
Jerry Kaiser

Applicant/Prospective Appellant
(Appellant)

and

Rural Municipality of Baidon, No. 131

Respondent/Prospective Respondent
(Respondent)

Before: Schwann J.A. (in Chambers)

Fiat

I. Introduction

[1] The applicant, Jerry Kaiser, seeks leave to appeal a decision of the Planning Appeals Committee [PAC] (PAC 2017-0017 (25 July 2018)), pursuant to s. 33.1 of *The Municipal Board Act*, SS 1988-89, c M-23.2.

II. Background

A. Events leading up to the Stop Work Order

[2] Mr. Kaiser is the owner of residential property in the Rural Municipality of Baidon, No. 131 [RM]. He is a recognized artist. In 2017, Mr. Kaiser installed a concrete pad on his property onto which he then mounted an artistic sculpture said to principally commemorate the pioneer women who had built the community. Mr. Kaiser did not apply to the RM for a permit prior construction and installation of the pad and sculpture.

[3] Pursuant to its authority under s. 242(4) of *The Planning and Development Act, 2007*, SS 2007, c P-13.2, the RM issued a “Stop Work Order” [SWO] to Mr. Kaiser on April 20, 2017, in connection with his art installation. It stated: “you have constructed or caused to be constructed a concrete pad on the said land without receiving a Development Permit”.

[4] The SWO was grounded on an alleged contravention of s. 62(1) of *The Planning and Development Act, 2007* and s. 3.2(a) of the RM’s Zoning Bylaw 08-2015 [Bylaw]. It directed Mr. Kaiser to stop work immediately and gave him two options: (i) apply for a development permit and complete all work necessary to comply with the RM’s Bylaw; or (ii) remove the concrete pad and restore the land to its original condition.

[5] It is common ground that no cost or fee is imposed with an application for a development permit.

B. Proceedings before the Development Appeals Board

[6] Mr. Kaiser appealed the SWO to the Development Appeals Board [DAB]. Mr. Kaiser failed to appear in person on the date set for his appeal hearing and the DAB proceeded in his absence taking into consideration his written submissions in which he advanced a number of arguments ranging from denying a concrete pad had even been constructed to allegations of harassment and questionable competence of the DAB.

[7] The DAB upheld the SWO and dismissed Mr. Kaiser's appeal, concluding: "monuments, statues, or other physical adornments such as this are not a permitted use in this zone according to local bylaws".

C. Proceedings before the PAC

[8] Mr. Kaiser then appealed the DAB decision to the PAC. In his notice of appeal, Mr. Kaiser identified the following three grounds as a basis to overturn the DAB decision: misidentification of the lot, failure to notify him of the hearing date, and erroneous reference to the RM of McKillop.

[9] The PAC readily dismissed all three grounds of appeal.

[10] But Mr. Kaiser had also raised a new issue on appeal before the PAC. As his structure constituted an art installation, he argued it should be exempt from the RM's permit requirements and that by demanding compliance with the permitting requirements the RM had violated his right to freedom of expression guaranteed by s. 2 of the *Canadian Charter of Rights and Freedoms* [Charter].

[11] In response to Mr. Kaiser's *Charter* argument, the PAC began by stating: "While not a ground before us, in deference to Mr. Kaiser's submission, we make *the following observations*" (emphasis added).

[12] The PAC then accepted as fact that Mr. Kaiser is a recognized artist and that his structure was a tribute to the pioneer women of Baildon. However, in relation to the nub of his argument, the PAC stated:

Mr. Kaiser says the municipal bylaws infringe upon his "freedom of expression" as an artist, which is offensive to the *Charter* and are, therefore, of no force and effect and he is not bound by them. The difficulty with his submission is there is absolutely no evidence to show the municipal bylaws in any way infringe on Mr. Kaiser's artistic freedoms. Nothing in the record establishes the application for a Development Permit, which is free, could in any way constitute an infringement of Mr. Kaiser's *Charter* rights. There is no evidence in the record before us showing the municipal bylaws and their proper application would impinge on Mr. Kaiser's artistic expression in any way. *There could be no evidence supporting the infringement of Mr. Kaiser's Charter rights as he absolutely*

refused to participate in the municipal permit and development process. No argument has been advanced that the bylaws, on their face, infringe on Mr. Kaiser's artistic freedom.

(Emphasis added)

[13] The PAC went on to consider whether it should grant a variance order and on this point. It concluded that doing so would amount to a special privilege for Mr. Kaiser and thereby defeat the intent of the Bylaw.

[14] In the end, the PAC dismissed Mr. Kaiser's appeal.

III. Analysis

[15] Pursuant to s. 33.1 of that *The Municipal Board Act* a further appeal can be taken to the Court of Appeal, with leave, on a question of law or jurisdiction:

Appeal by stated case

33(1) The board may, on its own initiative, submit a stated case on questions of law or jurisdiction, arising in connection with a matter that is before the board, for a decision of the Court of Appeal.

[16] Having regard to the need to establish a question of law or jurisdiction in concert with the analytical framework for leave set out in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119 at para 6, 227 Sask R 121 [*Rothmans*], Mr. Kaiser must:

- (a) identify a question of law;
- (b) demonstrate that the proposed appeal is of sufficient merit to justify leave being granted; and
- (c) persuade me that the proposed appeal is of sufficient importance to warrant the attention of the Court.

[17] In his draft notice of appeal filed with this Court, Mr. Kaiser identified two potential grounds of appeal. The "*Charter*" ground is framed as follows:

That the Committee made an error of law in finding that because there is no cost to apply for a permit, the Appellant's rights under section 2(b) of *The Charter* were not violated.

[18] The second ground relates to errors allegedly committed by the PAC in the application of the special privilege test. Since Mr. Kaiser abandoned this argument at the time of his leave application, it need not be addressed.

A. Does the proposed appeal identify a question of law?

[19] Mr. Kaiser has to satisfy me that his proposed appeal raises a question of law or jurisdiction. The answer to this question is found in the PAC decision itself. As set out above, the PAC found no evidence on the record of any infringement of Mr. Kaiser's artistic freedoms and

as such Mr. Kaiser had not met the evidentiary burden of establishing an infringement. Having reached this factual conclusion, the PAC found itself unable to rule on the s. 2(b) issue.

[20] Taking Mr. Kaiser's position at its highest, he can be said to be arguing that the PAC erred in determining that he needed to call evidence to establish an infringement when a simple effects-based examination of the wording of the Bylaw would disclose potential for it to be interpreted in a manner that might infringe his s. 2(b) rights. To the extent this represents Mr. Kaiser's argument, I find it does give rise to a question of law.

[21] Although not abundantly clear from the material filed with this Court or for his argument, I am prepared to accept that his proposed appeal raises a question of law.

B. Is the proposed appeal of sufficient merit?

[22] Mr. Kaiser advances two arguments in support of this part of the *Rothmans* test. First, although he concedes that he only raised the *Charter* issue for the first time on appeal before the PAC, since the PAC chose to entertain it, the PAC was obliged to address the *Charter* argument in accordance with the law. Building on this point, he says evidence was not required because it was the Bylaw itself that was unconstitutional. Requiring a permit for artistic expression represents, on its face, a violation of his s. 2(b) rights. Furthermore, since the PAC chose to address the *Charter* issue, once raised, the evidentiary burden shifted to the RM to lead whatever s. 1 evidence it wanted to call.

[23] Mr. Kaiser's second argument largely flows from his first. He argues that his recourse was either to apply to have the Bylaw amended to include a "works of art" exemption or to comply with the Bylaw by applying for a permit. In either case, Mr. Kaiser argues, his s. 2(b) *Charter* rights would have been infringed because "other players" would have had the opportunity to weigh in on his proposal, which is to say, other individuals or groups would be allowed to "edit" his art. On the latter point, Mr. Kaiser points to s. 3.2 of Bylaw that permits a development officer to refer a permit application to "any internal or external departments or organizations including other professional such as planning, legal or engineering, or 15 Wing Moose Jaw for review or comment prior to issuing a development permit" and that "[a]ny recommendations received may be applied as conditions to the development permit".

[24] In response to Mr. Kaiser's first argument, the RM contends Mr. Kaiser is effectively asking this Court to make a first instance finding about the constitutionality of the statutory scheme and the Bylaw in particular. To the extent Mr. Kaiser is seeking leave to challenge whether the Bylaw infringes his right of artistic expression, he is really asking this Court to rule on the constitutional validity of the Bylaw and perhaps even the legislative scheme that authorizes the passage of zoning bylaws. If Mr. Kaiser intended for this Court to do so, *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01, requires him to give prior notice to the Attorney Generals of Canada and Saskatchewan. The absence of notice presents a fundamental stumbling block for Mr. Kaiser to the extent he seeks to challenge the validity of the Bylaw.

[25] On a more specific level, Mr. Kaiser appears to argue the Bylaw *prima facie* breaches his s. 2(b) right to freedom of expression and, as such, the evidentiary burden shifted to the RM to justify the infringement.

[26] At the outset, it appears to have been implicitly accepted by the PAC that Mr. Kaiser's installation constituted or could be characterized as an emanation of his right of "freedom of expression". Thus, the next question that faced the PAC was whether the purpose or effect of the Bylaw was to restrict Mr. Kaiser's freedom of expression.

[27] As a matter of law, a person who alleges a breach of his or her right to freedom of expression must demonstrate that the impugned provision has the purpose or effect of limiting expression. Paragraph 53 of the RM's brief of law provides a broad-brush description of what the Bylaw did or did not contain:

As noted, the Building Bylaw does not purport to regulate expression. It does not compel speech. It does not regulate content, or purport to regulate or prohibit political or artistic ideas. It does not impose any additional costs on construction, for artistic purpose or otherwise. It does not otherwise address the content of the structures for which permits may be necessary. The Building Bylaw does not regulate expressive activity, in the sense that posterage and advertising bylaws, publication bans, or other actual restrictions on speech and expression might.

[28] On his leave application, Mr. Kaiser did not challenge the RM's characterization of the Bylaw as set out above. Nor do I take him to suggest that the purpose of the Bylaw is to restrict or limit his – or for that matter, artists more generally – freedom of expression or meaning. Given that the overall object and purpose of zoning bylaws under *The Planning and Development Act, 2007* is to control the use of land with the objects of health, safety and general welfare of RM inhabitants in mind, and in light of the accepted content of the Bylaw expressed above, Mr. Kaiser's position on this point appears sensible.

[29] The next question the PAC was required to address was, even if the RM's purpose in enacting the Bylaw was not to control or limit expression, did the *effect* of the RM's Bylaw restrict Mr. Kaiser's free expression with consideration given to his articulation of the principles and values underlying the freedom he asserted. Addressing this part of the test in *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976 [*Irwin Toy*], the Supreme Court of Canada said: "Here, the burden is on the plaintiff to demonstrate that such an effect occurred. In order so to demonstrate, a plaintiff must state her claim with reference to the principles and values underlying the freedom."

[30] The problem faced by Mr. Kaiser in seeking leave to appeal is that the PAC concluded that he had not established an evidentiary foundation to meet this part of the *Irwin Toy* test. It is to be recalled that the PAC did *not* make a ruling on whether there had been a *Charter* violation. Rather, the PAC simply found that Mr. Kaiser *had not discharged the burden of establishing a Charter breach based on the evidence before it*.

[31] Mr. Kaiser bore the burden of establishing a *Charter* violation. Beyond raising a s. 2(b) right to freedom of expression in an abstract sort of way, there was no evidentiary record from which the PAC could have found the permit requirement entrenched in the Bylaw had the effect of infringing Mr. Kaiser's s. 2(b) rights. The only argument Mr. Kaiser could muster on the leave application relates to the possibility that third-party input would generate the impugned effect. This argument has to be considered in light of the wording of the Bylaw. Under s. 3.2(a) of the Bylaw, the option to seek third-party input in the RM's consideration of whether to grant a permit is permissive, not mandatory and, in any event, even if input is received, the RM is not

mandated to blindly implement the recommendation. In short, Mr. Kaiser's concern is both premature and speculative. While the PAC may have overstated the evidentiary requirements for substantiating a s. 2 infringement, in my view, Mr. Kaiser had to have provided the PAC with something more than mere speculation in order to establish that the Bylaw would infringe on his s. 2 freedoms. Without deciding the issue, this could have taken the form of information about the historical application of the impugned provision or academic literature in relation to a similar type provision in other municipalities. None was offered.

[32] Quite apart from the above, as I see it, Mr. Kaiser faces two other problems with this prong of the leave test. First, the PAC, as a statutory decision maker, can only sit on appeal *from what the DAB decided*. As a matter of general legal principle, the PAC had no authority to broaden its jurisdiction or scope of inquiry to entertain a *Charter* argument for the first time when that issue had never been decided in the body below. In other words, since the PAC can only sit in appeal from what the DAB had decided, the PAC arguably had no jurisdiction to entertain and decide the *Charter* argument as a matter of first instance.

[33] Second, the PAC's discussion on the *Charter* issue was arguably *obiter dicta* to its decision on the matter that was under appeal. This appears obvious from the decision where the PAC stated: "While not a ground before us, in deference to Mr. Kaiser's submission, *we make the following observations*" (at para 15, emphasis added). An "observation" is not a decision.

[34] In summary, Mr. Kaiser has not persuaded me of the merits of his proposed appeal.

C. Is the proposed appeal of sufficient importance to warrant the attention of the Court?

[35] It is beyond question that the scope and content of *Charter* rights are of general public importance, particularly where they engage new or unusual circumstances. That said, the proposed appeal calls for this Court to express an opinion on a *Charter* right largely in the abstract and without a sufficient evidentiary record. For this reason, the proposed appeal fails to meet the third prong of the *Rothmans* test.

IV. Conclusion

[36] In conclusion, leave is refused. Since costs were not sought by the RM, no such order will be made.

"Schwann J.A."

Schwann J.A.

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