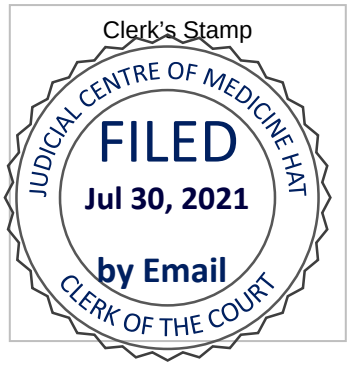
COURT FILE NUMBER	1608-00432
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	Medicine Hat
PLAINTIFF *Click to select and indicate if Applicant/Respondent*	Bruce Ekman
DEFENDANT *Click to select and indicate if Applicant/Respondent*	City of Brooks and Rebecca Taylor
DOCUMENT	**CHAMBERS ENDORSEMENT**

Clerk's Stamp



☒ **Order Granted**

☐ **Information Required**

☐ **Order Rejected**

☐ **Unable to Complete – see Comments/Reasons for further information**

Comments/Reasons:

I heard this matter as a special on July 27, 2021.

The results of prior Court proceedings and administrative hearings matter.

A party cannot simply commence a lawsuit raising the same or similar issues hoping for different results. One of the best and most concise statements on the issue remains that of Côté, JA in ***Summer Village of Argentia Beach v. Warshawski,*** 1991 ABCA 322 where he held:

> It suffices to dispose of this suit to say that any and all of the matters now raised, reasonably could have been raised at the latest, in the 1984 suit by the Village against the same parties. (If any could not, then that would only be because they should have been raised in the first suit.) Res judicata is not limited to what was argued and decided in the previous suit. It extends to what reasonably should then have been raised. Litigation by instalments is interminable. The Village argues that the second suit would have been made longer by raising these matters then. But the total time of the two suits is even longer if that is permissible, so the practicality argument does not convince.

This matter raises the issue of collateral attacks on the results of prior proceedings.

This is an application by the City of Brooks and its employee for summary dismissal of the action that has been brought against it in relation to development and planning matters. The plaintiff erected certain storage and playground structures on his land. By all accounts, the plaintiff had experience in construction, and there does not seem to be any issue with respect to the overall quality of construction. Nevertheless, erecting improvements on land in municipal areas requires compliance with municipal land-use bylaws. That is part of what comes with living in a municipal area.

The issue in this application is whether the matter can be determined summarily. Present summary judgement law originated with the culture shift in ***Hryniak v. Mauldin***, 2014 SCC 7 (CanLII), [2014] 1 SCR 87 and is now well settled in Alberta by virtue of the ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,*** 2019 ABCA 49 and ***Hannam v Medicine Hat School District No. 76,*** 2020 ABCA 343 cases. The Court must determine whether a fair and just adjudication can be made based upon the record before the Court or whether there are genuine issues for trial.

Summary judgement does not only benefit the successful party. It also ends a lawsuit for the unsuccessful party before incurring further costs in pursuing or defending a claim and before incurring costs awards at a higher level in relation to the claim.

The plaintiff says that the City of Brooks and its employee committed malfeasance in public office and other torts against the plaintiff in its dealings in relation to the disputed structures. The difficulty is that matters pertaining to the structures have been adjudicated upon in at least two different forums.

First, in action 1408-00365 which included these parties as well as Elaine Waters (who is not a party to this action), Justice Tilleman of this Court granted an order at the request of the City of Brooks permitting removal of the disputed structures. That necessarily put into issue whether the structures were lawful or not. If the plaintiff felt that the structures were lawful, that was the time to address the issue. In the words of Justice Côté, it is something that "reasonably ought to have been raised". It may well have been raised, but the conclusion reached was that the City was entitled to remove the structures. The best defence to such an application would be that the structures are lawful, but that is not the conclusion that was reached.

Justice Tilleman's order of January 22, 2015 gave the plaintiff an "out". The plaintiff was granted a reprieve from the order by making an application for a proper development permit or permits.

An application was made and a development permit was issued, but its terms were not complied with and the matter did not move forward. There was some argument to the effect that its terms were "absurd" in some respects, and there was argument about the difference between conditions and notations. The allegedly "absurd" term raised during argument was one that required a plumber and the installation of a water meter. Clearly, that was a generic term included in all development permits. There is no evidence whatsoever that the lack of a plumber had any effect on the dispute between the parties to this dispute or that the City insisted on the involvement of a plumber in this specific case. Ultimately, what did affect the matter was that the plaintiff did not meet the terms of the development permit as issued. Elaine Waters appealed the development permit terms to the Subdivision and Development Appeal Board and that appeal was unsuccessful. Results matter. One cannot simply start a new lawsuit and hope for a different result on issues that have already been decided.

A challenge to Justice Tilleman's decision would be an appeal to the Court of Appeal of Alberta. A challenge to the Subdivision and Development Appeal Board decision would be by way of leave application to the Court of Appeal. The order of Mr. Justice Tilleman was not appealed and leave to appeal the Subdivision and Development Appeal Board result was not sought or granted.

The removal of the structures took place in two segments. One entry and removal was on April 14, 2015 and the other was on October 16, 2015. It is argued that Justice Tilleman's order permitted only one entry. I do not see anything on its face that restricts the City of Brooks to one entry. In fact, paragraph 1 of the order says "Any time after January 31, 2015" which suggests that there might be multiple entries. Further, if there are any complaints about the entry and manner of removal, the plaintiff was free to remove the structures himself at any time. It was only when the plaintiff did not do the removal that it became necessary for the City of Brooks to do the removal.

One of the things that distinguishes this matter from cases like ***Kozina v Redlick***, 2019 ABQB 749 and ***JEC Enterprises Inc v Calgary (City)***, 2015 ABQB 555 as cited by the plaintiff are that the proceedings before Justice Tilleman gave a full opportunity to address the pre-development permit facts and events and the unappealed Subdivision and Development Appeal Board proceedings gave a full opportunity to address any issues or wrongs in the development application process. These were not different tracks such as a disciplinary track and a track on the merits of the dispute. These were all part of a consideration of the facts on their merits.

No doubt the experience has been most frustrating for the plaintiff, but the record shows ample warnings and requests from the City of Brooks prior to the proceedings before Mr. Justice Tilleman. The plaintiff chose to erect structures when it was clearly made known to him that development laws applied.

The dispute is most unfortunate but that is part of living in a municipality. A municipality endeavours to balance the rights of individual landowners with the rights of other residents, and complaints happen as they did here, and the City enforced its bylaws. The plaintiff had the right to contest the results in both the Court of Queen's Bench and before the Subdivision and Development Appeal Board. Unfortunately for the plaintiff, those contests were unsuccessful. The place to challenge them was by appeal rather than by simply filing a new action.

In the circumstances, the statement of claim must be dismissed. The other defendant Rebecca Taylor was a City of Brooks employee acting in the course of her employment. There is no evidence of any untoward actions or maliciousness on her part and the action is dismissed against her as well. The defendants have met their evidentiary burden and the plaintiff has not demonstrated any genuine issues for trial. The matter can be resolved fairly and justly based upon the record before the Court. A trial would only incur further costs and time for the parties. The defendants are presumptively entitled to costs of this application and the action generally, but if there are any matters pertaining to costs that might affect such a disposition or if the parties cannot otherwise reach an agreement on costs they make an appointment with me through the Masters Coordinator to settle costs within 90 days of issuance of these reasons.

I thank the parties and their counsel for their very clear and well stated submissions. The matter was very well argued from both sides and that was of great assistance to the Court. At the outset of the hearing of the matter the defendant’s brief had gone astray in the Court’s electronic filing system but it was located mid-hearing. I reserved my decision so that I could review the brief more fully and I thank the parties for their patience while I did so.

I have signed the defendants’ proposed form of order with slight modifications to reflect these reasons and it will be forwarded to their counsel.

DATE OF DECISION: 2021-07-30

Signed: _____

MASTER J. R. FARRINGTON