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Cameras, Conflicts, and (arbitration) Clauses

Top 3 municipal cases in the last 12 months.

Arbitration Clauses

10718 Nfld. Inc. v. St. John's (City), 2018 NLSC 82

- The Galway case
- Does a developer have to agree to an arbitration clause?

The clause

- (a) Where a difference arises between the parties bound by this Agreement, … one of the Parties may notify the other party in writing of its desire to submit to arbitration the difference or allegation for arbitration and the notice shall contain the name of the person appointed to be an arbitrator by the party giving the Notice;

How does a development agreement fit in?

- *"Development agreements … are also one of the regulatory tools by which the municipality controls subdivision and development. Development agreements work in combination with development permits, subdivision approvals, and municipal by-laws"*

It’s just a contract, right?

- *The proposed clause cannot be treated solely as a negotiated clause, but also a regulatory requirement by which the City must find its authority either express or implied in the legislation.*

The issue

- Did the city have the power to require an arbitration clause to be in the agreement?

Power of municipalities

- *“Being a creature of statute, the City has only those powers given to it either expressly by its enabling legislation, or as are necessarily implied or incidental to those powers expressly given.”*

No express authority

- City is bound by:
  - The *Urban and Rural Planning Act*
  - The *City of St. John's Act*

Implied authority

- *While it is not necessary for each and every action of the City to be expressly authorized, there must be some basis in the enabling legislation for implying the authority to require mandatory arbitration.*

Implied authority

- Developer argued no implied authority
- City argued that the authority was in the Development Regulations

Development Regulations

- *"(1) A Development Agreement **shall set out the terms of Council's approval,** and shall be signed by the applicant and the City Clerk within six (6) months of the approval granted by Council."*

Development regulations:

- Court disagreed with the City.

- *“the “terms of the approval” are not an unlimited set of contractual terms the City might want to negotiate, but are those terms that reflect what the Development Regulations and URPA require before development can be approved.”*

The Court's reasoning

- Going to court is a right.
- Legislation cannot take away a right by implication.
- Rights can only be taken away expressly.
- Legislature created the appeal boards for this purpose.

The takeaway

- Arbitration remains a great idea for development agreements
- But to make it mandatory, you need an **explicit power** to do so in your development regulations (or the *URPA*)
- Be careful in basing regulation on implied authority

Cameras

- Town of Paradise v Donovan Molloy (OIPC)
- Privacy implications for surveillance cameras

OIPC

- OIPC deals with access to information and privacy under *ATIPPA, 2015*
- NL legislation very concerned with transparency
- Personal information: “recorded information about an identifiable individual.”

Video Surveillance Guidelines

- Document issued by OIPC in June, 2015
- Guidelines are non-binding
- Guidelines present OIPC's interpretation of *ATIPPA, 2015*
- Potential issues with interpretation of ATIPPA in guidelines

Report P-2018-03

- Issued on April 3, 2018
- Gave recommendations regarding use of surveillance cameras
- Recommended that surveillance be suspended totally until recommendations complied with

OIPC's take on surveillance requirements

1. Privacy Impact Assessment is required in advance.
2. Must compile a "significant amount of information" to assess need for surveillance, and must provide to OIPC upon request

What information is required?

(According to the OIPC)

1. Detailed information about each incident
2. Assess harm arising from incident
3. Provide evidence of other measures/attempted fixes
4. Explain why they didn't work
5. Show that video surveillance did work

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Potential issues

- Procedural fairness for municipalities
- Reasonableness test?
- Standard of proof for privacy complaints?
- Expectation of privacy?
- Identity of privacy complainants?

Takeaways

- Case is before the court
- To be determined whether OIPC is taking the right approach
- Key takeaway: if you have cameras, draft a surveillance policy

Conflicts

- Coombs v. Town of Placentia
- Statutory appeal of the vacation of a councilor's seat

What is a conflict of interest

(1) A councillor shall not vote on or speak to a matter before the council or a committee of the council where

(a) the councillor has a monetary interest in the matter distinct from an interest arising from his or her functions as a councillor;

(b) the councillor has a monetary interest directly or indirectly in the matter;

When to vacate a seat

- A council shall, by resolution, declare vacant the office of an elected councillor where that councillor

  (a) fails to disclose that he or she has a conflict of interest in a matter being discussed by the council; or

  (b) discusses or votes on a matter on which he or she has a conflict of interest.

These are not formalities

- In this case the councilor declared a conflict and left the room.
- No get-out-of-jail free card – still discussed a matter while in a conflict of interest.

Retroactivity

- Councillor resigned his seat before investigation could conclude
- Election consequences
- Council retroactively vacated his seat

Interpretation of the Act

- Like in the Galway case, this is a right that requires explicit statutory authority to take away
- If there is a loophole, that's for the legislature to fix

Takeaway

- Until legislation is amended, possible loophole in the act.
- Resignation defeats Municipal Election Act consequences
- Ballot box will be the only remedy