

# MUNICIPAL LAW BULLETIN

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## PROBLEMS WITH PROPERTY TAX INCENTIVES

At Brownlee LLP's *Emerging Trends in Municipal Law* seminars this year, several questions were posed with respect to municipalities offering property tax incentives/rebates. In particular, many municipalities were interested in the possibility of providing landowners (or prospective landowners) with tax rebates as a way of encouraging development. While providing property tax incentives may seem to be an easy and mutually beneficial arrangement between a municipality and a landowner/business, it is rife with potential problems and impediments. In fact, property tax incentive arrangements can be contrary to the *Municipal Government Act*, R.S.A. 2000, c. M-26 (the "MGA") and the New West Partnership Trade Agreement (the "NWPTA"). In this article, we provide an overview of the legal impediments associated with property tax incentives.

### Property Tax Incentives Applicable to Future Years

It is not the case that a municipality has authority under the *MGA* to waive future property taxes associated with taxable (i.e. non-exempt) lands. While section 347 of the *MGA* provides council with the discretion, if it considers it **equitable to do so**, to cancel or reduce tax arrears (s. 347(1)(a)), to cancel or refund all or part of the tax (s. 347(1)(b)) or to defer the collection of a tax (s. 347(1)(c)) with respect to a particular taxable property or class of taxable property, the language used in that section suggests that it only applies to taxes already imposed. There is nothing to suggest that section 347(1) could be extended to allow a municipality to waive future property taxes of a landowner or class of landowners.

Further, a municipality agreeing to waive a landowner's future property taxes for an extended period of time (for example, 3 years) would likely be construed by the courts as an unlawful fettering of a future council's discretion. The establishment of tax rates for properties within a municipality falls within the legislative powers of a municipal council. Further, the ability under section 347 of the *MGA* to cancel, reduce, refund or defer the property taxes of landowner, or class of landowners, is specified to be a determination of council. As stated by the Supreme Court of Canada in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64 (at paragraph 56); "Municipal legislative powers are an integral part of governance that municipalities cannot give up. Municipal councils cannot fetter the discretion of successor councils to engage in the legislative process without undue influences."

### Property Tax Incentives as Business Subsidies

Tax incentives offered to encourage development may constitute a “business subsidy” and thereby run afoul of certain prohibitions in the NWPTA (the successor trade agreement to the Trade Investment and Labour Mobility Agreement (“TILMA”)). The NWPTA and TILMA define “business subsidy” as a financial contribution by a party, namely: (a) cash grants, loans, debt guarantees or an equity injection, made on preferential terms; (b) a reduction in taxation and other forms of revenue generation, including royalties and mark-ups, or government levies otherwise payable, but does not include a reduction resulting from a provision of general application of a tax law, royalties, or other forms of a party's revenue generation; or (c) any form of income or price support that results directly or indirectly in a draw on the public purse that confers a benefit on a specific non-government entity. The NWPTA prohibits parties from providing direct or indirect business subsidies that (a) provide an advantage to an enterprise that results in material injury to a competing enterprise of another party; (b) entice or assist the relocation of an enterprise from another party; or (c) otherwise distort investment decisions.

If the complaint process under the NWPTA is initiated, then there is a possibility of a fine being imposed to a maximum amount of \$5,000,000.

### Additional Considerations

A municipality considering providing a property tax adjustment should also consider to whom the adjustment is being offered and on what basis. With respect to the first consideration, it is important to note that section 347(1) of the *MGA* only provides that a municipality may cancel, reduce, refund or defer property taxes with respect to a particular taxable property or business or a class of taxable property or business.

Further, council is not allowed to cancel, reduce, refund or defer property taxes at its unfettered discretion but rather only when it “considers it equitable to do so” (*MGA*, s. 347). In considering providing a tax adjustment, council should be mindful of the wording of section 347 and, in particular, what “equitable to do so” means in the specific circumstances.

### Summary

There are significant issues surrounding a municipality providing tax incentives, including that these actions may be found outside the legal authority of the municipality and may be in contravention of the prohibitions against business subsidies in the NWPTA. This is not to say that tax adjustments and/or development incentives cannot be lawfully established in some circumstances, however, any such arrangement must be carefully constructed in accordance with the *MGA*, the NWPTA and considered legal advice.

**For questions regarding development incentives and infrastructure, contact one of the following members of our Planning and Development Team: Jeneane S. Grundberg, Rodd C. Thorkelsson or Lorne I. Randa.**

**For questions regarding tax policy and liability, contact one of the following members of our Assessment and Taxation Team: Barry A. Sjølie, Q.C., Alvin R. Kosak or Michael S. Solowan.**