

Inside Canada

Inept Drivers, Accessory Uses, Restrictive Covenants, and Vigilant Code Officers

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Failing to Appear in Court Results in Default Judgement

Morin v Edmonton (City), 2018 ABQB 104 (CanLII) http://canlii.ca/t/hqcp7

While in a City of Edmonton (City) parking lot, the Appellant backed up her motor vehicle and hit a red-light camera pedestal which was owned by the City. The City filed a claim for damages against the Appellant. The Appellant failed to appear and a default judgement in the amount $7858.97 was granted in her absence. The Appellant unsuccessfully filed an application with the Provincial Court to have the default judgement set aside. The Appellant appealed dismissal of the application.

HELD: Appeal dismissed

DISCUSSION: The Provincial Court Judge applied the test outlined in *Palin v. Duxbury* 2010 ABQB 833 to determine whether to set aside the Appellants' default judgment. To satisfy that test, the Appellant must: 1) have an arguable defence; 2) not deliberately let judgement go by default and have some excuse for the default, such as illness or a solicitor's inadvertence; and 3) after learning of the default judgement, must have moved promptly to open it up. In assessing the facts of the matter against the criteria, the Provincial Court Judge found that the Appellant did not have an arguable defence. The Appellant was in control of the motor vehicle, chose where to park and assessed whether the parking spaces were of adequate size for the motor vehicle. The City was not at fault.

On appeal of the Provincial Court Judge's decision, the Appellant argued that the standard of review should be correctness as the question of whether there was an arguable defence, is one of law. The Court agreed that by itself it was a question of law. However, the Provincial Court Judge intertwined the facts to assess the legal test and as such the Court found that it was a question of mixed fact and law. As a result, the Court could only overturn the Provincial Court Judge's decision if there was a 'palpable and overriding error' in arriving at its decision. The Supreme Court of Canada (SCC) has provided insight into what is meant by the phrase "palpable and overriding error" in a variety of cases. The SCC indicates that it something that is characterized as "unreasonable" or "clearly wrong." In reviewing the steps taken by the Provincial Court Judge to arrive at his decision, evidence was properly reviewed, the Court digressed that more evidence could be brought out in trial, but that is not to say the Provincial Court Judge did not review the evidence before him. As a result, the Provincial Court Judge did not make a palpable and overriding error in reaching his decision to dismiss. The appeal was dismissed.

Municipality Maintains Autonomy over Development and Implementation of Servicing within Their Communities

Don Black Investments Limited v. Middlesex (County), 2017 CanLII 47807 http://canlii.ca/t/h51lb

Two development companies, Don Black Investments (DBI) and South Winds Development Co. (South Winds) sought to develop neighbouring subdivisions in the Municipality of Middlesex Centre (Municipality). DBI proposed to develop its property into a mix of dwellings and townhouses, commercial development, a school block and a park space. However, it faced several issues with the Municipality's official plan, zoning bylaw, and waste and storm water services. A suggested permanent solution for the services would be to locate them on South Winds' property. DBI requested that it provide interim waste and storm water at its own cost and risk until a permanent solution was available. The Municipality failed to respond to DBI's draft plan conditions within the statutory timeframe. This led DBI to appeal to the Ontario Municipal Board (OMB). Prior to appearing before the OMB, DBI and the Municipality worked together to resolve over 40 issues, except one; whether it was reasonable for conditions of the draft plan approval to provide for the option of interim servicing at the discretion of the Municipality. South Winds objected to the wording of the draft plan conditions that allowed for an interim servicing option to be permitted by the Municipality.

HELD: Conditions are reasonable.

DISCUSSION: Despite the narrow question before it, the OMB considered whether the draft plan conditions agreed to between DBI and the Municipality were reasonable in light of section 51(25) of the *Planning Act (Act)*; whether proper regard was had for subsections 51(24) and 2 of the *Act*; and whether the wording of the conditions was consistent with the Provincial Policy Statement and the County and Municipality Official Plan. Section 51(25) of the *Act* allows for conditions to be imposed by the OMB if they are "reasonable, having regard to the nature of the development proposed for the subdivision". South Winds suggested that by allowing conditions that would let the Municipality determine whether an interim servicing should be permitted would result in uncertainty as to how the DBI subdivision would be serviced. The OMB disagreed, and stated that there was no uncertainty. The conditions supported by the Municipality, County and DBI was reasonable and certain; it was certain that DBI would provide full municipal services and it was certain that DBI would connect to the preferred full servicing solutions once such servicing was available. South Winds argued that any reference to interim servicing and "to the satisfaction of the Municipality" should be deleted in its entirety. The Municipality argued removing the language was unlawful as it suggested that the jurisdictional authority that it had over servicing within its jurisdiction would be removed. The OMB concluded that it was would be unreasonable to impose the

changes as proposed by South Winds.

South Winds further argued that the servicing approach of the Municipality harmed its ability to develop its lands and were contrary to the Provincial Policy Statement. The Municipality disagreed, indicating that the conditions did not harm South Winds' ability to develop its lands, but instead provided for orderly development that would have proper regard under section 51(24) and 2 of the *Act* and was consistent with the Provincial Policy Statement. The OMB agreed. All concerns raised by South Winds with respect to the condition were considered unfounded.

"Naturally and Normally Incidental" Leads to a Broad Interpretation of an Accessory Use in a Zoning Bylaw

Hutchinson v. Corporation of Norfolk County, 2018 ONSC 181 (CanLII) http://canlii.ca/t/hppg8

The Applicant, is a neighbour of Debono Greenhouses Ltd (Debono) and a resident of the Corporation of Norfolk County (County) collectively, the Respondents. Debono relied on wood chips as fuel to heat its greenhouses, consuming 10,000 cubic metres of chips annually. Debono ground trees brought to property from demolition sites and stored the chips on the premises. The Applicant complained to the Ministry of Environment and Climate Change (Ministry) and the County arguing that Debono's storage and grinding of wood chips created excessive noise, potential environmental concerns, property devaluation and it was not permitted under the Zoning Bylaw. The Ministry rejected the Applicant's environmental complaint. Following an internal investigation, the County concluded that Debono's operation was an accessory use to the greenhouse operation and therefore permitted under the County's Zoning Bylaw. The Applicant sought a declaratory order from the Court against the Respondents that the storage and grinding of the wood chips is contrary to the Zoning Bylaw.

HELD: Application dismissed.

DISCUSSION: Relying on the Ministry's assessment, the Court promptly rejected the Applicant's subjective and speculative arguments regarding noise, property devaluation and environmental concerns. The Court concentrated on whether Debono's use of wood chips was in compliance with the Zoning Bylaw. As indicated in *Suprun v. Bryla*, 2007 ONCA 800 the interpretation of a municipal bylaw is the function of the court, no deference is awarded to the finding of the County. The Court outlined the two principles that must be observed when interpreting a bylaw; first, that each case depends on its own and second, the words used in the bylaw are important *Conlin v. Prowse*, [1993] O.J. 2923 (Ont. Gen. Div.).

The Court concentrated on the second principle; having reviewed the language of the Zoning Bylaw, it found that the wood chip activity was not a permitted use. However, when reviewing the language of an accessory use, the Court arrived at a different result. The Zoning Bylaw defined accessory use as "a use naturally and normally incident to, subordinate to and exclusively devoted to a principal use and located on the same lot therewith." The phrase "naturally and normally" would therefore permit Debono's wood chip activity as an accessory use as long as the Court concluded that such use was not unnatural or abnormal. The Court contrasted this language with the other municipal bylaws that use the phrase "customarily incidental" when referring to accessory uses. The Court provided a discussion on the different phrases relying on the dissenting decision in *Conlin:* "customarily incidental" leads to a restrictive interpretation that would limit accessory uses to those demonstrated as common in the area. [While] "naturally and normally incidental" was said to be much broader and would permit the innovation accessory uses". The Court found that Debono's greenhouse operation, the principle use, required fuel and the wood chips were ground and stored to provide such fuel; therefore, the chips would not be on the property but for the principle use making the wood chips an accessory use.

Restrictive Covenant on Title Provides City Immunity Following Landslide

Kennedy et al v. City of Castlegar, 2018 BCCRT 35 (CanLII) http://canlii.ca/t/hq9s1

The Applicants own property (lot 2) in the City of Castlegar (City) which backs onto a creek. They argue that the City failed to maintain a culvert and a restrictive grate at the opening of the culvert that it previously installed, and as a result of the City's negligence, the Applicant's property was damaged due to blockage of the culvert. The City argued that it was not involved in the culvert installation, that the Applicant's damage was the result of a landslide along the creek for which the City has no authority as it is under provincial jurisdiction. Furthermore, the City cites a restrictive covenant that was registered on the Applicant's property which provides the City immunity to this claim.

HELD: Application dismissed.

DISCUSSION: Despite the variety of arguments raised by the Applicants, the Tribunal decision only concentrated on the restrictive covenant cited by the City finding it to be the determinative factor for the matter before it. The Applicants did not dispute the presence of the restrictive covenant on their property but argued that it was registered on its property by error. The Applicants' property was subdivided into Lot 1 and Lot 2 in 1979, and at that time the City registered a restrictive covenant on both lots. The restrictive covenant outlined the City and Province of British Columbia as the grantee and the property owners as the grantor. It explicitly outlined that the grantor "will never require or have any claim against the grantee." Furthermore, the restrictive covenant runs with the land and is perpetual, meaning it will apply to all future property owners. In 1985 the property owner of Lot 2 called the City and requested the removal of the restrictive covenant on Lot 2 and to remain solely on Lot 1. The Applicant relied on this memorandum to determine that the restrictive covenant was registered by error. The Tribunal concluded that this memorandum was simply a request, and the Applicants failed to prove that the City had agreed to remove the restrictive covenant. As a result, the Tribunal held that the restrictive covenant applies to the Applicant and the City is therefore not liable for any damages.

Safety is the Responsibility of Property Owner

Lacey v City of Calgary, 2018 ABPC 30 (CanLII) http://canlii.ca/t/hq6xv

The Plaintiff, a residential property owner in the City of Calgary (City) brought a negligence claim against the City alleging that a Safety Codes Officer (SCO) acting on behalf of the City breached the duty of care owed. The Plaintiff was in the process of demolishing the sidewalk on his property when a bulldozer hit his building, dislocating a portion of the brick veneer wall. Acting on complaints from the public, the SCO examined the Plaintiff's property, concluding that it was no longer safe and in danger of collapse. The SCO informed the Plaintiff that the building was no longer considered safe for occupants, the demolition

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site did not have the proper safety fence, and no permit from the City had been issued. As a result of the Plaintiff's inaction to reduce the danger on the property, the SCO hired a third-party contractor to erect a safety fence and secure the wall of the Plaintiff's building. The work by the third-party contractor cost approximately $17,000 which the City levied against the Plaintiff's property. The Plaintiff claimed that he was owed a duty of care by the City and the City breached that duty, and as a result the Plaintiff suffered damages.

HELD: Claim dismissed.

DISCUSSION: The City's defence was that it did not owe the Plaintiff a duty of care, and even if the Court found there was, the City did not breach it. In particular the City relied on its authority under s. 551(1) of the *Municipal Government Act*, RSA 2000 which provides a municipality the ability to take whatever actions necessary to eliminate an emergency, and s. 47(1) of the *Safety Codes Act*, RSA 2000 (*Act*) authorizing an SCO faced with an imminent serious danger to take action to remove the danger.

The Plaintiff argued that the SCO acting for the City had a duty of care to inform him of the requirements be followed so as to comply with the *Act* and the *Alberta Building Code 2014* as well as educate the public on these requirements. The Court found that the legislation stated the contrary. The *Act* put the onus on the owners of the property to ensure that all of their activity met the requirements of the Act and there was no obligation on the SCO. Therefore, no duty of care was owed.

The Plaintiff further unsuccessfully argued that once the SCO found the Plaintiff was not in compliance with the *Act* the SCO had a duty to issue an order that outlined the steps to comply. The legislation did not support such a claim. The *Act* states that the SCO may~ but is not required to~issue an order and as a result, the City's SCO was not obligated to take such action. The Court found that the SCO acted accordingly under the *Act* by hiring the third-party contractor to reduce the danger posed by the Plaintiff. In referencing the exclusion of liability clause in the *Act*, the Court found that even if it erred in finding that the no standard of care was owed, the City would not be liable if it had acted in good faith [*Condominium Corporation No. 9813678 v. Statesman Corporation* ABQB 493]. The Plaintiff did not prove that the City acted in bad faith when it hired the third-party contractors. The claim was dismissed. ML

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Charlotte for as little as little as $6.50 per fix-sized ballon. Sam Quinones, Dreamland 229, Bloomsbury Publishing (2015)
23. Allison Bond, *Why fentanyl is deadlier than heroin, in a single photo*, Statnews, Sept. 29, 2016, *available at* https://www.statnews.com/2016/09/29/fentanyl-heroin-photo-fatal-doses/
24. Josh Katz, *The First Count of Fentanyl Deaths for 2016: Up 540% in Three Years*, NY Times, Sept. 2, 2017, *available at* https://www.nytimes.com/interactive/2017/09/02/upshot/fentanyl-drug-overdose-deaths.html
25. Nate Raymond, *Saleswomen plead guilty to paying kickbacks to push fentanyl in NH, elsewhere*, New Hampshire Union Leader, July 12, 2017 *available at* http://www.unionleader.com/crime/saleswomen-plead-guilty-to-paying-kickbacks-to-push-fentanyl-in-nh-elsewhere-20170712
26. Anna R. Schecter and Lisa Riordan Seville, *Florida Drug Treatment Center Operators Busted in Crackdown*, NBC News, July 19, 2017, *available at* https://www.nbcnews.com/health/health-care/florida-drug-treatment-center-operators-busted-crackdown-n784326
27. *Id.*
28. Van Zee, *supra* note 12.
29. *Id.*
30. Esch, *supra* note 20. Some Purdue deponents have averred that the FDA itself added the unverified language; one source points out that the FDA official overseeing review of the insert left the government's employ and began working for Purdue two years later.
31. United States of America v. The Purdue Frederick Company, Inc., no. 1-07CR00029 (W.D. Va. July 23, 2007). http://www.vawd.uscourts.gov/OPINIONS/JONES/107CR00029.PDF
32. 21 U.S.C. §812 (2016).
33. *McKesson Agrees to Pay Record $150 Million Settlement for Failure to Report Suspicious Orders of Pharmaceutical Drugs*, Department of Justice, Jan. 17, 2017, *available at* https://www.justice.gov/opa/pr/mckesson-agrees-pay-record-150-million-settlement-failure-report-suspicious-orders
34. Complaint, City of New York v. Purdue Pharma L.P., *supra* note 17.
35. Nate Raymond, *Mallinkrodt Settles US Opioid Drug Probe for $35 Million*, Reuters, July 11, 2017, *available at* https://www.reuters.com/article/us-malinckrodt-settlement/mallinckrodt-settles-u-s-opioid-drug-probe-for-35-million-idUSKBN19W2EL
36. Van Zee, *supra* note 12.
37. Eyre, *supra* note 1.
38. Barry Meier, *F.D.A. Urging a Tighter Rein on Painkillers*, NY Times, Oct. 24, 2013, *available at* http://www.nytimes.com/2013/10/25/business/fda-seeks-tighter-control-on-prescriptions-for-class-of-painkillers.html
39. 21 U.S.C. § 824(d)(2) (2016).
40. *Letter to Congress*, National Association of Attorneys General, Nov. 13. 2017, *available at* http://oag.publishpath.com/Websites/oag/images/NAAG%20Letter%20re%20Repeal%20of%20Ensuring%20 Patient%20Access%20and%20Effective%20Drug%20Enforcement%20Act%20of%202016.pdf
41. *Pharma lobbying held deep influence over opioid policies*, The Center for Public integrity, *available at* https://www.publicintegrity.org/2016/09/18/20203/pharma-lobbying-held-deep-influence-over-opioid-policies
42. Eric Eyre and David Gutman, *Prescription Drug Money Fuels Morrisey Campaign*, Charleston Gazette Mail, Aug. 6, 2016, *available at* https://www.wvgazettemail.com/news/politics/prescription-drug-money-fuels-morrisey-campaign/article_c0fc197b-862e-5306-8724-61b9b7852ee8.html
43. *Risks and Benefits of Opioid Analgesics*, PrescribeResponsibly, *available at* https://www.prescriberesponsibly.com/articles/opioid-analgesics-risk
44. *AAPM Response to Citizens Petition of the FDA on Ultra High Dose Opioids, Docket No. FDA-2017-P-5396*, American Association of Pain Medicine, Nov. 2, 2017, *available at* http://www.painmed.org/files/aapm-response-to-citizens-petition-of-fda.pdf
45. Ryan Hampton, *Purdue Pharma: You Can't Wash Away Your Part in the Opioid Crisis*, Huffington Post, Dec. 15, 2017, available at https://www.huffingtonpost.com/entry/purdue-pharma-new-york-times-ad_us_5a33f201e4b0e1b4472ae5cf
46. Third Amended Complaint at 262, City of Chicago v. Purdue Pharma L.P., no. 14-cv-04361 (N.D. Ill. Oct. 25, 2016), *available at* http://www.feinberg.northwestern.edu/sites/ipham/conferences/globalhealthsymposium/docs/Third_Amended_Complaint_14_cv_04361.pdf.
47. Sean Emery, *Opioid Maker Agrees*