CITATION: Cash Converters Canada Inc. v. Oshawa (City), 2007 ONCA 502
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COURT OF APPEAL FOR ONTARIO

O'CONNOR A.C.J.O., FELDMAN and ROULEAU JJ.A.

BETWEEN:

CASH CONVERTERS CANADA INC. and 1151245 ONTARIO INC.

Applicants (Appellants)

and

THE CORPORATION OF THE CITY OF OSHAWA

Respondent (Respondent in Appeal)

and

ATTORNEY GENERAL OF ONTARIO and INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

Interveners

David Sterns for the appellants

David J. Potts for the respondent

William S. Challis and Stephen L. McCammon for the Information and Privacy Commissioner

Heard: January 22, 2007

On appeal from the judgment of Justice Edward P. Belobaba of the Superior Court of Justice, dated February 9, 2006, with reasons reported at [2006] O.J. No. 490.

FELDMAN J.A.:

[1] The City of Oshawa replaced its licensing by-law for second-hand goods dealers on April 24, 2004. The new by-law requires dealers of second-hand goods to submit electronically to police daily reports of all transactions, including detailed personal information about the vendors of each item. The by-law also requires dealers to pay an administrative fee for each report submitted. The application judge held that the by-law

was validly enacted and did not contravene provincial privacy legislation. For the reasons that follow, I would allow the appeal.

BACKGROUND

[2] The City of Oshawa has been licensing dealers of second-hand goods since 1974. The original licensing by-law required every licensed dealer to maintain at the store a register of daily transactions. The record included particulars of each item purchased as well as the name, address and description of the person from whom the purchase was made. Between 1974 and 1983, these records were open to police inspection and the dealer was also required to deliver the information to the local police by 9 a.m. each day. In 1983 the by-law was amended to require dealers simply to maintain the register, which was subject to inspection by police. The purposes of the record inspection system were to help monitor by-law compliance and to assist police in the investigation and recovery of stolen property.

[3] By 2003 there were thirty three licensed second-hand goods dealers operating in Oshawa. In order to improve enforcement of the by law, it was recommended that the City eliminate both the manual recording of information and the need for police officers to attend the second-hand stores to review the records by replacing those procedures with a system of electronic collection and reporting of information by the dealers.

[4] On April 26, 2004, the City replaced the former by-law regulating second-hand shops with By-Law 46-2004, which requires that comprehensive electronic records be maintained and transmitted to police at least daily, and in some cases in real time. The impugned provisions, found in Schedule “A” to the by-law, are as follows.

> 10. No second hand dealer shall permit the acquisition of a second hand good unless a record respecting the second hand good is created at the time of acquisition that includes the following particulars:
>
> a. Date and time of acquisition
>
> …
>
> c. The identity of the person from whom the second hand good was acquired including each of the following:
>
> i. Name;
>
> ii. Gender;
>
> iii. Date of birth;
>
> iv. Residential address;
>
> v. Telephone number; and

vi. Approximate height

d. Personal identification to verify the person's identification … in accordance with section 15 …

…

15. For the purposes of paragraph 10(d) … a second hand dealer must review an original, current, valid copy of at least three of the following types of personal identification, one of which must include a photograph of the person from whom the second hand good is acquired:

a. Driver's licence issued by a province or territory of Canada including a photograph of the person;

b. Birth certificate issued by a province or territory of Canada;

c. Canadian passport including a photograph of the person

d. Canadian citizenship card including a photograph of the person;

e. Certificate of Indian Status issued by the government of Canada;

f. Conditions Release card issued by the government of Canada;

g. Canadian Armed Forces identification card; and

h. "Bring Your Identification" card issued by the Alcohol and Gaming Commission.

…

20. Each second hand dealer shall transmit to Durham Regional Police Service as soon as is practicable but, in any event, no less frequently than weekly, copies of the records contemplated by sections 10, 12 and 13 of this Schedule.

…

22. For the purposes of section 21 of this Schedule, the following are the standards that the City Clerk may prescribe for a particular second hand dealer, at any time during the term of the licence and to the City Clerk's satisfaction:

a. Daily transmission of each record to Durham Regional Police Service, provided, however, that in the event that the second hand dealer is determined by a court of competent jurisdiction to have failed to comply with any provision of this Schedule,

> the City Clerk may require real time transmission of each such record;
>
> b. Maintenance of each record in a particular digitized electronic format capable of transmission via the internet within a secure environment including 128-bit encryption;
>
> …
>
> f. Payment on a monthly basis in the manner from time to time prescribed by the City Clerk of a fee up to $1.00 for each record required pursuant to section 10 and 12 of this Schedule …

[5] The by-law was enacted under s. 150(1) of the *Municipal Act*, 2001, S.O. 2001, c. 25, which provides that a municipality may license, regulate and govern any business wholly or partly carried on within the municipality. Section 150(2) of the Act provides that a municipality may only exercise its licensing powers for one or more of three purposes, namely health and safety, nuisance control and consumer protection.

[6] Schedule "B" to the by-law sets out the City's explanation of its reasons for licensing. Although the City makes reference to health and safety and nuisance control, it relies primarily on the consumer protection purpose as follows:

> The City of Oshawa has chosen to licence [*sic*], regulate and govern owners of second hand goods and salvage yard to enhance and encourage equal, fair and courteous treatment of customers, protect the property of customers, ensure products made available for resale are not stolen, promote accountability, and support proper and good business practices.
>
> This reason relates to consumer protection as licensing and regulation aim to prevent, mitigate or redress losses to, or practices which might negatively impact on second hand goods and salvage yard owners and members of the public.

[7] The appellant Cash Converters Canada Inc. is the Canadian franchisor or the Cash Converters chain of second-hand stores. The appellant 1151245 is a Cash Converters franchisee and carries on business as a licensed dealer of second-hand goods in the City of Oshawa. The appellants brought an application to quash the provisions of the by-law set out above on the ground that they exceed the statutory and constitutional authority of the municipality. The appellants also argued that the impugned provisions conflict with

both federal and provincial privacy legislation and that they are discriminatory insofar as they apply only to some dealers of second-hand goods. Finally, the appellants submitted that the transaction fee is invalid because it exceeds the cost of administering and enforcing the by-law.

[8] The application judge rejected all of the appellants' arguments. He held that the by-law was properly rooted in the province's property and civil rights power and was not in relation to criminal law; that it was authorized under s. 150 of the *Municipal Act, 2001*; and that it was not discriminatory. He further held that the by-law did not conflict with federal or provincial privacy laws, and that the challenge to the transaction fee was premature.

[9] On appeal to this court, the appellants maintain that the by-law exceeds the city's legislative competence and violates provincial privacy legislation. The appellants also maintain that the transaction fee is not authorized. The appellants do not appeal the application judge's findings that the by-law was properly grounded in the province's power over property and civil rights and that it was not discriminatory.

[10] The Attorney General intervened in the application in support of the constitutionality of the provisions. As no constitutional issue was raised on appeal, the Attorney General did not intervene before this court. The Information and Privacy Commissioner of Ontario intervened in the appeal as a friend of the court.

ISSUES

[11] The appellants challenge three conclusions reached by the application judge as the basis for upholding the validity of the by-law and raises them as issues on this appeal:

> (1) Is the by-law authorized under the *Municipal Act, 2001*?
>
> (2) Does the by-law conflict with s. 28(2) of the *Municipal Freedom of Information and Privacy Protection Act*?
>
> (3) Is the transaction fee authorized under the *Municipal Act, 2001*?

ANALYSIS

1) Is the by-law authorized under s. 150(2) of the Municipal Act, 2001 as "consumer protection" legislation?

[12] Subsections 150(1) and (2) of the *Municipal Act, 2001* provide:

> 150(1) Subject to the *Theatres Act* and the *Retail Business Holidays Act*, a local municipality may license, regulate and govern any business wholly or partly carried on within the

> municipality even if the business is being carried on from a location outside the municipality.
>
> (2) Except as otherwise provided, a municipality may only exercise its licensing powers under this section, including imposing conditions, for one or more of the following purposes:
>
> 1. Health and safety.
> 2. Nuisance control.
> 3. Consumer protection.

Although in Schedule "B" to the by-law, titled: "Explanation of Reasons for Licensing", the city relies on all three purposes to support the by-law, on this application, it says that the essential purpose of the by-law is consumer protection.

[13] In her affidavit, the deputy city clerk states that the record-keeping requirements imposed on second-hand dealers by the impugned by-law and its predecessor by-laws are:

> …integral to its consumer protection objective as they are regulatory in nature and effect and are aimed at the suppression of conditions that may lead to the commission of crimes. Specifically, the identification of the person from whom a second hand dealer acquires a second hand good, the matching of that information to particulars of the second hand good acquired and the collection of the record on behalf of the city are intended to discourage unscrupulous individuals from transacting business with second hand dealers. These measures are intended to protect second hand dealers as purchasers of second hand goods and to also protect the dealers' customers.

[14] The deputy clerk also points to timely and effective assistance to dealers and their customers where the dealer acquires and resells a stolen good as an ancillary benefit of the record collection function.

[15] She then states that the effectiveness of the record collection function is directly related to the consumer protection objective of the by-law because vendors of second-

hand goods “are less likely to be unscrupulous if they know the records are being collected in a timely and effective fashion.” She identifies paragraph 22.(a) of the impugned by-law, which is the paragraph that allows the city clerk to require a dealer to transmit the records to the police daily or in some circumstances, in real time, as a provision directly aimed at improving the record collection component of the record-keeping requirements.

[16] In other words, the city justifies the new by-law on the same basis as the one it replaced, as consumer protection legislation that protects dealers and their customers by collecting information about the vendors of second-hand goods. It is the collection of this information that deters those who deal in stolen property from trying to sell such goods to licensed dealers. The new features of the by-law enhance or improve the information collection function and therefore the consumer protection purpose of the by-law.

[17] The appellants’ objection to the new licensing conditions is that dealers are now obliged to collect personal, private information about the vendor of the second-hand goods, including a photograph and three pieces of official identification that many people would not ordinarily carry, and to transmit that information electronically to the police at least daily if not in real time. The appellants states that in this way, “the by-law gives the police access to sensitive profiling information on a targeted, partly low-income group of consumers, for unlimited uses including criminal investigation and prosecution, without search warrant protection, judicial supervision or any legal safeguards whatsoever.”

[18] The appellant 1151245 Ontario Inc. is the Oshawa franchisee of the Cash Converters group of stores. These stores buy and sell second-hand goods. They are not pawn-brokers nor do they provide pay-day loans. Of the over 28,000 items the Oshawa franchisee purchased in 2003, 30 items valued at approximately $1,200 were seized in connection with police investigations, and the store was not told whether any of these items was later found to be stolen. The city adduced no evidence of any actual problem involving the purchase and sale of stolen goods by second-hand dealers.

[19] The appellants submit that the new by-law is not intended to protect consumers, but rather to assist the police in investigating and prosecuting crimes related to stolen property. The evidence is that a software dealer called BWI promoted the system described in the by-law for use by the city and the local police. Its system allows the police to collect for their own use the data required by the by-law about each person who sells any second-hand good to a dealer. The fees proposed to be charged for each transmittal are to defray the cost of the system to the city.

[20] The proper approach to the interpretation of municipal powers has recently been discussed by the Supreme Court and followed by this court in such cases as *114957 Canada Ltee (Spraytech, Societe d’arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241;

Croplife Canada v. Toronto, (2005) 75 O.R. (3d) 357 (C.A.) leave to appeal denied: [2005] S.C.C.A. No. 329; *Toronto Taxi Alliance v. Toronto (City)* (2005), 77 O.R. (3d) 721 (C.A.); *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485. The question whether a by-law is *ultra vires* the jurisdiction of the enacting municipality is a question of law which is reviewed on the standard of correctness. However, in determining the question, courts are to take a broad and purposive approach to the construction and interpretation of municipal powers. See *United Taxi* at para 6.

[21] It is common ground that under the 2001 version of the *Municipal Act* pursuant to which this by-law was passed, the municipality's licensing power can be exercised only for the three purposes set out in s. 150(2). In *Toronto Taxi*, the application judge had concluded that the city had not shown that Toronto's new taxi cab licensing by law was enacted for the purposes of health and safety and consumer protection as asserted by the city and that the real purpose was to "re-engineer the taxi-cab industry in order to eliminate middlemen and to redistribute revenues generated by the industry in favour of active participants." This court disagreed with the narrow approach taken by the application judge. The court reviewed the Task Force Report that led to the enactment of the by-law and concluded that the report provided both a factual basis and a rational connection between the means chosen to overhaul the taxi licensing system and the health and safety and consumer protection objectives of the city. The court acknowledged that these objectives would only be indirect effects of the new system but deferred to the municipality on the issue of the potential effectiveness of its legislative initiatives.

[22] In my view, a similar approach should be taken in this case. I agree with the applicants that there is no suggestion that the former licensing by-law was ineffective or that the new and much more onerous provisions regarding the collection and transmittal to the police of personal information about vendors of second-hand goods is a necessary addition to the by-law for the consumer protection purpose. It appears that what drove the adoption of this new licensing by-law was the initiative of the BWI software vendor together with the desire of the police to be able to obtain this information for their database electronically without attending personally at the dealers' premises.

[23] However, the fundamental premise that collection of information about the goods and the vendors may deter unscrupulous vendors from attempting to sell stolen goods can be seen as a form of consumer protection by helping to keep stolen goods out of the marketplace and possibly thereby deterring those who may be inclined to steal goods for that purpose. As this court stated in *Toronto Taxi*, referring to the Supreme Court of Canada decision in *Nanaimo (City) v. Rascal Trucking Ltd*. [200] 1 S.C.R. 342, "A reviewing court should not second-guess the municipality as to whether the by-law will be more or less effective in achieving the intended purpose or purposes" (para. 46).

[24] Giving "consumer protection" a broad and generous interpretation that allows the municipality to achieve its legitimate interests (see *Croplife* at para. 37), I am satisfied that the enactment of this by-law fell within the municipality's authority and is not *ultra vires*. I would therefore not give effect to this ground of appeal.

2) Does the by-law conflict with s. 28(2) of the Municipal Freedom of Information and Privacy Protection Act*?*

[25] Under s. 14 of the *Municipal Act, 2001*, to the extent of any conflict with a provincial or federal Act or regulation, a by-law is "without effect". Section 28(2) of the *Municipal Freedom of Information and Privacy Protection Act*, R.S.O. 1990, c. M.56 (*MFIPPA*) provides:

> 28(2) No person shall collect personal information on behalf of an institution [which includes a municipality: s. 2] unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

[26] The appellants submit that the provisions of the by-law that mandate the collection of personal information about vendors of goods to licensed second-hand goods dealers and the daily transmission of that information electronically to the police, conflict with s. 28(2).

[27] The Information and Privacy Commissioner of Ontario intervened on the appeal as friend of the court, for the purposes of providing the court with the history of privacy legislation, the role of the Commissioner under that legislation and the case law and jurisprudence on privacy issues, including the interpretation and application of MFIPPA. In that role, the Commissioner took no position on the specific question to be decided by the court.

[28] The Commissioner has recognized expertise in the interpretation and application of the statutes relating to personal information and the protection of privacy. The Commissioner is given primary responsibility under the privacy statutes (*MFIPPA*, *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (*FIPPA*)) for supervising compliance. Most frequently, privacy issues arise by way of a complaint relating to the collection of personal information by or on behalf of a government or institution. In most cases, therefore, it is the Commissioner, not the courts, who determines whether the collection of private information contravenes *MFIPPA*, and if so, orders the information destroyed. Where collection is authorized under s. 28(2), the

Commissioner may still determine whether the information has been properly collected in accordance with other provisions of the Act and make appropriate orders.

[29] The right to privacy of personal information is interpreted in the context of the history of privacy legislation in Canada and of the treatment of that right by the courts. The Supreme Court of Canada has characterized the federal *Privacy Act* as quasi-constitutional because of the critical role that privacy plays in the preservation of a free and democratic society. In *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, Gonthier J. observed that exceptions from the rights set out in the act should be interpreted narrowly, with any doubt resolved in favour of preserving the right and with the burden of persuasion on the person asserting the exception (at paras. 30-31) In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, the court articulated the governing principles of privacy law including that protection of privacy is a fundamental value in modern democracies and is enshrined in ss. 7 and 8 of the Charter, and privacy rights are to be compromised only where there is a compelling state interest for doing so (at paras. 65, 66, 71). And in *H.J. Heinz of Canada Ltd v. Canada (Attorney General)*, [2006] 1 S.C.R. 441, Deschamps J. stated:

> [I]n a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information, except as prescribed by the legislation (at para. 26).

[30] In Ontario, the Williams Commission Report led to the enactment of *FIPPA* in 1987 and *MFIPPA* in 1991. The Williams Commission identified three specific concerns respecting government data banks: (1) where government collects personal information, the individual is unlikely to have an effective choice to refuse to supply the information; (2) because its activity is so broad, government holds very extensive personal information about individuals; (3) there is public anxiety about government agencies sharing their holdings of personal information and building comprehensive personal files on individuals (*Public Government for Private People: The Report of the Commission on Freedom of Information and Protection of Individual Privacy/1980*, Vol. 3 (Toronto: Queen's Printer, 1980) at pp. 504-505). The commission concluded that

> a privacy protection policy intended to preserve informational privacy would therefore attempt to restrict personal data-gathering activity to that which appears to be necessary to meet legitimate social objectives and would attempt to maximize the control that individuals are able to exert over subsequent use and dissemination of information surrendered to institutional records keepers (at p. 667).

[31] This approach underlies the three standards for the collection of personal information that are set out in s. 28(2) of *MFIPPA*: the collection must be either expressly authorized by statute, used for the purposes of law enforcement, or necessary to the proper administration of a lawfully authorized activity.

[32] In *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, the Supreme Court set out a two-pronged test to determine how to apply the paramountcy doctrine where federal and provincial legislation overlaps: (1) can a person simultaneously comply with both provisions (the "impossibility of dual compliance" test), and (2) does the provincial provision frustrate Parliament's purpose in enacting the federal provision? In *Croplife, supra*, this court held that the same two-pronged test should be used to interpret and apply s. 14 of the *Municipal Act, 2001* (at para. 63).

[33] Applying that test, the application judge found that the by-law does not conflict with s. 28(2) of *MFIPPA*. He cited three rationales for his conclusion. He first found that the first prong of the test is met so long as the information is collected on consent. He also concluded, based on s. 22(e) of Schedule "A" to the by law, which provides that the City Clerk may prescribe procedures "to ensure compliance with *MFIPPA* …", that the by-law expressly anticipates and provides for compliance with privacy laws. He found that the second prong of the test was met because there was no evidence that the information transmission requirements of the by-law frustrated the legislative purpose of MFIPPA. Finally he concluded that the collection of personal information by licensed second-hand dealers complies with s. 28(2) on the basis that it is "expressly authorized by statute", because the by-law is authorized by s. 150(2) of the *Municipal Act, 2001*.

[34] It is conceded on the appeal that the application judge erred in law by finding that s. 28(2) does not apply where the information is collected on consent. Consent is not one of the three conditions set out in s. 28(2) that allow the collection of personal information by or on behalf of a municipality. This was observed by the Commissioner in Investigation I94-068P, *Ministry of Community and Social Services*, [1995] O.I.P.C. No. 534. In contrast, where the legislature wishes any aspect of the act to operate based on consent it has so provided. See, for instance, the provisions regarding disclosure of certain information under s. 10(2), 14(1)(a) and 32(b), the manner of collection under s. 29(1) or the use of certain information under s. 31(a). I also agree with the appellants that contrary to the observation of the application judge, there is evidence in the record that some people who sell second-hand goods require the proceeds to meet their daily needs and therefore, when faced with the choice of providing the information or not selling the goods, cannot confidently be said to be giving their consent freely.

[35] The application judge also erred in law when he found that the collection of personal information was "expressly authorized by statute" on the basis that the by-law itself was authorized under s. 150(2).

[36] The phrase “expressly authorized by statute” has been interpreted by the Commissioner to mean that the specific types of personal information collected be expressly described either in a statute or in a regulation that has been authorized by a general reference to the activity in a statute. See Investigation I95-030P, *A College of Applied Arts and Technology*, [1995] O.I.P.C. No. 546; Investigation I96-057M, *A Board of Education*, [1996] O.I.P.C. No. 449 at paras. 17-18.

[37] For example, s. 9 of the *Pawnbrokers Act* specifically obliges a pawnbroker to keep a book with the full name, address and description of the person who pawns an article sufficient to identify the person as well as details of the person’s identification or a note that the person did not produce identification, and s. 13 requires pawnbrokers to make a daily report of the information to the chief of police or the person designated by by-law. There is no similar provision in the *Municipal Act, 2001*. The structure of the Act indicates that it was not the intention of the legislature to allow municipalities, simply by virtue of their power to enact by-laws, to determine the type of personal information that can be collected.

[38] Section 28(2) also allows personal information to be collected on behalf of an institution if the information is “used for the purposes of law enforcement.” Of significant concern in this case is the wholesale transmission to the police of a significant amount of personal information about individuals. This transmission occurs before there is any basis to suspect that the goods that were sold to the second-hand dealer were stolen and is made with no limit as to its use by the police or by those to whom the police may share the information. Although some of the information collected may ultimately be used for law enforcement, the purpose of the by-law and its intent in obliging vendors of second-hand goods to disclose so much personal information and transmitting all of it to the police is for consumer protection and not law enforcement.

[39] The City’s main position on the appeal is that the reason the by-law does not conflict with s. 28(2) of the *MFIPPA* is because it meets the third criterion of the section: the collection of the personal information under the by-law is “necessary to the proper administration of a lawfully authorized activity”, that is, the administration of the licensing of second-hand goods dealers.

[40] Again, the jurisprudence developed by the Privacy Commissioner interpreting this provision is both helpful and persuasive of the proper approach to be taken by the courts as well. In cases decided by the Commissioner’s office, it has required that in order to meet the necessity condition, the institution must show that each item or class of personal information that is to be collected is necessary to properly administer the lawfully authorized activity. Consequently, where the personal information would merely be helpful to the activity, it is not “necessary” within the meaning of the Act. Similarly,

where the purpose can be accomplished another way, the institution is obliged to choose the other route.

[41] The Commissioner's approach in complaints that come before her office is to examine in detail the types of information being collected and to determine whether each type is necessary for the collecting institution's activity. For example, in *Re Toronto Community Housing Corp.*, [2004] O.I.P.C. No. 196, the Commissioner received a complaint from a tenant that the housing corporation was requiring tenants who wanted parking stickers to provide copies of vehicle insurance and ownership papers which the tenant said was not authorized by the lease. The corporation justified its action because it wanted to address problems of break-ins, vandalism and illegally parked cars. These problems were caused by tenants who abused the parking system by renting out spaces to non-residents who then gained access to the building and parked in other residents' allocated parking spots. Also people were vandalizing the entry system mechanism, which then required costly repairs.

[42] The Commissioner considered individually the requirements to provide vehicle ownership documentation and vehicle insurance verification. The Commissioner determined that the ownership documents were necessary so that corporation staff could see that cars parked in the garage were owned by the tenants themselves. However, the Commissioner was not satisfied that the corporation needed the insurance information to properly administer the parking program and found that collection of the insurance information was not in compliance with s. 28(2) of the Act.

[43] The same approach is taken by other provincial privacy commissions. For example, in *Re Rick Arsenault Enterprises*, [2005] A.I.P.C.D. No. 45, the Alberta Information and Privacy Commissioner received a complaint that a Canadian Tire store, a provincially regulated organization under the jurisdiction of the Commissioner, had refused to complete a return of goods without obtaining certain personal information including the driver's licence number of the person returning the goods. As in the case on appeal, the stated purpose of collecting the information was to deter fraud. The evidence was that the store acknowledged that simply authenticating and confirming the identity of the individual returning the goods was sufficient for their purposes. The commission viewed this as a concession that the collection and retention of driver's licence numbers was not necessary for deterring fraud and therefore was not permitted under the Act. See also *Re K.E. Gostlin Enterprises Ltd*, [2005] B.C.I.P.C.D. No. 18 (British Columbia Information and Privacy Commissioner).

[44] The intervener provided the court with many examples of decisions of the Ontario Commissioner under the necessity criterion where the Commissioner examined each piece or category of personal information being collected by the public institution and the reason for collecting it, and determined for each whether that collection was necessary in

order to properly administer the activity that the institution was carrying on. If it was not, the institution was prohibited from collecting the information. See for example: *A Public School Board*, [1994] O.I.P.C. No. 457; *A College of Applied Arts and Technology*, [1995] O.I.P.C. No. 546; *A Board of Education*, [1996] O.I.P.C. No. 449; *Ministry of Natural Resources*, [1994] O.I.P.C. No. 447; *Re Sarnia Police Service*, [2005] O.I.P.C. No. 28; *Ministry of Housing*, [1995] O.I.P.C. No. 315; *A* Municipality, [1993] O.I.P.C. No. 381; *Re Regional Municipality of Niagara*, [2004] O.I.P.C. No. 261.

[45] In my view, this same approach to the interpretation and application of the necessity criterion in s. 28(2) ought to be employed by the court. The Commissioner's approach is both logical and effective in implementing the purposes of the privacy legislation. By using the same approach, the effect is to apply the Act in the same way whether an issue arises by complaint to the commission or in this context, where the court is asked to determine a conflict between, in this case, a by-law and *MFIPPA*.

[46] Using that approach, the issue is whether the city has satisfied its onus to demonstrate that both the collection of all of the information and identification required by the by-law, as well as the daily transmission of that information to the police for storage in their data bank, is necessary for an effective consumer protection regime to license second-hand dealers that deters people from dealing in stolen goods. Both must be justified because it is clear that the by-law is structured to operate as a co-ordinated scheme that includes both the collection and the daily transmission of all the information to the police for storage in their data bank.

[47] In her affidavit filed on behalf of the city, the Deputy City Clerk deposes that in a 2003 report for the city by its commissioner of corporate services, the commissioner identified two issues, manual record- keeping and the burden on the police, as reasons to consider electronic-computerized procedures to improve the enforcement of the by-law then in existence.

[48] The Deputy City Clerk states that the collection of identity information from vendors of second-hand goods is aimed at suppressing crime and is intended to discourage unscrupulous people from transacting business with second-hand dealers. If such people know that the records are being collected in a timely and effective fashion, they are less likely to be unscrupulous.

[49] The effect of this evidence is that the new provisions are intended to improve the old system by modernizing the recording of the information using computers and by making the system easier for the police to administer because they receive the information electronically on a daily basis without travelling to the second-hand stores. However, it is clear that there is no attempt to say that the new provisions are necessary for administering the licensing system or for its effectiveness. In contrast, in the *Toronto*

Taxi Alliance v. City of Toronto, [2005] O.J. No. 5460 (C.A.) the city had two task force reports that discussed the problem with taxi licenses and how the new by-law would address the problem.

[50] The appellants point out that there is no evidence to suggest that there is a growing problem in the municipality regarding the sale of stolen goods to second-hand dealers. On the contrary, there were only 30 suspected stolen items with a total value of $1,200, out of the 28,000 items dealt with by the Oshawa franchisee in 2003. Nor is there evidence that unscrupulous persons are more deterred by the electronic collection and transmission of personal information than by manual collection and transmission to the police.

[51] The effect of the new by-law is to facilitate the collection and electronic recording of detailed, identifying information about persons, mostly innocent but some unscrupulous, including their photograph and details of three pieces of identification as well as the time of their visit to the store and the nature of the goods offered for sale. This information is then transmitted and stored in a police database and available for use and transmission by the police without any restriction and without any judicial oversight. The intent of *MFIPPA* is to ensure that the collection and retention of private information is strictly controlled and justified.

[52] Based on the evidence in this application, the city has not demonstrated that the impugned provisions of the new by-law that mandate the collection and electronic transmission to police of detailed personal information about vendors of second-hand goods, is necessary for an effective consumer protection regime to license second-hand dealers. Given my conclusions that the impugned provisions in the new by-law do not come within the exceptions in s. 28(2) of *MFIPPA*, I am of the view that the application judge erred in law in his application of the *Rothman*'s test.

[53] In this application, the city effectively took an "all or nothing approach" to the by-law, and did not seek to justify the provisions clause by clause. As a result, I would declare the challenged sections of Schedule A to the by-law: ss.10(c), (d), 15, 20, 22 (a), and (b) to be "of no effect" under s. 14 of the *Municipal Act, 2001*.

[54] This conclusion does not preclude the city from enacting a new second-hand goods dealers' licensing by-law with provisions regarding the collection and transmission of some personal information that it may well be able to justify under s. 28(2). I would note that s. 46(a) of *MFIPPA* allows the Commissioner to "offer comment on the privacy protection implications of proposed programs of institutions." There is much merit, in my view, for a city to make use of this provision to have any proposed new by-law vetted through a detailed examination of each provision and the necessity for it by the Commissioner at first instance, rather than by a court. The Commissioner has both the

expertise and the experience in addressing these types of issues and can do so in a more efficient and cost-effective manner than a court.

3) Is the transaction fee authorized under the Act?

[55] Section 22(f) of the by-law imposes a fee on licensed second-hand goods dealers of up to $1.00 per transaction. The city relies on s. 150(8) of the Act, which allows the city to impose "special conditions" for a business license, and on s. 150(9) that restricts the total fees that can be charged for a license to the "costs directly related to the administration and enforcement of the by-law…." The appellants challenge s 22(f) on the basis that it does not specifically authorize a volumetric fee as required by the Supreme Court of Canada in three cases, *Re Kirkpatrick and District of Maple Ridge* (1986), 30 D.L.R. (4TH) 431; *Montreal (City) v. Civic Parking Centre Ltd*. [1981] 2 S.C.R. 541; *The Longueil Navigation Company v. City of Montreal* (1889), 15 S.C.R. 566.

[56] The application judge was not referred to these Supreme Court cases and decided the issue based on the application of s. 150(9).

[57] As I would declare of no effect the sections that mandate the transmission of the collected personal information to the police, the transaction fee provision becomes moot on this appeal. Furthermore, if the city were to reintroduce a licensing by law that does not conflict with s. 28(2) of *MFIPPA*, it will do so under the new *Municipal Act* that came into effect on January 1, 2007. Under the new provisions, s. 150(2) of the Act has been repealed and replaced with new licensing powers and s. 150(9) has been repealed and replaced with new provisions regarding licensing fees. In those circumstances, it is unnecessary to address this issue.[1]

RESULT

[58] In the result, I would allow the appeal, set aside the order of the application judge and declare ss. 10(c) and (d), 15, 20, 22 (a) and (b) of the by-law of no effect with costs of the appeal to the appellants on the partial indemnity scale fixed at $25,000 inclusive of disbursements and G.S.T., and costs of the original application fixed in the amount of $20,000 inclusive of disbursements and G.S.T.

Signature: "K. Feldman J.A."

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[1] As the amended *Municipal Act* (in force January 1, 2007) no longer contains s. 150(2), any replacement licensing by-law may also undergo a different analysis regarding compliance with s. 28(2) of *MFIPPA* in relation to the use of the information for law enforcement purposes.

"I agree D. O'Connor A.C.J.O."
"I agree Paul Rouleau J.A."
RELEASED: "D.O'C" July 4, 2007