

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

YUKON HOUSING CORPORATION

Petitioner

AND:

THE TOWN OF THE CITY OF DAWSON

Respondent

Richard Buchan

For the Petitioner

John Phelps

For the Respondent

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

[1] OPPAL J. (Oral): On March 12, 2001, the City of Dawson enacted a bylaw which confers a water and sewer subsidy upon private, non-government property owners, of residential units. The bylaw reads as follows:

A private, non-government property owner who is invoiced for water and sewer at the residential rate shall receive a \$350 water and sewer subsidy for each individual residential dwelling unit, provided his account is paid in accordance with following schedule.

[2] The petitioner, Yukon Housing Corporation, has challenged the validity of the

bylaw on the grounds that it is discriminatory. It is not in dispute that the Housing Corporation, which is the owner of 89 residential units within the jurisdiction, does not fall within the definition of "a private, non-government property owner."

[3] The Corporation has alleged that as a result of the bylaw, it has paid for the taxation year 2001, water and sewer rates in the sum of \$31,150 over and above what they ought to have paid but for the bylaw.

[4] The position of the City is the subsidy is intended for the benefit of private homeowners of residential properties and not for government or corporate interests. It is argued that the *Municipal Act* authorizes the City to grant such subsidies under appropriate circumstances.

[5] The Housing Corporation's position is that rules of statutory interpretation of the legislature confer power on municipalities on a case-by-case basis, to grant subsidies to certain groups or organizations in the best interests of the municipality. The circumstances of this case, the City enacting this legislation, has offended the general principles of municipal law and that the bylaw ought to be set aside.

[6] In determining whether a municipal bylaw is valid, the starting point in any judicial review of any legislation, begins with the general principle that courts must show deference to the decisions of duly elected councils, who presumably enact laws in the public interest. Courts ought to interfere with and set aside bylaws of municipalities only in the clearest of cases.

[7] Having said that, the bylaws enacted by municipal governments must conform to the provisions of the *Municipal Act*, the common law, and to the *Charter of*

Rights and Freedoms. Section 233(1) of the *Municipal Act*, S.Y.1998 c. 19, imposes certain limitations upon municipal governments to grant subsidies. Section 351 of the *Act* gives statutory authority to a person who challenges such a bylaw. That section reads as follows:

A person may make application to the Supreme Court for a declaration that all or a part of a bylaw is invalid on the following grounds:

- (a) the council acted in excess of its jurisdiction,
- (b) the council acted in bad faith,
- (c) the bylaw in whole or part, is discriminatory, or
- (d) the council failed to comply with a requirement of this or any other *Act* or the municipality's procedures bylaw.

[8] In this case, the essential argument that is raised by the applicant, Housing Corporation, is that the bylaw is discriminatory and therefore ought to be set aside.

[9] I made reference to section 233(1), and I point out that that section sets limits as to when a municipal government may act in these circumstances. The section reads as follows:

Except where it is otherwise provided by an *Act*, a council does not have the power to grant to any person, institution, association, group, or body any privilege or exemption from the ordinary jurisdiction of the municipality, or to grant any charter bestowing a right a privilege, to give any bonus or exemption from any tax, rate, or rent, or to remit any tax or rate levied or rent.

Section 245 states, however, that:

Council may by bylaw provide grants, gifts, or loans of money or municipal property or a guarantee of any borrowing within borrowing limits, including grants for

property taxes or service charges or fees, as council considers expedient, to any person, institution, association, group, government, or body of any kind.

[10] Those sections of course must be read together. They cannot be considered in isolation of one another. A leading case on the issue of discrimination is *R. v. Sharma*, [1993] 1 S.C.R. 650. In that case the Supreme Court of Canada considered the issue of whether a particular bylaw relating to street vendors, the requirement that street vendors apply for a licence, contravened the provisions against discrimination. The Supreme Court of Canada made the following comments, I make particular reference to the judgment of Mr. Justice Iacobucci, at pages 667 and 668, wherein he stated as follows:

I agree with Arbour J.A. that this case is governed by the decision of this Court in *Montreal (City of) v. Arcade Amusements Inc.*, [1985] 18 D.L.R. (4th) 161, with respect to the discrimination in the bylaw scheme. In that case, the Court held that the power to pass municipal by-laws does not entail that of enacting discriminatory provisions (i.e., of drawing a distinction) unless in effect the enabling legislation authorizes such discriminatory treatment. See also Rogers, *The Law of Canadian Municipal Corporations*....

And he goes on to state that:

The rule against discriminatory by-laws is an outgrowth of principle that, as statutory bodies, municipalities “may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the express power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purpose of the corporation.”

[11] The Court adopted with approval the reasons, or the general statements of law as set out by in the text the “*Law of Canadian Municipal Corporations*,” 2nd edition,

by Rogers, wherein the learned author discussed the issue of discrimination in the following way, paragraph 193.51:

By-laws which operate unfairly and are partial and unequal in their operation between different classes are discriminatory and therefore illegal. (v) A bylaw will not be characterized as discriminatory simply because it is directed at one particular person or lot. Two elements are required to establish discrimination: (1) the by-law must in fact discriminate, by giving permission to one person and refusing permission to another; and (2) the factual discrimination must be carried out with an improper motive of favouring or hurting one individual without regard to the public interest. (v).

The fact that a bylaw is passed to benefit a particular group, even at the expense or the prejudice of another group, is not sufficient to invalidate it on this ground so long as council acts in what it regards as the best interests of the public.

[12] Those general principles were adopted by the Court of Appeal of this jurisdiction in *Lees and Lees v. the Corporation of District of West Vancouver*, [1991] WWR 124. In particular I make reference to the fact that the acts of discrimination must be carried out with an improper motive of favoring or hurting one individual without regard to the public interest.

[13] I cannot conclude that this bylaw discriminates in a fashion that it shows favoritism of a type that would warrant setting it aside. There is no evidence that the City had any improper motive enacting the bylaw. The evidence of Scott Colson, the City Manager, sets out the intent and purpose of the legislation, which is to assist private owners of residential units by offering them subsidies. That was obviously done in the public interest. There is no evidence of any improper motive on the part of the City enacting that bylaw.

[14] It should be noted that the conferring of subsidies on a particular class, a particular industry or a particular geographical region is not in of itself discriminatory. In Canada there are numerous examples of subsidies that are granted by governments at various levels to particular industries and to particular geographical regions. Laws which confer those types of benefits upon regions, upon classes of persons, be it the granting of subsidies or of tax breaks, does not constitute discrimination per se. Those subsidies often are not conferred on an across the board or universal manner. It should also be noted that to give benefit to a particular group, even at the expense of another, is not illegal per se. In determining whether or not that the bylaw ought to be set aside on the basis that it is discriminatory, the intent and the purpose of the bylaw must be examined.

[15] Here it is apparent to me that the City, in enacting this bylaw, did so with the public interest in mind, and that is to assist individual property owners, as opposed to corporate and governmental interests, in paying their water and sewer rates. For those reasons the petition must be dismissed.

[16] Council argued the question of costs and I think, having regard to circumstances in this case, that they ought to be awarded on scale 3. I do not think there is something extraordinarily difficult about this case, and I so order.

OPPAL J.