In the Court of Appeal of Alberta

McCauley Community League v. Edmonton (City), 2012 ABCA 314

Date: 20121030
Docket: 1203-0155-AC
Registry: Edmonton

Between:

McCauley Community League

Applicant

- and -

The City of Edmonton, The Subdivision and Development Appeal Board of the City of Edmonton and Niginan Housing Ventures

Respondents

Reasons for Decision of
The Honourable Mr. Justice Jean Côté

Application for Leave to Appeal
the Decision of the Subdivision and
Development Appeal Board
Dated the 14th day of June, 2012

Reasons for Decision of
The Honourable Mr. Justice Jean Côté

A. Introduction

[1] Here a community association seeks leave to appeal to the Court of Appeal from the Subdivision and Development Appeal Board. The Board confirmed a development permit to build a multi-story building. The building is intended primarily to house aboriginal people. Two-thirds will have addictions or medical problems, or both. A precise description has to be extracted from a number of different pages, but para 8 of the applicant's written argument and para 3 of the respondent's written argument do so conveniently.

B. Bias

[2] The first ground of appeal proposed is freestanding. The chair of the five-person panel of the Board hearing the matter had previously decided a similar appeal or appeals on another lot or lots. He had then written Reasons coming to a definite conclusion on issues also to be argued in this case. So the community association argued and now argues that he appears biassed, and should not have sat. They point out that a quorum is only three members, and that even though the custom is to sit in five-member panels, the Board has something like 20 members.

[3] No significant evidence (other than his previous decision) was presented to support this ground of appeal. That is important, because this type of "attitude" bias has different rules than other types such as pecuniary interest or family or marital connection to a party. Opinions do not amount to operative bias (real or apparent) unless they are so firmly held that the usual course of argument cannot overcome them: ***R v JLA***, 2009 ABCA 344, 464 AR 289 (para 23), and authorities cited there.

[4] In particular, a member of a tribunal is not disqualified from sitting merely because he or she has previously heard and decided similar cases. See ***R v JLA***, *supra* (paras 14-15), and authorities there cited.

[5] That must be so, because a tribunal must be free to follow precedent even when it is not obliged to. It would be mischievous to oblige a tribunal to shut its eyes to its own previous decisions, policies, and interpretations. One of the very reasons to create specialized tribunals is to build up expertise, experience, and policies, and promote consistency and predictability. If any case like the present were an example of disqualifying bias, a busy expert tribunal would face a cruel dilemma. It could either ignore precedent and be unpredictable and inconsistent from one case to the next; or instead it could risk running out of members quickly, and get a growing backlog of pending cases which no fresh quorum could be found to hear. See ***Bennett v Superintendent of Brokers*** (1994) 48 BCAC 56, 36 CPC (3d) 96 (one JA). To paraphrase George Bernard Shaw and two Canadian authors, the law demands an open mind, not an empty mind. (See Brown & Evans, *Judicial Review*

of Administrative Action in Canada, vol 3, pp 11-13 and 11-56) (Canvasback, looseleaf, August 2012 version).

[6] Whether or not the same community association was involved in the earlier Subdivision and Development Appeal Board appeal and decision by the chair is irrelevant. No one suggests any animus against the association, and there is no evidence on the topic.

[7] I have read ***Mountain Creeks v Yellowhead (County)***, 2006 ABCA 126, 48 Admin LR (4th) 130, and find it distinguishable. There the impugned Subdivision and Development Appeal Board member was also a council member and had voted 11 times on related matters and at least six times over this very development, always against one party and for the other. Those were political votes, not tribunal decisions. In any event, no principle enunciated there is decisive here, and precedents have very limited use on factual questions.

[8] So apparent bias has no chance of success in the Court of Appeal, and I will not give leave on that ground.

C. Hybrid Uses

[9] The main legal objection of the association to the development permit here is this. The physical form of the building is to be very similar to a typical multi-story apartment building, with separate apartments with bedrooms, bathrooms and kitchens. The land is zoned for apartments. But the tenants in the building are intended to be aboriginal individuals and couples. Two-thirds will be people with many problems in everyday life. In particular, that fraction will be addicted to alcohol or drugs, or have multiple medical problems, or both. They will likely have little or no money, and need a good deal of help with everyday life. One-third of the tenants will not have any need for medical treatment.

[10] The applicant contends that the services which will be provided to two-thirds of the residents of the building, and even a few facilities to be present there, come more or less within the zoning bylaw's description of extended medical treatment services. That is a separate use category under the zoning bylaw. And this lot is not zoned for that purpose. However, the key words in the bylaw are "surgical or other medical treatment". The examples are hospitals and the like. Assisted living facilities are **not** given as examples.

[11] The applicant community association stresses the services for two-thirds of the proposed residents (draft agreement, Record, pp 528 ff). However, they appear to me more or less neutral, as many are mere personal grooming, diet and recreation. Others may be needed more by people with medical problems, but few are what a lay person would call medical or nursing services or treatment.

[12] The zoning bylaw s 7.1(3)(b) provides for cases where a proposed use fits within two or more categories of use in the bylaw, or when it fits into none. In such cases, the Use Class which is most appropriate in character and purpose is to be selected.

D. Area Redevelopment Plan

[13] The Subdivision and Development Appeal Board Reasons, p 24, rely on the *Municipal Government Act*, s 687(3)(a.1).

> (3) In determining an appeal, the subdivision and development appeal board
>
> (a.1) must comply with the land use policies and statutory plans and, subject to clause (d), the land use bylaw in effect;

[14] There is a further set of wrinkles also. The neighborhood is an old one, and is covered by a statutory plan adopted under the planning portions of the *Municipal Government Act*. It is called the Boyle Street/McCauley Area Redevelopment Plan. Two portions of it seem relevant. First, s 2.4 (p 14) contains a number of objectives. Among them, the applicant emphasizes para 16, which says to promote "family-oriented housing". The term "family-oriented dwelling" is defined in the zoning bylaw (s 6.1(31)). Very few of the suites in the proposed building would fit within that definition, as they have only one bedroom. (Lack of outside access would also be a problem.)

[15] The respondent, whose development permit is in issue, points out that s 2.4 has other objectives which would tend to favor this development, such as affordable low-income and special needs households (para 17), social and special needs housing projects (para 18), non-profit housing initiatives (para 19), and subsidized housing (para 21). The Subdivision and Development Appeal Board made the same point (Reasons, p 24). A part of that s 2.4's Map 3 shades in the lot in question here. The map has no explanation, only a legend whose key word is "designated". I find that word very ambiguous.

[16] The applicant says that s 2.4's other objectives are for the Whole Plan area, whereas para 16 is confined to grey-shaded areas on Map 3. I do not see how (if correct) that reduces the force of the other objectives, especially as the grey shading covers a large part of the Plan area.

[17] The respondent also suggests that another part of the Redevelopment Plan contains other objectives which tend to favor this development (see s 7.2.8 on pp 82-83). The other objectives are "a wide range of housing forms and initiatives", "low and medium rise apartments", "mixed use development", "medium density multiple family development", "small scale apartment housing for low income singles", and "medium density residential character". The eight objectives, and the policies, on p 83 reinforce that. The Subdivision and Development Appeal Board said much the same (Reasons, p 24).

[18] Nor does para 16 of s 2.4 of the Redevelopment Plan say (as would a zoning bylaw) that only family-oriented housing is permitted. It merely says to promote it. That appears neither absolute, nor

confined to family-oriented housing uses. For example, I would have thought that a school or a convenience store might be thought to promote family-oriented housing.

[19] Counsel for the applicant points out that when s 7.1(3) of the bylaw (about two or zero possible land use categories or zones) applies, the use to be selected becomes discretionary. That is so even though the zoning bylaw calls the use permitted (which usually means that the permit cannot be withheld, nor appealed against). The community association suggests that that makes the statements in the Redevelopment Plan mandatory preconditions to any development permit. No authority is proffered for that proposition, and it is not mere logic.

E. How to Decide

[20] If it were up to me to decide on the merits, I would agree with the Subdivision and Development Appeal Board. But that is not my task; nor is it even the task of a Court of Appeal panel, should I give leave.

[21] I have not found it easy to say that either side here is demonstrably and undoubtedly mistaken on the merits, but it is instructive to notice some of the features contributing to my difficulty.

[22] The first and most subtle is that the bylaw is often said to be about use of land, but much of its content and its descriptions of permitted and discretionary uses are about types of buildings or permanent improvements. In other words, use at a given moment is not the only consideration. Fitness for uses is a big consideration also. The Subdivision and Development Appeal Board's Reasons seem to come close to this topic (pp 25, 27).

[23] That partial contradiction lies close to the heart of the dispute here. Physically, the development permit allows a fairly typical apartment building (even if a few rooms may not be absolutely typical). The intended clientele is not typical of the general population, and is much closer to that of certain types of facilities, such as assisted living. Most of the activities in the building will be sleeping, eating, and private relaxation and socializing. But a significant minority will be low-grade medical or personal care for those with medical needs or long histories of neglect or personal dysfunction.

[24] The second feature giving difficulty is the fact that this is argued to be a case of a proposed use fitting into zero or two uses listed in the zoning bylaw, triggering the mysteries of s 7.1(3)(b) noted above.

[25] The third difficulty is the complexity of the competition between the zoning bylaw and the Area Redevelopment Plan. An important aspect of that is the number of differing and even conflicting objectives in that Plan.

[26] The fourth difficulty is connected with the third. Even though the Redevelopment Plan exerts some legal compulsion over the Subdivision and Development Appeal Board, which cannot merely

waive it, the language of the Redevelopment Plan is not legal. This plan uses aspirational language and speaks of broad long-term aims or objectives, not of actual present exact prohibitions or permissions. See Laux, *Planning Law and Practice in Alberta*, pp 5-13 and 5-16, and 5-17 (3d ed looseleaf, January 2010 version). And the Plan gives many aims, a number of which patently can conflict in a given case, and do conflict here, as shown above.

[27] The Subdivision and Development Appeal Board points out that the part of the Plan on which the applicant relies says "shall promote", not "shall approve" (Reasons, p 24).

[28] The Redevelopment Plan is obviously neither written by lawyers, nor written for lawyers to administer. It appears to be written by town planners for town planners to administer.

[29] There is a fifth difficulty. "Apartment Housing" is defined in s 7.2(1) of the zoning bylaw. The last 13 words of the definition after the comma could be read more than one way. The Subdivision and Development Appeal Board read them as broadening the definition and making it more flexible (Reasons, p 25). Presumably one should try to read the various permitted uses broadly enough to avoid gaps, if the uses' wording is ambiguous.

[30] The more that I consider the arguments of the parties (which were written out and then debated before me for 2-1/2 hours), the more I am driven to one fact. It is that the disagreements of opposing counsel and my lack of certainty about them and about the conflicting documents, all stem from my lack of expertise and experience. If I knew much more about the principles and practice of town planning, and its language, that would assist a great deal. The same would be true of experience with development applications and reading plans for proposed buildings. Some of the disputes here (especially the key one of apartment building vs. medical facility) heavily depend on such training and experience.

[31] I respectfully suggest that judges ordinarily lack much depth of experience and training in such town planning topics, even if one or two judges may have been involved in such topics while in practice as a lawyer. Few judges have been members of planning tribunals such as a Subdivision and Development Appeal Board.

[32] That is why the Legislature calls for specialized Subdivision and Development Appeal Boards, and why it confines appeals from them to questions of law and jurisdiction. It is also why the Supreme Court of Canada has repeatedly instructed courts to accord deference to decisions by expert tribunals. And it is why that deference is to include many questions of interpretation of the expert tribunal's home legislation, and legal questions which heavily involve specialized expertise of the tribunal.

[33] All those factors lead to several conclusions. First, all the various disagreements between the two sides (other than bias) involve a significant amount of fact. That is especially true of what the applicant argues is the pivotal test, "most appropriate in character and purpose" (bylaw s 7.1(3)(b)). And it is almost as true of what the Subdivision and Development Appeal Board found was the key point, whether the development here fit the definition of "Apartment Housing" (Reasons, p 29). I

have much doubt that any disagreement here is a question of law or jurisdiction alone, and so the Court of Appeal has no jurisdiction over the disputed points.

[34] If I am wrong, and if some narrow question of law could be extricated, I do not think that it alone could be decisive. It is trite law that an arguable question of general law is not a ground for leave to appeal unless it could reasonably lead to the result's being upset in that case. Some of the debate about how to interpret s 7.1(3) or the inability of a Subdivision and Development Appeal Board to waive a statutory plan is very interesting, but I cannot see that such topics would or could be pivotal here.

[35] And even if there is an extricable question of law here which could affect the result, it is so closely connected with the core of planning law concepts that it is the sort of "home legislation" topic where the Subdivision and Development Appeal Board's expert views and experience attract judicial deference from an appeal court. That is especially true of applying the words "most appropriate in character and purpose", in s 7.1(3)(b).

F. Accessory Use

[36] The argument of the applicant community association on this topic begins as follows:

> 37. Section 6.1(2) of the Zoning Bylaw defines "Accessory Use" [Tab 2] as follows:
>
> > "Accessory Use" means, when used to describe a Use or building, a Use or building naturally or normally incidental, subordinate, and exclusively devoted to the principal Use or building located on the same lot or Site.
>
> 38. The SDAB split the definition of "Accessory Use" into two parts – the use must be incidental, subordinate and exclusively devoted to the principal use and it must occur naturally, which the SDAB defined as meaning that it "must be obvious, occur logically and as expected" [Affidavit of Theresa Borys, Exhibit A, page 656]. In doing so, the SDAB incorrectly interpreted "Accessory Use". "Naturally or normally" are not to be treated as separate from "incidental"; they qualify "incidental" so that an "Accessory Use" must be "naturally or normally incidental to . . . the principal use".
>
> (citation of affidavit is in original text)

[37] The applicant correctly points out that the words "naturally or normally" modify the terms following. They are three: "incidental, subordinate and exclusively devoted . . .".

[38] Read in context I doubt that the words quoted by the applicant from the Reasons say otherwise or display error. The Board cannot have thought that the care services to be offered in this building would occur spontaneously without any human intervention, like manna dropping from Heaven. The Board was merely saying that the incidental use must tend to flow from the very nature of the principal use. I see no error of law on p 28 of the Board's Reasons. (It is p 656 of the Record.)

[39] And if I am wrong, any error by the Board about "naturally" would have worked against the development, and so tended to favor the community association.

[40] The applicant argued that since the contract with the government mandated medical and grooming services, that meant that they could not be ancillary. That is a *non sequitur*. By such reasoning, a government-mandated hot-lunch program could turn all schools into restaurants, for planning-law purposes. A dog's tail is mandatory, but it does not wag the dog.

G. Precedent

[41] Out of deference to the thoughtful arguments of counsel for the applicant, I have tried first to approach her arguments from first principles, as shown above. However, both counsel reproduced for me, and mentioned, an important recent decision of our Court: ***McCauley Community League v Edmonton and Excel Resources Society***, 2012 ABCA 224. A number of very important issues and even facts overlap between that case and this, though each case has a few issues not found in the other. That decision strongly supports what I have said above about the standard of review, about what is an apartment building, and about the limited legal role of the Redevelopment Plan.

[42] If what I have said above would have been doubtful or wrong before this ***Excel Resources*** decision, my words become correct after that decision. The appeal proposed here loses any reasonable prospect of success after that decision, especially given the Court of Appeal's limited jurisdiction and the standard of review. The Court of Appeal would not allow an appeal and send this decision back to the Subdivision and Development Appeal Board to rehear if the result of the rehearing would, and must in law, be inevitable.

H. Conclusion

[43] Therefore, if there are any extricable questions of law here, an appeal about them would not have a reasonable chance of success. Leave to appeal is denied, with costs on Column 2 to the respondent Niginan. The City and the Subdivision and Development Appeal Board did not appear, and will neither pay nor receive costs.

Application heard on October 18, 2012

Reasons filed at Edmonton, Alberta
this 30th day of October, 2012

Côté J.A.

Appearances:

J.A. Agrios, Q.C.
for the Applicant McCauley Community League

J.C. Johnson/A.N. Delgado (no appearance)
for the Respondent City of Edmonton

P.A.L. Smith, Q.C. (no appearance)
for the Respondent Subdivision and Development Appeal Board

K.L. Becker Brookes
for the Respondent Niginan Housing Ventures

were members of council which directed the affairs of the municipality, were so closely identified with one of the active parties (the municipality) in the hearing that a reasonable apprehension of bias was created.[46] In other words, principal officers of one of the parties were adjudicating the dispute.

In another significant case the court held that a reasonable apprehension of bias is made out where the board panel is the same as an earlier panel whose decision had been quashed by the court and a new hearing ordered.[47] But bias is not made out simply because a panel member has sat in judgment on similar cases.[48]

On the other hand, the Alberta courts have been much more lenient toward council members serving on an appeal board where their municipal corporation is even more directly affected by the outcome of the appeal board's decision than in the *Starland* case. Utilizing the "institutional", or "built-in" bias theory, the courts have consistently upheld board decisions, even where a reasonable apprehension of bias was found to exist as a result of the impugned board members' also being on council. In one case, *McArthur v. Council Foothills (Municipal District No. 31)*,[49] the municipal corporation was the applicant for a gravel pit development permit that the development appeal board approved. The board also happened to be the council of that municipality. In another case, *Baker v. Foothills (Municipal District No. 31)*,[50] the reeve of the municipality made statements prior to a development appeal board hearing to the effect that the municipality had been fighting on behalf of the applicant seeking a development permit for a livestock feedlot and whose application was before the board. The reeve was chairman of the board, which consisted entirely of municipal council members. In both cases, the courts declined to intervene because the *Planning Act* then in effect contemplated that council members could sit on a development appeal board.

46 *Ibid.* It should be noted that a number of other circumstances existed which appeared to have had a bearing on the outcome. For example, the municipality's engineer was found to have been given a preferred seat at the hearing in close proximity to the board, as was the municipality's counsel; the board received advice from that counsel in private and the board, on counsel's advice, had refused to allow the permit applicant to have a court reporter present with a shorthand machine for the purpose of preparing a transcript of the proceedings and only allowed the reporter to remain present on the undertaking by counsel for the developer not to attempt to use any transcript made by the reporter in subsequent proceedings. Also, the municipality had funded the legal costs of opposing neighbours in respect of the first appeal to the Court of Appeal and the second board hearing.

47 *Beier v. Vermillion River (County) Subdivision and Development Appeal Board*, 2009 A.B.C.A. 338 (Ritter J.A. dissenting.)

48 *McCauley Community League v. Edmonton (City)*, [2012] A.J. No. 1017, 2012 ABCA 314.

49 *McArthur v. Foothills (Municipal District No. 31)* (1977), 4 Alta. L.R. (2d) 222, 78 D.L.R. (3d) 359, 4 A.R. 30 (C.A.), additional reasons at (1977), 4 M.P.L.R. 299, 8 A.R. 216 (C.A.). See also *Tegon Developments Ltd. v. Edmonton (City)* (1977), 5 Alta. L. R. (2d) 68, 8 A.R. 384, 81 D.L.R. (3d) 543 (C.A.), *affirmed* [1979] 1 S.C.R. 98, 24 N.R. 269, 121 D.L.R. (3d) 760n.

50 *Baker v. Foothills (Municipal District No. 31)*, [1981] 2 W.W.R. 128, 116 D.L.R. (3d) 636 (Alta. Q.B.).

On the other hand, in the case of an appeal of a decision issuing a development permit or approving a subdivision, an appellant may wish to take steps to prevent the developer from proceeding with his development or subdivision, as the case may be, pending the outcome of the appeal.[251] Also, a person faced with a compliance order, made under s. 645 and affirmed by a subdivision and development appeal board, may wish to stay the order pending an appeal to the Court of Appeal.

Clearly, the filing of an application for leave to appeal, or the filing of a notice of appeal where leave is granted, will not by itself operate as a stay, just as the filing of an appeal from a judgment of a lower court to a higher court does not have that effect.[252] However, there are Rules of Court (R. 14.48 and R. 14.68, formerly R. 508) that permit a judge of either the court whose decision is under appeal or a judge of the Court of Appeal to grant a stay of proceedings pending the outcome of an appeal.[253] It has been held that the Rules apply to the statutory appeal to the Court of Appeal found in planning legislation, so long as they do not conflict with the statute.[254] There being nothing in the Municipal Government Act at variance with the stay provisions of the Rules, those provisions have been treated as enabling the Court of Appeal to grant a stay pending the outcome of an application for leave to appeal in a planning case or, where leave is granted, pending its determination.[255] However, the rule relied on appears to apply to staying a judgment of a court and not a decision of an administrative board.[256] Whatever power the court has to grant a stay, there is no power to grant a stay after denying leave pending an appeal from that denial.[257]

251 Needless to say, a developer who proceeds with construction of a development or subdivision that is under appeal assumes the risk that the approval may be set aside on grounds that foreclose any possible approval on a rehearing. In some municipalities, the filing of an appeal to the Court of Appeal operates to suspend the development permit: e.g., former City of Edmonton Land Use Bylaw, No. 5996, s. 19.1(3).

252 Alberta Rules of Court, R. 14.48 and R. 14.68, Alta. Reg. 124/2010.

253 *Ibid.*

254 *Houg Alberta Ltd. v. 417034 Alberta Ltd.* (1991), 117 A.R. 196, 2 W.A.C. 196 (C.A.).

255 *Armstrong v. Athabasca No. 1 (County)* (1990), 120 A.R. 285 at p. 286, 8 W.A.C. 285 (C.A.).

256 If one examines R. 14.48 and R. 14.68 carefully one notes that the "appeal" referred to in the Rule seems to clearly refer only to appeal from lower courts to the higher court and not to appeals from statutory tribunals. Perhaps a more reliable source of power to stay a decision of an administrative tribunal is the *Judicature Act*, R.S.A. 2000, c. J-2, particularly ss. 8 and 18(2). The issue was raised in *Numbers Erotique Boutique Ltd. v. Calgary (City)* (1995), 35 Alta. L.R. (3d) 172, 31 M.P.L.R. (3d) 39, [1996] 2 W.W.R. 511, 174 A.R. 341, 102 W.A.C. 341 (C.A.) but the court found it unnecessary to decide whether it had jurisdiction to stay a subdivision and development appeal board order. In *McCauley Community League v. Edmonton (City)*, [2012] A.J. No. 64, 2012 ABCA 23, it was held that sec. 18(2) of the *Judicature Act* could be invoked to obtain a stay of a board decision.

257 *Banner Enterprises Ltd. v. Development Appeal Board (Edmonton)* (1995), 165 A.R. 310, 89 W.A.C. 310 (C.A.). But in at least one case the court, after denying leave to appeal, effectively extended a stay on account of weather conditions hampering compliance with a removal order: *Voskoboinikov v. Calgary (City)* (1996), 181 A.R. 72, 116 W.A.C. 72 (C.A.).

the single justice of appeal hearing the application can decide that issue enough to rule on the motion.[1] Such a justice fo appeal held the Rules providing for security for costs were common, necessary, and constitutional, especially if the appellant is vexatious.[2]

The Supreme Court of Canada does not require security for costs of an appeal, even on special applications for security (save for the nominal statutory $500 which the Court discourages).[3] Such special security is not impossible, but it has never been ordered. Security as a condition of a stay of execution or a stay of proceedings, whether by a Justice of Appeal below or a Supreme Court of Canada Justice, is a different question.[4]

DIVISION 6
DECIDING APPEALS AND APPLICATIONS

Subdivision 1
Effect of Filing an Appeal

No stay of enforcement

14.68 Unless otherwise ordered under rule 14.48 or provided by law, the filing of an appeal or an application for permission to appeal does not operate as a stay of proceedings or enforcement of the decision under appeal.

Defined Terms
appeal, decision

Related Provisions
14.48 (application for stay)

See R. 14.48 and notes to it.

Intermediate acts valid

14.69 Unless otherwise ordered by the court appealed from, an appeal does not invalidate any intermediate act or proceeding taken.

Defined Terms
appeal, court appealed from

1 **Trisura Guar. Ins. v. Duchnij** 2021 ABCA 78, Calg 2001 0189 AC (¶'s 9-10, 35-40).
2 **Trisura v. Duchnij, supra** (¶'s 2, 41, 70-82, 97, 101).
3 The Supreme Court of Canada registry often tells appellants not to bother with the $500.
4 **Cinar Corp. v. Weinberg** 2012 SCC 25, [2012] 2 SCR 55.

Though times under the Rules may be extended, if this time is not extended, once it passes the appeal cannot be restored. Restoring it depends on the reason for the delay and the strength of the appeal.[1]

On the tests for restoring an appeal, see R. 14.65n.

Stay pending appeal

14.48 An application to stay proceedings or enforcement of a decision pending appeal may be made

(a) to the judge who made that decision, or

(b) to a single appeal judge, whether or not the application was made to the judge who made the decision, and whether or not that application was granted or dismissed.

Information Note

The preferred practice is to apply first to the judge who made the decision, but the rule does not preclude a direct application to a single appeal judge.

Defined Terms

decision, judge

Related Provisions

14.37 (applications incidental to an appeal); 14.68 (no automatic stay)

A. General

1. References

There are general Canadian references on this topic.[2]

On the tests for a stay, see Part C below.

2. Automatic Stay?

The general rule in Alberta is that there is no automatic stay created by a pending appeal.[3] Th fact that a party has announced his intention to seek a stay of an order (but never has so move does not oblige his opponent to withhold further action.[4] The legislation is different in many oth provinces, and under some federal statutes. But an application to the Supreme Court of Canac for leave to appeal creates no automatic stay.[5]

However, a few Alberta statutes create what is much like an automatic stay, by requiring certificate of no appeal to act on a judgment: note the *Divorce Act*, the (federal) *Bankruptcy a Insolvency Act*, and the *Land Titles Act*.[6] In all other cases, one can ignore a pending appeal a

1 **Coleman v. Coleman** 2014 ABCA 452, 588 AR 317 (one JA).

2 See the C.P.E., Chapter 64; Hals. Laws of Canada, *Civil Procedure*, 932 ff. (2d reissue 2012); Brown, *C Appeals* §§ 8:1100 to 8:3800 (Carswells).

3 Even if the appellant questions the jurisdiction of the courts of this province: **T.-D. Bank v. Switlo** 2004 AB 170 (one JA).

4 **Oommen v. Cap. Reg. Housing Corp. (#2)** 2017 ABCA 360, Edm 1703 0181 AC (one JA Nov 1).

5 **Re Thompson** 2018 ABCA 111, Edm 1803 0047 AC (one JA Mar 21) (¶'s 7-8), **leave den** (SCC 31 Jan '1

6 It takes compelling reasons to overcome the automatic stay in the *Bankruptcy and Insolvency Act*, but c was lifted to avoid irreparable harm, in **Re Glenwood Homes (After Eight Interiors v. Glenwood Hom**