

On the Waterfront – Two Recent Cases Examine the Authority to Regulate the Marine Environment

The British Columbia courts have recently released two important decisions relating to the constitutional authority of governments to regulate the marine environment. In one of them, *Salt Spring Island Local Trust Committee v. B&B Ganges Marina Ltd.*, 2008 BCCA 544 (“B&B Ganges”), the Court of Appeal examined a local government’s authority to regulate a floating structure under its zoning bylaw. In the other, *Morton v. British Columbia (Minister of Agriculture and Lands)*, 2009 BCSC 136 (“Morton”), the B.C. Supreme Court examined the province’s authority to regulate fish farming through its aquaculture regulations. In each case, the court was faced with the question of whether the challenged regulations intruded into an area of exclusive federal jurisdiction, a finding that would render those regulations invalid.

Local governments possess the authority to regulate the use of land under Part 26 of the Local Government Act, including by way of zoning bylaws. The Local Government Act defines “land” as including the surface of water. However, the authority to regulate the use of the surface of water is limited because, under Canada’s Constitution Act, the federal government has the exclusive jurisdiction to regulate with respect to matters of shipping and navigation.

In *B&B Ganges*, the defendant marina had converted a former oil tank barge into a float camp barge, and was using it as an office and reception area. The barge exceeded the size limit for structures under the zoning bylaw, and the Salt Spring Island Local Trust Committee ordered the marina to remove it. The marina refused, pointing to the fact that the barge was still registered in the Canadian Register of Ships, even though it had not been used for navigation purposes for some time, and even though it was not intended to be used for navigation purposes in the foreseeable future. The marina argued that since the barge was a “ship” it fell under federal jurisdiction and could not be regulated under the zoning bylaw.

The court rejected the marina’s argument, finding that registration as a ship was not conclusive evidence. The court looked instead at the totality of the facts of the case, and determined that the barge was no longer a “ship” but simply a “structure”, and therefore subject to regulation under the zoning bylaw. In the result, the Court of Appeal upheld the trial judge’s ruling that the marina must remove the barge. *B&B Ganges* confirms that local governments have authority to regulate floating structures under their zoning power, at least with respect to floating structures that are not used for purposes of navigation and shipping.

The *Morton* case provides an example of a decision going the other way. In *Morton*, a number of groups challenged the B.C. government’s authority to licence and regulate fish farms in coastal waters. The petitioners argued that the province was attempting to regulate in an area of exclusive federal jurisdiction, since the Constitution Act gives the federal government sole authority in relation to “sea coast and inland fisheries”. The province argued that fish farms are not “fisheries” subject to federal jurisdiction, but rather a matter of land use and farming.

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The court, however, held that the province's efforts to licence and regulate fish farming offended the division of powers under the Constitution Act both directly and indirectly – directly because the fish farms were themselves “fisheries”, and indirectly because the fish farms have an impact on traditional fisheries as well as the marine environment generally. It was not a complete wash for the province, since the court did allow that the province could validly regulate the cultivation of marine plants! The court suspended its order striking down the province's aquaculture regulations for one year, in order to give the federal government time to enact its own regulations

Both the B&B Ganges case and the Morton case illustrate the necessity of exercising caution when regulating matters that may fall under federal jurisdiction. When in doubt, local governments should seek legal advice.

Michael Hargraves

No Defamation Remedy For Local Government

The law of defamation has recently changed for local government in British Columbia.

In 1975, the British Columbia Court of Appeal in the *City of Prince George v. British Columbia Television Systems Ltd.* held that local government could bring an action for defamation. The Court held that since every incorporated municipality has all the rights and liabilities of a corporation and because a corporation had a right of action in defamation that a municipal corporation had the same right. In response to concerns about protecting freedom of speech, the Court of Appeal stated:

“...The short answer to counsel's submission, founded on freedom of speech, is simply that that right, under our law, must be exercised subject to the law of defamation which affords everyone protection against injury to reputation by untrue imputation. Moreover, as counsel for the respondent pointed out, in my view correctly, the law of defamation makes adequate provision by the principle adopted in respect of fair comment to protect those who make legitimate critical comments on matters of public interest. In my view the appellant's argument founded on free speech is without merit.”

In 1982, the Canadian Charter of Rights and Freedoms was enacted including, in Section 2(b), that everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media communication.

On March 26, 2009, the British Columbia Supreme Court, in *Dixon v. the City of Powell River*, heard an application for an order that the City of Powell River did not have the legal authority to institute civil proceedings or threaten to do so for defamation of its reputation as a municipal government. As summarized by the Court, the plaintiff, supported by the Attorney General of British Columbia, argued that the 1975 Prince George decision was:

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“... not binding authority on this Court because, although defamation is a common law cause of action, the Supreme Court of Canada has held that the law of defamation is informed by the principles of free speech enshrined in the Charter. In other words, common law defamation cases should be decided in ways that are consistent with the Charter principles of free speech. Because Prince George was decided before the Charter became Canadian law, counsel says it is not binding on this Court so as to compel me to find that a municipal government may maintain an action for defamation.”

The Court agreed. After referring to a number of Ontario decisions, which had recently refused to follow the Prince George case, the Court held that a municipal government could not maintain an action in defamation. The Court stated:

“In this case I conclude that I am not bound to follow the judgment in Prince George because a relevant statute, the Canadian Charter of Rights and Freedoms, came into force after the judgment in that case and the arguments concerning freedom of speech obviously did not consider that law. Given the authorities I have cited, I conclude that the rejection of the right to free speech argument by the Court in Prince George is inconsistent with the current law enshrined in the Charter and therefore, as per Spruce Mills, it follows that I do not consider Prince George to be binding on me. ... The Charter enshrined value of freedom of expression is paramount and local governments have resort to other means to protect their reputations from citizens who publish critical commentary about the government itself... It is antithetical to the notion of freedom of speech and a citizen’s rights to criticize his or her government concerning its governing functions, that such criticism should be chilled by the threat of a suit in defamation.”

This case is of significance as it has changed the law in British Columbia. Local government can no longer bring an action for defamation to its corporate reputation. Individual members of Council or staff will still have the ability to do so but such an action will have to be brought by them personally against any defendants.

Guy McDannold

You Should Be A-Waltzing with TILMA Today

The Trade Investment and Labour Mobility Agreement (“TILMA”), an agreement between the governments of British Columbia and Alberta came into effect on April 1, 2009 for the MASH sector (municipalities, academic institutions, schools and hospitals) in British Columbia.

1.0 Applicable TILMA Provisions (Jolly swagmen from Alberta now welcome)

The basic rules of TILMA are set out in Articles 3 and 4:

- Article 3 – each party to ensure that its measures do not operate to restrict or impair trade between or through the territory of the parties, or investment or labour mobility between the parties;

Article 4 (Non-Discrimination) – each party is to give treatment, that is no less favourable than the best treatment given to its own goods, persons, services and investors, to

- (a) like, directly competitive or substitutable goods,
- (b) persons,
- (c) services, and
- (d) investors or investments.

Article 14 of TILMA relates to procurement and provides that when it comes to procurement of goods, services and construction, the parties (British Columbia and Alberta) are to provide open and non-discriminatory access to procurements of their government entities where the procurement value is (as applicable to local governments

- (a) \$75,000.00 or greater for goods,
- (b) \$75,000.00 or greater for services, or
- (c) 2100,000.00 or greater for construction.

“Procurement Value” is defined as

“means the estimated total financial commitment resulting from a procurement, not taking into account optional renewals when the compulsory part of the contract is of at least one years’ duration.”

2.0 What is Procurement? (Grabbing the jumbuck at the billabong)

“Procurement” is defined in TILMA as

“means the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services or construction, but does not include

- (a) any form of government assistance such as grants, loans, equity infusion, guarantees or fiscal incentives, or
- (b) government provision of goods and services to persons or other government organizations.”

In other words, if a contract is at least a year in length and the contract for services is for less than \$75,000.00, then even though the contract may contain optional renewals (and in my opinion this would mean truly optional with neither party being bound to the renewal) then the TILMA rules would not apply.

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3.0 Exceptions (Holes in the billy can)

Exceptions to the requirement are set out in Part V of TILMA.

Of exceptions applicable to procurements, the following would likely be of most interest to local governments:

“Section 2

- (b) from a public body or a non-profit organization,
- (d) of health services and social services,
- (g) where it can be demonstrated that only one supplier is able to meet the requirements of a procurement,
- (h) for an unforeseeable situation if urgency exists and the goods, services or construction could not be obtained in time by means of open procurement procedures,
- (i) when the acquisition is of a confidential or privileged nature and disclosure through an open bidding process could reasonably be expected to compromise government confidentiality, cause economic disruption or be contrary to the public interest.”

As a matter of interest (to lawyers!), there is also a specific exemption for service provided by lawyers and notaries (Section 2(j)). Finally, if there is a call for bids and there are no bids received, then another means of procurement other than the open bid process may be employed. There are also some exceptions available under TILMA for regional economic development subject to the restrictions set out in Part V.

TILMA requires contracts at various threshold levels to be subject to open procurement processes, including advertising on B.C. Bid. Assuming that none of the specific exceptions apply to a situation, TILMA would supersede a local government's own internal tendering policy, imposing obligations over and above common law and statute. Accordingly, tendering policies should be reviewed to identify possible areas of inconsistency with TILMA.

The most likely discrepancy is that at common law a purchasing policy is not legally binding and that a local government may in any given situation depart from its own tendering policy and choose not to go to tender for a project that would otherwise require a tender under the municipal policy. Under TILMA, once the procurement falls within the parameters established by Article 14, then the TILMA rules apply, unless the municipality may take advantage of a specific exemption.

4.0 May a Contract be Divided Into Components? (How many jumbucks in a tucker bag?)

Some types of contracts, such as contracts for supply of goods and services, could theoretically be split into different, separate procurements that would not be subject to TILMA provided that

- (a) a compulsory component is at least one year in length, and
- (b) in the case of a contract for goods or services, the amount of the goods or services being contracted for is less than \$75,000.00.

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In the case of a contract for services where the services are to be provided on an hourly basis dependant on need, then whether or not the requirements of TILMA would have to be followed would depend upon whether it was reasonable for the municipality to consider, at the time of awarding the contract, that the value of the services would be less than \$75,000.00 during the compulsory component.

For example, if a municipality on an annual basis contracted out for consulting services from a consultant and past history demonstrates that the cost to the municipality would be less than \$75,000.00 per year, the municipality should be able to enter into an agreement for at least a year with that consultant without going to tender in accordance with TILMA. The contract could be for additional years in the form of optional renewals – both parties having the option to agree to continue the relationship. However, once it became clear that the \$75,000.00 threshold was to be surpassed on an annual basis, then TILMA would apply.

Similarly, it should be possible for a municipality to have separate contracts for different projects or services with the same contractor, where it makes sense objectively for sound public policy reasons to structure the business relationship this way. A regional district, for example, might wish to have an engineering firm do \$50,000.00 of work on a sewer project for Electoral Area A and other work (worth \$40,000.00) on a separate sewer proposed for Electoral Area B. These are different projects for different service areas and it should be possible to proceed in such circumstances without being subject to TILMA.

In this regard, it is important to note that under TILMA, a party must not act for the purposes of “avoiding competition”, “discriminating between suppliers” or “protecting its suppliers”. If the dominant purpose of the municipality in awarding separate contracts is to further the public interest (through the reduction of costs or the maintenance of high levels of service) then a decision should be defensible even under TILMA. However, if a municipality has a practice of repeatedly structuring its purchasing needs to deliberately avoid TILMA, then this will likely be considered a violation.

5.0 Can Local Government Act as Construction Manager and Avoid TILMA? (Jumping in the Billabong)

No. A construction contract could not be handled through the use of the construction management approval. The reason for this turns on the definition of “Procurement”, which under TILMA is “the total financial commitment resulting from a procurement ...”

In the case of a construction project this would be inclusive of the total value of construction. In that scenario, if the value of the procurement would still exceed \$200,000.00 then splitting one project into separate component “contracts” would not change that interpretation of Article 14, Section 1(c).

6.0 Is TILMA Legally Binding on Municipalities? (Down come the troopers, one, two three)

While British Columbia and Alberta have agreed that TILMA is to apply to local governments as of April 1, 2009, as yet, no implementation legislation has been brought into effect to actually make adherence to TILMA by municipalities a legal requirement.

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However, the provinces of British Columbia and Alberta are themselves both bound by TILMA (Article 2.1) to ensure compliance with TILMA by “government entities”, which includes local governments and would be vulnerable to monetary awards issued by the review panel if a breach of TILMA is found to have occurred. Therefore, it is likely that the Province will move to minimize TILMA violations at the local government level. This could include making provincial grants conditional on compliance with TILMA.

For the moment, however, there does not appear to be any direct legal consequence for a municipality that did not find TILMA an attractive dance partner.

Colin Stewart

The Far Reach of Freedom of Information to Local Government Subsidiaries

Local governments that have created corporations to operate their activities have an interest in the outcome of the Office of the Information and Privacy Commissioner for British Columbia (Order F09-08) – Corporation of the Village of Burns Lake, April 30, 2009, where two applicants made requests for information under the B.C. Freedom of Information and Protection of Privacy Act (FIPPA) to the Village of Burns Lake (the Village) and to two other entities - the Burns Lake Community Forest Ltd. (BCLF) and ComFor Management Services Ltd. (ComFor). The information requested related to several entities connected with the Burns Lake Community Forest in northern British Columbia.

The Village had created BCLF as a vehicle to enter into a long-term agreement with the Province of British Columbia to manage the operation of a community forest. The Village initially owned 100% of the shares of BCLF and appointed all of its directors. The Village, solely for tax purposes, subsequently transferred all BCLF shares to ComFor, another wholly owned subsidiary, all of whose directors were also appointed by the Village.

ComFor’s articles of incorporation were subject to the approval of the Inspector of Municipalities, who directed that ComFor should be subject to FIPPA.

When the information requests were made, the Village passed on the request to BCLF and ComFor as the appropriate parties to provide the information. BCLF and ComFor argued that they were not subject to FIPPA, as they were neither listed as public bodies under Schedule 2 of FIPPA, nor captured by the definition of “local government body” found in the legislation.

The issue in this case was whether BCLF and ComFor were “local government bodies” under FIPPA. To be “local government bodies” for the purpose of the legislation, it was a requirement that all the members and officers of the companies be appointed by, or under the authority of a municipality. BCLF and ComFor argued that the Village was just a “figure-head shareholder” of ComFor, and held the shares under various constraints and agreements. The companies argued these limitations were significant with respect to the question of whether ComFor’s members and officers were appointed under the authority of the Village.

The Commissioner considered a recent Ontario Court of Appeal decision where the Toronto Economic Development Corp. (TEDCO), an entity incorporated by the

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City of Toronto to carry out its economic policy, contended that it was not subject to the Ontario Municipal Freedom of Information Act (MFIPPA). MFIPPA, being the Ontario equivalent of FIPPA, provided that any body whose “members or officers” were appointed under the authority of a municipality was subject to the Act. TEDCO’s contention that it was not subject to MFIPPA was based on the fact that TEDCO’s directors appointed its officers. In that case, the court gave the Act a liberal and purposive reading and came to the conclusion that TEDCO’s officers were appointed under the authority of the City, and that TEDCO was, therefore, subject to MFIPPA.

In determining whether the officers of ComFor were appointed or chosen by or under the authority of the Village, the Commissioner employed the same approach to the interpretation of FIPPA and found that ComFor’s officers were appointed under the Village’s authority. Referring to ComFor’s own articles of incorporation, and the Village’s rights as 100% shareholder of ComFor, the Commissioner held that the Village had complete control and direction over ComFor.

According to the Commissioner, the key concept in this case was that the Village created ComFor and delegated to it, and its subsidiaries, the responsibility of the management of a publicly held resource. In his opinion, the purpose of the Legislature in including “local government bodies” under FIPPA was to capture such matters of public business, whether delegated to a public board, commission or a corporation. Therefore, as wholly owned subsidiaries of the Village, ComFor and all the other related entities, including BCLF, fell into the same category of public bodies subject to FIPPA.

Since ComFor was a “local government body” under FIPPA, the applicants had a right to have their requests for information processed, and the Commissioner ordered the companies to respond to the requests.

This case stands for the principle that the scope and purpose of freedom of information legislation flows through local governments to organizations that may be their delegates in matters of a public nature. If a high degree of control exists between the local government body and the delegate body or organization, these bodies and organizations may not be insulated from the application of FIPPA and must be prepared to operate in a manner consistent with the Act.

Maja Stupar

LoGo NoteBook is published by the law firm of Staples McDannold Stewart
2nd Floor, 837 Burdett Avenue
Victoria, BC, Canada V8W 1B3
Telephone (250) 380-7744
Fax (250) 380-3008
logolaw@sms.bc.ca
www.sms.bc.ca

and to become an email subscriber, contact webmaster@sms.bc.ca.

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