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Summaries provided by: Monica Ciriello, Niagara Region

Adverse Possession Against City Fails Because Public Used Disputed Lands

Richard v. Niagara Falls, 2018 ONSC 7389 (CanLII), http://canlii.ca/t/hwwgm

The Applicant owns residential property in the City of Niagara Falls ("City") that backs onto a former railway corridor ("Disputed Lands"). The Applicant filed an application for a declaration that he is the owner of the Disputed Lands by adverse possession. The City responded that it is the registered owner and has been since 1964 when it was transferred by N.S. & T. Railway, and that the Applicant failed to meet the test of ownership by adverse possession.

HELD: Application was dismissed.

DISCUSSION: It is not disputed by either party that the Disputed Lands were transferred to the City and that the statutory period for an adverse possession claim is 10 years immediately prior to 1999, which is the year it was registered in the Land Titles System. Case law has established (*McClatchie v. Rideau Lakes (Township),* 2015 ONCA 233), that for an adverse possession claim to be successful, the Applicant must prove three elements throughout the statutory period:

1. That the applicant personally or through his predecessors had actual possession of the disputed land;
2. That the applicant's possession was with the intention of excluding the true owner from possession; and
3. That the true owner was effectively excluded from possession.

In reviewing the first element, the Court agreed with the Applicant that the predecessors of the residential property had actual and continuous possession of

the Disputed Lands from at least the 1970's. Secondly, the Court noted that despite the fact there was no direct evidence submitted by the Applicant to prove the predecessors intention to exclude the City from the Disputed Lands, the Court inferred that the trees planted by the predecessors could be reasonably assumed to be an attempt to exclude the City from coming onto the Disputed Lands. The Court noted that the third element was challenging standard for any applicant to argue. Furthermore, as found in *Oro-Medonte (Township) v. Warkentin,* 2013 ONC 1416, land acquired by a municipality and used for a public purpose cannot be lost by adverse possession. This requires the municipality to demonstrate that the land has been used by and in benefit to the public. The City provided evidence that the Disputed Lands have been utilized by the public as a public trail. The Applicant was unable to prove the third element and the application was dismissed.

Planning Appeals Committee is Required to Assess All Information Prior to Deciding on Order

E.Z. Automotive Ltd. v Regina (City), 2019 SKCA 38 http://canlii.ca/t/j02bh

The City of Regina ("City") issued an order to comply to E.Z. Automotive Ltd. ("Applicant") for its operation of a salvage yard contrary to the City's zoning bylaw. The Applicant did not comply with the order and filed an appeal to the City's Development Board ("Board"). The Board dismissed the appeal; however, it included a statement in its decision that required the City to clearly outline the number of salvage vehicles that the Applicant can have on its property. Both parties appealed the Board decision to the Planning Appeals Committee ("Committee") as neither party wanted the City to unilaterally determine the number of salvage vehicles permitted on the property. The Committee held that the Board erred when it required the City to allow salvage vehicles on the property which is a contravention of its bylaw. The Committee upheld the Applicant's requirement to comply with the order. The Applicant appealed the Committee's decision.

HELD: Leave was granted.

DISCUSSION: The City did not dispute that the Applicant's property was zoned to permit an auto repair shop; however, it maintained that use of the property as a salvage yard was not permitted. Therefore, the City argued that it could not contravene its own bylaw to arbitrarily choose the number of salvage vehicles permitted on the property. When the City put forward this argument to the Committee, they agreed and upheld the order to comply. When the Court reviewed the Committee's decision, it determined that the Committee granted the City's appeal and dismissed the Applicant's appeal without providing reasons. The Committee had disregarded and overlooked the Applicant's evidence which outlined that its business had been in operation for years, and that the City's official plan supports protecting industrial and commercial businesses such as the Applicant's. In reviewing the evidence, the Applicant persuaded the Court that leave to appeal should be granted to address fundamental questions in light of the Committee's lack of reasoning.

Renewing an Eviction Order by the Landlord Tenant Board Shall Proceed by the Same Means as a Writ of Possession

Sunrise North Senior Living Ltd. v. Regional Municipality of York (Sheriff), 2019 ONSC 2678 http://canlii.ca/t/j029p

Sunrise North Senior Living Ltd. ("Sunrise") operates a retirement home in the

Regional Municipality of York ("Region"). One of the residents of Sunrise, Mr. Salmon failed to pay his rent. As a result, Sunrise appeared before the Landlord Tenant Board ("LTB") seeking an eviction order ("Order"). Sunrise was successful, and an Order was granted by the LTB in November 2017. Mr. Salmon failed to move out by the required date causing Sunrise to appear before the LTB again, obtaining a second Order. Sunrise filed the Order with the Court in June 2018 to have the Region's Sheriff evict Mr. Salmon. The Sheriff responded that it would not evict Mr. Salmon unless he provided consent to move to another accommodation, as required under the *Long Term Care Homes Act,* 2007, S.O. 2007, c. 8, s.7, the *Retirement Homes Act*, 2010 S.O., c. 11, s. 53(1), and various provisions of the *Public Hospitals Act,* R.S.O. 1990. Alternative accommodations had been presented and denied by Mr. Salmon. Sunrise filed an application for judicial review on an urgent basis for an order in the nature of *mandamus* compelling the Sheriff to evict Mr. Salmon.

HELD: Eviction order was renewed

DISCUSSION: The issue before the Court was a question of urgency, specifically whether the Order would expire on June 1, 2019. The Sheriff's position relied on the language of the *Residential Tenancies Act*, 2006, S.O. 2006, c. 17 ("*RTA*") that specifies an eviction order shall be enforced in the same way as a writ of possession and applied it in conjunction with Rule 60.10(3) of the *Rules of Civil Procedure*, Reg. 194which states "a writ of possession remains in force for one year from the date of the order." The Sheriff argued that the Order would expire one year from when it was filed with the Court, namely June 1, 2019, and that it cannot be enforced after that date unless it is renewed. Sunrise relied on section 81 of the *RTA* which states "an order of the board evicting a person from a rental unit expires six months after the day on which the order takes effect if it is not filed within the six months." The Order was filed within the six months, and as a result it was the position of Sunrise that the Order would not expire. The Court recognized that Sunrise was in a precarious and urgent position, because despite Sunrise's position, if the Sheriff was successful in its argument, the Order would expire on June 1, 2019 and there was no clear process under the *RTA* for the Court or the LTB to grant an extension. Once before the Court, the Sheriff did provide evidence that it was the Attorney General's position to allow a renewal of an Order to proceed the same as a renewal of a writ, by application to Superior Court. The Court determined it did have the authority and jurisdiction to grant a one-year renewal of the Order. In doing so, it would eliminate any sense of urgency and the *mandamus* issue to the application and allow it to proceed to a full panel of the Divisional Court.

Should Charges Without Convictions Still Appear on Criminal Record Check?

Kalo v Winnipeg (City of), 2019 MBCA 46 http://canlii.ca/t/j011v

The Applicant sought a criminal record check for a prospective employer. The Winnipeg Police Service ("WPS") administers this process on behalf of the City of Winnipeg ("City"). The Applicant's criminal record check showed no convictions. However, the criminal record check included further information in that the Applicant had been charged, although not convicted, of two previous offences. The WPS disclosed the additional information in accordance with the *Standard Operating Guidelines: Police Record Checks* as the Applicant would be working with vulnerable persons. The Applicant sought a declaration from the Court for a clear criminal record, and further argued that including the additional information was a *Canadian Charter of Rights and Freedoms* (*Charter*) violation. Prior to appearing before the application judge, the Applicant sought reconsideration by the WPS, however the WPS panel denied the reconsideration. The application judge

concentrated his decision on the issue of procedural fairness and the factors outlined in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817. The application judge concluded that the WPS procedure was not fair and that the Applicant had a right to an in-person reconsideration--in essence, a judicial review of the decision of the WPS. The City appealed the application judge's decision that sought to have the judicial review set aside.

HELD: Appeal was allowed.

DISCUSSION: The City argued that the application judge erred by committing errors of law and procedure. The Court agreed that the application judge erred, specifically by not addressing the standard of review, but elaborated that the record in front of the application judge was incomplete, as was the case in many Manitoba courtrooms. Interestingly, the Province of Manitoba lacks a legislative definition of what constitutes the record, despite its importance in the judicial review process. The Court had an issue with the application judge's decision as the application filed by the Applicant sought declaratory relief and not judicial review, and yet the application judge granted judicial review with no explanation. Furthermore, the Applicant filed a *Charter* claim which was overlooked by the application judge. Lastly, the Court found it most concerning that there was no analysis by the application judge as to the guidelines or policies applied by the WPS that outlines the criminal record check process and the exceptional or non-exceptional circumstances to release additional information. The Court concluded that there were many unanswered questions that were overlooked and granted an appeal.

Toronto Mayor's Condemnation of fabricated Anti-Muslim Incident is Not Justiciable by Human Rights Tribunal

Fan v. Toronto (City), 2019 HRTO 689 (CanLII), http://canlii.ca/t/j000c

The Applicant filed an application with the Human Rights Tribunal of Ontario ("Tribunal") against the Mayor of the City of Toronto ("City") in response to an alleged attack on a hijab-wearing student. The Mayor released a statement condemning such an attack. In due course, it was revealed that the attack was fabricated, and the Applicant, who identifies as a Canadian resident of Chinese orgin, alleged that the Mayor participated in the spread of a false narrative knowing that it would or would likely result in violence against those who looked like the alleged perpetrator, an "Asian man." The application was dismissed by the Tribunal having found that the Applicant did not have standing to bring forward the application. The Applicant sought reconsideration.

HELD: Request was denied.

DISCUSSION: The Tribunal has the authority under section 45.7 of the Ontario Human Rights Code ("Code") to reconsider a decision in accordance with the Rules. Any party can seek reconsideration within 30 days after the decision. However, reconsideration is a discretionary remedy that may be granted upon satisfaction of the elements set out in Rule 26. The Applicant did not rely on any reason outlined in the Rules, nor did the Applicant establish any reason for a reconsideration. The Applicant simply submitted identical arguments found in the original application, highlighting that the Tribunal's decision failed to apply a discriminatory analysis. The Tribunal had correctly established that a discriminatory analysis is followed only if the alleged discrimination relates to a social area in the Code (ie; "employment" or "goods, services and facilities," etc.). The application and reconsideration did not have a connection with an alleged discriminatory social

area of the Code. It was held that no new evidence or facts were presented by the Applicant and therefore, the Applicant failed to establish any element for reconsideration.

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