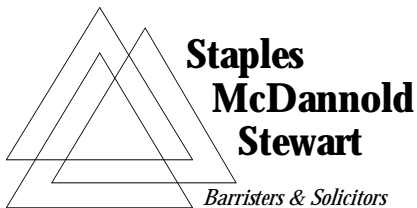


Legal Update – Recent Court Decisions

U.B.C.M. CONVENTION

September 25 to 28, 2001



prepared and presented by
Guy McDannold
Staples McDannold Stewart
2nd Floor - 837 Burdett Avenue
Victoria, BC V8W 1B3
Tel: 250 380 7744
Fax: 250 380 3008
Email: logolaw@sms.bc.ca
www.sms.bc.ca

1. ***Pacific National Investments v. City of Victoria***
Supreme Court of Canada (2000)

- zoning is a legislative power and local government must be free to amend or alter their bylaws in the public interest
- local government council cannot bind themselves or a future council by contract to prevent council from exercising zoning or legislative powers
- recognition of the importance of local government elected officials as community representatives

“Municipal legislative powers are an integral part of governance that municipalities cannot give up. Municipal councils cannot fetter the discretion of successor councils to engage in the legislative process without undue influences.”

“Municipal governments are democratic institutions through which the people of a community embark upon and structure a life together.”

“Municipal governments are governments exercising powers delegated by the provincial legislatures, and they must be able to govern based on the best interests of their residents and based on conceptions of the public good.”

2. ***City of Nanaimo v. Rascal Trucking Ltd.***
Supreme Court of Canada (2000)

- courts are to give a broad reading to the *Local Government Act* to determine local government jurisdiction – “a benevolent interpretation”
- courts are to give deference to the decisions of local government elected officials and are not to interfere unless the decisions are patently unreasonable

“In interpreting this legislation I would not desire to apply the technical or strict canons of construction sometimes applied to legislation authorizing taxation. I think the sections are, considering the subject matter and the intention obviously in view, entitled to a broad and reasonable if not ... a “benevolent construction”, and if the language used fell short of expressly conferring the powers claimed, but did confer them by a fair and reasonable implication I would not hesitate to adopt the construction sanctioned by the implication.”

“Municipal councillors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing *intra vires* decisions. The reality that municipalities often balance

complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the *intra vires* decision of municipalities be reviewed upon a deferential standard.”

“A bylaw is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the country, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.”

“... courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, court must be prepared to adopt the “benevolent construction” which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.”

“The standard upon which courts may entertain a review of *intra vires* municipal actions should be one of patent unreasonableness.”

**3. *Bekar v. Regional District of Bulkley-Nechako*
B.C. Court of Appeal (1995)**

- earlier recognition by the highest court in British Columbia of local government as a third level of government, with important responsibilities, which the court is not to interfere with

“It has been said municipal institutions are a third level of government. If this be so, it is inherent in that status that the important responsibilities of local government be recognized accordingly.

“Judicial intervention is not to be lightly undertaken in the affairs of a local government. The courts have recognized the hybrid nature of the responsibilities of those elected to municipal office. A line has been drawn between ensuring that local government operates according to law, and judicial intervention which would amount to substituting for the judgment of the ballot box the judgment of the courts.”

4. ***First National Properties Ltd. v. District of Highlands***
B.C. Court of Appeal (2001)

- elected officials are entitled to have strong opinions on land use and environmental issues
- such strong beliefs do not amount to malice entitling property owners to bring an action for abuse of public office

“Land use and environmental protection are surely not purposes extraneous or foreign to municipal governments. ... A motivation to preserve lands in their natural state is a proper municipal purpose, even where lawful actions carried out in furtherance of that purpose adversely affect the interests of one or more property owners.”

“Decisions made by elected officials in pursuit of what they see as the public good often adversely affect private interests. Knowledge that this will result can surely not, if the power is otherwise properly exercised, convert such decisions into targeted malice.”

5. ***CMHC v. District of North Vancouver***
B.C. Court of Appeal (2000)

- use of zoning power to restrict residential development and to preserve park, recreation and open space is valid local government objective
- legitimate for municipality to consider preserving large areas for parks and other uses which constitute open space

6. ***Pitt Polder Preservation Society v. District of Pitt Meadows***
B.C. Court of Appeal (2000)

- public hearings for zoning bylaws must be conducted in such a way to ensure procedural fairness for participants
- right to be heard before a municipal council makes decisions on proposed land use or zoning bylaws must encompass more than opportunity to express approval or disapproval of proposed bylaw
- failure to disclose relevant reports and documents to the public prior to the public hearing will amount to a breach of a duty of procedural fairness

“The right to be heard before Council makes a decision on proposed land use or zoning bylaws must encompass more than an opportunity to express approval or disapproval of the proposed bylaws. If the participatory process that is mandated by the statute is intended to provide Council with a meaningful examination and discussion of the issues material to Council’s decision, it appears to me to have been essential for members of the public to have been given access to impact reports and

other relevant documents in sufficient time to prepare reasoned presentations.”

**7. *Bavelas v. Copely and District of Saanich*
B.C. Court of Appeal (2001)**

- no claim for damages may be brought against a district municipality for draining highways with ditches and discharging water to a convenient watercourse – even if the watercourse is on private property and causes damage to private property

“549. (1) A district municipality may

- (a) collect the water from any highway by means of drains or ditches, and
- (b) convey to and discharge the water in the most convenient natural waterway or watercourse.

(7) No action arising out of, by reason of or in respect of the construction, maintenance, operation or use of a drain or ditch authorized by this section, whenever the drain or ditch is or was constructed, may be brought or maintained in a court against a district municipality.”

**8. *City of Vancouver v. Doll and Penny’s Café Ltd.*
B.C. Court of Appeal (2000)**

- validity of local government no smoking bylaws upheld
- business proprietors can be held liable for permitting customers to smoke in the business premises contrary to the bylaw
- in the trial court, the following statement was made:

“The goals of the no-smoking bylaw are not open to question on this appeal. It is a health bylaw properly enacted by the Vancouver City council. The purpose of the legislation cannot be attained without enforcement. That enforcement may be accomplished in many ways. It might require a force of City inspectors. It might require the involvement of the police. It will require the cooperation of the public and of the proprietors of restaurants. What is expected from the proprietors is codified in the bylaw.”

9. **114957 Canada Limited v. Town of Hudson**
Supreme Court of Canada (2001)

- Supreme Court of Canada upholds the right of Town of Hudson, Quebec to regulate and prohibit the use of pesticides within the municipality
- court gives broad reading to local government jurisdiction and finds no conflict with either Federal or Provincial regulations

“The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment. In the words of the Superior Court Judge: ‘Twenty years ago there was very little concern over the effect of chemicals such as pesticides on the population. Today, we are more conscious of what type of an environment we wish to live in and what quality of life we wish to expose our children [to].’ This Court has recognized that ‘[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment ...”

“The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.”

“A true and outright conflict can only be said to arise when one enactment compels what the other forbids.’ ... ‘A finding that a municipal bylaw is inconsistent with a Provincial statute (or a Provincial statute with a Federal statute) requires, first, that they both deal with similar subject matters, and second, that obeying one necessarily means disobeying the other.”

“As a general principle, the mere existence of Provincial (or Federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter.”

10. **Ingles v. Tutkaluk**
Supreme Court of Canada (2000)

- local government liability for negligent building inspection

“It is clear, that once a government agency makes a policy decision to inspect, in certain circumstances, it owes a duty of care to all who may be injured by the negligent implementation of that policy;”

“While I have stated above that a government agency will not be liable for those decisions made at the policy level, I must

emphasize that, where inspection is provided for by statute, a government agency cannot immunize itself from liability by simply making a policy decision never to inspect.”

“To avoid liability, the government agency must exercise the standard of care in its inspection that would be expected of an ordinary, reasonable and prudent person in the same circumstances. ... the measure of what is reasonable in the circumstances will depend on a variety of factors, including the likelihood of a known or foreseeable harm, the gravity of that harm and the burden or cost which would be incurred to prevent the injury. ... While the municipal inspector will not be expected to discover every latent defect in a project, or every derogation from the building code standards, it will be liable for those defects that it could reasonably be expected to have detected and to have ordered remedied;”

- this case was applied in the recent *Delta case: Owners, Strata Plan NW3341 v. Canlan Ice Sports Corporation and the Corporation of Delta*, B.C. Supreme Court (2001)

**11. 549196 B.C. Ltd. v. City of Kamloops
B.C. Court of Appeal (2000)**

- development cost charges apply if a new building imposes a greater capital cost burden on local government facilities than the burden imposed by the most recent use of the building’s land prior to the application for the building permit
- in determining if development cost charges apply, the most recent use of land that is compared with its new development, to determine if there are increased capital cost burdens, may be either an active use or a dormant use

“Counsel for the City submits that the chambers judge erred in finding the relevant comparison to be between the burden which the petitioner’s building will create and that created by the hotel in a period ending 20 years earlier. The relevant time for making the comparison, he submits, is the date of application for the building permit at which time, of course, the land was vacant. Put in that way, the submission goes too far. In the nature of things, land will almost always be vacant at the time of applying for a building permit....But...to go back 20 years to find a point of comparison cannot be justified. The appropriate point for comparison is the most recent use of the property prior to the application. In this context, I would not confine that to an active use such as the operation of the hotel but would include what might be called a dormant use such as holding the property for future development.”

12. ***District of Squamish v. Great Canadian Pumice Inc.***
B.C. Court of Appeal (2000)

- a private commercial entity leasing land owned by the Provincial government is subject to local government zoning bylaws and does not come within the exemption created by s. 14(2) of the *Interpretation Act*
- land used by the Provincial government is exempt from local government zoning bylaws even if that land is not owned by the Provincial government

“As far as the wording of s.14(2) is concerned, the phrase “bind or affect the government in the use or development of land” must in my view be contrasted with wording referring to Crown land regardless who is the user or developer thereof. The section does not refer, for example, to an enactment that would “affect the use or development of Crown land”...Instead, the section refers to an enactment that would “bind or affect the government in the use or development” of (any) land – wording that in my view suggests the section is restricted to the government as user or developer, presumably of any land regardless of ownership. This interpretation is consistent with the notion that s.14(2) was intended to ‘reverse the reversal’ of Crown immunity, there being no evidence that prior to 1974, a private party leasing land from the Crown was also entitled to claim immunity from land use laws in the province.”

Copy of this paper can be viewed on our website: www.sms.bc.ca

Presentation 626 040 Sept 24/01 GM/jm