Tribunals, Courts and the Handling of Fresh Evidence:
1091402 Ontario Limited v. The County of Simcoe and the Township of Oro-Medonte

Introduction

In *1091402 Ontario Limited v. The County of Simcoe and the Township of Oro-Medonte (Orsi)* a developer applied to the Ontario Municipal Board (OMB) for amendments to the County and Township official plans of Simcoe and Oro-Medonte respectively. Both parties led evidence concerning a study that was pending very shortly (the Inter-Governmental Action Plan or IGAP), but was not yet available at the hearing. The study would have important implications for the settlement and growth strategies of the official plans. In its decision, the Board refused Orsi's requests to amend the official plans and appeared to rely on the parties' submissions regarding IGAP in doing so. In one part of its decision the Board wrote:

> The Board accepts the evidence…that the Growth dynamics in Simcoe County are changing, and that the outcomes of the IGAP study may require the County and its member municipalities to rethink and adjust their development and growth strategies.

Later in the decision, however, the Board concluded:

> The time to reconsider the growth and development strategy of the Municipality is after there is a clearer understanding of the implications of the IGAP studies…or at the next five-year review of the Official Plan.

From the above two paragraphs, it appears that the Board felt that there was uncertainty about the issue before it, and that the results of the IGAP study would resolve this uncertainty. It nevertheless decided not to make a conclusive determination on this finding. The developer's s.43 application to the Chair of the OMB to withhold its

decision pending the release of IGAP was denied because it had failed to request an adjournment pending the study's release.

Because of recent changes to the *Planning Act* that had occurred during the course of the case, the developer had also lost its right of appeal. Specifically, s. 22 (7.1) of the *Act* now states that an appeal to the OMB is no longer an automatic right when it involves a question of land subdivision and settlement areas.

Analysis

Because the law does not require tribunals to apply the rules of evidence in a formal sense or to adhere to strict procedural standards, decisions are sometimes based upon irrelevant or insufficient evidence. This can lead to substantial unfairness. The decision in *Orsi* involved unfairness because it was, arguably, not decided on the merits—i.e. the OMB speculated and relied on evidence that was forthcoming but unavailable at the time, and, in the interim, the developer lost its right of appeal.

In the context of criminal and civil proceedings before the courts, it is well established that the availability of fresh evidence, the loss of a right to appeal, or the failure of a court to hear a case on its merits all support an order to rehear, set aside or vary its judgment. Had *Orsi* initially been heard in the courts, there is a much greater likelihood that its request for a variance or rehearing pending the release of the IGAP study would have been successful.

Turning first to new evidence in the context of criminal proceedings, such evidence is admissible under s. 683 (1) of the *Criminal Code.* This section provides that the evidence may be received on appeal when it is in "the interests of justice." Pursuant to this

section, the test laid out by courts for the admission of new evidence was established in *Palmer v. The Queen.*[1] The fresh evidence *must relate to a factual determinations made at trial*, and:

(1) The evidence should not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

In criminal matters, this test is interpreted flexibly in the interest of securing justice for the accused. Furthermore, even if the evidence in question could have been adduced at trial, thus failing the statutory test set out above, courts will still reopen an appeal if it is believed that the appeal has not been decided on its merits.

The failure of a court to deal with a case on its merits is especially decisive if the accused has also lost a right of appeal. In *R v. Jacobs*[2], the Supreme Court of Canada held that an accused was not to suffer the loss of a right to appeal on account of the oversight of counsel.

Turning next to the civil context, the statutory basis for the right to appeal based on new evidence is found at Rule 59.06(2)(a) of the *Rules of Civil Procedure.* This rule states that a party may make a motion to have an order set aside or varied on the ground that new facts have arisen after it was made. The test in *Palmer* is still followed, but more strictly than in criminal proceedings. Specifically, if the evidence was available through

[1] [1980] 1 S.C.R. 759 [*Palmer*].
[2] [1971] S.C.R. 92 [*Jacobs*].

due diligence, the moving party is unlikely to be successful. In *Re Bell*[3], it has also been held that a rehearing, based on new evidence, can be granted notwithstanding the fact that the matter had been dealt with on its merits.

Clearly, then, whether an adjournment has been requested or not, a right of appeal in both civil and criminal matters on account of new evidence or a failure to decide a case on its merits is available before the courts. In *Orsi*, the OMB made a decision that was based upon evidence for which the parties did not have a chance to fully present to the Board, ***and*** Orsi lost its right to appeal. . Furthermore, the evidence that touched upon the Board's decision was to become available shortly.

Based upon the test in *Palmer, Orsi* would likely have been granted a variance or a rehearing based upon the availability of the IGAP study results; that is:

> (i) The evidence could not have been adduced at the hearing, as it was unavailable at the time;
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> (ii) It was relevant to a decisive issue in the hearing, based upon the Board's statement that it would resolve uncertainty;
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> (iii) The evidence, being an expert study, was capable of belief; and
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> (iv) It could reasonably have been expected to affect the result of the hearing, again based upon the reasoning of Board Member Atcheson.

Even if the evidence in *Orsi* were not imminently pending, the OMB, nonetheless, based its decision on facts that neither side had a chance to argue fully. It can be said, then, that the OMB's decision was not made on the merits of the case. Because of this, *Orsi* lost its right of appeal. Taken together, these two facts support the finding that the case ought to have been reheard.

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[3] [1947] O.W.N. 801 (Ont. C.A.).

It is often disputed whether certain rules of evidence and procedure should apply to tribunals, or whether an analogous approach should at least be applied. Where the decision of the tribunal is in some sense judicial, as with the OMB, then the rules of natural justice should guide the tribunal's choice to invoke these formal rules; that is, where fairness requires it. The decision in *Orsi* was of a judicial nature. It involved a decision that was not based fully on the merits and for which new evidence, highly relevant to the hearing, was soon to be available. Based upon these factors, there is a strong basis for the argument that *Orsi* ought to have been given a second chance.