WEST COAST
environmental law

200 – 2006 West 10th Avenue
Vancouver, BC V6J 2B3
www.wcel.org

tel: 604.684.7378
fax: 604.684.1312
toll free: 1.800.330.WCEL (in BC)
email: admin@wcel.org

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Mayor Heintzman and Council
District of Squamish
37955 Second Avenue
P.O. Box 310
Squamish, B.C. V8B 0A3

FAX: (604) 892-1083
council@squamish.ca

Chair Crompton and SLRD Board Members
Squamish-Lillooet Regional District
PO Box 219
Pemberton, B.C. V0N 2L0

FAX: (604) 894-6526
board@slrd.bc.ca

*****BY FAX AND EMAIL*****

Dear Sirs/Mesdames,

Re: Fortis EGP Project

We were alerted to your communications with FortisBC ("Fortis") of October 7th and October 12th, 2016 by our client, the Concerned Residents of Squamish (copies of the letters are attached for your convenience). In these letters, Fortis asserted that it did not require a development permit from the District of Squamish ("the District") in order to undertake geotechnical investigations that it had planned for late 2016 and early 2017. We analysed Fortis's arguments on our clients' behalf, and respectfully disagree with Fortis's interpretation of the law. On instruction from our client, we bring this analysis to your attention in the hope that it will prove useful to you.

In particular, we question Fortis' argument that section 121 applies to its project. Moreover, even if it does apply, we are of the view that section 121 does not remove the District's jurisdiction over the pipeline in relation to matters of how and where the project should be built.

<u>Summary of Fortis' legal argument</u>

The foundations of Fortis's legal position are a 2013 Cabinet directive and a 2015 regulation. In 2013, Cabinet used its authority under section 3 of the *Utilities Commission Act* ("UCA") to issue

Direction No. 5 to the British Columbia Utilities Commission.[1] In *Direction No. 5*, Cabinet directed the BC Utilities Commission ("the Commission") to use its authority under section 45(4) of the UCA to make a regulation that would "exclude the EGP project from the operation of section 45(1) of the Act."[2] The EGP project refers to Fortis' pipeline project.

Section 45(1) requires proposed public utility projects to obtain a certificate of public convenience and necessity ("CPCN"). It is significant that Cabinet used sections 3 and 45(4) to achieve its objective, and we will return to that later.

In early 2015, the Commission complied with *Direction No. 5* by issuing the *EGP Project Regulation*.[3] This regulation used the power granted to the Commission by section 45(4) of the UCA to exclude the EGP project from the operation of section 45(1), meaning that Fortis does not require a CPCN for its EGP project.

Fortis now argues that the project regulation described above triggers section 121 of the UCA. In Fortis' words, "[i]n the case of the EGP Project, Section 121 of the UCA applies because the British Columbia Utilities Commission has issued a regulation exempting the EGP Project from the requirements of section 45(1) of the UCA. This exercise of the Commission's power is equivalent to an authorization for the purposes of section 121(1)."[4] Essentially, Fortis argues that an exemption from requiring a CPCN means that s. 121 operates to shield it from a requirement to obtain a development permit from the District before undertaking its proposed geotechnical work.

If this is true, then an exemption from the requirement to obtain a CPCN effectively ousts local government jurisdiction without an explicit declaration of such from Cabinet. We do not agree with Fortis' interpretation, for the reasons below.

Analysis of s 121's application

It is important to establish what section 121 does. Section 121 protects two things: powers conferred on the Commission, and authorizations granted to a public utility under sections 46, 88, and 22 of the UCA. Section 121 is reproduced here:

> **Relationship with *Local Government Act***
> **121** (1) Nothing in or done under the *Community Charter* or the *Local Government Act*
> (a) supersedes or impairs a power conferred on the commission or an authorization granted to a public utility, or
> (b) relieves a person of an obligation imposed under this Act or the *Gas Utility Act*.
> (2) In this section, **"authorization"** means
> (a) a certificate of public convenience and necessity issued under section 46,

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1 *Direction No. 5 to the British Columbia Utilities Commission*, BC Reg 245/2013, online: http://canlii.ca/t/52df9 [*Direction No. 5*].
2 *Direction No. 5*, *supra* note 1 at s 7.
3 *EGP Project Regulation*, BC Reg 13/2015, s 2, online: http://canlii.ca/t/52dpx [*EGP Project Regulation*].
4 Letter from FortisBC to the District of Squamish, 12 October 2016.

(b) an exemption from the application of section 45 granted, with the advance approval of the Lieutenant Governor in Council, by the commission under section 88, and
(c) an exemption from section 45 granted under section 22, only if the public utility meets the conditions prescribed by the Lieutenant Governor in Council.

At the broadest level, this section applies to any public utility that receives an "authorization" as defined in s. 121(2). Confusingly, it is clear that that "authorization" can in some cases be an exemption from the requirement to have an authorization. Exactly what that means in terms of the legal effect of s. 121 is discussed further in the next section.

Nonetheless, the section clearly purports to apply if an exemption from the application of section 45 is granted either under s. 88 (with the advance approval of Cabinet) or s. 22 (by Cabinet).

Fortis has argued that the exemption it was granted by the *Regulation* is equivalent to an authorization.[5] The problem for Fortis is that it received its exemption under s. 45(4), with Cabinet direction under s. 3 (see *Direction No. 5*, discussed above). On its face this seems like a different legal authority and is at least arguable that the Legislature has intended to limit the application of s. 121 to exemptions received under the sections specifically referenced.

In our view, there is a legitimate question as to whether s. 121 applies to Fortis' activities respecting the EGP project. It is possible that a court would hold that s. 121 does apply to Fortis, but this is far from clear.[6]

However, if we assume for the sake of argument that section 121 applies to Fortis the question of the impact of s. 121 on local government land use powers becomes critical and will be considered further in the next section.

<u>The effects of s 121 on local government decision-making</u>

As mentioned above, it is not clear that section 121 of the UCA applies to Fortis. However, assuming that it does apply, what is the legal effect on local government decision-making, zoning and development permits?

The primary purpose of the UCA is to regulate the production and pricing of energy in BC. In particular, the Legislature appears to have been concerned about the potential for monopolies to occur in the power sector. As such, the Act is not generally intended to regulate the location or day to day operations of public utilities. As was recently noted by the Commission in *Silversmith Power & Light Corp., Re:*[7]

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5 Letter from FortisBC to District of Squamish, 12 October 2016.

6 It is possible that a court, given the high level of cabinet involvement in this order, would find that the Cabinet and Commission's actions were also authorized under s. 88 (even though that section is not referenced in any of the relevant regulations or orders).[6] Alternatively, it might be argued that the exercise of s. 45(4) was a "power confirmed on the commission" within the meaning of s. 121 (although this seems to us a weak argument given the specific language in s. 121(2)).

7 2015 CarswellBC 2599, [2015] B.C.W.L.D. 7011, [2015] B.C.W.L.D. 7012 at paras 19-21.

> Utility regulation exists as a means to allow natural monopolies to serve customers in situations where economics dictates that the most efficient allocation of society's scarce resources results from the use of a single service provider, as opposed to more than one provider, which would be the case under free market competition.
>
> It is the regulator's function to prevent the abuse of monopoly power, so that customers have access to safe and reliable service at a fair price. At the same time, the utility is to be afforded the opportunity to earn a fair return on its investment so that it can continue to operate and attract the capital required to sustain and/or grow its business.
>
> Thus, the regulator must balance the legitimate interests of both customers and utilities by setting rates which are just and reasonable.

As discussed above, section 121 prevents the operation of the *Local Government Act* or *Community Charter* from "superseding or impairing" an "authorization."

The *Community Charter*[8] grants municipal councils the power to pass by-laws regulating a range of topics, including public places and protection of the natural environment.[9]

The *Local Government Act*[10] is a broad piece of legislation that outlines the powers of municipalities and regional districts. Among other things, it empowers municipalities and regional districts to enact official community plans and pass by-laws respecting planning and land use management (including by-laws respecting development permits).[11] The *Local Government Act* also allows municipalities and regional districts to pass by-laws respecting zoning, and it provides for the consultation of affected communities.[12]

The answer to the question of section 121's impact on local government powers needs to address the meaning of the term "supersedes or impairs." The case law does not discuss the term in detail or provide a working definition. In the only modern case we found that mentions the term "supersede or impair" in relation to legislation, the Court reproduces without comment a statement by the Commission that section 121 "requires that a municipality may not enact bylaws, standards and policies that conflict with an authorization granted to a public utility."[13]

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8 *Community Charter*, SBC 2003, c 26, online: http://canlii.ca/t/52pnm. [*Community Charter*]

9 Fundamental powers afforded to municipalities under the *Community Charter* include the power to pass by-laws about a range of topics, including but not limited to the following. Note, however, that regulations and other government measures do place some additional restrictions on bylaws related to some of these topics.
8(3) (a) municipal services;
(b) public places;
(c) trees; …
(h) the protection and enhancement of the well-being of its community in relation to the matters referred to in section 64 *[nuisances, disturbances and other objectionable situations]*;
(i) public health;
(j) protection of the natural environment;
(k) animals…

10 *Local Government Act*, R.S.B.C. 2015, c. 1 [*Local Government Act*]

11 *Local Government Act*, Part 14 – Planning and Land Use Management.

12 *Local Government Act*, s. 479.

13 *Coldstream (District) and FortisBC Energy Inc., Re*, 2012 CarswellBC 2649, [2012] B.C.W.L.D. 8082.

It appears that the BC government believed, when it introduced amendments to the section in 2006, that the phrase "supersedes or impairs" did have the legal effect of removing local government control over zoning for Independent Power Projects.[14]

While the government's intent in amending section 121 supports Fortis' interpretation the section, legislation must be interpreted based on the specific language of the statute. In our view, it seems unlikely that the section ousts all local government authority over a public utility, particularly where the "authorization" is an exemption that says little about the particular route.

First, as noted above, the primary focus of the UCA is generally on how much power should be produced and on its fair price. While the Legislature apparently did intend to restrict the powers of local government to some degree, the focus of the UCA and the Commission in those cases appears to be more on ensuring that an approved project proceed, rather than the siting and construction of public utilities. Fortis' interpretation does not appear to further the purposes of the UCA, and it undermines the purposes of the *Community Charter* and *Local Government Act* to restrict local government authority in this manner.

Indeed, the *Local Government Act* itself *requires* official community plans to specify: "the approximate location, amount and type of present and proposed … public utility land uses."[15] This requirement makes little sense if the plans, and related bylaws, that touch on public utility land use have no legal effect once the public utility has authorization under the UCA. These two statutes should be read together – and it seems that the best interpretation of s. 121 must leave local governments with at least some jurisdiction over public utility land uses.

Second, if a complete removal of local government jurisdiction were the government's intent, it could have done so much more clearly. For example, the *Private Managed Forest Land Act* forbids local governments from enacting by-laws with respect to private managed forest land if doing so would restrict, directly or indirectly, any forest management activity allowed under that legislation.[16] By contrast, section 121 on its face leaves a local government with the power to legislate in ways that do not "supersede or impair" the authorization. It seems a stretch to interpret the word "exemption" in section 121 as meaning an exemption not just from the requirements of s. 45 of the UCA, but an exemption from all requirements of the *Local Government Act* and *Community Charter* as well.

Third, as noted above, it is unclear what it means to "supersede or impair" an exemption (a negative act) from a specific positive requirement (in this case the requirement to obtain a Certificate of Public Convenience and Necessity under s. 45). In this case, the Commission exercised its power to exempt Fortis from the requirement to obtain a CPCN. How could a waiving of a requirement to get an approval be "superseded or impaired" by the operation of local government by-laws? Arguably, the only way that this exemption could be "superseded or impaired" would be if the District of Squamish were requiring Fortis, through the application for a development permit, to go back to the Commission and get a certificate of public convenience and necessity.

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14 Hansard, https://www.leg.bc.ca/documents-data/debate-transcripts/38th-parliament/2nd-session/H60515p at p. 4823.

15 *Local Government Act*, SBC 2015, c. 1, s. 473(1)(b).

16 *Private Managed Forest Land Act*, SBC 2003, c 80, s 21, online: http://canlii.ca/t/52ldt

Ideally an interpretation of s. 121 should be able to make some sense of this apparent contradiction.

So if Fortis is wrong in its interpretation, what is the legal effect of s. 121?

The purpose of the UCA suggests that section 121 is intended to prevent local governments from attempting to regulate the amount or cost of power to be produced – in other words to intrude upon the matters that the Commission routinely regulates.

Seen this way, the fact that s. 121 includes "exemptions" as "authorizations" makes sense – since it clarifies that a Utilities Commission decision not to regulate does not invite local governments to step in and regulate on matters squarely within the Commission's mandate.

The Commission's summary of the section,[17] as relating to "conflicts" between authorizations and local government powers, suggests a similar interpretation: that in the event of an actual conflict the Legislature intended authorizations and exemptions recognized by section 121 to trump local government by-laws and approval processes under the *Community Charter* and the *Local Government Act*.[18] Since the Commission is generally concerned with the production and pricing of power, and not with siting, this would generally not restrict the ability of local governments to zone and otherwise regulate land-use (including through development permits).

In considering whether a conflict might exist in the current case, it is appropriate to look at the specific language of the "authorization" on which FortisBC relies, and especially whether there is specific language in the Commission's exemption order which would purport to require Fortis' project to be built in a specific manner or in a specific place.[19] The Commission's exemption order, under s. 45(4), states only that "The EGP project is excluded from the operation of section 45 (1) of the Act," and adopts the definition of "EGP project" used by Cabinet in its Directive. The adopted definition of EGP Project is:

> **"EGP project"** means the project to expand the transmission facilities of FortisBC Energy (Vancouver Island) Inc at and between the Eagle Mountain Compressor Station in Coquitlam and an LNG Facility in Woodfibre, and at the Port Mellon Compressor Station;

Thus the Commission has "authorized" Fortis' project to be built and operated, but except for the approximate location of two compressor stations and the Woodfibre LNG destination it has not specified particular locations.[20] There is no suggestion that this description can be determinative of the route to be taken, location of other key elements of the project, or specifications as to how the project should be built. It is difficult to see that local government regulations concerning matters not covered in that definition could have been displaced under s. 121.

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17 Above, note 13.

18 In law, a "conflict" exists when it is impossible to comply with two laws simultaneously – in other words you can't comply with one without breaking the other.

19 We do not mean to imply that the Commission would have authority to make specific orders with respect of land use and thereby displace inconsistent local government laws. Rather, if the Commission has not purported to make such an order, then clearly s. 121 cannot operate in this case to displace local government land use rules.

20 This stands in contrast with authorizations, including exemptions, in relation to Independent Power Projects, which will generally concern a very specific location.

If the District of Squamish were to use its powers under the *Local Government Act* or *Community Charter* with the express intention of blocking the construction of any version of the EGP project, or in such a way that it became impractical to build the project at all, it is possible that section 121 might apply. However, that is not the case here. In our view, so long as the District of Squamish's rules are intended to regulate, and have the effect of regulating, how and where the project should be built, rather than whether it should be built, section 121 should not be interpreted as displacing the District's authority in respect of development permits, zoning or other regulatory powers.

In our view, Fortis and its project are subject to all ordinary and reasonable requirements of local government bylaws and regulation.

Next steps

Based on the above, in our view the District's ordinary bylaws related to the EGP apply, and the District should seek to enforce its bylaws with respect to the EGP project, including a requirement that Fortis obtain a development permit. Alternately, the District could request an interpretation of section 121 from the BC Supreme Court.

We trust that the above is helpful.

Sincerely,

Andrew Gage
Staff Counsel

cc. Hon. Pamela Goldsmith-Jones