Federal Court  Cour fédérale

Date: 20151209

Docket: T-1183-13

Citation: 2015 FC 1376

St. John's, Newfoundland and Labrador, December 9, 2015

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

HERB C. PINDER JR., JOHN WEDGE AND TOM MOLLOY TRUSTEES FOR THE PINDER FAMILY TRUST

Plaintiffs/Respondents

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, REPRESENTED BY THE MINISTER OF ENVIRONMENT, AND PARKS CANADA AGENCY

Defendants/Applicants

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Herb C. Pinder Jr., John Wedge and Tom Molloy (the "Plaintiffs"), Trustees for the Pinder Family Trust (the "Trust") bring this action against Her Majesty the Queen, as represented by the Minister of the Environment (the "Minister") and Parks Canada Agency (the

"Defendants") about a dispute arising over the location of the deck at the Plaintiffs' cottage in relation to the property line on a plot of land that is leased by the Plaintiffs from the Defendants. The cottage is the sole asset of the Trust.

[2] The Plaintiffs filed their Statement of Claim on July 4, 2013. The Defendants' Statement of Defence, dated August 8, 2013, was filed on September 16, 2013.

[3] An Amended Statement of Claim, dated August 5, 2013, was filed by the Plaintiffs on August 27, 2013. In their Amended Statement of Claim the Plaintiffs seek the following relief:

> A declaration that the Plaintiffs' lease (hereafter described) with Her Majesty the Queen in Right of Canada, represented by the Minister of Environment, and Parks Canada is in good standing;
>
> A declaration that the Plaintiffs' cottage does not contravene the *National Parks of Canada Cottage Regulations*, SOR/79-398 (the "*Regulations*");
>
> A declaration that Parks Canada Agency is estopped from claiming that the Plaintiffs' deck does not comply with the *Regulations* and the terms of the Lease;
>
> An interim and permanent injunction preventing the Defendants from terminating the Plaintiffs' lease or taking any other steps against the Plaintiffs in relation to the construction or location of the deck adjacent to the Plaintiffs' cottage;
>
> General damages in excess of $50, 000 and punitive damages; and
>
> Solicitor-Client costs.

[4] In the present proceedings, the Defendants brought a motion for Summary Judgment. In reply to that motion, the Plaintiffs filed their own motion for Summary Judgment and alternatively, seek a summary trial.

II. BACKGROUND

[5] The following facts and details are taken from the affidavits filed by the parties, as well as from the exhibits attached to the affidavits and the cross-examination transcripts.

[6] The Plaintiffs have filed the affidavits of Mr. Pinder and Ms. Rachelle Guerrero-Bennett, an assistant to Counsel for the Plaintiffs. Attached to the last affidavit are excerpts from the discovery examination of Mr. Alan Fehr.

[7] The Defendants filed the affidavits of Mr. Terrence Schneider, Town Site Manager for the Prince Albert National Park, together with the affidavit of Ms. Coralee Vaillancourt, Realty Officer with Parks Canada Agency, and of Ms. Tenley Desroches, a paralegal in the offices of Counsel for the Defendants. Exhibits attached to these affidavits were also considered as a source of the factual background information.

[8] Herbus Holdings Ltd., (the "Lessee") entered into a lease with the Defendants, as lessors, dated October 15, 1948. Pursuant to the terms of the lease, the Plaintiffs leased a lot in a subdivision of land in Prince Albert National Park, Saskatchewan for a period of forty-two (42) years. Payments to the Minister are due annually on April 1st. The lease and any subsequent renewal are subject to all regulations for the control and management of National Parks. Any waiver on behalf of the Crown is not binding unless made in writing.

[9] Upon expiry, the lease is renewable on similar terms upon six months' notice in writing to the Minister. The lease was renewed for another forty-two year term on May 16, 1988, to be computed from April 1, 1988 and expiring on March 31, 2030. On January 1, 1995, the Lessee assigned the lease to the Plaintiffs for $100,000 consideration.

[10] On July 22, 1994 IKOY Architects Sask. Ltd. ("IKOY"), sent specifications for a cottage (the "Cottage") and a deck to Sandy Husulak, Realty Clerk, Prince Albert National Park for "Approval in Principal." IKOY was engaged to design the Cottage. On September 12, 1994, IKOY submitted drawings for the Cottage to Ms. Husulak.

[11] By letter dated October 5, 1994, G.M. Lancaster, Town Site Manager, Prince Albert National Park advised the Plaintiffs that, with the exception of the choice of stain colour, the proposed plans complied with the National Building Code and Cottage Re-Development Guidelines, and were approved, subject to the acquisition of a building permit. The letter stated that the approval was for the Cottage only and that clarification was still required for the whirlpool.

[12] Construction of the Cottage took place between the fall of 1994 and the spring of 1995. In his examination for discovery on November 18, 2013, Mr. Pinder admitted that he instructed the construction company to build the deck to the property line. In his affidavit, he states that this decision was made in the fall of 1994 or spring 1995. His affidavit suggests that this decision was made after the building permit was granted.

[13] A memorandum dated June 23, 1995 from L.R. MacGregor, Building Inspector, stated that the Cottage meets "NBC, NFC & Park Requirements." By letter dated August 14, 1995, Sandi Hicke, Land Realty, Prince Albert National Park, advised Herbus Holdings Ltd. that a final inspection had been completed and that the development met National Building Code and *National Parks of Canada Cottage Regulations*, SOR/79-398 (the "Regulations").

[14] A survey of the land was performed on August 19, 1997. The drawing of that survey shows the south side of the deck extending to the property line.

[15] By the fall of 2005, the deck had sustained damage and required repairs. Mr. Pinder decided to extend the deck while the repairs were being completed. Under cover of a letter dated November 2, 2005, Mr. Pinder submitted to Coralee Vaillancourt, Lease Administrator, Prince Albert National Park of Canada, a plan for development of an enlargement of the deck on the land. Enclosed with the letter was a cheque for $50.00 for a development permit.

[16] On November 8, 2005 Ms. Vaillancourt advised Mr. Pinder that the then-current deck was not built in conformance with the approved site plan, and that the deck and shed would have to comply with the required setbacks before the proposed expansion could be considered. Mr. Pinder was offended by this, and claims it was an attempt by the regulator to bully him into surrendering the prior approval for the deck. After receipt of this letter, Mr. Pinder sought legal advice. He then proceeded to enlarge the east and west sides the deck, replace the surface boards and repair the damaged pilings. He did not remove the 1.2 metre widths from the south side of the deck.

[17] During the summer of 2008, Ms. Vaillancourt went to the property of Mr. Robert Leier, the adjacent neighbour, to discuss his proposed redevelopment. At this time, Mr. Leier expressed concern that the Plaintiffs' deck contravened the Regulations.

[18] Mr. Leier contacted Ms. Vaillancourt and Mr. Schneider by phone on October 23, 2009 to complain about the location of the Plaintiffs' deck. The Parks Canada employees advised Mr. Leier that a 1.2 metre setback had been approved for the Plaintiffs' deck.

[19] By letter dated October 28, 2009, Mr. Leier expressed the opinion that the Plaintiffs' deck was non-compliant. Ms. Vaillancourt responded by letter dated December 7, 2009. She informed Mr. Leier that Parks Canada received legal guidance to proceed with enforcing the Regulations and approved site plans.

[20] Subsequently, the parties sought a resolution. According to a letter from Terence Schneider, Town Site manager, dated December 7, 2009, the parties met at the Plaintiffs' Cottage on September 6, 2009. In that letter, the Defendant took the position that although a structural inspection was completed, a site inspection to confirm yard compliance was not performed. It further noted that the deck was rebuilt in 2005 without approval. The parties continued to correspond throughout 2010. By letter dated November 6, 2012, Parks Canada sent the Plaintiffs notice that the lease would be terminated if the development is not brought into compliance by June 1, 2013.

III. ISSUES

[21] The motions for summary judgment raise the following issues:

1. What is the Court's scope of inquiry in a summary judgment application?
2. Is there a genuine issue for trial?
3. Does the Plaintiff's deck comply with the Regulations?
4. If the deck is non-compliant, are the Plaintiff's entitled to equitable relief?
5. Do the Plaintiffs' claims of defamation and breach of privacy raise a genuine issue for trial?

IV. THE MOTIONS AND SUBMISSIONS

A. The Defendants' Motion

[22] The Defendants address three issues in their motion for summary judgment. First, they argue that the deck, as constructed in 2006, does not comply with the side yard width requirements under the Regulations.

[23] Second, the Defendants submit that the doctrine of estoppel does not apply so as to relieve the Plaintiffs from compliance with the Regulations.

[24] Finally, the Defendants argue that the allegation of defamation, breach of privacy and intentional misconduct of his employees, as advanced in the Plaintiffs' Statement of Claim, do not raise genuine issues for trial.

[25] The Defendants rely on the plain language of the Regulations, in particular the definitions of "yard", "side yard", and "side yard width" to argue that the deck built by the Plaintiffs is non-compliant. They note that although "projection" is not defined, the words "clear of projections" support the interpretation that the drafters intended to create gaps between structures, to further the purpose of the Regulations. They submit that the purpose of the Regulations is to protect the ecological integrity of the Park.

[26] The Defendants further argue that the regulatory scheme is designed to protect the ecological integrity of the Park; see subsection 8(2) of the *Canada National Parks Act*, S.C. 2000, c. 32 (the "National Parks Act"). The Regulations were enacted under the National Parks Act and overall, address putting limits on construction.

[27] The Defendants submit that the Regulations require the issuance of a development permit prior to the construction of a structure, such as a deck. The absence of a definition for "deck" does not limit the application of the Regulations. The failure of Mr. Pinder to obtain a permit when he repaired the deck means that he contravened sections 7 and 9 of the Regulations.

[28] The Defendants further submit that non-compliance with the Regulations cannot be cured upon the application of equitable principles, relying on the decision in *Sand, Surf and Sea Limited v. The Minister of the Department of Transportation et al.* (2005) 37 Admin. L.R. (4th) 146 (N.S.S.C.), aff'd (2006), 48 Admin. L.R. 53 (N.S.C.A.).

[29] The Defendants argue that the approval of a non-conforming use structure in 1995 is irrelevant to the legality of the work that was done in 2006, without a development permit. They submit that no equitable remedy is available to the Plaintiffs under the doctrine of promissory estoppel, in light of mandatory regulations. The Defendants rely on the decision in *Immeubles Jacques Robitaille v. Québec (City)*, [2014] 1 S.C.R. 784.

[30] The Defendants' third basis for its motion for summary judgment concerns the Plaintiffs' claim for damages arising from the alleged misconduct of certain employees of Parks Canada.

[31] The Defendants argue that they provided the Plaintiffs with many opportunities to comply with the Regulations. They submit that public authorities cannot be compelled to grant citizens a right to non-conforming uses, relying on the decision in *Immeubles, supra* at paragraph 25.

[32] The Defendants also rely upon the decision in *Sand, Surf and Sea, supra* at paragraph 63, where the Court rejected the applicant's allegations of bad faith and misconduct, including complaints of negotiating in bad faith, made about the Nova Scotia Minister responsible for the Department of Transportation and Public Works.

[33] The Defendants further argue that the Plaintiffs have not presented sufficient evidence to show malicious conduct by Parks Canada employees. A bald attack on the exercise of regulatory functions is not actionable at law; see the decision in *Sibeca Municipality of Frelighsburg*, [2004] 3 S.C.R. 304 at paragraphs 23 and 26.

[34] In respect of the Plaintiffs' allegations about defamation, the Defendants note that defamation is a cause of action based upon false "factual" statements. There are no facts to show that any statement by Parks Canada employees were untrue or capable of being defamatory.

[35] Finally, the Defendants argue that the Plaintiffs have not pleaded any basis in fact or law that a breach of privacy is actionable. No document about the Plaintiffs' property has been released to Mr. Pinder's neighbour.

[36] In conclusion, the Defendants submit that the only genuine issue of law arising in these motions is the interpretation of the Regulations and that issue can be determined in a summary manner.

B. The Plaintiffs' Motion

[37] The Plaintiffs filed, in response to the Defendants' Motion for Summary Judgment, their own motion, pursuant to the Rules for Summary Judgment and Summary Trial.

[38] The Plaintiffs generally argue that decks are not mentioned in the Regulations. Although section 7 of the Regulations requires a development permit for cottages or accessory buildings, decks are neither.

[39] The Plaintiffs submit that the Defendants focus on the definition of "yard" as excluding land covered by a structure. However, they say that the definition of "side yard" does not mention "structures" but cottages, main accessory buildings and projections.

[40] They argue that a deck is not part of a cottage, a main accessory building or a projection, and is not included in the calculation of side yard width.

[41] The Plaintiffs argue that the definition of "accessory building" in the Regulations is a building or structure on a cottage lot that does not form part of a cottage. The definition of "side yard width" uses the words "main accessory building" and this term is not defined. They submit that the use of "accessory building" in some parts of the Regulations and "main accessory building" elsewhere shows that the drafters considered that different buildings and structures were appropriate near boundaries of cottage properties. The term "main accessory building" is used in determining side and rear yard widths.

[42] The Plaintiffs further submit that the deck is not an "accessory building". According to paragraph 6(1)(b) of the Regulations "accessory buildings" must be at least 5 metres away from a cottage. They argue that if a deck were an "accessory building", then all decks at the site would be non-compliant.

[43] In a similar vein, the Plaintiffs argue that use of the word "main" is also important. They suggest that a "main accessory building" refers to a garage, boathouse or storage shed.

[44] The Plaintiffs submit that a deck is not included in the word "projection", that is a projection is something that extends from a main, larger body, such as eaves.

[45] The Plaintiffs argue that the Regulations do not mandate a permit for the construction of a deck. Rather, permits are required for cottages or accessory buildings.

[46] Alternatively, they submit that if a permit is required for a deck, the work done in 2005 was repair work, subject to section 9 of the Regulations.

[47] The Plaintiffs argue that the additional deck on the east side of the Cottage is a freestanding separate structure and that issue can be separated from the deck that is the subject of the current dispute.

[48] The Plaintiffs say that the work done on the south side was limited to replacement of the surface. They submit that there is not merit in the Defendants' claim that the deck was wholly reconstructed.

[49] The Plaintiffs advance an alternative argument in the event that it is determined that the deck is subject to the Regulations. They argue that the Defendants are estopped from terminating its lease in consequence of prior waiver of the side yard setback requirement when the Cottage was approved, by letter dated August 14, 1995. Relying on the decision in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at paragraph 13, they submit the 1995 acknowledgment by Parks Canada that it would not enforce the side yard setback, when approving the development, gives rise to promissory estoppel.

[50] The Plaintiffs also rely on the decision in *Forbes v. Caledon (Town)* (2009), 57 M.P.L.R. (4th) 19 (Ont. Sup. Ct. J.) where the Court held that the town was estopped from enforcing a bylaw due to the town's prior representation as to what would constitute compliance. The Plaintiffs submit that enforcement of the Regulations is not mandatory.

[51] The Plaintiffs also rely on the decision in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281where the Supreme Court of Canada found that lesser powers or narrower discretion for lower level officials is more likely subject to promissory estoppel. They argue that in the present case, there is a low level of discretion.

[52] The Plaintiffs also argue that Parks Canada is not only a regulator but a party to a commercial relationship, in the status of a lessor. They submit that although the lease is subject to the Regulations, clause 8 of the lease contemplates waiver by the Minister of a breach.

[53] The Plaintiffs argue that the letter of August 14, 1995 constitutes a waiver that now binds Parks Canada. They submit that they relied upon Parks Canada's inspection and approval of the property, to their detriment, and face strained relations with neighbours and the possibility of losing the property if the lease is terminated.

[54] The Plaintiffs argue that the integrity of Mr. Pinder has been damaged and his family's relations with the neighbours have been strained by the Defendants' allegations.

[55] The Plaintiffs also submit that the Defendants' wrongful conduct entitles them to general and punitive damages, and solicitor-client costs. They refer to Parks Canada's repeated denial that the Cottage and deck were approved by letter dated August 14, 1995, its allegations that they altered the deck after the June 1995 inspection, and the Defendants' reliance upon draft Regulations not in force as the factual basis of the Defendants' intentional misconduct.

C. The Defendants' Response to the Plaintiffs' Motion

[56] The Defendants, in response to the Plaintiffs' arguments about the interpretation and application of the Regulations, say that the exercise of the Minister's authority in this dispute is primarily a public law matter. The lease is not a purely contractual matter but is subject to the National Parks Act and the Regulations, relying on the decision in *Sunshine Village v. Parks Canada Agency and Her Majesty the Queen in Right of Canada* (2014), 457 F.T.R. 119 (F.C.).

[57] As for the Plaintiffs' arguments about estoppel, the Defendants reply that its failure to pursue every violation of the Regulations does not give rise to estoppel vis à vis the Plaintiffs, relying on the decision in *Polai v. the Corporation of the City of Toronto*, [1973] S.C.R. 38 at 41, where the Court found that non-enforcement of a bylaw was no defence to non-compliance.

V. DISCUSSION AND DISPOSITION

[58] The parties' motions for summary judgment are governed by Rules 215 and 216 of the Rules. Rule 215 provides that the Court may determine questions of fact and law in a motion.

[59] Where there are competing motions for summary relief, the Court will consider each separately, in terms of the burden that lies upon each moving party. According to the decision in *Collins v. Her Majesty the Queen*, [2014] D.T.C. 5066 (F.C.) the moving party in each motion carries the burden of showing that there is no genuine issue for trial. The responding party does not have to disprove the allegations.

[60] The burden of showing that there was no genuine issue for trial is high; see the decision in *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at paragraph 11.

[61] Summary judgment should be granted only in the clearest of cases. In *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, the Supreme Court of Canada commented upon the issuance of summary judgment, in the context of the Ontario Rules of Civil Procedure and said the following:

> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[62] More recently, the Federal Court of Appeal commented upon the application of *Hryniak* upon a motion for summary judgment pursuant to the Rules. At paragraph 11 of *Manitoba v. Canada*, 2015 FCA 57, Justice Stratas said the following:

> In my view, *Hryniak* does bear upon the summary judgment issues before us, but only in the sense of reminding us of certain principles resident in our Rules. It does not materially change the procedures or standards to be applied in summary judgment motions brought in the Federal Court under Rule 215(1).

[63] Pursuant to Rule 215(1) of the Rules, the Court will grant summary judgment where there is no genuine issue for trial. According to the Defendants, the interpretation of the Regulations is the only genuine issue to be determined upon their motion for summary judgment. They submit, as outlined above, that the other allegations advanced by the Plaintiffs, relating to defamation, breach of privacy and intentional misconduct do not raise genuine issues for trial and should be summarily dismissed at this stage.

[64] For their part, the Plaintiffs seek a summary judgment, pursuant to Rule 215. They rely on Rule 215(3), arguing that if the Court is satisfied that there is a genuine issue for trial, it may determine that issue by way of summary trial, pursuant to Rule 216.

[65] In *Teva Canada Limited v. Wyeth LLC* (2011), 99 C.P.R. (4th) 398 (F.C.), appeal allowed on other grounds (2012) 431 N.R. 342 (F.C.A.), Justice Hughes considered a request for summary trial and at paragraph 34, set out the conditions in which a summary trial is appropriate, as follows:

> [34] In the present case, I find that a summary trial and summary judgment is an appropriate way to proceed so as to secure a just, expeditious and least expensive determination of the issues before the Court. I do so for the following reasons:
>
> a. the issues are well defined and , while a disposition of the issues may not resolve every issue in the action, they are significant issues and their resolution will allow the action or whatever remains, to proceed more quickly or be resolved between the parties acting in good faith;
>
> b. the facts necessary to resolve the issues are clearly set out in the evidence;
>
> c. the evidence is not controversial and there are no issues as to credibility; and

> d. the questions of law, though novel, can be dealt with as easily now as they would otherwise have been after a full trial.

[66] Other factors that are relevant are whether the trial will take considerable time, whether there is a substantial risk of wasting time and effort, the costs of a full trial versus the amount claimed, whether cross examinations have occurred and whether a summary trial would result in piecemeal litigation; see the decisions in *Wenzel Downhole Tools Ltd. v. National-Oilwell Can. Ltd.* (2010), 87 C.P.R. (4th) 412 and *Society of Composers, Authors & Music Publishers of Can. v. Maple Leaf Sports & Entertainments*, 2010 FC 731.

[67] I will first address the motion of the Defendants. They address four issues, that is the interpretation and scope of the Regulations, and the Plaintiffs' claims for defamation, breach of privacy, and intentional misconduct.

[68] I am satisfied that the first issue addressed by the Defendants raises a genuine issue for trial, involving statutory interpretation. However, in light of the Plaintiffs' response to the Defendants' arguments and the Plaintiffs' own Motion for summary judgment and summary trial, this issue can be determined in the disposition of these motions, since the Plaintiffs raise the same issue, of interpretation and scope, albeit from a different perspective.

[69] The following provisions of the National Parks Act are relevant to the within proceeding :

2. (1) The definitions in this subsection apply in this Act.	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
"ecological integrity" means, with respect to a park, a	« intégrité écologique » L'état d'un parc jugé caractéristique

condition that is determined to be characteristic of its natural region and likely to persist, including abiotic components and the composition and abundance of native species and biological communities, rates of change and supporting processes.	de la région naturelle dont il fait partie et qui sera vraisemblablement maintenu, notamment les éléments abiotiques, la composition et l'abondance des espèces indigènes et des communautés biologiques ainsi que le rythme des changements et le maintien des processus écologiques.
8. (1) The Minister is responsible for the administration, management and control of parks, including the administration of public lands in parks and, for that purpose, the Minister may use and occupy those lands.	8. (1) Les parcs, y compris les terres domaniales qui y sont situées, sont places sous l'autorité du ministre; celui-ci peut, dans l'exercice de cette autorité, utiliser et occuper les terres domaniales situées dans les parcs.
(2) Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks.	(2) La préservation ou le rétablissement de l'intégrité écologique par la protection des ressources naturelles et des processus écologiques sont la première priorité du ministre pour tous les aspects de la gestion des parcs.

[70] The following provisions of the Regulations are in issue:

2. In these Regulations,	2. Dans le présent règlement,
"accessory building" means a building or structure on a cottage lot that does not form part of the cottage; (dépendance)	« dépendance » désigne une construction ou un bâtiment situé sur un lot mais ne faisant pas partie du chalet; (accessory building)
"cottage" means a building with facilities for sleeping, cooking, eating and sanitation; (chalet)	« chalet » désigne un bâtiment aménagé de façon à pouvoir y dormir, y faire la cuisine, y manger et possédant des installations sanitaires; (cottage)
"side yard" means that area of	« cour latérale » désigne la

a lot between the side lot line and the nearest part of a cottage or main accessory building, clear of projections; (cour latérale)

partie du terrain qui s'étend de la limite latérale du terrain à la partie la plus rapprochée d'un chalet ou d'une dépendance principale, abstraction faite des saillies; (side yard)

"side yard width" means the distance measured horizontally from the nearest point of the side lot line toward the nearest part of a cottage or main accessory building, clear of projections; (largeur de la cour latérale)

« largeur de la cour latérale » désigne la distance, mesurée horizontalement, entre le point le plus rapproché de la limite latérale du terrain et la partie la plus rapprochée d'un chalet ou d'une dépendance principale, abstraction faite des saillies; (side yard width)

"yard" means the land contained within the property lines of a cottage lot that is not covered by a building or other structure. (cour)

« cour » désigne la surface qui, à l'intérieur des limites de propriété d'un lot, n'est pas couverte par un bâtiment ou une autre construction; (yard)

5. (1) Every cottage erected, altered, reconstructed, added to or enlarged after the coming into force of these Regulations shall comply with the following requirements:

5. (1) Les chalets construits, modifiés, reconstruits ou agrandis après l'entrée en vigueur du présent règlement doivent être conformes aux spécifications suivantes:

(c) the side yard width not abutting a street shall be at least two metres;

c) la largeur de la cour latérale non contiguë à une rue doit être d'au moins deux mètres;

6. Every accessory building erected, altered, reconstructed, added to or enlarged after the coming into force of these Regulations shall comply with the following requirements:

6. Les dépendances construites, modifiées, reconstruites ou agrandies après l'entrée en vigueur du présent règlement doivent être conformes aux spécifications suivantes:

(b) the accessory building shall be located

b) la dépendance doit

(i) at least five metres from the cottage, clear of all projections,

(i) se trouver à au moins cinq mètres du chalet, abstraction faite des saillies, et

(ii) clear of all projections, at least

(ii) être, abstraction faite des saillies, à au moins

(A) one metre from the lot lines, if it is located in that portion of a side or rear yard that does not abut on a street, or	(A) un mètre des limites du terrain, si elles sont situées dans une cour latérale ou arrière qui ne donne pas sur une rue, ou
7. (1) Subject to section 9, no person shall erect, alter, reconstruct, repair the structure of, add to, enlarge, demolish, remove from a cottage lot or relocate on the same cottage lot a cottage or an accessory building unless a development permit for that purpose has first been issued by the superintendent.	7. (1) Sous réserve de l'article 9, il est interdit de construire, de modifier, de reconstruire, d'agrandir, de démolir, de déménager, ou de déplacer sur le même lot, un chalet ou une dépendance, ou d'en réparer la charpente, avant que le directeur ne délivre un permis d'aménagement à cette fin.
9. No development permit is required for repairs made in the course of normal maintenance of a building on a cottage lot that would not affect the structural integrity or susceptibility to fire of a cottage or an accessory building or substantially change its exterior appearance.	9. Il n'est pas nécessaire d'obtenir un permis d'aménagement pour les réparations d'entretien normal d'une dépendance ou d'un chalet situé sur un lot, si elles ne concernent pas la charpente, n'en augmentent pas les risques d'incendie ou n'en modifient pas considérablement l'aspect extérieur.

[71] The Supreme Court has said repeatedly that the goal of statutory interpretation is to discern Parliament's intent by reading the words of the provisions at issue according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole; see the decision in *Re: Sound v. Motion Picture Theatre Associations of Canada*, [2012] 2 S.C.R. 376 at paragraph 31, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.

[72] The principal fact giving rise to the within proceeding and the within motions for summary judgment and, for the Plaintiffs, summary trial is the deck. The Defendants argue that

the deck is non-compliant with the Regulations. Determination of compliance requires interpretation of the Regulations.

[73] The deck was initially built in 1994 - 1995. It was extended and repaired in 2005 - 2006. A secondary issue is whether the work done in 2005 and 2006 required a permit.

[74] The National Parks Act and the Regulations do not define "deck". The *Canadian Oxford Dictionary*, 2nd ed. defines "deck" as:

> **6** any floor or platform, esp. the floor of a pier or a platform for sunbathing. **7** *N Amer.* a level unroofed area, usu. of wooden planks, adjoining a house to provide an outdoor seating space.

[75] The key definition in the Regulations is "side yard width". For ease of reference the definition is set out below as follows:

2. In these Regulations,	2. Dans le présent règlement,
"side yard width" means the distance measured horizontally from the nearest point of the side lot line toward the nearest part of a cottage or main accessory building, clear of projections; (*largeur de la cour latérale*)	« largeur de la cour latérale » désigne la distance, mesurée horizontalement, entre le point le plus rapproché de la limite latérale du terrain et la partie la plus rapprochée d'un chalet ou d'une dépendance principale, abstraction faite des saillies; (*side yard width*)

[76] The Plaintiffs argue that the deck is a projection and consequently, exempt from the Regulations, specifically sections 5, 6, and 7 which set out the setback requirements for cottages and accessory buildings, and the requirement that a development permit must be obtained prior

to any construction relating to a cottage or accessory building. The Plaintiffs rely on the words "clear of projections" in the definition of "side yard width".

[77] According to the definition of "side yard width", the measurement is made from the nearest point of the side lot line to the nearest part of a cottage or a main accessory building clear of projections.

[78] Is the deck part of the Cottage or something else**?** Is the deck part of the Cottage or is it a main accessory building?

[79] Accessory building is defined as follows:

2. In these Regulations,	2. Dans le présent règlement,
"accessory building" means a building or structure on a cottage lot that does not form part of the cottage; (*dépendance*)	« dépendance » désigne une construction ou un bâtiment situé sur un lot mais ne faisant pas partie du chalet; (*accessory building*)

[80] The Regulations define "cottage" as follows:

2. In these Regulations,	2. Dans le présent règlement,
"cottage" means a building with facilities for sleeping, cooking, eating and sanitation; (*chalet*)	« chalet » désigne un bâtiment aménagé de façon à pouvoir y dormir, y faire la cuisine, y manger et possédant des installations sanitaires; (*cottage*)

[81] It is obvious that the deck is not a cottage. In my opinion, the deck is not an accessory building. Although it is a "structure", it is not a building within the dictionary meaning, see *Canadian Oxford Dictionary*, 2nd ed. as follows:

> **1** a permanent fixed structure forming an enclosure and providing protection from the elements etc. (e.g. an office building, school, house, etc.)

[82] In my opinion, the deck is a structure whose main purpose is for the enhanced enjoyment of the Cottage. It is ancillary to the uses of the Cottage which is primarily to accommodate residents. The deck is useful only in relation to a primary structure, that is the Cottage.

[83] According to the photographs attached as an exhibit to the affidavit of Terrence Schneider, sworn October 2, 2014, the deck is abutting the Cottage; there is no apparent gap between the Cottage and the deck. The deck is a part of the Cottage, for all practical purposes.

[84] Although physically the deck is a projection of the Cottage, insofar as it juts out, but its only practical purpose is a part of the Cottage. In my opinion, the deck is not a projection and accordingly is not subject to the exception accorded to projections, for example, the eaves on a building.

[85] According to *The Oxford English Dictionary*, 2nd ed., the word "projection" is defined as follows:

> **III. 5. a.** The action of placing a thing or part so that it sticks our stands out, or projects beyond the general line or surface; the fact or condition of being so placed as to project.
>
> **…**

> **c.** *concr*. Anything which projects or extends beyond the adjacent surface; a projecting part.

[86] If the deck is a "main accessory building" and does not form part of the Cottage, the result is the same. It is not excluded from the calculation of side yard width.

[87] Even if a deck were a projection, I would find the Plaintiffs' deck to be non-compliant. In my opinion, the words "clear of projections" means that projections are to be excluded from the calculation of the side yard width.

[88] In interpreting the Regulations, consideration must be given to both the English and French versions. Section 13 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) reads as follows:

13. Any journal, record, Act of Parliament, instrument, document, rule, order, regulation, treaty, convention, agreement, notice, advertisement or other matter referred to in this Part that is made, enacted, printed, published or tabled in both official languages shall be made, enacted, printed, published or tabled simultaneously in both languages, and both language versions are equally authoritative.	13. Tous les textes qui sont établis, imprimés, publiés ou déposés sous le régime de la présente partie dans les deux langues officielles le sont simultanément, les deux versions ayant également force de loi ou même valeur.

[89] In *R v. Daoust*, [2004] 1 S.C.R. 217 at paragraph 28, the Supreme Court of Canada said the following about the interpretation of bilingual legislation:

> … If there is an ambiguity in one version but not the other, the two versions must be reconciled, that is, we must look for the meaning that is common to both versions. Côté, *supra*, at p. 327. The common meaning is the version that is plain and not ambiguous: Côté, *supra*, at p. 327; see *Goodyear Tire and Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614; *Kwiatkowsky v. Minister of Employment and Immigration*, [1982] 2 S.C.R. 856, at p. 863.

[90] The scope of "side yard width" depends on the meaning given to the words "clear of projections".

[91] The Defendants argue that decks are "projections" and that "clear of projections" means that the distance must be measured from the end point of the projection to the nearest point of the side lot line.

[92] The Plaintiffs submit that decks are not "projections". Alternatively, they argue that the French version of the Regulations, "abstraction faite des saillies", is clear. The distance is to be measured from the nearest point of the cottage or accessory building to the nearest point of the side lot line.

[93] According to *Le Robert & Collins Dictionnaire Français-Anglais*, 8th ed., the words "abstraction faite" is defined as follows:

> … Faire ~ de to set *ou* leaving aside, to disregard; En faisant ~ *ou* ~ faite des difficultés setting aside *ou* leaving aside *ou* disregarding the difficulties.

[94] In the *LaRousse Dictionnaire Français-Anglais*, 1st ed., "abstraction faite de" is defined as follows:

> … ~ faite de apart from, leaving aside

[95] In the *LaRousse Dictionnaire Français-Anglais*, 1st ed., "saillie" is defined as follows:

> Nf 1. [d/un mur, d'une montagne] ledge; [d'un os] protuberance…
> 2. CONSTR projection …

[96] The *Le Robert & Collins Dictionnaire Français-Anglais*, 8th ed., defines the word "saillie" as follows:

> Nf 1. (= aspérité) projection …

[97] The common meaning of the French and English versions of the definition of "side yard width" is excluding projections. As such, the calculation of the side yard width is from the nearest point of the cottage, main accessory building or projection to the nearest point of the side lot line.

[98] On the basis of the available evidence, the deck extends to the southern side lot line. There is physically no space unoccupied between the Cottage and the southern side lot line. The deck does not comply with the two metre setback required, pursuant to paragraph 5(a) of the Regulations.

[99] The next question is whether the work done in 2005-2006 required a permit. On the basis of my determination above, the answer is "yes". I refer to sections 7(1) and 9 of the Regulations

which describe the circumstances in which a permit is required. Broadly speaking, a permit is required for the construction and repair of cottages.

[100] The Plaintiffs submit that the work completed was repair work done in course of normal maintenance of a building on a cottage lot and falls under the exemption provided in section 9 of the Regulations. Section 9 of the Regulations provides as follows:

9. No development permit is required for repairs made in the course of normal maintenance of a building on a cottage lot that would not affect the structural integrity or susceptibility to fire of a cottage or an accessory building or substantially change its exterior appearance.	9. Il n'est pas nécessaire d'obtenir un permis d'aménagement pour les réparations d'entretien normal d'une dépendance ou d'un chalet situé sur un lot, si elles ne concernent pas la charpente, n'en augmentent pas les risques d'incendie ou n'en modifient pas considérablement l'aspect extérieur.

[101] In my opinion, given that the repairs affected the structural integrity of the deck and Cottage, section 9 does not apply. The repairs were necessary because the pilings, which support the deck and Cottage, had shifted. It is clear that the structural integrity of the Cottage and deck were affected.

[102] Does the doctrine of estoppel apply to prevent the Defendants from terminating the lease?

[103] In my opinion, the answer to this question lies in the decision *Immeubles, supra* where the Court held that estoppel cannot be raised as a defence to non-conforming use. In any event, estoppel does not lie against a public authority where the promise made by the public authority

was unlawful or contrary to clear statutory provisions; see *Immeubles*, *supra* at paragraphs 21 and 30. Sections 5, 7 and 9 of the Regulations are clear, mandatory provisions and the Defendants are not authorized to consent to a non-compliant structure.

[104] Finally, it remains to address the Defendant's arguments about the Plaintiffs' claim for defamation, breach of privacy and intentional misconduct. The Defendants submit that, upon the evidence tendered, none of these claims raise a genuine issue for trial.

[105] I am satisfied that there is no basis for the claim of defamation. This claim requires proof, on a balance of probabilities, that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; that the words used referred to the plaintiff; and that the words were published, meaning that they were communicated to at least one person other than the plaintiff, see the decision in *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640 at paragraph 28.

[106] Once the plaintiff proves the required elements, the onus shifts to the defendant to defend against the claim. The defence advanced by the Defendants in this proceeding is that the statements made by Parks Canada officials were substantially true. On the basis of the evidence submitted, I am of the opinion that the statements made by Parks Canada were true.

[107] The Plaintiffs advance a claim of breach of privacy and seek damages. Presently, the law does not recognize a common law tort for breach of privacy. Some provinces have enacted legislation providing a right of action for breach of privacy; I refer to *Privacy Act*, R.S.B.C.

1996, c. 373; *The Privacy Act*, C.C.S.M., c. P125; *Privacy Act*, R.S.N.L. 1990, c P-22 and *Privacy Act*, R.S.S. 1978, c. P-24.

[108] Recently, the Ontario Court of Appeal recognized the tort of intrusion on seclusion; see the decision in *Jones v. Tsige* (2012), 108 O.R. (3d) 241. The Plaintiffs have not shown that their claim for damages for breach of privacy is justiciable. In other words, they have not shown that there is a recognized cause of action for breach of privacy.

[109] It follows that the Plaintiffs have not shown that there is a genuine issue for trial in respect of this claim and the Defendants' motion for summary judgment in response to that claim will be granted.

[110] As for the claim of intentional misconduct by employees of the Defendants, this claim would appear to fall under the tort of misfeasance in public office. This tort requires proof that a public officer engaged in deliberate and unlawful conduct in his capacity as a public officer and that the public officer was aware both that his conduct was unlawful and that it was likely to harm the plaintiff; see the decision in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at paragraph 23.

[111] I am not satisfied that the evidence submitted by the Plaintiffs establishes this cause of action. The Defendants here benefit from the maxim *omnia praesumuntur rite et solemniter esse donec probetur in contrarium*. In the absence of proof to the contrary, actions of a public officer are presumed to be performed correctly; see the decision in *J.R. Moodie Co. v. Minister of*

National Revenue, [1950] 2 D.L.R. 145 at 158 (S.C.C.). The Plaintiffs have not shown that their claim of intentional misconduct raises a genuine issue for trial.

[112] In the result, the Defendants' motion is granted with costs, and the Plaintiffs' motion is dismissed.

JUDGMENT

[113] **THIS COURT'S JUDGMENT is that** the Defendants' motion is granted with costs, and the Plaintiffs' motion is dismissed.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	HERB C. PINDER JR., JOHN WEDGE AND TOM MOLLOY TRUSTEES FOR THE PINDER FAMILY TRUST v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA, REPRESENTED BY THE MINISTER OF ENVIRONMENT, AND PARKS CANADA AGENCY
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
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