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In This Issue

Human Rights Adjudication Panel Permitted to Participate Without Being Named as Respondent to the Appeal

Interlocutory Injunction Dismissed: Public Health Risks Outweigh Potential Cultural Significance

Intervenor Status Denied: Applicant is not Specifically Affected by Appeal nor has Special Expertise on the Matter

On the Job Surveillance Can Be Used to Investigate Complaints against Employees

When a Committee is not a "Local Board" the Ombudsman has no Jurisdiction to Investigate Requirements Under the Municipal Act

THIS JUST IN: Toronto Seeks to Close Marijuana Dispensaries

Summaries provided by: Monica Ciriello, Ontario, 2015

Human Rights Adjudication Panel Permitted to Participate Without Being Named as Respondent to the Appeal

Yellowknife (City) v A.B. et al, 2017 NWTSC 63 (CanLII)

http://canlii.ca/t/h5tmj

The Respondent, a former employee at the City of Yellowknife (City) filed an application with the Northwest Territories Human Rights Commission (Commission) alleging discrimination by the City on the basis of family status. The Adjudicator determined that the City failed to accommodate the Respondent on the basis of her family status which ultimately forced her to resign. The City appealed and a pre-hearing conference was held. At the pre-hearing, counsel for the Human Rights Adjudication Panel (Panel), an independent agency of the Northwest Territories Legislative Assembly, was present. The City objected to the Panel's participation in the appeal and asserted that the Panel must seek leave from the Court to be added as a party to participate and make submissions.

HELD: Panel permitted to participate in appeal without being added as a respondent.

DISCUSSION: The Court examined whether the Panel had to be added as a party to participate and make submissions in the appeal. Both the *Human Rights Act* and the Rules of Court were silent on the issue, allowing the Court to have broad authority to make a determination of the Panel's participation. The Court identified common law practice as seen in *Carter v. Northwest Territories Power Corp.,* 2014 NWTSC 19 that tribunals such as the Panel have previously participated in appeals

with their participation limited to making submissions on jurisdiction, the record or the standard of review. However, the limitation or extension of their participation was at the discretion of the Court; and there has been no requirement that the party be named as a respondent in order to participate in the appeal.

The Court did highlight case examples such as *Ontario Energy Board v. Ontario Power Generation Inc.,* 2015 SCC 44 where a party was named as a respondent because there was a statute requirement or no other party was named as the respondent. The Court differentiated that from the issue at hand, where there was no requirement and there was already a named Respondent in the appeal. Therefore, the Court held that the Panel was permitted to participate in the appeal without being added as a Respondent.

Interlocutory Injunction Dismissed: Public Health Risks Outweigh Potential Cultural Significance

Mahmoud and Lebanese Palace Inc. and Itaif v. City of Ottawa, 2017 ONSC 5138 (CanLII)

http://canlii.ca/t/h5nnn

The Applicant is the owner and operator of a restaurant called Lebanese Palace Inc. in the City of Ottawa (City) which offers water pipes (shisha) that allow customers to smoke flavoured tobacco as it is bubbled through water. Following a rise in popularity of the use and demand of shisha the Applicant chose to make additional investments into shisha at the restaurant. However, that same year the City passed a bylaw prohibiting shisha smoking indoors. The City permitted a grace period for businesses with the enforcement of the bylaw commencing four months later. The Applicant filed an application alleging that the bylaw was unconstitutional and violated the *Charter of Rights and Freedoms (Charter)* by discriminating against the Applicant on the non-enumerated ground of culture. In the interim the Applicant brought this motion for an interlocutory injunction to prohibit the City from enforcing its bylaw until the application is decided in 2018.

HELD: Interlocutory injunction is dismissed.

DISCUSSION: In applying the three-pronged test for interlocutory injunction set out in *RJR MacDonald (Attorney General),* 1994 CanLII 117 (SCC) the Court looked to the Applicant to establish: a serious question to be tried; the suffering of irreparable harm if the injunction is not granted; and the balance of convenience favouring the granting of the injunction. Both parties agreed that the first prong was met and this was a serious and unique question to be tried. Turning to the second prong, the Court stated that irreparable harm has been held to be harm that cannot be quantified in monetary terms. The City argued that the Applicant's damages were purely monetary, as it related to a loss in revenues and investment. The Court agreed with the City that the second prong would not have been met if the matter was not a *Charter* case. The Court highlighted a unique exception outlined in *RJR MacDonald* for Charter cases "until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitute irreparable harm". Based on this, the second prong was met.

The crux of the case fell to the Court's determination of the third prong where the Court had to take into account the interests of the public. The City's primary argument was that if the injunction was granted it would weaken the City's authority to regulate smoking and its ability protect the public health of the community. Both

parties agreed there are health risks associated with shisha. The Applicant argued financial loss as well as the important cultural significance of shisha to Arab-Canadians. When balancing the arguments, the Court concluded that the increased health risk associated with shisha outweighed the arguments put forward by the Applicant and therefore balanced in favour of public interest. Therefore, the third prong was not met.

Intervenor Status Denied: Applicant is not Specifically Affected by Appeal nor has Special Expertise on the Matter

Canadian Centre for Bio-Ethical Reform v Grande Prairie (City), 2017 ABCA 280 (CanLII)

http://canlii.ca/t/h5q6z

The Canadian Centre for Bio-Ethical Reform (CCBR) applied to the City of Grande Prairie (City) to post an anti-abortion ad on the exterior of the City's buses. The City denied the proposed ad and CCBR filed an application for judicial review to quash the City's decision. The CCBR argued that it was a violation of s. 2(b) of the *Canadian Charter of Rights and Freedoms* (*Charter*) protecting its right to freedom of expression. The judge held that the City's decision to deny the proposed ad "was a reasonable limit on freedom of expression". The CCBR appealed. The Justice Centre for Constitutional Freedoms (JCCF) filed an application for leave to intervene in the appeal, which the City opposed.

HELD: Application dismissed.

DISCUSSION: The Court has the discretion to permit intervenor status to a party, but should do so sparingly, when it is satisfied that:

the applicant (a) will be directly and "specifically" affected by the outcome of the appeal or, (b) has special expertise or a unique perspective relating to the subject matter of the appeal that will assist the Court in its deliberations. (*Telus Communications Inc v. Telecommunications Workers Union*, 2006 ABCA 297)

Despite understanding that JCCF might be affected by the outcome of this appeal, the Court was satisfied by the City's argument that most of the public would be affected and at the very least interested in the outcome, which diminished JCCF's stance. JCCF unsuccessfully argued that due to its expertise, it would supply a unique perspective to this *Charter* argument that would assist the court in arriving at a well informed decision. The Court rejected this logic, finding that JCCF's argument was repetitious and not unique or additive to the arguments already submitted. The City further suggested that in addition to the submissions supplied by the parties, there is a tremendous amount of case law on this topic that would contribute to the Court making a well-founded decision. The Court held that JCCF was not specifically affected by the appeal nor would JCCF provide a unique perspective.

On the Job Surveillance Can Be Used to Investigate Complaints against Employees

Saskatoon (City) (Re), 2017 CanLII 55571 (SK IPC)

http://canlii.ca/t/h5mx9

The Complainant, a former bus driver at the City of Saskatoon (City) filed an investigation request with the Information and Privacy Commissioner (IPC) alleging

privacy invasions by the City. The City received a cyclist's complaint alleging that he was hit by a City bus operated by the Complainant. The City reviewed the bus camera surveillance for the Complainant's day to determine if he conducted himself appropriately during his entire shift. The Complainant argued this was an invasion of his privacy-and that his privacy was further breached when the City disclosed still photographs from the camera surveillance to the Union following his filed grievance.

HELD: City was authorized under the *Act* to disclose the Complainant's personal information.

DISCUSSION: The IPC proceeded by assessing whether the alleged privacy invasions by the City contained the Complainants personal information. Relying on s. 23(1) of the *Local Authority Freedom of Information and Protection Privacy Act (Act)* which defines personal information, as identifiable indicators relating to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved. Despite concluding that the video surveillance and still photographs collected by the City fell within the definition of personal information, the IPC found that under s. 24 of the *Act* the City had the authority to collect it; a city has the authority to collect personal information through surveillance only if it is collected for a purpose that relates to an existing or proposed program or activity of the city. The IPC concluded that safe public transportation was the purpose of the City activity and this permitted the City to collect personal information through surveillance for that purpose. It was highlighted by the IPC that the City, through signage posted on the bus, made passengers and the Complainant aware they may be recorded by on-board video and or audio surveillance. In addition, the IPC concluded that the City's use of the Complainant's personal information was not a privacy violation as it related to an investigation; the *Act* permits the disclosure of personal information for the purposes of conducting a proceeding before a tribunal.

When a Committee is not a "Local Board" the Ombudsman has no Jurisdiction to Investigate Requirements Under the *Municipal Act*

Hamilton (City) v. Ombudsman of Ontario, 2017 ONSC 4865 (CanLII)

http://canlii.ca/t/h5mvm

The Ombudsman of Ontario (Ombudsman) received a complaint that the Election Compliance Audit Committee at the City of Hamilton (City) was conducting private deliberations. The Ombudsman proceeded with an investigation under the premise that private deliberations were contrary to s. 239 of the *Municipal Act* (*Act*) as all meetings of local boards are to be open to the public. In the course of the investigation, the City asserted that the Ombudsman did not have jurisdiction to investigate the complaint as the Election Compliance Audit Committee was not a local board. Following its investigation, the Ombudsman concluded that the Election Compliance Audit Committee was a local board under the *Act* and had contravened the open meeting requirements by conducting its deliberations in private. As a result, the City filed an application under s. 14(5) of the *Ombudsman Act* for a determination if the Ombudsman had jurisdiction to investigate the City's Election Compliance Audit Committee and its Property Standards Committee for compliance with the open meeting requirements.

HELD: Ombudsman does not have jurisdiction to investigate either Committee under the *Act's* open meeting requirements.

BACKGROUND: The *Act* requires that a municipality ensure all municipal council, local board and committee meetings are open to the public and if it is closed, in the absence of an appointed investigator, the Ombudsman has the jurisdiction to investigate and make a determination if there has been a violation of the *Act*. The prerequisite for the Ombudsman's jurisdiction is therefore that it must be a municipality or a local board of a municipality at issue. The Court was tasked with determining whether the Election Compliance Audit Committee or the Property Standards Committee was a local board; the City argued that these Committees were "adjudicative tribunals that make quasi-judicial decisions". In reviewing the arguments, the Court looked closely at the definition of local board as outlined in s.1(1) of the *Act*:

a municipal service board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities, excluding a school board and a conservation authority; [Emphasis added.]

The Court determined, since the Election Compliance Audit Committee and the Property Standards Committee were not specifically listed, it meant the Court had to interpret the definition in its full statutory context taking into account the intention of the legislature (*Rizzo & Rizzo Shoes Ltd. (Re.),* 1998 CanLII 837). When assessing the Election Compliance Audit Committee the Court noted that the primary purpose of the Committee was to provide an audit forum for an elector to apply to if they believed that a candidate contravened a campaign finance provision. The meetings were open to the public, public notice was provided and presentations were made by the parties. At the conclusion, the Committee would deliberate its decision in private and make a determination on the outcome. The Court compared this mandate to the definition of "local board" in its full statutory context in light of the *Municipal Elections Act* and determined that it was not a local board but rather an independent and impartial decision making body.

As for the Property Standards Committee, the Court applied much of the same analysis from the Election Compliance Audit Committee. The mandate of this Committee was to provide an appeal process to property owners against whom property orders had been made by municipal officers. The Court had difficulty accepting how a committee determining appeals could have an open and public deliberation. The Court ultimately held that the Property Standards Committee was also an independent and impartial decision making body, not a local board.

THIS JUST IN: Toronto Seeks to Close Marijuana Dispensaries

The City of Toronto is seeking compliance with its municipal zoning bylaw and for that purpose has filed an application seeking an interim and permanent injunction to close a chain of seven marijuana dispensaries in the City. Arguments by Tim Carre and Jared Wehrle for the interim injunction were heard before the Superior Court on September 25 and 26, 2017.

Questions?

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