Federation of North Vancouver Community Associations

FONVCA AGENDA

THURSDAY April 16th 2009

Place: DNV Hall 355 W. Queens Rd V7N 2K6
Time: 7:00-9:00pm
Chair: Lyle Craver – Mt. Fromme Res. Assoc.
Tel: 604-908-2040 lcraver@shaw.ca
Regrets: Diana Belhouse

1. Order/content of Agenda

2. Adoption of Minutes of Mar 19th

http://www.fonvca.org/agendas/apr2009/minutes-mar2009.pdf

3. Old Business

3.1 The Right to Criticize Local Government

This issue was introduced as agenda item 5.3 on the May 15th/2008 FONVCA meeting.
See http://www.fonvca.org/letters/2008/14apr-to/Corrie_Kost_3may2008.pdf
BC Supreme Court Justice Nicole Garson ruled that Charter of Rights' guarantee of free speech overrides any claims by government that it can be defamed.
http://www.courts.gov.bc.ca/jdb-txt/SC/09/04/2009BCSC0406.htm
See http://www.vancouversun.com/news/Court+sends+message+governments+your+citizens/1446455/story.html or http://www.fonvca.org/agendas/apr2009/slapp-sun-31mar2009.pdf **(Attached)**

4. Correspondence Issues

4.1 Business arising from 3 regular emails:

4.2 Non-Posted letters – 1 this period

5. New Business
Council and other District issues.

5.1 Mountain Bike Races on NS June 28

- Input by Diana Belhouse

5.2 Tsleil-Waututh Notice of Fees

http://www2.canada.com/northshorenews/news/story.html?id=dff6e14c-0c6e-495a-9257-362a424cbdad
http://www.bclocalnews.com/greater_vancouver/northshoreoutlook/news/41946987.html
http://www.theprovince.com/news/native+policy+civic+quandary/1429509/story.html
http://surrey.ihostez.com/contentengine/Link.asp?ID=31119
The above report is also available at
http://www.fonvca.org/agendas/apr2009/Surrey-report-Stewardship-policy-Tsleil-Waututh.pdf

5.3 DNV/School 2008 Campaign Disclosures

http://www.dnv.org/article.asp?a=4376&c=764

5.4 Onerous Yard Waste Regulations

- 6 "item" limit way too low
- bundles <36" long, <6" radius
- DIY Charge of $5.30/100KG
  - Wastes our time
  - Uses more energy
- West Van & CNV have no limits
- Cannot "share" with neighbours

5.5 Report on April 8th Council Workshop

-comments/slides by observers Lyle & Corrie on report of Community Planning Working Group
http://www.fonvca.org/dnv-council-material/2009-03-08/CPWG-Web/
http://www.dnv.org/upload/documents/Council_Reports/1175746.pdf

6. Any Other Business

6.1 Legal Issues

(a) UBC Parking Tickets ruled invalid:

http://www.courts.gov.bc.ca/jdb-txt/SC/09/04/2009BCSC0425.htm
Raises some interesting legal issues about validity of municipalities issuing parking tickets.

(b) BC Supreme Court Guts Provincial Gag Law

http://www.courts.gov.bc.ca/jdb-txt/SC/09/04/2009BCSC0436.htm
http://www.courts.gov.bc.ca/jdb-txt/SC/09/04/2009BCSC0440.htm
120days→60days→now back to standard 28days
http://www.vancouversun.com/opinion/Liberals+should+examine+entire+issue/1455085/story.html
http://www.vancouversun.com/news/Oppal+overruled/1455153/story.html

(c) Defrauded Properties owner held blameless

http://www.canlii.org/en/bc/bcca/doc/2009/2009bcca138/2009bcca138.html
http://www.vancouversun.com/news/Lenders+beware+Phony+mortgages+bank+problem+court+rules/1476575/story.html

(d) Supreme Court - on privacy of garbage

From item 6.1 of November 20/2008 FONVCA Agenda…
http://scc.lexum.umontreal.ca/en/2009/2009scc17/2009scc17.htm

6.2 Any Other Issues (2 min each)

7. Chair & Date of next meeting.

Thursday May 21st 2009

Attachments

-List of Email to FONVCA - ONLY NEW ENTRIES
OUTSTANDING COUNCIL ITEMS-Cat Regulation Bylaw; District-wide OCP; Review of Zoning Bylaw; Securing of vehicle load bylaw; Snow removal for single family homes bylaw.

Correspondence/Subject Ordered by Date
16 March 2009 → 12 April 2009

LINK	SUBJECT
http://www.fonvca.org/letters/2009/16mar-to/Monica_Craver_18mar2009.pdf	Positive aspects of private biking venues
http://www.fonvca.org/letters/2009/16mar-to/Monica_Craver_13mar2009.pdf	Environmental Guidelines for Mountain Biking
http://www.fonvca.org/letters/2009/16mar-to/Monica_Craver_16mar2009.pdf	Salting of bike trails

For details/history see
http://www.fonvca.org/letters/index-letters-total-apr2009.html

ITEM 2.0

FONVCA
Minutes Mar 19th 2009

Attendees

Del Kristalovich **(CHAIR)**	Seymour C.A.
Eric Anderson	Blueridge C.A.
Diana Belhouse	Delbroook C.A. and NV Save our Shores Soc.
Corrie Kost	Edgemont C.A.
Cathy Adams	Lions Gate N.A.
Val Moller	Lions Gate N.A.
Dan Ellis **(NOTES)**	Lynn Valley C.A.
K'nud Hille	Norgate Park C.A.
Paul Tubb	Pemberton Heights C.A.

The meeting was called to order at 7:05 PM

1. ORDER / CONTENT OF AGENDA
Added items:
- 6.2 a) Regional Growth Strategy
- 6.2 b) Election Results: Public's Right to Know

2. ADOPTION OF MINUTES
Feb 19th minutes as previously amended re 2010 celebration sites in Lynn Valley were circulated. Moved by Val Moller, seconded by Paul Tubb and carried, to approve as amended.

3. OLD BUSINESS
3.1 Council open and Closed Meetings
Corrie reviewed correspondence: CAO has agreed the original meeting in question should not have been closed. Recourse in any future instance should be through CAO. Matter resolved.

3.2 Commercial Bike Race
Diana queried status / appropriateness of using DNV streets and trails. Is compensation being paid? Tabled to next meeting - more info needed.

4. CORRESPONDENCE ISSUES
4.1 Business arising from 2 regular e-mails
Mixed-use trails concerns. FoNVCA discussion elicited mixed views: some concern expressed about conflict and safety, others felt this was not a problem.

4.2 Non-posted letters – 0 this period.

5. NEW BUSINESS
Council and other District Issues

5.1 OCPs of Other Communities
http://www.vernon.ca/ocp/ and
http://www.vernon.sgas.bc.ca/index.php?page=process
Vernon's is one doc for whole community, while DNV has extensive Neighbourhood Plans (OCP Chapters). Corrie will survey what other communities do.

5.2 Sustainable Cities Discussion Paper
Sustainable cities: fact or fiction? By Dale Ann
http://www.entrepreneur.com/tradejournals/article/print/179269358.html
Read especially the concluding paragraph
- good ideas for consideration, but no conclusions.
- DNV differs from discussion base (largely a bedroom community)

5.3 DNV Zoning Bylaw Review
Arlington Group has invited Community Associations to participate in the process – email of March 6/2009 – date yet to be determined
http://www.fonvca.org/agendas/mar2009/Arlington.pdf
Corrie's notes of ADP meeting of March12th
http://www.fonvca.org/agendas/mar2009/notes-adp-12mar2009.pdf
- Meeting for input from interested community associations T.B.D. Corrie attended Mar 12 ADP meeting which provided input to project consultant – Concerns expressed whether Council has approved terms of reference, and how this will be coordinated with District OCP process.

5.4 Metro Vancouver 2009 Sustainability Report –
http://www.metrovancouver.org/about/publications/Publications/SustainabilityReport2009.pdf
- report tabled for information

5.5 Last-minute Additions to Consent Agenda
Letter to Council
http://www.fonvca.org/letters/2008/15dec-to/Corrie_Kost_16dec2008.pdf
and response by James Gordon
http://www.fonvca.org/letters/2008/15dec-to/James_Gordon_23dec2008.pdf

- Voicing concerns at the public input period, which begins Council Meetings, is an avenue for keeping key items from being added to consent agenda after the public has had their public input period. So "speak-up" else the item may never be debated by council!

5.6 Proposed Marine Dr. Bus Lane
http://www.translink.bc.ca/Plans/Public_Consultation/Marine_Drive.asp
Several concerns expressed about more congestion arising from loss of centre turn lanes; thus defeating the very purpose of the bus lanes.

5.7 Spirit Trail not on Waterfront in DNV
City of North Vancouverplan is
http://www.cnv.org/?c=3&i=455
DNV plan is
http://www.dnv.org/article.asp?p=true&a=4227&v=3

Some NV engagement is pending between First Nation Tsleil-Waututh native band and the Provincial Government – which may lead to a more desirable (and flatter) waterfront trail.

6. ANY OTHER BUSINESS

6.1 Legal Issues

(a) An "Annoying" Bylaw

http://www.brightoncity.org/ReferenceDesk/PressReleasesAndPublicNotices/2008/ord%20544%20publication.pdf
To ban annoyances conflicts with freedom of speech.

(b) Local Government Management Association publication:
http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/403899/WUF_Presentation_June19.pdf provides an overview of: MFA, NCS, UBCM, LGMA, CIVICINFO

(c) "Price Fixing" and local governments

http://www.fonvca.org/agendas/mar2009/high-price.pdf
Poor governance may result if bureaucrats, instead of politicians, run the show. Also – to balance it – read http://archive.epinet.org/real_media/010111/materials/warner.pdf which presents two paths to improve service deliveries – innovation to increase internal productivity and/or downsizing and contracting out.

(d) Overview of Dog Liability in BC.

http://www.cwilson.com/pubs/insurance/kxp2/
It is estimated that 460,000 Canadians are bitten by dogs each year. The above paper explores owner liability.
Scienter (full awareness) criteria: ownership, propensity, and knowledge → absolute liability
Negligence: ought to have known, failed to take care

6.2 Any Other Issues (2 min each)

a) Regional Growth Strategy requirements by Metro Vancouver

http://www.metrovancouver.org/planning/development/strategy/Pages/default.aspx Council Workshop to be held on March 30th where concerns will be expressed and possibly allayed – especially about autonomy over land zoning issues.

b) DNV intention to post election expenses on dnv.org web site. Nothing there yet – will report at next FONVCA mtg.

c) RCMP Community Survey

Block Watch advises this is available at:
http://www.cnv.org/c//data/1/240/NV%20RCMP%20Survey%202009.pdf

7. CHAIR AND DATE OF NEXT MEETING

7:00pm Thursday April 17th 2008

Lyle Craver – Mt. Fromme Residents Assoc.
Tel: 604-908-2040 lcraver@shaw.ca

Meeting was adjourned at 9:00PM.

Item 3.1

Subject: Democracy - the right to criticize local government.
From: Corrie Kost <kost@triumf.ca>
Date: Sat, 03 May 2008 19:51:18 -0700
To: "'FONVCA'" <fonvca@fonvca.org>, Mayor and Council - DNV <Council@dnv.org>, Ron & Jen Johnstone <rjstone@telus.net>, Brian Albinson <brianalbinson@shaw.ca>, Corrie Kost <kost@triumf.ca>, David Culbard <culbards@shaw.ca>, Grig Cameron <grig.cameron@shaw.ca>, James Walsh <jwalsh11@shaw.ca>, Peter J Thompson <peterjthompson@shaw.ca>, Brian Platts <bplatts@shaw.ca>, Alan Magelund <alanmags@telus.net>, Kitty Castle <kcastle@shaw.ca>

To all those who value democracy,

I have followed the Powell River case with great interest as it can have a profound influence on citizen participation in local governance. The issue first surfaced (for me) in the SUN article of April 25th "Civil rights group files lawsuit against city of Powell River" and continued with the SUN article of May 3rd "Lessons in democracy, Powell River Style".

For more details see
http://www.zwire.com/site/news.cfm?newsid=19449139&BRD=1998&PAG=461&dept_id=221589&rfi=6
http://www.canada.com/vancouversun/news/editorial/story.html?id=b9d0062d-0e36-4324-b0cb-b90de2477129

The important quote to remember is

"Speech About Government Is Absolutely Privileged: The reason for the prohibition of defamation suits by government lies not with the use of taxes, or with some abstruse theory about the indivisibility of the state and the people who make up the state. Rather, it lies in the nature of democracy itself. Governments are accountable to the people through the ballot box, and not to judges or juries in courts of law. When a government is criticized, its recourse is in the public domain, not the courts. The government may not imprison, or fine, or sue, those who criticize it. The government may respond. This is fundamental. Litigation is a form of force, and the government must not silence its critics by force."

- Justice Corbett, Halton Hills (Town) v. Kerouac, Ontario Superior Court 2006
http://www.canlii.org/en/on/onsc/doc/2006/2006canlii12970/2006canlii12970.html
The further extract from the above reads

[1] In this case, a local internet-based news purveyor is sued by the Town of Halton Hills in defamation. It is also sued by the Town's Director of Parks and Recreation, Terry Alyman. The plaintiffs allege that the defendant called Mr. Alyman "corrupt" in connection with his work for the Town.

[2] The defendant says that the claim asserted by the Town ought to be dismissed as disclosing no cause of action. The defendant seeks this order on two bases:

(a) the statements complained of do not refer to the Town, and thus cannot constitute a libel of the Town; and

(b) in any event, a government may not sue in defamation.

[3] The first argument is correct on a simple reading of the statement of claim. However, this deficiency could be addressed by amendment.

[4] The second argument is also correct, and is a complete answer to the claim made by the Town. No government may bring an action in defamation: authority in support of this conclusion from the United Kingdom, the United States of America, South Africa and Australia, is correct and ought to be followed. Canadian authority to the contrary, which predates the *Charter of Rights and Freedoms*, and relies upon English authority now expressly overruled, is no longer the law of Canada.

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Keep this in mind when a citizen is critical of a municipal council. The exercise of our freedoms is the only way to retain them.

Yours truly,

Corrie Kost
2851 Colwood Dr.
N. Vancouver, V7R2R3

ITEM 3.1

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Dixon v. Powell River (City),*** 2009 BCSC 406

Date: 20090326
Docket: S082905
Registry: Vancouver

Between:

John Dixon and
British Columbia Civil Liberties Association

Plaintiffs

And

The Corporation of the City of Powell River

Defendant

Before: The Honourable Madam Justice Garson

Reasons for Judgment

Counsel for the Plaintiffs:	R.D. Holmes
Counsel for the Ministry of Attorney General of British Columbia:	R. Butler
No one appearing on behalf of The Corporation of the City of Powell River	
Date and Place of Hearing:	January 5, 2009, February 12, 2009 Vancouver, B.C.

INTRODUCTION

[1] The plaintiffs seek a declaratory order that the City of Powell River does not have the legal authority to institute civil proceedings or threaten to do so, for defamation of its reputation as a municipal government. Further, the plaintiffs seek an order that the defendant be restrained from making threats to commence defamation actions against individuals who have published letters critical of the defendant's

conduct.

[2] This application is unopposed by the defendant. The Attorney General of British Columbia appears in response to service on it of a notice pursuant to the ***Constitutional Question Act***, R.S.B.C. 1996, c. 68.

[3] The application is brought as a summary trial pursuant to R. 18A of the ***Supreme Court Rules***, B.C. Reg. 221/90.

BACKGROUND FACTS

[4] The plaintiff, John Dixon, owns real property in the City of Powell River. He is an elector in the City of Powell River. He is also the secretary of the British Columbia Civil Liberties Association.

[5] The British Columbia Civil Liberties Association is a not-for-profit society incorporated in British Columbia. It has a special interest in, and is dedicated to, the protection and preservation of civil liberties in Canada, including rights of free expression.

[6] The Corporation of the City of Powell River is a body corporate of residents of Powell River under the provisions of the ***Community Charter***, S.B.C. 2003, c. 26, as amended, and the ***Local Government Act***, R.S.B.C. 1996, c. 323.

[7] The controversy that forms the background to this matter was a proposal by the City of Powell River to seek approval for funding in the amount of $6.5 million for what was known as the North Harbour Project. Pursuant to s. 86 of the ***Community Charter***, the city council chose to use what has been called the "alternative elector approval process".

[8] As noted in the statement of claim, the steps taken by the City of Powell River in relation to the North Harbour Project led to public discussion as to the merits of the proposed local improvement, the method of obtaining the approval of the community, and the management of the affairs and finances of the City of Powell River by the mayor and council.

[9] Certain members of the community of Powell River expressed views in opposition to the steps being taken by the City of Powell River. One of those individuals was Mr. Noel Hopkins. He published a letter in an online community newspaper known as *Peak Online*, on February 14, 2008. That letter was sharply critical of the conduct of city council.

[10] Another individual, Win Brown, added an online comment, suggesting possible criminal behaviour by city council.

[11] One of the members of city council, Patricia Aldworth, also published an email expressing her opposition to the steps being taken by council. I will refer to these three individuals collectively as "the Objectors".

[12] In response the defendant, City of Powell River, retained legal counsel and delivered letters to the Objectors: Patricia Aldworth, Winslow Brown, and Noel Hopkins. The letters to the three Objectors were similar. The letter to Patricia Aldworth stated as follows, in part:

> We are counsel for the City.
>
> We have reviewed a copy of an e-mail you published and distributed over the internet on or about February 21, 2008 styled, "*North Harbour Vote Count*". The e-mail, over your signature as "president", was addressed to "*Dear Townsite Ratepayers*". Your e-mail contained the statement: "*Likely City Hall will be using the days between now next Tuesday trying to eliminate some of the forms*".
>
> The City is a strong supporter of the right to engage in public debate about the conduct of government bodies and institutions. The City firmly supports individual rights to express ideas and to criticize the conduct and operation of civic institutions. However, as stated by the Honourable Mister Justice Wilson, "*freedom of speech is not a license to defame*".
>
> Your statement conveys the false and defamatory imputation that the City will be conducting the present elector assent process in a corrupt fashion. That is false and injudicious. More fundamentally, it is defamatory of the City and actionable against you.

> In all of the circumstances, we must put you unequivocally on notice that you are to refrain and desist from defamation of the City.
>
> We are not, by this letter, seeking in any way to silence you or discourage you from participating in the public affairs of the City. We must, however, demand that you conduct yourself in a manner which does not wrongfully damage reputations and does not constitute tortious conduct prohibited by the common law.
>
> A timely and unequivocal retraction of your statement, and a publication of an apology for this wrongful allegation, distributed to all to whom you published your e-mail statement, can be expected to mitigate the damages you have caused, and to reduce the damages to which your defamatory publication has exposed you.
>
> Please govern yourself accordingly.

[13] Following delivery of the defamation suit threat letters, Winslow Brown contacted the solicitor for the City of Powell River and told him that he could not afford a lawsuit and asked what he should do. The solicitor told Mr. Brown to contact the *Peak Online* and publish an apology and retraction there. The *Peak Online* publication declined, saying that what had been published was not defamatory. Mr. Brown contacted the city solicitor again and asked what to do. The solicitor told him "you had better do something", or words to that effect. Mr. Brown attended before a council meeting on March 11, 2008, and stated that he could not afford a lawsuit and he publicly retracted and apologized for the views he had expressed. He delivered a letter to that effect and asked if that satisfied the demands of the City of Powell River and whether "it was over", or words to that effect. The mayor declined to provide the assurance that the matter was "over", saying instead that the statement would be noted by the City clerk and communicated to the solicitors for the City of Powell River. According to the affidavit of Mr. Dixon, the mayor then stated words to the effect that defamatory comments about the City of Powell River would not be tolerated from anyone.

[14] The Corporation of the City of Powell River filed and then withdrew a statement of defence. It gave notice to counsel for the plaintiffs that it would not appear at this hearing. The application, as I said, is therefore unopposed.

ANALYSIS AND CONCLUSIONS

[15] The plaintiffs' application (as amended at the hearing) is for the following order, to which the Attorney General is not opposed:

1. The defendant City of Powell River lacks any legal basis or right to bring civil proceedings for defamation of its governing reputation, or bring other proceedings of similar purpose or effect, or to threaten to do so, including in the manner contained in the three letters dated March 6, 2008, sent by the solicitors of the defendant, City of Powell River, to Patricia Aldworth, Winslow Brown and Noel Hopkins, described above.
2. The defendant City of Powell River, its mayor, council, servants and agents, be and the same are hereby restrained from making threats that the City of Powell River will bring action and sue any person for defamation, or bring any other proceeding of similar purpose or effect, on any ground similar to that set out in the Defamation Suit Threat Letters.
3. The Defendant City of Powell River pay the costs of this proceeding to the plaintiffs after assessment thereof.

[16] Because the first issue is whether the plaintiffs have standing, it is necessary to examine the basis of the cause of action and the relief sought in the statement of claim. Paragraphs 24-26 of the statement of claim state:

> 24. The Plaintiffs are concerned that the actions of the City of Powell River described herein have had and will continue to have a serious and damaging effect on the right of all person in Canada under section 2(b) of the *Canadian Charter of Rights and Freedoms* to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communications."
>
> 25. The Plaintiffs expressly refer to and rely upon section 24 of the *Canadian Charter of Rights and Freedoms*, section 39 of the *Law and Equity Act*, and the inherent jurisdiction of this Honourable Court.
>
> 26. Section 8(1) of the *Community Charter* SBC 2003 c. 26 as amended is inconsistent with the *Canadian Charter of Rights and Freedoms* at least to the extent that it provides that a municipality "has the capacity, rights, powers and privileges of a natural person of full capacity …" and may sue for defamation.

[17] The plaintiffs assert that both plaintiffs have standing to institute the within action for the declaratory order and injunction.

[18] In the notice of motion before me the plaintiffs seek the following relief:

1. A declaration and order that:
   a. Government and public bodies, including municipal corporations such as the Defendant City of Powell River, lack the legal status and right and are not constitutionally permitted to be granted or to exercise "the capacity, rights, powers and privileges of a natural person of full capacity" to bring civil proceedings for defamation or any like cause of action or to threaten to do the same; and
   b. Section 8(1) of the *Community Charter* SBC 2003 c. 26 as amended is inconsistent with the *Canadian Charter of Rights and Freedoms* to the extent that it provides otherwise and to that extent is of no force or effect;
2. A declaration and order that the Defamation Suit Threat Letters were wrongful and unlawful;
3. An order restraining the City of Powell River, its Mayor, Council, servants and agents, from:
   a. Making threats that the City of Powell River will bring action and sue any person for defamation; or
   b. Otherwise by words and deeds seeking to deny or infringe the rights of any person under section 2(b) of the *Canadian Charter of Rights and Freedoms*; and
4. Such further and other relief as to this Honourable Court may seem meet and just.

[19] The order sought is considerably narrower than the relief sought in the statement of claim, the notice of motion or in the notice under the constitutional question.

[20] The notice delivered pursuant to the ***Constitutional Question Act*** states, in part, as follows:

> …
>
> 3) The law in question in this action is section 8(1) of the *Community Charter* SBC 2003 c. 26 as amended, which provides that: "A municipality has the capacity, rights, powers and privileges of a natural person of full capacity";
>
> 4) The rights and freedoms protected pursuant to section 2(b) and 24 of the *Charter of Rights and Freedoms* are infringed and denied by the Defendant as described in the Amended Statement of Claim;
>
> 5) The federal and provincial governments and governmental and public agencies created by them, including municipal corporations such as the Defendant in this case:
>
> a) Lack the legal status and right and are not constitutionally permitted to be granted or to exercise "the capacity, rights, powers and privileges of a natural person of full capacity" to bring civil proceedings for defamation or any like

cause of action or to threaten to do the same; and

b) Section 8(1) of the *Community Charter* SBC 2003 c. 26 as amended is inconsistent with the *Canadian Charter of Rights and Freedoms* to the extent that it provides otherwise and to that extent is of no force or effect …

[21] Mr. Dixon is no longer seeking an order that s. 8(1) of the ***Community Charter*** is inconsistent with the ***Canadian Charter of Rights and Freedoms*** ("***Charter***"). Rather he seeks a declaratory order that, at common law, the City lacks any legal basis or right to bring or threaten legal proceedings for defamation. It must be remembered that although the City did threaten to bring such proceedings, no such action was ever launched.

[22] As already noted, Mr. Dixon is a property owner and elector in the City of Powell River. The City of Powell River acknowledges that the cost for its solicitor's services in drawing the three letters referred to was $906.36, presumably an indirect cost to the electors. Mr. Dixon asserts that he has standing to argue that his rights under s. 2(b) of the ***Charter*** were infringed by the letters sent to the three Objectors. At para. 24 of the statement of claim, Mr. Dixon asserts that he has the right to both make and receive communications such as those communications to which the City of Powell River objected.

[23] At para. 25 of the statement of claim, the plaintiffs rely on s. 24 of the ***Charter***. Section 24(1) provides that:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied, may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[24] Section 2 of the ***Charter*** provides that:

> Everyone has the following fundamental freedoms:
>
> …
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> …

[25] It is argued by the plaintiffs that Mr. Dixon has the right not only to speak but to be the recipient of information in the public debate concerning the conduct of government affairs, including local government affairs. It is argued that his right to receive such information was curtailed by the letters delivered to the Objectors. It is further argued that Mr. Dixon has standing to sue to enforce or protect his ***Charter*** rights. Although Mr. Dixon was not the recipient of a letter from the City of Powell River threatening to sue him for defamation, he says that his right to freedom of expression embraces his right to receive communication from his fellow electors regarding concerns about the conduct of their local government. He says that he has standing to sue to protect his right to free and unimpeded access to all opinions of his fellow electors.

[26] Does Mr. Dixon have standing to assert that his rights have been infringed?

[27] The personal rights approach to standing under s. 24(1) of the ***Charter*** means that a person would be unable to challenge violations of the rights of a third party unless his or her own rights have also been violated: ***Benner v. Canada (Secretary of State***), [1997] 1 S.C.R. 358, 143 D.L.R. (4th) 577 at 604, formal judgment [1997] 3 S.C.R. 389; ***R. v. Hyatt***, 2003 BCCA 27, 171 C.C.C. (3d) 409. Both ***Benner*** and ***Hyatt*** held that ***Charter*** rights are personal rights and, further, the right to challenge the legality of an alleged violation of a ***Charter*** right depends upon the plaintiff or the accused establishing that his or her personal rights have been violated.

[28] In the case of ***Harper v. Canada (Attorney General)***, 2004 SCC 33, [2004] 1 S.C.R. 827, Mr. Harper brought an action for a declaration that certain sections of the ***Canada Elections Act***, S.C. 2000, c. 9, were of no force or effect because they infringed ss. 2(b), 2(d), and 3 of the ***Charter***. Those sections of the ***Canada Elections Act*** limited third party election advertising expenses to $3,000 locally and $150,000 nationally, and placed other limits on third party election spending. Mr. Holmes, counsel for the plaintiffs,

cites this case as authority for the proposition that Mr. Dixon has standing to bring the within action.

[29] At para. 17 of ***Harper***, Bastarache J. held:

> Freedom of expression protects not only the individual who speaks the message, but also the recipient. Members of the public – as viewers, listeners and readers – have a right to information on public governance, absent which they cannot cast an informed vote…
>
> [internal citations omitted]

[30] The plaintiffs and the Attorney General agree on this application that, with respect to both elements of the relief sought by Mr. Dixon under s. 24(1) of the ***Charter***, the issue of public interest standing need not be decided because Mr. Dixon, as a resident and ratepayer of Powell River, has a personal interest sufficient to provide him with personal standing (as modified at the hearing). I agree with this submission and accept that Mr. Dixon does have personal standing.

[31] I now turn to the issue of whether a government (as distinct from individuals associated with the government) can be defamed with respect to its governing reputation.

[32] In ***City of Prince George v. British Columbia Television System Ltd.***, 95 D.L.R. (3d) 577, [1975] B.C.J. No. 2071, the Court was asked to decide two questions of law under R. 34 of the ***Supreme Court Rules***. The judgment does not disclose the underlying facts. The two questions were: whether the statement of claim disclosed a cause of action for actionable defamation; and whether the municipality could sue in its corporate capacity for the libel or defamation asserted. Bull J.A., in concurring reasons, relied on the ***Interpretation Act***, 1974 (B.C.), c. 42, which defines "corporation" and delineates that an enactment establishing a corporation shall be construed to vest that corporation with power to sue in its corporate name. He held that every incorporated municipality has all the rights and liabilities of a corporation and because a corporation clearly has a right of action in defamation, a municipal corporation has the same right.

[33] In the same case, Aikins J.A. noted at para. 14 that:

> … the power to sue for libel would unduly encroach upon the right of the public at large to speak freely concerning municipal affairs.

[34] At para. 32 he held:

> … 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.

[35] Aikins J.A. and Bull J.A. agreed in deciding that a municipal corporation's governing reputation could be defamed and that it could sue for defamation.

[36] In the case at bar, both counsel submit that ***Prince George*** is 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 say it is not binding on this Court so as to compel me to find that a municipal government may maintain an action for defamation.

[37] In ***Hill v. Church of Scientology of Toronto***, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129, a prosecutor sued the Church of Scientology for alleged defamatory statements made by representatives of the defendant at a press conference. The defendant argued that the ***Charter*** rights of free speech protected the statements made by it about the prosecutor. The Supreme Court of Canada held, per Cory J., that the

common law of defamation must be interpreted in a manner that is consistent with ***Charter*** principles. Although in ***Hill*** the Court found no reason to depart from the common law principles of defamation applicable to that case, the Court said at para. 85:

> In *R. v. Salituro*, *supra*, the Crown called the accused's estranged wife as a witness. The common law rule prohibiting spouses from testifying against each other was found to be inconsistent with developing social values and with the values enshrined in the Charter. At page 670, Iacobucci J., writing for the Court, held:
>
> > Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in Watkins, supra, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.
>
> Further, at p. 675 this Court held:
>
> > Where the principles underlying a common law rule are out of step with the values enshrined in the Charter, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with Charter values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed.

[38] In ***Halton Hills (Town) v. Kerouac*** (2006), 270 D.L.R. (4th) 479, 80 O.R. (3d) 577, an internet newspaper was sued by the Town of Halton Hills in defamation because the publication asserted the municipality was corrupt. The defendant argued that a government could not sue in defamation.

[39] Corbett J. declined to follow ***Prince George***, noting that the case was decided before the ***Charter***, and held at para. 62:

> I conclude as follows:
>
> (1) Section 2(b) of the *Charter* guarantees freedom of expression;
>
> (2) expression about public affairs in general, and government in particular, lies at the core of freedom of expression;
>
> (3) any legal restriction on freedom of expression about public affairs has a chilling effect on freedom of expression generally, and infringes the Section 2(b) guarantee;
>
> (4) infringements of the Section 2(b) guarantee may be justified pursuant to Section 1 of the *Charter*. Laws against sedition, for example, may be justified, since society may guard against its own violent overthrow. Laws against hate speech may be justified to protect the victims of hate speech. The common law tort of defamation may be justified on the basis that private persons (including public servants) are entitled to protect their personal reputations;
>
> (5) there is no counterveiling justification to permit governments to sue in defamation. Governments have other, better ways to protect their reputations;
>
> (6) any restriction on the freedom of expression about government must be in the form of laws or regulations enacted or authorized by the legislature; the common law position, in the absence of such legislation, is that absolute privilege attaches to statements made about government;
>
> (7) "Government" includes democratically elected local governments.

[40] In ***Montague (Township) v. Page*** (2006), 79 O.R. (3d) 515, 139 C.R.R. (2d) 82, the defendant and

the Canadian Civil Liberties Association (as a friend of the Court) raised the question of whether it was consistent with s. 2(b) of the ***Charter*** for a government entity to sue a private citizen for defamation. The defendants were alleged to have defamed the municipal government in published letters critical of the government's conduct concerning a fatal fire. Pedlar J. held that the municipal government could not maintain an action in defamation. At para. 29 he held:

> In a free and democratic system, every citizen must be guaranteed the right to freedom of expression about issues relating to government as an absolute privilege, without threat of a civil action for defamation being initiated against them by that government. It is the very essence of a democracy to engage many voices in the process, not just those who are positive and supportive. By its very nature, the democratic process is complex, cumbersome, difficult, messy and at times frustrating, but always worthwhile, with a broad based participation absolutely essential. A democracy cannot exist without freedom of expression, within the law, permeating all of its institutions. If governments were entitled to sue citizens who are critical, only those with the means to defend civil actions would be able to criticize government entities. As noted above, governments also have other means of protecting their reputations through the political process to respond to criticisms.

[41] ***Cusson v. Quan***, 2007 ONCA 771, 286 D.L.R. (4th) 196, was a case concerning an Ontario police officer who had on his own initiative travelled to New York City following September 11, 2001, to assist in rescue efforts. His employer was criticized in the media for ordering Cusson to return to his duties. In the public controversy that followed, the defendant newspaper published articles critical of Cusson and suggested that his conduct was less than heroic – as had been claimed by some media. Cusson sued the newspaper in libel.

[42] The issue before the Ontario Court of Appeal concerned the question of qualified privilege and, in resolving that issue, it was necessary for the Court to grapple with the question of whether the law of defamation should be developed in a manner consistent with the ***Charter*** or whether the Courts were bound by pre-***Charter*** common law defamation judgments. Sharpe J.A. held at para. 130 that the law of defamation was not "…frozen…in a permanent state of hostility to any and all change…." and at para. 133, he stated:

> Our task, it seems to me, is to interpret and apply the earlier decisions in light of the *Charter* values at issue and in light of the evolving body of jurisprudence that is plainly moving steadily towards broadening common law defamation defences to give appropriate weight to the public interest in the free flow of information.

[43] Is ***Prince George*** binding and therefore determinative of the issue in this case?

[44] In the seminal case on *stare decisis*, ***Re Hansard Spruce Mills Ltd.***, [1954] 4 D.L.R. 590, 13 W.W.R. 285, Wilson J. described the circumstances in which a trial judge may depart from what would otherwise be binding authority as follows at para. 4:

> Therefore, to epitomize what I have already written in the *Cairney* case, I say this: I will only go against a judgment of another judge of this Court if:
>
> (a) Subsequent decisions have affected the validity of the impugned judgment;
>
> (b) It is demonstrated that some binding authority in case law, or some relevant statute was not considered;
>
> (c) The judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

[45] 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.

[46] It seems clear to me on the basis of ***Hill***, that common law causes of action must be applied in a manner that is consistent with the ***Charter***. It is evident that the law of defamation and the constitutional law of freedom of speech ought not to develop in two separate streams incorporating different values. Rather, the two should accommodate each other. In this case, I agree with the judgments in the ***Halton Hills*** and ***Montague*** cases in which the justices decided that governments cannot sue for defamation for damage to their governing reputations. 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. In ***Prince George***, Aikins J.A. considered and rejected the freedom of speech argument advanced by the plaintiffs, and held that a local government could sue for defamation on the same basis as any corporation. That reasoning cannot withstand ***Charter*** scrutiny. As Sharpe J.A. said in ***Cusson*** at para. 125:

> It is hardly necessary to repeat here the importance of the rights protected by s. 2(b) of the *Charter*, namely "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". These rights are an inherent aspect of our system of government and have been generously interpreted by the courts. Democracy depends upon the free and open debate of public issues and the freedom to criticize the rich, the powerful and those, such as police officers, who exercise power and authority in our society. Freedom of expression extends beyond political debate to embrace the "core values" of "self-fulfilment", "the communal exchange of ideas", "human dignity and the right to think and reflect freely on one's circumstances and condition": *R.W.D.S.U. v. Pepsi-Cola*, [2002] 1 S.C.R. 156 at para. 32. Debate on matters of public interest will often be heated and criticism will often carry a sting and yet open discussion is the lifeblood of our democracy. This court recognized in *R. v. Kopyto* (1987), 62 O.R. (2d) 449 at 462 that "[i]f these exchanges are stifled, democratic government itself is threatened."

[47] The passage just quoted is equally applicable to this case. 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.

[48] I now return to the question of whether to grant relief under s. 24. I am satisfied that Mr. Dixon's right to receive communications concerning his local government were infringed by the defamation threat letters. That threat has not been withdrawn in a manner that removes the chilling effect it had on the electorates' freedom of speech.

[49] I would therefore grant the declaratory relief sought by the plaintiff Dixon in the terms set out above. The precise terms of the order sought, are as follows:

> The defendant City of Powell River lacks any legal basis or right to bring civil proceedings for defamation of its governing reputation, or bring other proceedings of similar purpose or effect, or to threaten to do so, including in the manner contained in the three letters dated March 6, 2008, sent by the solicitors of the defendant, City of Powell River, to Patricia Aldworth, Winslow Brown and Noel Hopkins, described in the Amended Statement of Claim herein as the "Defamation Suit Threat Letters" copies of which are attached hereto.

[50] Is the plaintiff Dixon entitled to an injunction enjoining the defendant from repeating the conduct complained of?

[51] The order sought by the plaintiff Dixon is as follows:

> The Defendant City of Powell River, its Mayor, Council, servants and agents, be and the same are hereby restrained from making threats that the City of Powell River will bring action and sue any person for defamation, or bring any other proceeding of similar purpose or effect, on any grounds similar to that set out in the Defamation Suit Threat Letters.

[52] The injunction sought is a permanent injunction. Although it is true, as submitted by the plaintiffs,

that there is no evidence the City of Powell River has undertaken not to threaten or commence defamation proceedings against one of its citizens for publishing criticism of the local government in the future, I consider its withdrawal of its statement of defence and lack of opposition to this application as some recognition that its conduct was not lawful. I am reluctant to permanently restrain the defendant in such broad terms for future conduct that may involve different considerations and may not necessarily come within the reasons of this judgment. I also consider such an injunction unnecessary. The application for an injunction is dismissed.

[53] Does the British Columbia Civil Liberties Association have standing?

[54] There is no purpose or advantage, that I can perceive, in separately considering if the Civil Liberties Association has public interest standing to advance a claim for relief that I have already granted. Moreover, the Attorney General has requested leave to make further submissions on the question of the Civil Liberties Association's public interest standing, if I decide to consider this point. In my view the question at issue in this application is properly before the Court on Mr. Dixon's personal application. I therefore conclude that it is unnecessary for me to consider whether the Civil Liberties Association also has standing.

[55] The plaintiff Dixon has been successful on the main issue. Costs will follow the event. I make no award of costs in respect to his co-plaintiff, the British Columbia Civil Liberties Association.

"N. GARSON, J."

ITEM 3.1

Court sends a message to governments: don't gag your citizens

BY DAPHNE BRAMHAM, VANCOUVER SUN MARCH 31, 2009

Chalk up a win for citizens against governments and politicians who would silence them.

The Charter of Rights' guarantee of free speech overrides any claims by governments that they can be defamed by citizens critical of their actions, B.C. Supreme Court Justice Nicole Garson ruled last week.

"The Charter-enshrined value of freedom of expression is paramount and local governments have to resort to other means to protect their reputations from citizens who publish critical commentary about the government itself," she wrote in a case involving the city of Powell River's threat to sue three residents who criticized the mayor and council in an online newspaper.

"It is antithetical to the notion of freedom of speech and a citizen's right to criticize his or her government concerning its governing functions that such criticism should be chilled by the threat of a suit in defamation."

The decision may help cool a cross-Canada trend for governments -- municipalities in particular -- to quash dissent by filing SLAPP suits, the vernacular for strategic lawsuits against public participation.

B.C. municipalities have sued in the past and they were emboldened after the provincial government passed the 2004 Community Charter giving civic governments "natural person powers."

Last April, Powell River tried to sue three citizens -- including Coun. Patricia Aldworth -- who had accused the city of Powell River of improper and possibly criminal conduct when it used an alternative elector approval process to fund a controversial, $6.5-million harbour development.

The city sent similar letters to each of them. The tone of Aldworth's letter (which is included in the judgment) is chilling. After accusing her of being "injudicious," the city's lawyer went on to demand "a timely and unequivocal retraction."

Aldworth refused. But Winslow Brown, who couldn't afford a legal defence, went to city council, apologized and retracted his statements.

John Dixon, secretary of the B.C. Civil Liberties Association and a Powell River resident, took up the cause, filing the suit in B.C. Supreme Court asking for a declaration that the city does not have the legal authority to sue or threaten to sue for defamation.

Although B.C. municipalities have sued successfully in the past, Garson noted that those cases were decided prior to the 1982 Charter. She also referred to two recent Ontario judgments.

In one, the Ontario Superior Court noted a "fundamental and unfair imbalance between the means of the state and those of an individual."

"If governments were entitled to sue citizens who were critical," it said, "only those with the means to defend civil actions would be able to criticize government entities."

Powell River council unanimously decided in December not to defend itself in court, leaving it to the B.C. attorney-general to respond to Dixon and the civil liberties association.

The city issued a news release saying that the threatening letters had "a divisive and unintended effect on the community" and that council "regrets the effect those letters had."

Thin gruel for the citizens, who had been badgered and humiliated by their elected representatives.

Garson noted the city's decision not to file a defence and said it was "some recognition that its conduct was not lawful." Still, she ordered the city to pay the court costs.

Garson declined Dixon's and the BCCLA's request for a permanent injunction to keep Powell River from filing any future defamation suits against citizens as "unnecessary."

Let's hope that it and other governments have received the message loudly and clearly.

It is illegal to try to silence critical voters. They are the very foundation of our democratic society.

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ITEM 5.2

canada.com
WHERE PERSPECTIVES CONNECT

Friday » April 3 » 2009

Tsleil-Waututh serve notice on fees

First Nation's costs of business affects much of Metro Vancouver

Benjamin Alldritt
North Shore News

Friday, April 03, 2009

A new consultation policy unveiled by the Tsleil-Waututh Nation last week has rattled local politicians, who fear the fees attached to consultation work will hamper business development in the region.

The Tsleil-Waututh Stewardship Policy covers a huge parcel of land from the U.S. border up into Garibaldi Provincial Park, taking in much of Metro Vancouver and all of the North Shore. The consultation area is roughly twice as large as the area claimed by the Burrard band as traditional territory for treaty negotiations.

CREDIT: graphic supplied

The Tsleil-Waututh Nation has served notice that consultation fees will be charged "to all governments, businesses and individuals" within the area outlined in the map above for services rendered by the Burrard Inlet First Nation.

The policy calls for the Tsleil-Waututh to be closely involved with any planning, development or resource projects. It outlines the various services offered by the nation, including natural resource management, archaeology, project administration and geographic information system mapping. The policy also lists a variety of fees: $250 to set up a file, $200-400 for cultural heritage research, various hourly rates for technicians and managers, and a 12 per cent administration surcharge on top of any work the 430-strong Tsleil-Waututh need to contract out.

Leah George-Wilson, a former chief and the current Tsleil-Waututh director of treaties, lands and resources, said the nation needs to charge for consultation simply to handle the volume of work. "We got something like 800 referrals last year," she said.

"Some of these, like (the Gateway Project) or the Sea-to-Sky Highway upgrade are a huge amount of work."

George-Wilson said some of the large infrastructure projects generate boxes full of documents to review and act on. Without attaching a fee to the work, she said, the nation simply cannot process them. "We have to review them, and we have to have qualified people to review them," she said. "That costs money."

George-Wilson said the Tsleil-Waututh is already borrowing money to proceed with the treaty negotiation process. She said the fees are reasonable, and she expects the development community will accept them as a cost of doing business.

"This is about the Supreme Court ruling that says the Crown has an obligation to consult with us on matters in our traditional territory. They can't off-load their obligation back onto First Nations."

"We're not trying to hook local government," she added. "I expect they're already on the phone to Victoria asking how this can be worked out."

"We want all parties to know that Tsleil-Waututh is not anti-development. We've built our reputation on working with people, on partnerships. We're proud of that relationship."

Belcarra Mayor Ralph Drew is chairman of the Lower Mainland Treaty Advisory Committee (LMTAC), a body that represents 26 local governments as part of the treaty negotiation process. He said there were "a lot of raised eyebrows" when the Tsleil-Waututh policy was presented on March 25.

"There were lots of issued flagged, concerns raised and questions asked," he said.

While LMTAC's formal response is still being developed, Drew said "most everyone I talked to was aghast at what they were hearing."

Drew said he has three main complaints with the stewardship document. First, he said, it assumes that local government has a duty to consult with First Nations.

"The courts have been very clear; it is the federal and provincial Crown that has a duty to consult. Local governments are not agents or representatives of the Crown," he said.

Secondly, when asked to define what sort of projects the policy would apply to, Drew said the Tsleil-Waututh delegation told the committee to assume it covered "everything."

"This could be apply to things as small as a park bench if it happens to be near a historical or archaeological site," said Drew.

"The proposal, as it's written, is vague and all-encompassing. A lot of our questions revolve around trying to get some clarity about what they're focusing on."

Lastly, Drew worries that the policy could become another layer of approval and permitting for government and businesses to contend with.

Another member of the LMTAC, District of North Vancouver Coun. Alan Nixon, was critical of Drew's decision to speak with the media before the committee could produce a written response.

"I was extremely disappointed to read his comments," Nixon said. "I thought his remarks were pretty inflammatory."

While Nixon believes applying the stewardship policy across such a large area was "a bad move," overall he regards its release as a positive step.

"I think the map is a lightning rod for a lot of this angst. If they find a way to bring that area down, I think they would be better off. But it does set out very, very clearly what the expectations are for people who work in their territory," he said.

"I like the concept that the Tsleil-Waututh put forward, which is that they are going to be entrepreneurs and market their services."

"I think this an invitation to move along a path where trust can be developed," Nixon said.

"We can do this as municipalities, or we can wait for Victoria to impose it from above."

District of North Vancouver Coun. Mike Little, who also sits on the LMTAC, described the district's relationship with the Tsleil-Waututh as "excellent" and "very productive."

"In the past," he said, "they've just swallowed the cost of these referrals, and it's killing them. I think this policy attempts to do two things. It addresses their financial concerns, and it fills in the gap left by the courts, who never really defined what consulting meant."

Little said he read the policy as being largely voluntary, and doesn't expect it will be

enforceable until it's enshrined in a treaty or confirmed by the courts.

Nevertheless, Little said the policy's broad scope is cause for concern, especially if it prompts other First Nations groups to produce similar documents.

"We have a protocol with the Tsleil-Waututh, so I'm not too worried about that relationship. But we don't have one with the Squamish, the Musqueam, the Katzie and so on. If you were a business thinking of setting up in the Lower Mainland and you had to deal with nine First Nations with overlapping claims who all want to do this consulting work, and there are no real limits to the costs, I'm concerned that could stifle business growth."

District of North Vancouver Mayor Richard Walton echoed many of Little's comments, saying the district "starts with a high level of trust with the Tsleil-Waututh."

"They are a small band," he said, "and capacity is an issue. I'm sure there's things they would like to move faster on, but they just don't have the bodies.

"We're going to have a respectful conversation about how to control these costs. I am concerned if you're paying for another party's procedural costs as well as your own, that could get very expensive in a lengthy process."

Walton said the issue of overlapping claims will eventually work itself out in the treaty process. He was not aware of any other First Nations developing a similar policy. "We'll work through it. There's no point in pushing the panic button at this point," he said.

CLOSE WINDOW

ITEM 5.2

SURREY
CITY OF PARKS

Corporate Report

NO: R025

COUNCIL DATE: March 9, 2009

REGULAR COUNCIL

TO:	**Mayor & Council**	DATE:	**March 5, 2009**
FROM:	**General Manager, Engineering**	FILE:	**0450-20 (LMTAC)** **0440-01 (First Nations)**

SUBJECT: **Treaty Negotiations - Proposed Stewardship Policy from the Tsleil-Waututh Nation**

RECOMMENDATION

The Engineering Department recommends that Council:

1. Receive this report as information; and

2. Support the Lower Mainland Treaty Advisory Committee's intended course of action as documented in this report with respect to the Stewardship Policy proposed by Tsleil-Waututh Nation.

BACKGROUND

The Tsleil-Waututh Nation (TWN), with a population of 447 members, traditionally occupied and used the land and waters in and around North Vancouver and the lower mainland. The TWN's "Statement of Intent" (SOI) traditional boundary area, as submitted to the BC Treaty Commission for the purpose of Treaty Negotiations, encompasses an area of approximately 179,000 hectares. The boundary of the TWN's traditional area is illustrated in Appendix I attached to this report.

At a September 2008 Treaty Negotiations Main Table Working Group, the TWN provided representatives from Canada, British Columbia, and the Lower Mainland Treaty Advisory Committee (LMTAC) with a confidential briefing on the development of a *Tsleil-Waututh Stewardship Policy*. Parties were advised that the *Policy* would introduce and outline the TWN's expectations with respect to consultation and accommodation for project development within the TWN's 'Consultation Area.' At the time, the LMTAC table representative to the TWN negotiations requested that LMTAC provide Executive Committee members with a copy of the Tsleil-Waututh Stewardship Policy immediately upon receipt and subsequently proceed with analysis and impact assessment of the document.

The noted Consultation Area represents a territorial boundary whereas the TWN requires consultation to assess potential impacts of proposed land and resource policies, plans and developments that may transpire therein. The TWN's proposed Consultation Area is consistent with the current scope of Provincial consultation boundaries and is deemed to be independent of, and greater in geographic area than, their SOI area. To this end, the TWN Consultation Area encompasses an area of approximately 413,000 hectares and affects 23 local government jurisdictions including the City of Surrey. A copy of the TWN proposed Consultation Area map is attached as Appendix II.

DISCUSSION

At the February 25, 2009 meeting, Lower Mainland Treaty Advisory Committee (LMTAC), LMTAC Board members received a briefing on specifics pertaining to the TWN's proposed *Stewardship Policy*. A copy of the Tsleil-Waututh Nation Stewardship Policy is attached as Appendix III. This policy is considered a public document that can be shared with Councils and Boards.

The Tsleil-Waututh Nation Stewardship Policy, if implemented, has several legal and practical implications for local government, the most significant of which is a consultation fee structure that the TWN is proposing for any development-related projects that proceed within their Consultation Area boundary. Given the vastness of their Consultation Area, this would include any developments that occur within the lower mainland (including developments within the City of Surrey).

The TWN's fee schedule, as reflected on page 16 of their attached Stewardship Policy (Appendix III), is summarized as follows:

Tsleil-Waututh Nation Stewardship Policy Fee Schedule

Specific Fees:

- Referral Set Up Fee: $250 per application
- Cultural Heritage Investigation Permit: $200-$400 per application

Rates for TWN Staff:

- Resource Technicians and Administration: $50/hour
- Senior Resource Technicians: $75/hour
- GIS Technicians and Mappers: $75/hour
- Resource Managers: $100/hour

Contracted Technical or Professional Services:

- At cost + 12% administration

Travel Expenses

- At cost + 12% administration

LMTAC has advised its Board members that prior to engaging in analysis and/or determining a course of action regarding the TWN's proposed Stewardship Policy, more information and clarification is required from both the TWN and the Province.

Accordingly, the TWN representatives will appear as a delegation to present their *Stewardship Policy* at the March 25, 2009, LMTAC Board meeting where a detailed overview of the policy will be provided. Meanwhile, the LMTAC Executive has sent a letter (dated February 20, 2009) to Assistant Deputy Ministers for both the Ministry of Aboriginal Relations and Reconciliation and Ministry of Community Development requesting a meeting as soon as possible, in advance of the March 25 Board meeting, to discuss potential implications of the Stewardship Policy for local government. A copy of the Executive Committee's letter is attached as Appendix IV. This letter includes a number of key questions posed to the Province in relation to the Stewardship Policy. These questions are as follows:

<u>Consultation and Accommodation</u>

- The Stewardship Policy places the duty to consult on government; however, case law has placed the duty to consult with the Crown. Local and regional governments are not representatives of the Crown. What are the consequences to local government for failing to consult within the parameters described in the Tsleil-Waututh Nation (TWN) Stewardship Policy?
- Will the Province create consultation guidelines for project proponents, including local government, and what assurances are there that the Province's guidelines will be sufficient to satisfy the requirements of the TWN Stewardship Policy?
- How does the Province reconcile the differences between the TWN Consultation Area and the Statement of Intent area, and what are the implications for local government? For example, will local governments have to consult with all First Nations overlapping the TWN consultation area in the manner set out in the Stewardship Policy?
- How does the TWN Stewardship Policy fit into the greater context of the provincial Government's New Relationship?

<u>Land Alienation</u>

- Does the Provincial Government expect that local government must adhere to the TWN Stewardship Policy 2.2.3 when disposing of municipal or regional district lands?

<u>Land Resource and Other Planning Initiatives</u>

- What differences are to be expected in the applicability of the Stewardship Policy between municipal and regional district planning processes?
- How do the expectations of the TWN compare to forthcoming guidelines from the Ministry of Community Development for local government engagement with First Nations?

Assessment of Proposed Developments

- TWN goals (page 5) for the Stewardship Policy include preferential employment and contracting with TWN members and corporations. This outcome, while perhaps desirable, may conflict with local government labour contracts and procurement policies as well as the Trade Industry and Labour Mobility Agreement (TILMA). How should these potential differences in policies be reconciled?

Resourcing Requirements for Tsleil-Waututh Engagement

- As a matter of principle, governments at all levels do not charge each other for consultation. Do the Federal and Provincial Governments expect local government to participate in consultations if fees are deemed a prerequisite by First Nations?
- If local government does not pay TWN fees for consultation, is the consultation process still valid?
- Who is responsible to provide resource funding to First Nations to facilitate consultations?
- Do the Tsleil-Waututh Band and Council need to enact a by-law in order to charge consultation fees, and would the by-law require the approval of Indian and Northern Affairs Canada?

Next Steps Proposed by LMTAC

LMTAC will initiate analysis and action following a meeting with the Province including informal discussions with provincial negotiators at the TWN Treaty Negotiations Table and the TWN delegation at the LMTAC Board meeting on March 25, 2009. To this end, LMTAC will work closely with the Province to assist in their analysis of the Policy. Subsequently, LMTAC will work in conjunction with member Councils and Boards to formulate a strategy and gain consensus on an appropriate course of action to deal with this issue.

CONCLUSION

The Tsleil-Waututh Nation, located in North Vancouver, has proposed a Stewardship Policy that includes a Consultation Area that encompasses a boundary of approximately 413,000 hectares and affects 23 local government jurisdictions including the City of Surrey. The intent of the TWN's policy is to compel affected local governments to consult with and pay related fees to the TWN on any and all land development and planning matters. If implemented the policy has legal and practical implications for local government.

On behalf of all Lower Mainland local governments, LMTAC has communicated its concerns to the Province. LMTAC will be engaging in analysis of the TWN's Stewardship Policy and intends to develop a course of action, subject to Board approval and following meetings with the Province and a presentation of the Stewardship Policy by the TWN at the March 25, 2009 LMTAC Board meeting.

Staff will provide Council with further updates once clarification is obtained as the above-referenced events and actions unfold.

Vincent Lalonde, P.Eng.
General Manager, Engineering

VL/RAC/brb

Appendix I: Tsleil-Waututh Nation Statement of Intent
Appendix II: Tsleil-Waututh Nation Proposed Consultation Area Map
Appendix III: Tsleil-Waututh Nation Proposed Stewardship Policy
Appendix IV: LMTAC letter to February 20, 2009 letter to the Province dated February 20, 2009

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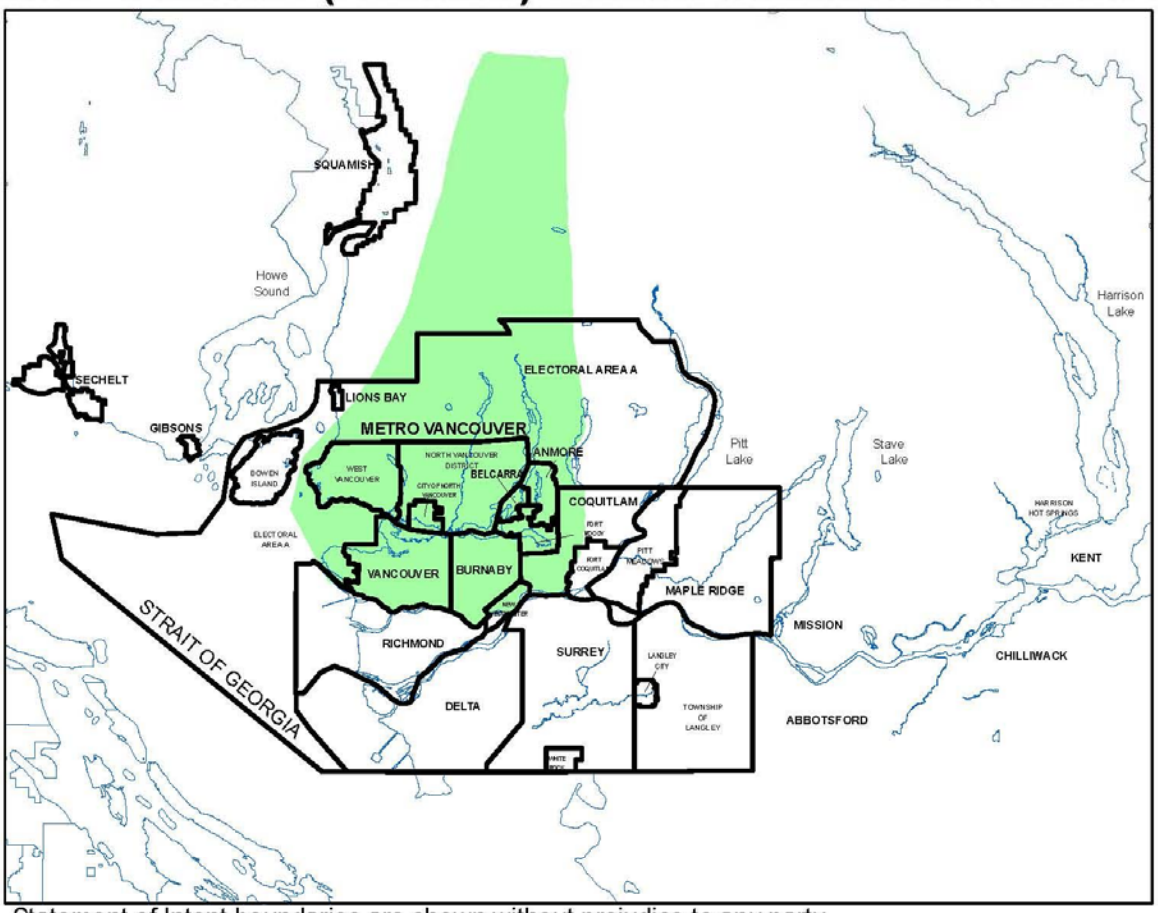
APPENDIX I

Tsleil-Waututh (Burrard) Nation Statement of Intent



Statement of Intent boundaries are shown without prejudice to any party.
Boundaries are subject to change over time, and depict BC's interpretation only.

Chief: Leah George - Wilson
Total Band Membership (estimated): 447
Population on Reserve (estimated): 231
Number of Existing Reserves: 3
Total Area of Reserves: 110 Hectares
Total Area Under Negotiation: 178,900 Hectares
Status: Stage 4

Sources: BC Treaty Negotiation Office (Victoria, BC)
Indian & Northern Affairs Canada (Ottawa, ON)
Lower Mainland Treaty Advisory Committee
Metro Vancouver Policy & Planning Department

December 2008

APPENDIX II


Tsleil-Waututh Nation Consultation Area
Legend
Road (all levels)
River / Stream
Lake
Park / Green Space
Tsleil-Waututh Consultation Area
Area of Interest
This map is a living document and is intended to be amended and refined over time. It is not an expression of the location of Tsleil-Waututh aboriginal title. The data used to produce this map originate from many sources and are presented without prejudice. This map is the property of the Tsleil-Waututh Nation and may only be reproduced with written permission.
Projection:
UTM, NAD 83, Zone 10
Map Scale 1:200,000
Map produced November 2008 by the Tsleil-Waututh Nation
Tsleil-Waututh Consultation Area
Whistler
Garibaldi
Garibaldi Provincial Park
Tantalus Provincial Park
Alice Lake Provincial Park
Squamish
Stawamus Chief Provincial Park
Britannia Beach
Anvil Island
Gambier Island
Howe Sound
Gibsons
Keats Island
Bowen Island
Cypress Provincial Park
Lower Seymour Conservation Reserve
Mount Seymour Provincial Park
Say Nuth Khaw Yum Provincial Park
Pinecone Burke Provincial Park
Golden Ears Provincial Park
West Vancouver
City of North Vancouver
District of North Vancouver
English Bay
Burnaby
Vancouver
Coquitlam
Port Coquitlam
Pitt Meadows
Maple Ridge
New Westminster
Surrey
Richmond
Langley
Georgia Strait
United States of America

APPENDIX III

Tsleil-Waututh Nation

Stewardship Policy

Issued
January
2009

Tsleil-Waututh Nation
Treaty, Lands and Resources Department
3075 Takaya Drive
North Vancouver, BC
V7H 2V6

TEL: 604-924-4154
FAX: 604-924-4158
EMAIL: stewardship@twnation.ca
WEB: www.twnation.ca

Printed on FSC Paper

TSLEIL-WAUTUTH NATION
Children of TAKaya – Wolf Clan
BURRARD INDIAN BAND

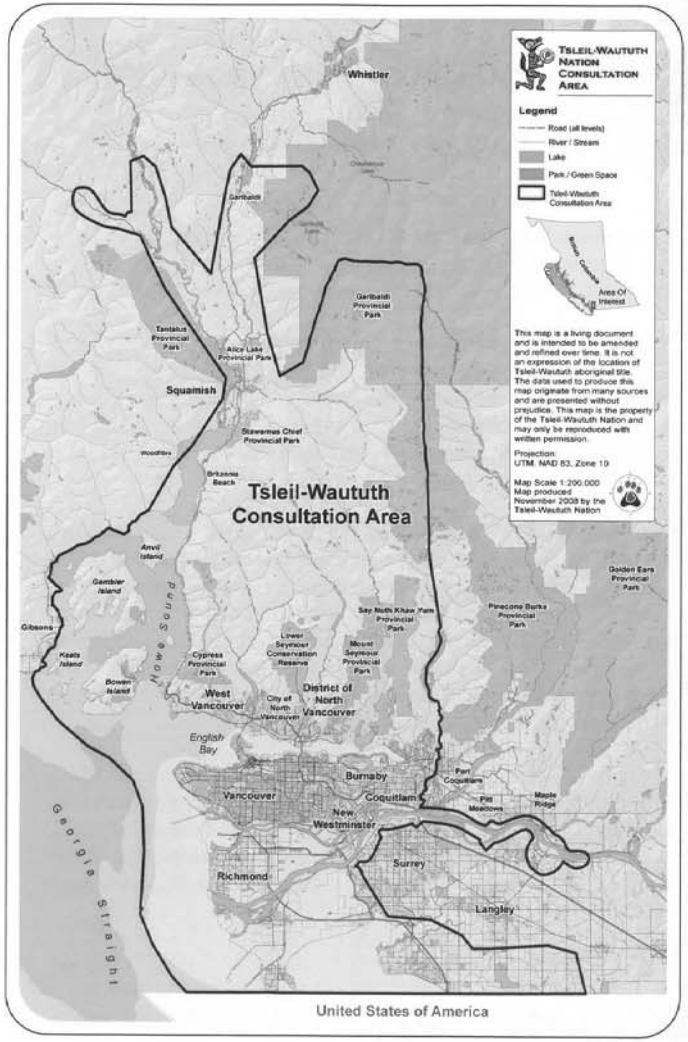
Welcome to Tsleil-Waututh territory. This Stewardship Policy is an invitation to all governments, individuals and organizations to participate in a process of land and resource stewardship.

This Policy applies to all lands and resources within the consultation area shown on the attached map. This consultation area map represents the area where the Tsleil-Waututh Nation requires consultation to assess potential impacts of proposed land and resource policies, plans and developments on Tsleil-Waututh interests.

The Consultation Area captures documented Tsleil-Waututh use and occupancy information. It is important to note that the consultation area map was created for the sole purpose of defining where consultation is required with the Tsleil-Waututh Nation and is consistent with the current scope of Provincial consultation boundaries. This consultation area map is independent of, and does not replace the Tsleil-Waututh Nation Statement of Intent Map as submitted to the BC Treaty Commission.

If you hold interests in the land, water and resources in the Tsleil-Waututh consultation area granted to you by other governments, or if you have plans or projects that involve the use of this area, we wish to talk to you about ways in which those interests can be used to better serve your needs and those of the Tsleil-Waututh Nation.

Leah D. George-Wilson
Chief, Tsleil-Waututh Nation



Tsleil-Waututh Nation Declaration

We are the Tsleil-Waututh First Nation, the People of the Inlet.
We have lived in and along our Inlet since time out of mind.
We have been here since the Creator transformed the Wolf
into that first Tsleil-Waut, and made the Wolf
responsible for this land.

We have always been here and we will always be here.
Our people are here to care for our land and water.
It is our obligation and birthright
To be the caretakers and protectors of our Inlet.

Our people descended from powerful Hereditary leaders, Waut-salk and Sla-holt
We know where we come from and we know who we are
We respect our heritage and
Nothing can change our history and our truth.

Our people travelled far and wide on our traditional territory, they paddled
Our waters and climbed our mountains.
They understood the richness that our traditional territory held, and in
Understanding this, they knew our land.
Our ancestors were responsible for our rivers, streams, beaches and forests
Of our traditional territory.
Our people knew our land well because it was for the benefit of everyone.

Our Tsleil-Waututh Nation is moving into our future.
Our children and our land are our future.
Our future will bring enough for our children's children to thrive.
We are looking forward,
We are ready to meet the next millennium.

Therefore, be it known far and wide that our Tsleil-Waututh Nation, the
People of the Inlet, are responsible for and belong to our traditional territory.
Let it be known that our Tsleil-Waututh Nation is a Nation unto itself,
Holding traditional territory for its people.

Table of Contents

Contact Information

Information Management Coordinator
Tsleil-Waututh Nation
Treaty, Lands and Resources Department
3075 Takaya Drive
North Vancouver, BC
V7H 2V6

TEL: 604-924-4154
FAX: 604-924-4158
EMAIL: stewardship@twnation.ca

Background

More than a decade ago, the Tsleil-Waututh community gave the leadership direction to put the Tsleil-Waututh "face" back on our traditional territory. Tsleil-Waututh began this journey by undertaking a traditional and contemporary analysis of the natural, cultural and societal conditions of the territory. The purpose of this analysis was to examine the partnership potential of working with governments and others to add the unique Tsleil-Waututh dimension to activities taking place within Tsleil-Waututh territory and to create greater economic and social results that can be equitably shared.

Tsleil-Waututh also began the steps necessary to resume our stewardship role for the lands and resources in the territory and our use and occupancy areas and to make every effort to engage others in rebuilding the health of the Burrard Inlet and its surrounding lands.

Tsleil-Waututh Centres of Excellence and Consulting Services

As a result of Tsleil-Waututh's initiatives to restore and rebuild our stewardship role, we have built strong internal capacity in various resource management areas over the past decade. The consulting services provided by the Tsleil-Waututh Centres of Excellence described below illustrate some of these internal capacities.

GIS Mapping and Information Technology

The Tsleil-Waututh have developed an accomplished GIS Department which performs GIS analysis and mapping. As the single most comprehensive source for digital bio-physical information on the Tsleil-Waututh traditional territory, the GIS Department has been a vital component in many projects including the Say Nuth Khaw Yum Bio-Regional Atlas, the Indian River Watershed Bio-Regional Atlas, and more. The department offers competitive hourly rates and will provide high quality maps as a contract service or for joint projects.

Planning Initiatives

The Tsleil-Waututh offer planning advice with special focus on strategic land use planning, timber supply analysis, forest stewardship planning, and cultural and ecological value mapping. The Tsleil-Waututh have won numerous awards for their planning projects, including the Canadian Society of Landscape Architects National Merit Award for the Whey-ah-Wichen/ Cates Park Management Plan. Governments and others who are undertaking planning activities are encouraged to consider using Tsleil-Waututh planners as a key part of your program or project.

Tsleil-Waututh culture is intertwined with our relationship to the waters of the territory. Industrial development and urban growth have led to levels of pollution in the marine and freshwater environments making the harvest of resources– shellfish, marine plants and other species–for food and economic purposes impossible. To help restore the health of these systems, the Tsleil-Waututh have developed a Marine Stewardship Program

involving systematic water quality testing in the Burrard Inlet and Indian Arm. These tests measure water quality, shellfish contamination and potential impacts on human health. All samples are delivered to Environment Canada Pacific's Environmental Science Centre for assessment. Unlike other water-testing organizations, the Tsleil-Waututh Stewardship program incorporates traditional knowledge, thereby offering a unique, comprehensive, and well-rounded service to other businesses.

Cultural Heritage and Archaeological Research

The Tsleil-Waututh traditional territory and include innumerous archaeological and heritage sites and resources. To ensure the preservation, protection and appropriate management of these sites and resources, the Tsleil-Waututh have developed an in-house archaeology department. Special focus has centered on land use and occupancy studies, land claims/treaty negotiations, policy development and archaeological assessments. The archaeological expertise developed by the Tsleil-Waututh is now offered to the business sector, other First Nations and other governments.

Stewardship Services

The Tsleil-Waututh own a number of companies that were created for the purpose of providing sustainable resource management services and providing economic development and employment opportunities for the Tsleil-Waututh community. These services include: forest resource planning, vegetation management, natural resource partnership negotiation, First Nation integrated community development, cross-cultural training, referrals, project administration and GIS mapping.

The Tsleil-Waututh Centres of Excellence are a contemporary dimension of our stewardship role. They operate in accordance with our own commitment to this Stewardship Policy. They are also a valuable component of Tsleil-Waututh economic development strategy. We encourage groups and individuals to consider utilizing these resources.

Tsleil-Waututh Stewardship Policy

We are pleased to provide this Stewardship Policy to all governments, businesses and individuals that may have interests within the consultation area. The Tsleil-Waututh Stewardship Policy is based on Tsleil-Waututh aboriginal rights and title and our relationship with the land. We have been taught by generations of our Elders that we have a responsibility to steward and share the land. We have been marginalized over the past 150 years and confined to our reserves. It is our intention to reverse that pattern and once again fulfill our obligation to take care of the land and share its bounty.

This Policy acknowledges the obligation of governments to consult with and accommodate Tsleil-Waututh interests and provides a collaborative and non-adversarial means for fulfilling that obligation.

This Policy does not constitute a blanket approval for land, water and resource decisions that have been made in the past in which the Tsleil-Waututh did not participate. Those decisions, and the tenures or interests that have been created from them, need to be dealt with through individual processes involving Tsleil-Waututh, the responsible governments and the various tenure holders in the consultation area.

We want this Policy to be a mechanism to further the growth of the relationships that we have built in recent years and to provide a certainty of purpose and intent that will invite and enable new partnerships and relationships. It is an invitation to work together with the full, up front and transparent knowledge of our needs and expectations.

Scope of Policy and Stewardship Framework

This Policy applies to all of the surface and subsurface air, land, water, cultural and other natural resources within the Tsleil-Waututh consultation area. The following goals apply to all proposed land and resource policies, planning initiatives and all projects planned, designed, and implemented within the consultation area:

- Assurance that the proposed policy, plan, development or land and resource use will not pose a threat of irreparable environmental, cultural or resource damage;

- Assurance that all such policies and projects contain an element that can contribute to the restoration of the natural and/or cultural health of the territories;

- Assurance that any proposed policy or project will provide more positive than negative social impacts for Tsleil-Waututh people;

- Assurance that these policies and projects will not jeopardize, prejudice or otherwise compromise Tsleil-Waututh Nation aboriginal rights, titles and interests;

- Provision for the widest possible opportunity for education and direct employment- related training for Tsleil-Waututh people in connection with any agreed upon project;

- Provision for economic participation by the Tsleil-Waututh Nation where possible, in commercial and industrial development projects;

- Assurance that any development will maximize and promote the development of new Tsleil-Waututh business opportunities and the utilization of existing Tsleil-Waututh businesses which may be associated with that development; and

- Provision for the proponent and the regulators to assist the Tsleil-Waututh Nation to accomplish the objectives stated above by providing financial assistance where necessary to mobilize Tsleil-Waututh's capacity to engage.

Stewardship Policy – Principles and Provisions

The Policy is divided into five sub categories:

1. Consultation and Accommodation
2. Land Alienation
3. Planning
4. Development Assessment
5. Resourcing Requirements for Tsleil-Waututh Engagement

1. Consultation and Accommodation

1.1 Introduction

Consultation with Tsleil-Waututh and the accommodation of Tsleil-Waututh interests where required is the over-arching theme of this Policy. It touches all of the other specific provisions in the Policy related to planning, development and resourcing. It provides direction for governments and others on how to engage with Tsleil-Waututh and sets out specific steps to achieve what Tsleil-Waututh defines as "meaningful consultation".

Governments have a legal obligation to avoid the unjustified infringement of aboriginal rights and title, to mitigate impacts and to accommodate First Nation interests. Tsleil-Waututh is committed to participating in consultation processes that reflect the principles described in this Policy where adequately resourced to do so.

1.2 Principles for consultation and accommodation:

The following principles frame the Tsleil-Waututh approach to consultation and accommodation:

1.2.1 In all cases, consultation with Tsleil-Waututh Nation should seek to achieve our informed consent.

1.2.2 Governments have the legal obligation to consult with Tsleil-Waututh and accommodate where there is potential for adverse impact or infringement. Tsleil-Waututh will cooperate with

proponents and others whom government has enlisted to engage with First Nations, however Tsleil-Waututh is clear that governments cannot "contract out" of their legal responsibility for consultation and accommodation.

1.3 Steps for meaningful consultation

1.3.1 The consultation process will focus on identifying means for involving Tsleil-Waututh as early in the planning process and decision-making process as possible.

1.3.2 Consultation with the Tsleil-Waututh Nation means:

a) provision of notice by the responsible agency to the Tsleil-Waututh Nation of the matter to be decided;

b) provision by the responsible agency and/or proponent of the resourcing required for the Tsleil-Waututh Nation to participate effectively in the consultation process (see Section 5 – Resourcing and the accompanying fee schedule);

c) provision of information about the matter to be decided in sufficient form and detail to enable Tsleil-Waututh to understand the nature of the matter to be decided and its potential impact on Tsleil-Waututh interests and to prepare and present their views on the matter;

d) provision of a reasonable period of time in which the Tsleil-Waututh Nation may prepare and present their views of the possible impact of the matter to be decided on their values, asserted aboriginal rights, titles and interests;

e) provision for the responsible agency and the proponent to respond to the issues raised by Tsleil-Waututh; identifying those areas where the responsible agency agrees to incorporate Tsleil-Waututh views and identifying those areas of disagreement;

f) establishment of an issue resolution process to deal with any disagreements arising from Tsleil-Waututh views and the response of the agency and proponent;

g) provision for full and fair consideration by the responsible agency and the proponent of the information provided by Tsleil-Waututh including a specific response to any outstanding issues not resolved through the issue resolution process referred to above.;

h) responsible agencies must notify Tsleil-Waututh in writing of the proposed decision by the statutory decision maker identifying how Tsleil-Waututh interests were considered and addressed;

i) Tsleil-Waututh must be provided with an opportunity to address any outstanding issues prior to a final decision by the statutory decision maker.

1.4 Steps for Accommodation

1.4.1 The consultation procedures outlined in Section 1.3 will include an accommodation process to address Tsleil-Waututh interests arising from potential adverse impacts or infringements. Accommodation arrangements may include, but are not limited to:

a) economic accommodations;
b) cultural accommodations;
c) social accommodations;
d) stewardship accommodations.

1.4.2 Tsleil-Waututh will take a flexible approach to structuring accommodation provisions. Depending on the nature of the proposed policy or project, Tsleil-Waututh may agree to offsetting stewardship initiatives, such as habitat restoration, carbon sequestration enhancement or other such projects, that contribute to the long term health of the territory.

2. Land Alienation

2.1 Introduction

Tsleil-Waututh has been excluded from government processes that enable the acquisition of so called "Crown land" from the early

20th century to the late 1950s. Since those laws were changed, a combination of federal fiscal policies for Indian Bands and a general level of poverty in these communities have made it very difficult for First Nations and First Nation citizens to acquire land. This makes the need for land a critical element of First Nation socio-economic development. Tsleil-Waututh has acknowledged this need and has taken steps to begin to address land requirements. Tsleil-Waututh is not averse to buying back areas of our traditional territory whenever they become available. Through this mechanism, for example, Tsleil-Waututh has acquired all of the fee simple land in the Indian River watershed.

2.2 Principles and Steps for Land Alienation

2.2.1 Land ownership together with appropriate jurisdiction is a key element of the Tsleil-Waututh community development strategy. Tsleil-Waututh is prepared to hold land in a number of ways, as 91(24) lands "reserved for Indians," fee simple, leasehold and through other mechanisms. Tsleil-Waututh land requirements include the need for rural land and, most importantly, for urban land for community expansion.

2.2.2 Any proposed alienation of provincial or federal land must first be the subject of meaningful consultation as set out in this Policy.

2.2.3 Where the Crown proposes a sale, lease, license or other disposition of Crown land in the traditional territory, the Tsleil-Waututh Nation must have priority opportunity to acquire those lands or equivalent lands within the traditional territory.

2.2.4 Existing tenure holders and licensees are invited to contact Tsleil-Waututh. We wish to work with you to structure a more effective working relationship that will add value to your activities and at the same time, contribute to achieving Tsleil-Waututh Nation objectives.

3. Land, Resource and Other Planning Initiatives

3.1 Introduction

Land and resource planning has been one inter-governmental function within which Tsleil-Waututh believes First Nations and other governments have made significant strides. As examples Tsleil-Waututh has led and helped secure resources for the Indian River Sustainable Resource Management Plan, the Say-Nuth-Khaw-Yum Park Management Plan and the Whey-ah-Wichen/Cates Park Management Plan. The following principles and processes are built, at least in part, on those experiences.

3.2 Principles to guide planning initiatives in the consultation area:

3.2.1 Effective planning is an important tool for the sustainable use of lands and resources.

3.2.2 Planning processes must be structured to reflect Tsleil-Waututh participation on a government-to-government basis.

3.2.3 All current planning processes and land use plan implementation processes should be evaluated and adjusted to be consistent with this policy.

3.24 New planning processes should consider Tsleil-Waututh's potential role as:

- process facilitator;
- the entity best suited to provide a balanced perspective on development and the environment;
- adding a cultural and historical perspective; and
- participating on the basis of our aboriginal rights and title.

3.3 Specific Steps for Successful Planning Processes

3.3.1 Any proposed planning initiative should first consider incorporating Tsleil-Waututh knowledge and proprietary information as a principal component of the data base for the plan. Tsleil-Waututh has collected and analyzed more information about the lands and resources of the traditional territory than any federal or provincial government agency, any local government or any present user of lands and resources. Tsleil-Waututh has built a highly competent planning and mapping function that is available to assist with undertakings throughout the consultation area.

3.3.2 The effectiveness of any planning initiative depends on the quality of the terms of reference for the plan. Tsleil-Waututh expects planners to engage Tsleil-Waututh prior to the completion of the terms of reference to ensure their thoroughness, relevance and applicability.

3.3.3 Tsleil-Waututh has demonstrated its ability to lead planning processes. Tsleil-Waututh suggests that planners consider using the Tsleil-Waututh expertise in this role.

3.3.4 Tsleil-Waututh may participate in "round table" stakeholder processes at their discretion provided that the government-to-government relationship has been established at the terms of reference stage and as an element of the final drafting and approval stages.

3.3.5 When a plan is near completion, Tsleil-Waututh needs to be involved in reviewing and providing input into a final draft before it is reviewed by other decision makers. The planning process needs to have a stage wherein Tsleil-Waututh and the planning agency can meet and resolve any outstanding issues on a government- to-government basis before approval.

3.3.6 Any plan that adversely impacts Tsleil-Waututh aboriginal rights, titles and interests, must be referred to Tsleil-Waututh with the intent of seeking Tsleil-Waututh's consent and must include provisions to accommodate any such impacts.

4. Assessment of Proposed Developments

4.1 Introduction

Tsleil-Waututh uses two "lenses" to analyze land use decisions, proposed projects and new or amended government policy that may impact our traditional territories and our traditional use areas. First, is the decision proposed a good land use decision? Does it represent the best use of lands and resources for the present and for the future? What impact does it have on the natural and cultural resource base within which it is proposed? What does it contribute to the cumulative effect of past land use decisions and what implications does it have for future development to which it may be linked or that it may enable?

The second "lens" looks at impacts and benefits. Will the proposed decision, project or policy have the ability to provide benefits to the Tsleil-Waututh community that are commensurate with the impacts that it will have? In this context, Tsleil-Waututh takes a holistic view of the project, decision or policy in context with the alienation of resources, lands and economic opportunities that have occurred throughout the traditional territory since contact and the assertion of sovereignty by settler governments.

Tsleil-Waututh will not endorse, approve or otherwise remove their objection to proposed decisions, projects or policies until Tsleil-Waututh has conducted a diligent assessment of the project through these two "lenses".

4.2 Principles for Assessing Policy and Project Development

4.2.1 Sustainable development is a key to supporting the social and economic objectives of the Tsleil-Waututh Nation and others.

4.2.2 Development assessment processes need also to reflect the government-to-government relationship between Tsleil-Waututh and the project review and approval processes. Key elements of that relationship are:

a) Early Tsleil-Waututh involvement in the development of the

scope of assessment documents

b) Tsleil-Waututh involvement that is voluntary and without prejudice in "round table" processes with stakeholders

c) An "end of process" decision forum between Tsleil-Waututh and government decision makers to ensure that adequate consideration has been accorded Tsleil-Waututh suggestions and concerns.

4.2.3 The Stewardship Policy requires that projects provide commensurate benefits to the community in consideration of the impacts that it will have. Accommodation and impact and benefit arrangements can take many forms and Tsleil-Waututh will take a flexible and creative approach to discussions related to accommodation, impacts and benefits.

4.3 Specific Steps for Successful Development Assessment

4.3.1 Proposed projects should be referred to Tsleil-Waututh as early in the development process as possible. Tsleil-Waututh will be able to assist with compilation and verification of the data base which will inform project assessment decisions.

4.3.2 Project proponents are invited to contact Tsleil-Waututh Nation prior to submitting projects for municipal, regional, federal or provincial approval. We are interested in negotiating arrangements which may serve to strengthen proposals and contribute to achieving shared objectives.

4.3.3 It is very important that Tsleil-Waututh review and support the scope of review document or terms of reference. If consensus is achieved at the outset, the chances of an appropriate project assessement are greatly increased. If we get it wrong at the outset, it is much more difficult to correct.

4.3.4 Tsleil-Waututh will need to engage with government and/or the proponent to canvass the possible opportunities for benefit to come from the project and to negotiate the necessary understanding for those benefits to be realized.

4.3.5 Tsleil-Waututh will monitor the environmental performance of the proponent as well as the regulatory performance of government. Tsleil-Waututh has only one traditional territory. Critical mistakes with respect to its integrity cannot be allowed to happen as they have in the past.

5. Resourcing Requirements for Tsleil-Waututh Engagement

5.1 Introduction

Tsleil-Waututh is currently funded only to participate in the management of our reserve lands. That means that at present, we have no resources dedicated or available to participate in the land, water and resource planning and management processes outside our reserve landbase.

This creates a serious imbalance and a basic unfairness. Up to now, we have been participating in dialogue with governments and proponents using borrowed treaty negotiation funding or trying to use other administration or program funding from already overstretched budgets.

Consequently, under this Policy, agencies and proponents will be expected to assist with resourcing needs on a case-by-case basis. Tsleil-Waututh has established a fee structure for various levels of consultation. This fee structure is not intended to create a barrier to consultation and accommodation, but is necessary to enable Tsleil-Waututh to engage in these processes.

5.2 Principles to Guide Resourcing

5.2.1 There must be complete cost recovery for all Tsleil-Waututh activities associated with consultation and accommodation.

5.2.2 Invoices are issued with payment due on receipt.

5.3 Specific Steps for Successful Resourcing

Step 1: Referral set up fee ($250.00)
This fee establishes a specific project file in the Tsleil-Waututh Treaty, Lands and Resources Department. It covers costs of diarizing, distribution, and initial screening by Tsleil-Waututh staff and must accompany any letter initiating consultation.

Step 2: Information Sharing
Information sharing may take the form of a meeting, or an exchange of information via other means and is an opportunity for questions of clarification and additional information to be addressed.

During this step, the Tsleil-Waututh can assess the need for additional information on the initiative to be proposed, as well as outline any additional resourcing requirements for the analysis and preparation of Tsleil-Waututh response.

Additional costs are to be estimated at this stage and the estimated costs are to be submitted with additional information by proponent or decision maker.

A Cultural Heritage Investigation Permits may be required from Tsleil-Waututh for certain projects to identify, protect, conserve and manage cultural heritage resources. (Permit fee $200-$400)

Step 3: Review of Additional Information and Technical Analysis
If required, this step is dependent on the estimate in Step 2. The estimate may have to be adjusted depending on level of complexity and need for contract technical or professional reviews.

Step 4: Follow-up Meetings
The number of meetings will vary by project. Meetings will be organized to present TWN analysis results, work to resolve any outstanding issues, and to review and provide final remarks with respect to notification by decision maker. This step covers Tsleil-Waututh staff time and any contracted technical or professional services.

Fee Schedule Summary

Specific Fees

- Referral Set-up Fee - $250
- Cultural Heritage Investigation Permit - $200-$400

Rates for Tsleil-Waututh Staff

- Resource Technicians and Administration - $50/hour
- Senior Resource Technicians - $75/hour
- GIS Technicians and Mappers - $75/hour
- Resource Managers - $100/hour

Contracted Technical or Professional Services

- At cost + 12% administration

Travel Expenses

- At cost + 12% administration

All prices are subject to change.

APPENDIX IV

LOWER MAINLAND TREATY ADVISORY COMMITTEE

February 20, 2009

CONFIDENTIAL

Mr. Julian Paine
Assistant Deputy Minister
Strategic Initiatives Division
Ministry of Aboriginal Relations & Reconciliation
PO BOX 9100 STN PROV GOVT
Victoria, BC, V8W 9B1

Mr. Mike Furey
Assistant Deputy Minister
Local Government
Ministry of Community Development
PO BOX 9490 STN PROV GOVT
Victoria, BC, V8W 9N7

Dear Messrs Paine and Furey,

Re: *Tsleil-Waututh Nation Stewardship Policy*

On behalf of the *Lower Mainland Treaty Advisory Committee* (LMTAC), I write further to correspondence dated July 25, 2008 (**attached**), following Mr. Paine's delegation to an LMTAC Board meeting, to seek clarification from the Province regarding its mandate on the status of local government lands for treaty settlements, and potential implications of the Crown duty to consult as they might apply to local government.

As we await a response, LMTAC was informed of the **attached** *Tsleil-Waututh Nation Stewardship Policy* that, once again, highlights a local government need for clarification regarding the potential implications of the Crown duty to consult with First Nations.

Specifically, an LMTAC member jurisdiction participating in the Canada-BC *Municipal Rural Infrastructure Fund* (MRIF) was recently advised by the *Tsleil-Waututh Nation* that the terms of their *Stewardship Policy* must be followed by any government interested in conducting activities within the *Tsleil-Waututh Nation's* defined Consultation Area; including payment of fees for consultation referrals. The MRIF process poses a challenging scenario for the local government involved; whereby, during the environmental assessment phase of the project, the Federal government delegated its Crown duty to consult with First Nations to the applicant local government without guidance on how that requirement may be satisfied.

LMTAC understands that the *Tsleil-Waututh Nation Stewardship Policy* is but one example of a province-wide issue and will receive an inter-agency response. LMTAC respectfully submits the **attached** questions and comments regarding the *Stewardship Policy* for your consideration, in developing a response.

.../2

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The *Tsleil-Waututh Nation Stewardship Policy*, as now implemented, presents significant implications for Lower Mainland local governments. For this reason, the LMTAC Executive Committee requests an opportunity to meet, at the earliest convenience, with staff representatives from both the *Ministry of Aboriginal Relations and Reconciliation* (MARR) and the *Ministry of Community Development* (MCD) to further discuss the *Stewardship Policy* and assess potential implications for local government.

The *Tsleil-Waututh Nation* offered to present their *Stewardship Policy* to the LMTAC Board on March 25th, 2009. Following, I propose meeting jointly with each of your Ministry staff at the next scheduled LMTAC Executive Committee meeting on **Wednesday, March 11th, 2009 (2:30pm- 4:30pm)**; however, LMTAC would be pleased to accommodate your availability.

We look forward to meeting with you in the near future. Please contact Ms. Regan Schlecker, LMTAC Managing Director, directly at (604) 451-6198 to schedule a meeting.

Sincerely,

Mayor Ralph Drew
Chair, Lower Mainland Treaty Advisory Committee

Attachments

cc: Jonathan Rayner, Director, Third Party Engagement, Strategic Initiatives Division, Ministry of Aboriginal Relations & Reconciliation
Deborah Bowman, Executive Director, Implementation and Lands, Negotiations Division, Ministry of Aboriginal Relations & Reconciliation.
Glenn Ricketts, Chief Negotiator, Strategic Initiatives Division, Ministry of Aboriginal Relations & Reconciliation
Catherine Panter, Chief Negotiator, Ministry of Aboriginal Relations & Reconciliation
George McRae, Senior Negotiator, Ministry of Aboriginal Relations & Reconciliation
Gary Paget, Executive Director, Governance and Structure Division, Ministry of Community Development.
Cathy Watson, Director, Local Government–First Nation Relations, Ministry of Community Development
Peter Jones, Manager, First Nations Initiatives, South Coast Service Centre, Integrated Land Management Bureau, Ministry of Agriculture and Lands
Chair Robert Hobson, President, Union of BC Municipalities (UBCM)
Councillor Corinne Lonsdale, Chair, UBCM First Nations Relations Committee
LMTAC Members

LMTAC Executive Committee Questions Addressed to the Province re *Tsleil-Waututh Nation Stewardship Policy*

Consultation and Accommodation (pgs 6-8)

- The *Stewardship Policy* places the duty to consult on government; however, case law has placed the duty to consult with the Crown. Local and regional governments are not representatives of the Crown. What are the consequences to local government for failing to consult within the parameters described in the Tsleil-Waututh Nation (TWN) *Stewardship Policy*?
- Will the Province create consultation guidelines for project proponents, including local government, and what assurances are there that the Province's guidelines will be sufficient to satisfy the requirements of the TWN) *Stewardship Policy*?
- How does the Province reconcile the differences between the TWN Consultation Area and the Statement of Intent area, and what are the implications for local government? For example, will local governments have to consult with all First Nations overlapping the TWN consultation area in the manner set out in the *Stewardship Policy*?
- How does the TWN *Stewardship Policy* fit into the greater context of the provincial Government's *New Relationship*?

Land Alienation (pgs 8-9)

- Does the Provincial Government expect that local government must adhere to the TWN *Stewardship Policy* 2.2.3 when disposing of municipal or regional district lands?

Land Resource and Other Planning Initiatives (pgs 10-11)

- What differences are to be expected in the applicability of the *Stewardship Policy* between municipal and regional district planning processes?
- How do the expectations of the TWN compare to forthcoming guidelines from the Ministry of Community Development for local government engagement with First Nations?

Assessment of Proposed Developments (pgs 12-14)

- TWN goals (page 5) for the *Stewardship Policy* include preferential employment and contracting with TWN members and corporations. This outcome, while perhaps desirable may conflict with local government labour contracts and procurement policies, as well as the Trade Industry and Labour Mobility Agreement (TILMA). How should these potential differences in policies be reconciled?

Resourcing Requirements for Tsleil-Waututh Engagement (pgs 14-15)

- As a matter of principle, governments at all levels do not charge each other for consultation. Do the Federal and Provincial Governments expect local government to participate in consultations if fees are deemed a prerequisite by First Nations?
- If local government does not pay TWN fees for consultation, is the consultation process still valid?
- Who is responsible to provide resource funding to First Nations to facilitate consultations?
- Does the Tsleil-Waututh Band and Council need to enact a bylaw in order to charge consultation fees, and would the bylaw require the approval of *Indian and Northern Affairs Canada*?

LOWER MAINLAND TREATY ADVISORY COMMITTEE

July 25, 2008

Mr. Julian C. Paine
Assistant Deputy Minister
Strategic Initiatives Division
Ministry of Aboriginal Relations & Reconciliation
PO BOX 9100 STN PROV GOVT
Victoria, B.C. V8W 9B1

Dear Mr. Paine,

Re: Delegation to the LMTAC Board July 23, 2008

On behalf of the *Lower Mainland Treaty Advisory Committee* (LMTAC), I would like to thank you and Ministry representatives, Mr. Ricketts and Mr. Rayner, for attending the LMTAC Board meeting on July 23, 2008, to provide a briefing on provincial activities related to the Common Table.

LMTAC Board members greatly appreciated your willingness to engage in an extensive dialogue about the Common Table process and the six key policy issues identified by Parties. I believe this opportunity to receive the Ministry's perspective on both mandate and procedural issues provided our members with a better understanding of provincial objectives at the Common Table.

Further to your request, I would also like to clarify a specific local government concern that was raised by the LMTAC Board regarding land selection for urban treaty and reconciliation agreements. In particular, some Lower Mainland First Nations are expressing the view that local government is an extension of the Province of British Columbia and, therefore, lands held by a local government should be treated similar to Provincial Crown land and available for treaty or reconciliation agreements. Following, this raises another significant concern regarding a First Nation expectation that the Crown duty to consult and accommodate First Nation interests on land and resource decisions also extends to local government.

It is LMTAC's understanding that the Provincial principles for treaty negotiations continue to include: *Private property should not be expropriated for treaty settlements* and *The Terms and conditions of leases and licenses should be respected; fair compensation for unavoidable disruption of commercial interests should be insured.* Following, the LMTAC Board requests confirmation from the Province on its mandate regarding the status of local government lands.

.../2

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We look forward to the next opportunity to meet with you. Please accept this letter as a standing invitation for you to return to a future meeting of the LMTAC Board to provide an update on the Common Table and provincial analysis of the six key policy issues.

If you have any questions, please don't hesitate to contact Regan Schlecker, LMTAC Managing Director, at (604) 451-6198.

Sincerely,

Mayor Ralph Drew
Chair, Lower Mainland Treaty Advisory Committee

Cc Hon. Michael de Jong, Minister of Aboriginal Relations & Reconciliation
Lorne Brownsey, Deputy Minister, Ministry of Aboriginal Relations & Reconciliation
Glenn Ricketts, Chief Negotiator, Strategic Initiatives Division, Ministry of Aboriginal Relations & Reconciliation
Jonathan Rayner, A/Director, Third Party Engagement, Strategic Initiatives Division, Ministry of Aboriginal Relations & Reconciliation
Director Terry Raymond, Chair, UBCM First Nations Relations Committee
LMTAC Members

ITEM 5.4

Yard Trimmings – a limited survey

(Corrie Kost – 2851 Colwood Dr., N. Vancouver, V7R2R3, Tel: 604-988-6615)

District of North Vancouver:

http://www.nsrp.bc.ca/images/stories/pdf/2009-District-Collection-Calendar.pdf

- 6 "item" limit (bundle, container, kraft bags) (limit not in on-line document!)
- Bundled: 36in by **12in** – branches up to **3in**

Richmond: http://www.richmond.ca/services/recycling/composting/yard.htm

The City of Richmond picks up yard and garden trimmings each week from single-family homes. Collection occurs on the same day that garbage and recycling are picked up There is **no limit on amounts**. However, all trimmings must be packaged in **CLEAR, STRONG PLASTIC BAGS** or in securely-tied **bundles** not more than 3 feet in length and **not more than 2 feet thick**.

- **No limits**
- Clear blue plastic bags
- Bundled: 36in by **24in** – branches up to **4in** diameter

Delta: http://www.corp.delta.bc.ca/EN/main/residents/272/919/composting.html

- **No limits**
- Rigid Containers with decal
- Kraft Paper bags
- Bundled: 39in by **24in** – branches up to **6in** diameter

Coquitlam:

http://www.coquitlam.ca/Residents/My+Property/Garbage+and+Recycling/Guidelines.htm

- **No limits**
- 77 litre Can with decal
- Kraft Paper bags
- Bundled: 39in by **20in** – branches up to **3in** diameter

Burnaby: http://www.city.burnaby.bc.ca/admin/Page3606.aspx#yardwaste

- **No limits**
- Clear Plastic Bags or labeled 77litre plastic cans
- Bundled: 36in by ??in – branches up to **4in** diameter

West Vancouver:

http://www.nsrp.bc.ca/images/stories/pdf/2009-West-Vancouver-Collection-Guide.pdf

- **No limits**
- 77 Litre Can
- Kraft Paper Bags
- Bundles: 36in by **12in** – branches up to **3in** diameter

City of North Vancouver:

http://www.nsrp.bc.ca/images/stories/pdf/2009-City-Collection-Calendar.pdf

- **No limits**
- 77 Litre Can
- Kraft Paper Bags
- Bundled: 36in by 12in – branches up to 3in diameter

ITEM 6.1 (a)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Barbour v. The University of British Columbia,*** 2009 BCSC 425

Date: 20090330
Docket: L050032
Registry: Vancouver

Between:

Daniel S. Barbour

PLAINTIFF

And

The University of British Columbia

DEFENDANT

Before: The Honourable Mr. Justice Goepel

Reasons for Judgment

Counsel for the Plaintiff:	S.D. Matthews R.M. Mogerman
Counsel for the Defendant:	D.G. Cowper, Q.C. R.J. Berrow D. Ullrich M. Tsurumi
Date and Place of Trial:	September 22-26, 2008 Vancouver, B.C.

INTRODUCTION

[1] Since 1990, the University of British Columbia ("UBC") has collected over $4,000,000 in fines and related towing fees, storing charges, administrative fees and other expenses and monies (the "Parking Regulation Fines") for breaches of the UBC Parking Regulations (the "Parking Regulations"). The plaintiff in this class action seeks on behalf of the class reimbursement of the monies paid.

[2] UBC is a university incorporated pursuant to the ***University Act***, R.S.B.C. 1996, c. 468 (the "***U.A.***"). Section 27(1) of the ***U.A.*** vests the management, administration and control of the property, revenue, business and affairs of the university in its Board of Governors (the "Board"). Pursuant to s. 27(2)(t) of the ***U.A.***, the Board is given the power "to control vehicle and pedestrian traffic on the university campus".

[3] The Board enacted the Parking Regulations and made them effective as of September 1, 1990. The Parking Regulations contain provisions governing vehicle traffic on campus, including the parking of cars. The Parking Regulations include provisions regarding offences, penalties, enforcements and appeals.

[4] The plaintiff brings this action on his own behalf and on behalf of all persons from whom UBC collected the Parking Regulation Fines from September 1, 1990 to the present (the "class"). The plaintiff alleges that the enforcement provisions of the Parking Regulations are unlawful because they are *ultra vires* UBC's delegated legislative authority. The plaintiff seeks restitution of and the constructive trust over the collected Parking Regulation Fines.

[5] In its statement of defence, UBC first pleads that the Parking Regulations are *intra vires* the powers vested in the Board pursuant to the ***U.A***. Alternatively, it pleads that if the Parking Regulations are *ultra vires*, there exist various private law justifications for the enforcement of the Parking Regulations and UBC's collection and retention of the Parking Regulation Fines.

[6] In ***Barbour v. U.B.C***., 2006 BCSC 1897 ("***Barbour 2006***"), I certified the action as a class proceeding. In ***Barbour v. U.B.C***, 2007 BCSC 800 ("***Barbour 2007***"), the common issues were framed as follows:

1. Are the University of British Columbia Parking Regulations (the "Parking Regulations") in whole or in part, *ultra vires* the public law powers delegated to the Board of Governors (the "Board") of the University of British Columbia ("UBC") by the *University Act*, R.S.B.C. 1996, c. 468?
2. Apart from UBC's public law powers pursuant to the *University Act*, can UBC:
   (a) enter into valid and enforceable contractual licenses which incorporate the substance of the Parking Regulations; or
   (b) rely on its common law proprietary rights as the owner of the UBC campus to collect and retain the equivalent of all fines and related towing fees, storing charges, administrative fees and/or other expenses and monies collected under the Parking Regulations from September 1, 1990 to the present (the "Parking Regulation Fines")?
3. If the Parking Regulations are found to be *ultra vires*, in whole or in part, the public law powers of the Board, can UBC:
   (a) enter into valid and enforceable contractual licenses which incorporate the substance of the Parking Regulations; or
   (b) rely on its common law proprietary rights as the owner of the UBC campus to collect and retain the equivalent of the Parking Regulation Fines?
4. If the answer to question (1) is yes, are the plaintiff and other class members entitled to public law restitution in the amount of the Parking Regulation Fines, subject only to applicable defences, if any, under the *Limitation Act*, R.S.B.C. 1996, c. 266, regardless of any juristic reason for the collection of the Parking Regulation Fines, including contracts and licenses entered into between UBC and class members, and UBC's common-law propriety rights as the owner of the UBC campus?
5. What limitation periods, if any, apply to the plaintiff and class members' claims for restitution?
6. Are the plaintiff and the class members entitled to prejudgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79?

[7] Common questions 1, 4 and 5 arise from the plaintiff's claim while questions 2 and 3 arise out of the defences raised by UBC.

[8] In its statement of defence and throughout the certification process, UBC took the position that the Parking Regulation Fines were *intra vires* the powers vested in the Board pursuant to the ***U.A.*** At the commencement of the common issue trial, UBC abandoned that position and acknowledged those parts of the Parking Regulations that impose the Parking Regulation Fines are *ultra vires* the public law powers conferred on the Board under the ***U.A.*** UBC now relies on its alternate submission that there exist private

law justifications for the enforcement of the Parking Regulations and UBC's collection and retention of the Parking Regulation Fines. In addition, UBC claims a right of set-off for unpaid parking services.

[9] It is important to note that the plaintiff does not challenge UBC's right to regulate parking on campus or to charge for parking. The challenge is limited to UBC's right to collect the Parking Regulation Fines.

BACKGROUND

[10] The evidence at the common issue trial was limited to the plaintiff' Notice to Admit and portions of an affidavit of Danny Ho, sworn March 12, 2006. Mr. Ho who is UBC's Director of Parking Services also gave *viva voce* evidence and was cross-examined. His affidavit had originally been filed at the certification hearing.

[11] There is little disagreement concerning the facts. I adopt the factual background set out in ***Barbour 2006*** at paras. 6-23:

> [6] Every day tens of thousands of people travel to and from UBC. These include students, faculty and staff, employees of other organizations, residents of UBC's neighbourhoods and visitors frequenting the university's services, educational, cultural, leisure or nature offerings and attractions such as the UBC Hospital, museums, theatres, sports facilities and gardens.
>
> [7] The Parking Regulations establish general traffic rules on the UBC campus. They apply to the entire campus and by their terms are enforced throughout the year.
>
> [8] Section 2 of the Parking Regulations sets out that all parking on campus requires a permit or payment at a pay lot, parkade or meter. It provides particulars in relation to the various permits that are available.
>
> [9] Section 3 of the Parking Regulations requires that all motor vehicles parked in permit lots on campus by faculty and staff, graduate and undergraduate students and persons whose normal place of employment is on campus must be registered. It notes that unregistered vehicles are only permitted to park in pay lots or parkades or at meters.
>
> [10] Section 8 sets out that vehicle access to walking areas of campus is not permitted without authorization.
>
> [11] Section 9 notes that the enforcement provisions of the ***Motor Vehicle Act*** and the ***Highway Act*** apply to roadways on the university campus.
>
> [12] Section 10 prohibits parking in certain areas, including building entrances, sidewalks, fire zones or areas that in any way impede the movement of emergency vehicles or traffic.
>
> [13] Section 12 provides for the issue of traffic notices for any contravention of the Parking Regulations.
>
> [14] Section 13 sets out that any person who commits an act forbidden by the Parking Regulations is guilty of an infraction and liable to penalty. The penalties are listed in a parking penalty schedule. A vehicle may be impounded if the penalties for three or more violations of the Parking Regulations remain unpaid.
>
> [15] Section 14 allows for the impoundment of vehicles. Grounds for impoundment include the impeding or obstructing of traffic, the blocking the movement of other parked vehicles, occupying a reserve space without authority, parking in contravention of a parking sign or in a prohibited area, displaying a counterfeit, lost or stolen permit, or circumstances of a repeat offender as defined in s. 13(2). The section specifies that If a vehicle is impounded, it will be held pending payment of all outstanding fees including towing fees, storing charges plus administration fees.
>
> [16] Section 16 of the Parking Regulations sets up an appeal process. Appeal notices must be filed within fourteen days and be accompanied by the prescribed penalty payment which payment will be refunded if the appeal is allowed. While the Parking Regulations state that appeals received without the required penalty may not be processed, evidence at the hearing suggests that as a matter of practice appeal notices given after the 14 day period and made without payment are

considered.

[17] In order to manage access to the university facilities and to control moving and resting traffic on campus, UBC has created the Parking and Access Control Services Department ("PACS"). PACS administers the Parking Regulations and is responsible for providing and managing vehicular access to campus facilities, balancing the supply and demand of parking on campus, ensuring parking facilities services and equipment are functional, accessible and easy to use and ensuring the long term financial viability and sustainability of the parking and access system, including the development and maintenance of facilities and physical assets.

[18] One of UBC's main components of traffic control on campus is to provide parking facilities including surface lots, parkades or metered parking for approximately 10,000 vehicles in strategic locations near the perimeter of the campus and to restrict parking to those facilities. The available parking options serve as access points for nearby facilities and direct traffic away from other areas of the campus. Parking as a means of traffic and access regulation on the UBC campus is particularly important because of the large non-resident student population, the size and location of the campus, and a dearth of parking alternatives in the surrounding area.

[19] PACS has developed an array of traffic and parking related features based on demand, required turnover, traffic patterns and space alternatives. These include: restriction of parking facilities for certain users; user fees; permits; rules to control parking within parking facilities, including maximum allowable parking periods, hours of operation, and differences in parking rates; rules to limit outside designated parking areas; and enforcement measures such as traffic notices, fines and, if warranted, towing.

[20] Currently, UBC maintains three types of parking facilities:

(1) five parkades with approximately 4,900 parking spaces;

(2) more than forty surface lots with approximately 3,000 parking spaces; and

(3) approximately 300 metered parking spaces.

Each of the parking facilities operates with its own set of rules and procedures which have changed and evolved since the Parking Regulations were passed. For example, surface lots may be open only to permit holders, hourly parking or a combination of both. Hourly parking is offered through automated ticket dispensers placed in central locations, which allow users to purchase pre-paid parking time. In close proximity to the automatic ticket dispensers, PACS has posted signs displaying the applicable fee schedules. The signs note that vehicles that do not display a valid ticket or permit, or that have outstanding parking violations, may be impounded.

[21] Apart from hourly parking for transit users, UBC has created long-term parking permits for various groups of regular users of UBC parking facilities. The permits are subject to geographic restriction and are also time limited in various lengths. On the UBC parking permit applications currently at use, as well as some but not all of the historic application forms, applicants agree to comply with the Parking Regulations.

[22] Students, faculty and staff living in residence enter into separate residence contracts with UBC at the beginning of their tenancies. These contracts have varied over time and also differ depending on the type of residence. Each of the standard form contracts currently in use include a provision referencing the Parking Regulations.

[23] From 1990 to 2004 every UBC student received a printed copy of the UBC calendar before commencing or returning to their studies at the beginning of the new academic year. Since 2005, the official calendar has been posted on the UBC website for on-line viewing or downloading. The calendar contains information concerning UBC's rules and regulations. It also contains the following student declaration:

> I hereby accept and submit myself to the statutes, rules and regulations and ordinances of the University of British Columbia and of the faculties in which I am registered and to any amendments thereto which may be made while I am a student of the university, and I promise to observe the same.

[12] Some statistical evidence was introduced. From the total of 432,847 traffic tickets issued from January 1, 1990 to December 31, 2005, more than half (219,664) remain unpaid.

[13] For the time period September 1, 2000 to March 5, 2006, PACS issued violation notices to 115,456 license plate numbers. That total may be broken down according to the number of outstanding violation notices associated with the license plate as follows:

(a) 76,025 license plate numbers (or 65.8%) have only one violation notice on record, accounting for 33.6% of the total;

(b) 18,929 license plate numbers (or 16.4%) have two violation notices, accounting for 16.7% of the total;

(c) 8,075 license plate numbers (or 7%) have three violation notices, accounting for 10.7% of the total;

(d) 12,427 license plate numbers (or 10.8%) have four or more violation notices, accounting for 39% of the total.

[14] As set out in the above figures, less than 20% of violation notice recipients are responsible for almost half of all parking infractions. That is, 49.7% of the violation notices are attributable to only 17.8% of the violators, each of whom has committed three or more violations.

[15] From January 1, 1996 to December 31, 2005, PACS converted or waved approximately 13.4% of all issued violation notices. “Converted” means that the penalty was withdrawn but the violation remained on record. “Waived” means the violation itself was withdrawn.

[16] Towing of vehicles may occur in several situations including for:

(a) impeding or obstructing traffic;

(b) blocking the movement of other vehicles;

(c) occupying parking spaces reserved for other vehicles;

(d) parking in contravention of a parking sign, on crosswalks, sidewalks, or areas identified with yellow hash marks as no parking zones;

(e) being parked in a pay lot or a parkade for more than 24 hours without payment of the requisite parking fees;

(f) being abandoned; and

(g) repeat offender status.

[17] According to the Parking Regulations, a vehicle qualifies as a repeat offender when PACS records show at least three unpaid parking infractions registered under the vehicle’s license plate. As a matter of practice, PACS does not tow vehicles under the repeat offender provision until they have at least four outstanding parking infractions.

[18] Until approximately 1996, it was PACS’ practice not to add vehicles to its tow list until they had 10 unpaid traffic notices and to issue tow warnings prior to towing a vehicle with 10 or more violation notices. Under this practice, at least 1,000 tow warnings remained outstanding at any given time. Over time, and with a goal to improve access to the community, PACS reduced the number of unpaid violations prior to towing to the present level of four.

[19] With regard to situations where vehicles impede or instruct traffic, or block the movement of other vehicles, a patrol person has some discretion whether the circumstances require towing.

[20] Tow rates are very low, approximately one or two vehicles a day. Towing is generally limited to four categories: vehicles obstructing emergency access, those occupying a disabled spot without a permit, upon complaint and “repeat offenders”.

[21] Vehicles are towed to an impound lot operated by PACS on campus. The towed vehicle is released to its owner once all outstanding penalties and towing charges are paid.

[22] Mr. Ho testified that PACS relies on the Parking Regulation Fines for enforcement purposes. Penalties are meant to deter activities which restrict the flow of traffic and compel compliance with the Parking Regulations. He testified that when a strike suspended all enforcement of the Parking Regulations, chaos ensued as drivers ignored the Parking Regulations, clogged the campus with vehicles and parked where they wanted for as long as they wanted.

[23] A June 3, 2002 report to the Board notes that students are the recipients of approximately 70% of all parking citations. The report recommended amending University Policy 67 to increase parking enforcement revenue. In July 2002, the Board accepted that recommendation. Under the amended Policy 67, UBC may refuse to process an application for admission, allow subsequent registration or provide academic transcripts to a student with unpaid Parking Regulation Fines.

[24] UBC has never relied on either contracts or its common law proprietary rights to collect Parking Regulation Fines. Throughout the class period UBC, in fact, only collected the Parking Regulation Fines pursuant to the Parking Regulations with what it asserted was its statutory authority to do so pursuant to the ***U.A.***

COMMON QUESTIONS

A. Are the Parking Regulations *Ultra Vires*?

[25] UBC has now conceded that parts of the Parking Regulations that impose the Parking Regulation Fines that the Class seeks to recover are *ultra vires* the public law powers conferred on the Board under the ***U.A***.

[26] UBC acknowledges that it has never possessed legislative authority to create offences or penalties in relation to parking and that the ***U.A.*** does not authorize the creation of regulations which allow for the imposition of the Parking Regulation Fines. UBC submits that the first question be answered yes.

[27] In regard to Question 1 the plaintiff seeks much wider relief. In particular, it seeks a declaration that certain specific sections of the Parking Regulations are *ultra vires* the public law power delegated to the Board and that the Parking Regulations are *ultra vires* because they violate rules of natural justice.

[28] Considerable evidence was led from Mr. Ho relevant to the natural justice issue. The plaintiff submits that the Parking Regulation Fines create an institutional breach of natural justice. Specific complaints are that the Parking Regulations purport to impose fines and penalties on the basis of a presumption of guilt that does not provide the right to be heard. The plaintiff further submits that the right to appeal contained in the Parking Regulations is flawed as the appeal is not to a neutral body but to the same body that issued the penalty. In the plaintiff's submission, UBC, through PACS, plays the role of police, prosecutor and judge in the scheme. The plaintiff submits that the structural natural justice problem is not cured by the way the Parking Regulations are, in fact, enforced or because UBC has adopted a policy of waiving the necessity of paying the penalty to launch an appeal.

[29] The plaintiff's allegation that the enforcement provisions are *ultra vires* for a given set of reasons must be considered in the context of the plaintiff's claim for restitution of the amounts paid. Restitution is the substantive relief claimed. UBC concedes that the enforcement provisions, pursuant to which the plaintiff claims restitution, are not effective as a matter of public law. That concession is all that is required to move on to the remaining common issues.

[30] I agree with UBC that the declarations the plaintiff seeks are neither necessary nor required. What is essential to address the remaining common issues is an affirmative answer to question 1.

[31] UBC's concession that the Parking Regulation Fines are *ultra vires* makes the natural justice issue moot. The answer to that question will not assist in determining the balance of the common issues and I decline to do so.

B. UBC's Private Law Powers

1. Overview

[32] Common questions 2 and 3 engage UBC's alternative defence that there exist various private law justifications for the enforcement of the Parking Regulations and UBC's collection and retention of the Parking Regulation Fines. UBC pleads that from time to time it has entered into contracts with, or granted licences to, the class members for the use of UBC parking facilities (the "Contracts" and "Licences"). UBC submits that the Contracts and Licences incorporate expressly, or by implication, the text of the Parking Regulations, including UBC's authority to charge and collect the Parking Regulation Fines, tow vehicles and provide an appeal process in the manner set forth in the Parking Regulations.

[33] UBC also relies on its common law proprietary rights as the owner of the UBC campus, and in particular its rights under the doctrines of trespass and nuisance, to remove vehicles parked on UBC property without consent, or in such manner as to constitute a nuisance, and to recover damages in respect of trespass and nuisance.

[34] UBC says that in the case of any class member who paid Parking Regulation Fines as the owner or user of the vehicle parked on UBC property without the consent of UBC, either because no consent was obtained or because consent was obtained for a limited period of time which had expired, or in such a manner as to constitute a nuisance, UBC is entitled to recover damages for such trespass or nuisance, including, without limitation, damages for the time, trouble and expense of removing the vehicle where affected. UBC further submits that it is entitled to retain the Parking Regulation Fines collected from those class members on account of such damages or as a settlement of UBC's entitlement to them, or both, as a set-off to any such claim raised by such class members.

2. Contractual powers

[35] UBC was originally brought into existence by a special act: ***An Act to Establish and Incorporate a University for the Province of British Columbia***, S.B.C. 1908, c. 53. During the class period, UBC was continued as a corporation in 1979 and 1996: ***University Act***, R.S.B.C. 1979, c. 419, ss. 3(1)(a) and (3); ***U.A***., ss. 3(1)(a) and (3). As a corporation, UBC has the general power to "contract and be contracted with in its corporate name: ***Interpretation Act***, R.S.B.C. 1996, c. 238, ss. 17(1)(b) and 29.

[36] Effective April 1, 2005, pursuant to the ***University Amendment Act***, 2004, S.B.C. 2004, c. 74, s. 11, universities were given the power and capacity of a natural person exercising their powers and carrying out their duties and functions under the ***U.A.*** (now s. 46.1 of the ***U.A***.).

[37] Given UBC's concession that it does not possess legislative authority to create offences or penalties in relation to parking and that the ***U.A.*** does not authorize the creation of regulations which allow for imposition of the Parking Regulation Fines, common questions 2(a) and 3(a) are effectively merged into one question, that being whether or not UBC can enter into valid and enforceable contractual regulations which are *ultra vires* its public law powers.

[38] The answer to this question requires a consideration of the law of *ultra vires* as it applies to corporations. Historically, the presumption of common law was that corporations created by or under a statute have only those powers which are expressly or impliedly granted to them. To the extent that a corporation acted beyond its powers, its actions were *ultra vires* and invalid: ***Communities Economic Development Fund v. Canadian Pickles Corp.***, [1991] 3 S.C.R. 388, 85 D.L.R. (4th) 88 ("***Canadian Pickles"***).

[39] The doctrine of *ultra vires* was first applied to memorandum companies incorporated under business corporation statutes in ***Ashbury Railway Carriage & Iron Co. v. Riche*** (1875), L.R. 7 H.L. 653. The House of Lords affirmed the applicability of ***Ashbury Railway*** to corporations created by special act in ***Baroness Wenlock v. River Dee Co.*** (1885), 10 App. Cas. 354 (H.L.). Lord Watson held that the powers of a statutory corporation are limited by the purposes of the corporation as set out in the special act at 362-63:

> Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of the opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.

[40] Section 30 of the ***Business Corporations Act*** S.B.C. 2002, c. 57 ("***B.C.A.***"), abolishes the doctrine of *ultra vires* for British Columbia corporations incorporated under that legislation. The ***B.C.A.*** does not apply to UBC (***U.A***., s. 3(4)).

[41] The doctrine of *ultra vires* continues to apply to corporations created by special act for public purposes: ***Canadian Pickles*** at para. 32.

[42] UBC's entire existence is derived from statute. Whether UBC has the capacity to enter into contracts containing the impugned terms must be determined through interpretation of the statute delegating its powers. Therefore, its authority to contract for the right to fine and impound vehicles for parking violations must be found in the ***U.A.***

[43] UBC relies on an obiter statement in ***Hague v. University of British Columbia*** (1988), 21 B.C.L.R. (2d) 245, 47 D.L.R. (4th) 150 (S.C.) for the proposition that UBC can contract with others who agree to be bound by regulations that UBC may not have had the statutory authority to pass. The regulations in ***Hague*** related to Senate appeals on academic standing. The Senate had by regulation limited substantive academic appeals to two courses only.

[44] The court in ***Hague*** quoted from ***Re Polten and Univ. of Toronto Governing Council*** (1975), 59 D.L.R. (3d) 197 at 202, 8 O.R. (2d) 749, (Div. Ct.) for the proposition that the defendant university could have bound its students to follow rules with "no statutory basis." The Ontario Divisional Court in ***Re Polten*** cited ***University of Ceylon v. Fernando***, [1960] 1 All E.R. 631 (P.C.) at 639 as authority for that proposition. However, the rules in question in ***University of Ceylon*** were the statutes of the university, and the *vires* of the statutes was not an issue.

[45] ***Hague*** is distinguishable. The court in ***Hague*** was not asked to determine whether UBC, as a creature of statute, had the power to limit academic appeals to two courses. There was no discussion in the decision indicating that the regulations in question were *ultra vires*.

[46] UBC also relies on s. 46(1) of the ***U.A.*** which came into force on April 1, 2005. That section reads:

> Subject to this Act and for the purposes of exercising its powers in carrying out its duties and functions under this Act, a university has the power and capacity of a natural person of full capacity.

[47] It is important to note the distinction between s. 46.1 of the ***U.A.*** and s. 30 of the ***B.C.A***. Pursuant to the latter, a corporation has the capacity and rights, powers and privileges of an individual of full capacity. Section 46.1 of the ***U.A*** gives a university such powers but only for the limited purpose of exercising its powers in carrying out its duties and functions under the ***U.A.***

[48] In this case, UBC has conceded that the taking of fines and impounding vehicles is outside UBC's ***U.A.*** powers. By extension, UBC does not have the power to contract for the right to take fines or impound vehicles since that would not be in furtherance of a power under the ***U.A.*** Since UBC has conceded that the taking of fines and the impounding of vehicles was as a matter of public law *ultra vires* the university, contracting for the power to take such fines is also *ultra vires*. Accordingly, I find that UBC cannot enter into contracts which incorporate the substance of the Parking Regulations and the answer to question 3(a) is no. In the result it is not necessary to answer question 2(a).

Common Law Propriety Rights

[49] Questions 2(b) and 3(b) raise the question as to whether UBC can rely on its common law proprietary rights as the owner of the UBC campus to collect and retain the equivalent of the Parking Regulation Fines. I am in general agreement with UBC's submission that if a person parks their vehicle at UBC without the permission of UBC, then that person is a trespasser. As against trespassers, UBC has its proprietary rights as a landowner, including rights based on the tort of distress damage feasant to tow cars and hold them until payment of towing and storage costs.

[50] To sustain a claim of distress damage feasant, a party must prove actual damage: ***Forhan & Read Estates v. Hallett and Vancouver Auto Towing Service*** (1959), 19 D.L.R. (2d) 756 (B.C. Co. Ct.). Under the doctrine of distress damage feasant, the vehicle is only distrainable for damage it is then doing, and

continuing. A party cannot distrain for prior damage: ***Vaspor v. Edwards*** (1702), 12 M.O.D. 658 at 660, 88 E.R. 1585 (K.B.).

[51] In ***Forhan*** the plaintiff's car had been removed and impounded from the defendants' private parking lot. The plaintiff sued for damages. The defendants submitted that the plaintiff was a trespasser and they were entitled to distress damage feasant. On the facts before it, the court concluded that the defendants had not proven any actual damage as the car did not block ingress or egress to or from the parking lot, did not deprive any regular patron or any patron from using the parking lot, and no proof was offered that anyone was deprived of a parking fee. Based on that finding, the court concluded that the distress and subsequent impoundment were both unlawful and awarded damages to the plaintiff.

[52] The plaintiff in the case at bar acknowledges that pursuant to the Board's power "to control vehicles and pedestrian traffic on the university campus" UBC can restrict and charge for parking on campus. The plaintiff does not challenge the *vires* of those sections of the Parking Regulations that regulate where parking is allowed or establish fees for parking

[53] UBC, as a private landowner has the power under the doctrine of distress damage feasant to impound and hold vehicles which, at the time of seizure, are causing actual damage. I accept UBC's submission that vehicles parked in contravention of the Parking Regulations cause damage to UBC sufficient to engage its right to invoke distress damage feasant. Such vehicles may be impeding or obstructing traffic or the movement of emergency vehicles; blocking the movement of other parked vehicles; occupying a reserved or handicap space without authority; or parked in contravention of a parking sign, yellow curb, crosswalk, sidewalk, improved boulevard or in a prohibited area. Where drivers have failed to pay the required parking fee UBC has been deprived of revenue and UBC has the right to remove cars parked in a pay lot or parkade who have not paid the required parking fee. Having properly impounded the vehicle, UBC can charge a reasonable fee for towing and storage and hold the vehicle until payment.

[54] UBC's common law proprietary rights do not give it the power to tow a vehicle, otherwise lawfully parked, because of a past offence. Nor can UBC refuse to release a car that has been lawfully impounded until other outstanding fines are paid.

[55] UBC cannot use its common law proprietary rights to collect the Parking Regulation Fines that it has no power to impose. I note that in most cases the Parking Regulation Fines are well in excess of any notional damage caused to UBC. To take but one example, a person who over parks at a meter faces a fine of $30 in circumstances where UBC's actual loss of revenue may be less than a dollar.

[56] In the result, therefore, the answer to common question 2(b) is a qualified no. UBC cannot rely on its common law proprietary rights to collect and retain all the Parking Regulation Fines. It can, however, rely on its common law proprietary rights to retain some towing fees and related storage fees.

[57] The same answer applies to common question 3(b). UBC's reliance on its common law rights is not impacted by the finding that some portion of the Parking Regulations are *ultra vires.*

C. Public Law Restitution

[58] Question 4 raises the issue as to whether or not the plaintiff and other class members are entitled to public law restitution in the amount of the Parking Regulation Fines regardless of any juristic reason for the collection including Contracts and Licenses and UBC's proprietary rights as the owner of the UBC campus. As set out above, I have concluded that UBC does not have the right to contract for the Parking Regulation Fines. Similarly, its common law proprietary rights do not extend to Parking Regulation Fines, albeit they are entitled to retain some towing and storage charges.

[59] The plaintiff submits that the recent decision of the Supreme Court of Canada in ***Kingstreet Investments v. New Brunswick (Finance)***, 2007 SCC 1, [2007] 1 S.C.R. 3, has established that monies paid in response to *ultra vires* demands are recoverable as of right.

[60] In his submission, the plaintiff cites at length from passages in Peter D. Maddaugh and John D. McCamus, *The Law of Restitution*, looseleaf Ed. (Aurora: Canada Law Book, 2008). The authors suggest that in recent decades there has been a substantial reform of the restitutionary doctrines applicable to claims against public authorities. In general terms, these reforms have substantially expanded the scope of

the restitutionary liability of public authorities and dismantled the various doctrines that provided defences or immunities to such claims.

[61] Maddaugh and McCamus state that the most important of the well-established proposition is that benefits conferred on a public authority that are caused by mistake, either of fact or law, are recoverable. The plaintiff submits that this principle is applicable to the class members. They paid under the mistaken belief that UBC had the authority to invoke the Parking Regulations. The plaintiff submits that if UBC did not have that authority, restitution should follow as a matter of course.

[62] The plaintiff further submits that payments made to a public authority under compulsion, including the traditional sense of duress to the persons or goods, are recoverable: ***Mason v. New South Wales*** (1959), 102 C.L.R. 108 (Aus. H.C.); ***Woolwich Building Society v. Inland Revenue Commissioners (No. 2)***, [1992] 3 All. E.R. 737 (H.L.). In this case a class member who did not pay faced increasing fines or penalties, the seizure of vehicles and the withholding of university services.

[63] UBC submits that ***Kingstreet*** does not support the broad recovery principle suggested by the plaintiff and is limited to circumstances in which a government has levied an unconstitutional tax. It further submits that ***Kingstreet*** does not apply to legislation that is administratively *ultra vires* and should not apply in such circumstances. It submits that private law restitution remains the applicable principle in the case at bar.

[64] In the result, UBC submits that the plaintiff's only possible claim is a conventional restitutionary claim that is subject to private law defences which form juristic reasons to deny recovery. The juristic reasons UBC relies on in its statement of defence are the Parking Regulations, the Contracts and Licenses and its common law proprietary rights as owners of the campus.

[65] In ***Kingstreet***, the Court recognized three categories of restitution claims: 1) restitution for wrongdoing; 2) restitution for unjust enrichment; and 3) restitution as a constitutional remedy for unconstitutionally collected taxes. While acknowledging that the retention of improperly collected taxes may unjustly enrich governments, the Court held that the ordinary principles of unjust enrichment should not be applied to claims for recovery of monies paid pursuant to a statute held to be unconstitutional: ***Kingstreet*** at para. 39.

[66] In ***Kingstreet***, the Court determined that taxpayers have recourse to a remedy as a matter of constitutional right because *ultra vires* taxes raise constitutional principles. Because taxes can only be levied with the authority of Parliament, if the tax is *ultra vires*, then it is unconstitutional and there cannot be any juristic reason to deny recovery.

[67] In ***Kingstreet***, the Supreme Court of Canada was wrestling with the appropriate restitutionary remedy in the case of a constitutionally *ultra vires* tax. ***Kingstreet*** is not an absolute statement about the effect of a constitutionally *ultra vires* finding outside of the taxation realm. Nor is it an absolute statement about the validity of any private or public law defence and the issue of remedy.

[68] In ***Kingstreet***, the Court reasoned that the Crown should not be able to retain taxes that they were not entitled to collect. At para. 53. the Court said:

> This flows from the constitutional basis for the right of restitution in this case: that the Crown should not be able to retain taxes that lack legal authority. It therefore matters little whether the taxpayer paid under protest and compulsion. If the law proves to be invalid, then there should be no burden on the taxpayer to prove that they were paying under protest. Such a finding would be inconsistent with the nature of the cause of action in this case. As Lord Goff said in *Woolwich*, at p. 172, "full effect can only be given to that principle [that taxes should not be levied without proper authority] if the return of taxes exacted under an unlawful demand can be enforced as a matter of right". The right of the party to obtain restitution for taxes paid under *ultra vires* legislation does not depend on the behaviour of each party but on the objective consideration of whether the tax was exacted without proper legal authority.

[69] While ***Kingstreet*** dealt with unconstitutional taxes, I do not accept UBC's submission that its reasoning cannot be extended to a public authority such as a university which collects money without legal authority. UBC purported to collect the Parking Regulation Fines pursuant to its powers under the ***U.A***. It now concedes that it has no such power. Having collected the Parking Regulation Fines without any legal

authority, those monies, like the taxes in ***Kingstreet***, should be returned.

[70] In ***Chiasson v. Canada*** (Attorney-General), 2008 FC 16, 295 D.L.R. (4th) 744 the court drew an analogy with ***Kingstreet*** in circumstances where the Minister of Fisheries had improperly taken money from an association of fishers. ***Chiasson*** supports the conclusion that ***Kingstreet*** is not limited to unconstitutional taxes.

[71] There is no question that there was, at the very least, in this case a mutual mistake about the validity of the Parking Regulations. UBC, until the commencement of the trial, repeatedly asserted that the Parking Regulation Fines were imposed pursuant to the power granted to the Board under the ***U.A.*** It has now conceded that it has no such power. Throughout the class period, it told class members that it had such authority and on the basis of that power compelled the class members to pay the Parking Regulation Fines, threatening increasing fines and penalties, seizure of vehicles and the withholding of services if they did not do so.

[72] As previously noted, in most cases the Parking Regulation Fines are far in excess of any damage caused to UBC by the miscreant parker. That said, I accept that UBC at all times has retained its common law rights to remove a vehicle improperly parked and is entitled to recover the costs incurred.

[73] Considering the merits of this matter, it is noteworthy that almost half of UBC's tickets go unpaid. The person who has been penalized by UBC's regime is the good citizen whose natural instinct is to trust that UBC has the power to impose the Parking Regulation Fines and pays the fine when it is demanded. There is something fundamentally unfair that those good citizens should not recover the money that UBC had no right to collect in the first instance.

[74] This result is consistent with the decision in ***Keough v. Memorial University of Newfoundland*** (1980), 26 Nfld. & P.E.I.R 386 (Nfld. S.C.T.D.), a case also involving a university parking scheme. In ***Keough***, the court found that the university parking regulations were *ultra vires* and ordered the fines paid by the plaintiffs refunded.

[75] This action was commenced in 2005. Rather than seek an amendment to its governing legislation, UBC, until the eve of trial, maintained that the Parking Regulations were valid and enforceable. Having now conceded otherwise, UBC can have little complaint that the money that it improperly collected is paid back to the class members.

[76] As a result, therefore, I find that class members are entitled to restitution in the amount of the Parking Regulation Fines subject only to applicable defences under the ***Limitation Act***, R.S.B.C. 1996, c. 266, monies paid to it for towing and storage charges of improperly parked vehicles and possibly UBC's claim for set –off as set out in paragraph 46 of its statement of defence. It may well be that given the findings made to date that UBC's set-off claims may now give rise to further common questions.

Limitation Periods

[77] If successful, many of the class claims will be subject to limitation periods. The claim for remedial constructive trust has a 10-year limitation period: ***Sun Rype Products Ltd. v. Archer Daniels Midland Company***, 2008 BCCA. 278, 81 B.C.L.R. (4th) 199. The other claims have a 6-year limitation period.

[78] I note that the availability of a remedial constructive trust depends on the court exercising its discretion to award that remedy, rather than an award in the nature of damages. Whether such a remedy is appropriate in this case has not yet been determined.

Pre-Judgment Interest

[79] The parties are agreed that if the plaintiff is successful at trial, then the class is entitled to pre-judgment interest under the ***Court Order Interest Act***, R.S.B.C. 1996, c. 79.

SUMMARY

[80] The Parking Regulation Fines are *ultra vires*. UBC cannot enter contracts or licenses that incorporate the Parking Regulation Fines. UBC's common law proprietary rights authorize the towing and storage of vehicles parked contrary to the Parking Regulations. UBC is entitled to collect the costs arising from such towing. UBC cannot, however, rely on its proprietary rights to charge or collect the Parking Regulation Fines. The plaintiff and other class members are entitled to restitution in the amount of the Parking Regulation Fines subject only to applicable defences under the ***Limitations Act***, towing and storage charges and the applicability of UBC's claim of set-off which has yet to be resolved.

[81] Once counsel has had the opportunity to consider these reasons, they should arrange a pre-trial conference to determine the next steps in this class proceeding.

"The Honourable Mr. Justice Richard B.T. Goepel"

The Honourable Mr. Justice Richard B.T. Goepel

ITEM 6.1 (c)

Lenders beware: Phony mortgages are the bank's problem, court rules

B.C. Court of Appeal says owners of properties hit by fraud don't have to pay

BY FIONA ANDERSON, VANCOUVER SUN APRIL 8, 2009

Homeowners can rest easier, but lenders may be scrambling after British Columbia's highest court ruled in favour of the owners and left lenders holding the bag if someone fraudulently takes out a mortgage on property they don't own.

In two decisions released this week, the B.C. Court of Appeal said mortgages placed on property by persons who had fraudulently transferred title to themselves were invalid, and the lenders could not collect from the legitimate owners.

In both cases, an unknown party had forged documents that transferred property into the name of a known co-conspirator, taken out mortgages on the property, and left with the money. In the first case, the person took out mortgages totalling $95,000 from two private lenders. In the second, the single mortgage was worth $320,000.

The lower court had transferred title of the properties back to their rightful owners but said the mortgages still stood, leaving the value of the properties seriously diminished.

Under the province's land titles system, those homeowners would have been compensated by the province's Assurance Fund -- which protects owners against fraudulent loss of property. So it was the government and the public that would have lost out in the end.

With seven claims made against the Assurance Fund since 2006, involving $1.6 million in fraudulent mortgages, the Land Title and Survey Authority of B.C. (LTSA), which is responsible for overseeing the fund, decided to appeal the lower-court decisions.

The problem in these cases is that both parties are victims of the person carrying out the fraud, said Robert Janes, a lawyer with Miller Thomson LLP, which represented the LTSA in the hearings.

"This is not a bad guy versus a good guy," Janes said. "It's innocent homeowner versus innocent mortgagee."

The difference is that if the homeowner is out money because the title is incorrect, the

Assurance Fund kicks in. If the lender is out money because its mortgage is invalid, the fund does not pay out.

The LTSA is given the duty of protecting the fund, and it's eager to pay those who are entitled, Janes said. "But they can't pay out to people who aren't covered under the act."

"The reality is, just like in any business dealings, there is always the possibility you are going to run into a fraudster and the government doesn't provide insurance against all forms of fraud," Janes said.

The Court of Appeal's decisions surprised lenders.

"The business community and lenders had thought ... that they could rely on the state of title as shown in the land registry," said Roger Lee, a lawyer with Davis LLP, which represented the lenders in both cases.

Now that's no longer the case, lenders must ensure a borrower actually has the title the land registration system says he has, Janes said. They can do that by asking for more security or a credit history, he suggested.

"They are the ones that actually deal with the fraudster," Janes said.

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SUPREME COURT RULING

Item 6.1 (d)

The state now has a place in the garbage cans of the nation

Privacy rights end when trash hits the curb, top court says

KIRK MAKIN

April 10, 2009

JUSTICE REPORTER

The Supreme Court of Canada said yesterday that governments have the right to sift through personal garbage once it reaches your property line, concluding a classic contest over property rights.

In a 7-0 ruling, the court said the rubbish is fair game for police, tax investigators or any other government scrutineer.

The decision means that Russell Patrick, a former record-holding swimmer on the Canadian swim team, will spend four years in prison for drug offences that came to light after police snatched garbage bags from behind his Calgary home on Dec. 17, 2003.

The court conceded that garbage contains a broad spectrum of highly private material, ranging from an individual's DNA to banking documents and intimate communications, which individuals might well want to keep confidential. But he noted that garbage is discarded for a reason - because it is no longer wanted - which greatly reduces any claim to privacy.

"Patrick did everything required to rid himself of the items taken as evidence," Mr. Justice Ian Binnie said, writing on behalf of Chief Justice Beverley McLachlin, Mr. Justice Louis LeBel, Mr. Justice Morris Fish, Madam Justice Louise Charron and Mr. Justice Marshall Rothstein. "His conduct was incompatible with any reasonable expectation of confidentiality."

Madam Justice Rosalie Abella wrote a concurring judgment, stating that police should have a reasonable suspicion that an offence has been committed or will be committed before they seize garbage.

Officers, reaching over Mr. Patrick's property line, made off with several bags of refuse, eliciting enough evidence of a potential ecstasy-manufacturing operation to obtain a search warrant for his house.

"When Patrick's conduct is assessed objectively, he abandoned his privacy interest when he placed his garbage for collection at the rear of his property, where it was accessible to any passing member of the public," Judge Binnie concluded.

"I do not think constitutional protection should turn on whether the bags were placed a few inches inside the property line or a few inches outside it," he added. "The point is that the garbage was at the property line, accessible to passersby."

Jonathan Lisus, a lawyer for the Canadian Civil Liberties Association, said the ruling could potentially apply to computer text messages, which the courts may interpret as a form of garbage. "The focus is on the information, not the form of it," Mr. Lisus said.

However, he said that deleted e-mail "is unlikely to be considered garbage because it resides on your server, which you control."

Judge Binnie said that to suggest that the Charter of Rights "protects an individual's privacy in garbage until the last unpaid bill rots into dust, or the incriminating letters turn into muck and are no longer decipherable, is to my mind too extravagant to contemplate.

"It would require the entire municipal disposal system to be regarded as an extension, in terms of privacy, of the dwelling-house."

Michael Bates, a lawyer for Mr. Patrick, said the ruling is both confusing and troubling. "I think that it's going to be difficult for anybody to maintain their privacy interest while at the same time using the municipal garbage system," he said. "Because if you're using the municipal system, at some point, that garbage is going to be in the hands of the garbage collector."

Citizens who do not want to run the risk of having government investigators root through their garbage may want to consider purchasing their own landfill sites or home incineration systems, he said.

"This case clearly says that any privacy interest you had is gone," Mr. Bates said. "The police, at the very least, will always be able to simply walk along with the garbage collector and simply have that person hand them the bag. I just don't see any other way a person can use the municipal system and at the same time maintain that privacy interest."

Mr. Bates did, however, find something to cheer about in Judge Abella's concurring judgment.

But Judge Binnie said that the degree of privacy accorded to garbage is all about context. For example, he said that garbage placed on a porch, in a garage or within the immediate vicinity of a dwelling cannot be considered to have been "unequivocally abandoned."

"In this case, Patrick's garbage was put out for collection in the customary location for removal at or near his property line and there was no manifestation of a continuing assertion of privacy or control," he said.

"The bags were unprotected and within easy reach of anyone walking by in the public alley way, including street people, bottle pickers, urban foragers, nosey neighbours and mischievous children, not to mention dogs and assorted wildlife, as well as the garbage collectors and the police."