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Nanaimo (City) v. Mema

Mema was appointed as the Chief Financial Officer of the City of Nanaimo in July, 2016. In March of 2018, Mema was suspended and in May, 2018 his employment was terminated. Mema filed a complaint with the B.C. Human Rights Tribunal that he was a victim of racial discrimination. The Tribunal found that Mema was the victim of racial discrimination because his race and colour factored into the City's decisions to suspend and eventually terminate his employment. Mema was awarded more than $600,000 as compensation for lost wages and injury to dignity. The City petitioned the B.C. Supreme Court for judicial review but the petition was dismissed. The City appealed to the B.C. Court of Appeal.

HELD: Appeal dismissed

DISCUSSION: The conduct that eventually led to Mema's termination was related to the use of a City-issued credit card for personal purchases. The practice of using a City credit card for personal purchases was not uncommon, however, in Mema's case there was a delay in repayment of the charges incurred which led to an internal audit. The audit identified Mema as a person who delayed repaying personal expenses charged to a City-issued credit card, but stated that there was no evidence of fraud or criminal activity. A senior manager subsequently prepared a Misconduct Report addressing the credit card issue and other concerns. The Tribunal found an underlying thread of racial bias in the Misconduct Report. As the City's decision to suspend and eventually terminate Mema's employment was based on the allegations in the Misconduct Report, which report was found to be discriminatory, the decisions to suspend and terminate were also discriminatory. The City advanced five arguments on appeal, all of which attacked the reasonableness of the Tribunal's finding that race was a factor in the decision to terminate. Three of the City's five arguments centered on the Tribunal failing to consider key factual and legal constraints such as failing to consider Mema's position of trust and incorrectly applying the inference test by ignoring the most obvious explanation for the Misconduct Report - Mema's own conduct. The other arguments suggested that the Tribunal erred in imputing inferred bias underlying the Misconduct Report to the

suspension and termination decisions. The Court of Appeal rejected the City's arguments and found that the Tribunal had asked the right questions and focused on the correct issues. The Court of Appeal held that the Tribunal had properly considered whether race was a factor in the adverse treatment by the City. It did not matter that Mema's conduct may have provided cause for termination because a termination for cause can still contravene the Human Rights Code if it is racially motivated. The issue before the Tribunal was not whether the City had cause to terminate Mema's employment, it was whether the termination was racially motivated. The Court of Appeal found that there was a reasonable basis for the Tribunal to conclude that race was a factor in Mema's termination.

Nanaimo (City) v. Mema

Tiny Township Association of Responsible STR Owners v. Tiny (Township)

The Township of Tiny borders the southern part of Georgian Bay and is a popular summer vacation spot. In August, 2022, the Township passed a bylaw regulating the operation of short- term rentals. The bylaw requires owners of short-term rentals to apply for annual licenses, restricts how short-term rentals can be used, regulates the duration of rental periods and caps the total number of days each year that a short-term rental can be rented. Prior to 2022, no such constraints applied to short-term rentals. The Tiny Township Association of Responsible STR Owners (the "Association") was formed and it applied to quash the bylaw. The Association's assertion was that the bylaw's intent and effect was to prohibit the operation of short-term rentals altogether. The application failed and the Association appealed.

HELD: Appeal dismissed

DISCUSSION: On appeal, the Association argued that: a) the bylaw was *ultra vires* the Township's business licensing power as it applied to a non-commercial activity; b) the bylaws restrictions on the duration and manner of renting a short-term rental effectively prohibit, rather than regulate the operation of short-term rentals; c) the restrictions are not a legitimate use of the Township's authority to regulate as they fail to account for existing property rights; and d) that the licensing cap is *ultra vires* the Township's authority respecting the economic, social and environmental wellbeing of the Township. The Court of Appeal held that the municipality's licensing power was not limited to regulating "businesses" and that under the *Municipal Act*, a licensing scheme could be enacted for any purpose for which a municipality may pass a bylaw. The Court also found that a short-term rental would qualify as a business in any event because renting premises for money is a commercial activity. The Court further found that the bylaw's restrictions were rationally connected to legitimate municipal objectives and those restrictions were regulatory, not prohibitive. The Court also found that the record showed extensive efforts by the municipality to balance competing interests and that the licence cap was a compromise between those who wanted an absolute ban on short-term rentals and those who wanted no restrictions. The decision of the Court of Appeal emphasizes the broad authority a municipality has over licensing pursuant to the *Municipal Act*. The multi-year consultation process, investigation and community engagement that went into the creation of the bylaw was relevant to the Court in making its decision.

Tiny Township Association of Responsible STR Owners v. Tiny (Township)

Lougheed v. Sechelt (District)

Lougheed's builder and engineer engaged in discussions with staff from the District regarding the construction of Lougheed's home. The home was constructed in accordance with plans that had been approved by District staff. As the home was built in an area that had flood control requirements, it had to meet certain height requirements. The house was built in accordance with the approved plans, but the plans did not comply with the bylaw's height requirements for homes in the flood area. The District issued a Stop Work Order and informed Lougheed that the building height should have been calculated using the Flood Construction Level requirements. Lougheed sought a development variance permit on the advice of District staff. The staff recommended that Council approve the variation. Council denied the variance application on the basis that the home needed to comply with the bylaw. Lougheed brought an application for judicial review.

HELD: Council decision was quashed and the Development Variance Application was remitted back to Council for consideration.

DISCUSSION: On judicial review Lougheed argued that staff had not provided Council with accurate facts. The report by staff to Council depicted the issue as builder error and did not advise Council that Lougheed had built in compliance with approved plans. Lougheed also argues that she was denied procedural fairness as she was not given an opportunity to address Council and therefore, was not able to advise Council that the errors in calculating the height of the house were as a result of a misunderstanding of the advice provided by District staff. The Court found that District staff were aware of the ambiguity of the direction given to Lougheed and her construction team and they should have ensured that the Development Variance Permit Application conveyed that information to Council. The Court found that Council's decision to deny the Development Variance Permit application was based on incomplete factual assumptions - that the issue arose due to builder error. Council did not get to hear Lougheed's perspective that she and her builders had met with District staff and believed they were complying with their advice. The Court found that the fact that Council relied on this erroneous assumption made its decision unreasonable. For that reason the Council decision was quashed and the matter was remitted back to Council for reconsideration in light of Lougheed's position.

Lougheed v. Sechelt (District)

Terra Firma Development Corporation Limited (Re)

Terra Firma had planned a large resort-style residential community in the municipality of West Hants, Nova Scotia. The community was to be centered around a Jack Nicklaus designed golf course. The project collapsed into insolvency in 2020 with over 500 creditors being owed over $200 million in predominantly unsecured claims. The main asset of Terra Firma was the hundred of acres of undeveloped land in West Hants, which had accrued significant tax arrears. The insolvency trustee had submitted a restructuring plan under the *Bankruptcy and Insolvency Act* that would vest the land with the trustee who could then conduct a structured liquidation to maximize asset value for creditors. The municipality opposed the plan and applied to lift the insolvency stay. The municipality argued that the *Municipal Government Act (MGA)* of Nova Scotia required it to allocate tax payments to the oldest arrears first and execute immediate tax sales. The trustee sought approval of the proposal and a declaration that the relevant provisions of the *Municipal Government Act* are constitutionally inoperative in these circumstances as they are in conflict with the provisions of the *Bankruptcy and Insolvency Act (BIA).*

HELD: The proposal was approved and the request to lift the insolvency stay was denied

DISCUSSION: The Trustee argued that the "oldest-first" allocation rule in the *MGA* conflicted with the federal insolvency regime. Its argument was that the *BIA* requires post-bankruptcy taxes to be kept current while pre-bankruptcy claims be dealt with through the proposal process. As a result, allowing the municipality to apply payments to historical or pre-bankruptcy tax arrears would undermine the *BIA* regime. The Trustee argued there was a constitutional conflict between the provincial and federal statutes and therefore the federal legislation prevails. The Court did not find a constitutional conflict between the two pieces of legislation. Rather, the Court held that the *MGA*'s "oldest-first" allocation mechanism was a form of "remedy" within the meaning of the *BIA*'s stay of proceedings and therefore was suspended during the proposal without engaging constitutional paramountcy. The Court clarified that as the "remedy" was stayed, so was the time limitation, such that the secured status of the municipality would not erode over time. The six-year period under the *MGA* after which tax liens would expire was tolled while the stay was in place, meaning that the municipality would not lose priority simply because it was unable to enforce during the proposal. The Court refused to lift the stay, with the exception of six parcels that the Trustee had identified as having no equity, finding no material prejudice to the municipality. The proposal was approved as it had received overwhelming creditor support and was calculated to benefit the general body of creditors.

Terra Firma Development Corporation Limited (Re)

Surrey (City) v. British Columbia Hydro and Power Authority

The City of Surrey planned a highway expansion that would impact and potentially interfere with British Columbia Hydro and Power Authority (BC Hydro) high-voltage transmission facilities. The land where those facilities were located had been provincially designated as a highway but not actually used as a highway. The land was primarily agricultural. Based on the possible expansion of the highway, BC Hydro would need to substantially modify and raise the high-voltage transmission lines. BC Hydro and the City of Surrey began negotiations about the modifications but those negotiations broke down. The City then brought an action in trespass against BC Hydro, and BC Hydro made an application to the British Columbia Utilities Commission pursuant to the Utilities Commission Act of B.C., seeking an order setting the terms upon which BC Hydro could continue to use a highway dedication in Surrey for high-voltage transmission facilities. The Commission found that BC Hydro had a right to place its facilities on the land and since the parties could not successfully negotiate terms related to the relocation of the facilities due to the planned highway expansion, the Commission imposed terms which would require the City to pay the multi-million dollar cost of relocating the transmission lines to accommodate the expanded highway. The City brought an application for leave to appeal the decision of the Commission on three grounds: 1) that the Commission had no jurisdiction to make the order as it was a dispute over property rights; 2) that the Commission should have dismissed the application as an abuse of process because the City has already commenced a trespass action; and 3) that the Commission applied the wrong test in imposing terms requiring the City to pay the cost of relocation the transmission lines. The chambers judge dismissed the City's application for leave to appeal. The City then made an application under the *Court of Appeal Act* to vary the judgment of the chambers judge and allow the City to appeal the decision of the Commission.

HELD: The application to vary was granted and the City was given leave to appeal the decision of the Commission

DISCUSSION: The City argued that the proper approach on a statutory leave application is to consider the merits of the appeal on the basis of whether there are "substantial questions to be argued". The City argued that although the chambers judge set out this approach correctly, he applied a different approach to his analysis of the merits and incorrectly found that the City had no realistic prospect of success. The Court of Appeal noted that this appeal raised the question of the correct approach that should be taken by a single judge in chambers to the merits of an appeal on a statutory application for leave to appeal. The Court of Appeal found that a chambers judge must approach the merits test cautiously and as but one factor in the specific multi-factor test that is relevant to the particular application at issue. In this case, the Court of Appeal found that the chambers judge had erred in summarily concluding that the City's proposed legal argument had no merit. The Court confirmed that arguable issues of law should not be summarily determined at the leave application stage. This case hinged on a previously undecided legal issue: whether a deemed "certificate of public convenience and necessity" under section 45(2) of the *Utilities Commission Act* actually gave BC Hydro the unfettered right to enter municipal property under section 32(1)(a) of the Act. As the legal question was novel and the financial consequences for the City were very high, the Court of Appeal found that the City had met the legal threshold required to bring its appeal before the full panel.

Surrey (City) v. British Columbia Hydro and Power Authority