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VIA EMAIL

REPLY TO: VANCOUVER OFFICE

November 24, 2009

Ms. Heather Cosman
Corporate Manager
Northern Rockies Regional Municipality
5319 - 50th Avenue South
Bag Service 399
Fort Nelson, BC V0C 1R0

Dear Ms. Cosman:

Re: Escort Agencies and Other Adult-Oriented Businesses
Our File No. 00075-0187

We are responding to your request for legal advice regarding the zoning, licensing and regulation of escort agencies and other adult-oriented businesses.

Please note that the citations for court decisions we mention in this letter are listed at the end of the letter.

Council Resolution

On October 26th the Regional Council resolved "that an Escort Agency be confirmed as a permitted use in the .. Zoning Bylaw .. and that amending bylaws be prepared to include an Escort Service and Adult Oriented Businesses category in the Zoning Bylaw, and to include regulations for the business in the Business License Bylaw and the Zoning Bylaw".

Staff have received some recommendations for regulations of escort services from Staff Seargent Tom Roy of the Fort Nelson RCMP Detachment, and it is questioned whether these regulations would be lawful for Council to impose. Later in this letter we will discuss the legality of these suggested regulations.

In addition to the RCMP suggestions, we understand that it will be useful to staff and to Council to have information on what regulations on these businesses have been imposed by other local governments in B.C. and elsewhere in Canada, and whether these regulations have been upheld by the courts.

Existing Businesses

We are assuming that although escort services may be operating currently within the Municipality, they are operating on an underground basis, unlawfully and without licenses. In

other words, we are assuming that if the Municipality adopts zoning and business bylaws to permit and regulate escort services in specific areas, the Municipality will not be faced with arguments that existing businesses can continue to operate from their existing premises, as grandfathered non-conforming uses.

Please advise if there are any doubts about interpretation of the existing zoning bylaw. Uncertainties in the zoning bylaw will be resolved in favour of the business. For example, in *Ultimate Relaxation Inc. v. Coquitlam (City)*, Coquitlam took the position that a steambath and massage business, with adult movies available, could only be permitted in a zone that allowed "non-medical health service centres, steam baths and health spas". The court disagreed and concluded the business could also be permitted as a "personal service establishment". Where the interpretation of a bylaw is not clear and unambiguous, "the Court may properly lean in favour of an interpretation that leaves private rights undisturbed."

Focus on Escort Services

You will note that in this letter, we have focussed our advice on escort services, as we were not clear what other businesses Council intended by referring in its resolution to "adult oriented businesses". Perhaps Council was contemplating body rub or massage parlours, adult boutiques, adult video stores, adult book stores, and/or exotic entertainment cabarets.

However, although this letter is focussed on escort services, because the issues are similar, you will note that some of the court cases we discuss below discuss body rub parlours and other adult-oriented businesses.

Statutory Authority

Under the Letters Patent issued in January 2009, the Northern Rockies Regional Municipality is a municipality, having the class of a district municipality. Therefore, authority for new bylaws must be found under the powers given to municipalities, not the powers given to regional districts.

Therefore, in this case, the authority for Council to rezone land is section 903 of the *Local Government Act*.

In the Schedule attached at the end of this letter, we excerpted from the *Community Charter* the Municipality's authority to license and regulate businesses. We recommend this legislation be reviewed, but in summary:

Community Charter, section 8(4) - A council may regulate signs.

Community Charter, section 8(6) - A council may, by bylaw, regulate in relation to business. Note the power is to regulate businesses, not prohibit businesses.

Community Charter, section 15(1) - A council may, in regulating under this Act ...., provide for a system of licences.

Community Charter, section 15 - Council may prohibit any activity until a license is granted, Council may provide for the granting or refusal of licences, Council may provide for an effective period for the licences, Council may provide for terms and conditions for the granting or holding of licences, Council may provide for the suspension or cancellation of licenses, and appeals of those decisions.

Community Charter, section 60 - How business licenses may be refused, suspended, cancelled. Because section 60 specifically deals with the refusal, suspension and cancellation of business licenses, these terms supercede the more general section 15 terms on these matters.

Community Charter, section 194 - Council may charge a fee.

Scope of Escort Service

To be sure that we are clear what Council is referring to by the term "escort service", we understand an escort service to be a business where an operator advertises the availability of escorts in the newspaper, on the internet and elsewhere, the operator takes calls from customers wishing the services of an escort, and the operator arranges for an escort to meet the customer for a date at the customer's home, a hotel room or other location specified by the customer. The escort and customer do not meet at the escort agency premises. The operator is paid a fee for each date arranged between the escort and customer. The operator does not receive any portion of the fee paid directly to the escort by the customer.

The escorts may be both females and males. The escort service may arrange dates only between males and females, or perhaps it may also arrange same-sex dates.

It appears that in many or perhaps all cases, the escorts are not employees of the agency; they are independent contractors who have a contractual arrangement with the agency.

Definition of Escort Service

For the purpose of Council defining an escort service within its Zoning Bylaw and within its business licensing and regulations bylaw, we are listing the following bylaw definitions we saw within the court cases we reviewed:

"dating/escort service shall mean a service providing companionship for and by individuals for profit or personal gain;"

"Escort Agency" means the business of providing or furnishing an escort or partner on an intermittent or temporary basis for a social occasion or function;

"Agency" means a person who charges or receives a Fee for arranging an introduction between an Escort and another person.

We should mention that bylaw definitions of various activities and businesses can be challenging, to ensure that they do not capture legitimate businesses and to ensure that the definitions are not vague or uncertain. In *Buchanan & Co. Ltd. v. City of London*, a body rub bylaw was quashed for vagueness and uncertainty, because the sweeping definition of "body

rub" caught the activities of hairdressers, barbers, athletic trainers and even baby-sitters who change diapers.

That is why the City of Vancouver's following definitions (in 1988) confirmed that escorts did not include persons escorting the elderly and the handicapped:

> "Social Escort" means any person who, for a fee or other form of payment, escorts or accompanies another person, but does not mean a person providing assistance to another person because of that other person's age or handicap.
>
> "Social Escort Service" means any person who carries on the business of providing, or offering to provide, the services or names of persons to act as escorts for other persons.

In *Zivkovic v. Kitchener (City)* the Ontario court held that the council had avoided problems usually associated with body rub parlours by simply calling them adult entertainment parlours. The court held that the phrase - "services appealing to or designed to appeal to erotic or sexual appetites or inclinations" - was quite clear.

Nature of Premises

It appears that the usual nature of an escort service is a telephone answering service. This would not require the business premises to have a storefront presence. However, we understand in Vancouver there are street-facing premises which offer both body rub and escort services.

We suggest that Council consider whether it is willing to allow escort services to be operated in the same premises as other businesses, especially other adult-oriented businesses. If escort services cannot be operated with other businesses, we think they would be less likely to have a high visibility street presence.

Legality of Escort Services

Escort services are not illegal business under the Criminal Code. In fact, adult prostitution is not a criminal offence. However, certain activities which involve the legal activity of prostitution are themselves illegal, such as communication in a public place or place open to public view for the purposes of prostitution.

In licencing escort services and escorts, the Municipality will want to ensure that it does not inadvertently give incorrect advice about this issue to a business licence applicant, as happened in the case of *R. v. Manion*.

In that case, Manion obtain a business license from the City of Calgary to operate an escort service. She collected $60 per call from escorts who attended meetings in hotel rooms with clients. She did not have a criminal record. She did not tell escorts what to do in the hotel rooms and she honestly believed she was not breaking the law.

The Calgary police started an operation focusing on escort agencies supplying prostitution services. A female officer attended at the escort agency office, posing as a prospective escort.

She was told she would have to pay the agency $70 per month for advertising, and drivers would be supplied. She was told the rates she should charge to clients, and the clothing to wear. An undercover male police officer posed as a client and met an escort at a hotel. In the end, Manion was charged criminally with living on the avails of the prostitution of another person.

As part of the court's decision to give Manion a conditional discharge, the court considered the advice she said she received from the City of Calgary licensing department:

> "I [had] no idea that what the city told me was not legal. I asked them if taking [an] introduction fee from these girls was legal, and they said it was, they told me what happens between two consenting adults is their business, and I wasn't responsible for what happened between those two consenting adults."

The court acknowledged that Manion may have misunderstood advice received from the City, but in any case, we highlight the importance of staff not providing advice of any nature to propective escort services or escorts themselves.

Business Licensing vs. Zoning

As set out in subsection 903(4) of the *Local Government Act*, the power to create zones and regulate certain land use matters within zones "includes the power to prohibit any use or uses in a zone".

The law is clear that a municipality cannot use its licensing power to effect land use zoning. The leading case in this area is the Supreme Court of Canada decision, *Prince George (City) v. Payne*. The City denied a business license for an adult boutique, even though the location was appropriately zoned commercial. The evidence was clear that the council did not want that type of business within its community. The court held that the council had unlawfully sought to prohibit land use through the mechanism of a licensing regulation.

Location of Premises

As we discussed, Council, its committees and staff will consider the appropriate zone where escort service businesses will be permitted.

We wish to mention the Ontario Court of Appeal case of *Body Rubs of Ontario Inc. v. Vaughan (City)* [2001] O.J. No. 2 (Ont. Court of Appeal). In that case, the City's business license bylaw designated locations at which body rub parlours could be located. As well, the bylaw limited these premises to 150 sq.m. in size, only one parlour per lot, and no larger than 15% of the area of a multi-unit building. The Ontario legislation allowed municipalities to limit the number of body rub licenses and define areas in which body rub parlours could and could not operate.

The company argued that the bylaw had the effect of prohibiting rather than regulating body rub parlours since there were virtually no available locations that met all the criteria of the bylaw. The court upheld the bylaw, on the basis that the casue of the insufficient locations was not the licensing bylaw, but market conditions and the apparent reluctance of landlords in the designated areas to rent space to body rub parlours. The City was under no obligation to ensure there were favourable market conditions before adopting its bylaw.

Canadian Charter of Rights and Freedoms

There are two major legal limitations on Council's ability to zone and otherwise regulate escort services and other adult-oriented businesses. The first limitation is the *Canadian Charter of Rights and Freedoms.*

This limitation will be mentioned throughout this letter, but as a general statement, when the land use that is affected by a zoning regulation or by a business regulation is an activity protected under the *Canadian Charter of Rights and Freedoms*, such as an activity that involve expression (e.g. selling and renting films), then to be lawful, the zoning or business regulation must also meet the stringent test under section 1 of the *Charter*. That is, to be lawful the regulation that interferes with a *Charter*-protected activity must be demonstrably justified in a free and democratic society.

A blanket prohibition on an a *Charter*-protected activity is much less likely to be found lawful than a limited restriction, such as a regulation that limits the time, place and manner in which the activity may be conducted but does not prohibit it entirely.

Infringement on Criminal Law

The second major limitation on Council's ability to zone and regulate these businesses is the division of powers between the federal government and provinces/municipalities.

Although this issue will also be mentioned elsewhere in this letter, jurisdiction over criminal law matters has been constitutionally assigned under section 91 of the *Constitution Act* to the federal government. Provincial or municipal laws may be found invalid if a court thinks those laws are concerned primarily with criminal law matters, such as matters of morality.

Courts have held that zoning bylaws may have a moral aspect (see, for example, *Moncton (City) v. Stelden Enterprises* and *Ontario Adult Entertainment Bar Association v. Toronto* with respect to zoning adult cabarets), but if a court thinks that the bylaw is primarily concerned with morality, there is a real risk it will be found invalid on a constitutional basis.

From a division of powers perspective, we think zoning and other bylaws can regulate adult-oriented businesses, so long as the regulation can reasonably be shown to be aimed at the neighbourhood consequences likely to be attributed to those uses. If a court cannot find a reasonable concern with neighbourhood effects, it may conclude that the real objective of the bylaw is to "criminalize" conduct on account of morality concerns and the prohibition may be found to unlawfully intrude on the federal government's criminal law jurisdiction.

This position is supported by recent decisions involving judicial challenges to bylaws related to pawn shops and panhandling. In both *Converters Canada Inc. v. Ottawa (City)* and *Royal City Jewellers & Loans Ltd. v. New Westminster (City)* the court declined to hold that a criminal law purpose could be found in a bylaw that regulates a legal business, even though that business is associated with criminal activities and subject to popular moral objection.

Purpose of Bylaw

As mentioned above, in order for a bylaw not to infringe on criminal law, the purpose of the bylaw cannot be to "criminalize" behaviour and the purpose cannot primarily be to regulate morality. The bylaw restrictions must have a reasonable connection to addressing local concerns. Court cases often consider minutes of council meetings and public meetings, newspaper interviews with council members, and other information to determine the real purpose of the bylaw.

In this section of the letter, we will review some cases which considered whether bylaws could be upheld or whether they were treading on the field of criminal law.

In *R. v. Morse* it was argued that the primary, or perhaps sole concern of the council in adopting the Red Deer escort licensing bylaw was moral considerations. The court held that no evidence of the motivation of council members had been given in evidence to the court and on the face of the bylaw, the court held that the bylaw was directed, not at morality, but to the manner in which escort businesses should be carried on.

The following is an excerpt from a paper on this subject prepared by a lawyer at our firm for a municipal law conference:

> "In applying the *Criminal Code* a court is unlikely to find that merely dancing in the nude for a duly warned private adult audience will constitute an indecent show. This non-criminal activity can therefore form a part of business that is often strictly regulated for reasons that some allege are founded on moral objections.
>
> Strict provincial regulation of exotic dancing that is combined with liquor sales was upheld by the Supreme Court of Canada in *Rio Hotel Ltd. v. NewBrunswick (Liquor Licensing Board)* as pursuing the provincial purpose of liquor control. Exotic dancers were seen by the Court as a liquor marketing tool to which a province could impose prohibitions.
>
> Municipalities may similarly apply their authority to regulate businesses specifically to exotic dancing and body-rub establishments if a municipal purpose is engaged. In the recent cases of *R. v. Zanzibar Tavern Inc. (c.ob. Zanzibar Circus Tavern)* and *R. v. Theofilaktidis* a primarily municipal purpose was found in the regulation of what employees of certain establishments could and could not do while nude.
>
> *Zanzibar* involved the bylaw prosecution of a company that operated an exotic dancing establishment. The court considered allegations that the adoption and enforcement of a City of Toronto bylaw was an attempt to supplement the criminal law. The relevant bylaw prohibited dancing "attendants" in exotic dancing establishments from touching customers.
>
> In determining the pith and substance of the bylaw, the court followed *Ontario Adult Entertainment Bar Association v. Metropolitan Toronto (Municipality)* in

which that same bylaw's purpose was held by the Ontario Court of Appeal to be "to promote health, safety and the prevention of crime and a riotous atmosphere in this type of establishment." The perceived health risk was related to the manner of touching in which nude exotic dancers might be reasonably expected to engage.

The accused corporation in *Zanzibar* alleged that the particular enforcement of the bylaw related to a moral objection to nudity, because the undercover police officer who was touched by a nude attendant gave evidence that he held no health concern for himself or for the dancer. Furthermore, the establishment had not been previously identified by Toronto as one that might be endangering public health. The court did not find that these facts revealed a criminal law purpose to the bylaw and confirmed that is was reasonable for the Toronto to prohibit touching of or by exotic dancers for reasons of preserving public health.

Turning to the *Theofilaktidis* case, the sincerity of a municipality's public health concerns was similarly challenged in that case, which was an appeal of a conviction under a City of Mississauga bylaw that prohibited body-rub establishments from permitting certain physical contact. The court noted that counsel for the accused "considered the legislation to be 'criminal law cloaked in health and safety concerns." The appeal was dismissed and the court found that the challenged bylaw was regulating rather than legislating morality, even though the regulation touched on matters of morality." The Ontario Court of Appeal did direct that a subsequent challenge to a similar body-rub bylaw be heard at trial, which confirms that the court will consider the question of colourability in cases where a bylaw is presumptively valid for health reasons.

Although Parliament can pursue a criminal law purpose related to health, the above cases indicate that the court will otherwise treat the preservation of health as a provincial and municipal purpose. This purpose can still be the pith of substance of the bylaw even if in enforcing the bylaw, the purpose is not recognized."

Council Report on Purpose of Bylaw

Please be reminded that section 8(9) of the *Community Charter* requires the Municipality to make available to the public, on request, a statement respecting Council's reasons for adopting a bylaw under section 8(3), 8(4) or 8(6). In order words, the statement or report would need give reasons for Council's decision to regulate these businesses, regulate their advertising, and require business licenses.

This statement or report ought to be prepared for Council's approval at the same time as the applicable bylaws are adopted.

Bylaw Must Not be Prohibitive

Of course, bylaws may also be quashed on other bases - for example, that they are unlawfully discriminatory, they were adopted in bad faith, or they prohibit a business when the local government is only allowed to regulate the business.

In *Eve Studio v. City of Winnipeg* the Manitoba court upheld a massage parlour bylaw. The bylaw required information to be recorded, restricted operations between midnight and 8 a.m., and limited the communities where these businesses could be located. The court held that although the bylaw may inhibit and restrict the business, the bylaw was not prohibitive - it did not prevent the carrying on of the business.

Separate Business Licences

There are a number of court decisions in which the municipal bylaw scheme under consideration required a business license by the escort agency and separate business licenses by each escort. This was also a recommendation of Staff Seargent Roy. This requirement does not appear to have been challenged in any court decision and we assume it is valid.

Disproportionate Business Licence Fee

In many of the court cases we reviewed, the court noted that the business license fee for an escort service was disproportionately high compared to the license fee for other businesses.

For example, in the following cases, the business license fees for escort services were:

$2000 (*Fort St. John (City) v. Northern Plains Ventures Ltd.*)

$3150 (*Collins v. Prince George (City)*)

$3600 (*Manion*)

$5000 (*R. v. Morse*).

In *Morse*, it was argued that the $5000 fee, at ten times higher than the fee for other businesses, resulted in the bylaw being prohibitory, rather than regulatory. The court held that, without evidence of the economic effect of such a license fee on the escort business generally, the bylaw could not be viewed as prohibitory. Similarly, in *Eve Studio v. City of Winnipeg*, a $3000 escort service licence fee was not found to be prohibitive.

The rationale for these higher fees was explained in *Manion* as the City of Calgary's belief that additional effort is required to monitor the activities of escort agencies. Calgary took the position that escort agencies "are often involved in prostitution activities which have public health implications (i.e. sexually transmitted diseases)".

The business license fee for each of the escorts was $200 in the *Manion* case.

Council will want to consider the amount of license fees that it will charge for escort service business licenses and escort business licenses.

Before leaving the subject of business license fees, we should mention that general legal principle that unlike taxes, which do not need to bear any relationship to the cost of services, fees must be at least generally proportionate to the cost of the service.

Furthermore, section 194(4) of the *Community Charter* provides that "a municipality must make available to the public, on request, a report respecting how a fee imposed under this section was determined". This requirement also suggests that fees must be proportionate. In any event, we mind the Municipality to prepare this report for approval by Council at the time of adoption of the business licensing bylaw.

License Fee Refund

Council will also need to consider whether its business licensing bylaw should provide for any discounts, interest, penalties or refunds (see *Community Charter*, section 194).

In *R. v. Morse*, it was argued that the Red Deer escort business license bylaw was invalid because only $10 of the $5000 license fee was refundable if the license was revoked or suspended. The court responded:

> "I suppose, in a particular set of circumstances, a case may be made out to support [the proposition that a refund of $10 on the revocation of a license is unconscionable.] ... On the evidence before me ...I am unable to conclude that [the bylaw refund section] .. is unconscionable so as to it invalidate it or the bylaw as a whole."

Residency Requirement

R. v. Morse was a bylaw enforcement case, in which a person was charged with operating an escort service without a business license. The accused claimed the escort licensing bylaw was invalid on a number of bases.

The bylaw required the escort service operator (and perhaps also the escorts themselves) to have six months residency in Red Deer before a license would be issued. The accused argued this violated the mobility rights guaranteed by the *Canadian Charter of Rights and Freedoms*. The court disagreed:

> "To the extent that the six-month residency required may delay the pursuit of a livelihood, that limitation on the right, would be, in my view, having regard to the interests of the municipality as set out in ... the [Alberta] *Municipal Government Act*, and the nature of the business to be regulated, a reasonable limit which can be justified in a free and democratic society."

In this case, Staff Seargent Roy has recommended that the Municipality's licensing bylaw require the escort service operator to reside in Fort Nelson and have a physical address at which the police could attend and speak in person to the operator.

We think this residency requirement would be unjustified, for a number of reasons. First, we assume the recommendation is that the operator must live in the area of the former Town of Fort

Nelson, but this is now just a portion of the area of the Regional Municipality. Also, we suspect what is important is that the business premises be located within the municipal boundaries, not that the operator live within the boundaries.

It may be reasonable for the business license bylaw to require escort agencies that are operating in the municipality to operate from an office in the municipality, but we suspect this is not a requirement of other businesses which hold licenses to carry on business in the municipality. Perhaps Council would not be concerned if (for example) an Edmonton-based agency operated an escort business in the municipality.

Hours of Operation

In the *Morse* case, the Red Deer escort service licensing bylaw required the service to remain open for business during the hours of 4 p.m. to 2 a.m. every day other than Sundays. The accused argued this requirement made the bylaw prohibitive, rather than regulatory, and that it violated a citizen's right to gain a livelihood guaranteed in the *Canadian Charter of Rights and Freedoms*. Apparently the escort business is very active after 2 a.m.

The court responded:

> "Although I concede ... that loneliness does not end at 2 a.m., even in Red Deer, I am not persuaded from the reading of [the bylaw], ... the evidence called on the trial, or from argument ... that the hours stipulated [in the bylaw] for being open are so unreasonable as to be prohibitive."

As well, the court held that this limitation on business hours was a reasonable limit on a person's right to pursue a livelihood, which right is guaranteed in the *Canadian Charter of Rights and Freedoms*.

Despite this case, we think a restriction on hours would need to be justified as addressing a local concern; otherwise, its purpose would appear to be the regulation of morality.

Certificate of Good Character

In *Giordani v. Brandon (City)*, the City's bylaw stated that all applications for an escort service licence and all applications for an escort license required a certificate of good character from the Chief of Police. The license itself was to be issued by Council.

The City acknowledged that it did not have the power to delegate its decision-making to the Chief of Police. The Manitoba legislation did not expressly allow the City to require such a certificate as a condition of granting a business license. The court was concerned that the bylaw did not set any standard for the Chief of Police to judge good character. As well, the Chief of Police was not required to advise Council why he judged someone to not have good character.

The court adopted the following principle from a 1957 Supreme Court of Canada case:

> ".. any individual has a common law right to engage in any lawful calling, subject to compliance with the laws of the jurisdiction in which it is carried on and such right is in no way dependent on his previous character."

The court held that the City of Brandon did not have the authority to require a certificate of good character as a precondition to the granting of an escort service business license.

Referral of License Application to RCMP

In *R. v. Morse*, the Red Deer bylaw required the license inspector to refer escort service license applications to the officer in charge of the RCMP detachment for his consideration. The accused argued this was an improper subdelegation of the license inspector's discretion to grant the license. The court held that this bylaw section did not delegate the issuance of a license to the RCMP. It was simply a means of obtaining information from an appropriate source to enable a decision to be made on the issuance of a license.

Criminal Record

It appears to be a common requirement of business license bylaws generally, not just escort business license bylaws, that the business license applicant not have a recent criminal record or criminal charges pending. This was also a recommendation of Staff Seargent Roy.

In *Collins v. Prince George*, the City's bylaw required the escort agency operator not to have been convicted of a criminal offence within 5 years of the license application, and if the agency was a corporation, no shareholder, director or officer could have a criminal conviction within the previous 5 years. The agency could not employ an escort who had a criminal conviction within 5 years.

As is discussed further below, we think that information required in relation to business licenses must relate to a valid municipal purpose and not be required as a tool to aid criminal law enforcement. We think that the business license should be refused only if the criminal record somehow relates to the business proposed by the applicant. For example, if an applicant for a daycare license had a criminal record for child sexual abuse, that would appear to be a valid basis for refusing the license. So the question arises - what criminal record would be a valid basis for refusing a business license to an escort business or an escort herself? A criminal record for human trafficking would appear to be a valid basis for denying a license to an escort agency, but we are doubtful that any criminal record at all will disentitle a person to a business license.

Age of Escorts

In every case we reviewed where the minimum age of an escort was mandated by a bylaw, the minimum age was 19. None of the cases challenged the validity of this bylaw requirement.

Our only question is whether the Municipality wishes to simply require this minimum age in the bylaw, or also require the agency to provide a declaration that it has confirmed the ages of its escorts, or even to require the agency to provide proof of age (eg. copies of birth certificates or other ID).

Where escorts are to be separately licensed, the Municipality would need to check identification to confirm the applicant was at least 19 years of age.

Age of Customers

It appears that some bylaws also require the customer to be at least 19 years of age. Obviously, this is a matter that the escort service cannot easily determine, since contact with the customer is made over the telephone. Nonetheless, Council may consider it important that escorts not be sent to meet under-age customers. Admittedly, though, it will be difficult for the agency to confirm the customer's age, so a bylaw requiring an agency to confirm the customer's age may be impossible to enforce.

Information Requirements

Information requirements within bylaws pose an additional risk - they may require the collection or distribution of information contrary to the B.C. *Freedom of Information and Protection of Privacy Act*, commonly referred to as FIPPA.

Section 26 of FIPPA provides only three exceptions to the general statement that personal information may not be collected by or for a public body (which includes local governments). The two possible exceptions that may apply in the case of regulating escort agencies are first, that the information is collected for the purpose of law enforcement and two, the information relates directly to and is necessary for an operating program or activity of the public body.

As you will see from our discussion below, there is much uncertainty in this area of the law and it does appear that some recent cases may have been wrongly decided.

Information About Escort Agency

We think there is no question that the license issuance could be conditional upon the Municipality receiving full information about the prospective license holder - full name, corporate name (if applicable), name under which the business will be operated, business address, licensee's address, telephone numbers and other contact information. The licensing bylaw could also require prompt notification of any changes to this information.

In every case where a license is to be issued a corporation, the Municipality should confirm, or require the applicant to confirm, that the corporation is validly incorporated under that name and has not been dissolved.

Information About Escorts and Customers

The more difficult area of the law is bylaw requirements for record-keeping and record distribution about escorts and their customers.

In *R. v. Morse*, the Red Deer bylaw required escort businesses to furnish to the City on demand the names of escorts and dates and the dating register. The accused argued this was a violation of the *Canadian Charter* protection against unreasonable search and seizure. The bylaw was upheld.

In *R. v. 252528 Alberta Ltd.*, the Edmonton bylaw required every agency to provide a written report to the City Manager within 10 days of the end of each month containing, among other things, a complete list of every introduction arranged for each escort in the previous month, including the date, time and location. The information had to include the name of each escort, their individual escort license numbers, and their alias (the names under which their services were advertised). However, this case did not decide on the validity of these bylaw requirements.

In *International Escort Services Inc. v. Vancouver (City)* the Vancouver escort service bylaw required the service to keep a list of all escorts and a record of all requests for escorts, the escort provided and the fee charged. This information had to be available for inspection and had to be provided on request to the license inspector or chief constable. It was argued that the bylaw was unlawful for violating the right to be secure from unreasonable search and seizure guaranteed by the *Canadian Charter of Rights and Freedoms*. The court held that although the bylaw did not offend the *Charter*, since there was nothing that constituted a search or seizure, the bylaw was invalid for exceeding the powers of the City. The records required went well beyond what was required to check against the employment of unlicensed escorts. The purpose of the information was not clear. In the court's opinion, the only information that could justifiably be required was the list of escorts being handled by the agency, since that information served the clear purpose of allowing the City to confirm that unlicensed escorts were not being employed.

In *Collins v. Prince George*, the bylaw required the agency to provide the name, age, address and "general description" of each escort, to notify within 48 hours of any change in personnel, and to maintain a written record of each request for an escort, including the name and address of the customer, the escort sent to meet the customer, and "the function to be attended". The court considered the validity of these bylaw requirements in light of the *Freedom of Information and Protection of Privacy Act*, and concluded that the bylaw could lawfully require the agency to provide contact information for each escort, but all other information should have been obtained directly from the escort herself.

Despite the *Collins* case, based on the wording of FIPPA, our firm does think that for the purposes of bylaw enforcement, a local government may collect information about escorts from the agency, without the consent of the escort. However, for the purposes of the business licensing program, we think information about the escorts must be obtained from them directly - unless the licensing program requires the escorts to sign a consent to information being given about them by the agency.

In summary, when considering what type of information the Municipality's bylaw will require, it is important to remember that the information must rationally be related to some valid municipal concern. So information about birth dates serves to confirm that under-age persons are not working as escorts. But information about physical descriptions appears more related to criminal law.

Inspection of Premises

In *R. v. Morse*, the Red Deer bylaw allowed inspections of premises used for escort and dating services. The accused argued this violated section 8 of the *Canadian Charter of Rights and Freedoms*, which guarantees against unreasonable search and seizure. The court disagreed and

held that providing reasonable access to inspectors to premises, registers and licenses was consistent with the interests of a municipality in regulating a business of this nature.

Carrying of License

In *R. v. Morse*, the Red Deer bylaw required the escort to at all times carry a copy of the City's business license. The accused argued that bylaw violated the *Canadian Charter* protection against unreasonable search and seizure. The court disagreed that this bylaw requirement was a search and seizure matter.

Advertising

As mentioned at the beginning of this letter, restrictions on advertising could unlawfully cross into the criminal law field and/or unreasonably affect the right of expression protected by the *Canadian Charter of Rights and Freedoms*.

In *R. v. Morse*, it was argued that the Red Deer, Alberta escort service licensing bylaw was invalid on the basis that it dealt with sexual behaviour. The bylaw provided:

> "No date or escort nor any person operating a dating and escort service shall offer or advertise that the date or escort or the dating and escort service offers or provides any form of sexual favours, sexual gratification or sexual intercourse."

The court held that that bylaw section was consistent with the regulatory powers given to an Alberta municipality, and that it was aimed at regulating the advertising of such a business.

In *Cabaret Sex Appeal v. Montréal (City)* the Quebec Superior Court considered a Montreal bylaw that regulated external signs for businesses that sold "erotic" goods and had "erotic shows". The bylaw only permitted a "sex business" (*commerce du sexe*) to use external signs that depicted the human body if there was no mention of erotic wares or services. Proprietors were subject to fines if they did not comply with the bylaw.

The Quebec Superior Court quashed the bylaw because it found that the Montréal council was attempting to impose its morals on the external displays of sex businesses and was both legislating criminal law and unjustifiably infringing the *Charter* protected freedom of expression. The court found that only purpose of the bylaw was to ban advertising images that the council considered immoral. On appeal, the higher court noted that the images targeted were "crude and in questionable taste" and agreed with the lower court ruling that the bylaw contravened the *Charter*.

In the case of *R. v. 252528 Alberta Ltd.*, the numbered company and its principal appealed their convictions of violating the City of Edmonton escort licensing bylaw. The bylaw provided that no agency could advertise its services using a telephone number, a name, an email address or an internet address unless the information was first provided to the City Manager.

Various ads appeared in the Edmonton newspaper which listed not a telephone number for the escort service, but which listed individual telephone numbers for various escorts. The company was licensed as an escort agent. The company explained to the court that it ran an advertising

business by another company called Dial and Dictate Ltd., which operated under the name J.U.I.C.E. (Just Us Independent Canadian Escorts), by which independent individual escorts could advertise their services to anyone who telephones an advertised telephone number. The court held that the numbered company was not an "agent" under the Edmonton bylaw, so did not have to provide information to the City Manager.

The reason we mention this case is to question whether Council wishes to restrict advertising such that only the name and telephone number of the escort agency is published, rather than the individual names and telephone numbers of the escorts.

Of course, an escort may be self-employed and not work for an agency. In that case, *her* name (or alias) and telephone number would be published. However, if the zoning bylaw does not permit the escort business as a home-based business, that should reduce the likelihood of escorts working without an agency.

One of the recommendations made by the RCMP was that the escort business be named and licensed as an escort agency, so that no one is misled as to the nature of the business. We think this is really a recommendation about advertising. We think it would be a proper regulation of these businesses to require that all newspaper, internet and other advertising include the words "escort service".

Health and Safety

In permitting and regulating escort services and other adult-oriented businesses, Council may have concerns about sexually-transmitted diseases. However, it must be remembered that laws of general application, such as provincial occupational health and safety regulations, would apply to escort services and all other adult-oriented businesses.

It can easily be seen how health regulation of escort businesses could be viewed as an infringement on criminal law. In *International Escort Services Inc. v. Vancouver (City),* in reviewing Vancouver's bylaw the court held accepted that there was no evidence Council acted on moral concerns and the court accepted the City solicitor's suggestion that Council had been motivated by social and health concerns.

In this case, Staff Seargent Roy has recommended that the Municipality's licensing scheme require escorts to undergo regular and frequent health checks for communicable diseases. We assume he means sexually-transmitted diseases. We think this requirement may be unlawful as exceeding the Municipality's power to regulate the lawful business of introducing customers to date, and as an unjustified interference with liberty and security of the person, as protected under the *Community Charter of Rights and Freedoms*

We also have a concern that if the Municipality adopted this requirement, customers of escorts might view this as an assurance by the Municipality that it has confirmed the escorts are disease-free.

Refusal of Business License

Since Council's perspective is in favour of permitting escort services, we are not focussing in this letter on the cases involving refusal to license escort services. However, we wish to mention that there are a number of cases questioning whether a council was justified in refusing to issue an escort service business license.

For example, in *Buck v. Courtenay*, the court directed Courtenay to issue the business license. Council had heard submissions from the public that escort services were a factor in family break-ups and resulting problems with youths. The City had refused the license on the basis that it was not in the public interest, but the court noted that the operator had no criminal record, she was attempting to set up a business that was neither contrary to the Criminal Code nor City bylaws, there was no suggestion of a dangerous situation, and there was no evidence that residents or businesses in the area would be adversely affected. There was no evidence that this activity had in the past adversely affected the youth of the community, its family life, or had promoted illegal activities.

Suspension or Revocation of Business License

Although we will not address this issue in detail, please be aware that once an escort service business license is issued, there are statutory and common law requirements applicable before the license can be suspended or revoked.

For example, in *McNeill v. North Vancouver (City)*, the City resolved that an escort business operator show cause why her business license should not be revoked for the reason that her services "exercised discretion" over a prostitute and showed her willingness to live, in part, on the avails of prostitution. The operator argued to the court, unsuccessfully, that there was procedural unfairness and she should have had notice of the meetings and other proceedings prior to Council's resolution.

Transfer of Business License

Similarly, we wish to mention that a local government cannot refuse a lawful transfer of a business license. In *Collins v. Prince George*, the court found that the transfer of an escort service business license to a new location was being intentionally delayed and this delay was motivated by issues of morality, rather than whether or not there was lawful compliance by the license holder when she applied to have her license transferred.

Bylaw Enforcers

Municipal officers and employees are usually tasked with enforcing a municipality's regulatory bylaws. Pursuant to section 16 of the *Community Charter*, authorized officers or employees may enter on or into property "to inspect and determine whether all regulations, prohibitions and requirements are being met in relation to" a municipal bylaw (section 16(6)(a)).

Section 16 does give councils the authority to authorize non-municipal actors to enter on or into property for the purposes of municipal bylaw enforcement (section 16(2)). It is pursuant to this authority that some councils authorize police officers to enforce municipal bylaws.

Police officers, of course, may enter on or into property for purposes entirely unrelated to municipal bylaw enforcement. When doing so, they are acting in their criminal law enforcement capacity and are subject to restrictions and preconditions imposed by the *Criminal Code*, the *Canadian Charter of Rights and Freedoms*, and extensive criminal law jurisprudence.

We assume the proposed new bylaws will be enforced solely by the Municipality's officers or employees, such as bylaw enforcement officers or the licence inspector. We expect it will be in both the Municipality's and the RCMP's best interest to maintain a clear regulatory and practical distinction between their respective roles. If, for example, police officers are tasked with attending business premises to inspect the register to ensure it is accurately filled out and, if not, to issue MTIs, this could lend some credence to an argument that the bylaw is essentially a "police bylaw" regulating criminal matters, and therefore not within the Municipality's jurisdiction. From the police perspective, police officers cannot circumvent the requirements or preconditions to entering property for a criminal investigation by purporting to enter on or into property pursuant to a municipal bylaw. Doing so would seriously jeopardize the admissibility of any evidence or information they obtained while ostensibly there for a non-criminal, municipal purpose. As such, we are assuming only municipal officials will be enforcing the proposed new bylaws.

Bylaw Enforcement

Presumably the new bylaw would include standard offence provisions that would enable the Municipality to prosecute alleged breaches of the bylaw by way of a long-form information under the *Offence Act*.

The Municipality may also want to establish this bylaw as one that can be enforced by bylaw enforcement officers or others under the Municipal Ticket Information system.

If you wish to discuss any of these points, please feel free to contact us.

Yours truly,

YOUNG, ANDERSON

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List of Court Decisions

Body Rubs of Ontario Inc. v. Vaughan (City) [2001] O.J. No. 2 (Ont. Court of Appeal)

Buchanan & Co. Ltd. v. City of London (unreported, October 23, 1998, Court File No. 28791, London, On.)

Buck v. Courtenay [1991] B.C.J. No. 2921 (B.C.S.C.)

Cabaret Sex Appeal v. Montréal (City) [1992] J.Q. No. 1600 (C.S.) (QL) [Cabaret Sex Appeal]

Collins v. Prince George (City) [2007] B.C.J. No. 7 (B.C.S.C.)

Converters Canada Inc. v. Ottawa (City) (2006), 18 M.P.L.R. 4th 153 (Ont. Sup. Ct. J.) rev'd on other grounds 37 M.P.L.R. (4th) 33, 2007 ONCA 604

Eve Studio v. City of Winnipeg [1984] M.J. No. 385 (Manitoba Court of Queen's Bench)

Giordani v. Brandon (City) [1997] M.J. No. 634 (Man. Court of Appeal)

International Escort Services Inc. v. Vancouver (City) [1988] B.C.J. No. 2475

McNeill v. North Vancouver (City) [1985] B.C.J. No. 490 (B.C. Supreme Court)

Moncton (City) v. Stelden Enterprises (2002), 9 M.P.L.R. (3d) 201 (N.B.Q.B.)

Ontario Adult Entertainment Bar Association v. Toronto (1997) 42 M.P.L.R. (2d) 1 (Ont. C.A.)

Prince George (City) v. Payne [1978] 1 S.C.R. 458 (S.C.C.)

R. v. 252528 Alberta Ltd. [2008] A.J. No. 1199 (Alberta Court of Queen's Bench)

R. v. Manion [2005] A.J. No. 260 (Alberta Provincial Court).

R. v. Morse [1984] A.J. No. 2627 (Alberta Provincial Court)

R. v. Theofilaktidis [2004] O.J. No. 5968 (Ontario Court of Justice)

R. v. Zanzibar Tavern Inc. (c.ob. Zanzibar Circus Tavern) [2007] O.J. No. 3381 (Ontario Court of Justice)

Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board) [1987] 2 S.C.R. 59

Royal City Jewellers & Loans Ltd. v. New Westminster (City) [2007] B.C.C.A. 398

Ultimate Relaxation Inc. v. Coquitlam (City) [1995] B.C.J. 2678 (B.C.S.C.)

Zivkovic v. Kitchener (City) [1999] O.J. No. 806 (Ontario Court of Justice)

Schedule - *Community Charter* - Business Licensing and Regulation Authority

Section 8(3) - A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:

> (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;

(4) A council may, by bylaw, regulate and impose requirements in relation to matters referred to in section 65 *[signs and other advertising]*.

(6) A council may, by bylaw, regulate in relation to business.

(7) The powers under subsections (3) to (6) to regulate, prohibit and impose requirements, as applicable, in relation to a matter

> (a) are separate powers that may be exercised independently of one another,
>
> (b) include the power to regulate, prohibit and impose requirements, as applicable, respecting persons, property, things and activities in relation to the matter, and
>
> (c) may not be used to do anything that a council is specifically authorized to do under Part 26 *[Planning and Land Use Management]* or Part 27 *[Heritage Conservation]* of the *Local Government Act*.

(8) As examples, the powers to regulate, prohibit and impose requirements under this section include the following powers:

> (a) to provide that persons may engage in a regulated activity only in accordance with the rules established by bylaw;
>
> (b) to prohibit persons from doing things with their property;
>
> (c) to require persons to do things with their property, to do things at their expense and to provide security for fulfilling a requirement.

(9) A municipality must make available to the public, on request, a statement respecting the council's reasons for adopting a bylaw under subsection (3), (4), (5) or (6).

Authority to establish variations, terms and conditions

12 (1) A municipal bylaw under this Act may do one or more of the following:

(a) make different provisions for different areas, times, conditions or circumstances as described by bylaw;

(b) establish different classes of persons, places, activities, property or things;

(c) make different provisions, including exceptions, for different classes established under paragraph (b).

(2) A council may, in exercising its powers under section 8 (1) *[natural person powers]*, establish any terms and conditions it considers appropriate.

Licensing and standards authority

15 (1) A council may, in regulating under this Act or the *Local Government Act*, provide for a system of licences, permits or approvals, including by doing one or more of the following:

(a) prohibiting any activity or thing until a licence, permit or approval has been granted;

(b) providing for the granting and refusal of licences, permits and approvals;

(c) providing for the effective periods of licences, permits and approvals;

(d) establishing

(i) terms and conditions of, or

(ii) terms and conditions that must be met for obtaining, continuing to hold or renewing a licence, permit or approval, or providing that such terms and conditions may be imposed, the nature of the terms and conditions and who may impose them;

(e) providing for the suspension or cancellation of licences, permits and approvals for

(i) failure to comply with a term or condition of a licence, permit or approval, or

(ii) failure to comply with the bylaw;

(f) providing for reconsideration or appeals of decisions made with respect to the granting, refusal, suspension or cancellation of licences, permits and approvals.

Division 9 — Business Regulation

Powers to require and prohibit

59 (1) A council may, by bylaw, do one or more of the following:

(d) prohibit the operation of a public show, exhibition, carnival or performance of any kind or in any particular location;

Business licence authority

60 (1) An application for a business licence may be refused in any specific case, but

(a) the application must not be unreasonably refused, and

(b) on request, the person or body making the decision must give written reasons for the refusal.

(2) In addition to the authority under section 15 (1) (e) *[licences, permits and approvals — suspension and cancellation]*, a business licence may be suspended or cancelled for reasonable cause.

(3) Before suspending or cancelling a business licence, the council must give the licence holder notice of the proposed action and an opportunity to be heard.

(4) Despite section 155 (2) (b) *[restriction on delegation of hearings]*, a council may, by bylaw under section 154 *[delegation of council authority]*, authorize a municipal officer or employee to suspend or cancel a business licence.

(5) If a municipal officer or employee exercises authority to grant, refuse, suspend or cancel a business licence, the applicant or licence holder who is subject to the decision is entitled to have the council reconsider the matter.

Nuisances, disturbances and other objectionable situations

64 The authority of a council under section 8 (3) (h) *[spheres of authority — nuisances disturbances and other objectionable situations]* may be exercised in relation to the following:

(a) nuisances;

(b) noise, vibration, odour, dust, illumination or any other matter that is liable to disturb the quiet, peace, rest, enjoyment, comfort or convenience of individuals or the public;

(j) the carrying on of a noxious or offensive business activity;

(l) indecency and profane, blasphemous or grossly insulting language.

Signs and other advertising

65 The authority of a council under section 8 (4) *[spheres of authority — signs and other advertising]* may be exercised in relation to the erection, placing, alteration, maintenance, demolition and removal of signs, sign boards, advertisements, advertising devices and structures.

General revenue sources

192 Municipalities have the following revenue sources:

(a) fees under Division 2 *[Fees]*;

Municipal fees

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:

(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;

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

(e) provide for the refund 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.