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MUNICIPAL AND PROVINCIAL CONFLICTS: INCONSISTENCY OR CONCURRENT AUTHORITY?

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I. INTRODUCTION

Local governments are empowered by provincial legislation and must therefore ensure that their actions are authorized by that legislation. As former Supreme Court of Canada judge Mr. Justice Iacobucci put it:

> Municipalities are entirely creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute.[1]

While we might be attracted to the simplicity of the above statement (as are those who attack local government decisions in court), the truth is a lot more complex. Since almost all local government powers in British Columbia are delegated to them by the Province (as opposed to the federal government), which might otherwise have chosen to regulate a particular matter itself, or not at all, it is sometimes difficult to determine whether the Province intended to reserve to itself the exclusive jurisdiction to regulate in relation to a particular matter, to give to local governments the concurrent authority to regulate in relation to that matter, or to stay out of the regulatory field itself, leaving it only to the local government to regulate in relation to it. This paper provides a summary of issues relating to concurrent jurisdiction and how courts resolve issues concerning alleged conflicts between provincial and local government regulation. It also highlights areas of uncertainty in the law.

II. THE STATUTORY BACKDROP

As good administrative law lawyers should always do, it is best to start with the enabling statute. In this case, that is the *Community Charter,* SBC 2003, c. 26. When adopted in 2004, the *Community Charter* came with the promise of a broadening of municipal powers. There were a variety of provisions of the new Act that reflected that broadening initiative, but to many of us the effort was most clearly reflected in section 8, which set out a list of general "fundamental" powers. These powers seemed clearly sufficient to authorize not only all of the regulations previously enacted by municipalities under the former *Local Government Act* with respect to the broad subject areas listed in section 8 but also an even wider range of regulations than those previously authorized. Section 8 gave municipalities authority in respect of subject areas over which they had always enjoyed jurisdiction – building, businesses, municipal services, public places, trees, domestic animals and so on. The *Community Charter* also extended municipal jurisdiction in several areas over which municipalities previously had more limited jurisdiction, including public health, environmental protection and wildlife.

[1] *R. v. Greenbaum* (1993), 100 DLR (4th) 183.

Further, the opening sections of the *Community Charter* express some thematic and directional elements that are directly relevant to delineating the relationship between local governments and their legislative progenitor. Section 1 recognizes municipalities as "an order of government within their jurisdiction" which is "democratically elected, autonomous, responsible and accountable". Section 2 provides that "the citizens of British Columbia are best served when, in their relationship, municipalities and the Provincial government acknowledge the jurisdiction of each, work toward the harmonization of Provincial and municipal enactments, policies and programs, and foster cooperative approaches to matters of mutual interest".

Section 4 of the *Community Charter* directs that municipal powers, including those powers in the *Local Government Act,* are to be "interpreted broadly in accordance with the purposes of those acts and in accordance with municipal purposes". Taken together, these provisions form a powerful direction from the legislature that municipal powers are to be benevolently construed. Chief Justice Bauman of the British Columbia Court of Appeal put it this way:

> Frankly, the Court can take the hint – municipal legislation should be approached in the spirit of searching for the purpose broadly targeted by the enabling legislation and the elected council, and in the words of the Court in *Neilson*, "with a view to giving effect to the intention of the Municipal Council as expressed in the bylaw upon a reasonable basis that will accomplish that purpose".[2]

Finally, and perhaps most importantly for this paper, section 10 of the *Community Charter* states:

> 10 (1) A provision of a municipal bylaw has no effect if it is inconsistent with a Provincial enactment.
>
> (2) For the purposes of subsection (1), unless otherwise provided, a municipal bylaw is not inconsistent with another enactment if a person who complies with the bylaw does not, by this, contravene the other enactment.

This provision is a codification of the common law test set out by the Supreme Court of Canada in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* 2001 SCC 40 where the Court, dealing with an alleged conflict between a municipal bylaw regulating pesticides and both federal and provincial legislation also regulating pesticides, stated:

> A true and outright conflict can only be said to arise when one enactment compels what the other forbids.[3]

[2] *Society of Fort Langley Residents for Sustainable Development v. Langley (Township),* 2014 BCCA 271.
[3] *Spraytech* at para 38.

While the expression of the test at section 10 of the *Community Charter* does not replicate the Supreme Court's exact words, the effect is the same. Admittedly, the "impossibility of dual compliance" test is a high standard to meet. One example of two statutes that were found to be in conflict based on this test was *A.G. B.C. v. A.G. Canada (Employment of Japanese),* [1924] AC 203, where Viscount Haldane of the Judicial Committee of the Privy Council struck down a Provincial law that forbade the employment of Japanese subjects in certain professions. This law (which would have been an obvious violation of the *Canadian Charter of Rights and Freedoms* if passed today) conflicted with the Federal *Japanese Treaty Act*, which explicitly provided that Japanese subjects were to be afforded the same employment opportunities as Canadian citizens.

III. THE NATURAL ENVIRONMENT

With the Federal Government's recent decision to ban single use plastics, this particular issue might become one about which local governments need not legislate.[4] However, it is still worth considering the BC Court of Appeal's decision in *Canadian Plastic Bag Association v. Victoria (City),* 2019 BCCA 254 (leave to appeal refused) which has potentially wide-ranging implications for local government bylaws in numerous subject areas. In that case, the City of Victoria's bylaw prohibited businesses from providing their customers with plastic checkout bags, and regulated the provision of paper and reusable checkout bags by fixing a minimum price for their sale.

The Canadian Plastic Bag Association challenged the bylaw on a number of grounds. Their main argument was that the bylaw could not be properly characterized as a business regulation, but was instead "in pith and substance" a bylaw for the protection of the natural environment.[5] While the power to regulate in relation to business is found at section 8(6) of the *Community Charter*, the power to regulate in relation to the protection of the natural environment is found at section 8(3)(j). The main point of contention in this case, however, was the fact that section 9(1)(b), which referred back to section 8(3)(j), carved out an area of Provincial interest in respect of all bylaws passed under the natural environment power.

Pausing for a moment, it is important to note that the "pith and substance" or "dominant character" test comes from constitutional law. The Constitution doles out powers to the provincial and federal governments which are the "exclusive legislative authority" of those levels of government.[6] One of those provincial heads of power is, of course, "municipal institutions in the Province". For the purposes of this paper, what is important to note is that the "pith and substance" test was created by the Courts for the purpose of giving effect to a constitutionally mandated division of *exclusive* legislative powers as between the provinces and the federal government, where no other means of determining the precise boundaries between those legislative powers were set out in the Constitution. It thus would seem to be a concept

[4] https://www.canada.ca/en/environment-climate-change/news/2020/10/canada-one-step-closer-to-zero-plastic-waste-by-2030.html
[5] Para 35.
[6] *Constitution Act,* ss. 91 and 92.

that should have no application where the legislative scheme at issue expressly provides for *concurrent* legislative jurisdiction and sets out specified rules as to how the boundaries of each party's jurisdiction is to be determined, as is the case with sections 8 and 9 of the *Community Charter*. While the pith and substance analysis makes sense as a means of delineating constitutional boundaries, given that no other means is set out in the Constitution for dividing what are said to be areas of exclusive legislative jurisdiction, it does not seem to be a concept that should be applied in determining the scope of a municipality's section 8 powers, because those powers are specified in the *Community Charter* as either unlimited subject areas or areas of concurrent legislative jurisdiction limited only in the manner set out in section 9.

The Association's argument, based on an interpretation of the scheme created by sections 8 and 9, urged the Court to use the pith and substance analysis as a tool by which they could decide whether the bylaw was *either* a business regulation *or* an environmental regulation. Despite the *Community Charter*'s attempt to set up a system of *concurrent* rather than *exclusive* authority, the Association successfully argued that section 9(2) necessitated this choice. Madam Justice Newbury stated:

> Section 9(2) provides that for certainty, s. 9 (which contains the requirement for ministerial approval) does *not* apply to a bylaw under s. 8 that is "under a provision *not* referred" to in s. 9(1) or is "in respect of" a matter to which s. 9(1) does *not* apply. This is so "even if the bylaw could have been made under an authority" to which s. 9 applies. Section 9(2) is very badly drafted, but in my view it is clear that since environmental protection *is* listed in s. 9(1), and the Bylaw relates in pith and substance to environmental protection, subsection (2) does not apply. Subsection (3) *does* apply. It states:
>
> > (3) Recognizing the Provincial interest in matters dealt with by bylaws referred to in subsection (1), a council may not adopt a bylaw to which this section applies unless the bylaw is
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> > (a) in accordance with a regulation under subsection (4),
> >
> > (b) in accordance with an agreement under subsection (5), or
> >
> > (c) approved by the minister responsible.
>
> It follows in my view that the approval of the Minister of Environment was required for Bylaw 18–008 of the City of Victoria. The fact that the Bylaw might have been validly enacted *in the absence of* s. 9 in the guise of a bylaw relating to business does not detract from the fact that in pith and substance, this Bylaw was intended for the protection of the natural environment and that that is its primary effect.[7]

[7] *Canadian Plastic Bag Association* at paras 55-57.

This holding could have drastic effects on the municipal regulatory model. Because environmental protection is listed as a provincial subject area in section 9(1) of the *Community Charter*, the Court found a business regulation bylaw that is in "pith and substance" aimed at environmental protection requires provincial approval. Section 9(2) of the *Community Charter* appeared to say pretty clearly that a bylaw under a provision of section 8 other than one listed in section 9(1) did not require provincial approval even if its main, or *only,* purpose was to deal with a matter that could also have been dealt with by a bylaw of the kind referred to in section 9 (1).

On its face, Victoria's bylaw was one that fit with the authority of *both* the business regulation power in section 8(6) (which is a provision not referred to in section 9(2)) and within the power to regulate in relation to the natural environment under section 8(3)(j) (which is one of the powers referred to in section 9(2)). So, on its face, the bylaw seemed to be authorized under section 9(2) as one that was made under an authority to which section 9 does not apply (s.8 (6)), even though it could also have been made under an authority to which section 9 does apply (s. 8 (3)(j)).

With respect to the Court, its analysis appears to ignore the meaning of section 9(2) rather than expound it. In paragraph 55, the Court says the City correctly contended that bylaws may be adopted under other provisions of section 8 without provincial approval even if they might have been adopted under section 8(3)(j). However, the Court then immediately goes on to deny that proposition, saying it would be "absurd" that a municipality could avoid the express approval requirement by simply enacting its bylaw under a provision of section 8 other than the provision authorizing bylaws for the protection of the natural environment. Except, that is not absurd in our view. The whole point of section 8(3)(j) and section 9 is to *add* to municipalities' power to deal with environmental matters beyond their pre-existing business regulation and other powers, not to prevent them from protecting the environment under those pre-existing powers.

The thing the Court describes as absurd is the key component of the scheme of concurrency reflected in sections 8 and 9, namely, that it is only the *extension* of municipal power effected by the addition of the broad power to regulate for the protection of the natural environment under section 8(3)(j) that was to require provincial approval, not the ordinary powers already possessed by municipalities to deal with environmental issues through their service powers, their powers to regulate construction or business or public places and so on. All those powers to protect the environment were to remain.

IV. RENTAL UNITS AND THE *RESIDENTIAL TENANCY ACT*

The pith and substance test emerged again in *1193652 B.C. Ltd. v. New Westminster (City),* 2020 BCSC 163 [*119*] (currently on reserve at the Court of Appeal). There, New Westminster had enacted a bylaw under its power to regulate business (section 8(6) of the *Community Charter*) and its power to regulate in relation to the protection of persons or property in relation to rental units (sections 8(3)(g) and 63(f) of the *Community Charter*). This bylaw

targeted the practice of renoviction – a practice where landlords end tenancies in purpose-built rental buildings for the purpose of renovating those units and raising the rents of those units to a level that is out of reach of the previous tenants.

The petitioner landlord who challenged the bylaw argued that by enacting the *Residential Tenancy Act,* the Province had impliedly excluded any municipal regulation in the area of landlord and tenant relations. Therefore, the landlord argued, any bylaw which "in pith and substance" related to landlord and tenant matters had to be struck down.[8] In effect, the landlord's argument was that because the legislature had created, through enacting the *Residential Tenancy Act,* such a comprehensive and complex scheme for dealing with landlord and tenant matters, it must have intended that no municipal regulation could touch on those matters.

Chief Justice Hinkson rejected this argument, citing section 10 of the *Community Charter,* which he said governed the relationship between municipal bylaws and Provincial statutes:

> More importantly, s. 10 of the *Community Charter* governs the relationship between municipal bylaws and provincial enactments in British Columbia. Section 10 contemplates an overlap between municipal bylaws and provincial enactments and does not prohibit a municipal bylaw from dealing directly with the same subject matter as a provincial enactment, unless there is an inconsistency in the manner specified by s. 10.
>
> I accept the submission by counsel for the City that there is no general rule that municipal bylaws cannot legislate in respect of matters that are otherwise regulated by the Province. If that were the case, there would be no need for s. 10 of the *Community Charter*.
>
> Section 10(2) of the *Community Charter* permits a municipality to pass a bylaw so long as it is not inconsistent with another enactment. Pursuant to s. 10(2), a municipal bylaw is not inconsistent with another enactment if a person who complies with the bylaw does not, by this, contravene the other enactment. The Impugned Bylaw does not require those complying with it to disobey a provision of the *Residential Tenancy Act.*[9]

There are situations in which the legislature does reserve for itself exclusive jurisdiction over a certain subject area, as was suggested by the petitioner in *119*. However, contrary to the petitioner's submission, the legislature does this through express language, rather than implied

[8] *119*, at paras 41-49.
[9] *119,* at paras 75-77

intention. Section 46 of the *Agricultural Land Commission Act,* for example, sets out a test whereby a local government bylaw is deemed inconsistent if it so much as "contemplate a use of land that would impair or impede the intent of this Act…". Similarly, section 5 of the *Building Act* makes a local building requirement ineffective "to the extent that it relates to a matter" that is restricted by the Province.

V. PUBLIC HEALTH

Public health is a topic that has loomed large since March of 2020, when we became aware that the COVID-19 pandemic was going to affect everything, from our ability to work at a physical office to how we do our weekly shopping. It is not an exaggeration to say that, for most of us, no single event in our lifetime has had such a profound impact on our daily lives.

Prior to the enactment of the *Community Charter*, a municipality could enact a bylaw provision aimed at achieving a public health objective only to the extent it either had specific, direct authority for the provision at issue (the authority to fluoridate water, for example) or to the extent that the public health objective could be achieved through another head of municipal regulation. There was no separate and distinct *general* authority to regulate in relation to public health in all its aspects regardless of whether the regulation fit within a more specific authority such as the authority to regulate business.

Pre-*Community Charter,* a municipality could make a service regulation that was aimed at protecting public health (a prohibition against discarding animal carcasses at the municipal dump, for example), but it did not have a *free-standing* authority to regulate in relation to public health. A rule requiring that parents immunize their children, for example, would not have fit within any of the traditional powers of a municipality and so could not have been enacted before the *Community Charter*. That model changed with the *Community Charter*.

Section 8(3)(i) gave municipalities a new general authority to regulate in relation to public health, regardless of whether the bylaw fit within another head of regulatory jurisdiction, such as the power to regulate in relation to business, public places or municipal services. But, the new power in section 8(3)(i) came with a limitation that was not applicable to most of the other powers listed in section 8, including those mentioned above. This limitation was effected by section 9, which provided that if section 8(3)(i) was the *only* authority to enact the public health bylaw provision at issue, then provincial approval of the bylaw was required. However, that was the extent of the limitation.

Section 9(2) appeared to clearly provide that if the bylaw could be adopted under another provision of section 8 (under the service power in section 8(3)(a) for example) or under another provision of the *Community Charter* other than section 8, or another Act altogether, then the bylaw could be adopted under that other provision without provincial approval. In essence, the scheme in section 8 and 9 appeared to allow municipal powers to continue (in a broadened form) in relation to areas already within municipal jurisdiction, and granted new, free-standing

powers in respect of matters, such as public health and environmental protection, that could only be exercised with provincial approval. This understanding of the municipal regulatory model introduced by the *Community Charter* seemed to be clearly delineated in section 8 and sections 9 (1) and (2), particularly section 9 (2).

However, the BC Court of Appeal's decision in *Canadian Plastic Bag Association* makes the above conception of the public health power a thing of the past. After that case, it is clear that any bylaw which has public health as its dominant purpose – including any bylaw that was primarily targeted at a COVID-19 concern – will need to comply with the approval process at section 9 of the *Community Charter.* In respect of public health bylaws, this means that the local government must comply with the *Public Health Bylaws Regulation,* BC Reg 42/2004 which creates multiple classes of public health bylaws:

> 2 (1) For the purposes of section 9 (4) (a) of the Act, bylaws made by a council under section 8 (3) (i) *[public health]* of the Act in relation to the following matters are subject to the restrictions and conditions set out in subsection (2):
>
> (a) the protection, promotion or preservation of the health of individuals;
>
> (b) the maintenance of sanitary conditions in the municipality;
>
> (c) the restriction, or potential restriction, of any individual's access to health services;
>
> (d) any matter that may affect the personnel, financial or other resources of a regional health board, the Nisga'a Nation or the PHSA.

Those different bylaws have different provincial approval requirements, which are:

- A council may not adopt a bylaw in relation to a matter referred to only in subsection 1 (a) or (b) unless the bylaw or a copy of it is deposited with the minister;
- A council may not adopt a bylaw in relation to a matter referred to only in subsection 1 (c) or (d) unless the bylaw is approved by the minister;
- Before adopting a bylaw in relation to matters referred to in subsection 1 (a), (b), (c) or (d), a council must consult with
  - The regional health board, or
  - The medical health officer

  responsible for public health matters within the municipality.

VI. CAN A POLICY CONFLICT WITH A REGULATION?

In *Pendergast v. Sidney (Town),* 2020 BCSC 1049, Madam Justice Power of the BC Supreme Court characterized it as "problematic" for the Town of Sidney to have relied on a policy which directly contradicted a provincial regulation.[10] This judicial review related to the process under the *Cannabis Licensing Regulation,* BC Reg. 202/2018 in which the Town could provide a recommendation to the Liquor and Cannabis Regulation Branch ("LCRB") concerning the issuance of a licence to a proposed cannabis dispensary. The policy with which the Court took umbrage stated that:

> The proposed retail storefront must present an attractive, pedestrian friendly face to the street by providing multiple points of visual interaction through doorways, clear windows and other pedestrian oriented features that promote activity and transparency.[11]

This requirement for clear windows, in the Court's view, was inconsistent with the regulation, which contained a requirement for non-transparent windows at section 5(1)(p). While the Court grounded its judgment largely in a procedural argument having to do with the Town's failure to gather the views of the affected residence, the outcome of the case was clearly influenced ("buttressed", even) by the fact that the Town's policy was in apparent conflict with what was required by the Regulation:

> My conclusion on the unreasonableness of the October 28, 2019 resolution is buttressed by the fact that the Town Council appears to have relied on s. 2 ii (b) of Policy DV-015, which I agree directly contradicts s. 5(1)(p) of the provincial *Regulation,* as it stood at the time this matter was before the Town Council. The Town Council appears to recognize the problematic nature of enacting a policy in direct contravention of a provincial regulation by their actions of instructing their staff to remove s. 2 ii (b) of Policy DV-015 on October 28, 2019.

What does it mean for a policy to "conflict" with a regulation? Clearly, section 10 of the *Community Charter,* which deals only with municipal bylaws, would not be applicable. Stepping back, it is interesting to note section 33 of the *Liquor Control and Licensing Act,* SBC 2015, c. 19, which states:

> 33 (1) The general manager must not issue a prescribed class of licence or make a prescribed type of amendment to a prescribed class of licence unless the local government or Indigenous nation for the area in which the establishment is proposed to be located or is located gives the general manager a recommendation that the licence be issued or amended.

[10] *Pendergast* at para 76.
[11] *Pendergast* at para 22.

Section 33 makes clear that a local government has an unfettered veto over the issuance of a cannabis licence by choosing to refuse to provide a recommendation. It seems counterintuitive to suggest that it is problematic for the Town, who has an unfettered discretion to prevent the issuance of a cannabis licence, to be implicitly limited in the factors that it could consider when choosing what kind of recommendation to provide. If the Town had not adopted the policy, but it was clear from the record that several Council members opposed giving a positive recommendation on the basis that the windows of the proposed dispensary were opaque, there would be no basis for setting that decision aside. Despite the authors' unease with the Court's reasoning, local governments should consider avoiding *Pendergast*-type issues should they choose to adopt policies to guide Council decision-making.

VII. CONCLUDING COMMENT

It is difficult to summarize the law in this area given the multiplicity of settings in which issues of jurisdictional overlap or conflict may arise in relation to local government laws and provincial laws but, as a general rule, bylaws that appear to be authorized by the text of the *Community Charter* or the *Local Government Act* are unlikely to be found by a court to improperly intrude into the exclusive jurisdiction of the Province or another Provincial regulatory body, unless (a) the local government has failed to obtain a statutorily required Provincial approval for the bylaw (such as one mandated by section 9 of the *Community Charter*), (b) the bylaw requires non-compliance with a Provincial enactment in the manner referred to in section 10 of the *Community Charter,* or (c) the bylaw is expressly prohibited by a Provincial statutory provision, such as one like section 5 of the *Building Act* or one like section 46 of the *Agricultural Land Commission Act* that sets out for the relevant type of bylaw a different conflict rule than the one established by section 10 of the *Community Charter*.

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