

## **From Skinny Dippers To Sidewalk Slippers and A Quick Look At Bills 23 (Health) And 27 (Green Communities)**

### **1.0 Skinnydipper Services Inc. v Surrey (City) (2007 B.C. Supreme Court)**

To what extent does a municipality have control over use of its own recreational facilities? What are the limits on municipalities regulating in relation to “public decency”?

These were the issues at play in the recent British Columbia Supreme Court decision *Skinnydipper Services Ltd. v Surrey (City)*.

The facts of the case are quite simple. The City of Surrey rented its pool facility to a group of skinny dippers for late night private skinny dipping. When word of this became public, the City received a number of outraged calls from citizens who felt that it was inappropriate to allow a public facility to be used this way. The Manager of Community Services, responding to the outcry, cancelled the permits that would have allowed the skinny dippers to continue to use the pool for one night a month for a further five months.

Council confirmed cancellation of the permit at an in-camera meeting.

When challenged by *Skinnydipper Services Inc.* the City cited three arguments in defence of the decision to cancel the permits.

1. The City of Surrey actually had a bylaw in place that contained the following prohibition:

*No person shall enter or bathe in any water at any bathing beach or in any swimming pool without being clothed in proper bathing attire.*

2. In addition, the City also referred to the Health Act Regulations which required pool managers to ensure that:

*(1) only persons in clean bathing attire, the owner of the pool and his servants or agents and person mentioned in Part 12 of these regulations are allowed to enter the pool area, except as otherwise provided in these regulations.*

3. Finally, Surrey said it was unfair to lifeguards who did not wish to supervise nude swimmers to require them to do this.

### **Municipal Bylaw in Relation to Nudity**

1. In response to the first argument, the Court held that the provision in Surrey’s bylaw prohibiting people from entering the pool without being clothed in proper bathing attire was ultra vires on the basis that it related to public decency which is a matter involving the criminal law, and was accordingly a matter under federal and not provincial jurisdiction. The Court found that the matter of nudity was covered in the Criminal Code and the municipality could not enact its own regulation. Check your own bylaws for similar provisions.

2. Secondly, the Court held that the Health Act provision was aimed at requiring people who wear bathing attire to wear clean (and not dirty) bathing suits. It said nothing about whether bathing suits needed to be worn. There was no evidence that there was a greater health risk posed by skinny dippers than by persons wearing bathing suits.
3. The Court simply dismissed the third argument, taking the view that Surrey could arrange its schedules to avoid posting lifeguards who did not wish to supervise nude swims to other times.

## **2.0 Denman Island Trust Committee v Ellis (2007 BCCA)**

Can an owner of land in a development permit area start cutting the trees on the land without a development permit?

An owner of land had cleared trees from a bluff that was located in a development permit area. He had been advised of the development permit area by Islands Trust staff, but proceeded to clear the trees without a permit anyway

The British Columbia Court of Appeal ruled that in this case the clearing of the trees was work which required a development permit.

The Court found that the removal of the trees could subject future development on the land (made possible by the clearing of trees) to hazards. Since the development permit area was created for the purpose of protecting development from hazardous conditions, it was appropriate for the Islands Trust to limit tree removal from the land even if there was no immediate development to be undertaken.

The case is interesting because it arguably enlarges the reach of the prohibition contained in section 920(1) of the Local Government Act to include activity that is not clearly part of an actual development on the basis that it could affect future development. The Court applied a form of the precautionary principle to give effect and meaning to the Local Government Act.

## **3.0 Dunsmuir v New Brunswick (2008 Supreme Court of Canada)**

**Issue:** What is the appropriate standard of review for the exercise of a statutory power?

Dunsmuir v New Brunswick is one of those cases that has a great potential to affect municipal law, although it is not itself a municipal law decision.

For many years Courts have held that where a decision-making authority such as a tribunal or a municipal council exercises a discretionary power, the decision should not be set aside by a Court if it was made within the jurisdiction of the authority unless the decision was one that was patently unreasonable. In the municipal law context the leading decision on this point was *Rascal Trucking Ltd. v Nanaimo* (2000 SCC), a decision of the Supreme Court of Canada that involved a declaration by the city council of Nanaimo that an enormous dirt pile constituted a nuisance.

In the Dunsmuir decision the Supreme Court of Canada has dropped the test of “patent unreasonableness”, moving instead to a test of simple “reasonableness”.

The Dunsmuir case was actually an employment law case. Mr. Dunsmuir was a lawyer employed by the Department of Justice in New Brunswick. After some unsatisfactory performance reviews he was dismissed from his position. He was given 4 months’ pay in lieu of notice. An adjudicator found that the termination was void as he had been dismissed without “procedural fairness”. Although he had been reprimanded for poor work performance on several occasions, prior to the actual dismissal he had not been given an opportunity to make representations.

On a judicial review, the adjudicator's decision was set aside and the termination reinstated. The Court of Appeal dismissed Mr. Dunsmuir's appeal, and the Supreme Court of Canada dismissed the further appeal.

In doing so, however, the Supreme Court in its reasons decided to jettison the test of "patent unreasonableness" in favour of a "simplified" test of "reasonableness". The factors taken into consideration in favouring the reasonableness standard included the fact that the Act contained a full privative clause purporting to preclude a Court from reviewing the decision, the fact that the decision-maker in the case had special expertise and that the nature of the issue was not one of central importance to the legal system.

In this case it was determined that the adjudicator's decision did not pass the required test of "reasonableness", but relied on an interpretation of the statute that fell outside the range of permissible statutory interpretations. The Court determined that the parties were in fact governed by private contract law and not by public law. Accordingly the decision to dismiss was valid.

#### **4.0 618061 BC Ltd v Anmore (Village) (2008 BC Court of Appeal)**

In 618061 BC Ltd. the B.C. Court of Appeal had to deal with the issue of whether the Village of Anmore had acted correctly when it entered into a latecomer's agreement with one developer ("Anmore Woods") requiring Anmore Woods to build the road ("Crystal Creek Drive") through another property owned by the plaintiff (the "Numbered Company"), so that when the Numbered Company went to develop its lands it was obliged to pay latecomer fees that reimbursed Anmore Woods its costs of putting the road through. The Numbered Company had dedicated the road as part of the first phase of development of its lands, but had not put the road completely through, perhaps hoping that Anmore Woods would be forced to do so as part of its development.

The issue for the Court was framed in terms of whether the decision of the municipality to enter into the latecomer's agreement imposing the full cost incurred by Anmore Woods to put the road through the Numbered Company's land on the Numbered Company was reasonable. The Court relied on the test set out in the *Dunsmuir v New Brunswick* decision discussed above.

Anmore Woods and Anmore contended that the road through the lands of the Numbered Company was an "excess or extended service". The Numbered Company contended that section 939 applied only to highways required under section 938, as part of the subdivision process. The Court agreed with the Village.

The Court held that "excess or extended services" in relation to a highway means simply that the highway "will provide access to land other than the land being subdivided or developed". As Crystal Creek Drive would serve the lands of the Numbered Company, it fell within the definition. This is a broad interpretation of the term "excess or extended services". The Court refused to find that the Village could not require Crystal Creek Drive to be built by Anmore Woods even though that part of the road was not on its lands. Section 939 is not limited to works only on the developer's lands.

The Numbered Company also argued that section 939 of the Local Government Act was linked to section 938 (subdivision bylaw requirements) and that the municipality could not impose road requirements under section 939 because it did not flow from a subdivision bylaw.

The Court held that section 939(2) was the pre-eminent subsection and was not subordinate to a bylaw under section 938 referred to in section 939(3). The

Court reasoned that held that the Village was not unreasonable in its conclusion that all costs of the part of Crystal Creek Drive in question should be paid by the Numbered Company. The Court reasoned that if the Numbered Company had proceeded with the second phase of its subdivision, it would have been required to foot the bill for the road serving its lands completely on its own.

## **5.0 North Pender Island Trust Committee v Hunt and Mummery (2007 BCSC)**

This case was a constitutional law decision dealing with the issue of whether the Islands Trust zoning bylaw apply to the federal water lot so as to limit the use.

The federal government owned a water lot at Port Washington on Pender Island. In 1910 a shed had been built on the water lot in connection with the general store.

It was held that the Islands Trust did have zoning authority over the water lot, on the basis that the lot had never actually been transferred to the federal government, but instead it was only that a reserve in favour of the Federal Crown had been created. Since it was not a question of federal property, the zoning bylaw could apply. The Court relied on the decision in Salt Spring Island Local Trust Committee v B&B Ganges Marina Ltd. (2007 B.C. Supreme Court) in which the B.C. Supreme Court had held that the effect of the municipal zoning power on the federal head of authority did not so impact the core of the federal jurisdiction so as to trigger the principles of constitutional paramountcy or interjurisdictional immunity which usually insulate matters of federal concern from local government bylaws.

## **6.0 Tercon Contractors Ltd. v British Columbia (Minister of Transportation & Highways) (2007 B.C. Court of Appeal)**

The issue in this case is whether an owner can, through the use of an appropriate exclusion clause in a tender (in this case an RFP), successfully prevent an unsuccessful bidder from bringing a claim against an owner when the owner accepts a non-compliant bid.

The answer is yes, and every owner would be wise to include an exclusion clause in its tender documents.

In the Tercon case the Ministry of Highways awarded a construction contract to a company that was, in reality, a joint bidder with another company, a process which had not been permitted on the face of the RFP documents. The trial judge had ruled that the Ministry's conduct in condoning the submission of the improper and non-compliant joint bid had been a fundamental breach of contract of the sort that did not permit the province to rely upon a very generous exclusion clause that read as follows:

*“Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim.”*

The trial judge had dismissed this clause as not governing the situation, on the basis that it was inconceivable that the bidder or the province would have thought that it protected the province in the case of a fundamental breach of Contract A or for acceptance of a non-compliant bid. The Court of Appeal, however, found the exclusion clause to be “so clear and unambiguous” that there could be no conclusion other than that the parties intended it to cover all defaults, including

fundamental breaches. In particular, the Court found that the bidder, Tercon, was a sophisticated bidder that would have had a breach of Contract A, such as acceptance of a non-compliant bid, in mind when it contemplated the scope of the clause.

## **7.0 Cerilli v Ottawa (City) (2008 Ontario Court of Appeal)**

The words “gross negligence” always catch the attention of the reader when they show up in a judicial decision. The issue in *Cerilli v Ottawa* was whether the City of Ottawa had been grossly negligent in not sanding, salting or otherwise maintaining a sidewalk on which a pedestrian slipped and broke her ankle badly.

The Ontario Superior Court held that Ottawa was grossly negligent, and the Ontario Court of Appeal agreed.

This is particularly relevant in Ontario where section 44 (9) of the Municipal Act in Ontario provides:

*“Except in cases of gross negligence, a municipality is not liable for a personal injury caused by snow or ice on a sidewalk.”*

In this case Mrs. Cerilli slipped on a sidewalk on January 25.

The evidence presented by the City indicated that the last time that the sidewalk would have been sanded for certain was the night of January 21-22. After that the only thing that might have happened is that it was possible that someone might have put grit down during the night of January 24-25 if it had been determined that there was an icy patch, a determination that would have been made on a drive-by by a spotter in a truck. There was evidence that a truck had gone out looking for icy patches, but no evidence that any grit had been placed on Preston Street.

In reaching its conclusion that the City had been grossly negligent the Court stated the following:

*“When there are freeze/thaw conditions and the City has reasonable measures in place to deal with those conditions and adheres to those measures, then it may escape a charge that it was grossly negligent.”*

The Court does not seem to have been persuaded that the inspection round in the truck was effective or reasonable. The Court found that Preston Street was not plowed and scraped between January 21 and 24 to save money.

Why is this case relevant to British Columbia?

In this province there is no protection for local governments similar to the law in Ontario. If a Court finds that a municipality is “negligent” in the maintenance of its sidewalks, then the municipality will be held liable for damages. But a legal test for gross negligence does become relevant in British Columbia because individual municipal officers and employees may be held personally liable where gross negligence is found (Local Government Act section 287.2). Accordingly, a legal test that pushes more situations into the realm of “gross negligence” has the potential to expose municipal officers and employees individually to a larger array of potential personal liability.

In Ontario it would seem that it does not take too much for a Court to find “gross negligence” in the case of an icy sidewalk. An error in judging the effect of the weather conditions and a decision not to specifically sand one of dozens of streets constituted “gross” negligence.

## **8.0 Bill 23 – Public Health Act**

Bill 23 brings a new Public Health Act into place in British Columbia and introduces a number of reforms in the area of public health that may have far-reaching implications for local government and the role that local government is to play in connection with the management of health and social issues with a health aspect.

### **8.1 Local Governments No Longer Local Boards Of Health**

The Health Act of British Columbia has, until now, given most municipalities the powers of a local board of health within their jurisdictions. As local boards of health, local governments were given specific statutory authority to make orders to deal with certain specific health and sanitation issues. The role of local government as the local board of health has now been eliminated. Under the Public Health Act, orders may be made by the Minister and by Health Officers appointed by the Province and the Health Regions.

### **8.2 Health Officers**

Health Officers are given powers to issue orders to deal with:

- health hazards (section 30);
- circumstances that may constitute a risk of a health hazard;
- a conflict in relation to matters that are contraventions of the Public Health Act and Regulations;
- an order in relation to bringing someone into compliance with a term or condition of a licence or permit held by that person (section 31(1)(d)).

The specific types of things that can be included in orders are outlined in section 32 of the Public Health Act.

There are also supplementary powers under section 33 for the Health Officer to make follow-up orders where an owner or occupier has failed to act on the order.

### **8.3 Public Health Plans**

A key component of Bill 23 is the establishment of a scheme for the creation and implementation of public health plans.

Public health plans can address one or more of the following matters:

- identify and address the health needs of particular groups from the population, including aboriginal peoples;
- monitoring and assessing the status of the health of the population, including through public health surveillance and monitoring indicators of, or factors influencing, the health of the population;
- prevention and mitigation of the adverse affects of diseases, disabilities, syndromes, psycho-social disorders, injuries and health hazards;
- identification, prevention and mitigation of the adverse health affects of health impairments;
- solicitation and planning for the delivery of core public health functions;
- achieve a prescribed purpose.

Section 3(1) gives the Minister of Health the power, by order, to:

*“require a public body to make, in respect of a specific issue or geographic area, a public health plan.”*

Under section 3(6), a public body that is subject to an order under this section must comply with the order.

The section, then, obviously allows the Minister to order public bodies, such as municipalities and regional districts, to make plans dealing with a wide variety of health related issues which have not hitherto been under the direct jurisdiction of the local government and some of which, such as health needs of Aboriginal peoples, are very clearly the responsibility of the Federal Government and not of local government.

The Minister is given a power to approve a health plan under section 4.

Once a health plan has been made and approved by Cabinet under section 4, then, for the purposes of implementing a public health plan, Cabinet may make a regulation:

- requiring a specific part of the government or a local government, to consider the public health plan during strategic or operational planning processes;
- require that the results of specific government or local government strategic or operational planning processes be consistent with the public health plan;
- provide that specified government or local government strategic or operational plans, bylaws or other planning documents have no legal effect to the extent of any inconsistency with the public health plan.

In other words, the public health plan can be made to override other local government planning processes such as regional growth strategies, official community plans and servicing plans. In some circumstances, this could require local governments to provide municipal water service to areas to overcome a health concern, regardless of the local government's policies and bylaws regarding service extension that may have been put in place in order to avoid suburban sprawl or inappropriate development. Note that it may not be the local government that is required to bring in the health plan. The Minister could order the Health Region to prepare a health plan to address a certain issue, and then, by regulation under section 6 of the Public Health Act require the local government to consider that public health plan as part of its strategic or operational planning processes.

#### **8.4 Other Powers of Cabinet**

Under section 120 of the Public Health Act, Cabinet may make a regulation in respect of local governments:

- to promote or protect the health of the people within its jurisdiction;
- to address a condition, thing or activity that could adversely affect a health promotion or a health protection initiative;
- require the local government to take action to monitor for a health hazard or a health impediment and respond to a health hazard or a health impediment;
- requiring a local government to deliver a public health function;
- authorizing the Minister to order a local government to modify or "rescind" a bylaw, operational or strategic plan or planning process.

If a duty is to be imposed on a local government to require that a bylaw be rescinded, then consultation of the local government is required under the Public Health Act. However, if an order of this type is to be

made in relation to more than one local government or is to affect local governments generally, then the Province may, in place of consultation with local governments individually, consult with the Union of British Columbia Municipalities.

## **8.5 Role of Local Government**

Section 83 of the Public Health Act sets out certain duties and powers of local government:

Role of local government

83 (1) A local government must do all of the following:

- (a) if the local government becomes aware of a health hazard or health impediment within its jurisdiction, take an action required by a regulation made under section 120 (1) (a) [regulations respecting local governments], or, if no regulation applies, either
  - (i) report the health hazard or health impediment to a health officer, or
  - (ii) take an action the local government has authority to take under this or another enactment to respond to the health hazard or health impediment;
- (b) provide health officers with information the health officers require to exercise their powers and perform their duties under this Act;
- (c) consider advice or other information provided to the local government by a health officer.

(2) A local government must

- (a) designate one of its members, or an officer or employee of the local government, as the local government liaison for the purposes of this section, and
- (b) send notice of the designation to the regional health board having authority over the geographic area in which the local government is located.

(3) A local government may

- (a) request a medical health officer to issue an order, under this Act, in respect of a health hazard, and
- (b) if the medical health officer refuses to issue the order or to issue the order as requested, request the provincial health officer to review the decision of the medical health officer.

(4) Following a review under subsection (3), the provincial health officer may

- (a) refer the matter back to the medical health officer, with or without directions, or
- (b) make any order that, in the opinion of the provincial health officer, is appropriate in the circumstances.

## **8.6 Duties in Relation to Health Hazards and Prescribed Health Impediments**

If a local government becomes aware of a health hazard or “health impediment”, section 83(1) requires the local government to take the action required by any regulation under section 120.

A “health impediment” is to be specified by regulation but the concept is defined very broadly under the legislation. Any condition, thing or activity that causes chronic diseases, disability or interferes with or is inconsistent with the goals of public health initiatives, or that is associated with poor health could be described as a “health impediment”. In theory this could apply to a wide range of activities and matters such as smoking, fast food, chemical additives in foods, pesticides, or use of mood altering drugs or alcohol.

Local governments are also required under section 83(1) to consider advice or information provided to the local government by a Health officer. How this duty can be fulfilled is not expressly stated. Presumably, a local council or regional board could delegate the power to consider advice from a local Health Officer or Provincial Health Officer to a specific member of staff. In certain circumstances, however, obviously the health concern may be of such a serious and immediate nature that it would be wise to bring the matter before council to determine whether there is any action which council can or wishes to take with respect to the matter.

## **8.7 Conclusion**

Bill 23 is obviously drafted in a way to permit for a more comprehensive and top down management of health issues and health crises, with local governments being tasked with the responsibility (and expense) of taking a front line and active role with respect to emerging and chronic public health issues.

## **9.0 Bill 27 - Local Government (Green Communities) Statutes Amendment Act, 2008**

Bill 27 introduced in the Legislative Assembly provides local government with powers to plan for developments that reduce the ecological footprint on the environment and promote the reduction of greenhouse gas emissions.

### **9.1 Regional Growth Strategies and Official Community Plans**

Regional Growth Strategies and Official Community Plans must now incorporate provisions regarding greenhouse gas reductions.

Regional growth strategies will be required to include a discussion regarding the reduction of greenhouse gas emissions in the regional district to the extent that this is a regional matter, as well as the actions proposed for the regional district with respect to achieving targets. Regional growth strategies will have to include this content requirement by May 31, 2011.

A new section 877(3) is being added to Part 26 of the Local Government Act to require that an OCP include targets for the reduction of greenhouse gas emissions in the area covered by the OCP, and policies and actions of the local government proposed with respect to achieving those targets. These requirements must be incorporated into OCPs by May 31, 2010 into Official Community Plans

The Province may establish later dates by regulation.

## 9.2 Development Cost Charges

There is a mandatory DCC exemption for developments that create dwelling units smaller than 29m<sup>2</sup>. This provides for an incentive to construct small dwelling units which may provide for some easing of the housing crisis at the very low end of the market.

In addition to the mandatory exemption for small unit developments, local governments will also be able to create permissive exemptions from development cost charges for “eligible developments”. These could qualify for reductions or waivers of DCCs in connection with small lot subdivisions designed to result in low greenhouse gas emissions or a development that is designed to result in a low environmental impact. The Minister may establish regulations determining criteria for what constitutes an eligible development or a class of eligible developments for the purposes of one or more of the eligible development categories. We would expect that such regulations would encourage higher density developments along transportation corridors and in municipal centres close to employment opportunities to cut down on the amount of commuting necessary (as opposed to small lot subdivisions at the periphery of suburbs that might not actually reduce commuting and reliance on the automobile). In addition, there could be exemptions made available for classes of development that incorporated elements of green design or features designed to reduce power consumption, waste, or self-sufficiency in various aspects of the development.

Section 934(4) will now require local governments, when setting development cost charges, to specifically take into consideration “how development designed to result in a low environmental impact may affect the capital cost of infrastructure referred to in section 933(2) and (2.1) and, under section 934(4)(e)(iv) whether the DCCs will discourage development designed to result in a low environmental impact”.

A new section 937.01 will be added to the legislation to require local governments to prepare and consider a report each year regarding the previous year on the amount of DCCs received, expenditures from the DCC reserve fund, the balance in the DCC reserve fund at the start and end of the year and any waivers and reductions that have been made under section 933.1(2) for eligible developments.

## 9.3 Development Permit Areas

Development permit areas may be established for the following new objectives:

- establishment of objectives to promote energy conservation (section 919.1(1)(h));
- establishment of objectives to promote water conservation (section 919.1(1)(i));
- establishment of objectives to promote the reduction of greenhouse gas emissions (section 919.1(1)(j)).

Section 920 of the Local Government Act is being amended to permit the establishment of development permit areas that include, among the other guidelines relating to:

- landscaping;

- siting of building and other structures;
- form and exterior design of buildings and other structures;
- specific features in the development; and
- machinery, equipment and systems external to buildings and other structures.

in order to provide for energy and water conservation and the reduction of greenhouse gas emissions. This will allow conditions to be included in the development permit.

#### **9.4 Off-Street Parking Fees**

Section 906 of the Local Government Act has been amended to allow local governments to use money collected for off-street parking to be used for transportation infrastructure that supports:

- walking (trails, sidewalks, foot paths, pedestrian corridors);
- bicycling (bicycle paths, bike lanes);
- public transit;
- or alternatives forms of transportation.

This will give local governments access to a pool of funds to support transportation options that do not generate parking demand.

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