

Inside Canada

Recent Cases of Interest

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City Obtains Second Dismissal of Dog Owner Claim

Oh v City of Coquitlam, 2018 BCSC 986 (CanLII) http://canlii.ca/t/hskqr

Mr. Oh, a resident and former dog owner, was granted an appeal. The City of Coquitlam (City) was initially successful in obtaining an order from the Chamber's Judge and Mr. Oh's claim was dismissed pursuant to *Court Rules Act* Rule 9-5(1)(a) on the basis that his assertions disclosed no reasonable claim. Mr. Oh appealed. The City went before the same Chamber's Judge to clarify that the matter had been dismissed under Rule 9-6(5)(a) finding that there was no genuine issue for trial. As a result, the Court of Appeal held that the Chamber's Judge erred, and Mr. Oh's appeal was allowed. The City filed an application to dismiss Mr. Oh's claim for the second time relying on two new affidavits and Rule 9-5(1)(b) and Rule 9-6(4). Mr. Oh argued that this application should be dismissed as it had already been ruled on by the Court of Appeal.

HELD: Claim dismissed.

DISCUSSION: The evidence presented by the City included affidavits from two City staff in the licensing department. One affidavit confirmed that the City records stated that Mr. Oh and his mother were co-owners of two dogs and the address was registered to Mr. Oh's parents' home. The other affidavit was from a City staff person that had received and approved the documentation to relinquish animal ownership of the dogs from Mr. Oh's mother. The definition of "owner" in the City's Animal Bylaw states:

> Owner, in relation to an animal, means a person:
> i. to whom a *dog license* has been issued under this Bylaw;
> ii. ...
> iii. who owns, is in possession of, or has the care or control of an animal, temporarily or permanently;
> iv. who harbours, shelters, permits or allows an *animal* to remain on or about that person's land or premises;

Upon receiving the two dogs from Mr. Oh's mother, the City ultimately put the dogs up for adoption. Relying on Rule 9-5(1)(b) which permits a Court to strike out any part of a pleading, petition, or other document before the court at any stage of a proceeding the Court deems to be unnecessary, the Court struck out the majority of Mr. Oh's claim. The remainder of Mr. Oh's claim is not positioned in negligence but rather in the tort of detinue. The elements for a potential claim in detinue involves the wrongly detention of another's good and the failure or refusal to deliver them without a lawful excuse (*Schaffner v. Insurance Corporation of British Columbia*, 2016 BCSC 1186). The City is awarded a complete defense to a detinue claim if the City had reasonable grounds to retain the goods despite Mr. Oh's demand for their return. The Court held that the City acted in accordance with its municipal bylaw to accept the dogs, and the City had no duty to return the dogs to Mr. Oh when he sought them, not only because the dogs were jointly owned, but also because the City was concerned for the dog's welfare. The remainder of the claim that was not struck under Rule 9-5(1)(b) is dismissed in its entirety under Rule 9-6(4).

Not All City Committees Are "Local Boards"

Ontario Ombudsman v. Hamilton (City), 2018 ONCA 502 (CanLII) http://canlii.ca/t/hsb9j

The Ombudsman of Ontario (Ombudsman) received a complaint that the Election Compliance Audit Committee and the Property Standards Committee (Committees) at the City of Hamilton (City) were conducting private deliberations. The Ombudsman proceeded with an investigation as permitted under section 14.1 of the *Ombudsman Act*, R.S.O. 1990, c.O.6. and s. 239 of the *Municipal Act* (*Act*) under the premise that private deliberations were prohibited as all meetings of local boards are to be open to the public. In Divisional Court, the City successfully challenged the Ombudsman's jurisdiction to investigate either Committee under the *Act's* open meeting requirements as neither Committee was a 'local board' as defined by the *Act*. The Ombudsman appealed the decision. The City submitted that the interpretation of 'local board' by the Divisional Court is correct, but in the alternative if the Committees are held to be a 'local board' the deliberations that took place were not 'meetings' within the meaning of s.239(1) of the *Act*.

HELD: Appeal dismissed.

DISCUSSION: The *Act* requires that a municipality ensure all municipal council, local board and committee meetings are open to the public and if they are closed, in the absence of an appointed investigator, the Ombudsman has the jurisdiction under s. 239(1)(b) of the *Act* together with s.14.1 of the *Ombudsman Act* to investigate a complaint. The Ombudsman makes a determination if there has been a failure to comply with the public meetings requirement of the *Act*. The prerequisite for the Ombudsman's jurisdiction to conduct an investigation is that it must be a municipality or a local board of a municipality at issue. The Divisional Court reviewed the definition of local board in s.1(1) of the *Act*:

> 'local board' means 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.

The Divisional Court concluded that based on this definition the Committees were not local boards. The Ombudsman argued that the Divisional Court erred because the Committees exercise power 'with respect to the affairs or purposes of one or more municipalities" and thereby fits explicitly into

the definition of 'local board.' In applying *ejusdem generis* the Court found that the language at the end of the 'local board' definition does not include entities which cannot be said to carry on the operations of the municipality. As a result, the Court disagreed with the Ombudsman, and upheld the decision of the Divisional Court that the Ombudsman does not have jurisdiction over the Election and Compliance Audit Committee or the Property Standards Committee as neither are local boards. Therefore the ruling did not allow the Ombudsman to investigate.

Interim Remedy not Granted where Later Remedies Available

Maitland v. Toronto (City), 2018 HRTO 657 (CanLII) http://canlii.ca/t/hs3ch

The Applicant, a current employee at the City of Toronto (City) filed an application with the Human Rights Tribunal of Ontario (HRTO) alleging discrimination and sexual harassment by her Supervisor at the City contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19 (*Code*). While awaiting the outcome of the application, the Applicant requested an interim remedy from the HRTO to prevent the City from terminating her employment and disciplining her for overpayment while she was off on sick leave. The City submitted that it had no intention to terminate the Applicant or seek reimbursement for any payment made to the Applicant.

HELD: Interim remedy denied.

DISCUSSION: The HRTO states that granting an interim remedy is an extraordinary step, because it would order the City to take, or in this case to not take, certain actions prior to a hearing on the merits of the Applicant's application and before any violation of the *Code* has been proven. As a result, the HRTO proceeds with caution and has held that an Applicant seeking an interim remedy has 'significant onus' or burden to demonstrate that the request meets the elements of s. 23 of the HRTO's Rules of Procedure (*TA v. 60 Montclair,* 2009 HRTO 369). Section 23 states that the HRTO may grant an interim remedy, before a full hearing of the application has taken place, where it is satisfied that:

23.2 a. the application appears to have merit;
b. the balance of harm or con vnience favours granting the interim remedy requested; and
c. it is just and appropriate in the circu stances to do so.

Further, a request for an interim remedy must include:

23.3. a. a detailed description of the order sought;
b. one or more declarations signed by persons with direct first-hand knowledge detailing all of the facts upon which the Applicant relies; and
c. submissions with respect to the merits of the Application, the balance of harm or convenience and why an interim remedy would be just and appropriate in the circumstances.

The HRTO found that the interim remedy was not necessary, given that the Applicant was unable to demonstrate that such a remedy was required, for two reasons: First, the Applicant did not meet s.23.3(b) and failed to provide facts to be relied on in the signed declaration. Second, if there was a finding of discrimination contrary to the *Code* and the Applicant had been terminated or disciplined for overpayment, the HRTO could address it at the conclusion of the hearing. The HRTO denied the Applicant's interim remedy request.

Town May Pass Expropriation Bylaw Before Conforming with Official Plan

9616837 Canada Ltd. v. Town of Wasaga Beach, 2018 ONSC 3048 (CanLII) http://canlii.ca/t/hs22s

The Applicant owns a downtown property in the Town of Wasaga Beach (Town). The Town created a Downtown Development Master Plan (DDMP) to create a more vibrant downtown core. To achieve the outcomes of the DDMP, the Town would require the Applicant's property. Although the Town's official plan did not yet incorporate the provisions of the DDMP, the Town passed a by-law to approve expropriating the Applicant's property and to provide the Applicant proper notice. The Applicant brought forward an application to quash the Town's by-law under s.273 of the *Municipal Act*, 2001, R.S.O. 2001, c.25, arguing that the by-law is in contravention of s s.24 of the *Planning Act*, R.S.O. 1990, c. P.13 (*Act*) because the DDMP did not confirm with the Town's official plan. The Town's response relied on s.24(3) of the *Act*.

HELD: Application dismissed.

DISCUSSION: Before turning to the statutory interpretation of s.24(3) *Act*, the Court highlighted that the Town has the power to expropriate the Applicant's land and cited *Dell Holdings Ltd. V. Toronto Area Transit Operating Authority,* 1997 CanLII 400 (SCC): "the expropriation of property is one of the ultimate exercises of governmental authority."

To lay the foundation for the statutory interpretation of s.24(3) of the *Act*, the Court cited *Driedger's,* the leading authority of statutory interpretation that rejects plain meaning, and has become the interpretation approach used by the Supreme Court of Canada:

> Today there is only one principle or approach ... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Section 24(3) of the *Act* permits:

> a municipality to take into consideration the undertaking of a public work that does not conform with the official plan and for that purpose the council may apply for any approval that may be required for the work, carry out any investigations, obtain any reports or take other preliminary steps incidental to and reasonably necessary for the undertaking of the work, but nothing in this subsection authorizes the actual undertaking of any public work that does not conform with an official plan.

The Applicant argued the plain language of s.24(3) does not permit the Town's Council to pass a by-law to accomplish the objectives of the section. Rather, the section only permits the Town to undertake matters pertaining to public works that do not require a by-law to be enacted. The Court disagreed. By applying the statutory interpretation of s.24 in its entirety, the Court determined that the purpose of the section was to allow the Town to take preliminary steps including applying for approvals that do not conform with the official plan while making changes to the official plan. This would ultimately allow the Town to move forward on two concurrent fronts, while ensuring that no public work is undertaken until the official plan is amended. The Court concluded that s.24(3) must be interpreted to provide the Town with the authority to take these preliminary steps by enacting by-laws. The steps taken by the Town were well within its authority under s. 24(3), therefore the by-law is a valid exercise of the Town's authority.

continued on page 35

was adopted to raise their First Amendment retaliation claim, and that granting their request would have been disruptive to the 2018 elections. The Court also noted that the lower court's order denying injunctive relief had been issued after the Supreme Court announced that it would review *Gill v. Whitford*, and that the lower court could have believed that it might be better off waiting for guidance from the Supreme Court, rather than "charging ahead."

Gill v. Whitford has now been remanded to the three-judge district court in Wisconsin and *Benisek v. Lamone* is going back to the lower court for further proceedings following its denial of injunctive relief. But there is still another case on the Court's docket that may address partisan gerrymandering.

League of Women Voters v. Rucho

Rucho is a partisan gerrymandering challenge to the First and Twelfth Congressional Districts under North Carolina's 2016 congressional map. Admittedly drawn by a Republican-dominated legislature to reflect a pro-Republican tilt and give Republicans a large majority, the N.C. map was struck down by the lower court as an unconstitutional partisan gerrymander.

The lower court ordered the state legislature to draft and submit a new plan before the end of January 2018, but the Supreme Court stayed the lower court's order on January 18, 2018. That stay order in *Rucho* placed the N.C. Republicans' appeal on hold for several months, presumably waiting for the Court to rule in *Gill* and *Benisek*, both of which were remanded on June 18, 2018 for further proceedings, *Gill* for lack of Article III standing and *Benisek* because the lower court had not erred when it decided not to require the state to redraw the challenged Maryland Congressional District map in time for the 2018 election.

On June 25, 2018, the Court vacated the judgment in the consolidated *Rucho* cases and remanded to the United States District Court for the Middle District of North Carolina for further consideration in light of *Gill*.

The core issue of whether, when and under what judicially manageable standard, if any, the Court can or will decide any of these partisan gerrymandering cases has yet to be resolved, but the machinery is in place to push toward a resolution possibly during the October 2018 term. The ball is in the challengers' court, and the stakes can potentially be as high as which party ultimately commands even a razor-thin majority in the U.S. House of Representatives. ML

Amicus Cont'd from page 23

of his opinion. Justice Breyer wrote separately to explain that he dissented as to the majority's severability analysis. Interestingly, although Justice Ginsburg, joined by Justice Sotomayor, dissented in full, she provided no analysis in her dissent as to the anti-commandeering argument and instead noted even assuming arguendo that the challenged portion of PASPA was unconstitutional, she also disagreed with the Court's severability analysis.

3. IMLA joined an amicus brief filed by the State and Local Legal Center in this case, arguing that PASPA not only violates the Tenth Amendment, but the issue in the case implicates a host of other critically important state and local laws. Specifically, to allow Congress to "freeze" into place state gambling laws through PASPA, would also allow Congress to do the same thing in areas like state authorization of medical marijuana, autonomous vehicles, physician assisted suicide, etc.

4. Chicago filed a brief in *City of Chicago v. Sessions,* No. 1:17-cv-05720, the State of California filed a brief in *United States v. State of California,* No. 2:18-cv-00490, and Philadelphia cited to *Murphy* in its post-trial briefing in *City of Philadelphia v. Sessions,* No. 17-3894.

5. While Philadelphia was not directly challenging the constitutionality of Section 1373 in its lawsuit, the court nonetheless held that the statute was unconstitutional because the DOJ had placed a certification condition on the Byrne JAG Grant and was thus requiring the City to certify compliance with an unconstitutional statute. *See City of Philadelphia v. Sessions*, No. 17-3894, 2018 U.S. Dist. LEXIS 94709, at *95-96 (E.D. Pa. June 6, 2018).

6. The primary basis of Judge Leinenweber's decision was *City of New York v. United States,* 179 F.3d 29 (2d Cir. 1999), decided by the only circuit court to assess the constitutionality of Section 1373 so far. In that case, the Second Circuit found that the Tenth Amendment, normally a shield from federal power, could not be turned into "a sword allowing states and localities to engage in passive resistance that frustrates federal programs." The Second Circuit concluded that Section 1373 was constitutional on its face and did not run afoul of the Tenth Amendment. That ruling is now highly suspect in light of *Murphy*. ML

Inside Canada Cont'd from page 25

County Council Expropriation Satisfies Reasonableness Standard

Woodward v Cardston (County), 2018 ABQB 460 (CanLII) http://canlii.ca/t/hshzv

The Applicant, a resident of Cardston County (County) owned a private road that he used to access his property. The County decided to expropriate the private road lands to create a public road and provided appropriate notice to the Applicant. The Applicant objected, and the matter was sent before a hearing officer. The hearing officer held that the County's intention to expropriate was to further a municipal purpose and it was within its authority under the *Municipal Government Act,* RSA 2000, c M-26 (MGA). The Applicant did not challenge the hearing officer's decision. As a result, County Council approved the expropriation. The Applicant sought judicial review of the decision by Council's decision.

HELD: Application dismissed.

DISCUSSION: To determine the standard of review, the Court relied on *Dunsmuir v. New Brunswick,* 2008 SCC 9 and noted that deference to elected officials is well established law. When the Court is faced with judicial review of a decision made by any elected officials, including Council it must determine first if the Council acted legally. If the court can determine that Council has, then the Court can review its decision with the standard of reasonableness. (*Northland Material Handling Inc. v. Parkland (County)* 2012 ABQB 407). The Court applied the first requirement to the issue before it, finding that s.14 of the MGA authorized the County to acquire lands within its jurisdiction by expropriation for a municipal purpose. The Court proceeded to review Council's decision on a reasonableness standard. Section 3 of the MGA outlines the municipal purposes for expropriation. The County relied on s.3(b): to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality. The Court held that the County's decision was reasonable and was made for a proper municipal purpose and dismissed the Applicant's application. ML