Managing Your Municipality During a Pandemic: Answers to the Most Common Questions

The state of the COVID-19 pandemic and its impacts are changing on an hourly basis. What follows are brief answers to the most common questions we have received over the past week as this situation has continued to evolve. This article addresses the following areas:

We caution that these answers are provided as of March 25, 2020. The situation is changing rapidly and the information provided below may change just as quickly. We all have to keep abreast of this fluid and emergency situation and keep updating our actions, our information and our advice.

Ideally, we recommend seeking advice from the appropriate experts, whether that be health, legal, or otherwise. However, in this time of a world health emergency, there will be times where we will all be placed in situations to make decisions quickly, without the opportunity for advice. If placed in this unfortunate situation, make the best decision you can. There are many protections built into the legal system and applicable statutes that have exceptions for acting in good faith during public health emergencies. Know that we stand ready, willing and able to provide as immediate advice as possible on all arising matters.

A. Amendment to *Emergency Management Act*

The Alberta Government passed a key amendment to the *Emergency Management Act* on Friday, March 20, 2020. As a result of this amendment, a declaration of a Provincial state of emergency no longer nullifies a state of local emergency. This is an important change and critical for Alberta municipalities. Why? Municipalities are best placed to monitor the local impact of the emergency: how it is affecting their citizens, businesses, and municipal operations, amongst other things. Municipalities are also best placed to identify and implement the local level response that is required to address those impacts, even when the emergency is Province-wide. The impact of COVID-19 will not necessarily be the same from community to community. Keeping local emergency management infrastructure operational helps both municipalities and the Province - the municipalities can better augment and support the Province's response, while the Province can also augment and support the local level response.

B. Employment

1. Self-Isolation/Absence Due to Illness/Sick Leave

• At least at this point, most of the government directions that affect your workplace and employees use the word "recommend". For example, it is "recommended" that employees self-isolate if they have any of the basic cold/flu symptoms whatsoever. That triggers your employer obligations under *Occupational Health and Safety Act* to treat that government "recommendation" as mandatory and required, which you would not only respect, but are entitled to enforce with your employees.

• In our opinion, if an employee is self-isolated at home and unable to work from home, and that self-isolation is as a result of following the Government's clear and current "recommendation", that employee is absent as a result of a medical issue and you should apply your sick leave policies, provisions and entitlements as normal per each employee's terms and conditions of employment.

• Provincial Government communication on this anticipated job protected leave has now been updated on the Alberta.ca website under support for employers. The link to this most recent content is:

https://www.alberta.ca/covid-19-support-for-employers.aspx

o Please note that the primary change from the initial anticipated announcement is while this leave is job protected, it is not listed as paid. Please refer to our prior advice that you should first check your own Collective Agreements, Policies and Procedures for applicable paid leave in these categories. Also note our prior advice that regardless of this new job protected leave, it is our opinion that under your general human rights obligation to accommodate any employee absent due to an illness or medical related issue, you may have a duty to accommodate unpaid leave well beyond this 14 day legislated amount and specific advice should be sought for your circumstances.

2. Family and Responsibility Leave

An Employer's statutory obligations on family and responsibility leave are covered in the *Alberta Employment Standards Code*. The link to the Alberta Facts Sheet on this statutory leave is:

https://www.alberta.ca/personal-family-responsibility-leave.aspx

Essentially every employee who has 90 days service with you is entitled to up to 5 days family responsibility leave. For this to apply, the child must be of an age that child care is required and the parent/employee must have reasonably explored all options. So could both parents stay home and claim this leave? No, normally it should just be one parent, and only if there are no other reasonable child care options (which understandably may be more common in the current unprecedented circumstances).

Employers should also check their own in house policies and/or collective agreements as many provide for a limited number of these days to be paid. Any in-house days whether paid or not for this purpose would overlap/count towards the five (5) day statutory responsibility outlined above from the *Employment Standards Code*.

Finally, a more advanced point on which legal advice should be sought, but you should also be mindful of, is family status accommodation obligations under the *Human Rights Act*. Employers have already always had "family status" accommodation obligations under the Alberta *Human Rights Act*. This means that when an employee must have child care to meet their legal care obligations to their child, and where there are no alternatives for child care and they cannot attend work, there is a duty under the *Human Rights Act* to accommodate that absence. Please note that other than the potential paid leave referenced above, accommodation beyond any paid days in your own applicable policies or agreements would be without pay. However, despite the fact that it is without pay and beyond your own in-house policies or the statutory *Employment Standards Code* five (5) days, there may very well be an ongoing obligation to accommodate that employee's absence to the point of undue hardship if the absence is as a result of the employee having to complete a required childcare responsibility for which there are no reasonable options, as discussed above.

3. Layoffs/Terminations

- Employers do have a number of potential options in dealing with employees for which there is no work at this time. Key potential tools include:
    - o Consent agreed assignment to alternative duties that are needed;
    - o Use of vacation banks;
    - o Use of overtime banks;
    - o Consent leave without pay pending restart/reopening;
    - o Layoff per any Union Collective Agreements;
    - o For non – union staff using the temporary layoff provisions in s. 62 – 64 of the *Alberta Employment Standards Code*:
        - ▪ Note if you wish to avoid automatic termination and potential related severance expense after the max layoff period of 60 days, we recommend looking into offering extension of benefits in the initial layoff letter in exchange for employee agreement that their employment/ layoff and benefits can continue past the 60 days if the emergency circumstances/closures continue past that time. Please seek specific legal advice to ensure this is done correctly.
    - o Potential to argue frustration of the employment contract and conclusion without liability. However, this is a very advanced point and its application could vary dramatically depending on the changing circumstances, so please seek specific legal advice if considering this option.

C. Privacy Issues and Public Interest Disclosure

An issue that has been raised numerous times by our municipal clients during the early stages of the COVID-19 pandemic is what information a municipality can disclose to its employees, community groups or the public in general about a possible or positive exposure to COVID-19 within the workplace or a public community space.

As a public body, municipalities should be well aware that their ability to collect, use and disclose personal information (i.e. information about an identifiable individual) is governed by the *Freedom of Information and Protection of Privacy Act* (the "*FOIP Act*"). In terms of disclosing personal information, the municipality must do so for the same purpose for which the information was collected or for consistent purposes, with the consent of the individual or where otherwise authorized by section 40 of the *FOIP Act*.

Notwithstanding this, the *FOIP Act* contains a public interest exception to these privacy rules (see Section 32). This public interest provision provides that the head of the public body must, without delay, disclose to the public, to an affected group of people or to any person information about, among other things, a risk of significant harm to the health or safety to the public, of the affected group of people or of the person. In relying upon this provision, the public body does not need to comply with any other provisions of the *FOIP Act*.

On the basis of this provision, we have been advising municipalities that if an exposure in your workplace or public facility is known, you can (relying on this public interest override section of the *FOIP Act*) and should communicate that to those potentially exposed to the possible risk of exposure to COVID-19. In doing so, the municipality must, if possible, first let the person whose information you are revealing know that the municipality needs to disclose the possible exposure to the virus and give them the opportunity to make representations about the disclosure. As well, when you have the opportunity, the municipality must report the disclosure under the public interest exception to the Information and Privacy Commissioner. There may be circumstances where there is not enough time to provide notification of the person whose information you are disclosing before disclosing the information to your workplace or the public. In such circumstance, the *FOIP Act* still requires you to notify the individual whose information has been disclosed and the Information and Privacy Commissioner of the disclosure pursuant to this Section. Such notices should in writing, particularly to the Commissioner.

We have also been advising that when disclosing such information to those that may be potentially exposed or affected that a municipality should first take steps to try to determine that the information is accurate and to only disclose the minimal amount of information necessary to provide such warning of possible exposure. This means that it might not be necessary to disclose the name of the person who has or may have COVID-19 (however, in some circumstances that might be necessary).

D. Governance

1. Role of Council and Administration

The roles of Council and Administration have not changed. Council and Administration should continue to fulfill their respective obligations under the *Municipal Government Act*, as well as all bylaws and policies.

2. Meetings and Public Hearings

For the time being, there have been no changes to the *Municipal Government Act* with respect to meetings, and therefore all meeting rules and procedures remain in place.

Due to the public health emergency declared by the Chief Medical Officer of Health, any mass gatherings of 50 or more are prohibited. Other restrictions also apply to mass gatherings. Any meetings or public hearings should only proceed in accordance with those restrictions. Additional details respecting mass gathering restrictions can be accessed at https://www.alberta.ca/restrictions-for-mass-gatherings.aspx.

Municipalities should keep an eye out for announcements from the Province with respect to electronic meetings and extensions to deadlines under the *Municipal Government Act*.

E. Contract Management, *Force Majeure* and Frustration

1. Waiver

It is critical to not waive rights either expressly or through actions. Contracts will set out deadlines for interim steps or completion (either by reference to specific dates or time frames from entry into the contract). Do not just let these deadlines go by unaddressed. In communications with the other party, indicate that an amending agreement (in writing) is required to address new time frames or other necessary changes. A simple amending agreement may be sufficient to provide clarity for all parties going forward.

2. Payment Provisions

First and foremost, as the purchasing party to any agreement respecting the purchase of goods or services, the municipality must look first at the provisions that apply to payments. In this regard:

- **Payment-Performance** – most agreements should provide for a clear connection between performance and payment, such that lack of performance or delivery should absolve or delay payment obligations;

- **Review Agreement** – that being said, it is not uncommon to see purchase and service agreements that do not make a strong connection between payment and performance, so review of the specific terms is needed in each and every case;

- **Default and Remedies** – a failure to deliver or perform may also be a default under the agreement, which may lead to the availability of termination or other remedies in contract;

- **Relief** – the failure to deliver or perform in the context of a pandemic may be subject to relief under the agreement, often in the form of a *force majeure* clause, discussed below;

- **Contrary Provisions** – unfortunately, that said, it is not uncommon to see some provisions that may conflict with payment-perform as noted above, and this can lead to a need to apply further, other, broader principles of contract interpretation and case law in order to resolve the conflict and determine what applies to the parties;

all of which demonstrates that reviewing the agreement is necessary in each and every case in order to address what may or may not be binding under the agreement.

3. *Force Majeure*

It would be very common to see in service agreements (less so in agreements respecting purchase of goods) a "*force majeure*" clause or clauses (literally, 'superior strength', but more practically translated as 'supervening event'), which may provide for relief against being found to be in default of an agreement where performance is prevented by unusual or extraordinary events or circumstances. In this regard, there are some important points:

- **Purpose** – is to relieve one or both parties of obligations under an agreement, where their performance is prevented or delayed by events beyond the reasonable control of the party claiming the relief;

• **Effect** – is to relieve the party entitled to the relief, such that the non-performance under the agreement does not constitute a default (relief generally in the form of additional time to perform, avoiding default, termination or other remedies);

• **Benefit** – although typically worded to apply to all parties to the agreement, generally speaking, this is more to the benefit of the party that is providing the good or service;

• **Not Mandatory/Necessary** – as it is of very limited value or benefit to the paying/purchasing party, it is not a mandatory clause and often may not exist in an agreement;

• **Conditions** – the agreement may have various conditions to obtaining relief (e.g. notice requirements), as well as requirements in order to continue to be entitled to relief (e.g. active steps to mitigate against the impact, working around the issues, etc.);

• **Case Specific** – this is entirely contractual relief, so it depends entirely upon what is stated in the *force majeure* clause in the contract.

4. Frustration

Where we have extreme unexpected events occurring and affecting the ability of the parties to perform an agreement, the agreement may be subject to *frustration of contract*:

• **Frustration of Contract** – the legal termination of a contract because of unforeseen circumstances that make the contract/agreement and its objectives virtually impossible to perform, make the performance of the contractual obligations illegal, or renders the contract/agreement fundamentally different from its original intended character;

• **Application** – can apply to any contract, including employment contracts;

• **Effect** – where a contract is frustrated in law, the contract/agreement automatically comes to an end and the parties are discharged from further responsibility and liability;

• **Compensation** – the provisions of the *Frustrated Contracts Act* do, however, provide for compensation for expenses incurred in order to arrive at a fair resolution between parties to the frustrated agreement;

• **Court Order** – often a court order is required to determine that the contract/agreement has been frustrated, as the question of whether or not the contract is truly frustrated may be subject to some dispute between the parties;

• **Impossible Performance** – in order to be frustrated, performance of the contract/agreement must generally be impossible, not just impractical, uneconomic, etc.;

• **Permanent** – in order for the contract/agreement to be frustrated, the impasse to performance must generally be impossible, not just impractical, uneconomic, etc.;

• **Temporary** – temporary events may frustrate a contract/agreement where the timing of performance is critical or fundamental to the contract/agreement, such as making later performance irrelevant;

• **Limited Use** – case law has typically applied this to cases of destruction of the subject matter of the agreement, where the basis object/function of the contract/agreement is no longer attainable, where performance becomes illegal or prevented by statutory power;

• **New Law** – the unprecedented nature of the COVID-19 pandemic could certainly result in new and unique applications of the concept;

• **Contemplation of Continued Agreement** – case law and the *Frustrated Contracts Act* both contemplate that if the contract/agreement contemplates continuation in the face of frustrating events (e.g. a *force majeure* clause), the courts shall give effect to the provisions of the contract/agreement;

• **Partial Frustration** – case law and the *Frustrated Contracts Act* both contemplate the possibility of partial frustration, with the remainder of the agreement continuing in full force and effect.

In short, *frustration of contract* is a very special legal concept that requires very specific review for each and every case.

5. Novel/Negotiated Approach

All that said, the Government of Alberta has been encouraging businesses and public entities to try and find ways to allow the usual flow of funds and commerce to continue in the face of the COVID-19 pandemic. The goal is to preserve the economy as much as possible, while also providing goods or services that may be critical to the response to and/or the on-going operations under the impacts of the COVID-19 pandemic. Getting creative, and finding ways to carry on, accommodate, and work around the impasses and impacts that are being faced, will benefit the parties, the economy and the communities, and their recovery.

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Questions?

Should you have any questions with respect to this bulletin, or if you would like more detailed information, please contact the following members of Brownlee LLP:

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