

REGULATORY REQUIREMENTS FOR MUNICIPAL UTILITY CORPORATIONS: RECOMMENDATIONS FROM THE BRITISH COLUMBIA UTILITIES COMMISSION

In recent decades local government utility corporations have proliferated in British Columbia and provided a mechanism through which municipalities and regional districts have been able to provide energy utility services to its residents through a legally distinct corporate entity owned and operated by the local government. With local governments increasingly electing to exercise their statutory authority under section 185 of the *Community Charter* to incorporate local government corporations as a vehicle through which they can provide energy utility services to its residents, inquiries into whether such local government corporations may be regulated under the *Utilities Commission Act* (the “**Act**”) or are exempt from its statutory requirements became a priority for the British Columbia Utilities Commission (the “**Commission**”). To address these matters, the

Commission commenced an inquiry into the regulation of local government energy utility corporations in the summer of 2019 to assess issues related to ownership structures and operational arrangements of local government corporations, the appropriate regulatory status of such ownership structures and operational arrangements and to answer whether local government corporations providing utility services fell within the municipal exclusion set out in the definition of “public utility” found in Section 1 of the Act. On November 10, 2022, the Commission released the stage 1 report (the “**Report**”) of the *Inquiry into the Regulation of Municipal Energy Utilities*. The Report addresses (1) whether a local government corporation wholly owned and operated by a local government and providing energy utility

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services exclusively within that local government's boundaries, meets the municipal exclusion set out in the Act and (2), if not, whether the provision of such energy services should be regulated under the Act.

BACKGROUND

The definition of "public utility" in the Act contains an express exclusion for a municipality or regional district in respect of services provided by the municipality or regional district within its boundaries; however, whether this exclusion encompasses local government corporations providing utility services is not addressed. This uncertainty has led to confusion regarding whether local government corporations providing utility services are to be treated as a regulated public utility, and subject to the statutory requirements for public utilities set out in the Act, or whether they fall into the municipal exception. The answer to this question has significant implications for local government utility corporations when considering the stringent statutory requirements for regulated public utilities set out in the Act. These include requirements that public utilities request and obtain approvals for the construction of new projects, provide information to the Commission when requested and apply to the Commission for approval of

rates charged to customers. When considering the statutory requirements set out in the Act, and the loss of a degree of autonomy to a utility corporation when it is deemed a public utility, it was in the interest of local governments that own and operate energy utility corporations to see the municipal exception expanded to encompass local government corporations. As a result, a number of municipalities and regional districts acting as interveners advanced a position at the inquiry that the municipal exclusion should be broad and encompass local government corporations providing utility services. In contrast, a number of large utilities that had been invited by the Commission to act as interveners submitted that this municipal exception should exclude local government corporations, evidently as a result of their concerns that creating this carve out could potentially create market advantages and an uneven regulatory landscape between differing utility providers.

IS A LOCAL GOVERNMENT UTILITY CORPORATION A "PUBLIC UTILITY?"

On the first question, the Commission concluded that the municipal exclusion to public utilities found in the Act does not apply to local government corporations wholly owned and operated by a local government and which

are engaged in providing energy utility services exclusively within the boundaries of the local government. However, the Commission found that these local government corporations should be eligible for an exemption provided certain reporting conditions are met. The Commission reasoned that the enactment of the *Community Charter* granted local governments the statutory authority to create corporations or acquire shares in a corporation and is demonstrative of a clear intention of the legislature to give local governments broad powers to provide services to their constituents, directly or through municipal corporations. The Commission exercised their authority under Section 88 (3) of the Act to make a recommendation to the minister responsible for the administration of the *Hydro and Power Authority Act* that local government corporations providing utility services within the boundaries of a local government and wholly owned by a local government be exempt from Section 71 of the Act, which sets out the statutory requirements related to energy supply contracts for public utilities, and Part 3 of the Act, which sets out the regulation of public utilities, but excluding sections 24, 25, 38, 42 and 43 of Part 3.

SHOULD LOCAL GOVERNMENT UTILITY CORPORATIONS BE REGULATED UNDER THE ACT?

On the second question, the Commission found that where a local government corporation providing utility services within the local government's boundaries is wholly owned by the local government there is little difference from a conceptual standpoint between the local government corporation and the more traditional structure where an energy utility is provided through a department of a local government rather than through a separate corporation. The Commission reasoned that where a local government is the sole shareholder of a local government corporation, they retain full control over the composition of the board of the company, the appointment of the board and the operational decisions on core aspects of the utility services provided. Accordingly, there is already a high degree of control and transparency within these local government corporations when considering the local government framework, which requires municipalities and regional districts to establish fees and municipal services through its bylaws. The statutory requirements set out in the *Local Government Act* and *Community Charter* ensure that rate making services related to utilities provided by

local governments are enacted through an open process that requires public participation. To establish reporting requirements for local government corporations, the Commission recommended the implementation of an annual reporting requirement for local government corporations and appended to the Report as Appendix B an *"Annual Declaration for Class of Persons Exemption Wholly Owned and Operated Local Government Corporations"* (the **"Declaration"**). The Declaration will require a local government to annually file and submit a form that confirms that the local government corporation was wholly owned and operated by the local government and providing energy utility services exclusively within the boundaries of the local government, disclose the number of complaints received in the previous year and the nature of the complaints and provide confirmation that the energy utility system is in compliance with applicable safety requirements.

TAKEAWAYS

When considering the potential implications of the Report, there are a number of key takeaways for local governments operating local government utility corporations which must be considered moving forward. In

particular, a local government will need to be mindful of the ownership structure of its local government utility corporations to assess whether it may fall within the exemption should these recommended changes be implemented and to determine whether it will be required to complete the Declaration. In the event that the local government is not the sole shareholder and other stakeholders have an ownership interest or it provides utility services outside the local government's boundaries then it will not qualify for the exemption, will be deemed to be public utility and will be required to comply with the statutory requirements set out in the Act. Local governments may also consider preparing for the implementation of these potential changes by instituting procedures that require their local government corporations to prepare audits, risk assessments and other reviews to ensure that they are compliant with all statutory safety requirements, remain apprised of best practices and technological changes in the utilities industry. It would be prudent for local governments and their utility corporations to work with industry consultants and other professionals to develop annual auditing and other processes through which it can ensure that the corporation is maintaining high safety standards and addressing complaints and other concerns appropriately.

This will assist local government corporations in meeting the requirements set out in the Declaration should those reporting requirements be implemented.

A report on stage 2 of the inquiry will be released at a later time and will address the regulatory considerations for other variations of local government affiliated utilities, consider the necessity of seeking advanced approval from the Government of British Columbia to offer a class of persons exemption to local government energy systems in certain circumstances and will make a recommendation to the Government of British Columbia to review the definition of a “public utility” in the Act as it relates to local government corporations. In the interim, local governments have been provided some indication of where the Act and its application to local government corporations providing utility services is likely headed and how it will be applied to local government corporations. If these recommended changes are implemented then so long as a local government utility corporation is wholly owned by a local government as the sole shareholder, is only engaged in the business of providing utility services and those services are only provided within the boundaries of the local government then it will be entitled to an exemption provided that the Declaration is completed. To

maintain an exemption, local governments will need to exercise caution with respect to any proposed ownership changes, expansions to the scope of its business or plans to provide services outside the local government’s boundaries as such changes will result in the local government corporation losing its exemption status and being classified as a public utility under the Act.

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David is an associate lawyer of the firm. His practice is focused on municipal, land development and construction matters. Prior to working at Civic Legal LLP, David worked as a litigator and represented insurance corporations, local governments, construction managers and local and national companies in a variety of legal actions and disputes. David has developed a unique perspective on risk management, negotiation, and strategy from his litigation experience, which he draws on to advise his clients on a variety of legal and regulatory issues. In his solicitors practice David routinely advises clients on local government issues, procurement processes and land use planning and development regulatory matters. He has further drafted construction contracts and municipal service agreements on varied construction projects and contractual matters.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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