

I Want to be Just Like You: When Municipalities Masquerade as Natural Persons

By Scott McAnsh

In many Canadian jurisdictions municipalities have been granted "natural person powers" which give them all the rights and powers of a natural person.[1] These powers are part of the modern shift towards a more nimble and flexible municipal corporation and are certainly a welcome evolution from the "prescriptive laundry list of itemized narrow power"[2] that preceded them. However, the degree to which these broad powers interact with the awesome powers that municipalities are still granted by statute should give us pause. In a growing body of cases, courts have shown a willingness to permit municipalities to use natural person powers to expand their statutory powers or circumvent their statutory limitations.

Background

Natural person powers give municipalities the clear authority to take various day to day actions reserved for legal persons, a prerogative which has long been available to private corporations. The natural person powers of municipalities give municipal corporations some of the same flexibility that private corporations enjoy. While private corporations have acted beyond their enumerated powers and objects for some time, municipal corporations have been slow to follow that trend.[3]

The Honourable Judy Gordon, who presented the 1994 Municipal Government Act to the Alberta Legislature posited that natural person powers "...create[] greater autonomy for municipalities,"[4] and "give[] the municipality the necessary administrative and business authority. It is not intended to expand powers."[5] This power is at the core of the many broad powers that came with the shift in municipal statutory drafting and interpretation first noted at the Supreme Court by McLachlin J. (as she then was) in dissent in *Shell Canada Products Ltd. v. Vancouver (City)*[6] . The Supreme Court unanimously noted in 2004 that "the 'benevolent' and 'strict' construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced."[7] Certainly, the powers of a natural person are broad. It ought not, however, be unlimited and it is the role of our judiciary to impose reasonable limitations.

The Line

One of the first appellate court cases to consider the scope of the natural person powers granted to municipalities was *St. Paul (County) No. 19 v. Belland*.[8] In that case the Alberta municipality of St. Paul was seeking an injunction against a farmer that had blocked a number of road allowances over his farmland. Slatter J. (as he then was), writing for a unanimous Court, held that despite the fact that the municipality had not prohibited the obstruction of the road allowance, by bylaw it was entitled to an injunction.[9] While this was purely an exercise in statutory interpretation, Justice Slatter spent a great deal of time setting out the history and purpose of the natural person power. In his review of natural person powers, he noted the fundamental difficulty with municipal natural person powers: municipalities can do more than a natural person when acting by bylaw.

"[T]he power to act by bylaw is in addition to, and not a limitation on, all of the powers of a natural person. If a municipality wishes to do something that a natural person could do, the municipality may do it in any manner that a natural person could. It is only where a municipal government is granted a power to do by bylaw something that a natural person could not do, that the power must be exercised by bylaw."[10]

This summary of the law has been embraced by other Alberta jurisdictions, as will be seen below. The fundamental problem with this articulation of the line between natural person powers and awesome statutory powers is that it permits natural person powers to run along with statutory powers. That is, natural person powers are not compartmentalised from the more coercive powers municipalities possess. Thus a municipality may purport to mix natural person powers with other powers and provide a thin line to determine when abuse takes place.

A differing conceptualization of the line between natural person powers and other powers was put forward in *1085459 Ontario Ltd. v. Prince Edward County (Municipality)*,[11] where Justice Hackland firmly limited the natural person powers of Prince Edward County. In that case a technology firm challenged the award of a municipal contract to another company. The claim was that the manner in which the tendered contract was set amounted to an illegal bonus prohibited by section 106 of the Municipal Act, 2001. While the case was determined largely on the standing of the applicant and the discretionary nature of the remedy, Justice Hackland made some important determinations on natural person powers.

In the bylaw adopting the challenged agreement with the firm, the County made reference to its natural person powers,[12] implying that it was those powers that authorized the transaction. The County had not followed the legislative framework governing the provision of municipal capital facilities, which governed the agreement in question. In re-

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State or local government may not deny, and shall approve" eligible facilities requests for modification. Providers will likely argue that as to zoning and regulatory practices, they are activities which are already occurring.

Conclusion

The courts will likely hold Section 6409(a) unconstitutional on Federalism, Commerce Clause and "blurring the lines of political accountability" grounds. Municipalities may wish to be careful to preserve their rights, should this occur. ML

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viewing that aspect of the arrangement, Justice Hackland was clear that "[b]ecause.. the Municipal Act... govern[s] agreements such as this for the provision of municipal capital facilities, the other general enabling sections of the Municipal Act do not apply."[13] Those general enabling sections included the natural person powers granted to municipalities.

The line thereby set by Justice Hackland appears to be that if power is governed by specific legislation the natural person powers cannot be used. In Justice Hackland's analysis, if a statutory framework exists, it governs. Such statutory frameworks cannot be augmented or circumvented with natural person powers. This differs from the limit on natural person powers set out by the Alberta Court of Appeal in *Belland*. The line has not yet been firmly set.

Application

The natural person powers were stretched to their limits in *McGowan v. Edmonton (City)*14 which relied on the articulation of the line set out by the Alberta Court of Appeal in *Belland*.[15] That case involved a challenge by a number of union representatives to the vote by the mayor of Edmonton as the sole shareholder of EPCOR to authorize the sale of many of its assets to its subsidiary, Capital Power Corporation. The challenge was to the vote of the shareholder, the City of Edmonton. EPCOR's capital structure is that it has one share, held by the City of Edmonton. A Voting Resolution, adopted by bylaw on June 26, 1995, had set out a voting procedure in which the mayor cast the shareholder vote but was required to exercise that vote in accordance with the majority vote of City Council. A number of grounds for invalidity of the vote were argued, including the inability of council to delegate to itself and the private nature of the vote.

Section 202 of the Municipal Government Act stipulates that when something is to be done by a municipality it must be either done by the council of the municipality or by the municipality's chief administrative officer. Section 203 sets out the limitations on a Council's delegation of power, including that it must be by bylaw and that certain powers cannot be delegated. The contention of the union representatives was that Council cannot by bylaw delegate power to itself to be exercised other than in accordance with the limitations on Council meeting set out in the Act; here, the private nature of the meeting contravened the Act.

Justice Hillier held that in making the shareholder vote the mayor and council were acting pursuant to their natural person powers and that "[i]n the case of natural person powers of the municipality... there has been no deliberation or choice exercised by the legislature so as to impose a similar control in relation to the manner of carrying out those powers."[16] That is, when exercising natural person powers there is less control on a how a council can act. This ignores section 202 of the Act, which specifically mentions natural person powers as those that can only be exercised by council or the chief administrative officer. More concerning, however, are the broader policy consequences of having differing procedural demands for municipal powers and natural person powers. It would clearly be outlandish to permit council to, by bylaw, delegate to itself some policy making power to be exercised in private with abnormal voting procedures. It is equally outlandish to find that self-delegation and abnormal council procedure is permissible when natural person powers are involved. Clearly what can only be done by bylaw, such as establishing a corporation, ought not be natural person powers, unregulated by procedure.

The most blurring of natural person powers and traditional municipal powers has arisen in the field of planning and development. In two notable decisions the interaction between planning powers and natural person powers has come to radically different conclusions.

In *Nowak v. Fort Erie (Town)*[17] a challenge was brought to a Town agreement with a developer in which the Town transferred a piece of land to the developer and the developer agreed to build on that land and provide a number of "municipal benefits". These were based on an agreement permitted in section 37(3) of the Planning Act[18] which states:

Where an owner of land elects to provide facilities, services or matters in return for an increase in the height or density of development, the municipality may require the owner to enter into one or more agreements with the municipality dealing with the facilities, services or matters.

The challenged agreement between the developer and the Town stated that the land was transferred for $2,700,000 but that would not be received in cash but rather as a community pavilion, a beachfront promenade, open space improvements, roads, and parking lot improvements.[19] The challenge was based on the fact that section 37 of the Planning Act does not permit the exchange of land for community benefits, only an increase in height or density. The Town asserted that it was not acting pursuant to the Planning Act, but rather as a natural person under section 9 of the Municipal Act, 2001.

Hainey J. agreed with the Town on this point, stating that municipal powers should be read broadly, that the overall contract was complex and "that the overall contractual arrangement... is *intra vires* the Town's statutory powers under sections 8, 9 and 11 of the Municipal Act, 2001 and section 37 of the Planning Act."[20] Those sections of the Municipal Act, 2001 provide for a broad interpretation of powers (section 8), including the natural person power (section 9), and that the Town may "provide any service or thing that the municipality considers necessary or desirable for the public" (section 11). Thus, Justice Hainey essentially held that the natural person powers and the statutory power in the Planning Act together permitted the arrangement between the parties.

Conflating statutory powers and natural person powers confers broad authority on municipalities. You or I could not increase the height or density permitted on parcel. That can only be done by bylaw, something a natural person cannot do. Permitting a municipality to use that exceptional power as one aspect of a bargaining position turns the municipality into much more than

a natural person. Adding a bargaining chip such as development potential to a natural person negotiation leaves it something other than a natural person transaction. As noted by Justice Cooke in *Bristol Developments (Alberta) Ltd v. Sturgeon (Municipal District No* 90): "It is hard to conceive of more fertile ground for the abuse and oppression of the citizen by the state than to allow that situation to exist where the bargaining positions of the parties are so disparate."[21]

The town of Okotoks in Alberta attempted to add its statutory planning authority to a purportedly private contract. On September 14, 2009 the Town passed a resolution which adopted a form of agreement that all developers would be required to enter into. The agreement stated that the developer would pay to the Town various fees per acre of land being subdivided or developed. The total cost to the developer under the agreement was $23,749 per acre. The agreement expressly stated that the fees imposed were separate from any of the levies and fees permitted pursuant to Part 17, Division 6 of the Municipal Government Act.

One developer, Prairie Community Development Corp., brought a challenge to the resolution adopting the agreement. The developer argued that the agreement was a form of levy not permitted pursuant to the Act. The Town argued that the agreement was not a levy under the Act, but rather an agreement entered into as a natural person. In *Prairie Communities Development Corp. v. Okotoks (Town)* [22] Justice McDonald agreed with the Town, as the agreement was not clearly a condition of subdivision:

The power to voluntarily enter into the Contribution Agreement with developers, under which they agree to contribute to infrastructure and other costs that benefit the Municipality as a whole, is a valid exercise of the Municipality's natural person powers. In my view, the Municipality would only exceed its jurisdiction under the MGA if it seeks to directly or indirectly require developers to enter into the Contribution Agreement as a condition of obtaining a development permit or subdivision approval." [23]

The developer appealed to the Alberta Court of Appeal.[24] Justice O'Brien, writing for a unanimous Court, reversed Justice McDonald, holding that natural person powers do not extend as far as the Town purported. The Court noted that the core issue with respect to the agreement was the extent to which the agreement was voluntary. Justice O'Brien wrote: "in my view, the collection of levies by way of contract does not fit comfortably with voluntary contributions."[25] After reviewing a great deal of evidence showing the Town's intent to collect the levies in the agreement the Court concluded that such agreements were required for developers to develop land in the Town, concluding: "Natural persons have no powers to issue subdivision or development approvals. Here, the Town is exercising its municipal powers which are restricted by the MGA."[26]

Conclusions

Natural person powers for municipalities are useful as they provide municipalities with a "basket of rights"[27] that allows broad actions. There is also little if any harm in municipalities engaging in natural person activities, such as entering into contracts, on a day to day basis. The danger comes when those broad powers are combined with the many unique powers that municipalities possess. It is difficult to consider a municipality to be acting as a natural person in a contract when it is offering up development rights, taxing powers or other special powers in negotiation. The difficulty that the jurisprudence has had to date is finding the proper limit for natural person powers.

It seems to this author that a firm line, such as that set out in *1085459 Ontario Ltd. v. Prince Edward County (Municipality)*, would be the best one to avoid abuse. That is, if the subject matter at issue is governed by statute, either in granting power or establishing a limited procedure, the natural person powers do not apply. This is in line with the desire of the Alberta Legislature that natural person powers not be used to expand power. Such a limit is also in line with the statutory limits needed on the exercise of awesome powers.

Municipal corporations can do more than you or I. We should at least get more freedom.

1. See, for instance: Community Charter, S.B.C. 2003, c. 26, s. 8(1); Municipal Government Act, R.S.A. 2000, c. M-26, s. 6; The Municipalities Act, S.S. 2005, c. M-36.1, s. 4(3); and Municipal Act, 2001, S.O. 2001, c. 25, s. 9
2. C.J. Williams & J. Mascarin, Ontario Municipal Act 2001 and Commentary (Toronto: Butterworth's Canada Ltd., 2002) at 40
3. St. Paul (County) No. 19 v. Belland, 2006 ABCA 55 at para. 11
4. Alberta, Legislative Assembly, Official Report of Debates (Hansard), 23 Leg, 2nd Sess, (10 May 1994) at 1854 (Judy Gordon)
5. Alberta, Legislative Assembly, Official Report of Debates (Hansard), 23 Leg, 2nd Sess, (9 May 1994) at 1775 (Judy Gordon)
6. [1994] 1 S.C.R. 231, at pp. 244-45.
7. United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), 2004 SCC 19, [2004] 1 S.C.R. 485 at para. 6
8. Supra, note 3
9. St. Paul (County) No. 19 v. Belland, supra note 3 at para. 28. It should be noted that this is a statutory remedy and that it is not open to a natural person to use the civil remedy of an injunction to enforce a breach of a quasi-criminal law, see Reece v. Edmonton (City), 2011 ABCA 238.
10. St. Paul (County) No. 19 v. Belland, supra note 3 at para. 15
11. (2005), 77 OR (3d) 114
12. 1085459 Ontario Ltd. v. Prince Edward County (Municipality), supra note 11 at para. 22
13. 1085459 Ontario Ltd. v. Prince Edward County (Municipality), supra note 11 at para. 18
14. 2009 ABQB 560, [2009] 12 WWR 709, 13 Alta LR (5th) 143
15. McGowan v. Edmonton (City), supra note 14 at para. 38
16. McGowan v. Edmonton (City), supra note 14 at para. 45
17. 2012 ONSC 2152
18. R.S.O. 1990, c. P-13
19. Nowak v. Fort Erie (Town), supra note 17 at para. 11
20. Nowak v. Fort Erie (Town), supra note 17 at para. 23
21. [1992] AJ 1458 at para. 7
22. 2010 ABQB 359
23. Prairie Communities Development Corp. v. Okotoks (Town), supra note 22 at para. 63
24. Prairie Communities Development Corp. v. Okotoks (Town), 2011 ABCA 315
25. Prairie Communities Development Corp. v. Okotoks (Town), supra note 24 at para. 29 [emphasis in the original]
26. Prairie Communities Development Corp. v. Okotoks (Town), supra note 24 at para. 51
27. McGowan v. Edmonton (City), supra note 14 at para. 47