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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

ROBERT HENRY McDONALD)	APPEARANCES:
trading and carrying on business as)	
SURPLUS DIRECT,	)	<u>DAVE G. HILL/RYAN NERBAS</u>
	)	for the plaintiff
plaintiff,)	
- and -)	
)	
PIOTR BIALOWAS, TOMASZ BIALOWAS	)	<u>BRENT C. ROSS/</u>
trading and carrying on business as	)	<u>DARYL A. CHICOINE</u>
TOP PRO ROOFING LTD.,	)	for the defendants
)	
defendants,)	
- and -)	
)	
THE CITY OF WINNIPEG,	)	<u>KALYN B. BOMBACK</u>
	)	for the Intervener,
intervener.	)	The City of Winnipeg
)	
)	
	)	JUDGMENT DELIVERED:
	)	JULY 15, 2021
)	

PERLMUTTER A.C.J.Q.B.

INTRODUCTION

[1] The plaintiff Mr. McDonald and the defendants own neighbouring commercial properties in Winnipeg. Mr. McDonald operates a business of buying

primarily furniture at liquidation and selling it to the public from his building on his property at 843 Main Street. The defendants use the yard on their property at 847 Main Street, which abuts Mr. McDonald's building, to store material and equipment. This action arose out of Mr. McDonald's ability to use a "man door" on the north wall of his building as a means of egress. The man door was blocked, or has the potential to be blocked, by equipment stored on the defendants' property. This in turn led to the City of Winnipeg determining that Mr. McDonald's building did not comply with the Building Code, and, therefore, Mr. McDonald was not entitled to an occupancy permit without making modifications to his building.

[2] Mr. McDonald brought this action seeking an order that he had a prescriptive easement over the defendants' property which would allow him to use the man door as a means of egress. Additionally, Mr. McDonald seeks a declaration that his building complies with the Building Code that was in effect at the time it was constructed (early to mid-1940's), and, therefore, it is not required to comply with the current Building Code. Shortly before the trial commenced, Mr. McDonald abandoned his claim for an easement, leaving the declaration regarding the Building Code as the only relief sought.

ISSUES

[3] It is undisputed that based on the available plans, permits, and City inspection reports, Mr. McDonald's building was originally constructed in the early to mid-1940's with a final expansion completed in 1951. It is also undisputed that the 1941 Building Code was in effect from 1941 to 1953. Very much in dispute is

whether the man door existed and exited from Mr. McDonald's building during this period and if so, is it governed by, required and compliant with the 1941 Building Code?

[4] It is the defendants' position that the 1941 Building Code does not apply and Mr. McDonald has no right to exit from the man door onto their storage yard. The City, which intervenes as an added party, supports the defendants' position and says the 2011 National Building Code applies. However, primarily, it is the City's position that this action ought to be stayed or dismissed on the ground that this issue ought to proceed in accordance with the statutory framework requiring such matters be determined by the Standing Policy Committee on Property and Development, Heritage, and Downtown Development (SPC) and/or the Winnipeg Building Commission (WBC) and/or because another proceeding is pending between Mr. McDonald and the City in respect of the same subject matter. As such, the City submits this court has no jurisdiction or ought to decline jurisdiction.

[5] In order to provide the necessary context, I will address why I have decided to exercise jurisdiction after I deal with the substantive issues.

EVIDENCE

Mr. McDonald's Case

[6] At trial, Mr. McDonald testified and called Edward Traa who is a senior fire prevention officer with Winnipeg Fire and Paramedic Service (WFPS) and Colin Neufeld who is an architect. Both Mr. Traa and Mr. Neufeld were qualified to give expert testimony. In addition, Mr. McDonald filed the Affidavit of

Allan Adelman affirmed April 19, 2019. It was agreed by all parties that this affidavit be admitted into evidence under s. 58(1) of *The Manitoba Evidence Act*, C.C.S.M. c. E150, (MEA) and under the common law necessity and reliability exception to the hearsay rule on the basis that it is necessary as Mr. Adelman is deceased and threshold reliability is met. It was also agreed that the weight to be attached to this evidence under the MEA and with regard to ultimate reliability (which concerns reliance and weight) would be determined separately once all the evidence was heard, following closing argument.

[7] Mr. McDonald acquired the building in 2007. In 2013, he applied for a building occupancy permit. On July 3, 2013, the City's Planning, Property and Development Department (PPD) denied the building occupancy permit and enumerated the conditions of denial ("PPD's two conditions") as:

1. **Infill** all main floor exterior window and door openings (including overhead door opening [and **the man door**]) on north elevation – not permitted.
2. Provide exterior exit landing and stair with handrails at exterior exit door on east elevation (i.e. back lane).

[Emphasis added]

[8] On July 10, 2013, PPD provided an interim occupancy permit for the building to expire October 3, 2013, and indicated the issuance of a permanent building occupancy permit was contingent on Mr. McDonald addressing (among others) PPD's two conditions. Mr. McDonald did not make the changes identified in PPD's two conditions. On September 21, 2015, an offence notice was issued to Mr. McDonald for using the premises without first obtaining a required building occupancy permit. Mr. McDonald entered a guilty plea to this common offence

notice. On November 4, 2016, Mr. McDonald was ordered by the Provincial Court to obtain a building occupancy permit by, and to ensure that all required work in PPD's two conditions and inspections are completed prior to, March 4, 2017. Mr. McDonald did not comply with this court order.

[9] At the end of May 2018, a fire crew that was conducting inspections identified for Mr. Traa that a bulldozer located on the defendants' storage yard was blocking the exterior of the man door exiting from Mr. McDonald's building. Mr. Traa attended at both Mr. McDonald's building and the defendants' neighbouring building, which led to the issuance to the defendants of a fire prevention order dated June 1, 2018 (the WFPS order). The WFPS order provides that:

- The defendants' premises were in a condition which constitutes a threat to life and property and contravenes the Manitoba Fire Code, as adopted by the Winnipeg Fire Prevention By-Law No. 35/2017.
- Sentence 2.7.1.6(1) of the Manitoba Fire Code states:

Means of egress shall be maintained in good repair and free of obstructions.
- The required exit door on the north side of Mr. McDonald's building (the man door) is obstructed by a heavy implement. The implement located on the defendants' rear lot has completely blocked the means of egress.
- The defendants were to remove the implement blocking the means of egress.

[10] The defendants complied with the WFPS order by removing the bulldozer.

[11] On December 19, 2018, PPD issued to Mr. McDonald an order to vacate the premises. This order noted again that an occupancy permit would be issued only after Mr. McDonald attended to PPD's two conditions. Mr. McDonald appealed this

order to SPC. This appeal is pending. One of the issues in that appeal will be whether the man door complies with the applicable building code.

[12] Mr. McDonald testified that the man door was constructed in the mid to late 1940's. He says the 1941 Building Code is the applicable building code. Mr. McDonald has not complied with PPD's two conditions because to do so would change his compliance with 1941 Building Code, which requires three exits. These three exits are provided by the main entrance door on the west, the east loading dock door, and the man door on the north. Mr. McDonald also testified that he has the right to go through the man door onto the defendants' property without the defendants' permission in the case of an emergency.

Mr. Neufeld

[13] Mr. Neufeld provided an opinion and testified that Mr. McDonald's building is compliant with the 1941 Building Code in relation to providing the required three exits from the building on the ground floor. Specifically, Mr. Neufeld opined that the man door is both required and compliant at the time of construction with the literal reading of the 1941 Building Code.

Mr. Traa

[14] Mr. Traa also concluded that if the 1941 Building Code or the 1953 Building Code (which salient articles read the same) applies to Mr. McDonald's building, a third exit is required. It is Mr. Traa's opinion that the man door exit is currently required by, and compliant with, the current Fire Code and these building codes.

[15] Mr. Traa also opined that the defendants are required by the Fire Code to keep the man door free and clear of obstructions. In support of this opinion, Mr. Traa referred to s. 2.7.1.6 of the National Fire Code which states that means of egress shall be maintained in good repair and free of obstructions. Mr. Traa testified this is why the WFPS order was issued to the defendants to remove the bulldozer from blocking the man door as a means of egress.

[16] Much of Mr. Traa's testimony was also confirmed through the City's answers to undertakings based on follow-up questions to him, as read-in by Mr. McDonald's counsel.

The City's Case

[17] At trial, the City called Geoff Mikolayenko and Mark Reshaur. Their testimony included the following.

Mr. Mikolayenko

[18] Mr. Mikolayenko is employed by the City as the commercial inspections administrator with PPD. PPD is responsible for the building code permitting system. In his testimony, Mr. Mikolayenko described PPD's permitting process and PPD's involvement in this matter.

[19] The Building Code applies to building construction at the onset and if there are alterations, change of use, or change of occupancy after the building is constructed and occupied. A building occupancy permit is the written authorization for the owner or occupant to occupy the building. In the context of existing buildings, an occupancy permit includes a verification the building is safe to

occupy. If PPD becomes aware of work done without a required permit, under the Winnipeg Building By-law it is the owner's responsibility to correct this, even if the work was done prior to their ownership of the building. Where a new owner is coming into a building and is not contemplating alterations, the owner applies for an "occupancy only permit". Once issued, it is permission for the owner to call for occupancy inspections, which includes inspection to determine whether the building plans reflect what is onsite and whether there are items that are unsafe or are risk conditions that have to be addressed prior to the release of the building occupancy permit.

[20] In undertaking the review of Mr. McDonald's application for an occupancy only permit, on the north side of Mr. McDonald's building, the overhead doors, the man door, and two windows were identified as not existing on previous permits. The concern was they were along the property line and the (current) Building Code would not permit such openings without them providing protection against the spread of fire, which Mr. Mikolayenko testified is difficult to achieve. The man door exiting to the defendants' storage lot presented the additional concern about whether Mr. McDonald's building had free passage or a right of passage over the defendants' property so as to access the public thoroughfare, which could have been the lane on the east. Based on the Building Code, an exit needs to provide a path of travel from anywhere in the building through that door to either a public thoroughfare or to a protected space outside of the building that has access to a public thoroughfare. Other items noted were that the stairwells serving the second

floor were not in the same location as the City's available information. It was decided these would all be further investigated onsite once the occupancy only permit was issued and the occupancy inspections were called for.

[21] On April 30, 2013, the occupy only permit was issued. The resulting inspection led to the July 3, 2013 letter from PPD to Mr. McDonald outlining the conditions of denial referred to above. PPD's two conditions were intended to correct the exiting of the building so that it would have a second code compliant exit at the back of the building (on the east). The Building Code requires an exit door (in this case the east door at the back) that is not at grade to be served by a proper landing and stair. Following Mr. McDonald's commitment to resolve PPD's two conditions, on July 10, 2013, an interim occupancy permit was issued, which was reflective of the City giving Mr. McDonald occupancy of his building until October 3, 2013, to allow that time to resolve his exiting issues either with changes to his own property or with some type of agreement with the defendants.

Mr. Reshaur

[22] Mr. Reshaur's testimony included the following.

[23] Mr. Reshaur is an assistant fire chief with WFPS. His responsibilities include supervising the day-to-day work of the Fire Prevention Branch. The Fire Prevention Branch exists for the enforcement of the Fire Code, the Fire Prevention By-law and other related civic legislation. This branch conducts fire inspections. The director of the Fire Prevention Branch runs the day-to-day operations of this

branch. Mr. Traa reports to the director of the Fire Prevention Branch and the director of the Fire Prevention Branch reports to Mr. Reshaur.

[24] PPD is responsible for enforcement and administration of the Building Code and administers the occupancy process. The Building Code stipulates building fire and life safety features. Once a building is built in compliance with a permit issued by PPD and then receives an occupancy permit from PPD, the Fire Prevention Branch then takes over responsibility for enforcing the maintenance of fire and life safety systems. If WFPS becomes aware of a Fire Code issue that represents an immediate life safety issue, it is the authority having jurisdiction and the responsibility to promptly deal with that issue to ensure the protection of the public. WFPS would deal with a compromised egress in a very prompt manner.

[25] In the case at hand, after the WFPS order was issued on June 1, 2018, the Director of Fire Prevention who issued the order, brought it to Mr. Reshaur's attention. It was an unusual order in that it was directed to the defendants to maintain the exit from Mr. McDonald's building clear of obstructions. At the time of issuance of the WFPS order, the Fire Prevention Branch did not know if there was an agreement or easement that guaranteed Mr. McDonald's building access to the defendants' property with the defendants obligated to maintain the man door clear of obstructions. WFPS's options were to maintain the man door clear of obstructions or close down Mr. McDonald's building. It was decided to maintain the man door as the means of egress unobstructed by issuing the WFPS order to the defendants. When it became apparent to Mr. Reshaur that Mr. McDonald was

interpreting the WFPS order as giving him a perpetual right to access the defendants' property and there were no agreements or legal vehicles assuring access to the defendants' property, Mr. Reshaur, with a manager in PPD, signed a letter dated February 27, 2019, to Mr. McDonald's lawyer. This letter includes the following:

...the Public Service has been consistent in its position that [Mr. McDonald] needs to provide a building code-compliant second exit. Short of a conforming construction agreement, prescriptive easement, encroachment agreement or other legal document that would establish the right of [Mr. McDonald] to exit onto [the defendants' property], the [man door] cannot be considered to be a viable exit, irrespective of when it was established or whether it was established under a permit. [Mr. McDonald's lawyer's] contention that the WFPS Order creates a permanent right of access is incorrect. The WFPS Order only addresses an immediate safety situation.

John Frye

[26] The City and the defendants jointly retained John Frye, an engineer, who gave expert testimony at trial.

[27] Dr. Frye's testimony essentially supports PPD's position as articulated by Mr. Mikolayenko including with respect to safety concerns regarding the use of the man door as an emergency exit and the need to provide a landing and stairs to grade for the east doors.

The Defendants' Case

[28] The defendant Piotr Bialowas testified and called Norman Blerot. Their evidence included the following.

Piotr Bialowas

[29] Mr. Bialowas, with his brother the co-defendant Tomasz Bialowas, own the defendant Top Pro Roofing Ltd., which is a roofing company. Messrs. Bialowas

bought their land and building at 847 Main in 2011. There are no caveats or instruments registered against their title that would allow the occupants of Mr. McDonald's building to enter the defendants' property. When Mr. Bialowas bought the property, he was aware of the man door and acknowledged there was nothing blocking it, although he was not aware if it was being used.

[30] Their storage lot (which is adjacent to the north of Mr. McDonald's building) is surrounded by a six-foot high fence with locked gates to protect the material and equipment stored in this lot (this fence is not along the north wall of Mr. McDonald's building and does not block the man door). There is no unused space in this storage lot and in a typical day, it is chaotic as there is lots of movement of material and equipment going to and from job sites. If he had to keep a path open from the man door, it would interfere with his day-to-day operations because he needs to use his property to its full extent and does not know who comes and goes through the man door. He wants to extend his building so that he can put up more office and indoor storage space, which he could not do in the same way if he is required to keep the area around the man door as open space. He wants Mr. McDonald to seal off the man door or prevent entry onto the defendants' property. He did not appeal the WFPS order because it was just temporary.

Mr. Blerot

[31] In light of the brick construction of Mr. McDonald's building, Mr. Blerot is a mason who was qualified to give expert testimony. Mr. Blerot opined that the man

door is not of original construction before or during the 1947 addition to Mr. McDonald's building. It is typical of early 1980's installation for creating a new door opening.

ANALYSIS

[32] Mr. McDonald argues that because the man door complied with the requirements of the 1941 (and 1953) Building Code and has been used as an exit since the mid to late 1940's, he does not have to meet the (current) Building Code requirements. Accordingly, Mr. McDonald asserts he is entitled to the declaration he seeks and this declaration will have a practical effect in resolving the question of whether he has the right to use the man door as a fire exit without it being obstructed by the neighbouring property owner.

[33] In my view, for the following reasons, Mr. McDonald has not met his onus of demonstrating that the man door is governed by, required and compliant with the 1941 Building Code.

Existence of the Man Door

[34] To begin, Mr. McDonald argues that it is more likely than not the man door was in existence during the salient time. However, I find that the man door did not exist from Mr. McDonald's building during the currency of the 1941 Building Code (1941-1953). I make this finding for the following reasons.

[35] First, while several witnesses testified it can be difficult to locate permits for older buildings in City records, the man door is not indicated on any of the plans, permits or City inspection reports.

[36] Second, an aerial photo produced by Mr. McDonald from November 1959, which includes Mr. McDonald's building, does not show the man door.

[37] Third, I place substantial weight on Mr. Blerot's expert opinion that the man door is not original to construction of the wall.

[38] Mr. Blerot is a journeyman bricklayer. He has been working since 1988 in this field. He has experience with heritage buildings such as doing masonry restorations at the Via Rail Train Station, the City Place Building, Dalnavert Museum, and MEC Winnipeg. He is president of the Manitoba Masonry Institute and is past president of the Manitoba Masonry Contractors Association.

[39] Mr. Blerot gave a sensible and compelling explanation about how he arrived at his opinion, using photographs of Mr. McDonald's building and the man door to support his opinion. In his evidence, he pointed out the different manner in which the wall bricks around the doorjambes of the man door are chisel cut without the "common bond" pattern and finishing of other window and door openings in the building. As well, Mr. Blerot gave evidence that the mortar used around the man door was of a type of premix commonly used in the 1980's, which is different in texture and colour from the mortar used in the 1947 timeframe. He pointed to a photograph which shows these colour differences between the mortar used on the sides of the man door (commonly used in the 1980's) and the mortar used on the rest of the wall. He also gave evidence regarding a photograph that shows this same mortar (commonly used in the 1980's) was pushed in, when the lintel (which

provides support for the weight above the opening) was installed to create the doorway.

[40] Mr. Blerot's opinion on the foregoing construction issues was not challenged on cross-examination. Moreover, he withstood cross-examination on his credentials. It was pointed out on cross-examination that he did not engage in masonry work in the 1940's. However, as noted, he has worked on heritage buildings and has significant relevant experience on which to ground his opinion. Mr. Blerot was challenged extensively on cross-examination regarding his characterization of Mr. Adelman's affidavit evidence (discussed further below) that Mr. Adelman used the man door from 1945 to 1963 as Mr. Adelman's "opinion" as opposed to fact. Mr. McDonald's counsel suggested this line of cross-examination proved Mr. Blerot was partisan in favour of the defendants. However, in my view, Mr. Blerot's answers in the context of this line of cross-examination do not detract from his other compelling evidence as I have discussed it above. I find Mr. Blerot's evidence to be credible and convincing.

[41] Fourth, the only first-hand factual evidence the man door existed during the time frame covered by the 1941 Building Code (between 1941 and 1953) is in Mr. Adelman's affidavit. Mr. Adelman deposed that he used the man door as an entrance and exit while his father occupied 843 Main from 1945 to 1963. Mr. McDonald's counsel argued that the most weight should be put on Mr. Adelman's testimony as he had nothing to gain in giving this evidence and unlike the experts he was not trying to justify his opinion. Mr. McDonald's counsel

pointed out that Mr. Adelman's memory is reliable as his description of the building addition being finished around 1951 accords with the building plans and his evidence as to the location of the man door on the building accords with a photograph. However, I give minimal weight to Mr. Adelman's evidence. I find that ultimately his evidence is not reliable.

[42] I question the reliability of Mr. Adelman's affidavit evidence given that it is inconsistent with the compelling evidence discussed in the three areas noted above. As well, while obviously through no fault of his, Mr. Adelman was not cross-examined on his affidavit. Testimony under oath, and cross-examination, have been considered to be the best assurances of the truth of statements of facts presented (David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 4th ed. (Toronto: Irwin Law, 2005), at 239, quoting from *R. v. Abbey*, [1982] 2 S.C.R. 24, at 41). Here, it is of particular concern that Mr. Adelman cannot be cross-examined on his evidence because the statements of fact deposed to by him address one of the bedrock issues. As argued by the defendants' counsel, if Mr. Adelman was cross-examined, for example, it might have been suggested to him that it was possible he was using the exit on the south wall of the building as opposed to the man door on the north. The following direction is also provided in s. 59(1) of the MEA, regarding the estimating of weight to be attached to evidence admitted under s. 58 of the MEA:

In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by section 58, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question

whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated...

[43] Mr. Adelman affirmed his affidavit on April 19, 2019. Based on his evidence that he was 12 years old when his father bought 843 Main Street in 1945, he was about age 86 when he affirmed his affidavit. His evidence is of his memory from 1945 to 1963, during which time he deposed he used the man door. As such, in his affidavit, he was recalling memories dating back about 56 to 74 years. As argued by the defendants' counsel, this is the opposite of a statement made "contemporaneously with the occurrence or existence of the facts stated".

[44] Having regard to all of the circumstances, as I said, I give very little weight to Mr. Adelman's affidavit evidence.

[45] Fifth, by reason of the evidence presented by Mr. Neufeld and Mr. Traa that three exits were required under the 1941 Building Code, it is suggested that the man door must have been present as one of these three exits. On this basis, these three exits would have been the main entrance on the west, the east door, and the man door. However, the building plans reflect an additional door on the south side. Dr. Frye addresses this in his report (p. 12, para. 1):

"I do not agree that the three *exits* were necessarily provided by the entrance, the East and North [man door] doors. This is because plans reflect the existence of a door on the South wall of 843 Main Street dating back to 1947. Drawings also reflect that the building South of 843 Main Street was not expanded past the South door until 1972."

[46] On cross-examination, Mr. Neufeld acknowledged that prior to trial, he had not seen the 1951 building plan that showed another loading door on the south. Similarly, Mr. Traa testified that if this south exit was still in a useable condition,

he could not say for sure it would still be his opinion that the man door was necessary to meet the life safety requirements of the Fire Code and whatever building code is applicable. While it is unknown whether the south door was a third exit at the salient time, it undermines the suggestion that the man door was necessarily in existence as one of three exits in the timeframe covered by the 1941 Building Code.

[47] Given my finding that the man door did not exit from Mr. McDonald's building during the currency of the 1941 Building Code, I find that the man door is not governed by the 1941 Building Code.

Unsafe Condition and Compliance with the 1941 Building Code

[48] If the man door existed during the currency of the 1941 Building Code, Mr. McDonald relies on the doctrine of non-conforming use and the exemption for non-conforming use in s. 241 of ***The City of Winnipeg Charter***, S.M. 2002, c. 39. However, I agree with the defendants' counsel that the doctrine of non-conforming use is limited to the application of zoning legislation (***Tuteckyj v. Winnipeg (City)***, 2012 MBCA 100, para. 37). Applicable to the case at hand is

The Winnipeg Building By-law No. 4555/87, which includes the following:

5.8.2 ... the owner of a building must ensure that every part of the building is in compliance with the Codes that were in effect at the time that that part of the building was constructed, altered or renovated. This requirement applies whether or not the owner owned the building at the time that the building or part of the building was constructed, altered or renovated.

...

8.3 The designated employee shall accept any construction or condition that lawfully existed prior to the effective date of the Code unless the

construction or condition constitutes an unsafe condition or contravenes some other by-law or regulation.

[49] So, even if the man door existed during the currency of the 1941 Building Code, it still must comply with the current Building Code requirements because, as I will explain, the man door creates an unsafe condition as it cannot be safely used without access to the defendants' property.

[50] The man door is on the property line and opens onto the defendants' property. Neither the 1941 Building Code nor the current Fire Code provide a right to use the defendants' property to allow egress through the man door.

[51] In support of their opinions that the man door is a required exit and compliant with the 1941 Building Code, both Mr. Traa and Mr. Neufeld rely on the following from the 1941 Building Code:

4.6.5.2 Number of Exits

...

(b) From Floor-areas on the Ground Floor. – Every *floor-area* to which there is *direct access* by doorways from a *street* (i.e., a ground floor), and which is designed or intended for more than 100 persons, or which has an area in excess of 3000 square feet, shall have at least two independent *exits*.

4.6.5.3 Location of Exits.-

(a) Distance to Exits. – *Exits* in buildings of Type 1A, 1B, or 1C (Fire-resistive) Construction, or Type 5 (Unprotected Metal or Fire-retardant Treated Wood) Construction shall be so located that no point in any *floor-area*, room, or space served by them is more than 150 feet distant from an *exit* measured along the line of *exit* travel; *exits* in buildings of other types of construction shall be so located that no such point is more than 75 feet distant from an *exit*.

...

2.1.1 For the purposes of this Code the definitions and interpretations given in this Article shall govern:

...

Exit shall mean a channel or means of egress providing passage from any building, *storey*, or *floor-area* to a *street* or other open space of equal safety.

4.6.1. General Requirements.

...

Where the term *street* is used as indicating the ultimate goal of an *exit*, it shall be interpreted as including any space open from ground to sky which is sufficiently large to constitute a place of safe refuge.

[52] In his report, Mr. Neufeld noted the definition of an exit has been revised over time to include an open public thoroughfare (street) or an open space with access to an open public thoroughfare. However, the 1941 Building Code only refers to the open space without including the part about access to the public thoroughfare. Therefore, reading the literal meaning of the 1941 Building Code in regards to the validity of the man door, it is compliant, as it opened into "space open from the ground to sky which is sufficiently large to constitute a place of safe refuge" on the adjacent defendants' property.

[53] Mr. Traa concluded the north wall of Mr. McDonald's building meets all requirements under the Fire Code and the man door meets the required fire resistance rating of an opening in a two-hour fire rated wall. For the purpose of being "sufficiently large to constitute a place of safe refuge" as required by the 1941 Building Code, this two-hour fire rating would protect those standing on the other side of the north wall of Mr. McDonald's building (in the defendants' storage

lot) from fire for two hours. Safe refuge would be from the man door exit along the north wall of the building.

[54] Dr. Frye testified that while the definition for exit has changed from the 1941 Building Code, the intent has always been the same. An exit should be able to take a person to an open space, acceptable to the authority having jurisdiction, that is far enough away from a building on fire such that he or she is not exposed to heat, flame, smoke or the possibility of collapse. As such, Dr. Frye opined that the man door would be a non-conforming exit and cannot be considered a required exit until such time as an easement agreement or some other right of access is in place that provides an unobstructed right of passage onto and through the defendants' property.

[55] I accept Dr. Frye's evidence for several reasons.

[56] First, the 1941 Building Code does not say for the purpose of an exit, the "space open from ground to sky which is sufficiently large to constitute a place of safe refuge" can be on a neighbouring private property. In my view, such an interpretation would be unreasonable as I would expect that if a building code could confer such property rights, at a minimum it would clearly say so. As noted in Dr. Frye's report, the building code does not create property rights permitting access to private property. Indeed, both Dr. Frye and Mr. Mikolayenko testified the building code regulates construction within property lines.

[57] Second, as Dr. Frye testified, it is common sense that if a person is evacuating a building he or she wants to get far enough away that he or she is no

longer exposed to the hazards of heat or smoke and also the possibility of wall collapse. It was Dr. Frye's evidence that without a right of access easement to such space on the defendants' property, it could result in the man door being blocked and unusable. This all accords with Mr. Mikolayenko's reasoning that even if the 1941 Building Code applied, PPD would not issue an occupancy permit to Mr. McDonald because there is no free access to the public thoroughfare, and, therefore, Mr. McDonald would have to engage in an agreement with the defendants to allow access onto their property.

[58] Third, Mr. Neufeld acknowledged that his opinion was based on the literal reading of the 1941 Building Code, and gave evidence that the (current) Building Code definition of exit "has expanded on and clarified the general position that we find in the 1941 building code. It makes it more explicit." To this extent, Mr. Neufeld's opinion reconciles with Dr. Frye's opinion that the intent did not change and was always to get a person far enough away to a space where he or she is not in danger of fire from the building or building collapse.

[59] Mr. McDonald contends that the WFPS order provides the requisite access from the man door onto the defendants' property. Mr. Traa's testimony certainly supports this position. Mr. Traa pointed out that s. 2.7.1.6 of the Fire Code states that means of egress "shall be maintained in good repair and free of obstructions". Mr. Traa testified that the Fire Code is silent as to whether it applies to only the owner of the building and does not provide an exception where another person's property is involved. As such, Mr. Traa testified the WFPS order was properly

issued to the defendants as they were blocking the means of egress from the man door and that the WFPS order will continue to apply.

[60] I reject the evidence and argument that the WFPS order provides the requisite ongoing access from the man door onto the defendants' property. Simply, the WFPS order cannot create a right of access from the man door over the defendants' property.

[61] Mr. Reshaur made this point in his testimony. Mr. Reshaur is Mr. Traa's superior. He (along with the director of Fire Prevention who signed the WFPS order) has delegated order signing authority from the Fire Chief pertinent to fire operations and prevention. Mr. Reshaur testified that under the circumstances, he disagrees with Mr. Traa's opinion that the defendants are required by the Fire Code to keep the man door free and clear of obstructions. He pointed out that ***The Fires Prevention and Emergency Response Act***, C.C.S.M. c. F80, and the Fire Prevention By-law clearly state the owner of property and/or their tenant is responsible for ongoing compliance with the fire code. The Fire Prevention By-law provides in s. 5:

Unless otherwise stated, the obligation for compliance with the provisions of this By-law is imposed on both the owner and the occupant of a property.

[62] This obligation includes maintenance of the means of egress under article 2.7.1.6 of the Fire Code (as referenced above in relation to Mr. Traa's evidence). This is also reflected in s. 70(1) of the Fire Prevention By-law, which provides that an owner of a building who fails to comply with this article is subject to a penalty. Here, the owner is Mr. McDonald. Mr. Reshaur testified that in this particular case,

with all the information available, it is not appropriate that the defendants be required to maintain the means of egress unobstructed and that the WFPS does not have that authority. Mr. Reshaur testified the WFPS does not possess authority to assign, take, or declare property rights.

[63] Without assured access from the man door to the defendants' property, for the purpose of s. 8.3 of the Winnipeg Building By-law, I find that the man door also constitutes an unsafe condition. In making this finding, I agree with the City's position as explained in the Deputy City Solicitor's email of March 13, 2019 to Mr. McDonald's counsel at the time:

The City's position is that the door referred to [is] not acceptable because it does not open onto a public right of way but rather exits directly onto the neighbouring property (847 Main). This represents an unsafe condition because the owner of 847 Main is entitled to use or develop that property within the limits of the zoning and other by-laws. If the owner were to construct a building or other structure along the property line, as he/she is legally entitled to do, or to store equipment or supplies up to the property, as he/she is entitled to do, the individuals exiting 843 Main using the door in question would be trapped.

[64] Mr. Mikolayenko provided a related explanation in his email of December 27, 2018 to Mr. McDonald's counsel at the time:

Unsafe Condition means (Code definition) any condition that could cause an undue hazard to the life, limb or health of any person authorized or expected to be on or about the premises.

Both the absence of a Court Declaration for the "Prescriptive Easement"...or other legal instrument for access from the north man door across 847 Main and the absence of a landing and stairs at the required exit doors at the lane (required for remoteness of exits) create an Unsafe Condition from the 1st storey (main floor) for exiting.

[65] Without a legal right of access to the defendants' property, there is no assurance the man door will provide a safe exit from Mr. McDonald's building

across the defendants' property. As I said earlier, Mr. McDonald chose to abandon his claim for an order that he has an easement over the defendants' property. Accordingly, even if the man door existed during the currency of the 1941 Building Code, I find that the man door is not governed by, or compliant with, the 1941 Building Code.

Jurisdiction

[66] As noted, it is the City's position that this court does not have jurisdiction or ought to decline jurisdiction to determine this action on its merits because ***The City of Winnipeg Charter*** sets out a statutory framework for addressing these kind of matters and the same issues raised in this action are pending before SPC in Mr. McDonald's appeal of the order to vacate. The City relies on the principle that, where the legislature has stipulated remedies or a procedure, an applicant must comply with such remedies or procedure. An applicant cannot instead avoid the roadmap set out in the legislation by bringing an action against the government. (***Basaraba v. Manitoba***, 2009 MBQB 28, para. 16.)

[67] The matters before SPC were originally adjourned¹ as the day before the SPC hearing, on March 14, 2019, Mr. McDonald filed a notice of application in this court against the defendants and the City, which sought orders/declarations associated with an alleged prescriptive easement over the defendants' property and/or a party wall agreement impacting upon the defendants' use of their property. Mr. McDonald's claim for declaratory relief regarding the 1941 Building

¹ The SPC hearing adjournment was extended several more times and the hearing has still not proceeded.

Code was not included in the notice of application. In early 2020, the notice of application was converted into the present action. On March 4, 2020, Mr. McDonald filed his statement of claim. In addition to claims regarding a prescriptive easement and with respect to the party wall agreement (which were also part of the notice of application), the statement of claim includes Mr. McDonald's claim for declaratory relief regarding the 1941 Building Code. The City was not originally named as a party to the statement of claim. By consent of the parties, on September 29, 2020, the City was granted leave to intervene as an added party in relation solely to Mr. McDonald's claim for declaratory relief regarding the 1941 Building Code. On April 8, 2021, Mr. McDonald filed a notice of discontinuance regarding his claims for a prescriptive easement and the party wall agreement. The only remaining claim is for the declaratory relief regarding the 1941 Building Code.

[68] It is Mr. McDonald's position that in light of how this matter proceeded, the City accepted the court's jurisdiction. Mr. McDonald's counsel argued the City purposely adjourned the SPC hearing until the determination of this trial and the late timing of the City's objection to jurisdiction precludes it from taking this position. Similarly, it is the defendants' position that by reason of how this matter proceeded, the City is estopped from objecting to the court's jurisdiction. At trial, Mr. Bialowas testified he would not have provided the defendants' consent to the City intervening as an added party if he was aware the City would take the position this matter be dealt with through the City process and not the court. The

defendants also submit that because they are not parties to the SPC proceeding, the principle that an applicant must comply with statutorily stipulated remedies or procedure is inapplicable.

[69] In my view, the question raised by the City's position is not whether the court has jurisdiction, but whether this court should exercise its jurisdiction.

The City of Winnipeg Charter does not limit the court's jurisdiction to grant the declaratory relief sought. However, Mr. McDonald has not exhausted the alternative remedy available through the City's process and there is in fact a pending appeal before SPC. In such a scenario, for the court to adjudicate a matter that is pending within an administrative scheme requires exceptional circumstances.

[70] In my view, the circumstances in this case are exceptional. Given the time, procedural steps, and resources devoted by the parties and the court in the unfolding of this action prior to, and then through, trial, in my view, it would be unjust for this court not to exercise jurisdiction.

[71] To provide proper context for my decision to exercise jurisdiction, further is required about the procedural background of this action.

[72] After it was indicated that the notice of application was to be abandoned but before filing the statement of claim, on February 6, 2020, there was a first case management conference with counsel for Mr. McDonald and the defendants. A timeline was agreed to for the filing of pleadings and discovery. Trial dates were set for nine days, from May 17 to 28, 2021. Counsel for the City was not at this

conference, but to encourage and permit further resolution discussions, the other counsel were asked by the court to contact the City's counsel.

[73] At the second case management conference on June 22, 2020, Mr. McDonald's counsel indicated the City advised it would not be participating in resolution discussions. Counsel were again advised to follow up with the City's counsel to determine if the City would participate in resolution discussions. Other pre-trial issues were discussed and it was confirmed the matter remained on track for trial.

[74] On August 11, 2020, by letter, the City's counsel advised the court the City was pursuing a motion to intervene and provided the related rationale.

[75] At the third case management conference on September 29, 2020, counsel for the City attended. It was indicated there would be a consent order for the City to intervene as an added party. The City's counsel also identified the witnesses it expected to call at trial. The parties indicated there may be a request for judicially assisted dispute resolution (which later took place).

[76] At the fourth case management conference on February 24, 2021, further issues to ready the action for trial were addressed. For example, counsel for the defendants and the City indicated they would consider whether there may be some duplication of their trial witnesses, such that they need not all be called. All counsel agreed to timelines for the filing of expert reports, agreed books of documents, and legal briefs. It was also indicated that within a week of this case management conference, the City would file its statement of defence. Significantly, up to this

point (about three months before trial), there was no clear indication by the City that it was taking issue with the court's jurisdiction to hear this action on its merits.

[77] On March 3, 2021, the City filed its statement of defence. The City pled to the merits of the declaratory relief regarding the 1941 Building Code and also pled:

The Building Code Issue is rooted [in] an ongoing matter relating to occupancy of 843 Main; determinations such as these relating to occupancy and the issuance of occupancy permits are matters which fall within the exclusive jurisdiction of [PPD].

When the conditions for occupancy were still not met, PPD issued an Order to Vacate...

McDonald did appeal the Order to Vacate to SPC:

- i. That appeal was originally returnable for determination on Monday, March 18, 2019.
- ii. On March 14, 2019, McDonald... filed [the Notice of Application]...

The SPC hearing of McDonald's challenge to the Order to Vacate has been adjourned pending the outcome of the Court matters, and remains unresolved to-date.

[78] On March 16 and 17, 2021, examinations for discovery took place.

[79] On April 8, 2021, Mr. McDonald filed his discontinuance of all of the action except for the declaratory relief regarding the 1941 Building Code.

[80] On April 9, 2021, the City's counsel filed a case management brief. In this brief, the City's counsel indicated that with the discontinuance of those parts of the claim relating to the prescriptive easement and the party wall agreement, the "Code Issue remains, now as an independent issue" and "as a stand-alone issue, the Code Issue is not properly before" the court. The City also indicated:

"Particularly following the abandonment of the balance of the Claim, the declaration sought in relation to the Application of the 1941 Building Code no longer properly exists before this...Court, and more properly ought to

proceed in accordance with the statutory framework requiring it to be determined by the SPC and/or the WBC.”

As such, the City sought to file a pre-trial motion for a determination of the issue of jurisdiction before trial. At the fifth case management conference of April 13, 2021, the other counsel agreed the City’s statement of defence was pled sufficiently broad that this position and these arguments may be advanced at trial without the need to file a notice of motion.

[81] Based on the City’s position as articulated above, the City was prepared to accede to the court’s jurisdiction until the issue became solely for the declaratory relief regarding the 1941 Building Code. However, the rationale for the change in the City’s position before and after the discontinuance of the claims for the other relief is unclear. Since the time it was added as an intervening party, the City’s status as an intervenor has always been limited to the claim for declaratory relief regarding the 1941 Building Code. The statement of claim has always pled the declaration regarding the 1941 Building Code as an additional stand-alone issue. I do not see how the discontinuance of Mr. McDonald’s claims regarding a prescriptive easement and the party wall agreement would change the foundational question of whether this court has, or should exercise, jurisdiction for declaratory relief regarding the 1941 Building Code.

[82] In my view, it also does not make sense that the City would have participated in defending the merits of the action as it did from the time it was added as an intervening party on September 29, 2020 (having advised six weeks earlier, it was pursuing a motion to intervene), and not sooner pursue such a

foundational motion. By not doing so, as is evident from their positions at trial regarding the City's position, the other parties would not have reasonably understood that the City would ultimately take this position on jurisdiction for the first time, at best, in its statement of defence filed over five months later on March 3, 2021, and much more definitively in its case management brief filed April 9, 2021. In the interim, Mr. McDonald and the defendants (and the City) proceeded with numerous required steps to ready the matter for trial, no doubt incurring substantial costs along the way. To adjourn the trial at the case management conference of April 13, 2021 (so as to permit the City's motion to proceed), about a month before trial, would have created substantial additional delay and would have wasted the two weeks of trial time that had been set since the first case management conference 14 months earlier on February 6, 2020. All of this, along with the multiple days of trial, will, if not adjudicated on the merits, result in a waste of judicial and other resources.

[83] In the end, as I said, with this procedural background and truly exceptional and unique circumstances, it would be seriously disproportionate and unjust not to adjudicate this action on its merits. For these reasons, I am exercising my discretion to adjudicate this action on its merits. However, as should be apparent, given the exceptional uniqueness of these facts and circumstances, my decision to assume jurisdiction should not be considered a precedent for the court assuming jurisdiction in other situations where the legislature has stipulated remedies or a procedure with which an applicant has not complied. In arriving at this

determination, it is also important to emphasize that this action is about the interpretation of by-laws and related codes. It is not about the powers of the City to issue occupancy permits.

CONCLUSION

[84] In conclusion, in these unique and exceptional circumstances, I am exercising my discretion to adjudicate this action on its merits. In doing so, I am dismissing Mr. McDonald's claim for a declaration as I find he has not met his onus of demonstrating that the man door at issue is governed by, required and compliant with the 1941 Building Code.

[85] If the issue of costs cannot be agreed upon, I will receive written submissions.

_____ A.C.J.