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Summaries provided by: Monica Ciriello, Ontario, 2015

City Building Inspections Do Not Violate Section 7 of the Charter of Rights and Freedoms

Toronto (City) v Tseng, 2017 ONSC 3219 (CanLII) http://canlii.ca/t/h3z4x

The Appellants, a mother, father and daughter, reside in the City of Toronto (City). In 2006 the Appellants constructed an addition to their home without obtaining a building permit, which was in contravention of the City's Zoning Bylaw. In 2013 the Appellants consented to a court order to obtain a building permit. However, since the court order, the City has been unable to conduct inspections of the addition on the Appellants' property as the Appellants alleged that the inspection may exacerbate their health conditions. The City brought an application under s. 38 of the *Building Code Act, 1992 (BCA)* seeking an order authorizing City inspections to be conducted. The Court granted the City's application and dismissed the Appellant's s. 7 *Charter of Rights and Freedoms (Charter)* argument, the Appellants' appeal the decision of the lower court.

HELD: Appeal is dismissed.

DISCUSSION: The Appellants revived the s. 7 *Charter* argument on their appeal. Section 7 is a provision of the *Charter* that declares "everyone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice." As found in *Carter v. Canada (Attorney General)*, 2015 SCC 5 to put forward a successful s.7 argument, the onus is on the Appellant to demonstrate that the actions taken by the government interferes with s.7 and is not in accordance with the principles of fundamental justice. At the lower court, the Appellants' were unsuccessful in arguing that permitting the City to inspect the addition on their property may endanger their already frail health,

ultimately putting their lives at risk and thus rising to the level of a s. 7 violation. The lower court found that the City was inspecting the property as a statutory requirement under the *BCA* to safeguard the construction of the addition. The judge stated "if anything, the City is attempting to see the security of the respondents [as they were in the lower court], as occupants of the building." The Court agreed with the findings of the lower court that inspecting the Appellants' property would not endanger their lives. The Court also went so far as to hold that the Appellants' argument was void, without merit and constructed of exaggerated language. The appeal was dismissed and the Appellants were required to pay costs of $10,000.

City Found Partially Responsible for Damages When It Requested Wrong Machine To Tow Excavator Out of Sinkhole

City of St. John's v Holden's Transport Limited, 2017 CanLII 29269 (NL PC) http://canlii.ca/t/h3s5h

Employees at the City of St. John's (City) were using a City excavator to assist in repairing a water main, when a sinkhole developed under the machine causing it to sink. The excavator remained undamaged. To remove the excavator the City contacted the Defendant, a towing company the City had a contract with to provide towing services. A boom truck was requested from the Defendant, while the Defendant obliged, it did recommend a wrecker instead. An operator from the Defendant's company removed the excavator partially from the sinkhole, when the belt snapped and it fell back into the sinkhole causing damage. The City claims damages from the Defendant for breach of contract and damage sustained to the excavator.

HELD: Contract breached, but City found to be contributorily negligent.

DISCUSSION: The City argued that the Defendant breached its contract, not only when it failed to remove the excavator without damage but also when it failed to have a supervisor on the job site as required in the tender contract. Relying on *Bowker v. Coquihalla Towing Co.,* [1998] B.C.J. No. 1072 the Court established that the law places the onus on the Defendant to prove on a balance of probabilities that proper care was taken in its actions. The Court accepted the City's evidence that the excavator was not damaged when it fell into the sinkhole, and had a supervisor attended the site as required in the tender contract to oversee the removal of the excavator, the belt may not have snapped. Therefore, the Court held the Defendants actions were inconsistent with the reasonable care of a reasonable person in the towing industry and as a result of the contract breach; the City's excavator was damaged. However, the Court also found that the City was contributorily negligent as a result of its request that the Defendant send a boom truck to remove the excavator instead of the wrecker which was recommended by the Defendant. As a result, the City was found to be partially responsible for the damage.

City Awards Request for Proposal Fairly and In Good Faith

Joginder Ltd v Edmonton (City), 2017 ABQB 328 (CanLII) http://canlii.ca/t/h3tgx

The City of Edmonton (City) issued a request for proposal (RFP) for a Disabled Adult Transportation Service Ambulatory Contract. The City awarded the contract to Prestige Transportation Ltd (Prestige) as it was the successful candidate of the RFP. The Plaintiff, Joginder Ltd. was unsuccessful in the bid and claimed that the

City breached its duty to act fairly and negotiate in good faith, and as a result it lost the bid and approximately $24 million in revenue. The City submitted that the Plaintiff's bid was rejected as it did not comply with the mandatory requirements outlined in the RFP and as a result sought a summary dismissal.

HELD: Summary dismissal granted, action dismissed.

DISCUSSION: To be considered for the RFP, the City had outlined mandatory requirements that had to be met. It was the City's position that the Plaintiff did not meet these requirements and was therefore not successful in obtaining the contract. After being deemed unsuccessful, the City sent the Plaintiff a letter outlining the areas where it failed to comply:

1. Applicants must be commercial passenger transportation companies with a primary business of providing commercial passenger transportation and have drivers and vehicles in active service.
2. Applicants must have their own dispatch and business telephone numbers, which is exclusively used by the dispatch company.

Addressing the first requirement, the Court relied on the Plaintiff's RFP proposal which described its business as a "dormant corporation" the Court agreed with the City that a dormant or inactive corporation would not meet the requirement of the present tense providing passenger transportation requirement. The Court then examined the Plaintiff's affidavit that acknowledged that "no vehicles had been used for commercial transportation purposes". The Court found that because no drivers or vehicles had been or were currently in active service, the Plaintiff did not meet this requirement. Examining the second requirement, the Court found the number provided by the Plaintiff to be acceptable, as the RFP did not state that the number would ultimately be the number used by dispatch. However, as the first requirement was not met the second was of no consequence.

The Plaintiff also submitted that the successful bidder Prestige, was not compliant with the requirements outlined by the City, and thus as a result of being awarded the contract the City did not act in a fair and good faith manner. The Plaintiff argued that Prestige did not comply with the requirement requiring that all companies applying to the RFP have vehicles in active service. At the time of the application, Prestige was a wholly owned subsidary of 331001 Alberta Ltd. (Alberta Ltd.) and all of the vehicles were registered under Alberta Ltd. The City submitted that all RFP requirements were met by Prestige. To determine if it was acceptable to have mandatory requirements met through related parties, the Court relied on *IMP Group Ltd. v Canada (Minister of Public Works & Government Services)* 2006 FC 1223 CanLII. The Court determined that the primary purpose of the RFP vehicle requirement was to ensure that the successful bid had the vehicles and drivers to fulfill the contract. Therefore, Prestige met the vehicle requirement regardless of being a subsidiary of Alberta Ltd.

City Successfully Provided Heritage Property Owner Notice Even When Sent to e Wrong Address

St-James No.1 Inc. v Hamilton (City), 2017 ONSC 2815 (CanLII) http://canlii.ca/t/h3nbm

The City of Hamilton (City) designated 1 St. James Place (James Place), owned by St. James No. 1 (Applicant) as a cultural heritage property under s. 29 of the *Ontario Heritage Act*, R.S.O. 1990 (*OHA*). At the time of incorporation, 1 St. James Place was owned by two directors: one in Waterdown and the other in Flamborough.

Eventually the director and Applicant in Waterdown became the sole director and owner of James Place. Section 34 of the *OHA* states that "the owner of the property designed under s. 29 may not demolish or remove a building or structure on the property unless it applies to the Council of the municipality and has received consent in writing to the demolition or removal." The Applicant submitted an application to the City seeking to demolish James Place. The application was refused. In early December 2015 another demolition application was submitted to the City, the address on the application showed the owner as the Flamborough address. The City sent a receipt of notice on December 14, 2015 to the Flamborough address and on March 9, 2016 Council refused the demolition of James Place. The City sent the refusal to the Waterdown address. As a result of the notice being sent to Waterdown, the Applicant argued that Council deemed to have consented to the application.

HELD: Application dismissed.

DISCUSSION: The issue before the Court centered on whether the delivery of Council's refusal decision sent to the Waterdown address, was sufficient notice. If notice of refusal to Waterdown was insufficient, then Council was deemed to have consented to the demolition application. The Applicant argues s. 67 of the *OHA* that Council did not provide proper notice because the address on the application was Flamborough, and s.67 (1)(b) indicates that notice is properly given if served "by mail to the last known address of the person to whom delivery or service is required to be made" and the last known address was Flamborough, not Waterdown. The Applicant also cites s.34(2) of the *OHA* which requires notice of Council to be provided to the owner, and since the owners address on the application indicated Flamborough and the notice was sent to Waterdown, the Applicant argued that Council was deemed to have consented to the application and the demolition.

The Court disagreed. To determine the interaction of s.34 and s. 67 of the *Ontario Heritage Act,* S.O. 1974 (predecessor legislation), the Court relied on the Supreme Court of Canada decision, *St. Peter's Evangelical Lutheran Church v. Ottawa (City)* 1982 CanLII 60. In this decision, the City did not provide notice to the owners of the church demolition application on the basis that only two members of the church were present at Council when the decision was made. Comparing *St. Peter's* to the matter at hand, the Court concluded that s.67 should be interpreted so as to permit flexibility to provide notice. The City did follow reasonable steps to provide notice to the Applicant, and the Applicant successfully received the receipt of notice from the City as the Applicant resides at the Waterdown address. The Court held that notice was provided within the required time period, and therefore Council was not deemed to have consented to the demolition.

Follow-up: City of Hamilton's Leave to Appeal is Dismissed by the Supreme Court of Canada

City of Hamilton v. Dean Saumur, an infant under the age of 18 years by his Litigation Guardian, Janet Saumur, and the said Janet Saumur, 2017 CanLII 25781 (SCC)http://canlii.ca/t/h3kdk

The City of Hamilton (City) submitted an application for leave to appeal a 2016 judgement of the Court of Appeal for Ontario. The leave to appeal was dismissed with costs by the Supreme Court of Canada on May 4, 2017.

In 2015 the Ontario Superior Court of Justice held that a nine-year-old boy, Dean was not contributorily negligent when he was hit by a car at a street corner in the City where a crossing guard was normally positioned. The crossing guard was not

present when Dean attempted to cross the street. The City submitted that it was not required to provide a crossing guard, but acknowledged that as it did voluntarily undertake to have one, it remained responsible to ensure that a crossing guard was in the appropriate locations at the required times. The Ontario Superior Court of Justice found the driver and the City both contributorily negligent at 50% each. The City appealed to the Court of Appeal, arguing that Dean was contributorily negligent. The Court of Appeal disagreed and upheld the Superior Court decision

Court of Appeal decision: HERE

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