PIVOT
equality lifts everyone

May 28, 2012

Mayor Banman and Members of Council – thank you for the opportunity to present some thoughts on this important issue of harm reduction.

My name is Scott Bernstein and I am a lawyer with Pivot Legal Society. Pivot is a non-for-profit organization based in Vancouver's Downtown Eastside. We advocate for the rights of marginalized people, including drug users, across the province in our main campaign areas of access to adequate housing, sex worker rights, youth justice, police accountability, and drug issues. I head up Pivot's Health and Drug Policy campaign.

Please allow me to preface my comments with support for the establishment of progressive and inclusive harm reduction services in Abbotsford. As the other speakers will set out in some detail today, the effects of drug use on individual health and community health and safety are effects that can be mitigated and, in some cases, removed completely with well-planned, low-barrier programs that provide services to drug users in a way that they can easily access.

Today, however, I wish to focus my comments on two points:

1) First, my interpretation of the legal effect of the 2005 Zoning Bylaw amendment that added "harm reduction use", prohibiting needle exchanges, mobile dispensing vans, supervised injection sites, and any other similar uses; and

2) Second, the legal authority of the City of Abbotsford to enact such a bylaw through its zoning powers conferred under the Local Government Act.

First, what is my interpretation of the legal effect of creating a "harm reduction use"? The Council Report of May 18, 2012 that you've received prior to this meeting states the following:

121 Heatley Avenue
Vancouver, BC V6A 3E9
tel.: 604.255.9700 / fax: 604.255.1552

> The Zoning Bylaw prohibits harm reduction in all zones in the City. However, if operated by the Provincial or Federal governments, the use is exempt from the Zoning Bylaw.

With respect, in my opinion, that statement is not accurate. The Zoning Bylaw does, indeed, prohibit harm reduction in all zones in the City, but there is – in fact – no exemption for any harm reduction uses, whether operated by the provincial, federal or municipal governments. The only stated exception is that methadone dispensing facilities are permitted if administered or by a registered pharmacist.

It is not clear from where the authors of the report are drawing their conclusion that provincial and federal programs are exempt, but, I suspect that they are relying on the fact that several zones of the City permit a "Civic Use", which is defined as:

> A use providing for public functions; includes federal, provincial, regional and municipal offices and related facilities, colleges, public hospitals, community centres, etcetera.

Notably, the definition of Civic Use, unlike Commercial Use, Community Service Use, Personal Care Use, Residential Care Use, and Supportive Recovery Use, does not explicitly state that the use excludes Harm Reduction. From this, is it possible to infer that Civic Use or any other uses includes harm reduction when it is not explicitly stated? The answer is "no".

In several areas of Abbotsford's zoning bylaws, the City has clearly expressed that zoning *permits* uses that are stated and no others. For example, section 130.15 – in the Administration sections - states that land, buildings and structures shall be used for the uses set out as Permitted Uses in the relevant sections of the Bylaw and any uses not specifically permitted are hereby prohibited. This idea is repeated again in the "permitted uses" section of each zone's description, which states that the following uses are permitted in this zone and no others.

If a bylaw is silent about a permitted use in a particular definition, such as the definition of Civic Use not mentioning harm reduction, but defines the use elsewhere, our courts have said that the effect of this is to interpret that the municipality is making a distinction between the two uses and intended to treat then differently.

This very issue was at the heart of the BC Supreme Court case of SRV Developments v. the City of Courtenay (1992 CarswellBC 635) – a decision affirmed by our Court of Appeal. In that case, the owner of a shopping centre urged the court to interpret that "liquor store" use was included in the definition of "retail and wholesale outlet". Noting that the City had defined liquor store elsewhere as a separate use, the Court denied to make that interpretation. The Court relied on the Supreme Court of Canada decision in *Watkins v. Cambridge Leaseholds* ([1966] S.C.R.), in which the plaintiff was trying to fit the definition of "department store" into that of "retail store" that Court stated:

> By making the two items separate and distinct in the by-law, the municipality was making a distinction between the two terms, even though, as a generic term, "retail store" would include a department store.

Similarly, in the case of Abbotsford's zoning bylaws, Civic Use is a generic term that might have included harm reduction provided by a provincial, federal or municipal authority, but for the fact that the City has made a distinction by defining harm reduction separately. This interpretation is, of course, supported by statements in the attached discussion paper, which discusses the provincial Health Authorities' reluctance to expand harm reduction services believing it would be in contravention of the bylaw.

And so, my conclusion on the first point is that the Zoning bylaw does, in fact, prohibit harm reduction uses throughout the City of Abbotsford, regardless of who is providing the service.

Second, and perhaps more importantly, does Abbotsford have the legal authority to use its zoning powers under the Local Government Act to prohibit harm reduction services in the City?

It is well-understood that municipalities are creatures of statute and are only empowered to exercise authority as specifically conferred upon them by the legislature. In doing so, those powers are subordinate to powers exercised and occupied by the delegating authority (*Winset Greenhouses Ltd. v. Delta*, 2003 BCSC 570).

Zoning authority for the City is granted by section 903 of the *Local Government Act*. As stated by Chief Justice McLachlin of the Supreme Court of Canada in the 2010 *Lacombe* case:

> Zoning legislation…has as its purpose the regulation of land use, having regard to the underlying characteristics and uses of the land in question…It functions by establishing zones, or regions, where particular activities may be conducted, having regard to the nature of the territory and related factors. The underlying purpose of zoning legislation…is to rationalize land use for the benefit of the general populace.

In the *Lacombe* case, the Court struck down a zoning bylaw which enacted a blanket prohibition on aerodromes across all zones of the City, regardless of their character. As noted by the Court, the bylaw did not function as zoning legislation, but rather as a stand-alone prohibition. (*Sacre-Coeuir (Municipalite) c. Lancome*, 2010 SCC 38).

In order to determine whether a particular bylaw is within the jurisdiction of the municipality, a court will first look to the essence of the bylaw, or its "pith and substance." The pith and substance of the Harm Reduction bylaw is not land use, in my submission, but something else. The fact that it even prohibits mobile dispensing vans – which is neither land, building or structure – is one indicator. The Report and its attachments, which explicitly describe a health care problem and proposed solutions addressed by harm reduction services

are another. The bylaw is, in pith and substance, regulation of health care.

In its effect, the bylaw prohibits delivery of what is unquestionably a desperately needed system of health care for marginalized persons in Abbotsford. In my understanding, regulation of health care is not a valid exercise of the zoning powers granted under the *Local Government Act* because it is not related to land use and closes out the valid exercise of the provincial power to establish what it sees as the most effective health care service delivery. A blanket prohibition on harm reduction services unlawfully infringes on the jurisdiction of the provincial health authority to do its job as it sees it.

If the bylaw does, in fact, allow for provincial and federal harm reduction programs, then it also is not zoning, as it is not dealing with the use of land, but rather the character of the person or entity seeking to use the land in this way.

In my opinion, a zoning bylaw that regulates health care delivery in such a broad manner is outside the jurisdiction of the municipality and likely infringes the Charter rights of marginalized persons by impeding their access to life-saving health care.

I urge Council to reconsider this bylaw not only for the legal basis on which it must stand scrutiny, but also for the role it plays in exacerbating an ongoing health crisis in this community.

Thank you,

Scott Bernstein
Lawyer,

Pivot Legal Society