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CONTENTS

MAY / JUNE 2024

REGULATING SOBER LIVING HOMES-A BICOASTAL PERSPECTIVE

By: Terrill C. Pyburn, City Attorney, Coconut Creek, Florida, and Norman A. Dupont, Partner, Ring Bender LLP, Newport Beach, California

There is general consensus that co-locating those battling substance abuse in residential settings can help rehabilitation. But communities rarely welcome sober homes into their midst. Laws at the federal, state, and local levels protect recovery facilities against measures aimed at excluding them and codify standards of care for the treatment of recovering residents.

PAGE 6

WHAT EVERY MUNICIPAL ATTORNEY SHOULD KNOW ABOUT THE FIRST AMENDMENT

By: Roger Horner and Ian Williams, Senior Specialists and Legal Editors, Thomson Reuters Practical Law Government Practice Service

No prerogatives are more fundamental to American democracy than those guaranteed by the First Amendment. Whether safeguarding speech, press, or religion, the right to assembly and petition, or a corollary right recognized by the Supreme Court—the freedom of association—local government lawyers are responsible for ensuring that each is protected.

PAGE 16



DEPARTMENTS

20 AMICUS
When Can Public Officials Block Someone on Social Media?
By: Amanda Karras, IMLA Executive Director and General Counsel
A recent Supreme Court decision provides guidance.

22 AMICUS AWARDS
With Appreciation
Recognizing the authors who power IMLA's legal advocacy program.

25 MID-YEAR IN REVIEW
Four hundred local government lawyers walk into a hotel…
A glimpse at IMLA's latest gathering.

28 DAY IN THE LIFE
Playing a Part in Well-Run Government
By: Avery Morris, IMLA Editorial Staff
Meet Lisa Glover
Cary, North Carolina Town Attorney.

30 INSIDE CANADA
Unstable Trees, Indecisive Officials, Questionable Applicants, and More.
By: Monica Ciriello, Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario
Recent Canadian cases of interest.

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INSIDE CANADA

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

Unstable Trees, Indecisive Officials, Questionable Applicants, and More

If a Tree Falls, Is a City Liable for Damages?
Camarda v. City of Abbotsford, 2024 BCCRT 284 https://canlii.ca/t/k3jrv
A City of Abbotsford ("City") tree fell on the Applicant's property, knocking down his fence and destroying a trampoline. The Applicant sought damages. It was uncontested by both parties that the City owns the wooded area and that the tree damaged the Applicant's private property.

HELD: Application dismissed.

DISCUSSION: To prove negligence, the onus was on the Applicant to demonstrate that the City owed a duty of care. The Applicant argued that the City should have inspected the trees regularly to prevent damage or injury. The City submitted that it did not owe the Applicant a duty of care as it was following a core policy decision and was thereby not negligent. The Supreme Court of Canada in *Nelson (City) v. Marchi*, 2021 SCC 41 outlined four factors to consider when determining a "core policy decision:" first, the decision-maker's level and responsibility; second, the decision-making process; third, the nature and extent of any budgetary constraints; and fourth, the extent to which the decision was based on objective criteria. The City submitted that its corporate tree management policy ("policy") outlined a reactive approach to assess the health of thousands of City trees, which is based on resident complaints or past incidents. The City provided evidence that there were no complaints about the tree that fell on Applicant's property and as a result the tree was not inspected prior. The Court was satisfied that the City's decision to have a reactive policy towards trees satisfied the four factors as a core policy decision; therefore the City did not owe the Applicant a duty of care. The Court also contemplated nuisance laws, which protect a person's right to use and enjoy their land without unreasonable interference. To prove nuisance, the Applicant had to prove that the City knew or ought to have known that the tree was a hazard or at risk of falling, and once aware was required to take reasonable steps to address it. The Applicant argued that the City's policy was inadequate and failed to identify the tree as a potential hazard. The Court found that due to a lack of resident complaints, the City would not have known that the tree was at risk of falling onto the Applicant's property. Therefore, the City was not liable for nuisance. Application dismissed.

Duty to Act or a Duty to Decide?
Bos v City of Vernon, 2024 BCSC 495 https://canlii.ca/t/k3nv1
The Petitioner owned two neighbouring commercial properties in the City of Vernon ("City"). At the request of the City, the Petitioner filed two separate applications for the proposed use of an outdoor storage facility on both properties. The City granted the proposed use and a corresponding business licence to operate on one of the properties but made no decision about the other property. The Petitioner sought judicial review, pursuant to section 2(2) of the *Judicial Review Procedure Act,* RSBC 1996 c. 241 to review the City's failure to issue one of the business licences and sought an order of *mandamus* to require the City to issue the permit.

HELD: Petition granted, in part.

DISCUSSION: The City submitted that the pleadings were deficient as it had issued business licenses for both applications submitted by the Petitioner. The Court found the City's submissions without merit, as the evidence revealed that no decision had been made with respect to one of the applications. The Court agreed with the Petitioner, that he was entitled to know whether or not an outdoor storage facility was permitted, and that the City had an obligation to make a decision and provide an explanation. The Court of Appeal in *Paldi Khalsa Diwan Society v. Cowichan Valley (Regional District)* 2013 BCSC 1773 provides guidance on an order of *mandamus*: there must be a public legal duty to act, the duty must be owed to the applicant, there is a clear right to performance of that duty, where the duty sought to be enforced is discretionary, no other adequate remedy is available to the applicant, the order sought will be of some practical value or effect, the Court in the exercise of its discretion finds no equitable bar to the relief sought, and on a balance of convenience an order in the nature of mandamus should be issued. In this case, the Court held that there was no prejudice to the City being mandated to perform its obligation, rather the prejudice lay with Petitioner. However, the Court noted that the order as sought by the Petitioner would compel the City to issue the licence, which was not appropriate. Rather, the Court issued an order of *mandamus* compelling the City to render

its decision on the Petitioner's application for a licence within 14 days of the order.

Appropriate Parties to Determine Top Cop Shop.
City of Surrey v British Columbia Ministry of Public Safety and Solicitor General, 2024 BCSC 506 https://canlii.ca/t/k3pjd
The City of Surrey ("City") sought an order in the nature of *certiorari* quashing a 2023 decision by the British Columbia Minister of Public Safety and Solicitor General ("Minister") directing the City to transition its police jurisdiction from the Royal Canadian Mounted Police ("RCMP") to the Surrey Police Service ("SPS"). The Minister opposed the order. In this application, the Surrey Police Union ("SPU") sought to be added to the proceeding as a respondent, or in the alternative, as an intervenor.

HELD: Application dismissed.

DISCUSSION: The RCMP is the national police service in Canada and serves cities within the province of British Columbia that do not have their own municipal service, including Surrey. The City Council passed a motion to develop the SPS that would replace the RCMP. The motion was approved by the Minister. The SPU relied on Rule 6-2(7)(b) and (c) of the Supreme Court Civil Rules to be joined as a Respondent. Rule 6-2(7)(b) and (c) provides that at any stage of the proceeding, the Court on an application by any person may be added as a party if the person ought to have been joined or the person's participation in the proceeding is necessary and if there is a question or issue relating to any relief claimed or the subject matter. The Court provided that the Rule is to be given narrow interpretation, as it is meant to remedy defects in the proceeding. SPU argued that its participation was necessary because of the potential effect on the City's submissions, on public safety in the City, and the potential occupational health and safety of the police officers providing services. The Court disagreed, not being satisfied that SPU had any direct interest in the outcome of the proceeding, or that its participation was necessary to ensure that all matters of the proceeding were effectively adjudicated. SPU's application to be added as a respondent was dismissed. In the alternative, SPU sought intervenor status.

The onus was on SPU to demonstrate that it had a direct interest in the outcome of the proceeding or that it represented a public interest in a public law issue to which it could bring a different and useful perspective, *EGALE Canada Inc. v. Canada (Attorney General),* 2002 BCCA 396. The Court had already determined that the SPU did not have a direct interest in the outcome of the proceeding, and found that the application to intervene failed on two grounds. First, the proposed intervenor must have a different and useful perspective with respect to the issues before the Court; SPU did not specify what its perspective was in respect to the legal issues and as such did not establish that it would bring a different perspective. Second, SPU raised occupational health and safety concerns that were not raised by the parties to this proceeding. SPU would need to offer evidence on these issues if it were permitted to intervene. SPUs application for intervenor status was dismissed.

Can Business Licenses Be Denied to Individuals Charged but Not Convicted?
Mr. Emperor Group of Businesses Inc. v Calgary (City), 2024 ABLCSAB 8 https://canlii.ca/t/k3ktz
The City of Calgary ("City") refused the Appellant's business licence application to operate. Upon intake and in accordance with its Business Licensing Bylaw and policies the City completed a security check with the Calgary Police Service ("CPS"). CPS did not recommend the issuance of a business licence to the Appellant as the owner had active criminal charges related to fraud. The City relied on this information to deny the Appellant's business licence application. The decision was appealed.

HELD: Appeal dismissed.

DISCUSSION: The Appellant argued that he was not aware of the particulars of the criminal charges against him, and further since the charges were still before the Court, he was not guilty of fraud. The City submitted that the Appellant was the sole director on the corporate ownership for the business licence application, and it had an obligation to consumer protection and the community when issuing a business licence. To fulfil that obligation, the City relies on its authority under the Bylaw. The City may deny a business licence application following consult with internal departments, and the results of a security clearance check from CPS. The City argued that it relied on the information by the CPS and did not issue a licence due to the outstanding criminal charges against the Appellant. The Board was satisfied that the Appellant was charged under 380(1)(b) of the *Criminal Code*, for Fraud under $5,000 and 374(b) of the *Criminal Code* to Draw Document Without Authority, and that these matters are still before the Court. Furthermore, the Board was satisfied that the City had the authority under its Bylaw to consult with CPS as part of its review process to determine whether the issuance of a business licence would be appropriate. Appeal dismissed.

Costs Imposed by the City is Not a Human Rights Discrimination
Pan v Village of Standard, *2024 AHRC* 35 https://canlii.ca/t/k3czb
The Complainant is a resident and owner of a hotel property in the Village of Standard ("Village"). The Complainant alleges that the Village discriminated against him by pursuing an outstanding tax amount due to his Chinese ancestry contrary to the *Alberta Human Rights Act* ("*Act*"). The human rights complaint was dismissed, and the Complainant appealed.

Continued on page 37

Amicus *cont'd from page 33*

the social media policy. For example, if the policy indicates that officials and employees must have disclaimers on private accounts noting that the views expressed on that account are private and not that of the City/County and the employee/official fails to provide such a disclaimer and the account is later found to be subject to the First Amendment, should the employer indemnify that employee for the ensuing lawsuit? If the failure to provide a disclaimer created liability and violated policy, employers should consider whether indemnification is appropriate in these circumstances.

NOTES

1. Gonzalez v. Google, No. 21-1333, Oral Argument Trans., p. 45:25 – 46:3.
2. In addition to Lindke v. Freed, the Court also heard argument in Moody v. NetChoice, LLC, No. 22-277 and NetChoice, LLC v. Paxton, No. 22-55, which pertain to state laws regulating content moderation decisions on certain websites, including social media websites and Murthy v. Missouri, No. 23-411 which involves issues of government speech and coercion as between the federal government and social media companies.
3. The brevity of the decision was even more surprising given that the Court granted certiorari in two cases involving this issue. O'Connor-Ratcliff v. Garnier resulted in a per curiam short decision vacating the Ninth Circuit's judgment and remanding the case to consider in light of the new test adopted by the Court in Lindke. The Court did not shed light on how the test it adopted might apply to the different facts in Garnier, including to elected officials and members of a body.
4. The amicus brief was authored by Caroline Mackie & Robert Hagemann of Poyner Spruill and can be viewed here: https://www.supremecourt.gov/DocketPDF/22/22-611/270245/20230630170439817_22-611%20Amicus%20BOM%20IMLA.pdf.
5. Lindke v. Freed, 37 F.4th 1199, 1203 (6th Cir. 2022).
6. Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1170 (9th Cir. 2022).
7. Lindke v. Freed, 144 S. Ct. 756, 762 (2024).
8. *Id.* at 766-767.
9. *Id.* at 767.
10. *Id.* at 766.
11. *Id.* at 764 (emphasis in the original) (internal quotations omitted).
12. *Id.* at 768.
13. *Id.* at 769.
14. *Id.* at 765.
15. *Id.* at 766.
16. *Id.*
17. *Id.* at 770.
18. *Id.* President Trump was subject to a similar lawsuit that was ultimately dismissed as moot after he was no longer in office. One of the factors the Second Circuit looked at in determining that Mr. Trump had engaged in official governmental action was his use of governmental resources in running the account. *See* Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 235 (2d Cir. 2019), cert. granted, judgment vacated sub nom. Biden v. Knight First Amend. Inst. atz Columbia Univ., 141 S. Ct. 1220, 209 L. Ed. 2d 519 (2021), and abrogated by Lindke v. Freed, 144 S. Ct. 756 (2024).
19. *Id.* at 768.
20. *Id.*
21. *Id.* at 769-770.
22. *Id.* at 770.
23. *Id.* at 769.
24. *Id.* at 769, n. 2.
25. *Id.* at 770.
26. *Id.*
27. *Id.*

Inside Canada *cont'd from page 31*

HELD: Application dismissed.

DISCUSSION: The Complainant alleged he received an outstanding tax bill in the amount of $29,000 accompanied by a threatening letter from the Village to auction his hotel if the arrears remained unpaid. The Village submitted evidence that the Complainant did not have an outstanding tax bill, but rather had been incurring fines for the removal of an illegal mobile home that was towed from his property and had remained impounded in a lot that charged a daily fee since 2016. Furthermore, the Village provided correspondence between staff and the Complainant that advised him the mobile home was illegal on his property and would be seized if not removed. The Complainant submitted that the Village's actions were solely based on race, as he and his family are the only Chinese family living in the Village. The complaint was dismissed by the Director of the Human Rights Commission ("Director"). The Director held that simply being part of a particular race, without evidence to support alleged discrimination, was not sufficient to establish that the Village's treatment occurred because of a protected ground. Upon review of the decision to dismiss, the Adjudicator agreed with the Director. The Adjudicator acknowledged that the Complainant was a member of a protected class under the *Act*, and that he suffered negative consequences when the mobile home was seized from his property and daily charges were incurred. However, the Adjudicator was satisfied that the Village provided a reasonable non-discriminatory explanation for the seizure of the mobile home and the costs incurred. Therefore, the Board concluded the Complainant was not discriminated against on the basis or race or colour, ancestry, and place of origin under the *Act*. The Director's decision to dismiss the complaint was upheld. Application dismissed. ML