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Rebuilding Ontario Place allowed to proceed

By **Stephen Thiele**

Law360 Canada (August 26, 2024, 11:35 AM EDT) -- Courts play a vital role in maintaining a check and balance on the actions of government. Indeed, courts have made many landmark rulings that have found various actions of government to be unconstitutional or in breach of our *Charter of Rights and Freedoms*.

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Although these cases are an important reminder that our society stands on the bedrock of the rule of law, our justice system has also sometimes been weaponized by special interest groups to challenge and delay pure policy decisions made by a duly elected government. For a special interest group that seeks to use the courts to tackle policy decisions, it is important that it carefully proceed before commencing this kind of litigation. As a first step, the special interest group must ensure that it is properly legally constituted. Furthermore, it must ensure that its arguments are based on cogent evidence. A special interest group that fails to meet these steps will essentially doom its court proceedings to failure.

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This was the result in *Ontario Place Protectors v. His Majesty the King in Right of Ontario*, 2024 ONSC 4194, where a special interest group's application to enjoin the Ontario provincial government from redeveloping the iconic Ontario Place lands along Lakeshore Boulevard in Toronto was dismissed because the special interest group lacked standing and, in any event, did not provide an evidentiary basis to support its contention that s. 17(2) of the *Rebuilding Ontario Place Act, 2023* (ROPA) was unconstitutional or that the government's plans violated the "doctrine of public trust."

Ontario Place was first opened to the public in 1971 as a theme park centred on Ontario themes and other family attractions. It also was used to host music events and concerts. However, after years of fading popularity and use, in 2012 the then-provincial Liberal government closed the venue for redevelopment. But for a decade nothing happened until Progressive Conservative Premier Doug Ford introduced plans to revitalize the land and reopen Ontario Place to the public. But Premier Ford's plans for redevelopment, which included leasing part of the lands for a health and wellness spa and removing trees, stirred political debate and spawned a judicial review application to challenge the

premier's plans on the grounds that his government had failed to undertake an environmental assessment.

The Ontario government then passed the ROPA, vesting the Ontario Place lands in the Crown and placing them under ministerial control.

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. As well, ROPA extinguished causes of action and barred proceedings in respect of various activities undertaken in accordance with ROPA. These exemptions and the extinguishment of the ability to bring certain causes of action against the Crown resulted in the special interest group seeking to have s. 17(2) of ROPA declared invalid for violating s. 96 of *The Constitution Act, 1867* and contending that the exemptions were a "breach of public trust."

The application failed because the applicant did not have standing.

Standing is an important part of our law. Where standing is challenged, the obligation rests on an applicant or plaintiff to demonstrate that it is entitled to bring its case to court. As expressed by the Supreme Court of Canada in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, "… limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases …"

The applicant judge found that the applicant, here, failed to show that it was an incorporated entity, what its purposes were or why it was permitted to commence the application.

The applicant was unable to convince the court that it should be granted public interest standing because it did not prove that it had a genuine interest in the matter or that it was the best party to litigate the issues that were being raised.

The application judge noted that affidavits 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," and simply raised concerns about the government's alleged lack of consultation and the precedential value of the legislation.

While the court's conclusion on standing was enough to dismiss the application, the application judge nevertheless considered the substantive issues raised in the application.

With respect to the alleged breach of s. 96 of *The Constitution Act, 1867*, the application judge accepted that legislation, which seeks to remove a court's jurisdiction over matters that go to the core of its jurisdiction or that denies access to justice would breach or violate s. 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. As well, the application judge noted that ROPA did not eliminate judicial review and that the applicant had overstated the effects of ROPA in regard to the immunity provided under s. 17(2). The application judge found that under ROPA general access to the courts was not removed by the legislation and that immunity to the Crown was only granted in a single context.

Accordingly, this ground of the application also would have failed.

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 public trust arguments being made in an appropriate case had been left open.

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 rejected this ground of the application because the *Canadian Forest Products Ltd.* case was distinguishable from the applicant's case, and the doctrine of public trust had been rejected by the Federal Court and the Federal Court of Appeal.

As well, the application judge was unconvinced that the applicant had established that His 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 a constitutional doctrine and there was no basis for striking the alleged impugned provisions of ROPA. In this regard, the remedy sought by the applicant 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. 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 s. 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.

This case provides important lessons for special interest groups to consider before they commence litigation.

First, it highlights the importance of standing. Under our legal system, individuals and organizations do not have a freestanding substantive right to commence legal proceedings regarding legislation that they find objectionable. The law of standing is more nuanced than simply being about access to justice.

Second, special interest groups cannot rely on the doctrine of public trust to attack government policy decisions because the doctrine remains an elusive part of Canadian law.

Lastly, and most importantly, this case demonstrates that the best place to resolve political issues is in the political arena. In general, courts are reluctant to intervene in purely political issues and debates, and as a result of losing, the applicant may have inadvertently bolstered the position of Premier Ford's government to redevelop Ontario Place as it has envisioned. In this regard, special interest groups must carefully consider the use of courts when attempting to score political points because unsuccessful court proceedings will simply result in some special interest groups being labelled as "busybody" litigants and deflate opposition to matters that may have legitimately lent themselves to vigorous political opposition.

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