CITATION: Leamington v. DeGoey, 2021 ONSC 694
COURT FILE NO.: CV-19-28152
DATE: 20210127

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
The Corporation of the Municipality of Leamington Applicant	Alexa M. Posliff, for the Applicant
– and –	
Paul DeGoey Respondent	Colin Bondy, for the Respondent
	HEARD: January 25, 2021

RULING ON MOTIONS

BONDY J.

A. INTRODUCTION

1) Introduction

[1] This is a decision and reasons related to a respondent's motion to stay an application and an applicant's motion to strike the respondent's motion for a stay.

[2] The applicant, the Corporation of the Municipality of Leamington ("Leamington"), is a municipality located in Essex County in the province of Ontario. The respondent, Paul DeGoey ("Mr. DeGoey"), owns a home and land at 1310 Mersea Road 6, Wheatley, Ontario. That is home and land within the municipal boundaries of Leamington. The parcel is four and a half acres in size and zoned M-3 or "Agricultural Hobby Farm" (the "farm"). In late 2018, Mr. DeGoey installed some plastic covered hoop greenhouses (the "greenhouses") on his farm and began cultivating cannabis for others in those greenhouses.

[3] Leamington asserts that Mr. DeGoey engages in the growing and processing of cannabis in the greenhouses contrary to several municipal by-laws.

[4] Leamington brought an application. A summary of the overarching substantive relief sought by Leamington is as follows:

1. An injunction restraining the respondent from using the premises for the growing or processing of cannabis;
2. A mandatory order directing the respondent to comply with the cannabis regulation by-law (By-law 35-18);
3. An order for the respondent to remove and dispose of all cannabis plants, fresh cannabis, dried cannabis, and processed cannabis products;
4. An order that the respondent provide the names and contact information for any tenant or occupier of the premises; and
5. An order that any person or persons with notice of the order shall be bound by its terms.

2) The motions

[5] The substance of the motions is as follows.

[6] As to the first, Mr. DeGoey seeks an order staying Leamington's application pending the Normal Farm Practices Protection Board's (the "Board") determination of the respondent's application for an order that the applicant's By-law 35-18 does not apply to the respondent. Mr. DeGoey takes the position that the use of his property as a cannabis facility is a "normal farm practice," and that Leamington lacks jurisdiction to interfere with a "normal farm practice."

[7] As to the second, Leamington seeks an order to strike the respondent's motion to stay. The grounds are Mr. DeGoey's failure to answer questions put to him during his examination on February 24, 2020.

3) Factual Background

a) The farming operation

[8] I reiterate, Mr. DeGoey's land is zoned as an "agricultural hobby farm" (A-3). That zoning allows greenhouses subject to certain conditions.

[9] Mr. DeGoey argues that:

> "a licensee with Health Canada is authorized to… send, deliver, transport, or sell to the registered person… a quantity of cannabis, other than cannabis plants or cannabis seeds, the does not exceed the equivalent of the maximum quantity of dried cannabis that is specified in the documents."

[10] By way of background, in 2019, Mr. DeGoey leased his greenhouses to several individuals to allow them to grow cannabis. He charged them $30,000. As part of the arrangement, he also assisted them with their operation.

[11] Each of those individuals had a licence to grow cannabis issued by Health Canada. The individuals include: Dong Rong Huang, Jinxian Liang, Jun Guang Lin, and Yan Ting Liang.

[12] Those four individuals have four things in common.

[13] The first is that they share the same medical practitioner. That is Shawn Chi Wai Seit.

[14] The second is that all four of their licences allow each individual to grow between 390 and 438 cannabis plants.

[15] The third is that all four of their licences provided that the cannabis be grown indoors at Mr. DeGoey's farm.

[16] The fourth is that the type of production they are permitted is "personal." In other words, according to the licences, it is anticipated that each individual will ingest between 390 and 438 cannabis plants in each growing cycle. I say that because the production of cannabis by each of those licences is, as said above, limited to their own use by the terms of that licence.

[17] Mr. DeGoey deposed that the year 2019 was to be a test year. If the cannabis cultivation was successful, he intended to seek his own medical cannabis cultivation licence and to substantially increase the amount to be charged to others to cultivate their cannabis. In other words, it seems that he was planning a reasonably large-scale operation where he would grow cannabis for himself and others. Mr. DeGoey deposed that Health Canada will allow up to four licences for his farm. Given the limits on the licences referred to directly above and below, I calculate, there would potentially be between 1200 and 1500 cannabis plants growing at any given time, if Mr. Degoey grew for himself and two other individuals at the same time, as he seems to be proposing.

[18] On January 29, 2020, Mr. DeGoey filed an application for registration with Health Canada for "Production of Cannabis for His Own Medical Purposes." A certificate by Olga Arucan, who is a nurse practitioner practising in downtown Toronto, was filed with that application. That certificate indicates a daily use of 95 grams of dried cannabis by Mr. DeGoey. It was unclear why Mr. DeGoey was either unable or unwilling to receive medical treatment closer to home. I say that because Mr. DeGoey already had a prescription from Dr. Khan. That prescription was, however, for only 5 grams per day.

[19] Mr. DeGoey's application was approved and a licence to grow medical cannabis was granted on March 3, 2020 by Health Canada. That licence allows him to grow a maximum of 495 plants indoors on his property for his personal use.

b) The Municipal by-laws

[20] The Municipality of Leamington, by-law No 35-18, *The Corporation of the Municipality of Leamington* (28 May 2018), s 1. contains several definitions, many of which apply to cannabis and cannabis facilities. Some of the applicable definitions include, without limitation, the following:

> 1(a) "cannabis" shall have the same meaning as cannabis as defined in the Cannabis Act (Canada).
>
> 1(b) "Cannabis Facility" means an indoor premises on which cannabis, cannabis seed or cannabis oil is grown, processed, extracted, packaged or otherwise made ready for sale, tested, destroyed, stored and/or shipped in accordance with the provisions of a license issued by Health Canada, as may be amended from time to time, but shall not mean a cannabis retail outlet operated by the Province of Ontario, cannabis lounge or cannabis retailer, and does not include any property which is not licensed by Health Canada and on which cannabis is grown exclusively for legal use by the registered owner of the property.
>
> 1(k) "Noxious Odour" means an Odour of Cannabis or from Cannabis Related Activities emanating from a Premises that is persistent or continuous and is likely to interfere with the ordinary enjoyment of other property in the vicinity of the Premises;
>
> 1(l) "Odour Abatement Protocol" means the combination of methods, practices, equipment and technologies designed for the purpose of eliminating the emission and emanation of Noxious Odours from the Premises to any other property;
>
> 1(m) "Part I Cannabis Facility" means a Cannabis Facility for which the municipality has received notices as a term of the application to Health Canada;
>
> 1(n) "Part II Cannabis Facility" means a Cannabis Facility that is not a Part I Cannabis Facility including a designated grower, a micro-cultivator, a micro processor or a premises on which cannabis is grown for or on behalf of one or more other persons than the registered owner of the premise.

[21] The Municipality of Leamington, by-law No 35-18, *The Corporation of the Municipality of* Leamington (28 May 2018), ss 5 and 6 govern Part I and Part II facilities. They read as follows:

> 5. A Part I Cannabis Facility shall:
>
> a. operate in accordance with its license from Health Canada, and any other requirement of the Province of Ontario and any competent authority;
> b. operate indoors;
> c. operate only in a Zone designated for agricultural use, where a greenhouse, but not a hobby greenhouse, is permitted;

d. operate with an Odour Abatement Protocol to eliminate the migration of any Noxious Odour off its Premises; and

6. A Part II Cannabis Facility shall:
   a. operate in accordance with its licence from Health Canada, and any other requirements of the Province of Ontario and any other competent authority;
   b. operate indoors;
   c. operate in a Zone designated for industrial use;
   d. obtain a business licence pursuant to the provisions of the Municipality's Business Licensing By-law 03-18;
   e. obtain, prior to commencing operation, a change of use permit, issued pursuant to section 10 of the *Building Code Act*, 1992 S.O. 1990 c. P. 23;
   f. operate with an Odour Abatement Protocol to eliminate the migration of any Noxious Odour off its premises and provide satisfactory proof thereof to Leamington;
   g. operate more than two hundred (200) meters from the property line of the nearest Sensitive Use;
   h. be limited to the production, processing and packaging of Cannabis on behalf of the registered owner of the premises and one other person; and
   i. be inspected by the Municipality's Fire Department and comply with the provisions of the Fire Protection and Prevention Act, 1997, S.O. 1997, c.4.

c) The position of Leamington in the application

[22] Leamington takes the position that Mr. DeGoey's cannabis facility is not a Part I Cannabis Facility because Part I Cannabis Facilities are licensed under the Cannabis Act and the regulations made thereunder. Health Canada maintains a list of licensed producers. Leamington filed a copy of that list, and Mr. DeGoey's name does not appear on it. Consistent with that assertion, Mr. DeGoey's application to the *Farming and Food Production Act, 1998*, S.O. 1998, c. 1 ("FFPPA"). states "one of the agricultural operations is the cultivation of cannabis on his farm pursuant to a license issued by Health Canada as a Part II grower."

[23] Leamington submits that Mr. DeGoey is not in compliance with the by-law requirements for a Part II Cannabis Facility for a variety of reasons. They include, without limitation, the following:

   a. Mr. DeGoey's property is not in an Industrial Zone, and he has not applied for a rezoning;
   b. Mr. DeGoey has not obtained Site Plan Approval pursuant to the Site Plan By-law and the *Planning Act*, R.S.O. 1990, c. P.13;
   c. Mr. DeGoey has not obtained a business licence;
   d. Mr. DeGoey did not obtain a change of use permit pursuant to the *Building Code Act 1992*, S.O. 1992, c. 23;
   e. Mr. DeGoey is not using an Odour Abatement Protocol to eliminate the migration of any Noxious Odour;

f. Related to "e" immediately above, Mr. DeGoey is operating less than 200 meters from a residential neighbourhood which is a sensitive use;
g. Mr. DeGoey has in the past allowed his premises to be used for growing of cannabis by persons other than the registered owner who is himself;
h. Mr. DeGoey is now himself growing cannabis in the facility but has failed to provide Leamington with the authority under which the cannabis currently purports to be grown. (Mr. DeGoey's counsel advised the court that Mr. DeGoey is not currently growing cannabis. It was not clear whether that was because of the temporary nature of the greenhouses which is discussed below, or a decision on the part of Mr. DeGoey to refrain from growing cannabis until he obtains approval from the Board or the court.); and
i. Mr. DeGoey has not arranged for the facility to be inspected by Leamington's fire department or compliance with *Fire Protection and Prevention Act 1997*, S.O. 1997, c. 4.

d) The position of Mr. DeGoey in the application

[24] Mr. DeGoey relies on the provisions of the FFPPA. In particular, he relies on the provisions of section 6, which provide as follows:

> *Normal farm practice preserved*
> 6 (1) No municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation.
>
> *Dispute resolution*
> (2) A person described in subsection (3) or a municipality may apply to the Board, in a form acceptable to it, for a determination as to whether a practice is a normal farm practice for purposes of the non-application of a municipal by-law.
>
> *Applications*
> (3) An application may be made by,
>
> > (a) farmers who are directly affected by a municipal by-law that may have the effect of restricting a normal farm practice in connection with an agricultural operation; and
> >
> > (b) persons who want to engage in a normal farm practice as part of an agricultural operation on land in the municipality and have demonstrable plans for it.

[25] Mr. DeGoey made an application to the Board on January 15, 2020. That was after establishing his cannabis facility and after the municipality began enforcement proceedings. On September 10, 2020, the Board notified the parties that it was declining to hear Mr. DeGoey's application until the issue of jurisdiction is determined by this court.

e) The interactions between Leamington and Mr. DeGoey

[26] On June 13, 2019, the Director of Legal Services for Leamington sent Mr. DeGoey a comprehensive list of all the steps required to bring his cannabis facility into compliance with the by-law.

[27] Pursuant to that letter, Mr. DeGoey attended at the municipality on July 10, 2019 and inquired as to the steps required to bring the facility into compliance. He was told that a rezoning would be required, and he was directed to the planning department.

[28] Mr. DeGoey deposed that the municipality told him that they would not rezone his property to the requisite industrial zone. There was, however, nothing more than that bald assertion. Leamington's By-law Enforcement Officer deposed that to date, no rezoning application has been submitted nor, to the best of the knowledge of the municipality, have any other steps been taken to bring the property into compliance, except for an undertaking to use the greenhouses only as "temporary structures." There was nothing in Mr. DeGoey's evidence disputing that assertion.

[29] With respect to the greenhouses, Mr. DeGoey has undertaken to remove the plastic from them six months a year. As a result, they are considered temporary structures. There is consensus that temporary greenhouse structures are not subject to the provisions of the *Building Code*.

B. ANALYSIS

1) Mr. DeGoey's motion for a stay

a) The Respondent's Position

[30] I reiterate, Mr. DeGoey maintained that the Board has sole jurisdiction with respect to the issues in Leamington's application because, it is his position, all of the provisions of the various by-laws relate to the question of what is a "normal farming practice."

[31] Respondent's counsel argued that, absent special circumstances, it is within the jurisdiction of the Board and not the court to determine "whether the cultivation of cannabis is a normal farm practice as part of an agricultural operation."

[32] As said above, the Board has declined to hear Mr. DeGoey's application until the issue of jurisdiction is resolved by this court.

b) The Applicant's Position

[33] The applicant took the position that most of the subject matter of the applicable by-laws and, accordingly, the application is outside of the jurisdiction of the Board and within the jurisdiction of this court.

c) Analysis

i. The test

[34] Section 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides as follows:

> *Stay of proceedings*
> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

[35] The party seeking the stay has the onus of proof. To grant a stay pursuant to the jurisdiction at s. 106 of the *Courts of Justice Act*, two conditions must be met. The two conditions are as follows:

> (i) continuing the action would cause substantial prejudice or injustice to the moving party, not merely inconvenience and expenses; and,
>
> (ii) a stay would not cause injustice to the responding party.

see S*chmidt v. Elko Properties Ltd.*, [2005] O.J. No. 3347, leave to appeal refused [2005] O.J. No. 5745 (S.C.), at para. 10; *Halton Condominium Corporation No. 59 v. Howard,* [2009] O.J. No. 3566, at para. 7; *Varnam v. Canada (Minister of National Health and Welfare)* (1987), 12 F.T.R. 34.

[36] Several factors inform this test, where a stay is sought in a court proceeding to allow a tribunal proceeding to advance. The factors outlined in S*chmidt*, at para. 11, include:

> (a) likelihood and effect of the two matters proceeding in tandem in two different forums;
>
> (b) possibility and affect of two different results in the proceedings before the court and the board of inquiry;
>
> (c) extent to which relief available in the two proceedings overlaps and the potential for double recovery in the circumstances; and,
>
> (d) magnitude of potential delay to the plaintiff proceeding with the civil action should the commission decide not to deal with the human rights complaint.

[37] I will review the facts of this case as against those principles.

ii. The purpose of the *Farming and Food Production and Protection Act* and the jurisdiction of the FFPPA Board

[38] The FFPPA defines normal farm practices as follows:

Definitions
1 (1) In this Act,

"normal farm practice" means a practice that,

(a) is conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances, or

(b) makes use of innovative technology in a manner consistent with proper advanced farm management practices;

iii. Jurisdiction

[39] I begin with the observation that I find the case law relied upon by respondent's counsel to be a correct recitation of the current state of the law. While this court retains jurisdiction "to issue an injunction prohibiting a farmer from carrying on an agricultural operation that is not a normal farm practice…[,] there remains a division of power between the Board and the court…. [As a result], absent special circumstances, the question… of whether a disturbance constitutes a "normal farm practice"(emphasis added) should generally be left for the Board to determine and the action should be stayed pending such determination : see *Pyke v. Tri Gro Enterprises Ltd.* (2001), 55 O.R. (3d) 257 (C.A.), at para. 55, *per* Charron J. (dissenting, but not on this point); and *Hill and Hill Farms Ltd. v. Bluewater (Municipality)* (2006), 82 O.R. (3d) 505 (C.A.), at para. 38. Importantly, a "disturbance" for purposes of the legislation "means odour, dust, flies, light, smoke, noise and vibration": see s. 1(1) of FFPPA.

[40] I also agree with Mr. DeGoey's assertion, in Respondent's Factum, at p. 38, that "the purpose of the FFPPA is to provide protections to the agricultural community to permit farmers to effectively produce agricultural products."

[41] I, however, part company with Mr. DeGoey's assertion as to what the term "normal farming practice" encompasses.

[42] Respondent's counsel relied heavily upon the decision of the Ontario Court of Appeal in *Bluewater*, at paras.17-23. He focused upon the following language, at para. 19:

> Because the FFPPA is intended to address competing land uses, an inference can be drawn that the legislature intended the Board to have the power to consider zoning by-laws which regulate the use of land in a municipality.

[43] Respondent's counsel essentially argued that language stands for the proposition that the Board has jurisdiction to declare that any and all of the provisions of a zoning by-law do not apply to an applicant, including, without limitation, land-use issues such as which uses will be allowed in what zones.

[44] I disagree with that interpretation. I find that it conflates the concept "land uses" with "farm practices." The first relates to what kinds of farming operations will be allowed in what zones, and the latter refers to how those farming operations will be carried on.

[45] I conclude that language stands for the proposition that the Board has jurisdiction to consider elements of zoning by-laws the subject matter of which includes such things as disturbances and normal farm practices.

[46] In *Bluewater*, the by-law in question purported to address minimum distance separations between a pig farm and the neighbouring non-agricultural use. The Divisional Court had ruled that the words "municipal by-law" did not include a "zoning by-law," and, accordingly, the Board did not have jurisdiction to address the issue of the minimum distance separation. In *Bluewater*, at paras. 17- 23, the court focused on that very narrow issue. The Ontario Court of Appeal decided that the Board did have jurisdiction over those provisions in the zoning by-law.

[47] However, as was observed in *Bluewater*, at para. 21, the jurisdiction of the Board is to decide whether a "practice," for the purposes of the non-application of a municipal by-law, is a normal farm practice. In other words, the issue in *Bluewater* was not whether the Hills could own and operate a pig farm on that land, but rather whether the practices associated with the pig operation, in that case minimum separation distances, were normal farm practices.

[48] Similarly, the decision in *Pyke* was not concerned with whether Tri Gro, which was also relied upon by respondent's counsel, could produce mushrooms, but rather whether the practices engaged by them, in particular Tri Gro's composting practices, were normal farm practices. In other words, the word "practice" relates to farming techniques and methods of a required standard and/or followed by similar agricultural operations: see *Bluewater*, at para. 50, citing *Pyke* with approval.

[49] That conclusion is consistent with the reference of the Court in *Bluewater* to the lack of an exception in the injunction prohibition for "land use control laws" similar to the exemptions for the *Environmental Protection Act*, R.S.O. 1990, c. E.19; the *Pesticides Act*, R.S.O. 1990, c. P.11; the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7; and the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40. Importantly, the injunction prohibition is limited to "a disturbance." I reiterate, a "disturbance" means odour, dust, flies, light, smoke, noise and vibration. In other words, there is nothing in that section to prevent a municipality from obtaining an injunction as to noncompliance with other aspects of a zoning by-law.

[50] That conclusion is also consistent with the preamble of the FFPPA which refers to "farm uses" and "normal farm practices" separately.

[51] Agriculture is a broad term which potentially embraces several aspects of food production, including not just the growing of crops but potentially also things, such as processing and packaging. Some forms of agriculture require a significant municipal water supply and/or

electrical supply. In deciding what types of farming operations will go where, the municipality is confronted with issues well beyond the potential disturbances that a particular farming operation, such as pigs, mushrooms, or cannabis, may have upon neighbours. Land-use planning is a complex field of endeavor which requires consideration of a host of variables including, without limitation, such things as:

a. Demand for and availability of municipal water and the requirement to maintain and/or expand the municipal water supply;
b. Available electricity supply and the requirement to maintain and/or expand the electricity supply;
c. Compatibility with nearby uses;
d. Waste disposal;
e. Police protection;
f. Fire protection;
g. Road traffic and the required to build and/or maintain roads; and
h. Drainage and the requirement to build and/or maintain drains.

[52] The interpretation proposed by respondent's counsel would deprive the municipality of control over various different agricultural land uses within the agricultural community, and, accordingly, would deprive the municipalities of the ability to allocate scarce resources. It seems to me that the legislature could not have intended that result.

[53] Consistent with that conclusion, as was observed in *Oakville (Town) v. Read (c.o.b. Read Farms),* 2011 ONCA 22, 328 D.L.R. (4th) 235, at para. 32, the FFPPA is primarily concerned with nuisance lawsuits from residents who neighbour farmlands.

> The Act is primarily concerned with nuisance lawsuits by neighbouring residents. This Act replaced the former *Farming Practices Protection Act*, R.S.O. 1990, c. F.6 and added a wider variety of nuisances that would be covered. This is also confirmed in the preamble, which recognizes that agricultural activities may cause discomfort and inconveniences to those on adjacent lands. As one member of the legislature stated: "We want to be able to make sure that with those who move from small urban or large urban areas into the farm area, for reasons usually of quality of life, that won't affect the ability of farmers to carry out their chosen field, so to speak."

[54] Further, in Read, at para. 34, the court noted:

> To read the Act as being applicable to zoning land use would mean that farmers could set up farms wherever they wanted, even in areas that have been designated for other legitimate land use purposes. That could not have been the intention of the legislature.

[55] Finally, the decision in *Read*, at para. 42, offers the following summary of the Board's jurisdiction:

> The Board may have power to order that some restrictive provision of a zoning by-law does not apply so as to restrict a normal farm practice which is carried on as part of an agricultural operation, but it has no jurisdiction to grant relief from the use provisions of a zoning by-law.

[56] This case is very similar to the decision in *Read* in that Mr. DeGoey essentially seeks to carry on his cannabis production operation as an exemption from the existing zoning by-law. He has made no effort to have the property rezoned or designated as a legal nonconforming use: see *Read*, at para. 26. Said another way, the provisions as to the potential disturbance or nuisance resulting from cannabis cultivation are not at the centre of Mr. DeGoey's application to the Board, but rather the zoning provisions which prevent cultivation of cannabis in properties zoned for an agricultural hobby farm.

[57] In this case, Mr. DeGoey objected to a number of provisions which cannot be characterized as a "disturbance" within section 1(1) of FFPPA. Similarly, I conclude that such provisions are outside of the jurisdiction of the Board. Examples include, without limitation, the following:

a. A land-use inconsistent with the zoning by-law allowable uses;
b. Site plan approval;
c. A business license; and
d. Inspection for compliance with the *Fire Protection and Prevention Act*.

[58] In summary, while, on the record before me, I do not find the Board has no jurisdiction whatsoever, I conclude that the Board's jurisdiction is far narrower than the relief sought in Leamington's application.

[59] For example, issues of nuisance related to noxious odours clearly come within the jurisdiction of the Board. They include such things as the By-law provisions as to odour abatement protocols and the minimum distance separation of 200 meters from the nearest sensitive use.

[60] I, however, make the following two observations with respect to the exercise of that jurisdiction by the Board.

[61] The first is that those issues are likely moot unless, and until, the provisions of Leamington's by-laws, that are outside of the jurisdiction of the Board, are decided.

[62] The second is that Health Canada has passed odour abatement regulations. The impact of those regulations on the Board's jurisdiction and/or decision-making process will, at some point, have to be considered. Unlike provincial regulations, the issue of conflict with federal regulations has not been addressed in the legislation. To be clear, that issue was not before me.

iv. Impact upon the parties and fairness

[63] As to the issue of fairness, Mr. DeGoey's cannabis production operation is in clear contravention of the municipal by-laws. The By-law came before the cannabis operation. Accordingly, Mr. DeGoey has always operated in contravention of the by-law.

[64] Mr. DeGoey deposed that he has "been advised by Leamington and verily believe that Leamington will not consent to the rezoning of the farm from agricultural to industrial." I reiterate, Kyle Reive is a municipal By-law Enforcement Officer with Leamington. He deposed that he advised Mr. DeGoey to discuss rezoning with the planning department, and that he verily believes that no rezoning application was submitted to the planning department. I reiterate, there is no evidence to suggest such an application was made, and, accordingly, I prefer the evidence of Mr. Reive in that regard.

[65] The appropriate remedy for Mr. DeGoey was to either attempt to conform with the applicable by-laws and regulations or make application under the FFPPA prior to commencement of production. Section 6(3)(b) of the FFPPA anticipates an application being entered into prior to commencement of a new activity contrary to an existing by-law. Instead, he elected to begin cannabis cultivation in direct contravention of a number of municipal by-laws and left it to Leamington to catch him and stop him.

[66] In other words, if the stay is refused, Mr. DeGoey will be in the same position if the application proceeds as he would have otherwise been had he complied with the municipality's planning process, site plan By-law etc. Accordingly, I find denying the stay may result in, at most, an inconvenience to Mr. DeGoey but neither an injustice nor substantial prejudice.

[67] I conclude that from Leamington's perspective, this is an improper use of the FFPPA legislation to delay enforcement of various by-law provisions which are, for the most part, within the jurisdiction of Leamington and are outside of the jurisdiction of the Board. It follows that the prejudice to Leamington would be significant if the stay is granted. It, further, follows this would result in a significant injustice to Leamington and its residents.

d) The risk of two matters proceeding in tandem, different results, double recovery and delay

[68] As said above, the subject matter of the application is for the most part outside of the jurisdiction of the Board, and, therefore, there is not much that would be considered in tandem if both proceedings continued simultaneously. Also as said above, while the issues of odour abatement protocols and minimum distance separation come within the jurisdiction of the Board, any decision in that regard would be moot unless, and until, Leamington's by-laws have been addressed and, in any event, would potentially have to consider Health Canada regulations regarding Noxious Odours emanating from cannabis facilities.

e) Conclusions as to Mr. DeGoey's motion to stay

[69] For all of these reasons, it seems to me that the stay should be refused and the matter before the courts ought to proceed. That can be either prior to, or in tandem with, a hearing before the Board. I will leave it to the Board to determine the appropriateness of conducting their own hearing either in tandem with or subsequent to the court hearing.

2) Leamington's motion to strike the motion to stay

[70] I did not find it necessary to decide this issue given my conclusions as to the respondent's motion to stay.

3) Costs

[71] The parties agreed that costs of $1,000 would be payable by the unsuccessful party in this motion to strike and $5,000 by the unsuccessful party in this motion for stay. It follows costs should be paid by the respondent in the amount of $5,000.

C. ORDER

[72] For the foregoing reasons, orders to go are as follows:

1) Mr. DeGoey's motion for a stay is dismissed;

2) Leamington's motion to strike is moot;

3) Costs are fixed at $5,000, all inclusive, payable by the respondent to the applicant.

Christopher M. Bondy
Justice

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