LITIGATION – DO'S AND DON'TS

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I. INTRODUCTION

Local governments often find themselves in situations in which there are conflicts and in which there is a dispute with other parties. When this happens, tension between the parties can be high, stress levels amongst staff can rise, and situations have the possibility of escalating quickly and unexpectedly.

Many decisions that local governments need to make in these circumstances are situation-specific. Sometimes, the disputes are not complex, and resolution can be achieved quickly and effectively. Sometimes, the disputes can become difficult to manage and eventually end up in litigation. A local government may find itself on either side of a dispute as well – on the plaintiff side commencing legal proceedings, or on the defence side responding to allegations of wrongdoings from other parties.

In this paper, we outline some common scenarios and best practices to keep in mind when tackling disputes of all kinds. While this paper does not replace legal advice from a lawyer who has considered the circumstances surrounding the dispute, it serves as a useful starting point for local governments to avoid some common pitfalls when managing matters that might lead to litigation through the courts.

II. THE LOCAL GOVERNMENT AS THE PLAINTIFF OR APPLICANT

A local government may find themselves in situations where it might need to consider commencing court proceedings to resolve disputes. To list only a few examples, the disputes may arise from a breach of contract[1]; they may arise from incidents that cause damage to the local government's property[2]; or they may arise from individuals or businesses not following orders or bylaws put in place by that local government.[3]

Litigation may take place in the BC Provincial Court or the BC Supreme Court. Prosecutions of bylaw offences and small actions to recover damages in amounts less than $35,000 will be filed in the Provincial Court, while civil claims for larger amounts of damages, injunctive proceedings to compel compliance with legislation, and statutory proceedings such as expropriations will occur in the Supreme Court. Appeals of matters in the Supreme Court may go to the BC Court of Appeal, or in rare cases all the way to the Supreme Court of Canada.

[1] *City of Nanaimo v. Millennium Nanaimo Properties Ltd.*, 2010 BCSC 1703
[2] *Peachland (District) v. 0748151 B.C. Ltd.*, 2009 BCSC 735
[3] *Prince George (City) v. Columbus Hotel Company (1991) Ltd.*, 2010 BCSC 149; *Salt Spring Island Local Trust Committee v. Westcoast Vacations Inc.*, 2012 BCSC 1590

Where damages are not sought, such as injunctive matters, typically proceedings will be commenced by way of a petition, with supporting affidavits. In circumstances where there are key disputed facts, the matter will proceed as a civil claim, with full witness and documentary evidence.

A. Keep the End Goal in Mind – What is the Desired Outcome?

When potentially litigious situations arise, it is important to keep in mind the desired end goal and desired outcomes. In all scenarios, it likely boils down to the dispute being resolved. The resolution of a dispute can look different depending on the context of the dispute. Sometimes, the resolution of a dispute may be best achieved from early negotiations with other parties. In other cases, the local government may need to commence legal proceedings in order to resolve the dispute. It is often clear that this is the likely outcome when the positions of the parties are in complete conflict.

If the desired outcome is for early resolution through negotiation between the parties, the local government may decide to complete investigations cooperatively and collaboratively with the other parties. If there is a higher likelihood for potential litigation, it is almost always worthwhile to retain a lawyer early on to assist with managing the dispute. The local government should take particular care in potentially litigious circumstances to ensure that investigations are completed properly, that evidence is properly gathered, and that any contractual obligations between the parties for managing disputes are met.

It is also important to note that if litigation proceeds, for most cases involving civil litigation (i.e., disputes amongst parties), it is the plaintiff or petitioner's onus to prove their case on a balance of probabilities. This means that in order for a local government's case to succeed as the instigator of litigation, it must provide both an evidentiary basis and a legal basis to prove its case, and the court must be satisfied that their version of events is more likely than not to have occurred (i.e., more than 50%).

B. Management of Records in Anticipation of Litigation

One advantage of a systematic approach to records management is the increased likelihood that evidence that might be useful in litigation is maintained and accessible. Some documents collected as part of an investigation may be deemed material and relevant as part of the disclosure requirements in civil cases or offence proceedings, and some of these documents will be protected by litigation privilege. The scope of litigation privilege is broader than just communications to and from your lawyer, and legal assistance may be needed to determine what should and should not be disclosed. It is important to have a process in place for organizing documents that may be considered privileged to ensure that no documents that ought to be protected by privilege are disclosed prematurely.

1. Mark Documents for Potential Grounds of Privilege

Any documents or communications that may be protected by a form of privilege should be labeled and categorized. There are three common forms of privilege that are claimed in litigation: settlement privilege; solicitor-client privilege; and litigation privilege.

Settlement privilege applies to documents between parties that are created for the purpose of resolving disputes or for the purpose of achieving settlement. We typically see these documents labeled as "without prejudice" communications; this is to ensure that the settlement communications and facts represented in settlement communications are not to be used in court. This protection allows parties to negotiate in good faith without the risk of these communications being used against them as part of court proceedings. When discussing settlement with other parties, written communications should be clearly noted as for settlement purposes, and marked as "without prejudice". While a label as "without prejudice" is not on its own determinative of whether settlement privilege applies, it can provide the courts with context as to what the intention of the communications were between the parties, and may support a finding that settlement privilege ought to apply to that specific document.[4]

Solicitor-client privilege protects communications between a lawyer and their client. This ensures that any legal advice and facts exchanged by a lawyer and their client cannot be disclosed to a third party, or used as part of a legal proceeding. In order for solicitor-client privilege to apply, the communication must be between a lawyer and their client, it must be made through the course of seeking legal advice, and the communication must be made in confidence.[5] In order to prevent these communications being inadvertently shared with third parties, these communications ought to be marked as being protected by solicitor-client privilege, and be stored in a separate folder from other kinds of communications.

Litigation privilege is the broadest of the three, and protects documents when the dominant purpose of that document is litigation. This prevents the disclosure of documents that are made in anticipation or for the purpose of litigation. In order for litigation privilege to apply, the litigation must have been a reasonable prospect when the document was created, and the dominant purpose of this document was for use in litigation.[6] This is a contextual analysis, and depends on the circumstances surrounding the creation of the document. However, when preparing documents in light of the potential for litigation, local governments should err on the side of caution, and mark these documents for litigation privilege. They should also be stored in a separate folder to prevent them from being inadvertently shared with third parties.

[4] *Arbutus Environmental Services Ltd. v. Peace River (Regional District)*, 2002 BCSC 130; *Toronto-Dominion Bank v. 2055848 Ontario Ltd. (Ferrovia Bar & Grill)*, 2009 9430 (ONSC) at paras 17 to 21.
[5] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1839 at para 16.
[6] *Himalainen v. Sippola* (1991), 62 B.C.L.R. (2D) 254 (C.A.).

2. Record Necessary Details to Support Admissibility of Documents

As a part of a local government's investigation of potential litigation disputes, a local government sometimes gathers evidence in the form of notes, reports, and photographs. When collecting documents that could potentially be used as evidence in litigation, it is important to keep these documents organized, and to maintain a record of information that is helpful in using the document as part of litigation proceedings.

With respect to notes, reports and photographs, it is best practice to also record as a part of the file:

- The author of the notes, reports, and photographs;
- Whether anyone else assisted in the creation of these notes, reports, and photographs;
- When these notes, reports, and photographs were created; and
- When reports or other documents are signed by a particular party, a note indicating who signed the document if it is not apparent from the document itself.

When gathering evidence, such as by inspections or by site visits, it is helpful to have two individuals from the local government to attend to gathering evidence. Notes should be created by these individuals as well to assist with refreshing their memory if significant time passes between the inspection or site visit and litigation proceeding. As well, having two individuals attend inspections and site visits allows for two potential sources for affidavit evidence, in case one individual is unavailable to swear an affidavit at the time of litigation.

3. Preservation of Evidence

Sometimes, there may be physical evidence available to assist in proving the plaintiff's case in litigation matters. For example, in cases where property damage is a result of potential defendants' negligence, the local government may seek to have the damaged property replaced. In a case of defective or damaged piping being replaced, the local government ought to preserve the defective or damaged piping and ought to store them pending litigation. This is because the inspection of the parts themselves by an expert may be necessary to prove the local government's case. So long as there is potential for litigation, the damaged property and parts should be stored to be used as evidence if litigation were to proceed.

C. Contractual Considerations Governing How Disputes are to be Resolved

Sometimes, the dispute resolution process is agreed upon by parties as a part of their contractual relationship with other parties. For example, it is not uncommon to see arbitration clauses in agreements, in which case the dispute between the parties would proceed before an arbitrator instead of through the courts.

The Master Municipal Construction Documents (the "MMCD") are examples of the type standard contract that provides dispute resolution provisions as part of the agreement. Local governments often use the MMCD as its standard contract for tendering construction contracts. For disputes arising as part of these kinds of construction contracts, there are specific timelines that are agreed upon by the parties. The procedure involves an initial decision from an appointed Contract Administrator, a dispute notice, the appointment of a Referee to assist with settlement, a settlement meeting, and then arbitration or litigation.

Local governments ought to consider any contractual obligations that they have with other parties that may affect how disputes are to be resolved, as failing to comply with these contractual provisions may affect a party's right to recovery when faced with a dispute against other parties.

III. THE LOCAL GOVERNMENT AS THE DEFENDANT OR RESPONDENT

Local governments are common targets for lawsuits. Many scenarios are relatively foreseeable and not entirely avoidable: e.g., accidents on municipal property, permit denials, challenges to bylaws, and contract disputes.

Timely and smart decisions can make the difference between a judgment for or against a local government and affect the time and costs required to obtain a result. In this section, we discuss some of the considerations and steps that local governments should be aware of and take when defending legal proceedings.

A. Contact Your Insurer

The first step a local government should take after being served with court documents is to contact their insurer. In most cases this will be the Municipal Insurance Association of British Columbia, although some local governments may also receive supplemental coverage through other providers. Depending on the nature of the claim, the local government's insurance policies may provide full or partial coverage for the claim and litigation services. Depending on particular policy terms, negligence-related claims (for example, involving accidents on municipal property and cyber security breaches) and contract-based claims will often be covered to some degree under a local government's insurance policies, while proceedings seeking to challenge bylaws or other local government decisions, especially where damages are not sought, may not be. Regardless of the type of claim, a local government should notify their insurers about a lawsuit as soon as possible to determine coverage availability.

B. Retain a Lawyer or Consult In-House Counsel

Along with contacting their insurer, local governments should consult legal counsel regarding a response to the court documents. As we outline below, different types of lawsuits have different response deadlines. Failure to file a response with the prescribed time period may lead to an order for default judgment against the local government. And while a default judgment can be set aside, the process for doing so will only add to the time and legal costs incurred. Even where a claim may be covered, insurers sometimes take time to process a claim and assign counsel, during which time other legal assistance may be needed to ensure deadlines are not missed.

If a claim relates to a matter that a local government previously retained counsel for, such as a contract or a legal opinion, staff may consider notifying that lawyer to assist with a response as their existing knowledge may facilitate a faster response.

C. Response Timelines

1. Civil Proceedings (Excluding Small Claims)

The timelines and procedures for filing and serving responses for different types of civil proceedings (excluding small claims) are found in the Supreme Court Civil Rules.[7] In most cases, the timeline for a local government to file and serve a response to a notice of civil claim will be 21 days after the claim was served on the local government, unless the court orders otherwise.[8] This timeline also applies where the local government intends to file a counterclaim against the plaintiff.[9]

The timeline for a local government to file and serve a response to a petition brought against it, for example a petition to judicially review a permit denial or a bylaw, is also 21 days after the petition was served on the local government, unless the court orders otherwise.[10]

For applications for interlocutory orders brought within the context of an action or petition proceeding, for example, an order to produce documents or to provide particulars, the timeline for filing and serving a response and each affidavit to be relied on by the local government is within 5 business days after service or, in the case of an application for a summary trial under Rule 9-7, within 8 business days after service.

[7] BC Reg 168/2009 (the "Rules").
[8] Rule 3-3(3)(a)(i).
[9] Rule 3-4(1).
[10] Rule 16-1(4).

The relatively short timelines for responding reinforce the importance of contacting the insurer and retaining a lawyer. Failing to respond to a served document within the applicable time period can lead to adverse consequences. For example, for claims involving damages, a failure to respond within prescribed timelines may lead to the claimant obtaining an order for default judgment.

Unless the court orders otherwise, all of the foregoing responses must be served in one of the following ways: (a) by leaving the document at the person's address for service; (b) by mailing the document by ordinary mail to the person's address for service; (c) subject to subrule (5) of this rule, if a fax number is provided as one of the person's addresses for service, by faxing the document to that fax number together with a fax cover sheet; (d) if an e-mail address is provided as one of the person's addresses for service, by e-mailing the document to that e-mail address.[11]

2. Small Claims

The rules for small claims— worth up to $35,000, with some limitations—are governed by the Small Claims Rules[12] and the Civil Resolution Tribunal Rules. The Civil Resolution Tribunal ("CRT") has jurisdiction over most claims worth up to $5,000, and certain accident claims up to $50,000. The Provincial Court Small Claims Division handles small claims above $5,000, or which the CRT has already ruled upon, among other claims.

The timeline for responding to a "dispute notice" filed with the Civil Resolution Tribunal is 14 days of receipt of the dispute notice. However, a local government can request further time to respond by contacting the CRT. Similarly, the timeline for filing a reply to a notice of claim filed in the Provincial Court is 14 days after the date of service.[13] The 14 days does not include the day of service. Any counterclaims should be filed at the same time as the reply.

As with regular claims, the risk of failing to file a response to a dispute notice or notice of claim is an order for default judgment against the local government.

Bottom Line: When served with a notice that a legal proceeding has been commenced against it, a local government should promptly file a response or retain a lawyer to do so to avoid adverse consequences. If the local government intends to retain counsel to prepare a response, they should make sure to provide counsel with any documents served on them.

[11] Rule 4-2(2).
[12] Small Claims Rules, BC Reg 261/93.
[13] Small Claims Rule 3(4).

D. Limitation Periods

A limitation period refers to the amount of time a person or entity has to commence a legal claim. The limitation period applicable for most claims is 2 years from when the claim was "discovered" as defined under the *Limitation Act*.[14]

However, section 735 of the *Local Government Act* (the "LGA") establishes a different limitation period applicable for certain claims against municipalities or regional districts:[15]

> 735 All actions against a municipality or regional district for the unlawful doing of anything that:
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> (a) is purported to have been done by the municipality or regional district under the powers conferred by an Act, and
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> (b) might have been lawfully done by the municipality or regional district if acting in the manner established by law
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> must be commenced within 6 months after the cause of action first arose, or within a further period designated by the council or board in a particular case, but not afterwards.

Despite its broad language, the provision applies to a narrow of set of claims. Specifically, courts have held that the provision only applies for claims in which a local government was acting in accordance with its provided legislative authority. It does not apply against actions alleging breach of a common law duty, such as a negligence claim.[16]

Section 736(1) of the *Local Government Act* imposes an additional requirement on claimants seeking damages against a municipality or regional district:

> A municipality or regional district is in no case liable for damages unless notice in writing, setting out the time, place and manner in which the damage has been sustained, is delivered to the municipality or regional district, as applicable, within 2 months from the date on which the damage was sustained.

The LGA sets out two caveats to this requirement. First, in the case of the death of a person injured, the 2-month notice requirement does not apply as a bar to the maintenance of an action against a local government.[17] Second, a failure to provide notice or insufficient notice is not a bar to the maintenance of an action where a court believes (a) there was a reasonable excuse, and that (b) the local government has not been prejudiced in its defense by the failure or insufficiency.[18]

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[14] SBC 2012, c 13, s. 6(1).
[15] An equivalent provision exists at s. 294(1) of the *Vancouver Charter*, S.B.C. 1953, c. 55 (the "*Vancouver Charter*").
[16] *Mema v. Nanaimo (City)*, 2023 BCSC 1189.
[17] LGA, s. 736(2).
[18] LGA, s. 736(3).

Section 623 of the LGA requires that notice of an application to set aside a municipal bylaw, order, or resolution be served not more than one month after the adoption of the bylaw or other matter, and not less than ten days before the hearing of the application. In the case of a bylaw requiring the assent of the electors that was adopted without assent, the ten-day rule applies but the one-month rule does not.[19] These limitation periods also apply in respect of regional district bylaws, orders, and resolutions by way of s. 425 of the LGA.[20] Section 624 provides that an application for a declaratory order relating to a bylaw on the grounds of irregularity in its form or method of enactment must not be entertained more than one month after the adoption of the bylaw.

An argument that a claim was commenced outside of the applicable limitation period operates as a complete defence to a claim. Thus, one of the ways local government staff can assist counsel to respond to a claim is by providing facts and assembling evidence for a limitation period defence. Specifically, staff can provide counsel with information on when the events underlying the claim occurred and any communications made between the claimant and local government about the claim (e.g., demand letters, notices, claims for compensation, etc.).

E. Freedom of Information Requests

The discovery process for civil actions allows parties to obtain relevant evidence needed to prove or defend legal claims. However, petition proceedings do not engage the normal discovery steps. In such cases a claimant or their counsel may use freedom of information ("FOI") requests, either before or after commencing proceedings, in an effort to obtain information to support their position.

For this reason, local government staff should be aware of section 14 of the *Freedom of Information and Protection of Privacy Act,*[21] which states:

> The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

Courts have determined that this section, although it refers on its face only to solicitor-client privilege, is broad enough to cover litigation privilege as well. Where a local government has been served, or suspects that legal proceedings in relation to a matter may be forthcoming, steps should be taken to notify the personnel responsible for processing FOI requests that any information relating to the claim or potential claim may be subject to privilege and thus potentially withheld. Doing so will help to prevent the inadvertent disclosure of privileged information in legal proceedings. If staff are uncertain about whether requested information is covered by solicitor-client privilege, legal counsel for the matter should be consulted.

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[19] There are equivalent rules in ss. 525 and 526 of the *Vancouver Charter*.

[20] However, the *Judicial Review Procedure Act* provides a backstop remedy for persons interested in bylaws, orders, and resolutions, insofar as there is no time limit for bringing an application for judicial review, though with the passage of time and the accumulation of prejudice to the local government and others relying on the validity of the decision, the court is less likely to grant a remedy.

[21] RSBC 1996, c. 165.

F. Media

From a legal perspective, there is often little to no benefit to a local government commenting on a legal case against it to the media. The best response is often "no comment" or "no comment while the legal process is ongoing". Staff should advise council members and other elected officials of this approach, as questions may arise in the context of open-camera council meetings or in other circumstances where elected officials are approached by the press. Where it is politically desirable to make a public statement on a matter, often the best course is to release a prepared statement through the local government's media relations officer, with the input of legal counsel to ensure that the statement is accurate and will not be prejudicial or disclose privileged information.

IV. CONCLUSION

Although the process of participating in court proceedings is often daunting for staff and elected officials who are unfamiliar with the litigation process, keeping the above principles and procedures in mind can assist in the orderly and successful handling of legal matters both by and against local governments.

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