Court of King's Bench of Alberta

Citation: Calgary (City) v Group Touchette Real Estate Inc, 2024 ABKB 65

Date: 20240202
Docket: 2301 08022
Registry: Calgary

Between:

City of Calgary

Appellant

- and -

Group Touchette Real Estate Inc. and Safety Codes Council of Alberta

Respondents

Reasons for Decision
of the
Honourable Justice Lisa A. Silver

Introduction

[1] The City of Calgary ["City"] appeals a decision of the Safety Codes Council of Alberta Appeals Panel (Building Sub-Council) ["Tribunal"] varying SCA Order No. 2022-0168 ["Order"] issued to Grand Touchette Real Estate Inc. ["GTREI"] that construction at their warehouse was not in compliance with the National Building Code – 2019 Alberta (Code) ["Code"]. Specifically, the Order was concerned with the mobile racking used in the building to store and transport tires within and from the building.

Procedural History

[2] The safety codes officer inspected the building on August 26, 2021. Before issuing an Order, the officer directed a professional engineer to "comment on the free standing racking system's compliance with the Code": **Council Order No. 2023-03** at para 88 ["Council Order"].

[3] The engineer inspected the site and found the mobile racks used by GTREI were stacked one upon the other without being attached to the building or to one another. The engineer reviewed the Code and the provisions on the design of "fixed storage racking." In the engineer's view, the racks were not portable when stacked. Therefore, the racks were subject to article 4.1.8.18 of the Code on fixed storage racking, which directed compliance with lateral load requirements to withstand earthquake or seismic motions.

[4] The engineering report ["Report"] was dated December 22, 2022. The Report required the racks, which were stacked, to be fastened to the floor of the building, and fastened together or to be stabilized through the use of an external brace.

[5] After receiving the Report, the safety codes officer issued an Order on December 27, 2022. The infringement identified in the Order was the construction and placement of "a building or parts thereof," namely, mobile racking, contrary to the Code. The Order directed GTREI follow the recommendations of the Report.

[6] Based on the Report, the Order directed the dismantling of the mobile racks, save one. It prohibited stacking of the mobile racks until a building permit "has been obtained where the racking system has been designed to resist lateral loads" pursuant to article 2.2.10.1 of Division C of the Code.

[7] GTREI appealed the Order on January 30, 2023. On April 5, 2023, the Tribunal heard the appeal.

[8] For reasons to follow, the appeal is dismissed.

The Tribunal Findings

[9] The evidence before the Tribunal established that GTREI used two different types of storage racks. According to the Tribunal's findings, the manufacturer's design permitted the stacking of individual racks while storing tires but only to a particular height. When stacked the racks were not to be moved but the individual racks could be moved by forklift. The racks were not to be fastened or anchored to anything: **Council Order** at paras 105 to 107.

[10] The Tribunal found both types of racks "meet the definition of portable" when they are not stacked, as the individual racks could be moved by forklift and were "not fixed in place": **Council Order** at para 112.

[11] The Tribunal further found the Code does not apply to portable racks "given the administrative guidelines" found in the Structural Commentaries (User's Guide – NBC 2015: Part 4 Division B) ["Commentaries"], which "explicitly" stated that portable racks were not included "in the scope of the documents.": **Council Order** at para 113. In making this decision, the Tribunal received evidence from the Technical Advisor, with extensive knowledge of the legislation, whose role was "to clarify questions" the Tribunal may have "regarding the interpretation" of the relevant legislation: **Council Order** para 96.

[12] The Tribunal released their decision on May 25, 2023. The Tribunal found that the "free-standing storage racks are portable and as such are not subject to the *Act* and Code." The Tribunal further found that although portable racks were not subject to the Code, the building and the configuration of the floor area due to the presence of the portable racks were subject to the *Safety Codes Act* ["*Act*"] and the Code as life, fire, and safety may be impacted.

[13] Therefore, the Tribunal varied the Order, requiring GTREI to "obtain a valid and subsisting building permit for the Building, with a scope excluding portable storage racks, in accordance with the requirements of Article 2.2.10.1 of Division C of the Code" by a certain date and time, if the existing building permit "does not cover the Building's current configuration." Upon compliance, GTREI was to arrange for another inspection.

[14] The City filed a Notice of Appeal on June 19, 2023. On October 30, 2023, the hearing of the appeal was expedited by the then Chief Justice Moreau. The appeal was heard on December 20, 2023.

Grounds of Appeal

[15] Pursuant to section 53(1) of the *Act*, an appeal shall only be heard on a question of law or jurisdiction. According to subsection (5), upon hearing the appeal the Court may confirm, revoke or vary the Order of the Tribunal.

[16] The Notice of Appeal enumerated several grounds of appeal, which were distilled into the following two issues in the Appellant's Brief:

1. Did the Tribunal err in law when it determined that the racking used in the warehouse was completely exempt from the *Act*, *Regulations* and the Code, and therefore did not require a building permit?
2. Did the Tribunal err in law by not analyzing section 49(b) of the *Act* and "directing the unsafe condition be resolved for public safety within the building"?

[17] The Respondent GTREI raised the preliminary argument that the City's grounds for appeal are not questions of law only but are grounds of mixed fact and law. The Respondent GTREI further argued there were no extricable questions of law. Before analyzing the City's asserted grounds of appeal, I will determine this preliminary issue.

The First Ground of Appeal

[18] While I agree that much of the City's written and oral argument revolved around the factual findings of the Tribunal, I find there is a question of law arising from the statutory interpretation of the legislative scheme. The City, however, augmented this question with the sub-issue of whether the Tribunal erred in finding the racks used by GTREI were portable. According to the City, the Tribunal misapprehended the evidence and the weight of the evidence, including the Technical Advisor's opinion, in coming to this finding, making this sub-issue also a question of law.

[19] It is well established that a misapprehension of the evidence is a question of mixed law and fact: ***R v Walsh***, 2016 ABCA 280 at para 19. In ***Housen v Nikolaisen***, 2002 SCC 33 [*Housen*], the seminal decision outlining the appellate standards of review, Justices Iacobucci and Major explained that while the application of a legal test to a set of facts is a question of mixed law and fact, in some cases a failure to consider evidence required by a legal test can lead to an error in law: ***Housen*** at para 27.

[20] There is nothing on the record suggesting the Tribunal failed to consider evidence. The Tribunal, in its sixteen-page decision outlined in detail the arguments and the evidence heard before them. In paragraphs 104 to 116, the Tribunal made findings of fact based on the totality of

the record before them. The City's articulated grounds of appeal directly impugn these findings of fact, which do not raise a question of law alone.

[21] In this view, I am supported by and mindful of the comments of the majority decision in ***Teal Cedar Products Ltd. v. British Columbia***, 2017 SCC 32 at paras 45 and 46 [*Teal*], in which Justice Gascon warned appellate judges to exercise caution when identifying extricable questions of law in matters engaging mixed law and facts: see also ***ATCO Electric Ltd v Alberta Utilities Commission***, 2023 ABCA 129 at para 16 [*ATCO*]. Specifically, Justice Gascon commented on counsel framing issues as mixed fact and law to strategically anchor their appeal within the question of law category: ***Teal*** at para 45; ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 54; ***Canada (Director of Investigation and Research) v Southam Inc,*** 1997 CanLII 385 (SCC) at paras 35-37, [1997] 1 SCR 748.

[22] I find this cautionary tone to be apt in this appeal where in both written and oral argument the City repeatedly brought the appeal to the factual level. In the end, the City may not agree with the factual finding of the Tribunal but that does not make this appeal a question of law alone. The Tribunal's findings of fact and its position on issues of mixed fact and law are beyond the scope of this appellate review: ***Canmore (Town of) v Three Sisters Mountain Village Properties Ltd,*** 2023 ABCA 278 at para 57; ***Planet Energy (Ontario) Corp v Ontario Energy Board***, 2020 ONSC 598 at para 33 [*Planet Energy*].

[23] In the case at bar "whatever the law was, the [Tribunal] was compelled to follow it. If the [Tribunal's] interpretation of the law was erroneous, that is an error of law": ***ATCO*** at para 21. The factual findings themselves, however, are not reviewable. Here, there is no reviewable question as to whether the racks are "free-standing storage racks [that] are portable": this is a finding of fact by the Tribunal with which I cannot and will not interfere.

[24] Thus, the reviewable, extricable question of law is whether the Tribunal erred in law in determining that portable, free-standing storage racks do not fall under the *Act* or the Code.

The Second Ground of Appeal

[25] Before moving into the analysis of the question of law engaged in this case, I will discuss the City's second ground of appeal that the Tribunal erred in law by not analyzing section 49(1)(b) of the *Act* and "directing the unsafe condition be resolved for public safety within the building." I find this second ground fails to raise a question of law only, and if it does, that section 49(1)(b) is inapplicable and irrelevant to the appeal.

[26] Section 49(1) provides the authority for the issuance of orders by safety codes officers. According to the subsection, to issue an Order, the officer must have reasonable and probable grounds that either under subsection (a) the *Act* is contravened or under subsection (b) "the design, construction, manufacture, operation, maintenance, use or relocation of a thing or the condition of a thing, process or activity to which this Act applies is such that there is danger of serious injury or damage to a person or property."

[27] I find this ground fails to raise a viable question of law alone for three reasons.

[28] First, this ground is another attempt to create a question of law from a factual concern. At the hearing, counsel for the City urged the Tribunal to consider the safety risk the racking devices posed: **Council Order** at para 56. Counsel also argued that the Order was issued by the

safety codes officer, acting within their jurisdiction, "in good faith with safety being the focus": **Council Order** at para 60. All these arguments were considered in the Tribunal's decision.

[29] Second, contrary to the City's position, section 49(1)(b) does not provide authority to the Tribunal to undertake a broadly based analysis of the racking system and determine if the racks were generally safe. Pursuant to section 49(3)(a), the Order must "set out what a person is required to do or to stop doing in respect of the thing, process or activity": ***Wong (Trustee of) v Brown***, 2001 ABCA 60 at para 4. Here, the Order fulfilled section 49(3)(a) by specifically identifying what GTREI must do to comply with the *Act* and Code. The specific concern identified in the Order was the failure of the racks to comply with the lateral load requirement in the Code, triggering the need for a building permit to ensure compliance.

[30] This level of specificity in the Order flows from section 7(e) of the *Administrative Items Regulations*, requiring the Order to "identify the contravention, if that is the subject-matter of the order." This requirement is also consistent with giving the party subject to an Order fair notice of the actions they must take to avoid the consequences of non-compliance. For instance, under section 67(1)(4)(d) of the *Act*, a person may be charged with an offence for failing to carry out an action required in an Order. Upon conviction, a person faces a heavy penalty and may be subject to fine and/or jail.

[31] Moreover, outside of section 49 there is no statutory basis for the Tribunal to undertake a wide ranging safety analysis of the circumstances before them. Such a reading of the Tribunal's authority is contrary to the *Act* and the statutory requirements of the issued Order. It would be difficult if not impossible for a party to appeal an Order to the Tribunal if the appeal did not specifically flow from the content of that Order. If the Tribunal were permitted to enter into a generalized safety analysis every time an Order was appealed, the grounds for such an appeal would be a moving target with no clear judiciable basis, disengaged from the factual circumstances of the case.

[32] Third, there was no legal requirement for the Tribunal to analyze section 49(1)(b) in coming to their decision. Section 49(1) of the *Act* sets out the lawful authority of the safety codes officer to issue an Order. The section ensures that an Order is not a random or arbitrary exercise of the officer's authority and is *Charter* compliant. Indeed, section 49 was referenced in the Order pursuant to section 7(c) of the *Administrative Items Regulations*, which requires the officer's legal authority be clearly marked in that Order.

[33] The Tribunal would only analyze section 49(1) if there was an argument that the officer did not have reasonable and probable grounds when issuing the Order. This particular concern was not directly raised before the Tribunal. There was no evidence on the officer's lack or presence of reasonable and probable grounds and no specific findings on whether there was a lack of lawful authority for the officer to issue the Order.

[34] Although an appellate court has the discretion in certain circumstance to depart from the general rule that a new issue may not be raised on appeal, I am not satisfied that this departure is appropriate here, particularly as the appeal is limited to a question of law alone. There is no evidentiary basis for this argument and the Respondent GTREI, who would be the party to raise the issue, did not do so: ***Pyke v Calgary (City)***, 2023 ABCA 304 at para 29 [*Pyke*].

[35] There is no doubt that the officer, when issuing the Order, had an objective basis for the belief that the racking was subject to the *Act* based on compelling and credible information from the engineer's report: ***Mugesera v Canada (Minister of Citizenship and Immigration)***, 2005 SCC 40 at para 114. That is not the issue at hand. Rather, the sole question of law is whether the Tribunal was correct in law when they found the portable racks were not subject to the *Act*.

[36] Whether the racks are subject to the *Act* is a matter of legal interpretation, which does not impact the officer's reasonable and probable grounds for issuing the Order at the time. The determination of this question does, however, impact the validity of the Order, which is a different issue from whether the officer had reasonable and probable grounds to issue the Order in the first instance. The situation is similar to the difference between an argument in a criminal matter that the police officer had no reasonable and probable grounds for an arrest and an argument that the accused person is not guilty of the charge because the conduct complained of does not fulfill the offence requirements as described in the *Criminal Code*.

[37] I therefore find section 49(1) is inapplicable and not engaged in this appeal.

Conclusion

[38] This leaves one ground of appeal engaging the interpretation of the relevant statutory requirements: ***Planet Energy*** at para 31. The Tribunal found as a fact that the free-standing storage racks were portable. The sole question of law is whether portable racks are subject to the Code and the *Act*. If portable racks are not subject to the Code, then the fact that GTREI's racks are generally unsafe is a matter for a different set of legislation, such as the *Occupational Health and Safety Act*, or for private law action.

Standard of Review

[39] The standard of review in statutory appeals from administrative tribunals was clarified in the ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 [*Vavilov*]. According to *Vavilov*, in considering questions of statutory interpretation, which is a question of law, I must apply the standard of correctness in accordance with ***Housen***: ***Housen*** at para 8; ***Vavilov*** at para 37. The standard is therefore one of correctness, and no deference is afforded to the Tribunal's decision on questions of law: ***Vavilov*** at paras 17, 36-37; ***ATCO*** at paras 15-16. I am therefore "free to replace the opinion" of the Tribunal with my own: ***Housen*** at para 8. I may either uphold the Tribunal's decision or substitute my own view: ***Vavilov*** at para 54.

[40] The standard of correctness is not, however, applied in a vacuum. In applying the standard and coming to my own conclusion based on the law, ***Vavilov*** expects that I will "take the administrative decision maker's reasoning into account": ***Vavilov*** at para 54; ***Planet Energy*** at paras 26,31; ***ATCO*** at para 16. I will analyze the ground of appeal on an appellate basis through this lens: ***Vavilov*** at para 36.

Analysis

[41] The principles of statutory interpretation are well-documented in case law and in scholarly works. The Supreme Court of Canada has embraced a modern approach to statutory interpretation requiring a contextual analysis. In doing so, the reviewing judge must read the words of the impugned legislation "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": ***Rizzo & Rizzo Shoes Ltd (Re)***, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21 [*Rizzo*].

[42] The Alberta *Interpretation Act* also assists. Section 11 requires legislation to be given a "fair, large and liberal construction and interpretation that best ensures the attainment of its objects." Even so, there are limits to this liberality of interpretation. My role is to discern meaning, it is not to create meaning that does not have statutory basis. In the end, it is the legislature's role to decide what will and what will not be in their legislation. Moreover, if there is a legislative gap, it is for the lawmakers to decide if it should be filled.

[43] With the above in mind, I will now review the statutory scheme and object of the *Act* and the Code, as well as the legislative intention to provide the context for the statutory interpretation. The purpose of this review is to lend context to the words of the relevant provisions and to "test their meaning against the context and purpose of the legislation and established legal norms": ***Pyke*** at para 33; ***La Presse Inc v Quebec***, 2023 SCC 22 at para 23.

The Statutory Scheme and Purpose of the Act

[44] Although the Tribunal does not have broad powers to assess each case in light of generalized safety concerns, there is no question that the primary object of the *Act* is to ensure the "safe management and control of any thing, process or activity to which this *Act* applies" pursuant to section 4(1) of the *Act*: ***Trion Properties Ltd v Safety Codes Council***, 2008 ABQB 549 at para 27; **Leduc *(County of) v Safety Codes Council***, 1999 ABQB 870 at para 42 [*Leduc*]. The other objective of the *Act* found under section 4(2) is the fostering of barrier-free accessible design.

[45] The *Act* also outlines the duties of the stakeholders in fulfilling this legislative purpose. For instance, owners, designers, manufacturers, contractors, and vendors have duties to ensure their activities, processes and things comply with the *Act* if subject to it. This multi-discipline approach is key to the proper workings of the *Act*, which is an umbrella statute that enables national standards for lawful activities within ten disciplines being buildings, fire, gas, plumbing, electrical, elevators, passenger conveyors or ropeways (i.e. ski lifts), pressure equipment, amusement rides, and private sewage disposal systems.

[46] Viewed holistically, this legislation is concerned with implementing government approved standards relating to the built environment. As a regulatory scheme, the legislation is concerned with public welfare, health and safety. Specifically, the *Act* requires minimum safety standards "in regard to the development and maintenance of buildings and structures on lands and in their use": ***Leduc*** at para 43.

[47] The regulatory scheme protects the public from the adverse effects of otherwise lawful activity: ***R v Wholesale Travel***, 1991 CanLII 39, [1991] 3 SCC 154 at 219. As mentioned, the list of lawful activities covered by the *Act* is informed by the various codes implemented under the *Act*. As lawful activity is being regulated through legislation, law makers will often engage

with the various stakeholders who engage in that lawful activity in the development and implementation of the regulatory scheme. This makes practical sense considering it is the industry stakeholders who have the knowledge and expertise of best practices.

[48] A good example of this kind of collaboration is found in the development of the National Building Code ["NBC"] and the Code. The NBC as a model code, is developed through code-users from all facets of construction and design. It is built on input, feedback, and consensus. In the appeal before me, it is the non-compliance with the Alberta Edition of the NBC or the Code that is at the heart of the issue, and I will now turn to the scheme and purpose of that legislation.

The Scheme, Purpose, and Structure of the Code

[49] The NBC is developed by the Canadian Commission on Building and Fire Codes ["Commission"] and published by the National Research Council ["NRC"]. The Commission is an independent body comprised of stakeholders or code-users from across the country. The NBC is an advisory document used nationally, which "sets out technical provisions for the design and construction of new buildings, [as well as] the alteration, change of use and demolition of existing buildings": National Research Council of Canada, *National Building Code of Canada 2015* (Ottawa: NRC, 2015) online: <nrc.canada.ca/en/certifications-evaluations-standards/codes-canada/codes-canada-publications/national-building-code-canada-2015>. Its purpose is the "promotion of public safety through the use of desirable building standards throughout Canada: ***New Brunswick Telephone Company Ltd. v. John Maryon International Ltd*** (1981), 1981 CanLII 3610 (NBKB), 33 NBR (2d) 543 at para 27, vard. (1982), 1982 CanLII 2906 (NBCA) [*John Maryon*]. It has no legal effect until enacted by provincial legislation.

[50] The NBC is implemented in Alberta through its adoption into the National Building Code – 2019 Alberta Edition or the Code: *Building Code Regulation*, Alta Reg 31/2015 section 1(1). The current NBC is from 2020 but the applicable NBC from which the current Code was derived is from 2015. The time lag for adoption reflects the time it takes for the review and agreed implementation of the appropriate legislative scheme. The Alberta Edition may adopt all or some of the NBC without change. Any modifications found in the Alberta Edition are consistent with local needs, standards, best practices, and any other provincial legislation relating to building design, construction, alteration, change of use and demolition of buildings.

[51] The Code contains "technical requirements relating to minimum health and safety standards and the use of safe and adequate building materials": ***Holtslag v Alberta***, 2006 ABCA 51, leave to appeal to SCC refused, 2006 CanLII 31713 (SCC) at paras 10 and 35 [*Holtslag*]. Even so, as recognized by the Court of Appeal for Alberta in ***Holtslag***, the Code is not a "textbook on building design," and advice from professional sources is required: ***Holtslag*** at para 35; ***John Maryon*** at para 27. It represents the minimum standards required by law and is not all inclusive.

[52] The *Act* is not the only piece of legislation that is directed towards public welfare, health and safety. Rather, it complements other safety-oriented legislative schemes such as the *Occupational Health and Safety Act*, which "maximize the safety of workplaces" within that built environment: ***R v Kal Tire***, 2020 ABCA 200 at para 10. This means the *Act* and the various codes implemented under it are not the only statutory response to protecting the public welfare, health and safety. The *Act* does not protect the public in all activities, processes and things and was not intended by the lawmakers to do so.

[53] Moreover, the Code was never intended to be all-inclusive as discussed in the preface to the Code. The preface, although not legally binding, provides insight into the development of the Code, its objectives, and its structure. According to the preface, as a result of decisions made by "the code-user community," the Code provisions do not regulate all characteristics of buildings, even if such characteristics relate to Code objectives: Code at *v – vi*, *vii*. Moreover, the Code does not apply to all building products, materials, and assemblies. Where it does, the Code may set out some standards to be achieved or may incorporate "by reference" other material or product standards published by other recognized organizations such as the CSA (Canadian Standards Association), which develop standards and publishes user guides: Code at *vii*.

[54] The Code is objective-based and divided into three Divisions: Code at *viii*. Division A defines the scope of the Code, provides definitions for words and phrases, outlines the objectives, describes functional statements, and the conditions precedent for Code compliance: Code at *x*.

[55] Broadly, the section 2.2 Objectives are concerned with safety, health, accessibility, fire and structural protection of buildings, and environment (such as excessive use of energy). Functional statements offer more detail than the objectives and describe conditions in the building that help satisfy the objectives: Code at *ix*. The preface clarifies that the objectives and functional statements are "entirely qualitative" and are not intended to be used on their own in the design and approval process: Code at *ix*.

[56] Division B contains acceptable solutions or technical requirements that satisfy the objectives and functional statements: Code at *x*. Also found under Division B are intent statements that provide the "basic thinking" behind each Code provision found under Division B: Code at *ix*. These statements and the explanatory notes found at the end of all Divisions are for explanatory purposes only and "do not form an integral part of the Code provisions": Code at *ix*. Division C contains administrative provisions.

[57] There are also a series of Structural Commentaries ["Commentaries"], which are "intended to help Code users understand and apply design requirements" in the NBC, and as adopted by the Code. Although the Commentaries are not mandatory requirements or legally binding, it provides "valuable background information" and "suggested approaches" to certain design questions relating to structural sufficiency such as seismic loads: National Research Council of Canada, *Structural commentaries (User's guide – NBC 2015: part 4 of division B)* (Ottawa: NRC, 2015) online: nrc.canada.ca/en/certifications-evaluations-standards/codes-canada/codes-canada-publications/structural-commentaries-users-guide-nbc-2015-part-4-division-b; ***Gemex Development Corp v City of Coquitlam***, 2009 BCSC 65 at para 105.

[58] In conclusion, I find that the *Act* and the Code are public welfare, health, and safety provisions, regulating lawful activity within the built environment. These provisions do not pertain to every building detail or structural element and were not intended to be all-encompassing. The Code is a technical document to provide solutions for those areas covered by the Code. The Code is developed by the code-user community and reflects best practices and industry standards, which are further supported by the non-binding explanatory Commentaries. I will now turn to the provisions relevant to the analysis of whether portable racks are subject to the *Act* and Code.

The Relevant Provisions

[59] In this part of the statutory interpretation analysis, I read the words of the relevant provisions "in their entire context and in their grammatical and ordinary sense" pursuant to ***Rizzo*** at para 21. The Code helps with this exploration by providing definitions of key words and phrases. Where a term is not defined, article 1.4.1.1 Division A of the Code directs the use of the Canadian Oxford Dictionary, 2nd Edition.

[60] I start with the premise that if the racks are subject to the *Code* then the permit requirements apply. There are two provisions in the Code that reference racks. One is a non-binding explanatory note pertaining to the measurement of tire storage volume in a storage area based on measurements of the racks containing the tires: Code at Note A-3.3.6.5(1) This article is not engaged in this appeal.

[61] The other reference to storage racks is article 4.1.8.18, which is found under Part 4 Division B Structural Design. Section 4.1 pertains to Structural Loads and Procedures. Under that section, subsection 4.1.8 is on Earthquake Load and Effects, which applies to identified structures that shall have proscribed resistance to earthquake loads and their effects. This is the article applicable according to the engineer's report.

[62] Article 4.1.8.18, which was the identified issue in the engineering report, is concerned with the ability of certain building structures, components, and equipment of a building to withstand seismic motion of the building. The article provides mandatory technical seismic lateral load requirements for specified items listed in Table 4.1.8.18. In reviewing the table and sentence 4.1.8.18 (1), the structures listed are connected to the building, giving rise to concerns with how these structures react when the building is impacted by an earthquake. The table for instance includes certain exterior and interior walls of the building and certain equipment connected to the building. Such items in the table are considered to be structurally involved in and part of the structural system of the building.

[63] Under table category 23 and 24, the table references "floor-mounted steel pallet storage racks." In the notes to the table, sentence 4.1.8.18 (13) and Note A-Table 4.1.8.18 are cited under category 23 and 24. Note A-Table 4.1.8.18 discusses the safety concerns with "failure or detachment" of non-structural components and equipment during an earthquake. The design requirements in article 41.1.8.18 ensure that "such components and their connections to the building" have structural integrity and the risk to life is minimized.

[64] Sentence 4.1.8.18 (13) refers to "free-standing steel pallet storage racks," which are "permitted" to be designed to resist earthquake effects. The sentence also references note A-4.1.8.18(13) from the non-binding explanatory notes to Part 4 Division B Structural Design. That note suggests that "free-standing steel pallets storage racks contain only materials typically loaded by forklift." It clarifies that there is no occupancy within the racks. The note also directs the code-user to further information on racks in the Commentaries on Design for Seismic Effects, which are also explanatory documents only.

[65] Commentary J speaks of the scope of subsection 4.1.8 and the seismic design objectives. Note 5 identifies the primary safety objective of seismic design to ensure that the building safely responds to seismic motion. In the event of a seismic event, the Code provisions ensure that the building will not collapse, nor will "attachments" fall on people near the building. Commentary 229 pertains to article 4.1.8.18, which according to that note are items "attached" to buildings to

ensure these items “neither fall nor become detached from the building” during a seismic event and pose a threat to life. Commentary 230 states that Article 4.1.8.18 is intended “to ensure that attached components and their connections to the building retain their integrity” during “strong ground shaking.” Commentary 240, 241, and 242 also speak of items as described in Table 4.1.8.18 and their connection to the building.

[66] Commentary 243 refers to sentence 4.1.8.18(13), which discusses “free-standing steel pallet storage racks,” that are not connected to the building, which should be analyzed either as separate structures or akin to the components under category 23 or 24 of the table. The commentary makes detailed references to the seismic design provisions found in CSA A344, ANSI MH16.1, FEMA 460, which are user guides from relevant organizations, providing technical design standards for steel storage racks. The commentary ends with a caution that “other rack structures within a building, such as portable racks, cantilever racks, drive in/drive through racks and shelving, are not included in the scope of these documents.”

[67] The Respondent GTREI relied on commentary 243 to submit that portable racks are not subject to the Code. The Technical Advisor to the Tribunal suggested that the documents referred to in the commentary included the Code and the various user guides specifically mentioned in the commentary: **Council Order** at para 102. The City responded that the commentary, which is not a mandatory provision, merely suggested that portable racks are not included but in any event, the reference to “documents” in the commentary does not include the Code.

[68] For purposes of determining this issue it is important to review the entirety of commentary 243. The commentary does specifically reference the Code as well as user guides published by the CSA (Canadian Standards Association), ANSI (American National Standards Institute) and FEMA (Federal Emergency Management Agency). The sentence immediately preceding the scope comment states that “These documents need to be applied in a manner consistent with the requirements of the NBC 2015.” In my view, the reference in the next sentence to other rack structures being outside the scope of “these” documents refers to all the documents referenced in the previous sentence, being the CSA, ANSI and FEMA guides and the Code.

[69] Even so, this does not necessarily mean portable racks are not subject to the Code. What is clear is that floor-mounted storage racks are subject to the Code pursuant to article and table 4.1.8.18. According to the Oxford Canadian Dictionary, “portable” means not fixed and moveable. Floor-mounted racks therefore do not include portable racks.

[70] What is not as clear is the status of “free-standing steel pallet storage racks,” which are referenced in sentence 4.1.8.18 (13) and in commentary 243. The dictionary definition of “free-standing” means unsupported and autonomous. An item can be portable and free-standing. Sentence 4.1.8.18 (13) specifically references “free-standing steel pallet storage racks,” which are “permitted” to be designed to resist earthquake effects. Commentary 243 advises that free standing storage racks that are unconnected to the building structure should be treated like floor mounted racks under the Code or assessed independently. Therefore, free standing racks may or may not be connected to the building structure.

[71] I therefore find based on section 4.1, including the explanations provided in Notes and Commentary J, that article 4.1.8.18 applies to items fixed or connected to the building to ensure that those items together with the building itself can adequately withstand a seismic event. The

reference to free standing steel pallet racks in sentence 4.1.8.18, refers to the floor mounted racks in the table, which are free standing but connected to the building structure. This interpretation is supported by a review of the other sentences under 4.1.8.18, which all discuss tabled items. All the table items are connected to the building. It is also consistent with the wording of commentary 243, which specifically discussed free-standing racks that are unconnected to the building structures. I further find that free standing storage racks, which are not connected to the building, according to the advice in the Commentary 243, may or may not be assessed pursuant to article 4.1.8.18. Again, the Commentaries provide advice and explanation only for potential design problems.

[72] This above interpretation supports a finding that portable racks, which are free-standing and not connected to the building structure, are not subject to the Code for four reasons.

[73] First, the Code itself does not reference portable racks. Based on the principle of statutory interpretation of implied exclusion, I find the clear legislative intent was to refrain from including portable racks in the Code: ***Canpar Holdings Ltd. v Petrobank Energy and Resources Ltd,*** 2011 ABCA 62 at para 34. This finding is also supported by the Commentaries, which make specific reference to portable racks. I appreciate the Commentaries are not legal documents, but they are insightful explanatory comments offered through the lens of Code requirements.

[74] Second, although the Code does reference free-standing racks of which portable racks are a subset, I find based on a review of the subsection 4.1.8 portable racks are not included. I am satisfied that sentence 4.1.8.18, which contains the only reference to free-standing racks in the Code, refers to floor-mounted racks in the table, which are free standing yet involved with the building structure. This interpretation is consistent with the focus in subsection 4.1.8 on element and components attached to the building and how they will react together with the building to seismic events. Moreover, although not binding and used for explanation only, Commentary J on design for seismic events also emphasizes items attached to the building.

[75] Third, in any event, even if sentence 4.1.8.18 is not referring to connected free-standing structures, the sentence uses permissive language, suggesting free-standing racks may comply with article 4.1.8.18. This permissive language is also reflected in commentary 243 that advises unconnected free-standing racks could be assessed separately from the Code provisions.

[76] Fourthly, commentary 243 carves out portable racks as “other rack structures within a building,” making it explicit that portable racks are treated differently than free-standing racks, which are included under the Code.

[77] Based on this analysis of the Code provisions, I will now “test” my statutory interpretation “against the context and purpose of the legislation and established legal norms” pursuant to ***Pyke*** and ***La Presse***.

Measuring the Interpretation with Context

[78] As already found, the *Act* and the Code are public welfare legislation. The primary purpose of the Code, which is the relevant legislation enabled by the *Act*, is to maintain minimum standards to protect the health and safety of those people who are in or around built environments. The engineer’s view that the portable racks were subject to article 4.1.8.18 of the Code highlights these objectives. That article provides minimum seismic load standards for components of the building that are structurally involved with the building system. The standards

ensure that when an earthquake happens these components move with the building, lessening the risk of harm.

[79] However, not every item within the building envelope is subject to the Code requirements on seismic events. This is established both upon review of article 4.1.8.18 and its surrounding legislative provisions as well as the explanatory notes and Commentary J. Moreover, this view reflects the legislative intent and development of the Code, which are minimum standards built through consensus and input of code users. In other words, not every event, even if potentially unsafe, is covered by the Code. In those instances it is up to the code-user to determine the appropriate design approach. Moreover, there are other complementary pieces of legislation such as the *OHSA*, which apply to protect public safety.

[80] I therefore find that portable racks are not subject to the Code. This statutory interpretation is consistent with the purpose of the legislation. It also consistent with established legal norms requiring me to discern the meaning of statutory provisions while refraining from re-writing provisions, which were not clearly legislatively intended.

Other Ancillary Arguments

[81] As mentioned earlier, the City urged a broad statutory context, citing provisions in the *Act* and Code that were not contemplated by the Order. For instance, the City urged an alternate interpretation, divorced from the Order requirements, that the portable racks as a whole were one structure and therefore considered a building under the *Act*. In my view, to make the portable racks subject to the Code outside of article 4.1.8.18 would require a strained and artificial interpretation of the Code for the following reasons.

[82] The City pointed to the definition of "building" under the Code, which included "any structure used or intended for supporting or sheltering any use or occupancy." The City further reasoned that the portable rack structure as a "building" altered or changed the occupancy of the warehouse (which was also a building) such that a building permit was statutorily required. The *Act* also defined "building" as including "a structure and any part of a building or structure but does not include any thing excluded by the regulations from the definition of building." In support, the City referred to previous Tribunal decisions, one of which found a crane-way was a building: ***Council Order No. 0015468***.

[83] In submissions on the appeal, I pressed the City on this interpretation by positing a thought experiment, on whether chairs stacked in a room within a building required a permit because the stack was a "building." The City agreed that chairs would not need a building permit. Indeed, chairs are not subject to the Code. Chairs might impact the occupancy of the building, not because of the inherent characteristics of the chair but because they could change the floor space or configuration of the building envelope. This view is consistent with the Tribunal's decision, which recognized portable racks may impact the floor configuration of the building thus potentially requiring a permit. The space taken by the racks may impact the building but not the racks themselves. Indeed, note A-4.1.8.18(13) clearly states that the racks themselves do not provide occupancy.

[84] I am satisfied that the Code, which is the applicable regulation, does not treat storage racks either individually or in a grouping as buildings. Individually, storage racks if floor mounted, are considered a structural element or component of a building not a building itself. Moreover, even if portable storage racks are grouped together, they are not a building. This

interpretation is supported by other provisions in the Code that define "building area" and "building height," with reference to walls and number of storeys. These definitions may cover a large outdoor crane-way towering over property but does not include a grouping of portable racks within a building.

[85] The City also maintained that not finding portable racks subject to the Code would create a statutory absurdity, permitting the unsafe use of portable racks as established in the facts of this case. I disagree. First, as mentioned, the City, pursuant to the Tribunal's decision, could review the floor configuration or rely on other complementary legislation to ensure and enforce safety requirements. Second, the City, as a code-user, could provide input into the future development of the Code to lobby for portable rack inclusion into the Code.

Conclusion

[86] In the end, to find portable racks subject to the Code would be inconsistent with the legislative purpose and intent of these statutes, which are developed by code-users to be used by them, not as a "textbook" or all-inclusive canon, but as an objective-based document providing minimum standards with technical design solutions to fulfill those standards. A rigid interpretation would not align with design realities, which do not employ "cookie-cutter" solutions but involve the application of expertise and knowledge to each unique circumstance. Finally, there are alternate legal pathways to the concerns engaged in this case.

[87] I therefore dismiss the appeal and confirm the Order of the Tribunal.

Heard on the 20th day of December, 2023.
Dated at the City of Calgary, Alberta this 2nd day of February, 2024.

Lisa A. Silver
J.C.K.B.A.

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