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LOCAL GOVERNMENT ASSISTANCE

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I. INTRODUCTION

Local governments are subject to various rules and restrictions regarding their ability to provide financial assistance to persons and corporations, including a general prohibition against providing assistance to business. This paper examines the statutory provisions relating to assistance that are applicable to municipalities, and some of the court decisions that have considered allegations of unlawful assistance to business. The rules for regional districts under the *Local Government Act* are substantially the same.

II. ASSISTANCE GENERALLY

A. Natural Person Powers and Assistance

Section 8(1) of the *Community Charter* vests B.C. municipalities with the "capacity, rights, powers and privileges of a natural person of full capacity". On its face, this section would permit a municipality to do anything that a real person might do. However, the Legislature has seen fit to restrict 'natural persons' powers, reflecting the fact that natural person municipalities have unnatural powers such as the power to impose taxes to generate revenue. These restrictions include rules regarding the provision of "assistance".

B. What is Assistance?

Sections 25(1) of the *Charter* defines "assistance" very broadly as a "grant, benefit, advantage or other form of assistance", including an exemption from a fee or tax and including the following forms of assistance, which are listed in section 24(1):

- Disposing of land or improvements, or any interest or right in or with respect to them, for less than market value
- Lending money
- Guaranteeing repayment of borrowing or providing security for borrowing
- Assistance under a 'partnering agreement'

Of note, the category described in the first bullet includes not only the outright sale of land, but also grants of lesser interests in land, including leases, statutory rights of way, easements and restrictive covenants.

C. Notice of Assistance

Pursuant to section 24 of the *Charter*, a council must give notice of its intention to provide the forms of assistance listed in section 24(1) (listed above), but not of any other forms of assistance. Accordingly, there is no obligation to publish notice of an intention to provide a grant to a non-profit organization.

Section 24 sets out the required notice content. Section 94 sets out how to provide notice and requires publication in a newspaper for 2 consecutive weeks. The notice may be published after council passes a resolution to provide the assistance, but must be published before the provision of the assistance and before making any contractual commitment to provide assistance (such as by signing a lease or land sale agreement or a loan guarantee agreement) [*Coalition for a Safer Stronger Inner City Kelowna v. Kelowna (City)*, 2007 BCSC 605].

III. ASSISTANCE TO BUSINESS

A. General Prohibition

Section 25(1) provides that except where permitted under the *Community Charter* or another Act "a council must not provide a grant, benefit, advantage or other form of assistance to a business, including (a) any form of assistance referred to in section 24 (1), or (b) an exemption from a tax or fee".

B. What is a "Business"?

The schedule to the *Charter* defines "business" as:

> (a) carrying on a commercial or industrial activity or undertaking of any kind, and
>
> (b) providing professional, personal or other services for the purpose of gain or profit,
>
> but does not include an activity carried on by the Provincial government, by corporations owned by the Provincial government, by agencies of the Provincial government or by the South Coast British Columbia Transportation Authority or any of its subsidiaries.

Importantly, the courts have held that the fact that there are commercial components to a non-profit organization's activities does not on its own mean that the organization or its activities constitute a 'business'. In *Salmon Arm (District) v. Salmon Arm Golf Club* (1994), 23 M.P.L.R. (2d) 214, it was alleged that a municipal tax exemption to a golf club, which was a non-profit society, amounted to a form of assistance to a commercial undertaking contrary to what was then section 292 of the *Municipal Act*. The Court held that the golf club's activities could

include some commercial components without constituting a commercial or business undertaking. The golf club charged green fees to the public, imposed annual dues on its members and operated a restaurant and pro shop. The Court held that these commercial elements were necessary to support ownership of the golf course property and to produce revenue to ensure that the club met its obligations to its members as well as to the District under its lease of District lands.

It is worth noting that at time of the *Salmon Arm Golf Club* decision, the assistance rules addressed assistance to business "undertakings", whereas the definition of business under the *Charter* speaks to a commercial or industrial "activity" in addition to undertakings. It could be argued that assistance to a commercial activity would be assistance, even if the activity is conducted by a non-profit organization. Furthermore, the definition of business under the *Charter* does not distinguish between incorporated businesses and other forms of business. Certainly, an individual or collection of individuals could be a business depending on the circumstances. For instance, an individual who develops land for profit would likely be a business [*Virdis v. North Vancouver (City)*, 2009 BCSC 1118].

C. Exceptions to the Prohibition against Assistance to Business

1. Heritage

Sections 25(2) and (3) specifically permit the provision assistance to a business for various purposes associated with the preservation of heritage property and resources.

2. Partnering Agreement

A municipality may provide assistance to a business pursuant to a 'partnering agreement', under which the business agrees to provide a service on behalf of the municipality. This kind of agreement is a statutory concept, and not necessarily a 'partnership' as that term is normally understood. The term 'partnering agreement' is specifically defined as "an agreement between a municipality and a person or public authority under which the person or public authority agrees to provide a service on behalf of the municipality, other than a service that is part of the general administration of the municipality". The term "service" is defined as mean "an activity, work or facility undertaken or provided by or on behalf of the municipality". Note that a local government must publish public notice of its intention to enter into a partnering agreement.

3. Waiving or Reducing Development Cost Charges for Eligible Developments

Section 563 of the *Local Government Act* provides that a local government may waive or reduce development cost charges for not for profit rental housing, for-profit affordable rental housing, small lot subdivisions designed to result in low greenhouse gas emissions and developments

designed to result in a low environmental impact. A local government bylaw is required to authorize such a waiver. Section 563(4) expressly provides that such a reduction or waiver is an exception to the general prohibition against providing assistance to business.

4. Tax Exemptions

Tax exemptions may only be provided in accordance with Division 7 of Part 7 (see section 21(a) with respect to partnering agreements and section 193(3) generally). Section 225 specifically provides for tax exemptions for land owned by a person providing a municipal service under a partnering agreement where the land that is used in relation to the partnering service. The exemption must be authorized by bylaw adopted by 2/3 of all council members and notice of the exemption must be given in accordance with section 227. While the bylaw must set out the term of the exemption, section 225 does not set out any upper limit on the term.

Importantly, a partnering agreement tax exemption does not automatically extend to exempt the property from school, hospital and other taxes. For instance, section 131(5) of the *School Act* provides that tax exemptions under section 225 of the Charter do not extend to school taxes, unless exempted by regulation or order under the *School Act*. This rule also applies to taxes under the *Hospital District Act* (s. 28 of that Act makes sections 130 to 132 of the *School Act* applicable).

IV. FORMS OF ASSISTANCE & RELEVANT CONSIDERATIONS

A. Considerations in Land Dispositions and Commercial Transactions

With any particular transaction, the question arises as to how far a local government must go in ascertaining whether the deal is for 'market value'. In general, the courts have shown great deference to council decisions.

1. Open, Competitive Selection Process

Where the transaction results from an open, competitive process, where the particular contract or acquisition opportunity is made available to the public generally, the local government will usually be in very strong position to defend unlawful assistance allegations, provided the local government proceeds with the 'best value' offer or proposal.

2. Due Diligence in Assessing Transaction Value

In *Miller v. District of Salmon Arm* (2005), 2005 BCCA 253, the B.C. Court of Appeal considered how far a council must go to ensure it receives market value consideration for the sale of land. A developer, who was also the mayor, was seeking a 38-lot subdivision. The developer initially proposed that the District exchange 1,500 square metres of unused road in return for the dedication of 85 square metres of new road as well as credit for a previous dedication by the

developer of 1,360 square metres of highway. Council approved the transaction, except that rather than giving credit for the past dedication, it required that the developer pay the transaction costs and an additional $12,000 as market value of the District road. A neighbour considered that the transfer of unused road would remove an access route for future development of his land and increase his development costs. He commenced the legal challenge on various grounds, including that the transfer of the road to the developer was for less than market value. The Court noted that council had used the assessed value of the developer's adjoining land as a yardstick for determining the value of the road. The complainant tendered an appraisal that indicated council had received substantially less than market value. However, the Court did not try to ascertain market value and then determine if the District had sold for less. Rather, the Court looked at council's intention and actions and held:

> Members of the District Council who dealt with this issue could reasonably be expected to have themselves some general idea of land value relating to lands located in the District…deciding the precise value of a small strip of land like the one transferred, land that was traversed by underground pipes, is not easy and probably no figure would command universal assent. Council chose to adopt as a measure of value assessed valuation which does usually provide some guide to value of land. The members of Council must, in my opinion, be afforded a decent measure of discretion in deciding on such an issue… I would not wish to be taken as saying it would in all circumstances be appropriate for a municipal body to proceed with a land transaction without obtaining specific appraisal information. In the case for instance of a sizeable lot in an urban area, it might be reckless on the part of a council to fail to get detailed appraisal evidence but that is not this case at all. It seems to me that Council was not acting in any improper fashion in the approach they took to valuation of this small piece of land.

Based on this decision, the level of due diligence will depend on the circumstances and a municipality may need not to obtain an appraisal or other valuation each time it proceeds with a transaction. For instance, assessed value comparisons will be sufficient for some land transactions, while appraisals may be required for more complex and important transactions. Also, there are different levels of appraisals, and more comprehensive appraisals will not be required in every case.

3. Transaction as a Whole

The courts have confirmed that in evaluating whether a council has disposed of land for less than market value, the court will review the transaction surrounding the disposition in its entirety, and not simply the cash component specifically indicated for the disposition [*Nelson Citizen's Coalition v. Nelson (City)* (1997), 38 M.P.L.R. (2d) 175 (B.C.S.C.)]. In the *Nelson Citizen's Coalition* case, the City had, as part of a complex transaction, agreed to sell 2 parcels of land to

a developer for a sale price of $1.00. In finding that the City had not provided illegal assistance, the Court examined the entire transaction, noting that "The whole of the contractual relationship between the parties is relevant".

4. General Deference to Business Deals

As can be seen from the above quotation from the *Miller* case, the courts have shown deference to council in assessing the value of its own assets. The courts have also shown a desire not to second-guess complex business arrangements. In *International Paper Industries Ltd. v. Greater Vancouver Regional District*, 2006 BCSC 72, International Paper alleged that the GVRD and the Greater Vancouver Sewerage and Drainage District, which is responsible for management and disposal of solid and liquid waste in the GVRD area, were providing illegal assistance to Wastech Services Ltd. The GVSDD had entered into a 20-year agreement whereby Wastech agreed to provide waste management services, including recycling services, at certain facilities on behalf of the GVSDD. Under the agreement, the GVSDD compensated Wastech by paying different rates for different hauling services, and making payments for fixed costs, capital expenses and property taxes and other expenses. In addition, if net revenue exceeded a base level, excess revenue was shared equally by GVSDD and Wastech. If net revenue fell short of that level, the parties would share the shortfall equally. International Paper alleged that by virtue of the agreement, Wastech received unlawful assistance in the form of tax breaks, below market lease payments and subsidized operating expenses and that while certain of Wastech's activities were public services on behalf of the GVRD/GVSDD, operating a large-scale commercial recycling operation was not. The Court held that the assistance provisions were inapplicable to the GVSDD because the GVSDD was not governed by the *Local Government Act* and was a separate entity from the GVRD. Nevertheless, the Court went on to consider whether GVSDD was providing assistance. International Paper's allegations focused on the recycling component of the service and the fact that Wastech had operated a private recycling facility on the same premises until 1996, when the arrangement with the GVSDD was put in place. To some extent, the Court sympathized with International Paper noting:

> It is…understandable that [International Paper] and others would view Wastech as competing at an advantage for the same commercial recyclables as do the private recyclers. The GVSDD does not have to pay taxes on property which it owns and uses for waste purposes…GVSDD will pay certain expenses incurred by Wastech in providing services on behalf of the GVSDD.

However, the Court characterized the business relationship as just one possible way of producing the desired results. The Court noted that "[T]he objective…is to encourage Wastech to operate efficiently, thereby allowing the GVSDD to provide waste management services to the public at a lower cost". The Court held:

> The GVSDD could have paid Wastech to perform the services by a fixed price contract. Undoubtedly, in determining the fixed price, Wastech would have ensured that its overhead expenses would be covered and included a provision for profit. Instead, the GVSDD has chosen a complicated formula which allows the GVSDD to participate in certain economies that Wastech is able to achieve. This is simply a different mechanism of determining compensation and ensuring that Wastech operates efficiently…The compensation provided to that company is complex, with benefits and obligations flowing both ways. Even if [the LGA assistance provisions] applied to the GVSDD, they are not appropriate to review the contract, weighing the tangible and inchoate benefits, to determine if the GVSDD has made a good deal.

5. Community Benefit

It is not clear as to the extent to which a municipality can consider 'community benefit' as part of what it receives in a given transaction. In the *Nelson Citizen's Coalition* case, the Court appears to have given some weight to the City of Nelson's desire to see its waterfront developed in determining that the City had not provided assistance to the developer. The Court noted:

> … the agreement, fairly considered, appears to be an attempt to allocate as between public and private interests, the costs of an integrated project. Unless there were an obvious aspect of "something for nothing" I see no basis on which this court can "pick the bones" of this agreement for signs of a S. 292 breach…The court is in no position to ascertain the point at which the City's demands would have been unacceptable and Huber would have abandoned the project, or to weigh that possibility against the interests of the City in the project proceedings. These judgments are all over matters of public interest within Council's mandate and discretion…I think assistance within Section 292 of the Municipal Act implies the conferring of an obvious advantage. Where, as here, a municipality exercises its power to contract under S. 19 to effect purposes that are clearly within the realm of public policy, I do not think S. 292 is an available mechanism to obtain a review of the contract, weighing the tangible and inchoate benefits, to determine if the municipality has made a good deal or not.

In *Vincorp Financial Ltd. v. Oxford (County)*, 2014 ONSC 2580, an Ontario county attempted to negotiate the purchase of lands in which the plaintiff had a financial interest for the purpose of

selling those and other lands to Toyota for the location of its new plant. When negotiations broke down, the County expropriated the lands and sold them to Toyota. The plaintiff claimed that the expropriation and sale for the expropriation price, and not fair market value, constituted assistance to business. The Court rejected the plaintiff's argument:

> The plaintiffs' position if accepted would lead to an absurd result. It would require the court to ignore the agreement as a whole and specifically ignore the value of the significant benefits that the Toyota Plant brought to the community. It is a fact that "looking at the development of the Toyota Plant as a whole, the net benefits to the County, including but not limited to the increased tax assessment, far outweigh any differential between the fair market value of the mall lands, calculated taking into account the Toyota Plant on the one hand, and the fair market value of the Mall Lands calculated without taking into account the Toyota Plant." However, the plaintiffs' approach would require the court to ignore the value of these significant net benefits.

If the agreements pertaining to a transaction impose specific obligations and restrictions on the other party aimed at benefiting the community, it is likely that these components could be considered in assessing the value of the transaction to the local government. For instance, the market value of a property is likely to be affected if the land sale agreement between the local government and the purchaser-developer includes obligations on the developer to develop within a specified time frame, to include specified design and landscaping components or to restrict the use of the land to the developer's proposed use, perhaps secured by registration of a covenant under section 219 of the *Land Title Act* against title the property.

B. Exercising Statutory Powers

In *Unifor, Local 1688, v. Ottaway (City)*, 2018 ONSC 3377, the taxi driver's union challenged the validity of a bylaw amendment that established "private transportation companies" like Uber and Lyft as a separate category of vehicles for hire and authorized them to operate in the City because, among other reasons, it provided an advantage to those companies over traditional taxis. The City had amended the bylaw after an extensive review conducted by a consultant which included broad consultation with the public and industry stakeholders and explored various regulatory options. The Court noted that although the private transportation companies benefitted from less onerous licencing restrictions and fees, taxis retained a monopoly over street hails. The Court concluded that it could not be said that the private transportation companies had been given an advantage out of proportion to the benefit to the City of hosting and regulating them.

C. "Deemed Assistance"

Lending money, guaranteeing repayment of borrowing and providing security for borrowing are deemed to be assistance, even if the local government were to provide the loan, guarantee or security in exchange for market value consideration. Banks lend money with a view to earning a profit. However, the *Charter* provisions regarding assistance do not speak to lending money for less than a market value return: lending money is assistance. Accordingly, a municipality may only provide a loan, guarantee or security for borrowing to a business pursuant to a 'partnering agreement'.

V. OTHER ISSUES WITH ASSISTANCE

A. Partnering Agreements

Typically, the need for a partnering agreement only arises where the municipality wishes to provide a loan or a loan guarantee, or where the assistance is in the nature of a tax exemption. These forms of 'deemed' assistance cannot be provided to a business without a partnering agreement.

In most other circumstances where a business is truly providing a service on behalf of the municipality, there is no 'real' assistance in the sense of the municipality giving something of value in exchange for something of lesser value. Under a typical arrangement, the total compensation package to be paid by the municipality is necessary in order to obtain the service – it is simply compensation for the provision of a service. For example, in the *International Paper* case, the legal arrangements were such that they would have qualified as a partnering agreement, however, the Court did not have to visit that issue, in light of its refusal to second guess the value of the GVRD's commercial arrangement.

Similarly, in *Misty Mountain Charters Ltd. v. Revelstoke (City)*, 2010 BSC 1246. In *Misty Mountain*, the petitioner challenged two contracts and the resolutions of council authorizing those contracts on the basis that they violated the rule against assistance to business. The petitioner operated a bus service which provided bus service to the City through BC Transit. In the year 2008, and again in 2009, the City contracted bus service to the nearby ski hill through the resort company to whom it had sold the ski hill in 2006. Under the agreements, the resort was prohibited from charging passengers a fee for using the service and although the City provided the buses for the resort's use all other costs of providing the service were borne by the resort. The 2009 agreement included express terms stating that it was a partnering agreement pursuant to section 21 of the *Community Charter*. The Court held that there was no assistance to business because the City was receiving benefits commensurate with its obligations under the agreements and that it could not be said that this was a situation in which the resort was receiving something for nothing – the hallmark of assistance to business discussed in the *Nelson Citizen's Coalition* case.

As noted above, under a partnering agreement, the business must agree to provide some service "on behalf" of the municipality. It is doubtful that a service simply provided to a municipality (such as the construction of a building), could be the subject of a partnering agreement. Some aspect of the service must be provided to the public on the municipality's behalf. In *Conibear v. Dahling*, 2010 BCSC 985, the Court stated, "In my opinion, although putting on a concert qualifies as an "activity", it cannot be considered "providing a service on behalf of the municipality." A person does something "on behalf of" another, when he or she does the thing in the interest of, or as a representative of, the other person".

B. Local Government Subsidiary Corporations

On occasion, a local government may incorporate a subsidiary corporation. Such a corporation is a separate legal entity from the local government. If it is a business undertaking or engages in a business activity, the local government will have to consider the assistance rules when funding the corporation. There are various ways to fund a subsidiary. Funding could be provided in exchange for some service or as assistance under a partnering agreement. It is also likely that funding could be provided by way of a capital investment through the acquisition of shares in the corporation. It is unlikely that such an investment would amount to assistance to the corporation, if the local government receives shares in the corporation in exchange for the investment. However, as loans are deemed to be assistance, a local government may not be able to fund a subsidiary corporation by way of shareholders loan, which is a normally convenient way to capitalize a corporation (except under a partnering agreement).

C. Forced Assistance?

In some cases, the law may force a municipality to provide assistance. Under the Federal *Telecommunications Act*, telecommunication companies have effectively been given rights to locate works on public property without any requirement for the provision of any kind of compensation. Under that Act, telecommunications companies can apply to the CRTC if they are unable to obtain rights to use municipal public property on acceptable terms from the municipality. In *CRTC Decision 2001-23*, which involved a dispute regarding access terms between the City of Vancouver and Ledcor Industries Ltd., the CRTC refused to allow the City to impose any kind of market value rent or fees. While the CRTC's reasoning is not entirely clear, it concluded for various reasons that the imposition of any kind of market-based charge was "not necessary or appropriate". The CRTC considered that it would be "extremely difficult to establish a "market-based" rate for the use of municipal property, as there is no "free market" consisting of totally willing buyers and sellers, for municipal consent to occupy and use municipal rights of way". The CRTC was also not satisfied that reference to adjoining land values was appropriate.

VI. ILLEGAL ASSISTANCE

A. Who Might Challenge?

While a person wishing to challenge a decision to provide assistance or an agreement connected with the provision of assistance would have to have 'standing' in order to proceed with the challenge, the most likely source of a challenge would be from a disgruntled ratepayer. A second possible source would be someone who is in competition with the business that receives the allegedly unlawful assistance. This occurred in the *International Paper* case.

B. Repercussions

1. Setting Aside Decision or Agreement

If a court finds illegal assistance, the decision to provide the assistance would likely be set aside. If the assistance arises under a contract, a court might set aside the contract. This could leave the local government and other party to the contract in an uncertain legal position if funds have been paid or property has changed hands.

2. Personal Liability

Under section 191 of the Charter, a council member who votes for a bylaw or resolution authorizing the expenditure or other use of money contrary to the Act may be disqualified from office and may also be personally liable to the municipality for the amount.

Section 191 includes a specific exception where a council member has relied on a municipal officer or employee who was guilty of dishonesty, gross negligence or malicious or will full misconduct. This exception is not of great assistance, in that it does not cover a council member who relies on an honest employee who simply turns out to be wrong. Thankfully, in *Gook Country Estates Ltd. v. Quesnel (City)*, 2006 BCSC 1382, the Court held, in considering a predecessor to section 191, council members may also be excused if they have acted honestly and reasonably.

The "good faith" defence was also raised in *Orchiston v. Formosa*, 2014 BCSC 1080. In that case, the City provided several loans to a wholly City-owned waterfront development corporation that were not accompanied by a partnering agreement. City residents sought to hold the councillors who voted for the loans personally liable for the outstanding amounts. The Court held that section 191 of the *Charter* should be interpreted to apply only where the funds remain outstanding. Since the loans were repaid before trial began, the Court held that the section did not apply and thus the councillors were not liable. The judge went on to that if section 191 were applicable, the good faith defence would have applied.

The potential for personal liability under section 191 reinforces the need for council members to act prudently in evaluating proposed transactions and related decisions.

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