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Fitness studio denied injunction to reopen during pandemic

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In April 2021, the Province of Ontario declared a second state of emergency related to the COVID-19 pandemic, and issued a province-wide stay-at-home order, which imposed various stringent measures limiting mobility of individuals, restrictions on indoor and outdoor gatherings and restrictions on travel. For many businesses, this has meant that they have shut their doors, as they cannot meet the Province's health requirements to be open to the public.

Pursuant to the *Re-Opening Ontario (a Flexible Response to COVID-19) Act* (the "*ROA*"), which continued various orders issued under the *Emergency Management and Civil Protection Act* (the "*EMCPA*"), a facility for indoor or outdoor sports and recreational fitness activities may open if it meets certain criteria. These criteria include that the facility be open solely for the purposes of allowing use of the facility by persons with a statutorily defined disability, who have received a written instruction for physical therapy from a regulated health professional and who are not able to engage in the physical therapy elsewhere. A facility for indoor sports and recreational fitness activities may also be open where the facility is used solely for the purpose of providing space for mental health support or addiction support services.

On April 27, 2021, the Acting Medical Officer of Health for the Brant County Board of Health issued a letter to all indoor sports and recreational facilities within the City of Brantford and the County of Brant (the "Instruction Letter"), which addressed compliance with the *ROA* and stated that "the capacity limit for a facility opening during the above restrictions must be limited to the number of patrons who can physically distance by 3 metres and in any event, cannot exceed 5 persons including staff."

The penalty for failing to comply with the *ROA* is a fine of up to $100,000 for individuals or $10,000,000 for corporations, for each day or part of each day on which the offence occurs or continues.

Upon receiving the Instruction Letter, the owner of a gym and fitness studio known as "The Fit Effect" determined that it would be impossible to operate

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his facility with only five persons including staff. He then commenced an application to quash the Instruction Letter and sought an urgent injunction prohibiting the County's Board of Health from enforcing it.

The injunction motion was heard by Justice D.A. Broad in May 2021: *The Fit Effect v. Brant County Board of Health*, 2021 ONSC 3651 (CanLII).

The basis for the motion was the traditional test for an injunction, requiring the applicant to show (a) a serious question to be tried; (b) irreparable harm if the injunction is not granted; and (c) that the balance of convenience favoured granting the injunction: *RJR MacDonald Inc. v. Canada (Attorney-General)*, 1994 CanLII 117 (SCC), 1994 SCC 117, [1994] 1 S.C.R. 311.

However, because the result of the interlocutory injunction motion would effectively amount to a final determination of the underlying application on the merits, the "serious issue to be tried" test was elevated to a "strong *prima facie* case" or a "strong chance of success" test: *Black v. City of Toronto*, 2020 ONSC 6398, 152 O.R. (3d) 529, at para. 41. In that regard, since the application would not likely be heard on the merits prior to the lifting of the *ROA* restrictions, the outcome of the injunction motion regarding the Instruction Letter would effectively amount to final relief with respect to the enforceability of the requirements set forth therein.

Justice Broad therefore assessed whether The Fit Effect had established a strong case that the Instruction Letter issued by the County's Board of Health ought to be temporarily quashed.

The Fit Effect argued, firstly, that the Instruction Letter was "*ultra vires*," meaning that the County did not have the statutory power to make the advice, recommendations and instructions contained therein. This argument was rejected. While O. Reg. 82/20 under the *ROA* does not expressly authorize public health officials, including medical officers of health, to issue advice, recommendations and instructions to businesses and organizations that are allowed to be open during the stay-at-home order, Justice Broad accepted that such authority is clearly implicit in the language of s. 2 of Schedule 1 of O. Reg. 82/20, which requires businesses to operate "in compliance with advice, recommendations and instructions of public health officials. Based on the language in the regulation, there was no intention to circumscribe the power of public health officials to issue advice, recommendations or instructions in the Instruction Letter.

Next, The Fit Effect argued that the Instruction Letter was issued in bad faith and for an improper purpose, specifically as an attempt to effectively close businesses which are otherwise legally operating in response to misplaced complaints from members of the public and competitors of those businesses to which the Instruction Letter is directed.

Justice Broad noted that an allegation of bad faith on the part of a public official such as a medical officer of health is a very serious matter. The Supreme Court of Canada has previously determined that concept of "bad faith" may encompass not only deliberate acts that are intended to harm, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith: *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 SCR 304, at para 26.

The County's Medical Officer of Health deposed that the Instruction Letter was issued in a good faith attempt to protect the public from the very real and ongoing threat of COVID-19, based on the ever-evolving state of knowledge about its spread. Moreover, he deposed that the instructions were not issued to target any one particular facility, but with the intention of having all facilities similar to and including The Fit Effect to operate safely.

Based on the evidence, Justice Broad was unable to conclude that The Fit Effect established a strong *prima facie* case that the Instruction Letter was deliberately intended to harm the applicant or that the Medical Officer acted in a manner that was so markedly inconsistent with the relevant legislative context that it amounted to bad faith.

Further, there was no evidence that the Instruction Letter had arbitrarily targeted the business of The Fit Effect even though the Instruction Letter was specifically addressed to indoor sports and recreational facilities. A party alleging that a public health measure aimed at reducing transmission of COVID-19 is arbitrary faces a significant hurdle. Provided that the steps taken are logically connected to the purpose of the enabling legislation or regulation, even if they are oriented toward risk reduction rather than an extant outbreak in the community, they are not arbitrary: *Schuyler Farms Limited v. Dr. Nesathurai*, 2020 ONSC 4711. The County's reasons for addressing the Instruction Letter to sports facilities were the concerns over the risk factors of close contact, prolonged exposure, forceful exhalation, and crowded places which are frequently present during exercise at a designated facility. These were not arbitrary measures.

Lastly, The Fit Effect argued that the Instruction Letter was contrary to the *Human Rights Code* because it effectively denied or restricted services otherwise available to the disabled community and infringed their statutory right to be free from discrimination. Justice Broad rejected this submission as the harms suffered by individual members of The Fit Effect are distinct from the harms suffered by The Fit Effect and its owner. None of the disabled members of The Fit Effect were parties to the proceeding and the potential harms identified by The Fit Effect and its owner with respect to this issue are not theirs to raise.

The latter point also defeated The Fit Effect's claim to be suffering irreparable harm, as it cited no authority for the proposition that the applicant on a motion for an interlocutory injunction may satisfy the requirement for irreparable harm based upon alleged harm to others who are not parties to the proceeding and who seek no relief from the court. The injunction test in *RJR MacDonald Inc. v. Canada (Attorney-General)* confirmed that irreparable harm refers exclusively to the harm to be suffered by the applicant itself if the injunction is not granted.

An intervenor on the motion, Autism Canada, argued that access to sports and recreational services for physical therapy that is free from exclusionary barriers is a protected right in Ontario, and that the additional restrictions enforced by the Instruction Letter created undue hardships to key service providers such as The Fit Effect in the community. Autism Canada submitted that monetary compensation is not a viable remedy in these circumstances.

However, Justice Broad noted that O. Reg. 82/20 provides specific recognition of the importance of continued provision of physical therapy opportunities in fitness facilities for

individuals with disabilities who satisfy the enumerated criteria. The Fit Effect made its own decision to close, rather than attempting to comply with the Instruction Letter. There was no doubt this had a serious impact on persons with autism spectrum disorder, in particular. However, the existence of these effects does not confer on a business like The Fit Effect the legal right to rely upon harm suffered by others to support their own claim of irreparable harm in the context of their claim for interlocutory injunctive relief.

As a result of the failure to establish the requirements of a strong *prima facie* case, The Fit Effect's motion for an interim injunction was dismissed. It is unknown at the time of this writing when or whether the application on the merits will be heard.

The decision reflects the lamentable tensions between individual businesses affected by the Province-wide shutdown and the efforts of health officials to impose restrictions which are intended to broadly protect public health. Courts have noted that while the pandemic is having a widespread financial impact, no level of government has caused the public health crisis or its financial impact. Rather, officials such as the County's Medical Officer of Health are attempting to fulfil their statutory mandate to protect public health in the face of an unprecedented worldwide health crisis.

Contact us

If you have a litigation matter and are in need of legal advice, please contact James Cook, at 416.865.6628 or jcook@grllp.com.

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