

Inside Canada

Transgender Advertisements, Roadway Controversies, and Non-Impecunious Taxpayers

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City Error: Removal of Advertisements Questioning Transgender Rights Violates Charter of Rights and Freedoms
CHP v. City of Hamilton
2018 ONSC 3690 http://canlii.ca/t/hvdf4

The City of Hamilton (City) had developed a City-wide "transgender protocol". The Christian Heritage Party of Canada (CHP), a federal political party which engages on various topics including transgender issues, CHP contracted with the City to place advertisements in bus shelters. The advertisements showed an individual from the back with short hair entering a room labelled "ladies showers" and slogan read "competing human rights." After the advertisements began appearing, the Canadian Broadcasting Company (CBC) contacted the City to inquire about them. Within two hours after receiving the CBC inquiry, the City's Communications Director determined that the advertisements were offensive~ despite not having obtained any material as to how they contravened any law, act or code~and requested that all such advertisements be removed.

The City confirmed that CHP was not consulted during this timeframe, and that it did not balance CHP's rights to political expression. Following the City's decision, it received a formal complaint, which lead City Council to pass a motion that all offensive advertisements be removed, and that a transgender pride flag be raised at City Hall. The City claimed that it removed the advertisements on grounds that they were offensive and discriminated against the transgender community. The CHP argued that it was attempting to engage in a political discussion and convey its position on a politically sensitive topic. It sought judicial review of the City's decision, which had been taken without considering the CHP's rights under the *Charter of Rights and Freedoms* (the *Charter*).

HELD: City's decision and motion quashed.

DISCUSSION: In evaluating whether CHP was deprived of natural justice, the Court balanced CHP's rights to political expression as opposed to the City's right to remove advertising that it considered offensive. The Court examined the freedom of expression clause under the *Charter* and concluded that free speech is paramount and must be protected; without free speech society would be a dictatorship. In drawing its conclusion, the Court cited *Bracken v. Fort Erie*, 2017 ONCA 668 which highlighted the right to free political speech and held that speech is not "violence" merely because people may find it offensive.

In oral submissions, the City claimed that the right to political speech was a lesser right than other rights guaranteed by the *Charter.* The Court disagreed as there was nothing in the law to support such a conclusion. The Court held that the City deprived CHP of natural justice by removing the advertisements without permitting CHP the ability to provide input into the decision. Furthermore, the City's actions were based on an inquiry by CBC and its decision to remove the advertisement was already made before it received a complaint. The Court acknowledged that while in some situations this may be acceptable and/or justified, this was not one. By all accounts, the City failed to demonstrate that the process it adopted was reasonable; it denied CHP of their fundamental right to natural justice. City Council's motion to adopt the decision made by the City was not legislating, it was merely ratifying the City's decision. The Court quashed both the City's decision and Council's motion.

Expropriation: Damages for Trespass Prior to Expropriation can be Triggered by Expropriation
City of Owen Sound (Corporation of the) v. Naidal Incorporated, 2018
2018 ONSC 6207 http://canlii.ca/t/hvl9d

While completing road construction, the City of Owen Sound (City) mistakenly trespassed on the property of Naidal Incorporated (Respondent). When the City was made aware it did not own that property, it obtained permission from the Respondent to complete the construction. When the road was complete, the City obtained an appraisal to expropriate the property and provided the Respondent with a statutory offer under s.25 of the *Expropriations Act*, which was accepted. The following year, the Respondent served the City with a notice of arbitration claiming additional funds for the expropriated lands, injurious affection and disturbance damages. City responded that the Respondent had been fully compensated and any claim for damages of trespass were frivolous as the Respondent had provided consent and furthermore, the claim should be statute-barred. The Ontario Municipal Board (OMB, now known as the Local Appeal Planning Tribunal (LPAT)) awarded the Respondent more than $50,000 plus interest and costs. The City appealed.

HELD: Appeal is dismissed.

DISCUSSION: The Court referenced s. 18 of the *Expropriations Act*, which states: "the expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs as are natural and reasonable consequences of the expropriation." The City argued that it did pay the Respondent all reasonable costs associated with the expropriation. Furthermore, the City submitted that it trespassed mistakenly during road construction years prior to the expropriation, and as a result the trespass was not a natural or reasonable consequence of the expropriation. In reviewing the matter before it Board had relied on the Supreme Court of Canada

decision, *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S. C.R. 32 which held among other things that, "it is not uncommon that damages which occurred before the expropriation can in fact be caused by that very expropriation". The Court held that the Board correctly found that the damages arising out of the trespass were a natural and reasonable consequence of expropriation and dismissed the City's appeal.

Property Taxes: No Refund Based on Poverty for Applicant with Two Million Dollar Net Worth
F.E.J.B. v Mississauga (City), 2018 CanLII 96173 (ON ARB) http://canlii.ca/t/hvk23

Each year the City of Mississauga (City), like all municipalities across the province, requires its residents to pay property taxes. The Applicant, a resident in the City filed an application to have her property taxes refunded pursuant to s.357(1)(d.1) of the *Municipal Act, 2001* S.O., c. 25 as a result of sickness or extreme poverty.

HELD: Application dismissed.

DISCUSSION: Section 357(1)(d.1) of the *Municipal Act, 2001* states:

357.(1) Upon application to the treasurer of a local municipality made in accordance with this section, the local municipality may cancel, reduce or refund all or part of taxes levied on land in the year in respect of which the application is made if,

...

(d.1) the applicant is unable to pay taxes because of sickness or extreme poverty;

To determine if an Applicant qualifies for a property tax refund, the Board must apply two-part test. First, the Board must determine if sickness or extreme poverty exists. If either exists, then the second part of the test places the onus on the Applicant to prove an inability to pay all or part of the taxes. To meet the first prong, the Applicant submitted medical records that demonstrated that she no longer worked, for medical reasons. The Board was not required to, but also reviewed the Applicant's evidence to demonstrate extreme poverty. The evidence the Applicant provided demonstrated that she lived in a four-bedroom custom home, with an approximate worth exceeding one million dollars. Furthermore, the financial and bank statements provided by the applicant demonstrated that she had a net worth of just under one million dollars. Despite this latter information, the evidence of sickness was not disputed by the City; thus the Applicant had satisfied the first prong. As a result, the onus was on her to demonstrate an inability to pay property taxes. Although there is no legal test, the Board looks to determine if applicants are using every last resource to pay some or all of their property taxes in order to provide a remedy under s. 357(1). Based on the evidence provided by the Applicant, her home was found to be mortgage-free and assessed at over one million dollars, and her bank records demonstrated that she had spent over five thousand dollars the previous year on pet food and supplies. The Board held that the Applicant application does not qualify for relief under the *Municipal Act*.

Roadways: Despite Faded Stop Line, Intersection Did Not Pose Unreasonable Risk
Chiocchio v. Hamilton (City), 2018 ONCA 762 (CanLII) http://canlii.ca/t/hv56g

The City of Hamilton (City) is seeking leave to appeal a trial judge decision that held the City negligent and partly responsible for a motor vehicle accident that caused Mr. Chicocchio to become a quadriplegic. In addition to the driver of the car that hit Mr. Chicocchio, the trial judge found that the City, by failing to repaint a faded stop line, breached its duty to keep its roadway in a reasonable state of repair. After hearing the evidence before the court, the trial judge held that had the driver stopped at the faded stop line the accident never would have occurred.

HELD: Appeal is allowed.

DISCUSSION: A municipality is required under the *Municipal Act*, 2001 S.O., c. 25 to keep roadways in its jurisdiction in a reasonable state of repair. Furthermore "a municipality is required to prevent or remedy conditions on its roads that create an unreasonable risk of harm for ordinary drivers exercising reasonable care" *Fordam v. Dutton-Dunwich (Municipality),* 2014 ONCA 891. The trial judge concluded that absent a proper stop line, a reasonable driver would not know where to stop, and would be required to exercise personal subjective judgement as to where to stop. As a result, the City created unreasonable risk by failing to keep its roads in a reasonable state of repair.

The Court found that the trial judge was focused on the wrong question. The question should have been whether in the absence of a stop line, did the intersection pose an unreasonable risk of harm for ordinary drivers even if they were exercising reasonable care. In addressing the wrong question, the trial judge failed to consider that drivers that stopped at the stop line would have a view of traffic one way, but their view the other way would be obscured by a house. A reasonable driver would not stop their cars twice. A driver would likely come closer to the intersection to see in both directions and proceed into the intersection when it was safe to do so. All evidence presented before the trial judge did not demonstrate that the intersection posed an unreasonable risk to ordinary drivers. The Court granted the appeal and set aside the trial judge's finding that the City failed to keep the roadway in a reasonable state of repair.

Standard of Proof: Decision Based on Preference of One Party's Testimony is Error in Law
Mississauga (City) v. Ahmad, 2018 ONCJ 671 http://canlii.ca/t/hvbxx

The Appellant was charged and convicted of using a hand-held device while operating a motor vehicle in the City of Mississauga (City) contrary to s.78.1(1) of the *Highway Traffic Act,* R.S.O. The police officer testified that he witnessed the contravention and was confident it was a cellphone. The Appellant testified that he was not holding a cellphone but confirmed that he did own one. Following the oral evidence of both parties, the Justice of the Peace (JP) rendered a decision in favour of the police officer without any reference to the legal standard to be met. The Appellant appealed the conviction and argued that the JP erred in law for failing to consider whether the Appellant's evidence raised a reasonable doubt.

HELD: Appeal allowed.

DISCUSSION: In reviewing the concise reasons issued by the JP to convict the Appellant, the Court noted that it was assumed that the JP knew the law and as a result, the legal governing standard to convict a party. However, the governing standard-- beyond a reasonable doubt--was not applied in the JP's reasoning. Rather, the JP registered a conviction based on the preference of one oral testimony over another. The Court held that even if a court or a JP believes or prefers one set of evidence over another, a court is required to consider if it has reasonable doubt after being presented with all evidence, *R v. W. (D.),* 1991 CanLII 93 (SCC). As a result, the JP's failure to consider the legal governing standard was an error in law, and a new trial was required to consider if the Appellant's evidence gives rise to a reasonable doubt. ML