RECENT DECISIONS OF THE COURTS

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Barry Williamson

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I. GOVERNANCE

A. Board of Variance

Martin v. Vancouver (City) 2008 BCCA 197

This was the first judicial decision to consider the power of a BC municipal council to rescind the appointments of members of a board of variance. The Court of Appeal upheld the decision of the chambers judge that the members of a board of variance enjoy no security of tenure and are owed no procedural fairness duties and were not entitled to any notice prior to their dismissal.

The Vancouver Board of Variance is constituted under provisions of the *Vancouver Charter* substantially similar to section 899 of the *Local Government Act.* Section 572(2.1) of the *Vancouver Charter*, like s. 899(9) of the *LGA*, states that council may rescind an appointment to the board at any time. However Martin argued that because the board was a quasi-judicial tribunal exercising an adjudicative function its members were entitled to independence, including security of tenure.

Whether members of the board were entitled to independence required an examination of the statutory provisions that govern the structure and process of the board. The chambers judge had concluded that board members held office "at pleasure" and could be dismissed at any time, without notice and without cause. The appeal court was not satisfied that the "at pleasure" characterization was appropriate for a non-Crown appointee. There was no dispute that the board exercised quasi-judicial power but its jurisdiction and powers were limited. The board's procedure was informal, evidence was not taken under oath and it did not give reasons for its decisions. The board did not have a policy making function and it was required to use its powers in a manner consistent with council's purposes; there being a statutory direction that it consider the general purpose and intent of the zoning bylaw in deciding whether to grant relief from the strict application of the bylaw. [S. 573(2)(b) of the *Vancouver Charter* mirrors the direction to *LGA* constituted boards that they not grant a variation that would defeat the intent of the zoning bylaw; s. 901(2)(c)(iv) *LGA*.] Of greatest significance was the unambiguous language of s. 572(2.1) that Vancouver council's authority to rescind the appointments could be exercised without any need to establish reasonable cause.

As for procedural fairness, the Court of Appeal considered the recent Supreme Court of Canada decision in *Dunsmuir v. New Brunswick* that qualifies the extent of procedural fairness duties set out in the SCC's earlier decision in *Knight v. Indian Head School District*. The analysis in *Knight* still governed but it did not assist Martin ultimately. Whether a duty to act fairly existed required the court to consider the nature of the decision to be made by the administrative body (in this case council), the relationship between the body and the individual and effect of the decision on the individual's rights. Although the court saw council as an administrative public

body with statutory powers, it was also an elected, legislative public body with wide powers in the area of planning and development; it had a significant degree of control over the composition of the board of variance. Board members were volunteers, serving part-time and for no remuneration, and as the court had determined earlier, without security of tenure. Council had also taken the decision to rescind all of the board appointments due to institutional, rather than personal concerns. The appeal court agreed with the chambers judge that City council had "budgetary, personnel and reputations concerns with the board in the community." Rescinding their appointments did not deprive the board members of their livelihoods. All of these factors weighed against finding a duty of procedural fairness that would have required giving the board members notice of their impending dismissals and an opportunity to be heard.

Finally the court rejected Martin's allegation that council had acted in bad faith. The board's decisions had resulted in two successful court challenges to its jurisdiction, which had seen substantial legal fees incurred. The evidence disclosed that apart from the concern about the board's management of its budget, council was concerned about the board's asserting control over staff resources and the number of complaints received about the board's decisions. These were held to be proper concerns for council. The court rejected as "rhetoric" the argument of Martin's counsel that council was reining in an independent minded board with the intention of appointing a more compliant board.

The case is significant in clarifying that procedural fairness duties do not extend to every holder of municipal office and that a full analysis of the statutory context of the office is required in order to determine what, if any procedural fairness rights are owed when rescinding an appointment. Councils faced with errant boards of variance have the comfort of knowing that they need not be saddled with having to work with a board or board members who have outlived their usefulness.

B. Conflict of Interest

Jaffary v. Greaves [2008] O.J. No. 2300 (Ont. S.C.)

The Ontario *Municipal Conflict of Interest Act* includes a prohibition on members attempting to influence the voting on a question in which the member has a pecuniary interest somewhat similar to s. 102 of the *Community Charter*, although the BC legislation is somewhat broader in scope. Greaves was a member of the Town of Huntsville council and the secretary and director of a development company that had a proposal to build affordable housing in Huntsville. All levels of government were eager to promote this type of housing and Greave's company had experience with a similar project in a Muskoka where development fees had been waived. Muskoka suggested that Greaves apply for a similar waiver from Huntsville. Greaves approached the mayor who recommended he write with his request to the administration and finance committee. Greaves provided a letter of request and twice appeared before the committee when the fee waiver was on the agenda. At each occasion before the committee, and subsequently before council, Greaves declared his interest and absented himself from the vote.

An elector brought an action to have Greaves' seat declared vacant by reason of his attempts to influence the vote. In reviewing the letter requesting the fee waiver the court considered that it provided background information for the most part but that there was one sentence that constituted advocacy for the waiver to be granted. The decision turned mainly on the issue of whether the committee meetings where Greaves had attended and which had received the offending letter were committees of council for the purpose of the conflict of interest statute. The judge declined to follow a number of previous decisions that had ruled committee meetings did not count as council meetings. The judge thought those cases applied the somewhat discredited strict construction approach to statutes having penal consequences (disqualification being somewhat penal). His view was that the legislative purpose was to prohibit members from participating in the decision making process where they had a pecuniary interest. The proceedings of a committee can be instrumental in paving the way for favourable consideration before council. To read the statute narrowly as excluding committee meetings would subvert the legislative intention.

The same issue would not arise in BC as s. 101(1)(b) of the *Community Charter* makes it clear that the pecuniary conflict rules apply at the committee level.

The court ruled that Greaves should not be disqualified. Greaves had acted on the recommendation of Muskoka and the Huntsville mayor in writing the letter requesting the fee waiver. His presence at the committee was seen as primarily intended to "educate" the other members about the steps that other levels of government had taken to encourage affordable housing. He had been careful to declare a conflict and leave the meetings when the matter was the subject of consideration. Applying the saving provision equivalent to those found in the *Community Charter*, the court held that Greaves' violation had arisen through inadvertence and an error in judgment.

The decision, although ultimately not costing the councillor his seat, demonstrates the difficulties of an elected member doing business with the local government, and that declarations of conflict and leaving the council chamber are not necessarily sufficient on their own, though they may be important in determining whether the saving provision will be applied.

C. Public Hearing Disclosure

Eaton v. Vancouver (City) 2008 BCSC 1080

The developer sought a rezoning allowing development of 16 townhouses and the retention of a heritage house in the Shaughnessy neighbourhood. There was a lengthy period of negotiation with the City and meetings with the residents where various proposals for developing the property were vetted. The petitioners retained Ray Spaxman, a former director of planning, to assist them in evaluating and responding to the developer's proposal. Spaxman was alive to the process that the City followed in determining what density to approve where part of the development involved compensation for retention of heritage buildings. The City would have access to the developer's pro-forma and the difference between the value of the site encumbered by the heritage retention and the unencumbered value determined the required compensation by

increased density. Spaxman was successful in having City staff disclose their evaluation of the developer's pro-forma, including estimates of sales revenue. However, neither the developer's actual pro-formas or the estimates of the unencumbered land value were made available. Nevertheless the neighbours hired consultants that prepared a pro-forma indicating that 16 townhouses would produce an excessive profit to the developer, viewed against the figure employed in the City's analysis. The petitioners claimed that 5 of the proposed townhouses could be removed and the developer still would still earn a return consistent with the City's assumptions.

The petitioners sought disclosure of the developer's pro-formas and supporting appraisals in advance of the public hearing. Their request was refused under the *Freedom of Information and Protection of Privacy Act*, the City citing the confidential nature of the market sensitive information on the developer's costs and sales revenues as being harmful to third party business interests if disclosed. In response to the petitioner's challenge to the rezoning bylaw approval, the City's Development Manager deposed that requiring public disclosure of the developer's financial calculations would not be conducive to the "full and frank disclosure" being made to City staff. The City's practice was that the developer's financial analyses were not provided to City Council, which only received a staff report on their analysis and conclusions on the results of their negotiations with developers.

The petitioners' argument was that a central issue on the rezoning was whether the developer was being adequately compensated or overcompensated by the proposed development. Without the requested documents they could not mount a proper challenge on the issue of compensation. Most importantly the appraisal analysis for the unencumbered land value was required before they could agree or disagree on the proposed compensation.

The court's review of the public hearing disclosure cases focused on the fact that only those documents that had been considered by council in reaching its decision were required to be disclosed. Accordingly the judge would not extend the City's duty of disclosure to documents not seen by council. The court concluded that the petitioners were able to provide informed, thoughtful and rational presentations to council in respect of the rezoning bylaw. The judge narrowly characterized the primary concern of the bylaw as being land use, rather than compensation to the developer. But that does not acknowledge that the density recommended by staff was the product of an analysis of what was required to properly compensate the developer. The judge rather grudgingly conceded that in a "limited sense" the amount of compensation to the developer was related to whether there should be 11 or 16 townhouse units or some number in between. Given the breadth of the disclosure obligation pre-public hearing established in the Court of Appeal's Pitt Polder decision, the limit set in the Arthur Bell case seems rather artificial.

D. Void Development Permits – Discretion to Grant Declaratory Relief

Gook Country Estates Ltd. v. Quesnel et al 2008 BCCA 407

In the trial court the plaintiff had sought declarations that the city and its officials had committed a series of illegal acts such as extending a water line outside the city's boundaries without proper

authority, granting assistance to a developer and unlawful issuance of two development permits. All of the claims were dismissed.

Only the dismissal of the claim in relation to the two development permits was appealed. The plaintiff's assertion that the permits were invalid rested on a combination of technical and more substantive objections. There was an argument that one permit had been authorized by a council resolution when it sat as a committee of the whole, and was in effect merely a recommendation to council, never followed with a formal resolution of the council. One of the permits was alleged to have been issued to the wrong corporate entity, while the other was issued to an employee of the developer, not the owner of the land. The more substantive arguments related to the absence of access restrictions, contrary to the city's sight distance standards. Other conditions that council had directed to be included in a permit were omitted. Uses were allegedly authorized that were contrary to zoning.

The appeal court upheld the decision of the trial judge to refuse the declarations on discretionary grounds. The plaintiff had the option to pursue its complaint under the normal, and expeditious, procedure of a petition under the *Local Government Act* or the *Judicial Review Procedure Act*. Had it chosen either of these summary processes the matter would have come to court much more quickly the two years it took bring it to trial in a proceeding that the court described as long and complex. By the time of trial the buildings had been built, leased and occupied. Both at trial and at appeal counsel for the plaintiff/appellant was unable to provide a satisfactory answer to the court's question of what would be the effect of granting the declaration. Would the buildings have to be torn down? The plaintiff's simple response that it was entitled to the declarations as a matter of right, without a concern for the consequences that might follow, including a vague reference to the prospect of further litigation, failed to convince either level of court.

The Court of Appeal dismissed the plaintiff's argument that *Hornby Island Trust Committee v. Stormwell* (1988, BCCA) stood for the proposition that there was no discretion to deny a declaration of invalidity where the bylaw (or by extension, the resolution or permit) was void for failure to observe a statutory pre-condition. Although there is a passage in the *Stormwell* judgment that would appear to have said that in those cases declaratory relief could not be denied, the appeal court in Gook Country said that the plaintiff was misconstruing the court's words. Nothing in the *Stormwell* decision should be interpreted as casting any doubt on the general proposition that declaratory relief is discretionary. The court went further to state that subsequent Supreme Court decisions, that have interpreted *Stormwell* as establishing a rule that declaratory relief cannot be refused in the case of an alleged void (as opposed to voidable) bylaw, should not be followed. The court provided examples of discretionary grounds that could result in a court refusing declaratory relief, including:

- the applicant lacking standing
- delay
- mootness

- the availability of other, more appropriate procedures, such as the *JRPA*
- the absence of affected, third parties
- the theoretical or hypothetical nature of the issue
- the inadequacy of the arguments presented
- the declaration being of merely academic importance and having no utility.

The appeal court also rejected the argument that the recent Supreme Court of Canada decision in *London (City) v. RSJ Holdings* [2007] 2 SCR 588 held that declaratory relief could not be denied on discretionary grounds where the matter was a "total lack of jurisdiction". Quesnel's council clearly had jurisdiction to grant development permits; the issue was whether it had done so properly. Although it could be argued that any errors on the part of council dealing with the development permits were broadly speaking "jurisdictional", they didn't fall into the category the Supreme Court of Canada had in mind in *RSJ Holdings*. However, the appeal court did not stop there. It went further to suggest that the SCC should not be understood as saying that the court had no discretion to deny declaratory relief on discretionary grounds even where there is a complete absence of jurisdiction.

The decision to uphold the trial judge's decision to deny the plaintiff's claimed declarations is no doubt welcome, given the highly technical nature of many of the plaintiff's arguments. It is the court's musings on the discretion to deny declarations in cases that would have previously regarded as jurisdictional, and thus not admitting any residual discretion, that will likely be the more enduring aspect of the case

II. REGULATORY

A. Regulatory Charges vs. Taxes

620 Connaught Ltd. v. Canada (Attorney General) 2008 SCC 7

This pronouncement from the Supreme Court of Canada represents that court's latest refinement of the law differentiating valid regulatory charges from potentially unconstitutional taxes. Previous cases at the Supreme Court level had dealt with provincial and municipal levies that were challenged as being constitutionally invalid for being indirect taxes. At issue in *620 Connaught* were business licence fees charged to hotel, restaurant and bar operators in Jasper National Park. The licence fee consisted of a flat fee together with a volume based charged dependent on the amount of alcoholic beverages sold. The authority for the fee was the delegated power to the Minister of Canadian Heritage to fix fees in respect of privileges provided by the Parks Canada Agency. The business operator's argument was that the fee was in reality a tax and as such under s. 53 of the *Constitution Act* could only be imposed by Parliament.

In distinguishing a tax from a regulatory charge, it is the primary purpose which is determinative. The primary purpose of a tax is to raise revenue for general purposes, whereas regulatory charges are imposed to finance or constitute a regulatory scheme, normally in relation to rights or privileges awarded or granted by the government. Although not at issue in *620 Connaught*, the court referred to a third category – user fees, which are charged by government for the use of government facilities or services.

The court referred to the prevailing four-part test identifying the characteristics of a tax:

- it is enforceable by law;
- imposed under the authority of the legislature;
- it is levied by a public body; and
- it is intended for a public purpose.

The court recognized that the application of the test did little to distinguish between taxes and regulatory charges, however, as regulatory charges would invariably share the same traits.

Regulatory charges could be further distinguished from taxes where there is a valid regulatory scheme and a proper relationship between the charge and the regulatory scheme. With respect to establishing the existence of a regulatory scheme the court looks for certain indicia, not of all of which must necessarily be present:

- a complete, complex and detailed code or regulation;
- a regulatory purpose which seeks to affect some behaviour;
- the presence of actual or properly estimated costs of the regulation; and
- a relationship between the person being regulated and the regulation – where the person regulated either benefits from, or causes the need for, the regulation.

The Supreme Court held that there was a regulatory scheme that amounted to a "complete, complex and detailed code of regulation." The code consisted of the *National Parks Act*, the *Parks Agency Act* and the regulations. The regulations applied to both specific parks and the town of Jasper. They ran the gamut from wildlife management to traffic regulations. They established how services, rights and privileges were obtained, what was prohibited and to whom authority was delegated. The court had no difficulty finding that the purpose of the regulations was to affect behaviour; in that they encouraged the use of the park by Canadians, while preserving its integrity for the future.

The third criterion of a proper estimation of costs was satisfied in that the forecast expenditures for the operation of Jasper National Park were estimated to be $20.4 million over the relevant

year. With respect to the fourth factor of the relationship between the person regulated and the regulation, the operators enjoyed the benefit of a well-maintained national park. Their revenues were linked to the number of visitors – the more attractive the park, the more visitors resulting in higher revenues. The scheme also limited the number of businesses in the park and being able to operate in a restricted market was also seen as beneficial to the operators.

With all four of the criteria having been met, the court found that the regulation of Jasper National Park qualified as a relevant regulatory scheme. The court then had to consider the relationship between the business licence fees and the regulation of the park.

If the fee revenue exceeds the costs of the regulatory scheme then a general revenue raising purpose could be implied, indicative of a tax, rather than a valid regulatory fee. Previous decisions have recognized that the government must be given some reasonable leeway with respect to the limit on fee revenue generation. A significant or systematic surplus beyond the cost of the regulatory scheme would be inconsistent with a regulatory charge but a small or sporadic surplus would not, "as long as there was a reasonable attempt to match the revenues from the fees with the cost associated with the regulatory scheme."

The business licence fee, which only generated $87,625 in annual revenue, could not be considered in isolation. The court mandated a consideration of all fee revenue in determining whether there was a surplus generated over the $20.4 million annual cost of Jasper National Park. There was insufficient evidence of the total fee revenue for Jasper Park but the court was prepared to rely on testimony to a parliamentary committee that there was an overall shortfall of $17 million between the fees collected and the total expenditures for mountain national parks. From this court the was prepared to draw the inference that fee revenues for Jasper Park likely did not exceed, or did not significantly exceed, the cost of the park's regulatory scheme. The court concluded was that there was a proper relationship between the business licence fees and the cost of the regulatory scheme.

One issue which set the tone for the analysis that followed was the selection of the appropriate regulatory scheme. The licensees contended that the scheme was the narrow regulation of businesses selling alcoholic beverages in Jasper National Park, or alternatively, the regulation of businesses generally. The court gave short shrift to this argument. As the appellants benefited from such things as heritage presentations, visitors' services and highway maintenance, the appropriate regulatory scheme was that governing the administration and operation of the national park as a whole.

Local governments, however, when facing challenges to regulatory charges and licensing fees, will likely have difficulty arguing by analogy from *620 Connaught* that the regulation of a local government as a whole is the appropriate regulatory scheme. The operation and regulation of national parks would appear to represent a distinct and discrete regulatory situation. In *Allard Contractors Ltd. v. Coquitlam* [1993] 4 SCR 371 the Supreme Court considered the validity of volumetric soil removal fees and found that the overall regulatory scheme included the construction and maintenance of roads. This cost burden enabled the municipalities to show that

the fees did not produce surplus revenue. Future cases will present interesting exercises in determining the outer boundaries of regulatory schemes.

B. Sign Bylaws – Freedom of Expression

Vann Media Group v. Town of Oakville 2008 ONCA 752

This was the second challenge by Vann Media of an Oakville sign bylaw. The first case had involved a total prohibition on third party signs and a prohibition on billboard signs larger than 80 square feet. In 2004 the Supreme Court of Canada allowed the Town's appeal on the billboard sign regulation. The Town did not appeal the ruling that found the third party sign prohibition invalid.

The Town returned to the drawing board and engaged in an extensive consultative process. The new bylaw provisions included prohibitions on erecting signs:

- on any property where there was an existing sign;
- on any property north of Dundas Street ;
- on any property not within an E (Enterprise) 2 zone;
- where there a building on the property;
- within 200 metres of any residential property, the road allowance of certain named streets, 2 major highways; or
- closer to the edge of a road than the building setback under the zoning bylaw.

Vann had sought to locate signs at 52 different locations in "employment lands" zones; being a mixture of commercial and industrial land uses. Some of the 52 locations were within the E2 zone but none of them could meet the other bylaw limitations. Vann's evidence before the lower court judge was that there were only 9 locations in all of Oakville where signs could be erected in compliance with the bylaw; none of which were amongst the 52 proposed by Vann. The lower court judge concluded that the effect of the bylaw was to effectively ban billboard advertising, as almost all of the commercial and industrial areas under consideration were eliminated. The judge quashed the sign bylaw in its entirety and order the Town to grant permits to Vann to erect billboards of 80 square feet or less. The judge understood that there were 11 such locations, but it was later determined by the parties that there were 21.

The Ontario Court of Appeal largely upheld the lower court's decision. Like most freedom expression cases, the key question is not whether the bylaw or regulation infringes the right of free expression, as the case law has set a low threshold to establish infringement. Instead, the focus of the court is whether the infringing law can be upheld under s. 1 of the *Charter* as a reasonable limit that can be demonstrably justified in a free and democratic society.

The Town was able to satisfy the first step of the justification, in that the primary justification of preserving the Town's visual and aesthetic character and preventing sign clutter was considered to be a pressing and substantial concern. The second part of the s. 1 justification looks at whether the law is proportional to the legislative objective. The Town argued on the basis of such cases *as Hudson v. Spraytech* [2001] 2 SCR 241 that the court should show some deference to, and not second guess, the decisions of the elected council. The appeal court accepted that in an "appropriate context", the courts should show deference to decisions of elected representatives but not when the government body has the onus of showing, through evidence and common sense reasoning, that an infringing law meets the justification test under s. 1. The sign restrictions were found to be rationally connected to the objectives of the bylaw. Visibility, proximity and compatibility with land use are proper factors in determining the visual impacts of signage. So too were setback and vacant lot requirements and the restrictions to particular zones. The difficulty came with establishing the measures were a minimal impairment of the free expression guarantee.

The court recognized that a law may meet the minimal impairment standard without it being shown that the "least restrictive means" have been enacted. It is sufficient if the measure adopted falls within a range of reasonable solutions to the problem at hand. The court should be mindful to the difficulty of drafting laws that both achieve the legislator's objectives, achieve certainty and only minimal intrude on *Charter* rights. The bylaw's prohibition of signs within 200 metres of residential zones and the road setback provision were appropriate to preserve the aesthetic of the Town in residential areas. The court could not see that these provisions could have been more narrowly tailored to meet the Town's objectives.

For the remaining restrictions the court held that the Town had failed to strike the appropriate balance. The prohibition on properties that already have signs and the limitation to vacant properties were accepted as severely limiting the ability to erect signs in an urban community such as Oakville. The E2 zone limitation effectively ruled out other "unremarkable" industrial areas. Noting again the evidence of Vann's expert that there were only 9 compliant locations, the court concluded that the cumulative effect of the various restrictions in eliminating most, if not all, commercially viable sign locations could not be justified as a minimal impairment. The Town argued that its size restrictions, upheld by the Supreme Court of Canada, that resulted in any lack of commercial viability and, accordingly it should not be required to "overcompensate" in other respects to ensure that it met the sign industry's goal of commercially viable visibility. The court pointed to the lack of any evidence from the Town that demonstrated this was the case. The court also pointed to the lack of evidence from the Town to justify the various restrictions as adequate balancing of its aesthetic concerns with the right to freedom of expression.

While asserting that it was not the job of the judiciary to re-legislate the Town's bylaws, the appeal court provided some guidance for drafting future bylaws:

- that more than one sign be permitted on large properties;

- the E2 zone restriction be broadened to allow third party signs in "non-prestige" industrial areas outside of the E2 zone;
- as opposed to the restriction to vacant lots, allow third party signs on very large properties with a large portion of open space;
- allow more signs near some of the proscribed north-south roads.

These comments suggest a significant degree of intervention in legislative judgments about the appropriate limits of sign bylaws but that is precisely what the justification analysis under s. 1 leads to. The courts assume the role of assessing whether legislation that infringes a right can be circumscribed to lessen the infringement. If that is the role for the court, then perhaps it is better that some assistance be offered as to what changes might be required to make the next generation bylaw withstand scrutiny.

The court overturned the lower court's direction that Vann be issued permits for a certain number of locations. In this respect it noted the lower court judge's erroneous assumption that only 11 locations – as opposed to 21 – locations were involved. More importantly, this was the Town's first attempt to produce a bylaw aimed at restricting, as opposed to prohibiting, third party signs. In the absence of bad faith the court was of the view that the Town should be given a further opportunity to draft new restrictions that would strike the right balance.

The decision shows that governments that embark on the task of justifying a regulation under s. 1 of the *Charter* should seriously consider providing evidence about the effects of the bylaw to counter that of the party challenging its validity. Arguments premised on common sense and reason alone may be not be sufficient to meet the onus of justification where the applicant has demonstrated adverse impacts. Even then it may still be difficult to satisfy the court that any restrictions on the location of signage meet the minimal impairment standard.

C. Dangerous Dogs – Pit Bull Ban

Cochrane v. Ontario (Attorney General) 2008 ONCA 718

The Ontario Court of Appeal upheld the validity of amendments to the *Dog Owners' Liability Act* that banned the breeding, sale and ownership of pit bull dogs. Owners were allowed to keep pit bulls born at the time the legislation came into force but they were required to have them sterilized and to leash and muzzle them in public. The lower court judge had rejected an argument that the legislation was unconstitutional for being overly broad but held that a part of the definition of pit bull dog was impermissibly vague. The Attorney General's appeal on the latter issue was successful, reinstating the entire legislative package.

The appellant owner was able to mount an attack under the fundamental justice provisions of s. 7 of the *Charter of Rights* because the legislation provided for potential imprisonment for a breach. Before the lower court there was conflicting evidence on the extent of the risk posed by pit bulls. The appellant relied on evidence that pit bulls are not inherently dangerous and thus a total ban

on all pit bulls was excessive. On the other hand the province submitted evidence of four savage pit bull attacks before the enactment of the legislation, together with studies indicating pit bulls were unusually unpredictable and were responsible for a high proportion of dog bite related fatalities.

The appeal court ruled that it was not entitled to substitute its opinion for that of the legislature as to how to best protect the public. It was not for the court to attempt to resolve the conflicting evidence on dangerousness. The test for a s. 7 overbreadth breach is whether the law is arbitrary because there is no "reasoned apprehension of harm" or whether the law is "grossly disproportionate" to the legislative objective. It could not be said that the legislature could not have found that there was a reasonable basis to act. Noting the right to own a dog is not protected by s. 7, the court held that the total ban was not arbitrary given the evidence regarding the unpredictability of the breed.

On the second issue the court noted that legal certainty is not the standard and legislation is not unconstitutionally vague because it is subject to interpretation. The law need only delineate an area of risk and it is only where a court after undertaking the interpretative process and has conclude that interpretation is impossible that a law will be declared unconstitutionally vague. The definition of pit bull referred to pit bull terriers, Staffordshire bull terriers, American Staffordshire terriers, American pit bull terriers and "a dog that has an appearance and characteristics that substantially similar" to the previously listed dogs. The core of the definition referred to named breeds accepted by kennel and breeder clubs. For the part of the definition struck down by the lower court, the appeal court noted that the phrase "substantially similar" was commonly used in statutes to broaden a defined class but at the same time served to control the reach of the law to constitutionally acceptable limits. In reviewing the jurisprudence on vagueness challenges, the court noted a long list of questioned statutory phrases that had been upheld by the Supreme Court of Canada. This confirmed that a law will not be struck down as vague "simply because reasonable people might disagree as to its application to particular facts."

The *Cochrane* decision involved provincial legislation but its potential influence extends to many municipal bylaws that have breed specific regulations. Those bylaws are more likely to survive any overbreadth or vagueness challenges and for those BC municipalities that are not faint of heart, the case provides support for going beyond mere regulation to adopting prohibitions, keeping in mind that the *Community Charter* animal power in s. 8(3)(k) provides for bylaws that regulate, prohibit and impose requirements. Section 12 provides a basis for breed specific regulation in allowing for bylaws that establish "different classes of persons, places, activities, property or things."

D. Waste Management Fees

Greater Vancouver Sewerage and Drainage District v. Ecowaste Industries 2008 BCCA 126

In 1996 the GVS&DD adopted bylaws that imposed a $3.00 per tonne disposal fee on operators of private disposal facilities. The previous year approval had been obtained from the minister for the GVRD's solid waste management plan. The plan included a statement that the district would

implement a system of licensing waste haulers operating in the region to minimize the delivery of waste to unauthorized or illegal sites. The minister's November 1995 approval letter did not impose a condition that waste haulers be licensed. Neither the disposal fee bylaw or any subsequent bylaw followed up with a licensing regime for waste haulers.

The *Waste Management Act* provisions in effect in 1996 when the fee bylaw was passed provided that a regional district could set and collect fees from the operator of a recycling or solid waste management facility. This separate fee setting authority was later subsumed within the overall solid waste regulatory authority given to regional districts under the 1998 *Waste Management Act* amendments, replicated in the current *Environmental Management Act.* Significantly, that authority commences with the statement that the bylaws may be passed "For the purpose of implementing an approved waste management plan."

Ecowaste paid the disposal fee for a period and then refused. It developed an elaborate argument that the fee had not been validly enacted because the plan submitted by the regional district and approved by the minister included a provision for the licensing of waste haulers, whereas the bylaws subsequently enacted, including the disposal fee, failed to include as an integral part, the licensing of waste haulers.

The Court of Appeal upheld the trial judge's decision on the validity of the fee disposal bylaw. The court concluded that Ecowaste was misreading the legislation. The legislation in place when the regional waste plan was approved by the minister did not require that bylaws accord with the plan. So long as the facility had been approved by the minister as part of the regional plan (as Ecowaste's site was) then the fee setting authority allowed collection of fees from a facility such as Ecowaste's. Although the court was satisfied that the fee bylaws were adopted for the purpose of implementing the regional plan, that was not a legal requirement in 1996.

Ecowaste faced another hurdle in that the 1998 *Waste Management Act* amendments included a provision validating the fee disposal bylaws, similar to MEVA legislation. Ecowaste sought to limit the effect of the validating provisions to the procedure that was followed in their adoption (as opposed to their substantive validity) but the court held that there was no ambiguity in the language employed by the Legislature which was intended to give full retroactive effect to the validation.

Ecowaste also challenged the fee bylaws as being an *ultra vires* tax. The appeal court had the benefit of the SCC's recent decision in *620 Connaught* in deciding this question. It rejected Ecowaste's argument that the code of solid waste regulation was incomplete and not sufficiently complex to meet the test confirmed by the *620 Connaught* decision. The court also found that the district had attempted to set the fee at an amount that would roughly match its costs of operating the regulatory scheme. The evidence indicated however that the scheme had been operating at a deficit.

The decision is a useful reminder of the importance of legislative history and that even though current enactments may provide more limited authority, previous enabling legislation in effect at the time of bylaw adoption may establish a continuing source of validity.

III. LIABILITY

A. Limits of Policy Defence in Responding to Court Decisions

Holland v. Saskatchewan 2008 SCC 42

The plaintiff was successful in a judicial review application challenging inclusion of release and indemnity provisions in the province's chronic wasting disease surveillance and certification program. Despite the court declaration, the provincial government failed to consider reinstatement of the farmer's certification in the program. The farmer suffered financial loss from reduced sale prices and fewer sales. He then brought a claim in negligence for the mere failure to act in accordance with legislative requirements – i.e. requiring release and indemnity in the absence of legislative authority authorizing their inclusion. The SCC upheld the striking out of this aspect of the plaintiff's claim, as it would effectively create a regime of absolute liability for public authorities acting outside their legislative mandates. The SCC had previously refused to recognize a "nominate tort of statutory breach" in *The Queen v. Saskatchewan Wheat Pool.* Breach of a statutory provision may provide some evidence of negligence but is not conclusive of liability.

At a policy level recognizing the plaintiff's claim would "put regulators and other public authorities in the position where, notwithstanding both careful efforts to determine the limits of their authority and earnest attempts to operate within those limits, they would nevertheless be exposed to private law liability if a court subsequently took a different view of the scope of their powers." Endorsing the plaintiff's claim would have a chilling effect on regulators and other government authorities, "who might become reluctant to pursue the public interest for fear that, at some later time, a court might fix them with liability because they misjudged the scope of their authority."

However, in relation to the failure to implement the declaration of the court that the government had no power to require the release and indemnity as a condition of the plaintiff obtaining certification of his herd, the court held that implementation of judicial decision is an operational matter, as public authorities are expected to implement judicial decisions. This aspect of the plaintiff's claim was allowed to proceed to trial.

B. No Duty in Tort to Subcontractors in Tender Process

Design Services Ltd. v. Canada 2008 SCC 22

Public Works Canada (PW) undertook a construction project using a design build process. There were two stages – a request for a statement of qualifications, followed by a request for proposals. At the SOQ stage potential applicants were advised that could bid on their own or with others as part of a joint venture. Olympic's submitted its bid as the sole proponent. Olympic had arranged for a number of subcontractors Olympic submitted a compliant bid but PW decided to award the contract to a non-compliant bidder. Olympic and its subcontractors sued. A settlement was reached between Olympic and PW. Olympic discontinued its claim and the subcontractors carrier on with their action. The Federal Court trial judge held that PW owed a duty of care in tort to the

subcontractors not to award the contract to a non-compliant bidder. The subcontractors were entitled to recover their lost profits and the cost of preparing their proposals to Olympic. The issue that made its way to the Supreme Court of Canada was whether, in the absence of a contract with PW, the subcontractors were entitled to recover their financial losses.

The Supreme Court examined the five existing categories of negligence claims that allow for recovery of pure economic losses. The so-called "Independent Liability of Statutory Authorities" was not engaged as PW was not exercising a regulatory function under statute. Instead the situation was more reflective of commercial dealings between private parties. The closest of the remaining four categories – relational economic loss – was rejected as inapplicable as there was no property of Olympic that had been damaged to which the subcontractors' economic loss could be "relational". The court decided this was not an appropriate case for recognizing a new duty of care in favour of subcontractors suffering loss from a failure to award a tender in accordance with "Contract A" principles.

The court examined the owner – subcontractor relationship under the two part Anns/Kamloops analysis. The first part of the analysis requires a determination of whether there is a sufficiently close relationship between the parties, or "proximity", to justify the imposition of a duty of care. The trial judge had concluded that it was reasonably foreseeable that the award of a contract to a non-compliant bidder would result in financial loss to the subcontractors. PW did not quarrel with the finding that it was foreseeable that such loss might arise but it argued that foreseeability does not of itself lead to the conclusion that there is a duty of care. In favour of recognizing a duty of care was the reliance on the subcontractors participation in the proponents team to do the work. Almost half the points in SOQ evaluation were related to the overall ability to carry out the project. In addition, each of the subcontractors expended considerable time and energy preparing their bids, relying on PW's documents and representations.

One of the factors to be considered in establishing a duty of care is whether the plaintiff had "an opportunity to protect itself by contract from the economic loss and declined to do so." In this regard the court noted that the subcontractors had the opportunity to form a joint venture with the proponent. Had they done so, of course, there would have a direct contractual relationship with PW, and they could have sued directly in contract on PW's breach of Contract A. The court saw this as an overriding policy reason for not extending tort liability in the circumstances:

> "Allowing the appellants to sidestep the circumstances they participated in creating and make a claim in tort would be to ignore and circumvent the contractual rights and obligations that were, and were not, intended by PW, Olympic and the appellants. In essence, the appellants are attempting, after the fact, to substitute a claim in tort law for their inability to claim under "Contract A". … To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract would be to allow for an unjustifiable encroachment of tort law into the realm of contract."

The result seems appropriate but the court's emphasis on the joint venturing opportunity as the basis for denying the existence of duty raises a question for future cases. What if the owner's RFP makes it clear that it will not accept joint venture proposals and will only accept proposals from a lead proponent, although recognizing that the proponent will engage subcontractors to carry out the work? Those subcontractors could be expected to sustain financial losses if the owner awards the contract to another non-compliant bidder. However, where the owner rejects the joint venture model for bids, the subcontractors are not able to protect themselves from economic loss through creation of a contractual relationship – the Contract A – with the owner. Greater subcontractor vulnerability might cause the court to adopt a different analysis, conceivably leaving the owner liable to subcontractor claims. Further cases will be required to sort out whether a duty of care owed by owners to subcontractors has been foreclosed by this decision.

C. Road Slip and Falls and *Occupiers Liability Act*

Talarico v. Town of Fort Nelson 2008 BCSC 861; *Plakholm v. City of Victoria* 2008 BCSC 1048

These two decisions demonstrate differing approaches to the determination of the duty of care owed to persons injured walking across or along highways. In *Talarico* the plaintiff slipped and was injured while walking on the side of a road which had no sidewalk. The cause of the fall was a patch of ice concealed by freshly fallen snow. The source of the ice was a waterline break on private property. The judge readily dismissed the claim in nuisance as the Town had no knowledge of the patch of ice before the plaintiff's accident.

The *Occupiers Liability Act* did not apply due to the exemption in s. 8 excluding the application of the Act to public roads occupied by governments, including local governments. The court considered the claim thereafter on the basis of negligence principles, and the policy/operational distinction in particular. After examining the Town's policy with respect to snow and ice removal the court was satisfied that its decisions to plough only the lanes of travel and not to inspect for ice or for water breaks were policy decisions that "predetermined the boundaries of [the Town's] undertakings and their actual performance." The Town did not owe the plaintiff a duty of care and her claim was accordingly dismissed.

In *Plakholm v. Victoria* the City carried out repairs on a street that served as a bus route. A cold asphalt patch was applied sometime between January 24th and February 1st, with the intention of replacing the cold patch later in the spring after further settling of the roadway. The plaintiff crossed the street on March 4th in mid-block and fell when she encountered an uneven section of pavement. There was no warning of the uneven pavement condition. The judge was satisfied that the location of the plaintiff's accident was the same as the earlier road repair. The evidence of the City's witness was that the difference in pavement elevation at the accident location was around 40mm (1.5 inches), which was the City standard that triggered the need for repairs to roadways.

The trial judge held that the *Occupiers Liability Act* did not apply due to the same s. 8 roadway exemption considered in *Talarico*. However, rather than approach the case on the basis of

negligence principles the judge stated that the case was not one in which a municipality's duty to inspect roadways or the frequency of inspections was at issue. He therefore applied the common law of occupiers liability, as it stood before the introduction of the *Occupiers Liability Act*. This required a determination of whether the plaintiff was an invitee or licensee, as different duties as occupiers owe different duties to each. The judge found the City liable on the basis that it ought to have known that in a residential area people would alight from a bus and attempt to cross the street mid-block. Having excavated the roadway and repaved it, the City should have appreciated that it would settle, creating the hazard of the height differential between the old and new pavement. The City should either have fixed the height differential or provided warning of the hazard.

The judge's decision to revert to common law occupier's liability principles and distinctions was arguably a step backward in that the intent of the *Occupiers Liability Act* was to abolish the discredited distinctions between various classes of plaintiffs entering onto occupier's premises or lands. Had the judge applied the law of negligence relating to public bodies he would likely have found liability as the actions of the City in respect of how it affected the repair were operational in character.

D. Notice of Claim Requirements

Thauli v. Corporation of Delta 2008 BCSC 437

This case underscores the difficulty in defeating plaintiff's claims for failure to give notice of the liability event within two months of the damage. The plaintiff was injured at an aerobics class when she slipped on a water bottle left by an unknown participant. The plaintiff worked as a paralegal in an ICBC defence practice, but had no familiarity with municipal law. During the first two months of the accident she spoke to several lawyers who were acquaintances. Only one of them mentioned the need to commence an action within 6 months; none of the lawyers mentioned the two-month notice provision in s. 288 of the *Local Government Act*. The Court of Appeal's decision in *Teller v. Sunshine Coast Regional District* instructs trial judge's to consider all the circumstances in determining whether a plaintiff has a reasonable excuse for failure to give notice within two months of an accident. Ignorance of the law, the gravity of the injury, language or comprehension difficulties or difficulties appreciating the possibility of local government liability may provide sufficient reason for not providing notice in the required time. They are all factors to be weighed.

The cases indicate that negligent legal advice will not shield a plaintiff (who may substitute a claim against the local government with a negligence claim against the lawyer). Delta argued that the plaintiff should have done more than rely on the casual "water cooler" advice given casually by the lawyers she spoke with shortly after the accident. The judge however thought it would not be reasonable to require persons who sustained a relatively minor injury to "at all times seek legal advice." He thought many lawyers who didn't regularly practice municipal law would in any event have been unaware of the notice requirement. Cumulatively, the plaintiff's predominating concerns for recovery from her injuries and return to work, need to take care of

her family and the lack of knowledge and lack of advice of the need to give timely notice was sufficient to provide a reasonable excuse.

IV. BYLAW ENFORCEMENT

A. Grow Ops – Powers of Entry

Arkinstall v. City of Surrey 2008 BCSC 1419

The owners' residence was targeted by Surrey's Electrical and Safety Inspection Team for an electrical inspection under the *Safety Standards Act* (the "SSA") based on historically high electrical consumption which suggested the possible presence of a grow op. The residence being 6800 square feet with an indoor pool, sauna/steam room, hot tub, greenhouse and central air conditioning provided another less sinister explanation for the high power consumption. Due to unexplained previous dealings with the police Mr. Arkinstall was prepared to allow the non-police members of the Team entry into his house but he insisted that the police not enter except with a warrant. The condition on police not entering was not acceptable to the Team which later followed through with the threat of disconnection for refusing unqualified entry to all Team members. The power was ordered re-connected as a result of the owners obtaining an interlocutory injunction.

In proceedings involving the City, the Attorney General and BC Hydro as respondents, the owners attacked the constitutionality of the 2006 amendments to the SSA as, first, being a colourable exercise by the province of the federal government's exclusive jurisdiction over criminal law and, second, a violation of Sections 7 and 8 of the *Charter of Rights* by authorizing warrantless inspections of private dwellings. The primary feature of the 2006 amendments had been the authority granted to local governments to request electrical consumption records from BC Hydro and other electrical utilities and to provide for notices of inspection to owners following on the receipt of the records.

The petitioning owners, supported by the BC Civil Liberties Association, argued that the amendments was intended to stiffen the criminal law regarding grow operations by supplementing a criminal prohibition with a penalty of electrical disconnection and the seizure of marijuana plans and growing equipment. They pointed to the province's declared aim of shutting grow ops down, as opposed to merely rendering them safe, and the strict insistence on police entry as part of the inspection process as revealing a true criminal law purpose. The court made full use of the extrinsic materials outlining the development of the Surrey EFSI project and that Team's identification of the lack of access to electrical consumption records as a limitation on the Team being more effective. The statements of two ministers in introducing the 2006 amendments were relied on to support the conclusion that in pith and substance the amendments were directed at "facilitating the identification and inspection of grow operations in the interests of public safety." Criminal enforcement aspects, such as freeing up police resources were ancillary and incidental to the public safety objective of the amendments. The judge considered it significant that one of the main advocates for the amendments was a fire chief.

Tactically the petitioners may have put themselves at a disadvantage by conceding the constitutionality of the pre-amendment Act, as the judge emphasized that for the most part the Team enforcement process being attacked was possible under the legislation pre-amendment. For example, disconnection, seizure of marijuana plants and growing equipment found during inspections and penalties for failure to comply with orders were unaltered by the amendments.

The court also rejected the argument that the amendments would have the foreseeable consequence of increasing electrical bypasses, undermining the purported public safety purpose. Questions regarding the efficacy of the legislation are best left to the legislature. The judge concluded the division of powers assessment by stating that to the extent that deterring and shutting down grow operations would reduce criminal activity associated with marijuana cultivation, this had long been recognized as a valid provincial objective; the provinces having concurrent authority with the federal government respecting suppression of conditions fostering crime and the prevention of crime.

On the *Charter of Rights* question the petitioners contended that searches of private residences under the SSA were not regulatory searches, permissible without warrant. They argued that the inspections focused on investigating criminal drug operations, the need for police presence and potential criminal consequences as framing the inspections with criminal law aspects. Any search would have to have prior judicial authorization, such as could occur using an administrative warrant under s. 275 of the *Community Charter*.

The court concluded that the entry provisions of the SSA were not contrary to s. 8 of the *Charter*. In balancing the individual's privacy interests in their and the province's interests in monitoring compliance with the SSA, the BC Hydro Electrical Tariff was found to circumscribe the individual's reasonable expectation of privacy. Inspections under the SSA were of a regulated service that could present a danger to the occupants and the community. They were safety driven, not criminal enforcement driven. Inspectors were required to have reasonable grounds under the Act and they conducted inspections at a date and time arranged with the owner, and not unannounced.

The court also drew some support from the BC Court of Appeal's 1986 decision upholding warrantless zoning inspections in ***R. v. Bichel.*** *Bichel* approved routine area inspections without any advance proof of an infraction, while the judge in Arkinstall observed that inspections under the SSA required reasonable grounds, arguably making them less intrusive. The petitioners questioned Bichel as a dated authority but it had notably been cited by the Supreme Court of Canada and continues to be relevant.

The judge sided with the petitioners on the ability of the police to enter a private residence under the authority of an SSA inspection. The respondents had sought to justify the police presence as an incident of their common law duty to preserve the peace. The judge accepted for the sake of argument that the police were acting in the exercise of a lawful duty, i.e. the protection of life and property and the preservation of the peace. However, the invariable requirement of a police presence could not be justified. There was no evidence to suggest that it was necessary to deal

with specific concerns relating to the petitioner's residence. The strict application of the policy requiring a police presence meant that it was irrelevant whether a residence was occupied, in the judge's example, by a 27 year old known drug dealer or an 87 year old widow who had never been the subject of a police investigation. Police intrusion into the privacy of a residence added a significant stigma to the inspection. Without any assessment of the specific circumstances to justify the police presence, the court concluded police attendance was not justifiable at common law, and thus resulted in a search that was contrary to s. 8 of the *Charter*.

The judge was careful to emphasize that he was not saying that at common law the police may never enter a residence without a warrant for the purpose of assisting inspectors. The circumstances that could conceivably justify their presence were not an issue before him however. He suggested that if the legislature considered there were real safety concerns which made police participation necessary that would be an appropriate issue for legislators to address. Alternatively, he observed that authority for police entry might be found in warrants issued pursuant to s. 275 of the *Community Charter*.

While *Arkinstall* is not an unqualified win for local governments, the court's decision upholding the constitutionality of the SSA amendments and the warrantless inspection powers is important for dealing with the public safety concerns associated with marijuana grow operations.

B. Perils of Pro Forma Affidavits

Township of Langley v. Jesiak 2008 BCSC 123

Langley sought an injunction to restrain the use of two "temporary" tents erected on the property in 1999, which it claimed were being used in connection with the owners sandblasting business. As well as relief under the zoning bylaw for the alleged unlawful use, the Township sought relief under the building and business licence bylaws. The court granted injunctions in respect of the lack of a building permit and business licence but rejected the claim in respect of the zoning bylaw.

The case highlights the pitfalls of relying on formulaic affidavits in a petition proceeding. The one bylaw officer that provided an affidavit deposed that on inspecting the property he noted that the tents contained commercial vehicles and other pieces of heavy sandblasting and painting equipment, and that other equipment was stored outside the tents. There was no evidence as to how the equipment was being used on the property at the time of the inspection. Without some specific evidence describing a business use on the property, the court was not prepared to give weight to the enforcement officer's affidavit general endorsement of the allegations in the petition as being sufficient to make out the breach of the zoning bylaw.

Having rejected the Township's case on the zoning breach (which again was that the respondents were operating a sandblasting business from the property) it may seem somewhat odd that the court would apparently rely on the respondents having applied for a business licence as sufficient support for the conclusion that without a business licence it was a breach of the business licence bylaw to store sandblasting and painting equipment and vehicles on the property.

C. Burden of Proof on Historic Breaches

Burnaby v. Chiodo 2008 BCSC 491

The defendant Chiodo bought the property in 2005 and sought to sell it in 2006 through a realtor that advertised it as having two basement suites. The house had been constructed in 1953 under a permit that allowed the owner to live temporarily in the basement while the upstairs living quarters were completed. Chiodo filed an affidavit from his next door neighbour to the effect that she had been familiar with the house since 1959 when she moved in. Her affidavit stated that there had always been a kitchen with stove in the basement. The judge thought it curious however that while the neighbour claimed knowledge of the house her affidavit was silent on whether or not there had been an interior staircase connecting the basement with the upstairs. The City's building inspector gave evidence that houses of the vintage of Chiodo's likely would have been constructed with an interior staircase.

The City's bylaws had prohibited secondary kitchens since the 1960's. In 1989 the City ordered the then owner to remove an illegal suite in the basement but there was apparently no compliance with the owner. The City's inspection of the house in 2006 resulted in a lengthy list of building and electrical bylaw contraventions relating to alleged illegal construction.

The defendant argued that certain aspects of the house complied with the building codes in effect at the date of construction. Chiodo, however, did not provide any evidence as to when the questioned improvements were made As none of the construction had taken place under permit the City's records could not assist him in establishing the date of construction. The court noted that there was no attempt to produce evidence from an expert on the date of construction based on an examination of the work. Without evidence as to when the works were carried out the court held that the defendant was unable to demonstrate that the work complied with the codes and regulations in effect when the work was done. The court was not prepared to accept the defendant's simple assertion that the work was not a problem when it was undertaken.

This was not a case where the court considered non-conformity principles apart from the second kitchen authorized as a temporary measure in 1953. With no permanent authorization the judge rightly rejected the non-conformity claim in respect of the kitchen. For the remainder of the contraventions the court might have required the City to bear the onus of establishing that the construction was not code-compliant when undertaken. However, the judge inferred from the absence of any City records that whoever did the work did not get the necessary permits. From that conclusion the court took a practical and sensible approach in concluding the non-permitted construction was also non-compliant with the code and municipal bylaws and must be rectified by the current owner.

D. Accessory Building Use – B & B

Sechelt (District) v. Cutlan 2008 BCCA 368

The respondent owners commenced construction of a main and accessory building prior to a zoning amendment bylaw which made it clear that a bed and breakfast use was not permitted in an accessory building. The District maintained that even before the amendment an accessory building could not be used as sleeping accommodation. The appeal court upheld the chambers judge's conclusion that the presence of sleeping accommodations in the accessory building would bring it within the definition of a "dwelling unit." The context of the bylaw made it clear that when dwelling units were intended to be permitted within a zone, explicit provision had been made. Accordingly, it could not be inferred that an accessory building was intended to include a dwelling unit, particularly where accessory building was listed as a permitted use in the same zone along with single family dwellings, a use that explicitly included a dwelling unit.

E. B & B Use – Part Two

0757107 BC Ltd. v. Town of Lake Cowichan 2008 BCSC

After initially submitting plans for a bed and breakfast with two kitchens, followed by a modification showing the previous kitchen area as a "mud room," the owners eventually confirmed their intention to construct a second kitchen within the residence. The subject zone allowed for bed and breakfast but not two family dwellings, which were permitted in another zone that didn't allow for bed and breakfast uses. Unfortunately the zoning bylaw did not define bed and breakfast use.

The court accepted the Town's position that the residence would become a two family by addition of the second kitchen. By implication a bed and breakfast use, being distinct from the single family and two family residential dwelling uses, did not allow the presence of a second kitchen, permitted within a two family residential dwelling. If the court accepted the owner's argument that a bed and breakfast use included additional kitchen facilities, there would be no reason for limiting the number of dwelling units to two, as opposed to twenty. The court was satisfied that the single family residential zone was intended to be more restricted in its permitted uses than the urban residential zone that permitted two family residential dwellings.

F. Ancillary Buildings

Burnaby v. Hayre 2008 BCCA 412

The Supreme Court judged denied Burnaby's injunction application relating to the construction of a concrete bunker-style garage, which consisted of the addition of a concrete roof slab spanning two retaining walls. The owner denied that he was using the structure to store or park vehicles. The chambers judge held that the structure did not meet the definition of a private garage in the zoning bylaw.

Burnaby was successful in convincing the appeal court that the bunker garage was a structure and a building within the meaning of the zoning bylaw. It was irrelevant whether the structure also met the definition of private garage. The owner's subjective intentions as to the use of the structure were also irrelevant. The words in the zoning bylaw "used or intended to be used" which were part of the definition of "structure" had to be interpreted objectively. The concrete structure objectively was intended to be a shelter, the design satisfying the definition of building. The construction of the garage contravened the floor area restrictions of the zoning bylaw which required that ancillary buildings had to be taken into account in determining the maximum permissible floor area.

G. Kennel Noise and Unhelpful *Obiter Dicta*

Coquitlam v. Crawford 2008 BCSC 993

The City was unsuccessful in its application for an injunction to restrain the breach of its noise bylaw. The neighbours closest to the kennel gave evidence of barking that interrupted their sleep and made use of their backyards unenjoyable. Other neighbours further away gave evidence that coyotes and other dogs in the neighbourhood were bothersome but not the dogs at the defendants' kennel. Evidence of a noise expert confirmed that barking from the kennel on occasion persisted for up to 3 hours. The barking was at times the dominant noise rising above background noise levels. While the Coquitlam noise bylaw did not establish maximum noise levels by reference to decibel standards, it seemed significant to the judge that the maximum decibel level of the barking recorded by the noise expert did not exceed the maximum levels in the City of Vancouver bylaw for either daytime or night time for a "quiet zone." The defendants had worked with the City and implemented several measures to minimize the noise from the kennels.

Of three sections of the bylaw which the City argued were applicable, the judge rejected two on rather dubious grounds. Regarding the section that no person shall make or cause or permit to be made or caused noise that disturbed the peace of the neighbourhood, the judge held that the owners were not making or permitting the noise from the dogs as dogs bark of their own accord. The court then considered the provision which prohibited owners from permitting their property to be used such that noise disturbed the peace, quiet, rest and enjoyment of the neighbourhood. Although three separate neighbours had testified in support of the City's case, the judge commented that this provision could not be interpreted so broadly that there could be a breach if a single person was disturbed. That may have been a fair reading of the bylaw provision but it was less than a fair reading of the evidence.

The court then addressed the bylaw section that provided that no person shall harbour any animal that by its cries "unduly" disturbs the peace and tranquility of the neighbourhood. Giving due regard to definitions of unduly as "excessive or unwarranted" the judge concluded that she could not find that the cries of the dogs (adding her doubt as to whether it could be said that dogs "cry") disturbed the surrounding neighbourhood. Had the judge stopped there the judgment might not have been that problematic. After all the court was faced with a conflict in the

evidence of the neighbours as to whether the dogs from the kennel were a source of disturbing noise. In determining which of the two factions' evidence to accept the court was entitled to place some weight on the City's bylaw officer that the noise had been attenuated by the creation of a berm at the edge of the property. Equally the judge could justifiably conclude that at least one of the complainants had been shown to have a tendency to exaggerate his evidence.

However, having found that the evidence did not make out a violation of the bylaw, the judge felt compelled to continue with an analysis of whether the City would have been entitled to an injunction. The judge referred to the case law that acknowledges that the very narrow scope of the court's discretion to deny a statutory injunction on proof of a breach. The judge then strayed into a consideration of the fact that the property was properly zoned for kennel use, asserting that the owner had the right to operate the kennel. Considering the several steps taken to reduce the court stated that there had not been any suggestion of other measures could have been taken to operate the kennel business "and at the same time not breach the Noise Bylaw." The judge referred to the owner's difficult personal circumstances and followed with the statement that the public's right to an injunction had to be weighed against any hardship an order might impose on the owner. The court concluded by stating that the owner had done everything that was reasonable to keep the noise to a minimum "and they have not breached the Noise Bylaw."

The introduction to this last portion of the judgment was that the City's entitlement to an injunction would be considered on the basis that the court might have erred in the conclusion that the bylaw had not been breached. Yet the judge seems to be at pains to reinforce the earlier conclusion that the owners had not been in breach. If the judge had really intended to say that the owner had exercised all due diligence to avoid breaching the bylaw (but had not been successful) and that it would be oppressive in the circumstances to restrain the kennel operation, this portion of the judgment might have been less muddled and a potentially useful addition to the case law. As they stand the *obiter* comments only add confusion as to the nature of the residual discretion to deny a statutory injunction.

H. Clear Breach Standard at Interlocutory Injunction Stage

Saanich (District) v. Island Berry Company 2008 BCSC 614

In this case Saanich's application for an interlocutory injunction to restrain the deposit of fill without a permit was rejected on the basis that the court not conclude that there was a clear bylaw breach. There was no doubt on the factual part of the case; the defendant was depositing soil on lands that were in a floodplain, partly within and partly outside the Agricultural Land Reserve, to create a berm. However, in accepting that the law at the interlocutory injunction stage requires a local government to show a clear breach of the bylaw, the court held that this required it to go beyond an assessment on the facts to consider any possible legal defences. On two of three potential legal defences the judge found that there was some merit. The court was not required to make a final determination at the interlocutory stage. Rather all that was required was that the court be satisfied that it was reasonably open to the defendant to make the argument at trial.

The first meritorious defence was that the Soil Deposit Bylaw was a colourable attempt to designate land as a floodplain without obtaining the ministerial approval as required by s. 910(3) of the *Local Government Act*. The bylaw purported to prohibit the deposit of soil in a designated floodplain and there was some background of the District having sought the minister's approval but approval being refused because the designated area was not a natural floodplain, but rather had been created by inadequate municipal drainage. The second defence that was considered to have merit involved a provision in the ALR Subdivision and Procedure Regulation stating that certain activities including berming could not be prohibited by municipal bylaw. The judge noted that the District conceded that this was a reasonable argument.

The case highlights the difficult choice local governments may face when confronted with an arguably unlawful activity. As in Saanich's case, a local government can move quickly with an interlocutory application that could bring the illegal action to an immediate halt. However, the standard of proof – to establish a clear breach on legal, as well as factual grounds – is higher. Alternatively, the local government can proceed by writ or petition for a final order, avoid any prospect of having to give an undertaking as to damages, and face a lower legal and factual burden. However, by then the illegal activity may be concluded. Obtaining compliance when tons of soil have been deposited or trees cut may be more problematic.

The decision in this case is also useful in confirming that even at the interlocutory injunction stage the court should not consider denying a statutory based injunction on equitable or discretionary grounds.