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Summaries provided by: Monica Ciriello, Niagara Region

Appellant Failed to Satisfy All Three Prongs of Adverse Possession Test Against the City

Richard v. Niagara Falls (City), 2019 ONCA 531 http://canlii.ca/t/j1bsg

The Appellant, a property owner in the City of Niagara Falls (the "City") sought a declaration from the Court by way of adverse possession that he was the legal owner of disputed land owned by the City that was behind his backyard. The application judge held that the Appellant was unsuccessful in making out the third and final prong of the adverse possession test. Specifically, the application judge held that the Appellant failed to establish that the City and the public were excluded from the disputed land for a 10 year period. The Appellant appealed, arguing that the application judge erred in law by applying not only an improper but also an unduly stringent standard on the third prong. The City argued that the application judge erred by finding that the Appellant was successful in establishing the first two prongs of the adverse possession test.

HELD: Appellant's appeal dismissed.

DISCUSSION: The Court scoped the issues presented before it and determined it was unnecessary to address all. The Court held that it was only important to determine whether the third prong was met as without it the adverse possession claim would not succeed. As established in, *Masidon Investments Ltd., v. Ham* (1984), 45 O.R. (2d) 563 (C.A), the third prong determines whether an appellant has "effectively excluded the true owner from possession" of the disputed land. The evidence provided to and examined by the application judge regarding the 10 year period did not amount to the Appellant excluding the City and the public from the disputed land. The Court determined that the application judge was accurate in

determining that the third prong was not met. The Court also concluded that the application judge did not apply an improper or unduly stringent standard on the third prong.

City's Bylaw May Have Economic Impact on Business but is Incidental Result

2386240 Ontario Inc. v. Mississauga (City), 2019 ONCA 413 http://canlii.ca/t/j0cb2

The Region of Peel (the "Region") passed a *Peel Waterpipe Smoking Bylaw* (the "*Bylaw")* which prohibits smoking waterpipes, also known as hookah in specified areas. The Appellant, an owner of hookah lounges in the Region took issue with the Bylaw seeking for it to be quashed and arguing that it was beyond the scope of the Region's authority. The application judge disagreed and held that the *Municipal Act*, 2001, SO 2001 c 25, provides the Region with the authority to pass the Bylaw as it was enacted for the protection of public health and safety which is explicitly outlined in section 11(2)(6). The Appellants appealed the application judge's decision.

HELD: Appeal dismissed.

DISCUSSION: The crux of the Appellant's argument was that the Bylaw was not passed for the protection of public health and safety but rather a prohibition of their business. Therefore the application judge erred in law in finding that the Region had authority under the *Municipal Act, 2001.* The Appellant relied on *Canada Post Corp. v. Hamilton (City)* 2016 ONCA 767, where the court decision established a need to not only consider the purpose of a bylaw but also the effects of a bylaw to determine if it is *intra vires*. Section 8(1) of the *Municipal Act, 2001* affords a City's authority to be "interpreted broadly so as to confer broad authority on the municipality to enable the municipality to given its affairs as it considers appropriate to enhance the municipality's ability to respond to municipal issues". Relying on this broad authority and in reviewing the evidence put forward by the Public Health Department before the application judge, the Court held that there was no evidence to support the Appellant's appeal, that the Bylaw was enacted to prohibit business. While the Court did acknowledge that the Bylaw *may* have an economic impact, that it would be an unfortunate and incidental result.

Developer Objects to City's Inclusion of Mandatory Arbitration Clause

St. John's (City) v 10718 Nfld. Inc., 2019 NLCA 41 (CanLII) http://canlii.ca/t/j19gt

The numbered corporation 10718 Nfld. Inc. is a developer (the "Developer") in the City of St. John's (the "City") currently undertaking a variety of local development projects. The City required a form of agreement with the Developer including a mandatory arbitration clause. The Developer argued that an arbitration clause prevented it from having any potential conflict heard and decided by a court, and sought an order of mandamus to compel the City to include wording that endorses it's right to access the court. The City responded that the arbitration clause was included in all development agreements to not only ensure compliance but to deal with a dispute if it were to arise in a cost-effective manner.

Before the application judge, it was determined that the first matter to address was

whether the City had the authority to include a mandatory arbitration clause in the development agreements. In reviewing both the *Urban and Rural Planning Act, 2000*, SNL 2000, c. U-8 (the "*Act*") and the City's *Development Regulations* (the "*Regulations*"), the application judge held thatthe City did not have the authority to unilaterally include a mandatory arbitration clause to any development agreement. The City appealed and expressed severe concern for the application judge's decision to review the City's authority, as it was an issue raised by the judge and not by either of the parties.

HELD: Appeal dismissed.

DISCUSSION: The issue before this Court was to determine if the application judge erred in finding that the City does not have the authority to mandate an arbitration clause. The Court reviewed the *Act* and the *Regulations* and found that both address next steps if there is a dispute between the parties. There is an appeal board as well as a right to appeal to the Supreme Court from a decision of the appeal board on a question of law or jurisdiction. In reviewing the legislation, the Court concluded that the recourse to the courts following the appeal board was limited to the specific process outlined. The authority for a City to enter into a development agreement is found in the *Act* and the *Regulations,* however as seen in *Sun Life Assurance Company of Canada v. St. John's (City)*, 2006 NLCA 62, a City does not have the authority to include a term in a development agreement beyond the underlying purpose for a development permit. Such purpose was to ensure that the land is controlled and used in accordance with the municipal regulations. The inclusion of an arbitration clause is not sufficiently connected to that purpose to be included within the authority outlined in the *Act* and *Regulations*. Therefore, the application judge did not err in concluding that the City does not have authority to include the arbitration clause in a development agreement.

JP Failed To Provide Reasons For Why No Victim Surcharge Should Be Added Following Conviction

Toronto (City) v. Alharirie, 2019 ONCJ 461 http://canlii.ca/t/j17mq

Following the Supreme Court of Canada decision in *R v. Boudreault*, 2018 SCC 58, a Justice of the Peace (the "JP") held on various occasions that there were to be no victim surcharges added to the fines after a defendant was found guilty. The City of Toronto (the "City") appealed six sentencing decisions of the JP when a victim surcharge was not added to the fines. The City was not seeking to add a victim surcharge to the fines, but rather a ruling that the JP erred when declaring that no victim surcharge should be added. Furthermore, the City sought validation from the Court that section 60.1 of the *Provincial Offences Act*, R.S.O. 1990, c. P. 33 (the "*Act*") is valid legislation that has not been changed by the *Boudreault* decision.

HELD: JP erred in law.

DISCUSSION: The Supreme Court of Canada decision in *Boudreault* ruled that victim surcharges were unconstitutional under section 737 of the *Criminal Code* (the "*Code")* but not under the *Act*. Following each finding of guilt, the JP registered a conviction, time to pay and no victim surcharge without providing reasons as to why no victim surcharge was being imposed. On each of the 6 claims, the City's prosecutor made submissions before the JP that *Boudreault* was not applicable to the charge before the court nor did it impact provincial matters as section 737 of the *Code* operates very differently than section 60.1 of the *Act*. The Court concluded that the JP failed to provide reasons for his actions, and it was well settled law that reasons must be given by a trier of facts *R v. Sheppard*, 2002 SCC 26. In failing to

provide reasons, the Court was unable to determine how the JP came to the holding he did, and as a result the JP erred in law.

Temporary Trespass Ban Imposed by City Against Resident Is Moot

Kaufmann v Edmonton (City) Police Service, 2019 ABCA 272 http://canlii.ca/t/j1bs7

The Appellant engaged in inappropriate behaviour in a City of Edmonton (the "City") recreational centre and as a result the City imposed a two-year ban (expiring April 8, 2018) against the Appellant from using all City recreation centres. In November 2017, the Appellant sought judicial review of the City's decision. The Court found in the Appellant's favour holding that a two-year ban was unreasonable based on the evidence provided before the Court and sent the matter back to the City to determine a penalty. The City provided the Appellant with additional evidence and re-imposed the two-year ban, still expiring on the original date April 8, 2018. After the ban expired in 2019 the Appellant sought an appeal of the City's decision as well as orders surrounding settlement communications.

HELD: Appeal dismissed

DISCUSSION: Considering that the ban has been expired for over a year, prior to hearing the appeal, the Court requested that both parties provide submissions on mootness. As outlined in *Borowski v. Canada (Attorney General),* [1989] 1 SCR 342 "an appeal is moot where the decision of the court will have no practical effect on the rights of the parties." The Court determined that the issue was moot as the Appellant failed to appeal the judicial review when it was imposed the second time. A court still has discretion to hear a matter on its merits even if it was moot, however this Court was not prepared to do this. In addressing the appeal regarding settlement communications, the Appellant had received a draft letter from the City as part of the settlement offer in 2017. The City had taken issue with the Appellant disclosing the contents of the letter to various third parties, arguing successfully that it was subject to settlement privilege. The lower court relied on *Union Carbide Canada Inc v. Bombardier Inc,* 2014 SCC 35 which professed that settlement privilege encourages the settlement of disputes and it cannot be unilaterally waived by either party. It is only through the strong outweighing of a public interest should there be an exception given to a party on the settlement privilege. As a strong public interest did not exist in this matter, the lower court was correct to hold that the contents provided to the Appellant by the City were settlement privilege.

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