

Court of Appeal Upholds LGA S. 943 Ruling (Sort of!)

In the [Summer 2008](#) issue, we reported on the B.C. Supreme Court Ruling in 694385 B.C. Ltd. v. Capital Regional District regarding the interpretation of s. 943 of the Local Government Act. In that case the court disagreed with the petitioner's attempt to argue that the one-year grace period created by s. 943 applied to any bylaw under part 26 of the Local Government Act rather than limiting the application of the section to only those bylaws that would be applicable to the subdivision. We also advised you that the petitioner was appealing that decision to the Court of Appeal.

The Court of Appeal heard the petitioner's appeal on November 7, 2008 and dismissed the appeal as being moot. There was no longer a live controversy between the parties since the petitioner proceeded to obtain the required development permits which it had previously refused to apply for at the time of the B.C. Supreme Court hearing, arguing that they were not required because of the one-year grace period under s. 943.

Accordingly, while this ruling cannot be taken to be an outright approval of the B.C. Supreme Court decision, the Court of Appeal made the following comments which tends to indicate that the Court of Appeal in the future will not likely agree with the decision appealed from:

The learned judge referred to much of the jurisprudence which has developed under s. 943 and its predecessors and concluded that the section does not give relief from all forms of new local government regulation that might affect a proposed subdivision.

As I take his reasons, he distinguished between new bylaws which regulate the creation of the new subdivision and which come within the 12 month protection set out in s. 943, and other types of regulation which might affect development on the lands, e.g. the need to obtain a building permit for a new home, but which do not affect the creation of the subdivision and the legal lots within it. In that case, the new bylaw may well apply, as in the case of the application of Bylaw 3353 to the issuance of building permits for homes pursuant to the petitioner's building permit applications. ...

If there was evidence that the petitioner was endeavoring to alter the land within the proposed new subdivision as part of the land development process which precedes an application for final subdivision approval, and if this work was taking place after adoption of the bylaw in question and before the expiration of the one-year grace period (28 March 2008) mandated by s. 943, there might be something to the petitioner's "live issue" submission.

But those are not the facts. The only work which the petitioner was undertaking in this period, was work initiated in the development of the single-family dwellings which are the subject of the petitioner's building permit applications.

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Indeed, because this was a simple boundary adjustment subdivision affecting existing serviced lots, it does not appear that any physical work, truly incidental to the creation of the new subdivision, was required.

The entire thrust of the petitioner's case in the Supreme Court – indeed the very grounds for the petition – centered only on the applications for the building permits and the applicability of the development permit requirements in that context.

Mr. McDannold, in pressing the mootness point, submits in his factum at para. 19:

19. The broad and sweeping argument which the Appellant now advances in this Court regarding the construction of works and services as part of a subdivision approval process is not supported by any factual or evidentiary foundation in this particular case.

I agree with this observation. In my view, it would be inappropriate to embark upon a consideration of s. 943 in the context that the petitioner now presses, in a vacuum – in the absence of a live issue between the parties – and, critically, in the absence of an evidentiary foundation to support the requested opinion of the Court on the true scope of s. 943 of the Local Government Act. In my view, the appeal is moot and I would dismiss it.

While local governments will still have to wait for a definitive ruling on s. 943 from the Court of Appeal this case at least gives a very strong indication that the Court of Appeal agrees with the interpretation used by most local governments in applying the one-year grace period.

Guy McDannold

Free Camping in Parks

We've had a pretty cold winter so I'm going to hope that our summer will be dry and hot. That's good because I love to camp... legally that is. For many local governments, a dry hot summer may lead to an increase in unlawful camping. This will require an expansion of municipal services.

In B.C. more people may seek to camp in public parks, given the City of Victoria v. Adams decision (see our [October 2008 Client Bulletin](#)). Indeed, with this global economic downturn, the City of Sacramento, California installed portapotties along its riverbank for a tent city comprised of about 150 homeless people.

As the municipal prosecutor for the City of Victoria in its recent camping prosecutions, I want to provide some practical advice with respect to dealing with the homeless and/or urban camping activists this summer.

Situation

In Adams, Madam Justice Ross held that an absolute prohibition on the ability of homeless people to erect temporary structures in parks and public places violated their Charter rights. In response to that ruling and pending an appeal to the BC Court of Appeal, the City adopted a policy of permitting overnight camping between the hours of 7 p.m. through 7 a.m. This was challenged and in late January, Judge Mackenzie of the Provincial Court advised the City to integrate its policy into a formal parks bylaw amendment.

The City amended its bylaw and continued to prosecute urban camping activists. On February 12, 2009, Judge Blake of the Provincial Court found that the amended bylaw was a measured response that accommodated all interests pursuant to the Adams decision. The bylaw amendment thus passed Charter scrutiny.

The City of Victoria may be amongst a handful (if any) of municipalities to permit overnight camping in North America. The bylaw amendment itself expressly stated that it was a temporary response to the Adams decision until the appeal is heard. Adams is now before the B.C. Court of Appeal and will be heard on June 10th, 2009.

Recommendation

In the meantime, many local governments are wondering whether their parks bylaws are in compliance with Adams. I have reviewed a number of parks bylaws and can confirm that they are not in compliance with the Adams decision. Most bylaws do not permit any temporary overnight camping in parks. Nevertheless, I do not recommend amending your bylaws until such time as the Court of Appeal has ruled on this matter. This may seem like an odd recommendation, however given the appeal, it is a practical one.

Critical to Adams is the requirement for enough overnight shelter beds to accommodate homeless persons. Urban municipalities have shelters but most suburban municipalities do not. And we have not begun to address the lack of shelter bed resources in rural municipalities. Thus, it would be prudent to wait for the B.C. Court of Appeal to provide some guidance before taking legislative action. If the appeal is successful, there may be no requirement to amend any bylaws. If the appeal is unsuccessful, it may well be that local governments will need to ensure that they have shelter beds in their jurisdiction before amending their bylaws. Moreover, some financial assistance from the provincial and federal governments may likely be needed.

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Conclusion

In the meantime, what this means is that local governments should allow homeless persons temporary, overnight camping in its parks until the B.C. Court of Appeal has rendered its decision. If there are urban camping activists who wish to challenge your bylaw, you should consider whether you have enough shelter beds before prosecuting because you would be unsuccessful in court if you do not have them.

In any event, we're hopeful for a positive result in the B.C. Court of Appeal. Until then, it may be a dry, hot summer with potentially free camping in public parks. Come by my site for a wiener roast!

Troy DeSouza

Local Government's Duty to Consult with First Nations

In its 2003 judgment in *Haida Nation v. British Columbia (Minister of Forests)*, the Supreme Court of Canada held that when the provincial and federal Crown contemplate conduct that may adversely affect aboriginal right or title, they have a duty to consult with first nations. This duty is apart from any statutory requirement, and arises when they have knowledge, real or constructive, of the potential existence of the aboriginal right or title.

The court found that the scope of the duty to consult is proportionate to a preliminary assessment of the strength of the first nation's claim or case that supports the existence of the treaty right or title, and to the seriousness of the potentially adverse effect of the Crown's actions on that right or title. In other words, the stronger the claim and the greater the impact of the Crown's actions on first nation title or rights, the broader the Crown's duty to consult.

This common law duty to consult is based on the concept of the "honour of the Crown" which flows from the Crown's assertion of sovereignty over lands and resources formerly held by first nations and the historical relationship between the provincial crown, the federal Crown and first nations.

While local governments also make decisions that affect aboriginal title and rights, particularly in the context of land use planning, the 2006 Court of Appeal decision in *Gardner v. Williams Lake (City)* suggests that this duty to consult does not extend to municipalities. However, as the *Gardner* case did not deal specifically with aboriginal title or rights, this cannot be considered a definitive statement of the law.

Regardless, section 879 of the Local Government Act creates a limited statutory duty for all local governments to consult:

879(1) During the development of an official community plan, or the repeal or amendment of an official community plan, the proposing local government must provide one or more opportunities it considers appropriate for consultation with persons, organizations and authorities it considers will be affected. [emphasis added]

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Local governments are further required to specifically consider whether consultation is required with, among others, first nations (s. 879(2)(b)(iv)).

In the Gardner case, the BC Court of Appeal said that the degree to which local government must consult under section 879, is a matter for the local government council or board to decide. This can be distinguished from the broad scope of the duty imposed on the Crown in the Haida case. The court went on to define the local government's duty saying that consultation, as a minimum, involves bi-lateral communication in which the person (i.e. the first nation) that is being consulted has the opportunity to question, to receive explanation and to provide comment to the local government upon the proposal. The consultation must also be meaningful; that is, the local government must do more than pay lip service to the requirement to consult. Finally, the court suggested that consultation includes such things as informal communications, meetings, open houses, delegations and correspondence.

Again, as this case did not consider aboriginal title or rights, the court's ruling cannot be considered a definitive statement on the scope of the duty in the aboriginal context. Given the ever-changing legal landscape of the duty to consult, it would be prudent, if not good legal practice, for all local governments to engage in some form of meaningful consultation as described in Gardner before making decisions that may affect aboriginal title or treaty rights.

This practice becomes more important in light of the New Relationship between the Province of British Columbia and First Nations, represented by the First Nations Leadership Council. These parties are currently in the process of drafting legislation and creating institutions to formally recognize and accommodate aboriginal title and rights in the province without the need for formal proof. One of the purposes of this proposed legislation is to enable shared decision-making in regard to planning, management and tenure of lands and resources.

David Pilling

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Not for Sale: Banning Commercial Signs

During every Federal Election, my father is not satisfied with having just an ordinary lawn sign in his front yard. He erects those 4x8 foot signs you see on highways on his front lawn. I'd like to stop that unsightly aesthetic and not just because Dad's political preferences differ from my own.

When it comes to local governments regulating advertising signage, a greater public interest is at stake. Courts have held that a town's distinct visual character and aesthetic is affected by the use of commercial signage. As such, the Town of Oakville has long attempted to restrict third party advertising signs to distinguish itself from its neighbouring municipality of Mississauga.

Unfortunately, Oakville hit another roadblock in the courts in *Vann Media Group Inc. v. Oakville* ("Oakville"). In Oakville, the Ontario Court of Appeal held that the Town's restrictions on third party billboard signage were in effect an "absolute" prohibition. As such, sign bylaw provisions are contrary to the Charter of Rights and Freedoms.

When Oakville lost a previous court decision in 2002, it embarked on a public consultation process before adopting a new sign bylaw. The respondent sign company chose not to participate in this process. Nevertheless, the trial judge held that there were only 9 locations where signs could be erected in compliance with the new sign bylaw. Of those, only one or two locations had sufficient visibility from traffic to be commercially viable. Thus, the trial judge found the entire sign bylaw to be unconstitutional and ordered the Town to issue permits.

The Appeal Court in Oakville did not strike down the entire sign bylaw, only the provisions it found unconstitutional. The Court also quashed the lower Court's Order mandating permits to the respondent sign company.

A few years ago, I defended the City of Nanaimo from a Charter challenge on its third party sign bylaw restrictions. Some lessons that can be learned from that successful defence in contrast to Oakville are as follows:

1. Have a meaningful Charter review/public process. The City of Nanaimo did that and also had a written document, which it tendered into evidence breaking down the Charter considerations restricting third party signage.
2. Consider sign bylaws from neighbouring municipalities. This is relevant to the Court as it provides a broad legislative spectrum in which it can view the sign bylaw in context. In Nanaimo's case, the evidence showed other municipalities had sign bylaws that were even more restrictive than Nanaimo's.
3. Avoid an "absolute" ban on sign advertising. Oakville's bylaw situation where compliance meant only one or two commercially viable billboards in the entire town was seen as an "absolute" prohibition.
4. Ensure your sign bylaw meets the minimal impairment test of the Charter. This is where most sign bylaws fail: either in that restrictions are too broad or too onerous. If you wish to prohibit signage broadly, then you must show that your restriction meets your objective with the least amount of impairment of the rights of others. The City of Nanaimo did allow third party signage for new businesses during a 90-day period but banned them after that.

It is fair game for municipalities to be distinct from others with respect to commercial advertising on its streets. However, municipalities must provide evidence to justify their distinction. Thus, it is Oakville's prerogative to be distinct from Mississauga. By the way, my Dad lives in Mississauga.

Troy DeSouza

Can the Court of Appeal Suspend a Trial Order Setting Aside a Local Government Bylaw?

The question of whether the British Columbia Court of Appeal has the jurisdiction and authority to suspend an order by the B.C. Supreme Court setting aside or quashing local government bylaws pending an appeal has not been expressly answered by the Court of Appeal until just recently.

On February 25, 2009 the B.C. Court of Appeal in *Western Forest Products Inc. v. Capital Regional District* answered this question affirmatively for the first time. In December 2008 the B.C. Supreme Court allowed the application by WFP and quashed a number of CRD zoning and OCP bylaws. The CRD appealed to the Court of Appeal and applied for a stay of the B.C. Supreme Court Order setting aside the bylaws pending the determination of the appeal. WFP argued that the Court of Appeal did not have the jurisdiction to grant the stay or suspension of the B.C. Supreme Court Order.

In allowing the CRD's application, the Court stated:

The power to grant a stay pending appeal is conferred by s. 18(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77. That section reads:

18(1) After an appeal or application for leave to appeal is brought, a justice may, on terms the justice considers appropriate, order that all or part of the proceedings, including execution, in the cause or matter from which the appeal has been taken are stayed in whole or in part.

The purpose of a stay is to temporarily suspend the operation of the decision made by the court from which the appeal is taken. That decision is evinced by that court's formal order (i.e. judgment). In this case, the formal orders that have been entered include recitals declaring the cost-sharing agreements unlawful, and quashing the bylaws. As those orders are "part of the proceedings ... in the cause or matter from which the appeal has been taken", I have the power to stay them, i.e., to suspend their operation. ...

The Court went on to hold that a stay should be granted in this case as there was merit to the appeal, potential for irreparable harm, and the balance of convenience favoured a stay order being granted. On the issue of irreparable harm the Court stated:

In my view, there is the potential for irreparable harm if a stay is not granted. The CRD is responsible for regulating land development in the Juan de Fuca Electoral Area in a manner it considers to be in the public interest. To allow development and growth to proceed contrary to the CRD's express wishes would result in harm to the public interest if this Court finds that the impugned bylaws were properly adopted. Further, given the present uncertainty as to which bylaws govern, allowing matters to proceed under the old bylaws could result in what ultimately proves to be the unnecessary expenditure of funds by the CRD, landowners, potential developers, and others.

This case is of significance for local governments as it is now clear that, pending the determination of an appeal by the Court of Appeal, they can apply for an order temporarily suspending a lower court's order quashing a bylaw. They must show that (a) there is merit to the appeal, (b) there is potential for irreparable harm if the stay is not granted and (c) the balance of convenience lies with the Court of Appeal granting a temporary order that suspends the quashing order until the appeal has been determined.

Guy McDannold