

LIDSTONE & COMPANY

BARRISTERS AND SOLICITORS

BULLETIN

TO: British Columbia Clients
FROM: Lidstone & Company
DATE: April 23, 2020
RE: Alternative Tax Collection Schemes
FILE: 99999-097

The purpose of this bulletin is to address issues regarding implementation of alternative municipal tax collection schemes under the *Community Charter* (“**Municipal Schemes**”). We will specifically consider whether an Alternative Municipal Scheme can:

- (a) set a tax due date on July 2nd; and
- (b) make penalties apply as of a later date than July 3rd if the Alternative tax due date is July 2nd.

Caution: This memo is not intended to give a full overview of Municipal Schemes or the general tax collection scheme under section 234 of the *Community Charter* (the “**General Scheme**”).

BRIEF ANSWER

The legislation, virtually unchanged from the content of the former *Local Government Act*, is open to several reasonable but conflicting interpretations on these issues. Municipalities can minimize their Alternative Municipal Scheme legal risk by avoiding both issues, by setting a due date other than July 2nd and making any penalties applicable to payments made after that due date.

Despite this, we think a municipal council may reasonably consider setting a July 2nd due date and if the tax bylaw is worded carefully may also make penalties payable later than to payments made after that due date. A policy ground for using July 2nd is that financial institutions automatically pay on that date and most taxpayers are accustomed to paying by that date (noting as well as the statutory payments due by August 1st for regional districts, BC Assessment, etc.). One of the policy grounds for later penalties is the fact that the Province has set later penalty dates for classes 4, 5, 6, 7 and 8. Any added legal risk due to a July 2nd due date and an October 1st penalty date must be weighed against the perceived practical and political benefits in the context

of the ambiguities in the legislation and the legal rationale set out in this memo.

BACKGROUND

Many municipalities are considering Alternative Municipal Schemes given the COVID-19 pandemic. The purpose of these schemes is to defer tax due dates or tax penalty dates to give property owners more financial flexibility, given ongoing economic disruptions.

We acknowledge the Province has expressed a wish that municipalities avoid liquidity crunches that could arise if municipalities significantly defer tax due dates or penalties.

Caution: The governmental response to the COVID-19 pandemic is rapidly evolving. Future provincial actions and legislative changes may cause us to reconsider the opinions below. We encourage you to frequently monitor provincial response efforts and seek further legal opinion as necessary.

LEGAL FRAMEWORK

The main legal issue is how municipal councils should interpret their powers to adopt Municipal Schemes under the *Community Charter*. Key legislative provisions include:

General tax collection scheme

234 (1) If this section applies, property taxes for a year are due on July 2 of the year.

(2) The Lieutenant Governor in Council may make regulations establishing penalties and interest that must be applied by municipalities in relation to payments made after the tax due date under subsection (1).

Alternative municipal tax collection scheme

235 (1) A council may, by bylaw, establish one or more dates on which all or part of the property taxes under this Part are due.

...

(3) A bylaw under subsection (1) may do one or more of the following:

(c) establish discounts to be applied in relation to payments made before a tax due date established by the bylaw;

(d) establish penalties and interest to be applied in relation to payments made after a tax due date established by the bylaw;

(e) set terms, conditions and procedures in relation to payments, which may be different for different classes of owners as established by the bylaw.

Municipal councils must interpret the above provisions in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of municipal legislation and the intention of the Legislature. If a tax bylaw is legally challenged, or if a municipality applies to court in relation to collecting under the bylaw, a court will consider whether a council interpreted its powers under the above passages reasonably (*1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101, para. 47).

ANALYSIS

(a) Alternative Municipal Schemes and July 2nd due dates

Can an Alternative Municipal Scheme set a tax due date of July 2nd? These alternative scheme provisions were copied by the Legislature from sections 366-368 of the former *Local Government Act*. The *Community Charter* requires Alternative Municipal Schemes to “establish one or more dates” when property taxes are due. There are two prevailing legal interpretations:

1. The *Community Charter* may implicitly require Alternative Municipal Schemes to set due dates other than the July 2nd date under the General Scheme. It is arguable that repeating the General Scheme in a Municipal Scheme may render the Alternative Municipal Scheme redundant, the premise of section 235 being the establishment of a new date other than the General Scheme date.
2. Alternatively, the legislation does not expressly require Alternative Municipal Schemes to set a different due date from the General Scheme. The ordinary meaning of “one or more dates” does not suggest July 2nd due dates are prohibited. The interpretation under #1 above would also imply insignificant changes in due dates, such as July 3rd, would be acceptable. This is an absurd result in that there is no practical difference between July 2nd and 3rd.

Both interpretations are likely reasonable in our view.

(b) Municipal Schemes and split penalty due dates

Can an Alternative Municipal Scheme set a penalty date of October 1st? Practically, we understand many municipalities would like to implement a July 2nd due date and a deferred penalty date of October 1st, so that all taxpayers and not only commercial interests would have the same penalty date.

The *Community Charter* itself does not refer to “penalty dates” as distinct from due dates. Section 235(3) allows, but does not require, Alternative

Municipal Schemes to “establish penalties and interest to be applied in relation to payments made after a tax due date established by the bylaw.”

A strict interpretation suggests that any penalty automatically applies “to payments made after a tax due date”, as stipulated in the legislation (i.e., paid after July 1st or whatever due date is established by the alternative scheme). Deferring penalty due dates by bylaw also arguably undermines the point of setting due dates as there would be no incentive to pay on the tax date.

A more liberal interpretation, however, supports having split penalty and due dates. The legislative scheme generally grants broad flexibility in designing Alternative Municipal Schemes. This includes the ability to set tax due dates at any point in the year and discretion as to whether the Alternative Municipal Scheme even imposes penalties. Read in this context, the discretion to impose penalties ought to allow for deferred or graduated penalties. As well, the wording of the bylaw could track the wording of the legislation by saying the penalty is applied in relation to payments made x days after the tax due date established by the Alternative Municipal Scheme (for an October 1 penalty date and a July 2 due date, for example, the bylaw could say “the penalty of x% applies in relation to payments made more than 90 days after July 2).

Both interpretations are likely reasonable in our view. The most cautious approach is however for Alternative Municipal Scheme bylaw to make any penalties apply in relation to payments made after the tax due date established by the bylaw.

A further way to minimize risk is to seek permission from the minister under section 781 of the *Local Government Act*. This section allows the minister to “confer on a local government further powers to manage and dispose of... taxation revenue” as the minister considers advisable. The minister can grant municipalities powers to forgive or waive tax penalties incurred during a deferral period regarding non-business taxpayers (i.e., between July 1st and October 1st). An additional alternative is to petition the Province to amend BC Reg 426/2003 to expressly allow an Alternative Municipal Scheme Bylaw to make all 2020 penalties for all classes apply as of October 1st.