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Tax Sales for Municipal Finance Officers

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I. INTRODUCTION

Recent tax sales involving Penticton, Spallumcheen and Pemberton have caused certain aspects of the statutory tax sale process to be subject to significant scrutiny. These aspects are: (1) when and how notice of the tax sale is given to the registered owner, (2) the minimum price for which a property must be sold at tax sale, and (3) the consequences of failing to redeem a property during the redemption period, especially where the owner does not understand or is misinformed about what they need to do to avoid losing the property.

All three of these aspects have a corresponding impact on municipalities and their collectors, including with regard to potential liability for damages. As much as tax sales are a very effective method of ensuring that most ratepayers pay their property taxes within three years of the tax being imposed, things can get ugly when a ratepayer ultimately and unexpectedly loses their property for failing to pay taxes or to redeem.

This paper will discuss current legal trends regarding notices, upset prices and post-redemption period court challenges to tax sales as each of these can have a significant impact on municipal liability. This paper assumes the reader has a general understanding of the mechanics of the tax sale process and is not intended to be a step-by-step guide.

II. NOTICES – AND TWO TYPES OF NOTICE IN PARTICULAR

Division 7 [*Annual Municipal Tax Sale*] of Part 16 of the *Local Government Act*, R.S.B.C. 2015, c. 1 contains reference to a surprising number of notices in just 27 statutory sections:

1. Section 647 – Notice of annual tax sale to the public at large (historically a newspaper advertisement)
2. Section 656 – Notice of tax sale of a particular property filed in the land title office
3. Section 657 – Notice of tax sale and date the redemption period ends to registered owners and chargeholders
4. Section 659 – Notice of unclaimed surplus proceeds from a tax sale
5. Section 660 – Notice to the collector of costs incurred by the purchaser to prevent waste
6. Section 662 – Notice of redemption filed in the land title office
7. Section 663 – Notice of non-redemption filed in the land title office
8. Section 666 – Notice to council of a complaint regarding a tax sale
9. Section 671 – Notice of default in payments by a purchaser under an agreement for sale

Although all of these notices are mandatory when the applicable circumstances arise, collectors usually have the most difficulty with giving notice under section 657 of the *Local Government Act*. Arguably the second most important notice, from a practical perspective, is not even mentioned in the Act. That notice is the notice to the owner of an impending tax sale if delinquent taxes are not paid in time.

1. The pre-tax sale courtesy notice

The *Local Government Act* does not expressly require any particular notice be given to an owner warning of an imminent tax sale. Annual tax notices must report taxes owing, taxes in arrear and, eventually, delinquent taxes. It is up to the individual municipality to decide how aggressively to warn of the consequences of a tax sale. In December 2021, the Office of the Ombudsperson in BC issued a report ("A Bid for Fairness: How $10,000 in Property Tax Debt Led to a Vulnerable Person Losing Their Home") that was critical of several steps taken by a municipality in a particular tax sale as well as of the BC tax sale process in general.

The Ombudsperson's report criticized how ratepayers were warned of the risk of tax sale in annual tax notices and other letters sent by the City of Penticton in advance of the tax sale. The report suggested that the use of small fonts, out-of-date statutory references and incomplete articulation of the consequences of having delinquent taxes were problems in the courtesy notices. Such notices might still be seen as better than nothing.

For finance officers and collectors seeking to minimize the number of tax sales in any given year, it can be hard to distinguish between three types of delinquent assessed owners: (1) the aware, being those who know they are behind on taxes but cannot pay or chose not to pay until the last minute, (2) the unaware, being those who do not know that they have fallen behind, but will pay if they can once their attention is drawn to that fact and the risks of tax sale, and (3) the vulnerable, being those who, even after they receive a letter explaining the risk of tax sale, are not able to understand the risk of tax sale or address their delinquent taxes because of a personal vulnerability. The Ombudsperson's report focused on the plight of a vulnerable individual. Among the report's recommendations was a suggestion that the "Ministry of Municipal Affairs issue best practice guidelines for municipalities to notify a property owner by personal service or registered mail before holding a tax sale in relation to their property."

Obviously sending courtesy notices through personal service and registered mail may cause some unaware assessed owners to become aware owners. In addition, failed efforts to serve such assessed owners in this way may instead reveal why a particular owner is unaware. Maybe the mailing address is out of date and the owner does not live on the assessed property. So even though registered mail "didn't work", it can serve as a prompt for other methods to be pursued to locate and contact the assessed owner.

If delivery by registered mail or personal service is achieved, that fact alone does not tell the collector if the person served was already aware of the delinquent taxes, was previously unaware or is a vulnerable person. If the delinquent taxes are paid, then the collector need not be worried about why the owner fell behind on taxes—at least for another year. However, if delinquent taxes are not paid, the collector may be left wondering whether it is because of the assessed owner's inability to pay, because the registered mail notice went to the wrong person or because, as the Ombudsperson's report describes, the person's "health concerns had made it hard for her to understand the tax notices sent to her home, and to respond appropriately to the other communications she had with the City about her tax situation."

In the absence of a statutory requirement to serve notices in advance of a tax sale (which may be imposed by the Legislature in the future), collectors have significant discretion with regard to whether and how to serve courtesy notices. Although seeking to serve every assessed owner who has delinquent taxes personally or through registered mail is an option, collectors who are familiar with their rolls may want to take a more selective approach depending on the problem. Some collectors might suspect that the assessed owner lives abroad, in which case locating and

communicating with the owner by any means will likely be the biggest challenge. If the assessed owner has a lengthy history of late payment of taxes and whose properties are littered with financial charges and liens, the collector might conclude that an inability to pay or a preference towards paying other more costly debt first is why the taxes are now delinquent. If the assessed owner is believed to be living in a mortgage-free property, as did the vulnerable person described in the Ombudsperson's report, and yet tax payments have simply stopped, then there may be something else amiss.

The Ombudsperson's report describes the need to make an extra, owner-specific effort as follows:

> As a matter of fairness, the City should have taken steps to understand why Ms. Wilson had not paid her taxes. In the circumstances, the City should have satisfied itself that Ms. Wilson's failure to pay her taxes was not due to some factors beyond her control. For example, Ms. Wilson was owed more than a single phone call in the 11 months before the expiration of the redemption period. Put another way, the City should have seen this tax sale as more than a collection effort: staff should have recognized that the tax sale could leave a person without a home or financial security. The City should have done more to ensure that the use of this extraordinary power was scrupulously fair.

Extra steps in particular cases might be seen as courtesy, rather than an act of fairness, but in any event if it results in delinquent taxes being paid and a tax sale avoided then that benefits both the municipality and the owner.

2. The post-tax sale notice to owners and chargeholders

Section 657(1) of the *Local Government Act* statutorily requires what is arguably the most important notice in the tax sale process:

> (1) Not later than 3 months after the sale of property at an annual tax sale, the collector must give written notice of the sale and of the day the redemption period ends, either by serving the notice or by sending it by registered mail, to persons registered in the land title office as
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> (a) owner of the fee simple of the property, or
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> (b) owner of a charge on the property.

Pre-tax sale notices warn that a tax sale might happen, but a post-tax sale notice under section 657(1) advises owners and chargeholders that no one paid the delinquent taxes for the property before the annual tax sale auction and the property was consequently sold at auction. The notice also advises the owner and chargeholders of the limited time in which to redeem.

If a municipality cannot serve an owner or chargeholder in accordance with section 657(1), the municipality may apply for an order permitting an alternative form of service under section 657(2)

of the *Local Government Act*. From the municipal perspective, the primary benefit of giving notice under section 657 is that it statutorily absolves the municipality of any further responsibility or liability to the owner or chargeholder (*Local Government Act*, s. 657(2)).

If the municipality fails to give such notice, the municipality may be liable to an owner or chargeholder for the losses arising from the sale. That is precisely what happened in the case of *Morgan v. Spallumcheen (Township)*, 2022 BCSC 752. In the *Spallumcheen* case the small municipality was liable to pay almost $360,000 for failing to give the owner of a property the statutorily required notice. These damages reflect the difference between the market value of the property sold and the sale price received at tax sale.

Given that pre-tax sale (warning) notices are often effective in encouraging some property owners to pay delinquent taxes to avoid a tax sale, it is reasonable to expect that fewer properties will need post-tax sale notices. Although post-tax sale notices will be fewer in number than pre-tax sale notices, a collector must recognize that now all owners and chargeholders must be given notice in accordance with the statute. Even where such notice has been given, the fact that the property was sold at tax sale increases the onus, from a fairness perspective, for a collector to attempt to identify why the taxes are not being paid.

As mentioned above with pre-tax sale notices, the collector may not know which owners and chargeholders are aware, unaware or vulnerable to misunderstand that a property has been sold at tax sale and the consequences thereof. Service of the statutorily required notice may be all that is necessary to avoid legal liability, but it does not conclusively answer the question of whether the owner or chargeholder actually received "fair warning"—i.e. did the notice of tax sale actually end up in their hands and did they understand its contents? Although above and beyond the statutory requirements, follow up phone calls or email exchanges may help confirm actual notice or may reveal a problem other than an inability to pay property taxes as they become due.

Ensuring redemption of those properties that an owner or chargeholder would want to redeem has the collateral benefit of sparing the municipality the additional costs associated with non-redemption, which include dealing with the surplus under section 659 of the *Local Government Act* and, in an increasing number of cases, dealing with claims of unfairness made by the owner and their advocates.

III. THE (MINIMUM) UPSET PRICE

The statutory upset price at tax sale was one of two reasons why the Ombudsperson said that the *Local Government Act* fails to protect the interests of owners. The "Bid for Fairness" report stated:

> Because the Act allows municipalities to set the upset price based only on the amount of taxes owed, with no consideration of the market value of the home, it is more likely that owners will lose significant equity in the sale process.

The above statement focuses its concern on the owner who does not redeem.

For those owners who redeem, the process may be better described as a "tax loan" rather than a "tax sale". The purchaser pays all the taxes that are owed by the assessed owner at the time of the tax sale and then, through the redemption process, the assessed owner pays the purchaser back with interest. The interest is payable on the purchase price, not just the upset price. The more the property sells for, the more interest that will accrue each day during the redemption period.

What sale price best benefits the owner depends on the circumstances. If an owner ultimately wants to and can redeem, that owner will want a low purchase price because that will lower the amount of interest on the "loan" that is accruing daily. However, an owner who does not redeem will want a high purchase price to maximize the surplus that is paid out after the redemption period ends. Amendments to legislation that would increase the minimum purchase price would, from this perspective, benefit the non-redeeming owner (likely the minority) but could cause redeeming owners to pay more in interest charges upon redemption. A further option for owners is to market and attempt to sell the property during the redemption period to try and realize a higher sale price.

Municipalities likely also benefit from a bidder paying a high purchase price. The principal liability risk that a municipality faces is an indemnity claim for losses suffered by an owner under section 669(3) of the *Local Government Act*. The larger the sale price, the smaller the financial loss suffered by the owner and chargeholders.

A further consequence of attempting to secure a higher sale price through a higher upset price, and one that might not be viewed as a negative in larger municipalities, is that a significantly higher minimum upset price could scare away all potential bidders. Even under the current framework there are a limited number of people with the financial resources and risk tolerance who are willing to buy a property:

(a) using all cash that is paid a year before transfer of title;
(b) with no opportunity to reconsider the purchase;
(c) sight unseen;
(d) as is-where is;
(e) with the risk of no transfer and a return of the purchase price without interest over a year later (*Local Government Act*, s. 664); and
(f) with no assurance of vacant possession on the transfer date.

If the upset price is set too high, bidders might see the risks as outweighing any potential benefit and simply not bid. If no bids are made, the municipality becomes the declared purchaser (*Local Government Act*, s. 650(2). This means that the municipality is still without the cash for overdue taxes, but now has a property that may or may not be worth the increased upset price.

Although it remains to be seen what legislative changes will be proposed, raising the upset price does not appear to advance the use of tax sales as a method of finding secured lenders willing to advance taxes on behalf of delinquent ratepayers. The expected gap between the purchase price of a property at tax sale and the market price a real estate agent could obtain with a lengthy marketing period, access to the property, and a willing seller, might encourage the Legislature to look at other means of lending to assessed owners who have equity, but are unable to pay their property taxes.

IV. FAILURE TO REDEEM DURING THE REDEMPTION PERIOD

A purely procedural interpretation of tax sale legislation suggests that a tax sale followed by non-redemption is simply a statutory means by which a municipality can effectively transfer ownership of land from someone who will not pay their property taxes to someone who will. If no one redeems then under section 663(1), "at the end of the redemption period, the collector must forward a notice to that effect to the registrar of land titles." The filing of that notice will cause the Land Title Office, in most cases, to register the purchaser as the new owner of the tax sold property.

While non-redemption might be seen as a "win" for the collector because the new owner is expected to be better at paying property taxes on time, there are often several practical reasons why municipalities and their collectors likely prefer to see properties redeemed. In the case of non-redemption, the additional risks and obligations include:

(a) there is a lingering risk of a court claim by the owner or chargeholder, even in circumstances in which the municipality believes it has no liability;
(b) the municipality must deal with the surplus in accordance with section 659 of the *Local Government Act*, which may necessitate a payment into court or additional notices to the owner;
(c) increasing uncertainty over whether a collector can or should wait to file a notice of non-redemption;
(d) the municipality may be asked by purchasers at tax sale to assist them with gaining possession and with other issues that are a private legal matter between the purchaser and the former owner; and
(e) claims or concerns that that the consequences of a particular tax sale are unfair even if the process complies with the statutory requirements.

For finance officials, the risk of a legal claim likely remains the foremost concern.

Recent cases have created some confusion over what sorts of claims a municipality might expect and when. This has also resulted in questions regarding a collector's obligation to file the notice of non-redemption "at the end of the redemption period". Is this filing something that must be done promptly or can the collector delay to see if legal claims are made?

Delay in filing the notice of non-redemption could impact the type of claim that should be brought. Section 669(1) of the *Local Government Act* says that "After the end of the period allowed for redemption, no action may be brought to recover the property or set aside its sale". While this might at first be interpreted as limiting an owner to only making a (time-limited) claim for damages where available, two cases indicate that other types of court claims could also be made.

In the case of *521006 B.C. Ltd. v. Pemberton (Village)*, 2019 BCSC 526, the court held that an owner could still commence an action for declaratory relief finding the tax sale to be invalid and any transfer of the property to the purchaser at tax sale to be illegal and invalid. The owner commenced its claim in the *Pemberton* case after the redemption period ended and after attempting to redeem two properties one day too late. This occurred after the owner had received misinformation from the municipality regarding the time to pay.

Notably in the *Pemberton* case, no notice of non-redemption had been filed because the municipality agreed not to file such a notice pending the outcome of the court action. Because of this, the plaintiff owner did not need to ask the court to transfer title of the properties from the purchaser back to the owner. The owner only sought to stop a future transfer. The purchaser of the properties in the *Pemberton* case also did not participate in the court proceedings, so the court did not hear arguments from her about why the properties should be transferred.

An instance in which a tax sale was "undone" after the redemption period ended also occurred in *Maple Ridge (Re)*, 2020 BCSC 1473. The *Maple Ridge* case provides an example of a municipality using judicial review under the *Judicial Review Procedure Act*, R.S.B.C 1996, c. 241 to invalidate a tax sale and avoid the consequences of an owner losing title to their land despite the owner not receiving notice of tax sale and the date the redemption period ends. In the *Maple Ridge* case, two different properties were sold at tax sale and the municipality failed to deliver written notice of the tax sale and the date the redemption period ended in accordance with section 657 of the *Local Government Act*. Both properties went unredeemed and, rather than file a notice of non-redemption, the municipality applied for a declaration that the tax sale itself was invalid. As in *Pemberton*, the collector had not filed a notice of non-redemption and so the properties had not transferred to the purchaser.

The fact that the municipality was the purchaser in the *Maple Ridge* case likely made it easier for that municipality to achieve a result that the City of Nanaimo failed to obtain in *McCready v. Nanaimo (City)*, 2005 BCSC 762. In the *Nanaimo* case, the municipal council passed a resolution purportedly declaring a tax sale invalid for manifest error under what is now section 668(1) of the *Local Government Act.* The reason for the declaration was because the municipality realized that it had failed to give the required notice of tax sale to the owner and was therefore at risk of a claim from the owner or chargeholder if the property was not redeemed.

The purchaser successfully challenged the council's declaration of a manifest error under section

668(1). The court held that the manifest error provisions only applied to circumstances leading up to and at the tax sale, not an instance of statutory non-compliance occurring after the tax sale.

The *Maple Ridge* decision suggests that, even if a municipal council cannot itself declare a manifest error, it can ask the court to set aside the tax sale for a failure to give notice under section 657 of the *Local Government Act* and may wait until the redemption period has ended (but presumably before the notice of non-redemption has been filed) to do this. Given that the relief sought in the *Maple Ridge* decision case was granted under the *Judicial Review Procedure Act*, the same relief could presumably have been sought by the owner in that case. This potential ability for an owner to set aside a tax sale after the redemption period ends supplements the owner's statutory right to sue to set aside a tax sale during the redemption period under section 666 of the *Local Government Act*.

V. DON'T FORGET ABOUT THE PURCHASER

The more recent decisions of *Pemberton* and *Maple Ridge* can be viewed as owner-favourable because the outcome spared owners from the consequences of municipal mistakes. Slightly older decisions, such as *Nanaimo* and *Sun Wave Forest Products Ltd. v. Prince Rupert (City),* 2012 BCSC 1908 can be viewed as favouring the purchaser by emphasizing the finality of the tax sale. The older cases were also decided after purchasers actively advanced their arguments in court to protect their interest in the tax sale. It is notable that no purchaser was asking to preserve the sale in the *Pemberton* and *Maple Ridge* cases and the court did not refer to the *Nanaimo* decision in either case. It is also notable that in the *Nanaimo* decision, the court refused to follow an even earlier decision (*Martman v. Sidney*, [1994] B.C.J. No. 210), which held that a municipal council could cancel a tax sale if the municipality failed to give notice under what is now section 657 of the *Local Government Act*. There has evidently been some ebb and flow in how the purchaser's interests in the sale are protected.

Maybe the *Pemberton* and *Maple Ridge* decisions suggest that the court would now decline to follow *Nanaimo* if similar facts arose again. Under the current law for judicial review, a court might not interfere with a council's decision to cancel a tax sale under section 668 because the municipality failed to give the required notice under section 657 of the *Local Government Act*. Cancellation by council must be done under section 668 because of the obligations imposed on the collector under section 652(c):

> 652 After a tax sale to a person other than the municipality, the collector must sign and give to the purchaser a certificate that
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> …
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> (c) states that an indefeasible title will be applied for on the purchaser's behalf at the end of one year from the date of sale unless the property is redeemed or the sale

is cancelled under section 668.

[underlining added]

Given that redemption remains a possibility there is no certain prejudice to the purchaser if there is a cancellation of the tax sale under section 668 prior to the end of the redemption period. The owner might have still redeemed at a later date had the sale not been cancelled. With a cancellation, the municipality must return the purchase price and pay the purchaser interest (*Local Government Act*, s. 668(1)(a)). Indeed, many purchasers at tax sale hope that tax sold properties are redeemed because it means they get paid interest on the money they have effectively loaned. The only difference here is that it is the municipality and not the redeeming owner or chargeholder who is paying that interest.

Section 668 of the *Local Government Act* does not permit a municipal council to cancel a tax sale after the redemption period ends. A municipality may, apparently, still apply for a declaration that the tax sale was invalid as was done in the *Maple Ridge* case, but by this time the purchaser can point to a prejudice in not being registered as the new owner under section 663 of the *Local Government Act* in circumstances in which the redemption period ended with no redemption.

In any event, it is the ratepayers generally who lose out when a tax sale is cancelled by a council during the redemption period. Rather than collecting unpaid taxes through a tax sale, the municipality has instead paid the purchaser money for nothing and the property tax debt of the owner continues to be unpaid. Nevertheless, if a municipal council seeks to cancel or invalidate a tax sale, the purchaser may resist being paid back with interest and rely on *Nanaimo* and challenge council's resolution to cancel. The purchaser could have a significant incentive to do so if the purchaser bought the property cheaply at tax sale and expects it to go unredeemed.

VI. CONCLUSION

Recent court cases and public scrutiny are likely discouraging of a mechanical, do-only-what-is-strictly-required, approach to tax sales. Rather, municipalities and their collectors are likely expected to be more investigative and considerate of the circumstances of the owner. Legislative changes and Ministerial practice directives may further seek to increase owner awareness and understanding of tax sale procedures. In any event, given the complications, risks and uncertainties that can arise from non-redemption, finance officials may wish to encourage staff to make the additional effort of identifying why a property might be sold at tax sale and go unredeemed. Compliance with statutory notice requirements is necessary to avoid liability, but additional efforts to ensure that those who need to know do know about a tax sale may help to ensure a fairer, and less litigious, outcome for all those involved.