By Nick Parker and Daina Young

Bill 20, the Municipal Government Amendment Act, received third reading on March 24th and was given Royal Assent on March 30th of this year. The majority of its provisions do not come into effect until proclamation, however amendments:

1. allowing cabinet to establish city charters,
2. enlarging municipal powers to impose off-site levies, and
3. making clear that developers can be required to install or pay for off-site public utilities

came into effect on March 30th.

This article reviews those amendments now in force and also highlights some of the significant amendments to the MGA that will come into effect later, should the remainder of the provisions be proclaimed. Bill 20 contains a number of amendments not discussed in this article, including those with respect to CAO responsibilities and assessment and taxation matters.

Provisions of Bill 20 Currently In Force

Part 4.1: City Charters

The addition of Part 4.1 to the MGA provides the framework by which cabinet on the request of a city may establish by regulation a charter for the city to address its evolving needs, responsibilities and capabilities in a manner that best meets the needs of the city’s communities. Subject to exceptions in Part 4.1, a city charter will govern all matters related to the administration and governance of the city, including the powers, duties and functions of the city and any other matters cabinet considers desirable.

Enlarged Powers to Impose Off-Site Levies

The amendment to s. 648(4) is a direct legislative response to the 2013 decision of the Court of Appeal of Alberta that held the previous version of ss. 648(4) made clear an off-site levy could not be recovered more than once in respect of land that was the subject of a development or subdivision. Therefore, even if the levies were to be imposed for different types of infrastructure, a municipality that had imposed a levy once to pay for all or part of the capital cost of new or expanded facilities for one of: (a) water, (b) sanitary sewage, (c) storm sewer drainage, or (d) roads, could not impose a further levy on the parcel of land. However, as a result of the amendment, a municipality may now collect a levy for each specific type of infrastructure regardless of whether it has imposed a levy for one type of infrastructure already.

Developers Can Be Required to Install or Pay for Off-Site Public Utilities

The amendments to ss. 650 and 655 of the MGA remove any doubt that a council in a land use bylaw as a condition of a development permit being issued, or a subdivision authority as a condition of issuing a subdivision approval, may require a developer to enter into an agreement with the
municipality to pay for or install a public utility necessary to serve the development or subdivision regardless of whether “the public utility is, or will be, located on the land that is the subject of the development / subdivision approval”. Previously, given the lack of the words in the quotation marks, it was arguable that the powers granted by these sections only applied to public utilities located on the land being developed or subdivided.

Provisions of Bill 20 Not In Force

Amalgamation and Annexation

Bill 20 will amend the MGA to allow 2 or more Summer Villages to amalgamate, regardless of whether they are contiguous, if they share a common body of water. The amalgamation provisions in the MGA will also be amended to allow for amalgamation proceedings to be initiated by 2 or more municipal authorities (currently, only a single municipal authority or the Minister can initiate such proceedings) and to expand the requirements for reports on amalgamation negotiations.

Bill 20 will add a new provision to the MGA which enables the Minister to make regulations respecting the procedures to be followed for an annexation.

Codes of Conduct

Bill 20 will add a new Division to Part 5 of the MGA with respect to codes of conduct. The provisions will require council to pass a bylaw to “establish a code of conduct governing the conduct of councillors”. The MGA will also be amended to require councillors to adhere to codes of conduct; the amendments specifically provide that a councillor cannot be disqualified or removed from office for a breach of the code of conduct.

The amendments authorize the Minister to make regulations respecting the matters that codes of conducts must address, the date by which councils must establish a code of conduct, sanctions to be imposed for breaches of codes of conducts, and other matters.

Closed Meetings

Bill 20 will make a number of amendments to the MGA which relate to closed meetings. The amendments themselves do not change the circumstances under which council or council committees may close their meetings to the public. The exceptions to disclosure set out in Part 1, Division 2 of the Freedom of Information and Protection of Privacy Act continue to apply. However, the amendments enable the
Minister to make regulations prescribing when council or a council committee may close its meetings to the public which could potentially expand the circumstances under which a meeting can be closed.

The amendments also specify certain procedures that council and council committees must follow when closing portions of their meetings to the public. Specifically, council or the committee must pass a resolution to close the meeting which sets out the basis for closing the meeting to the public. Once the closed portion of the meeting is complete, members of the public must be notified and given a reasonable amount of time to return to the meeting before the meeting continues. The amendments authorize council or a council committee to allow one or more persons to attend the closed portions of their meetings, but require the minutes to reflect the person’s name and the reason for their attendance.

### Public Participation and Petitions

Bill 20 will add a new provision to the MGA which requires municipalities to establish a public participation policy for the municipality. Similar to the provisions relating to codes of conduct, the amendments also authorize the Minister to make regulations respecting the contents of such policies and the date by which they must be put in place.

The MGA will also be amended to authorize municipal councils to enact bylaws modifying certain aspects of the petition requirements set out in the MGA. For example, a council may enact a bylaw reducing the number of petitioners’ signatures required or allowing petitioners to remove their names from petitions if certain steps are required. Council’s ability to modify the petitions requirements extends only to those matters specifically addressed in the new provisions.

The petition provisions of the MGA will be further amended to extend the time for a CAO to declare to council or the Minister whether a petition is sufficient or insufficient to 45 days (currently the requirement is 30 days), and to provide for the protection of personal information in petitions.

### Financial Administration

There will be a number of amendments made to the financial administration provisions of the MGA including with respect to financial plans. Currently municipalities must adopt annual operating and capital budgets. All other long-term financial planning is voluntary. The amendments will require municipalities at a minimum to adopt three-year operating and five-year capital plans, and contemplate that the Minister will make regulations respecting such plans.

### Advertising

The requirements for advertising set out in s. 606 of the MGA will be amended to allow for notice of bylaws, resolutions, meetings, public hearings and other things to be published on a municipality’s website or given in accordance with an advertisement bylaw enacted by the municipality. A new provision sets out requirements for advertisement bylaws.

### Planning and Development

Bill 20 will add new provisions to the MGA with respect to training programs for Subdivision and Development Appeal Board clerks and qualifications for SDAB members. The amendments contemplate that the Minister will enact regulations addressing the content of such qualifications and training programs.

Part 17 of the MGA will also be amended to clarify the hierarchy of statutory plans. Specifically, the amended provisions will provide that an area structure plan or area redevelopment plan (ASP or ARP) must be consistent with any municipal development plan (MDP) as well as any intermunicipal development plan (IDP) which applies to the same area, and that a MDP must be consistent with any IDP in respect to lands that are identified in both plans. In the event of an inconsistency between an IDP and an MDP, ASP or ARP, the IDP will prevail to the extent of the conflict or inconsistency. In the event of a conflict between an MDP and an ASP or ARP, the MDP will prevail to the extent of the conflict or inconsistency. There are additional amendments to Part 17 of the MGA which relate to SDAB appeals relating to direct control districts, the subdivision of land, and intermunicipal disputes.

Many of the amendments awaiting proclamation refer to regulations that may be enacted by the Minister of Municipal Affairs which, once enacted, will provide additional guidance and substance with respect to the new legislative requirements. Previously it was contemplated that the required regulations would be put into place and all of the amendments proclaimed in force by the end of 2016, however the current government has not confirmed when the remainder of the amendments contained in Bill 20 will come into force.
It starts with the best of intentions. Inexperienced developers decide to develop a country residential subdivision in your municipality from previously pristine farmland. In doing so, the developers will create beautiful and affordable residential lots to address housing demand – and make a little profit on the side. Yet the current approach to subdivision approval sees more and more of the associated infrastructure costs passed on to the developer, leaving some inexperienced developers unable to complete (or pay for) the required infrastructure. Roads and sidewalks remain unfinished, municipalities are unwilling to release lots, and lot sales grind to a halt.

What options are available to municipalities faced with developers who are unable or unwilling to complete the required municipal infrastructure or, even worse, simply walk away from the subdivision?

Section 655 (1) of the Municipal Government Act (“MGA”) expressly authorizes a subdivision authority to impose the following conditions on a subdivision approval:

(a) A condition the applicant enter into an agreement with the municipality to construct, or pay for the construction of, roadways, walkways, utilities, parking facilities, loading and reloading facilities.

(b) A condition the applicant enter into an agreement with the municipality to pay off-site or redevelopment levies imposed by bylaw;

(c) Any conditions necessary to ensure compliance with the MGA, the subdivision and development regulation, any applicable statutory plans, or land use bylaw; and

(d) Any conditions authorized by the subdivision and development regulation.

As a result, most multi-lot subdivision approvals will include a number of conditions and an obligation on the applicant to enter into a comprehensive development agreement providing for the construction of the municipal infrastructure required to service the subdivision and the payment of off-site levies.

Development Agreements

A development agreement will generally provide that the municipality will not endorse subdivision, (which is required in order for the subdivision to be registered at land titles), until completion of the required municipal improvements. This is a municipality’s first line of defence. Requiring the developer to complete all of the prerequisites the municipality requires prior to endorsement means the developer does not get its subdivided lots, and the ability to sell those subdivided lots, until after it has performed its obligations. Once subdivision is effective, the municipalities leverage is significantly reduced.

Development agreements will also often require the payment of security to the municipality, which secures the performance of the developer’s obligations under the agreement. In the event a developer fails to complete or pay for the construction of all or some of the required municipal infrastructure, the municipality can turn to the security it holds as per the terms of the development agreement. Including a security requirement in development agreements and insisting on the security being provided to the municipality in an acceptable form is recommended in almost all situations.

Things to Consider

1. Security provides some assurance to the municipality of full compliance by the developer with the terms, covenants and conditions of the agreement.

2. Security should be in one of two (liquid) forms, letter of credit or cash, and should be delivered to the municipality ideally upon the execution of the agreement but not any later than endorsement of subdivision approval or issuing of Construction Completion Certificates (“CCC”) if that occurs prior to the plan being registered.

3. The amount of security is entirely discretionary. It will sometimes be a percentage of the estimated cost of constructing and installing all of the municipal improvements (e.g. from 25% to 100%, or more). It will sometimes be a lump sum. The goal is to find a
number which provides the municipality with sufficient funds to perform the obligations of the developer in the event they do not.

4. A letter of credit should be an Irrevocable and Unconditional Letter of Credit issued by a Chartered Bank or a Treasury Branch, with a covenant by the issuer that if the issuer has not received a release from the municipality a certain number of days prior to the expiry date of the security, then the security shall automatically be renewed, upon the same terms and conditions, for a further period of time or a right on the part of the municipality to draw upon the full amount of the Irrevocable Letter of Credit in the event that the municipality has not received a replacement letter, or confirmation of an extension or renewal of the existing letter, a certain number of days prior to the expiry of the security.

5. Other forms of security could be a first charge on land or a registrable transfer of land. These are less liquid forms of security and require the municipality to take steps (possibly legal action) to convert to funds.

6. Include a provision allowing the municipality to increase or decrease the required security upon written notice to the developer at any time during the currency of the agreement if it appears to the municipality in its discretion that the security is excessive or insufficient. For example, the municipality may require an increase in security if the developer has failed to comply with the construction timetable or has been issued a notice of default.

7. The amount of security may, in the discretion of the municipality, be reduced in certain circumstances on application by the developer, for example, upon the developer having received a CCC or FAC for the municipal improvements.

8. The agreement should provide that the municipality may make demands as payee and beneficiary under the security provided by the developer to the municipality in the event a default by the developer has not been rectified by the developer, emergency repair work has been done to municipal improvements by the municipality in accordance with the provisions of the agreement and the developer fails to pay the costs and expenses of such repair work, or the developer is otherwise in default of any term, condition or covenant of the agreement.

What if a subdivision was endorsed, there is insufficient security to complete the remaining required municipal improvements, and the developer has started to sell the lots?

Caveat

Pursuant to s. 655 (2), a municipality may register a caveat under the Land Titles Act in respect of a development agreement between the municipality and the developer against the certificate of title for the parcel of land that is the subject of subdivision. The municipality must discharge the caveat when the agreement has been complied with. Where subdivision has occurred and lots are being sold to third party purchasers, developers may be induced into action in exchange for the municipality agreeing to discharge the caveat from those particular titles.

Bylaw Offences

Under s. 7 (i) of the MGA, a council may by bylaw create offences and provide for the penalties that may be imposed in the event of a breach. Commonly, the penalty provisions of a land use bylaw make it an offence to contravene a provision of the Land Use Bylaw and prescribe a maximum fine upon conviction.

All penalties provided for in a municipal bylaw are governed by the Provincial Offences Procedure Act. Under s. 557 of the MGA, a person also contravenes or does not comply with a provision of Part 17, a land use bylaw, a Stop Order under s. 645, a development permit or subdivision approval, or a condition of a development permit or subdivision approval is guilty of an offence and subject to prosecution and if found guilty is liable to a fine of not more than $10,000.00 or to imprisonment for not more than one year or both fine and imprisonment.
Stop Orders

However, prosecuting a developer who hasn’t complied with the subdivision approval does not necessarily “fix” the problem. Since the objective of most municipalities is to secure compliance, and not merely to punish, provision is made in ss. 645 and 646 of the *MGA* for the taking of steps aimed at bringing about compliance in the event of a breach.

Under s. 645, a development authority may issue a stop order requiring a development or use be stopped where it is of the opinion that it is not in accordance with the *MGA*, the regulations, the land use bylaw, a development permit or subdivision approval. Stop orders may also require such other measures to be taken as the development authority considers appropriate to bring about compliance. The order may be directed to the registered owners of the property, the person in possession of the property and / or the persons responsible for the contravention. A caveat in respect of the order may be filed against the title to the subject property, further warning of the planning breach.

Therefore, if a developer has failed to pay the required off site levies or fails to construct roadways to the required municipal standard, a stop order can be issued requiring the developer to stop construction and remedy the deficiency. In this way, s. 645 is an additional enforcement mechanism to those that might be available to the municipality under the development agreement.

Enforcement of stop orders can be pursued through prosecution under s. 557. The threat of prosecution may be enough to compel compliance. If not, s. 646 empowers a municipality to enter on the land and take any action necessary to carry out the order. Of course, this will only work where the order requires that work of some type be done to bring the lands into compliance. In this case, the cost of doing the work may be added to the municipality’s tax roll against the subject property and collected in the same manner as ordinary taxes.

Injunction

As an alternative to prosecuting the recipient of a stop order or the municipality going in and performing the work itself, a municipality may enforce the stop order through injunction proceedings. Section 554 of the *MGA* permits a municipality to apply to the Court of Queen’s Bench for injunctive relief where there is continuing non-compliance with the *MGA*, a bylaw or a stop order. An order for injunctive relief which is disregarded can form the basis for a contempt order from the Court.

Contractual Remedies

In addition to the statutory remedies available under the *MGA*, as a result of its natural person powers, a municipality enjoys all of the contractual remedies available under the development agreement. These can include enforcing against the security (see above), the municipality going in and completing the work, arbitration, or litigation. The Courts have recognized that while many statutory avenues of enforcement are available to municipalities, the contractual remedies remain as per the terms of the agreement between the parties.

Conclusion

It can be difficult working with inexperienced developers, who are unaccustomed to the complicated and expensive obligations which accompany subdivision. Which enforcement option, or combination of options, will work in your circumstances will depend very much on the initial subdivision approval and the attitude (and solvency) of the developer. More importantly, we hope this review highlights the importance of obtaining sufficient security and considering the pros and cons of the options available to municipalities in the unfortunate event things do not go quite as planned.
When is a Suspension a Constructive Dismissal?

By Sean Ward

When it comes to dealing with problem employees, most employers recognize that it is difficult to simply terminate an employee. The standard for just cause which allows an employer to terminate without notice or pay in lieu of notice (severance) is very high, and usually requires a pattern of misconduct with a record of repeated warnings to the employee over time. For this reason, employers often consider progressive discipline that may include reprimands or suspensions. Employers may be surprised, however, to learn that an improper suspension of an employee could give rise to the very same damages they would face for wrongfully terminating an employee.

In some cases, an employee who is suspended can claim they were constructively dismissed. Constructive Dismissal arises when an employer’s actions essentially amount to a repudiation of the implied employment contract. It often arises when an employer unilaterally makes changes to the employment terms, such as imposing a demotion or other change in the position, or reducing the salary or benefits to which an employee was entitled. But it can also arise when a suspension is imposed which is unfair, unduly harsh or not appropriate in the circumstances. A recent decision of the Supreme Court of Canada considered the issue of constructive dismissal arising from a suspension. In that case, the employee was returning from sick leave, and the employer was taking steps to terminate the employee. While it did so, it suspended the employee indefinitely, with pay, and delegated the employee’s duties to another individual.

The employee claimed he was constructively dismissed, and sued his employer. The employer claimed that by commencing the lawsuit, the employee had voluntarily resigned and was not entitled to any severance. The trial judge and court of appeal had agreed with the employer, but the Supreme Court concluded that these actions constituted a constructive dismissal, and the employee was entitled to damages as though he had been terminated without cause. The Court indicated that there was no simple objective rule for determining whether a suspension is wrongful, and each case must be examined based on the nature and circumstances of the suspension. However, the overriding question must be whether the suspension was reasonable and justified in those circumstances. The Court went on to outline several factors that will always be relevant to that determination, including:

- The duration of the suspension;
- Whether the suspension is with pay; and
- Good faith on the part of the employer, including demonstrating legitimate business reasons for the suspension.

An integral part of the good faith requirement is notifying the employee of the suspension and the reasons for which it was imposed. A failure by the employer to be “honest, reasonable, candid and forthright” in relation to the suspension creates a risk of constructive dismissal. Furthermore, a failure to provide the employee with any reason for the suspension, as occurred in the case before the Court, will almost certainly mean the suspension is unauthorized.

This does not suggest that municipalities should avoid suspending employees in appropriate cases. Where there is clearly wrongdoing on the part of an employee, suspension may be an appropriate interim discipline step prior to any termination. But the employer must be confident they can establish and prove the wrongdoing, and must communicate the reasons and basis for the suspension to the employee. Only the most serious cases should attract a suspension without pay, and those suspensions should be for a more limited duration.

Perhaps most importantly, this case suggests that municipalities should consider developing policies addressing the suspension of employees. Whether in a personnel policy or individual employment agreements, having agreed upon rules or guidelines setting out the types of suspensions that may be imposed (whether with or without pay, and for how long) will greatly reduce the risk that a court would view a suspension as wrongful. Following such a policy would provide some certainty for both sides, and reduce any ability to challenge a suspension that is imposed.

But absent any policies to provide guidance, it is important to remember that an employer does not have an unlimited right to suspend an employee. Any time a municipality considers imposing a suspension, it should give thought to the factors outlined in this case, to ensure that the suspension is reasonable, proportionate and undertaken in good faith.
Recent amendments to the *New West Partnership Trade Agreement (NWPTA)* came into effect on July 1, 2015. While the general purpose of *NWPTA* as a whole is to liberalize trade, commerce, and labour mobility between British Columbia, Alberta, and Saskatchewan, the amendments include a Bid Protest Mechanism (BPM) which provides suppliers with recourse against a government-entity which violates the terms of the agreement dealing with the procurement of goods, services, and construction projects. Although the BPM’s short limitation periods and capped awards restrain suppliers’ recourse, suppliers may now submit even relatively modest procurements to review by an arbitrator with the possibility of recouping both bid drafting and arbitration costs. The following is a brief summary of the BPM.

A supplier may initiate the BPM, alleging that a government-entity procurement process violates the agreement, by submitting a request for consultation to the alleged violator within ten days from the time the supplier knew or should have known of the alleged violation. The BPM consultation period is twenty days, during which time the disputants are to exchange sufficient information to enable a full examination of the matter and “make every effort to arrive at a mutually satisfactory resolution.” Consultations do not prejudice the disputants’ rights in any subsequent arbitration, nor do they prevent the disputants from agreeing upon any other informal means of resolving the matter. The disputants may extend the consultation period through mutual agreement as they see fit.

If the consultation fails to resolve the issue, the supplier has fourteen days from the end of the consultation period to submit a request for arbitration. The request must include, among other items, the factual basis of the supplier’s claim, details of the alleged violation, copies of all correspondence between the disputants, and remedies requested. Upon issuing its request for arbitration, the supplier nominates five arbiters from the signatory provinces’ posted rosters, and provides a $5,000 deposit toward any cost award that may be ordered against it. The arbitrator can also order a supplier to provide additional deposits in amounts and at times he or she finds reasonable in the circumstances. The deposit(s) will be returned when the proceeding concludes, or be applied toward any cost award issued against the supplier.

The government-entity has seven days from the Administrator’s notice to choose an arbiter from the supplier’s roster, and fourteen days from the supplier’s request for arbitration to submit its defense. The supplier may submit a counter-reply within seven days of the government-entity’s defense. If additional suppliers submit requests for arbitration concerning the same procurement at any time before the arbiter issues its decision, all bid protests will be consolidated into a single proceeding. In such cases, the arbiter may order additional submissions as required and fix time periods for delivery.

The arbiter is to release its final report within ten days of receiving all submissions, but may extend this time by ten days with reasons. The decision must be based solely on the disputant’s written submissions, consisting of the:

(i) supplier’s request for arbitration, including factual grounds of the alleged violation, all correspondence between the disputants, calculation of legal and bid costs, and remedies requested;

(ii) government-entity’s response to the allegations and calculations of its legal costs;
(iii) supplier’s counter-response; and

(iv) any other submissions the arbiter requests from the disputants.

The report is to contain the arbiters findings of fact, a determination on the alleged violation, recommendations for compliance where applicable, and the amounts of any cost and recoupment awards. Final reports are to be made public, subject to protections of the disputants’ confidential information at the arbiter’s discretion, and will itemize any awards issued. Disputants may request limited judicial review within five days of the decision under the applicable province’s arbitration legislation. Otherwise, the decision is binding on disputants. The agreement stipulates that each signatory province will introduce legislation to the effect that the arbiters’ final decisions are enforceable in a manner equivalent to a superior court order.

Although the arbiter’s final report may include recommendations for compliance, the disputants’ liability appears to be limited to cost and recoupment awards. In principle, costs are to be issued against the unsuccessful disputant; however, the arbiter has discretion to apportion costs as it sees reasonable in the circumstances, so even a successful disputant may bear a portion of the overall cost of arbitration. The arbiter will award costs even where the disputants abandon the arbitration process before the report is issued.

The agreement stipulates that arbitration is not directed to damages, but actual costs. Any cost award and, if applicable, any recoupment award issued against a disputant in any proceeding is not to exceed $50,000 each.

While the recent inclusion of the BPM does not alter a government-entity’s obligations under NWPTA, the BPM must now be taken into account both in establishing procurement processes and when a supplier calls into question any particular procurement process. While a government-entity is not obligated to suspend a procurement pending the BPM outcome, careful consideration will need to be given to how to respond to such complaints.
Municipalities are often building one construction project or another to better their community. Usually, a contractor is hired to build the project. Unfortunately it costs money to build projects and contractors want to get paid for the work they do. It is very important, however, that municipalities keep in mind the obligations imposed on them by the Builders Lien Act, R.S.A. 2000, c. B-7 (“BLA”) when making payments to contractors to avoid the risk of paying twice for the same work.

Section 18(1) of the BLA imposes a requirement on owners to maintain a holdback equal to 10% of the value of the work performed or materials furnished.

While owners are usually aware of the obligation to maintain a 10% holdback, sometimes they are not aware of the obligation to stop making all payments if a lien is registered against the project. This requirement is found in s. 18(2) of the BLA, which states:

In addition to the amount retained under ss. (1) or (1.1), the owner shall also retain, during any time while a lien is registered, any amount payable under the contract that has not been paid under the contract that is over and above the 10% referred to in ss. (1) or (1.1).

Section 18(1) requires an owner to retain a 10% holdback from all amounts paid to a contractor.

Section 18(2) requires an owner to retain, during any time while a lien is registered, any amount payable under the contract over and above the 10% holdback.

It is important that owners remember both of these obligations and comply with them. Failure to do so may end up having to pay twice.

Section 18(5) of the BLA confirms that a payment of an amount, other than that required to be retained under ss. (1) or (1.1), that is made in good faith by an owner or mortgagee to a contractor at a time when there is not any lien registered is valid, so that the major lien fund is reduced by the amount of the payment.

This means that if an owner makes a payment to a contractor when no lien is registered, the lien fund is decreased by the amount of the payment. However, if an owner makes a payment to a contractor in the face of a lien, the lien fund is not reduced by the amount of that payment. As a result, a payment to a contractor of any amount when a lien is registered by a subcontractor or supplier does not decrease the owner’s liability to any lienholders. The owner may have to pay lienholders the amount that was supposed to be held back as part of the lien fund, even though the owner has already paid the money to the contractor. Construction is expensive enough without having to pay for it twice.

So how can a municipality protect itself? A municipality should always conduct a land title search prior to making any payment to a contractor on a construction project. Section 12 of the BLA states that if a land title search is made which shows no liens registered on title, the owner can make a payment on the day of the search and, even if a lien is registered later that day, the payment is deemed to be made before the lien was registered. However, if an owner performs a title search on one day and makes payment to the contractor on the next day and a lien is registered in the meantime, the owner is at risk of having to pay the lienholder the amount paid to the contractor.

Always be aware of your obligations under the BLA. Always maintain the proper holdbacks. Never make a payment if a lien is registered against the project. Finally, always ensure a land title search is conducted on the same day that a payment is made to avoid the risk of having to pay twice for the same work.
As technology advances, and a municipality’s gadget arsenal along with it, so too must the awareness of legal consideration advance at pace. Drones are on the news and more recently in our backyards, with models available to the public, piloted from one’s smartphone.

One of the more productive applications of this technology, from a municipality’s point of view, is the enforcement of its bylaws and zoning requirements. It would be of considerable convenience to send a drone over a citizen’s property to detect and document an unpermitted accessory building or to document evidence of an unsightly property from the bird’s eye view. The potential is there for drones to be a valuable resource at a municipality’s disposal.

The legal aspects should not be overlooked when a municipality is considering the use of a drone. Legal considerations include aviation regulations, licensing and, the focus of this article, privacy, trespass and nuisance. It will not be long after the first bylaw contravention is identified by a drone that the complaints will come, most likely from the contravening individuals, that the use of a drone is a trespass onto their property, an interference with the use and enjoyment of their property (nuisance) and an invasion of their privacy.

In this regard, the law is still catching up with the technology. This is, however, the way law works; the principles that will be drawn upon to decide any dispute over the use of drones will be based on the previous case law relating to analogous ideas from our past. All of that to say that there is no Court decision to say “yes” or “no” to drones, but the principles are sound.

The starting point, most generally, is that a land owner owns her land from the center of the earth to the heights of space. This has proven impractical in modern times. The seminal case in Alberta is, as a great many things in Alberta are, thanks to a farmer. In Didow v. Alberta Power Limited, 1988 ABCA 257 (“Didow”), the farmer appealed to the courts for assistance with an aerial trespass. Transmission lines were intruding upon the airspace above the farmyard.

The Court found impractical the literal notion of ownership over everything above and below one’s land. While the farmer’s concern was in relation to the immovable transmission lines overhead, the Court also commented on more transient aerial presences, concluding that a landowner cannot object to air traffic that does not interfere with his or her use and enjoyment of the property. Therefore anything flying at such a height as would not disturb an owner or occupier would not easily constitute a trespass. The Court of Appeal, however, went on to say that a low flying aircraft would be capable of trespass.

The principles were drawn from a case that is quite similar to the issue that might be taken with drones and the pictures they take. In Bernstein v. Skyviews & General Ltd, [1977] EWHC 1, a landowner complained about an aerial photographer taking pictures from above his property.

The complaints were framed as a breach of the landowner’s privacy, trespass and nuisance. The conclusion was that the complaints had no legal founding in that instance. For the aerial photography situation the idea was to balance the private landowner’s rights to use her property against the public’s right to “take advantage of all that science now offer[es] in the use of air space”.

The general principle, which is what would be most likely to be applied today, is that a landowner has no greater rights than the general public at a height above what is “necessary for the ordinary use and enjoyment of [his / her] land and the structures upon it”. An actionable wrong would be if there was constant aerial surveillance and extensive photographic documentation of every activity on the lands below.

What does this all mean for drones used for photographing bylaw infractions?

- The drone should maintain a sufficient height above any property; higher than any structures or any height of structures or equipment that might reasonably be used by the landowner or occupant;
- The photographing or videoing should be transient and not dwell over any one property for long periods;
- As with taking photographs for evidence in any bylaw prosecution, privacy legislation such as the Freedom of Information and Protection of Privacy Act, and any applicable provincial or federal legislation, must be complied with.

Drones may be an extremely useful tool for municipalities going forward however, municipalities must remain mindful of both the legal concerns discussed above and the potential concerns arising from the relatively uncharted nature of this area of law.
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