

TIRION PROPERTIES LTD. v. SAFETY CODES COUNCIL

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Case Note: ***Tirion Properties Ltd. v. Safety Codes Council***, 2008 ABQB 549
Decided: September 8, 2008.

A recent decision of the Alberta Court of Queen's bench has provided much-needed clarification on the powers of Safety Codes Officers under the *Safety Codes Act*, R.S.A. 2000 c. S-1 (the "SCA"). The SCA was first enacted in 1991 to amalgamate seven pieces of legislation encompassing safety within the disciplines of building, fire, plumbing, gas, electrical, boilers, and elevators. It replaced legislation such as the former *Building Standards Act*, R.S.A. 1980, c.U-4 and the *Fire Prevention Act*, R.S.A. 1980, c.F-10.1, and created a legislative framework in which municipalities, owners, designers, contractors and manufacturers all share responsibility for setting and enforcing safety standards. Key to the SCA are the various technical councils tasked with designating binding safety standards within their particular spheres of technical competence. Also key to the SCA are the provincially and municipally-appointed Safety Codes Officers who wield enforcement powers under this statutory regime. It was the scope of these enforcement powers that was at issue in *Tirion Properties Ltd. v. Safety Codes Council*, 2008 ABQB 549 ("*Tirion*").

Tirion came before Justice D.B. Mason of the Alberta Court of Queen's Bench by way of statutory appeal following a decision of the Building Technical Council of the Safety Codes Council. The Safety Codes Council's decision itself upheld the Order of a Safety Codes Officer in which the current owners of two buildings (in this case, private homes), along with the builder of the homes and the subdivision developer of the land upon which the homes were built, were all named as parties responsible for the correction of building deficiencies. While compliance with the Alberta *Building Code* is properly the subject of the SCA, the difficulty in *Tirion* arose where the Orders of the Safety Codes Officer (which were upheld by the Safety Codes Council) named the builder and developer of the homes in question *nearly a decade after* subdivision development and construction had been completed. In effect, the Safety Codes Officer took the position that parties merely implicated in previous acts related to a building defect could be held liable for the rectification of that defect under the SCA. Issues such as present ownership and the actual ability to remedy defects were effectively irrelevant on the Safety Code Officer's view.

The two homes in question were built by two different builders, Calbridge Developments Ltd. and Chancellor Management Inc., on lands developed by Tirion Properties Ltd. as part of the "Hamptons" in Northwest Calgary. Both homes were built and sold to homeowners in 1999, and one of the homes had changed ownership in the intervening years. The location in which these two homes were built involved the placement of "deep fill" at the time in which the subdivision was graded. Shortly after taking possession of these homes, the homeowners noticed cracking foundations that were eventually attributed to the structures' settlement. In turn, the homeowners engaged their builders and the Alberta New Home Warranty Program ("ANHWP") in seeking resolution of the foundation issues. ANHWP engaged experts and made recommendations toward solving the problems, although it ultimately denied the homeowners' claims for compensation. As a result, in 2006, one of the homeowners who went on to pursue his claim by way of arbitration.

Apparently not satisfied with the progress being made in the arbitration process, the homeowner also contacted a City of Calgary Safety Codes Officer who attended at both homes early in 2007. The Safety Codes Officer subsequently issued Orders against the homeowners of the two homes in question, *and* against Calbridge Developments Ltd. and Chancellor Management Inc. as former builders, and Tirion Properties Ltd. as a former owner of the land. As a result, the developer and

the builders effectively found themselves liable to resolve a defect that was presently the subject of arbitration proceedings, and despite the findings of the ANHWP. This led the builders and the developer to challenge the Orders of the Safety Codes Officer, first before the Safety Codes Council, and then before the Alberta Court of Queen's Bench.

The prime difficulty with a Safety Codes Officer having the power to name peripherally-related parties to Orders is that the Courts' and arbitrators' roles in determining liability for construction defects and deficiencies are completely undermined and circumvented. While the law has long-standing rules and procedures with respect to the determination of liability in construction disputes, the powers seized by the Safety Codes Officer in *Tirion* represent a marked departure from generations of legal precedent and procedural safeguards surrounding the assignment of liability between parties in like circumstances. Such a departure represents a potentially crushing liability on developers and builders in Alberta.

Acting on behalf of Tirion Properties Ltd., Lowell A. Westersund, Q.C. and Christopher P. Knight of Fraser Milner Casgrain LLP's Calgary Construction Group, presented arguments to the Alberta Court of Queen's Bench advocating that the purposes of the *SCA* do not include mechanisms for the assignment of liability between parties in construction disputes. Accordingly, the powers of Safety Codes Officers ought not to be used to achieve such ends. The Alberta Court of Queen's Bench agreed. In Justice D.B. Mason's own words:

It is not the purpose of the *SCA*, as the Council itself expressly recognized, to “assign fault, damages or degree of involvement”. Owners in the position of [the homeowners] have recourse to a variety of legal remedies that may be available against a negligent developer. The purpose of the *SCA* is not to provide an alternative to litigation, but to ensure that the building is made safe for occupation. In my view, the Safety Codes Council erred in ordering Tirion to complete remedial work necessary to stabilize the residences.

With respect to the scope of the Safety Codes Officer's powers, Justice Mason went on to state:

The only reason the order issued against Calbridge was because the Safety Codes Officer concluded that Calbridge was at fault. As with the order against Tirion, the transparent purpose of the Order is to hold Calbridge, as contractor, responsible for the result of actions long past. In the event that Calbridge was negligent in building the Drysdale residence, the appropriate remedies may be pursued in court. The *Safety Codes Act* does not provide an alternative remedy to homeowners who may wish to pursue an action for defects against builders or contractors.

In the result, the decision in *Tirion* limits the scope of powers that some Safety Codes Officers under the *SCA* had taken for themselves. The purpose of the *SCA* in the context of construction is to require a minimum standard of safety in regard to the development and maintenance of buildings and structures. Buildings are to be made safe for occupation. The purposes of the *SCA* do not, however, include determinations of fault or assignments of liability. The powers of Safety Codes Officers under the *SCA* are accordingly clarified: the Courts (and Arbitrators) are the correct forum for assigning liability within construction disputes. Safety Codes Officers simply cannot issue Orders against builders and developers years after the completion of construction.

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