

Focus MUNICIPAL LAW

Municipal bylaws can still be challenged



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Last year, the Supreme Court of Canada confirmed that municipalities have broad discretion to make decisions within their sphere of authority, provided the decisions fall within a reasonable range of possible outcomes considering the facts and the applicable law (*Catalyst Paper Corp. v. North Cowichan (District)* [2012] S.C.J. No. 2). Many wishing to challenge municipal bylaws were left thinking that municipal decisions were effectively immune to challenge. However, several recent cases remind us that: (a) judicial deference only extends to decisions properly within the municipality's sphere of authority; (b) courts view municipal authority more narrowly than many municipal councils; and (c) citizens can effectively challenge bylaws passed without the municipality following applicable procedure and law.

An Ontario decision, *Eng v. Toronto (City)* [2012] O.J. No. 5661, provides guidance on determining if a municipal bylaw has a "proper purpose" and what factors to consider when determining if the subject matter of the bylaw is properly a "municipal issue." Toronto, like a number of other Canadian municipalities, recently passed a bylaw banning the possession, sale and consumption of shark fins within the city. The applicants sought a declaration that the bylaw was *ultra vires* the city, arguing that the bylaw lacked a proper purpose.

The *City of Toronto Act* empowers Toronto to, among other things, determine what is of public interest for the city and to respond to its needs. The court noted that although the power to deal with "municipal issues" is broad, a municipality's decision that a matter is a municipal issue is not determinative of the municipality's jurisdiction. The issue addressed by a bylaw must relate to problems that engage the municipality as a local entity, and not a member of a broader politic. As the bylaw did not protect sharks, and as eating shark fin soup did not endanger the health of the community as local entity, the bylaw did not address a true municipal issue and thus lacked a proper purpose. The bylaw was *ultra vires* the city, and was thus without force or effect.

Similarly, in *Canadian Wireless Telecommunications Assn. v. Nanaimo (City)* [2012] B.C.J. No. 1431, the court found *ultra vires* a bylaw requiring wireless service providers to either pay a \$30 fee for every 911 call placed in the municipality, or agree to collect a monthly call-answer levy from its subscribers. Nanaimo defended the levy by arguing that British Columbia's *Community Charter* authorized municipalities to charge user fees. After a useful analysis of the distinction between a tax and user fee, the court found that the 911 levy lacked the characteristics of a user fee, and had all the characteristics of a tax — the purpose of which was *ultra vires* the City of Nanaimo.

Wainfleet Wind Energy Inc. v. The Corporation of the Township of Wainfleet [2013] O.J. No. 1744, further clarifies the limits of municipal authority. The Township publicly opposed wind turbine projects pending further

study on health impacts. It passed a bylaw prohibiting wind farms within two kilometres of "a property." A developer of a renewable power facility challenged the bylaw for, among other things, being: (a) void for vagueness and uncertainty; (b) in conflict with provincial law; and (c) *ultra vires* the township. The court found the bylaw was *intra vires* the township, as it related to the economic, social and environmental well-being and the health, safety and well-being of persons, but was void for vagueness due to the undeveloped definition of "property." While the court found that provincial legislation did not "fully occupy the field," the province could approve a wind farm in Wainfleet on the terms of the provincial scheme, but Wainfleet's bylaw would prohibit the project's construction. In the case of such a conflict, a paramountcy provision in the provincial legislation would make the township's bylaw without effect. In summary, despite the bylaw's valid purpose, it was invalid for vagueness and its potential to conflict with provincial legislation.

Finally, *Kuciuk v. Sechelt (District)* [2013] B.C.J. No. 594, reminds us that municipalities must follow proper procedures when enacting or amending bylaws. Sechelt, B.C., passed a bylaw amendment that rezoned one property within a residential zone to allow for fish processing. The property was already operating as a non-conforming fish hatchery, and the fish processing would intensify the existing "grandfathered" use. *Kuciuk* describes Sechelt's third attempt at the rezoning: the first attempt was quashed for not providing affected persons a reasonable opportunity to be heard, and the

second try was quashed for other procedural errors. While the court found that Sechelt had adequately consulted on the third attempt, *Kuciuk* demonstrates that where municipalities do not follow all necessary procedures, courts will quash bylaws and the implementation of policy can be significantly delayed.

Canadian courts will show substantial deference to municipal decision-making, but only to the extent the decisions relate to matters within the municipality's jurisdiction. Attempts to act without proper purpose, or to extend jurisdiction into areas occupied by other levels of gov-

ernment, will not survive judicial scrutiny. Likewise, once procedural rules are set, either by provincial legislation or a municipality's own bylaws, courts will require municipalities to abide by these procedures or risk having their decisions set aside.

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Democracy: Exempting records from disclosure

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loath to take on additional work to find such records, which would only serve to earn them the enmity of their municipal bosses.

In *Ottawa (City) v. Ontario (Information and Privacy Commissioner)* [2010] O.J. No. 5502, the Divisional Court found that the personal records of a municipal employee were not subject to disclosure as they did not relate to the employee's job or any government purpose. Despite being in the custody or control of the city (on the city's computer system), the court determined that disclosing such records would not further the purpose of the MFIPPA, which is to "facilitate democracy."

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The decisions establish a common law exemption that simply does not conform to the principles underlying the right to access in MFIPPA.

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The recent decision in Order MO-2842 advances a common law exemption that is not justified under MFIPPA, directly conflicts with the underlying purposes of the statute and does not in any way serve to facilitate democracy.

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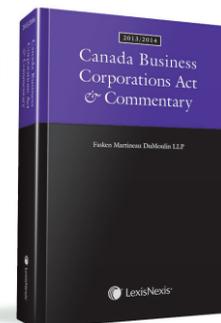
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