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Gardening on Vacant Land –Verdant History, Volatile Endeavor

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Comment:

Gardening on vacant land in Calgary – Part I

On the Victoria Day long-weekend in 2012, Donna Clarke and some volunteers planted potatoes on a vacant lot next door to her home in Scarboro on 17th Avenue S.W. The fence was painted in bright colours and painted tires were used as planters. The lots were owned by Scarboro Projects Ltd., an affiliate of Vancouver mortgage firm who had foreclosed on a number of adjacent properties in 2009. Three of the buildings had been ordered demolished by the City of Calgary in 2011 as part of a crackdown on derelict properties.

Ms. Clarke did not contact the owners before she planted the potatoes. When notified by the City, the owners demanded the removal of the gardens saying it was an inappropriate use and permission would not have been given in any case. The City issued a 24 hour deadline to remove the potatoes and the garden was removed.

Calgary's History of Vacant Lot Gardening

While the recent urban potato garden in Scarboro may be dismantled, it actually reflects a longstanding tradition in Calgary.

The Calgary Vacant Lots Garden Club (the "Club") was organized unofficially on Nov. 13, 1911, by a resolution of City Council, and it was formally established on March 2, 1914, with offices in City Hall. The purpose of the Club was twofold, one was to supply poor families with the opportunity to grow food as most vegetables and fruit came from British Columbia at the time and were expensive. Secondly, as Calgary was in the midst of a real-estate crash, it operated to beautify vacant lands in Calgary that would otherwise go to weeds, waste and garbage. The origins of the Club related to the "back to the land" movement in the early 20th Century, the modern iteration of which originated by Bolton Hall's advocacy and example in New York.

In its first year of operation, the Club had 225 lots planted and an additional 134 lots prepared for the next spring. The second year, 1915, saw 2,000 lots under cultivation by 1,128 individuals. In 1937, there were 1,896 members (688 on relief being excused from paying dues), with 2850 lots under cultivation. The Club was able to purchase seed and gardening supplies in bulk (although there were 300 bushels of seed potatoes donated in 1915 by the City) and could organize, transport and mobilize its members during the planting and harvests. Initially, members were charged dues of $1.00 for the "use" of one plot (25 ft X 120 ft) of 3,000 square

feet and were limited to two plots the second being charged at $0.50. These dues remained constant.

The Club initially paid the City for plowing and discing each vacant lot at the rate of $1.00 per lot but later urged its members to spade their plots and charged an additional $1.25-$1.75 per plot to plow if requested to do so and undertook to plow when there were six or more plots together. The Club also galvanized the private owners with one estimate, from the 1916 Municipal Manual being that "100 acres are directly controlled by the Club, and perhaps twice this amount was cultivated by private owners directly or indirectly through the influence of this organization."

At its peak in 1943, there were 2,366 Club members cultivating 3,229 vacant lots, one lot for every 30 Calgarians. These lots were both City owned and private lands lent to the Club by the owners until the land was needed. The Rules and Regulations of the Club always directed the return of vacant lands to the owner one version (1937) provided that:

> 11. In the event of the owner, or agent of the owner, requiring the land for building, or other purposes, the member is expected to give up possession on request. If the garden is taken away or destroyed, the Club will refund the money paid to the Club, and such other expenditures as in the opinion of the committee was necessary.

After the Second World War more lands were taken back by the private owners and the availability of vacant lots in Calgary declined. The Club was dissolved on April 14, 1952 and the City owned lands were administered by the City under the Parks Department as community gardens whenever possible.

The Parks Department had a history of agriculture on City owned property, for example in 1917 there were 200 acres under cultivation around the General Hospital in Bridgeland with the produce being donated to a variety of charities.

The Bridgeland Riverside Historical Gardens is the only remaining Vacant Lot Club Garden and has been designated a Historical Resource. The operating conditions are intended to replicate the Vacant Lot Club operations.

The Parks Department currently supervises some 58+ Community Gardens, some 4-5 of which are privately owned. The Parks Department has a procedure and application form to establish a Community Garden on City owned land. There is no current City policy with regard to community gardens on privately owned land.

Gardens on Vacant Private Land?

Why couldn't Calgary's privately owned vacant lots be used for gardening? What are some of the potential legal barriers to reviving the Vacant Lots Gardening Club?

Occupiers' Liability

The Alberta *Occupiers' Liability Act*, RSA 2000, c O-4 ("Act"), modifies the common law obligation of an owner to persons who visits the owner's property, which would include persons working in the garden. Passed in 1970, following the Alberta Law Reform Report No. 3, the Act

significantly altered the common law. In the words of the Alberta Court of Appeal in *Preston v Canadian Legion Kingsway Branch*, 1981 ABCA 105 (CanLII) (*Preston*) at para 12:

> This change is most marked because it does away with the old common law position that an occupier was only liable for unusual dangers of which he was aware or ought to have been aware. Under the old law the occupier could escape liability by giving notice.

The Act defines an *occupier* as follows,

> 1 … (c) "occupier" means
> (i) a person who is in physical possession of premises, or
> (ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,
> and for the purposes of this Act, there may be more than one occupier of the same premises;

Instead of the old common law distinction between invitees and licensees, for the purposes of the Act it combines them into a single category of "visitor" which defined in clause 1 (e). The definition of premises in clause 1(d) includes: staging and scaffolds; poles, pylons and wires used for transmission of electricity, communications or passengers (e.g. ski lifts); railway cars and locomotives; ships and portable trailers but excludes "...any portable derrick or other equipment or movable things" not listed.

Section 5 imposes the following duty on the occupier:

> 5 An occupier of premises owes a duty to every visitor on the occupier's premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there.

This change was described by Justice Moir for a unanimous Court in *Preston* in the following terms:

> 12 In my respectful opinion the effect of the Act is twofold. Firstly, it does away with the difference between invitees and licensees and puts both invitees and licensees into the common defined class of visitor. That in itself is a very helpful improvement in the law. Secondly, and more importantly, the statute now imposes an affirmative duty upon occupiers to take reasonable care for the safety of people who are permitted on the premises. ……. Now, the occupier has to make the premises reasonably safe. That does not absolve the visitor of his duty to take reasonable care but does place an affirmative duty on each and every occupier to make the premises reasonably safe.

Thus the legislated duty of care will be assessed on a case by case basis depending on the facts of the particular case.

The liability can be shared between the occupier and visitor in subsection 15(1) of the Act pursuant to the provisions of the *Contributory Negligence* Act, RSA 2000, c C-27. This was elaborated upon in *Wood v Ward*, 2009 ABCA 325 CanLII ("*Wood*"), where the Court of Appeal said:

> [7] It does not follow that the occupier is automatically liable for any injury suffered as a result of a foreseeable risk. Foreseeability of the risk creates a duty to the visitor, but it is still necessary to show negligence on the part of the occupier to impose liability. The *Act* does not intend to create no fault liability. Further, the fact that the risk is foreseeable by the occupier, or that the occupier is negligent in failing to protect the visitor from the risk, does not mean that the visitor has no duty to have regard for his own safety. ….. It follows that the duty of the occupier is not only to protect the reasonably diligent visitor, but also to be aware that some visitors might themselves be careless, that is, contributorily negligent. The occupier's duty ends only when either the risk on the premises or the conduct of the visitor becomes reasonably unforeseeable. [Emphasis added]

In *Wood* the Court rejected an argument in paragraph 14 that, there was "...an 'affirmative duty' under the *Act* to make their premises safe, and that 'doing nothing' cannot satisfy that duty." The Court of Appeal stated that the standard of care was "only 'such care as in all of the circumstances of the case is reasonable'…. If the premises are already 'reasonably' safe, even though they are not completely free of any risk whatsoever, then 'doing nothing' can discharge the occupier's duty."

After *Wood* it appeared necessary for the plaintiff to demonstrate not only the formal requirements of the Act, i.e. premises, occupier etc. but also "…necessary to show negligence on the part of the occupier to impose liability."

However, the Court of Appeal has clouded the issue in its recent decision in *Christensen v Calgary (City)*, 2011 ABCA 244 (CanLII), leave refused 2012 CanLII 17786 (SCC). In a blog posting dated August 19, 2011 by the year in review editors of the University of Toronto Faculty of Law Review, The Year in Review described the appeal decision, in part, as follows:

> In *Christensen v. Calgary (City)*, the Alberta Court of Appeal considered the standard of care under the *Occupiers' Liability Act*, R.S.A. 2000, c. O-4 for public in-line skating paths. Berger J.A., writing for the majority, noted that there were no established standards for constructing in-line skating paths and instead stated that the question was whether the plaintiffs had established on a balance of probabilities that, but for the wrongful actions of the appellant, the respondents' injuries would not have occurred. McDonald J.A., writing in dissent, held that the trial judge failed to articulate a standard of care and that Berger J.A. made the same error as the trial judge and effectively reversed the onus of proof.

In doing so, the majority decision rejected an argument based on *Fullowka v Pinkerton's of Canada Ltd.*, 2010 SCC 5 (CanLII) (*Fullowka*) that dealt with the Giant Mine bombing near Yellowknife, which stood for the proposition that in negligence cases the plaintiffs were obliged to demonstrate a standard of care that the defendants did not meet. The majority said at paragraph 17 that the plaintiffs were only required to establish "on a balance of probabilities that, but for the wrongful actions of the City, the [plaintiffs] injuries would not have occurred." The majority said that the wrongful actions of the City included:

a. The City failed to properly consult with the in-line skating community when renovating its pathway in 2001;

b. The City did not reasonably consider the needs of in-line skaters when renovating its pathway in 2001;
c. The City failed to properly research relevant guidelines for the design of pathways for use by in-line skaters and, if none existed, the City should have formulated its own; and
d. The City did not place adequate signage warning of the steep hill about to confront users of the pathway.

As to the causation of the injuries, they merely noted in paragraph 26 that "[t]here is, on this record, ample evidence to establish the requisite causal connection between the City's deficient conduct and the [Plaintiffs'] injuries."

Justice McDonald, in a strong dissent noted that the plaintiffs' expert at trial was presented only to remark upon the plaintiffs skating ability and was not qualified as an engineer, planner or path designer. Consequently there was no expert evidence advanced at trial which might assist the Court in its *duty* to articulate the relevant standard of care pursuant to *Fullowka*. In paragraph 46, he described the majorities list of wrongful actions as "little more than a wish list and do not constitute a properly articulated standard of care." Further, in his assessment the list of wrongdoings were not proven to have caused the injuries in the case. The lack of consultation was not causally linked to the particular injuries. Given the lack of any evidence of applicable standards for design – how could the renovations in 2011 meet such undefined standards? The obligation on the City to create guidelines, when the evidence was that Transport Canada had struggled for years to do so, imposed an unreasonable requirement on the City. Further, the trial court found that one plaintiff did not notice the sign placed by the City, again what would have been an adequate signage? The Supreme Court of Canada denied leave to appeal on April 5, 2012.

Christensen does leave a question, when there are no readily determinable standards of care will courts require the occupier to justify their conduct?

The injuries in *Christensen* were sustained prior to the amendments to the Act contained in section 6.1 which states, among other things, that the recreational use of "recreational trails reasonably marked as such" would be assessed as if the visitor were a trespasser. Provided in-line skating paths constitute recreational trails, the amended Act would deny compensation for plaintiffs in the same circumstances as *Christensen*.

Limited Duty to Trespassers

This common duty of care does not apply to adult trespassers pursuant to section 12 of the Act unless the trespasser is killed or injured by the "the occupier's wilful or reckless conduct."

Trespassing by children is dealt with in section 13 which provides the occupier will owe a duty to that child if he knows or ought to have known that a child will trespass on the premises and that the conditions of or activities on the premises "create a danger of death or serious bodily harm to that child." In subsection 13 (2) the extent of that duty (i.e. its discharge) will depend on the age of the child, the ability of the child to appreciate the danger and the "burden on the occupier of eliminating the danger or protecting the child from the danger as compared to the risk of the danger to the child."

Knowledge of facts from which a reasonable person would infer that a child is present or that the presence of a child is so probable that the occupier should conduct himself or herself on the

assumption that a child is present will be sufficient to trigger the duty to a child trespasser under subsection 13(3). This was the case in *Houle v Calgary (City)*, 1985 ABCA 153 (CanLII) where a child was playing in "…an abandoned supermarket parking lot in a suburban residential area where there were bound to be large numbers of playing children" [at para 16]. The 8 year old child succeeded in climbing over a fence of "of 1" x 4" pickets 3/4 of an inch apart and approximately 10 feet 6 inches high" marked with Danger and High Voltage signs and entered the transformer substation and came into contact with a live power line. He suffered severe electrical burns which resulted in the amputation of his left arm below the elbow. The risk of liability is both greater and more substantial with children as any severe injury will have a lifetime of consequences.

The common duty of care under section 5 applies to not only the condition of the premises, but also activities on the premises and the conduct of third parties on the premises pursuant to section 6 of the Act. Liability for damage to personal property brought onto the premises by visitors, whether they own it or not, is included in section 14 of the Act with the exception of damage caused by third parties. It is open to have visitors willingly waive liability under section 7 of the Act, for example by agreeing to waive claims. These waivers ought to be in writing but there is no requirement in the Act. However a warning without more, will not absolve the occupier of the liability "unless in all the circumstances the warning is enough to enable the visitor to be reasonably safe" under section 9 of the Act.

Risks of Gardening on Vacant Land

Gardening requires gardeners. The operation of gardens on vacant land would see permitted visitors and children. The possible scenarios giving rise to visitor liability are numerous: operation of motorized tilling machines, fertilizer residue (herbicides and pesticides are prohibited in City Gardens), unstable or slippery pathways, gardening tools being left in the open, the use of pruning or cutting implements, thorns, unsafe fencing, fire-hazards like tyres etc. Even if all visitors are prudent, the occupier faces liability for third party conduct on their premises. Further, children will be attracted to gardens – if they can climb a 3m fence in *Houle* it is difficult to conceive of any method to secure the premises that would isolate children from the risks of gardening.

A prudent lawyer would discourage her client from allowing gardening on her client's vacant lot. This was presumably the case in Scarboro although the lack of prior permission coloured the owner's response.

Insurance

One mechanism to mitigate financial risk to owners/occupiers is to obtain adequate insurance. This is how the City of Calgary does it. The process of establishing a Community Garden on City owned lands involves, among other things, a partnership with the local community association that would see it granted a Licence of Occupation. The Community Association would carry the insurance and have the City as a named insured. Similar arrangements could be made with the owners of vacant lots in Calgary.

To Be Continued

This does not end the enquiry, Part II turns to issues of land use in Calgary.

Links:

May 22, 2012 - Calgary Herald on Scarboro Potato Garden

City of Calgary Parks Department Community Gardens

Bridgeland Riverside Historical Gardens

Calgary Horticultural Society-Community Garden Resources Network

100 Year History of Calgary Parks Department (PDF Book)

Institute of Law Research and Reform, The University of Alberta *Report No.* 3: Occupiers' Liability (1969)