

All in a Day's Work for a Local Government Law Firm

In pondering the theme of the 2007 LGMA Conference, it occurred to us that our clients must derive as much satisfaction from their work as we do from ours. It's the sheer variety of it that makes it interesting. Every day brings new challenges and that's what makes it fun – it's never dull!

The daily menu of work in our offices is a reflection of the issues faced by local government managers. A sampling of some of our lawyers' deskwork for a single day in April illustrates the point. Consider the following issues, each in search of a practical solution for our clients to use:

- Our newest associate jumped at his first expropriation file that day and, in short order, had prepared an expropriation bylaw, a timeline of the procedures for the client and a number of opinions on various aspects of the situation in response to questions from the client, while juggling 5 other property related files and one regulatory matter that same day. Way to go!
- On the labour front, a client needed to know how to collect a debt owing to the local government by an employee who was leaving town for other employment. The employee had taken an expensive course paid for by the employer, whose policy was that if the employee left within one year of taking the course, the employee would reimburse the pro rata share of the course. Could the client deduct the amount from the last pay cheque? We won't reveal the advice given, suffice it to say that the answer is not as straightforward as one would think!
- Planning issues, many of them on a "rush basis" are often the order of the day, as revealed by this string of calls and emails to our solicitors – review a new policy for OCP amendments while the new OCP itself is being developed; consider the issues in unilaterally amending a development permit; how to create and implement minimum parcel size exemptions for the subdivision provisions of a zoning bylaw; gifting of a lot as part of a subdivision application; interpretation of a zoning bylaw provision relating to whether a unit in a resort condominium could be used a check in/check out facility; reviewing eleven documents related to a phased strata plan development, including bonding issues; draw up a housing agreement to ensure adaptable units in the conversion of a motel to a strata plan for residential use; and on and on

The litigators were away busily fighting the good fight for our clients and did not report in detail on their activities. But who can deny the glamour and excitement of their existence? They may not save lives in every case, but they do save livelihoods, neighborhoods, and taxpayers dollars, and preserve important principles. Their work takes them to the exotic corners, the hinterland and the bustling commercial centers of our beautiful and storied province. They even fly to the far away capital of our country to argue before the Supremes, and we don't mean Motown.

Who says municipal lawyers can't save the world? Or at least, that is what one of the partners asked, as he reported on preparing an audio-visual presentation on Global Warming that day for an upcoming conference. Look out Al Gore! Canada is warming

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up another presidential candidate! In addition to Global Warming, the same partner had Afghanistan and a multi-million dollar real estate closing on his mind, to say nothing of Personal Waistline Expanding as result of it being Treat Day at the office. Hmmm, from the sublime to the ridiculous, you say?

That's our life and we wouldn't have it any other way.

The Editor

Business Licence Refusal: How Detailed Must the Reasons Be?

The British Columbia Court of Appeal has just reversed a lower Court decision suggesting that, when refusing issuance or renewal of a business licence, a municipal Council must give detailed reasons for its decision. The decision must set out the background facts and the detailed reasons why the Council considered the refusal or non-renewal was justified in the circumstances. Thankfully, the Court of Appeal has recognized that municipal Councils are not Courts of law, and that it is unreasonable to expect municipal Councils to deliver their reasons with the same degree of detail and sophistication as a Judge might.

377050 B.C. Ltd. dba the Inter-City Motel v. Burnaby (City of) concerned a decision by Burnaby City Council to refuse the renewal of a business licence for the operation of a motel. In considering a staff recommendation that the licence renewal be refused, the City received a detailed report that included evidence from the RCMP as to alleged criminal activity on the premises, including prostitution and possible drug dealing. The business licence holder was provided with an opportunity to make representations to Council.

After its decision was communicated to the licence holder, the licensee's solicitor requested reasons for the non-renewal of the licence, pursuant to section 60(1)(b) of the Community Charter. The written reasons provided referred to Council's determination that reasonable cause existed, based on "poor management of the operation of the motel giving rise to concerns for public safety, the enjoyment of use of neighbouring properties, and the high demand for police services related to the business".

On the licence holder's application to the Supreme Court, the Justice hearing the case ordered that the matter be referred back to Burnaby Council for reconsideration. In making that order, the Justice was critical of the fact that a transcript of the closed meeting at which Burnaby Council had deliberated had not been available to the applicant. The Justice further found that the written reasons provided were not sufficient; he concluded that the reasons ought to have set out in some detail the relevant facts which supported Council's decision and, as well, the reasons (in the sense of a cause, explanation or justification) for Council having come to its conclusion. In making his order, the Justice ordered that a transcript of any future deliberation of Burnaby Council on the matter be made available to the license holder.

In allowing the appeal, the Court of Appeal referred favourably to an earlier decision of the B.C. Supreme Court in 552197 B.C. Ltd. (dba Luxor Nite Club) v. City of Abbotsford. In that case, a Supreme Court Justice had considered the adequacy of City Council's reasons for suspending a business licence. Although noting that the reasons were not comprehensive, the Court in that case had held:

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However there is no doubt that the owners of the club were aware of the reasons for Council's decision. The club had had lengthy dealings with the police and Council. The concerns of Council must have been well known to the operators of the club. There could not have been any mystery as to the reasons for the suspension. Courts give reasons to parties in order to ensure that they have a reasonable understanding of a decision. Accordingly, with respect, there is no merit to this argument.

In the Burnaby case, the Court of Appeal held that the approach taken in the Luxor decision was appropriate. The Court pointed out that the license holder clearly knew the issues that were troubling the City, and further found that the letter from Council provided adequate reasons. The Court of Appeal made this comment as well:

Municipal councils are not courts. Their reasons should not be scrutinized with the same criteria as judicial reasons. Decisions by council are made by a vote. The votes take into account the public interest. They also may reflect political considerations.

The Court also questioned the appropriateness of an Order requiring the Council to make available a transcript of a closed Council meeting.

This case is significant because it confirms that the sufficiency of reasons for cancellation or non-renewal of a business licence will be determined in the context of the history of dealings between the licence holder and the municipality. The case also recognizes the reality that a municipal Council makes its decisions based upon a vote, and that it is inappropriate to expect the same degree of detailed fact finding and analysis as one typically finds in a Court decision.

Although this decision is welcome, when cancelling or suspending a licence municipalities should still take care that, in all of the circumstances, the adequacy of Council's reasons for its decision are not open to challenge.

Peter Johnson

Legal Advice helps Municipality defend “Abuse of Public Office” Claim

In March 2006, the BC Supreme Court dismissed claims of “misfeasance in public office” (aka “abuse of public office”) and “negligence” made by Windset Greenhouses against Delta and its officials. The BC Court of Appeal’s rejection of Windset’s appeal was reported in *Windset Greenhouses (Ladner) Ltd. v. Delta* 2007 BCCA 126 and will not be appealed further.

This was the sixth court proceeding between these two parties, related to Delta’s attempt to regulate greenhouses. Previously, the courts had ordered certain restrictive covenants to be cancelled, finding that the municipality did not have the authority to require restrictive covenants concerning habitat preservation, lighting and heating as a condition of issuance of building permits.

The courts also declared invalid portions of Delta’s business licence bylaw dealing with greenhouse lighting and heating, concluding that it was a “farm bylaw” which required Ministerial approval, that was not obtained, under section 917 of the Local Government Act. With these successful actions, Windset then sought damages to recover its losses from Delta.

The BC Court of Appeal cited the following fundamental principles from the Supreme Court of Canada’s judgment in *Odhavji Estate v. Woodhouse* 2003 3 SCR 263:

... The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of “bad faith” or “dishonesty”. In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

The court’s key finding is that the municipal officials had an “honest but mistaken belief” that the municipality did have the authority to require the restrictive covenants and adopt the business licence bylaw.

On the restrictive covenant issue, Delta’s lawyer initially provided an outline of the procedure, but apparently made “an incorrect assumption” that one of the statutory prerequisites had been satisfied. Although that assumption was clarified and corrected with later advice, the court accepted that the municipal official “did not understand the consequences of [that] advice”. Windset had not proven that Delta’s officials “acted with knowledge of, or [were] recklessly indifferent to, the fact that there was no power to require...the restrictive covenant ...[which] would probably injure Windset”.

On the business licence issue, the court reached a similar conclusion, noting that “Delta received a legitimate legal opinion that it had power” to do what it did and therefore was “entitled to rely on the opinion”.

Lui Carvello, MCIP

Pit Bulls Be Banned!

Ontario's province wide ban on pit bulls just received qualified approval in a far reaching decision on dangerous dogs in Canada. Mr. Justice Herman of the Ontario Supreme Court of Justice (equivalent to the B.C. Supreme Court) recently upheld most of the Ontario Dog Owner's Liability Act (DOLA) as being constitutionally valid.

Facts

The applicant, Ms. Katherine Cochrane, was the owner of a pit bull named "Chess". Ms. Cochrane testified in her affidavit that "Chess" was a playful, affectionate and friendly pit bull and a "fixture in my neighbourhood". *Cochrane v. Ontario (Attorney General)* [2007] O.S.C. No. 1089 ("Cochrane").

Affidavits filed by the Attorney General detailed numerous victims of pit bull attacks. One in particular described a vicious attack on a 2 year old boy. The owner of that pit bull, John Robert Martin, was charged and convicted of criminal negligence (more on that later).

Legislation

DOLA established a scheme which made the dog owner liable for damages resulting from a bite or attack by the owner's dog. In 2005, the Ontario Legislature expanded the legislation and added breed specific provisions banning new pit bulls and grandfathering existing pit bulls. This was in response to several brutal attacks in Ontario. Contraventions under DOLA also resulted in the dog being destroyed.

The comparable legislation in B.C. is section 49 of the Community Charter, which gives animal control officers the power to seize dogs defined as dangerous and to obtain a court order for the destruction of a dangerous dog. Of course, in B.C. we do not have a province wide ban on pit bulls, although some local governments do restrict or prohibit pit bulls and other dangerous or vicious dogs.

DOLA is different from section 49 in that an individual convicted under DOLA can be fined not more than \$10,000.00 or imprisoned for not more than 6 months, or both. With the penalties directed to the dog owner, the standard of proof for guilt and conviction under DOLA is "beyond a reasonable doubt" as opposed to the lesser standard of "balance of probabilities" in the B.C. legislation, where the penalties are directed to the dog.

Mr. Justice Herman specified at the outset that he was not dealing with the "wisdom" of enacting legislation banning a particular breed of dogs. He said it was up to the legislature to make the correct policy choice of restricting the ownership of pit bulls. The Court's legal analysis focused on three issues:

1. Were the pit bull provisions unconstitutionally overbroad or vague?
2. Was DOLA's mandatory presumption that a written statement from a veterinarian that a dog was a "pit bull" offensive to section 11(d) of the Charter?
3. Was the designation of a particular breed of dog in a provincial statute ultra vires because the designation was addressed in a federal statute?

Court Decision

With respect to the three issues, Justice Herman ruled as follows:

First, the legislation was not overbroad. Although there was conflicting evidence in relation to the decision to target "all pit bulls", the legislature had a "reasonable apprehension of harm" and the province wide ban was not disproportionate to the objective.

One aspect of the legislation, however, was determined to be unconstitutionally vague. The legislation defined a pit bull as "a Staffordshire bull terrier, American Staffordshire

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terrier, American pit bull terrier or a dog that is substantially similar in appearance and physical characteristics to any of these three breeds”. However, the legislation also defined “pit bull” to include “pit bull terriers”, a generic definition that the Court found to be unconstitutionally vague and thus struck it down.

With respect to the second issue, Justice Herman found that the mandatory presumption in DOLA that a written statement from a veterinarian that the dog is a “pit bull” offended the right “to be presumed innocent until proven guilty ... in a fair and public hearing ... “ under section 11(d) of the Charter. That provision was also struck down.

Finally, on the third issue, the Court found that the designation of a breed in DOLA, a provincial Act, does not conflict with Canada’s Animal Pedigree Act and thus, DOLA is valid law.

There was a minor application during the conduct of this Court case where the Attorney General tried to bring in additional evidence after the hearing. The Court ruled against the Attorney General’s application and did not permit the additional evidence. It is interesting because the additional evidence related to John Robert Martin, the owner of the pit bull that attacked the 2 year old child. Eleven days after the conclusion of the hearing, John Robert Martin was killed as a result of an attack by the very same pit bull, his own dog.

Conclusion

Cochrane is a detailed, 261 paragraph decision on pit bulls and provides illumination to local governments dealing with dangerous dog bylaws, their own breed specific bans and section 49 of the Community Charter. Thus it would behoove local governments to review the decision in its entirety before adopting or revising their own bylaws on breed specific restrictions or bans.

Cochrane is now Canada’s leading decision on pit bull bans. If your local government decides to restrict the ownership of pit bulls within its jurisdiction, one telling comment from Mr. Justice Herman says it all:

“Dog ownership is not a right.”

Amen!

Troy DeSouza

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Design and layout by Jacqueline D. Staples
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