

SUPREME COURT OF NOVA SCOTIA

Citation: *Intact Insurance Company v. Baxter Trucking Ltd.*, 2018 NSSC 23

Date: 20180205

Docket: AMH No. 432061

Registry: Amherst

Between:

Intact Insurance Company, subrogated
to the rights of Cumberland Early Intervention Program
and Beaton Blaikie Barristers & Solicitors

Plaintiffs

v.

Baxter Trucking Limited

Defendant

Docket: AMH No. 428289

Between:

Walmer Inc.

Plaintiff

v.

Baxter Trucking Limited and Doug Richard

Defendants

LIBRARY HEADING

Judge: The Honourable Justice Mona M. Lynch

Heard: December 6, 2017 in Amherst, Nova Scotia

Written Decision: February 5, 2018

Subject: *CPR 12.02* Question of Law

Summary: In August 2012, the defendants were contracted by the Amherst Fire Department to assist with an active fire in the Municipality. During the demolition of the building on fire, the wall collapsed and damaged the adjoining building owned by one plaintiff and leased by the other plaintiffs.

Issues: Based on the facts agreed to herein, are either or both of the Defendants Baxter Trucking Limited and Doug Richard immune from tort liability for the claims alleged in the Actions, pursuant to s. 297(5) of the *Municipal Government Act*, SNS 1998, c. 18?

Result: Baxter Trucking and Doug Richard were acting under the direction or authority of an officer in charge, the deputy chief of the AFD, who was exercising powers conferred by s. 297 of the Act. Based on the facts agreed to, both of the Defendants, Baxter Trucking Limited and Doug Richard, are immune from tort liability for the claims alleged in the Actions, pursuant to s. 297(5) of the *Municipal Government Act*, SNS 1998, c. 18.

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Counsel:

Darren G. Blois, for the Plaintiff, Walmer Inc.
Chad G. Horton & Leah N. Grimmer, for the Plaintiff, Intact
Insurance Company
Colin D. Piercey & Jeff Waugh, for the Defendants, Baxter
Trucking and Doug Richard

By the Court:

Background:

[1] This is a motion by the Defendants in the two actions, Baxter Trucking Limited (Baxter Trucking) and Doug Richard, for an order separating a question of law from the other issues in the proceedings and for a determination of a question of law before trial, in accordance with *Civil Procedure Rule (CPR) 12*. The question of law involves the interpretation of Section 297 of the *Municipal Government Act*, SNS 1998, c.18, particularly s. 297(5) concerning liability in relation to an active fire. The plaintiffs in the two actions, Walmer Inc. (Walmer) and Intact Insurance Company, subrogated to the rights of Cumberland Early Intervention Program and Beaton, Blaikie, Barristers & Solicitors (Cumberland Parties), agree it is appropriate to ask the question pursuant to *CPR 12*:

Based on the facts agreed to herein, are either or both of the Defendants Baxter Trucking Limited and Doug Richard immune from tort liability for the claims alleged in the Actions, pursuant to s. 297(5) of the *Municipal Government Act*, SNS 1998, c. 18?

[2] The basic facts agreed by the parties include that the parties have agreed to seek a consent order that the two actions be heard together. Baxter Trucking is a trucking and excavation company located in Amherst, Nova Scotia, offering demolition services, and Doug Richard was a truck driver and excavation operator employed by Baxter Trucking. Walmer was the owner of the building located at 15 Victoria Street in Amherst (the Walmer Building). The Cumberland Parties were tenants in the Walmer Building.

[3] On August 26, 2012, a fire started in the Dooly's building adjacent to the Walmer Building and the Amherst Fire Department (AFD) fought the fire through the night of August 26, 2012, into the next day. The deputy chief of the AFD called the principal of Baxter Trucking, John Baxter, on the morning of August 27, 2012. AFD contracted with Baxter Trucking to demolish the Dooly's building while AFD continued firefighting operations. At all times, Baxter Trucking had the option to refuse to enter into the contract with the AFD and Baxter Trucking was not ordered to assist the AFD.

[4] The AFD has never ordered a company to assist in fighting a fire without payment. When companies, including Baxter Trucking, provided assistance to the

AFD it was always done on a contractual basis. On August 27, 2012, the AFD was trying to extinguish the fire and prevent it from spreading when it contracted with Baxter Trucking.

[5] Baxter Trucking owned both a probe attachment and an extension attachment for their excavators. During the initial phone call between the deputy chief of the AFD and John Baxter on August 27, 2012, John Baxter advised that he would prefer to use the extension attachment to demolish the Dooly's building because of its greater reach. John Baxter also informed the deputy chief that the extension attachment would take eight hours to install. The AFD requested, and John Baxter agreed, that Baxter Trucking would conduct the demolition without using the extension attachment because time was of the essence in preventing the fire from spreading to nearby buildings, causing further damage, and threatening public safety.

[6] During an onsite coordination meeting, before the demolition of the Dooly's building began, John Baxter again informed the AFD that, without the extension attachment, the excavator would not have the reach required to demolish the wall in a controlled fashion. The AFD again requested that Baxter Trucking proceed with the demolition without the use of the extension attachment.

[7] At each step of their operations, Baxter Trucking was following requests for particular operations as provided by the AFD.

[8] John Baxter, and another supervisor employed by Baxter Trucking, took instructions directly from the AFD and relayed those instructions to the excavator operator, Doug Richard.

[9] During the demolition of the Dooly's building, a portion of the wall of the Dooly's building collapsed and caused damage to the Walmer Building. This was the first collapse and it occurred at approximately 3:10 p.m. on August 27, 2012. After the first collapse, Baxter Trucking moved the excavator to the rear of the Dooly's building to demolish what remained of the wall. The second collapse occurred when the remainder of the wall of the Dooly's building collapsed and fell onto the Walmer Building at approximately 3:45 p.m. on August 27, 2012.

[10] The Dooly's Building was on fire for the duration of the demolition and continued to burn until the morning of August 28, 2012. Both demolitions were captured on video and posted to YouTube.

[11] The parties also agreed that:

- (a) The Agreed Statement of Facts provides the only facts needed to answer the Question, with the result that the facts necessary to determine the Question can be found without a trial;
- (b) The pre-trial determination of the Question will help to reduce the length and expense of this proceeding;
- (c) The pre-trial determination of the Question will reduce the duration of the trial (if one is needed), as the parties will be able to prepare and conduct the trial in accordance with the determination; and
- (d) No facts necessary to answer the Question will remain in issue after the determination.

Authorities:

[12] *Civil Procedure Rule (CPR)12.02* reads:

A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:

- (a) the facts necessary to determine the question can be found without the trial or hearing;
- (b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;
- (c) no facts to be found in order to answer the question will remain in issue after the determination.

[13] Section 297 of the *Municipal Government Act* (the Act) reads:

Powers where fire

297 (1) When any fire, rescue or emergency occurs, the fire chief or other officer in charge, and any person under the direction of that officer, shall endeavour to extinguish the fire and prevent it from spreading, conduct the rescue or deal with the emergency and, for that purpose, may

- (a) command the assistance of persons present and any inhabitant of the municipality;
- (b) remove property from buildings on fire or in danger of fire;
- (c) take charge of property;
- (d) enter, break into or tear down any building;
- (e) exclude and remove persons and vehicles from the building or vicinity; and
- (f) generally do all things necessary to respond to the emergency.

(2) It is an offence to disobey any lawful order or command of the

officer in charge.

(3) Where a fire alarm is given or the officer in charge has reason to believe that a fire exists on any premises, the officer in charge and any person under the direction of that officer may enter or break into any building for the purpose of ascertaining whether a fire exists.

(4) The officer in charge may direct that a building be pulled down or otherwise destroyed if, in the judgment of that officer, doing so will tend to contain a fire or protect the public from a dangerous condition.

(5) A municipality, a village, a fire protection district, a fire department, an emergency services provider and an officer in charge, and a person acting under the direction or authority of that officer, are not liable for an act done in the exercise of any of the powers conferred by this Section. 1998, c. 18, s. 297.

Issue:

[14] The parties agree and the court accepts that it is appropriate to separate the question of law and make a determination pursuant to *CPR* 12.02. Therefore, the issue is the question posed by the parties, which I will repeat here for convenience:

Based on the facts agreed to herein, are either or both of the Defendants Baxter Trucking Limited and Doug Richard immune from tort liability for the claims alleged in the Actions, pursuant to s. 297(5) of the *Municipal Government Act*, SNS 1998, c. 18?

Position of the Parties:

[15] The defendants' position is that Baxter Trucking and Doug Richard were acting under the direction or authority of the deputy chief of the AFD during the demolition and they are therefore immune from tort liability for claims in the Actions pursuant to s. 297(5) of the Act.

[16] Walmer's position is that while the AFD was telling Baxter trucking what services it required, it was not ordering Baxter Trucking and therefore Baxter Trucking and Doug Richard were not under the direction of the AFD. Walmer submits that the immunity in s. 297(5) only applies to those who are compelled to act under the direction or authority given to the fire officials and the immunity does not extend to those who voluntarily contract to provide services to a fire department.

[17] The Cumberland parties submit that the legislature did not intend to extend immunity to independent contractors who are under no obligation to assist in a fire. The immunity is only for fire fighters and those conscripted to assist the firefighters under s. 297(1) of the Act.

Analysis:

[18] The issue can be further refined to: Were Baxter Trucking and Doug Richard acting under the direction or authority of the deputy chief of the AFD at the time of the wall collapses on August 27, 2012?

[19] The answer to the issue requires the court to consider the principles of statutory interpretation. In **Sparks v. Nova Scotia (Assistance Appeal Board)**, 2017 NSCA 82 starting at para. 24, the court discusses the “modern approach” to statutory interpretation and the relevant principles of statutory interpretation:

[24] The Supreme Court of Canada has reminded us time and time again that we are to take a pragmatic approach to statutory interpretation. Our approach must be both purposive and contextual. For example, in *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 at ¶ 26 Justice Iacobucci describes this “modern approach”:

[26] In Elmer Driedger’s definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger’s modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example,... I note as well that, in the federal legislative context, this Court’s preferred approach is buttressed by s.12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 , which provides that every enactment “is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”.

[20] The court continues noting that s. 9(5) of the Nova Scotia *Interpretation Act*, R.S., c. 235, s. 1 holds that all enactments shall be deemed remedial, and interpreted to insure the attainment of their objects by considering among other matters:

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

[21] The Court notes that it is only if there is an ambiguity, after applying a purposive and contextual approach, that a court turns to other interpretative aids (para. 28). Quoting from *Bell ExpressVu Ltd. Partnership v. Rex*, the Court notes that an ambiguity must be real; the provision must be reasonably capable of more than one plausible meaning; and each meaning must be equally in accordance with the intention of the statute (para. 29).

[22] The Court concludes that, at the end of the day, legislation should be interpreted in a manner that is both reasonable and just (para. 31).

[23] Statutory interpretation was also recently considered by the Supreme Court of Canada in *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 at paragraph 50:

[50] The modern principle of interpretation requires that courts approach statutory language in the manner that best reflects the underlying aims of the statute. This follows from the obligation to interpret the words of an Act harmoniously with the object of the Act and the intention of Parliament. As Professor Sullivan notes, “[i]n so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided” (Sullivan, at §9.3).

[24] The *Municipal Government Act* is wide ranging legislation dealing with all aspects of municipal governance. Section 297 is a section specific to active fires. Section 297 is under Part X of the Act entitled “Fire and Emergency Services”. Section 297 gives broad and extraordinary powers to persons fighting an active fire. The main purpose of section 297 is to provide broad powers to protect the public by extinguishing the active fire and preventing it from spreading.

[25] Section 297 provides extraordinary powers to ensure the safety of both the people and property in a municipality during an active fire. It provides the power for the officer in charge and any person under the direction of that officer to: command assistance of persons present and any inhabitant of the municipality (s. 297(1)(a)); enter, break into or tear down any building (s. 297(1)(d)); generally do all things necessary to respond to the emergency (s. 297(1)(f)). Where the officer in charge has reason to believe that a fire exists on any premises, the officer in charge and any person under the direction of that officer may enter or break into any building to ascertain whether a fire exists (s. 297(3)). The officer in charge may direct that a building be pulled down or otherwise destroyed if, in the judgment of that officer, doing so will tend to contain a fire or protect the public from a dangerous condition (s. 297(4)).

[26] Along with the extraordinary powers in s. 297 of the Act, there is also an extraordinary immunity in s. 297(5). Among others, an officer in charge and a person acting under the direction or authority of that officer are not liable for an act done in the exercise of any of the powers conferred by s. 297. The purpose of s. 297(5) is to provide immunity to persons exercising the broad powers of s. 297 in fighting an active fire.

[27] Section 297 can be contrasted with s. 300 of the Act which provides a general immunity to the municipality, employees, emergency service providers, etc., for acts or omission in providing, or failing to provide an emergency service, unless they are grossly negligent. Section 300 provides both a more restricted immunity than s. 297 and to a more restricted group of people. The immunity in s. 297(5) is the appropriate immunity to consider during an active fire.

[28] In *Keizer v. Slauenwhite*, 2012 NSCA 20 at para. 7, the court quotes *Sullivan on the Construction of Statutes* as to the three questions an interpreter must address:

- (a) What is the meaning of the legislative text?
- (b) What did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?

What are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?

(a) Meaning of the Text:

[29] It is clear from the text in s. 297(5) that the immunity applies if Baxter Trucking and Doug Richard were acting under the direction or authority of an officer in charge. The parties agree: (a) that the extension attachment was not attached to the excavator at the request of the deputy chief of the AFD, because time was of the essence for public safety; (b) that at each step of the operation Baxter Trucking was following requests of AFD; (c) that Baxter Trucking took instructions directly from the AFD, and relayed those instructions to Doug Richard who was operating the excavator, and (d) that during the demolition by the excavator both collapses occurred.

[30] What does direction or authority mean? Dictionary definitions can be of assistance but the context of the legislation must be also considered. Direction can mean “the management or guidance of someone or something” or “instructions ... about how to do something”, according to the online *Oxford Dictionaries*. Authority is defined in the online *Oxford Dictionaries* as: “the power or right to give orders, make decisions, and enforce obedience”. The context is in an emergency. The purpose is to take all actions necessary to extinguish the fire, prevent the fire from spreading and thereby protecting the public.

[31] There is nothing in the ordinary sense of the words in s. 297 that would exclude from the immunity persons who entered into an agreement with the AFD to provide the services necessary to extinguish a fire. It is not, by its plain reading, restricted to firefighters, volunteer firefighters or other registered emergency service providers under the direction of the fire chief as suggested by the plaintiffs. That is more in line with the wording of s. 300 of the Act.

(b) Intent of the Legislature:

[32] The legislature clearly intended to provide these extraordinary powers and this extraordinary immunity to ensure the safety of the public during an active fire.

[33] The plaintiffs suggest that reading the section to provide immunity to persons under the direction of the officer in charge makes the word “authority” in s. 297(5) meaningless. I do not agree. Direction is about the activity and the manner in which it is done. Authority is about the power to do the activity. Authority is the legal power to do something and direction is how you exercise that power.

[34] The Plaintiffs' proposed meaning invites the court to read words into the legislation that are not there. There is no requirement in s. 297(5) that the person acting under the direction or authority of the officer in charge be conscripted or ordered to do the act. Acting under an order is not the wording chosen by the legislature. In fact, the legislative history shows that the immunity provision in *The Towns' Incorporation Act*, SNS 1918, c. 4 s. 221, limited immunity to persons acting under the scope of an order. *The Towns' Incorporation Act*, SNS 1941, c. 3 s. 207(3), widened the immunity from those acting on an order to persons acting under the direction and authority, which is similar to the present wording in s. 297(5) of the Act. It would be contrary to the principles of statutory interpretation for the court to read in the word "order" when the legislature specifically chose to take it out.

(c) Consequences of Proposed Interpretation:

[35] The plaintiffs suggest that the consequences of the defendant's proposed interpretation changes the common law, as it would shield independent contractors from tort liability. They suggest that legislature would have included independent contractors explicitly in the immunity section if that was the intent. They say that the right to claim against the defendants should not be taken away unless the provision is clear that the immunity applies to the defendants. While that may be the result, the court must apply the principles of statutory interpretation.

[36] The interpretation proposed by the plaintiffs would put a chilling effect on good citizens who agree to help in an emergency. If persons who agree to assist are liable but those ordered are immune, officers in charge will be unlikely to find anyone to agree to assist. Persons and companies owning the necessary equipment to assist in an emergency would not agree to assist. This could mean that the equipment necessary to fight a fire may not be available to a municipality. The power under s. 297(1)(a) to command assistance is limited to persons present and any inhabitant of the municipality. If equipment and personnel to operate the equipment were available in a neighbouring municipality, the person controlling those resources would be unlikely to assist if, by doing so, they would be liable for any damage which occurs. It is not feasible for fire departments in every municipality in Nova Scotia to own and to have the skilled personnel to operate heavy equipment such as excavators.

[37] The purpose of the legislation is to ensure the safety of the public by ensuring that everything necessary is done to extinguish the fire. The intent of the legislature

in s. 297(5) is to provide immunity to ensure that persons assist in extinguishing a fire without being constrained by fear of liability.

Conclusion:

[38] After applying a purposive and contextual approach to the section, I do not find an ambiguity. Section 275(5) is not reasonably capable of more than one meaning. There is only one plausible meaning that is consistent with the legislation's intention. I need not look to other interpretive aids.

[39] Here, Baxter Trucking and Doug Richard were not weighing the costs and benefits of proceeding with the demolition of the Dooly's building. From the agreed statement of facts, it appears that Baxter Trucking may have done things differently if they were making the decisions. They may have put on the extension attachment to have more control over the demolition.

[40] Baxter Trucking and Doug Richard were assisting the deputy chief of the AFD (who was an officer in charge) in his efforts to extinguish the fire and keep it from spreading, thereby protecting the public. The deputy chief provided the directions and instructions to knock down the wall. Baxter Trucking and Doug Richard endeavored to do so under the deputy chief's direction and authority. The deputy chief was exercising the powers given to him under section 297: tear down any building (297(1)(d)); generally do all things necessary to respond to the emergency (297(1)(f)); direct that a building be pulled down or otherwise destroyed if, in the judgment of that officer, doing so will tend to contain a fire or protect the public from a dangerous condition (297(4)). The fire department was in charge of the scene of the fire and the deputy chief was managing the scene of the fire.

[41] A contract does not change the words and intent of the legislation. A contract did not change the nature of the relationship between the defendants and the officer in charge.

[42] I am satisfied that Baxter Trucking and Doug Richard were acting under the direction or authority of an officer in charge, the deputy chief of the AFD, who was exercising powers and authority conferred by s. 297 of the Act.

[43] Based on the facts agreed to, both of the Defendants, Baxter Trucking Limited and Doug Richard, are immune from tort liability for the claims alleged in the Actions, pursuant to s. 297(5) of the *Municipal Government Act*, SNS 1998, c. 18

Lynch, J.