a bid protest under the new Bid Protest Mechanism (BPM) under NWPTA which came into force on January 1, 2019. Disputes under the BPM are heard by a single arbitrator. The arbitrator may award tariff costs up to $5,000 to the successful party to cover that party's legal costs, operational costs to be paid by the unsuccessful party to cover the arbitrator's costs, and bid preparation costs up to a maximum of $50,000 to cover a supplier's demonstrable staff and material costs of preparing a bid. Awards are enforceable against a local government in the same manner and with the same remedies as court-ordered damages.

Notably, BPM awards do not include lost profits, like a Contract A claim would, nor any other form of damages. Also notably, if a supplier were to protest a local government's sole sourcing a good or service in contravention of the obligation under NWPTA to conduct open procurements, the supplier would be unable to claim bid preparation costs because no bid had been prepared.

So, the potential liability associated with a breach of CETA, CFTA and NWPTA is much more limited in comparison to a breach of Contract A. However, unlike Contract A, which can be avoided by careful drafting of the procurement documents, a local government's obligations under the trade agreements cannot be avoided. If a procurement exceeds the values noted above, the local government should review the procurement to ensure that it is open, transparent and non-discriminatory.

Let's Converse About Conversion!

*Conversion is a tort (civil wrong) that often involves conduct similar to the crime of theft. Conversion can, however, involve much more innocent conduct. According to the Supreme Court of Canada, "[t]he tort of conversion involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession" (*Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 SCR 727 at para 31). Conversion attracts strict liability, which means that the defendant cannot claim, as a defence, that the act was committed in innocence. In order to establish the tort of conversion, the necessary elements that must be proven are:*

1. a wrongful act by the defendant involving the goods of the plaintiff;
2. the act must consist of handling, disposing, or destroying the goods; and
3. the defendant's actions must have either the effect or intention of interfering with or denying the plaintiff's right or title to the goods.

The BC Supreme Court recently considered the tort of conversion in *Lepage v. Bowen Island Municipality*, 2021 BCSC 1077. In *Lepage*, the plaintiff sought damages against the municipality for the unlawful destruction of his sailboat, the "Celeste", which was moored in Mannion Bay on Bowen Island. On or about January 19, 2016, the "Celeste" broke loose from its mooring and appeared to have run aground near a private dock and was submerged by water. A senior bylaw officer of the municipality requested permission from the Transport Canada receiver of wreck to salvage the sailboat and expressed her concern about the potential damage to the dock and the impact the sailboat could have on the ecologically sensitive eel grass in the area. On January 20, 2016, the receiver provided a direction to the bylaw officer to proceed with salvaging the vessel and to submit a notice to the receiver. On January 21, 2016, on the instructions of the bylaw officer to salvage and dispose of the vessel, the "Celeste" and its contents were destroyed by a tug and barge contractor. In early February, the plaintiff returned to Bowen Island when he learned about the fate of his sailboat and he sent a letter to the RCMP alleging theft and destruction of his personal property.

The first question to be asked in an instance of conversion is whether there was a wrongful act by the defendant involving the goods of the plaintiff. The Court concluded that the destruction and disposal of the "Celeste" and its contents was a wrongful act, as the destruction of the sailboat did not comply with the procedure under the *Canada Shipping Act*, which requires that before its destruction the wreck be held for 90 days after the person taking it into their possession reports doing so to the receiver of wreck.

Bowen Island raised the issue as to whether the defendant was the owner of the vessel. However, to make out the tort of conversion, the plaintiff is not required to establish ownership of the goods, as possession or the right to possession of the goods can be sufficient. The Court concluded that the plaintiff had not established legal ownership of the "Celeste", but he had established "either a legal or beneficial interest in the contents and several of the improvements to the vessel".

The defendant also raised the defence of abandonment, which can provide a defence to the tort of conversion. Bowen Island bore the onus of proving, on a balance of probabilities, that the plaintiff had intended to abandon the vessel. However, the Court concluded that the plaintiff had not abandoned the "Celeste". In coming to its conclusion that the plaintiff had not in fact abandoned the vessel, the Court pointed to the fact that the plaintiff had inquired into what happened to the vessel and reported the "theft" and destruction to the RCMP.

The Court noted that "[t]he remedy for conversion is that the defendant pay the value of the chattel at the time that it was wrongfully taken together with any consequential loss". The value of a chattel is assessed "based on the value of the property to the owner". This is generally based on market value, however, the Court may consider if the value of the chattel to the owner exceeds the market value and, if so, increase the damages award by a reasonable amount. Additionally, nominal damages may be awarded if the property is deemed worthless.

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In *Lepage*, the Court awarded the plaintiff $5,000 in damages for the destruction of the "Celeste" and its contents.

The Court's decision in *Lepage* is a reminder that a local government needs to take caution when goods belonging to someone else end up in the local government's possession. In many cases, local governments will benefit from the statutory authority to seize and eventually dispose of things left on municipal property. Pursuant to section 46(2) of the *Community Charter*, a municipal council may, by bylaw, authorize the seizure of things unlawfully occupying a portion of a highway or a public place. Sections 124(1)(g) and (h) of the *Motor Vehicle Act* contain a similar authority to adopt a bylaw in relation to vehicles unlawfully parked on a highway. In the case of private property, section 192(1) of the *Motor Vehicle Act* also provides that if a motor vehicle or trailer is left without the occupier's consent on private property within a municipality, the owner of the motor vehicle or trailer is deemed to have authorized and empowered the occupier to be the owner's agent for the purpose of towing it to a place of storage and of storing it.

In the absence of an authority under statute or bylaw to remove something left on local government property, a local government may find itself in the position of a bailee. According to Halsbury's Laws of Canada, "[i]n bailment, the person with legal possession of the chattel transfers possession to another, the bailee, for a fixed time or for a period determinable at the will of the bailor". Typically, the consent of the bailee is required, however in *Lam v. University of British Columbia*, 2013 BCSC 2142, the "Court found an involuntary bailment", in which the involuntarily bailee (the party stuck with a chattel they did not agree to hold) had a duty "to take reasonable care in the circumstances".

Sarah Strukoff ✍

Miscellaneous Statutes: Did You Know?

Did you know that under section 11 of the Correction Act, *SBC 2004, c.46, the Minister of Public Safety and Solicitor General may make agreements with a municipality for the detention in a provincial correctional centre of persons whose detention is chargeable to the municipality? Likewise, the Minister may make agreements for the detention in a municipal lockup of persons whose detention is chargeable to the Province. Both agreements may contain terms for the reimbursement of expenses that are mutually agreeable to the parties.*

Joe Scafe

Look For Your Lawyers

David Loukidelis and **Amy O'Connor** will be presenting at the Local Government Management Association's "Freedom of Information and Privacy Protection - Advanced" webinar being held on September 9, 2021.

We are excited to welcome **James Barth** to the firm as an articling student. James obtained his juris doctor from UBC's law school. During his studies, James oversaw Pro Bono Students Canada's Homeless ID project and worked as a research assistant on projects around housing commissions and encampments.

On September 2, **Alexandra Greenberg** will be called to the bar following the completion of her articles. We are also pleased to announce that Alexandra will be staying on with the firm as an associate lawyer.

Reece Harding will be facilitating a session entitled "Forging the Path to Responsible Conduct in your Organization - How to introduce a Code of Conduct to your Local Government" at the Local Government Management Association Corporate Officers Forum being held virtually on October 28, 2021.

We are finalizing the details for the 2021 **Young, Anderson** Annual Seminar, so stay tuned!

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

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