

Landslides, Marijuana, Hazardous Sidewalks and More

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City Looking to Win by a Landslide

Clark v Moose Jaw (City), 2017 SKQB 283 (CanLII) http://canlii.ca/t/h6fsm

The Applicants, homeowners who reside in Moose Jaw Saskatchewan (City) received correspondence from the City in May 2017 to vacate and demolish their residences by July 31, 2017. The City sent this request because the Applicants' homes were in an area that was prone to landslide or "slumping," which the City defined as "a condition when valley sides fall or slide down, and is a natural geological process that happens over time due to weak layers in the soil, impacted by moisture, erosion, freeze/thaw cycles and loads on land." The City followed up with an Order to Comply. The Applicants appealed to the Building and Accessibility Standards Appeal Board. The Board dismissed the City's requirement for the Applicants to vacate and demolish their residences, from the fixed date of July 31, 2017 to a flexible requirement at the owner's earliest convenience. The Board found that the City erred in the review of a geotechnical report. The Applicants sought a preservation order for their residence in the form of an injunction.

HELD: Adjourned.

DISCUSSION: In light of the Applicant's request for an injunction, the Court highlighted that it must consider whether the Applicants or visitors of the Applicants' residences were in imminent danger as suggested by the City. The Court outlined the test for an injunction as stated in the Supreme Court of Canada decision *RJR- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC). The onus is on the movant to establish: a serious question to be tried; the suffering of irreparable harm if the injunction is not granted; and the balance of convenience favours the granting of the injunction.

Not disputing the underlying injunctive injunctive test, it was appropriate to apply the test to the matter at issue, given that it was a safety risk, not just a monetary issue. Relying on *Willis v. O'Reilly* (1986), 1986 CanLII 3391 (SK QB) which states "if irreparable harm to the public would ensue from the granting of an injunction then there ought to be no injunction in the face of such danger." The Court held that it could not make an injunctive order, based on the lack of evidence before it. The Court stated that there may not be a sense of urgency as described by the City and so adjourning the decision to allow both the Applicants and the City to obtain further evidence of the actual risk of harm to the occupants and homes was required. The Court left it up to the Applicants to stay or leave until the matter was to be heard on October 10, 2017, but the City could not evict the Applicants.

Regulating These Joints: Zoning and Marijuana Dispensaries in Toronto

Toronto (City) v. Lanova Outsourcing Corp., 2017 ONSC 5743 http://canlii.ca/t/h6mhv

The City of Toronto (City) filed an application seeking an injunction to prohibit the operation of seven marijuana dispensaries in the City. The City argued that the marijuana dispensary storefronts were operating in contravention to the City's Zoning Bylaw. The dispensary operators (Operators) filed an application alleging that the Zoning Bylaw, the *Controlled Drug and Substances Act* (*CDSA*), S.C. 1996 c.19, and the *Access to Cannabis for Medical Purposes Regulations* (*ACMPR*), SOR/2016-230 was unconstitutional as the legislation violated the *Canadian Charter of Rights and Freedoms* and the *Constitution Act, 1982*, by not providing reasonable access to medical marijuana for patients that require it. In the interim, both parties brought a motion for an interlocutory injunction to prohibit the other party from their actions until the application is decided in December, 2018.

HELD: Interlocutory injunction granted in favour of the City.

DISCUSSION: In applying the three-prong test for interlocutory injunction set out in *RJR MacDonald (Attorney General)*, 1994 CanLII 117 (SCC), the Court looked to the moving parties to prove: a serious question to be tried; the suffering of irreparable harm if the injunction is not granted; and the balance of convenience favours the granting of the injunction. Both parties agreed that the first prong was met and this was a serious and unique question to be tried. Turning to the second prong, *RJR-MacDonald* has created a caveat for public authorities, allowing for a lower threshold than that required of a private application to establish irreparable harm. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility. The City argued that the Zoning Bylaw was enacted to promote and protect the public in the City, and the City was draining considerable resources as a direct result of the Operators' business in order to fulfill its protection obligation to the public. The Court agreed with the City, and determined the second prong was met.

The crux of the matter fell to the third prong and required the Court to determine where the balance of convenience fell. The City began by relying on *RJR- MacDonald* and *Harper v. Canada (Attorney General)*, 2000 SCC 57, and argued that the Operators had a high burden of proof to meet as there is a presumption that when a law is enacted it is to serve a public good. The City

together with the Attorney General argued that current laws provide safeguards and controls to protect patients and the public. The City claimed Operators were putting the public at risk as their products were being sold without adequate labelling, created without regulatory oversight, not inspected and are too easily accessible for minors. Furthermore, the City presented data which linked an increase in the incidence of armed robberies at dispensaries putting employees, customers and the public at risk. In an attempt to rebut the presumption that the legislation promoted the public interest, the Operators unsuccessfully relied on *Allard v. Canada,* 2016 FC 236 (CanLII) which discussed storefront marijuana stores providing reasonable access to medical marijuana. The Court found this argument unconvincing and not applicable to the current issue, and held that the City successfully met the test for the interlocutory injunction.

Planning for Marijuana Production: Temporary Use Bylaw Approved

Hurley v Brock (Township), 2017 CanLII 68089 (ON OMB) http://canlii.ca/t/h6p2f

The Applicant, a corporation, applied to the Township of Brock (Township) for a temporary use bylaw. The temporary bylaw would amend the Township Zoning Bylaw to allow the establishment of a medical marijuana production facility on four separate properties in the Township. There would be no retail facility on site, and all products would be shipped from the site by a secure courier. The Applicant intended on using the existing industrial buildings temporarily until it could locate a larger facility in the area. The Township approved the temporary use bylaw. The Appellant, a resident in the Township, appealed the Township's decision. The Appellant alleged concerns regarding consistency between the temporary use bylaw and the Regional and Township Official Plans.

HELD: Appellant no longer opposed Township's decision.

DISCUSSION: The Township Board framed the issue and outlined the relevant portions of the *Planning Act (Act)*, particularly section 24(1) which requires a temporary use bylaw to comply with the Official Plan as well as section 39 that permits a temporary use bylaw for a period of only three years. The Appellant relied on the testimony of Mr. Wellings, a planner retained by the Township to provide the recommendation report to deny the temporary use bylaw from the Applicants application. Wellings expressed concerns about the compatibility of the application with the surrounding area, and the lack of compliance with the Ministry of Environment and Climate Change (MOECC) guidelines. Two other planners were retained on behalf of the Applicant and the Township, each opposing the current appeal. Both testified that the proposed facility met the requirements of the MOECC guidelines, the Greenbelt Plan, that the proposal was compatible with both the Regional Official Plan and the Township Official Plan, and the facility would be utilizing underused land. Prior to the conclusion of the hearing, the Appellant indicated that his concerns were resolved and he no longer opposed the Township's decision to approve the temporary use bylaw.

Despite this the Board still had to still ensure that the temporary bylaw complied with the *Act*. The Board held that the potential impacts of the application were addressed and the proposal was consistent and complied with all relevant policies. The Board permitted the temporary use bylaw for a period of three years.

Bylaw Hierarchy: The Impact of Direct Cross Reference

McCann v Edmonton (City), 2017 ABCA 323 (CanLII) http://canlii.ca/t/h6jw6

The City of Edmonton (City) received an application that proposed converting a single detached home to a child care service. Upon review of the City's current Zoning Bylaw, a development officer granted a variance for on-site drop off spaces and issued the development permit to the corporation. The Appellants, neighbours of the proposed child care service, appealed the issuance of the permit to the City's Subdivision and Development Appeal Board (Board). They alleged that despite the Zoning Bylaw currently being in effect, the development officer should have applied the Land Use Bylaw. The appeal was dismissed, and Appellants received leave to appeal.

HELD: Appeal dismissed.

DISCUSSION: The question before the Court was whether the Board and/or the development officer erred in applying the City's current Zoning Bylaw rather than the Land Use Bylaw when issuing the permit, and if so, whether it had any effect on the issuance of the development permit. The Zoning Bylaw contained a transitional provision to deal with any statements that made direct reference to the Land Use Bylaw: to stay true to the original intent, the Land Use Bylaw would apply. In comparing the Zoning Bylaw and the Land Use Bylaw in the context of child care services in single detached homes, the variations were minimal and were simply around parking requirements.

The Court had previously ruled on the application of the transitional provision in *Parkdale-Cromdale Community League Association v. Edmonton (City)* 2007 ABCA 309 (CanLII) and *Cameron Corporation v. Edmonton (Subdivision and Development Appeal Board)*, 2012 ABCA 254 (CanLII) holding that if there is a direct express cross reference to the old Land Use Bylaw, then the provisions of the Land Use Bylaw would apply. Absent any explicit cross reference, the Zoning Bylaw would apply. In the current appeal, the child care service or parking requirements do not have any express cross reference to the Land Use Bylaw. The Court found the references to be generic and thereby directly transferable to the Zoning Bylaw. Therefore, the Court held that neither the development officer nor the Board erred in applying the Zoning Bylaw. In addition, the Court stated had the development officer were to apply the provisions in the Land Use Bylaw, the development permit would have still been permitted.

Municipal Snow Removal and Winter Footwear: Enough Negligence to Share

Costerus v. Kitchener (City), 2017 ONSC 6030 (CanLII) http://canlii.ca/t/hmr0f

In late January 2010, the Plaintiff sustained injuries after she slipped and fell on a City of Kitchener (City) sidewalk. The question before the Court was whether the City was grossly negligent in failing to meet its obligations as outlined in section 44 of the *Municipal Act*, 2001 (*Act*), and whether the Plaintiff was contributorily negligent

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felonious assault and attempted assault weren't supported by sufficient evidence. The court disagreed, affirming the trial court's ruling and holding that Price had been properly convicted given that he was afflicted with HIV and Hepatitis C and had spit on and bit an officer, knowing that his saliva was a deadly weapon capable of inflicting physical harm to another. His expectorant thus fulfilled the provisions of R.C. 2903.11(A)(2), "[n]o person shall knowingly cause or attempt to cause physical harm to another. . . by means of a deadly weapon. . . ."

The Body Parts: *State v. Kuperus*, 241 Ore. App. 605, 251 P.3d 235, 2011 Ore. App. LEXIS 396 (2011).

Note that in Oregon, teeth do not qualify as a deadly or dangerous weapon. Why? Because you can't "arm" yourself with your teeth... they are already in your mouth of course! The big question now is whether this analysis would also apply to dentures.

Conclusion

If it is not already apparent, courts often resist being bound by a concrete list of objects that may qualify as a "deadly weapon." As an example, California courts recognize that "[a]n instrumentality is a deadly weapon if it is capable of being used to inflict death or great bodily injury, and if its possessor intends to use it as a weapon should the circumstances require it," however, whether an object is a threat to others remains a question of fact that must be decided by a jury on a case-by-case basis.[9]

As this brief essay demonstrates, the consideration of what constitutes a deadly weapon, and under what circumstances, would seem to be excellent subject matter for presentation to enterprising law students around the country in their law school examinations.

Notes

1. Ohio R.C. 2923.11(A).
2. *Id.*
3. Fortney, 832 N.E. at 1268.
4. Faircloth, 2013 Tex. App. LEXIS 6513 *4.
5. *Id.*
6. 1996 N.Y. App. Div. LEXIS 13764 (N.Y. App. Div. 4th Dep't 1996).
7. 187 A.D.2d 761, 589 N.Y.S.2d 942, 1992 N.Y. App. Div. LEXIS 12678 (N.Y. App. Div. 3d Dep't 1992).
8. State v. Roullier, 1999 Mont. LEXIS 37, *1.
9. *Legal Censure of Unconventional Expressions of Love and Sexuality; Finding a Place in the Law for BDSM*, 28 Hastings Women's L.J. 25, 27 (2017). ML

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commands to drop the knife, an officer discharged a taser at Frederick, which she blocked with her purse and then followed up with charging the officers. At that point an officer shot and killed Frederick, prompting her estate to file suit alleging, among other things, excessive force Fourth Amendment claims under § 1983. The district court performed an analysis with the *Graham* factors and granted summary judgment to the police and associated municipality, leading the estate to appeal the dismissal. In focusing on the excessive force claim the estate argued the district court erred under the Ninth Circuit's "provocation rule," which holds that "[w]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." The Eighth Circuit noted first that during the pendency of this appeal the Supreme Court rejected the provocation rule in *Mendez*, deeming it fundamentally flawed because it "uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." The Supreme Court further clarified in *Mendez* that the "objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional." Applying these clarifications to the facts at hand, the Eighth Circuit found that it was objectively reasonable for an officer to use deadly force against an individual wielding a knife and charging another police officer.

The estate did not contest this, but instead argued the tasing was a distinct Fourth Amendment violation (from the latter deadly force applied), thus requiring the Circuit to follow Supreme Court guidance and assess this alleged violation of Frederick's Fourth Amendment rights independently. In doing so the Circuit found this non-lethal application of force was objectively reasonable as well because when it was applied the officers faced Frederick in a "small commercial space, in front of restrooms that might have been occupied, and brandishing a weapon that posed a danger to the officers and store customers." It affirmed the lower court.

http://media.ca8.uscourts.gov/opndir/17/10/163523P.pdf ML

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by choosing to wear running shoes despite observing the icy sidewalk conditions.

HELD: City is grossly negligent, and the Plaintiff is contributorily negligent.

DISCUSSION: The Court began by laying out the City's responsibility under section 44 to keep highways (which includes sidewalks) in a state of reasonable repair and highlighted section 44(9) which indicates that a City will not be liable for personal injury caused by snow or ice on the sidewalk unless the City is grossly negligent. To clarify the definition of grossly negligent, the Court looked to *Crinson v. City of Toronto* 2010 ONCA 44 that found that it does not require proof of misconduct that is willful, wanton or flagrant. The weather reports that were available to the City confirmed a significant wind chill which would contribute to the freezing of the precipitation in an overnight thaw-freeze cycle. In addition, upon further evidence it became clear that the City did not have a minimum winter maintenance standards policy which means there was no indicator which would determine when it was necessary for the snow removal operator to remove snow or ice from high pedestrian areas on sidewalks. Lastly, the Court accepted the evidence of the Plaintiff that there was significant ice and snow on the sidewalk.

The Court held that the plaintiff had established on a balance of probabilities that the City was grossly negligent in its failure to maintain its sidewalks at the time of the fall. The Court concluded that the City must have been aware of the weather reports and conditions and should have responded accordingly. Relying on past case law, the Court found this to be unreasonable; the Ontario Court of Appeal in *Dorschell v. Cambridge (City)* (1980) 1980 CanLII 1743 (ONCA) confirmed that the lack of a policy by a municipality or a policy of not taking any systematic or regular action to remedy snow or ice conditions was evidence of serious negligence. The Court further held that the Plaintiff's actions for choosing to wear running shoes, instead of winter boots despite observing the sidewalk conditions before she left her residence, constitute negligence and contributed to her injuries. The Court assessed the contributory negligence at 50%. ML