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Do not disturb: Striking a balance between welcoming public spaces and freedom of expression

From CNN to CBC, recent weeks have seen heightened debate over the balance between the right to freedom of expression and the need to promote safe and inclusive communities. For local governments, a recent case from the BC Supreme Court provides guidance on how an objective of promoting safe and welcoming public spaces can temper disturbing public advertising campaigns or displays.

In *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority* (2017 BCSC 1388), a society sought to promote its pro-life position using exterior advertising placards on buses in Metro Vancouver. The contractor responsible for transit advertising rejected the proposed ads, stating the ads were inconsistent with the transit authority's service objective of providing a safe and welcoming transit system. After obtaining a legal opinion that determined the ads were likely in violation of the *Canadian Code of Advertising Standards*, the transit authority supported the contractor's decision to deny the proposed ads. The society sought judicial review on the basis that the transit authority's decision infringed its right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*. The BC Supreme Court upheld the transit authority's decision to deny the proposed ads.

These same ads have been the source of much litigation across Canada in the past year, with varying outcomes. In the City of Peterborough, the courts allowed the ads to be displayed, while in Grande Prairie, the ads were denied. There were three main factors that were influential in the BC decision to uphold the rejection of the ads: the ads contained and referred to explicit content; the ads contravened accepted advertising standards; and the transit authority did not impose an absolute ban. A closer look at these three factors provides guidance on how local governments can balance the goal of providing safe and welcoming public spaces with a right to freedom of expression more generally.

1. The ads contained and referred to disturbing and explicit content.

An ad that contains disturbing content may be rejected on reasonable grounds. In rejecting an ad for its content, it does not need to qualify as discriminatory or hateful. Drawing analogies to tobacco advertising restrictions,

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as well as the justification for age restrictions in films, the court endorsed the position that, if it is acceptable to restrict the audience for certain types of content, then it may also be acceptable to restrict disturbing content when it is impossible to restrict the audience, so as to protect vulnerable groups. In this case, the court accepted that children and many members of the public would find the explicit images and phrases in the ad disturbing and potentially harmful, and they should not be forced to view these upsetting images and phrases in a public place.

2. The ads contravened advertising standards.

Prior to rejecting the ads, the transit authority obtained a legal opinion from Advertising Standards Canada (ASC) about the proposed ads. The ASC opinion concluded that the ads were likely to "raise an issue" with the sections of the *Canadian Advertising Standards Code* that require accuracy and clarity.

The Court agreed that relying on the *Canadian Advertising Standards Code* was a reasonable standard to use in measuring the appropriateness of the ads. The ASC is an independent body, supported by the advertising industry, that self-regulates advertising in Canada. It administers the *Code*, which sets the criteria for acceptable advertising on which many advertising complaints are evaluated by the ASC. Further, the *Code* has been developed over an extended period of time in response to complaints brought by members of the public about ads posted by other advertisers and public interest groups.

3. The transit authority did not impose an absolute ban.

The rejection of the ads was not absolute. The society was not restricted from conveying its moral opposition to abortion, rather from the use of graphic imagery and the term "killing". The transit authority had expressed to the society that it could submit ads supporting its anti-abortion position without the offending images and phrases.

This case supports the principle that, where advertising in a public place may cause harm to vulnerable groups, public bodies may be justified in refusing to allow it. In refusing to allow an ad for offensive content, however, local governments must be able to demonstrate that the content is likely to cause harm to vulnerable groups, and may wish to seek a legal opinion on whether the ad may be in contravention of established standards.

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With a New Government Comes a New Structure

After a close election and some post-election political maneuvering, the BC New Democratic Party managed to (just barely) end the BC Liberals' 16-year tenure and form a new government. This new government marks not only a shift in political policy, but also a major shift in how the government is organized, to which local governments will need to adjust. Many of the details regarding how this new government will be structured are still to be decided, but some of the most significant organizational changes have been revealed. Here is a list of what we know so far:

1. Confidence and Supply Agreement between the NDP and the Green Party

The most prominent structural change of this new government is the governing party's arrangement with the BC Green Party. In the general election, the NDP obtained only 41 of the 87 seats in the BC Legislative Assembly, which is shy of the 44 seats required to form a majority government. In order to maintain its hold on power, the NDP is relying on the support of the BC Green Party, and the 3 seats they obtained, to acquire the 44 votes required for majority support in the BC Legislative Assembly.

To ensure the support of the Green Party, the NDP has entered into a "Confidence and Supply Agreement" in which the Green Party has agreed to vote in favour of the NDP on confidence motions and to support the overall budgetary policy of the government for the next four years (or until the next scheduled election). In exchange, the NDP has agreed to consult with the Green caucus on certain matters so that their views may be incorporated, to establish regular meetings between the Premier and the Green Party leader, and to provide access to key documents and officials.

Although in many ways the arrangement resembles a coalition government, the NDP and the Green Party did not actually form a coalition. Rather, the Green Party will be forming its own caucus and it is not bound to support any policies or legislation brought by the NDP that do not relate to "confidence and supply".

Some ministries are familiar – such as the Ministry of Labour and the Ministry of Citizens' Services – but some ministries are completely new – such as the Ministry of State for Child Care and the Ministry of Mental Health and Addictions.

2. New Ministries

The next major structural change of note is the reorganization of provincial ministries. The new NDP government is organized into 20 new ministries. Some ministries are familiar – such as the Ministry of Labour and the Ministry of Citizens' Services – but some ministries are completely new – such as the Ministry of State for Child Care and the Ministry of Mental Health and Addictions.

The most significant ministry for local governments will be the Ministry of Municipal Affairs and Housing, presided over by the Honourable Minister Selina Robinson and her Deputy Minister, Jacquie Dawes. Minister Robinson is a former family therapist and city councilor from Coquitlam-Maillardville. She was first elected as a Member of the Legislative Assembly for Coquitlam-Maillardville in May 2013. During that time, she served as the Official Opposition spokesperson for mental health and addictions, seniors, local government and sports. In her mandate letter, Minister Robinson was tasked with the following responsibilities:

- to develop a community capital infrastructure fund for sports facilities, playgrounds, local community centres and arts and culture spaces, in partnership with local governments and First Nations;
- to build 114,000 affordable housing units in partnership with local governments, First Nations, the private sector and the non-profit sector;
- to develop a homelessness action plan; and
- to support the Mayors' Council 10-Year Vision for Metro Vancouver Transportation by funding 40% of the capital cost for each phase of the plan.

Addressing affordability and homelessness can be anticipated to be the top priorities for this Ministry.

Other significant ministries for local governments include:

- the new Ministry of Mental Health and Addictions, which has been tasked to develop a response to the opioid crisis;
- the new Ministry of State for Child Care, which has been tasked to work with all levels of government to implement a universal day care plan;
- the Ministry of Forests, Lands, Natural Resource Operations and Rural Development, which has been tasked to work with the Minister of Indigenous Relations, First Nations and communities to modernize land use planning and to manage BC's ecosystems, rivers, lakes, watersheds, forests and old growth; and
- the Ministry of Transportation and Infrastructure, which has been tasked to work with BC Transit, the federal government and local governments to fund transit improvements throughout the province.

3. Offices and Branches

The organization of most of the offices and branches within these ministries has yet to be finalized. However, according to the BC government's website, we can expect the Office of Housing and Construction Standards (which includes the Building Standards Branch), the Housing Policy Branch, and the Residential Tenancy Branch, to be a part of the Ministry of Municipal Affairs and Housing.

Rosie Jacobs ✍

Six Talking Points about the Supreme Court of Canada's Internet Decisions – *You Won't Believe Number Four!*

The Supreme Court of Canada recently issued decisions on pre-trial matters in cases involving two of the world's largest internet-based service providers: Facebook and Google. Although neither case involves a question of municipal law, the decisions of Canada's top court will be of note to local governments who seek to regulate the involvement of foreign internet-based companies such as AirBnB and Uber that impact local "sharing economy" businesses.

1. Facebook is everywhere – The case of *Douez v. Facebook, Inc.* involved certification of a class action lawsuit based on the claim that the plaintiff Deborah Douez and other residents of British Columbia suffered an invasion of privacy. The plaintiff alleged that her image and name were used by Facebook, without her consent, in an advertising product known as a sponsored story. The defendant Facebook accepted that the facts in the case had a sufficient connection to British Columbia that a British Columbia court could hear the plaintiff's claims, despite the fact that Facebook is not a resident of British Columbia. If an internet business is involved in litigation, it may matter what country or province the customers are located in. A business cannot simply say that all the business activity is occurring in the place in which the business locates its servers.

2. Terms in internet contracts are not always enforceable – One of Facebook's defences in the lawsuit was that the claim should not be heard in British Columbia because Ms. Douez, like millions of other users, agreed to have all disputes resolved in California courts when she signed up to use Facebook. Such a term would obviously make it easier for Facebook to manage its affairs from its California base. However, four of the seven Supreme Court Justices who heard the case found that it would be unconscionable to enforce this particular term against Ms. Douez because of the gross inequality in bargaining power between the two parties. This very controversial decision may make foreign internet-based businesses more cautious when entering into agreements with customers resident in Canada and other parts of the world.

3. A statute can trump a contract – Although Ms. Douez won on a contractual issue, she was unsuccessful in claiming that, regardless of any contract, the BC *Privacy Act* created a statutory tort that could only be enforced in a British Columbia court. The majority of the Supreme Court of Canada did not agree that the *Privacy Act* had that effect, but did acknowledge that it was within the Legislature's power to use clear and specific language to require that certain disputes be decided in British Columbia. This is a reminder that the Legislature could also require that certain disputes over internet-brokered vacation rentals or ride hailing services be decided in British Columbia.

4. The BC Supreme Court can make global orders – In *Google Inc. v. Equustek Solutions Inc.*, Google challenged an interlocutory order from the BC Supreme Court that prohibited Google from "indexing" (displaying as search

results) certain webpages of a competitor of a BC company called Equustek. The plaintiff Equustek complained that its intellectual property rights were being infringed by a foreign competitor and that searches conducted on Google's websites enabled the competitor to unlawfully pass off its goods as Equustek's. In considering whether such an order should be granted, the majority of the Supreme Court of Canada accepted that an injunction restricting a non-party, Google, was necessary to protect Equustek against the harm caused by its competitor. Abella J. noted that: *"When a court has in personam jurisdiction, and where it is necessary to ensure the injunction's effectiveness, it can grant an injunction enjoining that person's conduct anywhere in the world."* If Google did not comply with the BC order it would face fines for contempt. The decision in the Google case suggests that, if a foreign internet-based company is facilitating a bylaw contravention within a BC municipality, the BC municipality may be able to obtain an order that applies to that foreign company.

The decision in the Google case suggests that, if a foreign internet-based company is facilitating a bylaw contravention within a BC municipality, the BC municipality may be able to obtain an order that applies to that foreign company.

5. Respecting Canadian orders in Canada may not be enough – It is notable that Google originally sought to comply with the court order made against it by modifying the results of searches performed on Google.ca so that most Canadians would not be guided to the website of Equustek's competitor. However, the British Columbia Supreme Court later found that this was insufficient; Equustek was still being harmed because foreign consumers continued to be guided to the webpage of Equustek's competitor on Google.com. An order affecting searches made around the world for Equustek's products was required. A similar approach may be required for an injunction related to short-term vacation rentals, given that foreigners likely form a significant portion of site users.

6. Can Google be expected to play by everyone's rules? – One of Google's unsuccessful arguments against the injunction was that the order issued by the Canadian court might be relief that was unobtainable in other courts and could possibly conflict with foreign laws. Although this was not a proven issue in the Google case, there is an obvious possibility that internet marketing businesses can become regulated by the laws of multiple jurisdictions. For example, an internet-based business that markets a short-term vacation rental property on behalf of a BC owner may find that it must comply with a BC court order seeking to enjoin an illegal use of that property and a German court order requiring compliance with consumer protection standards for the advertisement of property rentals.

The Facebook and Google cases show a very aggressive response by Canadian courts to the question of harm caused to Canadian residents by content on the internet controlled by foreign companies. For local governments who are concerned that foreign companies such as Uber and AirBnB are facilitating contraventions of the local government's bylaws by linking customers to unlawful services using internet-based websites and apps, these cases suggest that the court may consider a global injunction to be appropriate to enforce court orders or laws. These cases also confirm that the Provincial Legislature can enact rules that ensure British Columbia courts have such jurisdiction.

Michael Moll

Private Docks on Crown Foreshore Now "Generally Permitted" by Province

Recent changes to provincial policy on the approval of private moorage facilities (docks) on Crown foreshore will make it considerably more difficult for local governments to administer and enforce their zoning regulations for these water areas.

The way things were

To review: many municipalities and regional districts include, within the territory over which they have zoning jurisdiction, lakes, rivers and intertidal areas. Generally speaking and subject to any subsisting aboriginal title, these areas belong to the provincial Crown. The zoning power may, due to the definition of "land" in the *Community Charter* (it "includes the surface of water"), be exercised in relation to these areas so as to regulate or prohibit the placement of docks, boathouses and so forth. While such regulations do not limit the provincial Crown in its own use of these areas, due to the effect of section 14(2) of the *Interpretation Act*, they are binding on any third parties that the Crown permits to use the areas. For example, they bind the owners of upland properties who might wish to make private use of the water area, such as constructing a private dock.

The building permit regime, which is the usual mechanism for administering and enforcing zoning regulations dealing with buildings and structures, is often not in play in these situations, either because there is no building bylaw applicable to the relevant area or because the structure is of a type that doesn't require a building permit. Until recently, the referral to the local government of an application for some kind of tenure over Crown land – typically a licence of occupation or a lease – has been the principal means by which the local government becomes aware of a building proposal and has an opportunity (by means of the referral response) to administer and enforce its regulations regarding the use of the area. If the zoning regulations permit the use for which the application has been made and the Crown is authorizing the tenure, a "compliance with local bylaws" clause has generally been included in the lease or licence document. If the use is not permitted, the Province has generally rejected the application for tenure.

A new regime

Recent changes to the Crown's policy regarding such situations will eliminate the tenure referral process in many areas. The Ministry of Forests, Lands and Natural Resource Operations has instituted a "general permission" approach to private moorage structures, which is now in place throughout the province except in certain areas where a requirement for specific permission based on an application has been retained. The principal features of this "general permission" are as follows:

1. It permits only the construction of a private dock for non-commercial boat moorage for the upland owner only. The policy defines a dock as "a structure used for the purpose of mooring boats and for providing pedestrian access to and from the moored boats, and can consist of: a single float, wharf or pier; a walkway ramp; pilings; anchor lines; or attached boat lifts".

2. It gives permission to construct a dock only to the upland owner who has riparian rights in relation to the water area. Riparian rights include, essentially, the right to access the water body at every point along the water boundary of the upland parcel; they do not automatically include a right to build a dock, and are common law rights that may be modified by bylaw or other enactment.

3. The dock owner must ensure that improvements are constructed or located to allow reasonable public passage around or over the structure.

4. The maximum dock dimension in marine areas is 60 metres in length with a maximum float length and width of 14 metres and 3.7 metres respectively and a maximum walkway width of 1.8 metres.

5. The maximum dock dimension in fresh water is 42 metres in length with a maximum float width of 3 metres and 3.7 metres and a maximum walkway width of 1.5 metres.

Docks that do not comply with these standards require an application for specific permission. Additional details of the general permission can be examined at http://www2.gov.bc.ca/gov/content/industry/natural-resource-use/land-use/crown-land/crown-land-uses/residential-uses/private-moorage

The general permission document states that the dock owner "must comply with all laws that apply to the installation and use of a Dock as contemplated by this permission", without mentioning local zoning and building regulations specifically. For the time being, certain areas that could be considered the principal battlegrounds in the campaign against private use of public water areas have been designated as areas in which specific permission for private docks continues to be required. Maps of these areas can be accessed at the site referenced above. They include the South Coast Region (north to Lund and east to Manning Park), the Sooke Basin, and the West Coast Region (head of Saanich Inlet to Parksville on Vancouver Island, including the Southern Gulf Islands). In the West Coast Region, specific permission is required only for new docks; existing docks can be replaced under the general permission as long as the standards for a new dock are met.

Implications for enforcement of dock regulations

The "general permission" approach puts many local governments outside these three specific areas in a difficult position with respect to the enforcement of zoning regulations for water areas, which may prohibit private docks entirely, impose environmental impact assessments, or limit their dimensions more strictly than the Province's policy. Inevitably local governments will be dealing with more situations where docks have already been built in contravention of a zoning bylaw or OCP, with the owner perhaps asserting that they interpreted a "general permission" to be an all-in authorization to build a dock. Though it is easy to overstate the effect of a "compliance with laws" provision contained in a specific tenure document that an owner may or may not have actually read, at least tenure holders would have been given a copy for their records. A similar provision contained within a general document that resides only on a government website seems less impressive in its legal force (though ignorance of the law is never supposed to be an excuse). Further, some local governments promote the use of larger, communal docks to avoid a proliferation of small docks having a more serious overall environmental and visual impact. The Province's policy seems to encourage an "every boater for himself" approach.

The Province's "general permission" approach also seems to have some implications in relation to its duty to consult with First Nations

regarding dispositions of interests in land that have the potential to infringe on aboriginal rights. Some First Nations having Douglas Treaty rights to "carry on our fisheries as formerly", for example, are users of some of the water areas in which the Province's policy permits upland owners to construct docks without asking for permission. Finally, the requirement to preserve "reasonable public access" around or over these structures does not appear to be enough to protect certain fisheries and marine environments from interference, whether in the construction or the operation of private docks.

Bill Buholzer ✍

Human Rights Complaint Filed by Resident Opposing Development Dismissed

A resident of the Town of Gibsons filed a human rights complaint against the Town, alleging that the Town had discriminated against her based on a disability by approving a development project that would negatively affect her access to a portion of the Town's waterfront. The Town filed an application to dismiss the complaint and was successful.

Under section 8 of the *Human Rights Code*, municipalities are prohibited from discriminating against individuals in the provision of services customarily available to the public on the basis of various grounds, including disability. This resident alleged that the Town discriminated against her on the basis of physical disability by approving the issuance of a development permit for a development along the Town's waterfront that included a hotel and condos. As part of this development, a road leading to the waterfront would be closed to vehicle traffic.

The resident has a disability that prevents her from walking more than a short distance without severe pain. In the complaint, she alleged that she would not be able to view the water from the same proximity after the road at issue was closed to vehicle access given the distance she would be required to walk to access the waterfront by way of the development.

The Town argued that it had not discriminated against the resident because the changes to waterfront access as a result of the development would actually improve accessibility to the waterfront for all members of the public, including those with mobility challenges, and would not have an adverse effect upon the resident.

Although the road at issue would be closed to traffic as a result of the development, it would be replaced by an accessible pedestrian plaza leading to a smooth, accessibly graded, pedestrian seawall. The Town was of the view that these aspects of the development would improve existing public access to the waterfront, particularly for people with mobility challenges. The developer was also required to provide accessible parking spots as part of the development, which members of the public could use to access the pedestrian plaza and seawall. The Town also argued that there were other points of vehicle access to the

waterfront from which the resident could enjoy the view of the harbour.

The Tribunal characterized the service that the Town offered as provision of public access to the waterfront. The Tribunal ultimately determined that there was no reasonable prospect the resident would be able to establish that the approval of the development and the closure of the road at issue triggered the protections of the *Code*. In coming to this conclusion, the Tribunal noted that the resident would lose her preferred proximity, view, and mode of access to the waterfront once the road was closed, but that she would still be able to access ocean views. The Tribunal also relied upon the extensive evidence filed by the Town that the development would provide greater accessibility to the waterfront for people with disabilities, not less.

Carolyn MacEachern

How to be a Commissioner for Taking Affidavits in British Columbia

Local government corporate officers are statutorily empowered as Commissioners for Taking Affidavits in British Columbia ("Commissioners"). With the advent of electronic land title registration, more local government staff are applying through the Provincial Order in Council Administration Office to be appointed as Commissioners with limited powers. We often receive questions about the powers and duties of Commissioners in the context of administering oaths, witnessing solemn documents, and witnessing signatures on land title office forms, so this article will provide a refresher and some helpful tips.

The power of a Commissioner is limited to administering oaths and witnessing affidavits, statutory declarations and affirmations under section 56 of the *Evidence Act*. That power does not encompass other tasks of a notary or lawyer such as witnessing wills or certifying the veracity of documents. The powers of a Commissioner are very much like those of a court clerk asking a witness in open court to confirm their identity and swear or affirm that the testimony they will give is true. Commissioners may be called upon to provide evidence on matters for which the solemn document provides proof, such as how the Commissioner confirmed the identity of the deponent, or whether a signed document is authentic.

Local government corporate officers and their deputies are statutorily-appointed Commissioners, pursuant to section 60(f) of the *Evidence Act*. Section 148(c) of the *Community Charter* also states that the corporate officer position includes the duty of "administering oaths and taking affirmations, affidavits and declarations required to be taken under this Act or any other Act relating to municipalities." As Commissioners under the *Evidence Act*, they have the power inside and outside British Columbia to administer oaths, take affidavits, take statutory declarations, and take affirmations regarding "any cause, proceeding, matter or thing" before a British Columbia court, and "any matter in connection with which an oath, affidavit, affirmation, solemn declaration or statutory declaration is permitted, authorized or required by law to be sworn, affirmed, declared or made". A statutorily-appointed Commissioner has very broad powers for administering oaths and

witnessing signatures on solemn documents, even beyond documents associated with their employer.

Other local government employees may apply to the Province to be appointed as a Commissioner. Some local governments find it helpful to have multiple staff members who can witness signatures on important documents, so they pursue these appointments. Usually, these Commissioner appointments are limited as to purpose (e.g. the witnessing of a particular person's signature, or the witnessing of signatures on a particular type of document) and are limited to three years in duration, at which point they may be renewed. The services of limited Commissioners must be directly related to the business of their employer.

If you are a Commissioner, be sure you know if there are any limitations on your powers to administer oaths and witness documents, and abide by those limitations. If your powers are time-limited, note that you always need to print the date your appointment expires along with your name under your signature. If you cease your position with your employer, your appointment as a Commissioner will automatically cease as well.

Mayors are not Commissioners due to their position, but they are authorized to administer oaths and witness solemn documents in the same fashion as Commissioners (s. 69 *Evidence Act*).

Steps for affidavits and statutory declarations

A Commissioner must take the following steps when witnessing a person's signature on an affidavit, statutory declaration, or similar solemn document:

1. Confirm the identity of the person making the statement (the "deponent").
2. Be physically present to witness the signature of the deponent on the document.
3. Ensure that the deponent understands the contents of the document s/he is signing and the significance of signing the document.
4. Administer an oath (a solemn promise to God), solemn affirmation, or solemn declaration whereby the deponent swears, affirms or declares that the contents of the document are true.
5. Watch the deponent sign the document.
6. Complete and sign the clause at the bottom of the document that includes the printed name of the commissioner and the date and place the statement was sworn/affirmed/declared.
7. If the document has attached exhibits or schedules (often numbered or lettered), sign each exhibit, along with a reference to the main document and the date of signature.

We recommend that Commissioners obtain an ink stamp with their name, the designation "A Commissioner for Taking Affidavits for British Columbia", and the expiry date of their appointment (if time-limited). Each and every exhibit requires the Commissioner's signature, and again, a separate ink stamp would be helpful. Ink stamps should generally have characters of at least 12-point font size and use dark ink.

Although it may seem awkward to ask a deponent whether they "solemnly swear that the contents of the affidavit are true, so help you God" or whether they "solemnly affirm that the evidence given in the affidavit is the truth, the whole truth and nothing but the truth", these statements help to underscore the legal importance of the oath the deponent is making. The Province prepared a guide on the duties of a Commissioner, containing more information on how to administer oaths and witness signature on solemn documents, especially in unusual circumstances such as where the deponent does not understand English or where the deponent is visually impaired. That guide may be found at:

http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/for-legal-professionals/commissioners/guide.pdf

Land Title Office documents

Most Land Title Office forms require that each party's signature be witnessed by an "officer" under the *Land Title Act*, and Commissioners are "officers" for land title purposes. As in the case of affidavits, Commissioners must be physically present for signature by that party, and must be sure the party knows the contents of the document, has signed it voluntarily, has the legal capacity to sign the document, and intends to be bound by it. After the party signs and dates the form, the Commissioner signs on the left-hand side of the form and clearly prints their name, full mailing address, capacity as a commissioner for taking affidavits, and date of expiry of their commission (if time-limited). Again, an ink stamp can be helpful for neatly showing all of this information.

Does an "officer" need to be physically present to witness signatures? The question arose in *First Canadian Title Co. v. Law Society of British Columbia* (2004 BCSC 197) where an officer was witnessing LTO forms via interactive videoconferencing. The court did not support any change to the formalities of signature and said that any process permitting documents executed at one location to be sent to another location for completion would provide increased opportunities for fraud. This case is useful if, as a Commissioner, you get pushback from your organizations' authorized signatories who would rather sign LTO forms alone on their own time. The Supreme Court has said that actual physical appearance before the Commissioner while signing the LTO document is a necessary step.

Relationship to Parties

Commissioners cannot witness their own signatures on affidavits or similar documents. However, under section 65 of the *Evidence Act*, if the commissioner who witnesses a solemn document is a partner, associate, agent or clerk of the deponent or for the party on whose behalf the solemn document is to be used, the solemn document is valid and has full effect. That said, the Province will often limit the power of Provincially-appointed Commissioners to witness signatures only of officers and employees within the same organization as themselves.

If a witnessing officer has an interest in a land title document, a court may find the officer's authentication has less value because of that interest. The BC Court of Appeal has on two occasions considered mortgages in favour of law firms where lawyers who were employed by the law firm in question witnessed the firm's signatures on the LTO mortgage forms (*Daroux Law Corp. v. Jennings* 2005 BCCA 229 and *R.A.D v. Campbell* 2015 BCCA 494). In both cases, the Court of Appeal discussed this practice as "unwise" and possibly a deficiency in execution, but ruled that neither mortgage was invalid because of the manner of witnessing the parties' signatures. These decisions are problematic, but are not determinative for local government Commissioners, especially those who are appointed for the purpose of witnessing signatures on LTO forms for their employer.

Can a Commissioner witness signatures for opposing parties on a matter, for example, the landowner's signature on a statutory right of way being granted to the local government? So long as the Commissioner is not limited in their appointment, the Commissioner can witness that signature. However, it is up to the Commissioner whether they wish to witness the signature, knowing that they could be called upon to describe the circumstances of signature if such evidence is required in court. There is no rule that a Commissioner must witness a signature on any particular LTO form or solemn document; if the Commissioner forms the opinion that the Commissioner cannot confirm the identity of the person before them, or if the Commissioner receives unsatisfactory answers to their questions, the Commissioner can decline to participate in the signature process.

Being a Commissioner is an important and serious designation to hold. Unlike live testimony in court, affidavits, statutory declarations and other solemn documents contain evidence that cannot be tested by watching or questioning a witness – yet these solemn documents have the same evidentiary

value. Our land title system relies on the fact that someone has confirmed that those who sign LTO documents are who they say they are, have the right to sign the documents, and understand the nature of the documents they are signing.

If you have any questions about administering oaths or witnessing signatures, please call us.

Christina Reed

Careful review of agreements necessary to secure parties' intentions

Local governments often enter into agreements under which disputes are to be settled by arbitration. Often the arbitration provisions are broadly drafted and appear to apply to any dispute arising under the agreement. However, the Arbitration Act *and arbitration itself are not generally available for the resolution of regulatory matters – only contractual ones. In addition, a recent decision of the Ontario Superior Court of Justice shows that an arbitration clause may be held inapplicable to a contractual dispute if the other clauses in the agreement express a contrary intention.*

In *Allied Accounting v. Pacey*, 2017 ONSC 4388, the defendant Karen Pacey was a former employee and shareholder of the plaintiff company. The company sought damages flowing from Ms. Pacey's actions following her departure, which they alleged included using confidential company information, soliciting their employees and clients, and competing contrary to the shareholders' agreement. Ms. Pacey brought a motion to stay the company's proceedings on the basis that, under the shareholders' agreement, such disputes were to be resolved by arbitration.

The provision in question was broadly drafted and appeared on its face to support Ms. Pacey's claim. It read:

> Any question, dispute or disagreement... arising under or pertaining to this Agreement including the interpretation, application or construction of this Agreement or any part thereof shall be determined by arbitration in accordance with the following terms and provisions...

However, another term of the agreement provided that breaches of the confidentiality and non-competition clauses would be subject to equitable relief granted by "any competent court having jurisdiction". In addition, the "governing law" clause of the agreement provided that the law of Ontario applied and that each party would submit to the jurisdiction of "the Courts of such Province." The court refused Ms. Pacey's submission that any reference to a "court" should be read as "arbitrator" and ultimately refused to grant the stay of proceedings.

The decision in *Allied Accounting* serves as a good reminder to carefully draft and review, not just arbitration provisions, but all parts of an agreement. If it is the intention of both parties that all disputes be resolved through arbitration, the parties should ensure there are no contrary intentions expressed in the agreement, including in boiler-plate clauses. As was the case in Allied Accounting, even an innocuous "governing law" clause can cast doubt on the parties' intentions if not reviewed and properly tailored.

Joe Scafe

City Balks at Castles in the Air

Prospective developers frequently tell local governments and their land use planners that they cannot afford to undertake technical studies on project feasibility – addressing such matters as geotechnical hazards, water supply and traffic impact – until appropriate OCP designations and zoning are in place on their development site. This creates a classic chicken-and-egg scenario, if the local government won't designate and zone the land to permit the development unless the development has been shown to be feasible. The developer's position may accurately reflect the reluctance of lenders to advance funds for feasibility studies when there is no guarantee that there will ever be a flow of revenues to enable the developer to repay the loan, or the lender's position that any such loan must have a high interest rate to reflect the greater risk. It also reflects the reality that developers often have little skin in the game to invest in project feasibility studies prior to rezoning.

The provincial Legislature long ago endorsed the use of evidence-based decision-making in relation to development approvals, by adding the impact study or "development approval information" powers that are now found in Division 6 of Part 14 of the *Local Government Act*. Local governments can, of course, forego the use of these powers, and zone land in advance of project impacts being identified or project feasibility being proven, but this can have unpalatable consequences. One is that the developer might simply flip the land, pocket the "land lift" resulting from the zoning change, and move on. Another is that land market players will assume that the land must be suitable for the type and density of development for which it is zoned – otherwise, the local government wouldn't have put the zoning in place – and price it accordingly despite project feasibility never having been proven. Meanwhile, the local government has lost its leverage for having feasibility studies prepared, and must issue development and building permits on the basis of the zoning that is already in place.

A recent BC Supreme Court decision examines what can happen when a local government refuses to allow itself to be ratcheted along in this manner. In *Land Castle Development Corp. v. Port Moody (City)*, an owner was seeking a zoning amendment to allow a 24-storey mixed-use development on land zoned for low density automobile-oriented commercial uses. The owner's application was in abeyance at its own request for nearly ten years while it negotiated with TransLink on issues related to its Evergreen Line, but in 2016 it asked that the application be processed. At that time, the City gave the owner notice of several studies that would be required to advance the application, including an environmental assessment and shadow impact study and updates to traffic and geotechnical reports. The owner responded, in part, that some of these documents would be more appropriately required at the development permit stage of approval. When City staff refused to assure the owner that there would be staff support for the project where the owner had not provided the requested information, the owner petitioned the Supreme Court for an order requiring the Council to consider the zoning amendment application on the basis of the information the City already had. The owner's representative submitted affidavit evidence that the owner could not afford to meet the City's information requirements if its zoning amendment was not ultimately approved. In other words, there had to be a chicken before there could be an egg.

The City's position was that its information requirements were mandated by a development approval procedures bylaw and required for proper evaluation of the application, and that certain reports that the owner had provided

with its application in 2006 were now too dated to provide an adequate basis for evaluating its application. There could not be a chicken unless there was an egg.

The BC Supreme Court agreed with the City. It would order the Council to consider the owner's rezoning application without the benefit of the information that the City had required the owner to provide, only if the City had been acting in a manner that was "unfair, oppressive, flagrantly improper or in bad faith" in requesting the information. Essentially, the owner would have to prove that the information that the City had requested was unnecessary in Council's consideration of its application, something it was not able to prove in this case. The Court observed that "the discretionary decisions of municipal staff, who I note have a responsibility to mayor and council to fully evaluate applications, should be upheld" in the absence of compelling evidence that the information they had requested was unnecessary or irrelevant to the application under consideration.

The Court's reference to "discretionary decisions" is interesting. Port Moody's development approval procedures bylaw, according to the oral reasons for judgment, required applicants for rezoning to provide "such other information as is required by the city to evaluate an Application". Port Moody submitted, in its response to the owner's petition, that the *Local Government Act* expressly stated as one of its purposes the provision to local governments of flexibility to respond to the different needs and changing circumstances of their communities – a reference to section 1(c) of the *Local Government Act*. The Court seems to have agreed that it was appropriate for the development approval procedures bylaw to leave to the discretion of staff the question of what information, provided by the applicant at their cost, was necessary to enable the City to evaluate any particular development application. This seems a fair enough interpretation of section 460, the authority for the Port Moody bylaw, which (while not cited in the case) requires merely that such a bylaw define "procedures under which an owner of land may apply for" a zoning amendment.

Not addressed in the reasons for judgment is the relationship between section 460 and the authority under sections 485 to 487 to designate or specify in the official community plan areas or circumstances where "development approval information" is required, thereby providing a legislative context for requiring impact studies in connection with an application for a zoning amendment. In addition to the consultation and public hearing obligations for official community plans, an OCP exercising "development approval information" powers must describe special conditions or objectives that justify additional application requirements. A bylaw adopted under section 486 to implement the requirements would have to establish not only procedures and policies for requiring impact studies, but also the "substance of the information that may be required". Finally, the development applicant may demand council reconsideration of any requirements imposed by municipal staff under such a bylaw. All of this gives development applicants both procedural and substantive protections in relation to the imposition of potentially costly and time-consuming impact study obligations.

The usual approach to the interpretation of local government powers in Part 14 is that one cannot use one section of the legislation to do something that another section specifically authorizes, without satisfying all procedural and substantive requirements associated with the specific authority. Using a development approval procedures bylaw authorized by section 460 to require a rezoning applicant to submit impact studies would seem to create some issues in that regard, but no such issues are addressed in the reasons for judgment in this case.

Bill Buholzer ✍

Look for your Lawyers

Look for us at the UBCM Annual Convention in Vancouver from September 25 to 29. **Reece Harding** will be presenting a session entitled "Code of Conduct" at the BC Mayors' Caucus on September 25 and **Sukh Manhas** will be presenting a session entitled "Cannabis Legalization". Many of our lawyers will be around the Convention and otherwise available for meetings upon request.

On October 13, **Sukh Manhas** will be presenting a legal update at the Local Government Management Association Corporate Officers Forum in Victoria.

Guy Patterson and **Bill Buholzer** will be teaching at the LGMA School for Approving Officers in Kamloops on October 23.

We are pleased to announce that **Sukh Manhas** has been reappointed to the UBC Faculty of Law as an adjunct professor, teaching Municipal Law. **Bill Buholzer** will once again be teaching the core planning law course, Legal Concepts for Professional Planning, at UBC's School of Community and Regional Planning.

On October 26, **Bill Buholze**r will be presenting a legal update at the Association of Regional District Planning Managers conference in Victoria.

David Loukidelis will be presenting the Local Government Management Association's "Recent FOI & Privacy Developments" webinar on November 7.

Guy Patterson and **Bill Buholzer** will be presenting a planning law course at SFU in downtown Vancouver on November 23.

On November 23, **Carolyn MacEachern** will be speaking at the Vancouver Labour Arbitration and Policy Conference being put on by Lancaster House, and will be participating on a panel on the topic of the challenges of legal drug use and the workplace.

Barry Williamson will be hosting and facilitating the Leadership & Governance breakout session at the Building SustainABLE Communities Conference in Kelowna on November 23.

Mark your calendars! We will be hosting our annual **Client Seminar** at the Fairmont Hotel Vancouver on November 24. For those clients unable to attend the Vancouver session, we will be hosting a second seminar on February 9 at the Westin Bear Mountain Resort in Victoria.

It is with great fondness that we bid farewell to **Jay Lancaster** who has accepted a position as in-house counsel for the City of Vancouver. His keen intelligence, insight, and sense of humour will be missed at the firm. We know he will be a great asset in his new role and will find and meet the new challenges he seeks.