Zoning By-laws: Human Rights and *Charter* Considerations Respecting the Regulation of the Use of Land

by Signe Leisk



Since the Supreme Court of Canada's 1979 decision in *Bell v. Her Majesty the Queen*,[1] municipalities have grappled with the issue of regulating the use of land and not the user. *Bell* is often cited for the principle that a municipality cannot "people zone," and, while no one disputes this premise, the difficulty arises where the use of land, by particular groups or for short durations, causes or is perceived to cause, external impacts of incompatible land uses which zoning is meant to avoid. These concerns often arise as a result of the shared use of dwellings by students in and around campuses, a concentration of social service uses, or short-term rentals in resort communities. The case law across Canada has been inconsistent, making it difficult for municipalities to effectively draft or enforce their by-laws. The courts have also made it clear that human rights codes and the *Canadian Charter of Rights and Freedoms*[2] must be considered in enacting zoning by-laws that may impact particular groups of persons.

A review of the cases across Canada demonstrates that such zoning by-laws are increasingly scrutinized by tribunals and the courts. In enacting such laws, a municipality needs to ensure that its by-law is passed for a proper planning purpose, and that there is sufficient information to support the reasonableness of the law in light of human rights codes and to justify any potential infringement of rights pursuant to s. 1 of the *Charter*.[3]

The Discriminatory Nature of Zoning

Any discussion of human rights and *Charter* considerations in zoning needs to begin from the perspective that zoning by-laws are, by their very nature, discriminatory. Establishing a particular land use zone creates a distinction—uses that will be permitted within the zone and those that will not. Such distinctions will have varying impacts on land owners and particular user groups.

In considering the appropriateness of a zoning by-law's distinctions, the overriding consideration should be its purpose. Generally, the purpose of the zoning power is to prevent nuisances and the physical interference with land by ensuring that adjacent land uses are compatible. In evaluating a zoning by-law, the first step should be to consider the purpose behind its provisions and whether this comports with legitimate land-use planning objectives. While this may seem a basic principle, this analysis has not always been undertaken by the courts.

Bell's "User v. Use"

In *Bell*, the applicable zoning by-law restricted the occupancy of a "dwelling unit" in certain zones to a single individual or a "family," defined by reference to consanguinity, marriage, and adoption.[4] Douglas Bell lived with two individuals who were not related to him by blood, marriage, or adoption, and was convicted of a violation of the by-law. In striking down the restriction, the Supreme Court of Canada held, in a 3-2 decision, that the "legislature never intended to give authority to make such rules and the device of zoning by reference to the relationship of occupants rather than the use of the building is one which is *ultra vires* of the municipality under the *Planning Act*."[5]

In support, the majority of the Court noted the prohibitive effect of the by-law in precluding the sharing of accommodation by adult persons unrelated by blood or marriage, mentioning college students as one of the many examples.[6] What the Court did not do was assess the municipal purpose in so restricting the allowable use of a dwelling unit. Although no one argues with the Court's basic premise—zoning the use of land rather than

its users—this lack of analysis means the decision provides insufficient guidance. Many cases that have followed *Bell* simply refer to the "user vs. use" distinction on the face of the by-law, without further elaboration.

However, municipalities can discourage or encourage uses without reference to "users" by framing restrictions in terms of unit size, number of rooms per unit, minimum lot size, and frontage. Merely looking at the words of a zoning by-law may not be sufficient, absent a consideration of the zoning regulation's purpose. A good example is zoning for retirement residences or retirement communities. Applying *Bell* on its face, any provision restricting the use of land to those over a particular age would be considered zoning the "user." However, there may be proper planning reasons for such a distinction, including the need to assess a demand for parks and schools.

The Subsequent Application of *Bell*

Following *Bell*, the Ontario Superior considered the validity of a zoning by-law that contained a definition of "family" in *Smith v. Township of Tiny*.[7] The definition in this case was broader than that in *Bell*, and included persons living together who were not related.[8] The court found that a restriction based upon a definition of "family" which incorporated most types of arrangements usual for people living together as a simple housekeeping unit was neither unreasonable nor discriminatory, nor did it constitute zoning based on the relationship of the occupants. The by-law was therefore upheld. The British Columbia Court of Appeal followed this reasoning in similar circumstances in the case of *Faminow v. North Vancouver (District)*.[9]

In the 2006 British Columbia Court of Appeal case, *Greater Victoria School District No. 61 v. Oak Bay (District)*,[10] the court considered a by-law that restricted the use of land to "civic use," defined as "a use providing for public functions under the auspices of a government body."[11] Citing *Bell*, the applicant asserted that the by-law was discriminatory because it drew a distinction between users. The court agreed, finding that the distinction between public and non-public use of land amounted to a distinction based on the "user," and severed the discriminatory portion of the by-law.

In Ontario, the decision in *Bell* has been considered several times by the Ontario Municipal Board, which hears appeals of zoning by-laws and other planning instruments across Ontario. In *Haydon Youth Services v. Kearney (Town)*,[12] the Board considered a by-law governing a facility that functioned as a group home for young offenders and youths with behavioural problems. After residents lobbied the city council, the by-law was amended to exclude young offenders, and to reduce the number of permitted residents from ten to four. On appeal, the Board held that the actions taken by the council were reasonable given the size and nature of the community and the level of services that the community had available. In considering the issue of "people zoning," the Board reiterated that zoning was, by its nature, discriminatory and, since planning was for people, "certain basic services must be available to serve the needs of those people, however you define them."[13]

Consideration of potential "people zoning" has often arisen respecting by-laws regulating tourist accommodation: *Canmore Property Management Inc v. Canmore (Town)*,[14] *Whistler (Resort Municipality) v. Miller*,[15] and *Whistler (Resort Municipality) v. Wright*.[16] In all of these cases, the by-laws zoned the buildings for long-term, residential use in the style of traditional single-family accommodation, though with broad definitions of what constituted a single "family." In each case, the courts rejected the applicants' arguments, finding, in line with *Smith*, that the by-laws regulated the use of land and not the users. Most recently, the Ontario Municipal Board decision of *Re Rosen*[17] upheld an interim control by-law that prohibited short-term accommodation use in a resort community, the Town of Blue Mountains. The by-law was challenged as "people zoning" that discriminated on the basis of income and place of origin, contrary to the Ontario *Human Rights Code*[18] and the *Charter*. The Board confirmed that it was bound by the *Code* and the *Charter*, but stated that several cases and many statutes distinguished between transient living and permanent accommodation, and that the municipality had acted within its authority in distinguishing between short-term accommodations and permanent dwellings. The proposed zoning by-law was held by the Board to be a "legitimate exercise of authority to zone for differing levels of use intensity and differing needs for municipal services."[19]

Another Ontario case that considered *Bell* is *Neighbourhoods of Windfields Ltd. Partnership v. Death*.[20] The City of Oshawa and a developer brought an application against homeowners who rented dwellings to post-secondary students, claiming that the use of the dwellings was not use as a "single housekeeping establishment," and contrary to the City's by-law.[21] The court ruled that the proper approach to interpreting a zoning by-law was one that took into account the words used, the intent of the council, and the purpose and scheme of the by-law as a whole. A single housekeeping establishment "would generally approximate a typical family group of one or two adult persons, together with minor or adult children or a similar social unit either by relationship or some other common bond for living together as a housekeeping establishment," but not short-term, temporary sleeping quarters and shared-facilities rentals by students.[22] The court considered prior case law, as well as the Ontario *Plan-*

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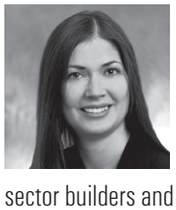

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ning Act (which prohibits zoning by-laws from distinguishing "persons who are related and persons who are unrelated in respect of the occupancy or use of a building"[23]). It concluded that it was lawful to zone so that the use of premises was "in accord with that which would typically occur in 'single family dwellings' provided the definition of 'family' [was] broad enough to include some unrelated persons."[24] Dismissing the appeal, the Ontario Court of Appeal held that the *Planning Act* prohibition did not prevent the court from considering, as a relevant factor, how the renters related amongst themselves.[25]

While this case seemingly broadened the ability of municipalities to consider the relationship between occupants in enforcing zoning by-laws (although arguably, not in passing such by-laws) it raises concerns as to *how* by-law enforcement officers or zoning examiners will evaluate the "relationship" between the occupants to determine whether a zoning by-law is being complied with.

Human Rights & *Charter* Considerations

Although the *Code* and the *Charter* were not argued in *Windfields*, the Ontario Human Rights Commission sought intervener status upon the application for leave to appeal to the Supreme Court of Canada, on the basis that the case concerned, at its core, access to housing, and that the effect of the decision was to limit housing choices for students. Although leave to appeal was not granted, the Commission continues to monitor zoning by-laws across Ontario, warning that zoning definitions that restrict the occupants of housing can have the effect of discriminating against *Code*-protected groups.

In *Alcoholism Foundation of Manitoba* v. *City of Winnipeg*,[26] the Manitoba Court of Appeal considered a *Charter* challenge to a group home by-law which required the disabled, the aged, and victims of drug or alcohol abuse to apply for permission to live together as a group or family. Although the by-law was found to be consistent with provincial legislation and the municipal zoning power, it was found to be contrary to s.15 of the *Charter*.[27] While a municipality had the right to protect "the neighbourhood integrity of its various districts," the court held that the by-law was an unjustified, differential treatment of disadvantaged groups,[28] and the City failed to present any evidence justifying this infringement under s. 1 of the *Charter*. The court held that the by-law amounted to objectionable and discriminatory "people zoning"—directly linking this concept and the *Charter*.[29]

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Subsequently, a British Columbia court heard a *Charter* challenge to a zoning by-law that restricted, in single-family residential areas, the use of secondary suites to only persons related to the homeowner: *Tenants' Rights Action Coalition* v. *Delta (Corporation)*.[30] The applicants challenged the by-law as unauthorized discrimination (in the municipal sense) and contrary to the *Charter*. Referring to the *Smith* case (a restriction on use based on a definition of "family" did not constitute discrimination), the court noted that *Smith* predated subsequent developments in human rights legislation and the *Charter*. However, as the court found the bylaw constituted unlawful discrimination in the municipal law sense (i.e., not authorized by the enabling statute), it declined to consider the *Charter* arguments.[31]

In *Congrégation des témoins de Jéhovah de St.Jérôme-Lafontaine* v. *Lafontaine (Village)*,[32] the Supreme Court of Canada considered whether the municipality's decision not to amend its zoning by-law to allow a religious group to build a place of worship infringed the right to freedom of religion guaranteed by the *Charter*. The municipality had repeatedly, without reasons, rejected rezoning requests from a congregation of Jehovah's Witnesses to allow it to build on different properties. The majority decision focused on a municipality's duty of procedural fairness and held that this duty had been breached, sending the application back to the municipality for reconsideration. As a result, the majority did not consider the constitutional questions, although the three of the four dissenting judges did. They agreed that a violation of the *Charter* had not been established, but their reasons provide some guidance on the application of the *Charter* to zoning by-laws. The dissent reasoned that a municipality was required to be neutral in matters of religion, and its by-laws had to be structured in such a way as to avoid placing unnecessary obstacles in the way of the exercise of religious freedoms.[33] For example, where there was no land available in a zone that permitted a place of worship, a municipality's refusal to amend its zoning by-law would constitute an infringement of an applicant's freedom of religion. The infringement would not result from the existence of the zoning by-law, but from "the refusal to adapt it to evolving community needs in a situation in which no land was available in the zone set aside for the establishment of places of worship."[34] What is most surprising about this analysis is the lack of discussion of land use planning issues.

In *Kitchener (City) Official Plan Amendment No. 58*,[35] the Ontario Municipal Board issued an interim decision in an appeal against an official plan amendment and zoning by-law amendment enacted by the City of Kitchener for its Cedar Hill area. Almost 20% of Cedar Hill's residents were persons with disabilities or persons in receipt of public assistance. The City was concerned about the area's over-concentration of single-person, low-income households, residential care facilities, and social/

supportive housing, and sought to decentralize these facilities and encourage a greater neighbourhood mix. The Board held that, before the City could enact measures in its official plan and zoning by-law to restrict housing for persons with disabilities or on public assistance, it would need to supply the relevant planning analysis, including a consideration of "people zoning" and human rights and *Charter* dimensions. The Board emphasized that *Bell* was not confined to consideration of "relationships" but with all "personal qualification of this type or other personal characteristics or qualities."[36] While the Board was not satisfied that there was a sufficient assessment or rationale to demonstrate that being in a "single-person, low-income household" (the characteristics targeted by the enactments) was not "people zoning," it gave the City and Region more time to address this issue.

The Board considered the purpose of the amendments to limit the number of neighbourhood residents who fell within certain identifiable groups. The *Human Rights Code* would appear to prohibit a by-law or planning instrument that had a discriminatory effect, subject to the defence of "reasonableness and bona fide under the circumstances."[37] The Board stated that a municipality which sought to justify the imposition of a discriminatory standard might be expected to establish that it had made real and meaningful efforts to accommodate the needs of persons adversely affected by that standard, or had explored less discriminatory approaches to achieving the objective.[38]

Lessons Learned

Courts across Canada have made it clear that any consideration of a zoning by-law that impacts particular groups in a community will need to address the applicable human rights codes and the *Charter*. What can be gleaned from the case law is that any municipality considering the enactment of such a by-law should consider its provisions from three separate, although related, perspectives: Is the zoning regulation being passed for a proper planning purpose, taking into consideration the purpose of zoning by-laws to prevent nuisances, and to address planning concerns (such as density, servicing, and parking)? If the by-law may impact certain *Code*-protected groups, is the by-law reasonable and bona fide in the circumstances? If the by-law may infringe a right guaranteed by the *Charter*, has there been sufficient analysis to support the infringement under s. 1 of the *Charter*? While the treatment of a by-law by the courts may be less than predictable, in this way a municipality can ensure that an adequate evidentiary basis exists to support its zoning by-law in the event of challenge.

Notes

1. [1979] 2 S.C.R. 212 (Can.).
2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, c. 11 (U.K.) (hereinafter "*Charter*").
3. Section 1 guarantees the rights and freedoms set out in the *Charter* "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." *Id.*
4. [1979] 2 S.C.R. at 215.
5. *Id.* at 223.
6. *Id.* at 221, citing the reasons of Estey, C.J.H.C., in the Ontario Divisional Court.
7. 1980 CarwellOnt 489, 12 M.P.L.R. 141; *aff'd* 29 O.R. (2d) 661 (Ont. H. Ct. J.); leave to appeal refused (1980), 29 O.R. (2d) 661n (Ont. C.A.).
8. "Family" was defined as "one or more human beings related by blood or marriage, or common law marriage or a group of not more than three human beings who need not be related by blood or marriage, living together as a single housekeeping unit," and included "not more than two roomers or boarders." 27 O.R. (2d) 690, 691-92.
9. 1988 CarswellBC 78, 24 B.C.L.R. (2d) 49 (B.C.C.A.).
10. 2006 CarswellBC 91, 2006 BCCA 28 (B.C.C.A.).
11. 2006 BCCA 28 at para. 2.
12. 1997 CarswellOnt 5666, 36 O.M.B.R. 124 (O.M.B.).
13. *Id.* at para. 17.
14. 2000 CarswellAlta 1066, 273 A.R. 63 (Alta. Q.B.).
15. 2001 CarswellBC 80, 2001 BCSC 100 (B.C.S.C.); leave to appeal dismissed, 2002 CarswellBC 1558 (B.C.C.A.).
16. 2003 CarswellBC 1907, 2003 BCSC 1192 (B.C.S.C.).
17. 2011 CarswellOnt 5300 (O.M.B.).
18. R.S.O. 1990, c. H.19.
19. 2011 CarswellOnt 5300 at para. 25 (O.M.B.).
20. 2008 CarswellOnt 5025, 48 M.P.L.R. (4th) 183 (Ont. Sup. Ct. J.); *aff'd* 2009 ONCA 277 (Ont. C.A.); leave to appeal to S.C.C. dismissed, [2009] S.C.C.A. No. 253 (S.C.C.).
21. The zoning bylaw specifically addressed "lodging house" and "lodging unit" uses and these were prohibited in the R1 zone at issue.
22. 2008 CarswellOnt 5025 at para. 59.
23. R.S.O. 1990, c. P.13, s. 35(2).
24. 2008 CarswellOnt 5025 at para. 61.
25. *The Neighbourhoods of Windfields Limited Partnership v. Death*, 2009 ONCA 277 (Ont. C.A.) ("In particular, we reject the submission that s. 35(2) of the *Planning Act* which prohibits 'distinguishing persons who are related and persons who are unrelated in respect of the occupancy or use of a building' barred the application judge from considering as a relevant factor how the renters related amongst themselves when determining whether they constituted a 'single housekeeping establishment'"). *Id.* at para. 4.
26. (1990), 69 D.L.R. (4th) 697 (Man. C.A.).
27. Section 15.(1) reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."
28. (1990), 69 D.L.R. (4th) at para. 41.
29. *Id.* at para. 48.
30. (1997), 151 D.L.R. (4th) 729 (B.C.C.A.).
31. *Id.* at paras. 54, 62, 63.
32. [2004] 2 S.C.R. 650 (Can.).
33. *Id.* at para. 71 (dissenting opinion of Mr. Justice LeBel, joined by Justices Bastarache and Deschamps).
34. *Id.* at para. 75.
35. [2010] O.M.B.D. No. 666 (O. M. B.).
36. *Id.* at para. 119.
37. *Id.* at para. 144.
38. *Id.* ML