

Municipality Restrained from Interfering with Cottage Owners' use of Fire-Pit Lands

Commercial Real Estate | Cottage Country | Litigation | Litigation & Dispute Resolution | Real Estate | Zoning By-Law

6 November 2020

Seasonal residents of cottage properties in Tiny Township obtained an injunction prohibiting the municipality from interfering with their use of disputed lands containing fire-pits: *Galati v. The Corporation of the Township of Tiny*, 2020 ONSC 6442 (CanLII).

The applicants were owners of three cottages among a line of neighbouring lots on the waterfront of Georgian Bay and adjacent to grassy lands between their properties and a beach. The beach lands had been dedicated to the public by the original owners of the lands in 1931. However the ownership of the grassy lands was in dispute as they had not been formally registered in the names of the cottage properties or the Township.

The cottage owners claimed that they and their predecessors in title enjoyed exclusive possession and use of the grassy lands in front of their respective cottage lots and the beach. They had erected signs stating that the grassy area was not accessible to the public. The cottage owners paid property tax levied on the grassy area and built fire-pits, which were in place since the 1980s at the latest, but possibly as early as the 1940s. The fire-pits are large, built with heavy stacked stone, and are visible in satellite imagery of the area.

In 2019, the Township tagged and removed the fire-pits with heavy machinery, and in 2020 placed boundary markers along the southern boundaries of the cottage lots, ostensibly demarcating where the cottage lots ended and where the Township's property began at the grassy area. The Township also began dredging sand to create an artificial beach in front of the existing sandy beach. When the cottage owners removed the boundary markers, the Township sent in by-law enforcement and the police.

In October 2020, the cottage owners sought an injunction restraining the Township from interfering with their use of the fire-pits and grassy area, and they argued that the Township was trespassing when it removed the fire-pits. The Township responded that the preservation of municipally-owned land was imbued with special public significance, and argued that the cottage owners had not commenced formal proceedings to acquire formal ownership of the grassy area by way of adverse possession or other claim for title.

The ownership of the lands will ultimately require adjudication through a review of the historical plans, by-laws, and other matters relating to property ownership. In the interim, the Township sought to enforce a by-law prohibiting the cottage owners' use of fire-pits.

The Court applied the test for an injunction established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311:

- a) Is there a serious issue to be tried;
- b) Will the applicant suffer irreparable harm if the injunction is not granted; and
- c) Where does the balance of convenience lie?

In the [Decision](#) granting an injunction in favour of the cottage owners, Justice Casullo found that they had raised a serious issue to be tried regarding the ownership of the disputed grassy area. The cottage owners had demonstrated exclusive and undisturbed possession of the lands for upwards of 80 years. For the

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

Municipality Restrained from Interfering with Cottage Owners' use of Fire-Pit Lands

purposes of the injunction, there was Court of Appeal precedent for the cottage owners' argument that since they had a better claim to ownership of the disputed lands as a result of possession, the Township may be found to have trespassed: *Patterson v. De Smit*, 1949 CanLII 308 (ON CA), [1949] 3 D.L.R. 178 (Ont. CA).

With regard to the nature of the harm, although the removal of fire-pits could be seen as an innocuous requirement, the Court was satisfied that the Township's interference with the cottage owners' use of the grassy area caused harm by affecting their enjoyment of the seasonal properties. In Justice Casullo's words:

With the presence of heavy equipment, Township employees, By-Law Enforcement officers, and the OPP, one can easily posit how a trip to the cottage might have lost some of its lustre.

The Court was also concerned that if the injunction was not imposed, the Township would take steps to remove the grassy Area completely. If that occurred, and ownership of the grassy area was ultimately found to reside with the cottage owners, the environmental impact could result in the loss of a natural resource.

Lastly, the Court balanced the interests of the parties pending final resolution of the issue of ownership of the disputed lands and found that the balance of convenience weighed strongly in favour of the cottage owners, and was not offset by any irreparable harm the Township may suffer if the injunction was granted. The Township expressed concern with its potential liability should anyone be injured if the fire-pits remained, relying on two newspaper articles from Toronto, where two members of the public were injured by illegal fire-pits. Justice Casullo found this to be a hollow argument. The uncontradicted evidence from the cottage owners was that fire-pits had been in use in the grassy area for many years with no reported injury to the public, and without any prior attempt by the Township to enforce public protection by-laws.

Accordingly, the cottage owners obtained an injunction prohibiting the Township, and any third parties at their direction, from trespassing over or interfering with the cottage owners' enjoyment and use of the disputed lands and fire-pits until the final disposition of the proceedings or other order of the Court.

The decision demonstrates that a party seeking an injunction restraining another from interfering with their enjoyment of property may not be required to establish that the harm which will be suffered is "irreparable." Indeed, in the context of preliminary relief, the Court noted that the test is a flexible one which involves an evaluation of the other factors. In the case at hand, the cottage owners were able to persuade the Court that the status quo should continue until the issue of ownership was resolved. Simply put, the Township had nothing to lose by waiting for the determination of ownership while the cottage owners could be permitted to continue using their properties as they had for decades prior to the dispute reaching the courts.

For more information please contact: **James Cook** at **416.865.6628** or **jcook@grllp.com**

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com