

Lobbying Related to Casino Proposal

Date:	September 19, 2012
To:	Executive Committee
From:	City Solicitor
Wards:	All
Reference Number:	

SUMMARY

As requested by the Executive Committee, this report discusses the appropriateness of ways to impose a ban on lobbying by the gaming industry and gaming regulators in relation to a proposal to locate a casino in the City of Toronto. It suggests that the City's current regulatory regime is sufficient to effect transparency. It also suggests that the proposed ban could be unconstitutional and, because it is a partial ban, could appear to be an attempt to disadvantage the gaming industry in the casino debate. This could both fuel an argument that the ban was adopted in bad faith and encourage lobbying without registration by the disadvantaged group.

Financial Impact

There is no financial impact beyond what has already been approved in the current year's budget.

DECISION HISTORY

At its meeting of April 10 and 11, 2012 City Council considered EX 20.15, No Casino without a Referendum – Motion MM22.2.

ISSUE BACKGROUND

At its meeting of April 10 and 11, 2012, City Council referred motion MM22.2 to the Executive Committee. The motion recommends the following:

City Council direct that no Casino be permitted in Toronto unless the City Clerk has conducted a City-wide referendum, as part of a general election, with results reported out on a city-wide and a ward-by-ward basis before Council considers the issues.

The motion was considered by the Executive Committee on May 14, 2012. Among other things, the Executive Committee requested the City Solicitor, in consultation with the City Manager, to report to the Executive Committee on October 9, 2012, on the "appropriateness of, and any ways and means, to facilitate a ban on lobbying by the gambling industry, casino organizations and agencies that regulate gaming". This report responds to that request.

COMMENTS

The Proposed Ban

It is worth noting that a purpose of the current lobbying by-law is to achieve transparency. The requirement to create a lobbyist registry is contained in Part V of COTA which is entitled "Accountability and Transparency". Registration of lobbyists requires transparency regarding a number of things including the identity and affiliation of lobbyists, the identity of the public office holders lobbied, the time of the lobbying, and the subject matter of the lobbying.

Arguably, the general authority to ban lobbying is included in the City's general powers under the *City of Toronto Act, 2006* (COTA). This is arguable because, while the power to pass by-laws regarding "[a]ccountability and transparency of the city and its operations and of its local boards" (s. 8(1) paragraph 2), empowers the City to enact some by-laws regulating and prohibiting lobbying, it is not clear that the proposed ban would enhance accountability and transparency or that its purpose would be to do so. The fact that the ban would be limited to certain groups suggests that it would have a different purpose, although the purpose is unclear. Even if a by-law imposing the ban could be enacted using powers under s. 8 of the COTA, the constitutionality and practical implications of the by-law must be considered. These will be discussed below. Since the objective for a ban was not articulated by Council, the discussion will be general in nature.

Freedom of Expression

A ban on any kind of lobbying must be considered in the context of s. 2(b) of the Canadian Charter of Rights and Freedoms (the Charter), which protects the freedom of expression. Generally speaking, s. 2(b) prohibits a municipality from passing a by-law that imposes a limit on the freedom of expression. The courts have developed a test for determining whether government action, including the passing of by-laws, violates s. 2(b). First, the prohibited activity must have expressive content, and lobbying clearly does. Some expression is exempt because it occurs on public property and is inconsistent with the normal use of the property. For example, while a protest may be acceptable on a City sidewalk, it would be unacceptable in a City day care facility. The method and

location of lobbying do not normally remove this form of expression from the protection of s. 2(b). In my view, lobbying is generally protected by s. 2(b), and the proposed ban on lobbying in relation to a casino proposal would infringe the freedom of expression by prohibiting this kind of expression by specified individuals.

Section 1 of the Charter

Section 1 of the Charter permits infringement of fundamental freedoms if the following three criteria are met:

(i) A Pressing and Substantial Objective

The City would be required to demonstrate that the concerns which the ban is designed to address are pressing and substantial. The concerns set out in the motion (MM22.2) include, among other things, the assertion that public consultation is required because Torontonians have previously demonstrated opposition to a casino, and the risks that a casino could negatively impact local businesses, sterilize the urban environment and require a large amount of parking. The motion, however, raises these concerns in support of an argument that there should be a referendum. The record of Council's decision contains no information about an objective for the proposed ban on lobbying by "the gambling industry, casino organizations and agencies that regulate gaming".

(ii) A Rational Connection between the Objective and the Limit Imposed

The connection between the objectives set out in the motion and a ban on casino-related lobbying is illusive, and it may be that there is another objective for the proposed ban not apparent in the report of Council's consideration of the matter. If Council seriously intends to consider imposing a ban on lobbying by some interested groups in relation to a proposed casino, it should articulate the objective it intends to achieve with this ban. Council could then request a report from the City Manager in consultation with the Lobbyist Registrar and City Solicitor addressing the practical aspects of achieving the objective through a ban. If a Council decision to limit the freedom of expression is challenged, this sort of justification for Council's action will be essential.

(iii) Demonstration that the Limit is a Minimal Impairment of the Freedom

This is the most difficult part of the s. 1 test to satisfy. The objective must be articulated before this part of the test can be applied because this part requires that the impairment be a rational means to achieve the objective without being excessive. Generally courts will find that a ban rather than a regulation imposes a greater limit than is required.

Depending on the objective identified, a reasonable limit might be achieved through amendment to the lobbying by-law. It is also possible that, upon closer examination in the context of the objective, it will become apparent that the lobbying by-law already includes regulations that could achieve the objective with less impairment than a ban.

Other Considerations

If lobbying in relation to a particular matter is banned, it is quite possible that some lobbying will still occur, but that the transparency achieved by lobbyist registration will be lost. The risk of this is greater with the sort of partial ban contemplated. I refer to the proposed ban as partial because it would apply to the "gambling industry, casino organizations and agencies that regulate gambling" omitting the sorts of organizations typically opposed to casinos (e.g. neighbourhood organizations, addiction counselling organizations). The proposed ban would give an advantage to these latter groups because they would be permitted to lobby. As well as encouraging illegal lobbying by those subject to the ban, the proposed ban could create the impression that the City intends to unfairly disadvantage the gaming industry in the casino debate. Although another objective for a ban might ultimately be articulated, this may remain a perceived objective and could fuel arguments that the by-law imposing the ban was enacted in bad faith.

Absent the demonstration of a defensible objective for a ban, I can only comment on the objective of lobbying by-laws generally, which is transparency. Transparency is best achieved through a regulatory scheme like Toronto Municipal Code, Chapter 140, Lobbying, and would be diminished by any ban or partial ban on lobbying.

The Lobbyist Registrar was consulted in the preparation of this report.

CONTACT

Wendy Walberg
Acting Director
Municipal Law, Legal Services Division
Tel: 416-392-8078
Fax: 416-392-3848
E-mail: wwalberg@toronto.ca

SIGNATURE

Anna Kinastowski
City Solicitor