SUPREME COURT OF YUKON

Citation: *Community Cannabis Inc. v Cannabis Licensing Board*, 2024 YKSC 60

Date: 20241105
S.C. No.22-AP017
Registry: Whitehorse

BETWEEN:

COMMUNITY CANNABIS INC.

PETITIONER

AND

CANNABIS LICENSING BOARD

RESPONDENT

Before Justice K. Wenckebach

Agent for the Petitioner — Jordan Stackhouse

Counsel for the Respondent — Gary W. Whittle

REASONS FOR DECISION

OVERVIEW

[1] The petitioner, Community Cannabis Inc., brought an application for judicial review of the decision of the respondent, the Cannabis Licensing Board, to deny Community Cannabis' application for a licence to sell cannabis. I denied the application for judicial review (*Community Cannabis Inc v Cannabis Licensing Board*, 2023 YKSC 57).

[2] The Board now seeks special costs, with increased or party-and-party costs in the alternative, arguing that costs are warranted because Community Cannabis engaged in misconduct during the litigation.

[3] Some of the alleged misconduct did not directly affect the Board but was directed at two other parties: the Yukon Liquor Corporation and the Yukon Montessori School. These parties participated in Community Cannabis' licensing hearing before the Board. The YLC was involved because, under the legislation, the president of the YLC reviews applications for licences to sell cannabis and forwards them to the Board if they are complete. Montessori was involved because it opposed the issuance of the licence, stating that it operates a school within 150 metres of the proposed location from which Community Cannabis would be selling cannabis (the legislation does not permit cannabis retailers to be located within 150 metres of an elementary or secondary school).

[4] Both parties were served Community Cannabis' application for judicial review, but did not seek to take part in the judicial review.

FINDINGS

[5] For the reasons provided below, I conclude that costs should not be awarded against Community Cannabis.

ISSUES

[6] I will consider the issues of costs based on misconduct against YLC and Montessori separately from those against the Board. The issues, therefore, are:

A. Should costs be payable for the conduct that affected the YLC and Montessori?

B. Is Community Cannabis' other conduct reprehensible and meriting a costs award?

LAW

Costs Awarded to Administrative Decision-Makers

[7] Generally, an administrative decision-maker is not entitled to an award of costs when their decisions are challenged in court. However, costs may be awarded where the petitioner in the application for judicial review engages in misconduct (*462284 BC Ltd v Liquor Control and Licensing Branch*, 2019 BCSC 1052 at para. 9). The court has found that costs were warranted in cases where the petitioner brought a non-meritorious claim; and when they collaterally attacked the legislation and independence or competence of the adjudicator (paras. 9-11).

Special Costs

[8] Under the Supreme Court of Yukon *Rules of Court (*the *"Rules of Court")*, special costs may be awarded for "reprehensible conduct" warranting rebuke (*Brosseuk v Aurora Mines Inc*, 2008 YKSC 18 at para. 24). In *Mayer v Osborne Contracting Ltd*, 2011 BCSC 914 ("*Mayer*"), the court, at para. 11, listed examples of reprehensible conduct:

> (a) where a party pursues a meritless claim and is reckless with regard to the truth;
>
> (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
>
> (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
>
> (d) where a party made the resolution of an issue far more difficult than it should have been;
>
> (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of

> merit in order to impose a financial burden on the opposing party;
>
> (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
>
> (g) where a party brings a proceeding for an improper motive;
>
> (h) where a party maintains unfounded allegations of fraud or dishonesty; and
>
> (i) where a party pursues claims frivolously or without foundation.

[9] Allegations of fraud and dishonesty may attract special costs because they are potentially very damaging to the party against whom the allegation is made (*Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 ("*Open Window Bakery")* at para. 26). Special costs may be awarded where allegations of fraud and dishonesty were made only on belief or speculation, or where the party has access to information permitting the conclusion that the party against whom the allegations were made was not acting dishonestly or fraudulently (*Mayer* at para. 17; *Open Window Bakery* at para. 26).

[10] At the same time, parties should not be dissuaded from alleging fraud or dishonesty where warranted. Because the award of special costs can have a chilling effect on litigants, courts should only order special costs when the "… examination of all circumstances show the allegations of fraud were unwarranted and completely unfounded" (*Chaplin v Sun Life Assurance Co of Canada*, 2004 BCSC 116 at para 28).

ANALYSIS

A. Should costs be payable for the conduct that affected the YLC and Montessori?

[11] With regard to the YLC, the Board argues that Community Cannabis misrepresented facts or YLC's position to the Court. With regard to Montessori, the Board submits that Community Cannabis inappropriately alleged that Montessori acted fraudulently or dishonestly.

[12] I conclude that costs should not be payable for Community Cannabis' conduct that affected the YLC and Montessori.

Facts

Misrepresentation of Facts or YLC's Position

[13] The Board's argument that Community Cannabis misrepresented facts or YLC's position is based on emails between Community Cannabis' counsel and YLC's counsel. Community Cannabis' counsel, in his email to YLC's counsel, stated that YLC had "greenlighted" Community Cannabis' application. In response, YLC's counsel stated that the YLC did not "greenlight" Community Cannabis' application. Additionally, in reference to Community Cannabis' written argument, YLC's counsel noted that the YLC did not state the application was compliant with the *Cannabis Control and Regulation Act*, SY 2018, c 4. YLC's counsel then clarified that the YLC advised the Board that the premises fell outside the 150-metre school buffer zone; and the YLC deemed the application complete.

[14] These emails were exchanged before the oral hearing took place. At the hearing, Community Cannabis' counsel submitted that Community Cannabis got the "green light" from YLC and that the YLC essentially indicated that Community Cannabis was "good

to go". Counsel did not, however, tell the Court that the YLC disagreed with this characterization, nor did he provide the court with YLC's position.

Allegations that Montessori Acted Dishonestly

[15] At the judicial review application, Community Cannabis argued that Montessori was non-compliant with the requirement that schools be registered with the Department of Education; and the location of its school was contrary to zoning by-laws. It alleged that Montessori was operating a "rogue" and "illegal" school.

[16] In my decision, I noted Community Cannabis' use of the words "illegal" and "rogue", and stated that such allegations should be made only when they can be fully supported. I also stated that, in the case at bar, Community Cannabis had not fully supported its position.

Analysis

[17] My analysis considers three factors: first, the Board was not, itself, directly affected by the alleged misconduct; second, the parties who may have been directly affected are not taking part in the application for costs; third, the party seeking the costs award is the administrative decision-maker whose decision was under review.

The Board was not Directly Affected by Community Cannabis' Conduct

[18] Community Cannabis' impugned conduct could potentially have an impact on Montessori and the YLC. Its submission that Montessori is operating a rogue and illegal school could unfairly tarnish Montessori's reputation as an education provider. Its alleged failure to explain YLC's position on the significance of deeming an application complete could skew the Court's understanding of how YLC views its role. This conduct would not, however, have an effect on the Board. In written argument on the application

for judicial review, moreover, the Board did not respond substantively to these points, other than to submit that Community Cannabis acted reprehensibly in stating that Montessori was operating a rogue school.

[19] Thus, if costs were to be awarded because of Community Cannabis' conduct towards the YLC and Montessori, the Board would receive compensation without having been affected by Community Cannabis' conduct. It is questionable, then, whether the Board should be entitled to costs on this basis.

[20] This is not to say that the moving party for special costs must always be the direct subject of the misconduct. The principle purposes for awarding special costs against a party that has acted reprehensibly are to punish them, and to deter other litigants from behaving in a similar manner (*Smithies Holdings Inc v RCV Holdings Ltd*, 2017 BCCA 177 at para. 128). Because the focus of a special costs order is on upholding the principles of justice, the court does not generally require the moving party to demonstrate that it suffered prejudice because of the other party's conduct.

[21] At the same time, in the circumstances of this case, it would be artificial not to consider that the Board will benefit from the costs award although it has not been affected by Community Cannabis' conduct. Therefore, I have taken into account that Community Cannabis' behaviour did not have a direct effect on the Board.

Participation of Parties Directly Affected

[22] It is also challenging to assess the merits of the application for costs without the participation of the other parties. This is especially true with regard to the argument that Community Cannabis improperly accused Montessori of dishonesty.

[23] In assessing whether special costs should be awarded in matters where a party alleges fraud or dishonesty, the court must determine whether there is any merit to the allegation. In the case at bar, there were some questions about Montessori's registration with the Department of Education, and its compliance with zoning by-laws. There is also some evidence, presented by Montessori at the licensing hearing, that it is registered with the Department of Education through another school. The information I have is not enough upon which to conclude how easy or difficult it would be to answer the questions about Montessori's registration with the Department of Education and compliance with zoning by-laws, or whether there was a sufficient basis to argue that Montessori was operating a "rogue" school. It is likely that Montessori would be best placed to answer these questions.

[24] In the application for special costs Community Cannabis argued that, by making these allegations, it was not alleging that Montessori was acting fraudulently. In making this submission, it addressed whether using the word "illegal" implied that Montessori was acting fraudulently. It did not, however, discuss the implications of using the word "rogue". It is not the use of the word "illegal" by itself that is problematic. It is the fact that Community Cannabis argued that Montessori was operating both a rogue and illegal school that was questionable. When rogue is used as an adjective, it is defined as "[w]ithout control or discipline; behaving abnormally or dangerously; erratic, unpredictable" (*Oxford English Dictionary*, s.v. "rogue (*adj.*), sense 2," March 2024). Stating Montessori operates a rogue and illegal school is precisely the kind of allegation that a party should make only where there is a foundation to do so.

[25] Ultimately, however, without Montessori's involvement, the Court's analysis about whether Community Cannabis' allegations had merit would be incomplete.

The Party Seeking Costs is the Administrative Decision-maker

[26] I also conclude that, in seeking special costs, the Board has overstepped its role in the application for judicial review.

[27] An administrative decision-maker does not automatically have full standing in applications for judicial review. This is because issues may arise when a decision-maker participates in judicial reviews of its own decision. One concern is about the decision-maker's impartiality, as an administrative decision-maker who actively and aggressively participates in a judicial review may have its impartiality called into question (*Ontario (Energy Board) v Ontario Power Generation*, 2015 SCC 44 ("*Ontario Energy*") at para. 41). Thus, the court has discretion in determining the extent and nature of the submissions an administrative decision-maker can make in an application for judicial review (at para. 57).

[28] The *Rules of Court* also speak to the standing granted to administrative decision-makers; and they are liberal in providing standing to them (*Western Copper Corp v Yukon Water Board*, 2010 YKSC 61 at paras. 32-36). At the same time, the *Rules of Court* do not restrict the Court's discretion when deciding standing. In applying the *Rules of Court* on standing to administrative decision-makers, the court's analysis will be animated by the considerations set out in *Ontario Energy*.

[29] The extent of the administrative decision-maker's standing is not the only factor that determines the kinds of submissions an administrative decision-maker can make in applications for judicial review. Even where an administrative decision-maker is given

full standing, it must still construct and present its arguments to ensure there are no concerns that the administrative decision-maker is partial. Thus, for example, in *Ontario Energy* the Board submitted that if it were to adopt the petitioner's methodology on an issue, the Board's ultimate decision "…would in all likelihood not change…" (para. 72). The Supreme Court of Canada noted this argument and stated: "…This type of statement may, if carried too far, raise concerns about the principle of impartiality such that a court would be justified in exercising its discretion to limit tribunal standing so as to safeguard this principle" (at para. 72).

[30] In the case at bar, the Board's standing was not discussed. As there was no other party to respond to the judicial review application, the application would not have been argued fully without the Board's involvement. The Board thus had full standing. The task then, for the Board, was to provide fulsome submissions while at the same time respecting the limits on the arguments it could make. In my opinion, the Board's submissions that special costs should be awarded because of Community Cannabis' conduct against Montessori and the YLC went beyond those limits.

[31] In coming to this conclusion, I am not finding that the Board has impugned its impartiality. Instead, I have determined that it would not be proper to determine this issue.

[32] Taking all the factors into consideration, costs should not be awarded to the Board because of Community Cannabis' conduct toward Montessori and the YLC.

B. Is Community Cannabis' other conduct reprehensible and meriting a costs award?

[33] The Board also alleges that special costs should be awarded because Community Cannabis made comments and submissions that were impermissibly

disparaging to the Board and misrepresented case law. I conclude, however, that Community Cannabis did not engage in reprehensible conduct.

[34] Community Cannabis' comments and submissions, which the Board argues were disparaging are as follows:

- During the hearing, Community Cannabis' counsel and I tried to locate a case in the materials. When I did, I stated that it was in the Board's Book of Authorities. Counsel to Community Cannabis replied: "I have a constant concern for the environment". The Board submits that Community Cannabis implied the Board is not concerned with the environment;
- Community Cannabis' counsel stated during the hearing that the Board's counsel mischaracterized his submissions and was "scoffing" while Community Cannabis' counsel made his arguments;
- Community Counsel argued that the Board interpreted and applied its statute in a fashion that countenances illegal activity; and
- Community Cannabis' counsel stated there was no order amongst the speakers during the licensing hearing before the Board.

[35] The Board also takes issue with Community Cannabis' submission that the case *Dunsmuir* is no longer relevant, stating that it is an irresponsible and misleading submission.

[36] I will address Community Cannabis' first two comments separately. I will then consider Community Cannabis' other two comments together.

[37] The comment about the environment was an off-hand, unremarkable statement. There is no issue with it.

[38] There is also no problem with counsel's submission that the Board's counsel mischaracterized his argument. This is a not uncommon submission. When it is made, opposing counsel is also free to clarify their characterization of the argument. Similarly, there are times where counsel will complain about another counsel's reactions during submissions. Even if mistaken, this does not arise to the level of reprehensible conduct.

[39] Community Cannabis' submissions about the Board's decision and process are also unproblematic. Moreover, these were arguments about the Board's reasoning and procedure. It is a fundamental feature of our justice system that litigants may question, disagree with and even attack the merits of a decision-maker's decision. It is not misconduct to make arguments that are strongly worded.

[40] Finally, I turn to Community Cannabis' submissions about the continued relevance of *Dunsmuir*. This was a legal submission, with which counsel to the Board disagreed, nothing more.

Conclusion

[41] I therefore deny the Board's application for costs.

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WENCKEBACH J.