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Provincial consultation with local governments – a matter of principle?

The Community Charter *deals with consultation in two ways: by s. 276 it obliges the Province to consult with municipalities in relation to a few types of legislation (repeal or amendment of the* Community Charter *or the* Local Government Act*, reductions of revenue transfers under the Local Government Grants Act, amendment of regulations dealing with property tax rates), and in s. 2(2) it states that the relationship between municipalities and the Province is based on, among other things, the principle that consultation is needed on matters of mutual interest, including consultation by the Province on proposed changes to local government legislation. There is no entitlement to consultation for regional districts in the* Local Government Act *that parallels s. 276 of the* Charter*, but s. 3 of the* Local Government Act *also states that the relationship between regional districts and the Province in relation to the* Local Government Act *is based on the principle that notice and consultation are needed for Provincial government actions that directly affect regional district interests.*

The legal significance of these statements of principle was tested for the first time in *Greater Vancouver Regional District v. British Columbia (Attorney General)*, a recent case arising from the Province's decision to remove a portion of Pacific Spirit Regional Park from the hands of the GVRD, without compensation, and transfer to the Musqueam First Nation. The legislation that mandated this transaction, the *Musqueam Reconciliation, Settlement and Benefits Agreement Act* of 2008, in addition to barring any compensation claim by the GVRD for the taking of the land, provided that no legal proceeding for damages could be commenced against the Crown in relation to the vesting of the land in the Musqueam. Limited as it was in its legal options, the GVRD sought a declaration that the settlement legislation was enacted without consultation contrary to s. 3 of the *Local Government Act*. (The GVRD is also arguing that the settlement legislation is unconstitutional in that it deals with matters within the exclusive jurisdiction of Canada – Indians and lands reserved for Indians – under *the Constitution Act, 1867*. That portion of its claim remains to be heard.) At the end of April, the Attorney General succeeded in having the GVRD's claim for declaratory relief stricken from the statement of claim on the basis that it disclosed no reasonable cause of action.

The parties were in general agreement that, as an exception to the general principle that the Legislature cannot bind future legislatures,

the Legislature may properly enact "manner and form requirements" thereby creating self-imposed procedural restraints of certain kinds. The issue in the case was whether s. 3 of the *Local Government Act* is such a self-imposed procedural restraint (it being assumed for the purpose of considering the Attorney-General's application to strike the claim that the Province had not given the GVRD notice or consulted with it on the settlement legislation). The case law on this point indicates that, in order to bind future legislatures, there must be a very clear indication in the statute that it is to operate as a constraint on future legislative action; examples of binding "manner and form" stipulations include requirements that statutes be enacted in both French and English, and provisions enacted within constitutional statutes such as human rights codes. Examining s. 3 of the *Local Government Act* in the context of Part 1 of the Act, entitled "Purposes, Principles and Interpretation", and against this background of case law, the Court reached this conclusion:

I conclude that it was not the intention of the British Columbia legislature that one subsection buried within a part of a statute (that is not a constitutional statute) titled "Purpose, Principles and Interpretation" have the mandatory binding effect contended for by the plaintiff. I would not ascribe to that section the meaning contended by the plaintiff. It is not a mandatory provision; rather, it should be interpreted as part of the preamble to the statute and a provision that expresses the aspirations of the government consistent with the legislative objectives of the *Local Government Act*.

The Reasons for Judgment do not indicate whether the Court's attention was drawn to s. 276 of the *Community Charter* as a possible example of a true "manner and form" requirement regarding local government consultation (for contrast with the more general language in s. 2(2) of the *Charter* and s. 3 of the *Local Government Act*), so it is not possible to conclude from this case with any certainty whether Section 276 has any binding effect on the Province, either. Certainly it is expressed in clearer terms than s. 3 of the *Local Government Act*, in that it refers to specific enactments on which consultation in required, and sets out in considerable detail how the consultation is to occur.

The GVRD has given notice of appeal of this decision, which has far-reaching implications not only for the other "principles" enunciated in s. 3 of the *Local Government Act* (co-operative relations, adequate powers to fulfill responsibilities, different approaches to different regions, and so forth) but for all their counterparts in s. 2 (2) of the *Community Charter* (which also states a principle about adequate municipal resources and another about consideration of municipal interests in inter-provincial, national and international

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negotiations by the Province) and perhaps for s. 276 of the *Community Charter* as well. It should not be lost on local governments that it is the provincial government itself, and not some third party, that is arguing in the courts that, as the Reasons for Judgment indicate, "if this legislation was intended to be a manner and form requirement … the effect of the legislation would have to be much clearer, that is, framed in imperative language rather than the vague language used". Many local governments will find it disappointing that, so soon after the enactment of the *Community Charter* and the counterpart amendments to the *Local Government Act*, the Province would be in full retreat from principles that were included in that legislation for the benefit of local governments.

Bill Buholzer

Consultation failure invalidates Island bylaws

The British Columbia Supreme Court has recently rendered its third decision on the local government duty to consider consultation matters under Section 879 of the Local Government Act. *In* Baynes Sound Area Society for Sustainability v. Comox Strathcona (Regional District)*, the Court considered not whether the local government's decisions in respect of consultation were reasonable, but whether the local government took a decision in respect of consultation at all.*

The Court reiterated the law as set out in *Gardner v. Williams Lake* that the duty imposed by Section 879 is a duty of the "local government" (defined in the legislation to mean the council or the regional board) and, in such circumstances, the determination of what consultation will take place, with whom it will take place, and the form of the consultation is to be made by a regional board or a municipal council. In the absence of evidence of a resolution of the regional board in respect of consultation under Section 879 in relation to the bylaws under attack in *Baynes Sound Area Society*, the Court held that the Regional District had failed to meet the statutory prerequisites to the adoption of the official community plan amendment bylaw, and quashed the bylaw. As an example of the "mischief" that the Legislature was presumably attempting to avoid in charging the regional board with the duty of considering matters of consultation, the Court referred to the fact that, during the Regional Districts' consideration of the OCP amendment in question, the chief administrative officer had written to the Comox First Nation rejecting its request for consultation in addition to that in which it had already been involved. The Court characterized this as a decision that Regional District consultation with the First Nation would not be "ongoing", a decision that ought to have been made by the regional board.

The decision in *Baynes Sound Area Society* confirms that local governments must ensure that they specifically consider and adopt a resolution establishing the consultation process to be undertaken under Section 879 in respect of each official community plan and each amendment to such a plan. Alternatively, the local government may choose to delegate the duty to consider various matters in relation to consultation, either generally or with respect to a particular application or class of applications, to a staff member or council or board committee.

For a complete discussion of the statutory duty to consider matters of consultation in relation to official community plans, please refer to the paper entitled "Consultation on Official Community Plans" in the Publications – Client Seminar Papers section at **www.younganderson.ca**

Sukhbir Manhas

How to complain to APEGBC

The British Columbia Supreme Court's decision in Puar v. The Association of Professional Engineers and Geoscientists *reinforces the fact that local governments have recourse to address the conduct of professionals, such as engineers, who are regulated by a governing body, and clarifies what constitutes a "complaint" to the Association.*

In *Puar*, a geotechnical engineer sought review of a decision of the Association of Professional Engineers and Geoscientists regarding its jurisdiction in relation to disciplinary proceedings and investigations against him, respecting possible geotechnical engineering errors made in relation to a home being constructed in West Vancouver. The geotechnical engineer had provided two Letters of Assurance to the District of West Vancouver in respect to the home. Unfortunately, during the construction of the home, a portion of an excavated slope sloughed and only minimal steps were taken to stabilize this area. The limited response to the initial sloughing resulted in further sloughing in the same area at a later date and as a result a lock-block wall, which was part of the construction, collapsed.

Subsequently, a professional engineer employed by the District wrote to the Association to request a review of the geotechnical engineer's practice in light of the failure of the lock-block wall. The municipal engineer's letter resulted in an investigation of the geotechnical engineer's practice by the Association. During the investigation by the Association, the geotechnical engineer raised numerous criticisms of its conduct following its receipt of the municipal engineer's letter. One of the geotechnical engineer's criticisms was that the municipal engineer's letter was not a "complaint". This criticism succeeded before a panel of the Association's discipline committee, which concluded that the letter was not a complaint. This conclusion was based almost entirely on the fact the letter did not use the word "complaint".

The Court disagreed with the Association's decision, concluding that the letter was a "complaint" because the purpose of the letter was to invoke the statutory power of the Association with regard to the conduct of one of its members, and the letter contained a request to the Association that it review the member's professional conduct. The Court adopted the following definition of complaint: "(a) an expression of concern about the care provided or other aspects of the professional relationship, (b) which identifies a registrant of the governing body in question". Local government staff wishing to direct the Association's attention to the conduct of one of its members should keep this in mind when corresponding with the Association.

The letter was a "complaint" because the purpose of the letter was to invoke the statutory power of the Association with regard to the conduct of one of its members.

Parvinder Hardwick

CVRD composting claims dismissed

On January 30, 2009, after a trial lasting 70 days, the BC Supreme Court released its decision in Westcoast Landfill Diversion Corp. v. Cowichan Valley Regional District. *Ten years ago, Westcoast constructed an in-vessel composting facility within the Regional District, a venture that turned out to be a financial disaster. Westcoast sought to recover from CVRD all it had spent on the facility and other damages, including loss of future revenues and punitive damages. The action against CVRD alleged negligent misrepresentation, breach of contract, unlawful interference with economic relations, and negligence, and alleged that CVRD had acted in bad faith. The total amount of the claim exceeded $17 million, plus unquantified punitive damages.*

Negligent Misrepresentation

With respect to its claim for negligent misrepresentation, Westcoast focused on representations made by CVRD that they would designate Westcoast as one of only two authorized designated sites to accept organic waste, and they would enact and enforce a ban on industrial, commercial and institutional ("ICI") organic waste and on yard and garden waste at all other facilities.

The court concluded that an agreement by CVRD to prohibit the delivery of ICI and yard and garden waste would have required a bylaw or resolution of the board, and no such bylaw or resolution was passed. Representations made by staff, councillors and directors could not create an implied contract in the absence of a resolution or bylaw authorizing such persons to enter into the contract. Further, any alleged contract would be ultra vires, as an illegal fettering of the board's legislative discretion. The court also found that Westcoast did not act on any CVRD representation in deciding to build its facility. Rather, it acted for its own commercial purposes and its decision to do so within the boundaries of CVRD was dictated by location and by its purchase of an acceptable site at an attractive price.

Breach of Contract

The claim for breach of contract focused on a number of promises CVRD had allegedly made to Westcoast, representing that it would do specific things to ensure Westcoast's financial viability. Westcoast argued that, in consideration for it agreeing to build, own and operate the composting facility, and agreeing to cap its tipping fee, CVRD agreed to designate Westcoast as one of two approved facilities for receiving and composting of organic waste, and to implement and enforce a ban on the dumping of yard and garden waste and ICI waste at all facilities other than Westcoast.

However, the evidence showed that Westcoast had not agreed to a fixed tipping fee, and could in fact charge whatever it wanted. The court found it inconceivable that either CVRD staff or its elected representatives would have agreed to designate Westcoast as one of only two approved facilities, and implement and enforce legislation requiring CVRD residents to deliver waste to Westcoast at a tipping fee left to Westcoast's discretion. The court found that Westcoast did not establish on a balance of probabilities that it had entered into any such contract with CVRD.

Further, even if the CVRD had contractually agreed to enact and enforce bans, and even if it had agreed in advance to the designation of authorized sites, the agreements would not have been enforceable because they would have unlawfully fettered the discretion of CVRD's board members to decide later on what bylaws or resolutions should be enacted and maintained in force.

Negligence

The claim for negligence dealt primarily with CVRD's failure to enforce the bans on ICI waste and yard and garden waste in a timely and effective manner. Westcoast argued that the bylaw enforcing these bans and the set of policies put in place to govern the enforcement were ignored and negligently applied, resulting in a loss of industrial, commercial and institutional compost feedstock by Westcoast.

While Westcoast alleged that CVRD owed a duty of care to Westcoast to ensure that their actions were reasonable in all cases and would not harm Westcoast's economic interests, the court found that CVRD did not have such a duty of care to Westcoast. The creation of a bylaw that benefits a particular person or business does not create a private right giving that person or business a cause of action. Additionally, the court found that CVRD acted reasonably and in good faith when enacting legislation relating to yard and garden waste, and CVRD was not negligent in its enforcement the ICI organic waste ban as the enforcement of that bylaw was a matter of policy.

Interference with Economic Relations

With respect to its claim for interference with economic relations, Westcoast claimed that CVRD had threatened to down-zone Westcoast's composting facility to stop it from accepting biosolids, and had threatened to contact the Capital Regional District to have it suspend business dealings with Westcoast. CVRD also enacted a bylaw to prohibit the escape of problematic compost odour. Westcoast claimed that CVRD had no authority to deal with odour complaints and, in fact, the odour issues had not been proven. Westcoast further argued that CVRD was vicariously liable for defamatory statements made to the media by the Director of Electoral Area C of the Regional District.

With respect to Westcoast's claim that CVRD threatened to rezone, the court found that the claim must fail because CVRD's intention was not to harm Westcoast, it was lawfully entitled to reconsider its zoning bylaw as the rezoning was initiated for a proper planning purpose, and Westcoast did not suffer economic loss as a result of CVRD's actions. With respect to Westcoast's claim that CVRD contacted the CRD and had them suspend business dealings with Westcoast, the court found that there was no intention to injure Westcoast and CVRD's conduct was therefore not unlawful.

In passing the bylaw prohibiting the escape of compost odour, the court found that CVRD was responding to public concern about the escape of odour and pollution, CVRD had a legitimate land use interest in taking measures to reduce or eliminate the nuisance to its residents caused by Westcoast's facility, and it had authority to enact bylaws to achieve that end.

With respect to the claim for defamation, the court found that any statement made by CVRD directors and staff members was a fair response to the public concern. The defence of fair comment upon matters of public interest applied. Further, the court found that CVRD was not vicariously liable for any statements made to the media by its EA Director because the Director had no inherent authority to speak for, act for, or bind CVRD. Because CVRD has no effective control over the actions of its Director, and had not authorized the Director to speak on behalf of CVRD, CVRD was not vicariously liable for such statements.

After addressing all of the alternative claims advanced by the plaintiff, the court determined that CVRD had acted reasonably and in good faith and was not liable in damages to Westcoast. The court dismissed Westcoast's action in its entirety, and awarded costs to the Regional District.

Joanna Track

Local government defamation claims unconstitutional

In Dixon v. Powell River (City)*, the British Columbia Supreme Court recently considered whether a government (as distinct from individuals associated with the government) can be defamed with respect to its governing reputation.*

The legal proceedings were brought by Mr. Dixon, as a resident of the City, for a declaration that the City did not have the legal authority to institute or threaten to institute civil proceedings for damage to its reputation as a local government. The legal proceedings arose out of circumstances where, in the context of an alternate approval process, a number of members of the community were sharply critical of the steps taken by the City, one member of the public going so far as to suggest that those steps were possibly criminal in nature. In response to this criticism, the City's legal counsel wrote on behalf of the City to three individual members of the community alleging that their comments were defamatory of the City, demanded a retraction of the comments and an apology, and implicitly suggested that failure to do so would result in the City suing individuals for damages. At least one of the individuals complied in order to avoid a defamation claim by the City. By the time of the hearing in this matter, the City had withdrawn its Statement of Defence and had advised Mr. Dixon that it would not be appearing at the trial. As a result, the trial proceeded unopposed.

In considering the issues, the Court had to determine whether it was bound to follow the 1979 decision of the British Columbia Court of Appeal in *City of Prince George v. British Columbia Television System Ltd.* (which held that a municipal corporation's governing reputation could be defamed and, as a result, a municipal corporation could sue for defamation, and which would ordinarily be binding within the province) or whether it should follow two more recent decisions of the Ontario Supreme Court of Justice (which held that municipal governments could not maintain an action in defamation). The Court held that, as the *Prince George* case was decided before the *Canadian Charter of Rights and Freedoms* came into force, the Court was not bound to follow that decision. The Court preferred the reasoning in the Ontario cases that held that affording local governments the right to sue for defamation would have a chilling effect on political speech and, as a result, violate freedom of speech rights under the *Charter of Rights and Freedoms*. The Court stated: "It is antithetical to the notion of freedom of speech and a citizen's right to criticize his or her government concerning its governing functions, that such criticism should be chilled by the threat of a suit in defamation".

Affording local governments the right to sue for defamation would have a chilling effect on political speech and, as a result, violate freedom of speech rights under the Charter of Rights and Freedoms.

Having considered the competing issues at stake, the Court held that local governments do not have the legal authority to institute or threaten to institute legal proceedings for defamation.

Sukhbir Manhas

2008 local government elections

The 2008 local government elections produced two cases in which the courts found in favour of the local governments concerned, holding that the complainants had in almost all respects failed to meet the burden of proving that the elections were conducted improperly.

Vicktor v. Lanktree was a brief decision of the BC Provincial Court. The applicant unsuccessfully ran as a candidate for mayor of the District of Hope. He applied to the court for a recount of mayoral votes. (He also applied for "a detailed record of the security measures in place for the advanced poll, the mobile poll, and the general voting day procedures" but the court held that it had no jurisdiction to grant this part of the application.)

The applicant lost the mayoral race by 19 votes, which equated to less than one percent of the votes cast. It happened to be the first election for which the District used voting machines. The applicant argued that the voting machines were unreliable and that in such a close election a manual recount should be conducted.

However, the judge found the applicant's assertion that the voting machines were unreliable was speculative. The judge found that none of the triggering events for a recount set out under the *Local Government Act* applied in this case, and that the District had, in accordance with the *Local Government Act*, passed a bylaw authorizing the use of automatic voting machines. The judge declared that if the legislature wished to allow for a manual recount of close elections conducted by voting machine, the legislature should set that requirement out clearly in the *Local Government Act*.

The second case was *Sadler v. Town of Gibsons*. The petitioners applied for a declaration that the election of councillors was invalid, due to substantial and material non-compliance with the *Local Government Act*. Subsection 145(3) of the *Local Government Act* provides that a court must not declare an election invalid due to irregularity or failure to comply with the *Local Government Act* if the court is satisfied that the election was conducted in good faith and in accordance with the principles of the Act, or that the irregularity or failure did not materially affect the result of the election.

The petitioners alleged a number of violations of the *Local Government Act*: that the election official conducted counting and opened ballot boxes alone; that ballots were not placed where persons present at the counting could see them; that invalid ballots were not marked void and were subsequently included as valid in the recount; and that vote tally sheets were not placed in the ballot box. The petitioners found it troubling that, in addition to these alleged violations of the *Local Government Act*, there was a marked discrepancy between preliminary and official election results. The petitioners further argued that the election should be declared invalid because the principles of openness, transparency, and the need for a formal, careful process during the conduct of an election were violated and that the discrepancy between preliminary and official results materially affected the outcome of the election.

After reviewing the evidence, the judge decided that the Town breached the *Local Government Act* in only one respect (which was admitted by the Town): by failing to notify candidates of the date, time and place of the determination of official election results. While this was an acknowledged oversight, the court found that the election was conducted in good faith, the oversight did not materially affect the result of the election and the election should not be

declared invalid even though the principle of transparency, on which the election provisions of the *Local Government Act* are grounded, was undermined.

In any event, the court found that the appropriate remedy in this case would have been a judicial recount. Section 143(6) of the *Local Government Act* provides that an application for a declaration of an invalid election may not be made on any basis for which an application for judicial recount may be made. The court found that, as the true nature of the petitioners' complaint concerned the tabulation and calculation of election results they should have applied for a judicial recount within the time specified in the Act, rather than a declaration of an invalid election.

Bryan Jung

CMHC escapes liability in leaky condo claims

In December 2008, the BC Court of Appeal dismissed an appeal by Alan McMillan and Linda Hepner from a B.C. Supreme Court decision dismissing their application to certify an action against the Canada Mortgage and Housing Corporation (CMHC) as a class action proceeding. The appellants had purchased a condominium unit in a development in White Rock back in 1994, and in 2000 it was determined that the building was suffering from premature building envelope deterioration. In other words, they had purchased a "leaky condo". The appellants brought an action against CMHC, contending that CMHC had conducted extensive research in building science and wall construction, focusing on wall assembly construction and water ingress-related envelope failures. The appellants claimed that, as a result of conducting this research and gaining particular knowledge, CMHC owed a duty of care to disseminate that information to all persons who purchased a residential unit located on the west coast of Canada between January 1, 1982 and December 1, 2005 that incorporated the allegedly faulty envelope design. The appellants sought to bring an action against CMHC on behalf of all such purchasers.

In order to certify a proceeding as a class action, the appellants had to show that the pleadings disclosed a cause of action. The test for whether pleadings disclose a cause of action is whether it is plain and obvious that the claim cannot succeed – certainly a test with a relatively low threshold. The court considered whether a trial judge *could* find that CMHC had the duty of care alleged by the appellants, or whether it was plain and obvious that the appellants' claim could not succeed.

In order to determine whether CMHC owed a duty of care to all purchasers of residential units on the west coast between 1982 and 2005, the court considered whether the relationship between CMHC and those persons disclosed sufficient foreseeability and proximity to establish a *prima facie* duty of care. The court found that this case did not fall within a recognized category in which proximity for tort law purposes had been recognized in the past. There were no cases in which a researcher was found to owe a duty of care solely on the basis of a failure to disseminate knowledge acquired. The court then considered whether a new duty of care should be recognized in this case. It considered the statutes under which

CMHC operates, and found that neither the *CMHC Act* nor the *National Housing Act* gave it any regulatory responsibility with respect to the construction of housing in BC. CMHC is a federal body and by definition does not have regulatory authority over the construction of private residences. Further, the court found that CMHC does not have a proximate relationship with a homeowner in the context of its role in insuring a mortgage, so as to create a duty of care. The court also found that the relationship between CMHC and the appellants was not close and direct, and ultimately concluded that it was plain and obvious that there was no proximity between the appellants and CMHC sufficient to give rise to a *prima facie* duty of care in tort law. Without a duty of care, there was no cause of action, and the claim could not be certified as a class action proceeding.

The court also found that imposing on CMHC a private law duty of care to individual homeowners would interfere with CMHC's ability to carry out its responsibility to investigate and publish its findings, and might also lead to indeterminate liability – meaning there could be no end to the list of plaintiffs that could make a claim against CMHC. These policy considerations supported the court's decision to dismiss the appeal.

On April 30, 2009, the Supreme Court of Canada denied an application for leave to appeal this decision. The prospect of involvement of CMHC as a potential defendant in "leaky condo" claims would therefore seem to be extremely remote.

Joanna Track

Board censured over censure motion

When it comes to disciplining alleged misconduct by their peers, elected officials would be well advised to take a time-out before rushing to make any decisions.

On April 9, 2009, the B.C. Supreme Court released its decision in *Barnett v. Cariboo Regional District*, striking down the board's resolution restricting Director Barnett's ability to contact and communicate with staff. Not only did Mr. Justice McKinnon express his "serious concerns" with the board's "disingenuous approach" to technical issues like how the board put the resolution on the agenda and the alleged grounds for meeting *in camera*, he also awarded special costs against the Regional District for acting with a "complete disregard for any fair process". This case confirms that elected officials—no matter how inappropriate their own conduct—are entitled to be treated fairly by their political peers.

In October 2008, the Board met *in camera* purportedly pursuant to s. 90(1)(d) [security of the local government's property] of the *Community Charter*. Once the two items involving Regional District property were concluded, the Board meeting remained closed to the public and copies of a report prepared by the Regional District's CAO about Director Barnett's behaviour were circulated for review. This was the first that Director Barnett heard of the report, and certainly the first that he heard of a proposed resolution prohibiting him from communicating directly with staff. Neither the CAO's report nor the proposed resolution was listed on the meeting's agenda. After the Board adopted its resolution and all copies of the CAO's report were collected, Director Barnett made a motion requesting that he be allowed to keep a copy of the report. The Chair ruled his motion out of order and adjourned the meeting. Subsequently, Director Barnett made various unsuccessful efforts to obtain a copy of the CAO's report and the minutes of the closed meeting. He repeatedly told the Board that he had procedural concerns about the manner in which the report was

considered and the resolution adopted. All of his efforts to have the Board revisit its decision were rejected and the Director applied to the B.C. Supreme Court to quash the resolution, alleging that the Regional District lacked the jurisdiction to pass it, that the resolution was defective for procedural reasons and that his right to procedural fairness had been violated.

With respect to the first issue, the Court quickly concluded that local governments must have jurisdiction to regulate the conduct of their elected officials, which includes the right to adopt a resolution of censure. Director Barnett's allegations about the procedural defects of the Board's resolution focused largely on the fact that it improperly relied on s. 90(1)(d) of the *Community Charter* to adopt the resolution in closed meeting. It is interesting to note that although he agrees that s.90(1)(d) does not apply to the Board's consideration of the CAO's report, Mr. Justice McKinnon goes on to conclude that judicial intervention was not warranted on that ground because:

> *…the statutory requirements under the* Community Charter *do not stipulate that each reason for closing a meeting to the public must be announced, or that the primary reason must be the one that is announced*.

With respect, we disagree with the Court's conclusion on this point. Section 90 of the *Community Charter* provides a list of reasons for which a part of a meeting may be closed to the public depending on the subject matter of the meeting or portion of the meeting. Section 92 requires that the council or board adopt a resolution stating the basis under which the meeting or part of a meeting is being closed to the public. We think that these statutory requirements clearly require that each reason for meeting *in camera* (that is, each subject matter to be discussed at each part of a meeting) be identified.

The bulk of the Court's decision reviews what, if anything, the Board was obliged to do procedurally before adopting a resolution such as this one, which was designed to discipline an elected official for alleged misconduct. The Court confirmed that an elected official is entitled to procedural fairness, which includes the right to be heard and the right to an impartial hearing before a resolution of that nature is adopted. The Court concluded the Regional District's efforts failed on both counts:

> *The fundamental problem with this approach to disciplining the petitioner is that he was never given any specifics of the complaints that might permit a reasoned and structured response. He was never given any opportunity to consult counsel or even any reasonable opportunity to study and respond to the vague allegations that upset the sensibilities of CRD staff and others. In that light, it is difficult to see how the petitioner's right to be heard was respected in any sense*.
>
> *The CRD defends its refusal to be specific on the basis that it wants to protect its staff from (presumably) harassment from Mr. Barnett. While this might be a laudable goal in terms of employee/employer relations, it should not have trumped the petitioner's right to a fair hearing*.

The Court awarded special costs against the Regional District. Normally, special costs are used by the Court to penalize improper conduct by a party in the course of the litigation itself, and thereby promote the proper conduct of litigation. Here, the Court's reasons for awarding the increased costs are brief and, interestingly, based not on the Regional District's litigation conduct, but rather on pre-litigation conduct, and in particular the Court's finding that the Chair of the Board had a "clear bias" against Director Barnett and took the lead in adopting the procedurally flawed censure resolution.

Stephanie James

Political protests as "strikes"

Many local governments will recall the events in the spring of 2004 when the Hospital Employees' Union and the BC Teachers' Federation organized work stoppages to protest legislation that interfered with their conditions of employment. Public sector unions such as the BCGEU and CUPE also encouraged their members to attend the protests to show sympathy with the HEU and BCTF. As a result, many municipal employees did not report for work.

Under the definition of "strike" in the *Labour Relations Code*, all work stoppages, including those conducted for political purposes, are prohibited during the term of a collective agreement. The Unions argued that the work stoppage was not a strike but rather a political protest rally. The Unions challenged the expansive statutory definition of "strike" and argued that it infringed their freedom of expression under the *Canadian Charter of Rights and Freedoms*.

The BC Court of Appeal has now considered the matter and confirmed that the definition of "strike" in the *Labour Relations Code* does not contravene the *Charter*. While the Court agreed that the prohibition of political strikes infringes upon freedom of expression, it concluded that the prohibition is justified under section 1 of the *Charter*. The Court noted the adverse impact of such strikes on public services, and that unions and their members are free to engage in protest strikes outside of working hours.

This decision confirms the definition of "strike" as including mid-contract political protests and that employees of local governments are not permitted to attend political protest rallies during working hours. The Unions have filed for leave to appeal to the Supreme Court of Canada and we will keep you updated on this issue.

Carolyn MacEachern

NEWS FROM THE FIRM

Not news, really, but a note from the archives. Our client newsletter is in its 20th year, and some readers may not have been on the subscription list when our September 1989 newsletter, our fourth issue, was awarded First Prize in the "Small Firms" category in *Canadian Lawyer's* 1990 Newsletter Awards. The jury cited our *"functional layout, with interesting and useful articles. A good, basic newsletter considering the target market for a small firm. One nice touch is binder punch holes along the spine, encouraging clients to save their copies."* (There was no trophy, medal or ribbon. We continue to provide the same number of holes along the spine, though with inflation their diameter has been increased slightly, and we trust that our articles, presented in more or less the same layout, are still both interesting and useful.) Our September 1989 newsletter was four pages in length (thereby requiring no staples which we are confident would also have found favour with the jury had they been required) and considered changes in holiday shopping legislation and bylaws (remember those?), as well as the split zoning case *Genevieve Holdings Ltd. v. City of Kamloops* and *Witt et al v. District of Surrey*, a case about reconsideration.

The real news: **Melania Cannon** has joined our firm for summer articles. Melania studied international relations at Mount Allison University in New Brunswick, and has completed her second year of law at UBC. She has been selected to clerk at the B.C. Supreme Court at the end of her third year.