LIDSTONE & COMPANY

LAW LETTER

In This Issue

AI: Proceed with Caution – Navigating Risks in Local Governance

In today's world, artificial intelligence or "AI" is everywhere — powering our smartphones, managing our social media feeds, and even driving our cars. Yet, many people may not fully understand what AI is or its potential impact on their lives. Local governments are also increasingly confronting and harnessing the use of AI, both as a workplace and as a service provider. However, along with these opportunities comes important considerations about accuracy, privacy, and ethical use. In this introductory article, we will explore what AI is, how it may be used by local government, the potential risks involved, the steps local governments can take to minimize those dangers, and proposed legislation affecting AI.

Understanding AI

AI refers to the capability of a machine to perform tasks that would normally require human intelligence. "Generative AI" is one branch of AI that, by learning from its input training data, generates new content with similar characteristics in the form of text, images, and sounds. Another branch is "predictive AI" which analyzes data to identify patterns, anticipate behaviors, and forecast future events.

Familiar generative AI tools like OpenAI's ChatGPT and Microsoft Copilot are powered by large language models or "LLMs" that use vast amounts of text data to learn the statistical properties of language. Using this, they can interpret prompts and produce text in a way that is similar to humans. They can perform a wide variety of language tasks including formatting and editing text, answering questions, conversing, analyzing text, and writing original content.

General Risks of Generative AI

While AI offers significant potential benefits to local governments, readily available AI tools, particularly chatbots like ChatGPT, also pose substantial risks.

Inaccuracy

At the forefront of those concerns is the accuracy of factual content generated by AI due to its

tendency to "hallucinate". Hallucination refers to the phenomenon where a response generated by AI contains non-existent, false, or misleading information that is presented as a fact. Such responses can appear convincingly accurate. Even when prompted, generative AI may not acknowledge the limits of its knowledge or the sources of its information.

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Like many people unfamiliar with generative AI's limitations, staff may assume that it may be used to obtain answers to factual questions. This might be a useful starting point, but if a user does not have experience and expertise in the area, there is a good chance they will be unable to detect a hallucinated and false response. Consider the example of a BC lawyer that was recently reprimanded for having the misjudgment of using ChatGPT to research case law and later citing those cases in her court submissions.[1] Prior to submission, she never verified if those cases were real, and it turned out that they were in fact made up by ChatGPT.

Local governments already use AI as a tool for administrative decision-making but should not be tempted to use them as a substitute for human reasoning and judgment. The Federal Court of Canada has heard arguments from many plaintiffs who claimed that Canada's use of an AI tool to assess immigration applications was procedurally unfair and did not meet the required standard of reasonableness for an administrative decision.[2] In those cases, the Court found the arguments irrelevant after determining that it was the reviewing officers who ultimately made the decisions, not AI.

Bias

A risk related to inaccuracy is bias. As generative AI's responses rely on the content of the data on which it was trained, any inherent bias in the training data will likely be reproduced in the output. Users must be aware of the limitations or inaccuracies in the training data when using any content generated by the AI. For example, generative AI powered policing tools meant to predict where crime is likely to occur can reinforce existing patterns of racial profiling, because the tools were trained on historical arrest data containing discriminatory practices by police departments.[3]

Privacy

Privacy is another substantial risk for local governments using generative AI. Entering information as prompts into generative AI systems may cause that information to be incorporated into the AI's training data to improve its own capabilities or shared with third parties without further notice to or authorization

[1] *Zhang v. Chen*, 2024 BCSC 285.
[2] See *Luk v. Canada* (Citizenship and Immigration), 2024 FC 623 (CanLII), *Kumar v. Canada (Citizenship and Immigration)*, 2024 FC 81 (CanLII), *Haghshenas v. Canada (Citizenship and Immigration)*, 2023 FC 464 (CanLII).
[3] See Hao, K. (2019, February 13) *Police across the US are training crime-predicting Ais on falsified data*. https://www.technologyreview.com/2019/02/13/137444/predictive-policing-algorithms-ai-crime-dirty-data/.

by the user.[4] As a result, users should be vigilant against entering sensitive or otherwise confidential information as prompts into any generative AI system. It may be unknown how far information entered as a prompt may travel, who else may access it, and how it may be used.

This is especially true for local governments with regard to personal information. Under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*),[5] local governments must avoid unauthorized use and disclosure of personal information in their custody or under their control and make reasonable security arrangements against such risks. Absent the consent of the individual whom the information is about, local governments may only use personal information for the purpose for which the information was obtained or compiled, for a use consistent with that purpose, or under very limited specific circumstances.[6] Given the current state of privacy and security, local governments should strictly avoid inputting personal information into public AI tools.

Options to Reduce Risk

Training

From the perspective of local governments as a workplace, one way to reduce risks associated with the use of generative AI is to ensure that staff receive appropriate training. The training can address fundamental questions about what AI is, how it works, and what risks it poses the local government if staff make use of AI in the course of their duties.

Human Oversight

Another key form of protection against the risks of generative AI comes from having adequate human oversight in reviewing information or outputs obtained from generative AI systems. Bearing in mind the risks of generative AI especially in cases where the local government is in part relying on information created by generative AI to make decisions, it is essential to have staff verify generative AI outputs for accuracy with other trusted sources and inspect them for biased or discriminatory content,

among other considerations. Ultimately, a human being must apply critical thought to outputs created by any generative AI tool and decide how to use that information.

Policy

Adopting a policy on the use of generative AI in the workplace can give effect to both of the

[4] For example, ChatGPT's privacy policy specifically provides that it uses information collected from user's prompts to improve its own services and may disclose that information without further notice to the user. See https://openai.com/policies/privacy-policy/; ss. 1-3.

[5] RSBC 1996, c. 165; s.30.

[6] *FIPPA*, s. 32.

aforementioned options. The policy can inform staff about concerns related to the use of generative AI, set limits on the specific generative AI systems that are authorized for use, impose training and education requirements, and designate the types of information that may and may not be entered into those systems. To this end, Lidstone & Company recently adopted its own "Generative AI in the Workplace Policy" to provide protocols that maximize the benefits of using generative AI applications while minimizing potential risks or concerns.

General

From the perspective of local governments as service providers, legal risks associated with AI tools are case-specific, complex, and can be uncertain due to the present lack of regulation. It would be prudent to seek specific legal advice regarding the implementation of a specific AI system as part of the local government's operations.

Incoming Legislation

As it currently stands, there is no direct requirement for local governments to report their use of AI tools or adhere to certain standards in the use of AI tools. In 2022, the federal government tabled the *Artificial Intelligence and Data Act* ("*AIDA*") as part of Bill C-27, which has presently passed second reading in the House of Commons.[7] *AIDA* creates common requirements across Canada for the design, development, and deployment of certain "high impact" AI systems. It prohibits certain conduct in relation to such systems that may result in serious harm to individuals or their interests. It also creates general offences related to AI systems, including using personal information for the purpose of using or making available for use an AI system, if the person using that information knows or believes that the information is obtained or derived from conduct that amounts to an offence under either federal or provincial law.

However, as Bill C-27 is still under consideration by committee in the House of Commons and will be supplemented by regulations, the contents and effects of *AIDA* may change considerably before it is enacted.

Looking Forward

Artificial intelligence presents local governments with tremendous opportunities to improve efficiency and service delivery. However, it is crucial to be aware of AI's limitations and implement ways to reduce risks associated with the use of AI before leveraging its benefits. Developing training programs, requiring human oversight, and adopting comprehensive policies are essential.

The law continues to develop in response to rapid changes in our use of AI and the increasing need to deal with vast amounts of information available in our society. Local governments should be prepared to seek information about these legal developments and proactively consider risk mitigation strategies for the evolving AI landscape.

~ Catherine Li & Chris Grove

Some Thoughts About Recriminalization

The recent ups and downs of drug decriminalization are known. On January 31, 2023, Canada decriminalized possession of small amounts of illicit drugs in most locations in BC. Public consumption of those drugs quickly became a concern, especially for municipalities.

[7] Parliament of Canada (2024, June 7). https://www.parl.ca/legisinfo/en/bill/44-1/c-27

In the fall of 2023, the Province enacted legislation to prohibit public consumption, but a group called Harm Reduction Nurses Association obtained a court injunction preventing the legislation from coming into force. In May 2024, at the request of the Province, Canada recriminalized public possession of illicit drugs in BC. This article will not rehash these events but will instead identify issues specific to local governments and make some observations as to "lessons learned".

First, decriminalization continues to apply to adults who are in private residences, are in designated health clinics, or are "unhoused and sheltering in accordance with all applicable laws". This wording regarding the unhoused may mean that if an unhoused person is allowed under a municipal bylaw to temporarily shelter overnight in a park, they would be allowed to possess drugs within the shelter during the overnight period. This wording aligns with a case which found that an unhoused person's tent was not subject to some protections from police searches under the *Charter of Rights and Freedoms* because the tent was not permitted under municipal bylaws (see **R. v. Picard, 2018 BCPC 344**). Overall, the applicability of some federal laws which benefit the unhoused (decriminalization and the *Charter*) may depend on compliance with municipal bylaws. This may incentivize people to shelter when and where a municipal bylaw allows sheltering and therefore assist municipalities in obtaining voluntary compliance with homeless sheltering provisions in their bylaws.

Second, the risk of arrest for possession in public places may provide some additional leverage to municipal bylaw enforcement officers when dealing with nuisance behavior in public places. Put simply, when the threat of a municipal penalty is ineffective at achieving bylaw compliance from some drug users, the possibility of the police being called could produce a more positive result. With that said, prior to decriminalization, our experience is that the police rarely arrested people for mere possession, so it may be that the risk of arrest will only be a marginal benefit for bylaw enforcement.

Third, the Province did not anticipate that public consumption would be such a significant issue. Its formal request for decriminalization in 2021 vaguely indicated that laws prohibiting public intoxication could be enforced, and statements by the Province to municipalities in early 2023 suggested that regulatory tools, such as smoking bylaws, could be used to deal with public consumption. However, when seeking to enact regulatory tools, municipalities were met by court challenges and admonishments from public health officers. In practice, the threat of a municipal penalty (i.e. a small fine) was probably of limited assistance. The "on the ground"

experience of municipal bylaw enforcement officers may have assisted the Province in anticipating the issues with public consumption.

Fourth, the May 2024 recriminalization makes it a criminal offence to possess in most public places, including when merely walking down the sidewalk and not consuming. This prohibition is significantly more onerous than the Province's fall 2023 legislation, which did not criminalize mere possession. It may be that the demand by the Harm Reduction Nurses to allow public consumption has effectively scuttled most of the criminalization project.

Finally, the court injunction obtained by the Harm Reduction Nurses illustrates that there can be surprising results when going to court. It also shows that it can be difficult to "reverse" the lessening of a prohibition. Prior to January 31, 2023, mere possession was a criminal offence. The Province sought to decriminalize possession (i.e. lessening the prohibition), and then tried to enact non-criminal restrictions on public consumption. Even though this was less restrictive than the pre-January 31, 2023 circumstances, the Province was then prevented from bringing into force this legislation. If a local government is considering lessening a prohibition which might engage the *Charter of Rights and Freedoms*, it may want to consider the risk of what happens if there is then a need to eventually reenact some of the prohibition.

~Anthony Price

Too Close for Comfort? Longstanding Regulatory Relationship Found to Create the Basis for Negligence

In a remarkable decision, Justice M. Smith of the Ontario Superior Court of Justice has recently ruled in *Metro Taxi Ltd. et al v. City of Ottawa*, 2024 ONSC 2725 ("*Metro Taxi*") that the City of Ottawa was negligent in failing to halt the operations of Uber in the City, and that the plaintiff taxi operators are entitled to be paid yet to be determined damages by the City.

The matter was heard as a class proceeding brought by members of the City's taxi industry. In line with the procedure followed in class proceedings, Justice Smith's decision considered the following "common issues" that had been approved for adjudication: (1) whether the City had been negligent in enforcing its taxi bylaw over a 27 month period when Uber began operating in the City, (2) whether the City's enforcement infringed on the equality rights of the taxi licence holders under the *Canadian Charter of Rights and Freedoms* and Ontario's *Human Rights Code*, and (3) whether the fees collected by the City under its taxi bylaw were unlawful taxes. While the Court answered the latter two issues in the negative, it also concluded that the City was negligent in enforcing its taxi bylaw.

Justice Smith began his decision by recounting the history of Ottawa's taxi industry and its relationship with the City. The City issued a limited number of taxi licences, and they could be transferred between operators. As the City had deliberately limited the number of licenses, the licences were seen as a valuable commodity, including by the City. The court also noted that the City had a past practice of prosecuting the operators of "bandit cabs" that operated without a valid licence.

The court then noted that in about 2014 vehicles began operating in the City using Uber's ride sharing platform. In 2016 the City enacted a bylaw that purported to regulate vehicles for hire, including those using the Uber platform. However, according to the decision, during the 27 month period at issue in the lawsuit, the City did not lay any charges against Uber for operating without a licence or take any other enforcement action against Uber under Ontario's *Municipal Act.*

In considering whether the City was negligent, the court asked whether (1) the City owed the plaintiffs a duty of care, (2) the City breached the standard of care, (3) the plaintiffs sustained damage, and (4) the damages was caused by the City's breach.

For a duty of care to exist, the harm complained of must be reasonably foreseeable, there must be sufficient legal proximity between the parties, and there must be no policy reasons negating such a duty. The Court found that the City owed the plaintiffs a duty of care, with the duty arising from "a series of specific interactions between the City and the Plaintiffs, and their decades-long close and direct relationship", which the court characterized as "a partnership or joint venture, created for the purpose of combatting unlicensed taxicab operators". It should be noted that in reaching that conclusion, the court in *Metro Taxi* distinguished the facts of that case from two other recent Ontario cases involving taxi licensing in which there was a similar statutory regime to that in Ottawa, but in which no duty of care was found to exist.

Instead, the court in *Metro Taxi* held that the relationship between the City of Ottawa and the plaintiffs was "more than a simple manifestation of the regulator-regulated relationship", and was a "collaborative and cooperative relationship". One example cited by the court of this relationship was the City's historic enforcement practices against the "bandit cabs", which was found to have been undertaken collaboratively and cooperatively with the operators of licensed taxis.

The court also held that the City had made "clear representations to the taxi industry that it would enforce its by-laws" and that "the taxi industry came to rely upon the City's representations and expected that the City would ensure compliance with the taxi by-laws …". As the City's representations included public statements that it would target illegal dispatchers, the court concluded this "was a direct representation to the Plaintiffs of the City's undertaking that it would safeguard the taxi industry's livelihood and investment" and that "the City was aware that not enforcing the by-law against illegal activity would adversely and financially impact the taxi industry". While the City continued to make such statements after the Uber platform started to be used in Ottawa in 2014, the court noted that by 2015 the goals of the City and the plaintiffs had started to diverge, with the

combatting of bandit cabs becoming a lesser priority for the City and the City seeking to find ways to allow Uber to operate legally.

Turning to the question of whether the City breached the standard of care, the court used what it described as "common sense" to determine whether the City acted reasonably. After noting that Uber's arrival in Ottawa was foreseeable and that Uber was a "bandit taxicab company" because of its refusal to comply with City bylaws, the court concluded that the City was expected to treat Uber as a bandit taxicab company and enforce its taxi bylaw as it had in

the past with other bandit taxi companies, and that the City's "[f]ailure to do so fell below the standard of care". The court held that the City had no plan for enforcement and had "abandoned its partner" with an "ineffective enforcement strategy that it knew or should have known would fail".

In reaching the preceding conclusions, the court was not persuaded by the fact that the City had issued 273 charges to 189 Uber drivers during the 27 month period, holding that the City knew or should have known that this approach was ineffective, in part because it knew or should have known that Uber was paying any fines imposed on drivers, and because the City "was only treating the symptoms" and "unreasonably chose to not pursue Uber's corporate entity". While the court acknowledged challenges with the latter, and that the City had a broad discretion in how to enforce its bylaws, the court was "not prepared to accord deference to the City's choices because the City acted unreasonably in its enforcement efforts".

After further concluding that the City has caused the plaintiffs' losses, the question of the amount of damages payable to the plaintiffs was left for a subsequent hearing that has yet to be held.

For the purpose of this discussion, the decision in *Metro Taxi* is remarkable in two ways. The first is the extent to which the court departed from existing caselaw which holds that, absent bad faith or statutory compulsion, local governments have broad discretion over the enforcement of their bylaws. This discretion can be based on a wide range of factors that include the resources available for enforcement, the likelihood of success, and the social good in pursuing enforcement. While the extent to which this was argued by the City is unclear from the Court's reasons for judgment, it does appear that the basic concept was put before the court. The distinguishing feature for the court seems to be its conclusion that the City's relationship with the plaintiff taxi companies went beyond the typical relationship between a regulator and those it regulates, and was a joint venture in which the licenced taxi companies could reasonably rely on the City actively taking steps to protect the interests of the companies.

The second remarkable feature of the decision is its consideration of whether the enforcement steps taken by the City were "reasonable". While this is to some extent linked to the court's conclusions on discretion, the fundamental point to note is that the court was even willing to consider the matter at all. Of note is that in reaching its conclusion, the court went beyond just considering what acts the City did and did not do to also consider whether those acts were likely to result in compliance. That is, the City reviewed the City's acts on the basis of whether the City knew or ought to have known whether its enforcement actions would have succeeded. Even when viewed in the context of the joint venture that the court concluded was in existence, this essentially required the City to take a "best efforts" approach to enforcement which, with respect, seems to be placing an unjustifiably high standard for the City to meet.

The decision in *Metro Taxi* seems to be an outlier in the caselaw, is not binding on other courts, and it is not known whether the City will appeal. Even if the City does not appeal, it is arguable that the decision is distinguishable on the basis of the facts found by the court which the court itself seems to treat as unusual, in particular the close relationship found between the City and the plaintiffs.

However, it is also conceivable that other cases could seek to argue that the decision in *Metro Taxi* is a valid precedent and that local governments may be liable for losses of others. While the *Metro Taxi* decision suggests this could occur in instances where the relationship between regulator and regulated is close, the decision arguably also extends to instances where a local government makes representations that it will take steps to protect

the interests of others. In that regard, the decision is a helpful reminder for local governments to be careful in the representations they make and to not make statements that can be reasonably relied upon by others.

~ James Yardley

Low Carbon Energy Regulation

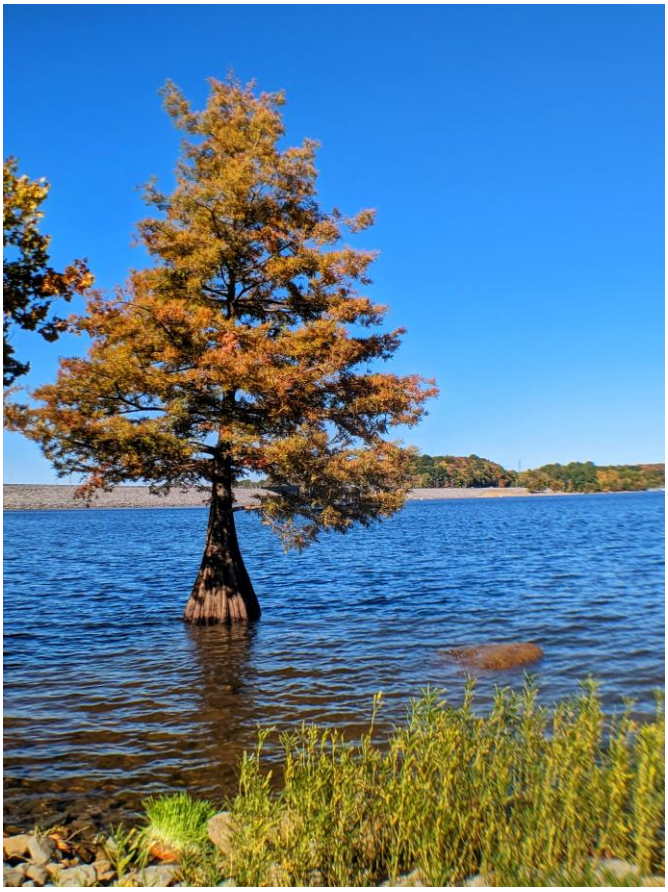
Several local governments are considering low carbon energy system regulation for new buildings and some retrofits.

Generally, local governments outside of Vancouver do not have authority to modify or impose more stringent building regulations with respect to energy conservation and the reduction of greenhouse gas emissions than as set out in the Energy Step Code and the Zero Carbon Step Code. The Zero Carbon Step Code may provide authority to reject renewable natural gas as a pathway to compliance for Part 3 buildings.

For lands within a designated energy conservation or greenhouse gas reduction development permit area (DPA), a local government may prescribe development permit guidelines with respect to machinery, equipment and systems external to buildings and other structures: s. 491(9)(e) of the *Local Government Act* (LGA). This authority likely allows for the compulsory connection to district energy systems, municipal electricity services, heat pumps, solar panels, geothermal heating apparatus, irrigation systems using recycled water, and other energy efficient systems.

As an alternative to building regulations, a local government may consider restricting renewable natural gas through voluntary agreements similar to how community amenity contributions have been secured traditionally.

If a municipality does not have a natural gas franchise agreement approved by the electors under section 28 of the *Community Charter*, it is possible to develop a public natural gas franchise regime under which the distribution of gas is restricted to existing users and phased out over the term of the agreement.



Generally, the *Building Act* constrains the ability of local governments to regulate buildings, such that a local government cannot impose its own standards for building activities apart from prescribed "unrestricted matters". This removes local government jurisdiction to broadly regulate building matters other than those that are prescribed as an unrestricted matter.

Step Code

S. 2.2(2) of the *Building Act General Regulation* authorizes local governments to impose building regulations related to the conservation

of energy by way of adopting a step set out in the Energy Step Code. S. 2.2(3) authorizes imposition of building regulations related to the reduction of greenhouse gas emissions in conformance with the Zero Carbon Step Code. S. 2.2 expressly provides that a local government cannot modify or impose more stringent regulations than those set out in the Energy Step Code and the Zero Carbon Step Code as provided in the *BC Building Code*.

Local governments have no authority to broadly regulate energy conservation and reduction of greenhouse gas emissions apart from what is authorized under section 2.2 of the regulation. To impose a building requirement by bylaw that exceeds the BC Building Code standards, provincial approval would be required under the *Building Act*. Since the province has already elected to regulate this area through the recent adoption of the Zero Carbon Step Code and Energy Step Code, it is uncertain whether approval would be granted in these circumstances. In addition, if the reason for regulating fossil fuel-based energy systems is for environmental benefits, then local governments may also require provincial approval to pass such a regulation under s. 9 of the *Community Charter*.

Requiring compliance with higher levels of the Zero Carbon Step Code will require builders to reduce greenhouse gas emissions and will decrease reliance on natural gas in new buildings. The Zero Carbon Step Code may also provide authority for local governments to reject a proposed emission factor for renewable natural gas for Part 9 buildings, subject to a "reasonableness" standard. We do caution that the Zero Carbon Step Code raises several uncertainties in how it is drafted and is still evolving. The province may clarify the use of renewable natural gas for compliance in the future.

"Renewable Natural Gas"

The Energy Step Code Modelling Guidelines and Instruction Manual for Part 9 Buildings and the Zero Carbon Step Code Informational Bulletin provide that the use of additional emissions factors for other fuels not listed in the BC Building Code are to be approved by the local government at their discretion. While these documents do not provide legal authority, in our view, these references may provide defendable reasons to restrict renewable natural gas as a compliance option with the Zero Carbon Step Code for Part 9 buildings. In further support of this position, the Energy Step Code Modelling Guidelines for Part 9 buildings does not make any reference to off-site renewable energy sources.

Renewable natural gas is being specifically marketed as low carbon energy and a means to meet strict emissions standards, including the province's emissions reductions targets. Accordingly, an attempt to significantly restrict renewable natural gas by rejecting a reduced emissions factor may attract a legal challenge despite local government scientific skepticism about the marketing.

Development Permit Area

One class of development permit areas (DPA) is to promote energy conservation and the reduction of greenhouse gas emissions. An energy conservation or greenhouse gas reduction DPA may have requirements in relation to landscaping, siting of buildings, form and exterior design of buildings, specific features, and machinery, equipment and systems external to buildings

The legislation does not provide authority to impose internal building requirements such as plumbing, appliances, insulation, heating, air conditioning, or lighting. As stated,

For buildings located in a designated energy conservation or reduction of greenhouse gas emissions DPA, the Building Act General Regulation designates the form and exterior design of buildings and other structures and

any matter relating to machinery, equipment and systems external to a building as unrestricted matters, which coincides with the authority granted to local governments under s. 491(9)(c)-(e) LGA. As a result, local governments can impose DPA guidelines that may be construed as building regulations for these unrestricted matters.

Despite the lack of judicial consideration, this authority likely permits a local government to adopt DPA guidelines with respect to exterior equipment such as water cisterns, solar collectors, and wind turbines, even though they may be connected to mechanical systems in the building. Further, the authority to impose requirements respecting specific features in the development, including machinery, systems and equipment external to buildings, likely allows for the compulsory connection to district energy systems, municipal electricity services, heat pumps, solar panels, geothermal heating apparatus, irrigation systems using recycled water, and other energy efficient systems.

In contrast, building design features such as low-E glazing and extra insulation for energy efficiency are likely outside the powers prescribed under s. 491(9) since these features are not *exterior* building components. In *511784 BC Ltd. et al v Salmon Arm* the court defined building "form" as referring to shape and it defined "exterior design" as relating to the external façade and walls in the sense of their appearance, such as colour and materials. The court adopted this definition in the context of considering the scope of the commercial, industrial or multi- family residential form and character DPA under s. 488(8) LGA. However, the decision sheds light on how courts may approach the interpretation of what constitutes "form" or "exterior design" in this context.

Community Benefit Agreement

As an alternative to adopting express building regulations that may exceed its jurisdiction or attract a legal challenge, a municipality may consider entering into agreements to secure higher building standards on a case-by-case basis. Such agreements would have to be

negotiated and secured voluntarily with developers.

For example, in the context of rezoning applications, s. 219 LTA covenants are often accepted as a "means of approving" a rezoning applicant's chances of obtaining the requested amendment." Covenants that are voluntarily granted in the hope that a local government might support a discretionary land use application have been upheld and enforced by

courts. S. 219 authorizes a local government to register a covenant on title of a property that imposes an obligation on a property owner "in respect of" the use of land or the use of a building, if functionally connected to the use of land or a building. In support of a discretionary land use application, a municipality may request promises that new buildings will limit renewable natural gas systems and will instead incorporate other low energy carbon systems, secured by a s. 219 covenant.

Another available contractual option to promote lower carbon energy systems is a phased development agreement that includes terms and conditions agreed to by the local government and the developer, including but not limited to, terms and conditions respecting the inclusion of specific features in the development and the provision of amenities.

Renewable natural gas can likely be restricted through voluntary agreements similar to how community amenity contributions are approached and secured. Under this approach, the restriction on renewable natural gas connections would not be a "requirement" but rather voluntary agreements that may result in applications being more likely to find favour with Council. In our view, as the higher building standards would be secured voluntarily on an ad hoc basis through a contractual agreement, it would not amount to unlawful local building regulation.

Franchise Agreement

If a municipality does not have a natural gas franchise agreement approved by the electors under section 22 of the *Community Charter*, it is possible to develop a public natural gas franchise regime under which the distribution of gas is restricted to existing users and phased out over the term of the agreement.

In addition to dealing with monopoly scheme, a local government may use a franchise agreement to negotiate with the utility regarding climate, equity, and resilience goals and actions, which is something that has not been done to date in franchise agreements.

~ Janae Enns & Don Lidstone, K.C.

Municipal Legal Update

***St. John's (City) v. Lynch*, 2024 SCC 17**

A recent Supreme Court case established that loss of property value from zoning a property that was later expropriated was not necessarily to be included in compensation for that expropriation.

Background

The City of St. John's was found to have constructively appropriated a property when it refused to permit development on it (whatsoever), denying the respondents all reasonable use of the property and acquiring a beneficial interest in the form of a right through the property for a continuous flow of groundwater to the City's own water facilities. At the time of the expropriation, a zoning regulation limited the property to discretionary agriculture, forestry, and public utility use. The trial judge concluded that the zoning regulation was an "independent enactment" and thus did not qualify as part of the "expropriation" thusly, the value lost from the zoning enactment was not to be ignored in determining the overall market value of the property and fixing compensation for the expropriation. The Court of appeal disagreed.

Analysis and Disposition

The SCC found the purpose of compensation for expropriation is to put the expropriated owner in the same economic position they were prior to the expropriation, respecting the rights of

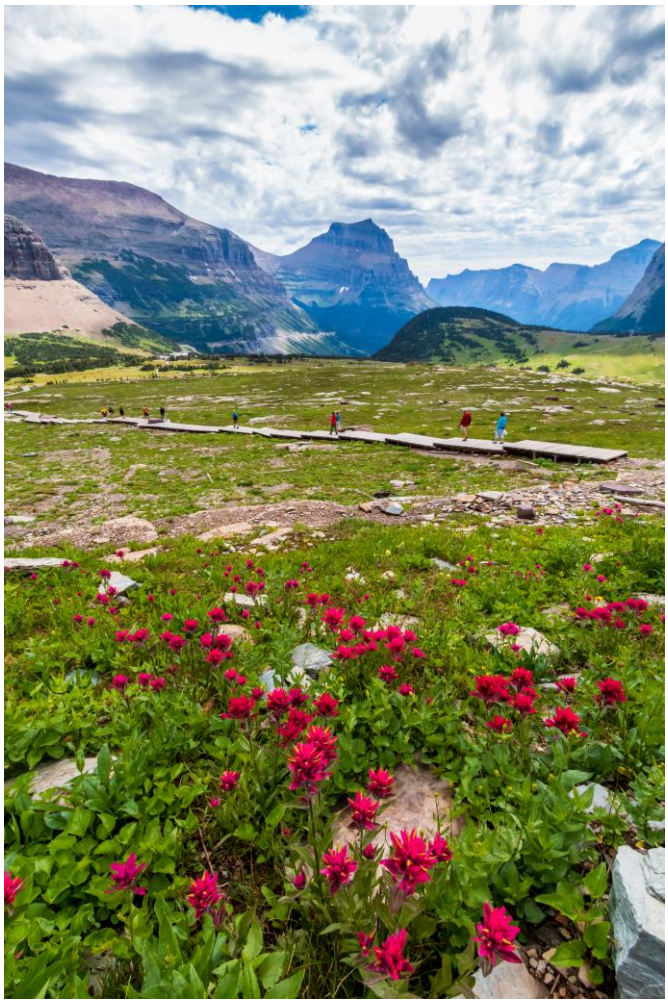
property owners while allowing public land development without excessive premium.

Zoning in and of itself did not qualify as an expropriation. Restrictions on land use did not in and of themselves necessarily constitute constructive expropriation. To qualify as such, an owner's interest in the property must have been so restricted that they have no reasonable use left for the property. Further, the state must have, through the expropriation, accrued a beneficial interest in the land in question.

Thus, zoning a property may be distinct from expropriating that property, provided the zoning does not fulfil the conditions outlined above. *Pointe Gourde* held that changes in property value caused by the expropriation itself must be ignored in compensation. This is logical insofar as, again the aim of compensation is to restore the position of the owner prior to the entirety of the expropriation process. However, as zoning is not part of the expropriation process, being a distinct and less restrictive form of land use regulation, to grant compensation for such would be restoring an owner to an economic position they did not have prior.

The SCC took special pains to note that, though per *Annapolis v. Halifax*, expropriation might qualify as a "process", that zoning might be a causative part of that process does not necessarily make that zoning part of the expropriation. If but for the zoning, the expropriation as an addition on top of such would not have occurred, that was not alone sufficient to establish the zoning as part of the expropriation. This case established a differentiation based on chronology. The zoning bylaw was passed in 1994, while the actual refusal of development occurred in 2013, with the prior statute being found by the courts to not have been motivated by an intent to expropriate, nor denying all uses of the property in effect insofar as it allowed limited agricultural uses, etc., while the denial of development declared that the property had to be maintained in its "natural state". Since there was a significant gap in time between the enactment of the zoning and the expropriative "moment", and because the zoning did not in itself have an expropriative purpose, the zoning was held to be not part of the expropriation, even though without the zoning, the expropriation, which was based on the zoning, would not have occurred.

In summary, the SCC upheld the trial court's judgment. Loss of property value from zoning is not necessarily to be compensated if the property is later expropriated, depending on whether the zoning was an integral part of the expropriations process, or a distinct legal enactment.



Bill 16: the Housing Statues Amendment Act

A recent act of legislation by the provincial government, Bill C-16 amended several statutes including the *Community Charter*, the *LGA*, the *Vancouver Charter*, and the *Islands Trust Act*. This report will focus on the changes to the *CC* and the *LGA*.

The *Act* has modified and granted new powers to local governments in four major areas: site-level works and services, transport demand management, tenant protection, density bonusing/inclusionary zoning. Each of these areas will be discussed in turn.

First, works and services. Previously, local governments could only require works and services to be performed by a developer as a pre-requisite of subdivision. Now, local governments may require works and services as a condition of subdivision approval or as a condition for the development of land more generally, i.e. before the issuance of a building permit. The amount of works and services a government may require. S. 506 includes the full list, but to provide a brief list, developers may be required to provide highways, water distribution, sewage, drainage, fire hydrants, signage, transit shelters, traffic calming, street lighting, bike parking, traffic calming mechanism, sustainable design to reduce emissions, etc.

It should however be noted that the above power has two limitations. Regarding development cost charges, if a service is being paid via a DCC, that service can also not be imposed as a requisite, unless the owner has agreed to providing that service. Further, this power must not be used to allow a density on land less than the applicable zoning.

Second of the powers granted by the *Act* is transport demand management. As condition of subdivision or building permit, approving officers may now require lands part of the relevant development to be dedicated (up to five meters in depth) to transportation infrastructure for walking, biking and public transit, as well as "constructing and designing sustainable design features". A "servicing officer" may also impose this requirement; what a servicing officer is has not yet been defined by regulation but will be a class of official local governments will have the power to appoint. This power is in addition to the extant power for approving officers to dedicate lands to highways as a condition of subdivisions.

Local governments may also require certain transportation demand management measures as a condition of building permit approval. Transport demand management is defined as "improving the movement of people and goods, reducing motor vehicle dependence, and increasing sustainable transportation through measures including electric vehicle chargers, end-of-trip facilities, and scooter and bicycle parking." Policies to advance these goals may be included in an OCP. Local governments may require developers to include certain features like EV charging stations, or bicycle and scooter parking to advance transportation management goals, along with future measures as prescribed by regulation. Developers may pay funds in lieu of these requirements, which are to be deposited into a reserve fund administered by a municipality, which must spend the funds on the above "transportation management" purpose. As of June 30th, of each year, the local government must provide a report giving expenditures and the total balance of the fund, along with a timeline for future projects, available to the public.

The third section of the legislation relates to tenant protection bylaws. The authority of specifically municipal councils is expanded. They are now as part of their power over safety of persons and property to pass certain tenant protections when a property is proposed to be redeveloped or is being redeveloped.

Redevelopment is defined in the legislation, being the demolition of residential properties for the purpose of new construction, if the result of which is the "complete and irreversible" destruction of living accommodations or common areas or amenities resulting in the termination of a tenancy agreement. If the termination of a tenancy occurs not for reasons of redevelopment, bylaws made under this new power have no effect.

If redevelopment is to occur, by bylaw, a municipality may require that landlord to provide any or all of the following:

(a) notices or information with respect to a redevelopment;

(b) financial compensation for the termination of tenancy agreements (noting that the bylaw must define the nature of the financial assistance and both how and when it must be disbursed);

(c) financial or other assistance to the tenant to find and relocate to comparable replacement units (noting that the bylaw must define what "comparable" is);

(d) the opportunity to exercise rights to enter new agreements for the rental of comparable units in property in which owners have an interest. This can also include a requirement that the owner rent the redeveloped units to tenants in priority to other persons and at a rate less than provided under applicable zoning bylaws and housing agreements.

It should however be noted regarding the requirement for financial assistance the amount the landlord is required to pay is required by legislation to be reduced by any compensation the tenant is receiving under the *Residential Tenancy Act*.

Fourth is the most expansive part of Bill 16, density bonusing and inclusionary zoning. The *LGA* now enables local governments to grant density bonuses in exchange for the provision of amenities or affordable/special needs housing. There are two ways of doing so, the first being a "conditional density rule" which is a type of

density regulation applying to particular zoning that grants increased density provided certain requisites are met. The Second is a "density benefits zoning bylaw" which does that same, but the condition must specifically concern affordable/special needs housing. Additionally, local governments may simply pass bylaws that require a certain amount of affordable/special

needs housing in particular zones without any corresponding bonus, simply as a mandate.

This last type of bylaw has additional procedural requirements. The law must include the scale of the affordable housing, either by providing a specific number in relation to all housing units in the development (gross or percentage) or the percentage floor area the affordable housing must take up. The bylaw must also include the form of tenure of the housing required, the affordability of the unit, including its sale price and rental charge, the length of time such requirements will apply to the unit, and the formula for calculating the capital costs for the provision of the unit. Local governments may vary these conditions per area, tenure, construction material, etc. as specified.

Once this requirement is imposed by bylaw, a developer has three options to meet the established legal requirement. First, they may follow the regulation as issued. Second, they can provide the same number of affordable units on other lands owned by the developer. If this option is taken, the local government and developer must enter into an agreement that specifies the location of the housing, who is to provide the housing, the timeline, how the housing meets or exceeds the original bylaw requirements, and other information required by regulation. Third, the developer may provide a payment-in-lieu. This payment must be equal to the "capital costs" as calculated in the bylaw for the provision of the housing. The funds are to be placed in a reserve fund administered by the local government who must use said funds fore the purpose of the provision of affordable housing. A report must be given on June 30th for this fund with the same requirements as that for transit demand management fund mentioned above.

Some entities are immune to such requirements for the provision of affordable/special needs housing. These include

- municipal corporation for affordable housing purpose
- a society (not including a member-funded society)
- not-for-profit housing cooperative
- board within the meaning of the *Health Authorities Act*
- Agent of the government
- The government of Canada
- Registered charity under section 248 of the *Income Tax Act*
- Prescribed bodies
- Precursor applications

The last category refers to building applications already being processed by local governments with relevant fees paid.

Regarding passing any of the bylaws mentioned above, including a density benefits zoning bylaw and a direct affordable/special needs housing bylaw, the local government must meet several procedural requirements. They must consult with affected persons. The local government must also perform a "feasibility analysis", considering "local housing conditions, residential construction costs, amenities, required density, and transportation". This must be made available to the public on request. The density provided or enabled must be higher than the minimum mandated for transit-oriented areas. All of the above applies both to the adoption and amendment of said bylaws, but no their repeal.

The province has not yet made any regulations under Bill 16, though it is likely to do in future, potentially adding to many of the above powers.

Bill 16 grants local governments the power to require various works and services as well as transport infrastructure as a condition of

subdivision and building permits. It further allows councils to protect tenants by imposing certain requirements on landlords redeveloping their properties. Finally, it enables local governments to require developers to provide amenities and affordable and special needs housing either through granting density bonuses for the provision of such services, or merely requirement the housing to be built as part of any and all developments in specific zones.

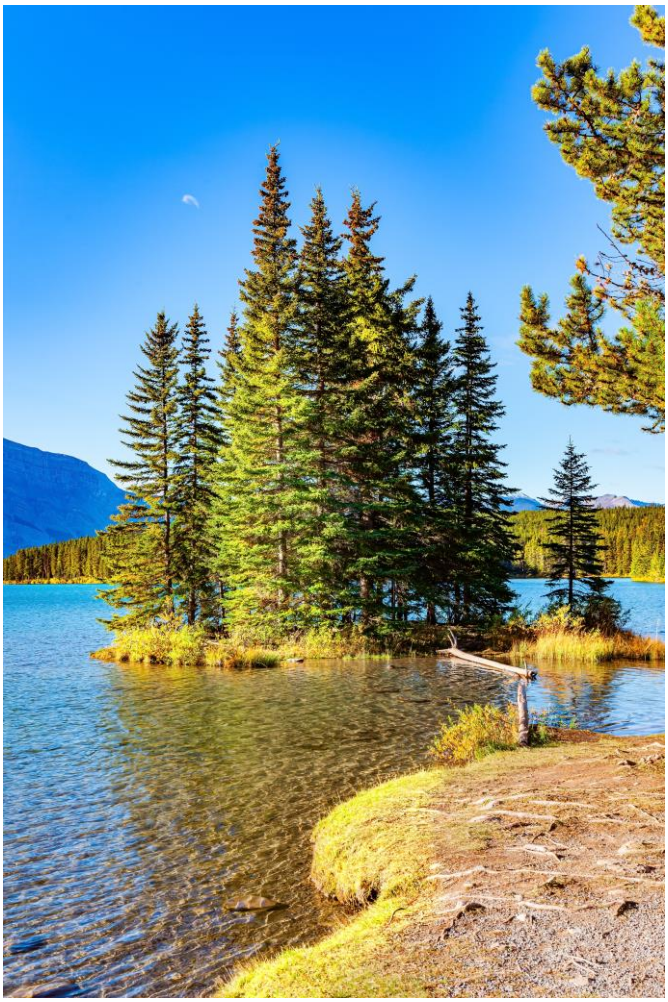
Fergus Creek Homes Ltd. v. Surrey (City), 2024 BCSC 207

In a recent BC Supreme Court decision, the Court found that a council's decision to not comply with its own procedure bylaw is judicially reviewable for reasonableness. The Court also found that a council must have good reason to justify a departure from the procedure bylaw.

Background

Around September 2020, Fergus Creek Homes Ltd. (the "Petitioner") submitted a development application to build 482 townhouses (the "Proposed Development") on its 10.4-acre property (the "Property"). On July 25, 2022, Council gave first and second readings to two bylaws to permit the Proposed Development, which amended the official community plan's land use designation and the zoning bylaw to rezone the Property (collectively, the "Amending Bylaws"). On August 8, 2022, Council gave third reading to the Amending Bylaws. On October 7, 2022, the City's approving officer granted a preliminary layout approval ("PLA") for the proposed subdivision, setting out the conditions that had to be met before the subdivision would be approved (the "PLA Letter"). On October 19, 2022, a City planner wrote a letter to the Petitioner's architect setting out a list of requirements needed to complete the Petitioner's development application (the "Requirement Letter").

On October 15, 2022, a new mayor and newly constituted Council were elected. In November 2022, the new Council motioned to rescind the third reading of the Amending Bylaws (the "Motion"). A copy of the August 8, 2022 minutes were provided to the Council on November 24, 2022; however, Council was not provided a new staff report or any other written briefing about the Proposed Development which included the history of prior relevant staff actions or consideration of s. 43(1)(a) of its procedure bylaw. A majority of Council voted in favour of



rescinding the third reading of the Amending Bylaws, filing the Amending Bylaws, and closing the application associated with the Proposed Development, among other resolutions (the "Impugned Resolutions"). The Petitioner was not invited to speak to the Motion or Impugned Resolutions. As a result, the Proposed Development came to a halt. The Petitioner

applied to the BC Supreme Court for judicial review.

Issues

1. Was Council's decision not to apply s. 43(1)(a) of the Procedure Bylaw reviewable?

2. If so, was the decision unreasonable?

Analysis

1. Council's Decision to Not Apply the Procedure Bylaw Is Reviewable

The Court found that while Council has the discretion not to follow s. 43(1)(a) of its procedure bylaw in a particular instance, doing so is a statutory decision subject to a reasonableness review under *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*"). Pursuant to s. 124 of the *Community Charter* (the "*Charter*"), the City has adopted Council Procedure Bylaw, 2004, No. 153000 (the "Procedure Bylaw"). Section 43(1)(a) of the City's Procedure Bylaw specifically provides that if a previously adopted resolution or bylaw is brought back for Council to reconsider, rescind, or amend, consideration must be given to any actions taken by City staff with respect to the matter being brought back.

The Court found that Council did not comply with the Procedure Bylaw as it did not have the information required by s. 43(1)(a), namely, the report with information about prior staff actions related to the proposed Development. The City argued that Council's decision to waive the application of the Procedure Bylaw was not reviewable because Council is the master of its own procedure, such procedural bylaws are not binding on Council, and that non-compliance with the Procedure Bylaw does not invalidate the proceeding.

The Court disagreed. After a close examination of *Virdis v. North Vancouver (City)*, 2010 BCCA 22 ("*Virdis*"), the Court found that *Virdis* stands for the proposition that courts do not interfere on matters of council procedure unless there are express statutory requirements for procedure. Here, the Court found the Procedure Bylaw is a relevant statutory procedural requirement. The Court also noted that the Procedure Bylaw constitutes an "enactment" and a "regulation". Based on this, the Court found the Procedure Bylaw is therefore not only an "express statutory requirement", but is also a "statutory obligation".

2. Council's Decision to Not Apply s. 43(1)(a) of the Procedure Bylaw Was Unreasonable

The Court found that the Procedure Bylaw is one relevant statutory legal constraint on Council's decision (*Vavilov* at para. 99). At the November 28, 2022 meeting, there was no reference to the PLA that had been issued by the City on October 7, 2022, nor the subsequent Requirement Letter from the City planner. Based on the record, no report from City staff about prior staff actions or any other information within the scope of s. 43(1)(a) of the Procedure Bylaw was submitted to Council before it voted on the Motion.

However, the Court inferred from the transcript of the Council meeting at issue that the reason for Council's Impugned Resolutions was because a previous application about the Proposed Development had been "rushed". The Court found this to be an unreasonable basis not to comply with s. 43(1)(a) of the Procedure Bylaw. The Court also found that a prior decision in the matter being rushed is not a justified reason to depart from a statutory procedural requirement required to provide the relevant information to Council.

The Court found it was unreasonable for Council to proceed without information about what City staff had done in respect of the resolutions proposed to be rescinded, so that Council members were informed about such relevant

matters before they made their decision. In addition, the record provided no justification for Council's departure from "longstanding practices or established internal authority" (*Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para. 75).

Disposition

The Court ultimately quashed the Impugned Resolutions and remitted the Motion back to Council for reconsideration.

***Bondar v. Neufeld*, 2024 BCSC 594**

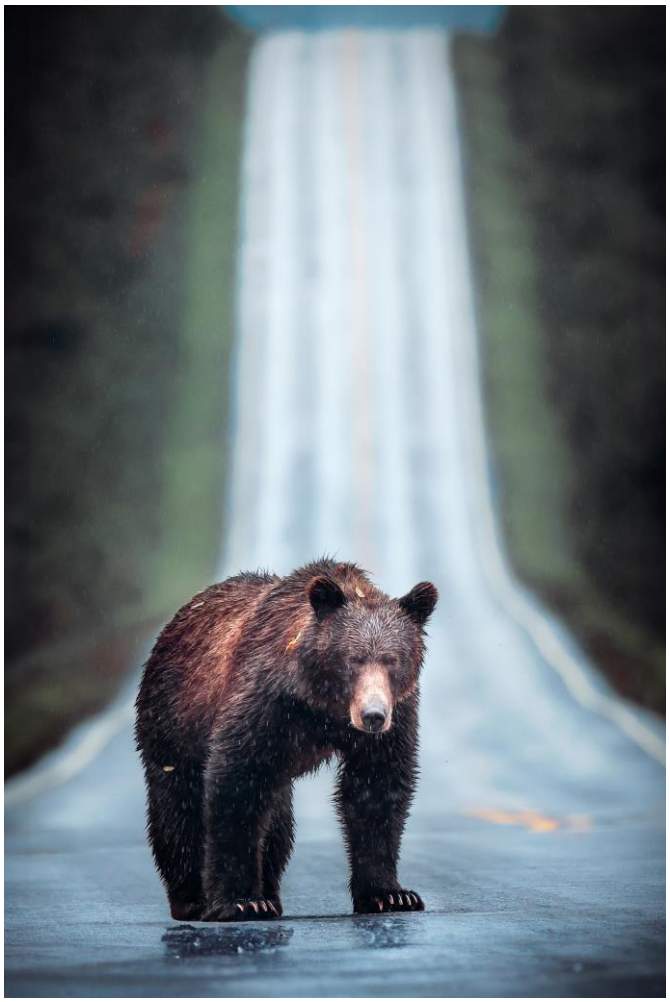
In this recent BC Supreme Court decision, the Court applied the defamation test to determine whether comments directed at a municipal school board candidate were defamatory.

Background

Dr. Bondar, a biologist and science educator, first ran for election as school trustee for the Chilliwack School Board in a by-election held on February 14, 2021. At that time, Mr. Neufeld was an existing school board trustee. In 2014, Dr. Bondar performed in a music video entitled "Organisms Do Evolve", which was available on her YouTube channel (the "Video"). The Video is approximately four minutes in length, and Dr. Bondar briefly appears naked (other than boots) during one part of it while swinging on a ball. The Video was the subject of a February 4, 2021, article in the Chilliwack Progress entitled "Chilliwack school board byelection candidate defends naked parody video." In the article, it was reported that Mr. Neufeld shared the Video in a private Facebook group.

In addition to the article, on or about February 4, 2021, a billboard sign was posted in a field next to a road in Chilliwack that showed a screenshot of Dr. Bondar in the Video. The billboard contained Dr. Bondar's name and the text, "Is this your child's idea of a School Trustee?" Dr. Bondar was elected as school trustee in the February 14, 2021, by-election.

A subsequent Chilliwack School Board trustee election was held on October 15, 2022. Both Dr. Bondar and Mr. Neufeld ran for re-election. On September 21, 2022, Mr. Neufeld participated in an interview for a group called "Action4Canada," in a segment entitled "Empower Hour." His interview was later posted online. In the



interview, among other things, he spoke about candidates for the then upcoming Chilliwack School Board election. In the interview, Mr. Neufeld described Dr. Bondar as a "strip-tease artist" (the "Comments"). In the October 12, 2022 Chilliwack School Board Election, Dr. Bondar was re-elected as school trustee and Mr. Neufeld was not.

Dr. Bondar commenced the action against Mr. Neufeld on November 3, 2022.

Issues

1. Were the Comments made by Mr. Neufeld referring to Dr. Bondar defamatory?
2. If so, can Mr. Neufeld rely on a defence in order to shield him from liability?

Analysis

1. Were the Comments Defamatory?

To make out a claim that the Comments are prima facie defamatory, the Court found that the plaintiff must demonstrate (from *Simán v. Eisenbrandt*, 2023 BCSC 379 at para. 43):

(i) that the impugned words were defamatory, in the sense they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
(ii) that the words in fact referred to the plaintiff; and
(iii) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

For a statement to be defamatory, the Court found that it must "lower the reputation of the plaintiff in the estimation of right-thinking members of society generally, or expose the plaintiff to hatred, contempt, or ridicule" (*Hudson v. Myong*, 2020 BCSC 517 at para. 105). The Court also noted that statements or publications can be defamatory of a person without identifying the person specifically. Statements "which do not refer to the plaintiff by name will meet the 'of and concerning' requirement if they may reasonably be found to refer to the plaintiff in light of the surrounding circumstances" (*Casses v. Canadian Broadcasting Corporation*, 2015 BCSC 2150 at paras. 334–335).

Applying the principles from the *Grant v. Torstar* test, the Court found the following:

(i) the Comments were defamatory, in the sense that they would tend to lower Dr. Bondar's reputation in the eyes of a reasonable person;
(ii) the Comments did in fact refer to Dr. Bondar; and
(iii) the Comments were published, meaning that they were communicated to at least one person other than Dr. Bondar.

2. Can Mr. Neufeld rely on a defence to shield him from liability?

Mr. Neufeld argued that the term "strip-tease artist" accurately described the plaintiff's performance and was therefore a true statement.

The Court found that a justification defence will succeed if the words in question are true or substantially true, in the sense they convey no worse meanings than an accurate account. The Court rejected this defence on the basis that the Comments gave an impression of Dr. Bondar that was misleading and potentially damaging to her reputation.

Mr. Neufeld also relied on the fair comment defence and argued that the subject publication related to a matter of public interest, and is recognizable as editorial, colourful, and/or rhetorical opinion that reflects his honestly held views based on proven facts.

The Court found that the fair comment defence has five elements. First, the comment must be on a matter of public interest. Second, it must be "based on fact". Third, though it can include inferences of fact, it must be recognisable as comment. Fourth, it must satisfy an objective test of whether any person could honestly express that opinion on the proved facts. Finally, even if the above elements are met, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice. Consideration of the elements of the fair comment defence requires an assessment of the defamatory words used in the full context surrounding their use

(*WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at paras. 55-56).
The Court found that Mr. Neufeld had not made out the fair comment defence on the basis that the Comments were not tethered explicitly or implicitly to any factual basis.

Mr. Neufeld also relied on the qualified privilege defence. Mr. Neufeld argued that as a candidate up for re-election, had a legal, social, moral or personal interest or duty to express his honestly held views about the conduct and character of other candidates, and the community had a corresponding interest to receive such information.

The Court noted that an occasion of qualified privilege exists if a person making a communication has an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published and the recipient has a corresponding interest or duty to receive it (*Bent v. Platnick*, 2020 SCC 23 at para. 121).

The Court found that qualified privilege did not exists in this instance, as the Supreme Court of Canada had already found that comments made during an election campaign do not constitute qualified privilege.

Disposition

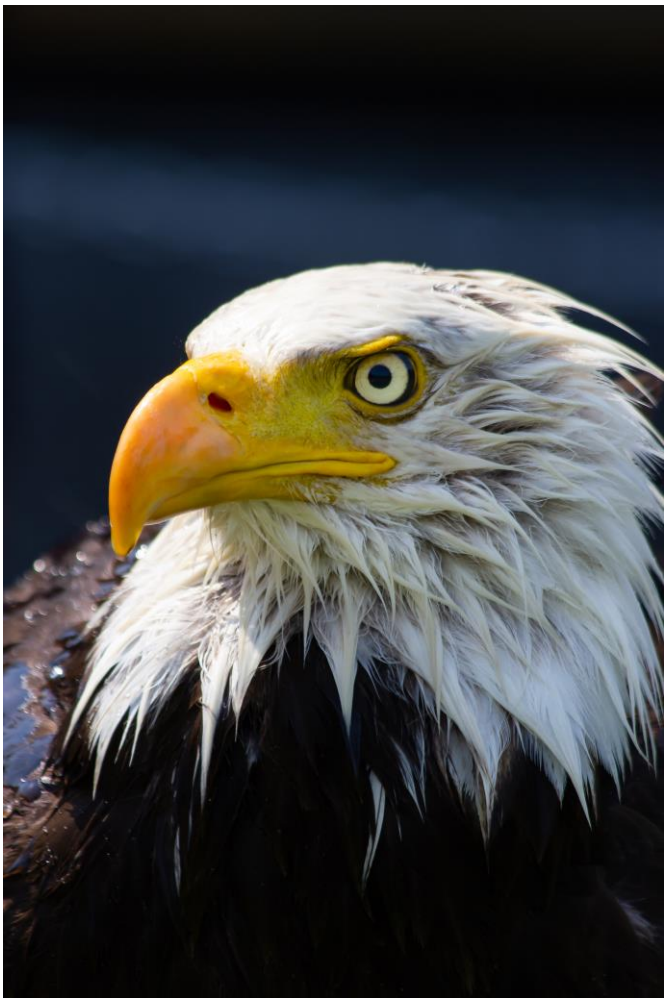
The Court found that Mr. Neufeld characterization of Dr. Bondar was an effort to discredit his opponent in a school board trustee election, which crossed the line and constituted defamation. His words were defamatory, and no defences could be made out.

Accordingly, the Court ordered Mr. Neufeld to pay Dr. Bondar $35,000 in general damages and $10,000 in punitive damages.

~ Qaasim Karim & Noah Robinson-Dunning

Municipal Liability for Contractor Safety Issues

When local governments enter into construction contracts, it is customary to include provisions in



such contracts imposing the responsibility for site safety on the contractor. It was believed – until now – that imposing such responsibility on the contractor would relieve the local government of legal liability for safety violations by the contractor.

That belief has come under a cloud after a recent Supreme Court of Canada ("SCC") decision in *R. v. Greater Sudbury (City)*, 2023 SCC 28. This article discusses what the decision was about, how it affects local government liability, and what measures local governments could consider to address the new legal reality.

In *Greater Sudbury*, the municipality contracted with a contractor to repair a water main in a busy urban area. During the repairs, an employee of the contractor struck and killed a pedestrian when driving a road grader through an intersection. No barrier was placed between the construction area and the public intersection, and no signaller was present. The contractor was tried and convicted for breaches of duties of an 'employer' under Ontario's *Occupational Health and Safety Act*. The legal question was whether the municipality also breached its duty as an employer by virtue of the fact that the work was contracted out by the municipality on its own land.

While lower courts found that the municipality was not an employer and acquitted it, the Ontario Court of Appeal found the municipal *was* an employer. The City appealed to the SCC. The 8 justices of the SCC that heard this case were evenly divided and issued two decisions – one upholding the Ontario Court of Appeal's decision and another overturning it. Because a majority decision is required to overturn a lower court's decision, the default result of this split was that the Court of Appeal's decision stood intact. While a divided judgment like this does not have the same force as a majority judgment, it does cast doubt on whether local governments can escape liability by making contractors liable for site safety.

For our purposes, the decision of the 4-justice panel that upheld the Court of Appeal's decision is relevant. So, what exactly did the upholding SCC faction say? Because the little space available here does not allow us to take an in-depth view of the decision, it is sufficient to discuss two main takeaways from the upholding faction's reasoning.

First, the upholding faction noted that nothing in Ontario's *Occupational Health and Safety Act* requires that an owner must have control over the workplace or the workers there in order to be characterized as 'employer'. In other words, an owner may be deemed to have all duties of an 'employer' under the statute even if the owner exerts no control over the site or workers.

Second, the upholding faction found that notwithstanding the above finding on control, an owner may still avoid liability if it exercised due diligence. Relevant considerations to make a finding of due diligence include the owner's degree of control; whether control was delegated to the contractor in an effort to overcome its own lack of skill, knowledge or expertise; whether the accused took steps to evaluate the constructor's ability to ensure compliance with safety laws; and whether the accused effectively monitored and supervised the constructor's work.

British Columbia's *Workers Compensation Act* has concepts similar to Ontario's *Occupational Health and Safety Act*, so the above findings are very relevant. Based on this author's experience reviewing construction contracts prevalent in BC, it appears that local governments may not meet most considerations to show due diligence that were provided in the judgment discussed above under practices that are prevalent today. For example, local governments ask for proof of WorkSafeBC registration but rarely inquire into the contractor's actual ability or experience in meeting safety requirements.

In response to the *Greater Sudbury* case, local governments may want to consider the following steps when contracting out construction projects.

- Consider bidders' safety track record during selection. For example, a local government could assign 10% or 20% of evaluation points to such past safety-related performance.
- Provide information of workplace hazards to contractors. For example, bid documents could identify areas around the workplace that could result in

construction equipment interfering with public thoroughfares.
- Monitor the contractor's compliance with workplace safety plan and statutory obligations during construction.

The *Greater Sudbury* decision is only a few months old at the time this article was written, and much remains to be understood in terms of its full effects on local government liability. The above should be taken as nothing more than preliminary considerations that may need to be revisited as the caselaw develops.

~ Rahul Ranade

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