

National Issues in Municipal Law

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Is "National Municipal" some kind of contradiction in terms? As a member of the Executive of the National Municipal Law Section of the Canadian Bar Association, I've been asked that question a few times. While generally speaking it's true that municipal law issues are particular to provinces, there are some municipal law issues that transcend provincial boundaries. Often this results from the operation of federal legislation, like the Aeronautics Act, that impinges on municipal powers right across the country. After a particularly informative round-table discussion during our last National MLS conference call, I thought some commentary on the potpourri of issues that my colleagues are dealing with in the other time zones would be worthwhile. (Surprisingly, Health Canada's medical marihuana production licensing program didn't come up!)

Council Prayer

Earlier this year the Supreme Court of Canada ordered the City of Saguenay, Quebec and its mayor to cease reciting a prayer prior to the commencement of council meetings and to pay to the citizen who challenged the validity of the bylaw that required the prayer $15,000 in compensatory damages and $15,000 in punitive damages for discriminatory interference with his freedom of conscience and religion. While the decision was based on the Quebec *Charter of Rights and Freedoms,* it's generally believed that the same result would flow from the *Canadian Charter of Rights and Freedoms,* and those municipal councils across the country that had not yet abandoned this practice have been doing so, reluctantly it seems in some cases. A Saskatchewan municipal lawyer commented that he had just attended a council meeting preceded by the usual prayer, but recited without explicit references to any particular deity – a manoeuver that I think few of us considered a fulsome response to the SCC decision, given that the complainant in the Saguenay case was an atheist. The Quebec lawyer on the call indicated that the *Saguenay* decision had caused little municipal angst in Quebec, and placed that non-reaction within the broader context of the electorate's rejection of the PQ "Charter of Values" in the last provincial election-the common theme being religious neutrality on the part of the state.

Historically, the purpose of prayers recited at the commencement of legislative deliberations at all levels has been to obtain, or at least solicit, the assistance of a higher power in reaching wise decisions. While there are likely a few council procedure bylaws in BC that still call for the recitation of a Christian prayer at the beginning of the meeting, most such bylaws were amended well before the *Saguenay* decision. In view of the Supreme Court's decision on council prayer, the prudent course for those local governments who wish to enable elected officials to seek this type of assistance in their deliberations would be to allow a few moments of silence so that they may do so privately. Other members who prefer to rely entirely on their own judgment in legislative matters may use this private time to silently rehearse their speeches, or check out who's in the public gallery.

Prostitution

Last November, Royal Assent was given to Bill C-36, the federal government's response to the Supreme Court's decision in *Canada {Attorney General) v. Bedford,* the case that dealt with the constitutionality of *Criminal Code* provisions related to prostitution. The Court held that laws, prohibiting keeping a brothel, living on the avails of prostitution, and communicating in public for purposes of prostitution placed sex workers in significant danger and thereby infringed on their right to security of the person under the *Charter of Rights and Freedoms.* The overriding principle behind Bill C-36 is that prostitution is a form of sexual exploitation that needs to be eliminated from Canadian society entirely, and its centrepiece is the criminalization of the purchase (but not the sale) of sexual services-essentially, cutting off the demand for these services. The Canadian Bar Association made submissions to the government last fall, criticizing aspects of Bill C-36 that in its members' view continued to suffer from the same constitutional defects as the legislation it was replacing. Other critics of the Bill have argued that sex workers will not truly be safe until they can provide sexual services legally, in licensed brothels.

Sex work has not historically been subject to overt local government regulation in Canada, but it's likely that local governments could come into the regulatory picture by virtue of their longstanding jurisdiction over land use and business regulation. For example, in a paper published in 2013 by the Canadian Women's Foundation on "Sex Trafficking" laws, the authors note that in New South Wales, "responsibility for regulating the industry lies with municipalities who use a range of licensing and business and zoning bylaws and apply occupational health and safety codes and inspections". In Christchurch, New Zealand, the Christchurch City Council Brothels (Location and Commercial Sexual Services Signage) Bylaw has been enacted to "restrict the location of brothels to certain parts of the district, with no restriction on the location of small owner-operated brothels," "provide for specified existing brothels to remain in their current locations," and "control signage that advertises commercial services that is in, or visible from, a public place".

The bylaw, including maps of "brothel allowed areas" and the addresses of existing and therefore lawfully non-conforming brothels, can be reviewed on the Christchurch City Council website.

Sales Tax Revenue Sharing

The use of provincial sales tax revenue to fund regional transit infrastructure is currently before the court of public opinion in the TransLink referendum. If voters approve, the Province might enact legislation temporarily increasing the provincial sales tax in Metro Vancouver by ½ of 1% to fund a specific list of regional transit improvements costing around $7.5 billion. This is the first time that the use of sales tax revenue to fund local infrastructure has been under serious consideration in British Columbia. In U.S. jurisdictions, local sales taxes contribute heavily to municipal revenues, and I was surprised to learn from a member of the municipal bar in Saskatchewan that his province has for some time been earmarking for its municipalities a significant share (currently 1/5 of about $1.4 billion) of provincial sales tax revenues. This is equivalent to a 1% municipal sales tax. In the period leading up to the release of the most recent provincial budget, the prospect of a provincial claw-back of this revenue had been raised, but in the end the Province decided to leave the revenue sharing formula undisturbed. It's probably just a matter of time before municipal sales taxes are debated generally in BC, given the limitations of the property tax system, and the real question may be whether the Province will, like Saskatchewan, be willing to vacate tax room in favour of the municipalities to which it has steadily been devoting responsibility to provide government services, or insist (as in the TransLink initiative) that any sales tax for local purposes be incremental to the existing provincial sales tax rate.

PILT

Another point of financial contact between senior and local governments, that seems to cause more friction in the eastern part of the country, is federal payments in lieu of property taxes (PILT). Likely this is because a greater number of federal institutions are located in Ontario and eastward, than in the west, though there are federal installations such as Canadian military bases and lands, and airports, in the west as well. A long-running dispute between the federal Minister of Public Works and Halifax Regional Municipality over the valuation of the Halifax Citadel National Historic Site for the purposes of PILT is nearing its conclusion, and will likely have significant consequences across the country. Canada unilaterally reduced the assessed value of the property for PILT purposes about 20 years ago from $20 million to $5.25 million, abandoning its previous practice of following the assessment determined by the provincial assessment authority. HRM exercised appeal rights under the federal *Payment in Lieu of Taxes Act,* culminating in a successful 2011 appeal to the Supreme Court of Canada which ordered the federal officials to make a proper value determination. A dispute advisory panel convened under the federal Act has recently made a recommendation to the Minister of Public Works on the resolution of the dispute between Public Works and HRM on the value of the property, and the municipality awaits the Minister's decision. Principles established in the Citadel litigation, meanwhile, will inform the Administration of the *Payment in Lieu of Taxes Act* throughout the country.

The Continuing Saga of Mayor Ford

For those who have been missing their regular media reports on the activities of Toronto ex mayor Rob Ford, there is now available on the website of the Ontario Ombudsman an April 2015 report entitled "An Investigation into Toronto City Hall Security." To give the flavour of the incidents that led to the Ombudsman preparing this report, the summary notes the following (under the heading "Security Guard or Bodyguard"):

> *Security had a practice of assigning escorts on a rotating basis. Over time, the Mayor's office began asking for a particular guard, who was soon publicly identified as the Mayor's security guard. Security did not enforce the existing practice, as they did not want to say no to the Mayor.*

The mayor to whom the security staff did not want to say "no" was, of course, Mayor Ford. The Ford era's demands on Toronto civic staff in various fields were without precedent, and are unlikely to be duplicated; few municipal solicitors, for example, are likely to have their in-council advice filmed and broadcast on the CBC National News. Toronto's City Manager in his response to the Ombudsman's report referred discreetly to the Ford era as an "unprecedented time". We have in our practice come across situations where elected officials have lost sight (though perhaps in a less spectacular way) of the fact that civic staff are there to perform public functions only, and not to perform political functions for members of council. Thus the Ontario Ombudsman's key recommendation, "that Security ensure its personnel are properly subject to management's direction and not that of elected officials," is a useful reminder to local governments throughout Canada.

CMBs

An issue of national scale that we *didn't* have time to discuss during the call is Canada Post's "community mailbox" program. As this program penetrates into urban areas, new conflicts are arising with municipalities regarding locations and physical standards for these facilities and the related roadway improvements. The City of Hamilton has recently passed a highway use bylaw (No. 15-091, for those who'd like to take a look online) that effectively establishes a moratorium on these installations, provoking Canada Post into an application to the Ontario Superior Court to quash the bylaw. While regulations under the *Canada Post Corporation Act* clearly authorize Canada Post to install mail receptacles on public highways, it is not at all clear that the federal government's exclusive jurisdiction over the postal service entitles the corporation to do so without obtaining municipal highway use permits, without complying with municipal location criteria for such facilities, or without complying with municipal standards as regards the lay-bys and parking areas that are required to allow safe and convenient access to the mailboxes. The outcome of the Hamilton case will therefore be of great interest to municipalities across Canada. ML