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NEWSLETTER

Beware of the Perils of Overspending: New Local Election Campaign Financing Provisions Tested in Court

Newly-passed campaign financing provisions of the Local Election Campaign Finance Act *were tested in court for the first time this February. Under the Act, if a candidate overspends on campaign expenses, they cease to hold office and their seat becomes vacant. This draconian penalty operates automatically unless the candidate petitions the BC Supreme Court for relief on or before the compliance deadline for a campaign finance statement or report.*

Under the Act, a court may only grant relief if it is satisfied that:

(a) exceeding the expense limit did not materially affect the result of the election, and

(b) the candidate exercised due diligence to ensure that the candidate's campaign period expenses did not exceed the expense limit.

A Different Municipal Standard

Many of us remember *Heed v The Chief Electoral Officer of B.C.*, 2011 BCSC 1181, where the Court ruled that Cash Heed acted with good faith despite overspending to the tune of nearly $70,000 in his successful bid for provincial office. The campaign finance provisions of the Elections Act only requires "good faith" and not the "due diligence" standard in its municipal counterpart. While these two terms may seem interchangeable, they mean very different things from a legal perspective. Broadly speaking, good faith is a lower standard than due diligence. Put another way, good faith means simply that an individual had the right subjective intention. Due diligence requires more: good intentions are not enough, and behaviour must be objectively defensible.

Practically this means candidates in municipal elections have to meet a higher standard than those running in provincial elections. Trying your best to not overspend and relying on your advisors may not be enough and municipal candidates will need to actively ensure they are not overspending to avoid the serious consequences that result.

The Recent Sidney Mayor's Case

In the unreported decision, Mr. Justice Bowden granted the relief sought by the petitioner Mayor of Sidney. In this case, the Mayor's financial

agent was out of the country during critical times of the election. A series of honest errors led to the candidate being over the campaign finance limits, which was only discovered after the election was completed. The election in this case was also a landslide victory, with the petitioner receiving over 80% of the votes.

Ultimately the Court was "completely satisfied" that the candidate exercised due diligence to ensure that his expenses did not exceed the expense limit. Despite this result, a different judge with a different set of circumstances may have taken a more restrictive approach which could lead to a local government's elected position(s) being vacant immediately after an election.

Ethan Plato & Reece Harding

Whale, Whale, Whale, What Have We Got Here? Court Finds Municipal Board Cannot Fetter its Bylaw Making Power Through a Licence Agreement

A recent decision of the British Columbia Court of Appeal, Ocean Wise Conservation Association v. Vancouver Board Parks and Recreation, *2019 BCCA 58, overturned a judgment that prevented the Vancouver Board of Parks and Recreation from prohibiting cetaceans at the Vancouver Aquarium. In this case, the Court affirms the principle that a municipality cannot fetter its bylaw making power unless there is legislation expressly authorizing the municipality to do so. The Court also found that the* Vancouver Charter *does not contain any provisions that expressly authorize the Park Board to fetter its bylaw making power.*

The Park Board passed a bylaw amendment (the "Amendment") to the *Parks Control By-law* in May 2017 prohibiting cetaceans (e.g. whales, dolphins, and porpoises) from being brought to, kept in or presented in a show at city parks. The Amendment was passed after two beluga whales died in captivity at the Vancouver Aquarium within days of each other due to toxicity from an unknown source. The Vancouver Aquarium, commenced judicial review proceedings to set aside the Amendment on the following four grounds:

(1) the Amendment was *ultra vires* on the basis it was precluded by the licence granted by the Park Board to the Aquarium;
(2) the enactment of the Amendment offended procedural fairness;
(3) part of the Amendment was void for vagueness; and
(4) the Amendment infringed the Vancouver Aquarium's right to free expression under s. 2(d) of the *Canadian Charter of Rights and Freedoms*.

The Park Board argued that a municipal body, imbued with legislative powers, is not permitted to fetter their legislative powers through a contract. Of the four grounds, the chambers judge found it necessary to only deal with the first ground; whether the Amendment was *ultra vires* on the basis it was precluded by the licence granted by the Park Board to the Vancouver Aquarium. The chambers judge agreed that the licence agreement prevented the application of the Amendment to the Vancouver Aquarium and declared the Amendment *ultra vires* and void to the extent it applied to the Vancouver Aquarium.

The Court of Appeal, however, allowed the Park Board's appeal and found the chambers judge erred in concluding the Park Board could fetter its bylaw making power in a licence agreement. To reach this conclusion, the Court of Appeal reviewed and applied the principles set out in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64 (CanLII) and *Wells v. Newfoundland*, 1999 CanLII 657. The Court listed the following anti-fettering principles derived from *Pacific National* at para. 48:

a) the fettering of a municipality's legislative powers is a very serious matter and a municipality cannot fetter those powers in a contract unless there is legislation expressly authorizing it to do so;
b) a municipality cannot indirectly fetter its legislative powers by being liable to pay damages for breach of contract in a non-business/proprietary contract concerning the exercise of legislative powers; and
c) a municipality will have to pay compensation for breach of business or proprietary contracts unless there is an express statutory provision denying compensation.

The Court of Appeal found the chambers judge had reversed the presumption that municipal bodies are not able to fetter their legislative powers unless there is some express permission to do so. The Court of Appeal reasoned that:

> [51] If one were to take the judge's reasoning to its logical conclusion, it would mean that whenever municipal legislation gives a municipal body the power to make bylaws and the power to enter into contracts, the municipality can fetter its legislative powers in a contract unless the legislation prevents it from doing so... [which is] contrary to the principles set out in *Pacific National*.

The Court of Appeal went on to find the chambers judge also erred in finding the *Vancouver Charter* authorized the Park Board's fettering of its legislative powers. The Court of

Appeal determined there were no provisions in the *Vancouver Charter* that permitted the Park Board such fettering and went on to discuss how the *Vancouver Charter* could be amended to permit fettering of municipal bylaw making powers:

> [66] A sufficiently clear authorization in the present case could have been included in the *Vancouver Charter* in at least two ways. First, a phrase could have been included in the s. 491 by-law making provision along the lines of "subject to provisions contained in any lease, licence or other agreement under s. 490(1)". Second, s. 490(1) could have included a phrase similar to the above-mentioned s. 702A(3) that the provisions of any lease, licence or other agreement were to apply "notwithstanding any by-law of the Board".

Lastly, the Court of Appeal found the chambers judge to have erred in relying on the decisions of *Kell-Erny's Ent. Ltd. v. Dyck* (1987), 1987 CanLII 2690 (BC CA) and *A.R.W. Development Corporation v. Beaumont (Town)*, 2011 ABCA 382 (CanLII) as supporting the power to fetter in preference to *Pacific National*. With respect to *Kell-Erny's*, the Court of Appeal found:

> [56] Kell-Erny's dealt with a fetter of a different kind than the fetter in this case (and in Pacific National). This case deals with a fetter of a municipal body's legislative powers. In contrast, Kell-Erny's dealt with a fetter of the statutory powers to regulate and manage a park. There was no exercise of legislative powers in Kell-Erny's, and it is of no assistance to the analysis in this case.

With respect to *A.R.W. Development*, the Court of Appeal found the chambers judge erred in relying on the principle that "a municipality cannot lawfully make use of its legislative authority for the purpose of annulling a valid and subsisting agreement to which it is a party to deprive the other party of his vested rights".

The Court of Appeal found the chambers judge had reversed the presumption that municipal bodies are not able to fetter their legislative powers unless there is some express permission to do so.

However, the Court of Appeal held that it was not asserted that the Park Board passed the Amendment for "the improper purpose of annulling or avoiding the 1999 Licence Agreement (as opposed to passing it out of what it considered to be in the public good)". Therefore, the anti-fettering principle endorsed in *Pacific National* should have been applied. The permissible form of fettering in respect of the exercise of a municipality's business or proprietary powers cannot be allowed to operate as a direct or indirect fetter on municipal legislative powers.

This decision is noteworthy as it affirms the primacy of the principle that a municipality cannot fetter its legislative powers unless there is legislation expressly authorizing it to do so. Additionally, this case highlights how the *Vancouver Charter* does not contain express authorization permitting the Park Board to fetter its bylaw making power.

Inder Biring

Are You Ready for the Surging Sea?

Sea level rise is a concern for coastal communities around the world, including in British Columbia. BC has approximately 170 coastal communities, which represent 4/5ths of its population. These communities will be affected by sea level rise to varying degrees. The BC government estimates that by 2100, sea level in the Vancouver area could rise anywhere from 0.04 to 1.03 meters, while the Fraser River delta could see sea level rise of 0.35 to 1.2 meters.[1]

This article will focus on the impacts of sea level rise on coastal communities in BC, particularly the Lower Mainland, and the powers local governments have to respond.

Local Government Impact

Local governments in BC will be affected by sea level rise in a variety of ways. Vancouver will experience an especially significant economic impact. Vancouver's at-risk assets include two of the region's most important employers and economic hubs, YVR International Airport and the Port of Vancouver, both of which sit within several meters of sea level. Other key pieces of infrastructure, such as ferry terminals and bridges, may also be damaged by rising waters. Areas of land may disappear entirely, with Stanley Park predicted to be an island separated from downtown Vancouver by 2100 if no adaptation measures are implemented.[2]

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While sea level rise is not a direct threat to human life given its slow onset, it will have an impact on populations by forcing relocation of people living in affected areas and affecting the livelihoods of many more. The population will also be affected by emergencies and natural disasters related to sea level rise, particularly storm surges and flooding. Local governments have a responsibility to prepare for these events and respond to them when they occur.

Local Government Response

In BC, the responsibility for preparing for sea level rise rests primarily with local governments. Broadly speaking, there are four major strategies for responding to sea level rise: avoidance of vulnerable areas; protection of property and infrastructure; accommodation of higher sea levels; and managed retreat from vulnerable areas. Some strategies are more effective than others. Too much reliance on protective measures can lead to massive spending on infrastructure and gives rise to a false sense of security, which may in turn encourage more development in vulnerable areas. Accommodation of the effects of sea level rise through building regulations, zoning, development permits and emergency preparedness is a superior option.

Which strategy is the most effective in a given area will depend on a number of factors, including the population density, the value of property, the capacity for moving structures and assets, and the degree of flooding risk. The remainder of this article will consider some (but not all) of the tools that local governments may use in implementing one or more of these strategies.

Protective Infrastructure

Protective infrastructure, such as dikes and sea walls, is the cornerstone of the protection strategy. Constructing such infrastructure is primarily the responsibility of local governments. Protective infrastructure falls into two main categories. Hard infrastructure is engineered, constructed infrastructure such as dikes, sea walls, and breakwaters. Soft infrastructure is more natural and includes beach restoration, tree planting, and construction or enhancement of wetlands or dunes.

The dike is one of the most widespread forms of hard protective infrastructure in BC. The Lower Mainland alone relies upon 600 kilometers of dikes, 400 flood boxes, and 100 pump stations to prevent flooding.[3] Upgrading dikes to prepare for sea level rise will be expensive. In the Metro Vancouver area alone, the estimated cost of upgrading dikes to current provincial standards is $9.5 billion.[4] This includes the cost of acquiring property on which to build dikes, implementing seismic resilience features, environmental impacts, and actual dike construction.

While hard infrastructure focuses on the protection strategy, soft infrastructure implements aspects of adaptation and avoidance as well as protection. A natural approach to adaptation for sea level rise also requires less capital and maintenance costs than do other forms of infrastructure and has added benefits for public recreation and enjoyment. Soft infrastructure may also be more environmentally friendly than hard infrastructure, which may contribute to erosion and habitat destruction.

Zoning Bylaws

An effective tool for local governments in the avoidance, adaptation, and managed retreat response strategies to sea level rise is the zoning bylaw power. Where an area is identified as vulnerable during the planning process, the local government may pass a bylaw prohibiting future development of that area. The slow onset of sea level rise allows local governments to take a long-term approach to land-use planning using zoning bylaws. For example, a local government could pass a zoning bylaw that requires uniformity in the lifespans of buildings in a certain zone. A developer of property in the zone would have to enter into a covenant on title acknowledging that higher flood construction levels and setback rules may apply to reconstruction at the end of the building's lifespan period. Less flood-secure structures could be permitted today, with the local government still preserving the potential to increase flood mitigation requirements when buildings are replaced in the future.

Zoning bylaws may also be used to ensure that vulnerable areas will be put to low-risk uses, such as for agriculture, short-term industrial uses, forestry or recreation, so that more valuable assets, such as schools, hospitals, or important infrastructure, will not be threatened. The power of zoning is limited where at-risk lands are already developed. While zoning bylaws cannot be used to force relocation of developed areas, they may be used to limit further development unless appropriate flood prevention measures are in place or are being implemented.

Development Permits

Development permits are a tool unique to BC that can be used in any of the sea level rise response strategies. Local governments can

designate lands that are exposed to particular hazards as Development Permit Areas (DPAs) in order to manage or prevent development. DPAs can be created for a range of purposes, including two that are particularly relevant to sea level rise: to protect the natural environment and to protect development from hazardous conditions. Where a DPA is intended to protect the environment, it may prohibit development entirely except in accordance with conditions, or may require the developer to protect or restore certain natural features. Where a DPA is intended to protect development from hazards, it may identify vulnerable areas and set out guidelines for and restrictions on development in those areas. Once a DPA has been designated, no development, subdivision, or alteration of the land can take place unless a development permit is issued.

Conclusion

While sea level rise over the next century poses a significant threat to the many coastal communities in BC, there is much local governments can do to respond. Sea level rise is already occurring, but its most significant effects will not be felt for many decades. This gives local governments ample time to engage in thoughtful preparation and community education. With such a wide range of tools available, the responsibility lies with local governments to prepare their communities for the present and future impacts of rising seas.

[1] British Columbia Ministry of Environment, "Sea Level Rise in BC: Mobilizing Science into Action," by Sustainability Solutions Group & MC3: www.retooling.ca/_Library/docs/bc_sea_level_rise_en.pdf.

[2] City of Vancouver, "Sea Level Rise," online: http://vancouver.ca/green-vancouver/sea-level-rise.aspx

[3] British Columbia, "Dike Management," online: http://www2.gov.bc.ca/gov/content/environment/air-land-water/water/drought-flooding-dikes-dams/integrated-flood-hazard-management/dike-management

[4] British Columbia Ministry of Forests, Lands and Natural Resource Operations, "Cost of Adaptation – Sea Dikes & Alternative Strategies," http://www.env.gov.bc.ca/wsd/public_safety/flood/pdfs_word/cost_of_adaptation-final_report_oct2012.pdf >

Kathleen Higgins

Payment after the Tax Sale Redemption Period: A Day Late Savings Time?

Municipal collectors should pay particular attention to the recent decision of 521006 B.C. Ltd. v. Pemberton (Village)*, 2019 BCSC 526 as it adds a judicial twist to the strict tax sale provisions of the* Local Government Act*. Most readers will have moved on to the next article, but for those still reading, the five key facts in the* Pemberton *case are as follows:*

- The corporate owner of land in the Village of Pemberton fell a few years behind in paying the property taxes that were due on a property it owned, such that the property was liable for tax sale on September 29, 2014.
- The property was sold at tax sale and the deadline to redeem the property under the

Local Government Act was September 29, 2015.
- The owner's principal was misinformed by the Village in the notice of tax sale and was told the property could be redeemed up until September 30, 2015.
- The owner tendered the redemption amount to the Village on September 30, 2015 and the Village initially accepted the money, but later sought to return it on the basis that the collector would be filing a notice of non-redemption.
- The owner threatened and later commenced legal action on November 19, 2015 for the purpose of preserving its title to the land, and the Village agreed not to file a notice of non-redemption until the claim was resolved.

This unfortunate fact pattern is a reminder to collectors to correctly state when the redemption period ends in their notice of tax sales. A few municipalities incorrectly state that the redemption period ends at 10:00am, which is too early, but arguably better than being a day late as occurred in this case.

The court considered the effect of three provisions in the *Local Government Act* in determining what claim the late-paying owner could make:

- During the period allowed for redemption, an action may be brought under section 422[*now s. 666*] to have the tax sale set aside and declared invalid (s. 421(1)(c) [*now s. 666(1)(c)*]).
- If a parcel of land sold for taxes is not redeemed as provided in this Act, at the end of the redemption period, the collector must forward a notice to that effect to the registrar of land titles (s. 420(1) [*now s. 663(1)*]).
- After the end of the period allowed for redemption, no action may be brought to recover the property sold or to set aside its sale (s. 424(1) [*now 669(1)*]).

Interestingly, in deciding the issue, Madam Justice Horsman found that the owner could still commence an action for declaratory relief declaring the tax sale to be invalid and declaring the transfer of the property to the purchaser at tax sale to be illegal and invalid. Because the purchaser at tax sale had not yet received registered title to the property, no transfer of registered title need be set aside.

Had title already been transferred, the bar against actions "to recover the property or set aside its sale" commenced after the redemption period could very well have limited the owner to asserting a claim for damages against the Village. Such a scenario would raise difficult questions as the *Local Government Act* strictly limits the claims that can be made against a municipality "by reason of the sale" (s. 669(2)(b)). For example, the owner is entitled to an indemnity for loss if they do not receive the statutorily required notice of tax sale, but the owner cannot make a claim for such an indemnity if the owner was aware that the property was sold at tax sale during the redemption period. Does this mean that a collector could mislead the owner about the process to redeem with impunity, even if it causes or contributes to an owner to fail to redeem in time? In her reasons for judgment, Madam Justice Horsman rejected an interpretation of the *Local Government Act* that left the owner with no remedy whatsoever. Ultimately, whether such a damages claim could be made ceased to be an issue as the court declared the tax sale invalid and the owner retained title to the property.

The court's declaration of invalidity due to a failure to give proper notice of the tax sale and date the redemption period ends appears to be inconsistent with earlier court decisions, including *McCready v. Nanaimo (City)*, 2005 BCSC 762, which held: "If council fails to properly notify the owner of the sale, the owner is given certain remedies against council. Council cannot rectify its failure to give notice

by cancelling the sale to the prejudice of the purchaser." In the *Pemberton* case, the court allowed the owner to claim a court ordered remedy that could prejudice the purchaser. The purchaser was named as a defendant in the *Pemberton* case, but did not attend the trial to argue in opposition of the relief sought by the owner.

Collectors may have difficulty reconciling the impact of the *Nanaimo* and *Pemberton* decisions. If a collector recognizes that they have failed to properly notify the owner of the tax sale and the date the redemption period ends, *McCready* suggests that there is nothing the municipality can do to declare the sale invalid. *Pemberton* supports the conclusion that the affected owner can apply to the court to have tax sale declared invalid and can do this either during or after the redemption period ends, so long as the collector has not filed the notice of non-redemption. This raises a number of practical questions: How long does a collector wait after the redemption period ends before complying with the statutory directive in section 663(1) of the *Local Government Act* to file the notice of non-redemption? What does the collector do with money tendered by the owner as the redemption amount after the redemption period has ended? What if the tax sale notice mis-states the time in which the property can be redeemed by a full year? What is the collector to do if he or she suspects that the owner does not want to redeem and does not want the tax sale to be declared invalid, either because the owner has no equity in the property or prefers to receive the surplus from the tax sale?

If these questions are answered in future court cases, it will be interesting to see whether the cases are claims brought by an owner who failed to get property notice of the tax sale, as in the *Pemberton* case, or by a purchaser at tax sale who has been denied the benefit of a collector filing the notice of non-redemption, as in the *Nanaimo* case. In both scenarios, the municipality receives the delinquent property taxes that it was owed, but must also deal with a party upset that the collector failed to fulfill a statutory duty.

Michael Moll

Alert: Judicial Review of Municipal Procurement

A recent decision of the BC Court of Appeal serves as a chilling reminder that local government procurement decisions, in addition to attracting potential liability under the law of tendering, may also be subjected to judicial review.

In *Murray Purcha & Sons Ltd. v. District of Barriere*, 2019 BCCA 4, the petitioner, an unsuccessful bidder following a District request for proposal process for winter road maintenance services, sought judicial review of the District's procurement decision. The petitioner was the incumbent service provider from 2013 – 2016, but when the contract concluded the District

decided to test the market. The RFP process called for each bidder to submit two envelopes. In the first envelope, each bidder was to state its qualifications, references, and its proposal for performing the work. If the bidder scored at least 70 out of a possible 110 points, then the second envelope containing its price would be opened. Each bidder's price would then be adjusted based on the bidder's score in the first stage, with the raw price accounting for 90% of the adjusted price. The District received 5 bids, which all met the minimum 70-point score as determined by a District staff person. The petitioner's adjusted price was $180,000, while the lowest price was $156,000. The District's council awarded the contract to the low bidder.

The petitioner did not sue alleging a breach of contract under tendering law, likely because the District's tender documents contained standard "no Contract A" language. Instead, it sought judicial review of the District's procurement decision. Judicial review is the process by which a person affected by a statutory decision can challenge the decision in court. Local governments typically face judicial review following the adoption of a rezoning bylaw or the refusal to issue a permit. Judicial review is rarely invoked following a local government's exercise of its natural persons power to contract.

In B.C. Supreme Court, the petitioner argued that the District had breached its duty to act fairly in making its procurement decision by not disqualifying the lowest bid for, among other things, revealing its price in the first envelope. In a cover letter accompanying its bid, the lowest bidder had brought to the attention of the District its policy of investing 3% of its revenues back into the community and had stated that in this case approximately $4,600 would be re-invested. Accordingly, by way of a quick calculation the bidder's total price was revealed in the first envelope. In the eyes of the petitioner, this was an attempt to influence the evaluator at the first stage of evaluation in contravention of the RFP process.

The Supreme Court determined that the District's procurement decision would be evaluated on the standard of reasonableness. The Supreme Court accepted testimony that it did not occur to staff that the low bidder had revealed its price through the cover letter, and noted that at the point of disclosure the other bidder's prices were unknown, the inference being that the extent of the influence on the evaluator, if any, was uncertain. The Supreme Court held that the procurement decision met the standard of reasonableness, and if the court's determination on the disclosure issue were incorrect, it would have exercised its discretion under the *Judicial Review Procedure Act* to validate the decision despite the defect.

At the Court of Appeal, the Court determined that the question of whether the District had made its decision in a procedurally fair manner would be determined on a standard of correctness, and the substantive decision would be assessed on a standard of reasonableness. The Court of Appeal held that if the District followed the process outlined in its RFP it would have met its duty of procedural fairness. Despite the District not disqualifying the low bidder's bid because of its disclosure of price, the Court held that the District met its duty of procedural fairness and that its decision was substantively reasonable. Accordingly, the District escaped liability.

The threshold question of whether local government procurement decisions are subject to judicial review was not considered by either level of court, as that determination appears to be considered by Canadian courts as having been answered in the affirmative in *Shell Canada Products Ltd. v. Vancouver*, [1994] 1 S.C.R. 231. In *Shell*, the City's decision to pass resolutions prohibiting the City from contracting with Shell Canada due to its business operations in apartheid South Africa was held *ultra vires*. The cases that follow *Shell* demonstrate that the availability of judicial review in respect of local government procurement decisions is now firmly entrenched in Canadian law, notwithstanding that *Shell* did not

concern a procurement decision, strictly speaking, and notwithstanding that it is the minority judgment in *Shell* and the reasons given within it which has largely been cited as the basis for this development: see *Northland Road Services (Robson) Ltd. v. British Columbia (Minister of Transportation)*, 2004 BCSC 595, and *Bot Construction Ltd. v. Ontario (Ministry of Transportation)*, [2009] O.J. No. 3590.

Murray Purcha & Sons serves as a reminder to local governments that a well drafted "no contract A" clause and an exclusion or limitation of damages clause may not be enough to avoid a trip to court following a procurement. A local government must also ensure that its evaluation process is fair and that it conducts the evaluation in accordance with that process. As *Murray Purcha & Sons* shows, an inadvertent error in evaluation can cost a local government time and expense, even when it is successful in court.

Joe Scafe

Proposed Amendments to the *Labour Code* Receive First Reading in the BC Legislature

On April 30, 2019, the British Columbia Government tabled Bill 30-2019, Labour Relations Code Amendment Act, 2019 *("Bill 30" or the "Bill") for first reading in the British Columbia Legislative Assembly. The Bill proposes a number of amendments to the* BC Labour Relations Code *(the "*Code*") that will be of interest to local governments.*

Change to Definition of Picketing

Bill 30 proposes that the definition of "picketing" in Section 1 of the *Code* be amended to specifically exclude lawful consumer leafleting that does not unduly restrict access to or egress from a place of business, operations, or employment, or prevent employees from working at or from that place of employment.

Right to Communicate Restricted

Currently, section 8 of the *Code* provides a "right to communicate" defence to claims under section 6 of the *Code* that an employer has interfered in the formation, selection or administration of a trade union. Section 8 presently allows an employer or any person to "express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion". Bill 30 proposes that the right to communicate be limited to expressing a "fact or opinion reasonably held with respect to the employer's business". If adopted, the amendment , puts employers at increased risk of being found to have interfered in the formation, selection or administration of a trade union where statements to their employees about their trade

union, or representation by a trade union, do not meet the more stringent, objective test of fact or opinion "reasonably held".

Increased Successorship Protection

Bill 30 also includes proposed amendments to the successorship provisions in section 35 of the *Code*. The amendments provide that if a contract for services in relation to specific types of services is retendered, and substantially similar services continue to be performed, under the direction of another contractor, the contractor is, among other things, bound by any collective agreement that was in force just before it took over the provision of services. The types of services covered include building cleaning, security, bus transportation, food services, non-clinical services in the health sector, and any other services prescribed by the Lieutenant Governor in Council.

Mediator to Assist Parties to Develop an Adjustment Plan

Another proposed change in Bill 30 is the introduction in section 54 of the *Code* of a mediator to assist the parties to a collective agreement to reach an adjustment plan. Section 54 requires an employer to give notice to a trade union, and to meet in good faith to develop an adjustment plan if the employer intends to introduce a measure, policy, practice or change that affects the terms, conditions, or security of employment of a significant number of employees to whom the collective agreement applies. Bill 30 would amend section 54 to allow either party to the collective agreement to apply to the Labour Relations Board (the "Board") for the appointment of a mediator to assist in that process.

Arbitrators to Hold Case Management Conferences within 30 Days of Appointment

One change to the *Code* proposed by Bill 30 would impact the arbitration of grievances. The Bill proposes the addition to the *Code* of a new section 88.1 which would require an arbitrator to conduct a case management conference within 30 days of being appointed. During the case management conference, the arbitrator must schedule the exchange of information and documents, schedule hearing dates, and encourage settlement of disputes.

This change will likely result in parties starting their arbitration preparation much earlier than at present. To make the most of the initial case management conference, unions will likely issue their demands for document production very shortly after the arbitrator is appointed. Employers will then have to consider those requests and determine whether they will object to the production of any of the documents before the conference. We also anticipate that arbitrators will order the exchange of information and documents earlier in the pre-hearing stage of an arbitration than presently occurs, resulting in the potential for settlements earlier in the process, and fewer adjournments due to the lack of preparation of the parties.

Changes to Section 104 Expedited Arbitrations

Bill 30 also proposes a number of changes in respect of expedited arbitrations under section 104 of the *Code*. That section currently permits a party to a collective agreement to apply to the Labour Relations Board for the appointment of an arbitrator to hear a matter by expedited arbitration. That application must be made within 45 days of the completion of the grievance procedure. Section 104 also presently requires that the Board set the date on which the arbitration will start, which date must be within 28 days of the application to the Board for the expedited arbitration. If no settlement is reached, the arbitrator must hear the grievance and issue written reasons within 21 days after the conclusion of the hearing. If jointly requested by the parties, the arbitrator would also have to, where possible, issue an oral decision within one day after the end of the hearing.

Pursuant to Bill 30, the time period for an application for expedited arbitration under section 104 of the *Code* would be reduced to 15 days. The requirement that the Board set the date for the start of the hearing, and the 28-day period for the start of the hearing would also be eliminated. Instead, the arbitrator would set the hearing dates, with a requirement that the arbitration end within 90 days of the date of the application for expedited arbitration. The requirement for an oral decision within one day of the end of the arbitration, on the joint request of the parties, would remain. However, if an oral decision has been issued and the parties jointly agree that no written reasons are required, the arbitrator would no longer be required to issue written reasons. In all other cases, the arbitrator must issue written reasons not exceeding 7 pages within 30 days of the end of the hearing. Bill 30 also would amend section 104 of the Code to expressly specify the powers of an arbitrator appointed under section 104 to set hearing dates, order that the parties exchange brief written summaries of their positions, order the preparation of an agreed statement of facts, limit the time allowed to the parties to present evidence or oral argument, limit references by the parties to authorities, and establish procedures designed to facilitate an expedited decision.

If the above amendments are adopted, we anticipate that fewer cases will be referred for expedited arbitration. Only those cases which can actually be dealt with on an expedited basis within the 90-day time limit, and for which a 7 page decision will suffice, will likely be referred.

Commencement

The amendments to the *Code* set out in Bill 30 will be effective on the date that the Bill receives Royal Assent, except for the amendment to section 35 which will be effective retroactively to April 30, 2019, the date of the first reading.

Michelle Blendell

BC Court of Appeal Upholds Strata Corporation's Power to Restrict Short-Term Rentals

In a recent decision by the BC Court of Appeal, HighStreet Accommodations Ltd. v. The Owners, Strata Plan BCS2478*, 2019 BCCA 64 (CanLII), the Court upheld a strata corporation's bylaw restriction on short term rentals after finding the protections afforded to strata lot tenants, under section 143 of the* Strata Property Act *(the "SPA"), did not apply to tenants who were not physically occupying the strata lot. By interpreting the words "occupying" and "ceases to occupy" in section 143 of the* SPA *to mean physical occupation by a tenant, the*

Court of Appeal's decision has strengthened the position of strata corporations with respect to restricting owners/tenants from using their strata lots to offer short-term accommodations.

In this case the appellant, HighStreet Accommodations Ltd., was in the business of leasing strata lots from owners and then licensing those strata lots to individuals to use as short-term rentals. The licence agreements would generally be for a period of 60 to 80 days.

HighStreet entered into a lease agreement with the owner of a strata lot governed by the strata corporation for a term of just over one year. After HighStreet signed its lease, the strata corporation passed the following bylaw (the "Bylaw"):

> 46.5 An owner, tenant or occupant shall not permit a residential lot (as such term is defined in the bylaws) to be occupied under a lease, sublease, contract, licence or any other commercial arrangement for periods of less than 180 days.

When passed, the Bylaw prevented HighStreet from conducting its business when it entered into licence agreements with its clients for a period of less than 180 days. A dispute arose when the strata corporation fined HighStreet in contravention of the Bylaw and denied HighStreet's licensees' access and use of the strata lot.

HighStreet argued that since it was an existing tenant who occupied the strata lot at the time the Bylaw was passed, it was grandfathered from the Bylaw. Pursuant to section 143 of the *SPA*, where a strata corporation passes a rental restriction bylaw there is a grace period before the bylaw applies to a strata lot. Subsection 143(1) provides:

> 143 (1) Subject to subsection (4), a bylaw that prohibits or limits rentals does not apply to a strata lot until the later of
> a) one year after a tenant who is occupying the strata lot at the time the bylaw is passed cease to occupy it as a tenant, and
> b) one year after the bylaw is passed.

At trial, the BC Supreme Court held that the protections offered by section 143 of the *SPA* were not applicable to HighStreet's circumstances. The judge stated that "there was nothing in the legislation suggesting that occupancy of units arising outside of a tenancy agreement are protected in any way" and that "only tenants occupying the lot can benefit from the non-applicability of rental restrictions".

The judge stated that "there was nothing in the legislation suggesting that occupancy of units arising outside of a tenancy agreement are protected in any way" and that "only tenants occupying the lot can benefit from the non-applicability of rental restrictions".

HighStreet appealed the trial judge's decision and argued that the Bylaw did not apply to it by virtue of section 143 of the *SPA* and that the judge interpreted the provision "unduly narrowly, erroneously limiting its right to deal with the strata lot as it saw fit in the absence of an applicable restriction".

HighStreet argued that since its tenancy with the strata lot predated the adoption of the Bylaw, it, along with its licensees, were protected under section 143(1)(a) of the *SPA*; that is, the Bylaw should not apply until one year after it ceases to occupy the strata lot as a tenant. In response, the

strata corporation argued that section 143(1)(a) of the *SPA* was not applicable to HighStreet as it was not a tenant occupying the lot; its clients occupied the strata lot.

The Court of Appeal found HighStreet's interpretation of section 143 of the *SPA* would "produce the absurd result" of a tenant being able to ignore rental restrictions applicable to the other strata lot owners in the building for an indefinite period. The Court of Appeal held the judge erred in focusing on the nature of licensing relationships rather than on occupancy with respect to its applicability to s. 143 of the *SPA*. Accordingly, the Court of Appeal stated:

> [50]The words occupying and ceases to occupy in s. 143 are used here in a provision which establishes a reasonable grace period before a valid rental restriction bylaw passed by the collective membership of a strata corporation applied to an individually-owned residential strata lot. In this context, in my view, they must mean physical occupation by a tenant, whether that tenant is a corporation or a natural person.

Nevertheless, the Court of Appeal upheld the Supreme Court's decision and agreed that section 143 of the *SPA* applies to tenants who physically occupy the strata lot, which HighStreet was found not to do, as its clients, and not HighStreet, were occupying the strata lot through a licensing agreement.

This decision is significant as it has set the parameters of section 143 of the *SPA* and confirms that strata corporations can control short-term rentals procured through licence agreements. A tenant/owner who wishes to license their strata lots, may only rely on section 143 of the *SPA* if they occupy the strata lot at the same time they are licensing it. This decision illustrates that the *SPA* does not protect business models similar to that of HighStreet, but rather focuses on protecting purchasers of strata lots and balancing the interests of individual and collective owners.

Inder Biring

Miscellaneous Statutes: Did You know?

Did you know that under section 9 of the Weed Control Act*, a municipality may establish one or more weed control committees? The duties of the committee include compiling lists of weeds the committee considers noxious and requiring control, advising the council on the appointment of weed control officers under the Act and supervising such officers, and assisting in the administration of weed control programs. Note that as of the time of writing, cannabis has not been prescribed as a noxious weed under the Act.*

Joe Scafe

Look For Your Lawyers

Young, Anderson welcomed this year's summer student, **Sarah Strukoff** on May 6. Sarah just completed her second year of studying law at Thompson Rivers University.

This year's GFOABC Conference in Victoria, will see a number of Young, Anderson presentations. On May 28, 2019, **Michael Moll** will participate in a pre-conference workshop on the annual municipal tax sale. On May 29, **Joe Scafe** will be presenting a session on permissive tax exemptions at the conference's collector's forum and on May 30, **Kathleen Higgins** will speak on local service taxes.

We look forward to welcoming **Amy O'Connor** and **Steven Shergill** as new associates after they complete their articles. Amy is currently articling at the Vancouver office of a national corporate law firm and Steven jumped straight into the municipal law world by articling with the City of Surrey.

On May 30 the CLEBC's Subdivision Regulation and Discretion seminar in Vancouver will include a presentation by **Mike Quattrocchi** with the 30-syllable title: "Subdivision Bylaws, Process, Statutory Considerations, and the Broad Powers of the Approving Officer" and a presentation by **Guy Patterson** more tersely called: "Bare Land Strata Plans, Phased Strata Plans, and Relevant Provisions of the Strata Property Act" (24 syllables).

Young, Anderson gives a fond farewell to **Sabrina Spencer** and **Curtis Jones** as they bring their ambition and legal-savvy to their new positions with Blakes, Cassels & Graydon and Worksafe BC, respectively.

Michael Moll and **Elizabeth Anderson** will be guest speakers at the Justice Institute of British Columbia's Bylaw 101 course in New Westminster on June 3 and August 26.

This year's LGMA Annual Conference in Vancouver will include a session lead by **Kathleen Higgins** and **Guy Patterson** entitled "The Cities We Need: Planning for Resiliency" on June 12 and a session featuring **Sukhbir Manhas** and **Elizabeth Anderson** called "Cannabis: The Lessons Learned so Far" in June 13.

Michael Moll will be presenting on "Remedial Action: Nuisance and Hazardous Properties" at LIBOA's annual conference on June 13 in Salmon Arm.

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