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Queen's Bench Boosts Municipal Bylaw Making Powers

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Cases Considered:

William Holowatiuk v. Beaver County, 2008 ABQB 290

This decision takes a broad view of municipal powers granted under the Alberta *Municipal Government Act* (R.S.A. 2000, c. M-26) (*MGA*). In doing so it finds that statutory provisions that limit municipal powers may not limit municipal bylaw making power. Although the Court engaged in an extensive historical and statutory interpretation exercize in reaching its decision, in my view, the decision failed to consider a key provision of the *MGA*, section 13. If it had, the Court might well have reached a different conclusion.

The Case, Arguments, and Decision

The case concerned the respondent, Beaver County, billing the applicant for fire fighting costs related to a fire on the applicant's land. The fire took place on a bare field with no buildings on it. The applicant claimed he had no idea how the fire occurred, and he did not know who reported it. There was no evidence that the applicant caused the fire, that the fire was in any way due to negligence or other action of the applicant, or that the applicant was complicit in respect to the fire.

The respondent billed the applicant for part of the fire fighting costs ($1570 of $3875) pursuant to its By-Law 04-870 (the "Bylaw"). Section 12.1 of the Bylaw enabled the municipality, in its discretion, to recover all or a part of fire fighting costs "to the person who caused the fire or *to the owner* or occupant of *the land* or property *in respect of which the action is taken* (emphasis added by the Court at para. 2). The respondent added the amount billed to the applicant to a parcel of land owned by the applicant pursuant to clause 553(1)(g) of the MGA which states that a municipality may add to the "tax roll of *a parcel of land* … costs related to the municipality extinguishing fires on *the parcel*" (emphases added) where the municipality has passed a bylaw making the owner liable for such expenses and costs. Since the applicant had sold the parcel on which the fire occurred, the respondent added the amount to the tax roll relating to another parcel of land owned by the respondent. Curiously, and likely to the detriment of the applicant, the applicant did not challenge whether the municipality had authority under clause 553(1)(g) to add the amount to the tax roll to any parcel other than the parcel subject to the fire. Because this was not challenged, the Court specifically stated that it would not consider this matter (at para. 15).

Without difficulty, the Court found that the Bylaw authorized the municipality to charge fire-fighting costs to the applicant. However the applicant asked the Court to find that the Bylaw was *ultra vires* or prohibited by provincial legislation on the basis that the Bylaw enabled the municipality to bill for fire fighting costs where the recipient was not to blame for the fire.

The applicant contended that the Bylaw was:

(a) ultra vires the *MGA*;
(b) prohibited by the *Fire Prevention (Metropolis) Act 1774*, 14 Geo. 3, c.78; and
(c) prohibited by the *Forest and Prairie Protection Act* (R.S.A. 2000, c.F-19).

The applicant's argument re (a) relied on section 551 of the *MGA* which concerns municipal authority in the event of an emergency. Subsection 551(5) states that the "expenses and costs of the actions or measures … are an amount owing to the municipality by the person who caused the emergency." The applicant argued that because of the limitation in this section, the municipality could not pass a valid bylaw that enabled a municipality to charge expenses and costs where the person did not cause the emergency.

Section 86 of the Imperial statute *Fire Prevention (Metropolis) Act* requires that there be evidence of landowner negligence in order for the landowner to be responsible for firefighting costs. The applicant's argument re (b) was that the *Fire Prevention (Metropolis) Act* is still law in Alberta and accordingly the municipality may not pass a valid bylaw that would enable a municipality to charge a landowner for firefighting costs where there is no evidence of negligence.

Subsection 9(3) of the *Forest and Prairie Protection Act* provides that "persons who are responsible for a fire shall on demand reimburse … the municipality … for the costs and expenses of fighting the fire." Re (c) the applicant argued that because of the expressed limitation the respondent could not pass a valid bylaw that would permit the municipality to demand reimbursement where a person is not responsible for a fire.

The Court used a correctness standard of review, since the issues concerned a question of *ultra vires*.

Re (a) the Court found that the bylaw was *intra vires* the *MGA*. Although the decision was not explicit in this regard, remarks in the case suggest that the Court found that the Bylaw was validly passed under clause 7(a) of the *MGA* which authorizes a municipality to pass a bylaw for the "safety, health and welfare of people and for the protection of people and property." The Court relied on *United Taxi Drivers' Fellowship v. Calgary (City)* [2004] 1 S.C.R. 485, which calls for a broad and purposive approach to the interpretation of municipal legislation drafted in the "modern style" (at para. 26). The modern style of drafting is typified by broad and general grants of authority, in contrast to limited and precise grants of authority. The modern style is typified in Part 2, Division 1 of the *MGA*, which expressly in section 9 states that the "power to pass bylaws under this Division is stated in general terms to … give broad authorities to councils

… within the jurisdiction given to them under this or any other enactment, and to enhance the ability of councils to respond to present and future issues in their municipalities."

Re (b) the Court found that section 86 of the *Fire Prevention (Metropolis) A*ct no longer is in force in Alberta on the grounds that the Province has occupied the field of law relating to liability for fire damage in clause 553(1)(g) and section 158 of the *MGA* of an earlier (now repealed) version of the *MGA* (R.S.A. 1980, c. M-26). Clause 553(1)(g) is discussed earlier in this comment. The repealed clause 158(e) specifically enabled a municipality to pass a bylaw for charging any cost to an owner or occupant for extinguishing a fire. The clause was silent as to whether the owner or occupant had to bear any responsibility for the fire.

Re (c) the applicant raised two provisions of the *Forests and Prairie Protection Act* that limit a municipality's right to recover fire-fighting costs from a person to situations where the person was responsible for or complicit with respect to the fire. Subsection 9(3) provides that the "persons who are responsible for a fire shall on demand reimburse … the municipal district or the urban municipality … for the costs and expenses of fighting the fire." Section 2.1 makes all persons responsible for a fire, or who own or control the land and who cannot establish that the fire was lit without their consent, jointly and severally liable for fire fighting costs. The applicant argued that these provisions clearly limit recovery for fire fighting costs to owners who are either responsible for or complicit with respect to it. The respondent argued that the noted provisions of the *Forest and Prairie Protection Act* do not remove or impact rights conferred on municipalities by other legislation, including the *MGA*. The respondent contended that the *MGA* gives municipalities the right to pass a bylaw to charge fire-fighting costs to a landowner, regardless of culpability. It argued that the noted statutory provisions of the *Forest and Prairie Protection Act* provide "a mechanism for the recovery of costs by a municipality" (at para. 3) that does not rely on any municipal bylaw. In other words, the respondent argued that provided that actions are authorized in a municipal bylaw that is valid under the *MGA*, it does not matter that the same actions could not be carried out under other legislative provisions, including other provisions of the *MGA*. The Court agreed with the respondent's analysis.

Comment on the Decision

Although there are many interesting aspects to this case, particularly of note is that the Court did not discuss the impact of section 13 of the *MGA* on a municipality's right to pass bylaws. Section 13 states:

Relationship to Provincial Law - If there is an inconsistency between a bylaw and this or any other enactment, the bylaw is of no effect to the extent of the inconsistency.

The *MGA* defines "enactment" to mean any Act of the Legislature of Alberta or a regulation under such Act and any Act of Parliament and any statutory instrument under such Act (s. 1(1)(j)). Accordingly, "enactment" would include subsection 551(5) of the MGA, which, as noted above limits a municipality's right to recover firefighting costs to the person who caused the emergency, and subsection 9(3) and section 2.1 of the *Forest and Prairie Protection Act* which include a similar limitation. "Enactment" would not likely include any provisions of the

Fire Prevention (Metropolis) Act since neither Alberta Legislature nor federal Parliament passed this Act.

It is arguable that the Bylaw is inconsistent with subsection 551(5) of the *MGA* as well as subsection 9(3) and section 2.1 of the *Forest and Prairie Protection Act* even construing "inconsistency" in its narrowest sense, as the impossibility of dual compliance (as set out in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161). It would seem impossible for a municipality to "comply" with both of the noted provisions and the Bylaw if we take "comply" to mean charging fire-fighting costs to a landowner who is not in any way responsible for a fire. Accordingly, if the Court had considered the impact of section 13 of the *MGA* on the validity of the Bylaw, it might well have, in the end, found for the applicant, on the basis that the Bylaw was inconsistent with other Alberta enactments.