

BYLAW DRAFTING

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OVERVIEW

GOAL OF BYLAW:

FURTHER A MUNICIPAL PURPOSE

Community Charter section 7:

- **Good government of the community**
- **Services, laws for community benefit**
- **Stewardship of public assets**
- **Fostering economic, social and environmental well-being of the community**

POLICY BECOMES LAW

GIVE LEGAL EFFECT TO THE INTENTION OF THE LAW MAKERS

CLEARLY COMMUNICATE THEIR POLICY AND INTENTION TO:

- **persons subject to the bylaw,**
- **persons who will be affected by it**
- **persons who administer and enforce it**
- **the judiciary (courts)**

“People continually try to misunderstand legislation...therefore, it is not enough to attain a degree of precision that a person reading (it) in *good* faith can understand, but you must attain, if you can, to a degree of precision which a person reading in *bad* faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.”

Stephen J., *Re Catrioni* 1890 [cited by B.C. legislative drafter, Janet Erasmus]

“...one of the surprising things about Washington is the amount of time spent arguing not about what the law should be, but rather what the law is...The simplest statute can become the subject of wildly different interpretations, depending on who you are talking to: the congressman who sponsored the provision, the staffer who drafted it, the department head whose job it is to enforce it, the lawyer whose client finds it inconvenient, or the judge who may be called upon to apply it.”

Barack Obama, *The Audacity of Hope*, 2004

EFFECT OF A PROPERLY ADOPTED BYLAW:

A REGULATION ENACTED IN EXECUTION OF A POWER CONFERRED UNDER AN ACT

A VALID BYLAW IS EQUIVALENT TO THE EFFECT OF PROVINCIAL LEGISLATION,

As binding as an Act of the Legislature or Parliament.

Interpretation Act (B.C.)

AUTHORITY TO PASS BYLAWS

Local governments may only regulate, prohibit or impose requirements:

- under authority delegated to them by a Provincial Government
- within the restrictions and conditions of any statute or regulation CC 8 (10)
- in accordance with constitutional law, notably:

- the division of powers under the ***Constitution Act, 1867***, sections 91 (federal) and 92 (provincial); and
- the ***Canadian Charter of Rights and Freedoms***

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

– ***Constitution Act, 1982***

- in accordance with common law principles: in good faith, not unreasonable, no unauthorized discrimination, and following rules of natural justice and procedural fairness.

Provincial Legislation

The Province must itself have authority under the ***Constitution Act***, section 92, for its statutes and regulations to be valid and for delegation of its powers to local government to be valid. Municipal statutes typically derive their constitutional authority from 92 (13) – “property and civil rights in the Province” and 92 (16) “all matters of a merely local or private nature”.

Unlike senior governments, a municipality or regional district is not a truly independent order of government and has no power except that which is lawfully delegated by the Province.

A bylaw that has been passed without authority in the governing statute or regulation is vulnerable to being declared invalid if challenged. The court may declare it to be void on the basis that it was “ultra vires” – beyond the jurisdiction of the local government, and without any force or effect.

In some cases, the Provincial government may be able to redeem unauthorized bylaws through a ***Municipalities Enabling & Validating Act*** (“MEVA”), assuming that is within the government’s own power. As this remedy would entirely depend on the political will of the Legislature, it is better not to rely on this possibility when drafting a bylaw.

In some circumstances, liability may attach to the local government if a bylaw imposed a requirement or burden, e.g., fees or charges, improperly or without authority (constitutional or statutory). ***Kingstreet v. New Brunswick*** 2007 SCC 1.

The primary sources of authority for enacting bylaws in British Columbia are the ***Community Charter*** (CC) and the ***Local Government Act*** (LGA). But there are many other statutes which may limit or empower a local government in its decision-making.

If “by bylaw”, then only by bylaw

The Community Charter provides that the power of a local government must be exercised through its council. Council itself is subject to the basic limitations of section 122:

122 (1) A council may only exercise its authority by resolution or bylaw.

(2) If an enactment provides that a council is required or empowered to exercise a power by bylaw, that power may *only* be exercised by bylaw.

(3) If a council may exercise a power by resolution, that power may also be exercised by bylaw.

(4) An act or proceeding of a council is not valid unless it is authorized or adopted by bylaw or resolution *at a council meeting*.

If an Act says, “*Council may by bylaw, regulate...*” the Council may not regulate by mere resolution, by policy, or by delegating a decision to an official. The

requirement for a bylaw signals the need for all of the conditions of common law and statute to be present.

Drafting Goals

The underlying goals for good bylaw drafting are **certainty, predictability, democratic transparency and accountability.**

A regulation must be clear and precise enough that everyone subject to the bylaw must be able to ascertain from reading it what they must do or not do in order to comply or to obtain a permit or approval.

Reservations

Even within the provisions of a bylaw, **Council may not reserve to itself a discretion to approve or decide something that is properly a matter to be determined by bylaw.**

For example, a bylaw had a provision that a utility line may be established in a municipality

“subject to the approval of Council...”:

In ***B.C. Electric Company Limited v. Surrey (District)*** (1956) 18 WWR 462 the B.C. Supreme Court held that this was not a valid regulation, but rather an attempt to allow for “ad-hoc” decision making.

It was also invalid for being “discriminatory in that the rights of an applicant are subject to the whim or caprice of the council”.

Re-delegation

Another problem is where, in a bylaw, Council “re-delegates” to itself by merely repeating a broadly stated, general power set out in a provision of the authorizing statute, so that the details are left to be negotiated and determined by resolution:

Canadian Institute of Public Real Estate Companies v. Toronto (City)
1979 Supreme Court of Canada
Brant Dairy Company Ltd. v. Milk Commissioners of Ontario 1973
SCR 131

Doman Industries v. North Cowichan (District) 1980 Supreme Court of British Columbia

- The Zoning bylaw merely repeated the contents of the municipal legislation, setting conditions for a development permit. Since it did not spell out any details, the court declared the bylaw invalid.

Delegation to Officials and Others

Any delegation of Council's power must be set out in a bylaw, but **Council cannot delegate to an official, an employee, or a committee or commission a power to make a bylaw or a power that is exercisable only by bylaw**: CC 154 (2). Council can never delegate any of its powers to a corporation: CC 154 (4).

Improper delegation, or an overly broad use of discretion that would otherwise be valid, may invite dispute and result in a court declaring it invalid. The challenger typically argues that the official, e.g., a manager or director, was unlawfully exercising a regulatory power, and that being invalid as beyond the administrative role. On the other hand, a local government may argue that the discretion was really only an administrative matter, that it was within the parameters set out in the bylaw, and that those parameters were sufficiently detailed and certain that their meaning and purpose can be legally determined. The courts tend to interpret the authority of administrators narrowly, in favour of common law or pre-existing rights, where there is ambiguity or doubt.

In allowing for any official discretion to approve, refuse, and especially, to make exceptions from the ordinary requirements of a bylaw, the **delegation must be authorized and must be clearly stated in the bylaw**. Discretion should not go beyond minor or technical matters that would normally be expected to vary with each situation or application, and should be based on and bounded by expressly stated conditions. For example, a requirement that something be done within a certain time period might be subject to exceptions for impassable road conditions or labour strikes.

Fees and charges may never be delegated, and amounts should be clearly ascertainable on the face of the bylaw. It is preferable that the amounts not be subject to changeable conditions or contracts made by third parties.

Amendments to bylaws, and their repeal, in most cases must meet all the same conditions that were required for the original bylaw.

Statutory Conditions and Restrictions

To be valid, bylaws must be properly enacted, following all statutory conditions and within any statutory restrictions. CC 8 (10).

Bylaws can only be made at an **open meeting** of Council, properly convened; following any and all **specific restrictions and conditions set out in the statute**, such as requirements for **notice, hearing opportunities or public hearings, assent or approval** of the electors, **petitions or counter-petitions**, and in some cases, **Provincial approvals**.

Check for any provisions in the authorizing statute that may be related to the matter you are dealing with. For example, if the basic power to regulate is in section 8 of the *Community Charter*, read the other provisions of section 8, and also section 9, which requires that various bylaws get approval of the Minister responsible or be authorized by specific regulation. See *Peachland (District) v. Peachland Self Storage Ltd.* 2013 BCCA 273. There, the District adopted a bylaw limiting the removal of soil to 200 m³ per year on each parcel of land. Under the *Community Charter*, section 9, ministerial approval is necessary for a bylaw that prohibits soil removal. As the bylaw was missing ministerial approval, it was declared invalid.

See also Community Charter section 10, which requires consistency with other Provincial enactments – statutes, regulations, letters patent, orders in council, rules, or proclamations.

A bylaw may be consistent if it is merely stricter than another law. However, if it would compel a person to violate another law, it will be in conflict and as such, is inconsistent and unenforceable.

Also check for any other statutes that may deal with the same subject. Some statutes have super-priority in that they prevail over other statutes.

For example, all bylaws must be consistent with the ***Human Rights Code*** of British Columbia.

The ***Freedom of Information & Protection of Privacy Act*** provides that it prevails if any of its provisions are inconsistent or in conflict with other statutes, unless the other Act expressly provides that the other Act, or a provision in the other Act, applies despite the FIPPA.

Some statutes that are related to the matter may expressly allow, condition, restrict or even prohibit municipal regulation, or provide that municipal regulation does not apply. Examples:

Conditions and Restrictions: The ***Fish Protection Act*** – Section 12 references the Riparian Area Regulation as a “directive” – it is in fact a regulation – and requires local governments to ensure that it includes provisions for fish protection

in zoning and land use bylaws, and that land use bylaws establish a level of protection that is at least equivalent to the standard of protection set out in the Riparian Area Regulation. That Regulation prohibits the approval of development – very broadly defined – except in accordance with professional reports, provincial guidelines, or specific authority from the federal Department of Fisheries and Oceans.

Prohibition: The **Private Managed Forest Land Act**– section 21 – Local government must not adopt a bylaw ...or issue a permit under the LGA Part 21 or 26 in respect of land that is private managed forest land that would have the effect of restricting, directly or indirectly, a forest management activity – even though the bylaw or permit does not directly apply to that land.

Applicability: The **Hydro and Power Authority Act** provides that Hydro is not bound by any statutes or statutory provisions except for the ones listed in that Act. The *Local Government Act* and the *Community Charter* are not among those listed.

Regulate, Impose Requirements and Prohibit

Note that these terms should be treated as distinct and separate from each other. The power to “regulate” has long been interpreted as not extending to a power of prohibiting the activity altogether. See the court’s reasoning in *Peachland (District) (above)*. There, the chambers judge held that the bylaw amounted to a prohibition on soil removal, and declared it invalid. The Court of Appeal dismissed the District’s appeal, The court summary states:

“ The only reasonable interpretation of the provision of the *Community Charter* in issue in this case is that it is directed at industrial-scale soil removal. The limits in the bylaw precluded any industrial-scale extraction, so the judge was correct in finding that the bylaw required ministerial approval.”

To ban or prohibit rather than merely restrict an activity that is otherwise lawful, the bylaw must be grounded in express authority stated in the governing statute.

Constitutional Authority

Division of Powers

Local government bylaws also must be consistent with the **Constitution Act, 1867**, the **Charter of Rights & Freedoms (1982)**, and with any interpretations of the courts and rules established by the courts through case law.

Just as provincial governments must observe the federal division of powers set out in the *Constitution Act, 1867*, as provincial entities, a local government must also stay within provincial powers.

Sections 91 and 92 of the *Constitution Act* establish the basic boundaries for federal and provincial power to make laws. Over the decades, various issues have been brought to the courts for interpretation, and a number of matters that are not specifically mentioned in section 91 have been found to be under the exclusive jurisdiction of the federal government. In particular, where the federal government and the court agree that a matter is of “national concern”, Parliament’s laws will prevail.

Many bylaws have been declared invalid by the courts for unlawfully encroaching into the exclusive federal power of the federal government. Note that trade and commerce, banks, navigation and shipping, fisheries, aeronautics, broadcasting and telecommunications, Indians and Lands reserved for Indians, and criminal law and procedures are, among others, matters that only the federal government may regulate.

Bylaws that deal with matters that are or could be dealt with by Parliament using its criminal law-making power are particularly susceptible to being declared invalid:

Maple Ridge (District) v. Meyer 2000 BCSC decency in community facilities
SkinnyDipper Services v. Surrey (City) 2007 BCSC 1625 decency
Royal City Jewellers v. New Westminster (City) 2007 BCCA 298 privacy

However, if the court finds that the bylaw was essentially designed at *preventing or deterring* criminal activity, the bylaw may withstand the challenge. See ***Federated Anti-Poverty Groups of B.C. v. Vancouver (City)*** 2002 BCSC [street panhandling].

As well, there are some matters, such as health and environmental protection, where the courts have recognized a dual or concurrent power: ***Spraytech v. Hudson (Town)*** so that a Provincial delegation to a town for bylaw powers that promote “health and welfare” of the residents was valid and sufficient to uphold a bylaw that restricted the use of pesticides for purely aesthetic purposes.

The Court will consider the dominant purpose of the bylaw, whether there is any evidence of an intention to recognize, preclude or restrict municipal regulation, and whether the municipal bylaw would be in conflict with the senior government law.

In some cases, a bylaw will be “read down” as being ordinarily valid, but not applicable in regard to the federal matter. For example, business licence bylaws that would ordinarily apply to a business might be declared inapplicable in relation to aeronautics, shipping or navigation, fisheries, or Indian reserves.

Charter of Rights

The Charter rights that are most often invoked when a bylaw is being challenged for constitutional authority are sections 2, 7, 8 and 15:

- 2.** Everyone has the following fundamental freedoms:
 - a) freedom of conscience and religion;
 - b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - c) freedom of peaceful assembly; and
 - d) freedom of association.

- 7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

- 8.** Everyone has the right to be secure against unreasonable search or seizure.

- 15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

If a bylaw that is otherwise valid is found to infringe a Charter right, the court will then analyze, under section 1, whether the infringement is a reasonable limit, “prescribed by law as can be demonstrably justified in a free and democratic society”.

Note that if the bylaw is too vague or uncertain, or is found to be overly broad in scope, it may be found invalid and incurable as contrary to section 7. A law that is so nebulous, vague or uncertain that no definitive meaning can be arrived at is not likely to be saved by section 1.

Although the *Community Charter* section 260 would allow for a fine of up to \$10,000 and section 263 would authorize a term of imprisonment for conviction of a bylaw offence, note that such a penalty may be more likely to draw

constitutional challenges. If a municipal penalty can be seen as an attempt to stiffen criminal law, the bylaw may not survive this kind of challenge.

HOW TO PREPARE AND DRAFT BYLAWS

Typically, or perhaps ideally, the process is as follows:

First, staff identifies an issue. Initial contact should be made with personnel having expertise on the subject. It would be rare for a drafter to have sufficient knowledge and skill on any particular subject to draft a good, effective bylaw without consulting others. Try to identify background and related issues. Consider WHIB questions:

Who, what, where, when, why

How, how much

If, if not

But [exceptions, exemptions]

It is always prudent to obtain basic legal advice at this stage as to whether the bylaw would be authorized. Legal counsel may also be able to advise as to other means of addressing the issue.

Staff may next prepare a report to a committee or directly to Council, describing the issue and background, and recommending that a bylaw be drafted to deal with an issue. The objects and rationale for the bylaw should be set out in the report. Ideally, a lawyer would review it or, if a draft bylaw is attached, the form the bylaw will take.

The *Community Charter* 8 (9) requires a municipality to make available to the public, on request, a statement respecting Council's reasons for a bylaw. The report will provide evidence of Council's intention.

If Council adopts the report, the Corporate Officer (Clerk) confirms with staff that a bylaw should be prepared.

If the bylaw is attached, has been assigned a number and meets other formalities, and no changes are contemplated, it could be voted on three times by Council at that (open) meeting. Normally at least 24 hours must pass before Council may finally adopt it. There are different requirements for business regulations and land use regulation such as zoning and OCP bylaws.

Obtain a number from the Clerk's Department and begin drafting the bylaw.

Always keep in mind the purpose and intention of Council.

Start with the core or main provisions, and work out from that core. Try to organize the bylaw under category headings and parts so that all provisions

dealing with the same subject are kept together. Consult with those who would have special knowledge of particular aspects of the bylaw.

The following is a typical arrangement of a bylaw:

Name of Local Government – set out the entire corporate name. A court taking judicial notice of a bylaw under the Evidence Act should be able to refer to the correct legal name.

Bylaw Title - The title generally derives from the words of the authorizing statute. It should be in plain language and simply stated so that it is easy to remember and reference – e.g., Business Regulation Bylaw; Tree Protection Bylaw, Animal Control Bylaw.

Subtitle to describe Purpose – This may be useful when using an electronic search engine for key words, and allows the reader to know the nature of the bylaw in greater detail than would be allowed by a simple title. E.g., A bylaw to licence and regulate business and business activities within HomeTown.

Purpose Statement – Some bylaws contain a purpose statement as well as a subtitle. It may help the court to interpret the bylaw in a “purposive” manner, i.e., the legislator’s intentions so that it is not left to the “subjective” purposes of the reader. This may help resolve any ambiguities as to purpose.

The disadvantage of a purpose statement are that

- it may obscure the precise objectives of particular sections in the bylaw; and
- the court may use a purpose statement to limit the effect of an empowering provision in the statute or bylaw.

A purpose statement should be sufficiently general that it is flexible and can encompass a number of more specific provisions.

Recital or Preamble

Similar in nature to a Purpose Statement. It may state the provisions of the authorizing statute, and include principles. Some lawyers advise against including a recital, unless it is limited to obvious, uncontroversial facts. The *Interpretation Act* requires that a court must consider a preamble as part of the bylaw intended to explain its meaning and objects. If it contains statutory references, principles or policy statements that conflict with any statements in the main provisions, confusion may arise.

It is my view that section numbers of authorizing legislation should not be mentioned in the recitals. Statutory sections are subject to change by the Legislature, and the bylaw may also be empowered by other sections of statute

that the drafter may not have contemplated. For example, provisions in a sign bylaw may be defended on the basis of land use and structures and not merely on section 108 of the LGA (the “sign” provision). As with purpose statements, the authority should be stated in a general way, if at all, and the principles stated in a broad way so as to encompass all of the provisions.

Enactment

The Council / Board of Home Town in open meeting assembled enacts as follows:”

The *Interpretation Act*, section 10, suggests there needs to be an enacting clause for a bylaw or other enactment to be valid.

10 The enacting clause of an Act of the Legislature may be in the following form: "Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:".

Citation

The citation provision may appear at the beginning or end of a bylaw. It is useful because the bylaw may have to be formally referenced or incorporated into other documents, proceedings or bylaws. There is no rule of law or accepted standard, but it is useful to state what it is, what it does, a number, and the year:

This bylaw may be cited as *Business Regulation Bylaw No. 1234, 2009*.

Definitions

These typically appear in section 2, towards the end of a bylaw, or in a schedule. I prefer to place them at the beginning (section 2) or as a schedule – just in case other provisions are added to the end of the bylaw.

Definitions should be used sparingly. Keep a copy of the *Interpretation Act*, which defines over 80 words that are commonly defined. It is not necessary to re-define those words unless it is necessary to define the word differently.

As well, the *Community Charter* has a schedule of definitions and *Local Government Act* has definitions at section 5. These and other statutes may also have definitions that appear with a part or division or section because they are intended to apply only to certain specified situations. The *Interpretation Act*, section 40, deems these statutes to apply and extend to all bylaws related to municipal and regional district matters. If you are dealing with the same subjects, try to keep them within these definitions.

If the definition is narrower or broader or deals with something else, the meaning should be specifically defined in the bylaw.

Interpretation

This section may be included with the Definitions. There is no advantage to repeating the provisions of the *Interpretation Act* (e.g., dealing with singular, plural, gender, calculation of time, etc) because these meanings are deemed to apply anyway, and the public is deemed to have knowledge of the *Interpretation Act*. However, sometimes it is necessary to amplify or expand on the *Interpretation Act* provisions to make the bylaw more easily understood.

Substantive Provisions

These should be drafted carefully, being well organized, clear and complete. They must be authorized constitutionally and by statute, and should be **clear and precise enough that everyone subject to the bylaw must be able to ascertain from reading it what they must do or not do in order to comply or to obtain a permit or approval.**

Try to keep sentences short, simple and concise, using plain language and clear formatting.

Enforcement and penalty provisions typically appear at the end of the substantive provisions.

Severability

Some bylaws contain this provision so that if any portion of the bylaw is found to be invalid by a court of competent jurisdiction, the invalid portion is severed and the remainder continues to be valid. This may save a bylaw if a court finds that one portion of it is invalid. If the court finds however that the Council or Board must have intended that the invalid portion is an integral part of the bylaw, the court may set aside the entire bylaw, even if the severability clause is present.

Schedules - If a Schedule is attached to the bylaw, the bylaw itself should identify it as attached to and forming part of the bylaw.

Typically, schedules are limited to fee amounts, technical standards and specifications and similar detailed information, forms of applications or letters, drawings, plans, or schematics, or provisions that are incorporated from another document.

Repeal

It is customary when adopting a new bylaw to repeal the bylaw that it may be replacing. A new bylaw will be presumed to supersede a bylaw that is already on the books, but sometimes it is not possible to identify precisely which portions of a new bylaw overcome which portions of an old bylaw.

As well, it is important to repeal any amending bylaws that may have been made since the date of the original bylaw.

Readings – Refer to the dates that first, second and third readings were given and voted on by Council or the Board.

Conditions – If a bylaw must be approved by the Province or other external authority before adoption, it is advisable to note the date and person approving after the Readings.

Adoption - The date of adoption is equivalent to “fourth reading”. It should be stated at the end of the bylaw.

Judicial Review - Summary

“It is a fundamental principle of the rule of law that state power must be exercised in accordance with the law. The corollary of this constitutionally protected principle is that superior courts may be called upon to review whether particular exercises of state power fall outside the law. We call this function “judicial review”.

“Municipalities do not have direct powers under the Constitution. They possess only those powers that provincial legislatures delegate to them. This means that they must act within the legislative constraints the province has imposed on them. If they do not, their decisions or bylaws may be set aside on judicial review.

“A municipality’s decisions and bylaws, like all administrative acts, may be reviewed in two ways. First, the requirements of procedural fairness and legislative scheme governing a municipality may require that the municipality comply with certain procedural requirements, such as notice or voting requirements. If a municipality fails to abide by these procedures, a decision or bylaw may be invalid. But in addition to meeting these bare legal requirements, municipal acts may be set aside because they fall outside the scope of what the empowering legislative scheme contemplated. This substantive review is premised on the fundamental assumption derived from the rule of law that a

legislature does not intend the power it delegates to be exercised unreasonably, or in some cases, incorrectly. “

Supreme Court of Canada, *Catalyst Paper Corporation v. North Cowichan (District)* 2012 SCC 2 [paragraphs 10 – 12]