LIDSTONE & COMPANY

ALBERTA MUNICIPAL LAW LETTER

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Feature Article

Purchasing Technology

Local governments today spend significant resources on purchasing services and products related to information technology. Such purchases span the range from municipality-wide systems (e.g., GIS-based work order management system) to individual mobile or desktop devices for staff use.

Typically, when purchasing low-value items "off the shelf", there is little room to negotiate contract terms. However, when making major technology purchases, local governments have the opportunity, and should use it, to ensure that unfavourable contract terms are avoided. In this article, I will discuss some common contracting pitfalls present in technology purchases, and how local governments may approach such terms during the procurement or negotiation process.

The challenge to negotiating contract terms in technology contracts is that unlike construction procurement where industry-standard contractual documents such as MMCD are available to the local governments, there are no similar tried-and-tested contractual documents for technology purchases. Instead, purchasers must rely on vendors' cookie-cutter terms (sometimes called "standard terms") as the starting point for negotiations. Such standard terms proposed by vendors tend to favour the vendors' interest and must therefore be reviewed carefully.

Below are some undesirable contractual provisions that are frequently found in contract language proposed by vendors.

Limitation on liability

Technology vendors that provide long-term services (say, 3-year software support after installation) typically seek to limit their monetary liability to *actual* fees paid to the vendor over a 6- or 12-month period prior to the dispute arising. The problem with such a term is that payment on such contracts is often front-loaded and little fees may be paid in later years. If a dispute arises in the fourth year of a 5-year contract, the fees paid in the preceding 6- or 12-month duration may represent a very small fraction of the contract price, thus significantly restricting the local government's monetary remedy.

In negotiating limitations on liability, local governments should insist on maintaining a

limitation on liability that is not less than either (a) the *total* contract price or (b) the *total fees paid* from the time the contract was executed to the time the dispute arises.

Limitation on warranty period

Technology vendors will often propose a short warranty period (say, 3 months) on products, even if such products have an intended service life of several years. The hazard presented by such a short warranty period is that the local government may not, in that short and early period, get an opportunity to test and use the product sufficiently to detect defects. Often, these early months are spent in mobilization of the new infrastructure and training of staff.

During contract negotiations, local governments should consider if the proposed warranty period will be sufficient for testing the product and detecting defects. If not, a longer warranty period may be insisted upon. There is no 'golden rule' for how long a warranty period should be; it will vary by nature of the product and how quickly it can be sufficiently tested in real-world scenarios.

Auto-renewal of contracts

Vendors who provide multi-year technology support services often propose terms requiring that the contract be automatically renewed upon expiry unless the purchaser takes affirmative steps to reject such renewal. The risk here is that unless the local government has a robust contract management system (which is often not the case), such vendor contracts may get renewed even when the vendor's performance has not been satisfactory during the original contract term or the vendor's offering is no longer needed.

Unless the local government intends such auto-renewal and has high confident in its own contract management system, it should insist on removing any automatic renewal clauses from technology contracts.

Out-of-province dispute resolution

Because technology vendors are often out-of-province companies (e.g., headquartered in Ontario or in the US), proposed contract terms may include a provision stating that disputes arising from the contract must be resolved in courts of Ontario or California and the law of that jurisdiction would apply. Agreeing to such a term puts the local government purchaser at a severe disadvantage as it effectively lessens the possibility of the purchaser finding a legal

remedy. This is so because, unless the purchase is of significant value (say, $50,000 or higher), it may not be financially viable to attempt litigation in an out-of-province court or American court. Further, all legal protections available in British Columbia may not be available in that outside jurisdiction, whether within Canada or elsewhere.

To avoid this unpleasant result, local governments should pay attention to the dispute resolution clause during contract negotiations and make sure that the contract allow the local government to bring action in a British Columbia court and that the law of British Columbia will apply.

A tactical note

Unlike construction contracts, technology products and services are typically sought through the RFP process (as opposed to an invitation to tender), which means that negotiation of terms is often pushed to the end of the procurement process. If all compliant vendors propose unfavourable terms such as those discussed above, the local government's negotiating leverage is limited. To avoid such a situation, local governments should identify certain critical contractual clauses within the RFP and require that proponents provide a statement in their proposal that, if shortlisted for negotiation, such clauses will be accepted as proposed in the RFP.

~ Rahul Ranade

Indigenous Rights and Interests and Reconciliation

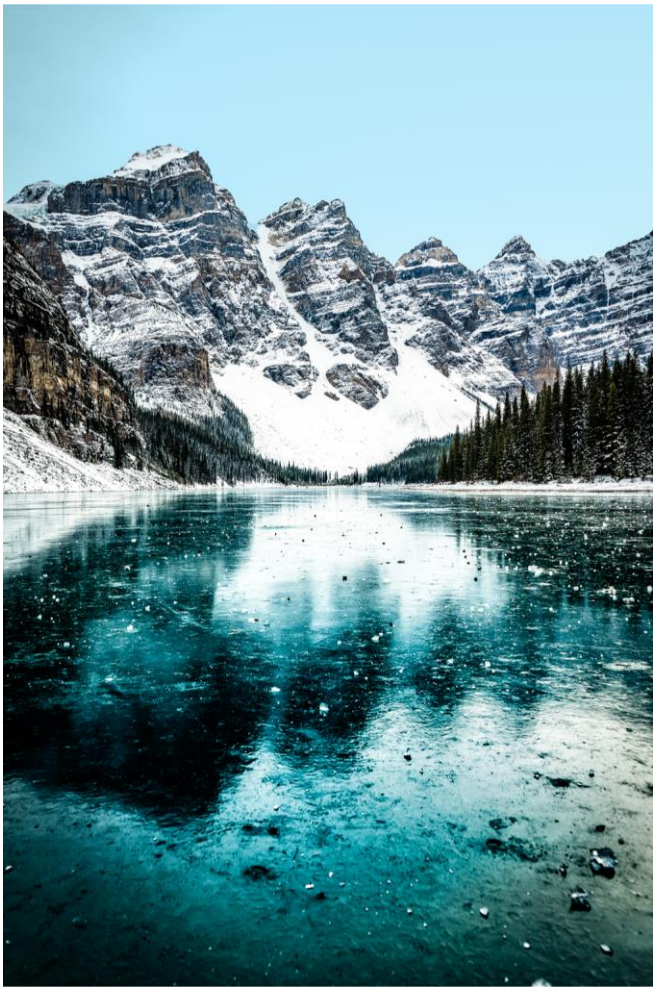
Introduction

The legal relationship between municipalities and Indigenous communities is complex and multifaceted. In Alberta, historical or modern treaties between the Crown and Aboriginal communities have defined some of the territory to which Indigenous communities exercise their rights and interests. The Federal government holds other lands as reserves for the benefit of "Indians" as defined under the *Indian Act.* Section 35 of the 1982 Constitution "recognized and affirmed" existing Aboriginal rights. It also protected the rights of Indians and Métis people. This requires the Crown to consult with Indigenous communities when it is aware its conduct may affect an asserted Indigenous right. This is known as the "duty to consult."

In 2015, the Truth and Reconciliation Commission (the "TRC"), which was set up in 2008 to document the effects of residential schools on Indigenous peoples, defined reconciliation as the process of "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country." The TRC went on to say that in order for reconciliation to happen in Canada, "there has to be awareness of the past, an acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour." This process is more inclusive that the legal fight over rights and interests.

The Federal of Canadian Municipalities has noted that "municipal leaders are doing their part to foster reconciliation while building respectful new partnerships with Indigenous communities." These efforts are commendable and are likely to grow as indigenous groups advocate for meaningful reconciliation. Notwithstanding the leadership shown in this area, municipalities must ensure that their reconciliation activities are consistent with their powers as set out in the *MGA*. In *Gardner* v. *Williams Lake (City),* 2006 BCCA 307 (CanLII), the British Columbia Court of Appeal stated:

> [24] Local governments, however, are the creatures of the provincial legislature, bound by their provincial enabling legislation. This case, therefore, does not engage the honor of the Crown or the heightened responsibility that comes with that principle in cases engaging Aboriginal questions…"



At a very high level, this article explore the scope of a municipality's obligations to Indigenous communities under the *MGA* and suggests other areas where their discretion is unfettered.

Intermunicipal Services

Municipalities may, but are not required to, enter into an agreement respecting the delivery of

services outside of its jurisdictional boundaries with an Indian band or a Metis settlement: s.54(2).

Statutory Plan Preparation

The *MGA* imposes limited obligations on municipalities to engage with adjacent First Nations communities. Under s.636 of the *MGA*, when preparing a statutory plan (e.g. the MDP and an ASP), a municipality must notify adjacent Indian bands and Métis settlements and provide them with a means for making suggestions and representations. This language limits the obligation to Indian bands governed by the *Indian Act* and Métis settlements governed by the *Métis Settlements Act*. This obligation is also limited to such areas which are adjacent to the area to which the statutory plan applies.

Intermunicipal Collaboration Framework

Municipalities may, but are not required to, invite Indian bands and Métis settlements, to participate in an intermunicipal collaboration framework: s.708.321. This framework would discuss the delivery and funding of services to be provided under the framework. As above, the only groups who may be entitled to participate are Indian bands governed by the *Indian Act* and Métis settlements governed by the *Métis Settlements Act.*

Unfettered Discretion

There are many other powers that a municipality may exercise which are not fettered by the *MGA*. These powers may be exercised in a way that pursues the goal of reconciliation. Such powers include:

- grants and funding to Indigenous groups;
- arranging training for staff and elected officials on reconciliation, the TRC and the Calls to Action;
- public engagement on respectful language and naming practices;
- creation of public education programs and reporting on activities and progress towards reconciliation;
- ensuring that any archival or museum services include input from stakeholders; and
- adopting employment terms that give staff leave for the National Day for Truth and Reconciliation.

-Alison Espetveidt & Don Lidstone, Q.C.

Case Law

Nelson v Marchi, 2021 SCC 41

Background

The City of Nelson (the "City") received a heavy snowfall in the beginning of January. The City cleared snow from angled parking spots in the downtown core by ploughing snow to the top of the parking spaces, which created a snowbank along the curb and separated the parking stalls from the sidewalk.

Ms. Marchi parked in one of the angled parking stalls, and then tried to cross through the snowbank to access the sidewalk. When she stepped onto the snowbank, she dropped through the snow and seriously injured her leg. Consequently, Ms. Marchi sued the City for negligence, with both parties agreeing that she suffered $1 million in damages.

As part of its defence, the City claimed policy immunity. The policy immunity defence applies to exempt a local government from liability notwithstanding the finding of a duty of care, if the actions giving rise to the plaintiff's damages

resulted from a "core policy decision". In *Just v British Columbia*, the SCC outlined the rationale for this defence, stating that:

> "[t]he need for distinguishing between a governmental policy decision and its operational implementation is thus clear. True policy decisions should be exempt from

> tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort."

A court faced with an allegation of negligence by a local government must determine whether the alleged negligence arose from a policy decision, thus negating the duty of care and exempting the local government from liability, or the operational implementation of that policy, in which case the exemption does not apply, a duty of care remains and the normal negligence principles regarding standard of care will apply.

The Supreme Court of Canada, in *Nelson (City) v. Marchi* ("*Nelson*") reaffirmed the policy/operational distinction, and drew from prior jurisprudence to find four factors that assess whether a decision is a policy or operational in nature:

1. The level and responsibilities of the decision-maker;
2. The process by which the decision was made;
3. The nature and extent of budgetary considerations; and
4. The extent to which the decision was based on objective criteria.

Two clarifications were also offered in relation to this framework. First, budgetary, financial and resource implications do not necessarily mean that a decision is policy, as these restrictions are just one among many factors to be reviewed. Second, the policy defence only applies to 'true' or 'core' policy, meaning that the mere presence of the term 'policy' on a document is not sufficient to invoke this defence. Instead, the focus is to remain on the nature of the decision itself, not the label or the format of the decision.

Our comments on each of the four factors identified in *Nelson* follow.

<u>The level and responsibilities of the decision-maker</u>

The key factor here is how closely related the decision-maker is to a democratically accountable official who bears responsibility for

public policy decisions. The higher the level of the decision-maker within the executive hierarchy, or the closer the decision-maker is to an elected official, the higher the possibility that judicial review for negligence will raise separation of powers concerns or have a chilling effect on good governance. Similarly, the more the job responsibilities of the decision-maker include the assessment and balancing of public policy considerations, the more likely this factor will lean toward core policy immunity. Conversely, decisions made by employees who are far-removed from democratically

accountable officials or who are charged with implementation are less likely to be core policy and more likely to attract liability under regular private law negligence principles.

The Alberta Municipal Law Letter is published monthly by:

LIDSTONE & COMPANY
BARRISTERS AND SOLICITORS

Toll Free: 1.877.339.2199

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www.lidstone.ca

Therefore, when formulating and enacting the policy, we would recommend that municipalities ensure that high-level officials, including elected officials or statutory officers, are involved in the decision-making process. Additionally, evidence indicating that the municipality engaged in a fulsome, balanced approach will assist in determining that a policy document is 'core policy.'

The process by which the decision was made.

The government decision is more likely to be one of policy if the process to reach that decision was: deliberative, required debate, possibly in a public forum, involved input from different levels of authority, and was intended to have broad application and be prospective in nature.

In contrast, the more a decision can be characterized as a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no sustained period of deliberation, the more likely it will be reviewable for negligence.

The nature and extent of budgetary considerations

Nelson made an explicit point of stating that budgetary considerations alone will not deem a decision to be core policy. However, there is a distinction between 'high-level' budgetary considerations, such as budgetary allotments for departments and government agencies versus lower level, day to day budgetary considerations made by individual employees.

For this reason, we recommend that the policy formulation, and the policy itself, reference the budgetary restrictions in how the municipality chooses to handle a particular issue (e.g., cost of policy choice, enforcement mechanisms, etc.).

The extent to which the decision was based on objective criteria

The final factor states that the more a government decision weighs competing interests and requires making value judgments, the more likely separation of powers will be engaged because the court would be substituting its own value judgment. Conversely, the more a decision is based on "technical standards or general standards of reasonableness", the more likely it can be reviewed for negligence. Those decisions might also have analogues in the private sphere that courts are already used to assessing because they are based on objective criteria. Therefore, we recommend explicitly addressing the risks and benefits being weighed by the municipality in creating its policy regarding this issue.

Jacobson v Newell (County), 2021 ABQB 505

The County of Newell (the "County") passed a bylaw (the "Bylaw") to reduce the number of

electoral divisions and corresponding councillors in the County from ten to seven. Two residents in the County applied to the court to have the Bylaw quashed on the basis that the County did not comply with the advertising and notice requirements in section 231 of the *MGA*. Specifically, the applicants argued that the County failed to wait until the 60-day petition period mandated by the *MGA* had concluded prior to passing the Bylaw, and that the County was required to wait and see if it received a valid petition before passing the Bylaw. The applicants were not challenging the substance of the Bylaw, but instead the process in which it was enacted.

Did the County comply with the MGA?

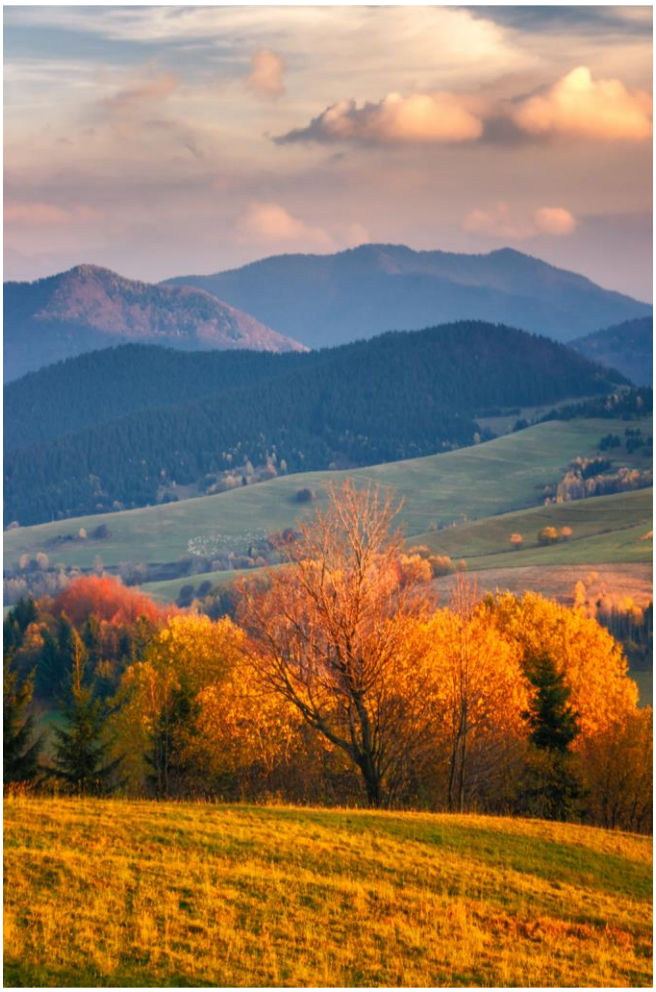
The court evaluated the County's implementation of the Bylaw on the standard of correctness. Statutory interpretation of section 231 led to the clear conclusion that it prohibited the passing of the Bylaw until a 60-day petition period had expired. The County had clearly passed the Bylaw without proper adherence to this provision of the *MGA*.

As for remedy, courts in Alberta have consistently held that strict compliance with notice requirements in enabling legislation is required when a municipality exercises extraordinary powers or passes bylaws dealing with taxation, expropriation, or other interferences with private rights. In this instance, the Bylaw set out to reduce the number of councillors in the County and to change electoral boundaries, which the court considered to affect 'private rights' of citizens. On this basis, the court held that the appropriate remedy was to quash the Bylaw.

News

Bill 77, Unpaid Municipal Taxes, and the Connection to the Inactive and Orphan Wells Problem:

Bill 77: *Municipal Government (Restoring Tax Accountability) Amendment Act, 2021* (2nd Session, 30th Legislature) appears set to become law. When enacted, it will amend the *Municipal*



Government Act, RSA 2000 c M-26 (*MGA*) to give municipal governments the power to place liens on some of the property of companies that fail to pay their assessed municipal taxes, and specifically allow the municipal government to place such liens on "linear property", which includes pipelines and wells (section 284(1)(k) of the MGA) within the municipality. The lien would have priority over every person except the Crown (see section 5 of Bill 77)

The purpose of Bill 77 was explained by the minister as follows: "…if a company becomes bankrupt or decides not to pay their taxes, municipalities will again have a tool to convince these companies to pay or else property may be seized to cover debts. As a result, companies will

have more of an incentive to negotiate payment plans with municipalities for their unpaid taxes, and if they do not, municipalities will have a hammer…." (2nd reading, *Alberta Hansard*, 30-2, (2 November 2021) at page 5928 (Hon Ric McIver)

Bill 77 will provide local governments with an additional tool for the recovery of unpaid taxes, but there are some limitations. First, the lien power applies only within the municipality and if a tax debtor has assets outside municipality's boundaries, there is no ability to secure a lien over those assets. Second, it has been noted in the legislature that only a small number of oil and gas companies do not pay their municipal taxes and of those companies, most are insolvent or bankrupt. Those companies typically do not have assets of any significant value and in consequence, a lien will in many cases not result in significant recovery. Furthermore, if an insolvent or bankrupt debtor does have some valuable assets, those assets will often be taken by the Alberta Energy Regulator and Orphan Well Association to pay for the debtor's clean-up liabilities.

Bill 77's quick movement through the legislature suggests it will soon become law and local governments should be considering bylaw amendments in response.

How Alberta's population estimates will apply to 2022 funding

Background

From 1913 to 2019, Alberta Municipal Affairs produced the Municipal Affairs Population List that detailed population counts for municipalities, Metis Settlements, and First Nations communities in the province based on the most recent municipal or latest federal census.

In 2019, the province announced that it would implement a system to estimate the population of each municipality annually rather than relying on municipal censuses between each federal census year for purposes of funding municipalities. The change was based on an expressed objective to provide greater consistency in funding.

In 2020, the Municipal Affairs Population List was discontinued and will be replaced by population estimates from Treasury Board and Finance. The 2021 population estimates are expected to be available this month.

Alberta Municipal Affairs has informed Alberta Municipalities that the following population data will be used by the province to calculate the allocation of provincial funding to municipalities in 2022:

- The Canada Community Building Fund (formerly the Gas Tax Fund) and the Municipal Police Assistance Grant will be distributed based on the annual population estimates prepared by Alberta Treasury Board and Finance.
- Municipal Sustainability Initiative (MSI) Capital is estimated to be 40.6% of each municipality's 2021 MSI Capital allocation.
- MSI Operating is estimated to match each municipality's 2021 allocation.
- Public Library Operating Grant amounts will be determined following the release of the provincial 2022 budget.
- Family and Community Support Services (FCSS) funding will be made according to three-year signed agreements between municipalities and the province.

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