

A Tangled Web: Leaked Confidential Council Reports and the Crime/Fraud Exception to Privilege

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In 2005, the City of Toronto passed a bylaw that restricted the hours in which "body rub parlours" (non-therapeutic massage businesses, known more colloquially as "rub and tug" establishments) could operate, based on nuisance concerns. The bylaw was based on the City's authority to regulate business. In 2006, a trade association sued, seeking to quash the bylaw on various grounds. It had previously attacked a bylaw increasing licensing fees. In response, the City Solicitor prepared a June 2006 report to City Council, addressing the state of the evidence supporting the bylaw. The report was stamped "confidential" and "in camera," and was titled "To: City Council. From: City Solicitor." The stated purpose of the report was "to seek instructions from City Council in this court application," and it discussed recommendations as to how counsel might conduct the pending challenges. That litigation was settled and abandoned in 2006, but the report had a second life to live.

In October 2006, another application was brought challenging the validity of the bylaw. The applicant was a business, Alpha Care Studio 45, represented by G. In February 2009, G. notified the City that he had a copy of the report and was going to rely on it in the Alpha Care application (a copy of the report was included with his letter). G. advised that the report was leaked to a representative of Alpha Care by a City Council member sometime in 2006, and it appeared it had been in G's possession since that time. The City Solicitor immediately asserted privilege over the report. She moved for its return and the return of any associated documentation, to remove G. as counsel of record, and to strike the entire application. It was conceded that the report had been used extensively in the application by G. on behalf of his client (in fact, that the application itself was "derivative of the report"). However, G. claimed that the "privilege was expressly waived by the member of City Council who provided the report to my client," and, later, through counsel, argued that the report was never privileged because of the so-called "crime and fraud exception" to solicitor-client privilege because the "hours of operation" bylaw could not be legally justified.

This exception rests on the proposition that consultation with a lawyer in order to facilitate criminal or fraudulent activity (or possibly any unlawful purpose) lies outside the scope of protection from disclosure because these communications are injurious to the interests of justice. (There is some dispute about how broad a definition of illegality should be encompassed in this principle.) The argument by G's counsel was that the City was allegedly acting unlawfully by knowingly persisting in the enactment of a bylaw that it knew to be invalid, and that the City Solicitor was a party to this unlawful conduct by recommending it in the confidential report.

As it should have, the court easily rejected the possibility of criminal action: "Whatever can be said about the confidential report to City Council it was certainly not facilitating a 'crime.'"

However, the judge agreed with the proposition advanced by G's counsel that the exception "would be engaged if City Council used the City Solicitor's legal advice in order to knowingly pass or perpetuate an unlawful by-law. This would be a serious abuse of office and a misuse of the lawyer's function." Moreover, because of the added public interest aspect of government administration, it was:

> equally fundamental that the City Solicitor ensure that City Council 'complies with the law.' It is not enough to take an adversarial stance in litigation, because opposing counsel's argument is not well framed, if it means that City Council will continue to proceed in a manner that knowingly violates the law. The statutory framework governing municipalities generally and the City of Toronto in particular, as set out above, does not permit this approach. More fundamentally, the importance of the rule of law as a constitutional precept in Canada does not permit this approach to public administration at any level of government.

However, it was unfair to the City to read the written report and advice "in isolation." Taking the surrounding circumstances and entire course of relevant conduct into account, the judge found it apparent that "the City Solicitor and City Council were acting with proper regard for the rule of law." The report was used as the preliminary basis for a discussion between solicitor and client about whether the bylaw was unlawful and about remedial steps, and had to be construed in the context of further discussion. The report was properly privileged, and the crime and fraud privilege exception did not apply.

Although the entire report was found to be privileged, Alpha Care was "at liberty to obtain production in the ordinary way of relevant facts referred to in the report." The difficult question

continued on page 38

an obligation to include, in any licensing by-law, an explanation of the reason why the municipality was licensing a business or imposing conditions, and how that reason related to the purpose for which the by-law was enacted.
16. (2005), 18 M.P.L.R. (4th) 89 (Ont. C.A.) *rev'g* (2005), 5 M.P.L.R. (4th) 114 (Ont. S.C.J.).
17. (2006), 18 M.P.L.R. (4th) 153 (Ont. S.C.J.). The court here determined that a by-law requiring second-hand goods dealers to submit daily reports of all transactions to police was authorized under s. 150(2). The court gave "consumer protection" a broad and generous interpretation that allowed the municipality to achieve its legitimate interests.
18. (2004), 49 M.P.L.R. (3d) 1 (Ont. S.C.J.).
19. *Id.* at & 23.
20. *Id.* at & 24.
21. *Adult Entertainment Ass'n. of Canada v. Ottawa (City)* (2007), 33 M.P.L.R. (4th) 1 (Ont. C.A.).
22. In *The Annotated Municipal Act, Second Edition, supra* note 13 at MA4-9, the authors note that: "Licensing now applies to almost all forms of municipal systems. This widens the scope of a municipality's licensing powers enormously and means that the municipal authority to require licenses may extend to any business activity, matter or thing that a municipality can regulate under ss. 9, 10 and 11. Therefore, it is imperative that the term 'license' effectively be read as meaning 'license/approval/registration/permission.'"
23. (2004), 46 M.P.L.R. (3d) 1 (S.C.C.).
24. Former s. 150(6) of the *Municipal Act, 2001* [now s. 152(1)] set out an exhaustive list of the various types of business that could be licensed, while s. 150(7) provided some limited exceptions.
25. O. Reg. 583/06. ML

Inside Canada

cont. from page 28

of remedies was resolved by the court deciding that both the Notice of Application and the supporting affidavit would be struck, but without prejudice to Alpha Care's right to commence a fresh application. G. was to have no communication with new counsel and Alpha Care was to make no reference to the contents of the privileged report when instructing new counsel. The court's reasons were since edited to remove the references to the privileged contents of the confidential report. The case is reported as *1784049 Ontario Limited (Alpha Care Studio 45) v. Toronto (City),* 2010 ONSC 1204 (Ont. S.C.J. Feb. 24, 2010). ML

Ordinances

cont. from page 29

governments in the second quarter of 2009 (at the time the Ninth Circuit decided the case), compared to the second quarter of 2008, were down 12.2 percent, by over $42 billion.[6] The second issue concerns the inappropriate burden of forcing law enforcement officers with having to diagnose psychological conditions, particularly when the detainee has been evaluated by medical professionals. Nevada law requires 480 hours of mandatory training for law enforcement officers on subjects like civil liability, constitutional law, juvenile law, probable cause, traffic laws, search and seizure, investigation of crime scenes, preservation of evidence, interrogation, weapons training, courtroom demeanor, ethics, and much more.[7] The training necessary to properly diagnose types of mental illness or mental status would require specialized and advanced training that is better suited for individuals in the medical profession. The Supreme Court is on recess until October 1, so it will be a few months before we find out whether the Court believes this to be a case worthy of Supreme Court review. IMLA thinks it is. Stay tuned.

Notes

1. City of Canton v. Harris, 489 U.S. 378, 388 (1989).
2. *Conn*, 591 F.3d at 1103.
3. *Id.*
4. *See* Boncher ex rel. Boncher v. Brown *City*, 272 F.3d 484, 485-86 (7th Cir. 2001); Manarite ex rel. Manarite v. City of Springfield, 957 F.2d 953, 959-60 (1st Cir. 1992); Barber v. City of Salem, 953 F.2d 232, 240 (6th Cir. 1992); Burns v. City of Galveston, 905 F.2d 100, 104 (5th Cir. 1990); Popham v. City of Talladega, 908 F.2d 1561, 1564 (11th Cir. 1990).
5. *See* Simmons v. City of Philadelphia, 947 F.2d 1042, 1049 (3d Cir. 1991).
6. U.S. Census, Quarterly Summary ML

Cases

cont. from page 35

In *Graham v. Connor*, 490 U.S. 386 (1989), the U.S. Supreme Court laid out several factors to consider whether the force used was excessive, including (1) the severity of crime, (2) whether the suspect posed an immediate threat to the safety of officers or others, and (3) whether he was actively resisting arrest or attempting to evade arrest by flight. In light of this, Norris's actions did constitute excessive force, as Brown was not arrested for a serious crime; she did not pose a threat to anyone's safety; and she was cooperative, did not resist arrest, and was not attempting to flee. *Brown v. City of Huntsville, Ala.*, No. 09-12965, 2010 WL 2243877 (11th Cir. June 7, 2010).

Excessive Force & Damages

Anthony Guy brought a Section 1983 action against certain San Diego officers, claiming the use of excessive force. Guy had participated in a fight outside a bar, and claimed that the police officers used pepper spray to subdue him, tightened the handcuffs on him to the point that they caused wrist pain, and caused cuts when they threw him to the ground. The jury returned a special verdict in favor of the defendants on all claims, with one exception: the jury determined that one officer did violate Guy's Fourth Amendment right to be free from excessive force. However, the jury awarded no compensatory or punitive damages, and only one dollar in nominal damages. The district court explained that, while excessive force was used against Guy, a jury could still conclude that all of the injuries he suffered were the result of the officers'