



## **Servicing and Utilities at Resort Communities in British Columbia**

By

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*This is a general overview of the subject matter and should not be relied upon as legal advice or opinion. For specific legal advice on the information provided and related topics, please contact the author or any member of the Public Utility and Regulatory Law Group.*

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## **I. INTRODUCTION**

This paper addresses four topics related to servicing and utilities at resort communities:

1. What are the unique characteristics and issues of utility services?
2. Who are the utility regulators and what do they do?
3. From whom, and under what terms, are utility services available?
4. A summary of issues for developers and investor-owners.

This paper provides information on these topics that should be useful to developers of resort properties, as well as potential buyers and investors in resort property strata units, homes or commercial enterprises.

### **A. What Utility Services Are Available?**

The utility services that are the subject of this paper are generally considered essential services necessary in the modern world for reasons of safety, health and convenience. These include the familiar services of electricity, natural gas, water, wastewater and sewage, and telecommunications. More exotic services may include propane service (rather than natural gas) and the delivery of heating or cooling mediums such as steam or chilled water. The provision and acquisition of each of the utility services described above have three unique characteristics.

### **B. Characteristics of Utility Service**

First, in most established resort communities, most of the time, it is more cost-effective, or practical, for owners of strata units, houses and businesses to acquire utility services collectively. For example, it rarely makes economic or environmental sense for home owners in an established resort community to run their own electrical generators, or have their own water wells and septic tanks. It follows that most utility services in resort communities are provided by service providers to a number of customers.

The second important characteristic of utilities is that service providers often have a natural or legislated monopoly. A natural monopoly can arise when it is too costly, or the revenues too small, for a would-be competitor of an existing service provider to construct and operate new parallel infrastructure. This is often the case where the services are provided through “long, skinny things”,

such as copper wire (electricity, telephone, television, internet), or pipelines (water, wastewater, and gas).<sup>1</sup>

Legislated monopolies arise through regulatory regimes that establish exclusive service areas for utility companies, typically through the issuance of certificates of public convenience and necessity (CPCN). The economic and policy basis for legislated monopoly service is that it is wasteful to build and operate redundant and potentially underutilized public service infrastructure.

Third, regulatory regimes that govern provision of public utility services have been established to protect utility customers from harmful monopolistic behaviour. In addition, regulatory regimes serve to protect the rights of utility companies to recover in rates sufficient revenues to earn a return on their invested capital. Thus, public utility regulators serve to balance the interests of the service providers on the one hand, and the service recipients on the other. This is an important point, as it is a common misconception that utility regulators are there solely, or even primarily, for the benefit of the service recipients. The regulatory regimes are more or less formal and sophisticated, depending on the legislation, if any, and the particular service.

### **C. Issues for Developers and for Investor-Owners**

From a resort developer's perspective, an important utility issue is determining whether to arrange for self-supply of utility services, whether to arrange for utility services to be provided by a third party service provider, or whether to establish a hybrid model incorporating elements or both. There may of course be different solutions for different types of service.

The over-arching utility issues for investor-owners are reliability of supply at least cost and, increasingly, at a predictable cost. A further more recent consideration for investor-owners in resort properties is the social issues arising from the provision of utility services. For example, more and more resort property owners are interested in receiving services in an environmentally sustainable manner. The nature of the regulatory regimes governing the provision of the services, and the model to deliver those services adopted by the developer, will be relevant considerations to these issues.

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<sup>1</sup> A partial exception arises in the telecommunications industry, where cablevision and telephone companies now compete head-to-head for telephone, internet, and television customers.

Through the following elaboration of the types of utility service and regulatory regimes available, it is intended that this paper will provide both developers and investor-owners with the means to begin assessing these issues at the resort properties they are developing, or buying into.

## **II. WHO ARE THE UTILITY REGULATORS AND WHAT DO THEY DO?**

### **A. Two Types of Regulators**

For the purposes of this paper, utility regulators are distinguished into two types. First are those entities that, acting on the basis of long-established common law principles, regulate the relationship between (monopoly) service providers, and their customers. The most formal and sophisticated example of such a regulator in British Columbia is the British Columbia Utilities Commission, which regulates electricity and natural gas utilities such as BC Hydro and Terasen, (BC Utilities Commission or Commission). The least sophisticated (if no less formal) is the B.C. Supreme Court.

In addition there are a myriad of “topical” regulators whose responsibilities impact the provision of public utility services. One example is Measurement Canada, a federal agency that regulates the use of revenue meters, commonly used by public utilities for the purposes of billing. Another example is the Provincial health officer and drinking water officers, who under the authority of the *Drinking Water Protection Act*, S.B.C. 2001, chapter 9, are charged with ensuring the dependable supply of safe drinking water for British Columbians.

This paper focuses on the more general public utility regulators, rather than the “topical” regulators.

### **B. Common Law Public Utility Regulation**

Jurisprudence going back several hundred years establishes common law obligations on private entities that provide essential public services. (See for example *Newton v. Cubitt* (1862), 142 E.R. 1053, a case involving a challenge to a monopoly ferry service on the Thames River.) The essential common law obligation on such an entity is to provide reasonable service to all who request it, and are willing to pay a reasonable rate for it, without undue discrimination.

The common law has been largely overtaken by complex statutory regimes such as the *Utilities Commission Act*, R.S.B.C. 1996, chapter 473, as amended (*Utilities Commission Act*, or Act), which establishes the BC Utilities Commission. However, despite the proliferation of statutory regimes and

public utility regulators, the common law obligations on public utilities survive. In *Chastain v. British Columbia Hydro and Power Authority* [1973] 2 W.W.R. 481, BC Hydro was successfully sued in an action brought on behalf of student customers. At that time BC Hydro was exempt from regulation by the BC Utilities Commission (then called the BC Energy Commission). BC Hydro's policy at the time was to require revenue deposits from certain classes of individuals, including non-home owners, which it believed posed unacceptable credit risks. An action seeking a declaration that the policy was illegal was successful on the basis that BC Hydro was:

“... a public utility and amenable to the general law relating to public utilities, notwithstanding the fact that the particular provisions of the Public Utilities Act do not apply to it [at paragraph 27].”

The Court went on to say:

“The obligation of a public utility or other body having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public has long been clear. It is to supply its product to all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers. The great utility systems supplying power, telephone and transportation services now so familiar may be of relatively recent origin, but special obligations to supply service have been imposed from the very earliest days of the common law upon bodies in like case, such as carriers, innkeepers, wharfingers and ferry operators.”

The Court in *Chastain* went on to note with approval the following from *St. Lawrence Rendering Co. Ltd. v. Cornwall*, [1951] O.R. 669 at 683:

“That a public utility was at common law compelled to treat all consumers alike, to charge one no more than the others and to supply the utility as a matter of duty and not as a result of a contract, seems clear [emphasis added].”

It follows that in the absence of any statutory regime, or any contractual relationship, customers and potential customers of public utilities have not insignificant common law rights regarding utility service and terms and conditions of service.

It is noteworthy that in *Chastain*, the common law obligations of public utilities were found to apply to BC Hydro, which was and continues to be an agent of Her Majesty the Queen in Right of British Columbia. There is also older Canadian jurisprudence on the applicability of common law public utility obligations to municipalities. In this regard, see for example, *Canada (AG) v. Toronto (City of)*

(1893), 23 S.C.R. 514 and *Hamilton (City of) v. Hamilton Distillery Co.* (1907), 38 S.C.R. 239. In both those cases the Supreme Court of Canada found that the municipalities were subject to common law duties to provide reasonable service at rates that were not unreasonably discriminatory, despite contrary but otherwise valid rates established by bylaw. Thus a municipality's refusal to extend service to a new customer, or to charge reasonable rates, may well be subject to legal challenge, a potentially important consideration given the exemption that municipalities have from formal regulatory regimes (see below).

A more recent example of the continuing applicability of common law public utility principles is *Vidéotron Telecom Ltd. v. OPGI Management Limited Partnership* [2003] O.J. No. 2278 (S.C.J.), leave to appeal dismissed [2003] O.J. No. 4424. In that case OPGI Management refused access to its downtown Toronto buildings to Vidéotron, which owned a fibre-optic network in those buildings (acquired through an asset sale from a bankrupt). Vidéotron was able to secure an interim injunction restraining Oxford from interfering with the equipment, or Vidéotron's rights to sell telecommunications services to tenants in the buildings, on the basis, in part, that Oxford's near-monopoly on downtown office space impressed its private property rights with a common law (public utility) obligation to provide reasonable access to Vidéotron.

### **C. BC Utilities Commission**

The BC Utilities Commission regulates the relationship between "public utilities" and their customers under the authority of the *Utilities Commission Act*. That enactment and others like it in jurisdictions across North America are built on the common law principles described above (*Chastain*, at paragraph 30). Section 1 of the Act provides the following definition of "public utility" (emphasis added):

"public utility" means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for

(a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or

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but does not include

(c) a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries,

(d) a person not otherwise a public utility who provides the service or commodity only to the person or the person's employees or tenants, if the service or commodity is not resold to or used by others, ...”

Thus, a “public utility” will include virtually anyone who provides electricity or natural gas to the public generally or to a corporation, for compensation. Compensation is broadly defined in section 1 of the Act to include a “gain or reward of any kind paid ... directly or indirectly”. Note that the definition of “public utility” expressly excludes municipalities and those who self-supply or supply to employees or tenants.

Section 61(3) of the Act makes it clear that public utilities are not free to provide service except in accordance with rates filed with the Commission:

“61(3) The rates in schedules as filed and as amended in accordance with this Act and the regulations are the only lawful, enforceable and collectable rates of the public utility filing them, and no other rate may be collected, charged or enforced.”

Section 59(1) of the Act prohibits public utilities from charging anything other than a “just” and “reasonable” rate, while section 59(4) establishes the Commission as “the sole judge, whether a rate is unjust or unreasonable”.

The word “rate” has a very broad definition in the Act (section 1) and includes:

“(a) a general, individual or joint rate, fare, toll, charge, rental or other compensation of a public utility,

(b) a rule, practice, measurement, classification or contract of a public utility or corporation relating to a rate, and

(c) a schedule or tariff respecting a rate;”

Thus, in addition to the rates a customer pays for utility service, “rate” includes important so-called “non-rate terms and conditions”, and are also typically found in public utility tariffs. Such provisions include extension tests, being tariff provisions that prescribe the allocation of cost arising from a new service connection between the new customer and the utility. Typically, a new customer is required to

pay the cost of all infrastructure from the point of connection with the utility's existing infrastructure. In some tariffs the new connecting customers are also required to pay the cost of any upgrades required by the utility to provide the service. These upgrade costs can be in some cases quite onerous.

The rights of a utility to disconnect customers, and the limits on those rights, are also set out in tariffs, as are fixed connection charges, credit policies, and right-of-entry provisions for meter-reading purposes.

The significance of section 61(3) is that the terms and conditions of service of a public utility regulated by the BC Utilities Commission are not contractual in nature, and therefore are negotiable only to the extent that there is room in the tariff language for interpretation. (Although most tariff language is not particularly clear and unambiguous.)

The significance of section 59(4) is that the Commission, by virtue of being the final arbiter on terms and conditions of service, has an obligation to hear and determine any complaint or application brought by a customer, potential customer or utility, regarding terms of service. As an independent decision-maker (acting judicially or legislatively, as the case may be), the Commission provides a convenient mechanism to resolve most if not all customer-utility disputes.

#### **D. Comptroller of Water Rights**

Under section 4 of the *Water Utility Act*, R.S.B.C. 1996, chapter 485, as amended, a water utility is subject to the same:

“duties, responsibilities and restraints ... as are imposed on a public utility under the *Utilities Commission Act* and the powers and jurisdiction of the Comptroller in respect of a water utility are the same as are vested in the British Columbia Utilities Commission under the *Utilities Commission Act*, in respect of a public utility ...”

Section 1 of the *Water Utility Act* provides the following definition of a water utility:

“water utility” means

- (a) a person who owns or operates in British Columbia equipment or facilities for the diverting, developing, pumping, impounding, distributing or furnishing of water, for compensation,

- (i) to or for more than the prescribed number of persons or, if no number is prescribed, 5 or more persons, or
- (ii) to a corporation, ...”

It is clear on the face of the definition of water utility that persons who provide wastewater disposal and sewage services are not water utilities within the meaning of that expression, nor are persons who serve less than five or more persons (there being no regulation prescribing any other number).

As with the *Utilities Commission Act* the definition of water utility expressly excludes municipalities and those who serve themselves, their employees or tenants, where the service is not resold.

It follows that water utility tariffs, as with electricity or gas tariffs, have the force of law and limit the scope of potential negotiations between a water utility and its customers, but also provide a mechanism to resolve customer-utility complaints.

## **E. CRTC**

The Canadian Radio-television and Telecommunications Commission (CRTC) is responsible for the regulation of television, cable, satellite and radio systems as well as telephone, internet, and other telecommunications carriers. The CRTC is established under the *Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22, as amended. The powers of the CRTC, as well as the regulatory scheme for telecommunications common carriers, is outlined in the *Telecommunications Act*, S.C. 1993, c. 38, as amended. The CRTC is also given regulatory power over Canadian broadcasting under the *Broadcasting Act*, S.C. 1991, c. 11, as amended, and is given regulatory authority over particular telecommunications carriers by virtue of carrier-specific acts.<sup>2</sup> As with utilities regulated by the BC Utilities Commission, Canadian carriers of telecommunication services must provide services in accordance with the rate or rates approved by the CRTC and must abide by all non-rate terms and conditions prescribed by the CRTC.

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<sup>2</sup> See, for example, *Bell Canada Act*, S.C. 1987, c. 19.

### **III. FROM WHOM, AND UNDER WHAT TERMS, ARE UTILITY SERVICES AVAILABLE?**

This section discusses some of the different ways in which public utility services may be provided by developers to investor-owners, and some important characteristics of those models.

#### **A. Regulated Third Party Service Direct to End Users**

The most familiar manner in which residences and commercial enterprises receive public utility services is through the large regulated public utilities such as BC Hydro and FortisBC (electricity) and Terasen (natural gas and propane). Other less familiar utilities include Central Heat Distribution Ltd., which distributes steam in the Vancouver downtown core for the purposes of heating, and White Rock Water Utility, a privately-owned water utility serving residents in White Rock. Well-known telecommunications examples include Telus and Rogers.

An important if obvious (perhaps) characteristic of this model is that the service relationship is between the regulated utility and the end-use customer. Thus while the developer will have responsibility for installation of the necessary infrastructure to allow connection to the utility's system, on an ongoing basis the investor-owners in the resort community will have responsibility for paying for and receiving the service in accordance with the tariff.

Virtually all regulated public utilities charge rates that are meant to cover their cost of providing service including, as noted above, an allowance for the cost of capital. Recovering the cost of capital in rates is meant to provide the investors in the utility with a return on their investment, i.e. profit. The return is commensurate with the relative risk of the enterprise. This risk-allowance in the cost of capital may have a material impact on the rates. A small resort utility such as Hemlock Valley Electrical Services Limited undoubtedly has a higher risk profile than FortisBC and therefore has a sound basis to have its rates established in a way that allows a higher return on its capital than would FortisBC. Thus, other things being equal, the rates of a large relative risk-free utility should be lower than those of a smaller riskier utility.

Another consideration that arises from this model is that different rates are generally set for different classes of customer, on the basis of cost-of-service studies. Thus, using BC Hydro as an example, electricity rates for high-voltage industrial customer are lower than residential rates which in turn are

lower than commercial customer rates. Hotels and strata common areas are examples of commercial customers. It follows that consideration of the rate structure of a proposed third party service ought to be a factor in whether to establish the customer relationship at the unit level, or at the resort property level.

A benefit of formal rate regulation is the common prohibition of cross-subsidies. The BC Utilities Commission has issued a number of rulings over the years designed to ensure that the cost-of-service rates it establishes are not covering costs incurred by utilities in respect of activities unrelated to the provision of the utility service. See for example the Commission's April 1997 "Retail Markets Downstream of the Utility Meter Guidelines" at [www.bcu.com/Guidelines.aspx](http://www.bcu.com/Guidelines.aspx).

### **B. Unregulated Third Party Service Direct to End Users**

The most common example of third party service providers that are not formally regulated by an independent regulator are of course municipalities. Municipalities provide electric service (eg. New Westminster), and of course water and sewage services.

Under this model the service relationship is between the municipality, and the end user customer. However, distinct from the regulated model, rates, and "non-rate terms and conditions" are subject to the whim of the municipality, disciplined only by the potential application of the common law principles in *Chastain*. Despite the still-vital common law public utility jurisprudence, very few municipalities have in recent times had their terms of service challenged in court proceedings. It follows, in the author's view, that the absence of a formal regulatory regime such as that implemented by the BC Utilities Commission will generally benefit municipalities at the expense of customers.

### **C. Regulated Redistributors**

A third hybrid model of service delivery is by regulated utilities that effectively act as redistributors for other utilities. An excellent example in the resort property context is Stargas Utilities Ltd. Stargas is a utility regulated by the BC Utilities Commission. It is owned by Silver Star Mountain Resorts Ltd. It buys natural gas from Direct Energy, a wholesale energy supplier, and redistributes the gas within the resort with its own infrastructure. Both the purchase of the gas from Direct Energy, and its sale to residents of the Silver Star community, are regulated by the BC Utilities Commission. Stargas, despite

its relatively small size faces all the issues that much larger regulated public utilities face, including the need to apply to the BCUC to increase its rates or amend its terms and conditions of service.

Another illustrative example in the resort property context is Sun Rivers Services Corp., now called Terasen Multi-Utility Services Inc. Sun Rivers was originally owned by a resort developer and an operator of the Sun Rivers resort community, which is just outside Kamloops on the North Thompson River. Sun Rivers provides electricity, natural gas, sewer, water, storm and groundwater drainage, geothermal loops, telephone, fire hydrant, fire water supply, and irrigation service to the resort community. Its purchases of electricity and natural gas, and its resale to community members, are both regulated by the BC Utilities Commission. Until 2002, Sun Rivers contracted out the actual operation of the public utility services to Terasen Multi-Utility Services Inc., which eventually bought Sun Rivers Services Corp. from the developer/operator of that property. Again, Sun Rivers faces all the issues that regulated utilities face, including the requirement to seek Commission approval of any changes to its rates, and “non-rate terms and conditions”.

One issue faced by all customers of redistributors is that rate stability is largely in the hands of the “upstream” service provider, and out of the control of the local utility. Thus, for example, if Direct Energy’s rates increase, Stargas would in the normal course be entitled to pass its increased costs on to its customers in the form of higher rates. With the development of continent-wide wholesale markets in electricity and natural gas this is an issue faced by all electricity and gas utilities, regardless of size. However, the larger the utility, the better it is able to attenuate cost volatility.

#### **D. “Unregulated” Redistributors**

Lastly, a service delivery model that is likely to be applicable to resort communities or properties are the smaller “unregulated” redistributors of utility services. Common examples include marinas and RV parks that often have the only customer relationship with upstream utilities such as BC Hydro or Terasen, but redistribute the services on their property. To the extent the redistribution is to tenants, the service is clearly unregulated under the *Utilities Commission Act* because of the definition of “public utility”. However, tariff provisions such as that found in BC Hydro’s Electric Tariff (page B-20) are not uncommon, and can limit the ability of an otherwise unregulated utility to recover the costs of its infrastructure:

“If a Customer wishes to sell electricity which he has purchased from BC Hydro to a tenant of that Customer on the same premises on a metered basis then the Customer shall agree that the selling price for such electricity shall not exceed the price which BC Hydro would have charged had that tenant been a customer of BC Hydro. This requirement shall be included in an agreement for resale between BC Hydro and the Customer.”

#### **IV. SUMMARY OF ISSUES FOR DEVELOPERS AND INVESTOR-OWNERS**

##### **A. Developers**

For a new or proposed resort development close to the existing infrastructure of an established public utility or municipality providing public utility services, third party supply to the residences and businesses in the community is likely to be the most attractive option. However, developers and resort managers should consider the following.

1. It is useful for developers to have a clear understanding of the extension rules in the utility’s tariff or municipality’s bylaws to see what costs they must bear. Often the process of ascertaining these costs itself can be time-consuming and expensive. Tariff language regarding extensions is often less than clear, and therefore subject to a wide range of interpretations.
2. Developers ought to consider who the customer should be given different rate structures for different customer classes. As mentioned above, different classes of customers pay different rates.
3. Developers should consider, in addition, the tariff-prescribed disconnection procedures, third party access provisions, and credit policies of the utility or municipality, to ensure consistency with the resort plan.
4. Developers should be aware that where the third party supplier is a municipality or other unregulated entity there are fewer practical options to deal with disputes with the service provider either at the outset or on a go-forward basis. Litigation in reliance on common law principles will always be more challenging than dealing with an independent regulator.

If a new or proposed resort facility is far from any existing public utility infrastructure some form of self-supply may be the only economical option. Considerations in this circumstance include the regulatory burden associated with selling services that are subject to formal regulation. An

increasingly viable and attractive option for self-supply is through subcontracting to a third party. Terasen Multi-Utility Services has been a pioneer in this industry in British Columbia. Another example is EPCOR Utilities Inc., owned by the City of Edmonton, which provides services similar to that of Terasen.<sup>3</sup> As noted in the Sun Rivers example, this model can also be converted to an independent third-party supply model.

## **B. Investor-Owners**

From an investor or owner perspective, reliability will generally be less of a concern when the utility services are to be provided by an established third party service provider, whether regulated or not. Established service providers in British Columbia, with the exception of the smaller privately owned water utilities, are well capitalized and have the necessary skills to provide reliable, economical service. Supply through a resort-owned utility can also be satisfactory, but potential cost and reliability concerns ought to be considered. Larger utilities are also more likely to be able to provide service alternatives that address social issues. BC Hydro, for example, sells Green Credits, which are intended to support the development of “green energy”, and provides a net metering service, allowing customers to self-generate and “sell” excess energy back to the utility.

Formal regulatory regimes ensure the existence of established complaint resolution procedures, and cost-of-service rates (no cross-subsidies). Because of utilities’ rights to recover in rates their cost of capital, formal regulation can, however, also lead to higher-than-anticipated rates.<sup>4</sup> In the absence of a formal regulatory regime, the common law may provide solutions to disputes although they are likely to be costly and uncertain.

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<sup>3</sup> For example, EPCOR currently provides, on contract, water and wastewater services to the City of Port Hardy.

<sup>4</sup> In *Hemlock Valley Electrical Services Ltd. v. British Columbia (Utilities Commission)* (1992) 66 B.C.L.R. (2d) 1 the Commission determined that a rate increase necessary to allow the utility to recover its cost of capital was too high for the customers to bear, and ordered the rate increase to be phased-in over time. This was determined to be illegal.

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