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DEVELOPMENT ISSUES: RAIL CORRIDOR SETBACKS AND CN GUIDELINES

By: Barnet H. Kussner, Partner, and Tiffany Tsun, Associate. Reprinted with permission. © WeirFolds LLP. This paper was delivered at the Rail Issues Forum in Halifax, Nova Scotia, on August 17, 2011.

Land use development along railway corridors poses a unique set of challenges as it operates within a multi-jurisdictional framework.

Currently, there are no uniform consultation protocols or land use appeal mechanisms to ensure consistency in planning of development near railways across the country. However, interested stakeholders have developed various guidelines and memoranda of understanding that set out development standards and “best practices” for planning around railway corridors. These standards usually prescribe minimum setback requirements to minimize noise, vibrations and safety issues for sensitive land uses. These standards offer guidance to regulators looking to minimize land use incompatibility caused by development near railway properties.

The ability to enforce these standards varies across Canada and typically depends on whether the provincial and municipal governments have adopted these guidelines in their land use policies and statutory framework. In Ontario, for example, rail companies are notified of any proposed land use changes affecting lands within 300 metres of a railway line. They also have appeal rights to the Ontario Municipal Board (an independent planning tribunal), provided that they meet the other requirements for obtaining party status. Thus, railway companies have the opportunity to enforce these standards by participating in the local planning process.

This presentation provides an overview of the statutory framework and the “best practices” guidelines for mitigating incompatibility between sensitive land uses and railway corridors.

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A. Proximity Issues

Development near railway corridors raises a number of proximity issues, such as:

- (a) disputes over noise, pollution and vibrations;
- (b) traffic concerns by blocked crossings;
- (c) pedestrian and vehicular safety at crossings; and
- (d) incompatible land uses (such as transportation of dangerous goods through densely populated neighbourhoods).

B. Statutory Framework

With few exceptions, railways have no power beyond their rail right of way and cannot control adjacent land-owners' land use. . . . [A] federal regulator can cause a railway to address a proximity complaint, but has little or no authority over a . . . municipal authority whose inadequate planning may have . . . led to the incompatible land use situation in the first place.¹

While railways and rights-of-way are federally regulated, land use planning and development falls within provincial and municipal responsibility.² Conflicts often arise between the land uses associated with rail corridors (such as transportation of dangerous goods) and sensitive land uses within proximity (such as residential development). This fragmented jurisdictional framework essentially means that no one level of government has the sole ability to address development issues along the rail corridor.

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Federal Requirements Affecting Development Near Rail Corridors

Railway Safety Act

The *Railway Safety Act*³ requires railway companies to give notice of a proposed railway work to adjacent land-owners and the municipality.⁴ As part of the approval process, any person receiving such notice may file objections with the Minister of Transport if he or she considers that the proposed railway work would prejudice personal safety or safety of the property.⁵ However, there is no reciprocal requirement for municipalities or developers to notify railway companies of proposed development near the railway corridor.

In 1992, Transport Canada issued the *Standards Respecting Railway Clearances*⁶ pursuant to the *Railway Safety Act*. These engineering standards apply to all tracks owned or operated on by a railway company and include minimum clearance requirements for structures over or besides a railway track.⁷

Canada Transportation Act

The *Canada Transportation Act*⁸ was amended in 2007 to authorize the Canadian Transportation Agency, a quasi-judicial administrative tribunal of the federal government, to resolve complaints regarding noise and vibration caused by construction or operation of railways under federal jurisdiction. A railway company is allowed to create only such noise and vibration "as is reasonable", taking into account its obligations under the statute, operational requirements and the area where the construction or operation is taking place.⁹ The Agency is authorized to investigate any noise or vibration complaints.¹⁰ If the Agency determines that the noise or vibration is not reasonable, it may order the railway company to undertake any changes in its construction or operation.¹¹ The Agency must publish guidelines for making such determinations and must consult with interested parties, including municipal governments, before issuing any guidelines.¹²

Examples of Provincial Requirements Affecting Development Near Rail Corridors

Planning Act

In 2006, regulations enacted under Ontario's *Planning Act*¹³ put in place notice requirements to railway companies for any proposed land use changes within a buffer zone. Railway companies must now be notified of any proposed official plans and amendments,¹⁴ zoning by-laws,¹⁵ plans of subdivision,¹⁶ and consents to sever lands¹⁷ if the proposal affects lands within 300 metres of a railway line. Any person who made submissions at a public meeting or to the local council has a right to appeal the proposal to the Ontario Municipal Board.¹⁸ Thus, railway companies

may raise any potential land use compatibility issues with the Ontario Municipal Board.

Moreover, applications for development permit approval under the *Planning Act* must include a sketch showing the approximate location of “all natural and artificial features” including railways.¹⁹

Ministry of the Environment Noise Assessment Criteria

In 1997, Ontario’s Ministry of the Environment published the LU-131 guideline on *Noise Assessment Criteria in Land Use Planning* (“LU-131”). The LU-131 guideline outlines the position of the Ministry on noise criteria for planning of sensitive uses, in support of the Provincial Policy Statement under the *Planning Act* and in accordance with the Ministry’s Guideline D-1 on Land Use Compatibility.²⁰

The Ministry implements the guidelines in LU-131 by providing comments to relevant agencies on development applications and planning documents that are circulated to the Ministry.²¹ The publication is also intended to assist municipalities in policy preparation and decision-making in the local land use process.²² For example, as part of the development approval applications municipalities may require developers to complete noise impact and feasibility studies in accordance with these guidelines.

The publication specifies procedures for establishing sound levels on the site of proposed noise sensitive land uses due to transportation sources, including railway sources. It also provides suggested conditions for requiring a noise feasibility study. The requirement for a feasibility study may be defined in terms of setback distance from the noise source. The guidelines recommend that a feasibility study be undertaken where the proposed lands are within 100 metres from a Principal Main Railway Line right-of-way, or 50 metres from a Secondary Main Railway Line right-of-way.²³

Ministry of the Environment Guidelines on Compatibility Between Industrial Facilities and Sensitive Land Uses

In 1995, Ontario’s Ministry of the Environment published Guideline D-6 on *Compatibility Between Industrial Facilities and Sensitive Land Uses*.²⁴ This document encourages adequate buffering of incompatible land uses by setting out guidelines for determining compatibility setback requirements. For example, the recommended minimum separation distances between a Class III industrial facility and a residential land use is 300 metres.²⁵ A Class III

industrial facility is defined as “a place of business for large scale manufacturing or processing, characterized by: large physical size, outside storage of raw and finished products, large production volumes and continuous movement of products and employees during daily shift operations”.²⁶

At the Ontario Municipal Board, CN has taken the position that rail yards are a Class III industrial facility.²⁷ Under this classification, the Ministry guidelines also recommend a noise feasibility study for any sensitive land use proposed within 1,000 metres of a rail yard right-of-way.²⁸

C. CN Guidelines for Rail Corridor Setbacks

As the Ontario Municipal Board noted in one decision,²⁹ since 1983 Canadian Pacific Railway (“CPR”) and CN have utilized a combination of setback and berm in establishing appropriate separations between residential uses and railway corridors.³⁰ However, the Board also acknowledged that these requirements had never been formally adopted by the railways, the Province of Ontario or the City of Toronto. CPR and CN rely on these guidelines to determine adequate mitigation to adverse impacts resulting from derailment, spills, noise and vibration.³¹

CN and CPR established these guidelines in their *Policy on the Environmental Protection of New Residential Development Adjacent to Railways: Recommended by CN and CP Rail*³². The policy addresses situations where new residential development is proposed to be built adjacent to railway rights-of-way. The document suggests minimum berm and setback requirements based on the classification of railway lines.

A typical rail classification system defines rail operations as follows:³³

- (a) Main Line (Principal or Secondary): volume generally exceeds five trains per day, high speeds, frequently exceeding 80 km/h, crossings, gradients may increase railway noise and vibrations
- (b) Branch Line: volume generally fewer than five trains per day, slower speeds usually limited to 50 km/h, trains of light to moderate weight
- (c) Spur Line: Unscheduled traffic on demand basis only, slower speeds limited to 24 km/h, short trains of light weight

The following tables summarize the CN and CPR land use requirements.³⁴

CN Rail and CP Rail Land Use Guidelines

Table 1a – CN Rail Land Use Guidelines for Residential Uses abutting the Rail Right-of-Way

	Setback of Dwelling	Noise Assessment and Ground-borne Vibration Assessment	Noise Attenuation Barrier	Berm and Fence	Buyer Awareness	Drainage Pattern/Utilities	Others
CN Rail							
Railway yards	300 m	All residential uses located between 300m and 1000 m (Noise and Ground-borne Vibration)					
principal main lines	30 m	All residential uses located within 300 m (Noise)	A min. of 5.5 m above top-of-rail	2.5 m safety berm with Acoustic fence (subject to the noise report)	A clause be inserted in all development agreements, offers to purchase, and agreements of Purchase and Sales or lease of each dwelling unit within 300m of the railway right-of-way, advising the property owners of the potential adverse impacts as a result of the railway operations.	Alterations to the existing drainage pattern affecting railway property requires prior concurrence from CN.	Restrictive Covenants on title advising that any berm, fencing, or vibration isolation features implemented are not to be tampered with or altered, and further that the owner shall have the sole responsibility for maintaining these features.
secondary main lines	30 m	All residential uses located within 75 m (Ground-borne Vibration)	A min. of 4.5 m above top-of-rail	2.0 m safety berm with Acoustic fence (subject to the noise report)			1.83 m min. height chain link fence along the mutual property line.
principal branch lines	15 m		A min. of 4.0 m above top-of-rail	2.0 m safety berm with Acoustic fence (subject to the noise report)			1.83 m min. height chain link fence along the mutual property line.
secondary branch lines	15 m		A min. of 4.0 m above top-of-rail	2.0 m safety berm with Acoustic fence (subject to the noise report)			
spur lines	15 m		n/a	n/a			

CN Rail and CP Rail Land Use Guidelines

Table 1b - CP Rail Land Use Guidelines for Residential Uses abutting the Rail Right-of-Way

	Setback of Dwelling	Noise Assessment and Ground-borne Vibration Assessment	Berm and Fence	Buyer Awareness	Drainage Pattern/Utilities	Others
CP Rail Applies to all residential development within 75 m of the CP Rail right-of-way	30 m	All residential uses located within 75 m requires both Noise Assessment and Ground-borne Vibration Assessment (if in excess of the acceptable levels, all dwellings within 75 m of the railway right-of-way should be protected through adequate measures)	2.5 m safety berm with Acoustic fence (subject to the noise report)	A clause be inserted in all offers to purchase, agreements of sale and purchase or lease, and in the title deed or lease of each dwelling, informing prospective purchasers or tenants of the existence of the railway's operating right-of-way; the possibility of alterations, including the possibility that the railway may expand its operations, which expansion may affect the living environment of the residents notwithstanding the inclusion of noise and vibration attenuating measures in the design of the subdivision and individual unit; and that the railway will not be responsible for complaints or claims arising from use of its facilities and/or operations	Alterations to the existing drainage pattern affecting railway property requires prior concurrence from CP. Any proposed utilities under, over or along railway property to serve the development must be designed in accordance with applicable standards. All plans for utility occupancies of railway property must be approved by the Railway prior to construction and installation.	1.83m min. height chain link fence along the mutual property line if no solid noise attenuation fence is required by the noise assessment. A clause on all agreements of sale and purchase or lease, and in the title for each dwelling affected by any noise and vibration attenuation measures, advising that any berm, fencing, or vibration isolation features implemented are not to be tampered with or altered, and further that the owner shall have the sole responsibility for maintaining these features. Any access roads across the railway will be subject to Railway approval, and must be in compliance with the latest Transport Canada regulations concerning same.

D. Other Industry and Government Initiatives

In 2003, the Federation of Canadian Municipalities and the Railway Association of Canada entered into a three-year Memorandum of Understanding to address proximity issues. The “Community-Rail Proximity Initiative” aims to “build common approaches to the prevention and resolution of issues when people live and work in close proximity to railway operations”.³⁵ The initiative was renewed for two more years in January 2007 and an open-ended memorandum of understanding was signed in 2009.³⁶

The initiative established a report on *Proximity Guidelines and Best Practices* outlining “model development guidelines, policies and regulations” for municipalities and railways.³⁷ As a result of this initiative, other jurisdictions have followed suit; for example, the City of Edmonton amended its zoning by-law to incorporate setback and berm requirements as conflict mitigation between residential land uses and abutting railway rights-of-way.³⁸

E. Summary

The various “best practices” guidelines offer directions to local governments looking to minimize land use incompatibility caused by development near railway properties. These policy guidelines offer some consistency in this multi-jurisdictional framework that governs planning of new development along railway corridors.

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Notes:

¹ Transport Canada, *Chapter 7: Proximity Issues*, online at http://www.tc.gc.ca/eng/tcss/rsa_review/chapter7-394.htm (citing CN, “Railway Safety in the Community”, Submission to the Railway Safety Act Review Panel (June 27, 2007) at 17).

² *Ibid.*

³ RSC 1985, c. 32 (4th Supp.).

⁴ *Ibid.*, s. 8(1).

⁵ *Ibid.*, s. 8(2).

⁶ TC E-05, online at <http://www.tc.gc.ca/eng/railsafety/standards-tce05-233.htm>.

⁷ *Ibid.*, ss. 3.1 & 4.

⁸ S.C. 1996, c. 10.

⁹ *Ibid.*, s. 95.1.

¹⁰ *Ibid.*, s. 95.3(1).

¹¹ *Ibid.*, s. 95.3(2).

¹² *Ibid.*, s. 95.2.

¹³ R.S.O. 1990, c. P19 [Planning Act].

¹⁴ *Official Plans and Plan Amendments*, O. Reg. 543/06, cl. 3(9)7.

¹⁵ *Zoning By-laws, Holding by-laws and Interim Control By-laws*, O. Reg. 545/06, cl. 5(9)11.

¹⁶ *Plans of Subdivision*, O. Reg. 544/06, cl. 4(8)10.

¹⁷ *Consent Applications*, O. Reg. 197/96, cl. 3(9)5.

¹⁸ *Planning Act*, *supra*, note 13, ss. 17(24), 34(19) & 51(39). Any person may appeal a decision granting consent under s. 53(19).

¹⁹ *Development Permits*, O. Reg. 608/06, Sched. 1, s. 24.

²⁰ Ontario Ministry of the Environment, *Noise Assessment Criteria in Land Use Planning Publication LU-131* (October 1997) at 1 [LU-131].

²¹ *Ibid.*, s. 1.2.1.

²² *Ibid.*, s. 1.2.2.

²³ Ontario Ministry of the Environment, *Noise Assessment Criteria in Land Use Planning: Requirements, Procedures and Implementation* (October 1997), s. 4.2.1.

²⁴ Ontario Ministry of the Environment, *Guideline D-6: Compatibility Between Industrial Facilities and Sensitive Land Uses* (July 1995) [Guideline D-6].

²⁵ *Ibid.*, s. 4.3.

²⁶ *Ibid.*, s. 2.0.

²⁷ *Re Windsor (City) New Official Plan*, [2002] OMBD No. 244 at para. 17.

²⁸ *Ibid.*, *Guideline D-6*, *supra*, note 24, s. 4.1.

²⁹ *Himel v. Toronto (City)*, [2003] OMBD No. 768.

³⁰ *Ibid.* at para. 12.

³¹ *Ibid.*

³² (May 1986).

³³ Earth Tech Canada Inc., *Final Report: Proximity Guidelines and Best Practices (Prepared for The Railway Association of Canada and The Federation of Canadian Municipalities)* (Markham: August 2007) at 7.

³⁴ Tables from Envision Freight, online at http://www.envisionfreight.com/tools/pdf/CN-CP_Guidelines.pdf. Envision Freight is a website developed as part of the National Cooperative Freight Research Program (NCFRP) in the United States.

³⁵ *Railway/Municipality Proximity Issues Information Base* (2010), online at <http://www.proximityissues.ca/english/AboutJoint.cfm>.

³⁶ *Ibid.*

³⁷ Earth Tech Canada Inc., *supra*, note 33 at 4.

³⁸ Envision Freight, *Fact Sheets: Canada’s Proximity Issues Website* (2010), online at <http://www.envisionfreight.com/factsheets/?id=proximityissues>.

RECENT CASES

The complete digests and citations of the following case summaries are reproduced in the "Recent Cases" tab division of the ONTARIO REAL ESTATE LAW GUIDE, at the paragraph numbers indicated.

Residential Landlord Treated Deposit As Forfeiture Penalty

The appellant submitted an application to the respondent to rent an apartment for one year and provided the respondent with a deposit equal to one month's rent. Six weeks before the appellant was to take possession, she informed the respondent that she would not proceed with the rental and asked for her deposit back. Two weeks later, the respondent informed her that it would not return the deposit and that it was prepared to give the appellant possession of the unit. The respondent was not able to re-rent the apartment until two months after the appellant was supposed to have taken possession. The appellant applied to the Landlord and Tenant Board for a return of the deposit under the *Residential Tenancies Act, 2006* (the "Act"). She argued that since she did not take actual possession of the apartment, she was not given possession within the meaning of subsection 107(1) of the Act. The Landlord and Tenant Board dismissed the appellant's application. She appealed to the Divisional Court and her appeal was dismissed. The appellant appealed to the Court of Appeal with leave.

The Ontario Court of Appeal allowed the appeal. The Court addressed two issues: i) the interpretation of subsection 107(1) of the Act, and ii) the nature of the deposit in this case. Regarding the first issue, the Court of Appeal agreed with the Divisional Court that subsection 107(1) does not authorize a tenant to obtain the automatic return of a rent deposit where the landlord has done everything necessary to give possession to the tenant, and the tenant has unilaterally repudiated the rental agreement. The words "not given" in subsection 107(1) suggest that it is the refusal or inability of the landlord to provide the premises that triggers the obligation to return the deposit, and this interpretation accords with common sense and fairness. The Court of Appeal added the qualification that if a landlord is able to release the premises without suffering any loss of rent, the landlord is not entitled to retain the deposit. Regarding the nature of the deposit in this case, however, the Court of Appeal found that the respondent had not treated the appellant's deposit as a rental deposit. The respondent had informed the appellant that it was retaining the deposit more than four weeks before the rental was to begin, at which point the respondent did not know whether it would suffer a loss or not. The respondent had, in effect, treated the deposit as a forfeiture penalty, and this use is not permitted under the Act. On this ground, therefore, the Court of Appeal declined to permit the respondent to keep the deposit.

Musilla v. Avcan Management Inc., 2011 OREG ¶58,874 (Ont. C.A.)

Writ of Seizure and Sale Had Expired and Could Not Be Renewed

In 1979, the respondent Elsa Antonia Dunn ("Dunn") made a mortgage loan of \$75,000 to the applicant Alexander Kovachis ("Kovachis"). The loan went into default and in June 1982, Dunn obtained a judgment against Kovachis for nearly \$85,000. The property that was the subject of the mortgage was sold under a power of sale, leaving a balance of almost \$27,000 owing under the judgment. Dunn made numerous attempts to collect the balance. Mr. Kovachis owned a one-third interest in another property (the "property"). Dunn filed a writ of seizure and sale (the "writ") against the property in June 1982. She also tried garnishing rents owed to Kovachis from the property, and bringing an application for partition of the property, all to no avail. She renewed the writ three times (in 1988, 1994, and 2000), each time in response to a Notice of Expiry sent to her by the Sheriff's Office. The Sheriff's Office stopped its practise of sending out notices of expiry in 2004, so Dunn was not aware that the writ was expiring in February 2006. It was not until November 2010 that she found out the writ had expired.

Dunn filed a caution against the property and, in January 2011, applied for leave to issue an execution to enforce the judgment. The property sold for \$2,000,000, and \$200,000 from the proceeds of the sale was held in trust pending the outcome of this litigation. Kovachis brought an application to determine whether Dunn had any interest in the proceeds of the sale of the property. He argued that the old *Limitations Act* (the "old Act") applied to Dunn's application for leave to issue an execution to enforce the judgment. The old Act barred actions on judgments after 20 years, which would mean that Dunn's judgment had expired in 2002 and that the 2011 application for leave to issue an execution was barred by the limitation period. Dunn argued that the new *Limitations Act, 2002* (the "new Act"), which came into force on January 1, 2004, applied. The new Act provides that there is no limitation period in respect of a proceeding to enforce an order of a court. Alternatively, if the old Act applied, Dunn submitted that the Court should invoke the doctrine of special circumstances to permit her to obtain an alias writ.

The Ontario Superior Court held that Dunn's writ had expired and could not be renewed by way of an alias writ. The transitional provisions of the new Act only apply if i) a claim is based on acts or omissions that occurred prior to January 1, 2004, and ii) no proceeding was commenced in relation to those acts or omissions prior to January 1, 2004. The Court did not accept Dunn's argument that her claim was to remedy the loss caused by the unenforceability of the 1982 judgment as a result of a 2006 omission, which was her failure to renew the writ before it expired. She argued that since the omission occurred after January 1, 2004, the new Act should govern, and no limitation period should apply. The Court found that the term "acts or omissions" in subsection 24(2) of the new Act refers to acts or omissions of a defendant; Dunn could not, therefore, rely on her own omission to bring the case into the limitation regime of the new Act. Dunn's claim was really based on an act that took place before January 1, 2004, and no pro-

ceeding to enforce her judgment had been commenced before that date. The transitional provisions of the new Act therefore applied, and Dunn's application for an alias writ was barred as a result of subsection 24(3), which provides that no proceeding shall be commenced in respect of a claim if the former limitation period expired before January 1, 2004. Dunn's right to enforce her judgment had expired in 2002. The Court also denied Dunn's request to invoke the doctrine of special circumstances in order to extend the limitation period to permit her to obtain an alias writ. Notwithstanding the special circumstances in this case, the doctrine of special circumstances does not give a court the power to allow the commencement of an action after the expiry of a limitation period.

Kovachis v. Dunn, 2011 OREG ¶158,875 (Ont. Sup. Ct.)

Title Insurer Required To Pay Claim Regarding Encroachment

The plaintiff had owned a waterfront property since 1969. In 2003, the defendants purchased the adjoining property on which sat a cottage. At the time the defendants acquired their property, they purchased a title insurance policy from the third party, Stewart Title Guarantee Company ("Stewart Title"). Following the purchase of the property, the defendants obtained a permit from the municipality to raise the cottage and construct a permanent block foundation using the building's original footprint. After the work was undertaken on the defendants' property, the plaintiff retained a surveyor who determined that the defendants' cottage encroached by about three inches onto her property. The defendants offered to purchase the disputed property from the plaintiff, but she declined.

In October 2008, the plaintiff issued a claim against the defendants, alleging that, in addition to the encroachment claim, the defendants had removed trees from the boundary line between the two properties, had placed backfill around the cottage on the plaintiff's property, and had created a side lot adjoining the plaintiff's land. The defendants defended the claim and brought a counterclaim. The defendants then submitted a claim to Stewart Title seeking both coverage and indemnity with respect to all of the plaintiff's claims. When Stewart Title continued to deny that it was required to defend the action, the defendants issued a third-party claim against Stewart Title, arguing that the insurer had a duty to defend the claim advanced against them in the main action and also to indemnify the defendants in the event the plaintiff was successful with respect to the claim relating to the cottage encroachment. The defendants brought a motion seeking a declaration that Stewart Title was obligated to defend all of the plaintiff's claims. They argued that even though some of the claims were not covered by the policy, all of the claims were intermingled with the main encroachment claim, for which Stewart Title had admitted coverage. Stewart Title filed a third-party defence, arguing that the duty to defend was limited to the reasonable costs associated with defending the cottage encroachment issue, as it was the only covered title risk under the policy.

The Ontario Superior Court dismissed the defendants' motion. The Court found that the claim relating to the cottage encroachment was covered, whereas the claims relating to the other issues were caused by the defendants after the policy date. These were therefore excluded from the coverage. Unlike in the case of *RioCan Real Estate Investment Trust v. Lombard General Insurance Company* (2008), 91 O.R. (3d) 63 (S.C.), where multiple theories of liability were put forward to prove the same damages, in this case multiple instances of encroachment were alleged and these distinct cases of encroachment could be defended separately. The actionable conduct alleged was different and distinguishable between the covered and uncovered claims. This case therefore fell into the category of cases in which the allocation of defence costs was appropriate and could be done on a "principled basis". Stewart Title should not be required to defend claims that clearly fell outside the scope of coverage. It was therefore only required to defend the cottage encroachment claim, while the defendants were required to defend the other claims.

Knapman v. Deweerdt; Stewart Title Guaranty Company (Third Party), 2011 OREG ¶158,876 (Ont. Sup. Ct.)

Tenant Not Entitled To Damages For Breach of Right of Way Clause

The applicant, Toronto Kosher Inc. ("Toronto Kosher") was a retail butcher operating out of leased premises (the "property") in a strip mall on Bathurst Street. The property was owned by Howard Teperman ("Teperman"), via a numbered company ("126"). Teperman also owned an adjoining vacant lot on nearby Deloraine Avenue (the "Deloraine Lot") via another numbered company, ("140"). The principals of Toronto Kosher signed an offer to lease with 126, to commence in June 2002, for a term of five years. The lease was renewed in March 2007, with an expiry date of March 1, 2012. Toronto Kosher had always required a delivery entrance at the rear of the property. Two possible means of access existed, one from Old Orchard Grove to the north, and the other from Deloraine Avenue to the south, by driving across the Deloraine Lot. Toronto Kosher had used the latter option for nine years.

To protect its interests in this right-of-way, Toronto Kosher had included a provision in the original offer to lease requiring 126 to enter into an agreement with 140 that provided for access across the Deloraine Lot, and giving Toronto Kosher an option to purchase the Deloraine Lot for \$125,000 if its access over the Deloraine Lot was ever threatened. Toronto Kosher registered a Notice of Lease on title to the Deloraine Lot in 2005. In April 2007, Teperman asked Toronto Kosher if it would delete the Notice of Lease to allow 140 to mortgage the property. The following week, Teperman and 140, instead of mortgaging the property, sold it for \$438,000, of which \$429,936 was a mortgage advanced by TD Bank. It was not until April 2008 that Toronto Kosher discovered that the Deloraine Lot had been sold. Toronto Kosher sued Teperman, 126, 140, and TD Bank, alleging that it had been deprived of the chance to exercise its option to purchase. Toronto Kosher eventu-

ally obtained a default judgment in May 2009 for \$409,874.88 plus interest. Meanwhile, the property leased by Toronto Kosher was sold under power of sale to Windward Drive Holdings Inc. (“Windward”). Toronto Kosher applied for a declaration i) that Windward, as its new landlord, was bound by the default judgment, ii) that Toronto Kosher was entitled to set off the judgment against its rent, iii) that Toronto Kosher was also entitled to a stand-alone judgment against Windward, and iv) in the alternative, that the sale of the property should be set aside as a fraudulent conveyance.

The Ontario Superior Court dismissed the application. The Court determined that equitable set-off was not available. The sale of the Deloraine Lot, for which Toronto Kosher had obtained the default judgment, had resulted in no actual business losses for Toronto Kosher. Toronto Kosher had never been prevented from using the access way, and Windward had even arranged for Toronto Kosher to have unobstructed use of the Old Orchard Grove access point. Toronto Kosher’s option to purchase the Deloraine Lot was limited by very specific language, and neither of the two preconditions had been satisfied. Toronto Kosher had therefore not actually been entitled to damages arising from either the breach of the right of way clause or the sale of the Deloraine Lot. While the Court would not question the technical validity of the default judgment, it found that it would be manifestly unjust on the facts to allow Toronto Kosher to recover what was in essence a windfall damage award, for losses that were never sustained. Such a result would not be fair, just, or equitable to Windward. There would be no manifest injustice in requiring Toronto Kosher to continue to pay rent without set-off. Nor was Toronto Kosher entitled to judgment against Windward. In accepting an assignment of the lease between Toronto Kosher and 126, Windward did not assume joint liability for any claims predating the assignment. Regarding Toronto Kosher’s claim of a fraudulent conveyance, the Court found that the badges of fraud alleged by Toronto Kosher were all satisfactorily rebutted by Windward. There was no basis for setting aside the transfer under the *Assignments and Preferences Act* or the *Fraudulent Conveyances Act*.

Toronto Kosher Inc. v. Windward Holdings Inc., 2011 OREG ¶158,877 (Ont. Sup. Ct.)

Tenant Was Required To Pay Landlord’s Legal Fees and Interest In Relation To Late-Paid Rent

The plaintiff operated a fitness centre in a space it rented in a mall operated by the defendant. Nearly every

month since April 2007 when the lease first began, the plaintiff had failed to pay its rent on time, and nearly every month the defendant had pursued the plaintiff for payment by having its lawyers prepare and deliver notices of default. Prior to the time of trial, a total of 36 notices of default had been sent, 30 of which had been prepared by the defendant’s lawyers. This practice had resulted in the accumulation by the defendant of significant legal fees, which the defendant had begun charging to the plaintiff as additional rent. The plaintiff had already paid the defendant \$17,240.42 towards the legal fees. A summary trial was conducted in which the defendant sought the payment of outstanding legal fees of \$46,254, although it refused to produce copies of its legal bills to prove the amount it had actually spent on legal fees. The defendant also sought the payment of interest that had accrued on late-paid rent, as well as an order compelling the plaintiff to participate in a pre-authorized payment plan in accordance with the lease, and a declaration that the plaintiff’s rights to exclusivity and the option to renew under the lease had been extinguished. The plaintiff sought a determination of what, if any, reasonable legal fees it was obliged to pay as additional rent.

The Ontario Superior Court held that the plaintiff was required to pay arrears of legal fees and interest on late-paid rent, and to participate in a pre-authorized payment plan. Its option to extend the lease and its right to exclusivity were extinguished. In the face of the defendant’s refusal to produce copies of the legal bills it had received from its solicitors, the Court was forced to approximate a reasonable amount for the costs incurred by the defendant. It determined that a fair and reasonable estimate of legal fees, based on the materials before it, was an average of \$500 per month, which totalled \$25,000. As the plaintiff had already paid \$17,240.42 towards the fees, a balance of \$7,759.58 was left owing. The defendant was also entitled to \$5,913.96 in interest on overdue rent. Regarding the question of a pre-authorized payment plan, the Court found that the prerequisite of a continuing monetary default had been met, and that pursuant to the lease, the defendant was entitled to require the plaintiff to participate in a pre-authorized payment plan. The Court also found that both the plaintiff’s option to extend the lease and its right to continued exclusivity had been extinguished by its conduct. The doctrine of spent breach did not save the option provision; regardless of whether the plaintiff was in good standing under the lease at the time it sought to exercise the option, nothing could erase the plaintiff’s abysmal record of defaults.

Cardillo Entertainment Corp. v. PCM Sheridan Inc., 2011 OREG ¶158,878 (Ont. Sup. Ct.)

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