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COMPELLED SPEECH: YOU CAN'T MAKE ME SAY THAT



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INSIDE CANADA

By: MONICA CIRIELLO,
Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario

Delaying Tactics, Redacted Documents, Single-Vote Recounts and More

Delay in Proceedings: How Long is Too Long?
Toronto (City) v. 961557 Ontario Ltd., 2023 ONCJ 158 https://canlii.ca/t/jwnnl
The Defendant, a local business, was charged by the City of Toronto ("City") under COVID-19 pandemic regulations for failing to comply with an order made during a declared emergency. The Defendant submitted that its constitutional rights were infringed due to the inordinate delay in proceeding with a trial relying on s. 11(b) and s. 24(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

HELD: Motion dismissed.

DISCUSSION: There was a lengthy history between the parties, as the charge was laid by the City against the Defendant on June 27, 2020, and t the trial concluded on December 19, 2022. The Court determined that there had been a total delay of 29 months and 22 days. The purpose of s. 11(b) of the *Charter* is to protect the rights of an accused individual and sets out the right to be tried within a reasonable time. The leading Supreme Court of Canada decision, *R. v. Jordan*, [2016] 1 S.C.R. 631 provides that "[t]imely justice is one of the hallmarks of a free and democratic society." *Jordan* establishes a framework concept of net delay, and whether the delay breached a presumptive ceiling. The presumptive ceiling for matters in the Ontario Court of Justice that proceed under Provincial Offences Act, is 18 months.

The Defendant submitted that the delay is beyond the 18-month ceiling and was therefore unreasonable. The City submitted that the net delay falls under the 18-month *Jordan* ceiling when subtracting Defendant delay including, unsuccessful disclosure motions and unavailability of defence council to set an earlier trial date taken together with the exceptional circumstances of COVID-19 pandemic. The Court was satisfied with the City's argument that the disclosure motion filed by the Defendant was frivolous and a deliberate tactic designed to create delay. It was agreed that the total delay from charge to trial was 29 months and 22 days, furthermore, both parties consented that the time period attributable to the COVID-19 pandemic as an exceptional circumstance was 8 months and 5 days. When subtracting the delay attributed to COVID-19 and the Defendant's action from the net delay, the remaining delay is 16 months and 20 days. With a delay below the 18-month threshold, the onus shifted to the Defendant to demonstrate that the delay was nonetheless unreasonable, and that the Defendant took meaningful steps to expediate the case. The Court found evidence to the contrary, that instead the Defendant took steps to delay the case and did nothing to advance it. Motion dismissed.

Settlement Privilege versus Public Interest in Information Request
Daniels v. Wolfville (Town), 2023 NSSC 126 https://canlii.ca/t/jwppc
The Appellant filed an information request with the Town of Wolfville ("Town") under the *Municipal Government Act*, S.N.S. 1998, c. 18 ("*Act*") seeking a copy of a settlement agreement ("Agreement") concerning a building development within the Town. The Appellant was not a party to the Agreement. The Town provided a partially redacted copy, prompting one of the parties to the Agreement to object and seek a review by the Information and Privacy Commissioner ("IPC"). The IPC recommended disclosure of the entire Agreement without redactions. The Town did not follow this recommendation, and the Appellant appealed.

HELD: Appeal granted.

DISCUSSION: The Town submitted that common law settlement privilege justifies its decision to withhold redacted information. The Appellant submitted that the *Act* abrogates common law settlement privilege and that the competing public interest outweighs the public interest in encouraging settlement. The crux of the matter before the Court was to weigh the purpose of the *Act*, which is to ensure that public bodies are fully accountable to the public, against the public interest in encouraging settlement. The Court outlined that the purpose of settlement privilege is to promote settlement, and it is vital to improve access to justice. There is public interest in favour of settlement because it promotes the interest of litigants, saving time expense and burden on the court system, while the purpose of the *Act* is to ensure that municipalities are fully accountable to the public, by

providing the public a right of access to records with necessary exemptions. The Court was satisfied that the public interest in the full accountability of public bodies, subject only to necessary exemptions, outweighs the public interest in settlement. Therefore, the appeal was granted, and the Town was ordered to provide the Appellant a copy of the Agreement that does not have redacted information.

Did the Arbitrator Apply the Right Test?

City of Toronto v. Canadian Union of Public Employees, 2023 ONSC 2122 https://canlii.ca/t/jwkct

The City of Toronto ("City") terminated an employee after an external investigation found that the employees conduct violated the *Human Rights Code*, R.S.O. 1990, c. H. 19 ("*Code*") and City policies. The Canadian Union of Public Employees ("Union") filed a grievance, and the arbitrator held that the City established grounds for discipline but not termination, finding that the employees' misconduct was not racially motivated. The City filed an application seeking judicial review.

HELD: Application dismissed

DISCUSSION: The City's position was that the arbitrator applied an incorrect test for discrimination when it concluded that the employees' misconduct was not racially motivated. The City maintained that the employees' conduct was discriminatory and a violation of the *Code*; therefore termination was warranted. The Union submitted that the Court should not interfere with the arbitrator's finding. The question before the arbitrator was not whether discrimination had occurred but rather, did the City have just cause to terminate the employee? A finding of discrimination does not always lead to termination. The arbitrator was satisfied with the evidence that City residents were not singled out for adverse treatment by the employee and there was no discrimination of the type alleged by the City. Case law has cautioned courts against reweighing evidence considered by an administrative tribunal, absent exceptional circumstances the reviewing court should not interfere with a factual finding. I The Court was satisfied that the City failed to demonstrate exceptional circumstances. The Court was also satisfied that the arbitrator recognized that the employee's conduct, although reprehensible, was not racist in the manner alleged by the City in support of its position to terminate him. The Court held that the City had not demonstrated a basis for the Court to interfere in the arbitrator's decision. Application dismissed.

Every Vote Counts: Single Ballot to Be Reviewed in Narrow Recount

Pella v. City of Toronto, 2023 ONSC 2021 https://canlii.ca/t/jwhhh

The Applicant lost the Ward 1 City of Toronto Catholic District School Board ("TCDSB") trustee position, by one vote, and sought a recount under s. 58 of the *Municipal Elections Act*, 1996, S.O. 1996, c. 32 Sched. *("Act")*.

HELD: Application granted.

DISCUSSION: On election day, voters were given ballots to vote for mayor, city councillor and a school board trustee. Ballots were put through an electronic tabulator which would scan and register detected votes. The tabulator would beep and not register the vote if the ballot contained an error and read "overvote". City policy required polling staff to alert the voter that there was a defect and offer a fresh ballot, if the voter declined the staff direct the tabulator to register the vote for other races but no vote would be registered for the "overvote". There was one such vote in the Ward 1 *TCDSB* election. The *Act* only permits a recount in the case of a tied vote; however, the Applicant submitted that there was need for a recount under s. 58(1): A person who is entitled to vote in an election and has reasonable grounds for believing the election results to be in doubt may apply to the Superior Court of Justice for an order that the clerk hold a recount.

The Applicant argued that there was possible doubt in the "undervote" where a tabulator failed to register a faint or partially filled ballot, and the one "overvote". The TCDSB and the elected school trustee argued that the Applicant's position was built on speculation. The City did not take a position. To determine if there were reasonable grounds to doubt the result of the election, the Court was satisfied that an "undervote" is common in municipal elections and the City's policy allow the tabulators to count the vote without an alert to the voter. However, when considering the "overvote", the Court was persuaded that in this election with a single-vote margin, the Applicant had reasonable grounds to doubt the outcome given the uncounted "overvote". The City's policy assumed that the voter who cast an "overvote" would have been given an opportunity to a fresh ballot, meaning that it was plausible that the one vote contained some discernable intent to vote for one candidate and the voter failed to cast a replacement ballot because the polling staff failed to alert him to a problem. The *Act* permits a recount in these circumstances to ensure the appearance of fairness. The Court granted the application and ordered that the uncounted "overvote" be counted by hand.

Seniority, Compensation or Both

Canadian Union of Public Employees, Local 79 v. City of Toronto, 2023 ONSC 2031 https://canlii.ca/t/jwgqh

The Canadian Union of Public Employees, Local 79 ("Union") moved for an order that the City of Toronto ("City") be found in contempt of the award of an arbitrator, which was filed and entered as an order of this Court.

Continued on page 39

Inside Canada *cont'd from page 33*

HELD: Motion dismissed.

DISCUSSION: Following the termination of an employee at the City, the Union filed a grievance that was referred to arbitration. The arbitrator set aside the termination for a suspension and included an award to reinstate the employee without loss of seniority and wages. The City sought judicial review of the arbitrator's decision. Initially the City requested the employee's agreement that if his reinstatement were to be overturned on the judicial review application, the employee would be required to repay wages, benefits and pension contributions. This prompted the Union's motion but ultimately the City did not require the employee to agree as a condition of reinstatement. The question before the Court was whether the City should be found in contempt of the award and order by maintaining the position that it reserves the right to seek an adjudicative decision requiring the employee to repay wages after his reinstatement in the event the judicial review is successful, and termination is upheld. The Union submitted that the City, by reserving this right, is trying to impose an additional condition on the employees' reinstatement not contained in the award. The City submitted that it complied with the award, and reimbursement of wages is a separate and distinct matter. The Court held that the award and order required the City to reinstate the employee, without loss of seniority and with compensation. The Court was not satisfied that the Union demonstrated that by reserving a future right if the judicial review application is successful, the City has deliberately and wilfully disobeyed the award and order. Motion dismissed. ML

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