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Canadian Legal News

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Summaries provided by: Monica Ciriello, Niagara Region

A Garage of Many Uses is Ultimately of No Use at All

Cape Breton Regional Municipality v Smith, 2019 NSSC 41 http://canlii.ca/t/hxc9n

The Respondents own a towing company in the Cape Breton Regional Municipality ("Municipality"). The company office operates out of their residential home and as a result had tow trucks and other vehicles parked on their property. In 2012, the Respondents applied to the Municipality for a permit to erect a commercial garage. The Municipality permitted it on the condition that the garage be used only for the use and storage of personal property. The Respondents signed an undertaking to that effect. The Municipality continued to receive complaints about the Respondents' use of the property. An investigation was conducted which resulted in evidence that the Respondents was in breach of the Municipality's bylaw and the undertaking, and the Respondents were convicted in 2015. The Municipality filed an application for an order to destroy and remove the garage and all commercial vehicles from the Respondents' property.

HELD: Application granted.

DISCUSSION: An application was made to the Supreme Court of Nova Scotia. The Court can only proceed "in the event of an offence" under section 266(2) of the *Municipal Government Act*, SNS 1998 c 18 to which the Court was satisfied with the Municipality's evidence of the 2015 conviction. In reviewing the Municipality's application for an order, the Court swiftly determined that the evidence demonstrated a clear violation and disregard for the Municipality's bylaw since 2012. Photographs of the Respondents' property revealed tow trucks, commercial trailers, derelict vehicles stored on the property, and the garage being used for commercial means. The Respondents argued that they were unaware of a violation

and that the Municipality was planning on proceeding to court. The Court dismissed the argument stating that the Respondents had been put on notice for several years. The Court determined that Respondents had a blatant disregard for the Municipality and it was satisfied that the problems with the Respondents would continue unless the strongest possible means were taken. The Court ordered that the garage be removed, an injunction to prevent the Respondents from storing vehicles on the property and any further violation by the Respondents would result in a contempt of court application.

A Lesson in Risk Mitigation to Reduce Potential Liability During the Winter Season

Marchi v Nelson (City of), 2019 BCSC 308 http://canlii.ca/t/hxxkj

The Plaintiff, a resident of the City of Nelson ("City") went out for dinner in January and parked her car on the street. Instead of walking to the corner to access the sidewalk, the Plaintiff proceeded to cross the snowbank. In doing so she lost her footing and dropped through the snowbank, injuring her leg. She then brought an action against the City.

HELD: Action dismissed.

DISCUSSION: The Plaintiff argued that the City owed her a duty of care to remove all snow and windrows from the downtown area where she was injured. The City responded that a duty of care was not owed because the snow removal schedule in the area was a part of a *bona fide* policy decision. The issue before the Court was to determine liability. It is conventional law that governments do not owe a duty of care if it can be established that the actions taken were *bona fide* (*Binette v. Salmon Arm (City),* 2017 BCSC 302 (aff'd 2018 BCCA 150). Furthermore, the Supreme Court of Canada in *Just v. British Columbia,* [1989] 2 S.C.R. 1228 made a clear distinction between policy and operation decisions made by governments, finding that liability may be found for the latter but not the former. Policy decisions are commonly impacted by financial, economic, social and political factors. The Court reviewed the City's snow clearing policy ("policy"), which was relied on during the date of the Plaintiff's injury. The policy set out specific guidelines respecting snow removal timelines and locations. The City put forward evidence that it relied on the policy while simultaneously balancing available manpower, equipment and cost. The Court determined that snowbanks including windrows are unavoidable in the City during the winter months and that the City acted reasonable by demonstrating proper discretion in operationalizing its policy. It promptly commenced snow plowing when the snowfall started, and 18 hours after the snowfall stopped the City commenced the removal of snowbanks and windrows. These actions were in line with the City's policy that states that the "overall goal is to keep Nelson safe for all the travelling public" and "we try not to place snow on any sidewalks or private driveways". The Court concluded the Plaintiff assumed the risk of crossing the snowbank and was injured based on her own actions.

A Twist to a Notice of Examination Motion

Beaudry v. City of Greater Sudbury, 2019 ONSC 1225 http://canlii.ca/t/hxq2j

The Plaintiff applied to the City of Greater Sudbury ("City") for the appropriate permits to develop a property into a personal residence. The City approved the permits before the Plaintiff commenced construction. Independent of the permits, the City had undertaken a review of the cul-de-sac where the Plaintiffs property was located to assess safety measures for the purpose of snow removal operations. When the Plaintiff commenced construction, in compliance with the permits issued by the City, it was met with an Order to Comply ordering the Plaintiff to return the work completed on the property its original state. The Plaintiff served the City with a notice of examination seeking them to produce certain records respecting the property; the City denied and the Plaintiff brought a motion to determine the issue of production.

HELD: Motion dismissed.

DISCUSSION: The Plaintiff is seeking production of certain records which is argued to be relevant to the City's bad faith or unfair treatment when it issued the Order to Comply. The motion proceeds under Rule 34 of the *Rules of Civil Procedure* which address records in the possession of the opposing party for inspection and the relevance of the records in possession. The issue before the Court was to determine whether the City's bad faith or unfair treatment is relevant to the Plaintiffs' negligence claim. It is common for this type of motion to be granted. However, in this matter the Plaintiffs' statement of claim did not allege bad faith or unfair treatment by the City. The Plaintiff requested to amend the statement of claim to include bad faith or unfair treatment. The Court denied the motion to produce documents in so far as relating to bad faith and unfair treatment as it was not presented in the claim and therefore had no relevance to the matter.

Hotel Design Elements Key Factor in Variance Matter

Canad Corporation of Manitoba Ltd v Winnipeg (City of) et al, 2019 MBCA 21 http://canlii.ca/t/hxzfx

A hotel developer and property owner, the Intervener in this matter, sought and was granted a variance to the City of Winnipeg's ("City") zoning bylaw by the Board of Adjustment ("Board") to construct a hotel. Pursuant to sections of *The City of Winnipeg Charter,* SM 2002, c. 39 (*Charter")* Canad Corporation of Manitoba ("Applicant"), another hotel developer in the City, appealed the Board's decision to the City of Winnipeg Appeal Committee ("Committee"). The Committee dismissed the appeal and confirmed the variance. The Applicant unsuccessfully appealed again with the reviewing judge holding that the zoning bylaw did not prohibit the variance granted. The Applicant appealed the reviewing judge's decision suggesting that the hotel developer could have configured the hotel differently, structuring it in a way that would not require a variance. The Applicant suggested that the injurious effects created were a result of the design and therefore a variance should not be permitted under s. 36 of the zoning bylaw.

HELD: Appeal dismissed.

DISCUSSION: The core of the appeal before the Court was to determine whether the reviewing judge's decision to uphold the Committee's decision was reasonable. Section 36 of the zoning bylaw permits a variance only if it has an injurious effect on the owner's property. Injurious effects are defined in the City's bylaw to include physical characteristics of the owner's site that make it difficult or impossible to comply with the provisions of the bylaw but does not include conditions that are created by the owner. The Applicant unsuccessfully argued that the Committee's

decision failed to mention any reference to section 36 of the zoning bylaw when it dismissed the appeal, and as a result the Committee failed to consider whether section 36 was satisfied. Therefore, they argued reviewing judge erred when he held the Committee's decision to be reasonable. The Court of Appeal disagreed, determining that the decision of the Committee was consistent with the interpretation of section 36, and in reviewing the submissions of the parties the issue of section 36 was raised. As a result, even if the section was not expressly mentioned, it was deemed considered. In summary, the Court of Appeal held that section 36 did not permit the variance.

Municipality Raises Concerns of an "Unpaid Friend" Representing the Applicant Before the Human Rights Tribunal of Ontario

CF v. Mississippi Mills (Municipality), 2019 HRTO 418 http://canlii.ca/t/hxzf1

The Applicant filed an application under the *Human Rights Code*, R.S.O. 1990, c. H.19 on behalf of her son when the Municipality of Mississippi Mills ("Municipality") built public play equipment that did not accommodate her sons' special needs. Before the application could be addressed by the Human Rights Tribunal of Ontario ("HRTO"), the Municipality filed an order to remove the Applicant's Representative. The Municipality alleged that the Representative was an unlicensed paralegal as he was denied a licence by the Law Society of Ontario ("LSO"). Furthermore, the Representative failed to meet the requirements of an "unpaid friend" under section 30(4) of By-law 4 of the *Law Society Act,* R.S.O 1990, c L.8.

HELD: Order denied.

DISCUSSION: As it is the right of the Applicant to select a representative, the onus was on the Municipality to establish a basis for removal, requiring an appropriate legal basis to do so. The Municipality relied on the decision *Steven Arthur Maynard v. The Law Society of Upper Canada,* 2017ONLSTH 93, which had denied the Representative his paralegal licence for not being of good character. The Municipality further suggested that the decision of the LSO to deny the Representative his licence cannot be circumvented, and the unlicensed Representative cannot represent the Applicant. The HRTO reviewed Rule A9.1 of the Rules of Procedure and disagreed with the Municipality finding that it does allow for Applicants to be represented by an unlicensed person. Proceeding with its second argument, the Municipality argued that the Representative did not meet the requirement of an "unpaid friend" within the meaning of the *Law Society Act.* The HRTO was not provided with authority to remove a Representative if a licence had been denied by the LSO, finding that the *Law Society Act* does not prohibit unlicensed representatives from relying on the "unpaid friend" exemption. As held in *Romanchook v. Garda Ontario*, 2009 HRTO 1077, tribunals, like courts, have the power to ensure the integrity of the administration of justice, and as such the HRTO determined that the Representative had not done anything that would warrant his removal from this proceeding.

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