LGMA Conference Newsletter

June 16–17, 2021

STEWART McDANNOLD STUART
Barristers & Solicitors

837 Burdett Avenue, 2nd Floor
Victoria, BC V8W 1B3

T: 250.380.7744
F: 250.380.3008

sms.bc.ca
logolaw@sms.bc.ca

Table of Contents

Introduction

Stewart McDannold Stuart is glad to be participating in this year's virtual Annual LGMA Conference: ***Harnessing Momentum, Steering Through Change***.

It has been two years since the last LGMA Conference and there have been a great number of changes for the LGMA and its members. It is good to see how LGMA and our clients have coped with and adjusted to the challenges of working during the pandemic. LGMA is providing a great conference agenda for this year's participants, and we are looking forward to the networking opportunities.

Stewart McDannold Stuart will have a virtual booth as an exhibitor, so please visit our booth via the conference website. Also, Kathryn Stuart and Ryan Bortolin will be presenting our popular Legal Update presentation on June 17th, 2021. Please visit us at our virtual booth and attend our presentation to receive two Gamification Challenge clues!

For more information about our firm, please visit our website at ***sms.bc.ca***.

STEWART McDANNOLD STUART
Barristers & Solicitors

You Gotta Have (Good) Faith: The Supreme Court of Canada Provides Guidance on the Exercise of Contractual Discretion Clauses

BY RYAN BORTOLIN

STEWART McDANNOLD STUART
Barristers & Solicitors

Many contracts contain clauses permitting a party to make a decision in that party's "absolute discretion". For example, a lease may contain a clause restricting a tenant from altering a building without first obtaining the approval of the landlord, which may be withheld in the landlord's "absolute discretion". Or, a service agreement may limit the right of a contractor to assign the contract to another person without the consent of the other party, which can be denied in its "sole and absolute discretion". However, the recent decision of the Supreme Court of Canada in *Wastech Services Ltd. vs Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, makes it clear that the "absolute" discretion granted by these clauses is not as broad as it may seem on paper.

At issue in the Wastech decision was a long-term contract between the Greater Vancouver Sewerage and Drainage District ("GVSDD") and Wastech Services Ltd. ("Wastech") for the transportation of solid waste to three different sites in Metro Vancouver. One of these sites, the Cache Creek Landfill, was located much further away than the other two, and therefore entitled Wastech to a higher hauling fee. The contract gave GVSDD the "absolute discretion" to determine the proportion of waste to be hauled to each of the three locations.

In 2010, GVSDD relied on this clause and advised Wastech that less waste would be hauled to Cache Creek that year. This resulted in Wastech making a significantly lower profit. Wastech filed a lawsuit alleging that GVSDD's exercise of discretion in this manner was a breach of contract, because it breached GVSDD's obligation to exercise its discretion in good faith by not acting with appropriate regard for Wastech's interests under the contract.

The action worked its way through the court system, before eventually being appealed to the Supreme Court of Canada. Ultimately, the Supreme Court of Canada held that GVSDD was required to exercise its discretion in good faith, even though the contract stated GVSDD's discretion was "absolute". Nonetheless, it found that GVSDD had exercised its discretion in good faith, meaning that there was no breach of contract.

In its decision, the Supreme Court of Canada articulated that there is a principle of law requiring parties to perform their contractual duties honestly, reasonably and not "capriciously or arbitrarily". Because of this principle, parties must exercise discretion granted to them under a contract reasonably, even if the contract itself says the discretion is absolute. The Court commented that what will be considered a reasonable exercise of discretion is highly context specific, but that in essence it requires the parties to exercise discretion in a manner that is consistent with the purpose for which it was granted.

In this case, the Supreme Court of Canada found that the purpose of the subject contract was to maximize efficiency and reduce costs associated with the Cache Creek Landfill. GVSDD's decision was consistent with this purpose. In coming to its conclusion, the Court recognized that this was a long-term contract involving cooperation between the parties. However, this cooperation did not detract from the fundamental purpose of the contract, which was to provide the most cost-efficient manner of waste disposal for GVSDD. Therefore, GVSDD's duty to exercise its discretion reasonably and in good faith did not require it to subordinate its interests to those of Wastech.

The Wastech decision is notable for the Supreme Court of Canada's clarification that even in a contract that gives one party absolute discretion over a matter, the exercise of that discretion must still be done in a reasonable manner. Therefore, the takeaway message is that parties to a contract must exercise any discretion afforded in the contract in a reasonable manner that is consistent with the purposes of the contract as a whole. This does not, however, require one party to confer a benefit on the other that was not part of their original agreement nor does it require a party to subordinate its interest to that of the other party.

Vavilov in Action: Breaching Confidentiality and the Motion of Censure

BY KATHRYN STUART

STEWART McDANNOLD STUART
Barristers & Solicitors

In ***Dupont v. Port Coquitlam (City)***, 2021 BCSC 728, the Supreme Court of British Columbia upheld the resolution of City Council to pass a motion of censure and impose sanctions against a Councillor who, contrary to section 117 of the *Community Charter*, had divulged to members of the public confidential information and records about a potential development of municipally owned lands.

In upholding the authority of the Council to make a motion of censure and impose sanctions, the Court focused on whether the motion and sanctions were reasonable in accordance with the test set out by the Supreme Court of Canada in the *Vavilov* decision.

According to the Court in *Vavilov*, the administrative law duty to provide reasons for a decision does not exist in circumstances where decisions, such as those made by a local government, do not lend themselves to producing a single set of reasons. This is because each member of Council may hold a different reason for making the decision.

Therefore, where a single set of reasons is not available, the Court will look at the decision process as a whole to determine its reasonableness. In this case, the reasons for the censure were contained in the motion of censure itself; the motion outlined the investigator's evidence of the Councillor's disclosure of the confidential information, making the censure motion transparent, intelligible and coherent.

The Court stated, applying *Vavilov*, that Council is presumed to have expertise with respect to its own processes and standards for behaviour. Council is entitled to consider the investigative report and the expertise of the investigator.

The Court found that the Councillor breached her duties of confidentiality under the *Community Charter* by disclosing information discussed in a closed meeting and disclosing records that were confidential. Ultimately, the Court concluded that the motion of censure and the sanctions imposed were reasonable.

This case confirms again the authority of a local government to adopt a motion of censure and impose sanctions on an elected official for behaviour it considers unbecoming. It confirms the duty of an elected official to comply with the confidentiality requirements in the *Community Charter* and it applies the standard of review of reasonableness established in *Vavilov*.

Local Governments and Residential Tenancies

BY PETER JOHNSON

STEWART McDANNOLD STUART
Barristers & Solicitors

Two recent court decisions considered the statutory powers of municipalities in British Columbia to regulate in relation to residential tenancies, and concluded on the facts of those cases that the bylaws in question did not conflict with the regulatory scheme under the *Residential Tenancy Act*.

V.I.T. Estates Ltd. v. New Westminster (City) 2021 BCSC 573

In *V.I.T. Estates Ltd. v. New Westminster (City)* 2021 BCSC 573, the Court was asked to quash certain amendments to the City's zoning bylaw. The amendments had been adopted under the authority of recent amendments to Part 14 of the *Local Government Act*, which allow local governments to include "form of tenure" regulations in a zoning bylaw. The bylaw amendments limited the tenure of all dwelling units on certain parcels of land, where six rental apartment buildings were located, to residential rental tenure. The Petitioners owned a number of strata units in the affected buildings, and sought an order declaring the amending bylaw ultra vires, an order quashing the bylaw, and various other orders that would have limited the application of the amending bylaw to the Petitioners' strata units. Had they succeeded, the extent of a local government's authority under sections 479(1)(c.1) and 481.1 of the *Local Government Act [Residential Rental Tenure]* in relation to strata titled buildings would have been significantly limited, and the non-conforming form of tenure rights of strata owners under sections 535.1 to 535.5 would have been significantly expanded.

Under sections 479(1)(c.1) and 481.1, which came into effect in 2018, a local government may limit the form of tenure, in a zone or part of a zone where multi-family residential uses are permitted, to residential rental tenure. In essence, this means that a zoning bylaw may restrict occupation of a dwelling in a multi-family residential building to occupation under a residential tenancy agreement. Sections 535.1 and 535.3 provide that housing units that are owner-occupied at the time such a zoning bylaw comes into effect are "grandfathered", and that a change in ownership of the unit does not affect the right to continue with that non-conforming form of tenure.

Although the strata units owned by the Petitioners were all being rented out under residential tenancy agreements when the new bylaw came into force, they nonetheless argued that they "occupied" those units given that they had the right to exercise power over, and to control the use of the units, and given that they had the legal right to resume physical occupancy of the units to the extent permitted under the *Residential Tenancy Act*. They argued that by attempting to limit the form of tenure of their strata units in perpetuity, the City had extinguished their statutory rights, bringing the zoning bylaw into conflict with a Provincial statute (the *Residential Tenancy Act*), with the result that the bylaw amendments had no effect pursuant to section 10 of the Community Charter. They also argued that the conflict between the zoning bylaw and the *Residential Tenancy Act* gave rise to a jurisdictional conflict between the City and the Director of the Residential Tenancy Branch, and was a matter of the jurisdictional boundaries between two administrative bodies that was subject to review on the correctness standard according to the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

The Petitioners further argued that the occupation rights of the landlord/owner of a strata lot are preserved through the non-conforming tenure provisions of sections 531.1–531.5 of the *Local Government Act*. They submitted that at the time the amending bylaw was adopted, they had a form of tenure other than residential rental tenure, i.e. tenure as freehold owners which included the right to assume occupation in accordance with the *Residential Tenancy Act*, and which continued as a protected non-conforming form of tenure. They submitted that the legislative purpose of the amendments to the *Local Government Act* must have been to curb the "renoviction" of tenants of non-stratified buildings.

The Court found that the appropriate standard of review of the City's interpretation of its authority under the *Local Government Act* was reasonableness, and not correctness.

The Court found that it was not unreasonable for the City to have interpreted the legislation as having a broader purpose than suggested by the Petitioners. It was also reasonable for the City to have interpreted sections 531.1 – 531.5 of the *Local Government Act* as only grandfathering units that were physically occupied by the owners, and not by tenants, at the time the bylaw was adopted.

The Court also rejected the Petitioners' argument that the bylaw was in conflict with the *Residential Tenancy Act*, the *Land Title Act* and the *Strata Property Act*, noting that section 10 of the *Community Charter* codifies the "impossibility of dual compliance" test, where compliance with a bylaw requirement necessarily means contravention of a provincial enactment. There was no reason why the Petitioners could not comply with the bylaw while also complying with the *Residential Tenancy Act*.

The Court also concluded that the City's interpretation of the legislation in question was reasonable, and consistent with the plain wording of the statute. Since the amending bylaws accomplished the Legislature's purpose of enabling the City to prevent an owner from converting a rented strata unit to one that was owner-occupied, there was no validity to an attack on the reasonableness of the bylaw.

1193652 B.C. Ltd. v. New Westminster (City) 2021 BCCA 176

The Court of Appeal's decision in *1193652 B.C. Ltd. v. New Westminster (City)* 2021 BCCA 176 dealt with a bylaw the City had adopted under its regulatory powers in relation to business, and its powers to adopt bylaws for the health, safety or protection of persons or property in relation to rental units and residential property that are subject to a tenancy agreement under the *Residential Tenancy Act*. The bylaw was adopted in order to prevent "renovictions", and imposed restrictions and requirements on landlords wishing to renovate or repair a rental unit that went beyond the restrictions in place under the *Residential Tenancy Act*. For example, under the bylaw an owner was prohibited from "renovicting" a tenant unless the owner had: a) entered into a tenancy agreement for another rental unit in the same building, on more favourable terms, or b) had made other arrangements for the temporary accommodation of the tenant while renovations were performed, and had arranged for the tenant's return to the same rental unit when renovations were completed, on the same terms and conditions.

The bylaw also limited the rent increases that could be imposed on a tenant returning to the rental unit following completion of renovations.

The Appellant owned a multi-family rental building that needed upgrades, and had unsuccessfully challenged the lawfulness of the City's bylaw in the B.C. Supreme Court (*1193652 B.C. Ltd. v. New Westminster (City)* 2020 BCSC 163). On appeal the decision of the court below was affirmed.

The Court of Appeal first decided that the appropriate standard of review of the City's decision that it had the jurisdiction to adopt the bylaw was reasonableness, and not correctness. The Appellant had submitted that City's decision fell within two exceptions to the reasonableness standard identified by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 — general questions of law of central importance to the legal system, and questions involving the jurisdictional boundaries between two or more administrative bodies. The Court of Appeal rejected the argument that the stricter standard of review applied.

The Court of Appeal also concluded that the City's decision to adopt the bylaw was based on a reasonable interpretation of its jurisdiction under sections 8(3)(g) and 8(6) of the *Community Charter*. The Court below had concluded that the bylaw fit comfortably within the jurisdiction of the City under sections 8(3)(g) and 8(6) of the *Community Charter*, when interpreted textually, contextually, and purposively. The Appellant had failed to show that this interpretation was unreasonable.

The Court of Appeal also addressed, and rejected, the Appellant's argument that the extent of the City's jurisdiction was constrained by the existence of the Province's regulatory scheme under the *Residential Tenancy Act*. The Court of Appeal found that the City's conclusion, that it was authorized by the *Community Charter* to address local concerns about affordable rental housing by enacting the bylaw, aligned with previous decisions of the Supreme Court of Canada such as *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)* (2001), 2001 SCC 40. In addition, section 10 of the *Community Charter* contemplates the potential for overlapping municipal and provincial jurisdiction by providing that a municipal bylaw is inconsistent with a provincial enactment only if it requires contravention of that enactment. It was reasonable for the City to conclude that the bylaw would not frustrate the Province's regulatory scheme under the *Residential Tenancy Act* unless the bylaw required contravention of the provisions of that statute, which it did not.

Campaign Contributions from Developers with "In-Stream" Development Applications Do Not Create a Conflict of Interest

BY ANDREW BUCKLEY

STEWART McDANNOLD STUART
Barristers & Solicitors

ANDREW BUCKLEY

The conflict of interest provisions in the *Community Charter*, SBC 2003, c 26 provide that an elected official cannot participate in discussions or vote on a matter if the official has a pecuniary (i.e. monetary) interest in the matter. However, the Courts have long held that the acceptance of a campaign contribution by an elected local government official from a developer does not establish that the official has a monetary interest in that developer's matters before council without evidence of "something more".

In the decision of *Allan v Froese*, 2021 BCSC 28 [*Allan*], decided earlier this year, the BC Supreme Court had to wrestle with the issue of whether the fact that a developer's development application was "in-stream" and before Council at the time contributions were received from the developer was enough to constitute that "something more".

In *Allan*, the conflict allegations were that the officials had received campaign contributions from representatives of several development companies within days or weeks of voting on those developers' applications. The stakes of the proceeding were high given that, "the singular penalty for breaching s. 101 [of the *Community Charter*] is severe: the elected official is disqualified from holding office until the next election".

Nonetheless, other than the timing of receipt of the contributions, there was no evidence to suggest that the contributions in any way swayed the officials from acting in good faith or in the best interests of the Township. Ultimately, the Court articulated its opinion of the petitioners' case as follows:

> *[73] The petitioners' claim is not based on evidence, but on speculation and suspicion founded solely on imprecise assertions of temporal proximity, which is insufficient to establish a pecuniary interest and insufficient to challenge the respondents' evidence. There is no evidentiary basis to support a submission that the respondents had a direct or pecuniary interest in the matters — i.e., the developers' various projects — before Council for consideration and vote. The petitioners' case does not rise to the point where I am even required to assess the reliability of their evidence…*

Much of the argument in the *Allan* case surrounded the appropriate legal test for determining whether an elected official has a conflict of interest. Clarifying the test was important given the significant consequences of a finding of conflict.

At paragraphs 26–32 of *Allan*, Justice Paul Walker articulated the test as follows:

1. The petitioners must prove, on a balance of probabilities, that the elected official had a "direct or indirect pecuniary interest in the matter under consideration" by council;

2. If step one is proven, the petitioners must then show that the exceptions in s. 104(1) of the Community Charter do not apply, these include showing that:

    a. the pecuniary interest is not an interest held in common with electors of the municipality generally,

    b. the pecuniary interest does not relate to remuneration, expenses or benefits payable to the council member in relation to their duties as a council member; and

c. a reasonably well-informed person would conclude that the pecuniary interest can reasonably be regarded as likely to influence the member in relation to the matter.

3. If the exceptions in step two are shown not to apply, the onus then shifts to the respondents to demonstrate that the official should, nonetheless, not be disqualified because their contravention was inadvertent or due to a good faith error in judgement.

After articulating the test, Justice Walker then applied the facts to the test. He concluded that "there is no evidence that any of the respondents had any direct or indirect pecuniary interest in the developers' projects put in issue by the petitioners". Thus the petitioners' claim failed at stage one of the test.

Nonetheless, the court went on to find that the petitioners had also not established that "a reasonably well-informed person would conclude that any such pecuniary interest would likely influence the respondents in the exercise of their public duties". Each of the developers' projects were within the bounds of the Township's legislative authority, had been considered by planning staff, and the applications were recommended to council by the planning staff who had vetted each project. In each instance, "the respondents' votes were consistent with staff recommendations as well as the respondents' own well-known pro-development campaign platforms".

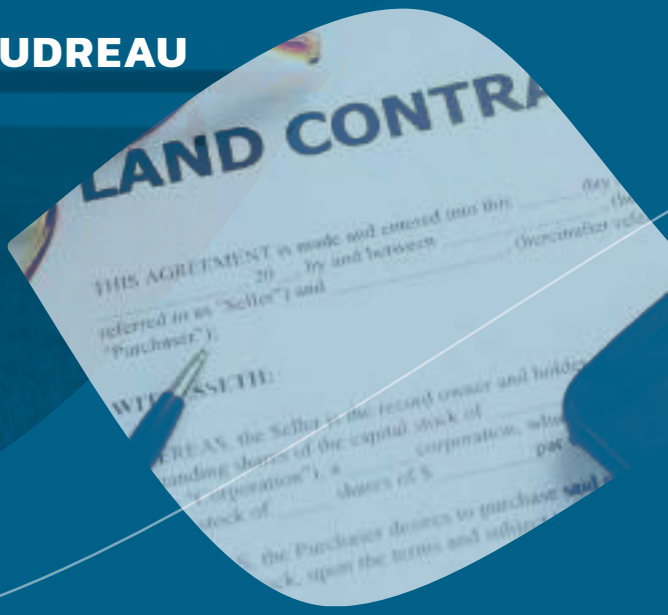
Lastly, with regards to the third stage of the test, the Court accepted "the respondents' unchallenged evidence that they acted in good faith and in the best interests of the Township throughout."

The *Allan* decision is important in analyzing the conflict of interest provisions in the *Community Charter*, clarifying the necessary evidence needed to support a claim brought under those provisions, and examining the interplay between the democratic right to receive campaign contributions and the expectation that such contributions will not interfere with the elected officials' autonomy. As Justice Walker concluded at the end of his judgement:

> *[102] ...[E]lected officials are expected to have opinions about civic priorities and policies and to campaign on those positions. A candidate who receives campaign contributions from supporters of their positions and then carries out their promises when elected does not, without more, breach the conflict of interest provisions of the Community Charter. As the case authorities establish, electors have a democratic right to make campaign contributions to a candidate they believe will support policies or platforms they wish to see enacted or undertaken.*

Lifecycle of an Application under the *Land Title Inquiry Act*

BY KERRI CRAWFORD & HEIDI BOUDREAU



STEWART McDANNOLD STUART
Barristers & Solicitors

The *Land Title Inquiry Act* (the "LTIA") provides a mechanism that allows a person claiming to be the owner of an estate in fee simple in land to have the title judicially investigated and the validity of owner's title declared by the court. The LTIA can be used in the context of historical land grants, or historic dispositions of land that were not perfected such as road dedications or expropriations. The current case law confirms that with limited exceptions, the LTIA cannot be used to supplant ownership held under an indefeasible title.

A recent example of the application of the LTIA is British Columbia Supreme Court decision of *Re Victoria (City)*, 2020 BCSC 1942[1], where the City of Victoria succeeded in an application under the LTIA based on the law of adverse possession and obtained declarations of title to three parcels of land.

The City's historical records demonstrated that in 1910 the City set out to acquire a number of parcels of land for the purposes of the construction of the Victoria High School. Despite the City having authorized the expropriation of the lands, and subsequently having negotiated agreements for the purchase of the lands with the owners, title to three of the parcels was never perfected in the name of the City. Instead, though the City believed that it had acquired those parcels, title remained registered in the absolute fee book in the names of the individual property owners. The titles were eventually converted by the Registrar of Land Titles to indefeasible titles in the names of the now deceased property owners. Pursuant to the *Land Title Act* (LTA), an indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence that the person named in the title as the registered owner is entitled to an estate in fee simple to that land.

Pursuant to section 23(3) of the LTA, a registered indefeasible title cannot be affected by a claim of "adverse possession". As noted above, the City of Victoria based its LTIA application on the doctrine of adverse possession, but was able to rely on section 23(4) of the LTA, which provides that as an exception to section 23(3), the first indefeasible title registered is void against the person in actual possession of and rightly entitled to the land at the time registration was applied for. A declaration of title by the Court under the LTIA permitted the indefeasible title to the three parcels to be registered in the name of the City of Victoria.

Land Title Inquiry Act Procedures

Proceedings under the LTIA are brought by way of petition. The LTIA contains numerous provisions relating to the evidence an applicant is required to produce to the court, as well as various forms, notice and registration requirements. In some cases, as with the City of Victoria case, the third party who may have a competing interest in the land is deceased, and their heirs, if any, may be difficult to locate and serve. Consideration may also have to be given to whether a third party's interest in the land has escheated to the Crown. The LTIA includes provisions under which the Court may give directions for notice to adverse claimants. The LTIA also requires publication in the Gazette before the Court grants a declaration of title.

1 *Re Victoria (City)*, 2020 BCSC 1942 [*Re Victoria*].

The LTIA requires that the petition must include:

- any applicable deeds of title;
- certified copies of all applicable land registry instruments affecting the land;
- a certificate from the land title registrar as to the state of title under investigations;
- an affidavit by the person whose claim to the title is being investigated; and
- a certificate from legal counsel for the applicant, that counsel has investigated the title and believes the petitioner to be the owner[2].

Typical examples of evidence included with an LTIA application are historical land registry documents, correspondence, local government records and bylaws, gazette notices and other provincial records. The LTIA provides that the court may receive evidence that is not usually receivable in court proceedings, as long as the court is satisfied as to the truth of the facts intended to be proven.

The LTA specifically provides that an application founded on adverse possession must not be accepted by the Registrar unless permitted by the LTA and supported by a declaration of title under the LTIA[3].

Registering Title in the Land Registry

Following issuance of a court order under the LTIA declaring title, the final step required to register the indefeasible title is the filing of the court order in the applicable land title office.

Registration in the Land Title Office requires filing of a complete Form 17 application along with a signed and certified copy of the court order. The document package submitted to the Land Title Office must also include the other supporting documents typically required for the registration of a fee simple interest in land, including a property transfer tax return form and the newly implemented Land Owner Transparency Declaration, and if applicable, the Land Owner Transparency Report. The registration of this document package will establish an indefeasible title in the name of the person identified in the court order as the registered owner.

Take-Away for Local Governments:

The biggest hurdle in this type of application is obtaining sufficient evidence to support the claim of title. The LTIA acknowledges the difficulties associated with proving title based on historical information, by allowing for evidence to be presented in a variety of formats and through relaxed evidentiary standards. Certified records from the Land Title & Survey Authority are among the most obvious and persuasive documents a court would consider, but other forms of evidence, such as correspondence, maps, photographs and newspaper articles can also be informative and persuasive.

2 LTIA, s. 4.

3 LTA, s. 171.

Historical records are rarely comprehensive, and British Columbia's land title legislation has undergone numerous transformations over time. Understanding the circumstances which might give rise to a historical claim to title often requires extensive research and analysis. Before consideration a proceeding under the LTIA, careful review of historical records is essential in order to understand the history of a particular parcel of land, and local government archives, and land title researchers can be invaluable in this regard.

Failure to Comply with Statutory Notice Requirements Invalidates Tax Sale

BY JESSICA EASTWOOD

STEWART McDANNOLD STUART
Barristers & Solicitors

BY JESSICA EASTWOOD

Each year, British Columbia municipalities are required, under Part 16, Division 7 of the *Local Government Act*, RSBC 2015, c. 1 (the "LGA"), to hold an annual tax sale where all properties subject to delinquent property taxes are offered for sale by auction.

There are important notice provisions contained in the *LGA* tax sale provisions that municipal staff need to be aware of. In a recent Supreme Court decision, *Maple Ridge (Re)*, 2020 BCSC 1473, the court confirmed the importance of strict compliance with the notice provisions and how failure to provide proper notice can invalidate a sale at the annual tax sale.

Because of the strict three-month period for service of notice after the annual tax sale, it is important that if a local government encounters any difficulty complying with the notice requirements that their legal counsel be consulted with before the three-month period ends.

Annual Tax Sale

Each year, on the last Monday of September the collector of a municipality must conduct the annual tax sale by offering for sale by public auction each parcel of real property on which taxes are delinquent. Once a property is sold at tax sale, the property owner, or an owner of a registered charge on that property, may redeem it within the redemption period which, as per section 660 of the *LGA*, is either one year from the day the annual tax sale began; or, if the municipality was declared the purchaser of the property, up to two years from the annual tax.

To redeem a property sold at tax sale, the relevant party must pay the amounts enumerated in subsection 660(3) of the *LGA* which includes the amount of taxes and interest owing on the property at the time of the tax sale as well as any incurred penalties. If a property is not redeemed in accordance with Section 660 of the *LGA* then a certificate of non-redemption is filed in the Land Title Office, transferring the property from the registered owner to the tax sale purchaser.

Required Notice

Section 647 of the *LGA* requires advance notice of the annual tax sale to the public to be published in a newspaper. The notice must indicate the time and place of the tax sale and the legal description of each property subject to sale.

Once a property is sold at the annual tax sale, written notice must be given to the registered owner and each owner of a charge on that property. Specifically, section 657 of the *LGA* requires that:

1. the registered owners in fee simple of a property sold at tax sale and owners of a charge on the property be given notice of tax sale and of the day that the redemption period ends;

2. notice be served by registered mail or personally served; and

3. notice be given no later than three months after the sale of the property at a tax sale.

Section 657(2) provides that on application, the Supreme Court may order that the notice under subsection 657(1) may be served by substituted service in accordance with the order.

Strict Notice Provisions

In cases such as *521006 B.C. Ltd. v. Pemberton (Village)*, 2019 BCSC 526 ("*Pemberton*") and *McQuarrie Bros. Motors Ltd. v. Fusilli Grill Ltd.*, 2018 BCSC 769, the BC Supreme Court has confirmed the requirement for strict compliance with the tax sale notice requirements of the *LGA*.

In *Maple Ridge (Re)*, 2020 BCSC 1473 ("*Maple Ridge*"), despite multiple attempts to both personally serve and to deliver by registered mail the notice of tax sale for the respective properties sold at tax sale, the municipality was unable to effect service as required by section 657 of the *LGA*. The municipality sought a declaration that the tax sales were invalid as a result of the lack of service.

The court in *Maple Ridge* held that "failure to deliver the written notice in accordance with s. 657— that is by personal service, registered mail, or pursuant to a substituted service order—constitutes a failure to fulfill an essential procedural requirement that is a condition precedent to a lawful transfer of title under the *LGA*". The court also held where notice has not been provided in accordance with section 657, the municipality lacks the authority to file certificates of non-redemption in the Land Title Office.

The BC Supreme Court has previously declared a tax sale as invalid where the content of the notice contained an error and did not provide the proper date for redemption (see *Pemberton*).

Notably, a declaration, as was given in *Maple Ridge*, is only available in the appropriate circumstances. In following the previous decision of the BC Supreme Court in *Pemberton*, the court in *Maple Ridge* held that section 669 (1) of the *LGA* does not oust the court's jurisdiction to provide declaratory relief after the redemption period has expired. Whether declaratory relief will be granted depends on whether title has transferred to the tax sale purchaser through the filing of a certificate of non-redemption.

In both *Maple Ridge* and *Pemberton*, the municipalities had waited to file the certificates of non-redemption until a decision was made by the court as to the validity of the tax sale. In both cases the court held that it was appropriate in the circumstances to declare the tax sales as invalid.

The reasons in *Maple Ridge* and *Pemberton* suggest that where there has been material non-compliance an essential procedural requirement, but the municipality files the certificate of non-redemption such that title is transferred to the tax sale purchaser, a declaration that would result in title transferring back to the original owner may not be appropriate, as it would give rise to concerns about the finality of the tax sale process and certainty of title. In this case, the only remedy available to the original owner is a statutory claim for indemnification under section 669(3) of the *LGA*.

Section 669(3) of the *LGA* provides that a municipality must indemnify a person who at the time of the tax sale was an owner of, a registered owner in fee simple of or an owner of a registered charge on the property for any loss or damage sustained by

the person on account of the sale of the property if (among other matters) proper notice under section 657 was not given. Section 669(4) of the *LGA* sets limits on the availability of the remedy under section 669(3), including a one-year time limit after the redemption period has ended for commencing an action, and providing that the municipality is not required to indemnify or pay compensation if the person claiming the indemnity was that the property was offered for sale at the time of the tax sale or was aware, during the redemption period, that the property had been sold.

Ensuring Service and Avoiding Litigation

If a municipality is having trouble personally serving the owner or charge holders, or serving them by registered mail, section 657(2) of the *LGA* allows the municipality to apply to the BC Supreme Court for an order of substituted service. Importantly, substituted service must also occur within the three-month period after the tax sale and so municipalities should begin trying to serve the appropriate parties as soon as possible after the tax sale to leave time for an application for substituted service should that be necessary.

If the municipality is unable to provide notice within the three-month period, then it is important to make continued efforts to bring the tax sale to the attention of the owner. As per section 669(4), evidence that the owner is aware that the property was sold during the redemption period provides a defence to a statutory claim for indemnification.

Finally, if a municipality has been unable to effect service of the tax sale notice, consideration may be given to seeking a court declaration setting aside the tax sale.

Municipal Liability for Negligent Building Inspection and How to Manage Risk

BY JOSH KRUSELL

STEWART McDANNOLD STUART
Barristers & Solicitors

A decision of the Ontario Superior Court from January 2021 highlights the serious financial risk to municipalities that regulate building construction and provides an opportunity for re-visiting best practices for managing such risk.

In *Breen v. The Corporation of the Township of Lake of Bays*, 2021 ONSC 533 ("*Breen*"), a couple purchased a cottage in Lake of Bays, Ontario in 1999 for $710,000. During subsequent renovations to the cottage in 2011 they discovered several structural issues and *Building Code* violations in the original construction that rendered the cottage unsafe to inhabit. Construction of the cottage by the previous owner had begun in 1989 pursuant to a building permit and the Township had conducted building inspections in 1990 and 1991.

The couple brought a claim against the Township for negligent building inspections and a failure to enforce the *Building Code*. The Court agreed that the Township owed a duty of care, had breached that duty, and was liable for damages of over $350,000 for repair costs and emotional and mental distress.

The Court found that subsequent purchasers of buildings, such as the Breens, have no say in the actual construction of a building that proves defective, and so they are entitled to rely on the municipality to show reasonable care in inspecting the progress of the construction.

Of note, municipalities in Ontario are required to appoint inspectors who will inspect construction projects and enforce the provisions of the Building Code. By contrast, in B.C., local governments are empowered, but not required, to regulate building construction. In practice, most local governments in B.C. do pass bylaws to regulate building construction, and once they do, the law of negligence dictates that, subject to certain defences, they will be held liable if they carry out their duties under the bylaw in an improper manner. This was made clear by the seminal case of *Kamloops v. Nielsen,* [1984] 2 S.C.R 2, where the Supreme Court of Canada held that once a municipality has made a policy decision to regulate building construction, the municipality owes a duty to enforce the bylaw provisions to prevent injury to persons such as third-party purchasers.

In *Breen*, the Ontario Superior Court found that the municipality's obligation to ensure that the building complied with the *Building Code* arose both at the building permit stage and during subsequent inspections at various phases of construction.

The Township was found to have fallen below the standard of care as it could not produce any evidence that a set of plans and specifications for the cottage were ever filed at the time of the permit application or at later inspections. Further, the Township never conducted an inspection of the structural framing of the cottage, and instead merely wrote to the permit holder that if the Township did not hear from him it would assume that the project was complete and that the Township would close its file.

Defences

It is beyond the scope of this relatively brief article to discuss in detail all the potential defences available to local governments facing negligent building inspection claims, but the most frequently employed defences fall into the following categories:

1. Policy decision immunity

If a municipality chooses for good faith policy reasons to limit the number of inspections it undertakes, it will not be liable for construction deficiencies outside the scope of its inspections. If, however, a particular inspector decides not to carry out one of the usual inspections in a particular case, that would likely be an operational decision giving rise to a duty of care.

2. Disclaimers

Attempts to include disclaimers in permits or other approvals, or in the text of a building bylaw itself, have proven to be largely ineffective at disclaiming or transferring liability from local governments, as the courts have traditionally read any ambiguity in the language against local governments.

3. Statutory protection to enforce bylaws, for building plan approval, and for individual public officers

While they cannot be discussed in detail here, local governments in B.C. should be aware of the protections offered by sections 738, 742, and 743 of the *Local Government Act*. The most important of these in this context is s. 743, which provides immunity to municipalities for liability arising out of issuance of a building permit where a professional engineer or architect has certified that the plans comply with the *Building Code*. This provision was successfully relied upon in the case of *Parsons v. Finch* before the B.C. Court of Appeal (2006 BCCA 513).

4. Purchaser knowledge of defects

The case law indicates that where a purchaser is aware of a defect in a dwelling but proceeds to purchase it in any event, the purchaser cannot later claim against the municipality for having failed to detect the defect on inspection while construction was underway (see *Day v. Regional District et al*, 2000 BCSC 1134).

In *Breen*, this defence was not available, as the couple had hired a professional home inspector to conduct an inspection before their purchase of the cottage, but that inspection had not turned up the unseen structural issues which were only found during subsequent renovations. The Court agreed that any inspection at the time of the Breens' purchase would only have revealed visibly apparent issues, and not the unseen structural issues.

5. Limitation periods

The *Limitation Act* contains a 2-year time limit for bringing actions, but, as in the *Breen* case, this time limit only begins to countdown from the time at which a plaintiff has, or ought to have, reasonably discovered that a negligent building inspection has occurred. For the Breens, their home inspection at the time of purchase had not turned up the problems and they were not aware of the original construction issues until they undertook renovations a decade after their purchase. Accordingly, they were not beyond the time limit.

There is, however, an "ultimate limitation period" in the *B.C. Limitation Act* that provides that for any claims arising out of construction occurring on or after June 1, 2013, the limitation period will expire 15 years later, regardless of when the damage took place or when it was discovered.

Best Practices for Managing Risk

First and foremost, local governments that decide to undertake building regulation need to ensure that building bylaws do not assign them responsibilities they are not capable of meeting and tasks they do not have the staff to perform.

Further, as the *Breen* case highlights, negligent building inspection claims can arise decades after the initial building inspections took place, and it is incumbent on the local government to preserve and produce evidence to properly defend itself. Accordingly, strict record-keeping and preservation is of the utmost importance. Standard documents, checklists and staff training can help ensure that claims can be readily responded to many years into the future.

It is also important for building inspectors faced with potentially defective projects to recognize that the ultimate stakeholder is the general public and not the permit holders and contractors on a particular project. Ensuring safety of the public overrides the expedient interests of the project owners.

Lastly, if at any time work is progressing in contravention of the building bylaw, the building inspection department should consider its options and choose a course of action. Reasons supporting the decision ought to be recorded. If the reasons include budgetary considerations, that should be noted, since the decision may be classified as a policy decision, potentially giving rise to a valid policy decision immunity defence. Failing to consider relevant options, on the other hand, is not a good faith policy decision.

Amendments to the *Environmental Management Act* and Contaminated Sites Regulation and Its Impact on Local Government Approval of Land Use Applications

BY ANDREW BUCKLEY & DAVID GIRODAY

STEWART McDANNOLD STUART
Barristers & Solicitors

BY ANDREW BUCKLEY & DAVID GIRODAY

On February 1, 2021, several significant amendments to the *Environmental Management Act*, SBC 2003, c 53 (the "*Act*") and the Contaminated Sites Regulation, BC Reg 375/96 (the "CSR") came into force. These changes reflect the efforts of the Province to streamline and clarify the process for addressing contaminated sites while tackling purported weaknesses within the previous regime. These amendments impact local governments' responsibilities in the regulation of contaminated sites and, with a few exceptions, introduce a new mandatory site investigation process when undertaking work on a potentially contaminated site.

Site Disclosure Statements

The amendments to the *Act* repeal the definition of "site profile" and replace it with a "site disclosure statement". The site disclosure statement is intended to provide a simplified process for identifying potential contaminated sites and will include, in most circumstances, a mandatory site investigation process. The investigation procedure is intended to assess whether past or ongoing uses on the subject property caused contamination to the site.

Section 40(1) of the amended *Act* requires that a person who knows or reasonably should know that a subject property has been used for a specified industrial or commercial use provide the approving officer or the local government, as applicable, a site disclosure statement when making an application for subdivision, zoning, or a development or building permit (if the development or building activity is likely to disturb the property's soil).

From a local government perspective, one of the most significant changes is that the new regime imposes requirements on building permit applicants and affects the authority of local governments to issue building permits, which was previously not the case. Local governments also no longer have the ability to "opt out" of the receipt of site disclosure statements where they are legislatively required — previously the Contaminated Sites Regulation allowed local governments to provide the Minister with written notice that they did not wish to receive site profiles.

Responsibilities of a Local Government in Receipt of a Site Disclosure Statement

Once in receipt of a site disclosure statement, municipalities or approving officers are required to take a number of actions within 15 days of receiving the statement. This includes assessing whether the site disclosure statement is satisfactorily completed, notifying the person who provided the site disclosure statement whether or not it has been assessed as satisfactorily completed, and forwarding the satisfactory site disclosure statement to the Registrar of the site registry established under the *Act*.

In assessing a site disclosure statement, it is not necessary for the municipality or approving officer to conduct a search of records or archives maintained by the municipality or approving officer. Further, municipalities and approving officers are not required to keep a record of a site disclosure statement once they have fulfilled their obligations set out in the *Act*.

Consequential amendments to section 557 of the *Local Government Act* also require that, after submitting the site disclosure statement to the Registrar, the local government must wait before approving the land-use application until the local government has been advised by a director under the *Act* that the site is not contaminated or that remediation or other compliance measures have been approved in accordance with the *Act*.

The new provisions are similar to the current provisions of section 557. One significant change, however, is that under section 557(3) and (4) a local government will be able to proceed with a rezoning application before receiving notice from a director, if the land is subject to a concurrent application for a development permit or building permit, and the site disclosure statement required in respect of the development permit or building permit has been assessed and forwarded to the registrar.

Local governments should also note that the enacting legislation contains transitional provisions under which the provisions of section 557, as they read before the amendments, will continue to apply to applications made before the date the new provisions come into effect.

Applicable Fees for Assessment of a Site Disclosure Statement

The amendments to the *Act* permit municipalities and approving officers to charge a fee for an assessment of a site disclosure statement pursuant to section 40 (5) of the amended *Act*. It will be to the discretion of local governments to determine whether to charge such a fee and how much they will charge for the assessment of a site disclosure statement.

Exemptions from Submitting Site Disclosure Statement to Municipality

The amendments also introduce new provisions within the CSR which provide certain exceptions to the general requirement that a site disclosure statement must be provided when making a land-use application related to a property which has been used for specified industrial or commercial uses.

For example, a person seeking re-zoning is exempted from submitting a site disclosure statement if the property is being used for a specified industrial or commercial use and that use would continue to be authorized if the zoning were approved.

Another example exempts a person applying for a development or building permit, even if it will disturb the property's soil, from having to submit a site disclosure statement if the permit being sought is solely for one or more of the following purposes:

1. demolition;
2. installing or replacing underground utilities;
3. installing or replacing fencing or signage;
4. paving; or
5. landscaping

Despite these exemptions, a municipality or an approving officer is not barred from otherwise requesting as part of the permit approval application the information which would normally be provided in a site disclosure statement even though the person is not required under the *Act* to provide a site disclosure statement.

Municipalities Required to Provide Site Disclosure Statements when Zoning or Rezoning own Land

The amendments to the *Act* also require a municipality undertaking to zone or rezone land in which it has an ownership interest to provide a site disclosure statement to the registrar within 15 days of the first reading of the applicable zoning bylaw that will impact the zoning of the subject property.

However, if the municipality does not intend to develop any of its land that is located within the area being zoned or rezoned, the municipality is exempt from having to provide a site disclosure statement.

Conclusion

The amendments to the *Act* and the applicable regulations are intended to create a more stringent process for identifying and remediating contaminated sites throughout British Columbia. In doing so, these amendments place a greater responsibility on local governments in their duty to receive and assess site disclosure statements. Local governments should be mindful to familiarize themselves with these changes and their expanded role in the new site disclosure statement regime.