LIDSTONE & COMPANY
ALBERTA MUNICIPAL LAW LETTER

In this Issue

Taxation of lands held by corporation controlled by a First Nation

It is well-established that lands outside reserves that are held in fee-simple, whether by an aboriginal or non-aboriginal person, are not subject to exclusive federal jurisdiction and, therefore, can be subject to municipal taxation and other bylaws. A question that sometimes arises is whether lands owned by a corporation controlled by a first nation ("FN Corp.") are also subject to municipal taxation and other bylaws. We answer that question in the affirmative in this article.

The *MGA* provides in s.289(1) that municipalities must prepare assessments for all property in a municipality, except for certain categories of properties described in the *MGA* which cannot be subject to municipal tax assessments. These exempt properties include all "property in Indian reserves" (s.298(1)(t)). Section 1(1) provides that 'Indian reserve' means a 'reserve' within the meaning of the *Indian Act* (Canada).

The *Indian Act* defines 'reserve' (s.2(1)) as land to which the legal title is vested in the Crown and that has been set apart for the use and benefit of a band, even if the said band has released or surrendered its rights or interests in the land. Thus, a key characteristic of land to be considered a 'reserve' under the *Indian Act* and, consequently, as an 'Indian reserve' under the *MGA* is that the land should be vested in the Crown.

In *Aseniwuche Winewak Nation v. Greenview (Municipal District No. 16)*, 2000 ABQB 839 (CanLII) ("*Greenview*"), the Court considered if lands owned in fee simple by certain co-operatives incorporated for the purpose of collective landholding by aboriginal persons could be subject to municipal taxes. Relying on an interpretation of s.298(1)(t) of the *Municipal Government Act* (which was substantively identical to the provision today), the Court concluded that such lands did not fall within the exemption established in the *MGA* for "property in Indian reserves.

Under s.91(24) of the *Constitution Act, 1867*, the federal Parliament has exclusive legislative authority over "Indians, and Lands reserved for the Indians". If the FN Corp could be characterized as an "Indian" or if the lands could be characterized as being "reserved for the Indians", then a municipality's taxation authority would not be applicable.

(a) Is the FN Corp an "Indian" under s.91(24)?

This question, in a general form, was expressly answered in *Reference Re Stony Plain Indian Reserve No. 135*, 1981 ABCA 316 ("*Stony Plain*"). There the issue referred to that Court was: "Is a corporation…in which all the shareholders are registered Indians… an Indian within the meaning of section 91(24)"?

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The Court found that a corporation attains its legal status from incorporation and is not characterized by the status of its shareholders. Accordingly, the status (i.e., ethnic status or otherwise) of any or all of its shareholders reservation has no bearing on the status accorded it at law. Thus, the FN Corp is not an "Indian" for purposes of s.91(24) of the *Constitution Act*.

(b) Are the lands "reserved for the Indians" under s.91(24)?

It has long been established that lands that are formerly "reserved for the Indians" under s.91(24) cease to be so if fee simple title to the lands is granted to any person (*Att'y-Gen'l for Canada v. Giroux*, 1916 CanLII 586 (SCC)).

The above principle was applied in *Stony Plain*, where a number of constitutional questions were posed to the court involving surrendered Indian lands. With respect to whether such lands constitute "lands reserved for the Indians", the Court held that once reserve land is surrendered and conveyed in fee simple to a grantee, it is no longer subject to the provisions of the *Constitution Act* or the *Indian Act*. Since the legal title is no longer vested in the federal Crown, the general laws of Alberta apply, regardless of whether the fee simple title-holder is an Indian or a non-Indian.

Conclusion

In our view, the following passage from the 'Aboriginal Law Handbook' concisely summarizes the law on this issue that we have discussed above through reference to case law:

"Corporations are separate legal entities. Therefore, they are not a 'band' or an 'Indian' even if they are owned by bands or Indians, so they do not receive income tax exemptions under the Indian Act.

Corporations owned by registered Indians, bands or other Aboriginal people will generally be subject to all the usual taxes, including a corporate tax on profits, GST/HST, PST, or other taxes. It does not matter whether the corporation is on or off-reserve or whether it exists to serve Aboriginal people or for commercial gain."

~ Rahul Ranade

Scope of the Municipality's Obligations under s. 350 of the MGA in Responding to Due Diligence Requests from Prospective Purchasers in Real Estate Transactions

Municipalities often receive due diligence search requests from law firms representing purchasers in real estate transactions ("**Due Diligence Searches**"). Municipalities may respond to these requests in a variety of ways and sometimes, the response includes the documents requested or expresses an opinion as to the contents of the records.

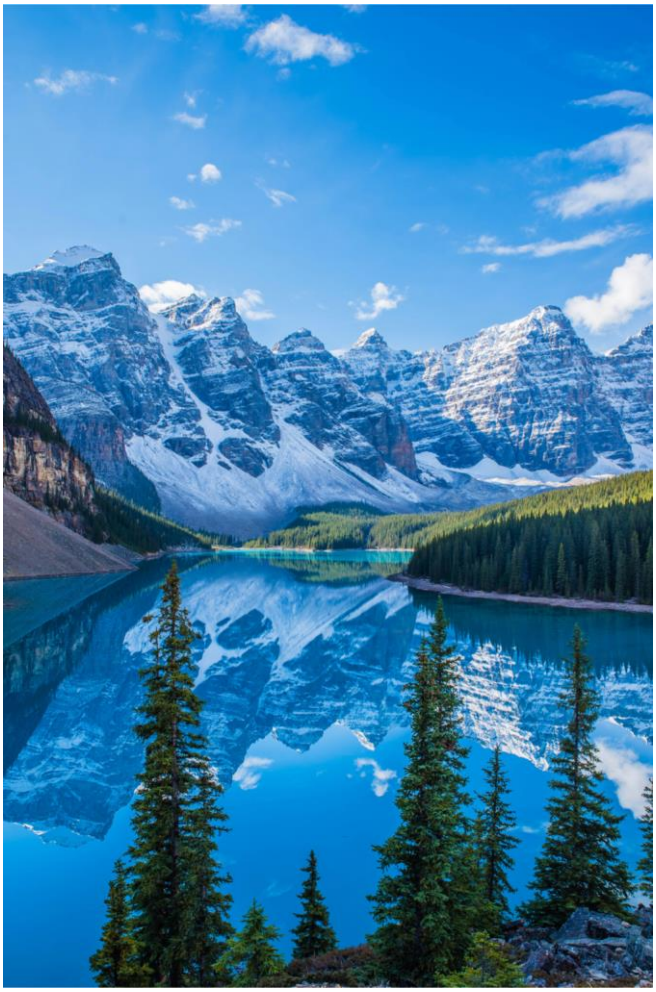
There is no legal obligation for the municipality to provide responses to Due Diligences Searches, unless they have been submitted as a request for access to information under the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 ("**FOIP Act**") or they are a request for a tax certificate pursuant to section 350 of the *Municipal Government Act*, RSA 2000, c M-26 ("**MGA**"). Each of these specific types of searches is discussed in further detail below.

Overview

We recommend instituting a standardized practice direct that Due Diligence Searches are to be completed within the legal framework for a request for access to information under the FOIP Act. The FOIP Act provides clear direction in terms of the obligation to provide documents (also known as records), the scope of the records that must be disclosed and those that must not be disclosed. The timelines for these Due Diligence Searches is thirty days, unless extended following the processes set out in the FOIP Act. The FOIP Act restricts the fees that can be recovered for these services to the actual cost of providing the services.

As an exception to this recommendation, there are common Due Diligence Searches for residential real estate conveyancing that can be provided more expeditiously and with careful controls to manage risk. Municipalities must offer tax certificates and may offer compliance certificates outside of a formal request for access to information under the FOIP Act.

For convenience, many municipalities have developed an express service of providing



limited information in the form of a compliance certificate for residents conveying real property. Typically, these services provide a stamp on a real property report ("**RPR**") confirming that the buildings comply with the land use bylaw.

These services are generally intended to meet the requirements of the Western Law

Societies' Conveyancing Protocol that was established by the four Western Law Societies in 2001 (the "**Protocol**"). For residential real estate transactions, the Protocol facilitates the advance of mortgage funds by allowing for efficient recovery by lenders in the event of a claim arising from a defect in the title of the property to be transferred, including non-compliance with municipal bylaws.

One example of a Due Diligence Search may involve a requestor seeking the zoning designation of a property and whether the municipality has any record of the property not conforming to the zoning designation. In our experience, it is common for compliance certificates to identify the land use district designation and to identify that the structures on the RPR comply with both the uses and regulations thereunder. In practice, it is common for compliance to expressly exclude any comments on the use of the structures because they are not apparent from an RPR.

Because these services are created by municipalities, each municipality has the authority to set its own standards with respect to the information disclosed as part of these services and the timelines on which they commit to providing this information. In all cases, the compliance certificate services should be carefully crafted to ensure that they do not expose the municipality to unnecessary risk. In all cases, municipalities should avoid offering opinions on the state of the property that is the subject of the request (e.g. environmental contamination or compliance of the use with municipal bylaws). These services can create claims that the municipality has inadvertently disclosed information in contravention of the FOIP Act, that it has misrepresented the information in its custody or, in limited cases, has violated copyright or intellectual property rights of a document's authors. That being said, these risks can be managed by appropriately drafted disclaimers on the scope of the information being verified as part of these services. Some other practices are discussed in further detail below.

In many cases, the scope of the information requested for Due Diligence Searches exceeds the types of information that would typically be provided in response to a request for a certificate of compliance. Consequently, we recommend that the standard practice at the municipality direct requestors to complete their Due Diligence Searches within the legal framework for a request for access to information under the FOIP Act or a tax certificate under the MGA.

Scope of the municipality's obligations under s. 350 of the MGA

Some of the examples of Due Diligence Search would likely be disclosed through a request for a tax certificate, including the following:

1. local improvement charges (to be levied including if any amount(s) have ever been paid and whether any amounts are outstanding) with respect to (but not limited to):
    (a) drainage, water, storm and sewer improvement charges;
    (b) power, street lane paving, curbs and gutters, sidewalks and special benefits, street lane and lighting charges; and
2. real property tax account information including but not limited to property assessment, current tax levy, status of the tax account, amounts of any additional items which may be added to the tax account and any additional information of this nature;

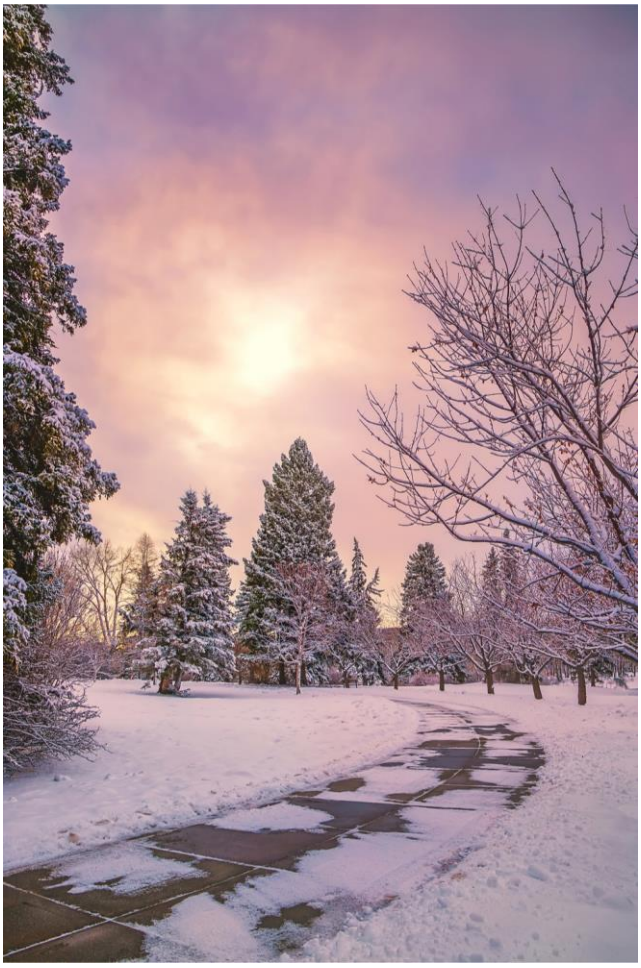
The municipality is obligated to provide tax certificates in accordance with section 350 of the MGA. This section provides:

> 350 On request, a designated officer must issue a tax certificate showing
>
> (a) the amount of taxes imposed in the year in respect of the property or business specified on the certificate and the amount of taxes owing,
>
> (b) the total amount of tax arrears, if any, and
>
> (c) the total amount of tax, if any, in respect of which collection is deferred under this Part.

The term "taxes" includes local improvement charges and any other amounts added to the tax roll.

In our experience, the amount that has "ever been paid" or "to be levied" are often included in a tax certificate because of the way in which a municipality's tax accounting software is set up. Many local improvement taxes provide for the amount to be paid in full at any time, thereby saving the property owner the interest on the charges. In our experience, many tax certificates show the credits in favour of the total value of the local improvement tax or the outstanding value of the local improvement tax. Whether this information is contained in the municipality's existing tax certificate format should be easily answered by a taxation clerk.

We have also given advice on other files that it is prudent to ensure that the total value of local improvement taxes are reflected on a property tax roll, even if these amounts are amortized over a number of years. This advice arises as a result of a number of situations in which parcels that are subject to a local improvement tax have been acquired by the provincial or federal governments and are no longer subject to the obligation to pay municipal property taxes. As a matter of policy, these levels of government are generally unwilling to cover local improvement taxes as part of their payments in lieu of taxes. This legal framework



has left municipalities on the hook for repaying the property's portion of the local improvement tax or amending the area subject to the local improvement tax, with significant resistance from the impacted rate payers.

There is no deadline in the MGA to provide this information, but the section indicates that it is to be provided "on request" and therefore these types of requests should be processed and provided relatively quickly.

Scope of the municipality's obligations under the FOIP Act

As recommended above, the Due Diligence Searches should be treated as a request for access to information under the FOIP Act. The FOIP Act indicates that "An applicant has a right of access to any record in the custody or under the control of a public body." The only exceptions to this right of access to the records are those types of records listed in Division 2 of Part 1 of the FOIP Act. These exceptions are either mandatory, meaning that the record cannot be disclosed, or they are discretionary meaning, that they can be disclosed in certain circumstances. Examples of each include the following:

Mandatory Exceptions

- disclosure would be harmful to the business interests of a third party (section 16(1));
- the information is about a third party and is in a tax record (section 16(2));
- disclosure would be an unreasonable invasion of a third party's personal privacy (section 17);
- the information is in a law enforcement record and its disclosure would be an offence under an Act of Canada (section 20(4));
- the information would reveal Cabinet or Treasury Board confidences (section 22);
- records relating to an audit by the Chief Internal Auditor that are created by or for the Chief Internal Auditor (section 24(2.1)(a));
- disclosure would reveal information about an audit by the Chief Internal Auditor(section 24(2.1)(b)) and
- the information is subject to legal privilege and relates to a person other than a public body (section 27(2)).

Discretionary Exceptions

- disclosure harmful to individual or public safety (section 18);
- confidential evaluations (section 19);
- disclosure harmful to law enforcement (section 20(1));
- disclosure harmful to intergovernmental relations (section 21);
- local public body confidences (section 23);
- advice from officials (section 24(1));
- disclosure harmful to the economic or other interests of a public body (section 25);
- testing and audit procedures (section 26);
- legal and other privileged information of a public body (section 27);
- disclosure harmful to the conservation of heritage sites, etc. (section 28); and
- information that is or will be available to the public (section 29).

In some cases, the records being sought may be part of records that are routinely disclosed or that are proactively disclosed. It may be worthwhile to compile a list of the types of documents that are routinely and proactively disclosed on the municipality's landing page for FOIP requests. This information might assist requestors in assessing whether the information they are seeking can be obtained without the need for a specific request for access to information.

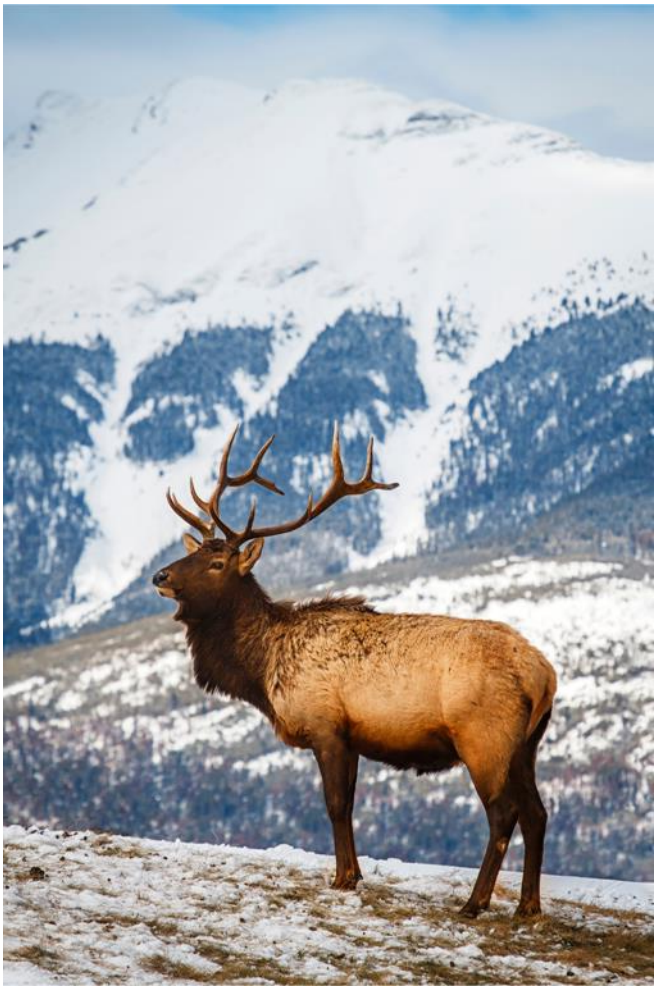
Section 7(2) of the FOIP Act only requires that the request be in writing and provide enough detail to enable the public body to identify the record. In practice, many municipalities direct an applicant to submit enquiries in writing to the FOIP Coordinator rather than accepting

enquiries made directly to a specific employee or department. This practice allows the requests to be processed by those staff with training and expertise in the requirements of the FOIP Act. This requirement would be consistent with best practices.

These requests must be dealt with promptly because the FOIP Act does not specifically require that the written request be received by the FOIP Coordinator. Any delays in forwarding the request to the FOIP Coordinator can impact the deadline for responding to the request. The long-standing practice of accepting requests through different departments will likely require training and communication with stakeholders and staff to ensure that these types of requests are processed in accordance with the terms of any new administrative directive.

In accordance with section 11 of the FOIP Act, the head of the public body must make "every reasonable effort to respond" to a request within thirty days of receiving it. The public body may either extend the deadline by a further thirty days or for a longer period with the permission of the Commissioner if, among other reasons, (a) the applicant does not give enough detail to enable the public body to identify a requested record, or (b) a large number of records are requested or must be searched and responding within the period set out in section 11 would unreasonably interfere with the operations of the public body. The Office of the Information and Privacy Commissioner ("**OIPC**") has found that a public body will only be allowed to extend this deadline if the inability to respond within thirty days arises because of "circumstances beyond its control." These circumstances do not include staff shortages.

Some requests arising from Due Diligence Searches will likely fall within either the mandatory or discretionary exemptions under the FOIP Act. For example, some requests will relate to developments, presumably including applications by third parties. Depending on the



stage of these applications, this information may include disclosure that is harmful to a third party's business interests. Other examples may include a request for information on bylaw enforcement actions. Depending on the requestor, these records may be exempt from disclosure because they relate to a "law enforcement matter".

Significantly, the FOIP Act only deals with "records" which are existing documents. There is no obligation for the municipality to provide opinion, comments or advice in response to a request for access to information.

The best practices for any risk management exercise includes several layers of protection. If there are multiple layers of protection and one layer fails, there are other protections in place. In our view, each practice on its own cannot avoid every potential risk of liability. For example, waivers and disclaimers are challenging to uphold through litigation and even the best training programs still result in inadvertent miscommunications.

Therefore, part of the process of designing any administrative directive could be to identify the types of claims that are priorities in terms of risk. Of particular concern in the examples of the Due Diligences Searches are those asking for information about hazardous conditions such as landfills and chemicals used on the property in the past. For these types of request with higher risk, the municipality can implement a more rigorous risk management program and assess whether it is necessary for all types of searches, such as copies of building or development permits.

~ Alison Espetveidt

Case Law

Edmonton (City) Library Board v. Edmonton (City)

Background

The City of Edmonton Library Board ("Library") appealed decisions of the City of Edmonton Subdivision and Development Appeal Board ("SDAB") which permitted the development of a cannabis retail store in downtown Edmonton.

The appeals concerned the power of the SDAB under s 687(3)(d) of the *Municipal Government Act* ("*MGA*") to vary development standards in a land use bylaw. In each of the appeals, the development standard in question was the requirement in the City of Edmonton *Zoning Bylaw 12800* ("*Zoning Bylaw*") that there be a separation distance of at least 200 metres between a cannabis store and a public library.

In this case, the Library objected to a development permit granted by the Edmonton SDAB for the development of a cannabis retail store in downtown Edmonton by varying the 200-metre separation distance from a public library prescribed in the *Zoning Bylaw*. The Library asserted that the SDAB wrongly imposed on opponents of the proposed development the burden of proving that the test for a variance had not been established under s 687(3)(d) of the *MGA*.

Section 687(3)(d) of the MGA provides that the SDBA:

> "(d) may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,
>
> (i) the proposed development would not
>
> (A) unduly interfere with the amenities of the neighbourhood, or
>
> (B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land, and
>
> (ii) the proposed development conforms with the use prescribed for that land or building in the land use bylaw."

The SDAB provided several reasons why the variance would not, in its words, "offend" s 687(3)(d) of the MGA. First, the "actual practical distance" (i.e., the walking distance) between the cannabis store and the public library was much greater than the distance as a straight line on a map, which "minimized the impact of the proposed development being in close proximity to the library. Second, the underground location of the cannabis store further mitigated any impact on the public library. As the SDAB pointed out, since there

was "no direct visual connection between the library and the proposed development . . . patrons would have to go out of their way to pass by or access this site". Finally, the SDAB determined that nothing from the Library or the development officer persuaded it otherwise. The Library was the only party opposed to the variance and the SDAB characterized its objections as being "general in nature" and concluded that many of its concerns "are addressed by the remote location of the proposed development".

The Library obtained permission to appeal the SDAB's decision to the Alberta Court of Appeal on three questions:

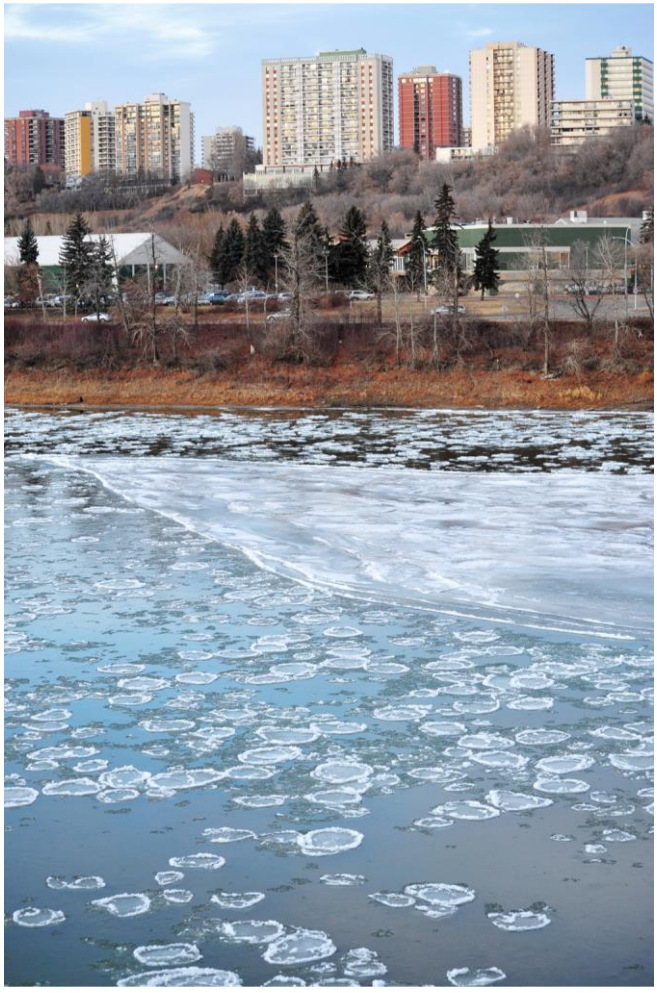
1. Did the SDAB incorrectly interpret the test for a variance in s 687(3)(d) of the MGA?

2. Which party bears the burden of establishing that the test in s 687(3)(d) is, or is not, met? Did the SDAB incorrectly assign the burden to the Library?

3. Did the SDAB incorrectly interpret the separation distance in s 70 of the Zoning Bylaw?

On the first two questions, the Court of Appeal concluded that the SDAB did not misinterpret s 687(3)(d) of the MGA by incorrectly assigning the burden of proof to the Library or otherwise. In rejecting the appeal on these grounds, the drew on its judgements in *Edmonton (City of) Library Board v Edmonton (City of) 2021 ABCA 355* ("Rundle") and *Newcastle Centre GP Ltd v Edmonton (City) 2014 ABCA 295* ("Newcastle"), noted that "conventional language about burdens of proof is not helpful given the role and jurisdiction of an appeal board under the MGA". Instead, "[a]n appeal board must consider all the evidence both for and against the variance" in order to "decide what reasonable inferences it should properly draw from the "evidence" as a whole presented at the hearing" (para. 17).

The Court of Appeal ruled that the SDAB acted in accordance with these principles: "[i]n our view, the SDAB acted in accordance with our



conclusions in Rundle. After hearing evidence and argument for and against the variance, it inferred from the evidence as a whole — including a number of compelling points from the [d]eveloper — that the proposed development would not lead to the negative effects contemplated in s 687(3)(d) of the MGA."(para. 18)

The Court of Appeal concluded "[t]his is not a case where an appeal board felt compelled to allow a variance simply because opponents failed to adduce conclusive evidence of negative effects. Rather, it is a case of a

proponent marshalling significant and compelling evidence why the negative effects condition had been met."(para. 22)

~ Lindsay Parcells

Rocky View (County) v. Wright

Background

This judgement concerned the determination of legal costs arising from an earlier judgement of the court in *Rocky View (County) v. Wright* (2021), 2021 ABQB 422 (the "**First Judgement**"). In the First Judgement, the judge dismissed the municipality's applications to have Councillor Wright removed from elected office on the basis that she had voted on a matter in conflict of interest and on the further basis that she had a property tax debt owing to the municipality. The court concluded that the purpose, structure and language of the *Municipal Government Act* (the "*MGA*") all evidence an intention that elected councillors actively represent their constituents on all decisions, including those that touch their areas most directly unless the issue in question has a clear and material financial impact on a councillor or their family. The court determined in the First Judgement that the matter Councillor Wright voted on had no material impact on her or her family and a reasonably well-informed member of community would not have thought that Councillor Wright would likely be influenced in her vote by the decision in question. As such, she had no pecuniary interest in the matter within meaning of the *MGA*.

With respect to the municipality's application to have Councillor Wright removed for unpaid property taxes in the First Judgement, the court concluded that although the councillor did not meet the due diligence standard expected of councillors, the evidence established that she did not know that her property taxes had gone unpaid. Further, the court concluded that a special meeting called by the mayor and council to have Councillor Wright declared disqualified and removed for alleged conflict of interest fell below standards of democratic due process and was the product of political animus toward her and a desire to remove her for reasons unrelated to the property tax debt.

Having dismissed the municipality's applications to have Councillor Wright removed from the office in the First Judgement, the court considered the issue of responsibility for legal costs. The court awarded Councillor Wright lump sum costs totaling $40,000 inclusive of disbursements, GST, and costs. The court determined that she should be reasonably indemnified for defending herself against the municipality's conflict of interest application, and that she should receive enhanced costs for defending herself against the municipality's tax arrears application. The court concluded that the municipality's application to have Councillor Wright removed for tax arrears might never have been commenced if she had been given an opportunity to be heard on the allegations and the municipal council had considered the merits of the situation with an open mind; however, as the court concluded that Councillor Wright was also the author of her own misfortune on the tax arrears issue, the court concluded that it was not unjust that she bear some of the costs of defending her position on that issue.

~ Lindsay Parcells

Alberta News

RMA Engagement Guide for Provincial Police Transition Engagements

The Rural Municipalities of Alberta ("RMA") has prepared an engagement guide that will help rural municipalities understand the issues that will be discussed at upcoming provincial police transition engagement sessions. The sessions are part of plans announced by

Alberta Justice and Solicitor General ("JSG") to engage with municipalities regarding the potential transition from RCMP police services to a new Alberta Provincial Police Service ("APPS"). The engagement sessions will address issues identified in the JSG's APPS Transition Study, APPS Future State Report, and the APPS Current State Report.

The RMA is also finalizing a provincial police service transition web hub that will host the engagement guide, APPS reports, and information on engagement sessions.

Changes to public health measures

The province announced the phased lifting of COVID-19 related public health measures on Feb. 8.

Step 1, which came into effect following the announcement, includes the removal of the Restrictions Exemption Program (REP) and removes capacity limits on venues with capacities under 500, including municipally operated venues such as libraries.

Step 2, which will take effect March 1, will include the removal of provincial mask mandates, mandatory work from home requirements, and screening prior to youth activities.

Step 3, which will take effect at an undetermined future date, will remove any remaining restrictions, based on the continued decline of provincial hospitalization rates.

2021 Canadian Census Results for Alberta

The 2021 Canadian Census indicates that Alberta continues to urbanize. Census data shows that since the previous census, Edmonton and Calgary have continued to grow consistently with historical averages (8.3% and 5.5% respectively) while smaller cities and towns just outside these cities experienced the greatest increases. In the Calgary region, the population of the City of Airdrie increased 20.3% while the City of Chestermere's population increased by 11.4%. In the Edmonton region, the population of the City of Leduc increased by 13.7% and the Town of Stony Plain increased by 4.7%.

Other municipalities outside these urban areas also increase. Other municipalities outside these urban areas also experienced population increases, including the Town of Canmore which experienced a 14.3% increase in its population.

The 2021 census also confirmed that 87.7% of Albertans now reside in municipalities that can be best described as 'urban', including cities, towns, villages, summer villages, and specialized municipalities. This continued shift to urban centres will have an impact on how senior levels of government fund infrastructure.

As of 2016, Alberta municipalities managed 62% of collector roads and 48.2% of arterial roads in addition to their ownership and operation of other facilities and services for their residents. With this background, the province is currently determining the funding allocation formula for the Local Government Fiscal Framework (LGFF) which will replace the Municipal Sustainability Initiative (MSI) in 2024 as the province's largest funding program for municipalities. Municipalities will need to be actively engaged in this process to ensure that funding from the province properly reflects these demographic shifts.

Meet Alison Espetveidt

Alison is a municipal lawyer in our Calgary office who is licenced in Alberta and British Columbia. She advises and advocates for clients on a wide range of municipal law issues, including land use planning and development, real estate, expropriation, governance, and enforcement. Alison's interest in municipal issues began when she worked in the aldermanic office at the City of Calgary. She has appeared as an advocate before many different bodies in Alberta. She has experience with administrative tribunals such as subdivision and development appeal boards, assessment review boards, the Land Compensation Board, the Alberta Utilities Commission and the Environmental Appeals Board. She has also appeared in the Provincial Court of Alberta, the Court of Queen's Bench (Alberta) and the Alberta Court of Appeal.

In addition to private practice, Alison has worked in-house for municipalities and businesses. She understands the complexities of the issues facing her clients. In her practice, she aims to provide practical solutions to immediate problems and to identify opportunities to develop best practices. Alison works hard to understand her clients' goals and priorities.

LIDSTONE & COMPANY acts primarily for local governments in Alberta and BC. The firm also acts for entities that serve special local government purposes, including local government authorities, boards, commissions, corporations, societies, or agencies, including police forces and library boards.