

## **British Columbia (Attorney General) v Lafarge Canada Inc: Public Property, Ports and the Paramountcy Principle**

In *Attorney General (British Columbia) v Lafarge Canada Inc.*, the Supreme Court of Canada has analyzed the constitutional framework within which both Federal and Provincial/Municipal interests in the use and development of ports lands are recognized, and conflicts between competing Federal and Provincial/Municipal regulations are to be resolved.

The case involved an application by Lafarge Canada Inc. to construct an integrated ship off loading/concrete batching facility on lands owned by the Vancouver Port Authority. Aggregate from the Sunshine Coast would be transported to the facility by barge, off-loaded, stored temporarily on-site, then mixed with cement (which would be trucked to the site), loaded into concrete trucks and delivered to construction sites in the Vancouver area. Much stress was placed on the fact that the batch plant was “integrated” into the unloading facility.

The Vancouver Port Authority consulted with the City of Vancouver with respect to the proposal but did not insist upon Lafarge seeking a development permit from the City. The City’s land use regulations prescribed limits such as a thirty foot height limit for development on the site – those regulations conflicted with the proposal. However, both the Port Authority and the City took the position that the development proposal was not subject to municipal land use regulations, and that a City development permit was not required.

A local residents’ association, the Burrardview Neighbourhood Association, took the Port Authority and the City to court, arguing that the development was subject to the development permit requirements of the City of Vancouver. The Neighbourhood Association was successful at the trial level, but lost on appeal. The British Columbia Court of Appeal held that lands owned by the Port Authority were federal public property and immune from the application of municipal land use regulations.

In a decision released earlier this year, the Supreme Court of Canada upheld the decision of the Court of Appeal, but for different reasons. The majority of the Court held that:

1. The lands were not “federal public property” for constitutional purposes. The Court noted that while certain lands within the Port were owned by the Federal Crown, and certain other lands were held by the Port Authority as an agent for the Crown, the subject lands were specifically described under the provisions of the Canada Marine Act as being held by the Port Authority other than as agent for the Crown. The federal government’s exclusive jurisdiction over federal public property only applied to lands in which the Federal Crown has a proprietary interest.
2. The use and development of port lands is a subject matter over which both federal and provincial/municipal levels of government may have a legitimate interest. The federal government’s interest may arise in relation to its jurisdiction over shipping and navigation. The interest of a municipality or the province arises under the

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provincial jurisdiction over property and civil rights, and municipal institutions. The “pith and substance” doctrine permits provincial/municipal land use regulations to have incidental effects on matters that would otherwise fall within federal jurisdiction over shipping and navigation, provided that those effects are not precluded by the doctrine of inter-jurisdictional immunity, or by the operation of federal paramountcy.

3. The proposed development was closely integrated with port activities and was therefore brought within federal jurisdiction, but was not at the core of the federal power over navigation and shipping. The doctrine of inter-jurisdictional immunity did not apply. In the absence of federal land use planning controls, the principles of federalism should not require or tolerate a regulatory vacuum. In the absence of such controls the City’s land use planning regulations would have applied to the proposal.
4. However, the case was resolved by application of the paramountcy principle. The Canada Marine Act required the Port Authority to develop a land use plan, setting out policies and objectives for the development of the port. The proposal had been reviewed and approved pursuant to the Port Authority’s land use plan, Port 2010. The whole project was sufficiently “integrated” into the ship/barge unloading facility to make federal law applicable to all aspects of it. There was an operational conflict between the federal law and the provincial/municipal law - including conflicts relating to height restrictions, and to noise and pollution standards. In the face of the Petitioner’s application, a Court could not give effect to both the federal law and the municipal law, and to that extent there was a “conflict”. In addition, to give effect to the municipal law would frustrate Parliament’s intent by depriving the Port Authority of its final decision making authority on the development of a project that was primarily shipping-related.

The case is significant for local government to the extent that it clarifies the principles under which competing federal and provincial/municipal interests in the use and development of port lands will be resolved. Port land is not an enclave that is exempt from the application of municipal land use regulations. To determine whether those regulations apply, however, requires careful consideration of the nature of the proposed development, and the potential application of federal statutes. Port development that is at the “core” of the federal power over navigation and shipping may be protected from municipal land use regulations by the doctrine of inter-jurisdictional immunity. In the case of development or facilities which merely “support” but are integrated into port activities, municipal land use controls may well apply, subject to the paramountcy principle.

The application of the paramountcy principle in this case may prove to be the most significant aspect of the decision. In the municipal law context, we have become accustomed to thinking of the paramountcy principle in the terms in which it was described and applied in the Supreme Court’s decision in the *Spraytech* case. There, the Court confirmed that for there to be a conflict between a federal and a provincial law such that federal law was paramount, obedience to one must necessarily involve contravention of the other. Viewed in that light, one could reasonably conclude that no such “conflict” existed in the case of the Lafarge proposal. Both sets of regulations could be complied with if the more restrictive (the City of Vancouver’s) were adhered to. However, having referred to its other recent decisions on paramountcy, the Supreme Court cast the “conflict” test in a somewhat different light. The question

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was not so much whether compliance with one involved disobedience to the other, but whether in the face of the Neighborhood Association's injunction application, a Court could have given effect to both.

The other aspect of the paramountcy doctrine that has come to the fore in cases such as Lafarge, and its companion case *Canadian Western Bank v. Alberta*, is the concept of "frustration" of Parliament's intent. The Supreme Court of Canada long ago abandoned the notion that where the federal Parliament had "occupied the field" through the enactment of legislation, any provincial interest in the same subject matter was necessarily excluded. Now, the Court has suggested that where the overall purpose or intent of the federal law would be frustrated by the application of a provincial law, the federal law should prevail. The Court assures us that it is not returning to the old "occupied field" theory. Still, one is left wondering how broadly the concept of "Parliamentary frustration" will be applied by lower courts when considering the overlap of federal and provincial/municipal laws in a multitude of areas, where in a federal system such "conflicts" will inevitably arise.

***Peter Johnson***

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## **Giving Reasons For Local Government Decisions**

In a series of Court decisions covering a variety of subject matters regulated by local government, it is increasingly clear that the Courts will now impose a requirement for elected officials to give reasons for the decisions made by them. The question that arises for staff is how to effectively meet this new obligation to give reasons.

As we reported in Giving Reasons in Zoning Matters,

<http://www.sms.bc.ca/logo/2004/fall/fall2004-2.htm>

the Supreme Court of Canada in a Quebec case involving Jehovah's Witnesses Congregation v. Village of Lafontaine held that the denial of a rezoning application, without the Council giving reasons for the denial, amounted to a breach of procedural fairness. Imposing an obligation to give reasons in a rezoning matter is a novel proposition here in British Columbia where zoning has always been seen as a legislative process.

In British Columbia, the Lafontaine decision has not yet been followed in a challenge to a rezoning decision, but it will no doubt happen soon. Lafontaine, however, was applied by the B.C. Supreme Court in Westwood Congregation of Jehovah's Witnesses (Trustees of) v. Coquitlam (City) where there was a successful challenge to the City's refusal to grant a permissive tax exemption. The Court held:

*I conclude that Council was required to give reasons to the Congregation for its refusal to include the Congregation in the permissive exemptions. Such reasons needed to include Council's reasons for refusing the Congregation's request for exemption. The reasons needed to go beyond a mere recitation of the Policy.*

*Council did not provide reasons for its refusal that addressed the merits of the Congregation's applications. Accordingly, I find that Council breached the duty of procedural fairness that it owed to the Congregation in its deliberations with respect to the bylaws.*

The Courts have for many years imposed a duty of procedural fairness in excess of the obligations set out in the statutory requirements for rezoning applications, such as the duty of disclosure prior to a public hearing. However, the imposition of a requirement for Council to give reasons for its decisions raises issues for staff about how best to meet this requirement.

Under no circumstances should there be a transcript of individual elected officials explaining publicly how or why they are voting. Rather, I believe guidance for how to give reasons can be found in two recent business license cases where the Courts upheld the local government sending a letter, through its staff, to the affected party briefly setting out the basis for Council's decision. Hopefully, the basis for Council's decision will be similar to the considerations set out in the staff report to the Council prior to the decision being made. So long as the applicant understands the basis of Council's decision, then brief written reasons in a letter from staff should be seen as sufficient to comply with the requirement to give reasons.

In 552197 B.C. Ltd. v. City of Abbotsford, a 2003 decision of the B.C. Supreme Court, the Court stated:

*The reasons are not comprehensive. 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*

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*understanding of a decision. Accordingly, with respect, there is no merit to this argument.*

In 377050 B.C. Ltd. v. Burnaby (City), the B.C. Court of Appeal stated:

*The respondent clearly knew the issues that were troubling the City. An April 4, 2006 letter from Council provided adequate reasons in the circumstances of this case. That letter replied to an inquiry made by counsel for the respondent. It noted that the municipality did not base its decision on the contravention of any particular bylaw or policy and stated that Council exercised its authority under s. 60 of the Community Charter to not renew the business license for what it considered to be reasonable cause: poor management of the operation of the motel giving rise to concerns for public safety, the enjoyment of use of neighbouring properties and a high demand for police services related to the business.*

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

## **Conclusion**

As long as a local government is satisfied that it has made the applicant aware of the issues which the elected body was considering and has given the applicant the opportunity to be heard in response to those issues, a brief description of the basis for Council's decision in a letter from staff consisting of two or three sentences should be sufficient in British Columbia if it accurately addresses the merits of the application.

**Guy McDannold**

## **The Pawnbroker's Case on Appeal**

In 2006, we published an article entitled *The Regulation of Pawn Brokers by Municipalities* <http://www.sms.bc.ca/handbooks/pawnbroker/pawnbroker.html>. The BC Court of Appeal in *Royal City Jewelers and Loans Ltd. v. New Westminster (City)* [2007] BCCA 398 has overturned the lower Court decision. The lower Court came to a number of conclusions regarding the grounds of Royal City's petition. In particular, it concluded that section 59 of the Community Charter authorized the Pawn Broker Bylaw adopted by the City of New Westminster; that it did not encroach into the criminal law jurisdiction; and that it was not contrary to section 8 of the Charter of Rights and Freedoms or freedom of information legislation.

However, the Court of Appeal has concluded that the authority to regulate business (section 8(6) of the Community Charter), and the authority to require and prohibit in respect of persons engaged in the business activity of purchasing, taking in, bartering or receiving used or second-hand goods (section 59(1)(b) of the Community Charter) does not authorize New Westminster's Pawn Brokers Bylaw. In particular, it does not authorize the requirement that the pawnbroker take the full name, address and description of the person from whom the second-hand article is received or bought and require confirmation by some picture identification, as well as a description of any motor vehicle with provincial licence wherever possible.

The Court of Appeal found that the authority in section 59(1)(b) of the Community Charter to require notification to the Chief Constable within the time period established by the bylaw (the "notification power") does not extend to the requirement to obtain the identity, description or biographical information of the person from whom the goods were received.

The lower Court took advantage of the fact that section 59 of the Community Charter does not define what it is that the Chief Constable is to be notified of. The Court of Appeal conceded that implicit in the notification power is the power to require disclosure of information identifying the goods. However, the Court of Appeal concluded that the disclosure of the additional information regarding the name and address of the borrower or seller, together with verifying ID as well as a physical description, occupation, description of the vehicle the person used in attending the premises is not implicit in, or necessarily incidental to, the power in section 59(1)(b) to notify the Chief Constable.

Although the Court of Appeal agreed that the additional information is useful in the investigation of potential property crimes and in locating persons of interest to the police, the requirement goes well beyond any reasonable understanding of the general power to regulate a business activity or the specific power to require these businesses to provide information about transactions to the police.

This Court of Appeal decision is important to local governments in a variety of ways. First, a significant number of municipalities will have a pawnbroker and second-hand dealer bylaw similar to the New Westminster Bylaw that was struck down. This means that their bylaws are in jeopardy.

Second, this case illustrates the limitation on the power to regulate business. In the earlier drafts of the Community Charter, the power in relation to business included both the power to prohibit and to impose requirements. Had the power to impose requirements in relation to business remained in the Community Charter there would have been no need to include section 59(1)(b). Section 59(1)(b) is an authority which is in addition to the authority contained in section 8 and is aptly described by the title of the Part of the Community Charter in which this section is found – "Additional Powers and Limits on Powers".

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There has been considerable judicial consideration of the concept of imposing requirements in relation to regulating business. In my earlier article, <http://www.sms.bc.ca/handbooks/pawnbroker/pawnbroker.html> I set out a number of cases where the Courts determined that the authority to require the taking of names, addresses and other personal information could only be justified if it were required for the purposes of “regulating” the business.

There would appear to be no regulatory aspect of the Pawnbroker and Second-Hand Dealer Bylaw which would require the municipality to obtain this information for the purposes of inspecting, restricting, authorizing, or controlling. For example, if the Bylaw required that the pawnbroker could only accept goods from someone over the age of 18, requesting that the pawner provide identification as to their age would be justified in accordance with the earlier case law.

Although the Court of Appeal, in *Royal City Jewelers*, reviewed the genesis of the authority of municipalities to regulate pawnbrokers and second-hand dealers, the Court did not mention the Pawnbrokers Act. The Pawnbrokers Act was adopted in 1897 and remained largely unchanged until its repeal in 2001. The Provincial Government enforced this legislation. Interestingly, the requirement to keep a pledge book included a requirement to take the name of the pawner and the address of the pawner, the name of the owner if the pawner was not the owner and the address of the owner as well as the articles pawned. This requirement was to be completed within four hours after the end of each day. Further, the pawnbroker was statutorily obligated to make all enquiries necessary to obtain that information. This information was to be displayed on the pawn tickets, which were to be kept in a place readable by persons entering the business premises.

The Court of Appeal decision in the *Royal City Jewelers* decision is not terribly surprising. Municipalities will have one of two options:

Under the first option, they must amend their pawnbroker and second-hand dealer bylaws to remove the offending provisions in which pawnbrokers are required to obtain personal information from borrowers or sellers.

The second option is to petition the government to amend the Community Charter to provide more specific powers like the ones that were originally contained in the now repealed Pawnbrokers Act. If such an amendment is forthcoming, it would be worthwhile to clarify that it applies to pawnbrokers as well as dealers in second-hand goods.

***Kathryn Stuart***

## **Carpe Diem! A Principle for Bylaw Enforcement**

A client was recently obstructed from gaining entry into an alleged unlawful bed and breakfast residence. The refusal had gone on for some time and finally a demand letter was personally served to provide 24 hours notice of an inspection to be made pursuant to Section 16 of the Community Charter. On the day of the inspection, the client's officers were again refused entry. Ironically, instead of simply agreeing to a reasonable inspection by Bylaw Enforcement Officers, who would be cautious about over intrusion, the owner of the property subjected herself to the typical police-style powers of an investigatory enforcement under a Search Warrant.

An Information to Obtain a Search Warrant was prepared to allow entry to the premises by way of a Court Order. The Information was based on reasonable grounds and sought through the statutory powers of Section 16 (inspection provisions) and Section 275 (Search Warrant provisions) of the Community Charter. The Information cited such reasonable grounds as alleging an unlawful bed and breakfast as evidenced by advertising on Internet sites, photographs and documentary evidence.

The granting of the Search Warrant by the Judge stunned the Defendants.

Municipal personnel involved in the Warrant search included:

- Two Police Officers;
- Two Senior Bylaw Enforcement Officers;
- A Building inspector;
- A Plumbing Inspector;
- An Electrical inspector;
- A Fire inspector; and
- A Business License inspector.

And yes, good evidence of an illegal bed and breakfast operation was obtained.

If you decide to follow this process, I recommend taking the following steps:

1. Personally serve a demand letter providing 24 hours reasonable notice pursuant to Section 16 of the Community Charter.
2. Show up 24 hours later and obtain the refusal.
3. Prepare an Information to Obtain a Search Warrant and a Warrant to Search Order and file it in Provincial Court pursuant to Sections 16 and 275 of the Community Charter.
4. Conduct your Search Warrant at a time and date where you can have coordinated enforcement from police and various bylaw inspectors and enforcement officers.

The Search Warrant is an effective tool to obtain evidence of bylaw contraventions. Bylaw contraventions are a quasi-criminal offence. Evidence outlining such contraventions can be searched and seized.

Seize the day!

***Troy DeSouza***