

Cases of Interest

By Monica Ciriello

On January 29, 2011 a water line servicing 96 Ross St. (96 Ross), a multi residential apartment complex located in the City of Barrie (City) broke. An inspector from the City advised 96 Ross that the City was not responsible for the repair, despite being on City property. The inspector recommended that 96 Ross use Rumball, a repair company to complete the repairs. Rumball completed the repairs immediately, as it was classified as an emergency repair situation. Upon completion Rumball presented a $9469.58 bill to 96 Ross, which refused to pay. 96 Ross stated that the City was responsible for the bill as the break occurred on City property. Rumball sued for the payment primarily from 96 Ross, and if 96 Ross was not responsible, then the City was.

Held: This matter was brought before Small Claims Court. It was held that 96 Ross was responsible for payment to Rumball. The City's lack of responsibility stemmed from its by-law whichset out the fees associated with the installation and renewal of water services. For services involving pipes exceeding 19 mm (as in the 96 Ross case) the City's approved fee was "full cost recovery." Accordingly, if the City had paid for the cost of restoring the water service, it would have been entitled to recover those costs from 96 Ross. If 96 Ross had refused to authorize the repairs and the City had incurred those costs, 96 Ross would still have been ultimately liable. The claim against the City was dismissed.

96 Ross St. Inc v. Corporation of the City of Barrie, 2014 Canlii 65319

The plaintiff, a homeowner, initiated an action against the City of Dauphin (City) for failing to enforce city zoning and business by-laws. The non-compliant property was a home-based business located adjacent to the plaintiff's residence. The statement of claim indicated that the plaintiff suffered loss of use, enjoyment, and comfort in his property as a result of the failure of the City to enforce the municipal by-law. The City moved for an Order striking out the Statement of Claim for failure to disclose a reasonable cause of action. The City argued that the claim did not establish a legal relationship between the City and the plaintiff and in the absence of such relationship the City had no cognizable 'duty,' requiring dismissal. The court had to determine the legal relationship, if any, between the plaintiff and the City.

Held: The duty of care applies to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency would constitute such a valid basis for exclusion. However, once the agency authorized a particular property to be used as a home-based business, there is a strong argument that such permission or licensing was an operational act, falling outside the exclusion for policy decisions.

The court found that such licensing carries an inherent duty to the business being permitted, as well as the duty not to act negligently and cause harm to the neighbours. Therefore, it was not plain and obvious that the plaintiff failed to plead a reasonable cause of action; the claim if true demonstrated legal proximity between the plaintiff and the City. The City's motion to strike was dismissed.

Dmitruk v. City of Dauphin, 2014 MBQB 189

In the last issue of *Municipal Lawyer*, we indicated that British Columbia Supreme Court Justice Brown had dismissed the injunction by the City of Burnaby (City) injunction prohibiting Trans Mountain Pipeline, its agents or employees from continuing to carry on work in the City in contravention of City bylaws. However, reasons for dismissing the injunction had not been published.

Held: The City must meet the requirements for an equitable injunction, as set out in *RJR-MacDonald*. The test is: 1) Is there a serious question to be tried? 2) Will there be irreparable harm? 3) Does the balance of convenience favour the applicant?

With regards to the first issue, Justice Brown found that there was not a serious question to be tried because there was another forum in which the matter could be determined. In the second prong, Justice Brown contemplated conflicting evidence but ultimately concluded that the investigations to be conducted by Trans Mountain constituted irreparable harm as contemplated in *RJR-MacDonald*. In the final element, it was found that the balance of convenience did not favour the City's position, as there was another forum with the jurisdiction to determine these matters, and an injunction would enjoin further orders from that forum.

The court found that the matter is properly before the National Energy Board (NEB), and the City has the ability to pursue the relief that it seeks in that proceeding. In the event that the NEB reaches conclusions that the City contests, it may pursue an appeal to the Federal Court and may seek an injunction in that forum.

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connection between the facts found and the choice made,' that the Agency's `decision was based on a consideration of the relevant factors,' and that the Agency has made no `clear error of judgment.'" (*citation omitted*).

Finally, when interpreting an ambiguous statutory provision involving Indian affairs, "the governing canon of construction requires that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Cal. Valley Miwok Tribe v. United States,* 515 F.3d 1262 (D.C. Cir. 2008).

Under these principles, the Secretary's interpretation prevailed. "[T]he Court finds that the term "recognized" does not unambiguously refer to recognition as of 1934, but rather is an ambiguous statutory term. Moreover, given the above discussion and Justice Breyer's concurrence in *Carcieri,* this Court finds the Secretary's interpretation of the term "recognized" to be reasonable and defers to it."

Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell, No. 13-849 (BJR) (D. D.C. Dec. 12, 2014). ML

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***Oil v. Trees Update on Burnaby BC: Burnaby (City) v. Trans Mountain Pipeline* ULC, 2014 BCSC 1820**

Toronto to Uber–"Get Out of Town!"

Municipalities throughout Canada are taking a stand against Uber. Uber, the start-up based out of San Francisco, has created a mobile application that allows anyone with a smartphone to hail a taxi or a limousine at the press of a button. Uber users can chose to order privately operated cabs (called UberX), regular licensed cabs (UberTaxi) or fancy limos with licensed drivers (UberBlack). The app uses GPS technology to match available drivers and a passenger based on their locations, calculates the estimated fare ahead of time and transfers the money electronically, so no physical cash is exchanged. Uber uses surge pricing, where prices go up in bad weather or on holidays. Uber makes money by taking 20% of every fare, and by charging a $1 "safe ride fee" on every trip. Everything else is governed by the market.

This app has managed to insert itself into taxi marketplaces around the world, angering cab companies, drivers and city hall regulators on every continent. Municipalities throughout Canada have taken measures to keep Uber out. Calgary, Alberta banned Uber after providing the results of a study conducted on Uber drivers and their unsafe driving conditions to council in August. Vancouver, British Columbia is in the midst of its own six-month Uber study, and has temporarily banned the service until the study is complete. Mississauga, Ontario also deemed UberX service to be against its regulations this summer and vowed to fight it under bylaws. Ottawa, Ontario was ready to attack as soon as Uber started its operations in the city, in one weekend two Uber drivers were fined $650 each.

The City of Toronto has gained tremendous media attention, after filing an injunction to stop all local operations of Uber last week. Beginning in August 2012, five months after Uber launched its initial UberBlack app, the City of Toronto charged the company with operating an unlicensed limousine business. Uber then launched UberTaxi. The City of Toronto once against charged Uber in December 2012 with operating an unlicensed taxi business. These charges, totalling 36 alleged offences in all, have been slowly making their way through the courts. On December 3, 2014 Uber and City of Toronto prosecutors met in court to set a trial date.

The City of Toronto is now seeking a court injunction against all Uber operations after Uber introduced another app, UberX, which recruits non-licensed taxi drivers in unmarked cars to pick up users and take them to their ultimate destination for a fee. The City argues that Uber has been operating illegally in Toronto since it arrived in 2012.

The city has two major issues with the service: that it is not properly licensed to operate as a taxi or limousine brokerage and that it is also using unlicensed and unregulated drivers that may pose a risk to the public's "health and safety." A taxi brokerage, which costs $300 per year, acts as a

middleman between passengers and drivers. The City is arguing that by definition, Uber's taxi and also its limousine service works as a brokerage "without the lawful authority to do so." The city's court application states "it is abundantly clear from Uber's operations that it is not engaged in or facilitating carpooling. It brokers vehicle transportation for compensation only."

Uber has maintained it exists as a technology provider and is not directed by taxi licensing standards. It does not own one car, nor does it have the middleman infrastructure of dispatchers and staff relaying phoned-in taxi orders.

Under Toronto's licensing rules, an individual who would like to become a licensed taxi driver would go to City Hall, pay a fee ($634 in Toronto), undergo a police check, prove his or her work status and take a 17-day training course. A vehicle is also required. This necessitates obtaining the new Toronto Taxicab Licence, which costs $4,742 and requires that the owner do most of the driving. What is the wait time to get the new Licence? Long--there are 1,095 individuals currently on the waiting list. This approach has created a system where there is a limited number of licensed cabs and an unlimited number of licensed cab drivers.

Perhaps the argument by Uber proponents is that the new company is not the problem, but is merely introducing a breakthrough technology and changing transportation paradymes, whether cities like it or not.

At this point it remains unclear whether ongoing legal challenges against Uber will be successful. The City of Toronto's legal bid for a quick shut-down of Uber faces a frustrating six-month delay. After filing the injunction and asking for an 'expedient' treatment the City has learned that the case will not be heard until May 19, 2015. ML

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was needed. This proposed rule is in direct contradiction to current EEOC guidance and Title VII cases admonishing employers to *avoid* discussions about religion.

As noted in the Tenth Circuit decision, individuals wear head coverings for a number of reasons, some religious and some cultural, and Title VII does not require accommodations for a cultural practice. Additionally, other practices that may or may not be religious in nature further illustrate the difficulties that the EEOC's position would create for employers. Many male religious believers must maintain facial hair either continuously or at certain times of the year. Under the EEOC's proposed rule, a government employer with a reasonable policy prohibiting facial hair might (or might not, depending on the post hoc judgment of a judge or jury) have to ask every beard-wearing applicant about his religious beliefs during the interview, and it might have to ask any non-compliant employee about those views before disciplining him for failing to conform.

IMLA will be writing an amicus brief (or joining as an amicus) in *EEOC v. Abercrombie*. Respondent's brief is currently due by January 21, 2015.

City of Los Angeles v. Patel–Supreme Court Merits Stage–Fourth Amendment / Facial Challenge to Municipal Hotel Records Ordinance

This case raises the question of whether a municipality can require hotel and motel operators to provide guest records to police without a warrant.

Facts: Los Angeles Municipal Code § 41.49 requires hotel and motel operators to keep specific information about their guests like their name, address, room number, and information about their vehicle parked at the hotel. Section 41.49 also states that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection." In a facial challenge to the ordinance, motel operators objected to § 41.49 authorizing warrantless inspection of guest records.

Issues: (1) Whether facial challenges to ordinances and statutes are permitted under the Fourth Amendment; and (2) whether a hotel has an expectation of privacy under the Fourth Amendment in a hotel guest registry where the guest-supplied information is mandated by law and an ordinance authorizes the police to inspect the registry, and if so, whether the ordinance is facially unconstitutional under the Fourth Amendment unless it expressly provides for pre-compliance judicial review before the police can inspect the registry.

Lower court ruling: In *Patel v. City of Los Angeles*, no. 2:05-cv-01571 (9th Cir. Dec. 24, 2013), the Ninth Circuit ruled in favor of the motel operators. In an en banc opinion reversing the Central District of California decision, the majority concluded that § 41.49 is facially unconstitutional because it fails to expressly provide for pre-compliance judicial review before the police can inspect the registry. The Ninth Circuit noted that the "procedural deficiency" with the ordinance affected all searches authorized by that ordinance and therefore there are "no circumstances in which the record-inspection provision may be constitutionally applied." Both dissenting opinions agree that the ordinance in this case isn't facially invalid because the standard for facial invalidity is so high and the motel operators failed to meet it. The challenger must establish that the ordinance wouldn't be valid under any set of facts. The Tallman dissent points out, for example, that police officer may routinely seek warrants before searching hotel guest registries regardless of the fact they are not required under the ordinance and that warrantless searches would be valid in some circumstances under the exigent circumstances or community care exception, (for example if someone in a hotel room is suicidal).

Significance to local government: This case involves at least two issues relevant to local governments. First, a number of municipalities have ordinances like the one adopted by Los Angeles and if the Ninth Circuit is correct all of these ordinances are invalid. The second and broader issue is whether someone can make a facial challenge to an ordinance based on the Fourth Amendment at all. The cornerstone of the Fourth Amendment is reasonableness, and reasonableness requires a factual analysis. Thus, it is difficult to understand how a facial challenge could be met under the Fourth Amendment.

IMLA joined the State and Local Legal Center's brief; the case will be argued March 3, 2015. ML