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Province free to redevelop Ontario Place *(Ontario Place Protectors v. HMTK in Right of Ontario)*

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The actions of a government are not immune from litigation before the courts, particularly where Constitutional or Charter rights are in issue. Although courts are an appropriate check and balance on elected governments to ensure that governments do not breach Constitutional powers or individual rights and freedoms, we have also seen the justice system used as a weapon to delay a government from implementing their vision simply because a special interest group disagrees with that vision.

In *Ontario Place Protectors v. His Majesty the King in Right of Ontario*, 2024 ONSC 4194 (CanLII), the applicant special interest group sought to enjoin the Ontario provincial government from redeveloping the iconic Ontario Place lands along Lakeshore Boulevard in Toronto. First opened to the public in May 1971, Ontario Place was closed in 2012 to many of the activities that were originally built on the site.

Under the current provincial government, Premier Ford introduced plans to revitalize Ontario Place and to re-open it to the public once again. However, not everyone agreed with those plans resulting in a judicial review application being filed in court to challenge the plans on the grounds that the provincial government had failed to undertake an environmental assessment.

In response to this application, the Ontario government passed the *Rebuilding Ontario Place Act, 2023* (**"ROPA"**), vesting the Ontario Place lands in the Crown and placing the lands under ministerial control. Among other things, ROPA exempted the land from the *Environmental Assessment Act*, the *Ontario Heritage Act*, and the City of Toronto's powers to regulate and prohibit noise under the *City of Toronto Act, 2006*. ROPA also extinguished causes of action and barred proceedings in respect of various activities undertaken in accordance with ROPA.

The applicant challenged ROPA on the grounds that by insulating actions taken in accordance with the legislation from court scrutiny and removing access to the courts, section 17(2) of ROPA violated section 96 of *The Constitution Act, 1867*. As well, the applicant argued

Continued on page 2

that the exemptions contained in ROPA resulted in a "breach of public trust".

The application failed for a number of reasons.

First, the government contended that the applicant lacked standing to bring the proceeding. Affidavit evidence filed in support of the application failed to identify whether the applicant was a legal entity, what its purposes were, or why it was permitted to commence the application. There was no evidence that the applicant's private rights were at stake or that the applicant was specifically affected by ROPA.

The affidavits also contained impermissible legal argument, were replete with inadmissible opinion that the government's plans were "deeply flawed for legal and moral reasons", "shortsighted", and "contrary to the principles of building a shared vision", andraised concerns about the government's alleged lack of consultation and the precedential value of the legislation.

As determined in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, the applicant was obligated to satisfy the court that it had standing. The standing of a party to bring a court proceeding is important to the administration of justice and ensures that the proper parties are before the court.

The application judge concluded that the applicant did not have standing on the grounds that there was insufficient evidence to show that it had a genuine interest in the matter, and that, in any event, the issue was best litigated by a party who had a cause of action which was extinguished by ROPA.

Although this was sufficient to dispose of the application, the court considered the substantive issues raised in the application.

With respect to the alleged breach of section 96 of *The Constitution Act, 1867*, jurisprudence supported the principle that legislation which seeks to remove a court's jurisdiction over matters that go to the core of its jurisdiction would breach section 96. Similarly, legislation that denies access to justice violated section 96.

However, the application judge explained that superior courts do not have limitless jurisdiction and that elected officials can, among other things, extinguish causes of action and enact immunity provisions.

The application judge found that ROPA did not eliminate judicial review, and that the applicant had overstated the effects of ROPA in regard to the immunity provided under section 17(2). General access to the courts was not removed by the legislation and immunity to the Crown was only granted in a single context.

With respect to the doctrine of public trust, the applicant relied heavily on the Supreme Court of Canada decision in *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, wherein the possibility of trust arguments being made in an appropriate case had been left open. However, the application judge explained that this case had been framed by the pleadings and was not a case about public trust.

As well, subsequent to this Supreme Court of Canada decision, the doctrine of public trust had been rejected by the Federal Court and the Federal Court of Appeal.

The applicant submitted that the doctrine of public trust represented an incremental extension of law in Canada, and that Ontario Place was a discrete piece of property, received cultural heritage awards and was publicly owned. However, the application judge was unconvinced that the applicant had established that Her Majesty the King stood in a trust-like relationship with Ontario Place.

In any event, the remedy sought by the applicant raised further problems because even if a doctrine public trust existed, it was not constitutional doctrine and there was no basis for striking the alleged impugned provisions of ROPA. Accordingly, the declaration sought by the applicant was simply a declaration "in the air" and that without a remedy to strike down those provisions, a declaration served no purpose. Based on the decision of *Bryton Capital Corp. GP Ltd. v. CIM Bayview Creek Inc.*, 2023 ONCA 363, the application judge concluded: "The court does not provide declarations that are 'of merely academic importance and [have] no utility'."

Finally, the applicant also sought a brief injunction to stop any activity at Ontario Place for a period of five days following the release of the court's decision. However, this request was rejected because the application raised no serious issue in respect of the public trust argument and there was no circumstance that permitted injunctive relief against the Crown in the face of section 22 of the *Crown Liability and Proceedings Act, 2019*.

There was also no irreparable harm from the decision taking immediate effect, and the balance of convenience did not favour the granting of an injunction.

The key takeaways from this case are the importance of standing, and the fact that the doctrine of public trust remains an elusive part of Canadian law. Moreover, this case demonstrates that courts may not be the best place to resolve issues that centre on political issues. It is arguable that the applicant's loss bolsters the Ontario government's position in regard to the redevelopment of Ontario Place. Political arguments that the government does not have the right to redevelop these lands in accordance with its vision are now back-stopped by a court decision. Accordingly, special interest groups must carefully consider the use of courts when attempting to score political points because unsuccessful court proceedings can back-fire and result in some special interest group being labelled as "busybody" litigants.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** in our dispute resolution group at 416.865.6651 or via email at sthiele@grllp.com.

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