



## A REVIEW of selected Supreme Court decisions

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**There is no doubt** that the buck stops at the Supreme Court when it comes to deciding on the interpretation of legislation that impacts upon all of us, including municipalities, and when it comes to developing the common law. Over the last two years the Court has issued a number of decisions that can have fairly significant implications on the operations of municipal governments. The following is a summary of just a couple of those cases that we have not dealt with in previous articles. By coincidence they both deal with two things near and dear to the hearts of many Canadians – taxes and liquor.

### ***620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7.**

Connaught owned all or nearly all of the hotels, restaurants and bars in Jasper National Park that served alcoholic beverages. It required a business license to sell alcohol and had to pay a fee under the authority granted to the Minister of Canadian Heritage pursuant to the *Parks Canada Agency Act*. Under Canadian constitutional law, only Parliament may impose a tax. The issue in this case was whether the National Park Agency under the authority of the Minister could impose a regulatory charge or tax.

The Supreme Court held that the essential character of the business license fees paid by the appellants in the Jasper National Park were regulatory charges and therefore within the Minister's delegated power. The Court found that they were regulatory charges because they were connected to a regulatory scheme. In order to determine if a government levy is connected to a regulatory scheme, two requirements must be met: (1) identify the existence of a relevant regulatory scheme, and [if there is evidence of such a scheme] (2) find a relationship between the charge and the scheme itself. In applying this test to the case at



hand, the Supreme Court noted that the regulation of the Jasper National Park qualified as a relevant regulatory scheme because: (1) The *Canadian National Park Act* and the *Parks Canada Agency Act* together with the accompanying regulations formed a complete, complex and detailed code governing how Jasper National Park should operate; (2) This scheme was aimed at affecting individuals' behaviour; (3) It further provided for a proper estimation of the costs of the operation of the Park; and (4) The appellants benefitted from the regulation in that a well maintained national park would attract more visitors and therefore increase the potential volume of their businesses. With respect to the second step, the Supreme Court found evidence of the relevant relationship between the fees paid and the persons being regulated and the regulatory scheme because the fees were tied to the costs of the regulated scheme.

This decision is of potential application to the imposition of licensing and similar fees by municipalities. If this

was a regulatory scheme, is there any kind of license fee that is not permitted?

***Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3.**

Kingstreet operated a number of nightclubs in the cities of Fredericton and Moncton, New Brunswick. These establishments were licensed to sell alcoholic beverages. Kingstreet purchased its alcohol from the Provincial Liquor Corporation's retail stores and paid a "user charge" that was prescribed by regulation. The appellants challenged the constitutional validity of the user charge and sought reimbursement of all amounts paid over the years since they opened business with compound interest.

The Supreme Court found that restitution is generally available for the recovery of monies collected under legislation that is subsequently declared to be outside the jurisdiction of a level of government. The Court explained that the principle of "no taxation without representation" is central to the Canadian

conception of democracy and rule of law. Therefore, the Crown may not retain a tax that they would not otherwise be entitled to receive because to do so would breach this most fundamental constitutional principle. As a result, a taxpayer who made payment pursuant to otherwise valid legislation that was outside the jurisdiction of government has a right to the return of the amounts paid.

The Supreme Court held that the appellants were allowed to recover all user charges paid on or after the day they commenced proceedings with interest. It did not award compound interest because Kingstreet did not allege any wrongful conduct on the part of the Province that might warrant moral sanction.

This is a significant change to the old principle that in order to secure a repayment of taxes or fees that were improperly collected the party had to pay them "under protest." The Court instead recognized that it would be unfair to let the Province in this case keep the money that was paid under an illegal tax. **L**

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