

That Doggy in the Window—Retail Pet Sale Bans in Canada

by Sophia M. Stadnyk, Senior Associate Counsel

On April 30, 2011, the first Canadian bylaw prohibiting the sale of dogs and puppies in retail stores came into effect. The bylaw, enacted by the City of Richmond, British Columbia (a suburb of Vancouver), was passed as an amendment to the Business Regulation Bylaw No. 7538 by adding "Canidae... including puppies and dogs" to the list of prohibited animals that could not be sold by pet stores. Dog sales were still permitted by the breeders of dogs and commercial dog kennels. The purpose of the amendment was to improve the condition of dogs sold as pets in the City, and to reduce the number of unwanted and abandoned dogs.[1] According to the Richmond Animal Protection Society, which operates the City's animal shelter, more than half of dogs adopted in 2007 and 2008 were purebreds, with more than a quarter being under a year old.

Prior to the adoption of the bylaw, Richmond received two petitions: one supporting a ban on the sale of *all* animals in pet stores, with some 2,160 signatures; the other opposing a ban on the sale of dogs, with approximately 1,174 signatures.[2] Council also heard submissions from various groups and entities, including Paul McGrath of the Pet Industry Joint Advisory Council of Canada (PIJAC), who spoke in opposition to the bylaw. According to the Council minutes, he expressed "his belief that the proposed ban would 'drag the puppy mill industry even further underground', making it easier for the continuance of substandard dog breeding conditions. He said that pet stores were a reputable source for buying pets, and that the proposed ban would allow people to obtain dogs from unlicensed and unregulated sources."[3]

After the bylaw was passed but before it came into effect, it was challenged by three pet stores licensed to do business in the City, and which sold dogs. They sought an order quashing the bylaw on the basis that was void and *ultra vires* the powers conferred on the City "on the grounds that the decision to enact it was made on a specious, wholly inadequate factual basis, improperly motivated, enacted in bad faith, discriminatory, contrary to the municipal purposes authorized by the *Community Charter*, [S.B.C. 2003, c. 26] and completely unreasonable."[4]

In a decision, *International Bio Research v. Richmond (City)*, dated April 15, 2011, Mr. Justice Savage of the B.C. Supreme Court upheld the bylaw. Examining the source of the City's authority to regulate the sale of dogs, he found two broad provisions in the *Community Charter*: a council could, by bylaw, "regulate, prohibit and impose requirements in relation to ... animals," (s. 8(3)(k)) and had the power to, "by bylaw, regulate in relation to business" (s. 8(6)). "Regulate" was broadly defined; further, the *Community Charter* specifically directed that the powers of municipalities "must be interpreted broadly in accordance with the purposes of [the *Community Charter* and the *Local Government Act*] and in accordance with municipal purposes" (s. 4(1)).

The court determined that the bylaw fell clearly within Council's authority to regulate animals, and, although the power to regulate in relation to business was more restrictive than the power to regulate or prohibit in relation to animals, the "[m]unicipal regulation of the conduct of business, including prohibiting certain types of transactions, is an established aspect of valid business regulation."[5] The bylaw was lawfully enacted pursuant to the power to regulate businesses that sold pets and pet supplies and did not prohibit such businesses. It was, therefore, within Council's jurisdiction and *intra vires*.

On the issue of whether the bylaw was passed for a valid municipal purpose, the court held it was: the evidence supported a finding that the Council passed the bylaw based on its conclusion that a ban on retail store sales of dogs would both reduce the number of unwanted or abandoned animals, and improve conditions for dogs that were sold as pets. The applicants, the court noted, did not seriously dispute this characterization of the bylaw's purpose.

The pet stores argued that the information before Council could not support that either of the purposes advanced would be a reasonable consequence of passing the bylaw. Adjudicating on the information before Council and the decision-making process was not, however, something that the court was prepared to do: "the effectiveness of legislation is not something that can be measured *a priori*," and "the wisdom" of a council decision was not a matter for the court to reconsider.[6] The only question for the court was whether there was a rational connection between the bylaw and its valid municipal purpose, and here, there was. Moreover, Council's decision was on a "policy laden topic on which there [was] no established 'right or wrong in the matter.'"[7]

The discrimination argument (that other sales were permitted, by kennels and breeders, thus the bylaw did not "capture" all of the problems related to dog sales) was rejected as well. The City was authorized to make distinctions between businesses and classes of business, and the distinction was based on the perception that impulse pur-

continued on page 38

Supreme Court

cont'd from page 23

it was obtained with evidence procured in violation of the Fourth Amendment.

The issue now comes before the U.S. Supreme Court. In addition to the question presented by the petition for certiorari (whether the warrantless use of a tracking device on Jones's vehicle to monitor its movements on public streets violated the Fourth Amendment), the parties were directed to brief and argue the following question: "Whether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent." ML

Inside Canada

cont'd from page 28

chases, with little wait time or screening, were most likely to occur at retail pet stores. "Requiring owners to put additional thought and preparation into their decision to purchase a dog is rationally connected to reducing unwanted dogs in the city."[8]

Other Canadian cities are now looking at enacting similar restrictions.

Notes

1. *International Bio Research v. Richmond (City)*, 2011 BCSC 471, at para. 16 (B.C.S.C. Apr. 15, 2011).
2. *Id.* at para. 6.
3. Council Minutes, Nov. 08, 2010, at para. 3, available at http://www.richmond.ca/cityhall/council/agendas/council/2010/110810_minutes.htm.
4. *International Bio Research*, at para. 3.
5. *Id.* at para. 37.
6. *Id.* at paras. 56,57.
7. *Id.* at para. 83.
8. *Id.* at para. 77. ML

Second Look

cont'd from page 30

4. Advisory Committee Notes, Fed. R. Evid. 502(d).
5. For an example of a motion seeking a Rule 502(d) order, *see* City of Dallas' Motion for Entry of Order Protecting Privileges from Waiver with Supporting Brief, *United States. v. Don Hill*, Crim. Action No. 3:07-CR-289-M (N.D. Tex. Aug. 5, 2009), ECF No. 929; and for an example of a Rule 502(d) order, see Order Granting Motion for Entry of a Protective Order as to City of Dallas, *United States v. Don Hill*, *supra* (N.D. Tex. Aug. 14, 2009), ECF No. 934, which provides in pertinent part:

> The motion is GRANTED, and it is hereby ORDERED that pursuant to Federal Rule of Evidence 502(d) and the Court's inherent powers, no privilege or protection for communications or other information claimed as privileged by the City of Dallas, Texas, is waived by disclosure connected with the litigation pending in this case, and that any such disclosure is also not a waiver in any other Federal or State proceeding.

Note that Dallas had to seek relief under common law and inherent powers to protect privileges beyond attorney-client and work product because Rule 502 is limited to protecting only those two privileges. The City's main additional concern was to protect the legislative deliberative privilege for City Council discussions. ML

List Serv

cont'd from page 32

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Federal

cont'd from page 18

have deterred broadband deployment or adoption, or that they will do so in the future. If the FCC has genuinely not pre-judged these issues, it should have little trouble concluding that its time and resources are better spent elsewhere. But, if the FCC cannot appreciate the evidence we have placed before them, we are fully prepared to visit the matter with higher authorities such as the Congress, the courts and the people of America—the real owners of the rights-of-way.

Jay Doegey is IMLA's President-Elect and City Attorney of Arlington, Texas. Gerry Lederer is Of Counsel with the law firm of Best Best & Krieger (incorporating the practice of Miller & Van Eaton) and a proud IMLA member. Best Best & Krieger has been honored to assist IMLA in assembling and serving as counsel to the local government coalition.

Notes

1. *In re Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, FCC 11-51 (Apr. 7, 2011).
2. The coalition's members, in addition to IMLA, include: The National League of Cities, National Association of Counties, United States Conference of Mayors, National Association of Telecommunications Officers and Advisors, Government Finance Officers Association, International City/County Managers Association, and the American Public Works Association.
3. *Seventh Broadband Progress Report and Order on Reconsideration* (GN 10-59), dissenting Statement of Commissioner Robert McDowell (released May 20, 2011) at 1. ML