COURT OF APPEAL FOR ONTARIO

CITATION: 2682283 Ontario Ltd (Volcano Café and Lounge) v. Durham (Regional Municipality), 2024 ONCA 132
DATE: 20240223
DOCKET: COA-23-CV-0341

Gillese and Copeland JJ.A. and Wilton-Siegel J. (*ad hoc*)

BETWEEN

2682283 Ontario Ltd o/a Volcano Café and Lounge

Applicant (Appellant)

and

The Regional Municipality of Durham

Respondent (Respondent)

Ryan Zigler, for the appellant

Sylvain Rouleau and Chantal deSereville, for the respondent

Heard: February 5, 2024

On appeal from the order of Justice Howard Leibovich of the Superior Court of Justice, dated February 13, 2023, reported at 2023 ONSC 993.

Copeland J.A.:

[1] The appellant appeals the order of the application judge dismissing its application to quash a municipal by-law passed by the respondent, the Regional Municipality of Durham (the "Region").

[2] For the reasons that follow, I would dismiss the appeal.

Factual background

[3] In 2019, the Health Protection Division of the Region recommended the enactment of a new smoking and vaping by-law. Smoking By-Law No. 28-2019 (the "by-law") was passed by the Regional Council on April 24, 2019. The Region subsequently received the consent of a majority of its lower-tier municipalities representing the majority of electors in the Region, as required by s. 115(5) of the *Municipal Act, 2001*, S.O. 2001, c. 25 (the "*Municipal Act*"). The last consent was obtained on June 24, 2019, on which date the by-law came into effect.

[4] The by-law contains various anti-smoking and anti-vaping prohibitions. The prohibitions with the most direct impact on the appellant are the prohibitions on: (i) smoking in or within a 9-metre radius of the entrance of listed public spaces, including casinos, bowling alleys, billiard halls, and hookah and vape lounges; and, (ii) the prohibition on smoking in an enclosed workplace. "Smoke or smoking" is defined in the by-law as including, but not limited to, "the carrying or holding of a lighted cigar, cigarette, pipe, water pipes, hookahs, medicinal cannabis, cannabis, or any other lighted or heated smoking product".

[5] The appellant opened a hookah lounge on February 21, 2020 – after the by-law came into effect. The Region received numerous complaints that the appellant was violating the by-law. Compliance officers attended the appellant's premises on multiple occasions and saw evidence that the by-law was being breached. On two occasions, summonses for contravention of the by-law were served, pursuant to the *Provincial Offences Act*, R.S.O. 1990, P.33 (the "*POA*"). In addition, on two occasions, closure and other compliance orders were issued, pursuant to the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7.

[6] The appellant brought an application seeking to quash the by-law, pursuant to s. 273 of the *Municipal Act*. In the alternative, the appellant sought a declaration that the prohibition against the use of hookahs was *ultra vires* on the basis that it was a disguised attempt to regulate business. The appellant also argued that the by-law was illegal because changes were made to Schedule A to the by-law ("Schedule A") after it was passed. Schedule A addresses set fines for offences under the by-law.

The Decision of the application judge

[7] The application judge dismissed the application. He found that the application to quash the by-law pursuant to s. 273 of the *Municipal Act* was statute barred by the limitation period of one-year after the passage of a by-law set out in s. 273(5). However, relying on this court's decision in *Foley v. St. Mary's (Town)*,

2016 ONCA 528, the application judge held that the application for declaratory relief was not subject to the one-year limitation period under the *Municipal Act*, and considered the claim on the merits.

[8] The application judge found that the by-law is valid and *intra vires* the Region's authority to legislate under the *Municipal Act*. Its purpose is to protect public health and safety from the risks of smoking, a purpose authorized under the *Municipal Act*. He rejected the appellant's argument that the by-law was a disguised attempt to regulate business.

[9] The application judge found that the changes to Schedule A after the by-law's enactment do not affect the validity of the by-law. Rather, the changes result from the procedure to establish set fines under s. 91.1(2) of the *POA*, which vests the authority to establish set fines for by-law offences in the local Regional Senior Justice ("RSJ") of the Ontario Court of Justice ("OCJ"). The application judge accepted that the Region is a sophisticated municipality that enacts by-laws on a routine basis and found that there was no basis in the record to conclude that the Regional Council was not aware that Schedule A would be altered by the local RSJ exercising her authority to establish set fines after the passage of the by-law.

The Positions of the parties

[10] The appellant no longer argues the by-law is *ultra vires* the Region's authority because it was enacted for an improper purpose. The appellant accepts

that the by-law has a valid public health purpose. However, the appellant maintains that changes made to Schedule A after the by-law was passed by Regional Council and consented to by a majority of the lower-tier municipalities had the effect of amending the by-law, thereby invalidating it.

[11] The appellant further argues that, if this court accepts that the changes to Schedule A were improper, s. 10.1 of the by-law and Schedule A are not severable from the rest of the by-law and that the whole by-law must be declared invalid.

[12] The Region argues that the changes to Schedule A do not invalidate the by-law. The substance of the offences under the by-law are in the body of the by-law. The changes to Schedule A do not change the offences created by the by-law; they only impact the set fines where offences are prosecuted under Part I of the *POA*. The authority to establish set fines for by-law offences rests with the local RSJ, pursuant to s. 91.1(2) of the *POA*. The Region has no authority to establish set fines for by-law offences. The Schedule A attached to the by-law at the time it was passed and when consent was obtained from a majority of the lower-tier municipalities was a placeholder until the local RSJ exercised their authority to establish set fines.

[13] In the alternative, the Region argues that, if the changes to Schedule A were invalid, the appropriate remedy is to sever s. 10.1 of the by-law and Schedule A.

The by-law would still be operable if s. 10.1 and Schedule A were severed, as prosecutions could still proceed under Part III of the *POA*.

Analysis

[14] I agree with the application judge that the changes to Schedule A to the by-law after it came into effect do not invalidate the by-law. In short, the changes to Schedule A were made by the local RSJ exercising her authority to establish set fines for proceedings under Part I of the *POA*. The authority to establish set fines for municipal by-law offences resides with the local RSJ of the OCJ, pursuant to s. 91.1(2) of the *POA*. The reference to Schedule A in s. 10.1 of the by-law refers to the set fines in Schedule A as established from time to time by the local RSJ. The Schedule A appended to the by-law at the time of its passage was a placeholder until the RSJ exercised her authority under the *POA* to establish set fines.

(1) Set fines for offences prosecuted under Part I of the *POA*

[15] It is helpful as context to recall that there are two procedural routes under the *POA* for prosecution of by-law offences. Under Part III of the *POA*, proceedings may be commenced by laying an Information: *POA*, s. 21. Where proceedings are commenced by Information under Part III, the proceedings are in a trial stream from the start.

[16] Part I of the *POA* provides for a different – and more streamlined – procedure. This streamlined procedure engages set fines. Under Part I, proceedings may be commenced by filing a certificate of offence and issuing and serving an offence notice: *POA*, s. 3. Where proceedings are commenced by certificate of offence and an offence notice, the starting point is what people would generally refer to as a "ticket". The person given the ticket may request a trial (*POA*, s. 5), or, if they do not wish to dispute the charge, they may opt to pay the set fine (plus applicable surcharges).[1] The regime for prosecutions by notice of offence with set fines under Part I of the *POA* is a means to prosecute by-law offences (and provincial offences) that allows resolution without an appearance before a judicial official and provides notice to citizens of fines that will be imposed in that context.

[17] The *POA* vests the authority to establish set fines for municipal by-law offences in the local RSJ of the OCJ. Section 91.1(2) of the *POA* provides as follows:

> (2) The regional senior judge of the Ontario Court of Justice for a region may specify an amount as the set fine for the purpose of

[1] There are options available other than a trial or paying the set fine, such as having a resolution meeting with a prosecutor in some cases (*POA*, s. 5.1) or pleading guilty and making submissions as to sentence (*POA*, s. 7). But for purposes of this appeal, the regime for set fines is the focus. The set fine may also be imposed where a defendant either does not respond to the notice of offence within 15 days, or where the defendant takes some action in response to the notice of offence, such as requesting a meeting with a prosecutor or requesting a trial, but then fails to attend: *POA*, ss. 9 and 9.1.

> proceedings under Part I or II for an offence under a by-law of a municipality in the region.[2] [Emphasis added]

[18] I make two observations about s. 91.1(2). First, the legislature chose to vest the authority to establish set fines for municipal by-law offences in the local RSJ of the OCJ. Second, the local RSJ's authority to establish set fines for by-law offences is not limited to the authority to establish the dollar amounts of the set fines, but also includes the authority to determine which by-law offences will have set fines. This is clear from the language in s. 91.1(2) that the RSJ "may specify the amount of a set fine … for an offence under a by-law…" (emphasis added).

[19] Section 91.1(2) of the *POA* was enacted in 2017. However, the authority of the local RSJ of the OCJ to establish set fines for by-law offences pre-dates the enactment of s. 91.1(2). Section 6 of the *Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings*, R.R.O. 1990, Reg. 200, gives the Chief Justice of the OCJ the power to establish set fines for an offence – including by-law offences. Section 36(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that, subject to the authority of the Chief Justice, an RSJ of the OCJ "shall … exercise the powers and perform the duties of the Chief Justice of the Ontario Court of Justice in his or her region."

[2] Part II of the *POA* enacts a procedure similar to the procedure in Part I, but it is applicable only to parking infractions. Because the by-law in this case concerns smoking, Part I, not Part II, would apply.

[20] As a matter of practice, prior to the enactment of s. 91.1(2) of the *POA*, local RSJ's of the OCJ exercised the power of the Chief Justice to establish set fines for municipal by-law offences, since these were local matters within each region and did not apply province-wide: Sheilagh Stewart and Jane Moffatt, *Stewart & Moffatt on Provincial Offences Procedure in Ontario*, 4th ed. (Salt Spring Island: Earlscourt Legal Press Inc., 2020), at pp. 5, 551, 553-54. The enactment of s. 91.1(2) of the *POA* in 2017 codified the practice that local RSJ's exercised the authority to establish set fines for municipal by-law offences.

[21] The reason set fines for offences prosecuted under Part I of the *POA* are set by judicial officers arises from the fact that a set fine is a sentence. Sentencing is a judicial function. Having a judicial official establish set fines under the *POA* ensures that judicial consideration is applied to the decision of the appropriate fine for an out-of-court resolution of the offence: *Provincial Offences Procedure in Ontario*, at pp. 5 and 552.

(2) The Changes to Schedule A do not affect the validity of the by-law

[22] As I will explain, the changes to Schedule A made by order of the local RSJ do not affect the validity of the by-law. They do not change the substance of the by-law. Rather, the changes to Schedule A are simply an exercise of the local RSJ's authority under the *POA* to establish set fines for municipal by-law offences.

[23] Section 10.1 of the by-law addresses set fines and provides as follows:

> Set fines for contraventions of this by-law shall be in accordance with Schedule A to this by-law, attached hereto and forming part of this by-law.

[24] At the time the by-law was passed and when consent from a majority of the lower-tier municipalities was given, the by-law contained a version of Schedule A. Schedule A is a one-page chart listing the set fines for contravening various prohibitions under the by-law. It contains three columns, headed: “Short form wording”, “Provision creating or defining offence”, and “Set fine”. As the headings suggest, the first column contains short form wording for a list of prohibitions in the by-law. The second column contains a reference to the specific section of the by-law that creates the listed prohibitions in the first column. The third column lists the dollar value of the set fine for contravening each of the listed prohibitions.

[25] Schedule A was changed on February 25, 2020, and again on June 20, 2022. On those dates, Rosenberg R.S.J. of the Central East Region issued orders establishing set fines under the by-law, pursuant to her authority under s. 91.1(2) of the *POA*. The changes to Schedule A included changes both to the amounts of the set fines and to the short form wording of the offences. The changes also ensured that the sections of the by-law referred to in the second column matched the sections for the short form description of the prohibitions contained in the first column.

[26] It is important to emphasize that the substance of the prohibitions created by the by-law and the offence of contravening a prohibition in the by-law are

contained in the body of the by-law and not in Schedule A. The establishing of the set fines by order of Rosenberg R.S.J. in February 2020 and June 2022 did not change the substance of the prohibitions or the offence of contravening a prohibition under the by-law.

[27] The appellant's argument focuses on the fact that, at the time the by-law was passed by the Region and consented to by the lower-tier municipalities, it contained a version of Schedule A. The appellant argues that the changes to Schedule A, in particular to the short form wording for the offences listed for set fines, after the consent by the lower-tier municipalities invalidate the by-law.

[28] It is not in dispute that for the by-law to come into force, in addition to being passed by the Regional Council, a majority of the lower-tier municipalities in the Region representing the majority of the electors in the Region were required to pass resolutions consenting to the by-law. This requirement is sometimes referred to as a "triple majority" because it requires: (i) a majority of the regional council; (ii) a majority of the lower-tier municipalities; and, (iii) that the lower-tier municipalities consenting to the by-law represent a majority of the electors in the region. The triple majority requirement is imposed on by-laws that prohibit or regulate the smoking of tobacco or cannabis in public places and workplaces: *Municipal Act*, s. 115(1) and (5). In this case, for greater certainty, the by-law specifies in s. 11.1 that it comes into force once a "triple majority" has been obtained in accordance

with s. 115(5) of the *Municipal Act*. As noted above, in this case, the final consent required for the by-law to come into effect was obtained on June 24, 2019.

[29] There are two difficulties with the appellant's argument that changes to Schedule A invalidate the by-law. First, although the appellant concedes that the local RSJ has the authority under s. 91.1(2) of the *POA* to establish set fines for municipal by-law offences, it characterizes that authority too narrowly. According to the appellant, the authority is limited to setting the dollar amounts of the set fines. As I have explained above, the authority given to the local RSJ under s. 91.1(2) of the *POA* is broader than that. It includes the authority to decide which offences to establish set fines for.

[30] Second, the appellant mischaracterizes the nature of the changes to Schedule A effected by the orders of Rosenberg R.S.J. The appellant contends that changes to the wording in Schedule A are invalid because they change the substance of the by-law after it was enacted. I disagree. The wording that the appellant refers to in Schedule A is the short form descriptions of the offences for purposes of the set fines. Deciding the wording for the short form descriptions of the offences is within the scope of the local RSJ's authority to establish the set fines. I reiterate that the prohibitions and the offence of contravening the prohibitions are found in the body of the by-law, not in Schedule A. The short form descriptions of the offences in the list of set fines in Schedule A does not change the prohibitions in the by-law or the offence of contravening them.

[31] I agree with the finding of the application judge that the version of Schedule A included in the by-law at the time it was enacted was a placeholder until the local RSJ exercised her authority under s. 91.1(2) of the *POA* to establish set fines for the offences in the by-law. As the Region does not have the authority to establish set fines for by-law offences, it could not have intended that attaching a version of Schedule A to the by-law at the time it was passed set the schedule in stone so that it could not be changed.

[32] The appellant also argues that the reference in s. 10.1 of the by-law to Schedule A incorporates the version of Schedule A attached at the time the by-law was passed into the by-law itself. According to the appellant, the effect of this incorporation is that changes to Schedule A constitute amendments to the by-law and would invalidate the by-law. I disagree.

[33] Section 10.1 of the by-law must be read in the context of s. 91.1(2) of the *POA*. The reference in section 10.1 of the by-law to “set fines” can only be understood as a reference to set fines under the *POA*. As noted above, the authority to establish set fines for municipal by-law offences rests with the local RSJ, not with the Region. Within that authority, the RSJ may change the amount of set fines and the offences for which set fines are established from time to time. In light of this context, the reference in s 10.1 of the by-law to the set fines being set out in Schedule A must be read not as referring only to the placeholder Schedule A that was attached to the by-law at the time it was passed, but rather

to the set fines established by the local RSJ from time to time under the authority in s. 91.1(2) of the *POA*.

[34] The appellant also argues that the set fines in the later versions of Schedule A were imposed by staff of the Region. The appellant argues that staff did not have the authority to change Schedule A and by doing so invalidated the by-law. I would reject this argument as it is inconsistent with the record and with the findings of the application judge.

[35] The portion of the record that the appellant relies on for this argument is a letter from legal counsel to the Region, dated July 21, 2022, sent in response to an inquiry from counsel for the appellant about the reasons for changes to Schedule A and the statutory authority for the changes.

[36] In this letter counsel for the Region explains the process for the local RSJ of the OCJ to establish set fines, pursuant to s. 91.1(2) of the *POA*. The appellant seizes on language in the letter referring to staff of the Region making "refinements" to the schedule for set fines to argue that staff established the set fines in the revised Schedule A. However, the appellant takes these passages out of context. The letter clearly and repeatedly states that the refinements made by regional staff to Schedule A were made for "submission to the RSJ" and "to be submitted to the RSJ for approval." The letter is clear that, while staff of the Region

drafted a proposal for the set fines schedule for the approval of the RSJ, the ultimate decision about the set fines was made by the RSJ.

[37] At the risk of belabouring this point, it is clear that the changes to Schedule A were made by the local RSJ and not by staff of the Region because the local RSJ issued two orders changing Schedule A. I agree with the application judge that it was these orders that changed Schedule A and that the process was consistent with s. 91.1(2) of the *POA*.

[38] I also agree with the application judge that there is nothing untoward about the changes made to Schedule A after the by-law was passed by the Region and consent was given by a majority of lower-tier municipalities. Set fines for municipal by-law offences are set regionally in order to address specific local by-laws and also to allow municipalities to request set fines that they believe appropriate for a particular offence and in the context of local circumstances: *Provincial Offences Procedure in Ontario*, at pp. 553-54. As occurred in this case, municipal staff may draft proposed short form wording and may request specific amounts as set fines. But the ultimate authority to establish set fines for by-law offences rests with the local RSJ. On the record in this appeal, it is clear that the authority to establish the set fines was exercised by the local RSJ in February 2020 and June 2022. The exercise of that authority did not amend the by-law. It only affected the set fines. It did not invalidate the by-law.

(3) The Sufficiency of the application judge's reasons

[39] The appellant argues that the reasons of the application judge only address changes to the dollar values of the set fines made subsequent to the passage of the by-law and fail to address its argument that there were changes to the wording of Schedule A.

[40] I would reject this argument. Before the application judge, there was no dispute that Schedule A had been changed as a result of the orders of the local RSJ exercising her authority to establish set fines. There was no dispute about what the changes were – including to wording of the short form descriptions of some of the offences for which set fines were established. The application judge's reasons refer to "changes" to Schedule A without enumerating the specific changes the appellant relied on. The application judge was not required to enumerate in his reasons every individual change relied on by the appellant. I do not read the application judge's reasons for finding that the changes to Schedule A did not invalidate the by-law as limited to the question of changes to the dollar values of the set fines.

(4) Severance as a remedy

[41] As I see no error in the finding of the application judge that the changes to Schedule A did not invalidate the by-law, it is not necessary to consider the

alternate argument regarding severance of s. 10.1 and Schedule A of the by-law as a remedy.

Disposition

[42] I would dismiss the appeal. As agreed by the parties, I would order costs of the appeal to the respondent in the amount of $10,000, inclusive of disbursements and HST.

Released: February 23, 2024 “E.E.G.”

“J. Copeland J.A.”
“I agree. E.E. Gillese J.A.”
“I agree. Wilton-Siegel J. (*ad hoc*)”