

ASSISTANCE

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I. INTRODUCTION

Local governments are subject to various rules and restrictions regarding their ability to provide financial assistance to other persons, with substantial limitations on providing assistance to business. At a basic level, the legislation requires public notice of certain forms of assistance. More significant restrictions on business assistance appear to be aimed at protecting the public from local government decisions that might ‘fritter’ away public assets. These restrictions also restrict the ability of local governments to assist businesses for some community benefit, such as to encourage businesses to locate in a community or to help ensure the survival of a key community employer. With respect to most typical local government transactions, these rules, if applied strictly, would open up many local government decisions to judicial second-guessing. Fortunately, the Courts have taken a very deferential approach in assessing council and board ‘business’ decisions, showing respect for decisions not made recklessly and without any intent to provide assistance.

This paper examines assistance and the statutory provisions applicable to municipalities. 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”. One might think these very broad powers would include the ability to ‘give away’ assets for purely altruistic reasons. A particularly decent natural person might do such a thing. However, while it is difficult to imagine a natural person giving away their own money to a business, a municipality might have a variety of public policy reasons for providing financial or other assistance to business, such as those discussed above. The Legislature has seen fit to restrict ‘natural persons’ powers, reflecting the fact that natural person municipalities have unnatural powers of taxation.

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’

Importantly, there are restrictions on providing assistance to a business, there is no prohibition on providing assistance to non-businesses.

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), 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, for instance.

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 a lease or land sale agreement or a loan guarantee agreement) [*Coalition for a Safer Stronger Inner City Kelowna v. Kelowna (City)* (2007), 32 M.P.L.R. (4th) 313 (B.C.S.C.)].

D. Assistance to Business

1. General Prohibition

Section 25 sets out a general prohibition on the provision of assistance to a ‘business’, except where expressly authorized under statute. 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. This expanded definition is awkward in the context of assistance, in that assistance is normally seen as something provided to someone, as opposed to someone's activities. In any case, it could be argued that assistance to a commercial activity would be assistance, even if the activity is conducted by a non-profit organization.

Also, 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. An individual who develops land for profit would likely be a business. However, a person who owns property for residential use would not likely be a business.

2. Exceptions

(a) 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.

(b) 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 need not be in a form of what one would normally consider to be a partnership. 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".

(c) 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 also rule applies to taxes under the *Hospital District Act* (s. 28 of that Act makes sections 130 to 132 of the *School Act* applicable).

III. FORMS OF ASSISTANCE & RELEVANT CONSIDERATIONS

A. Dispositions for Less than Market Value

This very broad category of assistance 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. This is by virtue of the wording of section 24(1)(a) of the *Charter* and the definition of “land” under the *Interpretation Act*.

In the relatively early stages of any discussion concerning a proposed grant of an interest in land, a municipality should consider what the market value of the property is and whether it will be receiving market value consideration in return for the grant. If not, then the municipality will be providing assistance and must publish notice of the proposed assistance. If the grant is to a business, the municipality will not be able to provide the assistance unless the transaction involves a ‘partnering agreement’.

B. Assistance in a Commercial Transaction

Aside from dispositions of land, municipalities also enter into various agreements from time to time, including in relation to the construction of municipal works and the provision of municipal services. While it seems doubtful that a municipality would provide assistance under such an arrangement (other than perhaps a form of ‘deemed assistance’ as discussed further below), legal challenges have been brought in this context and are discussed below. Again, a municipality may need to turn its mind to whether it is doing a ‘market value’ transaction, although in most cases this will be the case as the arrangements will be the result of some formal procurement process or arms-length negotiation.

C. Considerations In Land Dispositions and Commercial Transaction

1. Due Diligence & Necessity for an Appraisal

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 showed great deference to the decisions a council.

In *Miller v. District of Salmon Arm* (2005), 9 M.P.L.R. (4th) 95, 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.

2. 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”.

3. 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), 18 M.P.L.R. (4th) 211 (B.C.S.C.), 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.”

4. 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.”

It remains unclear as to the extent to which municipalities can consider ‘public’ or ‘community’ benefit in valuing its interest in a transaction. Nevertheless, if transaction includes imposes specific restrictions and burdens on the other party aimed benefiting the community, it is likely that these components would be significant factors in assessing the transaction. For instance, if a land sale includes obligations on a developer to develop within a specified time frame and to include specified design and landscaping components, and perhaps includes the registration of the covenant, these obligations would affect the market value of the property as sold to the developer.

D. “Deemed Assistance”

Lending money, guaranteeing repayment of borrowing and providing security for borrowing are deemed to be assistance, even if the local government provides 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.

IV. 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. Local governments do not normally wish to pay more for services than they have to.

In addition, the partnering agreements are restricted to services that are provided “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. It is likely that there must be some aspect of the service that is provided to the public on the municipality’s behalf. Efforts to characterize a business’ normal business activities as some vague municipal service (such as part of some economic development service), so as to enable the provision of assistance through a partnering agreement are questionable.

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 Leducor 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 that 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.

V. 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. In this respect, in *Gook Country Estates Ltd. v. Quesnel (City)* (2006), 26 MPLR (4th) 36 (B.C.S.C.), the Court held, in considering a predecessor to section 191, council members may also be excused if they have acted honestly and reasonably. This reinforces the need for councils to act prudently in evaluating proposed transactions and decisions, to ensure that in the event of a challenge, they can establish that they did act honestly and reasonably, and not recklessly.