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Ten Tips for Lawyer Well-Being in the Age of Coronavirus

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By: Chris Ritter, Director, Texas Lawyers Assistance Program, Austin, Texas

While undoubtedly rewarding, the legal profession is often filled with extraordinary demands that compromise personal time and intrude on family relationships. There are techniques and resources to help reduce stress, fight anxiety and regain control.

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FIRST AMENDMENT PROTECTION OF PROFANITY AND OTHER OFFENSIVE PARAPHERNALIA DISPLAYED IN THE PUBLIC'S VIEW

By: Sherri Russell, City Attorney, Lake Jackson, Texas

The 2020 presidential election merely revealed the accelerating trend towards public expression employing language that hitherto would have been considered profane. The ruckus is not new, and however inappropriate and discomfiting, mere profanity cannot be the object of municipal regulation.

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AVOIDING A COLLISION WHEN CODE ENFORCEMENT AND FAIR HOUSING INTERSECT

By: Patricia (Trish) Link, Assistant City Attorney, Austin, Texas

Rigorous enforcement of local codes can easily run afoul of federal laws enacted to protect the disabled, and can undermine efforts by unrelated adults to cohabit in lieu of entering nursing facilities.

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INSIDE CANADA

BY: MONICA CIRIELLO
Ontario 2015

COVID Restrictions, Heritage-Designated Buildings, Anonymous Complainants, and More

Balancing Health and Religion During COVID-19
Toronto International Celebration Church v. Ontario (Attorney General), 2020 ONSC 8027 https://canlii.ca/t/jcb6x

The City of Toronto (City) was designated as Stage 1 under the Ontario Provincial Government's *Reopening Ontario (A Flexible Response to COVID-19) Act*, 2020 (*ROA*) and as a result all places of worship were limited to permitting a maximum of 10 people to attend in person. The Toronto International Celebration Church (Church) has a maximum capacity of 1000 members and brought an application to strike down the *ROA* to the extent that it prohibited more than 10 people from attending a religious service, arguing an infringement of s.2(a) of the *Canadian Charter of Rights and Freedoms (Charter)*, which guarantees freedom of conscience and religion. The Church sought an interim injunction pending the outcome of the constitutional challenge, seeking to permit services at 30% capacity, the capacity limit that applies to municipalities in the less restrictive Stage 2.

HELD: Interim injunction denied.

DISCUSSION: *RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311 outlines the three-part test when considering whether to grant an interim injunction. First, does the *Charter* application have merit; second, will the party suffer irreparable harm if the injunction is refused; third, which party will suffer the greater harm from granting or refusing the injunction. To determine if the Church's *Charter* application had merit, the Court would have to find a serious issue to be tried. Ontario (Province) conceded that *ROA* restricted religious freedoms as guaranteed under the *Charter*. The onus was therefore on the Province to demonstrate that the restrictions are saved under s. 1:

> the *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Court was satisfied that there was a serious issue to be tried. Second, the Court reviewed whether the Church and its members would suffer irreparable harm if the interim injunction was not granted. The Court held that in person religious service is an important aspect of religious practices and, although *ROA* does not prohibit in person attendance, it means a large majority of the members cannot practice. Lastly, the Court considered whether the Province or the Church would suffer greater harm from granting or refusing the injunction. The Church argued that the balance favoured protecting religious freedom, while the Province argued the *ROA* was in place to protect public health by minimizing the spread of COVID-19. The Court held that although the knowledge of COVID-19 is evolving, there is an understanding that close proximity to others from outside one's household for long periods of time contributes to the spread, therefore there would be greater harm caused by granting an injunction, outweighing the religious freedoms of those at the Church. The Church failed the third prong of the *RJR-MacDonald* test; interim injunction denied.

Call the Police: Who is the Employer?
Ruddall v. Windsor (City), 2021 HRTO 217 https://canlii.ca/t/jdvt1
The Applicant, a police officer and the

Chair of the Board of the Safety Village, alleged that the City of Windsor (City) Fire Chief spoke about her in a discriminatory manner, raising issues of harassment and discrimination in employment contrary to the *Human Rights Code*, R.S.O. 1990, c.H. 19 (*Code)*. In response the City's Human Resources Department investigated. Unsatisfied with the outcome, the Applicant filed an application with the Human Rights Tribunal of Ontario (Tribunal) alleging that the City was responsible for the harassment and discrimination she had faced. The City argued that it was not the Applicant's employer and sought to dismiss the application and request a summary hearing.

HELD: Summary hearing denied.

DISCUSSION: It was the Applicant's position that as a police officer, the City was her employer, relying on the governance framework of both the *Municipal Act,* R.S.O. 1990, c. M 45 (*Act*) and the *Police Services Act*, R.S.O. 1990, c. P. 15 (*PSA*). The City argued that the Applicant's employer was the Windsor Board of Police Service (WBPS). To support its position, the City provided case law including *Laing v. Toronto (City)* 2003 45493 (ON SC) that saw a party unsuccessfully attempted to hold the City of Toronto responsible for the actions of police officers in the City. In *Laing,* the Court held that the Police Services Board is governed by the PSA, therefore it was the Board (not the City) that was responsible for the actions of the police officers.
In reviewing the employment status between the parties, as well as examining the control and dependency outlined in *McCormick v. Fasken Martineau DuMoulin LLP,* 2014 SCC 39, the Tribunal was persuaded by the City's position that WBPS is the Applicant's employer. The Tribunal explicitly highlighted that even though there is legislation under the *Act* for municipalities to provide and pay for police services, it was not the municipality that employed the members of the police force. Based on this finding, the City pointed out that the *Code* only provides protection from harassment in the workplace, and it was the City's position that since the Applicant was not an employee and these comments did not take place in a workplace, she was not subject to these protections. Furthermore, the City put forth the same logic for the Applicant's claim of discrimination, that even if the treatment of the Applicant could be defined as discrimination, it did not occur "with respect to employment." The Tribunal was not persuaded to grant a summary hearing based on the City's position. The Tribunal relied on the Supreme Court of Canada decision of *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, to take a contextual approach to whether an interaction could be found to be employment-based, and dismissed the summary hearing.

Can an Applicant Cross-Examine an Adverse Witness?
Ramsay v. Brantford (City), 2021 HRTO 201 https://canlii.ca/t/jdwpr
The Applicant was unsuccessful in applying for a position at the City of Brantford (City). She filed a sex discrimination claim against the City alleging that she was denied the position despite being qualified because she is a woman, contrary to the *Human Rights Code,* R.S.O. 1990, c. H.19. The Applicant summoned the successful candidate (Mr. Nafziger) to the hearing. The Applicant requested to cross-examine Mr. Nafziger during his examination in chief.

HELD: Request denied.

DISCUSSION: Applying the considerations within *Wawanesa Mutual Insurance Co. v. Hanes,* 1961 CanLII 28 (ONCA), the Tribunal determined Mr. Nafziger was an adverse witness as he is an employee at the City and most notably, the successful candidate for the position the Applicant was seeking. The Applicant sought to cross-examine Mr. Nafziger as an adverse witness under Rule 53.07 of the *Rules of Civil Procedure*, R.R.O, Reg 194 (*Rules*). The Tribunal's Rules of Procedure provide that the Tribunal has the authority to control its own process and proceedings, meaning that the *Rules of Civil Procedure*, RRO, Reg 194 (*Rules*) do not apply. Although the Tribunal had no obligation to apply the *Rules*, the Applicant argued that the Tribunal should consider the *Rules* as a guide and permit the cross-examination of the adverse witness to ensure a fair hearing. The Tribunal disagreed. In reviewing the question before it, the Tribunal did not rely on the *Rules* but cited section 23 of the *Evidence Act,* R.S.O 1990, c. E. 23. The Tribunal held that the Applicant was not permitted to conduct a cross examination of Mr. Nafziger because it would allow the Applicant to impeach its own witness and undermine the credibility of Mr. Nafziger's evidence.

Section 23 did permit the Applicant to question if an inconsistent statement was provided and ask Mr. Nafziger for an explanation. If while providing testimony, Mr. Nafziger proved to be a hostile witness, the Tribunal could permit him at that point to be cross-examined by the Applicant. However, for the reasons outlined above, the Tribunal denied the Applicant's request to cross examine Mr. Nafziger.

Complexities in Repealing a Building's Cultural Heritage Designation
Ferron v. Niagara Falls (City), 2021 23950 (ON CONRB) https://canlii.ca/t/jf0fp

In 2010, the City of Niagara Falls (City) passed a bylaw designating a City-owned schoolhouse construct-

Continued on page 38

ed in 1915 as a building of cultural heritage and value under s. 29 of the *Ontario Heritage Act,* RSO 1990, c. O.18 (*OHA*). Nine years later, the City began the process under s. 31(5) of the *OHA* to repeal the designation bylaw which protected the building with plans to demolish it to expand a City cemetery. Residents objected to the Conservation Review Board (Review Board).

HELD: Recommendation not to repeal designation.

DISCUSSION: Objectors before the Review Board expressed concerns that the City has few heritage-designated properties and those that are designated should remain. In response, the City conceded and agreed with the Objectors that the building maintains cultural heritage and value; however, it was the City's opinion that after years of consultation with the community and the Municipal Heritage Committee the bylaw should be repealed and the building demolished. *Trothen v. Sarnia (City),* 2016 29998 (ON CONRB) outlines the considerations for the Review Board when an owner of a property or building seeks to repeal a designation bylaw. The Review Board noted that although the matter before it addressed a municipally-initiated repeal under s. 31 of the *OHA, Trothen* would still apply. *Trothen* requires the Review Board operating within its authority of the *OHA* to review the evidence before it and make a recommendation whether the building maintains cultural heritage and value.

The challenge before the Review Board was that the City conceded the building maintained cultural heritage and value, thereby the Review Board could only arrive at the recommendation that the designation bylaw should not be repealed, and the building should be maintained under *OHA* protection. However, the City would not be bound by the Review Board's recommendation; the City like any other municipality in Ontario is legally obligated to consider but not required to follow a Review Board decision. Municipalities have broad discretion but are bound and required to uphold the principles of the *OHA*. The Review Board advised the City to proceed with caution when exercising its discretion following the Review Board's final recommendation to protect a schoolhouse that still maintained cultural heritage and value.

No Veil of Anonymity for City Employee Alleging Discrimination

Ahlawat v. Toronto (City), 2021 HRTO 140 https://canlii.ca/t/jddbd

The Applicant was terminated as an employee at the City of Toronto (City). In response, the Applicant filed a *Human Rights Code,* R.S.O. 1990, c. H. 19 (*Code*) application alleging discrimination when the City failed to accommodate his disability. Prior to the hearing, the Applicant sought an interim decision from the Tribunal to anonymize his name during the proceedings and requested to amend the application to add discrimination based on the grounds of race, creed, and place of origin.

HELD: Requests denied.

DISCUSSION: The Tribunal commenced by outlining that the natural process of legal proceedings in Canada are open and transparent, which includes the names of the parties involved. The Applicant expressed concerns that as a well-known South Asian in the City, the exposure of his mental health condition through this application would further stigmatize him in his community as well as worsen his condition. The City conceded that the Tribunal has discretion to grant an anonymization request but argued there were no exceptional circumstances presented by the Applicant to justify this request. Anonymization requests are reviewed on a case-by-case basis, allowing the Tribunal to strike a balance between the public interest in freedom of expression and open justice and the potential negative consequences of an applicant. The Tribunal relied on *C.M. v. York Region District School Board,* 2009 HRTO 735 which stated, "in general, values of openness support including the names of the parties in a Tribunal decision" further "without good reasons for doing so, parties should not make or defend allegations from behind a veil of anonymity […]". The lack of evidence presented by the Applicant failed to persuade the Tribunal to justify an anonymization request the and request was denied.

As for the Applicant's request to amend the application, the Tribunal noted that it had discretion to allow for an amendment under Rule 1.7 of the Tribunal's Rules of Procedure. The Applicant argued that he had every intention of including discrimination based on the grounds of race, creed and place of origin but as a result of a clerical error failed to check the appropriate box on the application. The Applicant relied on *Morris v. Oxford Country,* 2018 HRTO 1820 which permitted an applicant to amend an application after having been filed. The Tribunal was able to distinguish *Morris* from the matter before it; most notably in *Morris* the applicant did not raise any new factual allegations, while the Applicant here attempted to add additional examples of mistreatment by the City connected to the grounds of race, creed and place of origin. The Tribunal denied the request to amend the application under Rule 1.7 but made clear that by doing so the Tribunal was not disposing of the Applicant's initial allegations. Request to amend denied. ML