LIDSTONE & COMPANY

LAW LETTER

In This Issue

Local procurement and the global supply chain crisis

It would be an understatement to say that the global supply chain is facing a crisis. What started out with local shortages as a result of the COVID-19 emergency in 2020 soon blossomed into an endemic issue across the global supply system. By the end of 2021, supply issues have hit every step on the stairway of commerce, from raw materials to consumer retail. The reasons for the failure of the supply chain are complex and, like the financial crisis of 2008, it may take years for us to get the full story of what is happening currently.

Local governments, like any other sector of society and the economy, rely on the global supply chain for all its material needs - from personal protective equipment for its staff to raw material for infrastructure projects. Indeed, the crisis has hit local government hard in the form of unavailability of goods, delayed supplies, and rising costs of procurement.

What should local government purchasers do differently in the face of global supply chain issues? This article discusses some such measures that purchasers can consider. While each procurement is different, these measures have general applicability across many types of procurement.

The first measure that can be considered is structuring procurements to be *time sensitive*. With global uncertain about how the supply chain will behave in the coming months and years, if a buyer looks for a three- or five-year commitment for supply of certain goods, guess what a reasonable vendor will do? They will inflate their bids or quotes, not knowing what their own supplies will look like in coming years. To control prices, purchasers should consider structuring procurements so that the "look ahead" period for pricing is as short as practically possible. Because vendors have certainty about

their supplies in the shorter term, they would be likely to offer better prices. The longer the period over which prices are expected to be fixed, the more "padded" they are likely to be.

Another potential structural adjustment to procurement arrangements also pertains to *time*. It is well known that traditional purchasing processes (e.g., tender or request for quotations) take a long time, as long as several months.

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In such procurements, because prices are "locked in" at the time of tendering, there is an incentive for bidders to inflate their prices to make up for future uncertainty. To avoid this perverse incentive, purchasers can consider alternatives to this traditional procurement that are nimbler and may offer better price control.

One such alternative is to create pre-qualified lists of vendors (without price being a consideration). Once such a list is in existence, the local government can get quotes from this pool of vendors with relative rapidity, without again resorting to open tendering. If the local governments finds quoted prices to be outside its budget, it can simply withhold the purchase for some amount of time, without setting itself back in the procurement journey. Because the validity of such pre-qualified lists can be several years (subject to trade agreement requirements about re-advertising), it allows local governments buyers to time the market instead of being timed *by* the market (as it happens in traditional tendering processes).

The final potential measure we will discuss pertains to *contracting*. Contract templates typically used in local government procurement contain 'force majeure' clauses which protect the parties from being obligated to perform their side of the deal when conditions outside their control occur. With respect to the supply chain issues, force majeure clauses tend to favour vendors and, indeed, vendors across Canada and the world have relied on such clauses in the past two years to be excused for delayed performance. From a purchaser's selfish perspective, the simplest thing would be simply to delete such a clause. But doing so would be neither fair not economical, because vendors will then simply inflate their bids to make up for the loss of flexibility.

Instead, local governments could consider a genuine risk-sharing arrangement with vendors, which distributes the risk of additional cost or time if the global supply chain gets strained further in coming months of years. One way to objectively define a "strain" on the supply chain is to establish a commonly-understood baseline for the contract, such as the Consumer Price Index (CPI) published by Statistics Canada. If, at the time supply chain issues are claimed by the vendor, the CPI is at or lower than the baseline CPI, then the vendor would take all risk. On the other hand, if CPI is higher, then the risk would be split between the vendor and the local government. This is just one example of how risk-sharing arrangements can be structured in the contract.

The above discussion only covers some of what could be many creative approaches to reducing the adverse impact of the global supply chain crisis on local government procurement. Whichever approach is chosen, the key is to be prepared and face the crisis in proactive rather than reactive fashion (do take note that supply chain commentators are predicting that the health of the supply chain may be no better in 2022 than it was in 2021!).

~ Rahul Ranade

Municipal Societies – Their Incorporation and Maintenance

Introduction

Municipalities may consider organizing a society rather than a municipal corporation for carrying out a municipal service or objective. A society is a corporation but, in contrast to a business corporation, does not hold or issue shares and is not aimed at making money for its members. While it may engage in commercial enterprise to earn income, this must necessarily be "incidental" to its purposes, which must be non-profit. The earnings of a society must be directed to the purposes stated in the society's constitution. A corporation that has been registered under the *Societies Act* is prohibited under the legislation from having, as one of its purposes, the carrying on of a business for profit or gain (although it might carry on a business to advance or support its non-profit purposes). It must not have capital divided into shares and is limited as to whom and for what it may distribute its money or other property. In contrast, companies incorporated under the *Business Corporations Act* would typically be treated as an ordinary business, operating to provide profit or gain for its shareholders (see *Orchiston v. Formosa,* 2014 BCSC 1080).

In some cases, societies may also have an advantage over a business corporation, including the following:

- A society may be able to accept assistance from the municipality without a partnering agreement. That said, a partnering agreement may still be advisable given that the society will be a distinct legal entity.

- It may be easier for a society to obtain charitable status from the Canada Revenue Agency.
- A society may more clearly qualify for certain exceptions under the *Residential Tenancy Act* which are afforded to "non-profit municipal housing corporations".

- A society would not be treated as a public body under FOIPPA as long as the municipality does not substantially control it (i.e. does not appoint or choose all of the members or officers).

Considerations before incorporation

The municipality should consider a number of important issues before proceeding with incorporation of a society. First and foremost, council should clearly determine the municipal objective and consider whether that objective is best accomplished by means of a business corporation or society. As an alternative to incorporating a society, the municipality may consider establishing an in-house department with dedicated staff or some other means of achieving its objectives directly rather than through a society. The municipality should also consider if there is another type of business entity or arrangement that might better accomplish municipal objectives. For example, the municipality may consider entering into a partnering agreement under section 21 of the *Charter* (or section 183 of the *LGA*) with an external entity or creating a corporation under the *Business Corporation Act* or trust as an alternative to incorporation of a society.

A decision to incorporate will also need to be considered in context of political support. The municipality will want to be confident that the objectives and the society will be supported by the public as a wise use of municipal resources. Council will need to consider what parties may be affected by the society and once again, whether there is an alternative that better meets the needs of the community. Informing and involving the public and municipal employees in this process is vital in building and maintaining public support. The municipality will also need to consider other opportunities to regularly inform and engage the public. While this type of consultation is not required for the incorporation of a society, it may still be a beneficial exercise to gauge public feedback.

Once a decision is made to incorporate a society, the municipality should carefully consider the makeup of the board of directors. As is true of any corporation, qualified and experienced individuals should be sought out and appointed; however, in appointing these individuals, it is important to ensure that clear and comprehensive policies and guidelines are established to avoid conflicts of interest. To reduce the likelihood of a conflict of interest, municipal councilors should generally not be appointed to the society's board of directors. To ensure that council is able to adequately supervise the business of the corporation, the municipality should require the board to report to council on a regular basis and to otherwise advise council when significant business is conducted by the corporation. The municipality should also consider appointing municipal employees to the board and task the appointee with keeping council informed and ensuring the municipality's interests are addressed in board deliberations and decision making.

Incorporation

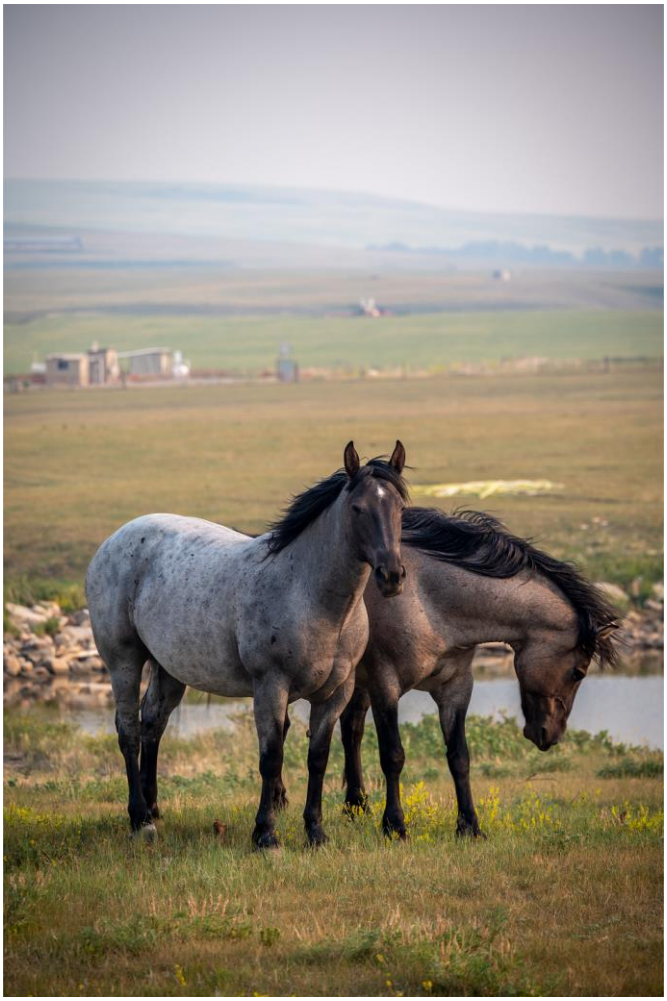
The process to incorporate a society is outlined in the *Societies Act*. Under section 13, a society is incorporated when the incorporation application is filed with the registrar, and a record is considered filed when it is accepted by the registrar and included in the register of societies as per s. 209(1). Unlike a municipal corporation, the municipality is not required to obtain the approval of the Inspector before creating the society.

The incorporation application consists of the following documents:

- The society's constitution, which must set out the name of the society and the

purpose of the society. The purpose of the society may be any lawful purpose but may not include carrying on a business for profit or gain (see section 2(2) of the *Societies Act*).

- The society's bylaws, which set out provisions regarding the internal affairs of the society and may set out restrictions on the society's activities or powers. These bylaws cannot be inconsistent with the *Societies Act* or any other legislation or regulation in BC, and a bylaw is invalid to the extent of any inconsistency. Section 11 of the *Societies Act* requires that the bylaws include provisions regarding:
    - Membership admission;
    - Any rights and obligations arising from membership;
    - A description of each member class (if the society has more than one class of members) and the rights and obligations applicable to each member class;
    - The conditions for losing good standing as a member, if applicable;
    - The election or appointment of directors;
    - The expiration of director terms if different from the default rule that terms end at the close of the next annual general meeting;
    - The quorum (if greater than three voting members) for general meetings;
    - Whether proxy voting is permitted; and
    - The rules for any indirect or delegate voting or voting by mail or other communications medium permitted by the bylaws.
- A statement of directors and registered office: The incorporation application must set out the full name and address of



each of the first directors of the society. The address does not have to be the director's personal address, but can instead be an address where the director is available or can be served with documents between 9:00am – 4:00pm on weekdays. These directors must be a natural person (that is, not a corporation or a municipality).

- $100 filing fee

The incorporation application is submitted online through Societies Online, the registrar's website for societies. The same procedure applies to the majority of society filings, such as constitution or bylaw amendments, changes of the directors or registered offices, or annual reports.

Registry forms are available as downloadable, fillable, and printable forms, so that they can be completed and signed by societies and kept with their records. The information for online filings must be entered through online forms accessible via the society's Societies Online dashboard. For each filing, societies have a choice whether to receive the records issued by the registrar in electronic or paper form (see s. 210). The selection can be made as part of the filing process.

Following incorporation, the basic affairs of the society must be organized, including appointment of senior managers, if any, passing of banking resolutions, and adoption of any pre-incorporation contracts.

Society Records

Section 20 of the *Societies Act* (BC) sets out the corporate records that the Society must maintain for the purposes of the *Societies Act*. It does not address record-keeping obligations under other enactments (for example, the records required to be maintained by the Society that is a registered charity or qualifies as a non-profit organization under the *Income Tax Act*). However, for the purposes of the *Societies Act*, s. 20 provides a useful checklist to organize the records of the Society.

The records generally fall into two categories, depending on who may be entitled to access the documents under the *Societies Act*. Section 20(1) enumerates records that are always accessible to directors and members (see s. 24(1) and (3)). Member access to the records listed in s. 20(2) can be restricted by bylaw, except to the extent that such records contain conflict of interest disclosures by directors and senior managers. Since the s. 20(2) records comprise the directors' meeting minutes and consent resolutions as well as the accounting records of the society, directors have full access to these documents.

The general public does not have access to the Society's records as of right. The only exception concerns the financial statements and auditor's report. Pursuant to s. 28(2), anyone can request a copy of the financial statements upon payment of the fee set by the Society. The fee cannot exceed $10 plus $0.10 per page for emailed copies and $0.50 per page for copies provided by other means (s. 24(5) and s. 6 of the *Societies Regulation*). Members and directors do not need to pay for copies of the financial statements.

Societies may, however, in their bylaws grant access to some or all of their corporate records to other persons, groups of persons, or the general public. The only record that is excluded from public accessibility is the register of the Society's members (see s. 24(4)).

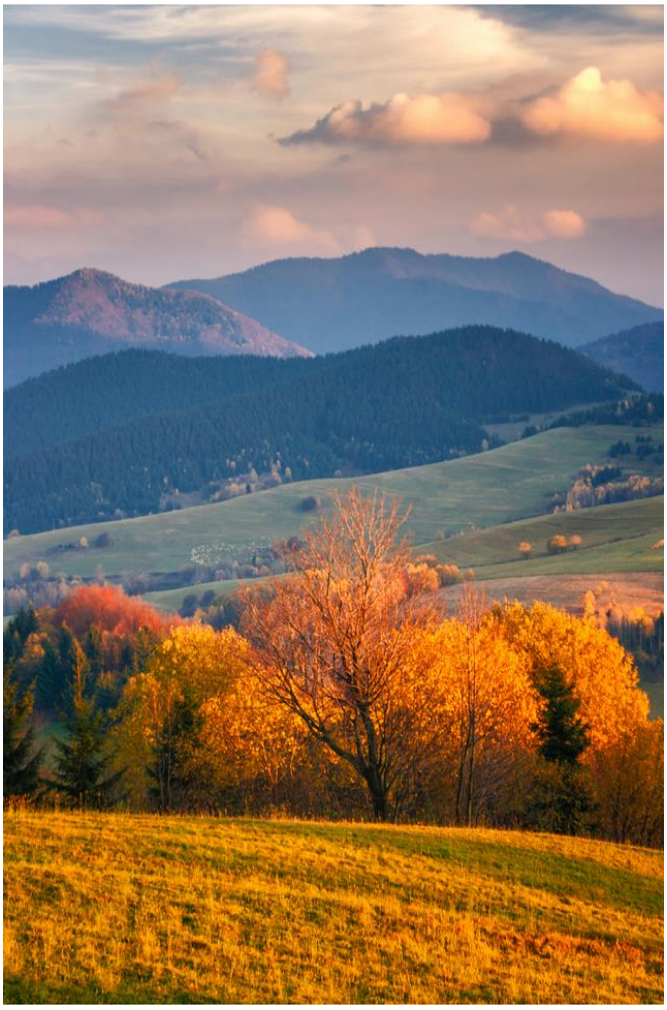
The records to be kept under s. 20(1) and that are *accessible to members and directors* are:

- the certificate of incorporation;
- the constitution (each certified copy furnished by the registrar, not only the most current version);
- the bylaws (each certified copy furnished by the registrar, not only the most current version);
- the statement of directors and registered office of the society (each certified copy furnished by the registrar, not only the most current version);
- each confirmation, other certificate, or certified copy of a record furnished by the

registrar, other than in response to a request;

- a copy of each order made in respect of the society by any court or tribunal or a federal, provincial, or municipal government body, agency, or official, including the registrar;
- the society's register of directors, including contact information provided by each director (which need not be the residential address);
- each written consent to act as director and each written resignation of a director;
- a copy of each record (other than directors' meeting minutes or consent resolutions) evidencing the disclosure of director's or senior manager's interest;
- the portion of directors' meeting minutes or consent resolutions evidencing the disclosure of a director's or senior manager's interest;
- the society's register of members, organized by different classes of member if different classes exist, including contact information provided by each member (such as mailing addresses, email addresses, or fax numbers);
- the minutes of each meeting of members, including the text of each resolution voted on at each meeting;
- a copy of each ordinary resolution or special resolution, other than a resolution included in the minutes of each meeting of members, and, in the case of a resolution consented to in writing by the voting members, a copy of each of the consents to that resolution; and
- the financial statements required under s. 35 of the *Societies Act* and the auditor's report, if any, on those financial statements.

The records to be kept under s. 20(2) and that are accessible to directors and to members *unless restricted by the bylaws* are:



- the minutes of each meeting of directors that lists all of the directors at the meeting and the text of each resolution voted on at the meeting;
- a copy of each consent resolution of directors and a copy of each of the consents to that resolution; and
- adequate accounting records for each of the society's financial years, including a record of each transaction materially

affecting the financial position of the society.

Members are entitled to inspect portions of records kept under s. 20(2) evidencing the disclosure of a director's or senior manager's interest, even if their access to director minutes or resolutions has been restricted in the bylaws (see s. 20(1)(g)).

Annual General Meetings

Annual general meetings are governed by ss. 71 to 73. The directors of the Society must call such meetings so that an annual general meeting is held in each calendar year. However, the Society is not required to hold an annual general meeting in the calendar year in which it is incorporated (s. 71).

Societies are required to present financial statements at an annual general meeting and the financial statements may not be older than six months at the time of the annual general meeting (see s. 35(2)(b)). In consequence, the Society will need to hold its annual general meetings within six months of its year end. For example, if the Society's year end is December 31, it would need to hold its annual general meeting by June 30 of the next year. The Society may, at no cost, request by December 31 that the registrar postpone the annual general meeting for that year to a date no later than March 31, or if a later date is prescribed, that later date, of the following year (s. 71(3)). The request is made through Societies Online and is only available between November 1 and December 31. If the request is approved, the meeting must be held on or before the date specified by the registrar. Once the meeting occurs, it will be deemed to have been held in the preceding calendar year (s. 72). Accordingly, a separate annual general meeting is still required for the calendar year in which the postponed meeting was actually held.

Section 72 recognizes that members may deal with the business to be conducted at all annual general meetings by written resolution consented to by all voting members. The consent resolutions must be adopted on or before the date the annual general meeting must be held; that is to say, either by December 31 of each year or by March 31 of the next calendar year or a later prescribed date, if approved by the registrar (s. 71).

Business at Annual General Meetings

The business that needs to be conducted at all annual general meetings is partially prescribed by the *Societies Act* and will otherwise be determined by the bylaws of each society. At a minimum, the *Societies Act* contemplates:

- determination that a quorum exists (s. 82);
- presentation of the financial statements of the society by the directors (s. 35);
- if an auditor has been appointed, presentation of the auditor's report on the financial statements (s. 35);
- election or appointment of directors (ss. 42 and 48(2));
- appointment of an auditor if required under s. 111(1)(a) or if the society has opted to have an auditor; and
- any member proposal to be considered in accordance with s. 81.

Other business typically conducted at all annual general meetings includes:

- election or appointment of a chairperson for the meeting;
- approval of the meeting's agenda; and
- approval of prior meeting minutes.

Annual Reports

Within 30 days after an annual general meeting has been held (or deemed to have been held if members proceeded by consent resolution), the Society must file an annual report with the registrar through Societies Online. The annual report must include the date on which the

meeting was held (s. 73(1)). The Society must file an annual report with the registrar for each calendar year, even if it fails to hold an annual general meeting as required by s. 71 or fails to deal with the annual general meeting business by consent resolution as allowed by s. 72. In that case, the annual report must be filed by January 31 of the next calendar year and indicate that no annual general meeting was held (s. 73(2)). If an annual general meeting was postponed with the approval of the registrar under s. 71(3), the report must be filed within 30 days after the date set by the registrar. If no meeting was held on or before that date, the report must indicate that the society did not hold an annual general meeting in that calendar year.

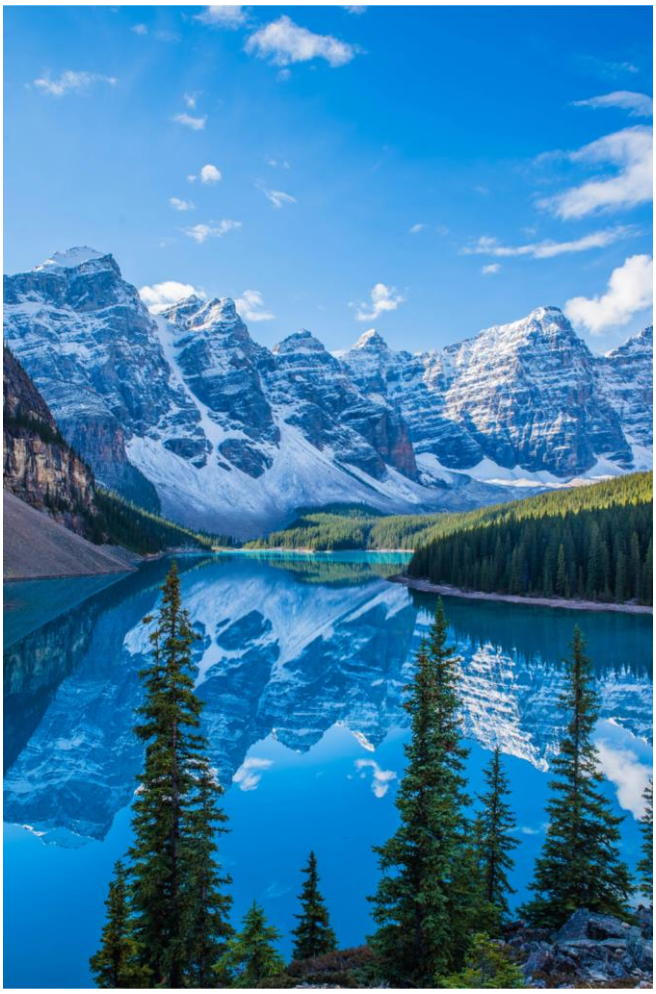
A society that files annual reports in two consecutive years indicating that an annual general meeting was not held may receive a notice from the registrar indicating that the registrar may dissolve the society unless it holds an annual general meeting for the calendar year in which the notice is sent and indicates in an annual report filed for that calendar year that the annual general meeting was held (s. 73(4)).

~ Lindsay Parcells

Local Government Election Year Kickoff

It is no surprise to anyone in local government that 2022 is an election year. The 2022 general local election and the 2022 general school election will be held on October 15, 2022. These past few months have marked the start of a busy time for local government election officials as well as Lidstone's Local Government Election Team, and we are excited to serve and support our clients. This year, we welcome you to contact Rachel, Andrew or Will for all your election-related needs.

We also understand that this election comes with additional challenges and uncertainty due to the on-going COVID-19 pandemic. In addition, there



are legislative changes to be aware of, including changes to mail ballot voting eligibility and new campaign financing rules. We have provided a review of these issues below and invite clients to contact us to discuss in greater detail.

Election Preparation in relation to the COVID-19 Pandemic

With all of the ups and downs that we have experienced over the last two years, it is difficult to predict what things will look like in Fall 2022. However, local governments across the province have dealt with this uncertainty skillfully and conducted numerous successful by-elections during the pandemic. We have assisted many of

them and have gained valuable knowledge and expertise.

Expanded Eligibility for Mail Ballot Voting

There are two main legislative changes that may be relevant in relation to elections held during the pandemic. The first is the repeal of s. 110(2) and (3) of the *Local Government Act* ("*LGA*"), which removed the eligibility requirements for mail ballot voting. Now, if a local government permits mail ballot voting by bylaw, all electors will be eligible to vote by mail ballot. We have had many questions from clients regarding this change which, especially in the context of the pandemic, is expected to increase the number of voters choosing to vote by mail ballot.

The Elections in Special Circumstances (COVID-19) Regulation

The other legislative change is the addition of s. 167.1, which allows the Minister of Municipal Affairs to make a regulation that provides an exception to or modification of election-related LGA provisions, regulations and bylaws in respect of elections in special circumstances. BC Reg 218/2021 (the "Regulation") was made under this authority. The power under s. 167.1 is in addition to s. 167, which was used by the Minister to make several ministerial orders relating to by-elections held during the pandemic. The Regulation will be repealed March 31, 2022 but this creates the authority needed for the Minister to make similar exceptions during the general local elections should BC experience another pandemic wave later this fall.

Local governments may wish to consult the "Guidance for Conducting By-elections and Assent Voting During COVID-19" published by the Province which contains practical advice and issues to consider in preparation for an election held during the pandemic. LGMA has also put together a list of resources related to by-elections during COVID-19 which contain additional relevant guidance.

Other Legislative Changes

There have been several other important amendments to Part 3 of the *LGA* since the 2018 general local election which should be reflected in the local government's election policies and procedures. For example:

- **30 Day Local Residency Requirement Dropped** - The Act no longer requires that a person be a resident of the municipality or electoral area for 30 days prior to the date of registration to be considered a resident elector under s. 65(1)(d).
- **New Candidate Endorsement Rules** - There are several changes to the provisions relating to endorsements by elector organizations (civic political parties). For example, if applicable, nomination documents must now include the name of the elector organization that proposes to endorse the person nominated per s. 87(1)(g). See also the amendments to Part 3: Division – Candidate Endorsement by Elector Organization.
- **New Canvassing Rules** - The addition of Division 17.1 (s. 160.1) relating to canvassing in housing cooperative, strata and rental properties.

In addition, the *Local Elections Statutes Amendment Act, 2021* (Bill 9) was given royal assent on March 25, 2021 and resulted in several changes to the *Local Elections Campaign Financing Act,* SBC 2014, c. 18. These changes took effect December 1, 2021. The changes more closely align the campaign financing rules for local elections with those for provincial elections under the *Elections Act*. In the coming weeks, we will be releasing an updated campaign financing guide reviewing these changes in detail. For now, the amendments include:

- sponsorship contribution limits which match provincial campaign contribution limits;
- a pre-campaign period which increases the length of time that election advertising is regulated before an election, consistent with the provincial *Elections Act*;
- providing Elections B.C. with additional investigative tools and penalties to support enforcement; and
- new regulations for elector organizations (civic political parties), including a requirement to register with Elections B.C.

We look forward to supporting you before, during and after local elections this year.

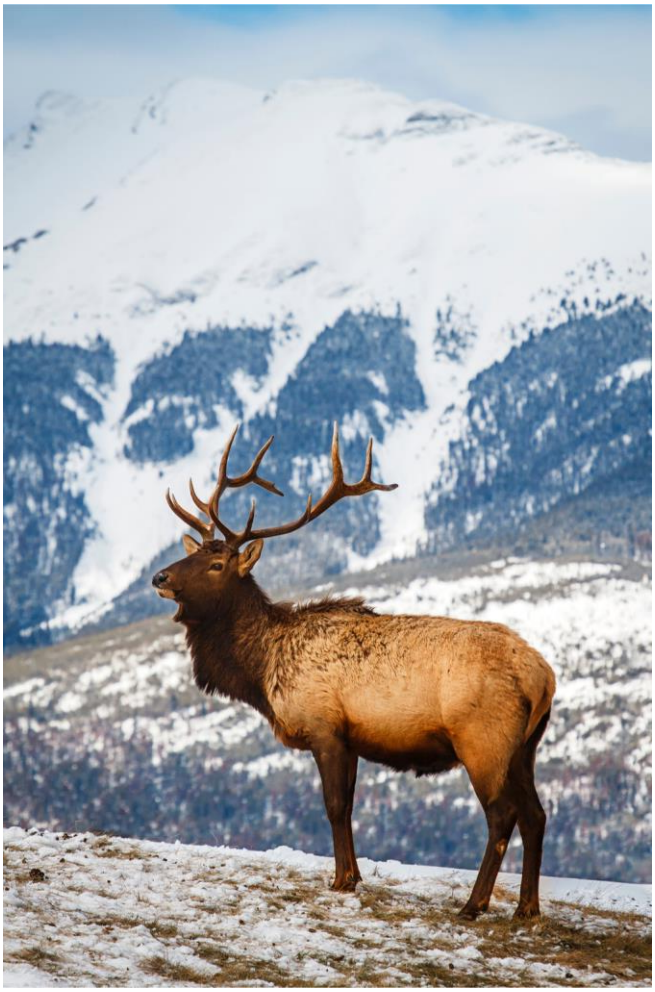
~ Rachel Vallance, Andrew Carricato and William Pollitt

Sick Leave – Does Your Collective Agreement "Meet or Exceed" ESA Minimums?

Beginning January 1, 2022, employees in British Columbia became entitled to paid and unpaid sick days under the *Employment Standards Act* (the "*ESA*"). The B.C. legislators implemented the change to alleviate the need for employees to choose between going to work sick or losing wages.

Section 49.1 of the *ESA* outlines the rights and obligations for the provision of sick leave. Any employee who has been employed for ninety (90) consecutive days is entitled to five (5) paid and three (3) unpaid days leave for absences due to personal injury or illness. The right to sick leave applies equally to full-time, part-time, casual and temporary employees. Employers may request that an employee provide reasonably sufficient proof of the need for the leave. The legislation also provides a formula, based on a thirty (30) day average, for calculating the amount of sick pay an employee is entitled to.

The addition of minimum sick leave entitlements in B.C. may be a welcome benefit for many employees but for employers of unionized workplaces it raises the tricky question of how



the new minimums impact existing sick leave provisions in negotiated collective agreements. Collective agreements often contain terms that address what happens if an employee is sick and cannot attend work. These provisions take many forms including accrual of sick days and sick leave banks, short term and long-term disability policies, and payments in lieu of benefits. The rights and entitlements of such provisions are often the result of detailed and complex negotiations between management and their union counterparts.

Previously, *ESA* minimums did not apply in unionized environments if a matter was addressed in a collective agreement. In 2019, however, the scope of the *ESA* was changed such that *ESA* minimums apply unless the relevant provisions of a collective agreement, when considered together, "meet or exceed", those contained in the *ESA*.

As a result, since January 1, 2022, many unionized employers have had to consider whether the sick leave provisions in their collective agreements "meet or exceed" the newly introduced minimums and are facing union demands that their members should receive the *ESA* minimum entitlements *in addition* to benefits already contained in their collective agreements.

The meaning of "meet and exceed" in the context of the *ESA* has been the subject of considerable jurisprudence. Using sick leave as an example, it is generally accepted that an assessment of "meet or exceed" will involve a three-step analysis:

1. Identity all provisions of the *ESA* having a rational and meaningful connection to the provision of sick leave benefits.
2. Identify all provisions of the collective agreement that have a rational and meaningful connection to sick leave benefits.
3. Conduct an assessment of whether the relevant collective agreement provisions, when viewed as a package, are at least equal to the relevant statutory provisions, viewed as a package.

When comparing the collective agreement and legislative provisions it is generally acceptable for some collective agreement provisions to fall below the minimum *ESA* requirements if other provisions of the collective agreement balance those provisions with superior entitlements in other respects. For example, it may be acceptable for an overall collective agreement scheme to result in some employees at first receiving less than the *ESA* and over time to receive significantly more.

The comparison is *not* whether an individual employee meets or exceeds the *ESA* in each and every year, but whether the provisions, when considered and applied to union members as a whole, will ultimately meet or exceed *ESA* requirements.

As the Labour Board has put it: "If it were necessary for each and every employee at every given moment to meet or exceed the benefit that would be provided by the application of the *ESA* at that given moment, the meet or exceed balancing test could well be rendered redundant"[1]

When determining if collective agreement provisions "meet or exceed" the *ESA* minimums, employers need to consider all relevant provisions and how they impact their union members as a whole. Depending on the collective agreement this can be a complex analysis. The "meet or exceed" requirement applies to any matter included within the ESA - not just sick leave. If this is an issue impacting your workplace, please reach out to Lidstone and we can assist you with understanding your obligations and provide advice on preventing and responding to union grievances.

~ Marisa Cruickshank & Debra Rusnak

Bill 26: Municipal Affairs Statutes Amendment Act (No. 2), 2021

The *Municipal Affairs Statutes Amendment Act*, otherwise known as Bill 26, makes substantial

[1] *Overwaitea Food Group and UFCW, Local 1518 (Reeves), Re*, BCLRB B420/97 at para 28.

changes to key local government legislation, including the *Community Charter* (the "*CC*"), *Local Government Act* (the "*LGA*") and the *Vancouver Charter*. Bill 26 received royal assent on November 25, 2021, and most of its provisions were brought into force on February 28, 2022 by way of B.C. Reg 17/2022.

Community Charter: Notice & Code of Conduct

Bill 26 grants greater flexibility to local governments in deciding how to give notice. Instead of requiring publication of notice in a newspaper, section 94.2 now authorizes alternative means to publish notice. For council to use this alternative process, it must adopt a bylaw that specifies at least two different means of publication by which the notice is to be published, and these alternative means may *not* include posting the notice in public notice posting places.

Bill 26 has also added several new provisions regarding code of conduct requirements for both municipalities and regional districts. Under section 113.1, council must decide within 6 months of its first regular council meeting whether it is going to establish a code of conduct, or review its existing code of conduct. If council chooses *not* to establish or review its code of conduct, section 113.2 requires that council reconsider this decision before January 1 of the year of the next general local election. If council declines to establish or review the code of conduct under section 113.1 or 113.2, a statement available to the public regarding why it chose not to do so. This statement is only available upon request by the public.

Local Government Act

Bill 26 amends the *LGA* to offer greater flexibility in deciding when to hold public hearings. New provisions also allow issuance of development variance permits to be delegated to staff in specific scenarios. Finally, a series of minor revisions are made within the *LGA* to ensure consistency with the new *CC* provisions.

Public Hearing Requirements

A significant change to the *LGA* is the new public hearing process. A series of changes under Part 13, Division 6 now mean that a local government is not required to hold a public hearing on a proposed zoning bylaw if an official community plan (the "OCP") is in effect for the area that is the subject of the zoning bylaw, and the bylaw is consistent with the OCP. Essentially, these revisions mean that, if a proposed zoning bylaw is consistent with the OCP, then the local government may opt-in to holding a public hearing, as opposed to be requiring to opt-out.

If the local government chooses to not hold a public hearing, then it must abide by the newly re-enacted section 467, which sets out how notice must be given when public hearings are not held. Specifically, the notice must state the purpose of the zoning bylaw, the applicable lands, the date of first reading, and where and when copies of the bylaw may be inspected. Further, several pre-existing provisions of section 466 apply to this process, with the exception that references to public hearing are to be read as references to the first reading of the bylaw. We note that close reading of these new provisions suggests that this process does not apply to in-stream bylaws that have progressed past first reading.

Provisions for consistency between *LGA* and *CC*

A series of smaller changes have been made to ensure consistency between the *CC* and the *LGA.* First, the code of conduct amendments made in the *CC* will apply to regional districts by way of section 205(1)(b.1), when that provision comes into force. Second, several *LGA* provisions have been re-enacted to require that notice be given in accordance with section 94 of the *CC*, including section 225(2) *[procedure bylaws]*, section 376(2) *[annual reporting on regional district*

finances], section 466(3) *[notice of public hearing for planning and land use bylaws],* section 494(3) *[public notice and hearing requirements for TUPs]*, and section 612 *[heritage designation procedure]*, and section 647 [*notice of annual tax sale*]. Finally, section 220 *[calling of special board meetings]* has been amended to simplify how notice to directors must be given.

DELEGATION OF POWER TO ISSUE DEVELOPMENT VARIANCE PERMIT

The new section 498.1 allows a local government to, by bylaw, delegate power to an officer or employee to issue a development variance permit (the "DVP") if the DVP meets certain requirements. This includes requirements that the proposed variance be a minor variance *and* vary the provisions of a bylaw under specific *LGA* requirements.[2]

If a bylaw delegates this power, the bylaw must include criteria for determining whether the variance is minor, and guidelines for the delegate to consider when deciding whether to issue the DVP. Finally, the owner of the land subject to the decision retains the right to have the local government reconsider the delegate's decision.

Vancouver Charter

The changes made to the *Vancouver Charter* are similar in effect to those made under the *CC*.

~Katie Dakus and Sara Dubinsky

Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc., 2022 BCSC 15

In January 2022, the BC Supreme Court released its decision in *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.* The decision is significant in finding Indigenous communities can claim against private (non-Crown) parties for nuisance resulting from interference with Aboriginal rights. This decision is significant for local governments given the potential for their decisions to impact Aboriginal rights.

Background

In 1952, what is now Rio Tinto Alcan built the Kennedy Dam, a hydroelectric dam on the Nechako River in BC. The dam and the watershed of the Nechako River are within the traditional territories of the Saik'uz First Nation and the Stellat'en First Nation. Both Nations claimed Aboriginal rights to fish in this watershed. While the dam was constructed and operated in compliance with relevant regulatory requirements, it significantly altered water flows and fish populations in the Nechako River. Neither Nation was consulted with regarding, or consented to, the dam.

In this action, the plaintiff Nations claimed the dam infringed their Aboriginal fishing rights. The Nations further claimed the dam's interference with such rights could ground nuisance claims against Rio Tinto. The plaintiffs also advanced Aboriginal title claims, although the Court made no findings on those for procedural reasons.

Decision

The Court's decision was lengthy. Though not comprehensive, we flag the following elements of its decision:

- The plaintiff Nations have a constitutionally protected Aboriginal right to fish the Nechako River for food, social and ceremonial purposes.
- The plaintiffs' Aboriginal rights can found an action in nuisance against parties other than the Crown. The Court agreed interference with Aboriginal rights can

[2] These include zoning bylaws respecting siting, size and dimensions of buildings, structures and permitted uses; off-street parking and loading space requirements; regulation of signs; screening and landscaping to mask or separate uses to preserve, protect, restore and enhance natural environment, and provisions prescribed by regulation under the Act.

ground nuisance claims, even if an extension of the common law of nuisance is necessary to do so.

- The construction and operation of the dam caused a decline in fish populations along the Nechako River. This decline in turn breached the plaintiff's Aboriginal fishing rights and caused "hugely negative impacts upon the plaintiffs as Indigenous communities."
- Rio Tinto would have been liable to the plaintiffs in nuisance. However, construction and operation of the dam conformed with provincial and federal regulatory requirements and permits. The dam's impact on the Nechako River, and resulting harm to fish populations, was therefore permitted and Rio Tinto immunized from liability because of the defense of statutory authority.
- While the defense of statutory authority immunized Rio Tinto from liability, the Court's decisions regarding Aboriginal rights and infringements of those rights obligated the Crown (both federal and provincial) to protect such rights. It is unclear how the Crown is to do this, and the Court declined to retain supervisory jurisdiction of any new flow regime for the river.

In reaching the conclusions above, the Court considered UNDRIP and provincial/federal legislation implementing it. It ultimately found these supported a "robust interpretation" of Aboriginal rights, even if it "remains to be seen whether the passage of UNDRIP legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title."

Impact on Private Parties

The decision is relevant in expanding the scope of private party liability for breaches of Aboriginal rights and title. Previously, Aboriginal rights and title claims centered on remedies against the Crown, or defenses to criminal and regulatory offenses. How Aboriginal rights and title impact private party rights remains a developing area of the law. This decision leaves open that private parties may be liable in nuisance for conduct that interferes with Aboriginal rights or title and, by extension, injunctive relief or damages.

Parties that are not the Crown ordinarily do not owe a 'duty to consult' Indigenous communities. However, the expanding scope of private liability for breaches of Aboriginal rights or title may incentivize non-Crown parties to give greater consideration to potential impacts on Aboriginal rights and title notwithstanding the absence of any such duty.

~ Will Pollitt

A New Direction in Judicial Respect for Local Governments? GSR Capital Group v. White Rock

The recent decision of our Court of Appeal in *GSR Capital Group v. White Rock*, 2022 BCCA 46 is notable or a couple of reasons. First, it helps to cement a developing trend in which BC courts appear to be giving local government decisions under judicial review greater deference, making them less likely to be overturned on judicial review. Second, and perhaps more importantly, it also contains language that telegraphs to other courts that local governments should not be treated with less deference than other administrative bodies. That is, in case the point needed to be made, the court has confirmed that local governments should be taken seriously.

Background

GSR owned property in White Rock that it wanted to develop with a 12-storey residential building. The property was located in an area designated as a development permit area, and in July 2018 the City granted GSR a development permit for the building. However, following the 2018 municipal election, the newly elected Council downzoned the property and the City refused to grant GSR a building permit for its project. GSR then brought an application in BC Supreme Court seeking judicial review in order to allow the construction to occur. GSR was unsuccessful (decision cited as 2020 BCSC 489), with the chambers judge holding that Council was entitled to deference with respect to its interpretation of the relevant *Local Government Act* provisions at issue, that its interpretation of the provisions was not unreasonable, that the City could withhold the building permit on the basis of existing case law, and that the development was not lawfully non-conforming.

The Appeal

GSR then appealed to the BC Court of Appeal, raising three issues;

- What was the applicable standard of review to be used by the court?
- Could the City downzone GSR's property and deny the building permit after having already issued a development permit for it?
- Was GSR's proposal lawfully non-conforming?

Determining the appropriate standard of review is crucial to the outcome of a judicial review hearing, since that sets how strictly the court will review the decision under review. On the basis of the decision of the Supreme Court of Canada in *Canada v. Vavilov*, 2019 SCC 65, the "default" standard of review will generally be reasonableness. However, the standard may instead be correctness in certain circumstances. From a practical perspective, the main distinction is that it will likely be easier for a party challenging a decision to succeed if the standard of review is correctness, since that allows the court to show less deference to the decision maker and to require the decision under appeal to be "correct", rather than just "reasonable".

GSR argued that the issues raised in its appeal raised "general questions of law of central importance to the legal system as a whole", and thus should be considered on the basis of the correctness standard. In pursuing this issue, GSR argued that existing case law characterized local governments as "distinct from other administrative tribunals, and less worthy of deference".

The Court of Appeal rejected this argument, holding that the issue raised by GSR did not come within the limited situations that would justify use of the correctness standard.

The Court of Appeal then upheld the City's interpretation of its powers on the basis that it was not unreasonable. While accepting that the City had issued a development permit, the Court also accepted that GSR's project was a "proposed

development", which came within the scope of the power in *LGA* s. 463 to withhold a permit.

Finally, the Court of Appeal concluded that the lower court was correct that, on the evidence, no lawfully non-conforming use had been established.

As none of GSR's arguments in the Court of Appeal succeeded, its appeal was dismissed.

The decision of the Court of Appeal is noteworthy for two reasons.

First, it has helped reinforce a trend in recent decisions of that Court that have applied the reasonableness test in a broad and, perhaps for local governments, increasingly deferential manner to decisions of local governments under judicial review. This includes the decisions of the Court of Appeal in *1120732 B.C. Ltd. v. Resort Municipality of Whistler*, 2020 BCCA 101 and, to some extent, in *English v. Richmond*, 2021 BCCA 442. While the point can always be made that each case is to determined on its own facts and merits, the Court of Appeal does have a role in influencing how lower courts approach the law and, on the theory that lower court judges do not like to be overturned on appeal, the decision in *GSR* may help reduce the extent to which lower court justices might otherwise view as outliers the "message" about deference sent in the *Whistler* and *Richmond* cases noted above.

Second, perhaps what is the more interesting and significant aspect of the decision in *GSR* is how the Court of Appeal characterizes local governments as administrative bodies. This arises out of a perspective that is sometimes experienced in court in which judges appear to view local governments as somehow being "lesser" types decision makers, and thus entitled to less deference by the court. Indeed, this was reflected by GSR's arguments to the court of appeal.

However, GSR's argument did not find favour with the court, which instead stated that the cases cited by GSR for this proposition, all of which were by the Supreme Court of Canada, and one of which was made as recently as 2007, "were decided under an administrative law regime that no longer prevails" and that "the theory that municipal bodies merit less deference than other types of administrative tribunals is no longer a sustainable one".

This is a significant statement by the Court, and sends a strong message to lower courts that local governments should be treated with the deference given to other decision makers, and not be treated as lesser. It signals a break with the past that hopefully will be heard.

~ James Yardley

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