INSIDE CANADA

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Ontario 2015

Expensive Dinners, Blanket Exemptions, Ashinaabe Water, Intensification, and More

Dinner for Two: $750 Under the Emergency Management and Civil Protection Act
Durham (Regional Municipality) v. Gonsalves-Borrice, 2022 ONCJ 37 https://canlii.ca/t/jm1dp

During the height of the COVID-19 pandemic, an officer with the Durham Regional Police charged the Defendant and three other individuals who were socializing and eating in a car, contrary to the Province of Ontario stay-at-home order. The Defendant disputed the charge.

HELD: Conviction registered.

DISCUSSION: Since March 2020, the Province of Ontario took additional measures to suppress the spread of COVID-19. The Province enacted regulations under the Emergency Management and Civil Protection Act, R.S.O. 1990, c. E.9. O.Reg 265/21 which included a provincial wide stay-at-home order (Order) requiring individuals to remain in their residence unless leaving was necessary. The Order listed a few exceptions, including to "obtain food, beverages, and personal care items." However, attending an organized public event or social gathering was explicitly prohibited under the Order. The onus was on the Defendant to prove on a balance of probabilities that there was an exception under the Order that applied to the charge.

The Defendant did not challenge the observations or testimony of the officer, but rather was under the impression that he was permitted to leave his residence under the Order to obtain food. While the Court agreed with that exception, it rightly pointed out that the Order was "not an invitation for the Defendant and his buddies to grab a meal and hang out." The Court held that the Defendant did not meet the onus, as he was more likely to be an individual socializing in a group rather than an individual who left his residence to get food out of necessity. The Court registered the conviction and upheld the $750 fine.

Court Cannot Grant Blanket Exemption under the Municipal Conflict of Interest Act
Re: Town of Laurentian Hills, 2022 ONSC 705 https://canlii.ca/t/jm3d2
The Town of Laurentian Hills (Town) sought an order from the Court exempting all the Town Councillors from the conflict of interest legislation under the Municipal Conflict of Interest Act, RSO 1990, c. M.50 (Act). The Town claimed that Councillors had a potential conflict of interest with the Town's major employer, Canadian Nuclear Laboratories (CNL). The Court held that it did not have the authority to grant a blanket exemption under the Act and directed the Town to prepare a draft order of potential pecuniary conflicts of interest. The Town failed to do so and instead filed a new notice of motion and sought the same relief.

HELD: Draft order issued with limited exemptions.

DISCUSSION: The Town's new notice of motion meant that the Court was faced with the same issue it had already decided; that it did not have the authority to grant Councillors a blanket exemption under Act. The Court had requested that the Town submit the directed information in preparation of a draft order for the Court to approve. The Town failed to do so, and a court order was never issued. The Court correctly questioned whether a court order was still required as requested again by the Town, given that two years had passed, and Council was not impeded from performing its role. The Court arrived at the same conclusion: that the Town's new notice of motion and proposed exemption was exactly what it could not rule on, namely the fact that an issue may come before Council and may involve a pecuniary interest of CNL is insufficient. The Court signed a draft order for the Town with which outlined limited and specific exemptions based on evidence provided at the original hearing.

No Right to Intervene in Anishinaabe Action for Taking of Water
Iskatewizaagegan No. 39 v. The City of Winnipeg, 2022 ONSC 535 https://canlii.ca/t/jm188
Since 1919, the City of Winnipeg (City) has relied on the water from Shoal Lake as its municipal drinking water. Iskatewizaagegan No. 39 (No. 39) and Shoal Lake No. 40 (No. 40) are Anishinaabe communities locat-

ed in the northwest part of Ontario on the shore of Shoal Lake. No. 39 brought an action for damages claiming that the City violated a 1913 Order in Council (Order) when it took water from Shoal Lake without providing compensation. No. 40 filed a motion to intervene in the action claiming that it has also suffered losses as a result of the City taking and diverting water from Shoal Lake. No. 39 opposed the motion brought forward by No.40.

HELD: Motion dismissed

DISCUSSION: The Province of Ontario granted an Order allowing the City to divert and use water from Shoal Lake as its drinking water source. The Order provided that full compensation must be made by the City to parties whose lands may be "injuriously affected or in any way interfered with" as a result. No. 39 argued that it suffered ecological, financial and cultural losses arising from the City taking the water from Shoal Lake and submitted that no compensation had been provided for these losses. The City and Province of Ontario agreed that No. 39 met the definition of "party" in the Order.

Rule 13.01 of the Rules of Civil Procedure provides that a person who is not a party can bring a motion for leave to intervene if the person claims an interest in the subject matter of the proceeding. No. 40 argued that it had an interest in the subject matter of the claim. The Court disagreed, finding that No. 39's claim is for damages not an action seeking a declaration or a court interpretation. It is a claim for compensation which No. 39 argues it is entitled under the Order and is therefore more of a private dispute, Authorson (Guardian of) v. Canada (Attorney General), 2001 CanLII 4382 (ONCA). The Court was not persuaded that No. 40 met the burden to intervene. Motion dismissed.

Can Legal Counsel Also Be a Witness to the Proceeding? Court Says No.

Goldie v. Kings (County), 2021 NSSC 342 https://canlii.ca/t/jlbs7

The Appellant filed a motion against the Municipality of the County of Kings (Municipality). In response, legal counsel for the Municipality prepared and filed an affidavit which it intended to rely on in the appeal. This resulted in the Municipality's legal counsel being a witness and cross-examined by an Appellant in the matter it is litigating. Legal counsel for the Municipality argued that providing testimony would not compromise the proper administration of justice and should be permitted.

HELD: Municipality must find new counsel.

DISCUSSION: The sole question before the Court was whether legal counsel may represent the Municipality and be a witness for the Municipality in the same matter. Common law provides that a lawyer appearing as both legal counsel and a witness in the same proceeding is a violation of the rules, but does not necessarily require that the lawyer be removed as counsel, Lavender-Smith v. Smith, 2021 NBCA 34. The inherent objective of the aforementioned violation is to preserve the integrity of the justice system.

In reviewing the matter before it, the Court determined that the Municipality retained legal counsel not only to represent it, but also to review, redact and produce thousands of documents on its behalf. The legal counsel's affidavit explained why certain redactions were done and remains the sole individual with the knowledge necessary to testify about the produced documents. The Court determined that in a cross-examination the Appellant would not be limited to asking questions of the affidavit. The Court found that it would be reasonable to expect that legal counsel would have his credibility challenged while on the stand.

Acknowledging the importance of the Municipality's right to be represented by counsel of its choice, and counsel should not be removed unless required to preserve the integrity of the justice system, Harder v. Sartorio, 2020 ABQB 404, the Court found that legal counsel's proposed dual role would create an unacceptable risk to the proper administration of justice and to public confidence in the integrity of the justice system. Legal counsel would have to rely on his own evidence in his submissions and will likely have to comment on his own credibility. Therefore, the dual role would not allow legal counsel to fulfil an obligation of detachment and objectivity to the Court. The Court held that the Municipality must find new legal counsel.

Intensification Does not Invalidate Prior Legal Non-Conforming Use

Belleville (City of) v. Reid's Insulating Inc., 2022 ONSC 714 https://canlii.ca/t/jm4m5

The City brought an application and sought a permanent injunction from the Court to enforce its Zoning Bylaw to prohibit the Respondent from using its property as a storage lot and driveway. The Respondent argued that the property complies with the Zoning Bylaw as a legal non-conforming use.

HELD: Application dismissed.

DISCUSSION: Under the Planning Act, R.S.O. 1990, c. P. 13 (Act) a municipality may enact zoning bylaws that may restrict a landowner's use of its own land. However, if the landowner's use was lawfully established under a prior zoning bylaw, so long as the use is a continuation the Act allows it as a legal non-conforming use. The onus is on the landowner to demonstrate a legal non-conforming use. If the use of the property changes prior to the zoning prohibiting the use, then the exception is lost, *Glenelg (Township) v. Davis* 1992 CanLII 8648 (ONCA).

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Granted in Part, Denied in Part by City of Eugene, Ore. v. F.C.C., 998 F.3d 701 (6th Cir. 2021)).
8. *Id.* at ¶ 36, *citing* Black's Law Dictionary (10th ed. 2014) & Merriam-Webster ("capital asset").
9. *See* Third Report and Order at ¶ 37 & n. 158 (finding that certain types of PEG equipment "often have useful lives of *several years*") (*emphasis* added) & ¶ 36 (finding that capital expenditures "benefit *several accounting periods*" and that capital assets are "*long-term* assets") (*emphasis* added). *See also* Governmental Accounting Standards Boards (GASB) Statement No. 34 (June 1999), at ¶ 19 (finding that capital assets include "land, improvements to land, easements, buildings, building improvements, vehicles, machinery, equipment, works of art and historical treasures, infrastructure, and all other tangible or intangible assets that are used in operations and that have *initial useful lives extending beyond a single reporting period*." (*emphasis* added).
10. Third Report and Order at ¶¶ 27, 32–33, & 38–39.
11. Third Report and Order at ¶ 39 & Alliance for Cmty. Media v. F.C.C., 529 F.3d 763, 784-785 (6th Cir. 2008), *citing* H.R. Rep. No. 98-934, 98th Cong., 2nd Sess. 1984 at 45 (legislative history of the Act).
12. *Id.*
13. *Id.*
14. Third Report and Order at ¶¶ 37 & 39.
15. *Id.* at ¶ 35 & n. 146.
16. *Id.* at ¶ 39 & Alliance for Cmty. Media, 529 F.3d at 784-785, *citing* H.R. Rep. No. 98-934 at 45.
17. Third Report and Order at ¶¶ 27 & 49.
18. Third Report and Order at ¶ 36, *citing* Black's Law Dictionary (10th ed. 2014) ("operating expense").
19. *Id.* at ¶ 36.
20. Third Report and Order at ¶ 41, n. 170; & Congressional Research Service Report, Public, Educational and Governmental (PEG) Access Cable Television Channels: Issues for Congress ("PEG CRS Report"), No. R42044, at 16, (Jan. 4, 2013), Charles B. Goldfarb, https://www.everycrsreport.com/reports/R42044.html (accessed Jan. 31, 2021). *See also* City of Glendale v. Marcus Cable Associates, LLC, 231 Cal. App. 4th 1359, 1362, 1373, & 1388 (2014) (finding that the city improperly and contrary to law used PEG fees to pay for the salaries of employees to record and edit programs to produce the PEG channel's film library).
21. Third Report and Order at ¶ 41, n. 170 & PEG CRS Report at 16.
22. PEG CRS Report at 16.
23. *Id.*
24. Third Report and Order, at ¶¶ 27 & 49.
25. Second Report and Order on Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 22 FCC Rcd. 19633 (2007) at ¶¶ 11 & 13 (Review Granted in Part, Denied in Part by Montgomery County v. F.C.C 863 F.3d 485 (6th Cir. 2017)).
26. Third Report and Order, at ¶ 40 & n. 166, *citing* 47 U.S.C. § 555(b) (2022).
27. In some situations, depending on the facts, rental payments for a studio under a "capital lease", or "lease-purchase agreement," may qualify as capital costs because this arrangement is a rent-to-own purchase plan, which is usually treated as an installment sale, in which the buyer ultimately takes possession and *ownership* of the property, thus making the "rental" payments essentially installment payments toward a final purchase. Black's Law Dictionary (11th ed. 2019) ("capital lease" & "lease-purchase agreement").
28. Black's Law Dictionary (11th ed. 2019) (defining "asset" as "an item that is *owned* and has value") (*emphasis* added).

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An intensification of a use can also terminate an existing legal non-conforming use, *Saint-Romuald (City) v. Olivier,* 2007 SCC 57. The Supreme Court of Canada outlined intensification factors that may destroy a legal non-conforming use, including the intensity of the activity which may bring about a change in the type of use, an addition of a new activity, or the new activity creates an undue problem for the municipality or neighbours compared to the previous activity. The City's Zoning Bylaw came into effect in 1987 and all parties agree that it applies to the Respondent's property. The Court was provided with affidavits and photographic evidence from the prior property owner who owned the property from 1975-2010, which provided that the property was used as a storage lot. The City relied on evidence of the neighbours, who had resided at their homes adjacent to the Respondent's property since 2004 to suggest that the storage use was not continuous. In the alternative, the City argued that the Respondent's use of the land had intensified to a "change in kind" which therefore terminated the existing legal non-conforming use.

The Court disagreed, finding that the Respondent had established a legal non-conforming use and it was satisfied that it was continuous, and any intensification had not resulted in a termination of the legal non-conforming use. The City also argued that the Respondent's use of a driveway violated the Zoning Bylaw and ceased in 2009 when the Respondents used the driveway for storage. The Respondent provided the Court affidavits and satellite photographic evidence to demonstrate that the property was always open and used as a driveway. The Court held that whether the use was abandoned was a question of fact and was satisfied that the property owner met the onus to show that the use was continuous. Application dismissed. ML