Case Law Update

for the

Ontario Municipal Administrator's Association

2018 Fall Workshop

Thursday, October 25, 2018

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A. FUNDAMENTALS OF THE PROVINCIAL-MUNICIPAL RELATIONSHIP

City of Toronto et. al. v. Attorney General of Ontario, 2018 ONSC 5151 (CanLII).

Toronto (City) v. Ontario (Attorney General), 2018 ONCA 761, (CanLII)

Background

Province announces a significant cut (Bill 5) to the size of the City of Toronto Council after the election process had commenced.

A lawyer (Rocco Achampong, who was also a candidate) and the City of Toronto initiated the application to challenge the Province's decision. The primary basis of the challenge was the assertion that the Provincial Legislation "*substantially interfered with both the candidate's right and the voter's right to freedom of expression as guaranteed under section 2(b) of the Canadian Charter of Rights and Freedoms*".

Section 2(b) of the Charter is a follows:

> ***Fundamental freedoms***
> *2. Everyone has the following fundamental freedoms:*
>
> *(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication*;

Section 3 of the Charter is a follows:

> ***Democratic rights of citizens***
> *3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein*.

The Lower Court Decision (Justice Belobaba)

The lower court was presented with a number of Charter based arguments. That said, the most compelling argument and the one that was the primary focus of Justice Belobaba's decision involved the Charter Right to "freedom of expression". His specific conclusion was that the "*reduction...in the number of City wards and corresponding increase in ward-size population...substantially interfered with the municipal voter's freedom of expression under s.2(b) of the Charter of Rights, and in particular her right to cast a vote that can result in effective representation"*.

The Court of Appeal Decision

A motion was brought before the Court of Appeal by the Province to "stay" the decision of the lower court until such time as a full hearing of the Province's appeal of that decision could be heard. The Court of Appeal granted that motion and in rendering its decision it gave a clear indication of this panel of the Court of Appeal's view of the chances of success on the full hearing of the appeal.

The Court of Appeal noted that the "*application judge was understandably motivated by the fact that the timing of Bill 5 changed the rules...which he perceived as being unfair to the candidates and voters*". The CA however noted that unfairness ***"****does not necessarily establish a Charter breach*".

The Court of Appeal concluded that the application judge "*appears to stretch both the wording and the purpose of s. 2(b) beyond the limits of that provision. His decision blurs the demarcation between two distinct provisions of the Charter: the protection of "expressive activity in s. 2(b) and the s. 3 guarantee of the democratic rights of the citizens to vote and be qualified for office"*.

The underlying logic in the Court's decision seems clear. The drafters of the Charter only created a specific right to democratic rights at the federal and provincial level of government. To assert that the section 2(b) right to "freedom of expression" entails or creates a specific right to some specified form of representation at this third (and unrecognized in the Charter or Constitution) level of government is untenable.

B. ANTI-SLAPP FOLLOW-UP

United Soils Management Ltd. v. Barclay, 2018 ONSC 1372, (CanLII)

This is the second case involving a defamation claim by United Soils Management against residents opposed to their proposed land use.

Background

United Soils Management Ltd. initiated a defamation claim against Kayt Barclay (Barclay) based upon her participation and posts in a closed Facebook group (just like the Mohammed case). The principal of United (Mr. Cloke) sent an email to Barclay (only 3 hours after the specific post at issue appeared online) advising that he had instructed United's lawyer to issue a lawsuit against her. The offending post was taken down three days later and the entire group site was shut down the next day as a result of Notice of Defamation being served. Barclay had little time to respond to the communication or potential lawsuit (i.e. to consider or issue retraction/apology).

The statement of claim was served two days later.

Barclay utilized the Anti SLAPP (i.e. Strategic Lawsuits Against Public Participation) legislation that was first tested in the Mohammed case and brought a motion to have the defamation claim dismissed. This legislation has as its goal the prevention and termination of litigation that has the desired effect of silencing a person's freedom of expression. For all intents, its goal is to prevent bullying through the initiation of a lawsuit.

The Ruling

Justice Wilson outlined the obligations of each party on such a motion. She found that United Soils had not satisfied the onus upon it to "pass" three "tests" and as such she dismissed the defamation claim by United Soils against Barclay.

Of note, with respect to the third test which requires a plaintiff (United Soils) to establish that the "*harm suffered or likely to be suffered by the plaintiff is sufficiently serious that public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression*", Justice Wilson essentially concluded that the almost immediate termination of the Facebook Group and all of its postings clearly demonstrated that the public discussion was silenced by the direct and aggressive action of United Soils in bringing the defamation lawsuits so quickly. This effectively negated any claim United Soils could make that some harm flowed or would flow from the now terminated postings.

The Damages (and Penalty)

When an Anti SLAPP defence is successful, the court then has jurisdiction and authority to award damages if the initial proceeding (the defamation claim) is found to have been brought in bad faith or for an improper purpose. The test (identified in the Mohammed case) is "*would a reasonable person informed of the facts conclude that a claim was initiated or pursued in bad faith or for an improper purpose*".

This is where the conduct of United Soils' principal, Mr. Cloke, really comes into play. In the decision, the Judge made reference to particular emails sent by Mr. Cloke to Barclay (referenced earlier under the Background heading). In that email (sent 3 hours after the alleged defamatory post), Mr. Cloke stated "*I have just asked my Counsel to issue you a lawsuit*...."***I look forward to the process***..." (Emphasis Added).

The Judge noted that it "*sets the tone of the Plaintiff's actions...I infer...an element of pleasure that he had found a comment he could act upon to launch a defamation action*...". Later in the decision, she commented that it *"is clear that the Plaintiff pounced on Barclay's comments...persisted in the claim, notwithstanding that the Facebook Group had been deleted...has vigorously and aggressively pursued this action*...". The Court concluded that the purpose of the action was for "*shutting down public debate around an important issue or instilling fear..."* and that "...*amounts to bad faith or improper purpose*".

On the issue of damages, Justice Wilson again noted that there was limited case law on this legislation and made reference to the Mohammed decision (as the only case in which a damage award has been issued). She expressed disagreement with the decision in Mohammed as to the scope of damages indicating that in the Mohammed case, Justice Lederer appears to presume that damages "*are intended to compensate the defendant for harm suffered"*. (In Mohammed the damages awarded were $7,500.00 instead of the $20,000.00 claimed because there was no medical evidence to support the claim).

Justice Wilson indicated that an Anti SLAPP award is not limited to compensating for harm suffered but is also there as a "consequence for improper use of the justice system". Effectively, in this court's view, one of the purposes of a damages award is to send a message and act as a deterrent.

An additional note on the deterring effect of a successful motion under the Anti SLAPP legislation is the award of costs that accompanies the decision. In the Barclay case, United Soils was subject to a cost award requiring to pay Barclay's legal costs of $123,000.00. United Soils would also have had to pay its own lawyer.

C. RECOVERY OF COSTS IN RELATION TO HAZARDOUS MATERIAL SPILLS

Canadian National Railway Company v. Ontario (Director, Ministry of the Environment and Climate Change), 2017 CanLII, 66327 (ON ERT)

Background Facts:

CNR had two train derailments in northern Ontario in the winter of 2015 (February 14th and March 7th). There were spills of hazardous liquids. CNR initiated major responses to address the spills and, by all accounts, was a responsible corporate entity. The MOECC also responded and was "overseeing" the response by CNR. Of note, and there was no disagreement between the CNR and MOECC on this fact, the MOECC was not itself (or through agents) conducting the clean up work.

The MOECC issued a "***spills cost and expense recovery order***" in relation to each spill. The total amount sought from CNR exceeded $340,000.00. The CNR appealed the orders pursuant to section 140 of the EPA. (As part of the appeal process in accordance with the Act, the MOECC requested additional costs/expense raising the total to over $600,000.00. The process and issues related to the supplementary request are not essential to the focus of today's discussion).

The Legislation

The *Environmental Protection Act* section 99.1 states:

Director's order for costs and expenses

99.1 (1) If a pollutant is spilled, the Director may issue an order requiring the owner of the pollutant or the person having control of the pollutant to pay to the Minister of Finance any reasonable costs or expenses incurred by Her Majesty in right of Ontario for the following purposes:

1. To prevent, eliminate or ameliorate any adverse effects or to restore the natural environment.

2. To prevent or reduce the risk of future discharges into the natural environment of any pollutant owned by or under the charge, management or control of the person against whom the order is made. 2005, c. 12, s. 1 (19).

The Issue

Although there were a number of legal issues at play in this matter, the critical aspect for discussion herein is the Environmental Review Tribunal's interpretation of section 99.1. Specifically, the question for the ERT was whether the MOECC had authority to impose the cost Order when MOECC was not actually conducting or paying for the clean up and when was "overseeing and monitoring" the clean up efforts of CNR and its contractors.

In that regard, CNR challenged three specific aspects of the Cost Order:

a. chemical sampling expenses - the MOECC claimed approximately $180,000.00 in hazardous material chemical sampling costs of the affected areas;
b. the salary/wages of permanently employed staff of the MOECC who were overseeing and monitoring the situation - the MOECC claimed over $300,000.00 for that time;
c. the imposition of administration/overhead costs - the MOECC imposed an 8% administration fee on the sampling/staff and other costs that were incurred.

The Result

The ERT's answer was yes; the MOECC was "incurring" all of the foregoing costs for the purposes set out in section 99.1.

Three basic elements/foundations to the ERT's line of reasoning in arriving at this decision were that:

1. The EPA is a "*public interest-focused remedial legislation...to be given a "generous interpretation*" (based on Ontario Court of Appeal and Supreme Court of Canada decisions);

2. The entire context of the EPA and in particular the powers and duties of the MOECC must be considered when the MOECC gets involved in these situations; and

3. The principal intention of the amendments to the EPA that included section 99.1 (and 100.1 as it relates to municipal authority to issue similar orders) is that the *"polluter pays*".

Sampling
Although it was determined that MOECC sampling program did not assist or guide the CNR's day to day response/clean up efforts and that CNR was doing its own sampling, the ERT concluded that such a connection was not necessary to justify or warrant the imposition of sampling costs. The MOECC determined (in accord with its duties) that its regular presence at the sites and sampling was necessary to monitor CNR's approach and progress, to verify the sampling done by CNR and to respond to public concerns about the impact of the spill.

One particularly notable comment made in the decision provides a real insight to the underlying rationale. The MOECC had to be able to respond to residents with confidence to tell them that their drinking water was safe.

Staff Cost
The CNR argument was that MOECC staff costs were not truly incurred by MOECC because these persons were owed their salaries regardless of their work in connection on this matter. This was the argument that held the most logical weight. However, the ERT did not accept that argument. The ERT concluded that whether the MOECC used its own staff or the services of a contractor was not determinative of the issue. It concluded that MOECC staff spent a great deal of time on this situation and that it had consequential effects on MOECC overall staffing and obligations in other areas and in responding to other matters (a domino effect). It utilized an evaluation based upon the "nature of work" conducted by the staff rather than relying upon the "nature of the employment" assessment. Simply stated, MOECC (Provincial resources) staff time was deployed to respond to a situation caused by CNR (a polluter) that otherwise could have been deployed elsewhere and/or other matters. Based upon the underlying "polluter pays principle", the CNR was to be held responsible for these lost opportunity costs.

Administration Cost
The ETR approved the administration costs. In short, it accepted the MOECC's argument that MOECC responds as an organization, not just as individual staff members on the site. The ERT concluded that "the work done by frontline workers...is in some measure made possible and inextricable from the supports provided by the human resources and other offices in the MOECC".

What Impact Does this Decision Have on Municipalities?

Municipalities have similar authority to issue a "***spills cost and expense recovery order".*** That authority is found in section 100.1 of the EPA

Municipality's order for costs and expenses
100.1 (1) If a pollutant is spilled, a municipality may issue an order requiring the owner of the pollutant or the person having control of the pollutant to pay to the municipality any reasonable costs or expenses incurred by the municipality, or a local board of the municipality within the meaning of the Municipal Affairs Act, to prevent, eliminate or ameliorate any adverse effects or to restore the natural environment.

In addition, such cost orders have the added benefit of subsection (5)

Lien
(5) If a municipality issues an order under subsection (1) against a person who owns real property in the municipality and the pollutant was spilled on that property, the municipality shall have a lien on the property for the amount specified in the order and that amount shall have priority lien status, as described in section 1 of the Municipal Act, 2001 or section 3 of the City of Toronto Act, 2006, as the case may be.

Words of Caution
When it comes to environmental contamination, it will come as no surprise that the costs and expenses associated with responses to and/or clean up of hazardous spills can escalate quite quickly. The amount of money spent on outside contractors and/or the deployment of municipal equipment and staff resources could have a significant impact on a municipality's short and long term financial position. It can affect the availability of resources that were intended for specific departmental projects.

Although the amount of such Cost Orders can be added to the tax roll and has priority lien status, actual recovery of the funds may take significant time. Depending upon the nature of the property and the spill, the property against which the "priority lien" applies may have a market value that is lower than the lien amount and that discrepancy could be further expanded if there was not a full clean up of the property.

D. Building Department Claims: Discoverability

Gillham v. Lake of Bays (Township), 2018 ONCA 667 (CanLII)

Background
Owner has a cottage constructed by home builder in 2006. Three years later, the owner notices that deck is sinking (a bit). They contacted the home builder and were told the deck foundation settling was not a big issue and somewhat "normal". The home builder later suggested the problem was being caused by work conducted by another contractor who built retaining walls on the sloped property. Ultimately a consultant (Trow) was hired by the owners (at the recommendation of the home builder) who concluded that some loose soils in the area of the deck piers and a retaining wall was the culprit. Their report recommended some major and expensive work to rectify the deck and retaining wall settling. The retaining wall contractor advised them to wait and see as this sort of thing happens and the settling may reach its "conclusion". Bottom line was that the Trow report provided no comments on the footings or foundations of the cottage and made no assertions that the problems with the deck and retaining wall could be a sign of problems with the cottage.

Over the next few years the owners notice a continuation of the problem. They hire a new contractor to fix the problem and are advised to get a soils study which is completed. That consultant gave some warning that the loose soils that caused the

problem for the deck and retaining wall may also exist in relation to the cottage. When the repair work is underway it is determined that the footings and foundations of the cottage itself are built on the same "loose soil" that was the root of the deck and retaining wall problem. The owner then commenced a lawsuit against the general contractor, the retaining wall contractor and the Township of Lake of Bays

The Law

Generally speaking, there is a limitation period that precludes a person from initiating a law suit against another party if they have waited too long after discovering the problem that would give rise to the right to sue. There are a variety of limitation periods and when they begin to run is tied to when they are "discovered" (in this case it is a two year period). When and what constitutes discovery is stipulated in the *Limitations Act* and the case law that interprets and applies those provision.

In this case, the Court of Appeal assessed a number of prior Court of Appeal decisions on the topic and commented on the most recent statutory amendments to the *Limitations Act*.

One of those modifications was the addition of subsection 5(1)(a)(iv) which requires the Court, when considering when the limitation period begins to run, to determine whether "*having regard to the nature of the injury, loss or damage a proceeding would be an appropriate means to seek a remedy to it*".

In the Gillham situation, the question was whether the limitation period began to run when the owners first noticed the settling of the deck and engaged the original contractor and Trow to look into the issue. The lower Court agreed with the defendants that the claim was discovered or discoverable in 2009.

The Court of Appeal disagreed stating that the lower Court Judge had made an error of law when assessing the test of discoverability. Specifically, the Judge "*failed to consider the specific factual or statutory setting of the case before him and determine whether it was reasonable for the property owner to commence litigation immediately*" over what was originally characterized by the defendants as a "minor issue".

In this case, although in retrospect it may have been reasonable or logical to conclude that there may have been a connection between the minor issue (deck settling) and the major issue (house settling), the Judge must assess the state of knowledge at the time the situation is unfolding. Clearly in this case the response/assessment of the Defendants in 2009 was a significant factor in the determining whether the home owners ought to have discovered the major issue.

Word of Caution

Building Department staff have to be careful when being pulled into early consultations with owners and contractors as their initial assessments that may not benefit from complete and thorough information could be used against them in the future. Clearly they have to be cautious about understating the nature and potential root cause of what may at first glance appear to a minor issue or concern.