March 28, 2014

The Decision in *Smith v St. Albert (City)*: An example of a Municipality's Expansive Powers to Regulate Just About...Everything?

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Case commented on: *Smith v St. Albert (City)*, 2014 ABCA 76

In our system of cooperative federalism, it is well settled that limiting a government's powers to the boundaries of its jurisdiction is a futile exercise. The dual aspect of a single jurisdictional subject matter is a reality for any federal system. It is more than likely that any one single jurisdictional subject matter can be shared by several different levels of government without leading to outright conflict. The courts' modern approach to resolving the overlap is to recognize the dual aspect of a single subject matter, so long as the subservient legislation does not adversely affect or impair any vital element of the core competence of, or conflict with, legislation enacted by the higher level of government (*Canadian Western Bank v Alberta*, [2007] 2 SCR 3).

It might at first blush appear that municipalities, created entirely by statute and granted delegated powers from the province under section 92(8) of the *Constitution Act, 1867*, are mere diminutive figures in the pecking order of jurisdictional powers that exercise little *real* power. However, as this commentary will explore, municipalities have become very adept at navigating the crowded field of overlapping and shared jurisdictional spheres, thereby finding their own space to exercise their powers, all the while receiving broad protection by Canadian courts to do so.

Enacting a municipal bylaw for the purpose of suppressing crime falls within a municipality's jurisdiction

In *Smith v St. Albert (City)* (blogged about by Linda McKay-Panos here and here), the Alberta Court of Appeal held that a provision of the City of Edmonton's business license bylaw which restricts the sale and display of items associated with illicit drug consumption is properly within the municipality's jurisdictional power and that the bylaw does not constitute an unlawful intrusion into the federal government's criminal law power.

In particular, the Court held (at para 32) that the pith and substance of the bylaw provision was to suppress conditions likely to lead to the commission of crimes and that ultimately, the bylaw's aim was to promote public order and safety:

> Based on the foregoing, we find that, in pith and substance, the *Bylaw* creates a business licensing regime designed to create safe and viable communities by restricting the cumulative sale of goods linked to drug consumption...Therefore, the essential character of the *Bylaw* is about suppressing conditions likely to lead to the commission of all types of crime that may ultimately affect public order and safety in the community.

At paragraphs 48-51 of its decision, the Court of Appeal held that the bylaw fell within the powers of the Province of Alberta since the suppression of conditions giving rise to criminal activity is within the province's jurisdictional competence under section 92(13) and (16) of the *Constitution Act, 1867*.

Support for this proposition can be found in a number of Supreme Court of Canada cases such as *Bedard v Dawson*, [1923] SCR 681, where the Court upheld the validity of a provincial law authorizing a judge to close a disorderly house for up to one year on the basis that the legislation was aimed at suppressing conditions calculated to favour the development of crime rather than the punishment of crime; *Reference Re The Adoption Act, The Children's Protection Act, The Deserted Wives' and Children's Maintenance Act*, [1938] SCR 398, where the Court acknowledged that the provinces, sometimes acting directly, or through delegation to municipalities, have since Confederation assumed responsibility for controlling social conditions which tend to encourage vice and crime; and in *Canada (Attorney General) v Dupond*, [1978] 2 SCR 770, where the Court upheld a municipal ordinance regulating public demonstrations on the basis that it was aimed at preventing conditions which could lead to breaches of the peace and threaten the administration of justice.

The distinction between a bylaw which purports to exercise a criminal law power (exercisable only by the federal government under section 91(27) of the *Constitution Act, 1867*) and one which merely seeks to suppress the conditions which might contribute to criminal activity (and therefore properly within provincial jurisdiction) is critical to understand. This distinction was discussed by the Supreme Court of Canada in *Ontario (Attorney General) v Chatterjee*, [2009] 1 SCR 624:

> [29] The question, however, is at what point does a provincial measure designed to "suppress" crime become itself "criminal law"? There will often be a degree of overlap between measures enacted pursuant to the provincial power (property and civil rights) and measures taken pursuant to the federal power (criminal law and procedure). In such cases it is necessary for the Court to identify the "dominant feature" of an impugned measure. If, as is argued by the Attorneys General here, the dominant feature of the *CRA* is property and civil rights, it will not be invalidated because of an "incidental" intrusion into the field of criminal law.

How does a court determine what the dominant feature of a challenged municipal bylaw really is? As the Alberta Court of Appeal explains in *Smith v St. Albert* (at paras 22 to 27), evidence of the bylaw's purpose can come from both intrinsic and extrinsic sources. Examples of intrinsic sources include the bylaw's purpose clause or the general empowering provisions set out in sections 3 and 7 of the *Municipal Government Act*, RSA 2000, c M-26, which define a municipality's objectives. Extrinsic evidence includes the various reports and materials submitted by a municipality's administration, including the minutes of discussions regarding the bylaw at municipal council. Whatever the source relied upon to identify a bylaw's purpose, municipal councillors consider a broad range of factors when deciding whether to enact a bylaw including social, economic, political, administrative, and other grounds. Given that a council

may consider all of these factors in its political calculus when enacting a bylaw, it can be extremely difficult for a challenger of a bylaw to identify what the overriding or dominant purpose for enacting a bylaw might have been. Conversely, it will be relatively easy for a municipality to establish that at least *one* of the reasons for enacting a bylaw properly falls within its jurisdiction.

And this is partly why few will ultimately succeed in arguing that a municipal bylaw is *ultra vires* on the basis that it does not fall within a municipality's jurisdiction. Partly too, is the modern approach to interpreting municipal powers and jurisdiction which recognizes that it is municipal councils, not courts, which are ultimately best situated to assess the needs of the people they serve and that it is really up to municipal councillors to assess what mischief a bylaw is intended to address.

The proper approach for reviewing the exercise of municipal powers and jurisdiction:

In Alberta the legislative authority for our municipal institutions and their jurisdiction is found in the *Municipal Government Act*, RSA 2000, c M-26 ("*MGA*"). Comparable legislation is found in other provinces. The *MGA* grants broad powers to municipalities pursuant to section 3 which states that the purposes of a municipality are:

- to provide good government,
- to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality, and
- to develop and maintain safe and viable communities.

Section 7 of the *MGA* empowers municipalities to pass bylaws in furtherance of achieving its purposes, chief among those:

- the safety, health and welfare of people and the protection of people and property;
- people, activities and things in, on or near a public place or place that is open to the public;
- nuisances...;
- businesses, business activities and persons engaged in business; and
- services provided by or on behalf of the municipality.

Section 8 of the *MGA* grants municipalities the power to enact a regulatory system of licenses, fees and permits over matters within their jurisdiction. Section 9 makes it clear that a municipality's power to pass bylaws must be interpreted broadly to:

- give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under this or any other enactment, and

- enhance the ability of councils to respond to present and future issues in their municipalities.

Read together, there can be little doubt that the delegation of powers to municipalities regarding matters within their jurisdiction is vast and expansive. Consider, for example, the specific wording in section 9(a) of the *MGA* in which the Alberta Legislature has delegated to municipalities the right to govern in "whatever way the council considers appropriate".

It has taken Canadian courts some time to accept the fundamental role that municipal councils play in dealing with the complexities of decision-making at a local level. But it is now largely beyond dispute that a broad and purposive approach must be taken when interpreting municipal powers and the exercise of those powers. Courts have clearly signaled that they will exercise deference when reviewing municipal decision making and that it is ultimately a municipality, not the court, that is in the best position to determine how its powers are to be exercised.

In her landmark dissent in the case of *Shell Canada Products Ltd. v Vancouver (City)*, [1994] 1 SCR 231, Madam Justice McLachlin (as she then was) articulated what has now become the accepted view of how to deal with the exercise of municipal power. Starting at page 244 of the decision, Justice McLachlin rejected the narrow, pro-interventionist approach to the review of municipal powers, in favour of a more generous, deferential approach. This reasoning was based on a principle known as "subsidiarity" which recognizes that local councils best understand the problems and issues facing their constituents at a local level and are best able to craft an appropriate response (for example, see Justice L'Heureux-Dubé's reasons in the Supreme Court of Canada case of *114957 Canada Ltee (Spray-Tech, Societe d'arrosage) v Hudson (Ville)*, [2001] SCR 241 at para 3).

In Shell Canada Products, Justice McLachlin extensively develops and articulates her thinking on the issue of judicial restraint with respect to a court review of the exercise of municipal powers (at 244-247):

> ...courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold...
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> Such an approach serves a number of purposes which the narrow interventionist approach does not. First, it adheres to the fundamental axiom that courts must accord proper respect to the democratic responsibilities of elected municipal officials and the rights of those who elect them…
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> Second, a generous approach to municipal powers will aid the efficient functioning of municipal bodies and avoid the costs and uncertainty attendant on excessive litigation…
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> Thirdly, a generous approach to municipal powers is arguably more in keeping with the true nature of modern municipalities...
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> ...Primary responsibility for deciding the welfare of the community belongs to the municipal corporation. If the courts take upon themselves the judgment of the rightness or

> wrongness of council's decisions in these matters, they, as a body having no connection with local inhabitants, usurp the choice which the inhabitants conferred, by democratic process, on the council. If the courts are to interfere in this process, they must have a positive justification for doing so and that justification must relate to their own peculiar nature and function…
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> Finally, the broader, more deferential approach to judicial intervention in the decisions of municipalities is more in keeping with the flexible, more deferential approach this Court has adopted in recent cases to the judicial review of administrative agencies…
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> These considerations lead me to conclude that courts should adopt a generous, deferential standard of review toward the decisions of municipalities...

Justice McLachlin's approach in *Shell Canada Products* has been endorsed in subsequent decisions of the Supreme Court of Canada. In the recent case of *Catalyst Paper Corp v North Cowichan (District)*, [2012] 1 SCR 5, Chief Justice McLachlin, in delivering the Court's decision, continued to develop the theme she first raised in *Shell Canada Products* and concluded (at paras 19, 20 and 30) that:

> ...review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. "Municipal governments are democratic institutions"...In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.
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> The decided cases support the view of the trial judge that, historically, courts have refused to overturn municipal bylaws unless they were found to be "aberrant", "overwhelming", or if "no reasonable body could have adopted them"...
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> .....
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> ...municipal councils have extensive latitude in what factors they may consider in passing a bylaw. They may consider objective factors directly relating to consumption of services. But they may also consider broader social, economic and political factors that are relevant to the electorate.

This deferential approach to the interpretation of municipal powers also complements the current thinking on statutory interpretation in which there is a general presumption that all forms of legislation, including municipal bylaws, intend to comply with their jurisdictional limits. To be precise, there are two presumptions at play here: the presumption of jurisdictional limits (also known as the presumption of constitutionality), and the presumption of preferred interpretation. These presumptions encourage courts to exercise judicial restraint and apply a broad, purposive interpretation in order to save, rather than to strike down legislation, wherever possible.

Challenging a bylaw's jurisdiction – with what result?

It should come as no surprise that in keeping with the modern judicial treatment regarding the interpretation of municipal powers, few challenges which are made to the exercise of a municipality's jurisdiction to enact a bylaw succeed.

There are two important Canadian decisions which mark opposite ends of the *ultra-vires - intra-vires* spectrum. On the one end is the Supreme Court of Canada's decision in *R. v Westendorp,* [1983] 1 SCR 43, where a Calgary bylaw prohibiting a person to remain on a street for the purpose of prostitution or the purpose of approaching another person on a street for the purpose of prostitution was not found to be an attempt at controlling public nuisance. Rather, it was a colorable attempt at regulating the criminal offence of prostitution. On the other, is the Supreme Court of Canada's decision in *Rio Hotel Ltd. v New Brunswick (Liquor Licensing Board),* [1987] 2 SCR 59 where the Court held that provincial legislation imposing restrictions on liquor license holders regarding nude entertainment related to both matters of a purely local nature and matters relating to property and civil rights within the Province; rather than the exercise of a criminal law power.

Since then, the *Rio Hotel* decision has generally held sway. Bylaws enacted in Edmonton and Red Deer regulating body-rub parlours, massage clinics, and the licensing of escorts have been upheld on the basis that their pith and substance relates to the regulation of businesses and does not constitute an exercise of criminal law power (*Moffat v Edmonton (City),* [1979] AJ No. 545; *R. v Morse*, [1984] AJ No. 2627; and *Strachan (c.o.b. Kats) v Edmonton (City)* 2003 ABQB 309; a Red Deer bylaw which attempted to deal with violence in bars by increasing a licensing fee based on the size of drinking establishments was found to be within a city's jurisdiction regarding the issuance of fees for the purpose of raising revenue (*Passutto Hotels (1984) Ltd. v Red Deer (City)*, 2006 ABQB 641); a Calgary bylaw requiring boaters to wear lifejackets was properly within the municipality's jurisdiction to promote the safety and welfare of boaters rather than comprising an unlawful intrusion into the federal sphere of navigation and shipping (*R. v Latouche*, 2010 ABPC 166), an Edmonton bylaw which prohibited fighting in public was found to be within the municipal jurisdiction as it provided safe and enjoyable public places by deterring public fighting (*R. v Keshane*, 2012 ABCA 330), and most recently, although in respect of provincial legislation, in the case of *R. v Kirk,* 2013 ABPC 130, where provisions of the Alberta *Securities Act* were held to fall within the Province's jurisdiction as they were more concerned with the conduct of actors in the securities market rather than the attempt to exercise a criminal law power.

Generally speaking, we suggest that bylaws which impose licensing regimes with a view to regulating, rather than prohibiting, certain types of activities or behaviour pertaining to property and civil rights or pertaining to a purely local matter will be upheld – notwithstanding they may trigger the dual aspect doctrine. That being said, in May 2014, an appeal will be heard in the Ontario case of *Tsui v Vaughan (City)*, 2013 ONCJ 643, where a Justice of the Peace found that a bylaw which imposed restrictions on the hours of operation of body rub parlours, and the nudity of the attendants, was not really about protecting against the spread of communicable diseases. Rather, the court concluded that the bylaw represented a colorable attempt to exercise a criminal law power or, as the court colourfully put it, "remove the "night" from ladies of the night" (at para 54).

The weight of blogosphere commentary is leaning heavily in favour of the City of Vaughn successfully appealing on the basis that prohibiting body rub parlours from being open overnight into early morning hours suppresses the conditions giving rise to prostitution or deals with public nuisance, and is, like *Smith v St. Albert (City*), a proper exercise of a municipality's jurisdiction (See, for example, Scott McAnsh's article "Body Rub and the Suppression of Crime" on his firm's website). The outcome may simply lie in the fact that municipalities have the jurisdiction to license businesses, especially those related to body-rub and massage activities for any number of properly articulable reasons, and that absent any argument that the bylaw infringes upon the business's section 7 *Charter* right for being overbroad, has a good chance of being upheld.

This blog does not necessarily represent the views of The City of Calgary. The authors wish to acknowledge the thoughtful editorial feedback provided by Toby Eines, Research Lawyer, City of Calgary Law Dept.