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REGULATING BUSINESS: WHERE ARE THE BOUNDARIES?

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I. INTRODUCTION

From prohibiting the sale of dogs in pet stores, to medical marijuana "compassion clubs" and body rub parlors, local governments are pushing the boundaries of business regulation and many are wondering when they are going to hit the wall.

Recently the City of Richmond gained national (and even international) attention for its decision to ban the sale of dogs (and before that rabbits) in pet shops within the City. While some other municipalities in the United States preceded Richmond in this legislative change, Richmond was considered by many to be the first to do so in the context of a business community that included three retail stores that were actively selling puppies at the time of the bylaw.

Indeed, it was the first to have such a bylaw challenged, and the first to successfully defend it.

The case, *International Bio Research dba Pet Habitat, et al. v. Richmond (City),* 2011 BCSC *("Pet Habitat"*) has since been cited as breaking ground for similar bylaws in North America.

A November 8, 2011 Globe and Mail article identified *Pet Habitat* as a precedent for the City of Toronto's recently adopted ban on the possession, consumption and sale of shark fin soup:

> A case in point is the recent ban by Richmond, B.C., of the sale of dogs from pet stores. The bylaw was challenged in court on the basis that the city lacked the jurisdiction to ban the sale, but the bylaw was upheld by the B.C. Supreme Court. One lawyer commented that "Banning the sale of shark products, like banning the sale of dogs from pet stores, would be a valid municipal purpose that would likely withstand judicial scrutiny in B.C. and other parts of Canada as well".

These two examples, the banning of puppy retail sales and the banning of shark products, provide a helpful framework for considering where our law currently stands in relation to the regulation of businesses, and where its limits may lie. This paper will explore the boundaries of business regulation in light of the law as it has been settled in *Pet Habitat* and as it may develop, using, as an example, the prohibition on shark products in Toronto.

II. PROHIBITION ON SHARK PRODUCTS

A. The Position of Toronto

Consider the Toronto bylaw at Appendix A. It prohibits the sale, consumption and possession of all shark products in the City of Toronto. Would a BC municipality have similar jurisdiction, and what authority could it rely on?

In Toronto, the bylaw suggests that it takes its authority from the City's jurisdiction to "pass by-laws in respect of animals, the health, safety and well-being of persons, the economic, social and environmental well-being of the City and the protection of persons and property, including consumer protection."

The staff reports that accompany the bylaw (see: Appendices B and C) do not provide any greater clarity as to jurisdiction. In fact one of the reports, dated October 4, 2011, by the Acting Executive Director of Municipal Licensing and Standards, indicated that staff had identified clear concerns with the shark fin industry, but that no clear municipal purpose existed for its regulation. He gave the opinion that the bylaw would not properly fit under the purposes of health and safety, consumer protection, or nuisance control. That report indicated that while the City of Brantford and the Town of Oakville had already enacted shark fin bans, the City of Mississauga had released a report concluding that it was not under the authority of a local municipality to prohibit the sale and consumption of shark fins. The report noted that the City could be seen as overstepping its jurisdictional powers to regulate trade in shark fins – a trade that is currently legal in Canada – and that because shark fins arrive in Canada as processed food products there are no local animal welfare issues involved. Furthermore, the report indicated that there are no conclusive identifiable health concerns connected to the consumption of shark fins.

On a practical level, the report stated that enforcement of a ban on possession, sale and consumption of shark fin products implied search and seizure powers that bylaw enforcement officers do not have, such as entering private residences. This could render the bylaw virtually unenforceable.

A second report addressed some of the enforcement concerns by suggesting that compliance would be sought through education and awareness programs. It did say that the bylaw could be enforced as an offence, or through business license reviews.

In addition to the above two staff reports, Toronto City Council apparently had before it a number of confidential legal reports, approximately 30 emails from individuals and council members, eight written submissions and letters on shark consumption habits, attitudes and awareness from individuals and organizations, including the Jane Goodall Institute, the Humane Society international, Roots and Shoots Beijing, Born Free USA, the Centre for Oceanic

Awareness, Research and Education, and CTS Friends of Animals Network. The Council also received five petitions carrying a total of approximately 16,000 signatures.

B. Jurisdiction of BC Municipalities

What local government powers could such a bylaw fall under in B.C., and does the *Pet Habitat* decision actually assist or expand local government jurisdiction to that extent?

Although business regulation powers are not mentioned *per se* in the Toronto Bylaw, the sale of shark fins is a commercial activity, and could therefore fall under the power to regulate businesses in BC. Consumption of shark fins might come within local government's concurrent jurisdiction over public health, if there was evidence to support a health concern. Finally, the mere possession of shark fins could potentially fall under the power to enact bylaws to protect animal welfare.

However, all of the above possibilities must be analyzed in the context of our legislative and judicial framework. Even the *Pet Habitat* decision raises some significant concerns in this regard.

1. Business Regulation

Local governments in BC have no power to outright prohibit a business. Pursuant to s. 8(6) of the *Community Charter*, municipalities may regulate with respect to business, but may not prohibit.

However, regulation of businesses has been recognized as requiring restrictions on those businesses, including setting out rules of what must NOT be done by a business. Municipal regulation of the conduct of a business, including prohibiting certain types of transactions, is a well-established aspect of valid business regulation in British Columbia and Canada.

In *Jones v. Vancouver (City)* (1920), 51 DLR 320 (BCCA), our Court of Appeal started a long line of authority in this Province regarding municipal powers to regulate in relation to business. The bylaw at issue prohibited betting transactions at billiard halls. The prohibition was challenged as a prohibition of business rather than regulation, but this challenge was rejected by all five members of the bench. While there are four sets of reasons, all state that the bylaw is *intra vires* the City on the basis that the prohibition of a particular transaction (even a critical one) at a billiard hall does not prohibit the lawful operation of billiard halls, but merely regulates them.

The *Jones* line of authority was affirmed at various times with respect to BC municipalities. The two current leading cases on the issue of municipal regulation versus prohibition of a business in BC remain *Murray W. Schacher Enterprises Ltd. v. Vancouver (City),* [1975] 1 WWR 717 (BCSC) (approved BCCA, unreported October 29, 1975), and *Re Try-San International Ltd. and City of Vancouver* (1978), DLR 83 DLR (3d) 236 (BCCA). These cases confirm that cities have to authority to place restrictions on business, even where those restrictions may make the

business uneconomic in some circumstances, without being found to exceed their authority to regulate.

In *Murray W. Schacher Enterprises Ltd.,* above, the challenge was to a City of Vancouver business regulation bylaw that prevented rental agencies from collecting their fee prior to the tenant securing a rental, thus putting the petitioner rental agency and two others out of business. Although the City of Vancouver did have the authority to prohibit in relation to business on a unanimous vote, in the absence of a unanimous Council, the City was limited to regulating without prohibiting. The BC Supreme Court found that the bylaw did not prohibit business, only one means of doing business.

> It may be that the applicant will have to change the manner of doing its business in order to survive. Many regulations involve restraint, and result in changed conditions. The regulation does not prevent rental agencies from carrying on business, but dictates the manner in which such business shall be conducted.

The judgment was affirmed by the BC Court of Appeal in a decision that is not reported, but which is quoted by the Court of Appeal in *Re Try-San International Ltd* at paragraph 15 of that judgment.

Re Try-San International Ltd., above, was an application to quash a Vancouver business regulation bylaw that regulated body rub parlours. The evidence in that case was that the businesses were likely to lose more than 90% of their income as a result of the challenged bylaw, which required the nude service providers to be fully clothed, and required the businesses to close during their most profitable hours.

Nevertheless the Court of Appeal found that this economic effect did not amount to a prohibition on the business of body rub parlours *per se*. The Court found that evidence put in through the opinions of the businesses operators was inadequate to establish the economic effect more generally on a class of business, and that the bylaw, in any event, was not a complete prohibition of body rub parlours, but merely a regulation of them.

This line of authority has continued to be followed in BC, including in *British Columbia Lottery Corp. v. Vancouver City* (1997), 46 BCLR (3d) 24 at 44 (aff'd 1999 BCCA 18).

In *Montreal (City) v. Arcade Amusements Inc.,* [1985] 1 SCR 368 at paras. 74-75 the Supreme Court of Canada found that a municipality may set conditions with respect to a business that make it uneconomic for it to continue or establish itself in current circumstances, but that this does not amount to a prohibition of the business itself.

In the *Pet Habitat* case, Mr. Justice Savage considered and approved of the above cases as the leading cases on the distinction between regulation and prohibition of a business. In that case, the evidence of the economic effect of the Bylaw on pet stores was far less stark than in any of

the above cases. Of the three petitioners, only one adduced financial information to support the statement that the Bylaw could put them out of business under their current business model. For another, PJ's Pets, there was no suggestion that the Bylaw would prevent them from continuing to operate their business in Richmond. Even on the evidence of the three businesses challenging the bylaw, there was support for the City's position that pet stores could have a viable business model without selling puppies. The City also had evidence of another seven pet supply stores that sold no animals and continue their operations successfully in Richmond.

In addition, dog sales continue to be permitted by Richmond businesses that comply with the more stringent standards required of hobby and commercial kennels in the City.

On the evidence, the Court found that Richmond's bylaw regulates businesses that sell pets and pet supplies, but does not prohibit them, and is authorized pursuant to the City's power to regulate in relation to business under s. 8(6) of the *Community Charter*. Savage J. concluded that:

> Manifestly, the Bylaw does not prohibit retail pet stores. It regulates the animals that can be sold by them.
>
> … [T]he Bylaw regulates businesses that sell pets and pet supplies but does not prohibit them and is a lawfully enacted bylaw pursuant to the municipality's power to regulate in relation to business pursuant to s. 8(6) of the Community Charter. It was therefore within Council's jurisdiction to pass the Bylaw; it is *intra vires*.

Applying the above reasoning to a ban on the sale of shark fins, in soup or otherwise, there is likely no class of business that would be prohibited by such a ban. Rather there are a number of businesses where the provision of shark fin products may be important to their profitability, but there are many businesses in the same class that do not rely on that product. Therefore, there is a strong basis to believe that a ban on the sale of shark fins would be within a municipality's jurisdiction to *regulate* business.

However, even if a challenge on the basis of a municipality's limited jurisdiction to regulate and not prohibit in relation to a business is unlikely to succeed, a further issue remains: What is the municipal purpose?

2. Proper Municipal Purpose and Good Faith

The case law has developed substantially since the majority of the Supreme Court of Canada found in *Shell Canada Products Ltd. v. Vancouver (City),* [1994] 1 SCR 231 that the City of Vancouver could not direct that its staff not to fill up municipal vehicles at Shell stations, because of Shell's investments in apartheid South Africa at the time. The majority found that the Council's direction in this respect related to matters of an international nature that were

not within the scope of valid municipal considerations. Therefore, even though the City clearly had the authority to purchase gas from any number of suppliers, and therefore no issue as to the City's *prima facie* authority was at stake, the purpose of the decision was found to go beyond the authority of the City.

Since that time, the dissenting reasons of our now Chief Justice in *Shell Canada* have been far more broadly cited. Those reasons suggest that Courts should be slow to second guess the validity of municipal actions within jurisdiction on the basis of their political purpose or a broad sense of the well-being of their community. In BC, courts will not find that a democratically elected Council acted in bad faith or for an improper purpose unless there is no other rational explanation (*MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* (1995), 126 D.L.R. (4th) 449 (BCCA) at 178).

However, there is a risk that if all the evidence suggests that the purpose of the Council's decision was to affect practices outside of the municipality, this may be grounds under the majority in *Shell Canada*, to find that the decision is invalid as not having a "municipal" purpose.

This was the basis for a similar challenge in *Pet Habitat*: essentially that the true purpose on the ban on sale of puppies in retail stores was to cut off the demand for puppies bred in deplorable bulk production conditions, largely in the United States, and supplied through major wholesalers in puppies. The pet stores argued that this purpose was not a valid municipal one.

The court accepted the City's position that the bylaw had two apparent purposes: to improve the conditions of dogs sold as pets in the City of Richmond, and to reduce the number of unwanted and abandoned dogs in Richmond. Furthermore, the court accepted that the City need only have one authorized or proper purpose for the Bylaw to be valid, even if members of Council may also have had other motivations *(Koslowski v. West Vancouver (District)* (1981), 122 D.L.R. (3d) 440 (BCSC) (McEachern CJSC) at 50-55), and that the City did not have to prove that the bylaw would empirically have the specific desired effect (*Montreal (City) v. Arcade Amusements Inc.,* above).

The court went on in *Pet Habitat* to find that the City had "at least" one valid purpose in enacting the bylaw that could be rationally or reasonably connected to the bylaw itself: the reduction of the number of unwanted and abandoned dogs in Richmond, through a limitation on impulse puppy purchases in retail stores. With respect to the broader purpose to improve the conditions of dogs sold as pets in Richmond, and the alleged purpose of ending puppy mills outside of Richmond, the decision in *Pet Habitat* falls short of endorsing either as a valid municipal purpose.

If anything, the reasons of Mr. Justice Savage indicate in *obiter* that Richmond may not have the power to prohibit the sale of dogs if its sole purpose is to drive puppy mills out of business.

What then can be said about the municipal purpose behind a ban on shark fin products?

The Toronto reports that accompany the bylaw do not identify a particular municipal purpose. In fact, they suggest there is not one. Animal (shark) welfare, and the ecological balance of our oceans that may be lost through the overfishing of this species, are cited as major concerns. Is this enough to be a valid municipal purpose?

3. Animal Welfare

Under the old *Local Government Act*, the powers conferred on local government with regard to animal regulation are very specific. Section 703 provided that a council could regulate or prohibit the keeping of dogs, horses, cattle, sheep, goats, swine, rabbits or other animals, and define areas in which they could or could not be kept. Section 704(c) – (e) provided that a council could, among other things, regulate the sale of animals, and prohibit cruelty to animals.

In contrast, s. 8(3)(k) of the *Community Charter* simply provides that a council may, by bylaw, regulate, prohibit and impose requirements in relation to animals. In *Pet Habitat*, the court confirmed that this broader authority subsumes the more specific provisions of s. 704 of the *Local Government Act*, and that municipalities may regulate, as well as prohibit, in relation to animal welfare and the sale of animals.

However, it is not clear that enactments in regard to animal welfare can extend to non-living animals, or animals that are outside the boundaries of the municipality when they are alive. It seems tenuous to suggest that animal welfare concerns can validly sustain a ban on the sale, possession, and consumption of a processed food item to the extent that has been done in Toronto.

If anything, this seems less likely to be upheld in Ontario than in BC, where the courts have been far more restrictive in their interpretation of valid municipal purposes. In *Pet Habitat,* the court rejected and distinguished two Ontario cases relied upon by the pet stores.

In *Xentel DM Inc. v. Windsor (City),* 243 D.L.R. (4th) 451, the court held that Windsor did not have jurisdiction to prohibit entertainment involving exotic animals. Windsor argued that the bylaw was valid under the authority to regulate for public safety, but the court determined that the bylaw was adopted in bad faith, as its pith and substance was animal welfare and public morality. On the latter point, it involved criminal law that was properly federal in nature.

In *Southwold (Township) v. Buwalda*, 24 M.P.L.R. (4th) 54, 2006 CarswellOnt 3384, the local government enacted a bylaw that prohibited the possession of exotic animals. The preamble stated that the bylaw's purpose was to prohibit or regulate the sale of animals, and made no mention of public safety. The evidence indicated that the township's purpose was largely to prevent one individual from keeping big cats (cougars, lions, and tigers) as pets. A child had recently been mauled by one of these cats on a school field trip. The court found the bylaw to be overbroad, and found that it was in fact directed solely at the activity and use being made by one individual of his property, in keeping exotic animals. While Council believed it was acting in

the public interest, the Ontario courts found the manner in which it acted demonstrated an improper municipal purpose in considering animal welfare issues.

In BC, municipalities may consider animal welfare issues. They may also consider environmental issues. Provided that a bylaw only affects businesses within its territorial jurisdiction, even if motivated by a broader concern regarding animal welfare or the environmental sustainability of our oceans, there are strong arguments that councils should not be found to be acting for an improper purpose. Ironically, however, the *Pet Habitat* decision, which is relied upon by animal welfare advocates for this position, may not assist in this.

Finally, the Toronto bylaw prohibits possession of shark products, as well as their sale. It may be that the only possible basis for this prohibition is local jurisdiction over animals. The prohibition on possession truly puts this sphere of jurisdiction to the test, when it is applied not simply to support a valid purpose but to ground a prohibition on ownership of a non-living animal product. By this logic, the ownership of leather pants would equally be at risk.

4. Reasonableness

In addition to being within the jurisdiction of Council, bylaws must also be found to be reasonable, in a very broad sense. In *Pet Habitat* one of the main challenges was that it was not open to the Council of the City of Richmond to conclude that a ban on puppy sales in retail stores would have any effect on the number of abandoned dogs in the City of Richmond, let alone on puppy mills, on the submissions made to Council.

Council in *Pet Habitat* had thousands of pages of submissions before it. The evidence was often contradictory, and it was not evidence admissible in a court of law, but it was sufficient, in the Court's view, to allow Council to consider that there was a rational connection between the puppy sales in retail stores and the number of dogs later abandoned to the Richmond shelter.

We do not have the materials before Council in Toronto. However, the *Pet Habitat* case suggests that in a case that pushes the boundaries of local government business regulation, some basis that can be related to the welfare of the inhabitants of the municipality, must be provided to Council for their consideration.

III. CONCLUSION

Overall, the *Pet Habitat* case reaffirms that the wisdom of a decision of Council is not a matter for the court to reconsider in matters of policy, and that in questions where there may be no right or wrong answer, Councils are entitled to consider the general interests of their constituents, provided they act within their authority.

Nevertheless, questions of proper municipal purpose are likely to continue to pervade business license bylaws, as Council's are asked to respond to broader and broader concerns previously

thought to be reserved to the provincial and federal governments. Puppy sales and shark fin soup may be just the beginning.

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