

Court of Queen's Bench of Alberta

Citation: Tirion Properties Ltd. v. Safety Codes Council, 2008 ABQB 549

Date:20080919

Docket: 0701 06583 ;0701 10973

Registry: Calgary

Between:

Action No.: 0701 10973

**Tirion Properties Ltd. and
Calbridge Developments Ltd.**

Applicants

- and -

Safety Codes Council

Respondent

And Between:

Action No.: 0701 06583

Tirion Properties Ltd.

Applicant

- and -

Safety Codes Council

Respondent

Corrected judgment: A corrigendum was issued on September 19, 2008; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Reasons for Judgment
of the
Honourable Mr. Justice D.B. Mason**

Nature of the Proceedings

[1] These two appeals are from two orders made by the Safety Codes Council on the 30th of May, 2007, pursuant to the *Safety Codes Act*, R.S.A. 2000 c.S-1 ("SCA"), respecting differential soil settlement at two adjacent residential properties in the Hamptons residential district of Calgary, described as: 1) 287 Hamstead Way N.W., Calgary, Alberta owned by Darcy Drysdale and 2) 291 Hamstead Way N.W., Calgary, Alberta owned by Lili and Igor Motchalov. Both Orders of the Council confirmed two remedial Orders made by Safety Codes Officer William Peter Barnowich respecting these two properties.

[2] Both the Safety Codes Officer's Orders and the Orders of the Safety Codes Council required in identical terms that the two registered property owners, their respective general contractors who built their residences and the land developer of phase 15A of "the Hamptons" residential district complete the remedial work necessary to stabilize and repair differential movement and settling of the soil under each of the residences. The general contractor who built the Drysdale home was Calbridge Developments Ltd. and the general contractor who built the Motchalov home was Chancellor Management Inc. The land developer of this phase of the Hamptons is the Applicant/Appellant, Tirion Properties Ltd. Both the registered owners of the properties and their respective contractors as well as Tirion Properties Ltd., the developer, appealed the Safety Codes Officer's Orders to the Council. As stated the Council confirmed the terms of the Safety Codes Officer's Orders respecting both properties.

[3] Only Tirion, the developer, and Calbridge, the general contractor for the Drysdale residence, have appealed the Orders of the Safety Codes Council. Section 53 of the SCA provides for an appeal from an Order of the Safety Codes Council to the Court of Queen's Bench only on a question of law or jurisdiction.

Facts

[4] Both residences were built in 1999. The building permit for the Drysdale residence issued March 4, 1999 and for the Motchalov residence on January 5, 1999. Both contractors purchased the building lots from Tirion. The initial title to the Drysdale lot was registered in the name of Tirion on May 11, 1998 and title passed directly to Drysdale on July 23, 1999. Tirion was also the registered owner of the Motchalov lot from May 11, 1998 until June 28 1999 when title passed directly to the Motchalovs. As stated, both contractors purchased the land from Tirion, but neither of them transferred the property into their respective names. They chose to hold the transfer of title and directly transfer title from Tirion to the owners upon completing construction.

[5] Calbridge constructed the Drysdale home with a prior approval of the building grade established and approved by the City of Calgary. Adem Engineering Consultants Ltd. ("Adem Engineering") provided a report to Calbridge respecting a soil bearing capacity review with recommendations. The report was based on an inspection in February 1999. The ground was frozen. The engineer noted the exposed layers consistent of fill made up with a clay till and shale mixture of approximately 7.3 metres in depth. The engineer addressed the installation of footings and suggested that rebar in the basement walls be installed to control the combined effects of differential settlement and concrete shrinkage. This would tie the foundation together as a single unit.

[6] The report also addressed excavating procedures for footings placement in the frozen soil. The report disclaimed any assessment of the quality or uniformity of the fill as an unknown and that was excluded from the site assessment. Following upon the issue of the building permit and the conditions attached, a Safety Codes Officer visited the site on at least six occasions over the construction period. All six reports raised no concerns with the construction process.

[7] Drysdale and the Motchalovs took possession of their homes in the summer of 1999. Within a year of construction, the Motchalovs advised the Alberta New Home Warranty Program (“ANHWP”) of cracking in the drywall and foundation walls. Drysdale raised the issue of cracking as early as November 1999 with Calbridge, but Calbridge declined to investigate the problem. In 2003 Drysdale and the Motchalovs again raised the issue with ANHWP and requested a structural inspection. ANHWP engaged the services of Adem Engineering once again. They reported to ANHWP by letter dated July 30, 2004 on two level surveys respecting each of their residences. These assessments were issued August 20, 2003 and July 2004. Adem Engineering found there was ongoing differential settlement along the northwest foundation wall of the Drysdale residence which they found was “due to an unknown geotechnical condition”. No letter from Adem Engineering addressing the Motchalov property was included in the return made by the Safety Codes Council to this Court.

[8] The second consultant engaged by ANHWP was Jacques Whitford Ltd. (“Whitford”) to perform forensic geotechnical investigation respecting both properties. Whitford issued its report on October 1, 2004. At one stage, this report characterized the differential settlement issue for both sites as “likely the result of the footings being founded on poor quality fill. The poor filled condition may have occurred either before or after construction, but is likely a combination of both circumstances.”. However, the report also raised the question of surface water run off, running back against the foundation as well as perched ground water being trapped within the deep fill as additional issues for consideration. Further, the report raised the possibility that gas connections to each residence were so located as to provide a preferential pathway through the back fill of the line installations that would trap water at the lower stepped footing elevations. Whitford recommended installation of a properly functioning weeping tile drainage system around the perimeter of the exterior footings of each residences.

[9] It was not until March 2005 that ANHWP informed Drysdale that it had denied coverage under its structural warranty program. The reason given was that ANHWP had concluded that surface water had been allowed to collect at the base of the foundation due to lack of proper surface management systems. ANHWP concluded that this was one of the main contributing factors to the settlement.

[10] ANHWP went on to recommend that a geotechnical engineer be engaged to address the possible other causes respecting fill, compaction, damage by frost during construction and other possible sources of differential settlement.

[11] Drysdale chose to go to arbitration with ANHWP. He engaged Curtis Engineering Associates Ltd. (“Curtis Engineering”) to assess the situation. Curtis Engineering reported in November of 2006 and opined that the settlement was due to soft soil with low bearing capacity at the depths of the footings and immediately below. No explanation was given as to why or how the soil had been made soft, except for the intermediate conclusion that there could be other causes for the soft soils. Drysdale then requested a Safety Codes Officer attend the residences, William Peter Barnowich, the Safety Codes Officer attended on the 16th of January of 2007.

[12] Barnowich issued two Safety Code Officer Orders respecting each of the residential properties at issue. The Order respecting 287 Hamstead Way N.W., Calgary, Alberta named Darcy Drysdale as the owner of the property, Calbridge Developments Ltd. as contractor, and a former unregistered owner of the property, and Tirion Properties Ltd. as developer and a former registered owner. All three parties were ordered to:

1. Forthwith take all necessary action, from now until remedial work is completed, to ensure that no person (or property) is exposed to undue risk, pursuant to Sentences 1.2.6.1.(1) and 8.1.2.2.(1) and 8.2.1.4.(1) of the Alberta Building Code 1997; and
2. To engage the services of a Professional Engineer to design and supervise the underpinning construction necessary to permanently stabilize and repair the building indicated in the above schedule; pursuant to Sentences 2.3.3.1.(8) and 4.2.4.1.(1) of the Alberta Building Code 1997 and the recommendations of the aforesaid Geotechnical Investigation Report by Curtis Engineering Associates Ltd.. The Professional Engineer's detailed design and construction specifications must be acceptable to the Authority having jurisdiction (City of Calgary - Plans Examiner) and are to be submitted, along with an application for a Building Permit, to the Authority having jurisdiction (City of Calgary - Plans Examiner) by no later than 16:00 hours on the 28th day of February 2007; pursuant to Sentence 2.3.3.1.(8) of the Alberta Building Code 1997; and
3. Prior to commencing the remedial construction to stabilize and repair the building, to obtain a valid and subsisting building permit for any remedial work necessary, pursuant to Sentence 1.2.1.1.(1) of the Alberta Building Code 1997 and Section 4(1) of the Calgary Building Permit Bylaw 64M94; and
4. To permanently correct the structural failure of the building by stabilizing and repairing the building to comply with the Professional Engineer's prescribed remedial work, the conditions of the Building Permit, and the requirements of the Alberta Building Code 1997 by no later than the 30th day of April 2007, pursuant to Clause 1.1.2.1.(1)(b), Clause 1.1.2.1.(1)(h), Clause 1.1.2.1.(1)(l), Sentence 1.2.6.1.(1) and Sentence 1.2.6.1.(2) of the Alberta Building Code 1997; and
5. To provide written verification of compliance from the Professional Engineer, engaged to supervise the stabilization and repair of the building, to the Authority having jurisdiction (Safety Codes Officer - Building) to confirm that the building foundation and its support are structurally adequate and that all of the remedial work to the building foundation and its support has been completed to the Engineer's design specifications and the requirements of the Alberta Building Code 1997. Such verification

must be provided to the Authority having jurisdiction by no later than 16:00 hours on the 15th day of May 2007; pursuant to Sentences 1.2.4.5.(1) and 2.5.1.3.(2) and 2.5.1.3.(3) of the Alberta Building Code 1997.

[13] Similarly, the other Order issued by Safety Codes Officer named the Motchalovs as registered owners, Chancellor Management Inc. as a contractor and former unregistered owner and Tirion Properties Ltd. as developer and a former registered owner. All three parties were ordered to do to the Motchalov property what had been ordered with respect to Drysdale property in identical terms.

[14] Both Safety Code Officer Orders were appealed by all parties to the Safety Codes Council in accordance with provisions of s. 50, 51 and 52 of the SCA.

Safety Codes Council Fact Findings

[15] The findings of the Safety Codes Officer and the various engineering reports support the conclusions of the Council that both the Drysdale and Motchalov residences suffer from differential settlement requiring remedial work to repair and rehabilitate both buildings. Currently, there is minimal safety risk to the occupants but unless the settlement problems for the residences are solved in a timely fashion, the safety risks will increase.

[16] At issue is the cause of the settlement and the jurisdiction of the Safety Codes Officer and the Council to determine cause and fix responsibility. On the issue of causation, the Council in its fact findings relied on the authority of the Safety Codes Officer pursuant to section 49(1) of the SCA to issue an Order if the officer believes unreasonable and probable grounds that:

- a) The *Act* is contravened; and
- b) The construction of a thing... activity to which the *Act* applies is such that there is danger of serious injury or damage to a person or property.

[17] The Technical Division of the Safety Codes Council heard both appeals. The Council considered a wide variety of material placed before it by the registered owners and the general contractors as well as by Tirion. Presentations were made by David Price, Professional Engineer and Manager of Building Regulations for the City of Calgary together with the written report from the Safety Codes Officer hereinafter quoted. The Council also reviewed the available engineering reports provided by Tirion, by the New Home Warranty Program and by the owners. The council also reviewed a series of building permits and inspection reports related to the construction of both residences.

[18] Under the provisions of s. 52 respecting appeals from Safety Codes Officer Orders, the Council may:

(a) confirm, revoke or vary an order, suspension or cancellation appealed to it and as a term of it's order may issue a written variance with respect to any thing, process or activity related to the subject matter of the order if in its opinion the variance provides approximately equivalent or greater safety performance with respect to the persons and property as that provided for by this *Act*,
...

[19] The Council in the case of the Drysdale residence issued Order number 0015325 by varying the Safety Codes Officer's Order as follows:

UPON REVIEWING the Order dated January 16, 2007 issued by the City of Calgary against Darcy Drysdale, Calbridge Developments Ltd., and Tirion Properties Ltd. AND UPON HEARING the Appellants and the Respondent, THIS COUNCIL ORDERS THAT the Order is Varied by:

1. Replacing the Order's directive, item 2 with;
2. To engage the services of a professional engineer to assess, design, and monitor the remedial work to permanently stabilize and repair the building; and to do the remedial work in accordance with the engineer's direction. The professional engineer's detailed design and construction specifications must be acceptable to the Authority Having Jurisdiction (City of Calgary Safety Codes Officer - plans examiner) and are to be submitted along with an application for a Building Permit, to the Authority Having Jurisdiction by no later than 16:00 hours on the 10th day of July, 2007; pursuant to Sentence 2.3.3.1.(8) of the Alberta Building Code 2007; and"

[20] The Safety Codes Council Order 0015326 respecting the Motchalov residence also confirmed both Chancellor and Tirion as parties to the Order. With respect to Tirion, the Safety Codes Council set out their findings and reasoning in the following terms insofar as the Motchalov property:

Tirion was a former owner of the land. Tirion did work on the land, specifically the placement of infrastructure and fill for the purpose of constructing a residential neighbourhood which was expected to include single family structures. This work was done with the knowledge of pre-existing land conditions, and under their control and direction including soil movement such as the fill placement. Although Chancellor constructed the structure and was noted as an unregistered owner, the Land Title Certificate indicates Tirion as the owner at the point of construction initiation. The Appeal Panel notes the *Safety Codes Act* s. 5 which states that an owner is responsible to ensure that the *Act* is complied with, and s. 8 which states that a contractor shall ensure the *Act* is complied with, and s. 9 which states that a vendor is not to advertise, offer for sale or sell anything

which does not comply with the *Act*. The Appeal Panel believes that Tirion operated in each of these capacities at the initial stages and had minor or no direct control over the structure's construction, however it did have an obligation to ensure its work and product were suitable for the housing construction that was going to follow.

[21] To better understand the Safety Codes Council Orders, recourse must be had to the full reasons of the board for their decision:

Reasons for Decision

1. The Appeal Panel's scope is within the provisions of the *Safety Codes Act*, and regulations, codes, and standards under the *Act*; with focus to the safety and health of persons and property. The Appeal Panel does not assign fault, damages, or degree of involvement. (my emphasis)
2. The Appellants and the Respondent agreed that the differential settlement evident in the building is not acceptable and that remedial work must be done to correct the settlement and damages to the structure to address safety concerns.
3. The arguments advanced by each of the Appellants focussed on removing themselves from fault. As the Appeal Panel does not address the assignment of fault and as the evidence submitted identified each of them as having one or more involvement roles identifiable within the *Safety Codes Act*, it is the decision of the Appeal Panel that each of the Appellants was appropriately named on the originating Order and will remain named.

Drysdale is the current owner. It is important that an owner ensure that the owner's property including structure(s) are safe, not only for the occupant(s) but also for other persons that may access the property or structure. The Appeal Panel notes that the *Safety Codes Act* s.5 states in part that the owner of a building shall ensure that it meets the requirements of the *Act*.

Calbridge was a previous, although unregistered, owner, was the constructor of the structure, and a vendor of the land and structure. Added to the expectation of owner is the duty of the contractor to ensure codes, standards and good construction practices are utilized while the property is under the care and control of the contractor. Specifically, a contractor is expected to know the soils conditions to be built upon and to take necessary measures to ensure the construction methodology and materials are adequate. The Appeal Panel notes the *Safety Codes Act* s.8 which states that a contractor shall ensure the *Act* is complied with, and the Alberta Building Code 1997 sentence 1.2.1.9.(1) provides in part that neither the issuance of a permit nor inspections made relieve the responsibility for compliance with the *Act* or the Code. Contractors and vendors

have an obligation to ensure their work or product meets or exceeds the acceptable level identified by the *Safety Codes Act* and its codes and standards.

Tirion was a former owner of the land. Tirion did work on the land, specifically the placement of infrastructure and fill for the purpose of constructing a residential neighbourhood which was expected to include single family structures. This work was done with the knowledge of pre-existing land conditions, and under their control and direction including soil movement such as the fill placement. Although Calbridge completed the Building Permit Application identifying themselves as the owner, the Land Title Certificate indicates Tirion as the owner at the point of construction initiation. The Appeal Panel notes the *Safety Codes Act* s. 5 which states that an owner is responsible to ensure that the *Act* is complied with, s. 8 which states that a contractor shall ensure the *Act* is complied with, and s. 9 which states that a vendor is not to advertise, offer for sale or sell anything which does not comply with the *Act*. The Appeal Panel believes that Tirion operated in each of these capacities at the initial stages and had minor or no direct control over the structure's construction, however it did have an obligation to ensure its work and product were suitable for the housing construction that was going to follow.

Due to the involvement of each of the Appellants as outlined above the Appeal Panel is satisfied that each of the Appellants should remain named in the Order.

4. The presentations at the hearing identified underpinning the structure's perimeter as a solution to achieve remediation. There may be the potential that lesser underpinning may achieve acceptable results or that another solution may present itself. Therefore, the Appeal Panel recognizes that there may be other engineered solutions that may be acceptable to the Authority Having Jurisdiction to stop the continuing settlement and correct the existing failure.
5. The Appeal Panel took into consideration the structure's movement to date, the amount of movement, the rate of movement, and that the structure is expected to continue to move until corrected. Based upon the information presented, the Appeal Panel believes there is minimal immediate risk to the safety of persons, property, or the environment and as such the time extensions provided will allow opportunity to achieve corrective action without adversely compromising safety.
6. The Appeal Panel recognizes that the *Safety Codes Act* assigns responsibilities for compliance with the *Act* to Owners, Designers, Manufacturers, Contractors, Vendors, and Professionals and found that the Safety Codes Officer served the Safety Codes Order to involved persons allowed by the *Safety Codes Act*.

[22] Key to the Safety Codes Council's Orders respecting both properties were the opinions of the Safety Codes Officer, Mr. Barnowich and his determination of responsibility for and compliance by the owner, the "contractor/owner" and the "developer/former owner" as defined

by him. The following quotes the opinion and reasoning of the Safety Codes Officer submitted in writing to the Safety Codes Council at the appeal hearing.

Owner- Responsibility For Compliance

The Safety Codes Officer is of the opinion that that the Owner is required on the Order as:

1. The owner is in care and control of the property. No remedial work can be carried out by the other parties unless the owner allows access and authorization to proceed with remedial work.
2. Section 5 of the *Safety Codes Act* states that the owner of any thing, process or activity to which this *Act* applies shall ensure that it meets the requirements of this *Act*, that the thing is maintained as required by the regulations and that when the process or activity is undertaken it is done in a safe manner.
3. If prosecution becomes necessary to obtain compliance, a penalty imposed by the Court would likely include an Order from the Court. Section 68(2) of the *Safety Codes Act* which states that ... “If a person is guilty of an offence under this *Act*, the Court may, in addition to any other penalty imposed or order made, order the person to comply with this *Act* or any order, permit, certificate or variance, or all or any one or more of them, as the case requires.”. Due to item #1 noted above, the owner would have to be on such an Order from the Court and therefore should not be removed from the Order of the Safety Codes Officer.

Contractor/Former Owner - Responsibility For Compliance

The Safety Codes Officer is of the opinion that that the Contractor is required on the Order as:

1. The Building Permit (#BP1999-00701) was issued to Calbridge Developments Ltd. who was indicated as the owner of the property. Sentence 1.2.1.9.(1) of the Alberta Building Code 1997 states that... “Neither the issuance of a permit, nor inspections made by the authority having jurisdiction, shall in any way relieve the owner of a building from full responsibility for carrying out the construction or having the construction carried out in accordance with the requirements of the *Safety Codes Act* and regulations made pursuant to that *Act*, this Code, or the permit, including any special conditions required by the Authority having jurisdiction.”.

2. Section 5 of the *Safety Codes Act* states that the owner of any thing, process or activity to which this *Act* applies shall ensure that it meets the requirements of this *Act*, that the thing is maintained as required by the regulations and that when the process or activity is undertaken it is done in a safe manner.
3. Section 8 of the *Safety Codes Act* states that a contractor who undertakes construction, operation or maintenance of or builds or installs any thing to which this *Act* applies shall ensure that this *Act* is complied with .
4. Due to the fact that the soils at this particular site is of deep fill and not of undisturbed soils, the preparation of the site required Professional Engineers involvement and therefore Part 4 of the Alberta Building Code 1997 is applicable. Part 9 cannot be used with respect to deep fill or soils bearing capacity on disturbed soils.
5. Further to the contractor's concerns, the grade slip is a document that was produced by Sunbow Consulting Ltd. for the subdivision developer. The grade slip and other professionally prepared documents are generally accepted at face value by the Authority having jurisdiction unless there are reasons to believe otherwise or in the future prove otherwise (i.e. building settlement).
6. Contrary to the contractor's beliefs, the Safety Codes Officer did not make his decision to issue the Order, as written, in isolation and by only reviewing the Geotechnical Investigation Report prepared by Curtis Engineering Associates Ltd. Refer to the FOUNDATION REVIEW prepared by David Price, P. Eng., Manager Building Regulations, City of Calgary, for background information on our conclusions in this situation.

Developer/Former Owner - Responsibility For Compliance

The Safety Codes Officer is of the opinion that that the Developer/Former Owner is required on the Order as:

1. The grade slip is a document that was produced by Sunbow Consulting Ltd. for the subdivision developer. The grade slip and other professionally prepared documents are generally accepted at face value by the Authority having jurisdiction unless there are reasons to believe otherwise or in the future prove otherwise (i.e. building settlement). The Grade Slip submitted for Building Permit (#BP1999-00701) indicated that Tirion Properties Ltd. is the

developer of the property and that the property has up to 7.32 metres of fill.

2. Tirion Properties Ltd. carried out the grading and compaction of the land to provide developed lots on deep fill that were to be suitable for construction of residential dwellings. Article 4.2.4.15. of the Alberta Building Code 1997 permits buildings to be placed on fill provided that subsurface investigation shows that the fill is made capable of safely supporting the building and that detrimental movement of the building will not occur. In this case detrimental movement of the building has occurred. Findings that the deep fill has not been placed to appropriate standards can reasonably be taken as the prime cause of differential and progressive settlement. As the entity that developed the subdivision and chose to utilize deep fill, the Developer was in care and control of the site at that time and is responsible for the condition of the deep fill. It is the opinion of the Authority having jurisdiction that the term “building” includes the lands supporting the structure.
3. This developer was the registered owner of the site until the unregistered transfer of the property to Calbridge Developments Ltd. on July 15, 1999. Sentence 1.2.1.9.(1) of the Alberta Building Code 1997 states that ... “Neither the issuance of a permit, nor inspections made by the authority having jurisdiction, shall in any way relieve the owner of a building from full responsibility for carrying out the construction or having the construction carried out in accordance with the requirements of the *Safety Codes Act* and regulations made pursuant to the *Act*, this Code, or the permit, including any special conditions required by the Authority having jurisdiction.”.
4. Section 5 of the *Safety Codes Act* states that the owner of any thing, process or activity to which this *Act* applies shall ensure that it meets the requirements of this *Act*, that the thing is maintained as required by the regulations and that when the process or activity is undertaken it is done in a safe manner.
5. Section 8 of the *Safety Codes Act* states that a contractor who undertakes construction, operation or maintenance of or builds or installs any thing to which this *Act* applies shall ensure that this *Act* is complied with.
6. Contrary to the developer’s beliefs, the Safety Codes Officer did not make his decision to issue the Order, as written, simply on the

fact that Tirion Properties Ltd. was a former owner of the property and by only reviewing the Geotechnical Investigation Report prepared by Curtis Engineering Associates Ltd. Refer to the FOUNDATION REVIEW prepared by David Price, P. Eng., Manager Building Regulations, City of Calgary, for background information on our conclusions in this situation.

Issues

1. What is the appropriate standard of review applicable to these appeals?
2. Did the Safety Codes Council exceed its jurisdiction or err in law in finding that the *Safety Codes Act* applied to the land developer Tirion Properties and the contractor Calbridge, and in naming Tirion and Calbridge as a parties to its Orders?
3. Did the Safety Codes Council err in its determination that the construction of the residence by Calbridge was the cause of the differential settlement of the Drysdale residence?

1. Standard of Review

[23] Though this matter comes before me as a statutory appeal, the Supreme Court of Canada in *Dr. Q. v. College of Physicians and Surgeons*, [2003] 1 S.C.R. 226, at para. 21, made it clear that a standard of review analysis is required, regardless of whether the matter comes before the court by way of statutory appeal or judicial review:

The term “judicial review” embraces review of administrative decisions by way of both application for judicial review and statutory rights of appeal. In every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review...

[24] The Supreme Court has recently reconsidered the analysis applied to determine the appropriate standard of review of an administrative tribunal, in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9. In *Dunsmuir*, the Court eliminated the standard of review of patent unreasonableness and held that, henceforth, the only two standards of review will apply: reasonableness and correctness. The first question the Court should ask is whether existing jurisprudence has already determined the degree of deference to be accorded to the question at issue; if not, the Court must proceed to analyse a number of factors to determine the appropriate standard of review. Those factors are the existence of a privative clause, the purpose of the tribunal, the nature of the question, and the expertise of the tribunal. The Court made it clear that in many cases it will not be necessary to consider all of these factors, as some may be determinative.

[25] In *Kristel Homes Ltd. v. Edmonton (City)*, [2003] A.J. No. 1130, 2003 ABCA 182, the Alberta Court of Appeal considered an appeal from a judicial review of a decision of the Safety

Codes Council. The primary issue was whether an application for judicial review could proceed where the owner of the property had failed to exercise his statutory right of appeal. However, in considering the decision of MacCallum J., Paperny J.A. held at para.14:

The standard of review on the question of whether the Act authorizes an Officer to issue an order is one of correctness. The chambers judge carefully considered the applicable provisions of the Act, the Alberta Building Code... and the standards relating to the correction of unsafe conditions, and held that the demolition order was a valid exercise of power pursuant to the provisions of the Act.

[26] In *Leduc (County) v. Safety Codes Council*, [1999] A.J. No. 1381, Gallant J. considered a judicial review from a decision of the Building Technical Council, a sub-council of the Safety Codes Council, which revoked an Order of a Safety Codes Officer to cancel a building permit. Gallant J. considered the principles set out in *Pushpanathan v. Canada (Minister of Immigration)*, [1998] 1 S.C.R. 982 and concluded, at para. 45, that the Council's "compliance with statutory interpretation and adherence to statutory requirements" was subject to a standard of review of correctness, and its findings of fact were subject to a standard of reasonableness simpliciter.

[27] In my view, *Kristel Homes* and *Leduc (County)* establish the appropriate standard of review in respect of the question of whether the Safety Codes Officer was authorized to issue an Order against the developer, Tirion, and the contractor, Calbridge. That standard of review is correctness. Moreover, an analysis of the four factors, set out above, would yield the same conclusion. There is no privative clause in the SCA. Instead, there is a statutory right of appeal to this Court on questions of jurisdiction or law. This suggests a very limited degree of deference: *Coffey v. College of Licensed Practical Nurses of Manitoba*, [2008] M.J. No. 116 (C.A.), 2008 MBCA 33. The purpose of the Act, as described by Gallant J. in *Leduc (County)* at para.43 is to "require a minimum standard of safety... in regard to the development and maintenance of building and structures." I agree with Gallant J. that these are "fairly ordinary considerations involving fairly non-difficult facts and considerations for reviewing judges." The question before me is whether the Safety Codes Council erred in law by naming Tirion and Calbridge as parties to the Orders. The question is not one that turns upon disputed facts before the tribunal, it is essentially a question about the scope of the tribunal's jurisdiction and whether, in ordering Tirion and Calbridge to take remedial steps, the Safety Codes Officer and the Safety Codes Council effectively assigned liability for damages rather than pursuing their statutory mandate to remedy an unsafe condition. The strictly legal nature of this question suggests a very limited degree of deference.

[28] The standard is different with respect to the Safety Codes Council's conclusion that the cause of the differential settlement of the Drysdale residence can be, at least partially, attributed to the construction of the residence. The evaluation of expert reports regarding the causation of the differential settlement falls squarely within the Safety Codes Council's field of expertise. I agree with Gallant J. who held, at para.45 of *Leduc (County)* that the appropriate standard of

review for the Council’s “findings of fact and conclusions otherwise” is reasonableness simpliciter.

2. Did the Safety Codes Council err in law in finding that the *Safety Codes Act* applied to the land developer Tirion Properties and the Contractor, Calbridge Developments Ltd?

[29] Tirion takes the position that the Safety Codes Council exceeded its jurisdiction and erred in law by naming Tirion as a party to the Orders under the appellation of “former owner” or as an “owner” as defined under s. 1 of the SCA. Tirion points out that a former owner is not a term defined within the statute nor is there authority for granting orders against parties with former connections to structures or the property. Tirion maintains it was not a lessee, a person in charge or a person with care and control or a person who exercised powers and authority of ownership with respect to either of the residences.

[30] Further, Tirion submits that it complied with all of the regulations applicable at the time. It provided all of the reports and complied with all of the inspections and developed the property in accordance with permits issued by the City of Calgary. Further, Tirion states that the subdivision and the development of the property was completed in accordance with the provisions and regulations applicable under the *Municipal Government Act*, R.S.A. 2000, c.M-26. All of Tirion’s activities were authorized by permits, approvals and final certificates issued by the City of Calgary under its authority pursuant to part 17 of the *Municipal Government Act* not the SCA.

[31] Tirion also contends that the Alberta Building Code, particularly paragraph 4.2.4.1.5, applies only with respect to buildings constructed on fill and that this would be the sole responsibility of the contractor, not the developer. The Building Code addresses standards for construction of buildings. It does not address subdivision, construction standard for roads, services or sidewalks nor does it address safety issues relating to those things. Tirion further observed that the Safety Codes Officer, Barnowich, issued the order naming Tirion because “nothing was happening” and submits that is an abuse of power not within the authority of the Safety Codes Officer. Neither the Safety Codes Officer, nor the Council, nor the *Act* provides that the Council is in a position to apportion liability, determine degrees of fault and apportion damages.

[32] Calbridge contends that it is not a proper party to the Orders because it has no ability to control or obtain the actions mandated by the Orders and as such, is not capable of remedying the alleged damage.

[33] With respect to Tirion, the Safety Codes Council, relying upon *Bell Express Vu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, at para.26, contends that the Act must be interpreted in its “entire context and in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of [the legislator].” It is the Safety Codes Council’s contention that an interpretation of the SCA that would limit its ambit to the current owner would be narrow and inconsistent with the proper approach to statutory interpretation. Because the Order was issued against Tirion as former owner as well as contractor, owner and

vendor of the lands, Tirion was in the submission of the Safety Codes Council a proper party. Moreover, because the Safety Codes Act states that any reference to “this Act” includes all applicable codes and bylaws made pursuant to the Act, the ambit of the Act is extended beyond (in this case) “buildings constructed on fill” to the infrastructure and fill itself, since infrastructure and fill are addressed in the Building Code.

[34] With respect to Calbridge, the Safety Codes Council points out that there is no doubt that Calbridge was a builder, contractor, vendor and occupier of the Drysdale property and that it was responsible for the foundation and footings. As such, in the Council’s submissions, there is no question that Calbridge is a proper party to its Order. The Safety Codes Council points out that access to the property is not an issue, as the registered owner of the Drysdale lands has indicated that contractors would be allowed on to the property to remedy the Safety Codes issues.

(a) The Safety Codes Act and the Alberta Building Code

[35] The SCA applies, *inter alia*, to the design, manufacture, construction, installation, operation and maintenance of buildings. Section 1(2) of the *Act* provides:

1(2) In this *Act*, a reference to “this *Act*” includes the regulations and bylaws made under this *Act* and any code, standards or body of rules declared to be in force pursuant to this *Act*.

[36] A number of relevant definitions are set out in s.1 of the SCA:

1(1) In this *Act*,

(f) “building” includes a structure and any part of a building or structure, but does not include any thing excluded by the regulations from the definition of building;

(g) “construction” includes alteration, installation, repair, relocation, demolition and removal;

(h) “contractor” means a person or organization that does or undertakes to do, either for the person’s or organization’s own use or benefit or for that of another, whether or not for the purposes of gain, any process or activity to which this Act applies;

(v) “owner” includes a lessee, a person in charge, a person who has care and control and a person who holds out that the person has the powers and authority of ownership or who for the time being exercises the powers and authority of ownership;

[37] The responsibilities of the owners, contractors and vendors are set out in sections 5, 8 and 9:

5. The owner of any thing, process or activity to which this *Act* applies shall ensure that it meets the requirements of this *Act*, that the thing is maintained as required by the regulations and that when the process or activity is undertaken it is done in a safe manner.

8. A contractor who undertakes construction, operation or maintenance of or builds or installs any thing to which this *Act* applies shall ensure that this *Act* is complied with.

9 (1) A person who is a vendor in the ordinary course of business, other than as an employee or an agent, shall not advertise, display or offer for sale, for lease or for other disposal, or sell, lease or otherwise dispose of, any thing to which this *Act* applies unless the thing complies with this *Act*.

(3) No person shall advertise, display or offer for sale, for lease or for other disposal, or sell, lease or otherwise dispose of any thing that is prohibited from being sold by the regulations.

[38] By subsection 3 of section 45 the Safety Codes Officer may in the order, make the following directions:

45(3) An order

- (a) shall set out what a person is required to do or to stop doing in respect of the thing, process or activity and a reasonable time within which it must be done or stopped;
- (b) may direct a method of work, construction, manufacturing, operation, maintenance, use or relocation that must be followed;
- (c) shall meet the requirements of the regulations on format and contents.

[39] The regulations applicable to the issues raised in this appeal are set out in the Alberta Building Code of 1997. The Code is administered in conformance with the appropriate provincial regulations made pursuant to the *Act*. The application of the Code is set out at s.1.1.2.1.1):

1.1.2.1.1) This code applies to any one or more of the following:

- b) the construction of a new building;

I) The correction of an unsafe condition in or about any building or property;”

[40] Responsibility for compliance is set out in s.1.2.1.9:

1.2.1.9.1) Neither the issuance of a *permit*, nor inspections made by the *authority having jurisdiction*, shall in any way relieve the *owner* of a *building* from full responsibility for carrying out the construction or having the construction carried out in accordance with the requirements of the *Safety Codes Act* and regulations made pursuant to the *Act*, this Code, or the *permit*, including compliance with any special conditions required by the *authority having jurisdiction*.

2) The *owner* shall ensure that all activities which take place on the site meet the requirements of this Code.

3) The *constructor* shall ensure that

a) precautions are taken to safeguard the public and protect adjacent properties,

b) the methods used in demolition or erections are safe, and

c) the material and equipment used on site meet the requirements of this Code.

4) Every vendor or supplier of materials and things used in the construction of a *building* shall ensure that the materials and equipment he advertises, displays, sells, leases or otherwise disposes of meet the requirements of the Code.

5) The *designer* shall ensure that the plans and specifications comply with the requirements of this Code.”

[41] A number of relevant definitions are set out in s.1.1.3.2.1):

Building means any structure used or intended for supporting or sheltering any use or occupancy.

Fill means soil, rock, rubble, industrial waste such as slag, organic material or a combination of these that is transported and placed on the natural surface of a soil, or rock, or organic terrain. It may or may not be compacted.

Foundation means a system or arrangement of *foundation units* through which the loads from a building are transferred to supporting *soil* or a *rock*.

Foundation unit means one of the structural members of the *foundation* of a *building* such as a footing, raft or *pile*.

[42] The Building Code also addresses construction on fill in para. 4.2.4.15:

4.2.4.15. Construction on Fill

1) *Buildings* may be placed on *fill* if it can be shown by *subsurface investigation* that

a) the *fill* is or can be made capable of safely supporting the *building*,

b) detrimental movement of the *building* or services leading to the *building* will not occur, and

c) explosive gases can be controlled or do not exist.

(b) Assessment of the Decisions of the Safety Codes Council

[43] The Safety Codes Council properly recognized that its jurisdiction was confined to the provisions of the *Safety Codes Act* and regulations, codes and standards under the *Act*. The Council went on to say that it does not assign fault, damages or degree of involvement. However, having so defined its jurisdiction did the Council then go on to do exactly what it said it does not do in the case of both Tirion and Calbridge, that is assign fault, impose responsibility and find degrees of involvement?

[44] The Safety Codes Council based its decision in respect of Tirion on its determination that (a) Tirion was a former owner of the land, and was the owner at the time of construction initiation; (b) Tirion did work on the land, specifically the placement of infrastructure and fill; and (c) Tirion sold the land to the contractors and was therefore a vendor. The Council concluded that Tirion was therefore a proper party pursuant to s.5, which states that an owner is responsible for compliance with the *Act*; s.8, which states that a contractor shall ensure that the *Act* is complied with; and s. 9, which states that a vendor is not to advertise, offer for sale or sell anything which does not comply with the *Act*.

[45] The Safety Codes Council based its decision in respect of Calbridge on its determination that (a) Calbridge was a former owner, although unregistered and contractor as well as a vendor; (b) Calbridge owed a duty to ensure code standards and good construction practises were observed; (c) Calbridge owed a duty to know the soil conditions and take necessary measures to ensure construction methodology and materials were adequate in accordance with section 8 of the SCA; and (d) there is no indemnity or protection or indemnity to the contractor arising under the Alberta Building Code 1997 regulations and even in the face of properly issued permits and inspections, the responsibility of the contractor remains independent of such permits and approvals.

[46] The SCA replaced 7 separate pieces of legislation in the disciplines of building, fire, plumbing, gas, electrical boilers and elevators. The purpose of the amalgamated legislation was to ensure that municipalities, owners, designers, contractors and manufacturers share in the responsibility for setting of standards and delivery of service. The Safety Codes Council was established to ensure there is appropriate input in sharing of the responsibilities for the delivery of the safety system in Alberta. The Council is to be made up of persons with technical competency in particular disciplines which come under the *Act*.

[47] There is nothing in the SCA itself which includes or purports to include earthworks, the stripping or grading of land or relocating and placing of fill. Nor does the SCA refer in any way to the installation of underground services such as the construction of roads, sidewalks or the design or processes of subdividing a residential property. In neither of the preceding statutes to the SCA that could be applicable to the issues raised in this appeal, the *Uniform Building Standards Act*, R.S.A 1980, c.U-4 and the *Fire Prevention Act*, R.S.A. 1980, c.F-10.1 was there any statutory provision dealing with subdivision and land preparation for construction of residences or other types of construction.

[48] The SCA applies to buildings. It also applies to electrical systems, elevating devices, gas systems, plumbing and private sewage disposal systems and pressure equipment, none of which relate to property development and preparation of lands or property for purposes of the construction of buildings. Reference to property, fill or soil are to be found only in the Alberta Building Code.

Tirion

[49] Insofar as Tirion is concerned, is it open to the Safety Codes Council to extend the ambit of the application of the SCA beyond buildings, as a result of references to fill in the Building Code, a regulation under the SCA? Alternatively, because buildings involve the installation of foundations and foundation units on land, is the Safety Codes Council “on solid ground” to extend its reach beyond the contractor who constructs the foundation to the land developer who prepares the land on which the foundation rests?

[50] Neither conclusion would be consistent with the language of the SCA and the Building Code, or with, more generally, the purpose of the SCA and the ambit of the jurisdiction of the Council set out therein. First, it is clear that the focus of paragraph 4.2.4.15 of the Building Code is the building, not the fill itself. In my view, the proper interpretation of paragraph 4.2.4.15 is that the builder must ensure that the building is on solid ground. A developer that places the fill but does not construct the building does not fall within the combined ambit of paragraph 4.2.4.15 and the SCA. As Tirion points out, the City of Calgary establishes guidelines developers in placement of fill, and Tirion complied with City guidelines by obtaining and providing to the City the appropriate engineering reports. In short, *fill* does not fall within the scope of the Building Code and the SCA; *construction on fill*, on the other hand, does.

[51] More generally, and perhaps more to the point, the purpose of the SCA, as described by MacCallum J. In *Kristel Homes*, is to ensure that safety codes are complied with in the design,

manufacture, construction, installation, operation and maintenance of buildings. To this end, a Safety Codes Officer is empowered to issue an Order against an owner, contractor or vendor because, at the time the Order is made, any one (or more) of those parties might be best positioned to take the necessary steps to remedy the violation. To make an Order against the developer, years after development and construction is complete, on the basis that they once owned the property and prepared the fill, does not advance the objectives of the SCA if the developer is no longer in a position to take the steps necessary to ensure compliance. Instead, what such an Order reflects is an attempt to assign liability for defects, which is not what the SCA was intended to do.

[52] 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 Drysdale and Motchalov 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.

Calbridge

[53] Unlike Tirion, there is no question that Calbridge was under a responsibility under the Building Code to ensure that the Drysdale residence was placed upon fill that was capable of safely supporting it. The issue is not whether the SCA and the Building Code, properly construed, apply to a contractor in the position of Calbridge at the time that Calbridge was a builder, contractor, occupier and/or vendor. The issue is whether it falls within the scope of the jurisdiction of a Safety Codes Officer, and the Safety Codes Council, to order Calbridge to take remedial steps years after Calbridge sold the property.

[54] The Safety Codes Council points out that s.49 of the SCA provides that one or more of several parties, many of whom are obviously not the current registered owner, may be the proper subject of an order. As such, the Council contends, it is clearly not inconsistent with s.49 for an Order to issue against Calbridge and Calbridge’s argument that only the current registered owner is the proper subject of an order is without merit.

[55] I agree that there may be circumstances in which an order would appropriately issue against a number of parties as set out in s.49. For example, where the property is currently registered in the name of an owner, and currently under construction by a contractor, there would be some utility in making an order against both parties because both are at that time well situated to take the necessary remedial actions. In the case at bar, however, the Drysdale property was sold by Calbridge in 1998, with Drysdale taking possession in 1999. Whether Drysdale is willing to grant access to Calbridge to undertake remedial work is beside the point. 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.

3. Did the Safety Codes Council err in its determination that the construction of the residence by Calbridge was the cause of the differential settlement of the Drysdale residence?

[56] Because the Council erred in adding Calbridge as a party to its Order, it is not strictly necessary to consider this question. However, submissions on the point were heard and in my view it is appropriate to address it briefly.

[57] From a review of the submissions of the Safety Codes Officer, it appears that the Safety Codes Officer and the Safety Codes Council relied upon the August 2006 Foundation Review of the Drysdale property conducted by David Price, P. Eng. After a review of the October 1, 2004 Jacques Whitford investigation, the July 30, 2004 Adem Engineering report and a February 17, 1999 Soil Bearing Capacity review by Adem Engineering, as well as an inspection of the property itself, Mr. Price concluded that the builder should have been aware that the lot was utilizing deep fill, and that the deep fill failed to protect the home from differential movement. He concluded that the property had “failed to meet the serviceability standards in the Building Code or reasonable standards of construction when compared to typical construction standards in the experience of Building Regulations inspection staff.”

[58] The Building Code provides that a building may be placed on fill if it can be shown by subsurface investigation that the fill will safely support the building and that detrimental movement of the building will not occur. The Safety Codes Officer and the Safety Codes Council concluded, on the basis of Mr. Price’s report, that the Building Code was breached. I have serious reservations about this conclusion because Mr. Price’s investigation was conducted nearly ten years after construction. It is clear that drywall and foundation cracks occurred much earlier, but I cannot conclude that the conclusions drawn by the Safety Codes Officer and the Safety Codes Council were reasonable in view of the evidence before them.

Conclusion

[59] In the result, the appeal from the decision of the Safety Codes Council order the appellants Tirion and Calbridge to take remedial action in respect of the residences at 287 and 291 Hamstead Way N.W. is allowed. The Appellants are entitled to their costs.

Heard on the 21st day of January, 2008.

Dated at the City of Calgary, Alberta this 8th day of September, 2008.

D.B. Mason
J.C.Q.B.A.

Appearances:

Lowell A. Westersund, Q.C. and Christopher P. Knight, Student-at-Law of Fraser Milner
Casgrain LLP
for the Applicant, Tirion Properties Ltd

Colin D. McKinnon of Scott Hall LLP
for the Applicant, Calbridge Developments Ltd.

Thomas D. Marriott of Brownlee LLP
for the Respondent, the Safety Codes Council

**Corrigendum of the Reasons for Judgment
of
The Honourable Mr. Justice D.B. Mason**

On p. 12, para. 25 the word “consider” should read “considered”.

On p. 13, para. 27 the words “*Kristel Homes* and *Leduc (County)*” should not be bolded.

On p. 21, after para. 59 this matter was heard on January 21, 2008 only and was not heard on November 23, 2007 or January 22, 2008.

On p. 22, appearances should read as follows:

Lowell A. Westersund, Q.C. and Christopher P. Knight, Student-
at-Law of Fraser Milner Casgrain LLP
for the Applicant, Tirion Properties Ltd

Colin D. McKinnon of Scott Hall LLP
for the Applicant, Calbridge Developments Ltd.

Thomas D. Marriott of Brownlee LLP
for the Respondent, the Safety Codes Council