YOUNG ANDERSON
BARRISTERS & SOLICITORS

SEPTEMBER 2019, VOLUME 30, NUMBER 3

NEWSLETTER
UBCM CONFERENCE ISSUE

Tender "Reprisal Clause" Not Constitutionally Invalid

Observers of the law of tendering may recall that in Sound Contracting Ltd. v. Nanaimo (City), *2000 BCSC 1819, the BC Supreme Court held that it was within a local government's powers to exclude from its procurements contractors who have commenced court proceedings against the local government. Recently, in* J. Cote & Son Excavating Ltd. v. Burnaby (City), *2019 BCCA 168, it was argued that such clauses are invalid infringements on the constitutionally protected right to access the courts. The British Columbia Court of Appeal rejected those arguments, confirming that such clauses are not invalid as contrary to the* Constitution Act, 1867 *or the* Canadian Charter of Rights and Freedoms.

In 2013, one of J. Cote's employees was killed on a construction job for the City of Burnaby. J. Cote sued the City, and a few months later the City added a clause to its tender documents which made ineligible any bidder who had been involved in litigation against the City in the previous two years. J. Cote brought court proceedings against the City seeking a declaration that the "reprisal clause" was invalid on three bases: it unjustifiably infringed the constitutionally protected right of reasonable access to the courts contrary to the *Canadian Charter of Rights and Freedoms*, it prevented access to the courts in a manner inconsistent with section 96 of the *Constitution Act, 1867* and the rule of law, and that it was contrary to public policy.

At trial, the BC Supreme Court held that although the *Charter* provides persons accused of an offence the right to a trial within a reasonable amount of time it does not contain a general right of access to the courts for the resolution of civil disputes. Furthermore, J. Cote was not entitled to a *Charter* remedy because it could point only to the preamble and not to a section of the *Charter* which the impugned clause contravened. On the issue of the constitutionally protected right to access to the courts, the court noted that a rule that prevents access to the courts will only be unconstitutional where it imposes undue hardship on the person it affects. J. Cote argued that had it known that the City was going to impose the clause, it would not have brought its action related to the death of its employee and that the loss of the

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opportunity to bid on City jobs had caused it undue hardship. However, the BC Supreme Court held there was insufficient evidence to establish undue hardship because the amount J. Cote would have made on City work during the period it was blacklisted was speculative. Lastly, J. Cote argued that a rule that prevents a party from having recourse to the courts is invalid as against public policy. The trial court reviewed *Sound Contracting* and a case from the Alberta Court of Appeal, both cases in which the court held that the prohibitions were established for legitimate business purposes and were within the municipalities' powers to enact. The BC Supreme Court dismissed J. Cote's action.

J. Cote appealed the rulings on the *Charter* and the *Constitution Act*, abandoning its position that the clause was against public policy. The Court of Appeal confirmed that the *Charter* does not provide a general right of access to the civil courts. The Court of Appeal also confirmed that the right of access to the courts under the *Constitution Act, 1867* can only be infringed by a rule imposed by law, and rejected the appellant's submissions that the City's policy of not doing business with contractors involved in litigation against the City could be characterized as law. The Court of Appeal also held that the impugned term did not represent a barrier to the courts as in the cases relied upon by J. Cote in argument. Indeed, J. Cote accessed the courts when it sued the City relating to the death of its employee. Rather, the term presented contractors with a choice – whether or not to litigate against the City. Lastly, the Court of Appeal held that contract law, and by extension the freedom to choose with whom to contract, is governed by the private law principles of freedom of contract and commercial certainty, and absent a contractual term that offends public policy constitutional review is not appropriate. The appeal was consequently dismissed.

J. Cote's arguments appear to have been based upon a fundamental mischaracterization of the clause in question. The clause did not prevent any contractor from accessing the courts to enforce a contract or to seek recompense for an act or omission. Instead, it presented them with a choice: pursue such claims in court or continue to compete for City work. As the Court of Appeal confirmed, absent bad faith, constitutional protections do not apply to limit a party's right to choose with whom it does business in accordance with the private law principles of freedom of contract and commercial certainty.

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Court of Appeal Reconsiders Dangerous Dog Framework

It was a long road for Punky the Australian cattle dog, spanning all three levels of court in British Columbia and culminating in the Court of Appeal's decision in Santics v. Vancouver (City) Animal Control Officer*, 2019 BCCA 71. Punky had attacked and injured a woman who was sitting and texting at Locarno Park Extension. The victim of the attack had serious puncture wounds in her leg, which took a month to heal, leaving scarring and in some areas a loss of sensation.*

In Provincial Court, the judge concluded on the evidence that Punky was a dangerous dog which, as defined by the *Vancouver Charter*, includes a dog that has "killed or seriously injured a person". This same definition is found in the *Community Charter*. He then dealt with the issue of whether Punky should be euthanized, applying seven factors from *R v. Barber*, SKPC 178. The trial judge found that there was evidence that Punky had a history of aggression and biting, and that Punky's owner, Santics, had been warned many times about the risk that Punky posed but had failed to take any steps to alter his behaviour. Finally, the trial judge was concerned that Santics did not appreciate the extent of the risk posed by Punky.

Santics chose not to challenge the finding that Punky was a dangerous dog, but made three arguments challenging the destruction order: (1) that the trial judge ought to have considered her "property interest" in Punky; (2) that the trial judge made an error in finding that Santics would not obey court ordered conditions; and (3) that the trial judge made an error in finding that Punky could not be rehabilitated and should not be adopted. The BC Supreme Court found that all three grounds of appeal essentially raised the same question: "whether the trial judge should have given Punky a second chance".

Santics' arguments before the BC Supreme Court failed. The BC Supreme Court found that the trial judge properly balanced Santics' property interest with the public's interest in being reasonably safe and secure from a dangerous dog. Further, Santics' attitude toward Punky was determinative on the issue of a conditional order. The BC Supreme Court pointed to the evidence before the trial judge that Santics often referred to bites as "nips" and had argued that the victim's injuries were not severe as stitches had not been used. Before making this statement, Santics knew that stitches were not used because they would increase the risk of infection.

The BC Supreme Court also found that Punky was unlikely to be rehabilitated, holding that, once an animal control officer has proven that a dog is a "dangerous dog" for the purposes of the *Vancouver Charter* or *Community Charter*, the Provincial Court has jurisdiction to order the dog's destruction. All of the evidence, taken together, led to the conclusion that Punky was dangerous, and in turn established a basis for destruction.

On further appeal, the Court of Appeal confirmed the findings of the Provincial Court and the BC Supreme Court. The Court of Appeal went on however, to reconsider the broader dangerous dog caselaw, including *Capital Regional District v. Kuo*, 2008 BCCA 478. The key issue on appeal was whether a Provincial Court judge had the authority to find a dog to be "dangerous" within the meaning of s. 49(1) of the *Community Charter* or s. 324.1(1) of the *Vancouver Charter*, but still make a conditional order falling short of destruction. Mr. Justice Abrioux found that the plain meaning of these provisions, considered along with the scheme and object of the legislation, made clear that there was no authority for conditional orders.

However, the Court of Appeal found that a Provincial Court judge retains the discretion to decline to make a destruction order, even where the dog in question meets the statutory definition of "dangerous dog" – the Provincial Court judge simply cannot make an order other than for destruction, effectively ending conditional orders. The Court of Appeal stated that the overarching question relevant to any destruction application is whether the dog is "an unacceptable risk to the public". The Court of Appeal defined this novel standard with reference to whether, on the balance of probabilities, the dog is likely to kill or seriously injure in the future. The test for whether a dog is a "dangerous dog" within the meaning of the *Community Charter* and *Vancouver Charter*, on the other hand, is fully satisfied by past conduct of the dog having killed or seriously injured a person or domestic animal.

In the end, the result of the Court of Appeal's decision is somewhat mixed. By putting an end to conditional orders the result may be to shorten the length of dangerous dog proceedings, which were frequently prolonged by evidence as to whether the dog could be rehabilitated and what rehabilitative measures might be effective. However, the animal control officer and intervenor Licence Inspectors' and Bylaw Officers' Association of BC had asked the court to affirm that an order for destruction must be made where the dog was shown to meet the statutory definition of dangerous dog. Instead, the Court opted for the heightened standard of demonstrating an "unacceptable risk to the public", requiring the court to find a future likelihood of the dog killing or seriously injuring a person or domestic animal.

Nick Falzon

Keep Calm and Ride On: New Ride-Hailing Regulations Announced

After years of anticipation, online platform "ride-hailing" services, such as Uber and Lyft, may finally start operating in British Columbia later this year. Ride-hailing services, which the Provincial legislation calls "Transportation Network Services", are services where passengers use a website or mobile application to hire and pay for travel in a licensed vehicle. In September 2019, new regulations come into force that support the full implementation of these services in BC.

The *Passenger Transportation Amendment Act* and Regulation amendments provide the legislative basis for introducing ride-hailing to BC. The legislation focuses on passenger, driver and company safety, and grants exclusive jurisdiction over operating areas, fleet sizes and rates to the Passenger Transportation Board (PTB). The PTB is an independent tribunal in BC established under the *Passenger Transportation Act* and also governs taxis, limousines, shuttle vans, and inter-city buses. Any company seeking to provide commercial online ride-hailing in BC will require approval from the PTB, which may begin accepting applications on September 3, 2019. Once approved and issued a license, online ride-hailing companies will be permitted to operate in BC.

Operational Policy

The PTB recently released its operational policy for Transportation Network Services, outlining how much drivers can charge, where they can pick up and drop off, and the number of licensed vehicles in each region or area. The PTB has outlined that:

- there will be no initial limit on the fleet size for Transportation Network Service companies;
- drivers will have larger operating areas than taxis, divided into 5 regions: Lower Mainland/Whistler; Capital Regional District; Vancouver Island; Okanagan-Kootenay/ Boundary-Cariboo; and BC North Central & other regions of BC; and
- the minimum rate will be the same as the flag rate for a taxi in Metro Vancouver (roughly $3.25-$3.95) and there will be no maximum rate.

Additionally, a new blanket insurance product, that will be made available by ICBC in September, must be purchased by all companies offering ride-hailing services. The blanket insurance will apply when the driver is providing ride-hailing services, while the driver's own basic vehicle insurance policy will apply in all other circumstances.

The minimum rate will be the same as the flag rate for a taxi in Metro Vancouver (roughly $3.25-$3.95) and there will be no maximum rate.

Driver and Vehicle Requirements

All drivers will operate ride-hailing services under the Transportation Network Service company's authority, and to be hired as a driver a number of requirements must be met. Drivers must:

- have a Class 4 licence, as the *Motor Vehicle Act Regulations* require a commercial class driver licence for the operation of any vehicles for hire;
- complete a police criminal record check;
- ensure their vehicle meets all requirements, including that the vehicle must be less than 10 years old; and
- pass a vehicle inspection either annually or semi-annually.

A driver is not required to provide wheelchair accessible vehicles; however, a fee of 30 cents per trip will be charged to non-accessible vehicles to support funding for accessibility programs.

Municipal Authority

In addition to these requirements, Transportation Network Service companies and drivers must continue to comply with all provincial regulations and any applicable municipal bylaws. Municipalities will retain their authority to issue business licences, set business licence requirements, and regulate through street and traffic bylaws. Municipalities will have the authority to establish one set of business licence requirements for taxi fleets and a different set of requirements for ride-hailing if they wish, and can similarly establish different street and traffic rules for taxis and ride-hailing in relation to streets and traffic.
Municipalities will not be permitted to: prohibit online ride-hailing vehicles from operating within the municipality; regulate the number of vehicles that may be operated; or refuse to issue a business licence for the sole reason that the person holds a business licence issued by another municipality. Thus any existing bylaws that prohibit passenger directed vehicles, regulate the number that may be operated within a municipality, or regulate chauffeurs who operate motor vehicles under a PTB licence, will have no effect on online ride-hailing service providers.

Amy O'Connor

Court of Appeal Confirms Municipal Powers to Enforce Property Clean-Up

A recent decision of the British Columbia Court of Appeal (the "BCCA"), Chase Discount Auto Sales Ltd. v. Waugh*, 2019 BCCA 271, confirms that municipalities are able to regulate private property and compel actions to remediate unsightly properties. Generally, property maintenance bylaws are not seen by the courts as a zoning restriction, rather simply bylaws restricting the manner in which allowed uses may be conducted on property, as authorized under s. 8 of the* Community Charter*, S.B.C. 2003, c. 26 (the "*Community Charter*").*

In this case, the Village of Chase (the "Village") was found to have validly exercised its right to restrict the use of the owner's private property (the "Property") in respect of unsightly conditions, separate from any use restrictions in its zoning regulations. The Court of Appeal affirmed the chambers judge's decision to uphold the Village's:

1. Property Maintenance Bylaw no. 731-2010 (the "Maintenance Bylaw");
2. resolution to review the Property's state of condition; and
3. "Order to Comply" with the Maintenance Bylaw.

The Village's zoning bylaw allowed for multiple uses, including the storage of automobiles and automobile parts. However, the Maintenance Bylaw specifically stated that "[a]ll real property within the Village of Chase must be maintained by the property owner or their designate so as to prevent the property from becoming unsightly". The definition of "unsightly" included "refuse or clutter and includes the storage of any type of vehicle(s) in contravention of this Bylaw".

The Village's bylaw enforcement officer served an order on the property owner requiring the contraventions of the Maintenance Bylaw to be remedied by August 1, 2018, otherwise the Village would enter onto the property, complete the work, and bill the property owner. The owner filed for judicial review, seeking to strike down the Village's Maintenance Bylaw and set aside the bylaw officer's order to comply.

The fact that a municipality may be able to deal with certain conditions through council-imposed remedial action requirements does not limit a council's ability to use remedies under a bylaw adopted pursuant to a fundamental power under section 8 of the Community Charter.

The lower court judge upheld the Village's Maintenance Bylaw and the order to comply. The property owner appealed.

First, the property owner argued that the chambers judge erred in interpreting s.17 of the *Community Charter* as authorizing a council to require property owners to clean up their properties. The owner argued that any remedial action requirement must be imposed within the authority of ss. 72-80 of the *Community Charter*. The remedial action authority in those sections contain procedural safeguards, such as a notice requirement to the homeowner and a right to request reconsideration by council of any decision to impose remedial action requirements. The appeal court rejected this argument, agreeing with the chambers judge that the authority to "regulate, prohibit, and impose" requirements by bylaw under ss. 8, 16 and 17 of the *Community Charter*, including in relation to unsightly conditions under s. 64 (k), are a stand-alone authority for a municipality to enter onto a property to inspect and determine whether bylaws are adhered to and to recover the costs if the person subject to the requirement fails to take the required action that is ordered by the municipality.

Second, the property owner argued that s. 16 only allowed the bylaw officer to enter onto the property but did not confer the authority on the bylaw officer to require that remedial action be taken. The Court of Appeal, however, found the power to impose requirements under s.8(3)(h) in respect of s. 64 nuisance matters, supplemented by ss. 16 and 17, provided authority for the bylaw officer to issue the order on behalf of the Village requiring "that something be done" to address the unsightliness.

Finally, the property owner argued that the Maintenance Bylaw was invalid as being, in effect, a zoning bylaw, which had not been adopted in accordance with the formalities (including a public hearing) under s. 464 of the *Local Government Act*. The appeal court also rejected this argument, stating that "the Property Maintenance Bylaw applies to all properties "across all zones" and does not purport to establish different zones for different uses as a zoning bylaw would", and therefore does not have the same effect as a zoning bylaw. The Court distinguished this situation from the 1980 case of *Gulf Canada Ltd. v. Vancouver (City)* where a licensing bylaw was struck for

effectively being a zoning bylaw as it imposed requirements only on 64 specific parcels of land. In *Gulf*, the use restrictions were found to concern the *use* of land, not the *manner* in which the service station business could be conducted. In contrast, the Court in *Chase* concluded that the Maintenance Bylaw regulated and restricted *how* the activities on the Property could be carried out but did not prevent the permissible (under zoning) use of the land for storage and display of automobiles.

The case is helpful in confirming the authority of municipalities to deal with unsightly conditions under their property maintenance bylaws, including through remedial orders authorized by such bylaws. This authority is separate and independent from the remedial action requirement provisions in Division 12 of Part 3 of the *Community Charter*. The fact that a municipality may be able to deal with certain conditions through council-imposed remedial action requirements does not limit a council's ability to use remedies under a bylaw adopted pursuant to a fundamental power under section 8 of the *Community Charter*.

Steven Shergill

Consistency, Consistency, Consistency!

On June 20, 2019 the BC Supreme Court revisited the issue of consistency with Official Community Plans by refusing to quash a zoning bylaw amendment that was allegedly inconsistent with a regional district's Official Community Plan (the "OCP").

In *Kalantzis v. East Kootenay (Regional District)*, 2019 BCSC 1001, the petitioners petitioned to quash a zoning bylaw amendment adopted by a regional district board as it was inconsistent with the respondent regional district's OCP for Lake Windermere.

Baltic Bay, which is located at the east side of Lake Windermere, includes a beach and two housing subdivisions, Baltic and Pedley Heights. Many of the residents own boats and moor their boats to mooring buoys in the bay. However, due to concerns over the number of buoys in the bay, the Regional District enacted a zoning bylaw that limited the placement of new mooring buoys.

The respondents, Baltic Community Association ("BCA") and Pedley Heights Community Association ("PHCA"), who represented a number of owners in the two subdivisions, created a proposal for a 90-slip marina as an alternative to the use of mooring buoys. BCA and PHCA proposed to own and operate the marina together. However, the proposal required an amendment to the relevant zoning bylaw and the Regional District's OCP.

During a public hearing, many residents voiced their opposition for the proposed marina and the proposal was modified to include a 60-slip marina. The Regional District adopted the requested amendments

("Impugned Amendments"). The petitioners raised three arguments in order to quash the Impugned Amendments. First, the petitioners argued that the Impugned Amendments were unreasonable and were inconsistent with the Regional District's OCP; second, they argued that the Regional District breached its duty of procedural fairness; and third, they alleged that the Regional District had no jurisdiction to amend the proposal from a 90-slip to a 60-slip marina.

On the first issue, the petitioners argued that a section of the OCP required bylaws or policies to be in place to manage the proposed marina. The petitioners suggested that the Regional District's OCP required that a formal agreement be in place between BCA and PHCA. However, the Regional District's OCP did not define "bylaws or policies" which can result in a broad range of possibilities and it is not clear whether a "formal" agreement needed to be in place.

The decision in Kalantzis *is a useful example for local governments and their staff of the broad discretion that may be afforded to local governments with respect to interpreting an OCP that employs general terms that do not have the exactitude associated with zoning bylaws.*

As per section 474(1) of the *Local Government Act* ("*LGA*") an OCP outlines objectives and policies to guide decision making on land use and development. Accordingly, bylaws and works undertaken in a district must be consistent with the OCP.

The Court held that "[t]he language of "policies or bylaws… in place" [fell] short of stipulating that a formal agreement or arrangement [was] required" (at para 56). Rather, the Court concluded that "it is open to the District, acting reasonably, to conclude that an informal arrangement or understanding could be considered as policies in place to manage the allocation of moorage spaces as contemplated" in the OCP (at para 59). Moreover, the Court noted that because the OCP "loosely" uses the word policies, the term "policies or bylaws" did not connote that a formal agreement was required.

Further, in making its decision, the Court relied on the Management Plan submitted by PHCA when it applied for the bylaw amendments, which illustrated that PHCA and BCA had a history of cooperation and had addressed various elements of a joint management agreement. Thus, the Court held that the Regional District had acted reasonably in concluding that the Impugned Amendments were consistent with the OCP.

On the second issue, the Court held that procedural fairness did not require the Regional District to obtain and produce a draft agreement between the BCA and PHCA. As mentioned above, the Regional District was satisfied with the basic elements of the Management Plan without requiring the PHCA and BCA to submit a draft operating agreement. The case law establishes that procedural fairness considerations related to public hearing disclosure do not require a local government to seek out and obtain information it does not need or wish to obtain. Procedural fairness only requires a local government decision-maker to disclose the information and material that is relevant in the sense that it will be considered and thus influential to a decision.

Lastly, on the third issue, the Court concluded that the Regional District did in fact have the jurisdiction to amend the marina from a 90-slip to a 60-slip facility. Regarding applications for zoning amendments, the *LGA* distinguishes

between applications that increase density and those that decrease density, with the former requiring an additional public hearing and the latter only requiring the owner's consent. The land in this case, a portion of Lake Windermere, was owned by the Crown. The definition of "owner" in the *Community Charter* contemplates ownership of a fee simple parcel; the lake bed and water of Lake Windermere had not been crown granted to create a fee simple parcel. Accordingly, the Court determined that "owner", for the purposes of the constraint in s. 470 of the *Local Government Act* requiring a post-public hearing alteration decrease in density to have the consent of the owner, did not apply to the Crown as owner of land. The Court also rejected the petitioner's alternative argument that the land, for the purposes of s. 470 was not owned by the Crown and thus any alteration of the bylaw after the public hearing must trigger a new public hearing, there being no owner that could consent to a decrease in density. The Court considered if there was no owner of the land then the section requiring the owner's consent before a reduction in density post-public hearing simply had no application.

The ruling in *Kalantzis* can be contrasted with the ruling set down in *Sevin v. Prince George (City)*, 2012 BCSC 1236, where the Court held that a zoning bylaw amendment was inconsistent with the City's OCP and was therefore held invalid and quashed. In *Sevin*, the inconsistency was found to arise because the OCP contained specific land use policies that identified urban areas as suitable for recovery facilities without any similar policies applicable to the rural areas in which the City council sought to rezone for a recovery facility use. While an OCP may state guidelines and objectives in general terms, policies may be stated in more precise terms that give rise to clear requirements in relation to consistency rule.

The decision in *Kalantzis* is a useful example for local governments and their staff of the broad discretion that may be afforded to local governments with respect to interpreting an OCP that employs general terms that do not have the exactitude associated with zoning bylaws. But as the contrasting result in *Sevin* shows, there are still limits to this discretion in the case of more specific statements or policies in OCPs.

Inder Biring

Working a Little too Much from Home? Home Occupations vs. Prohibited Business in Residential Zones

Local governments and property owners can often get into disputes over which businesses may be conducted as a home occupation and which must be conducted on land zoned for that business as a principal commercial or industrial use. Two recent court decisions illustrate how the court will interpret land use bylaws to draw a dividing line.

Columbia Shuswap (Regional District) v. Jones, 2018 BCSC 1776

The defendant owned land in the Columbia Shuswap Regional District zoned as "Small Holdings". The Small Holdings zone permitted single-family dwellings and a number of secondary uses, including home occupations. The defendant resided on the top floor of a two-storey residence on the land, using the main floor and the surrounding property to perform light construction work and store and maintain vehicles and equipment for his construction business.

The CSRD maintained that the work the defendant performed on the property was not a permitted home occupation under the zoning bylaw. The court categorized the work as "general trade contracting office and works yard" use, and it noted that while the zoning bylaw did not indicate that such use was a home occupation, the bylaw specifically permitted the use in the "Highway Commercial" and "General Industrial" zones. The court then turned to the implied exclusion principle, which holds that where a zoning bylaw expressly allows a use in zone A but not zone B, the court can imply that the municipality intentionally excluded the use from the zone B, even if the zoning bylaw does not expressly prohibit such use in zone B. Applying this principle, the Court presumed that the zoning bylaw deliberately excluded "general trade contracting office and works yard" as a permitted home occupation, and found that the company's use of the property violated the zoning bylaw.

Cowichan Valley (Regional District) v. Stack, 2018 BCSC 2073

The defendants owned property in Cobble Hill in the Cowichan Valley Regional District. At the time of the trial, the defendants had never resided on the property, but their daughter had. The property was zoned as "R-2 Suburban Residential". The zone allowed home-based business, defined in the zoning bylaw as an occupation, business, trade or professional practice carried on for remuneration or financial gain and which is accessory to the residential use of the property.

These cases highlight that determining if a business or occupation is truly "home-based" for the purposes of a zoning bylaw is not always a straightforward exercise.

The defendants owned and operated a millwork company on the property starting in 2010. The CVRD brought a petition for a statutory injunction to prevent the defendants from continuing operation of the company, arguing that the zoning bylaw prohibited it. The defendants disagreed, stating that the company was permitted as a home-based business. The court asked how the business could be "home-based" if the defendants did not live on the property. The defendants responded that it fell within the category because their daughter, a director of the company, lived on the property. The court was unconvinced, noting that the defendant's daughter became a director of the company in March 2016, after the CVRD asked the defendants to shut down their sawmill operation. Ultimately, the court concluded that the defendants appointed their daughter director solely so that they could argue the business was home-based and compliant with the zoning and decided that the zoning bylaw prohibited the defendants from operating the millwork business on the property.

These cases highlight that determining if a business or occupation is truly "home-based" for the purposes of a zoning bylaw is not always a straightforward exercise. In some cases, such

as *CSRD v. Jones*, the result will turn on a legal question of statutory or bylaw interpretation, while in other cases, such as *CVRD v. Stack*, the outcome will depend more on the court's analysis of the facts and evidence.

Jordan Adam

Some Amendments to the *Employment Standards Act* Are Now in Effect

On May 30, 2019, the British Columbia Government granted royal assent to Bill 8 – 2019, being the Employment Standards Amendment Act, 2019 *("*Bill 8*" or the "Bill"). The Bill makes a number of significant changes to the* Employment Standards Act *(the "*Act*" or the "*ESA*") that will be of interest to local governments. A number of amendments to the* ESA *made by Bill 8 are currently in effect with other amendments only coming into force on a date to be set by a Provincial regulation.*

Informing Employees of Their Rights

Following the enactment of *Bill 8*, employers are now required to provide their employees with information about their rights under the *Act*, in a form provided by or approved by the Director of Employment Standards (the "Director").

The Intersection of the ESA with Collective Agreements

Prior to the enactment of *Bill 8*, the *ESA* provided that if a collective agreement contained provisions regarding hours of work, overtime, statutory holidays, annual vacation or vacation pay, seniority retention, recall, termination of employment or layoff, the provisions of the *Act* in respect of those matters would not apply to the employees covered by the collective agreement. The application to a collective agreement of certain provisions of the *Act* regarding such matters as paydays, payment of wages upon termination or resignation, how wages are paid, and many others, was also excluded if the collective agreement contained any provision respecting the particular matter. However, if a collective agreement did not contain any provisions in respect of one of those particular matters, the provisions of the *Act* in respect of that matter were deemed to be incorporated into the collective agreement.

Bill 8 reinstitutes the "meets or exceeds" test that existed prior to 2002 in respect of the intersection of the *ESA* and collective agreements. Pursuant to that test, the provisions of a collective agreement must be compared to the corresponding provisions of the *ESA*, and if the collective agreement provisions when considered together, meet or exceed the *ESA* requirements when considered together, the collective agreement provisions replace the *ESA* provisions in respect of the employees in the bargaining unit. The issues to which the meets or exceeds test apply are special clothing, hours of work or overtime, statutory holidays,

annual vacation or vacation pay, and seniority retention, recall, termination of employment or layoff. If, however, a collective agreement does not contain provisions regarding those matters, or the collective agreement provisions when considered together do not meet or exceed the *ESA* requirements when considered together, the *ESA* requirements will be deemed to be incorporated into the collective agreement. The other provisions of the *ESA* excluding the application of the *Act* to matters such as paydays, and payment of wages when employment terminates, discussed above, have been deleted.

Bill 8 also adds a number of additional matters to the list of matters which are to be enforced via a collective agreement grievance procedure in respect of employees covered by the collective agreement.

While the above amendments to the *ESA* came into force on May 30, 2019, the *Act* also provides that those amendments do not apply to a collective agreement that was in effect on that date. Instead, the prior provisions of the *Act* continue to apply, until the collective agreement is renewed. That delay gives the parties to a collective agreement time to negotiate any changes needed to bring the collective agreement into compliance with the revised *Act*.

Restrictions on Hiring Children

Under the existing *ESA*, the employment of a child under the age of 15 is prohibited unless the child's parent or guardian has given written consent. The employment of a child under the age of 12 is also prohibited without the Director's consent.

The new rules, which at the time of writing this article are not yet in force, will come into effect by regulation of the Lieutenant Governor in Council. They prohibit the employment of children under the age of 14 without the permission of the Director. Children 14 or 15 years of age may only be employed to perform light work, with the written consent of their parents or guardians. The employment of children aged 14 or 15 to perform any work other than light work, is also prohibited without the Director's permission. "Light work" has been defined to mean prescribed work, or a prescribed occupation that the Lieutenant Governor in Council considers unlikely to be harmful to the health or development of a child who is 14 or 15 years of age.

The employment of children aged 14 or 15 to perform any work other than light work, is also prohibited without the Director's permission.

Bill 8 also prohibits the employment of children under the age of 16 in a hazardous industry or in hazardous work, and prohibits the employment of children at least 16 years of age but under 19 years of age in a hazardous industry or in hazardous work, unless the child has attained the age prescribed by regulation of the Lieutenant Governor in Council in respect of the hazardous industry or hazardous work. "Hazardous industry" is defined to mean a prescribed industry that the Lieutenant Governor in Council considers likely to be harmful to the health, safety or morals of a person under 16 years of age. "Hazardous work" means prescribed work that the Lieutenant Governor in Council considers likely to be harmful to the health, safety or morals of a person under 16 years of age.

New Leaves of Absence

Section 54 of the *ESA* requires an employer to grant employees the leaves of absence specified in Part 6 of the *Act* for which they qualify, and at the end of the leave to return the employee to his or her prior position, or to a comparable one. *Bill 8* introduces a new critical illness or injury leave to enable employees to take unpaid leaves of absence to care for critically ill family members. The changes also enable employees to access employment insurance benefits that were introduced by the Federal Government early in 2018. An employee who requests such leave is entitled to up to 36 weeks of unpaid leave to provide care or support to a critically ill child, and up to 16 weeks of unpaid leave to provide care or support to an adult family member.

Bill 8 *introduces a new critical illness or injury leave to enable employees to take unpaid leaves of absence to care for critically ill family members.*

The *Bill* also introduces a new leave of absence for employees experiencing domestic or sexual violence. An employee is now entitled to an unpaid leave of absence for the following purposes necessitated by domestic or sexual violence:

- to seek medical attention for themselves or their children;
- to obtain victim services or other social services for themselves or their children;
- to obtain psychological or other counselling services for themselves or their children;
- to temporarily or permanently relocate themselves and/or their children;
- to seek legal or law enforcement assistance, including preparing for or participating in any civil or criminal legal proceedings related to the domestic or sexual violence; and
- any other prescribed purpose.

If an employee requests such a leave of absence, they are entitled during each calendar year to up to 10 days of unpaid leave, in units of one or more days or in one continuous period, and in addition to up to 15 weeks of unpaid leave.

Termination Following Notice of Resignation

Bill 8 also adds to the *ESA* a provision regulating the termination of employees who have given notice of resignation. The amendment provides that if an employee with three consecutive months of service to the employer gives notice of resignation, and the employer terminates the employee's employment during that notice period, the employer must pay the employee the lesser of the wages the employee would have earned in the remainder of the notice period, or the pay in lieu of notice that the employer would otherwise have to pay the employee on termination of employment.

Payroll Records

Previously an employer had to retain payroll records for two years after an employee's employment ended. An employer must now keep payroll records for at least 4 years after the date on which the payroll record was created.

Wage Recovery Period Increased

With the amendments introduced by *Bill 8*, the *ESA* now increases the period for which an employee may generally recover wages owing by an employer from 6 months to 12 months. However, the Director may, in prescribed

circumstances, extend the wage recovery period to 24 months.

The Processing of Complaints

Bill 8 will also amend the investigation and processing of complaints under the *ESA*, once the Lieutenant Governor in Council passes the necessary regulations. The requirement that complainants complete the "self-help kit" currently required by the Director, and engage with the employer directly, before filing a complaint will be eliminated.

The requirement that complainants complete the "self-help kit" currently required by the Director, and engage with the employer directly, before filing a complaintwill be eliminated.

Once these amendments are in effect, the Director will be able to extend the 6-month time limit to file a complaint, if the Director is satisfied that special circumstances exist or existed to preclude the filing of the complaint within the time limit, and an injustice would otherwise result. The Director will also be required to investigate all complaints accepted for resolution by the Employment Standards Branch. The Director will further be empowered to conduct an investigation to ensure compliance with the *ESA* and regulations, at any time and for any reason. Following the completion of an investigation, the Director will be required to produce a written report of their findings. In addition, the Director will be able to waive monetary penalties for breach of the *Act*, in specified circumstances.

Michelle Blendell

Miscellaneous Statutes: Did You Know?

Did you know that under section 16 of the federal Canada Marine Act *a mayor, councillor, officer or employee of a municipality mentioned in the letters patent of a port authority is prohibited from being a director of that port authority? This prohibition, which also applies to a large swath of the provincial and federal civil service, is presumably for conflict of interest reasons. Also excluded are individuals who are bankrupt, have been declared mentally incompetent or are members of the House of Commons.*

Joe Scafe

Look For Your Lawyers

Sukhbir Manhas will be part of the "Rail Trail Panel" session on September 12, 2019 at the Thompson Okanagan Local Government Association Annual Conference in Salmon Arm.

Gregg Cockrill has returned from his sabbatical. During his time away, Gregg wrote a paper on the contentious issue of community amenity contributions. Stay tuned for publication details.

David Loukidelis will be presenting to senior public service executives through a national webinar called "Ethics & Integrity" on September 17 that is part of the Inside Public Sector Leadership annual program.

On September 24, **Sukhbir Manhas** and Jan Enns (Jan Enns Communications) will be presenting the "Elected Officials Must Themselves be Resilient" clinic at the Union of BC Municipalities Annual Convention in Vancouver.

Sarah Strukoff has returned to Thompson Rivers University to complete her final year of law school. Sarah already has a big head start on her classmates in her municipal law course. Young, Anderson is looking forward to Sarah rejoining the firm as an articling student in 2020.

Elizabeth Anderson and **Michael Moll** will be guest speakers at the Justice Institute of BC's Bylaw 101 course in New Westminster on September 30, October 28 and December 9.

On October 19 in Ottawa, **David Loukidelis** will be speaking at the CBA's Access to Information and Privacy Law symposium as part of a session titled "Access, the Duty to Document, and the Deletion of Records".

The firm's articling student, **Prince Arora**, is now in the office having completed the Law Society's Professional Legal Training Course (aka the bar exam). Prince's articles commenced upon his graduation from UBC law school's JD program with a business law concentration. Prince was also honoured to receive the Business Law prize.

Sukhbir Manhas will be sharing speaking time equally with other panel members as they discuss "The Balancing Act" at the Local Government Management Association Corporate Officers Forum on October 3 in Prince George.

On November 7, **Reece Harding** will be speaking on "Responsible Government" at the Vancouver Island Local Government Association Annual Conference being held in Victoria.

Young, Anderson will be presenting its Annual Local Government Law Seminar on November 22 at the Fairmont Hotel Vancouver, 900 Georgia Street, Vancouver. The Victoria session of the Seminar will be held on February 7, 2020.

STAY CONNECTED

If you are keen to receive client bulletins and updates to the firm blog by e-mail, go to **younganderson.ca** and click on the "**STAY CONNECTED**" button at the top of the webpage.