YOUNG ANDERSON
BARRISTERS & SOLICITORS

CASELAW UPDATE

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CASELAW UPDATE

I. CITY'S REFUSAL TO RETURN $6 MILLION CONSTRUCTION DEPOSIT AFTER DEVELOPMENT STALLED NOT AN UNLAWFUL PENALTY

Taisheng International Investment Services Inc. v. Terrace (City), 2025 BCSC 2079, is an interesting case decided only in late October of this year. Taisheng sought the return of a $6,183,686.00 construction deposit from the City of Terrace related to a development known as the Skeena Industrial Development Park. The case highlights interesting areas of the law, including the law of penalties, and is a good illustration of the fallout that can follow from a stalled development.

The parties entered into a development agreement in 2014 for the purchase, sale and development of lands near the Northwest Regional Airport. The purpose of the agreements was to develop the industrial park to support the long-term economic sustainability of the City and its development partner, the Kitselas First Nation. The material terms of the agreement were that:

- Taisheng would purchase 1,187 acres of land for $11.78 million;
- Taisheng would construct an industrial park in accordance with a development plan agreed upon by the parties;
- Taisheng would construct a road to service the industrial park and if it completed the road by a specified date the City would reimburse Taisheng to a maximum of $2.52 million;
- Taisheng would construct a groundwater collection and storage system to service the industrial park by the same date and if it completed the groundwater works by a specified date the City would reimburse Taisheng up to $6.18 million;
- Taisheng would be responsible for any construction costs in excess of the amounts the City agreed to reimburse Taisheng; and
- To secure Taisheng's obligation to develop the lands, Taisheng would grant the City an option to repurchase the lands which could be exercised if Taisheng failed to develop the lands by a specified date.

In 2017, the parties amended the agreement to require Taisheng to complete the road and groundwater works by early 2019 or forego to the specified reimbursements unless it provided the City letters of credit equal to the reimbursement costs. Taisheng failed to complete the road and groundwater works by the specified date and did not grant the City the letters of credit. Instead, the parties entered into a second amendment of the development agreement that extended the date for Taisheng to receive the road reimbursement by 7 months.

Taisheng managed to complete the road by the extended date and the City provided Taisheng the $2.52 million reimbursement. However, finding a suitable source of groundwater to serve the industrial park proved challenging and the groundwater works were not completed by the extended date. The parties again agreed to amend the agreement.

The final amendment affirmed that it was Taisheng's obligation to construct the groundwater system, that Terrace would pay the groundwater reimbursement amount to Taisheng and in exchange Taisheng would pay a cash deposit to the City, and the City could use this deposit to construct the groundwater system if Taisheng defaulted. Apparently, this shell game was to avoid the City running afoul of the prohibition on liabilities of a capital nature in agreements of longer than 5 years set out in section 175 of the *Community Charter*.

By late 2021, little work had been completed on the groundwater system, likely due to the estimated cost of completing the system exceeding $14 million. Terrace determined it would exercise its option to repurchase the lands. When Taisheng refused to convey the lands, the parties attended arbitration. The City succeeded at arbitration and the lands were transferred back to the City for the agreed-upon price of approximately $3 million. Taisheng requested the City to return the deposit for the construction of the groundwater works. The City refused, citing the final amendment which provided that the City was entitled to retain the deposit and use it to construct the groundwater system upon Taisheng's default.

Taisheng sued the City, claiming the City was in breach of the purchase agreement for failing to return the deposit. Taisheng argued that it was an implied term of the final amendment that if the City chose to exercise the option to purchase, it must return the construction deposit to Taisheng. Taisheng claimed that without that implied term, the final amendment would lack business efficacy. The courts must interpret agreements in a manner that gives agreements business efficacy.

The Court found that the agreement would have no business efficacy if it were interpreted to require the City to return the construction deposit to the City. The Court held that doing so would defeat the stated intention of the parties to incentivize Taisheng to develop the industrial park in a timely manner. Furthermore, it would directly conflict with the express term of the final amendment that provided that Taisheng was only entitled to the return of the construction security if it completed the groundwater system within the deadline agreed upon by the parties.

Taisheng also argued that no sensible party would enter into the final amendment if the City could at any time exercise the option to purchase and retain the construction deposit. Taisheng argued that this would be an absurd and punitive result. However, the Court held that any reasonable municipality would not have entered into the final amendment if it was required to return security which was expressly given to secure Taisheng's obligation to construct the development.

Taisheng also argued that if the City were permitted to retain the construction deposit, it would result in an unenforceable or unconscionable penalty. A court will find a clause of an agreement as an unenforceable penalty when the sum forfeited is out of all proportion to the damage and it would be unconscionable for the other party to retain the monies. Unconscionability may be found where there is an inequality of bargaining power and the agreement is very unfair. The Court held that a construction deposit was a true deposit and is an exception to the rule that a party cannot be required to forfeit a sum of money for a breach unless it is genuine pre-estimate of the loss of the breach. The Court also held that there was no suggestion of unequal bargaining power to ground a finding of unconscionability.

The Court held that given that the estimated cost to complete the groundwater system is now $14 million, a cost which the City must pay to see the development completed, the construction deposit was not penal in nature. The Court concluded by stating that the only unconscionability would be a scenario in which Taisheng was returned the deposit, relieving it of its contractual obligations and placing the high cost of completing the development solely on the City.

At the end of the day, Taisheng paid a $11.8 million purchase price and was left with the $3 million it received from the City upon reconveyance of the lands. Taisheng also received the $2.5 million road reimbursement from the City but this only covered the cost Taisheng incurred to build the road. The City was left with the lands, which had been improved by the construction of the road, and the $6 million construction deposit which can only be used to construct the groundwater system. However, the City lost the economic stimulation it expected the industrial park to generate, and was left with a stalled development and the prospect of ponying up an additional $8 million to complete the $14 million groundwater system.

The case is a good reminder to local governments to always ensure complex development agreements are well drafted – if there had been more ambiguity in the final amendment, the City may have been required to return the construction deposit. In addition, local governments should be careful that liabilities to reimburse a developer do not extend beyond a five-year time horizon. Lastly, both parties should conduct their due diligence on the proposed development to lessen the chance that development costs balloon, as they did in this case.

II. TOWNSHIP'S COMMUNITY AMENITY CONTRIBUTION POLICY ESTABLISHED AN UNLAWFUL MANDATORY COLLECTION SCHEME

In *Lorval Developments Ltd. v. Langley (Township)*, 2025 BCSC 1148, Lorval sought to overturn the Township's community amenity contribution ("CAC") policy, alleging that it created an unlawful mandatory collection scheme. Lorval was seeking to rezone over 70 acres of land to permit the development of the lands as a business park. In 2021, Lorval obtained third reading of the bylaw that would rezone the lands. By late 2023, it had paid $8 million in security and spent $26 million in site preparation costs related to the development.

The policy was created in 2018 and provided administrative guidelines by which the Township negotiated the CACs the Township would collect from applicants seeking rezoning. The policy provided: "In this policy, the amenities are intended to be collected through a fixed rate contribution, based on a set of predetermined amenities" and "In the event that CACs are not made to help provide the amenities, it is not necessarily in the public interest for the local government to support a rezoning". In 2024, the Township amended the CAC policy to add a $550,000/acre target contribution for rezonings in the neighbourhood in which the development lands were located. Although the Township removed this target after Lorval commenced litigation, Lorval proceeded to challenge the remainder of the policy.

Lorval argued that the policy was beyond the Township's legal authority because it represented a mandatory payment scheme unsupported by statutory authority. It argued that this stands in contrast to the statutorily authorized regimes for density bonuses, phased development agreements and the recently introduced amenity cost charges.

The Court referred to *Ainsley Financial Corp. v. Ontario (Securities Commission)*, in which the Ontario Court of Appeal examined a policy adopted by the Ontario Securities Commission regarding the regulation of penny stocks. In *Ainsley*, the Court held that a regulator was entitled to provide non-binding guidelines intended to inform those subject to regulation but absent statutory authority such policies cannot impose mandatory requirements. The Court said that in determining whether a policy imposes mandatory requirements, the key consideration is the thrust of the language considered in its entirety. In *Ainsley*, the Court found that the Commission's policy unlawfully imposed mandatory requirements based on two primary factors: (1) rather than general statements of principles, standards, criteria or factors intended to give direction, the policy was written in the form of a statute; and (2) the policy had a coercive tone – it linked practices considered not in accordance with the public interest to the Commission's power to sanction in the public interest. Notwithstanding the Commission's arguments that the policy was intended to inform and that every decision of the Commission would continue to be based on the facts and circumstances of each case.

In the Township's case, the Township argued that the policy describes the specified contributions as guidelines or targets and as "voluntary amenity contributions" to be achieved in "site by site negotiations" intended to "obtain a target contribution". However, the Court found that the policy represented more than administrative guidance. The Court held that when read as a whole, the policy indicated a mandatory fee regime and suggested the specified contributions will generally be required as a condition or rezoning. The Court held that the policy was a complex, detailed scheme with numerous precise formulas, processes, exemptions and exceptions to the exemptions. Like the policy in *Ainsley*, it was akin to legislation. Although the policy did not link the guidelines to sanctions like the policy in *Ainsley*, the Court held the effect of the policy in concert with the Township's discretionary control over zoning was to coerce developers into making the payment of unauthorized levies.

The key takeaway from the case is that a CAC policy, if your local government uses one, should be carefully drafted to avoid any implication that the CACs outlined in the policy are binding and a necessary condition of a successful rezoning. A local government may wish to ask itself the questions that the Court at paragraph 121 of the judgment set out to answer: "Is it [the policy] a guide to the non-binding contributions to be discussed and negotiated between the Township and developers on a case-by-case basis? Or a detailed scheme intended to dictate the presumptive mandatory contributions?" The case is under appeal.

III. COURT OF APPEAL DETERMINES THAT ISSUANCE OF PERMITS TO EASEMENT HOLDER WAS REASONABLE DESPITE PROPERTY DISPUTE

The Armstrongs purchased the property located at 11410 Chalet Road in North Saanich ("Lot B") in 2018. Lot B is waterfront property with shoreline access to a beach on Deep Cove. The Griers own 11416 Chalet Road ("Lot A"), which is immediately north of Lot B. Lot A is not waterfront property.

In 2016, an easement was registered on title to Lot B. The easement covered a 25-metre strip of land along Lot B's western property line and provided the owners of Lot A the right to travel over the easement by foot to gain access to a beach below Lot B (the "Easement"). The Griers acquired the Easement from the previous owner of Lot B, who was a friend, to maintain access to the beach if the property was sold.

Accessing the beach required navigating a steep slope, and the Griers could not access the beach safely without stairs. Although the Easement did not expressly authorize the construction of stairs within the Easement area, the Griers constructed stairs in 2021 without providing notice to the Armstrongs or applying for a development permit from the District of North Saanich. The Armstrongs objected both to the stairs and the lack of permit. The Griers ultimately applied to the District for a permit retroactively, without consent of the Armstrongs, despite the fact that the District's Development Applications Procedure Bylaw (the "Bylaw") provided that permit applications shall be signed by "the Owner(s) of the site that is subject to application." The Bylaw defined "Owner" as follows:

> ""Owner" means, in respect of real property, the registered owner of such property, as verified by the District through either a Land Title Office search or BC Assessment Roll search, or such owner's agent designated by the owner in writing."

The Armstrongs opposed issuance of the permit, arguing that the Griers were not "owners" of the land and thus were not entitled to apply. The District maintained that the Bylaw's definition of "Owner" must be interpreted in light of the Land Title Act's definition of "Owner", which includes the registered owner of a charge on land. On this basis, the District ultimately issued a permit to the Griers on the following conditions:

- The District took no position on the extent of the rights granted under the Easement and the permit was subject to determination of that issue;
- The permit only covered improvements within the Easement area; and
- The permit only approved the stairs until "the fee simple owners have consented to or been ordered to permit the improvements in their current location."

The District issued building and occupancy permits for the stairs shortly thereafter. Following the issuance, both parties filed petitions related to the matter. The Griers sought a declaration that the Easement permitted them to build the stairs, while the Armstrongs sought to have the Court set aside the District's decision to process and issue permits for the stairs and order removal of the stairs. Ultimately, the trial judge had to answer two questions: did the Easement permit the Griers to construct the stairs, and was the District entitled to issue the permits?

The Court began by reviewing the principles of easements, noting that while an easement gives the easement holder a set of rights that co-exists with the owner of the land, they do not give the holder exclusive or unrestricted use of land. Additionally, it found that easements may give the holder ancillary rights if they are reasonably necessary to the exercise and enjoyment of the easement, even if such rights aren't specifically stated in the easement agreement.

In this case, as the Easement did not include the express right to construct the stairs, the trial judge was tasked with interpreting the purpose of the Easement and determining if the stairs were a necessary ancillary right. Ultimately, the judge determined that:

- The clear purpose of the Easement was to provide a land corridor from Lot A to the beach below Lot B;
- The Easement area could not be used safely to access the beach in its unimproved state; and
- The construction and use of the stairs is an ancillary right that attaches to the Easement and is reasonably necessary for its exercise and enjoyment.

While the Armstrongs raised several issues on appeal, the Court was not persuaded by any of these arguments and upheld the original decision, concluding that the stairs were lawfully constructed as a necessary ancillary right to ensure the safe and comfortable use of the Easement for its intended purpose.

The Armstrongs argued that the only reasonable interpretation of the Bylaw is that the definition of "Owner" does not include the owners of a registered charge. Because the Bylaw required the "Owners" to sign a permit application, the District was not entitled to consider an application that was not signed by the Armstrongs. The District, on the other hand, argued that the Griers, as easement holders, were "owners" under the Bylaw given the Land Title Act definition of "owner."

In determining this issue, the trial judge's stated task was considering whether "there are any reasonable interpretations of the statutory provisions in question that would have authorized the consideration and issuance of the permits." After reviewing the interpretations advanced by the parties, the judge determined that while the Armstrongs' position may have been stronger on a strict statutory interpretation basis, the District's interpretation was also reasonable in light of the circumstances, given that:

- The *Community Charter* definition of "Owner", which the Armstrongs argued should be applicable to the Bylaw, "does not address the situation of an easement";
- The Bylaw made specific reference to the land title office in relation to verifying ownership, and
- The *Land Title Act* definition of an owner contemplates an easement holder being an owner.

Ultimately, the judge determined that, considering the relevant factors and legal constraints, the District's decision to process and issue the permit was reasonable. The judge emphasized the fact that the development permit was only valid until the Armstrongs consented to the stairs or were ordered to permit them, that the Griers were only treated as owners for the improvements within the easement area, and that the District took no position on the rights granted by the easement as relevant factual considerations.

On appeal, the Court also rejected the argument about the definition of "Owner", but for different reasons, noting that while section 460 of the *Local Government Act* requires that a local government must define procedures under which an owner of land may apply for a development permit, this does not imply that only owners are entitled to apply or that a municipality is only entitled to issue permits to owners. In fact, the purposes of the *Local Government Act* and *Community Charter* (flexibility and responsiveness to changing circumstances) are contrary to such a restrictive interpretation. Additionally, the District's permitting processes and decisions fall under the District's authority to regulate, prohibit, or impose requirements via bylaw in relation to buildings or structures, which is provided by a general enactment that cannot be limited by a specific power (such as 460 of the *Local Government Act*) due to section 4 of the *Community Charter*. On this basis, the Court of Appeal went a step further than the trial judge, disagreeing that the Armstrongs' interpretation of the definition of "Owner" was stronger than the District's from a statutory interpretation

perspective, and ultimately concluded that the District's interpretation was "clearly available to it in light of the modern principle of statutory interpretation."

The Court also found that there are no statutory provisions, regulations, or bylaws that expressly require the signature of every owner before an application for a permit may be processed. In my view, there is no basis upon which to read in an implicit requirement to that effect.

The trial judge determined that the Armstrongs were given opportunities to communicate their position to the District on many occasions before the permit was issued. The Court of Appeal agreed with this conclusion, holding that it saw no basis upon which to conclude that the Armstrongs, by virtue of the Griers' private meetings and communications with the District, were denied the opportunity to present their case fully and fairly.

In this case, the District found itself caught in a property dispute that it didn't have the ability to influence or resolve because it was required to decide whether or not to issue the development permit. Ultimately, the District acquitted itself well by determining its position on the matter early and communicating it clearly to the parties. In issuing the development permit with conditions that acknowledged the dispute, the District showed that its decision was responsive to the facts of the matter.

IV. PROVINCIAL LEGISLATION DEEMED TO INTERFERE WITH COURT'S ADJUDICATIVE FUNCTION

In *Kitsilano Coalition for Children & Family Safety Society v. British Columbia* (Attorney General), 2024 BCCA 423, the legislature's decision to amend legislation in order to shield a bylaw amendment from challenge was subject to review by the Court of Appeal.

This case originates with the City of Vancouver's plan to construct a 12-storey residential project with 129 apartments, roughly half of which would include support services, with the remainder allocated to low-income residents. The development necessitated an amendment to Vancouver's *Zoning and Development By-law*, and section 566 of the *Vancouver Charter* required the City to hold a public hearing regarding the proposed amendment. The public hearing took place over six days in June and July 2022, involving over 300 community members and 2,000 written submissions. Following the hearing, Council approved the rezoning amendment in principle on July 26, 2022.

Opposed to the project was the Kitsilano Coalition for Children & Family Safety Society, which was incorporated in 2021 and supported and funded by residents, homeowners, and businesses in Kitsilano. In October 2022, the Coalition filed a petition for judicial review in the BC Supreme Court, seeking a declaration that the City breached procedural fairness during the public hearing and arguing the City's decision to approve the rezoning in principle was unreasonable. The Coalition sought an order quashing the approval and requiring a new public hearing.

In April 2023, before the Coalition's petition could be heard, the Provincial Government intervened by enacting the *Municipalities Enabling and Validating (No. 5) Amendment Act* ("MEVA 5"). MEVA 5 amended the *Municipalities and Validating Act (No. 5)*, S.B.C. 2023, c. 3, by adding two new provisions, including section 7(2):

> (2) Despite section 566 [amendment or repeal of zoning by-law] of the Vancouver Charter, despite the City of Vancouver's Procedure By-law No. 12577 and despite any decision of a court to the contrary made before or after this section comes into force,
>
> (a) the public hearing on the amending bylaw, held on June 28, 29 and 30, 2022 and on July 14, 25 and 26, 2022, is conclusively deemed to have been validly held,
>
> (b) the amending bylaw is conclusively deemed to have been validly adopted by the Vancouver council, and
>
> (c) all powers and duties in relation to the zoning bylaw, as amended by the amending bylaw, may be exercised or performed as if the amending bylaw had been validly adopted by the Vancouver council under section 566 of the Vancouver Charter.

Following enactment of MEVA 5, the Coalition launched a separate proceeding seeking a declaration that MEVA 5 was unconstitutional and of no force and effect under section 52 of the *Constitution Act, 1982,* because it contravened section 96 of the *Constitution Act, 1867* by interfering with the superior court's core function of adjudicating the pending judicial review application.

At issue was whether MEVA 5 constituted a valid retroactive amendment of the law or an impermissible interference with the superior court's adjudicative role that contravenes the constitutional guarantee of judicial independence under section 96. At the Supreme Court, the trial judge noted that while the principle of parliamentary sovereignty, being the legislature's power to make laws without any limits or constraints, is a foundational principle of Canadian government, it is qualified or limited by several factors. One of these limits is section 96 of the *Constitution Act 1867*, which states the following:

> "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

Although this section appears to be an appointment power, the Supreme Court of Canada has held that it must be interpreted in a manner consistent with the section's intended purpose, which is "to give effect to the compromise reached at Confederation by protecting the special status of the superior courts of general jurisdiction as the cornerstone of our unitary justice

system," and that a corollary of this special status is the principle of judicial independence. The Supreme Court has held that, as a result, a legislature is constitutionally precluded from:

- Transferring an essential function of the superior courts to a parallel body, or
- Otherwise impermissibly interfering with the exercise of the court's core jurisdiction by circumscribing it to the point of maiming the superior courts in their very essence.

The core jurisdiction of the superior courts has been held to include the authority to review the exercise of executive power, particularly with respect to its own jurisdictional limits (in other words, to undertake a judicial review).

The trial judge ultimately found that MEVA 5 did not offend section 96, reasoning that the legislation was comparable to legislation in previous cases that had upheld legislation designed to drive the result in pending litigation by changing the applicable law. The Society appealed the BC Supreme Court decision, arguing that the trial judge erred by interpreting MEVA 5 as creating a "legislated exception" (i.e., a substantive amendment) to the existing law, rather than merely purporting to deem or direct a particular outcome under the existing law.

The Court of Appeal noted that the question at issue was one of constitutional validity as opposed to statutory interpretation, and this distinguished it from the cases relied on by the City and the trial judge. These past cases demonstrated that where a statutory provision is amended in general terms and the amended legislation is intended to be retroactive, the court is required to give effect to the law, even where doing so affects or negates existing rights that have been recognized based on an early version of the law. However, the challenge raised by the Coalition was not based on MEVA 5 applying retroactively; it was based on MEVA 5 being an attempt by the legislature to dismiss a specific court proceeding, thus usurping the Court's function. In relation to this issue, the Court reviewed *5185603 Manitoba v. Government of Manitoba* 2023 MBCA 47, in which a legislative amendment:

- Purported to terminate a lease and prohibit the bringing or maintaining of any action or proceeding in relation to the application of the new section; and
- Deemed to dismiss a specific claim via the following:

  > "Any action or other proceeding referred to in subsection (6) commenced before the day this section comes into force is deemed to have been dismissed, without cost, on the day that this section comes into force, including, without limitation, a Court of Queen's Bench file No. C119-01-21887." [Emphasis added.]

In *5185603 Manitoba*, the Court found that, in dismissing the specific action, the provision effectively blocked the Court from resolving the dispute, a task that is central to the adjudicative function of the courts, and in doing so bypassed the essential authority and function of the Court.

MEVA 5 differs from the *5185603 Manitoba* legislation because it does not, on its face, purport to dismiss or stay judicial proceedings. The Attorney General sought to distinguish the two pieces of legislation on this basis, arguing that MEVA 5 merely created a legislative exception, while the Manitoba legislation interfered with the Court's adjudicative function by commandeering its power to grant orders entirely. Ultimately, the Attorney General took the position that, using MEVA 5, the legislature had "taken back" its jurisdiction with respect to property and civil rights by removing Vancouver Council's authority to approve the rezoning with respect to the relevant property, with 566 of the *Vancouver Charter* and the City's procedural bylaw remaining generally applicable in all other instances.

While the Court conceded that the legislature has the authority to restrict, limit, change, or repeal the *Vancouver Charter* via legislation, it noted that no actual law was amended via MEVA 5, and no new law was created for the reviewing court to apply in its adjudication. MEVA did not change the authority of Council, nor did it suspend any of the public rights created by the *Vancouver Charter* or its bylaws or revise any legislation. Ultimately, the Court found the effect of MEVA 5 was as follows:

> "Section 7 simply makes a kind of direction that, notwithstanding what the law might be, a particular state of affairs is to be 'deemed' to exist — that the public hearing has been "validly held" and the proposed amending bylaw has been "validly adopted". The effect of MEVA 5 deeming a particular state of affairs to be true is to direct the outcome of a specific court proceeding. That direction is obviously intended for the Supreme Court. That, as the Attorney seems to concede, "interferes with the Court's adjudicative function by commandeering its power to grant orders entirely.""

As MEVA 5 did not amend the law in any way, it had the effect of bypassing the court, leaving it with no adjudicative role in the matter after the amendments were adopted. As such, the Court found that MEVA 5 infringed upon the Court's adjudicative role and thus was contrary to section 96, and the Court declared that it was of no force or effect.

The legislature can amend legislation and make such changes retroactive. A court reviewing a claim must consider the impact of retroactive amendments and apply them to the claim, even if doing so results in a decision that is different than it would have been had the amendment not been adopted. In this scenario, the court is still fulfilling its role of reviewing and applying the law. Conversely, the legislature cannot direct the court, either explicitly or implicitly, to decide a matter in a certain way, as doing so removes the court's adjudicative function.

V. COURT OF APPEAL CONFIRMS BROAD LOCAL GOVERNMENT DISCRETION IN REFERRAL OF CANNABIS RETAIL STORE LICENCE APPLICATIONS

In *Canna Northwest Enterprise Inc. v. Salt Spring Island Local Trust Committee*, 2025 BCCA 47, at issue was a judicial review of Salt Spring Island Local Trust Committee's decision denying Canna Northwest Enterprise's referral application for a proposed cannabis retail store.

Under the *Cannabis Control and Licensing Act*, S.B.C. 2018, c. 29, a person must have a licence for a cannabis retail store from the Provincial Liquor and Cannabis Regulation Branch. Under s. 33 of the Act, a licence may not be issued unless the local government gives a positive recommendation to the LCRB that the licence be issued. If a local government provides comments and recommendations regarding a licence application, the local government is required under s. 13 of the *Cannabis Licensing Regulation,* BC Reg. 202/2018 to take into account "the location of a proposed retail store" and gather the views of residents if the local government considers the issuance of a licence may affect nearby residents.

The SSILTC has a policy regarding the consultation process for such applications which includes, at a minimum, mailing notification to residents and owners within 500 metres of the proposed location, one public meeting, posting of public notices and one advertisement in a local newspaper. With respect to Canna's application, SSILTC passed a resolution directing staff to hold a public open house in accordance with the policy to gather community input regarding the application and to bring forward a report detailing the consultation process. No public opposition was received at the open house but shortly before the meeting when SSILTC was considering Canna's application, the SSILTC received written correspondence from the public which raised various concerns regarding the location including the proximity of the proposed store to schools, parks and a library as well as competition and market saturation. Canna was advised by SSILTC staff of this correspondence and that it was available on the SSILTC's website for review.

During the usual "Town Hall and Questions" period at the beginning of the meeting when SSILTC was considering Canna's application, the public raised the same concerns. Canna chose not to attend that portion of the meeting. Later in the meeting when Canna's application was brought forward, SSILTC heard from staff and Canna regarding the application. A trustee then moved that the application be denied for the reasons of location, competition and market saturation. SSILTC staff raised the concern that "competition and market saturation" were subjective and not advisable. Staff suggested the LCRB is more concerned with impact on community and location. The motion was therefore amended and passed to deny Canna's application for the reason "the location is not appropriate due to proximity to schools, the library and a public park".

On appeal, Canna argued that the SSILTC's decision to deny its referral application was unreasonable because: (1) the SSILTC relied on views expressed by persons who were not owners or residents within 500 metres of the proposed location as set out in the SSILTC's public consultation policy, (2) the SSILTC had no evidence before it regarding the proximity of the

proposed location to schools, libraries or parks, and (3) the SSILTC's real reason for not approving Canna's application was not location but competition and market saturation.

The Court of Appeal disagreed finding the SSILTC's decision was reasonable. With respect to Canna's first argument, the Court considered it was not a reasonable reading of s. 33 of the Act and s. 13 of the Regulation to limit public input to only views expressed by owners or residents within 500 metres of the proposed location at the open house. The Court noted the statutory scheme recognizes the importance of local community input into approval of a proposed cannabis retail store and only specifies minimum consultation requirements. Canna's position also disregards the institutional context in which the SSILTC makes decisions.

Similarly, the Court found that Canna's argument about the lack of evidence before the SSILTC regarding the proximity of the proposed cannabis retail store location to parks, schools and libraries misconceives the nature of decision making by an entity such as the SSILTC. The Court noted Salt Spring Island is a small community, and the trustees as well as residents would have been well aware of the distances.

With respect to Canna's argument that the real reason the SSILTC declined to approve the application was a concern about competition and market saturation, the Court found that the SSILTC's decision was transparent and intelligible. It was clear from the record that the trustees were concerned about location as well as competition and market saturation but they focused on location because staff advised them against stating competition and market saturation as a reason. The Court went on to find that the Act and Regulation do not identify or restrict what location-related factors a local government may consider. Just as proximity to schools and other public facilities may be a consideration, proximity to other cannabis outlets may also be a location-related consideration.

Canna also argued that the process was procedurally unfair because Canna did not have an opportunity to respond to the public opposition to its application expressed before as well as at the beginning of the meeting of the SSILTC. The Court rejected this argument finding that Canna was notified of the correspondence by SSILTC staff and had the opportunity to respond to this correspondence. Specifically with respect to the public comments made at the beginning of the meeting, the Court noted that SSILTC's procedure bylaw establishes the Town Hall feature at SSILTC meetings. It was Canna's responsibility to inform itself of the SSILTC's procedures, including opportunities for public participation at its meetings. Furthermore, all the comments reiterated the concerns that had already been raised in the correspondence Canna had reviewed before the meeting.

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