IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *36041 Yukon Inc.* v. *City of Whitehorse*
2005YKSC 37

Date: 20050624
Docket No.: S.C. No. 03-A0194
Registry: Whitehorse

Between:

36041 YUKON INC.
OPERATING AS THE COFFEE BAR

Plaintiff

And

THE CITY OF WHITEHORSE

Defendant

Before: Mr. Justice L.F. Gower

Appearances:
Paul Douglas — Agent for Plaintiff
Timothy S. Preston, Q.C. — For the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The City of Whitehorse (the "City") passed a bylaw which prohibited persons from smoking in all public places, including restaurants and licensed dining premises, but permitted smoking in cocktail lounges and taverns for the first year after the bylaw came into effect. A few months prior to the passage of that bylaw, the plaintiff established a coffee bar and food service business in an industrial area of Whitehorse. As of January 1, 2004, its customers were no longer able to smoke on its business premises. However, they could continue to do so in cocktail lounges and taverns, many of which provided

essentially the same food services as the City's restaurants. The plaintiff has challenged the validity of the smoking bylaw on the basis that the bylaw unfairly discriminated against it, that the City acted in bad faith and that the plaintiff has suffered business losses as a result. The parties were directed by the pre-trial conference judge to proceed firstly on the issue of liability.

ISSUES

[2] The issues are:

1. Does the City have legislative authority to enact bylaws which, on their face, appear to be discriminatory?
2. Is the smoking bylaw discriminatory?
3. Did the City act in bad faith in passing the smoking bylaw?

FACTS

[3] In November 1995, the City of Whitehorse Municipal Council ("Council") passed a smoking bylaw prohibiting smoking in certain public places, including government buildings, food preparation areas, public transportation and confined public places.

[4] In May 2003, the Council considered a recommendation from its public health and safety committee to consider a new bylaw that would prohibit smoking in all public places, except cocktail lounges and taverns. The proposed bylaw was given first reading before Council on May 12, 2003. On May 26, 2003, Council adopted a public engagement process for the proposed bylaw.

[5] On June 30, 2003, following further public input and an administrative recommendation, the proposed bylaw was amended prior to second reading to include cocktail lounges and taverns within the definition of public place. As a result, smoking

would be prohibited in cocktail lounges and taverns, along with all other public places. It was to come into effect 30 days after adoption.

[6] In July 2003, Council heard from the British Columbia and Yukon Hotels' Association, which submitted that an immediate smoking prohibition in lounges and taverns would have significant adverse economic impacts and that the prohibition should be phased in over a period of several years.

[7] On August 11, 2003, Council again amended the proposed bylaw by stipulating that the implementation date for lounges and taverns would be January 1, 2005. For all other public places and businesses, the bylaw was to come into effect on January 1, 2004. The bylaw, as amended, was then given second and third reading and passed.

[8] Between May and August 2003, when the bylaw was finally enacted, the City received 15 letters and 189 e-mails on the topic. Council was also presented with studies on the impact of the smoking ban on hotel and restaurant economics. The City provided evidence that Council took into account the injurious effects of second-hand smoke on the general population, the particular vulnerability of children to second-hand smoke, and the fact that children are not permitted to enter cocktail lounges or taverns. The Council apparently balanced the consideration of the potential adverse economic impact upon the hoteliers with the health needs of the community. In consequence, it delayed the implementation of the bylaw for lounges and taverns for a period of one year from the date the bylaw would otherwise come into effect, as I have just described.

[9] A special meeting of Council was held on March 15, 2004 to reconsider the bylaw. It remained unchanged. A further meeting of Council was held on October 4, 2004 to

consider a possible exemption of a private club from the smoking bylaw. That consideration was also rejected.

THE LAW

[10] My discussion of the law in this area necessarily begins with the *Municipal Act*, R.S.Y. 2002, c. 154, (the *"Act"*). Section 266(b) of the *Act* states that a municipal council may pass a bylaw which deals with any "activity, industry, [or] business … in different ways …". Further, a municipal council may divide each such activity, industry or business into "classes and deal with each class in different ways …". Sections 351(1)(b) and (c) of the *Act* say that a bylaw may be challenged as being invalid if Council acted in "bad faith" or if the bylaw is "discriminatory". Bad faith is not defined in the *Act*, but s. 351(2) specifies that a bylaw is discriminatory:

> "… if it operates ***unfairly and unequally*** between different classes of persons ***without reasonable justification***." (emphasis added)

[11] Section 351(4) says that a bylaw may not be challenged on the ground that it is unreasonable. That appears to contradict s. 351(2). It would seem arguable that, while a bylaw may not be challenged simply on the grounds that it is "unreasonable", in certain cases, the rationale for saying that a bylaw is unreasonable may overlap with the questions of whether it operates "unfairly" or whether there is "reasonable justification" for the bylaw being discriminatory. I will return to this point after a consideration of the relevant case law.

[12] One of the leading cases on whether a bylaw is discriminatory is the Supreme Court of Canada decision in *Montreal (City)* v. *Arcade Amusements Inc.*, [1985] 1 S.C.R. 368. That case stands for the general proposition that municipal councils cannot make

bylaws that are discriminatory, unless the enabling legislation allows them to do so (at para. 102).

[13] Later, in *R.* v. *Sharma*, [1993] 1 S.C.R. 650, Iacobucci J., speaking for five other members of the Supreme Court of Canada, confirmed this proposition a bit more explicitly, at para. 25:

> "… The rule against discriminatory by-laws is an outgrowth of the principle that, as statutory bodies, municipalities "may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation" (Makuch, Canadian Municipal and Planning Law (1983), at p. 115)."

[14] *Arcade Amusements*, cited above, also held that a bylaw is not invalid simply because a court considers it to be unreasonable. More particularly, at para. 102, the Supreme Court quoted Lord Russell of Killowen C.J., in *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, as saying:

> "… ***A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient***, or because it is not accompanied by a qualification or an exception which some judges think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges. …" (emphasis added)

This principle of judicial deference to municipal authority is well established, as the following cases indicate.

[15] The comments of Estey J. in the Supreme Court of Canada case of *Kuchma* v. *Rural Municipality of Tache*, [1945] S.C.R. 234, were quoted with approval by the British

Columbia Court of Appeal in *Macmillan Bloedel Ltd.* v. *Galiano Island Trust Committee* (1995), 126 D.L.R. (4th) 449 (B.C.C.A.), at paras. 108 and 109:

> "Upon the question of public interest, ***courts*** have recognized that the municipal council, familiar with local conditions, is in the best position of all parties to determine what is or is not in the public interest and ***have refused to interfere*** with its decision ***unless good and sufficient reason be established***." (emphasis added)

[16] Later, at para. 114, the Court of Appeal referred to yet another Supreme Court of Canada decision in *Shell Products Canada Limited* v. *City of Vancouver*, [1994] 1 S.C.R. 231, where McLachlin J., as she then was, writing for the minority, said that "… judicial review of municipal decisions should be confined to clear cases …".

[17] Finally, O'Brien J. of the Ontario Court of Justice in *Ontario Restaurant Assn.* v. *Toronto (City)*, [1996] O.J. No. 5401, at para. 34, repeated this refrain:

> "… The fact that a municipal by-law is passed to the benefit of a particular group, even at the expense or to the prejudice of another is not sufficient to invalidate a by law on grounds of discrimination. ***So long as no improper motive is shown and so long as a municipal Council acts in what it regards as the best interest of the public as a whole it will not be reviewed by a court***." (emphasis added)

[18] The British Columbia Court of Appeal in *Restaurant and Food Services Assn. of British Columbia* v. *Vancouver (City)* (1998), 155 D.L.R. (4th) 587, dealt with an application to set aside a smoking bylaw passed by the City of Vancouver. The Court found the City had the legislative authority to pass the bylaw. It also described the bylaw before it as a valid "political compromise" between the various options in resolving this particular point of conflict (at para. 29). Further, the Court noted that the City was not required to choose "the best or most efficacious" of the options (at para. 15). Similarly,

the Court suggested that the City's "political motives" in arriving at such a compromise were not a factor justifying an intervention to set aside the bylaw (at para. 27).

[19] Finch J.A., as he then was, for the majority, quoted with apparent approval, at para. 27, the chambers judge, who said:

> "… it was entirely within the [City's] authority, when enacting the By-Law, to reach a compromise … by prohibiting smoking in restaurants only, leaving certain other eating and drinking establishments unregulated. … The fact that in choosing the option it did the [City] created an ***uneven playing field*** between different classes of eating and drinking establishments, and the fact that ***economic consequences*** may flow from this distinction, cannot operate as grounds for setting aside the By-Law. …" (emphasis added)

At paras. 28 and 29, Finch J.A. went on to find that the bylaw was justifiable, even though not a perfect solution:

> "… The effect of the exemption therefore is to permit smoking only in those establishments serving food where few minors are permitted, and to prohibit smoking in those establishments serving food where minors are free to enter. There was a ***rational foundation*** for drawing a distinction on those lines … and Council's decision to act on that distinction cannot therefore be said to be arbitrary, or capricious. It was based on a sound reason.
>
> … ***Admittedly, the by-law does not afford the same level of protection to all inhabitants of the City equally***, and it does not protect all minors. ***But there is nothing in the [governing legislation] which would require such a utopian outcome.*** …" (emphasis added)

[20] Ian M. Rogers, Q.C., in *The Law of Canadian Municipal Corporations*, 2nd ed., at p. 1026, sets out the common law test for when a bylaw can be said to be discriminatory:

> "Two elements are required to establish discrimination:

a. the by-law must in fact discriminate by giving permission to one person and refusing permission to another; and

b. the factual discrimination must be carried out with an improper motive of favouring or hurting one individual without regard to the public interest."

[21] "Bad faith", although related to discrimination, is a separate concept: *Lees et al* v. *Corporation of District of West Vancouver* (1979), 15 B.C.L.R. 233 (C.A.). *Black's Law Dictionary,* 5th ed., says that "bad faith" implies the conscious doing of a wrong with a dishonest or immoral purpose. Laskin J.A., speaking for the Ontario Court of Appeal in *Equity Waste Management of Canada* v. *Halton Hills (Town)* (1998), 35 O.R. (3d) 321, at p. 340, said that bad faith by a municipality:

> "… connotes a lack of candour, frankness and impartiality. It includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest …"

"Unreasonableness" may also help to establish bad faith: *Re Howard and Toronto*, [1928] 1 D.L.R. 952 (C.A.).

[22] Where bad faith is alleged, the onus of proof clearly rests upon the applicant: *Lees*, cited above, at p. 244; and *Equity Waste Management*, cited above, at p. 338 - 339.

[23] Rogers, at p. 1027, says that discrimination is not the same as "unreasonableness". Further, at p. 1028, he says:

> "The general rule is, apart from statute, that the courts should be slow to condemn as invalid any by-law on the ground it is unreasonable simply because it may be oppressive and unfair or in restraint of trade and then only in an extreme case." [1]

[1] Ian M. Rogers, Q.C., *The Law of Canadian Municipal Corporations*, 2nd ed., Carswell

[24] The need for “an extreme case” probably arises from the words of Lord Russell in *Kruse* v. *Johnson*, which was quoted with approval in *Arcade Amusements*, cited above, at para. 102;

> “… I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and ***unequal in their operation as between different classes***; if they were ***manifestly unjust***; if they disclosed ***bad faith***; if they involved ***such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men***, the Court might well say, “Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires”. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. …” (emphasis added)

[25] Thus, returning to the *Municipal* Act, notwithstanding s. 351(4), it would appear that a bylaw can be challenged as being unreasonable in the truly egregious sense just described by Lord Russell. However, if that is found to be the case, then the bylaw is not struck down simply because it is unreasonable, but because it can no longer be said to be within the legislative jurisdiction of the municipality. In other words, a municipality cannot have legislative authority to pass bylaws which are so unjust, oppressive or unfair as to be incapable of justification by reasonable persons.

[26] It is also important to note here that in Lord Russell’s opinion, mere unequal operation of a bylaw as between classes, without more, would be reason to strike it down. This has been referred to as the “neutral rule of discrimination”[2], which simply means that no discrimination, no matter how rational, reasonable or wise, will be allowed, if the power to pass discriminatory bylaws is not within the municipality’s

[2] *R*. v. *Sharma*, [1993] 1 S.C.R. 650 (S.C.C.), at para. 19

governing legislation. In the current case, ss. 266(b) and 351(2) of the *Municipal Act* do authorize the passage of apparently discriminatory bylaws, providing they can be reasonably justified.

[27] As for s. 351(2), I agree with the City's counsel that this provision is likely an attempt to codify the common law test for discrimination. The two principal elements of s. 351(2) are:

1. the bylaw must operate "unfairly and unequally" between different classes of persons; and
2. it must do so "without reasonable justification".

[28] "Unfairly and unequally" in the first element are not defined in the *Act*, but the terms reflect the language in *Kruse* v. *Johnson* and in the common law test. It is helpful to consider the differential treatment of classes of persons as being "unequal" in the sense of giving permission to one and refusing it to another, which is factual discrimination. It is also helpful to consider the unequal treatment as being "unfair" in the sense that it is intended to favour or hurt a particular person, or class of persons, without taking into account the public interest. However, there may be other ways in which a challenger could establish unfairness, given the relatedness between the concepts of discrimination, bad faith and unreasonableness.

[29] The second element of s. 351(2) is the lack of reasonable justification. This also reflects the language in *Kruse* v. *Johnson*. The use of the word "justification" suggests that it should fall to the municipal council, as the author of the bylaw, to defend it. However, because the common law states that the onus clearly rests upon the challenger of the bylaw, he or she must initially establish that the bylaw is operating

“unfairly and unequally” before the onus would shift to the municipality to provide its “reasonable justification”.

[30] Further, since unreasonableness by itself is generally insufficient to invalidate a bylaw, it would seem strange to expect a challenger to have to prove unreasonableness, in a justificatory sense, when attacking a bylaw under s. 351(2), especially if the challenger has already made a sufficiently strong (*prima facie*) case that the bylaw operates both unequally and unfairly. Rather, it seems more logical to expect the municipality to establish the reasonableness of the bylaw in the justificatory sense.

[31] What could constitute reasonable justification is unclear, because the term is not further defined in the *Act*. Presumably, it might include an argument that the municipality took into account the greater public good and the impact of the bylaw on the community as a whole. The public interest aspect of the common law test would logically be a topic for the municipality to argue, since it is in the best position to elucidate the particular considerations of the municipal council in that regard.

[32] Consistent with that proposition, if the challenger establishes unfairness and inequality, that should be sufficient to allow an inference that the bylaw is also contrary to the public interest. Thus, the onus should shift to the municipality, as I have suggested. Otherwise, the challenger would be in the awkward position of having to prove a negative, that is, that the public interest was not taken into account.

[33] Finally on this point, given the principle of judicial deference to municipal decisions, the onus on the municipality is not high. As was the case in *Restaurant and Food Services Assn.*, cited above, all a municipality need do is provide a “rational foundation” for the bylaw. In other words, *any* reasonable justification will be sufficient.

The municipality, in this context, is not required to provide a comprehensive strategic rationale.

[34] In summary:

1. If a municipality has no legislative authority to pass a bylaw which purports to discriminate, then the bylaw will be struck down as invalid.
2. If the municipality appears to have the proper legislative authority to pass a bylaw which purports to discriminate, but the bylaw is so egregiously unreasonable that it fails the *Kruse* v. *Johnson* test, then it will be struck down as being beyond the legislative jurisdiction of the municipality.
3. If the bylaw is simply “unreasonable”, but not in the egregious *Kruse* v. *Johnson* sense then, pursuant to s. 351(4) of the *Municipal Act*, that alone is insufficient grounds for quashing the bylaw. However, mere unreasonableness may support an argument that the bylaw was passed in “bad faith” or that it operated “unfairly and unequally”.
4. Bad faith, if established, is a ground for quashing a bylaw under s. 351(1)(c) of the *Act*.
5. If the challenger proceeds on the ground of discrimination under s. 351(1)(d) of the *Act*, then s. 351(2) is engaged:
    a. Section 351(2) initially requires the challenger of a bylaw to establish, on a balance of probabilities, that it operates “unfairly and unequally”. In most cases, the unequal operation, or factual discrimination, of the bylaw will be relatively easy to establish. If the challenger also provides evidence that the bylaw was passed for the improper purpose of favouring or hurting an

individual or group of persons without considering the public interest, that would be sufficient to prove unfairness. There may, however, be other ways of proving unfairness. In some cases, once both unfairness and unequal operation have been established, it may be inferred that the bylaw was passed without regard to the public interest.

b. If the challenger can make a sufficiently strong (*prima facie*) case that the bylaw operates both unfairly and unequally, then the onus will shift to the municipality to provide its "reasonable justification", which logically would be expected to focus on the public interest consideration. The onus on the municipality here would not be high, given the judicial deference to municipal decision-making – any rational foundation will be sufficient.

ANALYSIS

Issue 1: Does the City have legislative authority to enact bylaws which, on their face, appear to be discriminatory?

[35] As stated earlier, ss. 266(b) and 351(2) of the *Municipal Act*, read together, authorize City Council to pass apparently discriminatory bylaws, providing that the discrimination can be reasonably justified. Therefore, the answer to this question is "yes".

Issue #2: Is the smoking bylaw discriminatory?

[36] The primary issue raised by the plaintiff is discrimination. Although it did not specifically plead bad faith in its statement of claim as a reason for challenging the bylaw, it implicitly did so and continued to argue that point during this part of the trial. Further, some of the plaintiff's arguments on discrimination overlapped with the issue of bad faith. Given the interrelationship of these issues, that was not surprising. For

convenience, in this part of my reasons I will address both the plaintiff's arguments on discrimination and its arguments on bad faith.

[37] The plaintiff strenuously argued that the bylaw had the effect of treating it and other restaurateurs differently from hoteliers. I agree. Customers attending at the premises of a restaurateur would, after January 1, 2004, no longer be able to smoke. On the other hand, those same customers could potentially walk across the street to a lounge or tavern serving essentially the same menu as the restaurant and, without even ordering an alcoholic beverage, they would be permitted to smoke. The hoteliers were given permission to allow smoking during the phase-in period, while the restaurateurs were refused such permission. In that sense, the bylaw operates "unequally between different classes of persons" ("persons" includes businesses), contrary to s. 351(2) of the *Act*. In the common law sense, the bylaw "factually discriminated" between the businesses. However, that is not the end of the analysis.

[38] To prove discrimination under the *Municipal Act*, the plaintiff must also establish that the bylaw operates "unfairly". It could do that by showing that the bylaw was passed with an improper motive and without regard to the public interest. At the very least the plaintiff would have to prove some unfairness *beyond* the mere fact of unequal treatment.

[39] If the plaintiff is able to prove the bylaw operated both unfairly and unequally, then it would be necessary for the City to establish that there was a reasonable justification for the bylaw.

[40] I will now turn to the specific arguments of the plaintiff, as I understood them.

Insufficient Public Input and Debate

[41] On the elements of improper motive and public interest, and to some extent bad faith, the plaintiff argued that there was an insufficient opportunity for a full public debate on the issue at the meeting of Council on August 11, 2003. It also submitted that there should have been additional public input between the second and third readings of the bylaw. It suggested the process had been rushed, perhaps as a result of the hoteliers' lobbying efforts.

[42] In response, I note firstly that s. 218 of the *Municipal Act* provides that two readings can take place at one meeting.

[43] Secondly, there was evidence that it was normal practice for Council to pass second and third readings of bylaws at the same meeting.

[44] Thirdly, the published agenda for the Council meeting on August 11th clearly stated that the smoking bylaw was scheduled for both second and third reading. I assume the agenda was publicly available. Had the plaintiff (or any other member of the public) felt that the agenda should be amended to postpone third reading, it could presumably have lobbied one or more of the City Councillors to propose such an amendment.

[45] Fourthly, Council reconsidered its decision on March 15, 2004, and yet again on October 4, 2004. Several of the Councillors and the Mayor were recorded as saying how difficult and complex the issue was for them and that there were no simple solutions.

[46] Finally, it is trite to say that City Councillors have been elected to debate matters of municipal governance – as between themselves. Council meetings are generally not opportunities for full-fledged debates between the Councillors and members of the

public. Admittedly, there are occasions when it may be appropriate for Councillors to receive public input from citizens and groups on contentious issues such as smoking in public places. In this case, the information provided to Council was extensive and was received over a period of several months. It was in various forms, including e-mails, letters, meetings and individual submissions from citizens at Council meetings. At some point, Council had a political responsibility to attempt to decide the issue once and for all. It did so on August 11, 2003.

The Short Notice to Restaurateurs

[47] The plaintiff further complained that the City did not fully consider the economic impacts on the restaurateurs by making them subject to the bylaw as of January 1, 2004, in comparison with the hoteliers, who had until January 1, 2005. In that sense, the plaintiff said the restaurateurs only had four months notice to prepare for the impact of the bylaw, whereas the hoteliers had 16 months notice. This was another example of why the plaintiff felt the City was acting unreasonably and in bad faith.

[48] In response, I would again note that while the bylaw may have treated restaurateurs and hoteliers “unequally”, which is factual discrimination, it is still incumbent upon the plaintiff to prove that the bylaw operated “unfairly”. It is important to remember here that an earlier version of the bylaw was to have prohibited smoking in all public places, including lounges and taverns, to be effective 30 days after the passage of the bylaw. Had the bylaw been passed in that fashion, all parties would have been left with a relatively short adjustment period. However, as a result of the amendments passed on August 11, 2003, they were given additional preparation time. Looking at it from that perspective, it remains true that the hoteliers were given approximately 16

months notice, but it is also true that the restaurateurs were given over 4 months notice of the bylaw's effective date, which is more than what had been originally proposed.

[49] I find the plaintiff has not met its onus in establishing either discrimination or bad faith. As suggested in *Restaurant and Food Services Assn.*, cited above, the fact that the bylaw created an "uneven playing field" with "economic consequences" to the restaurateurs is not a basis for setting it aside. Similarly, the City's "political motives" in granting more time to the hoteliers are not grounds for attacking the validity of the bylaw.

The Preponderance of Public Input

[50] The plaintiff argued that the majority of the public input (through letters, e-mails and presentations to Council) asked for a total ban on smoking, without any exception for the hoteliers. In essence, the plaintiff suggested that Council should have decided the issue based upon the preponderance of public opinion, and the fact that it did not is evidence that it acted unreasonably and in bad faith.

[51] On the other hand, I agree with the City's counsel that the test is not whether the City should have counted the opinions "for and against" an exemption for hoteliers and voted for the majority. Rather, the evidence indicates that the City fully and fairly considered the public input and made its decision without an improper motive and in the public interest. The plaintiff has not proven otherwise. In any event, the City established a reasonable justification - it was attempting to balance the economic issues with the particular vulnerability of minors and children to second-hand smoke.

No Reasonable Justification

[52] The plaintiff argued that the City did not meet the test of reasonable justification under s. 351(2) for at least two reasons. First, while minors and children were protected

from second-hand smoke in lounges and taverns, adults in those establishments were not. The plaintiff suggested that the most reasonable answer to the problem of second-hand smoke would have been to protect all of the City's citizens. Second, in granting an exemption to the hoteliers, the plaintiff says that the City denied it an opportunity to compete in the food service marketplace.

[53] The short answer to that submission is that the City was not obliged to choose the best or most reasonable option, providing that the bylaw is for a legitimate purpose and is in the public interest. I have already found that the plaintiff has failed to prove otherwise. Once again, as the British Columbia Court of Appeal said in *Restaurant and Food Services Assn.*, cited above, at para. 29:

> "… Admittedly, the by-law does not afford the same level of protection to all inhabitants of the City equally, and it does not protect all minors. But there is nothing in the [governing legislation] which would require such a utopian outcome. …"

[54] Further, at the risk of repetition, to the extent that Council might be accused of political motives in accommodating the lobby from the hoteliers in allowing the one-year exemption, that is simply not a relevant factor in this analysis. Finally, that this may have resulted in unequal treatment and adversely affected his competitiveness, is not a sufficient reason to find the bylaw invalid.

[55] Therefore, the answer to this question is "no", the smoking bylaw is not discriminatory.

Issue 3: Did the City act in bad faith in passing the smoking bylaw?

[56] For the reasons set out above, the plaintiff has not satisfied me, on a balance of probabilities, that the City acted in bad faith in passing this bylaw.

CONCLUSION

[57] In summary, while the plaintiff has established that it was treated “unequally”, that is differently, from the hoteliers under the bylaw, that is not proof of discrimination under the *Municipal Act*. The plaintiff was further required to prove that the City acted “unfairly”. On that aspect of the test the plaintiff has fallen short. Nor did the plaintiff satisfy me that the City acted in “bad faith”. In any event, the City has provided a reasonable justification for the bylaw. It allowed an adjustment period of one year to offset the probable adverse economic impacts upon the hoteliers, while ensuring that minors (who cannot enter cocktail lounges and taverns) continued to be protected from second-hand smoke. As for the plaintiff’s suggestion that the City’s decision was simply unreasonable, that is not a basis for setting it aside under the *Act*.

[58] Therefore, the plaintiff’s action is dismissed.

COSTS

[59] Although the City’s counsel asked for costs in his trial brief, I did not hear from the parties on this point at trial. While I do not wish to prejudge the issue, I would simply observe that this was a legitimate issue for the plaintiff to raise, and one of significant public interest. It did so carefully and in a professional manner. I would hope in these circumstances, the City might consider bearing its own costs.

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GOWER J.