

7

CONSTITUTIONAL CHALLENGE - NO SMOKING BY-LAW

The Health and Emergency Medical Services Committee recommends that:

- 1. The recommendation contained in the following report, May 12, 2005, from the Regional Solicitor and the Commissioner of Health Services be received, subject to amending the amount “\$103,005.99” wherever it occurs in the report, being the amount of legal fees incurred, to “\$104,063.77”.**

1. RECOMMENDATION

It is recommended that:

1. Committee and Council receive this report for information.

2. PURPOSE

The purpose of this report is to advise Committee and Council of the abandonment of the constitutional challenge against the Regional Municipality of York’s No Smoking By-Law.

3. BACKGROUND

As reported to Committee and Council in September 2002 and June 2004, Crow’s Nest and its owner, Irv Riopelle, filed an application on July 2, 2002, challenging the constitutional right of the Province to legislate health-related matters and the corresponding right of the Region to regulate smoking in public places, as well as the delegation of enforcement duties to the proprietors of public places.

If the court found that the Province did not have the right to regulate health matters, section 213 of the *Municipal Act* could be struck down as unconstitutional. The consequence would be that the Region’s No Smoking By-Law would have been declared invalid.

The application was filed as a result of a prosecution against the Crow’s Nest under the Region’s No Smoking By-Law and was to be considered a test case for other similar challenges.

3.1 External Legal Counsel

As reported to Committee and Council in September 2002, the Region retained Paterson MacDougall to defend its position in response to this application. This law firm

successfully defended The Regional Municipality of Waterloo in respect of two challenges against its No Smoking By-Law.

4. ANALYSIS AND OPTIONS

4.1 Abandonment of Constitutional Challenge

On April 29, 2005, Crow's Nest served the Region with a Notice of Abandonment of the application challenging the legality and constitutionality of its No Smoking By-Law. No reason was given by the Applicants for the abandonment of its court challenge to the Region's No Smoking By-Law.

4.2 Legal Fees

At the commencement of their retainer in September 2002, Paterson MacDougall estimated that fees with respect to defending this application might total approximately \$75,000.00, but the cost would depend upon the length of the hearing. Due to the tactics of counsel for the Crow's Nest, the proceedings in this matter have been protracted and as a result the legal fees for the Region's defence against this application were estimated in the report to Council in June 2004 to reach \$200,000.00. Upon abandonment by Crow's Nest, the total legal fees and disbursement costs incurred by the Region are \$103,005.99.

As the respondent in the constitutional challenge, the Region had no option but to defend this action. Our legal counsel made every effort to minimize delays, however, the length of the proceeding was ultimately determined by the court.

The only statutory authority for costs to be recovered from Crow's Nest in connection with this application would be for witness fees of \$6.00 per day plus mileage, up to a maximum of \$100.00, pursuant to s. 60 (2) of the *Provincial Offences Act (POA)*. Costs under s. 60 (2) and these costs are rarely awarded against defendants.

Costs are not recoverable in this case as the Crow's Nest's application was raised as a defence in the context of a prosecution commenced by the Region under the *POA*. This is different from a Superior Court application brought under the *Municipal Act*, in which costs in a civil application can be obtained against the losing party. The court challenges to the Waterloo by-law were raised in civil actions, not *POA* prosecutions, and thus costs were awarded in those cases.

5. FINANCIAL IMPLICATIONS

The 2004 approved Business Plan and Budget included funds in the amount of \$75,000.00 for legal fees in relation to this matter. Sufficient funds were made available in the corporate contingency budget, in 2004, to accommodate the additional fees that were estimated to be \$125,000.00, bringing the total budgeted cost to \$200,000.00. The actual total of the legal fees incurred, that of \$103,005.99, is within the allotted amount.

6. LOCAL MUNICIPAL IMPACT

There is no direct local impact since this challenge relates to the validity of Provincial legislation and the Regional By-Law. Local municipalities would only be impacted if the legislation and by-law were struck down as invalid. As the case was abandoned, no court ruling was made.

There are still approximately 200 charges outstanding which have been held in abeyance pending the outcome of this test case. These outstanding charges will now be discussed with defence counsel in May 2005 with a view to a resolution without trial.

7. CONCLUSION

The Region defended the constitutional validity of the No Smoking By-Law, and unfortunately no ruling was given due to the abandonment of the case by Crow's Nest. Legal counsel made every effort to move the proceedings along in a timely fashion. As the Region was responding to a constitutional challenge in the context of a prosecution, the Region could not avoid incurring the legal cost of \$103,005.99.

The Senior Management Group has reviewed this report.