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THE ONTARIO COURT OF JUSTICE

IN THE MATTER OF THE PROVINCIAL OFFENCES ACT R.S.O. 1990

HER MAJESTY THE QUEEN

Vs.

ONTARIO REALTY CORPORATION

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R E A S O N S F O R J U D G M E N T

BEFORE HIS WORSHIP JUSTICE OF THE PEACE S. NG
On May 17th, 2004 at
1530 Markham Road, TORONTO, Ontario

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Charge: *Environmental Assessment Act*

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Appearances:

Ms. S. Barton	Provincial Crown Attorney
Mr. T. Gilbert	Provincial Crown Attorney
Mr. M. Miller	Counsel for the Defendant
Mr. S. De Caprio	Counsel for the Defendant

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ONTARIO COURT OF JUSTICE

T A B L E O F C O N T E N T S

WITNESSES	Exam. in-Ch.	Cr-exam.	Re-exam.

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E X H I B I T S

EXHIBIT NUMBER		ENTERED ON PAGE

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REASONS FOR JUDGEMENT 4

REASONS FOR SENTENCING 14

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Transcript Ordered: May 20, 2004

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MONDAY MAY 17th, 2004

THE COURT: Good afternoon, everybody. We started in the winter and now it's spring, or approaching. Any other matters to address? Counsels anything else?

MS. BARTON: There is one matter that we've raised only this morning with counsel is that there was some evidence during the trial regarding notices that the ORC Mr. Gerard testified had been posted on the website regarding the sale of the Milroy lands.

THE COURT: Right.

MS. BARTON: We have information now from the ORC's office and from the Commissioner of the Environment's office indicting that there are no records of any such notice ever having occurred. So we've asked our friends - I don't know what position they take about this - we've asked our friends to correct the record in this regard. I do not know what their position is.

MR. MILLER: Good afternoon, sir. This is a point that came up February 12th...

THE COURT: Okay.

MR. MILLER: ...while during the trial. And Mr. Gerard gave evidence. He was cross-examined. He's answered these questions. This morning by fax, dated this morning at 10:01, was not received by us until 11:30, is their position. I don't agree with what Ms. Barton just said in any way, but in any event. But at this point, I don't think it's a material point. Even if it is a material, he's

given his evidence. He's been cross-examined. This evidence did not come to light this morning. It came to light to us this morning. And I don't think it's relevant and the case is over. We are here today to hear the judgment, not to keep the trial being opened and reopened and to bring back witnesses and to do all of that. It's not fresh evidence.

THE COURT: Okay. Are you content for me to proceed with my judgment?

MS. BARTON: Yes, we are. We just wanted to raise the issue in case it becomes relevant. Thank you.

THE COURT: Okay.

R E A S O N S F O R J U D G M E N T

NG, J.P. (Orally):

I have reviewed all the matters and material that was presented to me and considered positions of both parties in this matter. We are here as the prosecution contended that the allegations that the Ontario Realty Corporation, on the sale of the lands on March 28th, 2002, sold properties in the Town of Markham to the Catholic Cemetery Archdiocese of Toronto. Their contention or their allegation is that the Ontario Realty Corporation had conducted environmental assessment that was not proper according to what they are indicating.

One of the issues that was brought forward was the ORC's Class EA is a self-policing process. In this

Court's opinion, this holds the procedures and rules must be followed. That is this Court's opinion. This may be a policy but this does substitute a more complex and more onerous task of proceeding under the *Environmental Assessment Act*. So therefore, this Court takes that position that all processes and documentation et cetera, and suggestion must be followed and adhered to.

Regarding the bump-up request, this Court is not going to make any finding with respect to the category that was chosen. In this case, a category that was chosen was Category B. This Court contends that this issue, if the parties are not happy, can be taken to adjudication with the Ministry of Environment. But this Court here is to make findings with respect to the ORC, the Ontario Realty Corporation that they did not adhere to, follow the process in a Class EA and thereby violating their role in this case as a proponent of this application.

In reviewing the Class EA process in relationship to the Category B, this Court understands that the category, as it goes up from A to B to C, et cetera, et cetera, the process, and the involvement of the parties become more intense. In other words, more parties, more organizations are involved.

The defence has suggested that their involvement is

discretionary as who they may include as a list provided in the EA process. Specifically at issue is whether the ORC is required - obligated to include the aboriginals and natives. They are interested in this matter. This category does list aboriginals and relevant First Nations in the vicinity of the proposed undertaking.

The evidence according to the defence that they have fulfilled their requirement by involving various groups and ministries and suggested then in the absence of evidence of any aboriginals or native living in this vicinity, their obligation has been fulfilled.

In reviewing the EA process, two-way communication is fundamental to good EA planning. This Court agrees that the ORC have discretion to include or exclude groups listed. However, under the guideline for consultation, public consultation should be established at the onset. Potential participants must be informed as to their input, as to how their input will be incorporated. Proponents must be flexible in implementing a public consultation program and in conducting consultation events.

With certain undertaking, it may become apparent that additional consultation methods be used. For example, in areas that generate a high degree of public interest, proponents should be prepared to

alter the format or agenda of consultation or significant population of the aboriginals/natives are expected to live in the vicinity or having interest in their proposal propose undertaking. Then the social profile and methods of public consultation should be designed with the participation of the aboriginal and native people involved.

The word "may" does give the proponent flexibility to include or exclude groups listed in the EA policy. Under consultation documentation, in this Court's opinion, is they are not limited to groups listed. In theory, using their discretion, the proponent may consult with none of the groups. This would be unlikely and not keeping within the spirit and the guidelines of this process. Fundamentally good EA planning and process requires input.

In this case, it is undisputed that the subject site is a middle-Iroquoian village going back hundreds of years. The search for participants should be expanded to groups that not only live in the vicinity, but those who have an interest.

According to steps B/6B, under the subheading for undertaking involving any of the following actions/sale or disposition, a broader list of affected parties be consulted, in order to identify any potential features or characteristics which may

be overlooked. Further, it indicates that on a proposed sale of heritage property, parties contacted would include local government heritage advisory groups.

In the guideline for consultation item number seven it states that the M.B.S., which is the Management Board Secretariat, will conduct its relations with the First Nation in a manner consistent with the August 1996 statement of political relations.

In the last sentence of that paragraph indicates that where significant population of aboriginal people are expected to live in the vicinity or have an interest in their proposed undertaking, then a social profile and methods of public consultation should be designed with the participation of the aboriginal people involved. This clearly obligates the proponent to include First Nations in this consultation.

This position is also supported by the *Constitution Act* of 1982, which provides the existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed.

In summary of the cases provided by the prosecution supporting the issue, the aboriginal and natives be given the opportunity to participate in a process that affect their heritage, land and culture. This Court agrees that the government has responsibility

to act in a fiduciary capacity with respect to the aboriginal people. The relationship is to be in a trust like manner rather than adversary. This was quoted in *R. vs. Sparrow*.

Another case provided by the prosecution, *D-E-L-Z-A-M-U-N-K-W vs. British Columbia*, the case addresses that aboriginals and natives do relocate in other areas willingly or unwillingly.

In a third standard that's embodied in s. 35(1), the crown has a duty to consult with aboriginal people when it seeks to interfere with rights associated with their aboriginal culture interest or aboriginal territorial interest.

Lastly, the government must consult with aboriginals in good faith. In other words, the government has an obligation to make its best efforts to include and seek aboriginal and native groups that have an interest.

The subject site is an Iroquoian village going back hundreds of years. Therefore, the issue of canvassing aboriginal and natives in the surrounding areas of the site - this may be in Mississauga or Brantford - it is a duty of the Ontario Realty Corporation to satisfy this Court that this has been done. They must include groups or individuals of aboriginal and native descent into the consultation process.

Having Mr. Cooper drive by with Ms. Barb Harris is not consultation. This, in the Court's opinion, is merely a visit. Consultation requires a formal process with notification, reasons, objectives, purpose, six-point site analysis according to the EA process. Time must also be given to her, to address issues to seek advice independently according to the guideline set out in the EA process. This was not done. So that drive by with Ms. Harris is merely a visit, as I indicated.

The Court was also puzzled as to the position taken by Mr. Gerard. As Mr. Gilbert stated, well, he admitted that there was a duty, "You are saying that Ms. Harris fulfilled that role." Furthermore, Mr. Gerard did not agree that the aboriginal people be consulted. He stated he relied on M.C.C., which is the Ministry of Culture and Communications and on the archaeologist, who he stated is required by law to contact First Nations. He expected that the contact with First Nation come from Mr. Cooper. Even if the Ontario Realty Corporation or the Ministry of Communication and Culture had contacted First Nations, this Court certainly would ask the question, where is the supporting documentation to support those consultations?

This Court disagrees that contact was made in this case. Certainly, one could, in this Court's opinion, delegate contact with First Nation but

this must be supported by documentation. If and when consultation is made, an undertaking, along with its purpose, six-point site analysis, the procedures as required in EA process must be given. There was no evidence that that was given to any First Nation or native groups.

Mr. Gerard maintained that there were banker boxes of documents that exist. Well, that was his day in Court. The Court has not seen documentation that would satisfy the Court, his obligation. Mr. Gerard also did not convince the Court that proper documentation was provided to the parties according to the process. Mr. Gerard stated that the M.C.C. was consulted. As he stated, it was their mandate to protect archaeological resources in the province to maintain close relations and contact First Nations in Ontario because of their mandate.

The Court takes the position that this is not a substitute to the ORC's duty to consult. If this consultation was made, where is the documentation? Attempts to consult must also be documented. By posting a notice on the Environmental Registry, by meeting with Rouge Park Alliances does not fulfil their mandate of seeking aboriginal and native living in the vicinity or aboriginal native groups to have an interest.

These arguments fall short of the defence of due diligence. They have stated that a number of

groups, individuals were consulted but they have not consulted an important group that has a history going back hundreds of years on the site that's in question. This the Court finds puzzling. They have not documented their efforts or their attempted efforts.

By hiring an archaeologist who conducted a stage-three investigation, having implemented restrictions on the title is not sufficient to convince the Court that they have fulfilled their role.

And certainly, by having restrictions, thus so it does indicate there are some importance to this property. And certainly and one has restrictions or one engages in an archaeologist. This Court maintains that that is a start and a way to have other parties that are interested. And with further input, this would also make the process better. And this Court finds that that is a spirit of the process.

With respect to the defence argument that enforcement branch investigated and found that the process was adhered to is not satisfactory. No one from the branch appeared to give evidence as to the method of their investigation, their interpretation of the EA process, and what information was used in their investigation. The Court does not accept this argument. This Court does not accept this

argument that this issue has been dealt with and completed.

With respect to the tenants and the farmers that are on the property, this Court is not convinced that the chart that listed the wells, the water lines, et cetera, is consultation. As Gordon Miller, the Commissioner stated, this is an environmental site assessment, not an environmental assessment. The defence suggested that they or part of the box group that was consulted.

The Court is not convinced that they were consulted properly according to the EA process. In the Court's opinion, the defence have not fulfilled their requirements and failed to convince the Court that they have made their best efforts. The due diligence argument have failed.

Therefore, the Court finds that the Ontario Realty Corporation have failed to conduct a proper environmental assessment before disposing of subject property. This is contrary to s.38 of the Ontario *Environmental Assessment Act*. Therefore, I do find that the Ontario Realty Corporation is guilty of this charge.

Okay. At this time, I would like submissions on penalty.

(**CLERK MONITOR'S NOTE:** At this time submissions were heard and duly recorded, however not transcribed for the purposes of this transcript.)

R E A S O N S F O R S E N T E N C I N G

NG, J.P. (Orally):

Okay. With respect to the fine, certainly there is no evidence that the ORC has any violations at this time. Certainly, the evidence I heard that they did not conduct themselves in bad faith. They did make efforts. In this Court's opinion, they fell short of that. So based on that, I am not going to impose a maximum fine. I will impose the fine of $7,500.

And with respect to cost, this Court is not going to award cost, because I am not satisfied with the case provided that this gives me the jurisdiction to do that. And certainly, it was a disclosure issue and certainly that case does not convince me that the issue that we have here is on point with respect to the Court awarding cost in this matter.

So based on that, I am not going to be awarding costs. How much time would you like to pay that fine, $7,500?

MR. MILLER: Well, fortunately, I'm glad to say I don't have an impecunious client, but give me just one moment, if I may, sir. Because of the

Ministry, I would like to say 60 days.

THE COURT: Okay, I will grant 60 days for payment.

MR. MILLER: Thank you.

THE COURT: I would like to thank the counsels for attending and participating. I would like to thank the members of the public for being here. And thank you for Mr. Stanford for being here over the last few days in February. I believe it's February. But I would like to thank him for being present. I would like to thank all the witnesses that were here. And thank you very much for your attention and your participation. Thank you everybody.

(**CLERK MONITOR'S NOTE**: During this time, Mr. Miller inquired about ordering transcript for judgment.)

THE CLERK OF THE COURT: This Court now stands adjourned.

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FORM 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 2))

Evidence Act

I, Jacqueline Francis-Gayle, certify that this document is a true and accurate transcript of the recording of R. v. Ontario Realty Corporation in the Provincial Offences Court held at 1530 Markham Road, Toronto, taken from Recording No. E3-134, which has been certified in Form 1.

July 12, 2004
Date

J. Francis-Gayle
Signature of authorized person