YOUNG ANDERSON
BARRISTERS & SOLICITORS

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NEWSLETTER

A LOOK BACK AT 2012

In this newsletter we have compiled an updated selection of our client bulletins from 2012, released since our last Newsletter. If you want to be sure to get these bulletins as they come out, subscribe to our RSS feed or Twitter accounts by clicking on the Twitter and RSS logos on our website www.younganderson.ca. Past newsletters and bulletins can also be found in electronic form on that website.

In reviewing the events of 2012, various themes emerge, including issues of consultation with First Nations, limits on the power to regulate in respect of animals, and employee privacy rights. However, one theme in particular found its way onto the national stage, with court decisions in both BC and Ontario: conflict of interest.

Conflict of Interest

2012 and the early part of 2013 saw significant developments in the area of conflict of interest. In B.C., we started the year with two decisions: *Baziuk v. Shelley,* and *Schlenker v. Torgrimson*.

Baziuk v. Shelley concerned a councillor who was found to be disqualified from holding office because he was still considered to be an employee of the city as a member of its volunteer fire department (See our May 2012 Newsletter at http://www.younganderson.ca/images/uploads/May_2012_Newsletter_Vol23_1.pdf for a fuller discussion).

Schlenker v. Torgrimson, which considered conflict of interest in the context of elected officials sitting as directors of non-profit societies, was originally decided in January of 2012 by the BC Supreme Court. That court found that two Islands Trust trustees who had voted to provide funding to two non-profit societies on the Island involved in water conservation and climate change issues pursuant to the Salt Spring Island OCP, of which they were board members, were not in a common law or pecuniary conflict of interest because they received no remuneration from the societies, and because the reasonably objective observer would consider that the societies were established to further the work of the local government and not to benefit the trustees personally.

An appeal of that decision was heard on November 26, 2012, the same day that the Ontario lower court gave reasons on *Magder v. Ford*, finding that Mayor Ford was disqualified from office, having voted on a motion that related to the use of his office to fundraise for his private football charity. A discussion of that case can be found in our client bulletin released January 25, 2013 at http://www.younganderson.ca/publications/bulletins/archive/2013/01.

Somewhat ironically, the B.C. Court of Appeal overturned the *Schlenker* decision in January

2013, finding the two trustees to be in a pecuniary conflict of interest, just two weeks before the Ontario Divisional Court (Ontario's court of appeal) overturned Mayor Ford's disqualification.

At first glance, it might appear that the law in Ontario and the law in British Columbia are now diametrically opposed with respect to the involvement of local government elected officials in private societies. However, a closer look at the decisions belies that appearance.

The Ford Case

In the case of Mayor Ford, the Ontario Divisional Court's decision continues to support a finding that Mayor Ford was in a conflict when he used City letterhead to raise funds for his private football charity. However, it was not this conflict of interest that founded the disqualification application. Rather, this conflict was the basis only for a recommendation by the City's integrity commissioner that Mayor Ford repay the $3,150.00 he raised for the charity back to the original donors. The integrity commissioner did not recommend disqualification in that case. Indeed, it would appear that the two types of penalties authorized by the *City of Toronto Act* were limited to a reprimand, or a suspension from council without pay for up to 90 days.

The basis for disqualification in the *Ford* case was actually Mayor Ford's participation in a vote in council in support of a resolution that he not have to repay the funds raised. The appellate court in Ontario agreed that Mayor Ford had a personal and financial interest in that issue when he voted, that was distinct from any interest he may have had in the football charity. However, the appellate court also found that Toronto's City Council had no authority to require Mayor Ford to repay those funds, and therefore the vote which Mr. Ford participated in was a nullity. On that basis, Mayor Ford's participation in the vote could not be the basis for disqualification.

The *Ford* case raises a more general concern with respect to the usefulness of conflict of interest provisions. The most egregious cases of conflict of interest may well be those cases where a local government official votes to enrich themselves, where they have no authority to do so. The Ontario appellate decision would seem to say that, as long as there was no legal authority for the City to actually follow through on such an enrichment, the attempt itself could not be penalized or subject to the requirements of the *Act*. The complainant has promised to seek leave to appeal this case to the Supreme Court of Canada.

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The Schlenker Case

In *Schlenker* there was also no disqualification ordered, but in that case it was because the trustees were no longer in office. Indeed they had announced that they would not be seeking re-election in the 2011 municipal election before the conflict allegations were even made. The petitioners in the *Schlenker* decision also sought "reimbursement" of funds paid to the non-profit societies, and this relief was denied, in part, because the trustees had not received any of those funds.

So in fact, the Ford and *Schlenker* decisions are similar in that neither decision resulted in a disqualification from office, but both decisions supported findings of conflict of interest. However, there is also a very significant distinction between the cases that is of great concern to many local governments across British Columbia: a distinction that rests in the types of non-profit societies the elected officials in each province had been involved with.

Non-Profit Societies as a Local Government Tool

In the *Ford* decision, the non-profit society was a private football foundation. While a worthy cause, there was no suggestion that the society was linked to the purposes or objectives of the City of Toronto.

In the *Schlenker* decision, the two societies at issue, the Salt Spring Island Water Council and the Salt Spring Island Climate Action Council, were formed in an effort to coordinate the activities of the Islands Trust representatives, the Regional District representative for Salt Spring Island, water improvement district directors (on the Water Council Society) and other community stakeholders, in respect of local government issues regarding water conservation, and the climate change targets in the Official Community Plan. One or both of the trustees sat as board members on these societies, together with the Regional District director who chaired the Water Council Society. In so doing, the elected officials were using the non-profit societies to coordinate between local governments and other levels of government in furtherance of local government goals.

There has been a substantial response from local governments that consider participation of their elected officials on non-profit societies to be essential to their work as local governments.

The Court of Appeal's decision in *Schlenker* therefore has had significant ramifications across British Columbia for local governments that participate in societies created, in many cases, specifically for the purposes of coordinating between governments and forwarding the goals of the local government. It also affects local governments that have appointed elected officials to the boards of local societies seeking to establish accountability for the projects financed or supported by the local government, such as fire prevention societies, or the Canada Winter Games society.

There is nothing new about the requirement that elected officials cannot participate in council decisions that pertain to matters in which they have a personal or pecuniary interest. However, prior to the *Schlenker* decision, it was generally believed that a director, who is not paid for their position or remunerated in relation to their participation in a board or society, would not have a pecuniary conflict in relation to monies paid to

that society if those monies would not or could not flow to them. Furthermore, in *Save St. Ann's Academy Coalition v. Victoria*, our Court of Appeal found that the appointment of two City of Victoria councillors to the provincial Capital Commission, a crown corporation, did not lead to a disqualifying conflict of interest preventing those councillors from voting on council resolutions in matters pertaining to the Commission's property. This was because the Commission's statutory foundation actually *required* the appointment of representative from the City on the board.

Elected officials can continue to wear both hats, but must declare a conflict and remove themselves from council discussions around matters dealing with the non-governmental societies in which they are directly involved.

The implication of the *Schlenker* decision is that elected officials sitting on societies or boards that are not established by statute, or that are established by statute but which do not *require* the appointment of an elected official to their board, cannot participate in discussions, either at the council table or with staff or outside entities, in relation to any pecuniary or financial matters relating to that society or board. As most elected officials are appointed to these types of societies for the specific purpose of ensuring accountability for local government contributions, amongst other things, this prohibition on their participation renders their appointment to these boards essentially useless to the local government.

Next Steps

Since the *Schlenker* decision, there has been a substantial response from local governments across British Columbia that consider participation of their elected officials on non-profit societies, both in their community and inter-jurisdictionally, to be essential to their work as local governments. As noted by the BC Supreme Court judge in the *Schlenker* decision, elected officials are generally elected to office on the basis of their contributions to their community, and often as a result of their involvement in non-profit societies.

It should be noted that the *Schlenker* decision does not prevent or prohibit in any way local government officials from continuing to participate on non-profit societies that are of interest to them, and should have no significant impact on their participation in private non-profit societies (i.e., those non-profit societies where the local government officials are not appointed by their local government). With respect to those societies, it is clear that local government officials have and continue to have a personal conflict of interest with respect to matters relating to societies they are directors of when it comes to council voting and participation. In other words, elected officials can continue to wear both hats, but must declare a conflict and remove themselves from council discussions around matters dealing with the non-governmental societies in which they are directly involved.

With respect to societies directly related to the purposes and objectives of the local government, whose boards are largely made up of elected officials specifically for the purposes of coordinating their governmental work, the *Schlenker* decision puts the constitution of societies and the usefulness of these societies directly into question. For now, local governments may wish to appoint non-elected officials to those boards to represent the interests of the local government. They might also consider models of cooperation other than non-profit societies, such as committees,

commissions, or service agreements.

Ultimately, however, the use of non-profit societies in order to coordinate the work of local governments between each other, and the appointment of local government officials to these societies, may well require a legislative or regulatory remedy. One solution that we have suggested is the introduction of a regulation pursuant to s. 282(2)(e) of the *Community Charter*, which would expressly exempt elected officials from the conflict of interest provisions in the *Charter* where they are expressly appointed by their local government to sit on the board of a non-profit society. Given that the *Schlenker* decision also implicates participation in corporations, local governments may also wish to seek an exemption for elected officials who are appointed by their local governments to sit on boards of municipal wholly owned corporations. Other legislative or regulatory options are also available, and we understand that the Ministry is in the process of reviewing the issue, together with the UBCM.

Francesca Marzari

September 24, 2012

Court of Appeal Rejects Local Government Duty to Consult First Nations

On September 24, 2012 the British Columbia Court of Appeal dismissed the appeal of the Neskonlith Indian Band. The NIB had sought to quash a development permit issued by the City of Salmon Arm on the basis that the City had a duty to consult and accommodate the NIB.

This argument stems from the Supreme Court of Canada's 2004 decision in *Haida Nation v. British Columbia (Minister of Forests)* that established a duty to consult and accommodate on the part of the Crown regarding decisions that may impact Aboriginal rights and title after claims to such rights and title have been made or before they are resolved through treaty. Such obligations are based on "the honour of the Crown".

Since the *Haida* decision, First Nations around the Province have been asserting that local governments are obligated to consult on decisions that First Nations say have a potential to infringe their claimed Aboriginal rights and title. In this case *Neskonlith* claimed that by allowing the private development in the floodplain to be sited too low, Salmon Arm was creating a circumstance that would give rise to the need for future flood mitigation measures to protect the development from flooding (such as channelling in the Salmon River or dike construction), that might impact their aboriginal rights.

In dismissing the appeal, our Court of Appeal found that the City had no duty to consult and accommodate this First Nation. The Court made several findings in this regard. It found that the ultimate legal responsibility for consultation and accommodation rests with the

Crown, that the honour of the Crown cannot be delegated even to a governmental organization such as a local government and that while procedural aspects of the duty to consult can be delegated, the Province has not in general delegated the duty to local governments. The Court found:

> ...As the third order of government, municipal councils are simply not in a position to, for example, suspend the application of bylaws or the terms of OCPs, grant benefits to First Nations or indeed to consider matters outside their statutory parameters...
>
> ...And while it is true that First Nations may experience difficulty in seeking appropriate remedies in the courts in cases like this one, it is also true that as creatures of statute, municipalities do not in general have the authority to consult with and if indicated, accommodate First Nations as a specific group in making the day-to-day operational decisions that are the diet of local governments.

In addition, the Court considered the practicality of consultation between local governments and First Nations the Court, and commented:

> ...Daily life would be seriously bogged down if consultation – including the required "strength of claim" assessment – became necessary whenever a right or interest of a First Nation "might be affected. In the end, I doubt that it would be in the interests of First Nations, the Crown or the ultimate goal of reconciliation for the duty to consult to be ground down into such small particles, obscuring the larger "upstream" objectives described in *Haida*.

The Court dismissed the appeal on two other grounds finding that the adverse impact alleged by Neskonlith in this case was too speculative to give rise to a duty to consult and that even if a duty to consult did exist, the City had adequately consulted Neskonlith.

The *Neskonlith* case is clear direction for British Columbia local governments that their consultative obligations to First Nations when dealing with the issuance of development permits, building permits or amendments to Official Community Plans or zoning bylaws are rooted in their statutory obligations as specified in the *Local Government Act, Community Charter* or the local government's own bylaws. Further, reconciliation of aboriginal rights or title are not the responsibility of local government but of the Crown.

Reece Harding & Gregg Cockrill

Update

Consultation obligations were also the subject of the Court of Appeal's ruling in *Halalt Nation v. North Cowichan (District)* discussed in November 2012.

October 25, 2012

Workplace Computers and Employee Privacy Rights

The Supreme Court of Canada recently released the decision of R. v. Cole *about whether a teacher had a reasonable expectation of privacy in personal materials stored on a work-issued laptop. The issue in this case was whether the police had breached section 8 of the* Charter of Rights and Freedoms *when it viewed the contents of the teacher's laptop and created a mirror image of the hard drive for forensic purposes without a warrant. Section 8 of the* Charter *guarantees the right of everyone in Canada to be secure against unreasonable search or seizure.*

The teacher in this case was charged with possession of child pornography and unauthorized use of a computer. He had been provided with a work-issued laptop and was permitted to use it for incidental personal purposes. A technician who was performing maintenance activities on the laptop found a hidden folder containing nude and partially nude photographs of an underage female student. The technician notified the principal and copied the photographs to a compact disc. The principal seized the laptop and school board technicians copied the temporary Internet files onto a second disc. The laptop and both discs were given to the police.

The Court concluded that there was a reasonable though diminished expectation of privacy in the laptop in these circumstances. Therefore, the police infringed the teacher's rights under section 8 of the Charter. However, the Court also concluded that the conduct of the police officer in this case was not an egregious breach of the Charter and the admission of this evidence would not bring the administration of justice into disrepute. Therefore, the Court deemed the evidence admissible and ordered a new trial.

In its discussion of whether the teacher had a reasonable expectation of privacy, the Court inferred that he had a subjective expectation of privacy in the informational content of his computer. Therefore, the issue for the Court to determine was whether the teacher's subjective expectation of privacy was objectively reasonable. While there is no definitive list of considerations, the Court reviewed the employer's policy regarding computer use, the ownership of the laptop, the context in which personal information was placed on the employer-owned computer and the nature of the information.

The employer's policy was clear that the employer owned the hardware and data stored on it but it also allowed employees to use work-issued laptops for personal purposes. In weighing the considerations and, in particular, the nature of the information on the laptop, the Court determined that the teacher had a reasonable expectation of privacy in his laptop but that the ownership of the laptop and the employer's policies and practices diminished that expectation.

In its reasons, the Court was clear that it was not commenting on the issue of an employer's right to monitor computers issued to employees. It was dealing with the conduct of the police and whether the teacher's rights under section 8 of the Charter were breached.

However, the Court stated it agreed that the principal had a statutory duty to maintain a safe school environment and "...by necessary implication, a reasonable power to seize and search a school-board-issued laptop if the principal believed on reasonable grounds that the hard drive contained compromising photographs of a student."

While this case does not directly address the issue of an employer's right to conduct a search of an employee's activities on workplace computers, it highlights the importance of internet use policies that explicitly set out the ownership of materials stored on employer technology and sets limits on personal use of such technology by employees. This case also confirms the rights of employers to conduct reasonable searches of personal information on workplace computers for legitimate business purposes.

Carolyn MacEachern

Update

It is likely that workplace issued cell phones and smart phones will generally be treated similarly to laptops. However, in *R v. Fearon*, 2013 ONCA 106, the Ontario Court of Appeal has recently held that cell phones may be searched without a warrant as an incident to an arrest (ie., where there are reasonable grounds) if they are not password protected.

November 1, 2012

Cohen Report Cites Problems with RAR Implementation

The report of the Cohen Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River has been released. Given that the Commission's terms of reference included consideration of freshwater habitat matters, it was maybe inevitable that Commissioner Bruce Cohen would hear evidence and make recommendations regarding the Riparian Areas Regulation, including the effect of the Court of Appeal's decision in Yanke v. Salmon Arm*. In that case, it was decided that, once a "qualified environmental professional" has determined that a particular proposed development will not result in harmful alteration, disruption or destruction of fish habitat, neither the B.C. Ministry of Environment nor the Department of Fisheries and Oceans has any role under the RAR with respect to the question of whether land within a "streamside protection and enhancement area" identified pursuant to the RAR may be disturbed or built upon.*

Chapter 6 of Volume 1 of the Cohen Report deals with habitat management. As regards the role of the RAR in habitat protection, the Commission heard evidence from the B.C. Ministry of Environment that compliance monitoring with regard to RAR implementation, focused on QEP, local government and developer activity, indicated "low compliance" up to the date of the Commission's hearings. In particular 40% of local governments covered by the RAR "did not have the appropriate bylaws or process in place to trigger regulatory action under the RAR", and for sites monitored on Vancouver Island, developer non-compliance with development approval conditions was 62%. The Commission acknowledged information in an MOE report indicating many instances of development occurring "without the benefit of a RAR assessment" and QEP reports that "sites are regularly cleared of vegetation before the QEP is called in to perform an assessment". Witnesses noted numerous deficiencies in the RAR process, including (of particular interest to local governments affected by the Regulation) lack of monitoring and enforcement of conditions recommended by QEPs in assessment reports, and reliance of the entire system on local governments that may consider fish habitat protection to be someone else's responsibility.

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Commissioner Cohen's recommendations dealing with the RAR are contained in Chapter 2 of Volume 3 of the Report. Of particular interest to local governments that are subject to the Riparian Areas Regulation are these:

- DFO should encourage the Province of B.C. to continue to monitor compliance with the RAR, to conduct effectiveness monitoring of projects that have been through the RAR process, and to consider DFO input into the impact of setback "variances" on fish and fish habitat (thereby addressing the *Yanke* decision).
- DFO should work with B.C. to achieve a target of 90 percent local government compliance with the *Fish Protection Act* as regards riparian area protection.
- DFO should encourage B.C. to amend the RAR to require provincial approval of setback "variances" and to require local governments to enforce compliance with assessment reports on the basis of which development proposals are approved.

Provincial and DFO involvement in the so-called "variance" process would presumably reinstate something like the pre-*Yanke* "letter of advice" process, though one would expect that any follow-up on this recommendation will place such involvement on a proper statutory footing. Greater local government compliance with the *Fish Protection Act* would obviously be easier for the Province to achieve if it provided resources to enable local governments to map their riparian areas so as to be able to enact bylaws protecting them (especially for regional districts) and to prepare adequate development permit guidelines in cases where DP areas are the chosen riparian area protection tools; To date these resources have not been forthcoming. As regards requiring local government enforcement of developer compliance with assessment reports, the amendments to Part 26 of the *Local Government Act* carried out concurrently with the *Fish*

Protection Act conferred no new development permit powers as regards incorporation of QEP recommendations as DP conditions or QEP monitoring of compliance. Even where conditions for compliance can be imposed, enforcement of DP conditions via Supreme Court proceedings can be expensive and time-consuming for local governments. These factors will have to be taken into account in any provincial effort to require local governments to enforce these permit conditions.

The Cohen Report also contains some last-minute observations about the amendments to the *Fisheries Act* (Bill C-38) that significantly narrowed the concept of "harmful alteration, disruption or destruction of fish habitat" that has in the past underpinned federal fish habitat policy, and upon which the language of the RAR is wholly dependent (the amended *Fisheries Act* would prohibit only "serious harm to fish that are part of a commercial, recreational or Aboriginal fishery"). The Commissioner notes that the legislation was tabled five months after the completion of the Commission's evidentiary hearings, but that none of the federal government witnesses gave any hint that these changes, which were obviously significant and highly relevant to the Commission's terms of reference and which must have been in an advanced state of preparation, were in the legislative pipeline. The Commissioner sees the amendments as "potentially problematic" in relation to habitat degradation and loss, which he found may have contributed to the long-term decline of sockeye stocks. (There is, of course, no mention in the Report of this year's omnibus federal legislation (Bill C-45), which contains significant amendments to the *Navigable Waters Protection Act*, another federal statute that Commissioner Cohen notes also plays a role in the regulation of the sockeye fishery.) If the RAR is being amended to deal with the Cohen Commission recommendations, it will be interesting to see whether the Province will also make the Regulations consistent with the federal government's narrow focus on commercially viable fish species and actual harm to fish, or retain the scope of the Regulation to maintain broader protection of riparian habitat.

The full Cohen Commission report can be reviewed at http://www.cohencommission.ca/en/FinalReport/

Bill Buholzer

Update

To date we are not aware of any regulatory or statutory response by the Province to the *Yanke* decision, the Cohen Report recommendations re RAR, or the amendments to the *Fisheries Act*.

November 22, 2012

Court of Appeal Confirms Adequacy of First Nations Consultation Regarding Ground Water Project

In 2003 the District of North Cowichan applied for an environmental assessment certificate for a groundwater extraction project involving the construction and operation of three wells near the Chemainus River on land owned by the District. The project was intended to replace the surface water system serving the Town of Chemainus, which was plagued by ongoing turbidity problems, particularly in the winter months.

The Chemainus River runs through the Halalt's traditional territory including the Halalt reserve (I.R. #2). Early in the environmental assessment process, Halalt raised concern that the project might adversely affect the aquifer under the reserve (to which it claimed title) and flow levels and water temperature in the river, thereby impacting aboriginal rights related to its traditional use of the river, including fishing rights.

In response to Halalt's concerns, the Province, the District and the Halalt engaged in an extensive series of meetings and other discussions regarding potential impacts of the project. The consultation process spanned some six years and included consideration and discussion regarding numerous reports prepared by experts retained by all three parties.

As the process developed, some of the experts expressed concern that the extraction of groundwater in the drier summer months could have some impact on the river, and that further study would be necessary to determine the extent, if any, of the summer pumping impacts. In response, the District decided in 2008 to revise the project. It amended its environmental assessment application to seek a certificate authorizing the construction of two wells rather than three, with pumping to be confined to the period from October 15 to June 15, with only one well of limited pumping capacity operating at a time. With the elimination of summer pumping, the evidence of the experts was that the project would not adversely affect the river or the water supply available to Halalt from the aquifer. An environmental assessment certificate authorizing the revised project was issued to the District in March of 2009 and in September of 2009, the Halalt filed a judicial review application to set aside the certificate on the ground that they had not been adequately consulted or accommodated regarding their aboriginal rights and title.

In July of 2011, Madam Justice Wedge of the Supreme Court of British Columbia granted declarations that the Province had indeed failed to adequately consult and accommodate the Halalt. Justice Wedge held that the proper project to be considered was a year-round pumping project as originally envisioned, not the winter pumping project for which the actual certificate was issued. She regarded the decision to issue the winter pumping certificate as a "strategic" decision that would lead to an inevitable amendment to permit summer pumping without aboriginal interests being adequately addressed. She was also critical of the consultation process itself, particularly the Crown's failure to fully assess the strength of the Halalt claims before deciding to engage in "deep" consultation and the Province's decision to allow the District to unilaterally narrow the scope of the project. Justice Wedge directed that all actions under the certificate be "stayed" until adequate consultation and accommodation "concerning year-round pumping" occurred.

In a decision released on November 22, 2012, the British Columbia Court of Appeal reversed the decision of the chambers judge and restored North Cowichan's pumping certificate.

The Court of Appeal agreed with the Province and the District that the adequacy of consultation and accommodation must be addressed in relation to the actual Crown decision being challenged, not a hypothetical or possible future decision. The Court of Appeal held that consultation and accommodation should be assessed in relation to the "current" Crown decision unless that decision "may constrain the ability of the Crown to respond appropriately in the future." The Court held that the issuance of a certificate authorizing limited winter pumping did not affect the Crown's obligation to fully and adequately consult and accommodate Halalt's summer pumping concerns should the District seek to amend the current certificate to authorize such pumping. This was "not a case where the ability of the Crown to address future potential adverse impacts was compromised."

The Court of Appeal also held that there was nothing improper about the Province failing to consult the Halalt before allowing the District to modify its application to eliminate summer pumping. On this issue the Court said the following:

The Crown had no legal duty to consult the Halalt before modifying the Project; the duty was to consult about the Project that was being recommended to the Ministers. The Crown met that duty.

[164] It is correct that the Halalt were not consulted before the scope of the Project was altered, initially and finally, but once changes were made, the Halalt were consulted and did provide comments. The comments of the Halalt on the proposed recommendation to the Ministers were provided to the Ministers. The recommendation and the comments of the Halalt addressed the scope of the Project as proposed and as modified.

[165] It may be that others would have handled the details of consultation differently, but that is not the test. Did deep consultation take place? On the record, clearly it did. The Halalt contend that they should have been consulted before the Project was modified. The chambers judge agreed. In my view, that proposition is premised on an

> incorrect appreciation of the legal obligation to consult on this Project. As modified, it did not compromise the Crown's ability to meet its duty to consult. There was no legal obligation to continue consultation on summer pumping. The Crown had no legal duty to consult the Halalt before modifying the Project; the duty was to consult about the Project that was being recommended to the Ministers. The Crown met that duty.

The Court of Appeal also disagreed with the BC Supreme Court Judge's conclusion that the consultation process should be regarded as inadequate by reason of the Crown's failure to do a thorough "strength of claim" assessment prior to deciding to engage in deep consultation with Halalt. The Court noted that such a preliminary assessment is "desirable" and "sometimes" necessary, but that in cases where the Crown concedes the necessity of deep consultation "it is the quality of the consultation that must prevail". The Court concluded that in this case the Crown had engaged in adequate consultation and that appropriate accommodation of the Halalt claims had been made when the project was modified to eliminate summer pumping, which was the only identified source of potential adverse impacts.

The Court's comments about financial compensation are also significant. During the consultation process, Halalt indicated the Crown's duty to adequately accommodate its concerns might be met through financial compensation. The Chambers Judge was critical of the Crown's refusal to consider financial compensation. On this issue the Court of Appeal held that it was not unreasonable to refuse to consider financial compensation in this case, given that the potential adverse impacts had been addressed through modification of the project to address the Halalt's concerns. The Court added the observation that "it is not difficult to discern strong policy reasons for refusing compensation."

Gregg Cockrill

It was not unreasonable to refuse to consider financial compensation in this case, given that the potential adverse impacts had been addressed through modification of the project.

Update

The Halalt Nation has applied to the Supreme Court of Canada for leave to appeal. They are seeking, amongst other things, a determination of their aboriginal rights in relation to ground water.

November 30, 2012

Eng v. Toronto (City), 2012 ONSC 6818: Ontario Superior Court of Justice Rules Toronto Shark Fin Ban Invalid

On November 30, 2012, the Ontario Superior Court of Justice struck down the City of Toronto's bylaw banning the possession, sale, and consumption of shark fin products. The challenge was founded on two main arguments: that the bylaw's primary purpose was the protection of sharks, which was argued not to be a valid municipal purpose, and that the municipality could not have jurisdiction over the harvesting of fish caught outside the boundaries of the Province of Ontario, as Ontario itself does not have that power and could not delegate it. Spence J. found for the applicants, holding that the bylaw was highly intrusive and lacked a proper municipal purpose.

Although the Toronto bylaw was far more sweeping in scope than most shark fin bans, this decision will be of interest to local governments in British Columbia that have banned or intend to ban the sale of shark fin products, as both the purpose of protecting sharks and the purpose of protecting public health and well-being were found to be outside of the City of Toronto's jurisdiction.

The preamble to the Toronto bylaw stated that "the consumption of shark fin and shark fin products may have an adverse impact on the health, safety and well-being of persons and on the economic, social and environmental well-being of the City of Toronto". Spence J. held that for this purpose to be valid there had to be some identifiable benefit to the City. Toronto argued that its ban would benefit the City economically and environmentally by contributing to the reduction of global shark finning, which would benefit communities around the world, including Toronto. The judge rejected this argument, stating that "the ban will not by itself have any identifiable benefit for Toronto with respect to

The purpose of protecting public health and well-being were found to be outside of the City of Toronto's jurisdiction.

the environmental well-being of the City."

The evidence showed that the ban was also partly motivated by concern over the inhumane nature of shark finning. The judge held that the power to regulate in respect of animals does not extend to shark fin products. Toronto submitted that the bylaw reflected the social and environmental values of the City with respect to the treatment of animals, and that this was a municipal purpose related to the social well-being of the City. Spence J. found that "social well-being of the City" referred to the ability of the City's inhabitants to live together as an urban society, rather than to the expression of some inhabitants' values, and that the practice of shark finning has no effect on the ability of Torontonians to live as a community.

The argument that shark fins are unhealthy for human consumption was rejected as having no air of reality, given that there was no evidence that moderate shark fin consumption would have any ill effect on people's health, and that many food products can be injurious to health if consumed to excess.

Accordingly, Spence J. held that the bylaw did not have a proper municipal purpose, and was therefore *ultra vires* and without any force and effect.

Melania Cannon

Update

In British Columbia, many municipalities have enacted business licence regulations in relation to the serving of shark fin products, while others have bylaws in preparation that have paused after the *Toronto* decision. Most adopted and draft bylaws in BC focus on local authority over business licencing, an established area of jurisdiction and different from the Toronto ban, though still subject to a consideration of proper municipal purposes.

News from the Firm

In other exciting news, **Bill Buholzer's** revised handbook on the *Community Charter*, retitled *Local Government in British Columbia*, is being published by the Continuing Legal Education Society this spring. Bill has added five new chapters, including one providing an overview of local government planning and land use management powers, and has removed material dealing with the transition from the *Municipal Act*.

News from the Firm

Bill Buholzer will be speaking on planning law topics at PIBC's South Island Chapter event at Burnside George Community Centre in Victoria on March 6.

Ray Young and **Alyssa Bradley** are presenting a panel session at this year's annual conference of the Rocky Mountain Land Use Institute in Denver, Colorado in early March. The session is entitled "Common Problems: Common Solutions: Common Law".

Mike Quattrocchi and **Carolyn MacEachern** will be speaking at the North Central LGMA being held in Prince George from March 12-14.

Carolyn MacEachern will also be speaking at the UBCM Benefits Conference in April.

Bill Buholzer will be presenting a session on conflict of interest at the North Central Local Government Association AGM and Convention being held in Quesnel from May 1-3.

Pat Kendall will be presenting a legal update at the annual GFOA Conference being held in Whistler from May 27 – 28.

The Local Government Management Association Annual Conference is being held in Kelowna from June 11-13. **Bill Buholzer** will be speaking on works and services bylaws at the Approving Officer's Seminar on June 11, and **Francesca Marzari** will be presenting a session on business regulation and shark fin soup on June 12.

Young Anderson is hosting an all-day planning law pre-session at this year's National Annual Conference of the Canadian Institute of Planners being held in Vancouver this July. **Ray Young** is also presenting on two panel sessions at the Conference: one addressing the legal nature of Official Plans, and the other addressing growth management legislation.