SUPREME COURT OF YUKON

Citation: *Community Cannabis Inc v Cannabis Licensing Board*, 2023 YKSC 57

Date: 20231010
S.C. No. 22-AP017
Registry: Whitehorse

BETWEEN:

COMMUNITY CANNABIS INC.

APPLICANT

AND

CANNABIS LICENSING BOARD

RESPONDENT

Before Justice K. Wenckebach

Counsel for the Applicant — Vincent Larochelle

Counsel for the Respondent — Gary Whittle

REASONS FOR DECISION

OVERVIEW

[1] The applicant, Community Cannabis Inc., applied for a licence to sell cannabis. Upon receipt of the application, the Cannabis Licensing Board, as required by the *Cannabis Control and Regulation Act*, SY 2018, c 4 (the "*Act*"), provided notice to the public of the application.

[2] Several objectors responded to the notice. Some opposed the application on the basis that the store would be located within 150 metres of two schools run by Yukon Montessori Society. The first school is a preschool and kindergarten called "The Casa".

At the time of the application, Montessori was preparing to open the second school (the "New Montessori School"). The objections were raised because s. 11 of the *Cannabis Control and Regulation General Regulation*, OIC 2018/184 (the "*Regulation*") requires cannabis retailers to be located more than 150 metres away from an "elementary school" or a "secondary school".

[3] The CLB held a hearing to consider Community Cannabis' application. Community Cannabis, a representative from Montessori, and other members of the public attended the hearing.

[4] At the hearing, Community Cannabis took the position that the Montessori schools were not schools within the meaning of the *Act*; thus, Community Cannabis' retail location did not violate the *Act*.

[5] The CLB determined that the Montessori schools were schools for the purposes of the *Act* and rejected Community Cannabis' application for a licence.

[6] Community Cannabis has brought a judicial review challenging the CLB's decision. It seeks that the Court quash the CLB's decision and order it to issue the requested licence forthwith. The CLB opposes the judicial review application.

[7] For the reasons set out below, I deny the application for judicial review.

ISSUES

[8] The issues that have been raised in this judicial review are:

(A) Should the Court decide arguments that are being raised for the first time on judicial review?

(B) What is the standard of review?

(C) Did the CLB err in its decision?

ANALYSIS

(A) Should the Court decide arguments that are being raised for the first time on judicial review?

[9] I conclude that I should not decide arguments that are being advanced for the first time at the judicial review hearing.

[10] At the licensing hearing, Community Cannabis took the position that because the Montessori schools are run by a society or independent business and are not staffed or overseen by the Yukon government, they are not schools within the meaning of the *Act*.

[11] In its judicial review application, Community Cannabis abandoned this argument. Instead, it submits that the New Montessori School is not an elementary school or secondary school within the meaning of the *Act* for two reasons: first, because it had not yet opened when the licensing hearing was held; and second, because, once it opened, it would be operating in violation of the City of Whitehorse Zoning Bylaw 2012-20 (the "Zoning Bylaw"). Because it would be in violation of the Zoning Bylaw, it would also be in violation of the *Education Act*, RSY 2002, c 61, which requires schools to be in compliance with all applicable legislation. It also submits that The Casa is not an elementary school pursuant to the *Act*, because it is a preschool. If it can be considered to be an elementary school, however, then it would be operating contrary to legislation, again, because it would be in contravention of the Zoning Bylaw.

[12] None of these arguments were raised at the CLB hearing. Before examining the substance of the submissions, therefore, I will address whether I should make a decision on these issues at all.

Raising New Issues - Legal Principles

[13] The court has the discretion to refuse to consider an issue raised for the first time on judicial review. The Supreme Court of Canada has stated that, generally, the court should refuse to exercise its discretion in favour of the applicant if the applicant could have presented the issue before the initial decision-maker but did not (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras. 22-23).

[14] There are a number of reasons for this general rule. First, where the legislature has chosen an administrative tribunal to decide an issue, the courts should respect this legislative choice. The court shows this respect by permitting the tribunal to first address the issue and make a decision. This is especially true where the issue falls within the tribunal's specialized area of expertise (at paras. 24-25).

[15] In addition, proceeding for the first time at judicial review may prejudice the opposing party (at para. 26).

[16] Finally, a judicial review is conducted on the evidentiary record created at the tribunal level. A court sitting on review may not have adequate evidence upon which to make a decision (at para. 26).

What Constitutes a New Issue

[17] What constitutes a new issue was also considered by the Supreme Court of Canada in *R v Mian*, 2014 SCC 54. It states, at para. 30:

> An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties …

[18] Although *Mian* occurred in the context of raising a new issue on appeal, the Supreme Court's decision has also been applied to judicial review applications (*Singh v Canada (Minister of Citizenship and Immigration)*, 2023 FC 875).

[19] This principle applies equally to new arguments, even when the general topic was raised at the tribunal level (*Singh* at paras. 41-43). Where the argument raises new facts and legal analysis, the issue will be found to be a new issue.

Is Community Cannabis Raising New Issues at Judicial Review?

[20] At the licensing hearing, Community Cannabis raised the question of whether the Montessori schools were schools under the *Act*, but the factual and legal bases upon which its submissions rested are different than the issues raised now. At the licensing hearing Community Cannabis' position was that the Montessori schools are not schools because they are privately run. The facts relevant to the issue are about the status of the owner and operator of the school. The legal analysis concerns whether a privately run school is captured by the legislation.

[21] The facts raised at judicial review concern where the schools are located, when the New Montessori School would be opened, and, likely, the ages of the children and the curriculum taught at The Casa. The legal analysis includes a consideration of bylaws, if a school can be captured by the legislation if it is not yet opened and what factors distinguish an elementary school from a daycare or preschool. Community Cannabis is relying on different facts and argument than it did at the CLB and is therefore raising new issues.

Should Community Cannabis be Permitted to Raise the New Issues?

[22] The factors used to determine whether I should decide these new issues are: whether the questions at issue are within the CLB's expertise; the extent of the evidentiary record; and whether all perspectives are fully presented to the Court.

[23] I will first address whether the new issues fall within the CLB's expertise. The question of whether an institution is an "elementary school" or a "secondary school" arises because s. 11 of the *Regulations* requires cannabis retailers to be more than 150 metres from elementary schools and secondary schools. This provision concerns the public interest in limiting young people's exposure to cannabis. The legislature has entrusted the CLB to define the terms "elementary school" and "secondary school" so as to best address this public interest. This issue falls squarely within the CLB's area of expertise.

[24] Counsel to Community Cannabis submits that the onus was on the CLB to consider, on its own motion, the issues Community Cannabis is now raising. Counsel to Community Cannabis submits that not only should the CLB have canvassed these issues, but that it was incumbent on the CLB to investigate whether the Montessori schools were operating in accordance with legislation. Following this logic, then, the Court should step in where the tribunal has failed to fulfil its role.

[25] I am not persuaded by this argument. It is unreasonable to require the CLB to inquire about whether schools are operating in accordance with the various laws that apply to them. The CLB is entitled to presume that schools are operating in compliance with legislation.

[26] Moreover, it would be unworkable to place such an onus on the CLB. In responding to a similar argument in the refugee context, the Federal Court stated at para. 23 in *Dhillon v Canada (Minister of Citizenship and Immigration)*, 2015 FC 321, citing *Guajardo-Espinoza v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 797 (FCA):

> …the Refugee Division cannot be faulted for not deciding an issue that had not been argued and that did not emerge perceptibly from the evidence presented as a whole … Saying the contrary would lead to a real hide-and-seek or guessing game and oblige the Refugee Division to undertake interminable investigations to eliminate reasons that did not apply in any case, that no one had raised and that the evidence did not support in any way, to say nothing of frivolous and pointless appeals that would certainly follow.

This is equally true of licensing hearings before the CLB.

[27] Thus, the question of whether the Montessori schools are elementary schools or secondary schools pursuant to s. 11 is best answered by the CLB and should be addressed by it first.

[28] Additionally, there is insufficient evidence upon which to decide the issues. The only information provided at the licensing hearing about the operations of The Casa is that it combines a preschool and kindergarten. No evidence was provided about zoning. The evidence provided about when the New Montessori School was to open was also imprecise. The Court does not have the necessary facts upon which to decide the issues.

[29] Not only is there insufficient evidence, but the party best placed to respond to the issues raised cannot do so. It is Montessori that can provide information and submissions about the education they provide at The Casa and about any zoning

issues. However, Montessori is a third party to the court proceedings and its perspective is missing.

[30] Before leaving this question, I would also like to address Community Cannabis' argument that Montessori is violating zoning bylaws. It submits that the Montessori schools are only permitted to operate in zones designated as "Public Works". The Montessori schools, on the other hand, are located in zones where schools are not permitted. Community Cannabis argues that the Montessori schools are therefore in contravention of the Zoning Bylaw, as well as the *Education Act*, which requires schools to comply with all legislation. Community Cannabis concludes by stating that Montessori is operating "illegal" or "rogue" schools.

[31] This is not, however, a complete analysis. Thus, for example, Montessori is renting the spaces it uses for schools. It is not clear to me whether it is the owner of the building, or the lessee, who must ensure compliance with bylaws. If it is the owner who must ensure compliance, then, arguably, Montessori is not in violation of the Zoning Bylaw. It is also possible that Montessori has successfully applied to have the buildings re-zoned. Other questions, as well, are unaddressed.

[32] Allegations of fraud and dishonesty are serious. They can damage the reputation of those accused of deception. Similarly, accusing an institution of operating a "rogue" or "illegal" school can also harm the institution. Parties should be careful to bring such allegations only when they can support them fully. This is especially true when the party about whom the allegations are made cannot respond. In this case, Community Cannabis has not fully supported its position.

[33] I therefore conclude that I will not decide the new issues Community Cannabis has raised on judicial review.

(B) What is the standard of review?

[34] Counsel to the CLB submits that the standard of review is reasonableness. Although counsel to Community Cannabis does not dispute that the standard of review is reasonableness, he also suggests that the Court may, at the hearing of the application, determine that the standard of correctness applies. However, the submission that the standard of review is correctness is tied to Community Cannabis' argument that the Montessori schools are not compliant with legislation. As I am not deciding that issue, the argument for a standard of review of correctness also falls away. The standard of review is reasonableness.

(C) Did the CLB err in its decision?

[35] I conclude that the CLB's decision is reasonable.

[36] A tribunal's decision is reasonable if it is based on internally coherent reasoning and is justified in light of the legal and factual constraints that bear on the decision. In determining whether a decision is reasonable, the reviewing court will look at the justification, transparency, and intelligibility of the decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at para. 99).

[37] Turning to the facts in this matter, in its reasons the CLB first provides the definition of the word "school" as set out in legislation, dictionaries, and case law. It then states at para. 56 of its decision:

> The Board finds that the Montessori Borealis [Yukon Montessori Society] is [a] private school; that it operates under the Yukon's Aurora Virtual School; that it provides instruction to approximately 60 students between pre-school

> and Grade 7; and, while the school follows Montessori pedagogy and educational approaches, it conforms to and meets the requirements of the British Columbia curriculum.

[38] The CLB then refers to the definition of "school" under the *Education Act* and the case law, and states that private schools fall within the definition. Although it does not specifically identify the principles from the common law and legislation it relies upon, the factors it uses to conclude the Montessori schools are elementary schools or secondary schools are drawn from the case law and the legislative definitions it cites.

[39] Counsel to Community Cannabis submits that the CLB's decision is unreasonable, in part, because it does not define what an "elementary school" or a "secondary school" is. It is true that the CLB does not provide a comprehensive definition of the terms "elementary school" or "secondary school". However, it did not need to do so. A tribunal's decision is based on the facts and arguments presented to it (*Vavilov* at paras. 126-127). Here, the issue was whether a private school fell within the legislative definition of "elementary school" or "secondary school". The CLB did not need to provide a fulsome definition of the terms "elementary school" or "secondary school" to answer that question.

[40] Counsel to Community Cannabis also argues that the CLB erred because it used the word "school" rather than "elementary school" and "secondary school", which are the phrases used in the *Act*. The legislature's choice of language is important. I agree with counsel that the CLB should be careful to use correct terminology, because there will be times that the legislature's use of "primary" and "secondary" to modify the word "school" will be pertinent in determining the meaning of the phrases. On the facts before the CLB in this instance, however, it was not pertinent. The CLB's reference to "school"

rather than “elementary school” and “secondary school”, therefore, did not lead it into error.

[41] It is possible, from the CLB’s reasons, to follow its chain of reasoning; and its reasons are internally coherent. I find the CLB’s decision is reasonable.

CONCLUSION

[42] I dismiss Community Cannabis’ application for judicial review.

[43] The CLB stated at the hearing that it is seeking costs. A hearing on costs can be set down if the parties are unable to agree on costs.

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WENCKEBACH J.