

Constitutional challenge delays York Region's 'smoke police' case

BY JEFF MITCHELL
Staff Writer

A Newmarket businessman who slammed a door on the region's 'smoke police' may never know if he's guilty of obstructing justice.

Frank Findlay's case was to go to trial Tuesday, but a justice of the peace ruled a constitutional challenge of York Region's anti-smoking bylaw must be heard first.

That challenge, brought by well-known Toronto lawyer Morris Manning, is to be considered in a Newmarket court in February.

If the constitutional challenge is successful, Mr. Findlay's obstruction charge as well as other charges laid under the bylaw could be thrown out.

Justice of the Peace Karen Walker adjourned Mr. Findlay's case until March, saying she agreed with arguments that the obstruction case depends on the outcome of the challenge.

"I think (the JP's decision) speaks to the issue that Mr. Manning's challenge is fundamental to this bylaw remaining in effect," said Brian Patterson, a forensic accountant who is acting as Mr. Findlay's agent.

Mark McDonnell, a lawyer for York Region, fought the adjournment, arguing the bylaw remains enforceable until the constitutional challenge is heard in court.

"The law is now valid; it still is valid. It has not been struck down," Mr. McDonnell said.

Mr. McDonnell accused Mr. Patterson of trying to "ride the

coattails" of the constitutional argument launched by Mr. Manning.

Although the JP chided Mr. Patterson for seeking adjournment on the day Mr. Findlay's trial was to proceed, she ultimately agreed with his argument.

"My granting the adjournment is based on the constitutional issue," Ms Walker said.

Mr. Riopelle has joined a chorus of York Region restaurant and pub operators who say the bylaw has severely affected profits.

Mr. Findlay faces a charge of obstruction in connection with his refusal in August to allow a bylaw officer inside his Timothy Street office.

Mr. Findlay had earlier been cited for smoking in his office after a neighbouring tenant complained to the region.

Mr. Findlay said he complied with an officer's instructions that he not smoke or keep ashtrays in the office.

He admits he refused the bylaw officer entry to his office by shutting the door in his face during a third visit because he believed the region had overstepped its authority.

Although places of business are specifically listed as off-limits for tobacco use in the bylaw, Mr. Patterson questions its application to Mr. Findlay's business

since he is usually the only person working in the office.

Outside court, Mr. Findlay said he may join the constitutional challenge.

Although the case before the courts cites just one applicant, Newmarket restaurateur Irv Riopelle, the costly fight is being bankrolled by numerous restaurant and pub owners in York Region and beyond.

Some of them face charges which have been adjourned until the case is heard.

Mr. Riopelle faces numerous charges after he decided to flout the bylaw, which restricts smoking in his Prospect Street pub to 25 per cent of the occupiable floor space.

Mr. Riopelle has joined a chorus of York Region restaurant and pub operators who say the bylaw has severely affected profits.

Mr. Riopelle's application challenges the authority of municipalities to pass and enforce bylaws on issues, such as smoking and public health, which he argues ought to fall under federal jurisdiction.

The application claims the bylaw goes beyond the region's legal authority.

It also argues municipal smoking bylaws allowed under the provincial Municipal Act infringe on the rights of individuals as defined in the Constitution.

The application is to come to court in Newmarket on Feb. 21, but Mr. McDonnell said Tuesday it will be some time before actual legal arguments are heard.

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