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Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

SEP OCT 2024
VOL.65 NO.05



Overcoming Human-Nature Dualism In The Texas Hill Country: Local Governments And Urban Spaces

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By: Norman A. Dupont, Counsel to Aleshire & Wynder LLP, Westlake Village. California

In reversing four decades of what had been settled *Chevron* deference, the Supreme Court's recent *Loper Bright Enterprises* decision promises to radically restrict federal agency authority and replace it with judicial oversight. But that transformation may not be as sweeping at the state and local level.

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FIT FOR DUTY: A MUNICIPAL LAW PRACTITIONER'S GUIDE TO EFFECTIVE AND DEFENSIBLE PHYSICAL ABILITIES TESTING

By: Christoper Towle, City Attorney, Newton, Kansas

It is essential that employees--whether long-time staff or new applicants—are capable of handling the physical requirements of their jobs. At the same time, employers must be alert to tests and measurement criteria that unfairly discriminate against some workers.

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OVERCOMING HUMAN-NATURE DUALISM IN THE TEXAS HILL COUNTRY: LOCAL GOVERNMENTS AND URBAN SPACES

By: AJ Urteaga, Assistant City Attorney, Land Use & Real Estate Division, Austin, Texas

A common perception is that biodiversity has little to do with heavily populated urban areas. But the reality is that cityscapes can be home to a wider array of plant and animal life than most of us would suspect—it just takes a broader awareness of the possibilities and a shift in focus.

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INSIDE CANADA

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

Blocked Drainage, Illegal Tempos, Arson Allegations, and More

Appellant Circles the Drain on Appeal Attempts

Katelnikoff v Irricana (Town), 2024 ABCA 205 https://canlii.ca/t/k58v1

The Appellant experienced ongoing flooding on her property in the Town of Irricana ("Town") due to a blocked drainage pipe connected to a concrete swale managed by the Town. The buried drainage pipe was originally installed as part of an easement agreement for storm water management. The Appellant filed an application and sought a mandatory permanent injunction and order that the Town remove the drainage pipe from the property. The application was dismissed by the chambers judge; the Appellant appealed on four grounds.

HELD: Appeal dismissed.

DISCUSSION: In reviewing the appeal, the Court of Appeal considered whether the chambers judge had erred when issuing its decision related to the scope of evidence considered, the test for an interim injunction instead of a permanent injunction, nuisance caused by flooding, and other errors of fact. The Appellant argued that the drainage pipe was not a permitted use by the easement on title, claiming that the overland drainage could not include buried pipes, and the chambers judge erred when he interpreted the buried drainage pipe as permitted within the easement. The Court of Appeal disagreed, finding that the drainage pipe was within the easement's scope, affirming that the judge's interpretation of the easement was consistent with its terms and intentions. The Appellant also claimed that the chambers judge incorrectly used the test for an interim injunction instead of the test for a permanent injunction, relying on *Plains Midstream Canada ULC v Keyera Partnership* 2021 ABQB 871. The Court of Appeal disagreed, finding that the chambers judge had applied the correct higher standard for permanent injunctions, focusing on whether the Appellant demonstrated an enforceable right. The judge concluded that the Appellant failed to establish this right, which meant a permanent injunction could not be granted. The Appellant further argued that the chambers judge erred in concluding there was only one incident of nuisance, and further evidence was ignored. The Court of Appeal disagreed, finding that there was no error in the determination based on the evidence that was presented. The Court of Appeal also dismissed the Appellant's claim that there were other errors of fact, finding that the Appellant did not point to any palpable or overriding error by the chambers judge in regard to those fact findings. Appeal dismissed.

Moral Licensing 101: The Case of the Tempo

Town of Dollard-des-Ormeaux c. Gibson, 2024 QCCM 11 https://canlii.ca/t/k36mh

The defendant, a resident in the Ville de Dollard-des-Ormeaux ("Town"), was charged with violating a municipal by-law that prohibits "temporary shelters". The by-law did not specifically define the term "temporary shelter" however, and it was interpreted by the Town to include tent like structures used in the winter to provide a roof over vehicles in a driveway for the purpose of keeping ice and snow from the vehicle, commonly known as "tempos." The charge is a strict liability offense.

HELD: Defendant guilty.

DISCUSSION: Since the charge is a strict liability offence, the Town did not have to establish the defendant's intent to commit the offence. The defendant argued that the tempo was required due to her role as a foster parent. The defendant provided evidence that the agreement with the clinical support service required a controlled area in the home to leave items that may pose a risk to minors. The defendant used their garage as this area, which required the vehicle to be parked on the driveway under the tempo. The defendant argued the defense of impossibility and claimed that it was impossible for her to comply with the Town by-law because the garage was used as a controlled area as required by the foster support service. To be successful in this defense, a defendant has to demonstrate that the impossibility is beyond the defendant's control. The defense failed because the defendant was unable to provide evidence that compliance with the Town's by-law were beyond her control. The Court noted that there were alternative potential solutions available other than

using the garage, including using one of the household bedrooms for storage or reducing the number of foster children in the home. The Court stated that while admirable, the defendant chose to foster a high number of youth and had failed to make reasonable attempts to comply with the Town by-law. The Court held that non-compliance with the Town's by-law was not justified by the defendant's personal circumstances or the perceived fairness of the by-law's enforcement. The defendant was found guilty.

When To Seek Leave vs Appeal as of Right?

Tabet v Winnipeg (City of), 2024 MBCA 60 https://canlii.ca/t/k66v4

The Plaintiffs brought a legal action against the City of Winnipeg ("City") claiming trespass and nuisance due to the City's drainage system causing flooding onto their properties. The City argued that it had a prescriptive easement over the Plaintiffs' properties and therefore a right to enter. The City further submitted that it had used the properties continuously and openly for more than twenty years. The motion judge partially granted the City's summary judgment motion, recognizing the prescriptive easement, but denied the Plaintiff's request to dismiss the City's defense. The plaintiffs sought leave to appeal the motion judge's order and questioned whether it required leave or if it could be appealed as of right.

HELD: Order may be appealed as of right.

DISCUSSION: The issue before the Court of Appeal was to determine whether the motion judge's order constituted a final or interlocutory order. The Court assessed whether the order definitively resolved a substantive issue or whether it only addressed the procedural matters. The Court relied on the principles set out in *Nguyen v Winnipeg (City of)*, 2022 MBCA 33 and *Kinnarath v People's Party of Canada*, 2024 MBCA 2, to determine whether the motion order definitively resolved a substantive issue or whether it only addressed procedural matters. Additionally, the Court cited *Johnson v Ontario*, 2021 ONCA 650, which held that an order which definitively addresses a substantial defense, like a prescriptive easement, is considered final if it impacts the overall outcome of the case. The Court concluded that the motion judge's order to recognize the City's prescriptive easement and dismiss the Plaintiffs' motion was final because it resolved the City's crucial defense that could potentially determine the Plaintiffs' claims of trespass and nuisance. Therefore, the order was eligible for appeal as of right, bypassing the need for leave.

The Burden of Proof for Negligence on City Roadway Maintenance

Fadler v Milton (Town), 2024 CanLII 71124 https://canlii.ca/t/k62r3

A motorcyclist lost control while riding on a municipal roadway in the Town of Milton ("Town") resulting in catastrophic injuries and leaving him in a vegetative state. The motorcyclist's family members ("Plaintiffs") brought a claim against the Town for negligence alleging that roadway conditions caused the accident and ultimately the injuries. The Town sought summary judgement, arguing that there was no genuine issue requiring a trial as the roadway was in reasonable condition and that the Plaintiffs had not sufficiently demonstrated a pothole played a role in the accident. The Plaintiffs responded that the Town's motion was premature, as the evidence raised a triable issue.

HELD: Summary judgment granted.

DISCUSSION: At the core the Court's decision rested on the inadequacy of the Plaintiffs' evidence. A summary judgment is appropriate if there is no genuine issue requiring a trial. The Plaintiffs argued that the motion for a summary judgment was premature due to incomplete discoveries. The Court disagreed, finding that the Plaintiffs had ample opportunity to conduct discovery but did not pursue them. The Court found that the Plaintiffs' failure to seek necessary discoveries suggested that they were prepared to argue the merits based on the existing record. The Court concluded that the Town's motion was not premature. The Court also found that the Plaintiffs submitted insufficient evidence, including hearsay evidence provided by their lawyer who relayed an expert opinion from an engineering firm; that evidence was dismissed as it was not an expert report. Lastly, the Plaintiffs did not provide evidence to prove that the Town failed to keep the roadway in a reasonable state of repair. Section 44 of the *Municipal Act*, 2001 ("*Act*") provides that municipalities must keep roads in a reasonable state of repair, and the onus was on the Plaintiffs to show that the Town failed in its duty. The evidence before the Court was that of the Town's expert witness, who attributed the accident to the motorcyclist's high speed rather than the roadway conditions. The Court was not persuaded by the Plaintiffs' attempt to challenge the findings of the expert witness. The Court noted that although it was sympathetic to the Plaintiffs' situation, it awarded summary judgment and costs in favour of the Town.

Feeling the Burn on Filing Frivolous Actions

Gallos v. Toronto (City), 2024 ONSC 4183 https://canlii.ca/t/k60tv

The Plaintiff filed an action against the City of Toronto ("City") and several other named defendants, including a former City Councillor and various City Staff. The action alleged various serious offences by the City officers, including wrongful shutdown and arson of the Plaintiff's restaurant. The Plaintiff sought $250,000 in damages and an order compelling the City to issue a building permit to rebuild his restaurant at a size more than double that permitted within the City. The

Continued on page 39

duce%20the%20number,firearms%20they%20take%20into%20inventory (providing ghost gun figures from 2016- 2021).
21. CBS News, *Philadelphia reaches settlement in case against 2 large suppliers of ghost guns,* April 12, 2024, available at: https://www.cbsnews.com/philadelphia/news/ghost-guns-settlement-polymer80-jsd-supply-philadelphia/
22. *See* Brief of the Local Government Legal Center, p. 20-21, available at: https://www.supremecourt.gov/DocketPDF /23/23-852/316175/20240702104637030_23-852%20FINAL%20Ami%20Brief%20as%20filed%20PDFA.pdf
23. Brief of 20 Major Cities, et. al., p. 13-15, available at: https://www.supremecourt.gov/DocketPDF/ 23/23-852/316235/20240702145232136_23-852%20PDF%20A%20Amicus%20Brief%20of%2020%20Major%20Cities%20et%20al..pdf
24. *Id.*
25. Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res., 532 U.S. 598 (2001).
26. *Id.* at 605.
27. Sole v. Wyner, 551 U.S. 74, 83, (2007).
28. Stinnie v. Holcomb, No. 3:16-CV-00044, 2021 WL 2292807, at *4 (W.D. Va. June 4, 2021), *aff'd*, 37 F.4t h 977 (4th Cir. 2022), *on reh'g en banc*, 77 F.4th 200 (4th Cir. 2023), and *vacated and remanded*, 77 F.4th 200 (4th Cir. 2023).
29. Stinnie v. Holcomb, 37 F.4th 977, 981 (4th Cir. 2022), *reh'g en banc granted*, No. 21-1756, 2022 WL 3210714 (4th Cir. Aug. 9, 2022), and *on reh'g en banc*, 77 F.4th 200 (4th Cir. 2023), *cert. granted sub nom. Lackey v. Stinnie*, 144 S. Ct. 1390 (2024).
30. Stinnie v. Holcomb, 77 F.4th 200, 210 (4th Cir. 2023).
31. *Id.*
32. *Id.* at 213.
33. *Id.* at 211.

Inside Canada *cont'd from page 29*

Court directed the registrar to provide notice to the Plaintiff that in review of his statement of claim, the Court was considering the action as frivolous or vexatious or an abuse of the court's process.

HELD: Action dismissed.

DISCUSSION: The Ontario Rules of Civil Procedure provides a mechanism for addressing occasions where a litigant advances a claim that is frivolous, vexatious or otherwise an abuse of process. Pursuant to Rule 2.1.01, the Court may on its own initiative stay or dismiss a proceeding if the proceeding appears on its face to be frivolous or vexatious or otherwise an abuse of process of the court, *Gao v. Ontario (Workplace Safety and Insurance Board),* 2014 ONSC 6100. The Court identified several issues with the Plaintiff's statement of claim: First, the allegations lacked material facts, particularly concerning three of the named City Staff defendants, who were not substantively connected to the claims. Second, the action was time-barred, as it was brought well beyond the two-year limitation period specified in the *Limitations Act,* 2002 S.O. 2002, c. 24, with no submissions as to why the actions should not be barred by the *Act*. Third, the claims were based on serious allegations without supporting material facts, rendering them vexatious. Lastly, the Court noted that the Plaintiff had a history of unsuccessful litigation on similar matters against the City, reinforcing the conclusion that this case was an abuse of the judicial process. The Court's decision emphasizes the importance of ensuring that legal proceedings are based on substantive and timely claims to prevent misuse of judicial resources. The action was dismissed for being frivolous, vexatious or otherwise an abuse of process.



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