

November 28, 2018

Bazos v Bell Media Inc

The recent Toronto municipal election produced no shortage of last-minute court challenges and legal drama. One such dispute came between Bell Media and Faith Bazos (aka Faith Goldy)—the controversial mayoral candidate known for her far-right political views. The Court’s decision in *Bazos v Bell Media Inc*, released just six days before the election, addresses fundamental questions of jurisdiction between courts and administrative tribunals, as well as the circumstances in which the Court will exercise its discretion to grant injunctive relief in a matter which otherwise falls under a tribunal’s jurisdiction.

The dispute arose when Ms. Goldy attempted to purchase advertising time on the Bell-owned television station, CP24, to promote her mayoral candidacy. Bell initially agreed, and then later reversed its decision to air Ms. Goldy’s advertisements after receiving numerous complaints about her political views. Bell, which characterized its reversal as a “business decision”, refunded Ms. Goldy’s payment but did not otherwise communicate a reason for the cancellation. There was no suggestion that Ms. Goldy’s intended advertisements contained objectionable content.

The Application

Ms. Goldy applied to the Ontario Superior Court of Justice for a declaration that Bell was required to allocate broadcasting time to her advertisements, as well as a mandatory order requiring Bell to do so. Ms. Goldy also sought, in the alternative, the same relief under section 24(1) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), as well as pursuant to her contract with Bell.

In support of her application, Ms. Goldy relied on regulations passed by the Canadian Radio-television and Telecommunications (“CRTC”) under the *Broadcasting Act* (the “*Act*”), which require broadcasters to allocate time on an equitable basis to all accredited political parties and rival candidates represented in an election. Ms. Goldy argued that she had a statutory right to purchase airtime from Bell on an “equitable basis,” and that Bell violated that right by refusing to provide airtime for her ads.

Rather than oppose the substance of Ms. Goldy’s complaint, Bell argued that the Superior Court did not have jurisdiction to adjudicate the dispute. Bell submitted that if Ms. Goldy wished to enforce CRTC’s regulations, she should have applied to the

CRTC tribunal instead.

The Court ultimately agreed with Bell that the CRTC—not the Court—was the appropriate venue in which to adjudicate this dispute. In his analysis, Justice Cavanagh reasoned that the CRTC had exclusive jurisdiction in the area with which the dispute was concerned, and that the essential character of the dispute, itself, fell within that same area. Moreover, he found that the CRTC has authority to grant the very relief sought by Ms. Goldy, including a mandatory order against Bell which would operate, in effect, as injunctive relief.

Deference to the Specialized Expertise of an Administrative Tribunal

Justice Cavanagh's analysis began with a consideration of whether the dispute concerned an area of concurrent, overlapping, or exclusive jurisdiction as between the Superior Court and the CRTC.

In his reasons, Justice Cavanagh observed that the language in section 3(2) of the Act established a “principle of exclusivity,” by which Parliament signalled that the purposes of the Act would be best achieved if left to a single, independent public authority. He also noted that it would be undesirable for the Superior Court to assume jurisdiction in this case because doing so would disrupt Parliament's intended scheme for the interpretation of the regulations made under the Act to be reviewed by the Federal Court of Appeal.

Interestingly, Justice Cavanagh seized on the concept of “curial deference” as a factor weighing in favour of the CRTC having exclusive jurisdiction over this matter. Curial deference is the basic idea that when a legislature sets up a specialized tribunal and invests it with broad powers, that tribunal should be given deference to make decisions with which a court might otherwise disagree. Although the CRTC had not issued any decision in this matter, Justice Cavanagh applied the concept of curial deference to the preliminary question of jurisdiction. His rationale for doing so was that the same deference that should be afforded to a tribunal's decision should similarly weigh in favour of disputes being adjudicated according to the statutory regime, rather than by the courts.

Ultimately, in finding that the CRTC maintained exclusive jurisdiction, Justice Cavanagh concluded that, if the Court were to assume jurisdiction, it would violate the spirit, if not the letter, of the legislation.

Application for *Charter* Relief does not Change the Essential Character of the Dispute

Ms. Goldy also argued that the Superior Court should hear her

application because it involved broad *Charter* principles including freedom of expression and democratic rights. She argued that these principles fell squarely within the competence of the Superior Court, and outside of the traditional ambit of the CRTC.

Justice Cavanagh held that the Superior Court has concurrent jurisdiction with the CRTC over *Charter* issues. However, he observed that the existence of concurrent jurisdiction does not, itself, preclude the CRTC from granting *Charter* relief. Indeed, the Supreme Court of Canada, in 2010, confirmed that administrative tribunals have the authority to grant *Charter* remedies. In addition, tribunals must always act consistently with the *Charter* and its values when exercising their statutory functions. Further, the CRTC was familiar with interpreting the many broad objectives of the Act itself, which reflected various societal interests. Finally, nothing about the specific *Charter* values invoked by Ms. Goldy in this case changed the fundamental nature of the dispute between herself and Bell.

The Court thus declined to exercise its discretion to “carve out” the *Charter* issues from the CRTC’s jurisdiction and have them heard separately.

No Exceptional Circumstances to Warrant an Injunction

Ms. Goldy placed considerable emphasis on her argument that she would be deprived access to justice if the Court declined to exercise its jurisdiction, because her application to the CRTC would not be decided before the election. She therefore urged the Court intervene by ordering injunctive relief.

Justice Cavanagh agreed with Ms. Goldy that the Court had residual jurisdiction to grant an injunction in rare circumstances, such as dire emergencies, even where a statutory tribunal has exclusive jurisdiction over the subject matter of the injunction. However, he declined to do in this case in light of the evidence in the record before him, which demonstrated, among other things:

- Ms. Goldy took no steps to make an application to the CRTC;
- There was no evidence to confirm that the CRTC would have been unable to hear her application before the election, had she applied. Bell, in fact, filed evidence demonstrating that it was possible for the CRTC to issue decisions within a very short time period;
- Ms. Goldy did not present evidence that she attempted to place ads with other media outlets;
- Ms. Goldy was polling at just 6% support for her mayoral

candidacy at the time of the hearing, and the Court's intervention would not have any realistic impact on the outcome of the election.

Impact

The decision in *Bazos v Bell Media* underscores the importance of reviewing the relevant legislative scheme to determine the most appropriate venue when commencing legal proceedings. Second, the decision makes clear that adding, or emphasizing, *Charter* relief will, itself, not result in a court exercising its jurisdiction where the specialized tribunal is otherwise authorized to grant *Charter* relief.

Finally, where a litigant seeks the Court's intervention on an urgent basis, she or he should very carefully consider the evidence adduced in support of their request. Justice Cavanagh was unimpressed and, ultimately, unpersuaded by Ms. Goldy's case in light of the evidence that she declined to initiate an application to the CRTC, did not seek to place advertisements with other media outlets, and was admittedly polling at a meager 6%. As such, her circumstances did not warrant the Court's urgent intervention.

With notes from Jessica Kras.

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