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Municipality Cannot Prohibit Farm Use That Regulations Permit--Even For Cannabis

0826239 B.C. Ltd. v Richmond (City), 2018 BCSC 1438 (CanLII) http://canlii.ca/t/htp1x

The Petitioner, a corporation involved in the construction of greenhouses for the production of medical cannabis applied to the British Columbia Supreme Court for judicial review of a refusal by the City of Richmond (City) to lift a stop work order and a refusal to issue two building permits.

The Petitioner applied for a building permit to construct the first of a number of greenhouses on land situated in an Agricultural Land Reserve (ALR) within the City. It filed an "owner's undertaking" to comply with the City's bylaws and stated that the proposed crops to be grown in the greenhouse were for a "local source of same day fresh micro-greens in line with the 100 mile diet scheme for culinary end users." The Petitioner also indicated that they might become involved in "experimentation with alternate crops." The next year, the City became aware that the first greenhouse might be used for the production of cannabis, by virtue of a press release issued by an affiliated corporation, which indicated that it was successful in obtaining a cannabis production license under the *Access to Cannabis for Medical Purpose Regulations* (*ACMPR*). The City took the position that using the property to grow cannabis was an unlawful and prohibited use under the City's zoning bylaw. In response, the Petitioner sought a declaration that the City's zoning bylaw was of no force or effect to the extent that it prohibited the production of medical cannabis. The Petitioner also sought an order compelling the City to lift the stop work order and issue the building permits.

HELD: Application granted.

DISCUSSION: The Court found that there was inconsistency between the zoning bylaw and the ALR *Use, Subdivision and Procedure Regulation* (ALR Regulation), which provides that a municipality cannot prohibit a farm use that the ALR Regulation specifically allows. Therefore, to the extent that the bylaw prohibited the production of cannabis otherwise permitted by the *ACMPR*, it was of no force or effect, pursuant to s. 46(4) of the *Agricultural Land Commission Act*. The City's decision not to lift the stop work order was improper, and the City could not require the Petitioner to sign a statutory declaration swearing it would not produce cannabis on the property. The Court ordered that the building permits be approved and stop work order be lifted since there were no concerns regarding the property except the cannabis issue.

Plaintiff Unsuccessful in Obtaining Damages After Claiming City Charged Wrong Party

Dron v Hamilton (City), 2018 CanLII 82870 (ON SCSM) http://canlii.ca/t/htth5

The Plaintiff was charged and convicted of "unlawfully causing construction not in accordance with a building permit pursuant to s. 8(13) of the *Building Code.*" The crux of the Plaintiff's claim was that the City of Hamilton (City) "knowingly prosecuted an innocent person" contrary to section 465(1) of the *Criminal Code*, R.S.C. 1985, c. C. 46 which creates an offence of conspiracy to prosecute a person for an alleged offence, knowing that he did not commit that offence. The Plaintiff submitted that he was a victim of misidentification, as his son shares his same name, and it was his son that was charged but the Plaintiff was prosecuted and convicted. The Plaintiff brought this Small Claims action against the City and the Ontario Court of Justice (collectively, Defendants) for unjust treatment in connection with a Building Code violation and sought $25,000 for damages flowing from certain construction costs he incurred.

HELD: Action dismissed.

DISCUSSION: In rendering his decision, Justice Winny enumerated six distinct reasons why the Plaintiff's action must fail:

1. The Plaintiff, who was self-represented, failed to disclose a civil cause of action. He alleged that the Defendants committed a criminal offence to which the Small Claims Court has no jurisdiction;

2. The Small Claims Court has no jurisdiction to (i) grant equitable relief and (ii) to exercise supervisory or appellate authority over the Ontario Court of Justice;

3. The Plaintiff failed to plead a basis for the $25,000 damages award;

4. The claim was barred by the finality doctrines of res judicata, abuse of process and the rule against collateral attacks;

5. The Plaintiff wrongfully attempted to rely on section 11 of the *Criminal Code*, which provides that no civil remedy is affected or suspended by reason that an act or omission is a criminal offence. The Court noted that the Plaintiff must have a civil remedy before it can be preserved by section 11; and

6. the claim brought by the Plaintiff is statutorily bared by the expiry of the two-

year limitation period under s. 4 of the *Limitations Act*.

Part 1: Court Held that Provincial Legislation Substantially Interfered with Rights Guaranteed Under the Canadian Charter of Rights and Freedoms

City of Toronto et al v. Ontario (Attorney General), 2018 ONSC 5151 (CanLII) http://canlii.ca/t/httrh

The Ontario government announced mid-election that it was enacting legislation to reduce the number of City of Toronto (City) wards and councillors from 47 to 25. This announcement had the effect of nearly doubling the ward populations from an average of 61,000 to 111,000. The Provincial legislation, known as Bill 5: *Better Local Government Act, 2018* (Bill 5), took immediate effect in the middle of the election period, at which point over 500 candidates for the October 22, 2018 election had been certified. At the time of the enactment, the City Clerk was well underway preparing for a 47-ward election. In response to Bill 5, City Council held a special meeting and voted in favour of legally challenging the legislation.

HELD: Application granted.

DISCUSSION: Justice Belobaba found that Bill 5 substantially interfered with both candidates' and voters' rights to freedom of expression, as guaranteed under s. 2(b) of *Canadian Charter of Rights and Freedoms (Charter)*. As a result of the timing of the legislation, the Provincial government also infringed on the municipal candidates' freedom of expression. Furthermore, because Bill 5 almost doubled the population of City wards, it breached municipal voters' rights to cast votes that could result in effective representation. Justice Belobaba noted that while the provincial legislature has no obligation to consult and no obligation of procedural fairness, electoral fairness is a fundamental value of democracy and flows from political equality of citizens, as entrenched in the Constitution. Elections are fair and equitable only if candidates are given a reasonable opportunity to present their positions; Justice Belobaba found that Bill 5 prevented candidates from having such an opportunity. Once the newly elected provincial government took office, it was not entitled to suddenly and in middle of electoral process impose new rules that undermined an otherwise fair election by substantially interfering with candidates' freedom of expression. Furthermore, Justice Belobaba found that any infringement under the *Charter* could not be justified as a reasonable limit under s. 1 and accordingly declared parts of Bill 5 to be of no force and effect. This decision ultimately revered the municipal election back to the 47-ward structure.

Part 2: Court of Appeal Overturns Justice Belobaba's Decision, Calling It "Dubious Ruling"

Toronto (City) v. Ontario (Attorney General), 2018 ONCA 761 (CanLII) http://canlii.ca/t/hv54t

Immediately after the release of Justice Belobaba's (application judge) decision, the Attorney General appealed the application judge's order to the Court of Appeal for Ontario ("Court") for a stay motion which would permit Bill 5: *Better Local Government Act, 2018* (Bill 5) to remain in place and allow the election to proceed on the 25-ward structure. In the alterative to this appeal, the Premier of Ontario had

drafted Bill 31, the *Efficient Local Government Act* with the section 33 notwithstanding clause and had it ready before the Legislature for a final vote. As a result of the urgency of the matter, the Court of Appeal issued a prompt but brief decision.

HELD: Order is stayed.

DISCUSSION: The Court held that the application judge was understandably frustrated by the timing of Bill 5 and its impact to change the rules of the election in the middle of the election. However, the Court found that the application judge stretched the interpretation of the *Canadian Charter of Rights and Freedoms (Charter)*when he held that the unfairness rose to the level of a *Charter* breach. The Court acknowledged that Bill 5 may have disrupted or inconvenienced the municipal campaigns that were underway but the question before the application judge was not whether the legislation was unfair but instead whether it was unconstitutional. The candidates and the voters had a reasonable expectation of operating under a 47-ward structure but that was not constitutionally guaranteed, and the voters' right of freedom of expression was not infringed merely because the ward population increased from 61,000 to 111,000. The Court concluded that there was a *strong likelihood* that the application judge erred in law and as a result held that the order of the Superior Court was stayed.

No Constitutional Remedy Available for Contractor to Bid on City Contracts

J. Cote & Son Excavating Ltd. v City of Burnaby, 2018 BCSC 1491 (CanLII) http://canlii.ca/t/htrlz

A dispute arose between a construction contractor (Contractor) and the City of Burnaby (City) over a hidden defect in a contract for sewers. One of the Contractor's workers died while carrying out the contract. Two months after the Contractor commenced an action against the City over the hidden defect, the City added a new clause to its invitation to tender that indicated tenders would not be accepted from any party if that party had engaged in legal proceedings against the City in the prior two years. By virtue of the reprisal clause, the Contractor was no longer permitted to bid on work for the City.

In 2017, four years later, the City removed the reprisal clause from its invitation to tender. The Contractor claimed that there were nine contracts tendered by the City that it would have bid on but for the impugned clause. In view of that, the Contractor brought an action for a declaration that a clause in the City's Invitation to Tender was of no force and effect, as it was unconstitutional.

On that basis, four issues were put to the Court for determination:

1. whether the reprisal clause unjustifiably infringed a Charter protected right of reasonable access to the courts and thus was of no force and effect;

2. whether the impugned clause was unconstitutional because it prevents access to the courts in a manner inconsistent with s. 96 of the *Constitution Act, 1867* and is also inconsistent with the rule of law;

3. whether the impugned clause should be declared invalid as contrary to public policy given that it may deny access to the courts; and

4. whether it matters that the limit is imposed by contract.

HELD: Application dismissed.

DISCUSSION: On the first and second issues, the Court found that the *Charter* does not provide a general right of access to the courts for the resolution of civil disputes. The reprisal clause did not infringe a *Charter*-protected right of reasonable access to the courts. Moreover, because the Contractor's argument was not anchored on a particular section of the *Charter*, there was no constitutional remedy available. On its own, the rule of law, as an unwritten constitutional principle, could not serve as a basis for invalidating the reprisal clause.

On the third and fourth issues, public policy did not invalidate the clause, nor did the *Charter* or s. 96 of the *Constitution Act* render the contractual provision invalid. The Court concluded at paragraph 84 that a municipality is entitled to insert a term as part of its public bidding process which bars bids from contractors who are engaged in litigation with the municipality, as long as there is no indication of bad faith and the clause lies within the municipality's power. In such cases, the clause is valid and not contrary to public policy.

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