LEGAL ISSUES IN MUNICIPAL TAX SALES

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Michael Moll

710 – 900 West Hastings Street, Vancouver BC, V6C 1E5 | www.civiclegal.ca

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TABLE OF CONTENTS

I. Introduction 3
II. Pre-tax sale procedures 4
A. Identifying properties liable for tax sale 4
1. Land exempt from tax sale 5
2. Trickier scenarios 7
B. Giving owners and charge holders notice of an impending tax sale 11
1. The form pre-tax sale notice 11
2. Identifying explanations for non-payment 11
3. Mandatory pre-tax notice under section 647.1 12
C. Publishing notice of the tax sale 15
D. Educating the public about tax sales 16
E. Providing additional information to bidders at the auction 18
F. Municipal bid authorization 18
G. Dealing with last minute payments 19
III. Conducting the annual municipal tax sale 20
A. Person who conducts the tax sale 20
B. Timing and location of the tax sale 20
C. Method of selling and the upset price 20
D. Forms of payment provided by the purchaser 23
E. Insufficient bids 23
IV. After the tax sale: the redemption period 23
A. Filing notice that the property has been sold at tax sale 24
B. Giving notice of the tax sale and the date the redemption period ends 24
1. Obtaining a title search 25
2. Obtaining a company search for corporate owners and charge holders 26
3. Attempting delivery by registered mail 26
4. Seeking personal service if registered mail ineffective 26
5. Contacting legal counsel regarding substituted service 27
A. Substituted service 27

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1. Method of applying to court 28
2. Timing of the application to court 28
3. Carrying out substituted service 28
4. Situations in which substituted service is likely necessary 28

B. Consequences of failing to give notice of tax sale 30

C. Redemption and other events and actions 31

1. The partial transfer of ownership rights 31
2. Redemption 31
3. Redemption by instalments 32
4. Imposition and payment of taxes during the redemption period 33
5. Waste to the property 34
6. Municipal action in relation to property purchased by the municipality 34
7. Foreclosure or other forced sale of the property by a creditor 35
8. Cancellation by council for manifest error 35
9. Owner/charge holder application to set aside the tax sale 37
10. Application for judicial review by municipality 37

V. After the redemption period ends and no one redeems 38

A. Registration of the purchaser (notice of non-redemption) 38

B. Consequent extinguishment of some charges 39

C. Property transfer tax 40

D. Federal goods and services tax 40

E. Refusal to register purchaser's title 41

F. Access to and use of the property 41

G. Distribution of the surplus 42

1. Single claim by (now former) registered owner 42
2. Multiple claims against the surplus 42
3. No one claims the surplus 44

H. Collection of taxes unpaid by the (former) owner 44

I. Court action or application by the (former) owner or charge holder 46

1. Action seeking indemnity 46
2. Action or application seeking to invalidate sale after redemption period ends 50

J. Judicial review application by the municipality 52

VI. Concluding comments 53

I. INTRODUCTION

Tax sales have been a municipal collection remedy in British Columbia for over a century. More recently, tax sales of property in Penticton, Spallumcheen and Pemberton have attracted media attention and revealed the significant financial and emotional risk to owners, and the significant liability risk to municipalities, that can arise from misunderstanding or being unaware that a property has been sold for municipal tax sales.

Tax sales are a harsh, strict and effective response to the non-payment of property taxes by ratepayers. The burden of complying with statutory procedures and addressing legal issues that arise with tax sales is far outweighed by the benefit of a process that strongly encourages most owners to pay municipal property taxes on time. Tax sales almost always operate as an effective collection mechanism against the small minority of owners who fall too far behind on payments.

A municipal tax sale is a statutorily mandated response to property taxes becoming delinquent. A delinquent tax is a property tax or eligible fee that has been imposed but has gone unpaid by the end of two consecutive calendar years. If a property still has delinquent taxes imposed against it by 10am on the last Monday in September, the property must be offered at an auction that day. The intended effect of the tax sale is that the collector uses the money received from the winning bidder at the auction to, first, collect those taxes that have been imposed on the property but not paid for multiple years, and then, second, to hold on to any surplus money for the benefit of the owner or others claiming an interest in the property. The statutory process gives the owner a year (in most cases) to either pay the purchaser back with interest if the owner wants to keep the property or to let the property be transferred to the purchaser and to make a claim on the surplus. Given that most properties are redeemed rather than transferred to the purchaser, the process may arguably be better described as a mandatory tax loan rather than a tax sale.

The above is a very general and simplistic summary of the mechanics of a municipal tax sale in British Columbia. In practice, the municipal tax sale process is more complex and can give rise to several legal issues. When conducting a tax sale, a collector's first reference should always be to the procedures set out in the *Local Government Act*, RSBC 2015, c 1

and the *Community Charter*, SBC 2003, c 26 .[1] The intention of this paper is to provide supplementary commentary on legal issues that arise from matters not expressly covered in the statute.

II. PRE-TAX SALE PROCEDURES

The mandatory use of the tax sale process is imposed by section 254 of the *Community Charter*:

> If applicable, a municipality must recover unpaid property taxes, including any interest and penalties owing on those taxes, by tax sale in accordance with Division 7 of Part 16 of the *Local Government Act*.

A more precise requirement imposed on the collector is set out in section 645(1) of the *Local Government Act*:

> At 10 a.m. on the last Monday in September, at the council chambers, the collector must conduct the annual tax sale by offering for sale by public auction each parcel of real property on which taxes are delinquent.

The requirement that the collector offer real property with delinquent taxes for sale protects the integrity of the tax collection process. This is because a mandatory tax sale prevents a situation in which an owner is effectively spared the obligation to pay property taxes because a collector is slow to, or chooses not to, take other effective steps towards collection. Taxes that are never collected are no tax at all.

A. Identifying properties liable for tax sale

A collector is expected to be able to identify which properties are subject to delinquent taxes imposed. A more complicated task is identifying if any of those properties can be excluded from the tax sale despite the imperative language in section 645(1) of the *Local Government Act*.

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[1] Readers should note that this paper does not cover tax sales conducted by the Province of British Columbia in relation to land outside the boundaries of a municipality, tax sales conducted by the City of Vancouver or tax sales conducted by an improvement district. Different legislation applies to such tax sales.

Absent a legal basis for exclusion, the collector will breach a statutory duty if the collector withholds from sale a property on which taxes are delinquent. Collectors may note that the Nova Scotia court in *Antigonish/Guysborough Federation of Agriculture v. Antigonish (Municipality)*, 2012 NSSC 352, aff'd 2013 NSCA 71, held that a collector has "no choice" and must offer a parcel liable for tax sale at a tax sale. In that case, a collector had repeatedly refrained from selling a property at the annual tax sale because it was owned by a regional county government and occupied by a non-profit organization.

In the *Antigonish* case, the occupant considered the land to be tax exempt under municipal legislation and the collector appeared to agree. However, the land was being assessed as taxable commercial property and tax bills were being issued annually. Neither the county nor the occupier contested the tax bills or the property's assessment status. The county and the occupier simply did not pay those tax bills, and the unpaid amounts accumulated over the years. The reasons in the *Antigonish* case indicated that the property only went up for tax sale because the Nova Scotia government felt compelled to remind municipalities of the obligation to recover unpaid taxes through tax sales.

1. Land exempt from tax sale

Below is a list of some of the situations in which the collector should not offer a property for tax sale despite taxes being delinquent.

a) Property affected by stay or order under federal legislation

The Constitutional division of powers in Canada under the *Constitution Act, 1867* means that federal legislation prevails over conflicting provincial legislation regarding the same subject matter (see *Re: Westline Ranch Ltd*. (1985), 68 BCLR 301 (SC)). The *Companies Creditors Arrangement Act*, RSC 198, c C-36 the *Bankruptcy and Insolvency Act*, RSC 195, c B-3 and the *Farm Debt Mediation Act*, SC 1997, c 21 are all federal statutes that provide a process for addressing the failure of a debtor to pay debts owing to creditors. These statutes also provide for the issue of orders or notices to creditors that operate as a stay (suspension) or prohibition against creditors taking action to collect debts except as permitted by the statute or an order issued under it. These stays seek to prevent different creditors from taking competing actions to collect while also enabling the debtor to pursue a uniform response to insolvency. A collector should seek legal advice if the municipality is served with an order under the above acts regarding a ratepayer.

Collectors should also note that in the case of property owned by a farmer that is not (yet) the subject of a stay, the collector is required to give written notice to the farm under section 21 of the *Farm Debt Mediation Act* before seeking recovery of a debt through tax sale. The Ministry of Agriculture and Agri-Food Canada prescribe a form for this purpose.

b) Tax sale of property prohibited by court order

A court may, for a variety of reasons, issue an order prohibiting a property from being sold at an upcoming tax sale. For example, a tax sale was stayed by the court in *Burnaby (City) v. Thandi*, 1999 BCCA 589, because the owner was actively appealing a court decision regarding the municipality's authority to impose $270,000 in property taxes as an unpaid fees-for-service-to-land imposed by bylaw. Since the owner was engaged in ongoing challenge to the fees and the validity of the bylaw, the British Columbia Court of Appeal stayed the tax sale pending the determination of these claims. Although it would take time for the court to determine whether the taxes were validly imposed, the Court of Appeal held the municipality was unlikely to be prejudiced by any potential delay in the collection of such taxes.

An order prohibiting the tax sale of a property may also be made in a legal proceeding that does not involve a dispute between the owner and the municipality. The court may make such an order if it considers it appropriate for dealing with a dispute over title to the property, a dispute over administration of an estate or a foreclosure. Such an order should be served on the municipality, and, ideally, on the collector personally.

c) Land vested in the Provincial Crown (with some exceptions)

Land vested in the Provincial government but held or occupied by others is liable for municipal property taxation (*Community Charter*, s. 228(1)). Those taxes could go unpaid and become delinquent. In such cases, the collector is prohibited from selling the land at tax sale and must employ a different process under section 257 of the *Community Charter*. This process could result in the Province cancelling the lease, licence or permit of occupation if the taxes continue to be unpaid.

One exception occurs when the land vested in the Province is held by a person under an agreement to purchase. A collector should consider seeking legal advice if intending to sell such land under sections 653 and 654 of the *Local Government Act*. Section 646 of

the *Local Government Act* grants council the power to adopt a bylaw that would exempt such a property from tax sale.

Another exception is discussed later in this paper with regard to property that has vested in the government by escheat. The court in *Saini v. Grand Forks (City),* 2011 BCSC 320 declined to find that escheated land is necessarily exempt from tax sale.

d) Land vested in Canada

The Constitutional division of powers means a municipality cannot impose property taxes on the Crown in right of Canada or federal Crown agents for land they own within the municipality. Property taxes may be imposed in certain circumstances on a non-federal government occupier of those lands (*Community Charter*, s. 228). If taxes imposed against the occupier go unpaid, the municipal collector may not sell federally owned property to recover those taxes.

e) Manufactured home in a manufactured home park

Whether and how a manufactured home in a manufactured home park can be sold at tax sale is a topic of some debate amongst municipal lawyers. The issues arise because under section 3 of the *Manufactured Home Tax Act*, RSBC 1996, c 281 the owner of a manufactured home park is not liable for the unpaid property taxes imposed on the manufactured home owned by someone who rents a pad in their park. If the manufactured home has delinquent taxes, but the manufactured home park does not, seizure and sale through distraint under section 252 of the *Community Charter* may be the municipality's only method of "direct" collection. This process is quite different from the tax sale of property, and collectors should consult legal counsel before taking any steps.

Outside of a manufactured home park, if a folio for a parcel has delinquent taxes and one of the improvements on the parcel is a manufactured home, then the manufactured home can be sold together with the parcel at tax sale.

2. Trickier scenarios

Below is a list of scenarios in which the eligibility of the property for tax sale is less clear under the law or may require more investigation.

a) Land owned by a dissolved corporation or society

If a company or society dissolves while still owning property, that property escheats to the Provincial government under the *Escheat Act*, RSBC 1996, c 120. The transfer of ownership by escheat may not be permanent, and furthermore may be deemed at law to have never occurred in the first place. If a corporation or society is restored within two years of dissolution, the "revival has effect as if the land of the corporation had not escheated to the government" (*Escheat Act*, s. 4(4)). The case of *Saini v. Grand Forks (City)*, 2011 BCSC 320 confirmed that such a revival of a dissolved owner means, for tax sale purposes, that the land was never vested in the Province. As will be discussed later, this potential outcome has important consequences for a collector seeking to give notice of the tax sale and the date the redemption period ends.

After two years, a court order is required to vest the escheated land back into the corporation or society. There is a question as to whether that order could include as a term that the effect of the order on the land is that the escheat never occurred.

The possibility that presently escheated land may in future be deemed to have never been subject to escheat effectively means that collectors should offer at tax sale land with delinquent taxes and a dissolved corporation as its registered owner. If the collector does so, one of four results will occur:

- The company is restored before the end of the redemption period such that the escheat is deemed to have never happened;
- The property is redeemed before the end of the redemption period;
- The property is not redeemed by the end of the redemption period and the Province consents to the registration of the purchaser as the new owner despite the escheat; or
- The property is not redeemed by the end of the redemption period and, because of the escheat, the registrar refuses to register title in the name of the purchaser. Under section 664 of the *Local Government Act*, the municipality is deemed the purchaser and the original purchaser receives the purchase price back without interest.

All four of these outcomes will result in the municipality recovering taxes owing on the property through either a tax sale of the property to a purchaser or the municipality's acquisition of the property at tax sale (but still subject to the escheat). If the collector does not put a property up for tax sale because of the escheat, the collector risks failing to uphold the duty to sell certain property at tax sale and is allowing one more year to pass in which the taxes for the property will go unpaid.

Before offering for sale any property owned wholly or in part by a corporation or society, a prudent collector should obtain a B.C. company or society summary from the corporate registry. If the owner is dissolved, legal advice should be sought given the issues that will very likely arise in giving the required notice under section 657 of the *Local Government Act* and registering purchasers upon non-redemption.

b) Land subject to a certificate of pending litigation

A property that is subject to a certificate of pending litigation filed in the Land Title Office should still be liable for tax sale. If the collector identifies a certificate of pending litigation before the tax sale, the collector should contact the filing party as they may be interested in paying the delinquent taxes. The filing party risks losing their claim to the property if the property is sold at tax sale and not redeemed.

c) Land subject to an expropriation notice

A property that is subject to an expropriation notice under section 6 of the *Expropriation Act*, RSBC 1996, c 125, should still be liable for tax sale. The filing of an expropriation notice does not necessarily mean that the property will ultimately be expropriated during the redemption period or at all. A collector should seek legal advice about handling this particularly difficult issue.

d) Land subject to a foreclosure

A property that is subject to a foreclosure proceeding remains liable for tax sale unless the court has issued an order specifically prohibiting the tax sale (*1055249 B.C. Ltd v. Grace Mtn. Land Co.*, 2018 BCSC 2355).

e) The delinquent taxes have been challenged, but no court order affects the tax sale

In some cases, an owner refuses to pay property taxes because the owner disputes the amount charged or the ability of the municipality to impose a particular charge. The appropriate course of action for the owner is to either pay the delinquent taxes and seek to recover them later by a court challenge or commence a court proceeding and seek an interlocutory order prohibiting the tax sale of the property pending a decision on the owner's challenge (an example of this latter approach occurred in *Burnaby (City) v. Thandi*, 1999 BCCA 589). If neither of these events occur, a collector must sell the property at tax sale. The collector has no power to decide that delinquent taxes are due and payable, but that those taxes are also sufficiently "iffy" that a tax sale should not be used to collect them.

f) A home subject to the *Homeowner Protection Act*

A curious situation might arise if a property sold at tax sale contains a "new home" as defined by the *Homeowner Protection Act*, SBC 1998, c. 31. Section 22 of the *Homeowner Protection Act* generally prohibits the sale of new homes unless certain warranty insurance is in place. If a new home, without insurance, is liable for tax sale then a question arises as to whether the prohibition on selling the home under the *Homeowner Protection Act* applies to a mandatory tax sale under the *Local Government Act*. Since the regulations do not presently provide for a general exemption for properties sold at tax sale, the statutory remedy would appear to be to obtain a property specific exemption from the registrar with responsibility for the BC Housing New Homes Registry. Whether this step is legally necessary is unclear, especially since section 23(6) of the *Homeowner Protection Act* exempts a municipality from any liability to a purchaser arising specifically from the statute.

g) Utility company improvements

Section 644 of the *Local Government Act* provides that the land and improvements of a utility company, except for certain "specified improvements", are subject to annual property taxes and thus could be sold at tax sale. Section 644 further provides that "specified improvements", such as poles, cables and towers, cannot be individually taxed as land or improvements and the utility company must instead pay a revenue-based tax calculated in accordance with section 644(7) of the *Local Government Act*. A collector

should seek legal advice if an "electric light, electric power, telephone, water, gas or closed circuit television company" is in arrears, because the available remedies will differ depending on whether it is a property tax or a revenue-based tax that is going unpaid.

B. Giving owners and charge holders notice of an impending tax sale

At time of writing, the *Local Government Act* does not impose a requirement to give an owner or charge holder specific notice that their property will be sold at tax sale if the delinquent taxes are not paid. This is expected to change in 2025. In the meanwhile, Giving such notice remains a prudent practice.

1. The form pre-tax sale notice

In the months leading up to a tax sale, a diligent collector should still make multiple efforts to contact the owner of a property with delinquent taxes to remind them of the need to pay taxes to avoid a tax sale. 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 the City of Penticton warned ratepayers of the risk of tax sale in annual tax notices and other letters sent 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. Still, such notices might be better than nothing.

Following the Ombudsperson's report, the Ministry of Municipal Affairs prepared a guide titled "Municipal Property Tax Sales: An Introduction and Best Practices". The guide includes a standard form letter to advise owners of the impending tax sale as well as steps the owner can take to avoid the tax sale or to respond to the property being sold if the tax sale is not avoided. This standard form letter can also be sent to charge holders.

2. Identifying explanations for non-payment

In conjunction with sending a pre-tax sale notice, collectors may wish to assess whether there is some apparent explanation for the non-payment of taxes. It can be difficult 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 choose 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.

Collectors might suspect that an 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 title to their property is 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 property taxes are now delinquent. If the assessed owner appears to be living in a mortgage-free property, as did the vulnerable person described in the Ombudsperson's report, and tax payments have simply stopped, then there may be something else amiss.

Some potential explanations, such as the owner being a vulnerable person or being deceased with no one administering their estate, will warrant contacting the Public Guardian and Trustee. The earlier this is done, the more time it gives the Public Guardian and Trustee to (potentially) assist prior to a critical deadline.

3. Mandatory pre-tax notice under section 647.1

To date the sending of a pre-tax sale notice has been a courtesy to owners. Statutory requirements regarding an impending tax sale are expected to be in place in 2025 with the anticipated coming into force of section 647.1 of the *Local Government Act*. That section has been enacted by the legislature but will not become law until a regulation brings it into force. Even prior to section 647.1 coming into force, it remains a good practice to send a pre-tax sale notice to owners and charge holders. The standard form in the Provincial guide: "Municipal Property Tax Sales: An Introduction and Best Practices" should be used for this notice.

Once in force, section 647.1 will provide as follows:

> 647.1 (1) At least 60 days before the date of the annual tax sale, the collector must, in relation to any property subject to tax sale, give written notice, either by serving

the notice or by sending it by registered mail, to persons registered in the land title office as

(a) owner of the fee simple of the property, or

(b) owner of a charge on the property.

(2) A notice under subsection (1) must include the following:

(a) the time and place of the annual tax sale;

(b) the legal description and street address, if any, of the property subject to tax sale;

(c) the amount of all taxes owing to the municipality on the property and the amount of interest to the date of the annual tax sale;

(d) the upset price of the property for the purpose of the tax sale;

(e) a statement that, if the amount of delinquent taxes calculated in accordance with section 246 [*delinquent taxes*] of the Community Charter is not paid before the annual tax sale, the collector will offer the property for sale by public auction at the time and place stated in the notice;

(f) a statement that, if the property is sold at the annual tax sale, a right of redemption will remain in the owner or holder of the charge until the end of the redemption period.

(3) On application, the Supreme Court may order that a notice under subsection (1) may be served by substituted service in accordance with the order.

(4) The collector must retain a copy of each notice under subsection (1).

The parties who must be sent or served a pre-tax sale notice under section 647.1 are the same parties who must be sent or served post-tax notice under section 657 of the *Local Government Act*: registered owners and charge holders. Recommended steps for identifying and notifying these recipients are discussed in greater detail later in this paper with regard to the post-tax sale notice.

Although the same types of people (owners and charge holders) receive both pre- and post-tax sale notices, the number of people who must be sent a pre-tax sale notice will likely be much larger. This is because section 647.1 will require a notice be sent in relation

to every property with delinquent taxes owing. A post-tax sale notice need only be sent in relation to those properties that are ultimately sold at tax sale.

Section 647.1 also prescribes much more detailed content for a pre-tax sale notice than is presently required for a post-tax sale notice. The new provision also imposes an express requirement that the collector retain a copy of the notice. A collector should be keeping copies of all correspondence sent in relation to taxes owing regardless of what is expressly required by statute.

Section 647.1 of the *Local Government Act*, once it comes into force, will raise several questions, some of which are discussed below. Readers should also be aware of the possibility that, in the interim, section 647.1 will be further amended such that the provision is different from what is discussed in this paper.

a) When would it be prudent to serve the required notice?

The July 2nd general tax due date creates a dilemma regarding the timing of the pre-tax sale notice. If service of the pre-tax sale notice is first attempted after July 2nd, then that will be close to the statutory deadline for service (60 days before the tax sale). A collector may not have much time left for substituted service if the first attempt at service is unsuccessful. Substituted service is discussed in greater detail with regard to the post-tax sale notice later in this paper.

If service is attempted at the beginning of the year when the taxes for a property first become delinquent, then the collector will be foregoing some potential cost-savings that would result if at least some of those property owners pay their delinquent taxes in the first half of the year. There appears to be little incentive to attempt to serve all delinquent owners and charge holders in May or June, given that the prospect of the penalty for current year taxes may prompt some delinquent owners to pay off their taxes in full by July 2nd. Giving notice prior to July 2nd could be better rationalized if the legislation permitted a required pre-tax sale notice to be sent by regular mail.

b) If a collector fails to give notice under section 647.1, can the property still be sold at tax sale?

A collector will be required to serve the pre-tax sale notice under section 647.1 of the *Local Government Act* and will also be required to sell (most) properties with delinquent

taxes at tax sale (section 645(1)), but it is not clear how a failure to fulfill the requirement to serve the pre-tax sale notice will affect the requirement to sell.

After a tax sale, the owner of a property may ask the court to set aside the sale because of non-compliance with section 647.1 (*Local Government Act*, s. 666(2)(c) once amended). Given that the court has set aside a tax sale at the request of a municipality because of non-compliance with the post-tax sale notice requirement (*Maple Ridge (Re)*, 2020 BCSC 1473), the court will likely do the same in response to non-compliance with the pre-tax sale notice requirement. A council may also, without going to court, set aside a tax sale for a manifest error in the proceedings before the sale under section 668 of the *Local Government Act*. Unlike the post-tax sale notice discussed in *McCready v. Nanaimo (City)*, 2005 BCSC 762, non-compliance with section 647.1 could be described as a manifest error in the tax sale. A collector may therefore wonder what the point is of selling a property at tax sale if the next step is to ask council to immediately set the tax sale aside, especially since this means involving a purchaser in the interim. The *Local Government Act*, once amended, does not expressly state that a failure to comply with the section 647.1 pre-tax sale notice requirement means that the collector should not abide by the section 645(1) tax sale requirement.

c) What is the impact of section 647.1 of the *Local Government Act* on compensation claims?

The coming-into-force of section 647.1 of the *Local Government Act* will also bring into force a consequent amendment to subsection 657(3) of the *Local Government Act*. Subsection 657(3) will read:

> (3) No liability or responsibility other than as set out in subsection (1) [post-tax sale notice] and section 647.1 [*owners must be given notice before tax sale*] rests with the collector or municipality to give notice of the sale for taxes.

This amendment suggests that liability could attach for non-compliance with section 647.1. However, it is not clear how that liability will be affected if there is subsequent compliance with the post-tax sale notice under section 657.1. This issue is discussed in greater detail later in this paper.

C. Publishing notice of the tax sale

Section 647 of the *Local Government Act* provides:

647(1) Notice of the annual tax sale must be published in accordance with section 94 [*requirements for public notice*] of the *Community Charter* and must specify

(a) the time and place of the annual tax sale, and

(b) the legal description and street address, if any, of the property subject to tax sale.

(2) If the council has adopted a bylaw under section 94.2 [*bylaw to provide for alternative means of publication*] of the *Community Charter*, the notice under this section must be published by at least one of the means of publication specified in the bylaw not less than 3 days and not more than 10 days before the annual tax sale.

(3) If the council has not adopted a bylaw under section 94.2 of the *Community Charter*, the last publication of the notice must be not less than 3 days and not more than 10 days before the annual tax sale.

Failure to give the proper statutory notice will jeopardize the tax sale and can have consequences that impose significant liability on the municipality. The statutorily required notice is published for the benefit of the public at large. Although the notice may prompt someone to pay the delinquent taxes on a property, the principal purpose of the notice is to attract bidders.

D. Educating the public about tax sales

Most residents within a municipality are likely unfamiliar with the tax sale process and may never see a reason to educate themselves if they habitually pay their property taxes on time. A municipality may nevertheless want to increase community knowledge of the risks associated with tax sale because that could provide some collateral benefit to the more vulnerable property owners. There are many instances in which a property owner has a friend or family member who is monitoring their welfare. One such example is described in the Ombudsperson's report discussed above:

Until 2013, Ms. Wilson had lived with their elderly mother. Ms. Allen explained that following their mother's death in 2013, and prior to the tax sale, she was in contact with her sister, which included travelling to Penticton to visit her and to inquire about her well-being. Based on Ms. Wilson's assurances, Ms. Allen understood that she was managing well. She told us that the home was well kept and she had no

> reason to suspect that Ms. Wilson needed Ms. Allen to assist her in managing her affairs. In 2016, Ms. Wilson had granted Ms. Allen power of attorney. It is important to note that when a person is designated under a power of attorney, they have no positive obligation to manage a capable person's financial affairs. At the time, Ms. Allen was not aware that her sister had not been paying her taxes despite having the financial resources to do so.
>
> Ms. Allen learned after the sale of the house that her sister'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. Her health concerns also made it difficult for her to actively seek assistance from Ms. Allen or take other steps to protect herself. Because Ms. Wilson had not asked her for help, Ms. Allen did not realize that her sister's ownership of the house was in jeopardy.

For those people who are concerned about a vulnerable property owner it could be very helpful for them to know the risk posed by a tax sale should property taxes go unpaid. It would also be helpful to know that a person can check to see whether a property is liable for tax sale without engaging the property's owner. This can be done by either reviewing the publicized notice of tax sale listing all the properties liable for auction or making a request described under section 249 of the *Community Charter*:

> (2) The collector must provide, to any person who requests this, a certificate showing
>
> > (a) the amount of unpaid taxes charged against specified real property,
> >
> > (b) whether the real property has been sold for taxes, and
> >
> > (c) if the property has been sold for taxes, the time if any remaining for redemption and the amount required to redeem it.

A person may also request a copy of the current year's tax notice for a property under section 238 of the *Community Charter.*

Collectors may therefore wish to consider publishing or distributing information regarding the tax sale process that is intended to educate the public at large. This information may assist those who are "looking out" for their neighbour, friend, or family member. Although privacy protections may prevent a collector from publicly revealing

the name of the owner who has allowed their taxes to become delinquent, the fact that a property within the municipality has delinquent taxes is not private information. Indeed, statute requires that such information be published in a newspaper or otherwise.

E. Providing additional information to bidders at the auction

Collectors sometimes contemplate providing bidders at the tax sale auction with information regarding a property offered for sale that is more than just the property's civic and legal description and the property's upset price. This additional information might include providing bidders with a title search that they can review. Although well-intentioned, this practice could expose the municipality to undue risk if the bidder relies on information presented by the collector that turns out to be inaccurate or incomplete. The municipal collector is not in a position to speak authoritatively with regard to the condition of the property, the nature of the charges registered against the property or whether a charge will survive the tax sale. Even municipal government matters such as the zoning and development potential for a property can be challenging for a collector to describe concisely. How a particular property may be used and developed can be complicated by land use bylaw interpretation, lawful non-conforming status and restrictive covenants.

A potential exception to the practice of avoiding providing bidders with additional information would be to advise bidders of an amount outstanding in relation to a remedial action requirement or other municipal action in default under section 17 of the *Community Charter*. This is an amount owing that, if unpaid, will be added to the taxes of the property next year. This is also an amount that the collector should be able to report with precision.

F. Municipal bid authorization

Although not a matter for the collector, section 648 of the *Local Government Act* provides: "A person authorized by the council may bid for the municipality at the annual tax sale up to a maximum amount set by the council." If this option is to be pursued, council must adopt a resolution prior to the tax sale and the amount to be bid should be duly accounted for within the municipality's financial plan.

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G. Dealing with last minute payments

Collectors are often uncertain about what to do with people who seek to pay overdue taxes by uncertified cheque in the days or hours before the tax sale. If the municipality accepts the cheque and, after the tax sale, the cheque is returned for insufficient funds, the collector will have failed to either collect the delinquent taxes or to sell the property at the tax sale.

Some municipalities require last minute owners to pay by bank draft, certified cheque or electronic transfer, however there is no statutory authority that allows a collector to place that restriction on a payment of taxes just because the taxes are being paid at the last minute.

The collector's practical options when faced with an uncertified cheque are not ideal:

- The collector can, if time allows, seek to have the cheque certified by the bank (at the municipality's expense) prior to presenting it for payment;
- The collector can refuse the uncertified cheque, which may expose the municipality to liability for the owner's additional costs of redeeming the property;
- The collector can accept the uncertified cheque as payment and withdraw the property from the auction (e.g. take the chance that the cheque bounces for insufficient funds); or
- The collector can accept the uncertified cheque and seek to cash it, but nevertheless proceed with the tax sale of the property (e.g. take the chance that the cheque does not bounce).

A collector is likely obliged to accept an uncertified cheque. A collector might only consider the last option if the collector expects that the cheque will bounce. If the cheque clears to the collector's surprise, the collector should promptly ask the municipality's council to cancel the tax sale of that particular property for manifest error (*Local Government Act,* s. 668).

Some collectors might consider adjourning the tax sale under section 645(3) of the *Local Government Act* until it is known whether an uncertified cheque has cleared or not.

Repeated daily adjournments for this purpose are likely not conducive to a competitive auction.

III. CONDUCTING THE ANNUAL MUNICIPAL TAX SALE

A. Person who conducts the tax sale

Section 645(1) of the *Local Government Act* requires the collector to conduct the tax sale by public auction. The collector "means the municipal officer assigned responsibility as collector of taxes for the municipality" and includes the deputy collector (*Community Charter*, Schedule, s. 4).

Section 645(4) provides that the collector may act as auctioneer at the tax sale, which suggests that a person other than the collector may auction the properties instead.

B. Timing and location of the tax sale

The tax sale must be held in council chambers at 10 a.m. on the last Monday in September. If the last Monday in September is a holiday, the annual tax sale must instead be held on the next Monday that is not a holiday (*Local Government Act*, s. 645(2)). In 2024, the annual tax sale will be on October 7, because Truth and Reconciliation Day (September 30) falls on a Monday.

The Covid-19 pandemic resulted in some unique developments. Temporary emergency legislation was adopted to give municipal councils the opportunity to postpone the annual tax sale by a year. For municipalities that did hold sales, some municipal collectors were concerned that their respective council chambers would not accommodate many bidders once pandemic-related social distancing measures were imposed. Although pandemic-related regulations may have reduced the capacity of the council chambers compared to the regular capacity permitted under fire regulations, there was no emergency legislation that authorized moving the tax sale to a larger space.

C. Method of selling and the upset price

An auction is typically conducted for each of the properties in turn. If a property liable for tax sale consists of two or more parcels under a single assessment roll folio, the parcels should be offered together. The form of auction is typically an "English auction" (with ascending bids). Some improvement districts conduct their tax sale by accepting sealed

bids. Although a "first-price sealed bid auction" is technically an auction, there is some uncertainty as to whether an "auction" in section 645 of the *Local Government Act* permits types of auctions that involve blind bidding.

If at the end of the auction for a property, one or more bids exceeds the "upset price" the highest bidder is declared the purchaser at the highest bid price. The upset price is the price calculated by totalling the amounts set out in section 649(1) of the *Local Government Act.* The upset price is usually far less than market value of the property, creating an opportunity for a purchaser, depending on the bidding, to purchase the property for an amount that is at or close to the upset price. This would leave little to no surplus for the owner and charge holders.

For an owner who ultimately redeems, a low purchase price at tax sale is actually a benefit, because it means less interest must be paid at the time of redemption. However, the possibility of a non-redeeming owner receiving little to no surplus from a tax sale was criticized as unfair in the Ombudsperson's report. Assessment of fairness aside, there are many reasons why one should expect the purchase price for a property at tax sale to be much less than the price that a realtor would obtain through marketing the property and negotiating a standard form purchase and sale agreement. Unlike a typical real estate transaction, at tax sale a purchaser is buying a property:

- using all cash that is paid a year before transfer of title;
- with no opportunity to reconsider the purchase;
- sight unseen;
- as-is, where-is and with no representations by the owner as to quality or fitness;
- 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
- with no assurance of vacant possession on the transfer date.

For these reasons many purchasers strongly prefer that the properties they buy at tax sale be redeemed so that the purchasers can simply collect the interest on the purchase price.

The successful purchaser at auction must: "immediately pay the collector the amount of the purchase price" (*Local Government Act*, s. 650(4)) and the purchaser or purchaser's agent must complete a statement under section 651 authorizing "the collector to make an application to register, at the appropriate time [if it occurs], the purchaser's title to the real property." This statement must include the purchaser's full name, occupation and address. If the purchaser is more than one person, the collector should obtain the signature, the full name, occupation and address of each person. If those people wish to be registered as joint-tenants, or tenants in common with uneven shares, the signed statement that they provide to the collector must say that. Ideally the purchaser(s) will have received legal and accounting advice before taking such a step.

Once the purchaser has paid the purchase price and provided the required statement, the collector must sign and give the purchaser a certificate under section 652 of the *Local Government Act* that:

> (a) describes the parcel sold,
>
> (b) states the sale price, and
>
> (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.

This is an important document for the purchaser as it is effectively evidence of an entitlement to registration of title unless the property is redeemed or the sale is cancelled under section 668 of the *Local Government Act*. Collectors should also note that there are circumstances in which the whole tax sale, including the certificate, will be declared invalid by the court.

Paying "immediately" means that the winning bidder provides payment before the next property is offered for sale. If a purchaser fails to pay the purchase price immediately, the collector must offer the property again for tax sale (*Local Government Act*, s. 650(4)). Following this process ensures that a property has actually been sold before the next property is offered for sale. If the collector does not obtain immediate payment, a number of issues could arise. These include a complaint from the owner that the purchase price was far lower than it should have been. The owner may complain that by the time it was discovered that the highest bidder was unable to pay such that the owner's property was

offered again, other bidders had left the tax sale or had spent the money they had brought on other properties.

D. Forms of payment provided by the purchaser

A collector is likely permitted to specify required methods of payments by bidders that are more limited than the methods by which someone can pay property taxes. This is because a ratepayer must pay, and must be allowed to pay, taxes, whereas a person may choose whether to participate in a tax sale auction. A collector, in conducting the auction, likely has control over how winning bidders are allowed to pay for their properties. A prudent course for a collector is to announce at the commencement of the auction, and ideally with previous warning, that only bank drafts, certified cheques or other means of payment satisfactory to the collector will be accepted and payment must be received immediately after the bidder wins the auction. In practice, this requires bidders to bring one or more prepared bank drafts in various amounts which are then presented at the time of purchase.

The collector should be very careful in calculating the upset price and confirming that payment equal or exceeding the upset price was actually received. In the Ontario decision of *Carrocci v. McDougall (Township)* (2004), 71 OR (3d) 41 (Sup Ct J), the court set aside a tax sale on the basis that the purchaser had, on the date of the tax sale, delivered a payment to the municipality that was one penny ($0.01) less than the amount that the applicable statute required the purchaser to provide.

E. Insufficient bids

If no bid for a property equals or exceeds the upset price, the municipality is declared the purchaser (*Local Government Act*, s. 650(2)). The collector may, however, offer the property again for sale later at the very same tax sale (s. 650(3)) and potentially find greater interest from bidders once other properties have been sold.

IV. AFTER THE TAX SALE: THE REDEMPTION PERIOD

The redemption period is one year from the day the annual tax sale began, or two years from that day if a municipality was declared the purchaser at tax sale and the municipality's council later passes a bylaw extending the redemption period for a year. Assuming no such extension, for a tax sale that began on September 25, 2023, the

redemption period ends on September 25, 2024, even if an adjournment by the collector resulted in a property being sold on September 26, 2023. The redemption period is a critical time for owners and charge holders of property sold at tax sale because they should take positive action within the redemption period if they want to retain their interest in the land.

A. Filing notice that the property has been sold at tax sale

Section 656 of the *Local Government Act* requires the collector to file a notice in the land title office "promptly after selling property for taxes". Fulfillment of this step is expected to warn anyone who acquires title or a registered interest in land that their interest is subject to the risk of non-redemption. The slower the collector is to file the notice, the greater the risk that a person might purchase title to, or register an interest in, the property without being aware that the property was sold at tax sale.

B. Giving notice of the tax sale and the date the redemption period ends

Section 657(1) of the *Local Government Act* imposes a strict requirement on collectors to give notice to certain persons that a particular property was sold at tax sale and the date the redemption period ends for that property:

> 657(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
>
> (a) owner of the fee simple of the property, or
>
> (b) owner of a charge on the property.

To determine who needs to be served, a prudent collector will perform a title search after filing a notice under section 656 of the *Local Government Act*. The title search will provide a list of all owners and charge holders whose interests were registered prior to the filing.

The requirement imposed on the collector is to give notice to the registered owner of the parcel and <u>every owner</u> of a registered charge within three months following the tax sale. Although section 657 of the *Local Government Act* does not make express mention of the surplus received by the municipality at the tax sale, it is prudent to let the owner and

charge holders know the amount of the surplus so that they have a better understanding of the consequences of the tax sale.

The giving of notice under section 657(1) is limited to the two methods of giving written notice, personal service and registered mail (*Martman v. Sidney* [1994] BCJ No 210 (SC)).

Giving notice to registered owners and charge holders may prove more difficult than some collectors might expect. Shortly after the tax sale, a prudent collector should take the steps set out below for each property sold at tax sale.

1. Obtaining a title search

A collector should obtain a title search to identify the owner and all the charge holders registered in the Land Title Office as the names and addresses of such people may not match what is shown on the assessment roll. Section 657(1) of the *Local Government Act* requires notice to be served on persons "registered in the land title office" as either the "owner of the fee simple of the property" or the "owner of a charge of the property".

A "charge", as defined by the *Land Title Act* is either an estate or interest in land that is less than fee simple or an encumbrance. "Encumbrance" is defined in that same act as including among other things "a judgment, mortgage, lien, Crown debt or other claim to or on land". An interest in land includes certain charges against land that are not financial in nature, such as a restrictive covenant or easement. These charges will survive non-redemption in a tax sale, and it is a common practice among collectors to not serve registered owners of such non-financial charges. The *Local Government Act* does not expressly exclude owners of these charges from the service requirement.

It is also a common practice among collectors to choose not to serve the Provincial or federal government as registered owner of a financial charge, because that registered Crown debt will survive non-redemption. There is no statutory support for this practice. Furthermore, being notified of a tax sale gives the provincial or federal government an opportunity to inquire after the surplus and to potentially make a claim against the surplus in the case of non-redemption. This opportunity will be lost if the provincial or federal government first learn of the tax sale after the surplus has been paid out.

A person who is "registered in the land title office" as an "owner of a charge" likely does not include a person who benefits from a building scheme that applies to the land sold at tax sale. Although a "building scheme" is defined in the *Land Title Act* as a "a restrictive

covenant constituting a special local law applicable to the defined land", the equally burdened neighbours under the scheme cannot claim to each be registered as an owner of a charge on the tax sold property. Those neighbours will also not be identified as the registered owner of the building scheme on a title search or state of title certificate. Building schemes will also survive non-redemption following a tax sale.

2. Obtaining a company search for corporate owners and charge holders

A collector should obtain company and society searches for corporate owners and charge holders as this will provide the collector with important information. The search will state a registered office or, if it is an extra-provincial company, a registered attorney, at which personal service can be made or registered mail can be delivered. The search will also state whether the company or society has been dissolved, a situation that triggers the need for substituted service. A collector should also be cautious of companies that are not in good standing and risk being dissolved before the collector can give the requisite notice of the tax sale.

3. Attempting delivery by registered mail

Seeking to deliver the notice through registered mail is usually the preferred first attempt at complying with section 657 of the *Local Government Act*. To be effective, the notice must not just be sent by registered mail, it must also be signed for on receipt (see: *Gray v. Township of Langley*, (1986) 9 BCLR (2d) 1 (CA) and *Angled Enterprises Ltd. v. City of Quesnel* (1988), 39 MPLR 170 (BCCA) with regard to an earlier version of the tax sale legislation). If the collector knows that both steps have not occurred, either because the mail has been returned undelivered or the collector knows that someone other than the owner has signed for the registered mail, notice has not been given.

The collector should keep a record of all attempts to give notice by registered mail, both successful and unsuccessful, and retain returned envelopes and Canada Post notifications of successful delivery.

4. Seeking personal service if registered mail ineffective

Typically, by the third week of October, a collector should know whether a notice has been delivered by registered mail. If the notice has not been delivered, the collector should promptly pursue personal service. Personal service is usually done through a process server but can be done by a municipal employee. Personal service means that the requisite

notice has been delivered into the hands of the owner or charge holder. Posting the notice on the property or leaving the notice with another adult at the owner or charge holder's residence is ineffective.

The critical information for the process server is direction to the locations at which the person is most likely to be found. If that person does not reside at the address on title, collectors should consider trying to locate the individual using internet searches, e-mail and telephone numbers on file, property visits and skip tracers. The collector should keep detailed records of the product of these searches. Process servers should provide the collector with an affidavit of service if their efforts are successful and an affidavit of attempted service if not.

5. Contacting legal counsel regarding substituted service

If by the beginning of November, a collector continues to have trouble giving notice to an owner or charge holder by personal service or regular mail, it is strongly recommended that the collector contact a lawyer experienced in tax sales. In some cases, the lawyer's experience with past tax sales means they are often able to provide additional assistance regarding steps to effect service or locate the person sought. More importantly, a lawyer can assist with applying for a substituted service order if that is the collector's only practical option to give notice of the tax sale and the date the redemption period ends no later than 3 months after the tax sale.

A. Substituted service

Section 657(2) of the *Local Government Act* provides that, in response to an application, the Supreme Court can order that notice of the tax sale and the day the redemption period ends may be served by substituted service. Substituted service, more commonly known as "alternative service", occurs when the municipality performs certain actions set out in an order that the court identifies as a sufficient alternative method of giving notice of the tax sale and the date the redemption period ends. For owners or heirs whose whereabouts or contact information is unknown, these steps commonly include posting a notice together with the order on the property sold at tax sale, sending the notice and the order by regular mail or publishing a notice in the newspaper. In other instances, the court may simply authorize service by sending notice to a known email address if it appears that the recipient is avoiding registered mail or personal service.

1. Method of applying to court

Applications for substituted service orders are made by requisition. This means that a lawyer representing the collector and the municipality files a written request with the court for an order, together with a draft of the order and one or more affidavits that provide evidence in support of the order. These affidavits are usually sworn by the collector and the municipal employee who has been most involved in the attempts made by the municipality to give notice of the tax sale. In reading the affidavits, the court will be looking for evidence that the proposed method of alternative service will reach those who need notice.

Once the requisition is filed, the lawyer does not need to attend court, but simply waits for the court to (hopefully) grant the order sought.

2. Timing of the application to court

The application for a substituted service order should be made sooner rather than later. The 3-month period to give notice ends right around the Christmas holidays and is generally a busy time for everyone involved, including the court. The preparation of affidavits is often more time consuming than collectors expect. Furthermore, as much as the court makes great efforts to respond to such requisitions, substituted service orders are (too) often granted days before the deadline for giving notice which leaves the collector with very little time to take the steps necessary to give notice in accordance with the order.

3. Carrying out substituted service

Once the municipality and its collector have obtained an order permitting substituted service, the steps set out in the order must be carried out precisely as ordered and must be completed within the 3-month notice period.

4. Situations in which substituted service is likely necessary

Collectors are sometimes slow to resort to a substituted service order, because they maintain hope that either the owner or charge holder can be located in time or someone will pay to redeem the property thereby obviating the need to give notice. Such delay risks placing the collector in a position in which there is no time left to obtain a substituted service order. The liability exposure that this creates is discussed in the next section.

In some cases, the necessity for substituted service can be identified at an early stage. For example, a substituted service order will be necessary if the owner or charge holder who is required to receive notice is:

- a dissolved corporation or society – While dissolved, there is no legal person to accept notice by registered mail or personal service, but a dissolved corporation or society can later be restored. A municipality was caught out by this "resurrection" in *Saini v. Grand Forks (City)*, 2011 BCSC 320, because the corporate owner had been dissolved during the 3-month period in which notice needed to be given, but was later restored and made a claim. A substituted service order could seek to serve the owner of the property by seeking to give notice to both the Province and the known directors of the dissolved corporation.

- believed to be dead – A deceased person cannot sign for registered mail or personal service, and the practical response is to obtain a substituted service order that seeks to notify the heirs. The collector should also notify the Public Guardian and Trustee if it appears that no one is willing to administer a deceased person's estate. Although an executor or administrator of the deceased person's estate might become the registered owner of the property in the future, this change in registered ownership is neither a certainty nor something that should be expected to happen before the statutory deadline for service.

- incarcerated – Federal and provincial correctional services will very rarely reveal the location of an inmate without the inmate's consent. Even if the location of the inmate is known, arranging and confirming personal service on that inmate is usually extremely difficult.

- a person lacking capacity – A collector may believe that a person, because of illness or disability, does not understand the notice of tax sale and date the redemption period ends even if they have personally received it. In such cases, a substituted service order that includes the Public Guardian and Trustee or the person's appointed committee is appropriate.

B. Consequences of failing to give notice of tax sale

At best, the failure of a collector to give the statutorily required notice is of no ultimate consequence, because the property is redeemed before the redemption period ends. At worst, the municipality may be statutorily liable to indemnify an owner or charge holder for the financial loss they sustained on account of the property being sold at tax sale. Such losses could be in the millions of dollars. The question of when such a claim for an indemnity arises is discussed later in this paper with regard to actions commenced by an owner after the redemption period.

The consequence of a failure by a municipal collector to give the statutorily required notice of a tax sale and the date the redemption period ends is a legal liability for the municipality that should not be conflated with the consequences befalling an owner who fails to redeem. Tax sales are a harsh remedy that is strictly applied and a person may lose title to their property despite having potential options for redemption. In the Ombudsperson's report "A Bid for Fairness", the Ombudsperson expressed concern with the adequacy of the tax sale notification period and with the risk that an owner will lose significant equity if the winning bid is close to the upset price.

There is no doubt room for improvement in tax sale procedures. Nevertheless, it should be noted that the Ombudsperson's report focused on an owner for whom health issues, rather than a lack of funds, was likely driving the non-payment of taxes and non-redemption. The report noted that:

> … health concerns had made it hard for [the owner] 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. [The owner's] health concerns also made it difficult for her to actively seek assistance from [the owner's sister] or take other steps to protect herself.

A registered owner who can be contacted, but who does not know what to do in response to notice of a tax sale, is different from an owner who cannot afford to redeem or an owner who cannot be found and is simply ignorant of the tax sale. Every owner of a tax-sold property is vulnerable to the harsh consequences of non-redemption. However, it is the owner who is unable to protect themselves that likely attracts the most sympathy.

C. Redemption and other events and actions

During the redemption period, several events and actions can occur:

1. The partial transfer of ownership rights

Section 665(1) of the *Local Government Act* provides that:

> 665(1) When real property is sold at an annual tax sale under this Act, all rights in it held by persons who at the time of the tax sale were an owner of the property or the registered owner of a registered charge on the property, immediately cease to exist, except as follows:
>
> (a) the property is subject to redemption as provided in this Act;
>
> (b) the right to possession of the property is not affected during the time allowed for redemption, subject to
>
> (i) impeachment for waste, and
>
> (ii) the right of the purchaser at the tax sale to enter on the property sold to maintain it in a proper condition and to prevent waste;

This means that as of the tax sale, and for as long as the property goes unredeemed, the registered owner on the date of the tax sale ceases to have any ownership rights except a right to possession. In most cases this means that not much changes "on the ground" during the redemption period. Nevertheless, the purchaser has purchased rights, and the lingering question will be whether those rights will be surrendered back to the owner on redemption or will continue and later include registered title and a right of possession after the redemption period ends.

2. Redemption

Redemption of the property sold at tax sale is what is expected to occur during the redemption period. The person who chooses to redeem the property is usually, but not always, the owner. Section 660(1) of the *Local Government Act* provides that the following people may redeem a property:

> (a) an owner or registered owner in fee simple of the parcel,
>
> (b) an owner of a registered charge against the parcel, or

(c) another person on behalf of a person referred to in paragraph (a) or (b).

Charge holders such as mortgagee banks will usually redeem to protect the equity they hold in a mortgage, but a collector should not rely on this to occur. Although a mortgage may be registered on title, the mortgage may be paid off, leaving no equitable interest in the property for the bank to protect through redemption.

Subsection 660(1)(c) effectively operates to provide that almost anyone can redeem a property if they purport to be doing it on behalf of a registered owner or charge holder. The collector should make clear that any money paid to redeem the property cannot be later refunded to the payee if the payee regrets paying another person's property taxes. There are countless situations in which a person other than the registered owner or charge holder might seek to pay the property taxes. For example: an expectant heir of a deceased owner may redeem even though they are not (or not yet) the appointed executor of the deceased's estate; a tenant under an unregistered lease may pay on behalf of the tenant's landlord to prevent the landlord from breaking the lease through non-redemption; or a person who is the beneficial owner of a property may redeem once that person realizes that the nominee registered owner has not taken care of the property taxes. The collector's obligation is to recover taxes owed to the municipality, and a collector may be wandering dangerously beyond their jurisdiction if the collector starts passing judgment on whether a redeemer is entitled to pay on behalf of another person.

To redeem, a person must pay the amount owing on the date of the payment using the formula set out in section 660(3) of the *Local Government Act*. Once the payment has been received, the collector must forward to the purchaser the total amount that the purchaser has paid plus interest to the date of redemption at the rate prescribed under section 11(3) of the *Taxation (Rural Area) Act*. If the purchaser consists of multiple people, the collector should divide the payment to reflect the share of ownership for each person shown on the statement issued under the *Local Government Act*, s. 651.

Upon redemption of the property, the collector must also file a notice of redemption with the Land Title Office, together with the applicable fee (*Local Government Act*, s. 662). This step causes the cancellation of the notice of tax sale on title.

3. Redemption by instalments

With one exception, a collector should never accept part payment or instalments as payments towards redemption. In most cases, a person must pay the entire amount

payable under section 660(3) of the *Local Government Act* to redeem. The purported receipt of instalment payments by a collector also risks significant instances of confusion between the collector and the payor: confusion over how many instalment payments are needed, confusion over whether a large partial payment prevents the owner from later losing the property (it does not), confusion over how to deal with any interest credit arising from paying some money early and confusion over what to do with the money if the property is not redeemed as a collector may seek to credit at least some of the money received towards taxes owed by the (now former) purchaser under section 658 of the *Local Government Act*.

The one statutory exception for part payment occurs when a person pays through two instalments as prescribed under section 661 of the *Local Government Act*. This option is only available to a person if the municipality was declared the purchaser of the land and if three other conditions set out in section 661(1) are met. If an entitled person pays exactly 50% of the upset price and interest owing during the one-year redemption period, the redemption period is extended by 11 months and 21 days to allow for a second and final payment within that time.

4. Imposition and payment of taxes during the redemption period

Section 658 of the *Local Government Act* provides:

> 658 (1) During the period allowed for redemption, real property sold at an annual tax sale must continue to be assessed and taxed in the name of the person who at the time of the tax sale appeared on the assessment roll as owner and that person is liable for taxes accruing.
>
> (2) The accruing taxes continue to be a special lien on the property under section 250 [*taxes are a special charge on the land*] of the *Community Charter*.
>
> (3) The tax sale purchaser may pay the taxes that become due during the period of redemption, and the amount paid must be added to the amount required to redeem.

In combination, these subsections make clear that the owner is the one who is liable to pay taxes accruing during the redemption period, but that the purchaser may still pay those taxes. The purpose of such a payment by the purchaser would appear to be to avoid exposure to interest and other charges if the owner neither redeems nor pays the accruing

taxes and those taxes are later imposed on the purchaser as the new owner of the property.

5. Waste to the property

An owner who expects to lose title to a property at the end of the redemption period may allow the improvements to fall into significant disrepair or take other action that "wastes" the property. A purchaser may apply to the court to evict such a wasteful owner or to enter onto the property to maintain it in a proper condition. The purchaser can add these maintenance costs to the redemption amount by giving notice to the collector (*Local Government Act*, s. 660(3)(b)). The collector does not have any discretion to assess whether the costs incurred by the purchaser are reasonable or not (*Woytowich v. Kitimat (District)*, 2012 BCPC 400), however a prudent collector will promptly advise the owners and charge holders that the costs are being added. This dispute between the owner and the purchaser is otherwise unlikely to involve the municipality unless the owner's actions negatively impact municipal utilities and prompt the municipality to take remedial action.

6. Municipal action in relation to property purchased by the municipality

If the municipality is the purchaser of a property sold at tax sale a few additional considerations will apply:

a) Insurance

As the purchaser, the municipality has a new and significant—if unregistered—interest in real property and should consider immediately insuring that interest. That said, the municipality's insurer may not be prepared to insure a property during the redemption period given the municipality's limited control of the property.

b) Resale of property

The municipality, and only the municipality, can offer to resell the property sold at tax sale in accordance with section 655 of the *Local Government Act*. The sale must occur within 9 months of the tax sale and must be for a price equal to or greater than the upset price plus interest accrued to date. The municipality will be required to give notice of the disposition in accordance with *Community Charter*, s. 94 and legal advice on the transaction is strongly recommended.

c) Extension of the redemption period

As discussed earlier, a municipal council may extend the redemption period by one year through a bylaw adopted under section 660(6) of the *Local Government Act*. The purpose of such an extension is presumably to give the owner or other interested parties more time to redeem.

7. Foreclosure or other forced sale of the property by a creditor

Owners who have fallen behind on taxes owed to a municipality are often behind on payments to other creditors. If another creditor seeks to force the sale of a property sold at tax sale, such a creditor has a significant interest in redeeming the property to avoid the consequences of non-redemption. Legal advice should be sought in each case as the creditor may instead seek to obtain an order from the court that prevents the collector from taking any action if there is non-redemption.

8. Cancellation by council for manifest error

Section 668 of the *Local Government Act* provides as follows:

> 668 (1) During the period allowed for redemption, if the council finds a manifest error in the tax sale or in the proceedings before the sale, it may order that
>
> (a) the purchase price be returned to the purchaser together with interest at the rate prescribed under subsection (2), and
>
> (b) the taxes be dealt with as the circumstances require, either
>
> (i) by restoring the taxes as they were before the sale, or
>
> (ii) otherwise as directed by the council.

This section allows for a council to, by resolution, order the cancellation of a tax sale of a property before the redemption period ends. It is a remedy that, when available, will not involve the court unless the purchaser initiates a challenge.

There is some lingering uncertainty as to what a council may consider a manifest error. In *McCready v. Nanaimo (City)*, 2005 BCSC 762, a purchaser challenged a council's cancellation order and the court held that such an order can only be made in relation to an error in the tax sale or in proceedings before the sale. The court concluded that an

error occurring after the tax sale, specifically a failure to provide the notice of tax sale required under section 657 of the *Local Government Act* is not eligible for cancellation by council.

In deciding the *Nanaimo* case, the court rejected earlier contrary rulings such as *Martman v. Sidney*, [1994] BCJ No 210 (SC) and held:

> The [*Local Government Act*] sets up a complete code that governs the sale of land for delinquent taxes. The code offers protections, both to owners and to tax sale purchasers. After the sale has taken place, council cannot act to the detriment of the purchaser. If council fails to properly notify the owner of the sale, the owner is given certain remedies against council. Council cannot rectify its failure to give notice by cancelling the sale to the prejudice of the purchaser.

This is a purchaser-favourable view because it recognizes that the owner's potential entitlement to the transfer of the property should not depend on how effectively an owner can evade service or how ineffectively a collector is in seeking to serve the notice after the tax sale.

If similar facts arose again, there is a significant question as to whether the court would make an order that so favours the purchaser. The cases involving the Village of Pemberton and the City of Maple Ridge discussed below suggest that the court might now decline to follow the decision in *Nanaimo* to spare an owner a harsh result. The purchaser will also receive their purchase price plus interest, which may be all the purchaser originally expected from the tax sale process. The current law applicable to judicial review has changed significantly since the *Nanaimo* case was decided, which is another reason why 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*.

The finding in *Nanaimo* that the error must occur at or before the tax sale would not appear to preclude the cancellation of the tax sale of the property because a municipality failed to give the (soon-to-be) required pre-tax sale notice under section 647.1 of the *Local Government Act*. If there is a failure to give such notice, but the property is nonetheless sold at tax sale, a collector should request council consider ordering the cancellation of the tax sale.

9. Owner/charge holder application to set aside the tax sale

Under section 666(1) of the *Local Government Act*, a registered owner or registered charge holder of property sold at tax sale may bring an action in the BC Supreme Court "to have the sale set aside and declared invalid." The legal action is subject to restrictions. First, the grounds for the action are limited to the following under *Local Government Act*, s. 666(2):

> (a) the property was not liable to taxation during the years in which the taxes for which the property was sold were imposed;
>
> (b) the taxes for which the property was sold were fully paid;
>
> (c) the collector did not give to that person the notice required by section 657 [*this subsection will be amended to also include section 647.1*];
>
> (d) irregularities existed in connection with the imposition of the taxes for which the property was sold;
>
> (e) the sale was not fairly and openly conducted.

Second, such an action "must not be brought until one month after written notice has been given by the person to the council stating in detail the grounds of complaint" (*Local Government Act*, s. 666(3)).

10. Application for judicial review by municipality

A 2020 decision involving the City of Maple Ridge suggests that a municipality could apply to the court during the redemption period to declare a tax sale invalid because the municipality failed to provide notice of the tax sale and the date the redemption period ends as required by section 657 of the *Local Government Act*. That decision, which is discussed in the next part, involved a court application made after the redemption period ended. There does not appear to be a reason why such an application cannot be brought earlier, however a council authorizing such an application to the court has presumably decided that council cannot set the tax sale aside for manifest error.

V. AFTER THE REDEMPTION PERIOD ENDS AND NO ONE REDEEMS

If the redemption period ends with the property sold at tax sale not being redeemed, there are a few additional steps for the collector to take and events that may occur.

A. Registration of the purchaser (notice of non-redemption)

Section 663(1) of the *Local Government Act* provides:

> 663 (1) If a parcel of land sold for taxes is not redeemed as provided in this Act, at the end of the redemption period, the collector must forward a notice to that effect to the registrar of land titles.
>
> (2) The notice under subsection (1) must
>
> (a) set out the full name, occupation and address of the purchaser, and
>
> (b) be accompanied by
>
> (i) the fees payable under the *Land Title Act*, and
>
> (ii) an application in the form approved under the *Land Title Act* for registration of title in fee simple in the name of the purchaser.

The forwarding of this notice by the collector is the act that causes the Land Title Office to register title of the property in the name of the purchaser. Under the statute, the forwarding should occur "at the end of the redemption period". A collector may face pressure from a purchaser who is anxious to obtain title to the property. The cases discussed later in this section regarding post-redemption period legal actions suggest that the speed with which the collector fulfils the duty under section 663(1) could have a significant impact on liability. Delay may be to the owner's advantage because it gives the owner more time to have the tax sale declared invalid as was done in *521006 B.C. Ltd. v. Pemberton (Village)*, 2019 BCSC 526. However, if a collector fails to register a notice of non-redemption as required, the purchaser may commence a court proceeding seeking to compel the registration (*McCready v. Nanaimo (City)*, 2005 BCSC 762).

Collectors may also want to be mindful of the possibility that an owner will obtain an order granting a stay under federal bankruptcy and insolvency legislation and will do so

during the redemption period. Legal advice should be sought in this situation as the stay may prevent the collector from filing a notice of non-redemption without leave of the court. Nevertheless, if the purchaser paid for the property at tax sale before the stay was issued, then the likely result will be that the surplus (if any) will stand in place of the property unless someone makes a timely redemption.

B. Consequent extinguishment of some charges

Not only does the filing of a notice of non-redemption transfer title away from the owner, it can also cause the cancellation of many registered charges. Section 663(5)(b) of the *Local Government Act* provides that the filing of the notice of non-redemption operates:

> (b) as a quit claim in favour of the purchaser of
>
> > (i) all right, title and interest of every previous owner in fee simple of the parcel, or of those claiming under any previous owner, and
> >
> > (ii) all claims, demands, payments, charges, liens, judgments, mortgages and encumbrances of every type, whether or not registered under the *Land Title Act*,
>
> subsisting at the time the application to register is received by the registrar, except the matters set out in section 276(1)(c) to (g) of the *Land Title Act*.

The list of excepted claims, rights and interests is lengthy and includes federal and provincial charges as well as non-financial rights over the land, such as easements and rights of way. The excepted matters also include rights of expropriation and escheat.

A number of claims, rights and interests are not excepted and are consequently expected to be discharged upon non-redemption. These include builders liens and strata liens for unpaid strata fees. There have been past instances in which the Land Title Office has declined to register the purchaser on title without a certificate of payment under section 256 of the *Strata Property Act*. In such a case, a purchaser may seek to appeal the registrar's decision on the basis that the strata corporation is deemed to have quit its claim against the purchaser. More commonly, rather than awaiting a certificate of payment from the strata, the registrar will treat the notice of non-redemption as being a deemed request from the strata to release the lien.

Anyone claiming in debt under a discharged lien may still claim against any surplus funds held by the municipality. Strata corporations who decline to redeem a property and do not make a claim on the surplus (if available) before the surplus is paid out will be left with just a personal debt claim against the (former) owner.

The registrar should also remove any certificates of pending litigation. A certificate of pending litigation is filed if someone claims that they have an interest in the land despite someone else being the registered owner of that interest. Just as the owner loses all their interest in the land, so does a person who makes a claim against that owner's interest.

Municipal taxes are not excepted from the quit claim provision and it is clear that all claims for taxes imposed prior to the tax sale cease to attach to title. This is not surprising, because all of those taxes form part of the upset price and have either been paid by the purchaser or incorporated into the value of the property if the purchaser is the municipality under section 650(2) of the *Local Government Act*. For those taxes that are imposed after the tax sale, those taxes can be reattached to title through the purchaser becoming liable under section 251(1) of the *Community Charter* to pay taxes unpaid in the previous year. This interplay between the quit claim and the liability of future assessed owners is discussed later in this part.

C. Property transfer tax

If a collector forwards a notice of non-redemption to the Land Title Office, the "municipality must immediately notify the administrator under the *Property Transfer Tax Act*." (*Local Government Act*, s. 663(4)). Ministry of Finance Tax Bulletin PTT 016 sets out the information that the Provincial administrator expects to receive from the municipality and how it can be communicated. The Ministry of Finance will then seek to collect the property transfer tax from the purchaser.

D. Federal goods and services tax

The federal Goods and Services Tax may apply to a purchaser's acquisition of a property through a tax sale. A collector should consider seeking legal advice if the property contains a building that was newly constructed or is part of a failed development.

E. Refusal to register purchaser's title

Section 664 of the *Local Government Act* contemplates the possibility that a collector files a notice of non-redemption and the registrar of land titles refuses to register title in the name of the purchaser. Such an action may occur if the registrar identifies the land as escheated land and the Province refuses to waive its interest. Ministerial consent would also be required to transfer land subject to a lien under the *Land Tax Deferment Act*. The registrar may also decline to register a transfer of land subject to notice.

Section 311 of the *Land Title Act* provides that a dissatisfied person, most likely the purchaser, can appeal the registrar's decision not to register a transfer following non-redemption (*Local Government Act*, s. 664(1)). If the refusal to register the purchaser as the new owner is upheld by the court, the "municipality is deemed to have been declared the purchaser of the property at the tax sale and the municipality must refund the purchase price, without interest, to the purchaser" (*Local Government Act*, s. 664(2)). In this case, not only does the purchaser lose out on interest, the purchaser may also be unable to recover taxes advanced and maintenance costs to prevent waste.

It is not clear whether non-registration means the municipality can, at a later date, seek to file a fresh notice of non-redemption naming the municipality as the purchaser once the registrar's concerns are addressed (e.g. expropriation notice, escheat). Legal advice should be sought in this situation.

F. Access to and use of the property

If the municipality becomes the registered owner of a property sold at tax sale, a number of legal issues may arise following the transfer of title relating to gaining access to the property, dealing with any persons still occupying the property and dealing with personal items left on the property. A municipality should contact its lawyers to review the circumstances of each property purchased by the municipality.

In the case of property transferred to a private purchaser, that purchaser might seek the municipality's help or advice in dealing with the same sort of post-transfer issues. Municipal staff should decline to assist in these cases and suggest that the purchaser seek independent legal advice. Although the municipal collector has the authority to conduct the tax sale, the collector has no authority to deal with private disputes that arise from the transfer of title and the safer course is to not become involved.

A purchaser is entitled to contact the municipality with regard to inquiries related to the surplus, including to potentially make a claim against the surplus as discussed below.

G. Distribution of the surplus

Section 659 of the *Local Government Act* sets out a very specific process for dealing with the surplus, being the amount above the upset price received by the collector. At the end of the redemption period, the collector should not immediately forward the money to the owner, but instead wait for the owner to make a written application to council (*Local Government Act*, s. 659(1)). Legal advice should be sought if the property involved had multiple registered owners at the time of tax sale and the municipality has received an application from an owner, but not an application from every owner.

1. Single claim by (now former) registered owner

If the registered owner makes such an application, and the municipality receives no other claims, then the legislation provides that "money received by the collector at the annual tax sale above the upset price must be paid without interest to the person who was the owner at the time of the annual tax sale, on written application to the council."

Payment to the owner of all "the money received by the collector at the annual tax sale above the upset price" means that the municipality will not hold back money to cover current year property taxes or other debts. If the municipality seeks to do this, it should make a claim against the surplus as discussed below.

2. Multiple claims against the surplus

If, before an application is made by the owner or the money is paid out, the municipality receives notice from anyone else, written or otherwise, in which that person claims entitlement to the money, the collector should apply to pay the surplus into court. Section 659(3) of the *Local Government Act* provides that if "another person" other than the owner makes a claim against the surplus "the money must, without leave, be paid into the Supreme Court".

Such claims on the surplus by someone other than the owner may be received before the redemption period has ended. Although (most) financial charge holders lose their registered interest in the property upon the collector's filing of notice of redemption, they can still claim an interest in the surplus realized from the tax sale of the property (*Re M-B*

Industries Ltd. (1987), 17 BCLR (2d) 197 (Co Ct)). Likely claimants would include holders of builders liens, as in *Re M-B Industries Ltd.*, strata corporations with unpaid strata liens or registered judgment holders. Because there are competing claims, the collector is required to pay the surplus into court. Once that is done, the owner and the claimant(s) can apply to get their share of the money out, with the court deciding how to resolve their competing claims of entitlement.

A purchaser who has advanced current year taxes under section 658(3) of the *Local Government Act* likely has a strong claim against the surplus. A purchaser who did not pay the current year taxes but foresees becoming liable for those unpaid taxes under section 251(1)(b) of the *Community Charter* might still attempt an anticipatory claim against the surplus, although the court would presumably not be prepared to pay a portion of that surplus to the purchaser until after the purchaser has actually paid taxes imposed against the (now former) owner. In any event, the municipality should not assess the strength of a claim and should apply to pay into the court if it receives competing claims.

The municipality itself might seek to claim against the surplus a set-off for debts owing by the owner to the municipality. These debts could include the current year taxes and unpaid utility fees imposed in the current year during the redemption period. Debts owed under a court judgment, a Certificate of Amounts Owing (Bylaw Notice) or an *Offence Act* Certificate (Municipal Ticket Information) are normally registrable against title, so they should be equally claimable against the surplus. Other claims in debt against the former owner may also be provable in court as amounts the municipality is entitled to claim against the surplus.

Section 659(3) of the *Local Government Act* provides that a surplus "must" be paid into Court and does not provide for any deductions for taxes owing. This arrangement may be reflective of the fact that claiming against a surplus is not necessary for tax collection if unpaid taxes and utility fees imposed against the (now former) owner in the year the redemption period ends are statutorily added to next year's taxes under sections 251(1)(b) and 258(2)(b) of the *Community Charter*.

Also, by not giving the municipality an express right to make deductions from the surplus, the legislation accommodates the possibility that another creditor might have a higher priority claim against the surplus than the municipality. For example, if the (now former) owner of the property declares bankruptcy after the tax sale has been completed, section

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136 of the *Bankruptcy and Insolvency Act* lists a number of claims that will rank in priority to claims for "municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding the bankruptcy, that do not constitute a secured claim against the real property or immovables of the bankrupt". The bankrupt has by this time lost their property through tax sale.

The provincial or federal government might also make a claim against the surplus as a means of recovering directly from the person against whom the lien was originally imposed, rather than relying on the Crown liens that survive non-redemption as means to collect from the new owner.

The payment into court is typically done through a requisition made in relation to ("re:") the amount of money held in surplus. The municipality's lawyers can assist with preparing the materials necessary for filing with the court. If the municipality is not claiming against the surplus, then the payment into court should be the last step of the tax sale process that the municipality takes for this property. If the municipality is claiming against the surplus, then the municipality will need to make an application to the court, with notice to the other known claimants, requesting a payout from the surplus (*Local Government Act*, s. 659(4)).

3. No one claims the surplus

If no one makes a claim on the surplus within 6 months after the redemption period, the municipality must publish a newspaper notice stating the name of the owner to whom the surplus is payable, the date it became payable and the amount of the surplus.

If no one claims the surplus 3 months after publication of the newspaper notice, the surplus must be transferred to the BC Unclaimed Property Society (*Local Government Act*, s. 659(6)).

H. Collection of taxes unpaid by the (former) owner

A new tax year will begin a little over three months after the redemption period ends. In the preceding year, the following may have happened: title to the property was transferred to the purchaser, neither the (now former) owner nor the purchaser paid the taxes that were imposed in relation to the property since the tax sale and there was no surplus from the tax sale on which a claim could be made.

The former owner remains liable to pay the unpaid taxes during the redemption period. However, purchasers at tax sale will sometimes argue that they are not and can never be liable to pay taxes that were imposed during the redemption period against the former owner. Purchasers who take this position typically emphasize the following:

- That under section 658(1) of the *Local Government Act*: "during the period allowed for redemption, real property sold at an annual tax sale must continue to be assessed and taxed in the name of the person who at the time of the tax sale appeared on the assessment roll as owner and that person is liable for taxes accruing."

- That the quit claim under section 663(5)(b) is subject to an exemption for certain government charges, but municipal charges described in the *Land Title Act*, s. 23(2)(c) are not included.

The better view, however, is that during the year that contains the end of the redemption period, the purchaser is not liable to pay property taxes imposed in that year. The purchaser is not the assessed owner of the property for that year even though non-redemption has resulted in the purchaser becoming the registered owner of the property before the year is out. However, if the taxes imposed in that year go unpaid by December 31, then the purchaser, as the assessed owner for the following year, will be liable to pay those taxes the following year by operation of section 251(1)(b) of the *Community Charter*. This view considers the following:

- The *Local Government Act* requires that taxes accruing during the redemption period are to be imposed against the owner, but also permits the purchaser to pay these taxes (s. 658(1)-(3)). There would be no purpose to the purchaser's payments unless the purchaser risks future liability for these taxes and wishes to avoid paying interest arising from the late payment.

- The quit claim in favour of the purchaser is only for those claims "subsisting" at the time of the filing of notice of non-redemption. The quit claim does not operate to extinguish taxes that are not payable by the purchaser at the time but may be imposed against the purchaser in the future.

- The assessed owner of the property in the calendar year following the end of the redemption period will be the purchaser or someone who acquires title from the purchaser. Under section 251(1)(b) of the *Community Charter*, that

> person named as the assessed owner of the land is liable to pay "all unpaid taxes imposed in a previous year". Those should include taxes that the previous assessed owner of the land (the owner at the time of the tax sale) failed to pay by December 31 in the previous year and after the notice of non-redemption was filed.

In short, the purchaser's opportunity to pay taxes during the redemption period should be interpreted as being responsive to the possibility that the purchaser may eventually become liable to pay those taxes, plus accrued interest and penalties, if the property goes un-redeemed. This interpretation is more harmonious with the general scheme of municipal tax collection and tax sales. Not only does it confirm a purpose to granting the purchaser the right to pay property taxes during the redemption period, but it also supports a process in which unpaid taxes are always recoverable as a charge against the property. It would seem strange for the Legislature to mandate a process that requires a collector to recover three consecutive years of unpaid property taxes through the sale of a property; but to then place the collector in a much worse position to collect the subsequent year's property taxes. If the subsequent year's property taxes are <u>only</u> recoverable as a personal debt, then the collector is left to sue someone who has proven themselves unable or unwilling to pay previous year's property taxes and who has also just lost a valuable asset through tax sale.

I. Court action or application by the (former) owner or charge holder

The time following the redemption period is a time in which the municipality faces the risk of a legal action being brought by an owner or charge holder of the land at the time of the tax sale. A municipality may be subject to a court proceeding seeking an indemnity for loss or, in certain circumstances, seeking to invalidate the tax sale.

1. Action seeking indemnity

Section 669 of the *Local Government Act* provides for a claim for indemnity that may only be brought after the redemption period ends:

> 669 (1) After the end of the period allowed for redemption, no action may be brought to recover the property sold or to set aside its sale.
>
> (2) No action may be brought

(a) against the registrar of land titles, the minister charged with the administration of the *Land Title Act*, the Land Title and Survey Authority of British Columbia or the collector in respect of the sale of the property or the registration of an indefeasible title to it, or

(b) against the municipality in respect of any loss or damage sustained by reason of the sale, except as provided in this section.

(3) A person who at the time of the tax sale was an owner of, a registered owner in fee simple of or an owner of a registered charge on the property must be indemnified by the municipality for any loss or damage sustained by the person on account of the sale of the property if the circumstances referred to in section 666 (2) (a), (b) or (c) [*property not liable for tax, tax paid or notice of tax sale not given*] existed.

(4) As limits on subsection (3),

(a) no action may be brought to recover indemnity or compensation under this section after the end of one year from the time allowed by this Act for redemption of the real property, and

(b) there is no right to indemnity or compensation under subsection (3) if it is shown that the person claiming indemnity or compensation was aware at the time of tax sale that the property was offered for sale, or was aware during the period allowed for redemption that it had been sold.

Subsections 669(2)(b) and (3) of the *Local Government Act* operate to only permit the (now former) owner or charge holder to commence an action to recover a statutory indemnity for loss sustained. In other words, the plaintiff can only seek monetary compensation and cannot get the property transferred to a purchaser at tax sale back. Such an action can also only be commenced within one year of the end of the redemption period (*Local Government Act*, s. 669(3)). Furthermore, section 669(4)(b) provides that a person cannot claim a statutory indemnity if it is shown that person was aware at the time of the tax sale that the property was offered for sale or was aware during the period allowed for redemption that it had been sold.

The remedy for an owner under section 669 of the *Local Government Act* is to commence an action claiming an indemnity for loss from the municipality on the basis that the property was sold despite the property not being liable for taxation, the taxes being paid up, or the taxes being due but the owner not receiving the statutorily required notice. Because section 669(4)(b) of the *Local Government Act* precludes recovery if the claimant is shown to have had certain knowledge, there are effectively only three factual grounds for an action for an indemnity:

- The property was not liable for taxation but was still sold at tax sale and the claimant was neither aware at the time of tax sale that the property was offered for sale nor was aware during the period allowed for redemption that it had been sold.
- The taxes on the property were fully paid [which may exclude properties sold with arrears, but not delinquent taxes] but the property was still sold at tax sale and the claimant was neither aware at the time of tax sale that the property was offered for sale nor was aware during the period allowed for redemption that it had been sold.
- The property was sold at tax sale, the collector failed to give the statutory notice required under section 657 of the *Local Government Act* and the claimant was neither aware at the time of tax sale that the property was offered for sale nor was aware during the period allowed for redemption that it had been sold.

The combined effect of section 669 is that if no action is taken during the redemption period to either set aside the tax sale or to redeem the property, the claimant's interest in the property is lost. Furthermore, the claimant has no claim under any ground if the claimant knew during the redemption period that the property was sold at tax sale. Questions of fairness may arise if such critical knowledge was only acquired at the last minute.

If an owner is entitled to an indemnity under section 669(3) of the *Local Government Act*, then the value of the sold property must be determined. The owner's damages will be the difference between the property's value and the price paid by the purchaser at the tax sale. For example, in *Morgan v. Spallumcheen (Township)*, 2022 BCSC 752, the court found that this difference was $352,316.28 and ordered the municipality to pay the former owner this amount.

In making this order, the court determined that the property valuation date for calculating the amount payable will depend on the circumstances of the case. For the indemnity claim in the *Spallumcheen* case, the court found it appropriate to calculate damages using the market value of the property at the time of trial. This was because it was only after a trial that the owner received the indemnification payment and was "made whole". Consequently, if property values are rising, a municipality may want to consider whether admitting liability early and paying the indemnity promptly will reduce the amount of damages the municipality must pay.

The court in *Spallumcheen* also concluded that the entitlement to an indemnity under section 669 of the *Local Government Act* does not include a full indemnity for the legal costs necessary to assert the claim. Absent a full indemnity, the expense of pursuing litigation almost always exceeds the amount of costs awarded by the court. This means that an owner who successfully claims an indemnity will likely still be financially worse off than if the tax sale never happened. In the *Spallumcheen* case that result was certain; the owner had entered into a contingency fee arrangement with his lawyers as that was the only way he could afford to pursue the lawsuit. Given that tax sales are most likely to involve owners with strained finances, owners may be more likely to accept a prompt indemnification payment to avoid the cost of challenging the amount offered through a court claim.

a) Impact of section 647.1 of the *Local Government Act*

The introduction of section 647.1 will complicate the application for claims for an indemnity. This is because there may be instances in which an owner or charge holder was served with the required pre-tax notice, but not the required post-tax notice or vice-versa. Furthermore, one of those notices might have been served by actual service, but the other was served by substituted service. These permutations will affect the court's assessment of whether there is no right to an indemnity because it can be "shown that the person claiming indemnity or compensation was aware at the time of tax sale that the property was offered for sale, or was aware during the period allowed for redemption that it had been sold" (*Local Government Act*, s. 669(4)(b)).

It is difficult to see how an owner who did not receive a pre-tax sale notice should still be entitled to a full indemnity if the owner was actually served (rather than deemed to be served through substituted service) with a timely post-tax sale notice. That owner would

have known that they have at least nine months to redeem the property and would have had time to take the steps necessary to avoid losing the property. The owner's losses arising from not knowing about the tax sale until after it happens are arguably limited to the extra fees added to the upset price under section 649(1)(c) and (d) of the *Local Government Act*. An owner might also complain that being obliged to redeem post-tax sale requires more cash be paid now than just paying the delinquent taxes pre-tax sale and delaying the payment of the other taxes owing.

A failure to provide the required pre-tax sale notice is nevertheless "a liability" that rests with the municipality (*Local Government Act*, s. 657(3) once amended), so a collector should not assume that an owner or charge holder has no claim because they have been subsequently served under section 657(1) of the *Local Government Act*.

2. Action or application seeking to invalidate sale after redemption period ends

At first glance, an action for compensation and indemnity under section 669 of the *Local Government Act* would appear to be the only legal proceeding that can be commenced after the redemption period ends. However, the recent cases of *521006 B.C. Ltd. v. Pemberton (Village)*, 2019 BCSC 526 and *Maple Ridge (Re)*, 2020 BCSC 1473 are examples of the court issuing declaratory relief that have the effect of setting aside a tax sale after the redemption period ends.

In the *Pemberton* case, the court struggled with the harsh application of section 669 of the *Local Government Act* to circumstances in which the owner's failure to redeem on time might be excused. The key facts in that case were:

- Lands belonging to a corporate owner were sold at tax sale on September 29, 2014.
- The deadline to redeem the lands under the *Local Government Act* was September 29, 2015. However, the owner's principal was misinformed by the collector in the notice of tax sale and was told the property could be redeemed up until September 30, 2015.
- The owner tendered the amount needed to redeem the lands on September 30, 2015, and the Village initially accepted the money, but later sought to return it on the basis that the collector would be filing a notice of non-redemption.

- The owner threatened and later commenced legal action on November 19, 2015 for the purpose of preserving its title to the land, and the Village agreed not to file a notice of non-redemption until the claim was resolved.

The owner in *Pemberton* commenced an action under section 666 of the *Local Government Act* rather than making a claim for an indemnity under section 669. The court held that the owner could still commence an action for declaratory relief. The court then declared the tax sale of the lands to be invalid and also declared the transfer of the lands to the purchaser at tax sale to be illegal and invalid. Because the purchaser at tax sale had not yet received registered title, no action to recover the lands was necessary.

It is also notable that in the *Pemberton* decision, the presiding judge expressly rejected an interpretation of the *Local Government Act* that left the owner in that case with no remedy whatsoever. The court referenced the lingering uncertainty over whether an owner could ever recover title registered in the name of the purchaser that had been suggested in tax sale cases such as *Gray v. Langley (Township)* (1986), 9 BCLR (2d) 1 (CA) and *Standard Trusts Co. v. Municipality of Hiram*, [1927] SCR 50 that involved earlier and slightly different legislation.

The court's owner-favourable interpretation of the legislation in the *Pemberton* case deviates from the stricter application of the legislation that occurred in *McCready v. Nanaimo (City)*, 2005 BCSC 762 discussed earlier. The finality of tax sales after the redemption period ends was upheld in *Sun Wave Forest Products Ltd. v. Prince Rupert (City),* 2012 BCSC 1908 and 2013 BCSC 1235.

The *Nanaimo* case and the court's consideration of the prejudice to the purchaser was not discussed in the reasons for judgment in the *Pemberton* case. It is worth noting that the purchaser was named as a defendant in the *Pemberton* case, but did not attend the trial to argue in opposition of the relief sought by the owner. The court did order the refund of purchase price to the purchaser, but did not make an order that expressly awarded the owner any interest on that amount. A case involving both an owner and a purchaser vigorously championing their respective interests may be necessary to conclusively determine the scope of remedies available to an owner who did not redeem a property during the redemption period.

J. Judicial review application by the municipality

Consistent with the owner's claim for relief in the *Pemberton* case, the decision of *Maple Ridge (Re)*, 2020 BCSC 1473 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 ends 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.

The municipal council in *Maple Ridge* sought to achieve what the council in *Nanaimo* failed to do—reverse the tax sale on the basis that proper notice was not given. In the *Maple Ridge* case, the deemed purchaser at tax sale was the municipality, placing the municipality in the advantageous position of not having a private purchaser complain that they were being prejudiced, as occurred in *Nanaimo*. The application for judicial review in *Maple Ridge* relied heavily on the *Pemberton* decision and the court found that:

> the failure to deliver the written notice in accordance with s. 657—that is by personal service, registered mail, or pursuant to a substituted service order—constitutes a failure to fulfill an essential procedural requirement that is a condition precedent to a lawful transfer of title under the [*Local Government Act*].

The reasons for judgment in the *Maple Ridge* case do not mention either the *Nanaimo* or the *Prince Rupert* decisions. In the *Prince Rupert* case, the court cancelled a certificate of pending litigation that an owner had filed as part of an attempt to recover land that the owner says was sold at an invalid, or *ultra vires*, tax sale. The court in *Prince Rupert* recognized that an application for a declaration that the sale was invalid was a remedy that the owner could, in principle, seek through judicial review. However, the court found in the *Prince Rupert* case that by the time such an application was made, the owner was statutorily barred from recovering the land.

Despite declaring the tax sale invalid in the *Maple Ridge* case, the court notably declined to issue a declaration that the unpaid taxes and interest from the dates of the tax sales form a lien on the property as if the tax sale has not taken place and are deemed to be

delinquent taxes, finding there to be no legal basis to make such a declaration. This type of relief is something the court may do under *Local Government Act*, s. 667 if the court sets aside a tax sale in response to an application made <u>during</u> the redemption period. The lack of statutory authority to make declarations regarding taxes for a judicial review application made later likely reveals a legislative gap and one that has arguably been created by the court invalidating tax sales in response to applications made after the redemption period ends.

In the *Maple Ridge* case, the court did not need to deal with the question of whether the purchaser was entitled to interest on the purchase money held by the municipality between the date of the tax sale and the day it was declared invalid. Presumably, the court would follow *Pemberton* and not award interest. This would put purchasers in an uncertain position as to whether they should expect to get interest on their purchase money if they do not wind up acquiring the property. A purchaser will receive interest if the owner redeems (*Local Government Act*, s. 660), the Province refuses to accept the tax sale purchaser under section 653 and 654 of the *Local Government Act* or the municipal council cancels the tax sale for manifest error (*Local Government Act*, s. 668). A purchaser will not receive interest if the sale does not go through because the Land Title Office refuses to register the purchaser (*Local Government Act*, s. 664) or because the court declares the tax sale invalid in response to an application made by the owner or the municipality.

VI. CONCLUDING COMMENTS

Tax sales have been a remedy for unpaid property taxes in British Columbia for over a century (*North Vancouver (District) v. Tracy*, (1903) 34 SCR 13, provides an example of historic legal pitfalls). The remedy is based on the principle that if an owner will not pay the property taxes, then the collector can sell the property, or at least the potential to acquire the property, to someone who can. The proceeds from such a sale are used to immediately cover the overdue taxes, even if the purchaser is not guaranteed title because the owner is still given a year to redeem the property.

The legislation and practical realities relating to tax sales create a number of risks and complications. Owners may not know or understand that they may lose their property for unpaid taxes. The method of sale discourages a high purchase price, exposing the owner and charge holders to potential significant financial loss. Also, the purchaser must decide

to buy the property, sight unseen, a year before the potential transfer date and without any certainty of acquisition.

The significant consequences of tax sales to owners have recently come under increased scrutiny and have resulted in owner-favourable findings in the *Pemberton* and *Maple Ridge* decisions as well as a 2021 BC Ombudspersons report. This has prompted anticipated changes to tax sale legislation and recommended best practices that focus on giving owners and charge holders better notice. Whether these changes will provide effective protection to the most vulnerable owners remains to be seen. There is also a lingering question as to the impact of these changes on the interests of purchasers, especially given a recent shift by the courts towards an owner-favourable interpretation of tax sale legislation. It may be that purchasers will start making claims that seek to tip the balance the other way.