Ontario Supreme Court
Thunder Bay (City) v. Kasstan Estate,
Date: 1999-03-01

Re Corporation of the City of Thunder Bay

and

Estate of Mary Kasstan et al.

Ontario Court (General Division), Stach J. March 1, 1999

David G. Nattress, for applicant.

Francis J. Thatcher, for respondent, Micalda Kasstan.

Mary D. Bird, for respondent, Clara Kasstan.

Randall V. Johns, for Public Guardian and Trustee (as guardian of the property of Clara Kasstan).

[1] STACH J.:—In one of its provisions, the *Planning Act,* R.S.O. 1990, c. P.13, s. 31(24) and (25) ("the Act"), permits municipalities to make repair orders and to carry out immediate remedial work on property that poses an immediate danger to the health or safety of any person. The applicant here, the Corporation of the City of Thunder Bay ("the city") seeks an order from this court confirming an emergency order previously issued by the city under s. 31(24) of the Act for immediate remedial and other work to residential premises 1101 Frederica Street West ("the residence") in the City of Thunder Bay. The city seeks to recover from the respondents $14,995.48, the amount expended under the emergency order for the "clean-up". This amount includes work charges for the property on which the residence was situate, and on four adjacent lots.

[2] The respondents in this application are related to one another. They have an interest in the residential premises, or one or more of the adjacent lots. At the time in question, however, only the respondents Clara Kasstan and Micalda Kasstan were actual occupants of the residence. They are the persons most directly affected by the emergency order, and it is they who challenge the city's application for confirmation In doing so, Micalda and Clara Kasstan raise serious *Charter* issues regarding the manner in which the city exercised its powers under the Act.

[3] In order to highlight the issues raised in this application, some understanding of the relevant factual background is required.

Factual Background

[4] From the material filed one gleans that Clara Kasstan, a former music teacher, is a proud and fiercely independent woman in her mid-70s. She is part of a large family but, with one important exception, is distanced from them. The exception is her sister Micalda. After living in southern Ontario, Clara Kasstan returned to Thunder Bay some years ago and lived in the family residence at 1101 Frederica Street with another family member. That family member passed away in 1991. Thereafter, Clara Kasstan remained alone in the residence until her sister Micalda moved in with her in 1996. Clara Kasstan has an income of approximately $980 per month.

[5] Micalda Kasstan receives income monthly from her Canada Pension and Old Age Pension. There is no significant difference in age between Micalda and her sister Clara and it is probably fair to say that Micalda Kasstan is as proud and fiercely independent as Clara. Despite the death of their mother many years ago, paper title to the family residence remains in the name of their late mother's estate. Because their late mother died without a will, several next of kin also have an interest in the residence.

[6] The residence at 1101 Frederica Street first came to the attention of the city officials in 1996 as a result of a complaint respecting the condition of its yard. Ultimately (under a different process from that at issue here), the city engaged contractors to clean up the yard. Officials of the city attended at the premises on September 2 and 3, 1997 to monitor the yard clean-up. Clara and Micalda Kasstan objected strongly to the presence of city personnel and city agents on their premises. They say that such persons were unlawfully on their premises, a position vigorously contested by the city. For purposes of this application, I am prepared to assume (without deciding) that city officials and agents were lawfully present in the yard (but only the yard) on September 2 and 3, 1997.

[7] On September 2 and 3, Donna Mahoney, a licensing and enforcement officer with the city, allegedly made observations about the condition of the yard and the circumstances of Clara and Micalda Kasstan. In her affidavit sworn January 13, 1998, Mahoney deposes that on September 3 she acquired information that:

(a) the furnace of the residence was not in use;

(b) the house was heated in winter by electric heaters;

(c) in her perception Clara and Micalda Kasstan were unkempt, dirty and emitted a horrible odour;

(d) the smell emanating from the house was horrible;

(e) (from Clara Kasstan) there was no running water in the residence;

(f) there was evidence in the yard of rotten apples and worm and bug-infested potatoes and onions which Clara Kasstan allegedly claimed to be her food.

[8] During the clean up of September 2 and 3, Clara Kasstan and Micalda Kasstan had vehemently objected to the presence of city officials on their property as unlawful and the police were called to the site as a consequence. Also on September 3, 1997, Donna Mahoney contacted representatives of the city's fire and the health departments and requested that they check the residence to identify potential safety and health hazards. When representatives of the fire and health departments arrived, Clara and Micalda Kasstan refused them entry.

[9] The conditions catalogued by Donna Mahoney on September 2 and 3 allegedly raised concerns in her over the health and safety of the occupants of the residence, Clara and Micalda Kasstan. Some time later, also on September 3, 1997, the police, presumably with the knowledge of Donna Mahoney (and, one suspects, at her instance), made application to a justice of the peace under s. 16 of the *Mental Health Act,* R.S.O. 1990, c. M.7 for a warrant to apprehend Clara and Micalda Kasstan and to take them to a psychiatric facility in Thunder Bay for psychiatric assessment.

[10] There is no material before this court regarding the information the police actually presented to a justice of the peace on September 3, but it is common ground that a warrant of apprehension was issued under s. 16 of the *Mental Health Act* against both Clara Kasstan and Micalda Kasstan on September 3 and executed on September 4. In my opinion, it is significant that the city made no concurrent application to the justice of the peace on September 3, 1997 for a search warrant to permit inspection of the residence on September 4, 1997.

[11] On September 4, 1997 Donna Mahoney and Murray Haywood, also a licensing and enforcement officer, attended at the residence with the police officers when the police executed the warrant of committal against Clara and Micalda Kasstan. Neither Mahoney nor

Haywood had a search warrant. According to paras. 16 and 17 of the affidavit of Donna Mahoney:

> The Police removed the two ladies from the house at approximately 2:00 p.m. on the afternoon of September 4, 1997. It was at that time that I could see through the open front door the horrible conditions inside the house. I attach as Exhibit “D” hereto a series of pictures taken by Murray Haywood, also a Licensing and Enforcement Officer with the City of Thunder Bay. The picture identified as number 1 is a view of the rear door of the house, number 2 is a view through the front door into the living room, number 3 is a view of the rear porch from the door and number 4 is a view through the clothesline door.
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> In consultation with Murray Haywood, we determined that a situation dangerous to safety and health existed and an emergency order was issued pursuant to s. 31(24) of the *Planning Act*…

[12] What emerges clearly from this deposition is that the decision by city officials to issue an emergency order was not made until after the on-site “inspection” in the afternoon of September 4, 1997. While present at the scene on September 4, Murray Haywood took a series of polaroid photographs which were filed as exhibits on this application. I infer from the affidavit of Donna Mahoney and certain of the photographs taken by Murray Haywood that both Mahoney and Haywood were within the property lines and very near the front and rear doors of the Frederica Street residence during the afternoon of September 4. Indeed, the photographs in question focus on the interior of the residence seen through its opened doors. Whether Donna Mahoney and Murray Haywood had a right to be present there and to conduct themselves as they did, without a search warrant, is very much in issue: see, for example, *R. v. Evans,* [1996] 1 S.C.R. 8, 104 C.C.C. (3d) 23.

[13] When the committal order was executed on September 4, 1997, Clara and Micalda Kasstan were apprehended by police and removed from the residence against their will. According to Clara, she was handcuffed and dragged out of the house. Both were taken to the Lakehead Psychiatric Hospital. They remained hospitalized as involuntary patients for 14 days. Micalda Kasstan was ultimately found to be competent to care for herself and to manage her property. She was discharged.

[14] Clara Kasstan may suffer from a mental disorder. She was found to be incompetent to manage her personal affairs and, in September 1997, the Public Guardian and Trustee

assumed guardianship over her property, a situation which continues to the date of this hearing. Ultimately, Clara discharged herself from hospital and took up residence in rented accommodation with her sister, Micalda. The remedial work performed to their residence at 1101 Frederica Street was carried out by or at the instance of the city while Micalda and Clara were involuntary patients at the Lakehead Psychiatric Hospital.

The Planning Act

[15] The sections of the *Planning Act* which come into play in this application are contained in Part IV of the Act which deals with COMMUNITY IMPROVEMENT. Principally we are concerned with a number of subsections under s. 31 of the Act. The subsections are reproduced, in part, below:

> 31(4) Subject to subsection (5), when a by-law under this section is in effect, *an officer* and any person acting under his or her instructions *may, at all reasonable times and upon producing proper identification, enter and inspect any property.*
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> (5) *Except under the authority of a search warrant* issued under section 158 of the *Provincial Offences Act, an officer* or any person acting under his or her instructions *shall not enter any room or place actually used as a dwelling without requesting and obtaining the consent of the occupier, first having informed the occupier that the right of entry may be refused and entry made only under the authority of a search warrant.*
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> (6) *If, after inspection, the officer is satisfied that* in some respect *the property does not conform with the standards prescribed in the by-law, he or she shall serve* or cause to be served by personal service upon, or send by prepaid registered mail to, the owner of the property and all persons shown by the records of the land registry office and the sheriff's office to have any interest therein *a notice containing particulars of the nonconformity* and may, at the same time, provide all occupants with a copy of such notice.
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> (7) After affording any person served with a notice provided for by subsection (6) an opportunity to appear before the officer and to make representations in connection therewith, the officer may make and serve or cause to be served upon or send by prepaid registered mail to such person an order…
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> …

(16) *When the owner or occupant* upon whom an order has been served in accordance with this section *is not satisfied with the terms or conditions of the order, the owner or occupant may appeal to the committee* by sending notice of appeal by registered mail to the secretary of the committee within fourteen days after service of the order, and, in the event that no appeal is taken, the order shall be deemed to have been confirmed.

(18) The *municipality* in which the property is situate *or any owner or occupant* or person *affected by a decision under subsection (17) may appeal to a judge of the Ontario Court (General Division)* by so notifying the clerk of the corporation in writing and by applying for an appointment within fourteen days after the sending of a copy of the decision…

…

(24) *Despite any other provisions of this section, if upon inspection of a property the officer is satisfied there is nonconformity with the standards prescribed in the by-law to such extent as to pose an immediate danger to the health or safety of any person the officer may make an order containing particulars of the nonconformity and requiring remedial repairs or other work to be carried out forthwith to terminate the danger.*

(25) *After making an order under subsection (24), the officer may, either before or after the order is served, take or cause to be taken any measures he or she considers necessary to terminate the danger, and for this purpose the municipality has the right, through its employees and agents, to enter in and upon the property from time to time.*

(26) *The officer, the municipality or anyone acting on behalf of the municipality is not liable to compensate the owner, occupant or any other person by reason of anything done by or on behalf of the municipality in the reasonable exercise of its powers under subsection (25).*

(27) *Where the order was not served before measures were taken* by the officer *to terminate the danger,* as mentioned in subsection (25), *the officer shall forthwith* after the measures have been taken, *serve* or send *copies of the order,* in accordance with subsections (7), (8) and (9), on or to the owner of the property and all persons mentioned in subsection (6) *and* each copy of the order shall have attached thereto *a*

statement by the officer *describing the measures taken* by the municipality *and providing details of the amount expended in taking the measures.*

(28) *Forthwith after the requirements of subsection (27)* or (28) *have been complied with the officer shall apply to a judge of the Ontario Court (General Division) for an order confirming the order made under subsection (24),* and…

…

(*c*) the judge in disposing of the application may confirm the order or may modify or quash it and shall make a determination as to whether the amount expended by the municipality in taking the measures to terminate the danger may be recovered by the municipality in whole, in part or not at all.

(Emphasis added)

Discussion

[16] Counsel for the respondents Micalda and Clara Kasstan take the position that, although the committal warrant did authorize the police officers to attend at the residence for purposes of executing the committal order under the *Mental Health Act,* the by-law enforcement officers, Mahoney and Haywood, could not lawfully enter upon the premises at the same time for purposes of their inspection under s-s. (24) except with a search warrant. They argue, in short, that the activities of Mahoney and Haywood on September 4, 1997 constituted a warrantless search of the premises. This argument assumes some significance in view of the *inspection* requirement of s-s. (24) and the factual background previously recited.

[17] If by-law enforcement officer Donna Mahoney had been persuaded of “an immediate danger to health or safety” on September 2 or September 3, 1997, one infers that she would have issued an emergency order under s. 31(24) at that time, and similarly, that she would not have considered it necessary to solicit further opinion from the fire and health departments of the city. Indeed, her own affidavit makes it clear that the decision to issue the s. 31(24) order was a direct consequence of the late afternoon inspection of September 4.

[18] Counsel for the respondents argued that an application for a search warrant under s. 31(5) of the Act should have been made to the justice of the peace on September 3, 1997

at the same time the police made their application for a committal order. I find merit in that position

[19] From the reaction she and other city officials received on September 3, Donna Mahoney must certainly have known that her further presence and that of other by-law enforcement officers was unwelcome anywhere on the subject property and that a search warrant was necessary to carry out the inspection of the residence contemplated by s. 31(24). Indeed, Mahoney knew that Micalda and Clara Kasstan had categorically refused entry to officials of the city's Fire Department and Department of Health on September 3.

The Law

[20] The material portion of s. 31(24) reads as follows:

> 31(24) *Despite any other provisions of this section*, if *upon inspection* of a property the officer is satisfied that there is nonconformity with the standards prescribed in the by-law to such extent as to pose an immediate danger to the health or safety of any person the officer may make an [emergency] order…

(Emphasis added)

[21] In this segment of the argument, much attention was focused on the meaning to be accorded to "inspection". It is not defined in the Act. Accordingly, I attribute to the term *inspection* what I perceive to be its plain and ordinary meaning in this context, namely, "an official examination"[1]. In my opinion, this kind of official examination cannot be effected in circumstances like those present here without actual entry onto the premises.

[22] Inspections are specifically referred to in s-s. (4) of the Act. The statutory, procedure governing entry into a *place actually used as a dwelling* is specified in s-s. (5) and clearly mandates a request for and the consent of the occupier, "having informed the occupier that the fight of entry may be refused and entry made only under the authority of a search warrant." Failing such consent, entry can be effected only under the authority of a search warrant.

[1] See also *The Concise Oxford Dictionary of Current English,* 8th ed. (Oxford: Clarendon Press, 1990) and *Black's Law Dictionary,* revised 4th ed. (St. Paul: West Publishing, 1968).

[23] The meaning to be accorded “inspection” in s. 31(24) of the Act and its concomitant requirements must be informed by s-ss. (4), and (5) of the Act. Subsection (24) does not, in precise terms or by necessary implication, diminish the requirements for entry from those specifically outlined in s-ss.(4) and (5) and, in my opinion, if it attempted to do so, it could not pass constitutional muster under the *Canadian Charter of Rights and Freedoms.*[2] Neither, in my opinion, is there any basis for the argument that the by-law enforcement officers possessed common-law authority to trespass upon the private property of the respondents to conduct the inspection.

[24] The opening words of s-s. 24, *viz, “despite any other provisions of this section”,* are, indeed, words of qualification but, in my opinion, are intended to contradistinguish the more cumbersome and time-consuming procedures of s-ss. (6) through (18) of s. 31 which are clearly inconsistent with and unworkable in the more emergent situations contemplated by s-s. (24): see para. 15 above [p. 709 *ante*]. The opening words do not, however, eliminate the requirement clearly spelled out in s-s. (24) for an *inspection* to take place; nor do they, for purposes of such inspection, eliminate the constitutional safeguards that govern entry comprised in s-s. (5).

[25] I do not suggest that there may never be circumstances which so patently constitute immediate and serious danger to human health or safety that constitutional safeguards may have to be sacrificed. I do suggest that, in reference to the *Planning Act,* such circumstances must certainly be rare.

[26] In s-ss. 31 (24) and (25), the legislature has delegated to municipal authorities extraordinary power to interfere with “property”[3] where verified nonconformity poses an immediate danger to the health or safety of any person. The exercise of such power is not, however, without some restraint. As Sopinka J. observed in *R. v. Kokesch,* [1990] 3 S.C.R. 3 at p. 17, 61 C.C.C. (3d) 207 at p. 218:

> This Court consistently has held that the common law rights of the property holder to be free of [state] intrusion can be restricted only by powers granted in clear statutory language.

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[2] James A. Fontana, *Law of Search and Seizure in Canada,* 4th ed. (Markham, Ont.: Butterworths, 1997), p. 331 *et seq.* See also Peter Hogg, *Constitutional Law of Canada.* 3rd ed., supplemented, (Toronto: Carswell, 1992), at pp. 37-12.3 and 12.4.

[27] And at p. 29-30 S.C.R., p. 228 C.C.C.:

> Even before the enactment of the *Charter,* individuals were entitled to expect that their environs would be free of prowling government officials unless and until the conditions for the exercise of legal authority are met: see *Eccles v. Bourque* [1975] 2 S.C.R. 739; and *Colet v. the Queen,* [1981] 1 S.C.R. 2. The elevation of that protection to the constitutional level signifies its deep roots in our legal culture. La forest J. put it in this way in *Dyment, supra,* in words that commend themselves to me (pp. 427-28):
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> > Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

[28] The yard clean-up performed by the city and its agents on September 2 and 3 was by its nature less intrusive than the subsequent search of the dwelling. Yet, on September 2 and 3 the city appears to have followed the statutory procedure precisely, with due observance of its safeguards to the citizen. This raises the question why city officials, on September 4, 1997 opted for a shortcut in pursuing a more serious intrusion into the privacy of Clara and Micalda Kasstan. Given the factual background I have already outlined, Mahoney and Haywood knew or ought to have known that they were trespassing on the premises when they performed their inspection of the residence on September 4. These by-law enforcement officers were effectively piggy-backing their inspection of the residence onto the quite separate, and distinct committal warrant being executed by police under the *Mental Health Act.*

[29] I have little doubt that the conduct of Donna Mahoney was carried out with the best of intentions and executed in good faith. I observe also that the results of a further inspection of the residence reasonably called for intervention by way of remedial work. It is nevertheless clear that an "*ex post facto* justification of searches by their results is precisely what the *Hunter* standards were designed to prevent" (*R. v. Kokesch, per* Sopinka J., at p. 29 S.C.R., p. 227 C.C.C.). Also as noted by Sopinka J. (at p. 33 S.C.R., p. 231 C.C.C.): "Any doubt they may have had about their ability to trespass in the absence of specific statutory authority to do

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[3] According to its definition in s. 31(1), "property" means a building or structure of part of a building or structure, and includes the lands and premises appurtenant to and all mobile homes, mobile buildings, mobile structures, outbuildings, fences and erections thereon whether heretofore or hereafter erected, and includes vacant property.

so was manifestly unreasonable, and cannot, as a matter of law, be relied upon as good faith for the purposes of s. 24(2) [of the *Charter*]".

[30] Also as noted by the authorities, the absence of prior authorization raises a presumption of unreasonableness: see *Hunter v Southam Inc.,* [1984] 2 S.C.R. 145 at pp. 162-63, 14 C.C.C. (3d) 97 at pp. 109-10, *per* Dickson J. (as he then was). In the hearing before me, the city presented no evidence to rebut the presumption. It seems apparent, moreover, that no protocol existed in the city's planning department regarding the procedure employees should follow in exercising the extraordinary powers delegated to its by-law enforcement officers under s. 31(24) of the *Planning Act.* The result in my opinion is an infringement of the *Charter* rights of Clara and Micalda Kasstan to be secure against unreasonable search.

[31] Section 24(1) of the *Charter* permits the court to grant such remedy as it considers appropriate and just in the circumstances. Where municipalities are granted extraordinary powers to interfere with the property of a resident, the municipality must, in exercising such power, be scrupulously careful not to overstep and, at the very least, must ensure that the statutory conditions for the exercise of that power are lawfully satisfied. Although I find that the remedial work ultimately performed by the city was reasonably necessary, was reasonable in scope and was performed at a reasonable cost, nevertheless, I hold that the just and appropriate remedy here is to withhold confirmation of the city's emergency order and to direct that the amount expended in clean-up by the city may not be recovered. In view of the wide dispositional latitude given to the court in s. 31(28) of the *Planning Act* (see para. 15 above [p. 710 *ante*]) it may be unnecessary to resort to s. 24(1) of the *Charter* in reaching this conclusion. For reasons previously outlined, however, I prefer to rest my decision upon both grounds.

[32] The city's application is dismissed. Costs may be spoken to by appointment to be arranged through the trial co-ordinator or by teleconference

Order accordingly.