

CITATION: Weld v. Ottawa Public Library, 2019 ONSC 5358
DIVISIONAL COURT FILE NO.: DC-18-2401
DATE: 20190916

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Aston, Bale and Favreau JJ.

BETWEEN:)
)
MADELINE WELD AND VALERIE) *Alan Honner*
THOMAS) for the Applicants
)
Applicants)
)
- and -)
)
OTTAWA PUBLIC LIBRARY) *Gabriel Poliquin and Charles Daoust*
) for the Respondent
)
Respondent)
)
) HEARD: September 11, 2019

FAVREAU J.:

Overview

[1] At the beginning of the hearing, we heard submissions from the parties on the issue of whether this matter was properly brought as an application for judicial review. After hearing submissions on this issue, the panel advised the parties that the application was dismissed for reasons to follow. These are the reasons.

[2] On October 27, 2017, Madeline Weld entered into an agreement with the Ottawa Public Library to rent the auditorium at the main branch of the library for the purpose of screening a movie titled "Killing Europe". The movie was to be screened on November 25, 2017.

[3] Before the scheduled screening, the Library received complaints from members of the public regarding the content of the movie. Based on those complaints, senior employees of the Library viewed the trailer for the movie. After viewing the trailer, the CEO of the Library in consultation with the senior management team concluded that the movie was likely to promote hatred and discrimination on the basis of race, ethnic origin and religion, and that it may contain gratuitous sex and violence.

[4] On November 24, 2017, the Library notified Ms. Weld in writing that it had received a number of complaints, and that it was terminating the contract due to the content of the movie. In doing so, the Library relied on the following term in its rental agreement:

The Library will not provide public space, facilities, and/or properties within its jurisdiction to an individual or group that supports or promotes views, ideas or presentations which promote or are likely to promote discrimination, contempt or hatred to any person on the basis of race, national or ethnic origin, color, religion, age, sex, marital status, family status, sexual preference, or disability, gratuitous sex and violence or denigration of the human condition. The Library reserves the right to cancel a contract if any of the above-circumstances arise.

[5] The applicants seek to judicially review the respondent's decision to terminate the room booking on the grounds that the decision breached their entitlement to procedural fairness, violated their section 2(b) *Charter* rights to freedom of expression and was unreasonable.

[6] The respondent raised a preliminary issue as to whether the issues on this application are properly the subject of an application for judicial review.

Applicable legal principles

[7] Section 2(1) of the *Judicial Review Procedures Act*, R.S.O. 1990, c.J.1, sets out this Court's jurisdiction to hear an application for judicial review:

2 (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may [...] grant any relief that the applicant would be entitled to in any one or more of the following:

1. ... [A]n order in the nature of *mandamus*, prohibition or certiorari.
2. ... [A] declaration ... in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

[8] Section 1 of the *Judicial Review Procedures Act* defines "statutory power" as follows:

"statutory power" means a power or right conferred by or under a statute,

...

(b) to exercise a statutory power of decision,

...

(d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party...

[9] Even where the decision at issue is exercised pursuant to a statutory power, the case law has established that judicial review is only available where the decision "is the kind of decision that is reached by public law and therefore a decision to which a public law remedy can be applied": *Setia v. Appleby College*, 2013 ONCA 753, at para. 32.

[10] Recently, in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, at para. 14, the Supreme Court explained the limited reach of public law:

Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature - such as renting premises and hiring staff - and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347 (CanLII), [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (*ibid.*). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

[11] In this case, even if we were to accept that the Ottawa Public Library is a public body, in order to proceed with the application for judicial review, we would have to be satisfied that the specific dispute between the parties has a sufficient public character.

[12] In *Air Canada v. Toronto Port Authority and Porter Airlines Inc.*, 2011 FCA 347, at para. 60, the Federal Court of Appeal listed a number of factors that are relevant to determining whether a dispute falls within the scope of public law such that it can be subject to judicial review:

- a. *The character of the matter for which review is sought.* Is it a private commercial matter, or is it of broader import to members of the public?...
- b. *The nature of the decision maker and its responsibilities.* Is the decision-maker public in nature, such as a Crown agent or statutorily-recognized administrative body, and charged with public responsibilities? Is the matter under review closely related to those responsibilities?
- c. *The extent to which a decision is founded in and shaped by law as opposed to private discretion...*
- d. *The body's relationship to other statutory schemes or other parts of government...*
- e. *The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity...*
- f. *The suitability of public law remedies...*
- g. *The existence of compulsory power...*
- h. *An "exceptional" category of cases where the conduct has attained a serious public dimension...*

[13] The Court in *Air Canada*, at para. 60, also noted that "[w]hether or not any one factor or a combination of particular factors tips the balance and makes a matter 'public' depends on the facts of the case and the overall impression registered upon the Court".

[14] The Court of Appeal and this Court have adopted the *Air Canada* factors in determining whether a dispute has a sufficient public character to warrant judicial review: *Setia*, at paras. 33 and 34; *West Toronto United Football Club v. Ontario Soccer Assn.*, 2014 ONSC 5881 (Div. Ct.), at para. 21; and *Sangar v. Ontario (Private Career Colleges Superintendent)*, 2018 ONSC 673 (Div. Ct.), at 42.

Analysis

[15] In this case, weighing the factors identified in *Air Canada*, we find on balance that the Ottawa Public Library was not acting in a public capacity when it cancelled its agreement with Ms. Weld:

- a. The transaction between Ms. Weld and the Library involved a contract for the rental of an auditorium to screen a movie. This was a private event for which members of the public would only be able to attend if they bought a ticket from Ms. Weld or the organization to which she belongs.
- b. The Ottawa Public Library is governed by the *Public Libraries Act*, R.S.O. 1990, c. P.44. Section 23(1) of the Act provides that public libraries are not to charge a fee for admission and use in the library of the library's materials. Section 23(2) requires public libraries to allow members of the public to borrow circulating materials and review reference materials free of charge. Section 23(3) of the Act sets out the services for which public libraries can charge members of the public, which include at subsection (b) fees for "the use of the parts of a building *that are not being used for public library purposes*" (emphasis added). This makes clear that, while the Library is authorized to rent space to the public for non-library purposes, its core functions are to make books and other materials available to the public, and not to make space available to the public for screening films or other private events.
- c. The Library's decision to cancel its agreement with Ms. Weld was not based on any legal obligation or on the exercise of a statutory power. Rather, the decision was the exercise of discretion in accordance with the terms of the agreement.
- d. Some of the library's trustees are also Ottawa City councillors. However, the decision was not made by the Board of Trustees. In any event, in our view, this oversight by the municipal government is not sufficient to give a public character to the decision.
- e. Public law remedies are not suitable to this dispute. The applicants seek an order quashing the decision and an order in *mandamus* requiring the Library to honour its agreement. *Mandamus* is only appropriate where a public official has a statutory or public duty to do a specific thing that he or she has not done. The Ottawa Public Library has no obligation to make its extraneous space available or to enter into a contract with any particular person. Publicizing the availability of rooms for the community and the

general public does not imply any legal obligation on the Board or confer any right on the applicants or any other members of the public. If it improperly breached its contract, the Library may be subject to private law remedies, or if it discriminated on prohibited grounds it may be subject to the *Ontario Human Rights Code*. But public law remedies are not appropriate for this contractual dispute.

- f. The Ottawa Public Library has no power or authority over the applicants. They are free to seek out another venue for screening the movie. In fact, the applicant, Valerie Thomas, was able to see the movie in another location in another city.
- g. This case does not fall within the exceptional category of cases identified by the Federal Court of Appeal in *Air Canada*. It does not have a "very serious, exceptional effect on the rights or interests of a broad segment of the public".

[16] During the hearing, the applicants' counsel argued that the respondent's decision to cancel the booking was the exercise of a statutory power because it was made pursuant to the Library's power under section 23(3)(c) to charge fees for renting space. However, that provision is permissive, and it simply gives the Library the authority to charge a fee for the use of parts of the building. It does not require libraries to rent out their space nor does it prescribe the criteria libraries are to follow in deciding how and to whom they rent space. Therefore, while the power to charge a fee derives from a statute, the decision to rent or not to rent space to a particular group or individual or for a specific purpose is not the exercise of a statutory power.

[17] The applicants' counsel also relied on the Library's policy dealing with room bookings to argue that the decision to cancel the booking was an exercise of statutory power. Regardless of the content of the policy, it is not a statute or regulation, nor was it made pursuant to a statute or regulation.

[18] Finally, the applicants' counsel argued that the Ottawa Public Library is subject to the *Charter*, and therefore its decisions are reviewable by this Court. However, the preliminary issue on this application is not whether the Library is subject to the *Charter* but whether the subject matter of the application is properly brought as an application for judicial review. If the decision was amenable to judicial review, then the next question would be the application of the *Charter*. However, given our conclusion that the decision at issue was not made pursuant to the exercise of a statutory power and that it does not have a public character, the application of the *Charter* does not arise.

[19] Accordingly, on balance, we find that the issues raised on this application are not of a sufficient public character to warrant review by way of an application for judicial review.

Conclusion

[20] The application is therefore dismissed.

[21] At the conclusion of the hearing, we asked the parties for their respective positions on costs. Counsel for the applicants requested an opportunity to make written submissions. The Court granted the request and set a schedule for the exchange of submissions. The respondents'

submissions are due within 10 days of the hearing date, and the applicants' submissions are due 10 days thereafter. A separate decision dealing with costs will be issued once the panel has received and considered the parties' submissions.

C. Favreau J.

FAVREAU J.

I agree

A. Aston J.

ASTON J.

I agree

S. Balle J.

BALE J.

RELEASED: SEP 16 2019

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B E T W E E N :

MADELINE WELD AND VALERIE THOMAS
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– and –

OTTAWA PUBLIC LIBRARY
Respondent

REASONS FOR JUDGMENT

FAVREAU J.

RELEASED: September 16, 2019