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BIAS AND PREJUDGMENT IN THE QUASI-JUDICIAL DECISION-MAKING PROCESS

THE PUBLIC RELEASE OF BODY CAMERA VIDEOS

PUBLIC NUISANCE: MUNICIPALITIES AND THE COMMON GOOD



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INSIDE CANADA

By: MONICA CIRIELLO, *Ontario 2015*

Impound Fees, Unplugged Cellphones, Inhospitable Stadiums, and More

Police Authority to Impose Impound Fees
King v. City of Charlottetown and Shaw's, 2021 PESC 39
https://canlii.ca/t/jjzp0
In June 2018, the Charlottetown Police (Police), acting on behalf of the City of Charlottetown (City) obtained a search warrant for the Plaintiff's vehicle which was seized and searched thoroughly. Following the search, it was towed to an impound lot where it started to accrue impound fees of $25 per day. In September 2018, after the Plaintiff was charged and sentenced, the Police advised the impound that the vehicle could be released, but the impound fees were the Plaintiff's responsibility. The Plaintiff paid the fees, but thereafter sought reimbursement from the City.

HELD: City liable for impound fees.

DISCUSSION: The question for the Court was whether the Police had the authority to place the vehicle in impound and impose the impound fees on the Plaintiff during a criminal investigation. The Police testified that it was standard practice to impound a vehicle and impose the fees on the vehicle owner, but confirmed they were not relying on legislative authority or an internal written policy. The Court held that the Police only have the impound authority pursuant to their seizure and search of a vehicle for at best three days, following which it should be returned to the party. Failing to return a vehicle may have serious financial implications on individual owners for which they have no control.

The Court further found that because the Police practice was not rooted in legislation or internal policy, all the impound fees incurred by the Plaintiff were the responsibility of the Police. Furthermore, the Court held that the Police were negligent in failing to release the vehicle to the Plaintiff after it was determined that the search provided no additional evidence. The Court held that there was no evidence to suggest why this decision could not have been made after three days. Indecisiveness or lack of policy caused the Plaintiff pecuniary loss. The Court found that these actions did not meet the standard of care of a reasonable individual acting in these specific factual circumstances. The Court held that the City was solely responsible for the damaged incurred by the Plaintiff.

Disconnecting Cell Phone While Driving is not "Use"
City of Montréal c. Hafez, 2021 QCCM 99
https://canlii.ca/t/jjs33
The Defendant was charged with using a cellular device while operating a vehicle contrary to the *Highway Safety Code*, CQLR c C-24.2 *(HSC)*. He argued that the cellular device was not in use, but rather it lit up and caught the eye of a police officer when he disconnected it from the vehicle charger.

HELD: Defendant acquitted.

DISCUSSION: The Defendant's argument was one of a minor distinction, specifically that disconnecting a cellular device does not constitute usage. Therefore, such an act is not in contravention of the *HSC*. Unfortunately, the legislation does not define what constitutes "using" or "use of" a cellular device. The City of Montreal (City) provided jurisprudence that the act of plugging in or charging a cellular phone constitutes use, *Poulin c. Ville de Rosemere,* 2020 QCCS 2010 and argued that disconnecting or unplugging a cellular device should attract the same meaning because both were distractions from the road and distractions while operating a vehicle is what the legislation sought to ban. As a result, the City asserted, the Court must rely on plain language of the word "disconnect" to determine the intent of the legislators, *Poulin c. Ville de Rosemere,* 2020 QCCS 2010.

The Court cited *Collins English Dictionary*; "to disconnect" a piece of equipment means to separate it from its source of power or to break a connection that it needs in order to work. Relying on this definition, the Court rejected the City's argument

that the act of disconnecting is a "use" of a cellular device, because the Court rationalized that disconnecting a charging battery enables a cellular device to be used; however, it does not constitute using a cellular device, which is a separate act. The Court acquitted the Defendant based on this distinction.

Accommodations Under the Alberta Human Rights Act
Hort v City of Cold Lake, 2021 AHRC 168 https://canlii.ca/t/jjgfp
The Complainant alleged discrimination on the grounds of physical and mental disability by the City of Cold Lake (City) for denying access to the City's Multipurpose Stadium (Stadium), contrary to the *Alberta Human Rights Act,* RSA 2000, c. A-25.5 (*Act)* The City sought to have the application dismissed, arguing that the Stadium was built in compliance with the Alberta Building Code.

HELD: Application dismissed.

DISCUSSION: The Complainant's application submitted that persons with physical disabilities cannot access the Stadium and thereby cannot attend events held at the Stadium, contrary to the *Act*. The application made specific reference to one football game. The City acknowledged that there may have been one event where disabled persons were unable to attend as a result of its location at the Stadium. The City argued that the Complainant failed to provide evidence that he was denied access to the football game or any other event, and that the evidence before the Tribunal failed to mention an adverse impact on the Complainant or anyone else. The City further argued that it had made a reasonable accommodation and met the requirements for a barrier-free design in compliance with the Alberta Building Code, as the Stadium offers accessible seating, signage, wheelchair-accessible washrooms and concession window. Any additional access for one-off events would be cost-prohibitive, resulting in an undue hardship on the City.

The Tribunal acknowledged that the Stadium may be inaccessible to persons with physical disabilities, and there is recognition that disabled persons may not have been able to attend at least one event at the Stadium; however without additional evidence that the Complainant suffered an adverse impact, it did not rise to the level of discrimination. The Complainant's application was dismissed.

Did City Terminate Employment Due to Criminal Charges on CRC?
Farquhar v. City of Nelson and another, 2021 BCHRT 62 https://canlii.ca/t/jg24l
The Complainant alleged discrimination contrary to the *Human Rights Code (Code)* RSBC 1996, c -210 when his employment as a heavy equipment operator was terminated by the City of Nelson (City) after it became aware of his drug-related criminal charge. The City sought to dismiss the application, arguing that it terminated the Complainant for not submitting the required criminal records check (CRC) documentation in a timely manner, which did not violate the *Code*. In contrast, the Complainant argued that he was terminated for the contents of the CRC itself, which listed a criminal drug charge.

HELD: Application to deny dismissed.

DISCUSSION: The Tribunal reviews complaints to assess whether there is a reasonable prospect that an application would succeed in order to warrant the time and expense of a hearing. The threshold is low: the Complainant must only demonstrate that the evidence is not conjecture, *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49. The evidence before the Tribunal suggested that the Complainant was discriminated against, contrary to *Code* and was terminated for having a criminal charge. Although the *Code* references criminal "convictions" and not criminal "charges," the Tribunal was satisfied in applying a liberal interpretation to include criminal charge, *Dore v. Crown Tire Service Ltd.* (1989), 10 C.H.R.R. D15433.

The onus was on the Complainant to demonstrate the nexus between his criminal charge and termination by the City, *Quebec v. Bombardier Inc. (Bombardier Aerospace Training Center),* 2015 SCC 39. The Complainant's evidence was his own statement that the day he submitted his CRC was the day he was terminated. The Tribunal made a reasonable inference based on the circumstances, that although there may be some merit to the City's concerns unrelated to the CRC, the Complainant's application had a reasonable prospect of success. The City's application to dismissed was denied.

Development Permit Appeals: Proximity Does Not Assure Affected Person Status
Dimant v Calgary (City), 2021 ABCA 396 https://canlii.ca/t/jl3kg
The Applicant appeared before the City of Calgary's (City) Subdivision and Development Appeal Board (Board) to appeal a development permit granted by the City to build a distribution centre approximately one kilometer away from the Applicant's business. The Board struck down the appeal, finding that the Applicant was not an affected person within the meaning of the *Municipal Government Act,* RSA 2000, c. M-26 (*MGA*). The Applicant applied under the *MGA* for permission to appeal the Board's decision.

HELD: Application to appeal dismissed.

DISCUSSION: The Court has discretion to grant an appeal it if

Continued on page 36

Amicus *cont'd from page 35*

> the narrow question before the court was whether the introduction of an un-*Mirandized* statement at trial *alone* constitutes the violation of a "right" secured by the Constitution. Our court›s answer? Yes, the lack of *Miranda* warnings violates the Fifth Amendment even if subsequent statements were freely and voluntarily given.[30]

IMLA filed an amicus brief in this case, explaining first that we believe *Miranda* is an important holding, but the result for a *Miranda* violation is the exclusion of a confession in a criminal case, not the creation a substantive right under Section 1983 for which there would be civil liability. This case presents an opportunity for the Court to address the circuit split, which currently results in a scenario in which law enforcement (and local governments) are liable for a Section 1983 violation due to the introduction of an un-*Mirandized* confession at a criminal trial based solely on their geography.

Conclusion

The Supreme Court requested a response in the *Tekoh* case, which means at least one Justice is interested in the case at this juncture, but it takes four to grant certiorari. Given the briefing schedule, the earliest the Court would possibly grant certiorari in that case would be late January or early February, which means there is an outside chance the Court could hear the case at the end of the current term (if it grants the Petition). The *Lawrence* case was filed later and so if the Court grants certiorari, it would not hear the case until the fall of 2022 at the earliest. As noted at the outset, odds are never in the Petitioner's favor for getting a grant of certiorari, but both of these cases provide compelling issues that the Court will need to address at some point given the ongoing circuit splits involved. ML

1. Lawrence v. Las Vegas Metro. Police Dep't, 451 F. Supp. 3d 1154, 1170 (D. Nev. 2020).
2. *Id*. at 1164-65.
3. *Id.* at 1169.
4. *Id.*
5. *Id.* at 1169-70.
6. *Id.*
7. *Id.* at 1170.
8. *Id.* at 1171.
9. Lawrence v. Bohanon, 847 F. App'x 516, 516-17 (9th Cir. 2021).
10. *Id.* at 517.
11. Mitchell v. Forsyth, 472 U.S. 511, 525-27 (1985).
12. Johnson v. Jones 515 U.S. 304, 307 (1995).
13. *Id.* at 307.
14. *Id.* at 308.
15. *Id.* at 313.
16. Plumhoff v. Rickard, 572 U.S. 765, 773 (2014).
17. As Judge Fletcher of the Ninth Circuit recently explained in another case involving this same issue, "the law in this area is extraordinarily confused." Est. of Anderson v. Marsh, No. 19-15068, 2021 WL 139733, *735 (9th Cir. Jan. 15, 2021) (Fletcher, J. dissenting). In his dissent in the *Marsh* case, Judge Fletcher goes on to cite several cases from other circuits which also note the confusion of the law in this area. *See*, *e.g.*, Diaz v. Martinez, 112 F.3d 1, 3 (1st Cir. 1997) ("The dividing line that separates an immediately appealable order from a nonappealable one in these purlieus is not always easy to visualize."); Camilo-Robles v. Hoyos, 151 F.3d 1, 8 (1st Cir. 1998) ("Cases are clear enough at the extremes. ... [But d]etermining the existence *vel non* of appellate jurisdiction in cases closer to the equator is more difficult. ... If this were not complex enough, the district judge is not legally obliged to explain the basis on which a denial of summary judgment rests."); Walton v. Powell, 821 F.3d 1204, 1209 (10th Cir. 2016) ("[W]e have struggled ourselves to fix the exact parameters of the *Johnson* innovation."); Barry v. O›Grady, 895 F.3d 440, 446 (6th Cir. 2018) ("Each of our too-many-to-count additional glosses on *Johnson* is needlessly complicated. ..." (Sutton, J., dissenting)). Judge Fletcher closed his dissent with the following plea to the Supreme Court: "I respectfully ask the Supreme Court to tell us clearly, in an appropriate case, whether and in what circumstances an interlocutory appeal may be taken when the district court, viewing disputed evidence in the light most favorable to plaintiff, has denied a motion for summary judgment based on qualified immunity." *Est. of Anderson,* 2021 WL 139733 *742.
18. Tekoh v. Cty. of Los Angeles, 985 F.3d 713, 715-16 (9th Cir. 2021).
19. *Id.* at 715.
20. *Id.* at 716.
21. *Id.*
22. *Id.* at 717.
23. *Id.*
24. *Id.*
25. *Id.* at 717-18.
26. *Id.* at 718.
27. *Id.*
28. *Id.* at 723.
29. *Id.*
30. Tekoh v. Cty. of Los Angeles, 997 F.3d 1260, 1265 (9th Cir. 2021).

Inside Canada *cont'd from page 33*

is satisfied that the issue before it raises a question of law. The Applicant argued that the Board erred in law by failing to consider section 685(2) of the *MGA*, which allows a person affected by a development permit to appeal. The Applicant argued he was an affected person as the new distribution centre which was planned to be only one kilometre away would result in serious traffic safety issues around his business. The Court found that the Board had considered the *MGA* and correctly held that the Applicant was not an affected person. The Court noted that although geographic proximity is an important factor for consideration if an applicant is an affected person, so is the consideration of significant impact on the applicant by the proposed development. The