Citation: *The City of Whitehorse v. 6660 Yukon Ltd.,* 2005 YKTC 43

Date: 20050526
Docket: 04-06404
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

The City of Whitehorse

Applicant

v.

6660 Yukon Ltd.

Defendant

Appearances:
Lorie Lavoie — Counsel for the City of Whitehorse
Peter Morawsky — Counsel for the defendant

REASONS FOR JUDGMENT

[1] On August 10, 2004, the Defendant Applicant, 6660 Yukon Limited, was charged with a noise violation contrary to section 22(1) of the City of Whitehorse Maintenance Bylaw 92-60. The Applicant has brought a pre-trial motion seeking to quash the information on the basis that section 22(1) of the bylaw is invalid.

[2] Section 22(1) reads:

> Everyone who makes or causes noises or sounds in or on a highway or elsewhere in the City which disturbs (sic) or tend to disturb the quiet, peace, rest, enjoyment, comfort or convenience of the neighbourhood or of persons in the vicinity, shall upon warning from any Peace Officer cease making or causing such noises forthwith, or shall be deemed to have contravened the provisions of the bylaw.

[3] In support of its application, the Applicant has proffered three grounds upon which it argues the section of the bylaw should be found to be invalid:

1. The section is ultra vires;
2. The section amounts to an unlawful delegation; and/or
3. The section is potentially discriminatory in nature.

[4] Each of these arguments is dependent on the Applicant's characterization of the section as one that creates an offence of failing to obey a Peace Officer's warning. I will deal with each argument in turn.

Ultra Vires:

[5] In terms of its submission that the section of the bylaw is ultra vires, the Applicant argues that there is no offence under section 22(1) until a Peace Officer has warned and that warning has been disobeyed, which makes the offence one, not of making noise, but of failing to desist in making noise once warned by a Peace Officer. As there is no authority contained in the *Municipal Act* for the City to pass a bylaw that a Peace Officer must be obeyed, the Applicant submits that section 22(1) is ultra vires.

[6] The Respondent City submits that the City has the authority not just to pass bylaws but also to enforce them. It argues that here the offence is not one of ignoring a warning. The warning is simply part of the City's enforcement scheme.

[7] As noted by the Supreme Court of Canada in *R.* v. *Greenbaum,* [1993] S.C.R. 674; [1993] S.C.J. No. 24, File No.: 22506: "Municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute" (p. 9 paragraph 22).

[8] However, while it is true that a city may not act beyond the scope of authority conferred by statute, it should be noted that enforcement is clearly not beyond the scope of authority conferred by the *Municipal Act*. The bylaw-making power conferred upon the City by the *Municipal Act* of necessity both inherently and expressly includes the power to enforce those bylaws. Section 265(p) of the *Municipal Act* specifically provides for the passing of bylaws regarding the "enforcement of bylaws".

[9] I am of the view that the warning requirement in section 22(1) is more properly characterized as part of the enforcement of the offence rather than as part of the offence itself. Peace Officers have the discretion, flowing both from the common law and from statute, to determine whether or not to lay a charge in any given instance. Here, the City has chosen to limit that discretion by requiring Peace Officers in all cases to warn offenders and give them an opportunity to avoid a charge by ceasing to make the offending noise, before a Peace Officer is empowered to lay a charge. Such a limitation on enforcement makes good sense and allows for a more fair and equitable result in ensuring that only those who are making noise knowing full well it is disturbing to others are charged with an offence.

[10] As the Respondent City is entitled not just to pass bylaws within prescribed areas, but to enforce them as well, I am not persuaded that section 22(1) is ultra vires.

<u>Unlawful Delegation:</u>

[11] With respect to the second ground alleging an unlawful delegation of authority, reference must be made to the authorizing sections of the relevant Municipal Acts.

[12] Section 22(1) was created under the authority granted by a previous incarnation of the *Municipal Act* in section 291(c), which read:

> The council may by bylaw
>
> …
>
> (c) regulate or prohibit the making or causing of noises or sounds in or on a highway or elsewhere in the municipality which disturb or tend to disturb the quiet, peace, rest, enjoyment, comfort or convenience of the neighbourhood or of persons in the vicinity, or which in the opinion of the council are objectionable or liable to disturb the quiet, peace, rest, enjoyment, comfort or convenience of individuals or the public, and make different regulations or prohibitions for different areas of the municipality.

[13] Section 265(m) of the current *Municipal Act* sets out the bylaw-making authority regarding noise as follows:

> A council may pass bylaws for municipal purposes respecting the following matters
>
> …
>
> (m) nuisances, unsightly property, noise and pollution and waste in or on public or private property

[14] Bylaw 92-60 is preserved under the new act by virtue of section 12(1).

[15] The Applicant argues that section 22(1) in tracking the language of the original authorizing section (but for the peace officer warning) amounts to an unlawful delegation of authority. In support of this proposition, the Applicant relies on the decision of *Brant Dairy Co.* v. *Ontario (Milk Commission),* [1973] S.C.R. 131*)* in which the Supreme Court of Canada stated:

> A statutory body which is empowered to do something by regulation does not act within its authority by simply repeating the power in a regulation in the words in which it was conferred. That evades exercise

> of the power and, indeed, turns a legislative power into an administrative one. It amounts to a re-delegation by the Board to itself in a form different from that originally authorized; and that this is illegal is evident from the judgment of this Court in *Attorney General of Canada* v. *Brent,* [1956] S.C.R. 318 (p. 10)

[16] The Applicant's position is dependent on the contention that the insertion of the warning requirement effectively creates an offence of failing to obey a Peace Officer rather than an offence of making noise. The Applicant submits that while it is okay for a Peace Officer to have discretion to lay a charge, it is an unlawful delegation to allow a Peace Officer the discretion to 'create' the offence without prescribing clear, objective standards for the exercise of that discretion.

[17] The Respondent agreed with the Applicant's characterization of the state of the law as it relates to regulatory bylaws, but submits that the cases are distinguishable on the basis that the section in question has a prohibition as opposed to a regulatory focus. The Respondent further argues that the wording of section 22(1) is not meant to give a Peace Officer the absolute discretion to make the charge. The Peace Officer is still required to investigate, and the section sets out a clear and objective standard which must be met.

[18] In my view, the issue is not whether the bylaw is prohibitive or regulatory in nature as suggested by the Respondent, but whether the authority or power conferred in the enabling statute is general or specific in nature.

[19] It is possible to conceive of the granting of a general power to either regulate or to prohibit which requires a municipality to define parameters and set general standards. Indeed, the wording of section 265(m) of the current *Municipal Act* sets out the power to make bylaws concerning noise in extremely general terms. Clearly any bylaw made under that section intending to prohibit

the making of noise would require the exercise of discretion in defining an objective standard as to what noise is to be prohibited.

[20] It is notable that the *Brant Dairy, supra,* case involved a general power to set quotas without further restricting the power conferred. In the case at bar, the original authorizing section itself set out very specific parameters for the exercise of the bylaw-making power. In my view, it is not an unlawful delegation to restate the wording in the authorizing section where that section is very specific as to the limits of the power conferred.

[21] Had the City employed the wording of the enabling section in its entirety by adding the phrase “or which in the opinion of **a Peace Officer** (as opposed to the Council) are objectionable or liable to disturb” **this** would have amounted to an unlawful delegation of power to a Peace Officer as this portion of the enabling section clearly contemplates the Council, rather than a Peace Officer, defining what is objectionable and liable to disturb.

[22] Section 22(1) does not in fact delegate any actual power to the Peace Officer to define or create the offence. It simply delegates the responsibility for enforcement to the Peace Officer, and, as noted above, limits the Peace Officer’s enforcement discretion by requiring a warning.

[23] I also find that the wording of section 22(1) includes a sufficiently clear objective standard to govern the actions of the Peace Officer enforcing it. As noted in *Dhillon* v. *Richmond (Municipality),* [1987] B.C.J. No. 1566:

> The general approach to examining a municipal by-law whose validity is challenged on the grounds of uncertainty or vagueness is that the vagueness must be so pronounced that a reasonably intelligent person would be unable to determine the meaning of the by-law and govern his actions accordingly. A mere difficulty in interpretation will not be sufficient. (p. 5)

[24] Such is not the case here. Indeed, the Applicant conceded that, but for the insertion of the warning requirement, the bylaw is sufficiently clear to stand.

[25] I find that there has been no unlawful delegation of authority in the drafting of section 22(1).

Discrimination:

[26] Dealing with the final ground put forward by the Applicant, namely the potentially discriminatory nature of section 22(1), the Applicant relies on the test set out in *R.* v. *Kraus,* [1974] 1 W.W.R. 251 (Sask. Dist. Ct.) as adopted in the *Dhillon, supra,* case:

> By-laws which operate unfairly and are partial and unequal in their operation between different classes are discriminatory and therefore illegal
>
> …
>
> By-laws giving either the council or a municipal official discretion to permit someone to do any act without which permission the act is prohibited have been held to be discriminatory to the extent that they enable permission to be given to one and refused to another. If express power to discriminate is conferred by statute then such by-law would not be open to attack on this ground.
>
> The council has power to pass laws binding on all those who are subject to its jurisdiction; but an attempt to regulate the conduct of any individual rather than to pass a general law is bad. (p. 8)

[27] The Applicant notes that there is no express power to discriminate conferred in the *Municipal Act* and argues that section 22(1) is potentially discriminatory as it gives the Peace Officer the discretion to warn or not, and by choosing to warn, to create the offence.

[28] The Respondent points to section 351(2) of the current *Municipal Act* which defines a bylaw as discriminatory if "it operates unfairly and unequally between different classes of persons without reasonable justification". The Respondent argues that, as section 22(1) does not discriminate against a class of persons on its face, it is not discriminatory.

[29] It is important to note that the Applicant's contention that section 22(1) is potentially discriminatory is founded on the characterization of the offence as being one of failing to obey a warning from a Peace Officer rather than of making noise. As noted above, I disagree with that characterization. Accordingly, this ground, too, must fail.

[30] The creation of the offence is not discretionary; enforcement is. The section sets out a clear and objective standard for determining if an offence has been committed. The Peace Officer retains the common law and statutory discretion to lay a charge or not, subject to the limitation on that discretion imposed by the section in requiring that a warning be given before a charge may be laid.

[31] Section 22(1) is of general application. It does not operate unfairly or unequally between different classes of persons, and cannot be said to be discriminatory.

[32] In conclusion, as each of the grounds advanced by the Applicant has proven to be unsuccessful, it is the determination of this court that section 22(1) of the City of Whitehorse Maintenance Bylaw 92-60 is valid.

Ruddy T.C.J.