** Unedited **

Indexed as:

Czumak v. Etobicoke (City) (Ont. Ct. (Prov. Div.))

Between
John Czumak, Peter Czumak and Cherry Park Contracting Inc.,
Appellants, and
City of Etobicoke, Respondent

[1994] O.J. No. 2247
DRS 95-01084

Ontario Court of Justice - Provincial Division
Toronto, Ontario
Fairgrieve Prov. Div. J.

September 16, 1994.
(32 pp.)

Land regulation — Land use control, building or development permits, offences — Punishment for construction not in accordance with approved plans — Enforcement of Building Code Act, offences — Failure to comply with building inspector's "order to comply", defences, invalidity of order — Contraventions of "stop work order", what constitutes, evidence and proof — Failing to assist entry, general — Failure to post building permit, persons who may be convicted — Sentencing, general, applicable principles.

Appeal from conviction and sentence on charges under the Building Code Act. On September 1, 1993, the respondent City issued a building permit authorizing a large-scale renovation of a building owned by the parents of AB and CD who were craftsmen carrying on a home renovation business through a company named XY Ltd. Acting on his observations during an inspection of the building as well as the admission of CD that some of the renovation work already done was not in accordance with the approved drawings, a City building inspector issued an "order to comply" dated October 14, 1994 directing AB, CD, and their company to "cease all work" on the subject building. By this time, AB, CD and the company had commissioned their architects to prepare revised drawings needed for a fresh application for a building permit. That application was filed on October 21, 1994. When the said inspector visited the building on October 20, he noticed that work on the building had continued in spite of his order. On the very date the application was filed, the City's senior building inspector, GH, attended at the building and posted a "stop work order" thereon. GH testified that when he returned to the building the next day, he noticed that there were signs of continuing construction work. He also noticed that the building permit card was not posted in a conspicuous place as required by the Building Code. When GH tried to enter into the building to carry out an inspection, he was not allowed entry. Between October 22 and October 29th when the additional building permit was issued, GH was denied entry to the property on six occasions and, in fact, was not allowed entry until November 1, 1994 when he attended with a warrant. Meanwhile, AB, CD and their company did not at any time cease work completely. Instead, they continued with it because they were anxious to complete it before the onset of winter. AB, CD, and XY Ltd., the present appellants, were charged and convicted of 41 charges under the Building Code Act and fined a total of $454,500. Specifically, they were each convicted of (1) construction that was inconsistent with approved plans; (2) failure to comply with the inspector's "order

to comply"; (3) contraventions of the "stop work order"; (4) failing to assist entry; and (5) failure to post the building permit. This appeal was from the convictions except that in respect of the charge of construction that was inconsistent with approved plans as well as the sentences imposed.

HELD: Appeal allowed. Only convictions of AB on two counts of failure to post the building permit were upheld. Sentences were varied by (1) reducing the $5,000 fine imposed on XY Ltd. for construction not in accordance with approved plans to $300; (2) reduction of the sentence on AB and CD in respect of the said offence from $2,000 to a suspended sentence in each case; (3) $4,000 fine imposed on AB in respect of the first count of failing to post his building permit was reduced to $100 and $5,000 fine imposed in respect of the second count reduced to a suspended sentence. The justice of the peace who presided at the trial both fundamentally misinterpreted the provisions of the Building Code Act and misapprehended the legal significance of the evidence she heard. The fines she imposed were grossly disproportionate to the gravity of the offences she erroneously found to have been committed and she ignored the sentencing principles which governed in cases of this kind.

Statutes, Regulations and rules Cited:

Building Code Act, S.O. 1992, c. 23, ss. 1(1), 8(13), 12(1), 12(2), 14, 16(1), 19(3), 21(1)(a), 21(1)(b), 36.
Canadian Charter of Rights and Freedoms, 1982, s. 8.
Ontario Reg. 160/93, s. 2.4.2.1.
Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 57(3), 66(1), 72(2), 77, 78, 129(1), 129(2).
Mark Carniglia, for the Appellants.
J.R. Hart, for the Respondent.

¶ 1 **FAIRGRIEVE PROV. DIV. J.**:— The three appellants are two brothers, John and Peter Czumak, and their incorporated home renovation business, Cherry Park Contracting Inc. On February 9, 1994, they were convicted by a justice of the peace in the Provincial Offences Court at Etobicoke of all 41 charges against them under the Building Code Act, S.O. 1992, Chap. 23. The same day, fines totalling $454,500 were imposed. They have appealed now against all of the convictions and sentences, with the exception of one conviction for each of them on a charge relating to construction that was not in accordance with a building permit that had been issued. The abandoned that particular appeal when the appeals were argued on August 15, 1994.

¶ 2 The number of convictions and the magnitude of the fines imposed convey, in my opinion, a completely wrong impression of the seriousness of the appellants' conduct, and it will quickly become apparent that I take a view of this case that differs substantially from that taken by the justice at trial. In fact, I see no reason to defer a statement of the inescapable conclusion that the learned justice of the peace both fundamentally misinterpreted the provisions of the statute and misapprehended the legal significance of the evidence she heard. Moreover, in my view, she went on to impose fines which were grossly disproportionate to the gravity of the offences she erroneously found had been committed, and she ignored the principles which govern sentence in cases of this kind.

¶ 3 In fairness to the justice of the peace at trial, however, it should be noted that the defendant, John Czumak, appeared before her without counsel and as agent for the other unrepresented defendants. As a consequence, the trial court did not have the benefit of the very able and helpful submissions that were made by Mr. Carniglia on the appeal. As well, some of the provisions of the Building Code Act can be regarded as rather technical in nature and might, understandably, not have been very familiar to the presiding justice. This was the sort of case, then, where any court would have found itself particularly

reliant on the assistance of counsel to identify the issues and to argue the respective positions taken. The absence of defence counsel at trial made the task for the justice of the peace much more difficult than it might otherwise have been. Having said that, however, it obviously did not relieve the court of its duty to apply the law properly and to deal with the defendants fairly: see R. v. McGibbon (1988), 45 C.C.C. (3d) 334 at p. 347 (Ont. C.A.).

Overview of the Case

¶ 4 Although it will still be necessary to review the evidence in some detail so that it can be related to the various charges, it might be helpful to put matters in context first by providing a brief overview of the case. Without wanting to oversimplify, I think it is fair to say that the whole case really boiled down to a situation where the defendants, making renovations to their family's house, proceeded to make some changes to a second storey addition which were not in accordance with the plans which had been approved by the municipality at the time that work commenced. These changes were described as an additional window on one side of the house, an enlargement of the master bedroom, and the movement of a second-floor ensuite bathroom from its original position. It was conceded that this work started before the architect had finished revised drawings for submission to the City, and before a new building permit could be issued. It was pointed out on the appeal, although not necessarily understood at trial, that the City was obliged to grant approval of these changes and to issue the new permit, because the revised construction complied with all of the legal requirements. Approval was ultimately given and the revised permit was issued, but not until at least two weeks after the work had commenced.

¶ 5 During the period before the revised permit was obtained, an "Order to Comply" was issued by a building inspector, and some work continued thereafter. There was no proof, however, that any of the work after the "Order to Comply" was issued was not in accordance with the original building permit. In any event, the fact that work continued led to a "Stop Work Order" being posted. Even after this "Stop Work Order", some construction was observed to have continued.

¶ 6 On seven occasions from October 22 to November 1, 1993, Mr. Chalmers, the senior building inspector, attended at the house, but entry was refused to him by one or other of the defendants. At the same time, although Mr. Chalmers testified that he had not been aware of it before trial, other inspectors were allowed to enter so that they could conduct inspections, and they approved the work that had been done. Mr. Chalmers was finally allowed to enter on November 1st, but only after he produced a warrant for entry or search, and only after Mr. Czumak had spoken to his lawyer concerning the warrant.

¶ 7 On the basis of those facts essentially, the defendants were convicted of the 41 offences and fined, as already stated, a total of $454,500, as follows:

[See paper copy for chart]

The Evidence

¶ 8 There was very little dispute concerning the facts. The prosecution called two witnesses, Randy Chalmers, the senior building inspector, and Enzo Galli, a building inspector, both employed by the City of Etobicoke. John Czumak gave evidence for the defence, not so much to challenge the evidence given by the prosecution witnesses as to explain the defendants' conduct from his perspective. The justice of the peace was not really called upon to make findings of credibility, given that all three witnesses were obviously honest, reasonable people who had provided reliable and generally consistent evidence.

¶ 9 John Czumak and Peter Czumak lived with their parents in a house located at 1 Sunnydale Drive

in Etobicoke. The parents had bought this house in the summer of 1993, and the two brothers, as part of their corporate business, proceeded to renovate the house that Fall, converting what had been an ordinary suburban bungalow into what the photographs showed to be a handsome two-storey dwelling. Mr. Czumak testified that as well as enlarging and improving his family's accommodation, the renovated house was intended to provide a showpiece of their craftsmanship for prospective clients. Local approval had been given for the construction, including the second storey addition, after drawings had been filed, and work had started under the building permit which had been issued by the City on September 1, 1993.

¶ 10 On September 27th, in answer to a neighbour's complaint that a window had been installed upstairs on one side of the house that had not been shown on the approved drawing, Mr. Galli went to the house, although he did not say what, if anything, he did on that occasion. On October 12th, Mr. Galli was called by the defendants to come to the house to conduct what he described as a "framing inspection". Mr. Galli testified that he found the work to be well done, although he did not have the approved plans with him at that time. The next day, Mr. Galli received a report from the heating inspector that the pipes and a partition did not line up according to the approved drawing, and that the defendants had apparently extended the master bedroom on the second floor over the back of the garage further than had been approved. On October 14th, Mr. Galli called Peter Czumak to ask him about what had been reported to him. Mr. Czumak acknowledged that the report was accurate, and advised him that they were having revised drawings prepared that he would submit to the City. Mr. Galli also testified that they had some minor plumbing and heating work to be rectified or which required revised drawings.

¶ 11 Later the same day, October 14th, Mr. Galli attended the property and observed himself that a bedroom had been made larger and that the bathroom had been moved from its original position on the drawing to a spot over behind the garage. Mr. Galli then issued what he referred to as "a compliance". This "Order to Comply", dated October 14, 1993, was filed as an exhibit. It read, in part, as follows:

> An inspection of the property/building at the above location has disclosed the following contravention(s) of the Building Code Act, R.S.O. 1992 [sic] and/or Ontario Regulation 413/90 as amended. In accordance with subsection 12(2) of the Act, you are hereby directed to comply with the corresponding provisions by taking corrective action.
> Act/Code Reference: Ontario Building Code Act, Section 8(13)
> Contravention: No construction except in accordance with approved plans
> Remarks: 2nd floor addition not per approved plans. Cease all work and submit revised plans showing deviations and changes for authorization by the Chief Building Official. [emphasis added]
> [Above] shall be carried out forthwith. [emphasis in original]

¶ 12 Mr. Galli next visited the house on October 20th, after checking with his office to find that no application for revision had been received; in fact, his records showed that the application was not received until the following day, October 21st When Mr. Galli attended on October 20th, he found that "work was still in progress" and that "it had been drywalled and... taping was going on". The work at that time was not otherwise described.

¶ 13 Mr. Chalmers, the senior inspector, went to the address the next morning, October 21st, and posted a "Stop Work Order", signed by himself and the Chief Building Official. This document was also entered as an exhibit Under very large lettering saying "Stop Work Order", it read as follows:

> In accordance with Subsection 14(1) of the Building Code Act and pursuant to the Order to Comply issued by Inspector Enzo Galli dated October 14, 1993, it

> was found that on October 21, 1993, the contraventions identified on the said Order have not been rectified. You are hereby ordered to cease all work immediately except for any corrective work necessary to eliminate the contraventions and any work necessary to alleviate hazardous conditions.

When asked by the prosecutor what the purpose of the "Stop Work Order" had been, Mr. Chalmers replied that work had continued in contravention of the "Order to Comply" which had been issued on October 14th. Mr. Chalmers stated, "The Order was issued on October 14th and work was continuing up until October -- and on October 21st". He also testified that on October 21st, he observed that "there was masonry work continuing on the front of the house and there were workers inside working on drywall", and he produced a photograph taken that day showing workmen doing masonry work on the second floor balcony at the left front of the house. It is of some significance, I think, that the stone balcony was in fact part of the original approved plan, and that there was no evidence of where in the building the continuing drywall work was being done.

¶ 14 Because the defendants were convicted of numerous offences allegedly committed over the following days, it is necessary to state briefly what occurred on each of those dates.

¶ 15 Mr. Chalmers testified that when he returned to the house on the Friday morning, October 22nd, the day after the "Stop Work Order" was posted, he observed workmen cleaning and removing construction debris from the house. He also stated that he noted that the building permit card was not posted, as required, in a conspicuous place, and he asked that it be posted on the site. Mr. Chalmers returned during the afternoon of the same day and spoke to Peter Czumak, who told him that there would be no entry allowed into the house. The reasons given then by Mr. Czumak were that there were people in the house, and he was not prepared for an inspection because he was applying for a new permit that had not yet been issued. Peter Czumak told Mr. Chalmers that he would allow him entry the following Monday morning.

¶ 16 On Monday, October 25th, Peter Czumak phoned Mr. Chalmers to cancel the inspection and to make further inquiries concerning the progress with his permit. Mr. Chalmers attended nonetheless, bringing Mr. Galli with him. Although a person, identified by Mr. Chalmers simply as "the builder", told him that he-would allow him entry as long as he left his camera outside, which Mr. Chalmers agreed to do, he was then refused entry to the property. Mr. Chalmers took photographs of masonry work going on on the second floor balcony and the front porch of the house. Mr. Chalmers also observed that the "Stop Work Order" was still in place, but the building permit had not been posted.

¶ 17 The next day, October 26th, Mr. Chalmers again spoke to Peter Czumak on the phone to make him aware that work was continuing in violation of the "Stop Work Order" and that they were being denied entry into the house. Mr. Czumak repeated that there would be no entry allowed into the house. Mr. Chalmers and Mr. Galli went to the house anyway. At that time, Peter Czumak told them that he would not allow them to enter, saying that he thought people were sleeping in the house, and that they were trespassing and should not come on the property again. Mr. Chalmers testified that on that day he observed some soil removal and grading work going on at the front of the house. The building permit card was still not posted, according to Mr. Chalmers' evidence.

¶ 18 The following afternoon, on October 27th, Mr. Chalmers returned to the house Peter Czumak told them again that they were trespassing. Mr. Chalmers testified that work was continuing on the front balcony, and that he heard the noise of hammering and skilsaws coming from inside the house. He also observed that the building permit card was still not displayed, although a Cherry Park Contracting Inc. advertising sign had been put up. In terms of the additional work since his last visit, Mr. Chalmers pointed to the photographs which showed changes to the front pillars and the floor of the second floor

balcony.

¶ 19 Mr. Chalmers went back the next day, October 28th, to find that workmen were putting down marble for a stone floor on the balcony. Peter Czumak told him to get off the property, and not to trespass. He also warned Mr. Chalmers that if he entered the property again, he would be removed.

¶ 20 The following day, Friday, October 29th, Mr. Chalmers and Mr. Galli went to the house and found that the sodding in the front yard had been completed. Mr. Chalmers also testified that they were refused entry to the property again, this time by John Czumak. The building permit card, he said, was still not posted.

¶ 21 Also on October 29th, the additional permit that had been applied for on October 21st was issued. It was accepted that this permit provided proper authority for the changes from the original approved drawing. Mr. Chalmers testified that according to the Building Code Regulations, the "Stop Work Order" would have been lifted with the issuance of the new permit.

¶ 22 Mr. Chalmers returned to the house the following Monday, November 1, 1993, with a warrant. He testified that he was not given entry on his first attempt John Czumak testified that he told the inspectors to wait while he called his lawyer to seek advice concerning the validity of the warrant, and that there was a 20-minute delay before he allowed Mr. Chalmers in. Mr. Chalmers ultimately found that the additional permit had been issued the previous Friday.

¶ 23 Mr. Galli agreed in cross-examination that he had been told by both Peter Czumak and John Czumak that he could attend the property at any time to inspect it, as long as he was not with Mr. Chalmers. Mr. Galli further testified that in fact he had gone there without Mr. Chalmers after the "Stop Work Order" had been posted, and that he had been allowed in on those occasions. John Czumak testified that the defendants never denied access to any inspector except for Mr. Chalmers. In reply, Mr. Chalmers conceded that he had been unaware of Mr. Galli's visits until the morning of trial. The reason why they did not want to let Mr. Chalmers in, according to Mr. Czumak's evidence, was that when the senior inspector first attended, he had wanted to come in with a camera, and they did not want him to take pictures. Mr. Czumak testified that Mr. Chalmers had replied that "he didn't need to take pictures to gather evidence for court, so we felt threatened at that point in time, so we never let him in".

¶ 24 Mr. Czumak also testified that all the work that was done after the "stop work" did not worsen or "affect the situation at all". He stated that the work on the balcony continued because it was a hazard with no railings there, and that they kept going with other work because his whole family was living in the dwelling and they were anxious to complete it before the cold weather.

¶ 25 With respect to the delay in obtaining approval for the changes and the revised permit, Mr. Czumak explained that the new drawings took some time to be produced by their architect, and that the approval process, which a clerk behind the counter had said might take two or three hours, ended up taking two weeks. The preparation of the revised plan, he testified, had started before the "Order to Comply" was issued. Mr. Czumak also testified as to his knowledge of other projects where revisions were approved on the spot, without the need to submit revised plans, but he did not suggest that even if that had occurred on other occasion, it would have provided them with any defence to the charge here of construction that was not in accordance with the approved plans.

The Convictions

(a) Construction not in accordance with approved plans

¶ 26 At the commencement of the hearing of the appeal, as already stated, the defendants abandoned their appeals from their convictions on the counts against each of them that on October 14, 1993, they committed the offence of "constructing or causing to be constructed a building addition except in accordance with the plans and specifications and other information on the basis of which a permit was issued or any changes thereto authorized by the Chief Official", contrary to sections 8(13) and 36 of the Building Code Act. Those appeals are accordingly dismissed as abandoned.

(b) Failure to comply with the Inspector's Order

¶ 27 The three defendants were each convicted of an offence, contrary to s. 12(2) of the Act, alleged to have been committed on October 20, 1993. The section reads as follows:

> 12(2) - Order. An inspector who finds a contravention of this Act or the building code may make an order directing compliance with this Act or the building code and may require the order to be carried out immediately or within such time as is specified in the order.

Failure to comply with such an order is made an offence by s. 36(1)(b) of the Act:

> 36(1) - Offences. A person is guilty of an offence if the person, ... (b) fails to comply with an order, direction or other requirement made under this Act; ...

¶ 28 The difficulty with the "Order to Comply" issued by Mr. Galli on October 14th was that it included a direction to "cease all work" that Mr. Galli was not authorized by the statute to give. While he could have ordered no further construction except in accordance with the building permit, that is not what his "Order to Comply" said, nor does it appear to have been the interpretation given to the Order by Mr. Chalmers or by the learned justice of the peace at trial. The charges themselves were framed in a way that alleged a failure to comply with Mr. Galli's order, inter alia, "requiring that all work cease".

¶ 29 The only evidence concerning October 20th was, as already noted, that unspecified "work was still in progress" and that "it had been drywalled and... taping was going on". There was no evidence that any of this work on October 20th was not in accordance with the original building permit. In convicting the defendants on the basis of that evidence, the only evidence before her, the learned justice must have considered it sufficient that any work at all after the "Order to Comply" had been issued made out the offence. She was in error, in my respectful view, if that was her assumption.

¶ 30 The other reference in the charge to Mr. Galli's "Order to Comply" was its "requiring that ... revised drawings be submitted for authorization by the Chief Building Officer". Indeed, Mr. Galli's Order required that this be done "forthwith". The unchallenged evidence, however, was that the defendants' architects were in the process of preparing the revised drawings when the Order was issued, and they were in fact submitted within seven days. I do not think that it would be reasonable to interpret "forthwith" in the context of Mr. Galli's Order to mean simply "immediately", as if such drawings would instantly materialize upon their being demanded. The Order must be read, in my opinion, as a direction to be complied with "as soon as reasonably practicable" in the circumstances which, in this case, meant as soon as the architectural drawings were completed and available for submission. In R. v. Thomsen (1988), 40 C.C.C. (3d) 411 at pp. 419-20 (S.C.C.), LeDain J. referred to the authorities supporting the appellant's submission there that there is no difference between forthwith" and "forthwith or as soon as practicable", and he went on to quote, without expressing any disagreement, from the judgment of Finlayson J.A. in R. v. Seo (1986), 25 C.C.C. (3d) 385 at p. 409 (Ont. C.A.):

> In my opinion, there is no difference in meaning between "forthwith" and "forthwith or as soon as practicable". Both mean the same thing having regard to the nature of the test and the condition that it is designed to monitor. The breath sample under s. 234.1 or s. 235 is to he provided as quickly as it effectively can be and if this means waiting for the device to arrive or taking the detained person to a place where there is such a device, this would be within the definition of "forthwith". It does not mean "immediately".

Even if the later decision of the Supreme Court of Canada in R. v. Grant (1991), 67 C.C.C. (3d) 268, casts doubt on that conclusion in the particular context of roadside screening tests, I do not think it changes the meaning to be ascribed to "forthwith" in the context here.

¶ 31 Once Mr. Galli's "Order to Comply" is properly construed, I do not think the evidence permitted a finding that this part of the Order had not been complied with. In any event, the learned justice in her reasons gave no indication that she based her finding of guilt concerning these counts on the failure to submit drawings, to which she made no reference at all. Rather, it was apparent that the convictions resulted from her conclusion, which was wrong in my view, that any continued construction established the offence charged.

¶ 32 In my opinion, the prosecution failed to prove any failure to comply with the Order issued on October 14th by Mr. Galli, if the Order is interpreted in a way that conforms with the authority he had under s. 12(2) to make it. It follows that the appeal from the convictions in relation to that offence must be allowed, the convictions set aside, and acquittals entered.

(c) Contraventions of the "Stop Work Order"

¶ 33 The three defendants were each convicted of five counts alleging violations of the "Stop Work Order" that had been posted by Mr. Chalmers on October 21, 1993. These offences were found to have been committed on the five days following the posting of the Order. The provisions regarding a "Stop Work Order" are set out in s. 14 of the Act, as follows:

> 14.-(1) Stop Work Over. If an order made under section 12 or 13 is not complied with within the time specified in it, or where no time is specified, within a reasonable time, the chief building official may order that all or any part of the construction or demolition cease.
>
> (2) Service. The order shall be served on such persons affected thereby as the chief building official determines and a copy shall be posted on the site of the construction or demolition.
> (3) Timing. The order is effective from the time it is posted under subsection (2).
> (4) Effect of Order. If an order to cease construction or demolition is made, no person shall perform any act in the construction or demolition of the building in respect of which the order is made other than work necessary to carry out the order made under section 12 or 13.

The appellants challenged both the validity of the "Stop Work Order" and the adequacy of the evidence to establish violations of it.

¶ 34 Mr. Hart fairly conceded that there was no evidence of any "construction or demolition" on

October 22, 1993, and that the defendants should not have been found guilty of the three charges relating to that date. The only evidence concerning October 22nd was that there was some "cleaning" and "removal of debris" observed. Although it clearly would have been preferable for the prosecutor to have made the same concession at trial, and for the justice to have examined the evidence more carefully before entering the convictions and imposing $31,000 in fines for this innocuous conduct, Mr. Hart's concession was still appropriate. The appeals against the convictions for violating the "Stop Work Order" on October 22, 1993, are accordingly allowed, the convictions set aside, and acquittals entered.

¶ 35 Similarly, with respect to October 26th, another of the five alleged offence dates, the only evidence in support of the charge was Mr. Chalmers' evidence that when he went to the house, he observed some "soil removal" and "grading work" going on in front of the house. "Construction" and "demolition" are both defined in s. 1(1) of the Act, and the definitions do not encompass the work in the yard observed by Mr. Chalmers. The offences alleged to have been committed on October 26th were not proved, and the appeals relating to those counts will be allowed, the convictions set aside, and acquittals entered.

¶ 36 With respect to the three remaining dates on which the "Stop Work Order" was alleged to have been contravened, October 25th, 27th and 28th, the appellants' position was that an offence could be committed only if the "Stop Work Order" was valid. One of the conditions required by s. 14(1) for a "Stop Work Order" is a failure to comply with an order under s. 12, in this case, Mr. Galli's Order issued on October 14th. Mr. Carniglia submitted that since no failure to comply with Mr. Galli's Order had been proved, both because no unauthorized work was proved to have been done after the Order was made and because the revised drawings had been filed on October 21st, the chief building official had no authority to make the "Stop Work Order". I agree with this submission. If the "Stop Work Order" was made outside the authority conferred by the statute, then there was no obligation on the part of the appellants to comply with it: see Regina v. Grant supra, per Lamer C.J.C. at pp. 276-7.

¶ 37 The appeals against all of the convictions for failing to comply with the "Stop Work Order" must be allowed, then, with acquittals being substituted for the convictions that are set aside.

(d) Failing to assist entry

¶ 38 The two individual defendants were each convicted on seven counts alleging violations of s. 19 (3) of the Act. The section reads as follows:

> 19.-(3) Assistant. Every person shall assist any entry, inspection, examination, testing or inquiry by an inspector or chief building official in the exercise of a power or a performance of a duty under this Act.

There was evidence that either Peter Czumak or John Czumak had, on six of the seven specified dates; refused Mr. Chalmers entry to the property. On the seventh date, November 1, 1993, John Czumak did not initially allow Mr. Chalmers' entry, but did so only after a delay of about 20 minutes, after he had spoken to his lawyer.

¶ 39 The issue of whether each individual defendant was a party to an offence allegedly committed by his brother was not raised either at trial or on the appeal. Although on each occasion involving a refusal to allow Mr. Chalmers entry, only one of the brothers dealt with him, there might have been evidence sufficient to establish that both were parties to each offence, within the meaning of s. 77 of the Provincial Offences Act, R.S.O. 1990, c. P.33. I do not think that such a conclusion was inevitable, however, and I think that before convicting both persons on each of the counts, the learned justice ought

to have at least analyzed the evidence in this regard. Her bald statement that "I find you both liable, responsible and guilty" was not, it seems to me, adequate in the circumstances. In any event, I think the appeals from these convictions can be decided without considering the point.

¶ 40 An offence under s. 19(3) requires that an inspector, in this case Mr. Chalmers, be engaged "in the exercise of a power or a performance of a duty" under the Act. The prosecutor's position at trial was that on each occasion when Mr. Chalmers attempted to gain entry to the premises, he was exercising his power under s. 12(1) of the Act, which reads as follows:

> 12.-(1) Inspection. An inspector may enter upon land and into buildings at any reasonable time without a warrant for the purpose of inspecting the building or site in respect of which a permit is issued or an application for a permit is made.

Although not brought to the attention of the learned justice of the peace, another provision of the Building Code Act is also relevant. Section 16(1) provides:

> 16.-(1) Entry to Dwellings. Despite sections 8, 12 and 15, an inspector shall not enter or remain in any room or place actually being used as a dwelling unless,
>
> (a) the consent of the occupier or a warrant issued under this Act is obtained;
> (b) the delay necessary to obtain a warrant or the consent of the occupier would result in an immediate danger to the health or safety of any person;
> (c) the entry is necessary to terminate a danger under subsection 17(3); or
> (d) the requirements of subsection (2) are met and the entry is necessary either to remove a building or restore a site under subsection 8(6) or to remove an unsafe condition under clause 15(5)(b).

Further, s. 21(1) provides for the warrant referred to in s. 16(1)(a):

> 21.-(1) Warrant for Entry and Search. A provincial judge or justice of the peace may at any time issue a warrant in the prescribed form authorizing a person named in the warrant to enter and search a building, receptacle or place if the provincial judge or justice of the peace is satisfied by information on oath that there is reasonable ground to believe that,
>
> (a) an offence under this Act has been committed; and
> (b) the entry into and search of the building, receptacle or place will afford evidence relevant to the commission of the offence.

¶ 41 In his submissions before the defendants were found guilty of all the offences, Mr. Czumak made the following argument:

> ... All my inspections were passed by each individual inspector, except for the heating inspector and he was never denied access. My plumbing inspection was passed, my electrical, my insulation inspection was passed, so the only thing left to check to Code, which there is no Code for, is the heating inspection.
> As for rights to come into the house, I'm not sure if people have the right just to

> walk into somebody's dwelling whenever they please, while somebody's living there. That will be all, thank you.

¶ 42 In her reasons for judgment, the justice of the peace stated as follows:

> Just to get the formalities out of the way, Mr. Czumak, I find in each case the Crown has made its case out beyond any doubt, and I convict both Peter and yourself and this company.
> What has caused me tremendous concern, sir, is that I see the exhibits and I see that you are a registered party to the company known as Cherry Park Contracting Inc. And I am concerned and alarmed that you would conduct yourself in the fashion you have. Denying access to Mr. Chalmers, notwithstanding the fact that he is indeed a representative of the City of Etobicoke and a building inspector.
> As for your last comment, sir, I am looking at the Building Code, section 18. Under section 18, it is the powers of the inspector, and I am quoting ...
> You had no right to deny Mr. Chalmers access merely by virtue of what you feel is justifiable, because he had a camera. And even when he chose to set the camera aside, sir, again you denied him access. Now, I am going to go through each day and I am going to endorse on the record what my findings are, sir, but generally speaking, it is alarming to hear that you can stand before me and feel that you have done nothing wrong.
> Indeed I find that each turn, sir, at each occasion, you obstructed wilfully the inspection of the property on Sunnydale, because for no other reason than you thought you could. You forced the City of Etobicoke to take the drastic step of obtaining a search warrant, because you refused access inside the building. And again, sir, considering yourself to be a professional in the contracting business, that causes me concern. ...
> ...
> It appears that your defence has been one of it is well, it was inconvenient to allow them in, because people were living in the building. Whether or not people were living in the building, it does not prohibit the inspectors authority, rights or obligations to enter the property.

¶ 43 The evidence was uncontradicted both that the property was at all times a place actually being used as a dwelling occupied by the Czumak family, and that access to the premises was given to all of the City inspectors, except for Mr. Chalmers or persons in his company, whenever they sought it. While the apparent personality conflict between the senior building inspector and the defendants may have been unfortunate, I do not think it warranted the finding that the defendants had defied the City's authority or disregarded their obligations under the statute in the way the justice suggested.

¶ 44 In any event, it is apparent that s. 16(1) prohibited Mr. Chalmers from entering the dwelling without having either the consent of the occupier or a warrant. Prior to November 1st, he had neither. While one can readily understand that the justice of the peace would not be familiar with the particular section of the Building Code Act, it is a little surprising that she would consider that a municipal building inspector would have statutory authority, without prior authorization and in the absence of exigent circumstances, to override the reasonable expectations of privacy that occupants of dwelling houses have come to expect the law to protect. In R. v. Landry (1986), 25 C.C.C. (3d) 1 (S.C.C.), La Forest J., while dissenting in the result, stated at p. 16:

> The sanctity of the home is deeply rooted in our traditions. It serves to protect

> the security of the person and individual privacy. The same thought was expressed as early as 1604 in the language of the day in the first proposition of the celebrated Semayne's Case (1604), 5 Co. Rep. 91a at p. 91b, 77 E.R. 194 at p. 195, as follows:
>
> > "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose."

Recent judgments of the Supreme Court of Canada have made it clear that s. 8 of the Charter provides protection against warrantless searches of the perimeters of dwellings as well: see R. v. Kokesch (1990), 61 C.C.C. (3d) 207 (S.C.C.), Wiley v. The Queen (1993), 84 C.C.C. (3d) 161 (S.C.C.), R. v. Grant (1993), 84 C.C.C. (3d) 173 (S.C.C.), and R. v. Plant (1993), 84 C.C.C. (3d) 203 (S.C.C.). I think it is apparent that Mr. Czumak's layman's instinct concerning his right to refuse Mr. Chalmers entry to his family's home was right in law, and that the justice of the peace was in error.

¶ 45 Quite apart from the legal error at trial, I might say that I have considerable difficulty understanding why Mr. Chalmers, who was evidently aware of the warrant provisions that he ultimately resorted to, would return to the Czumak residence day after day after the occupants' lack of consent to his entry had already been communicated to him. Because none of the participants in the trial asked him why he did not use the warrant procedure after the first refusal, it is not possible to assess the sincerity of his attempts to enter the premises or the reasons for the unnecessary repeated confrontations with members of the Czumak family.

¶ 46 While the right of the defendants to refuse entry prior to a warrant being obtained provides an answer to the six charges between October 22nd and 29th, the appellants were also convicted of an offence relating to Mr. Chalmers' visit on November 1st after he had obtained the warrant. The evidence was that Mr. Chalmers' initial attempt was unsuccessful, because Mr. Czumak wanted to call his lawyer to obtain legal advice concerning the warrant. Entry was delayed for 20 minutes until after he had spoken to his lawyer, and the senior inspector had returned with police officers. It appeared to be the prosecutor's position, since he sought and obtained a conviction relating to this conduct, that Mr. Czumak's seeking legal advice before admitting Mr. Chalmers constituted the alleged offence, and one, incidentally, that Mr. Hart later submitted called for fines approximating the $27,000 actually imposed by the justice of the peace.

¶ 47 I think it is wrong to characterize the defendant's conduct in the way the prosecutor contended. By way of analogy, in the context of failing or refusing to supply breath samples for breathalyzer testing, it has been held both that the failure or refusal must be clear and unequivocal, and that a denial of the right to counsel provides a reasonable excuse for failing to comply with a lawful demand that was made. In Jumaga v. The Queen (1976), 29 C.C.C. (2d) 271 (S.C.C.), Laskin C.J.C., in a judgment which dissented on other grounds, stated at p. 272 that the Manitoba Court of Appeal had erred in regarding as a "refusal" the accused's deferring a decision pending a requested opportunity to consult with a lawyer by telephone:

> The statutory meaning of a refusal cannot be made to depend on whether an accused says "no, I wish to consult my lawyer" rather than "please wait until I consult my lawyer". On any reasonable construction, there is no refusal in either case.

Pigeon J., for the majority at pp. 276-7, expressly agreed with the Chief Justice on the point I think that Mr. Czumak's conduct should be viewed in the same way. The evidence was that the defendant, in effect, deferred his decision as to whether to allow entry until speaking to his lawyer, and that 20

minutes later, he allowed Mr. Chalmers to enter. Those facts do not make out an offence of "failing to assist entry", contrary to s. 19(3), and in my opinion, the charges relating to November 1st should have been dismissed as well.

¶ 48 The appeals against all of the convictions for failing to assist entry are allowed, the convictions set aside, and acquittals entered.

(e) The failure to post the building permit

¶ 49 The three appellants were each convicted of two counts of failing to post the building permit in a conspicuous place relating to October 25 and 26, 1993, contrary to s. 2.4.2.1. of the Building Code Regulation, O. Reg. 160/93. The section in question reads as follows:

> 2.4.2.1. Where a permit has been issued pursuant to the Act, the person to whom it is issued shall have the permit or a copy thereof posted at all times during construction or demolition in a conspicuous place on the property in respect of which the permit was issued.

While the building permit which had been issued and which should have been posted was not itself filed as an exhibit, Mr. Chalmers testified that the building permit for the property, No. 71981, issued on September 1, 1993, was issued to John Czumak. Both the "Order to Comply" and the "Stop Work Order", which were made exhibits, also referred to the same permit as "Issued to John Czumak".

¶ 50 There was no evidence, then, that the permit had been issued to anyone other than John Czumak. It follows, I think, that there was no evidence of either of the other appellants having had any duty, under s. 2.4.2.1. of the Regulation, to post the permit. There was also no evidence that either of them aided, abetted, counselled or procured the commission of this alleged offence by John Czumak, within the meaning of s. 77 or s. 78 of the Provincial Offences Act. The convictions, therefore, of Peter Czumak and. the corporation were, I think, unreasonable and unsupported by the evidence. Their appeals are allowed, their convictions set aside, and acquittals entered.

¶ 51 Mr. Chalmers testified that when he visited the property on October 25th and 26th, he observed that the building permit in question had not been posted. Although Mr. Chalmers did not actually observe any construction work being done on October 26th, there was evidence of work both before and after that date, so I think the duty to post the permit "during construction" applied to that date as well. A different conclusion was not suggested by Mr. Carniglia. Mr. Chalmers' evidence was not contradicted by the defence at trial, although during the reasons for sentence given by the justice of the peace, when she referred to these offences, Mr. Czumak stated, "The permit was posted". Although I think it would have been fairer, particularly since he was unrepresented by counsel, if the learned justice had brought to his attention that he had given no evidence concerning that matter and made further inquiries about whether he wished to apply to reopen the defence, no complaint was made about her failure to do so. Rather, Mr. Carniglia argued that the "rules of natural justice" required a specific warning to be issued, prior to charging a person with this offence. I reject that submission. The obligation imposed by the Regulation is clear, and the evidence supported the findings made by the justice in this regard.

¶ 52 John Czumak's appeals against his two convictions for failing to post his building permit are dismissed.

The Sentence Appeals

¶ 53 Mr. Hart quite candidly described the sentences imposed by the learned justice of the peace as "unique" and "out of whack". Mr. Carniglia suggested that the justice appeared to have lost sight of the fact that she was dealing with real people whose lives would be devastated by her injudicious actions. While harsh, I do not think that observation is without foundation. The fines imposed, however, were still less than the sentences Mr. Hart had sought, and he repeated that his instructions had been to recommend for the "less serious offences", 10% of the maximum fines for each defendant for each count, and 50% of the maximum penalty for the "serious charges", into which category he put the failure to assist entry and the violation of the "Stop Work Order" offences. The maximum penalty for a first offence prescribed by s. 36(3) and (4) of the Act is a $25,000 fine for a person and a $50,000 fine for a corporation.

¶ 54 Mr. Hart also suggested that the justice of the peace, because of the number of counts and the large amounts of the fines she imposed, had simply lost track of the arithmetic. He likened the experience for him to playing a slot machine and having it spew out endless money. While it may be that counsel acting on behalf of municipalities prosecuting provincial charges do not consider themselves to have the same obligations of fairness and reason that Crown Attorneys have when prosecuting criminal cases, although I do not know why their responsibilities should be different, I think it is obvious that the justice of the peace was seriously misled by the submissions that were made. The result was that outrageously excessive fines were imposed and a serious injustice occurred.

¶ 55 In any event, of the 41 convictions at trial, the ones that remain are one conviction for each appellant on a charge of construction not in accordance with a building permit and, in the case of John Czumak, two convictions for failing to post his building permit on two successive days. For the first of the offences, the justice of the peace imposed fines of $2,000 on the individual defendants, and $5,000 on the corporation. With respect to John Czumak's failures to post his building permit, she imposed a fine of $4,000 for the first and $5,000 for the second. They are all clearly outside the appropriate range, in my view, and require adjustment.

¶ 56 It is an error in principle to impose a fine without an investigation into the defendant's ability to pay it, or to impose a fine which he or she lacks the means to pay within a reasonable time: see R. v. Ward (1980), 56 C.C.C. (2d) 15 (Ont. C.A.), and R. v. Snider (1977), 37 C.C.C. (2d) 189 (Ont. C.A.). As well, s. 57(3) of the Provincial Offences Act provides that the court may make such inquiries concerning the defendant's economic circumstances as it considers desirable. In this case, after the prosecutor's submissions concerning sentence, Mr. Czumak stated simply, "I can't afford those fines". He went on to explain that he and his brother did not have any assets, and that their company was almost insolvent Mr. Czumak stated that they had not been paid for their last three projects. As well, although the prosecutor referred to evidence that the defendants' parents had purchased the house for $220,000 and that it was then listed for sale at $449,000, Mr. explained that with the cost of the property and the construction, there would be Czumak little profit. The purpose of the project had been to demonstrate their workmanship to obtain spin-off work, and because the house had been over-improved for the area, their margin was very slim.

¶ 57 It was not clear whether the fact that the total fines approximated the listing price of the house was merely a coincidence or whether they were intended to penalize both the parents for what they had invested in their home and the brothers for the cost of the work that they had done. Even if the evidence had supported the justice's findings concerning all the offences, there was still no rational basis that I can see for imposing fines of the magnitude she imposed. On even the most sinister interpretation of the appellants' conduct, one could not justify fines which would have the effect of bankrupting the business or financially ruining the family.

¶ 58 Mr. Hart did not dispute Mr. Carniglia's further submissions as to sentence which were made on

the appeal. These included reference to the defendants' circumstances that had not been elicited in the trial court. No prior record of any kind was alleged for any of the defendants. Although not stated expressly, John Czumak appeared to be in his late twenties or early thirties. Although the brothers had been struggling with their business, they had contributed substantial voluntary construction work for local charitable organizations, including Ronald McDonald House and Sunnybrook Hospital. There was no basis, in my view, for regarding the defendants as ether than decent, hard-working and productive members of the community who, on this isolated occasion, contravened the Building Code Act by committing the relatively minor offences.

¶ 59 General deterrence is important when dealing with Building Code violations, having regard to the statute's safety and consumer protection objectives. The Act ensures compliance with minimum construction standards and allows municipalities to maintain the quality of their neighbourhoods. The courts have a role to play in the enforcement of the statute by imposing penalties which appropriately repudiate the offences that are found to have been committed and which persuade builders that compliance with the law is required.

¶ 60 Mr. Carniglia, a former city prosecutor himself, suggested that the usual sentence for construction not in accordance with a building permit ranged from a suspended sentence, which is not uncommon, to perhaps a $1,000 fine where particular aggravating factors are present. He challenged Mr. Hart to cite any case where more than a $2,000 fine had been imposed. Mr. Hart did not do so, but he pressed his submission that a far more severe penalty was required. It is significant, I think, that this was not a case where an owner proceeded with major construction without any permit at all, or where the work was found not to have been of good quality or not to have been authorized by a revised permit issued only a few days later. The defendants permitted access to inspectors not accompanied by Mr. Chalmers, so that there was no attempt to conceal the work or to avoid the Building Code Act approval procedures.

¶ 61 Having regard to the circumstances, I think a $300 fine would be appropriate for the violation concerning the work that was not in accordance with the building permit. This amount would reflect the need for deterrence, I think, but still take the mitigating factors into account. Since the corporation was the vehicle used by the brothers for their renovation work. I do not think that any purpose would be served by dividing the fine among the defendants or imposing separate individual fines which total more than that amount. For the convictions relating to this offence, then, a fine of $300 is imposed on Cherry Park Contracting Inc., with the 15 days to pay provided by s. 66(1) of the P.O.A. With respect to John Czumak and Peter Czumak, sentence will be suspended, with probation for six months on only the conditions set out in s. 72(2) of the P.O.A.

¶ 62 With respect to John Czumak's convictions for failing to post his building permit, there will be a fine of $100 for the count relating to October 25, 1993, and a suspended sentence, with the same probation already ordered, for the continuation of the same offence the following day. Mr. Czumak will also have the 15 days provided by the P.O.A. to pay this fine.

Costs

¶ 63 This is a case where the appellants should have all their costs of the appeal, pursuant to s. 129(1) of the Provincial Offences Act. If the parties are unable to agree as to the amount to be paid by way of costs to the appellants by the respondent, the appellants may apply to me within thirty days following release of this judgment for an order, pursuant to s. 129(2), fixing the amount, directing payment to the clerk of the trial court for payment over to the appellants, and fixing the period within which the costs shall be paid.

Disposition

¶ 64 For the reasons stated, the appeals are allowed with costs. Of the 41 convictions, 36 are set aside, and acquittals are entered. The sentences with respect to the remaining convictions are varied by reducing the fine imposed on the corporation for construction not in accordance with the approved plans from $5,000 to $300, with 15 days to pay, and for the individual appellants, from $2,000 to a suspended sentence in each case. With respect to John Czumak's convictions for failing to post his building permit, the fine on the first count is reduced from $4,000 to $100, with 15 days to pay, and on the second count, from $5,000 to a suspended sentence.

FAIRGRIEVE PROV. DIV. J.

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