LIDSTONE & COMPANY
BARRISTERS AND SOLICITORS

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BY EMAIL

Matt Hulse
Our Horizon Society
c/o Centre for Social Innovation
720 Bathurst St.
Toronto, ON M5S 2R4

E-mail: matt@ourhorizon.org

Dear Matt:

Re: Face the Change BC Report
20122-101

YOUR REQUEST

You have asked us to conduct a legal review Our Horizon's Face the Change BC Report (the "Report"). The Report analyzes whether municipalities in British Columbia have the authority to require gas stations to place warning labels on gas nozzles. The Report notes several statutory provisions that could provide authority for such a requirement. We have analyzed each of those provisions in turn.

The research, analysis and conclusions in this letter only apply to municipalities within British Columbia and do not extend to the City of Vancouver, British Columbia regional districts or local governments in other jurisdictions.

SUMMARY ANSWER

In our opinion, a requirement to place labels on gas nozzles could be validly imposed pursuant to a municipality's power to regulate business. If enacted pursuant to this power, we recommend that labelling requirements be included in a larger body of rules within which a person may operate a gas station business. A regulatory charge may be imposed to off-set the cost of such a regulatory regime, provided the charge is tied in to the regulatory scheme, or is itself is a means of regulating business.

A municipality may also impose a labeling requirement pursuant to its power to regulate in relation to public health, the protection of the natural environment, or both, provided the bylaw complies with the concurrent authority provisions in section 9 of the *Community Charter.*

LEGAL RESEARCH AND ANALYSIS

Regulation of Business

As noted in the Report, a municipality's power in relation to business is more limited than its other powers under the *Community Charter*. While council is authorized to "regulate, prohibit and impose requirements" in relation to those powers listed in section 8(3), council is only permitted to "regulate" in relation to business. As a result, a requirement in a bylaw to do something at one's expense (such as place a label on a gas nozzle) could be challenged due to the fact that council lacks the power to "impose requirements" on business.

However, it is also important to note that the definition of "regulate" includes "authorize, control, inspect, limit and restrict, *including by establishing rules respecting what must or must not be done*, in relation to the persons, properties, activities, things or other matters being regulated". The ability to establish rules regarding what must be done significantly broadens a municipality's regulatory power. We also note subsection 8(8)(a), which states that as an example, the power to regulate includes "to provide that persons may engage in a regulated activity only in accordance with the rules established by bylaw." Subsection 8(8)(c) provides statutory authority to require that certain things be done on private property.

We also note the reasoning of the British Columbia Supreme Court in *International Bio Research v. Richmond*, 2011 BCSC 471 which describes the extent of municipal authority to regulate business. In that case, the court considered the validity of a bylaw which prohibited pet stores from selling dogs. The City had enacted the bylaw believing that it would reduce the number of unwanted and abandoned dogs in the City and that it would improve the conditions of dogs being sold as pets. The court upheld the validity of the bylaw, finding that it was a valid exercise of the power to regulate in relation to business. In particular, the Court held that the bylaw was not a prohibition on business, despite the fact that it prohibited a certain type of transaction, even a critical one:

> [37] Regulation of business necessarily involves restrictions on businesses, including setting out rules of what cannot be done by a business. Municipal regulation of the conduct of business, including

> prohibiting certain types of transactions, is an established aspect of valid business regulation.

The Court noted previous case law, including the decision of the Supreme Court of Canada in *Montreal v. Arcade Amusements Inc.*, 1985 CanLII 97 (SCC), where the Court found that a local government may set conditions for the operation of a business that make it uneconomic to continue, and this will not amount to prohibition of the business itself (para. 41).

In our opinion, the statutory provisions described above, as well as the court's interpretation of municipal authority to regulate in relation to business, indicate that a requirement for gas stations to place labels on gas nozzles could be validly imposed as part of a larger business regulation scheme which establishes rules by bylaw respecting what must be done in relation to gasoline distribution businesses.

If a municipality were to impose a gas nozzle labelling requirement pursuant to its power under section 8(6), we recommend that the municipality include it within their business regulation bylaw, as part of a larger body of rules within which a person may operate a gasoline distribution business. We also note that a municipality can impose a regulatory fee to off-set the cost of a licensing or regulatory regime, provided such a regulatory charge is tied in to the regulatory scheme, or is itself is a means of regulating business. We have discussed this issue further below.

Section 8(3) powers

In addition to the business regulation power, you have identified several other powers pursuant to which a requirement to place labels on gas nozzles could be validly imposed. Under section 8(3), council has the power to, by bylaw, regulate, prohibit and impose requirements in relation to:

...

(h) the protection and enhancement of the well-being of its community in relation to the matters referred to in section 64 [nuisances, disturbances and other objectionable situations];

(i) public health;

(j) protection of the natural environment;

We have discussed each of these provisions in turn below.

Public Health and Protection of the Natural Environment

We agree that the requirement for gas nozzle labelling might be validly imposed pursuant to a municipality's power to regulate public health, protection of the natural environment, or both. However, as you noted, both the public health and protection of the natural environment powers are subject to concurrent jurisdiction under section 9 of the *Community Charter*. As a result, the municipality must comply with the *Public Health Bylaws Regulation* or seek ministerial approval of the bylaw if enacted under the public health power, and must seek ministerial approval of a bylaw enacted under the protection of the natural environment power.

As an aside, when seeking ministerial approval of a bylaw, we typically recommend that clients involve their ministerial contact early in the process, to discuss the content of the proposed bylaw and avoid issues arising after several readings of the bylaw have already taken place.

Community Well-Being

The power to regulate nuisances and disturbances may be exercised in relation to several matters listed in section 64. You have identified section 64(c), "the emission of smoke, dust, gas, sparks, ash, soot, cinders, fumes or other effluvia that is liable to foul or contaminate the atmosphere," as a matter which may provide authority for the requirement to label gas nozzles.

In our opinion, the placement of labels on gas nozzles may not be sufficiently connected to emissions to permit a municipality to validly impose such a requirement pursuant to that section. The bylaw provision, if imposed, would not directly regulate, prohibit or impose requirements relating to emissions of gas, fumes or other effluvia, but would instead serve to warn people that the use of fossil fuels contributes to emissions. While its intended effect would be to reduce emissions by changing attitudes and behaviours of consumers, the requirement would not directly regulate emissions; it is the use of the product by the consumer that contributes to emissions.

We also note that in this section, the Report states that there are two matters under section 64 that are relevant, but only identifies one.

Fees

The Report also discusses the imposition of fees to off-set costs of the licensing or regulatory regime. Section 194 of the *Community Charter* provides:

194 (1) A council may, by bylaw, impose a fee payable in respect of

(a) all or part of a service of the municipality,

(b) the use of municipal property, or

(c) the exercise of authority to regulate, prohibit or impose requirements.

(2) Without limiting subsection (1), a bylaw under this section may do one or more of the following:

(a) apply outside the municipality, if the bylaw is in relation to an authority that may be exercised outside the municipality;

(b) base the fee on any factor specified in the bylaw and, in addition to the authority under section 12 (1) *[variation authority]*, establish different rates or levels of fees in relation to different factors;

(c) establish fees for obtaining copies of documents that are available for public inspection;

(d) establish terms and conditions for payment of a fee, including discounts, interest and penalties;

(e) provide for the refund of a fee.

(3) As exceptions, a council may not impose a fee under this section

(a) in relation to Part 3 *[Electors and Elections]* or 4 *[Other Voting]* of the *Local Government Act*, or

(b) in relation to any other matter for which this or another Act specifically authorizes the imposition of a fee.

(4) A municipality must make available to the public, on request, a report respecting how a fee imposed under this section was determined.

(5) A municipality may not impose a highway toll unless specifically provided by a Provincial or federal enactment.

Local government fees generally fall into two categories: user fees and regulatory charges. A fee for the use of municipal services must be related, at least loosely, to the cost of providing the service, and it must be levied only on the party that uses the service. A regulatory fee that is not a fee for services may be imposed in relation to rights or privileges granted by the municipality, to finance the regulatory scheme of which it is a part, or to prohibit or encourage the behaviour of those subject to the fee. It is important to ensure that a municipal levy can properly be categorized as a

regulatory charge or user fee, as opposed to a tax, as the *Community Charter* does not authorize the imposition of a tax.

Whether a particular government levy is a tax or a fee has been considered on numerous occasions by Canadian courts. In *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, the difference between a tax and a fee was discussed at paras 15, 21-22:

> [15] Whether a levy is a tax or a fee was considered in *Lawson*, *supra*. Duff J. for the majority concluded that the levy in question was a tax because it was: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.
> . . .
>
> [21] Another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid: see G. V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981), at p. 72. This nexus was also considered relevant to determining the nature of a municipal charge in *Allard Contractors, supra*. In that case the Court engaged the question of whether an indirect tax levied by a province was validly enacted as incidental to a matter of provincial jurisdiction. Addressing the relationship between a charge and the cost of the underlying service, Iacobucci J. wrote (at p. 411):
>
> > A surplus itself is not a problem so long as the municipalities made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme. . . .
>
> [22] In determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice. The evidence in this appeal fails to disclose any correlation between the amount charged for grants of letters probate and the cost of providing that service. The Agreed Statement of Facts clearly shows that the procedures involved in granting letters probate do not vary with the value of the estate. Although the cost of granting letters probate bears no relation to the value of an estate, the probate levy varies directly with the value of the estate. The result is the absence of a nexus between the levy and the cost of the service, which indicates that the levy is a tax and not a fee.

The process for determining how a government levy should be properly classified was discussed in *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, where Gonthier J. wrote, at para. 30:

> In all cases, a court should identify the primary aspect of the impugned levy. This was the underlying current of the earlier cases on s. 125, which focused on the "pith and substance" of the charge: "*Johnnie Walker*" case, *supra*; *Re Exported Natural Gas Tax*, *supra*. Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee.

In our opinion, a fee imposed on gas stations to recuperate the cost of the labeling system is likely to fall within the ambit of a regulatory charge as opposed to a user fee, as its purpose is to finance or constitute a regulatory scheme and not to charge for access to municipal services.

The courts have specifically discussed the difference between a regulatory charge and a tax. The starting point for distinguishing between a tax and a regulatory charge is to look at the indicia of a tax, as first set out in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, and subsequently adopted and modified by Major J. in *Eurig Estate (Re)*, [1998] 2 S.C.R. 565. These indicia have been adopted and applied by courts in numerous occasions, one of the most recent being *Canadian Wireless*, a case in which a number of wireless providers challenged a bylaw that imposed a levy on wireless telephone users for the financing of a 911 emergency response system. The indicia are described as follows (at paras. 21-22 of *Westbank*):

> The natural starting point for characterizing a governmental levy is this Court's decision in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, at pp. 362-63. In that case, Duff J., as he then was, explained that the impugned charges in that case were taxes because they were: (1) enforceable by law, (2) imposed under the authority of the legislature, (3) imposed by a public body, and (4) intended for a public purpose. Duff J. also noted that the charges there were compulsory, and affected a large number of people.

In *Westbank*, the Supreme Court added a fifth consideration to those articulated by Duff J. in *Lawson*, namely, that the government levy would be in pith and substance a tax if it was "unconnected to any form of regulatory scheme." A tax can therefore be distinguished from a charge where the levy is imposed primarily for regulatory purposes, or is necessarily incidental to a broader regulatory scheme. That is to say, even if a levy has all the other indicia of a tax, it will be a regulatory charge if it is connected to a regulatory scheme (*Westbank* at para. 43; *Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7 at para. 24).

In *Westbank* the Supreme Court set out a two step approach to determine if a levy is connected to a regulatory scheme. The first step is to identify existence of a regulatory scheme (at para. 44):

> To find a regulatory scheme, a court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.

The first three considerations establish the existence of a regulatory scheme. The fourth consideration establishes that the scheme is relevant to the person being regulated (*Connaught* at para. 25).

The second step of the analysis is to determine the existence of a relationship between the charge and the regulatory scheme itself. This relationship will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behavior. In *Connaught* the Supreme Court held that business licence fees assessed for the right to sell alcoholic beverages in Jasper National Park were a regulatory charge, and not a tax, as they were connected to the regulatory scheme governing the Park. In that case, the Court held that the regulatory scheme was relevant to the appellants' businesses and there was a relationship between the fees paid by the appellants and that regulatory scheme.

In light of the foregoing, we think that a regulatory charge could be validly imposed on gas stations operating within the boundaries of a municipality as an aspect of the municipality's business regulation bylaw. As long as such a regulatory charge is tied in to the regulatory scheme, or is itself is a means of regulating business, it should not amount to a tax and is likely to

be permissible. Municipalities should exercise caution when implementing such a charge to ensure that it is not characterized as a tax.

Freedom of Expression

On the issue of whether the labelling requirement could offend the guarantee of freedom of expression in the *Charter*, you noted several cases - *RJR-MacDonald Inc v. Canada* and *Canada v. JTI-MacDonald Corp*, which both related to cigarette labelling, and *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)*, in which ORHMA challenged a requirement for restaurants to place information notices on their entrances to communicate the results of their health inspections.

In the ORHMA case, the Ontario Court of Appeal concluded that requiring restaurant owners to post inspection notices did not result in a violation of section 2(b) and that, if it did, the violation was justified under section 1. The bylaw in the ORHMA case can be distinguished in some ways from the proposed labelling in this case. Firstly, City of Toronto bylaw at issue in ORHMA required restaurants to post the results of an objective inspection as opposed to a general notice relating to the dangers of product. Secondly, the notices required under the bylaw were not necessarily permanent; restaurants with violations were re-inspected within one or two days, at which time the notice could be removed if the issues were addressed. Despite these differences, the requirement for restaurants to post inspection notices is analogous in some ways to requiring owners of gas stations to post warning labels. In both cases, the notices are meant to warn consumers about the dangers relating to the consumption of the product and may negatively impact businesses.

In our opinion, the labelling requirements in this case are more analogous to the labeling requirements in the Supreme Court of Canada cigarette cases. In *JTI-MacDonald*, the Supreme Court of Canada found that although the labelling requirements infringed on freedom of expression by compelling speech, the interference was justified. We think it is likely that a court would analyze the requirement for gas nozzle labels similarly. This would include a fulsome proportionality analysis pursuant to section 1 of the *Charter*, including whether the labelling is minimally impairing. As noted in the Report, to avoid being struck down, the labels should be attributed to the municipality and the municipality should allow the business to post other notices, including in response to the labels; in *RJR*-MacDonald, the court found that prohibiting tobacco companies from attributing the message to government and preventing them from placing other information on their packaging was not minimally impairing or rationally connected to the government's objective.

Overall, municipalities that are contemplating a labelling requirement must have a good and sufficient justification for the infringement of expression and should take care to limit the scope of the infringement to the extent necessary.

Scope of Municipal Powers

We also agree generally with the Report's discussion regarding the scope of municipal powers.

In *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 SCR 231, where the City of Vancouver resolved not to do business with Shell due to its investments in apartheid South Africa, and *Eng v. Toronto (City)*, 2012 ONSC 6816, where the City of Toronto instituted a ban on shark fins, the court could not identify a benefit for the citizens of the municipality taking the impugned action. In both cases, the court ruled that the municipality's action was *ultra vires*, as the municipality was attempting to regulate matters beyond its boundaries. We agree that the proposed labelling requirement can be distinguished from these cases.

As the Report notes, the majority of the Supreme Court of Canada in *Shell* stated that that "Council can have regard for matters beyond its boundaries in exercising its powers but in so doing any action taken must have as its purposes benefit to the Citizens of the City." On that basis, we think that the labelling requirement could be validly imposed notwithstanding the fact that it has extra-territorial effects, provided there is evidence that the requirement provides a direct benefit to residents of the municipality. For example, if there is evidence that labelling could reduce fuel consumption, which would in turn reduce emissions in the municipality and improve local air quality, the bylaw could be upheld as sufficiency connected to the municipality.

We also note, as the Report does, that portions of the dissent of McLachlin J. (as she then was) in *Shell*, have been adopted by the Supreme Court in several subsequent municipal law cases. At paragraph 85 of her dissent, McLachlin J. made the following statement:

> I would cast the proper functions of a municipality in a larger mould. The term 'welfare of the citizens', it seems to me, is capable of embracing not only their immediate needs, but also the psychological welfare of the citizens as members of a community who have an interest in expressing their identity as a community...

While the court in *Eng* did not apply McLachlin's reasoning, it is possible that a court considering the labelling requirement could take a broad view

of a municipality's powers; relying on McLachlin's reasoning, a court could permit a municipality to require gas nozzle labelling even in the absence of any direct and tangible benefits to its residents. Despite this possibility, we recommend that any bylaw enacted by a municipality to require gas nozzle labelling be based on evidence of direct benefits to the municipality itself, in addition to any considerations that extend beyond local boundaries.

Conclusion

In conclusion, we agree that municipalities in British Columbia have the authority to require labels on gas nozzles, provided the requirement is imposed reasonably and in good faith and in accordance with relevant legislation. However, we also think that the likelihood of such a requirement being challenged is high given the potential effect on gasoline retailers and wholesalers.

As we noted above, the research, analysis and conclusions in this letter only apply to municipalities in British Columbia. Our opinion does not extend to the City of Vancouver, regional districts in British Columbia or local governments in other jurisdictions.

Please do not hesitate to contact us if we can assist you further.

Sincerely,

LIDSTONE & COMPANY

Rachel Vallance
Associate
vallance@lidstone.info

RV/rv