

# Court of Queen's Bench of Alberta

**Citation: R v Burgess, 2020 ABQB 50**

**Date:** 20200117  
**Docket:** 191425172S1  
**Registry:** Edmonton

Between:

**City of Edmonton**

Respondent

- and -

**Spencer Burgess**

Appellant

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**Memorandum of Oral Decision  
of the  
Honourable Mr. Justice J.S. Little**

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## **I. Introduction/Facts**

[1] Mr. Burgess appeals a Commissioner's decision to refuse him a new trial on five bylaw infractions.

[2] He was issued the tickets on July 17, 2018, each of which is for \$100 and all of which relate to failure to leash or control a dog, which resulted in a dog attack.

[3] The tickets required him to appear in Traffic Court November 22, 2018 at 9:00 am or to plead Not Guilty by mail if he wished to contest them.

[4] He did wish, and a trial date was set for January 31, 2019 at 1:30 pm.

[5] Mr. Burgess appeared on that date, but the court did not have time to hear his trial. A new trial date was scheduled for October 16, 2019 at 9:00 am.

[6] Mr. Burgess was not present when court began on October 16, 2019 and was convicted by a Commissioner pursuant to s. 34 of the *Provincial Offences Procedures Act* (the Act), which permits a conviction in absentia. Mr. Burgess showed up at court that day at 11:00 am, and he

appeared before a Commissioner at 1:30 with his witnesses to argue pursuant to s. 38 of the Act that his conviction should be set aside because he had a reasonable excuse for missing the trial: he thought that it was scheduled for 1:30 pm.

[7] The Commissioner denied his argument, and Mr. Burgess appealed.

[8] His appeal was scheduled to be spoken to on December 20, 2019 at 1:30, but court was not sitting that afternoon, so it was moved ahead to December 13 at 1:30, at which time the appeal was scheduled for today.

[9] The appeal is now properly before me.

## **II. Issue: Reasonable Excuse**

[10] Section 38 of the Act reads:

Conviction set aside

s. 38 Where a defendant has an excuse for failing to dispute the charge or failing to appear in person or by agent at a trial, the defendant or the defendant's agent may, if not more than 15 days have elapsed since the conviction first came to the attention of the defendant, appear before a justice and the justice on being satisfied by affidavit that the defendant has established on a balance of probabilities that the defendant's excuse is reasonable shall set aside the conviction and

- (a) give the person appearing a notice of trial in accordance with section 33, or
- (b) proceed in accordance with section 35.

[11] Mr. Burgess applied the same day, so there is no issue that he was within the 15 day window.

[12] The City argues that making a mistake as to the start time of one's trial does not rise to the level required to be a reasonable excuse and cites a number of cases in support of that argument.

## **III. Jurisprudence**

[13] In *R v Choudry*, 2005 ABQB 973, Justice Watson, as he then was, held that merely forgetting the date was not a reasonable excuse.

[14] In *R v Kinder*, 2012 ABQB 382, Justice Lee held that it would be a miscarriage of justice to maintain the conviction of an accused who retained a lawyer who then missed the court appearance.

[15] In *R v Varkki*, 2016 ABQB 443, Justice Veit allowed a new trial to an accused who missed his trial date because he did not yet have the evidence he required to run the trial. The accused had parked in a handicapped stall without a proper sticker – he was taking his young disabled daughter to church and at the time of the trial he had not yet received from Alberta Health Services the necessary documentation for a handicapped sticker. Justice Veit discussed

the Alberta Court of Appeal decision in *R v Dahmer*, 2015 ABCA 294, but concluded that it did not close the categories of what might be reasonable excuses.

[16] The only decision binding on me is *Dahmer*. In *Dahmer*, Wakeling, JA sets out a number of examples of what may be “no fault” reasonable excuses including matters beyond a person’s control such as an injury or hiring of a lawyer who forgets the date. He confirms that a person who “forgets all about the date” does not have a reasonable excuse. He does not distinguish between date and time.

[17] Importantly, he focuses on efforts an accused takes to meet the trial date:

[26] In addition to ‘those rare conditions when a defendant, without fault on their part, fails to participate in the process’; the defendant must be able to show that he or she took an objective positive step to defend the action, as opposed to cases where the defendant is merely forgetful or careless. The onus is on the defendant to show evidence that she put some responsible effort into attending to the court date or disputing the charge.

[18] The adjourned date in this case for the trial was October, 2019, some eight months after it was first scheduled. Mr. Burgess admittedly had been told eight months earlier that it was a 9:00 am start, but he was thinking 1:30 because that was the time for the first, aborted trial. The Commissioner told him that they do not call the list for 9:00 o’clock trials till 10:00 am, and the court then allows a half hour leeway for traffic, etc. Effectively Mr. Burgess was a half hour late.

[19] Mr. Burgess is not without fault here. But he did not “forget all about the date”. Like Justice Veit in *Varkki*, I do not read *Dahmer* as closing the door on what might be a reasonable excuse. Nor do I read it as standing for the proposition that a defendant who has always shown an intent to challenge the charge and who showed up on the right date but a half hour late, and immediately sought a new time, for a trial already adjourned by the Court for eight months, is barred from having his day in court.

[20] I find telling that:

1. The Court had to adjourn his first scheduled trial for eight months due to its lack of resources. Mr. Burgess was ready to go on that date.
2. His first “speak-to” date for this appeal was scheduled by the Court for a time when the Court was not sitting. In other words, Mr. Burgess is not the only one who was mixed up.

[21] Legislation which allows a person a 15 day window to apply to reverse a conviction cannot be interpreted to deny Mr. Burgess, in these unique circumstances, his trial date because he was a half hour late for a trial adjourned by the court for eight months.

[22] In *Seinfeld* Episode 17, Season 6, called *The Kiss Hello*, George Costanza fails to give 24 hours notice of cancellation of a physiotherapy appointment, and the therapist charges him a \$75 penalty. When she later, without notice, cancels an appointment George had booked, the therapist refuses to reimburse him the same amount for his time. George rails against this injustice.

[23] To allow the Court here to penalize Mr. Burgess by refusing him his day in court because he was a half hour late, when the Court itself bungled its dates twice and required his attendance both times, would be a similar injustice.

**IV Conclusion**

[24] Mr. Burgess's appeal is allowed, and I order that a new trial date be set.

Heard on the 16<sup>th</sup> day of January, 2020.

**Dated** at the City of Edmonton, Alberta this 17<sup>th</sup> day of January, 2020.

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**J.S. Little**  
**J.C.Q.B.A.**

**Appearances:**

Kaylyn Johnson  
City of Edmonton  
for the Respondent

Spencer Burgess  
Self-Represented Litigant