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... a newsletter for local governments

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Bylaw Bites Judge

The days of a Judge granting an MTI conviction and then lowering the fine are over. Praise the Lord!

On June 15, 2005, the Honorable Mr. Justice Brine in the Supreme Court of British Columbia rapped the knuckles of a lower Court Provincial Judge for erroneous sentencing in an MTI conviction.

In R. v. Lurie, a Provincial Court Judge granted two convictions for "animal at large" each with a fine amount of $50.00. However, instead of awarding the total $100.00 fine, the Judge questioned the reasonableness of the amount of the fine and then awarded the fine to the NANA Foundation (an animal rights group) rather than the proper recipient, the City of Victoria.

The Judge stated "I am not happy to impose the minimum (fine amount)." The Bylaw Officer who successfully prosecuted the MTI was flabbergasted.

On Appeal, Mr. Justice Brine held that the Provincial Court does not have discretion to vary the amount of fine indicated by bylaw and that such fines are payable to the local government who issued the ticket. The Appellant, Mr. Lurie, argued in Court that what the lower-Court Judge did was wise and generous and that Judges should have the flexibility and discretion to vary the fines. Mr. Justice Brine stated that what the Judge did was:

"wrong, and without commenting on my view of the appropriateness of what he did… it did not conform with the Community Charter."

Those were strong words coming from a reviewing Judge. In addition, Mr. Justice Brine held that there is no discretion to vary the amount of the fine or the penalty imposed provided that the Bylaw provides for a penalty within the jurisdiction permitted in the legislation.

Under the Community Charter Regulations for MTIs, the maximum fine for an MTI is $1,000.00. Thus, so long as the fine or a penalty does not exceed $1,000.00, a local government can fix the fine in whatever amount it deems reasonable and a Provincial Court Judge cannot reduce that fine.

This decision clearly applies to MTIs. However, the reasoning is applicable to other ticketable fines as they are limited by the Offence Act. What is important is the principle that elected councils, not unelected judges, should decide what penalties are appropriate in a community. Further, judges should interpret the law, not make the law.

So from now on when you conduct your own MTI prosecutions in Court, and you are successful in your conviction, the only thing a Judge should be asking you is "how much is the fine". If a Judge indicates that he or she is not happy with the fine amount, your answer is "tough". Of course, I would suggest you be more diplomatic than that.

Troy DeSouza

What's in this issue...

Authority to Charge Fees for Specialized Police Reports

By implementing its authority to impose fees pursuant to section 194(1) of the Community Charter, a municipality may be able to recover some of the cost associated with the preparation of detailed police reports, such as traffic analyst/accident reconstruction reports. Such reports often require detailed investigation by specially trained police officers and are often sought by parties engaged in litigation resulting from traffic accidents.

The Supreme Court of British Columbia has held that, if those fees are not set by bylaw, municipal police departments, or the RCMP, cannot charge fees for the production of such reports. In the 1998 decision of Borgen (Committee of) v. Moreau Estate, the RCMP practice in British Columbia at that time to charge a fee of $500 for the production of an accident reconstruction report was challenged. The Court, in finding that the RCMP could not require the payment of such a fee, made the following comments:

> In this case what is being sought, without the benefit of legislative authority, is the validation of an arbitrarily set fee to give partial recovery for the cost of training these special officers and for the many, many hours that are involved in the preparation of these reports.
>
> It strikes me that this could be the thin edge of the wedge. There is no legal authority, as I see it, to demand that an individual involved in a private litigation matter should have to pay the RCMP for this particular part of their investigative report, and yet not have to pay for the rest of the investigative file, except for the nominal photostat and other charges associated with the production of that file. These latter kind of charges are generally referred to as the reasonable costs associated with the production of the copy of the police file. That is the kind of order that is made by this Court on applications for production of a third party's documents under rule 26(11).
>
> Can and should the RCMP be allowed to charge such fees without legislative authority? As I have said, it may be the thin edge of the wedge. At what point might the RCMP determine that all of their reports, irrespective of the purpose behind their preparation, should be paid for by those involved in civil litigation? Possibly, in time, the public will be asked to pay the RCMP for services rendered in all of their duties as ostensible provincial police in this Province. The services performed by the RCMP are paid for by the Canadian taxpayer who should not be asked to bear another tax in the guise of the fee charge.
>
> I do not think it appropriate to levy such a fee in this way and in this matter, and again, without, as far as I can see, legislative authority for it.

Section 194(1) of the Community Charter appears to provide the legislative authority lacking in the Borgen case. Section 194(1) reads as follows:

> A council may, by bylaw, impose a fee payable in respect of
>
> (a) all or part of the service of the municipality, ….

Since policing is undoubtedly a service of a municipality, this provision in the Community Charter allows a municipality to impose, by bylaw, a fee, or fees, with respect to any part of this service provided by the police service including the drafting and production of reports or other documents arising out of motor vehicle accident investigations. However, such a bylaw would also require a detailed report to Council justifying the amounts proposed for such fees. This will help to avoid any argument that the fees are arbitrary or unreasonable and will satisfy the requirements set out in section 194(4) of the Community Charter which reads as follows:

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> A municipality must make available to the public, on request, a report respecting how a fee imposed under this section was determined.

A fee bylaw adopted by the municipality would not run afoul of the Freedom of Information and Protection of Privacy Act (the "FOI Act"). In the usual case, where an application for the production of documents is made pursuant to the FOI Act, the fees that can be charged by a municipality for this service are limited by section 75(1) of the FOI Act, which reads as follows:

> Section 75(1)
>
> The head of a public body may require an applicant who makes a request under section 5 to pay to the public body fees for the following services:
>
> (a) locating, retrieving and producing the record;
>
> (b) preparing the record for disclosure;
>
> (c) shipping and handling the record;
>
> (d) providing a copy of the record.

While the above provision appears to clearly limit the kinds of fees which may be charged for producing a document pursuant to a request under the FOI Act, it also appears that if a municipality adopts a fee bylaw relating to certain documents then it will be possible to deny to an FOI applicant production of such documents unless the fees set out in the bylaw are paid. This appears possible due to the wording of section 20(1) of the FOI Act which reads as follows:

> Section 20(1)
>
> The head of a public body may refuse to disclose to an applicant information
>
> (a) that is available for purchase by the public, or
>
> (b) that, within 60 days after the applicant's request is received, is to be published or released to the public.

If a municipal bylaw allows for the release of police department documents to a member of the public upon payment of a prescribed fee, then it will be possible for the municipality or the police department to take the position that it is entitled to refuse access to such information pursuant to a request under the FOI Act. A bylaw of the municipality prescribing a fee schedule for production of police department documents provides legislative authority for the municipality to rely upon in taking the position that the kinds of documents described within the City's bylaw are available for purchase by the public and that therefore the municipality or the Police Department may refuse to disclose such reports pursuant to section 20(1) of the FOI Act. In this manner, the municipality can thereby avoid the fee schedule set out pursuant to the FOI Act and instead require payment of the fees set out in its fee bylaw.

Bruce Jordan

Onsite Sewage Disposal: The New Roles of Health and Building Inspectors

Effective May 31, 2005 the Sewerage System Regulation, B.C. Reg. 326/04 came into effect and repealed the former Sewage Disposal Regulation, B.C. Reg. 411/85. Our clients have raised various questions regarding the impact of the new Sewerage System Regulation. Here are some of those questions together with our answers.

Should a Health Authority apply the old Sewage Disposal Regulation or the new Sewerage System Regulation if a property owner has been issued a Sewage Disposal Permit under the old Regulation and that permit has not yet expired?

Neither the Health Act, under which the Sewerage System Regulation is enacted, nor the Sewerage System Regulation itself, contain any transitional provisions setting out the rights of individuals who have been granted a permit to construct under section 3 of the former Sewage Disposal Regulation. Section 3(4)(c) of the former Sewage Disposal Regulation provides that it is a condition of every permit that it could be valid for up to one year.

Permits issued prior to June 1, 2005 which would not expire on or before May 31, 2005 are potentially valid for one year from the date of their issuance.

What are the rights of an individual holding such a permit in the face of the new Sewerage System Regulation?

By applying the transitional provisions of section 36(1)(c) of the Interpretation Act, the procedures established in the new Sewerage System Regulation must be followed as far as they can be adapted in the recovery or enforcement of penalties or the enforcement of rights existing or accruing under the former Regulation. Given that the certification program under the new Sewerage System Regulation is significantly different than the inspection and approval system under the old Sewage Disposal Regulation, the adaptation really amounts to following the new Sewerage System Regulation. Any person holding a permit to construct under the old Sewage Disposal Regulation should be required to complete their system under the certification process set out in the new Sewerage System Regulation.

One exception to this may be a marine discharge permit. Under the former Sewage Disposal Regulation, marine discharge was permitted. The new Sewerage System Regulation is silent on the issue of marine discharge. Since there is no procedure under the new Regulation that can be adapted, section 35(1)(c) of the Interpretation Act likely applies. This section provides that if an enactment is repealed, it does not affect a right that has been acquired under the enactment that has been repealed. It codifies the common law of the presumption of noninterference with vested rights. Therefore a property owner with a marine discharge permit may proceed under the former Sewage Disposal Regulation provided they do so prior to the expiration of the permit.

What action should the Health Authority take if they are aware that a person has constructed and installed a sewerage system in advance of filing the information required under section 8(2) of the Sewerage System Regulation?

Section 8(2) of the Sewerage System Regulation requires that an "authorized person" must file with the Health Authority certain information regarding the proposed sewerage system, including the name, address and telephone number of the owner, the type of structure that the sewerage system will serve, conditions relating to the soil, plans and specifications of the sewerage system and written assurances that the plans and specifications are consistent with standard practice. Section 12 of the Sewerage System Regulation makes it an offence if a person fails to comply with section 8(2). Therefore, the Health Authority could prosecute an individual for contravening section

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8(2) of the Sewerage System Regulation. Alternatively, the Health Authority could accept the "filing" under section 8(2).

Even if a Health Authority is aware that a system has been constructed or installed before the authorized person files under section 8 of the Regulation, there is no explicit authority to refuse to accept the filing, perhaps other than in a situation where there is a Court proceeding underway or a Court Order in relation to a system on the property.

The Health Authority has no statutory duty to approve a sewerage system; it merely accepts information from the authorized person. The authorized person makes representations in its submissions that the system has been constructed in accordance with standard practice.

What is the duty, if any, of the Health Authority in respect of a section 8 "filing"? Should the Health Authority accept a filing under section 8(2) of the Regulation if it does not contain the necessary items stipulated in subparagraphs (a) through (d)? Does the Regulation require the Health Authority to look at the items required under sections 8(2)(a) - (d), especially the plans and specifications?

Section 8(2)(b) specifies that the authorized person must file the items stipulated. At the very least, the Health Authority must determine whether those items are included in the filing. Consequently, in order to make this determination, the Health Authority must examine the items. Section 8(2) does require that the filing be in a form acceptable to the Health Authority.

Following from this interpretation of section 8(2), a very difficult question arises regarding the scope of the obligation of the Health Authority to consider the items submitted in the filing. We have concluded that, at the very least, the Health Authority should determine that none of the items stipulated in section 8(2)(a)-(d) are missing or incomplete. However, it is difficult to predict whether a Court would find a Health Authority liable if it failed to identify an error visible on the face of the "filing", in particular on the plans or specifications, that would make the filing inconsistent with "standard practice".

What obligation would the Health Authority have to accept a filing if it was clear on the face of the plans or specifications that they were not consistent with "standard practice", despite a written assurance of the authorized person that they are consistent?

If a property owner suffered damage, in reliance on the authorized person's representations, the property owner may sue the Health Authority, as well as the authorized person, for the Authority's role in accepting the authorized person's representations. If the authorized person was no longer in existence or had no insurance, it might be worthwhile for the property owner to seek damages from the Health Authority.

A difficult question for the Court would be whether section 8 imposes a duty on the Health Authority and if so, what is the scope of that duty. There are some cases where a public authority was found liable, such as Dha v. Ozdoba [1990] BCJ No 768 (BCSC) and Cook v. Bowen Island Realty Ltd. [1997] BCJ No. 2319 (BCSC), where clearly inadequate specifications and drawings made by professionals were accepted by public officials and approvals were granted on the basis of those submissions.

Although there is no formal approval required by the Health Authority under section 8 of the Regulation, there is a requirement that the authorized person file the items specified in section 8(2)(a)-(d). If one of the items is missing, incomplete or clearly

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inadequate on the face of the filing, the Health Authority may be exposed to potential liability. The potential is greater if one of the items was actually missing or clearly incomplete.

What level of detail can a Health Authority require when checking the items of the "filing"?

This is an extremely difficult question to answer. Each item in section 8(2)(a)-(c) has the potential to be very general or very detailed. Can a Health Authority refuse to accept a "filing" if, for example, the description of the porosity of the soil is very vague or there is no evidence to support it? What if the plans were not to scale?

One way to approach these issues would be for the Health Authority to develop "submission policies" that would establish the level of detail and form of the "filing". However, this might create an expectation that the Health Authority will analyze the "filing" - a role that the Regulation arguably did not intend - and it may attract greater liability.

"Standard practice" is defined in the Regulation as "means a method of constructing and maintaining a sewerage system that will ensure that the sewerage system does not cause, or contribute to, a health hazard".

Sections 8(3) and 9(2) of the Sewerage System Regulation specify that an authorized person, in order to determine whether plans, specifications, system construction and maintenance plans are consistent with standard practice, may have regard to the Ministry of Health Services' publication "Sewerage System Standard Practice Manual". Both these sections use the word "may" and thus there is no obligation on the authorized person to ensure that the sewerage system proposed is consistent with the Sewerage System Standard Practice Manual standards.

Nevertheless, because the meaning of "standard practice" establishes an "outcome based" standard, i.e. that a system should not cause or contribute to a health hazard, then deviation from the Standard Practice Manual should not be arbitrary or specious. There should be a reasonable factual basis for using a practice that is not set out in the Standard Practice Manual, especially if doing so may call into question whether that practice can meet the test of not causing or contributing to a health hazard.

If the Health Authority reviews the "filing" for consistency with the standard practice, there is a question as to whether this increases potential liability, and whether the Health Authority has the authority to refuse to accept the "filing" on the ground that the "filing" is not consistent with standard practice. The answer is unknown at this time and may be determined in future by a Court.

Given that the new Sewerage System Regulation does not require approval of the Health Authority, what can Building Inspectors require from owners who are making application for building permits?

Section 8(3)(l) of the Community Charter authorizes municipalities to regulate, prohibit and impose requirements in relation to buildings and other structures by bylaw. Section 15 of the Community Charter sets out the powers of a municipality when providing for a system of permits. Among other things, a local government may prohibit an activity or thing until a permit or approval has been granted, provide for the granting and refusal of a permit, provide for effective periods of permits and establish terms and conditions of a permit, including terms and conditions that must be met for obtaining and continuing to hold a permit.

Under section 54 of the Community Charter, a municipal permit is required before a building or part of a building is occupied. In addition to the conditions established

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under section 15 of the Community Charter, "the permit may be withheld until the building or part of it complies with … any other health and safety requirements established by bylaw, … any Federal or Provincial enactment in relation to health or safety."

Under the former Sewage Disposal Regulation, most building bylaws required the owner to supply to the Building Inspector proof that approval had been given by the Health Authority for the installation and construction of an onsite sewage disposal system should one be required. Under the new Sewerage System Regulation, no approvals are required for onsite sewerage systems and therefore, these provisions in building bylaws should be amended to reflect the new Regulation.

The bylaw could require the owner to provide to the Building Inspector the Letter of Certification that section 9 of the Sewerage System Regulation requires to be filed with the Health Authority by the authorized person, together with a plan of the sewerage system as it was built and a copy of the maintenance plan for the sewerage system. This will put the onus on the owner to demonstrate to the Building Inspector that the property complies with the Sewerage System Regulation.

Sections of building bylaws that require proof of Health Authority approval for onsite sewage disposal systems are aimed at ensuring that no buildings are constructed without approved systems and that the systems servicing the buildings are adequate.

Therefore, if, as part of the building permit approval, a Letter of Certification were required, a property owner would not be permitted to construct a building without first ensuring that a sewerage system has been constructed in accordance with standard practice.

The suggested amendments to building bylaws should refer to section 9 of the Sewerage System Regulation, in particular that the required Letter of Certification must certify that:

1. the authorized person has complied with the requirements to provide the owner with a copy of the sewerage system plans and specifications as provided to the Health Authority under section 8(2)(b), a maintenance plan for the sewerage system that is consistent with standard practice and a copy of the Letter of Certification provided to the Health Authority under section 9(1)(b);
2. the sewerage system has been constructed in accordance with standard practice;
3. the sewerage system has been constructed substantially in accordance with the plans and specifications filed under section 8(2)(b), for a sewerage system described in sections 2(c) or (d);
4. the estimated daily domestic sewage flow through the sewerage system will be less than 22, 700 litres; and
5. if operated and maintained as set out in the maintenance plan, the sewerage system will not cause or contribute to a health hazard.

Can a local government issue a building permit if an owner making a building permit application presents a holding tank permit issued by a Health Authority?

The Regulation now provides an owner with the option to apply to a public health inspector for a permit for the construction of a holding tank under section 4 of the regulation. This creates an issue for lands that are within a local government building

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inspection service because the B.C. Building Code requires Part 9 Buildings to be connected to a sewer system or a private sewage disposal system. A "private sewage disposal system" does not include a holding tank. This term is defined in the B.C. Building Code as a plant for the treatment and disposal of sewage.

It would appear that the Building Inspector would have to refuse to issue a building permit for a Part 9 Building if the applicant has only a holding tank permit. It is unclear whether this was the intention of the Ministry of Health when it drafted the Sewerage Regulation, as the Regulation itself does not limit the circumstances under which a holding tank permit may be issued. Owners wishing to develop their lands may expect that if they have a holding tank permit they will be able to build where it would not have been possible otherwise. In circumstances where Part 9 of the B.C. Building Code applies, this would be a false expectation.

Kathryn Stuart

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Non-conforming Siting – "No Further Contravention"

The case of 579340 B.C. Ltd. v. Sunshine Coast Regional District and Wills 2005 BCSC 1203 recently considered the non-conforming siting provisions in section 911(9) and (10) of the Local Government Act, which state:

911 (9) If the use and density of buildings and other structures conform to a bylaw under this Division but

(a) the **siting, size or dimensions** of a building or other structure constructed before the bylaw was adopted does not conform with the bylaw, …,

the building or other structure or spaces may be **maintained, extended or altered** to the extent authorized by subsection (10).

(10) A building or other structure or spaces to which subsection (9) applies may be **maintained, extended or altered only** to the extent that

(a) the repair, extension or alteration would, when completed, involve **no further contravention of the bylaw** than that existing at the time the repair, extension or alteration was started, … [Emphasis Added]

The case involved a cottage entirely located within the 30m setback of a lake. The owner sought to redevelop the cottage, including increasing its height. The Regional District's Zoning Bylaw provided that "no building **or any part thereof, …** shall be constructed reconstructed, moved, located or extended within 30 metres…" of the lake. The owner argued that since the distance to the lake was not being decreased, there was "no further contravention" of the bylaw, which argument the Court said had "some initial attraction".

However, the Court agreed with the Regional District that the addition was a further contravention and therefore not permissable, stating:

> *…s.911(10) must be construed to mean that any expansion of the cottage within the setback area, whether toward the lake, upward or outward, would constitute a further contravention of the bylaw.*

In essence, setbacks apply to roof structures, additional stories etc. just as much as they do at ground level such that there is a further contravention even though the addition may be within the maximum height permitted under a bylaw. To many, this will not come as a surprise as we have consistently expressed this opinion to our clients.

In a similar vein, the Court provided the following additional commentary **(obiter dicta),** which although not binding on future judges, further clarifies these sections:

> *…I would comment that a repair or alteration that does not result in the cottage taking up more space within the setback area would not, in my view, constitute a further contravention of the setback regulation. If the cottage were only partly in the prohibited area, then the petitioner would, as a result of s.911(10), be able to extend those parts of the cottage not in the setback area.*

Lui Carvello, MCIP