

# LIDSTONE & COMPANY

## BARRISTERS AND SOLICITORS

### MEMORANDUM

**TO:** Clients  
**FROM:** Don Lidstone, Q.C.  
**DATE:** March 18, 2020  
**RE:** Meetings, Public Gatherings and FOI Access  
**FILE:** 99999 - 044

---

### **Meetings, Public Gatherings and Access to Information**

In this memorandum we address several issues: first, the provincial declaration of emergency, second, the ability of a council or board to hold an open meeting without members of the public in attendance and, third, that the Office of the Information and Privacy Commissioner (“OIPC”) has decided to grant public bodies a 30 day extension to respond to FOI requests received between March 1, 2020 and April 30, 2020.

### **Provincial Declaration of State of Emergency**

The provincial government has declared a provincial state of emergency under section 9(1) of the *Emergency Program Act* (EPA). Public Safety Minister Mike Farnworth announced the declaration today as part of the Province’s response to the COVID-19 outbreak.

The Act gives the Minister extraordinary powers under section 10(1) of the EPA. The Minister may do all acts and implement all procedures that the minister considers necessary to prevent, respond to or alleviate the effects of an emergency or a disaster, including authorize or require a local authority (including a municipal council or regional board for an electoral area) to implement any emergency measures. Future ministerial directions could affect meetings, essential services, retail regulation, facilities, evacuations, travel, fixing of prices, rationing or other things.

We have spoken to the Province today, and as of the time of this bulletin we are not aware of any specific authorizations or requirements affecting local governments. The declaration is for two weeks and can be extended by the Minister.

As well, the provincial legislature will hold a special session Monday to address specific COVID-19 matters. There may or may not be an enactment affecting local meetings and hearings.

## **Order of Provincial Health Officer**

As stated yesterday in our bulletin, the Provincial Health Officer promulgated an order under the *Public Health Act* entitled “Mass Gatherings re: COVID-19”. The order provides that every municipality and regional district is prohibited from permitting the gathering of people in excess of 50 people at a place of which the local government is the owner, occupier or operator, or for which it is otherwise responsible. The Order expires on May 30, 2020 and is subject to revision, cancellation or extension by the Provincial Health Officer.

The order applies to community centres, recreation facilities, meeting facilities, theatres, and other places owned, occupied or operated by the local governments, including concessions or licenced areas. It also applies to any events held or occasioned by local governments, such as parades, festivals, concerts or demonstrations.

Local governments are required under section 42 of the *Public Health Act* to comply with the Order. Failure to comply with the Order is an offence under section 99 (1) (k) of the *Public Health Act*.

## **Freedom of Information Requests: 30 Day Deadline Extension Option**

In response to COVID-19, the Office of the Information and Privacy Commissioner (“OIPC”) has decided to grant public bodies a 30 day extension to respond to FOI requests received between March 1, 2020 and April 30, 2020. The full decision is available online: <https://www.oipc.bc.ca/news-releases/2399>.

If a public body decides to make use of this extension, it must notify the applicant of the extension (in accordance with section 10(3) of the *Freedom of Information and Protection of Privacy Act* [“FIPPA”]). In addition, the public body must provide the OIPC with a list by June 30, 2020 of all such extensions that it uses.

This extension option adds to a public body’s usual options regarding extensions, so it is still open to a local government to also grant itself an extension under FIPPA s. 10(1) and apply to the OIPC under FIPPA s. 10(2) for further permission to extend a response deadline.

## **Open Council or Board Meetings and Public Hearings**

A number of councils and boards wish to hold open meetings in the absence of members of the public, in order to prevent gathering of large numbers of people in close contact with one another that can promote the transmission of SARS-CoV-2 and increase the number of people who develop COVID-19. The question arises whether a Court may in the future set aside a resolution or bylaw adopted at such meetings.

The federal Parliament and provincial Legislature are both now endeavouring to hold meetings without impacting public health, and councils and boards wish to do the same. To be clear, we do not think the Order of the Provincial Health Officer alone permits open meetings to be held

without the public since most meetings involve less than 50 persons or can be set up to accommodate overflows in other places if the number in the chamber exceeds 50.

We have considered all the currently available tools and offer the following advice respecting holding open council meetings or public hearings without the public:

### **1. Follow Provincial Health Officer Order**

Every municipality and regional district is prohibited from permitting the gathering of people in excess of 50 people at a place of which the local government is the owner, occupier or operator, or for which it is otherwise responsible. The Order expires on May 30, 2020 and is subject to revision, cancellation or extension by the Provincial Health Officer. This applies to council or board meetings and public hearings, as well as meetings of committees, commissions, or other such bodies.

According, it is advisable to direct an officer or employee to be stationed at the entrance to the meeting chamber and restrict attendance to 50 persons, including the council, board and staff. The other individuals, if any, who cannot gain entrance may be served by electronic or other means of communication outside the chamber. Many communities have this set up already for public hearings or under their procedure bylaw pursuant to section 128 of the *Community Charter*.

From a liability and risk management perspective, it would be wise to set up the chamber so that members, staff and the public are each 6 feet apart, during the meeting and for access and egress. Here is a photo of a meeting setup in a gym, limiting attendance to 50 inside with the recommended spacing:



## 2. Emergency Power Under Section 20 *Community Charter*

Prior to the provincial declaration of a state of local emergency today, a local government could proceed to hold open meetings without the public. Under s. 20 of the [Community Charter](#), local governments have two branches of emergency powers:

20 (1) If an emergency within the meaning of the *Emergency Program Act* arises in a municipality, the council has the powers provided under that Act.

(2) If another form of emergency arises in a municipality, the council may declare that the emergency exists and provide for the necessary powers to deal with the emergency.

Prior to the provincial declaration of a state of local emergency today, our view was that a local government could rely on its section 20(1) branch of its emergency powers to hold an open meeting without the public in attendance if it first declared a state of local emergency under the EPA. Section 13 of the EPA provides a local authority (which in the case of a municipality is the municipal council or in the case of a rural area of a regional district is the regional board, EPA s. 1) with broad authority after declaring a state of local emergency to authority **may do all acts and implement all procedures that it considers necessary** to prevent, respond to or alleviate the effects of an emergency or a disaster. This is reinforced by section 26 EPA which states that the Act supersedes all other Acts, which would include the *Community Charter*.

A question raised by many is whether a municipal declaration of local emergency can be made if the Province has made a provincial declaration of emergency regarding the same area or part of an area. We think the answer is yes, if the municipal declaration is made after the time the Province makes its declaration. The question arises because section 14(3) EPA says a municipal declaration made in respect of part of a jurisdictional area **ceases to have any force or effect** on the making of a state of emergency declaration by the Province, and the Province made a province-wide declaration Wednesday. Accordingly, we think a municipal declaration made after the provincial declaration has force and effect, subject to the need for renewal every seven days.

Although some advisors have said a local government may proceed with meetings without the public using the section 20(2) *Community Charter* or section 295 *Local Government Act* emergency power, the case law is not helpful in these circumstances [e.g., *Kuypers v Langley (Township)*—held that the predecessor provision in the *Municipal Act*, which did not at that time reference the EPA, was limited to granting emergency powers only where there was “a sudden and unexpected event...about to take place”].

## 3. Electronic Meetings

Although some advisors have said that a local government may hold a valid open meeting without the public in the chamber under section 128 of the *Community Charter* [*Electronic meetings*], s. 128 would not be appropriate for meetings during a pandemic because it requires providing the facilities at a specified place with a municipal officer in attendance (such as an overflow theatre or gym when the Council Chamber is full). Council members, however, may

attend a special meeting electronically if allowed by the procedure bylaw and the electronic or other communication facilities enable the public to hear, or watch and hear, the participation of the member.

#### **4. Public Hearings**

A council or board may waive a hearing under section 464(2) and 467 of the *Local Government Act*.

#### **5. Provincial Enabling Enactment**

In light of the budgetary, pandemic, facility, security, health and other urgent matters on local agendas, we have recommended to the Province the enactment of a provincial regulation during the life of the pandemic emergency that gives local governments express authority to hold meetings without the public. In regard to obligations to broadcast the meetings and allow public participation by remote electronic means such as telephone, Skype, Zoom or similar means, it has to be noted that very large areas of the province still have no internet or cell service and that many procedure bylaws could not include electronic participation since it is not available or feasible everywhere.

- **Don Lidstone, Q.C.**