

Lessons from *Cunningham v. Front of Yonge*

Many municipal treasurers have found themselves wondering what to do when, in the midst of a tax sale, the property owner presents payment in full of all outstanding realty taxes, penalties, interest, and the municipality's costs (the "cancellation price"). Should they accept the payment, cancel the tax sale, perhaps damage the integrity of the tendering process, and possibly risk legal action by one or more tenderers? Alternatively, should the treasurer refuse the payment and continue with the tax sale?

The Ontario Court of Appeal's decision in the recent case of *Cunningham v. Front of Yonge (Town)*¹ appears to give the treasurers of Ontario municipalities a clearer picture of what to do in this situation.

Background

On March 14, 2002 the Township of Front of Yonge registered a tax arrears certificate against a farm owned by Mr. and Mrs. Cunningham, pursuant to the *Municipal Tax Sales Act* (the "Act"). Notices of registration of a tax arrears certificate were mailed on March 18, 2002 and final notices were mailed on January 8, 2003.

Mr. Cunningham did not receive any of the notices. Mrs. Cunningham did receive the notices and hid them from her husband. On or about May 26, 2003 a neighbour advised Mr. Cunningham that his farm was being advertised for tax sale.

On May 29, 2003, Mr. Cunningham met with the township's treasurer. There is a dispute in the evidence as to what was said. Mr. Cunningham claims that he was told he would have to pay the full amount of arrears and costs in order to have the tax sale proceedings cancelled, but that he was not given any time limit for doing so. The treasurer's evidence is that she told him the full payment had to be made by June 4, 2003, the day when the tenders were to be opened and made public.

The tenders were opened on June 4, 2003, without any payments having been made. Successful tenderers were declared and they were advised that they had fourteen days to pay the balance of the purchase price owing. However, they did not pay the balance owing. Instead, on July 3, 2003 the second highest tenderers were declared the successful tenderers. A tax deed, however, had not been registered.

Meanwhile, Mr. Cunningham arranged to borrow sufficient funds to pay the cancellation price. On June 17, 2003, when contacted by counsel for the lender, the township took the position that once the tenders were opened the treasurer had no discretion to cancel the tax sale, pursuant to subsection 12(6) of the Act, and it refused to accept the Cunninghams' offer of full payment of the cancellation price. On June 18, 2003 the Cunninghams' lawyer faxed a letter to the township, indicating that his clients were in possession of funds and wished to pay the arrears immediately. On June 19, 2003 the Cunninghams applied to the courts for relief from forfeiture.

The court granted the application, cancelled the tax sale, prohibited the township from registering a tax deed, and gave the Cunninghams thirty days to pay the cancellation price. The court also ordered the township to pay the Cunninghams \$45,000.00 in costs.

The township and the second highest tenderers appealed the decision. On October 12, 2004, in a unanimous decision the Ontario Court of Appeal dismissed the appeal and the township and the second highest tenderers were ordered to pay the Cunninghams a further \$20,000.00 in costs.

Analysis

With regard to the conflicting evidence over what, if any, time frame the treasurer gave the owner to pay the cancellation price, the lower court ruled in favour of Mr. Cunningham. The judge ruled that Mr. Cunningham could reasonably have expected to have the tax sale cancelled if he acted expeditiously, as he did, in securing the funds necessary to pay the cancellation price. The Court of Appeal ruled that this issue was not central or necessary to the determination of the application.

The central issue on appeal was whether the treasurer of a municipality retains the discretion to cancel a tax sale pursuant to subsection 12(6) of the Act once tenders have been opened and a successful purchaser chosen, but before a tax deed is registered.

Subsection 12(6) of the *Municipal Tax Sales Act* states:

Where, in the opinion of the treasurer:

(a) it is not in the financial interests of the municipality to continue with proceedings under this Act; or
(b) because of some neglect, error or omission, it is not practical or desirable to continue proceedings under this Act,

the treasurer may register a cancellation certificate in the prescribed form, but this subsection does not apply so as to prevent the treasurer from registering a new tax arrears certificate and proceeding under this Act.

Please note that on January 1, 2003 subsection 12(6) of the Act was replaced by subsections 382(6) and 382(7) of the *Municipal Act, 2001*.

This case confirms that a municipal treasurer retains discretion under subsection 12(6) to cancel a tax sale at any time up to the registration of the tax deed. In the decision for the Court of Appeal the judge stated, "Was the application judge correct in his legal conclusion that a municipal treasurer retains discretion under subsection 12(6) to cancel a tax sale at any time up to the registration of the tax deed? In my opinion he was."

The *Cunningham* case also confirms that a tax sale must be cancelled on application to the court if the evidence shows that the treasurer of the municipality did not exercise the discretion to cancel or continue with the tax sale as outlined in subsection 12(6) of the Act. In dismissing the appeal, the Court of Appeal concluded "A person on whom a discretion is conferred has a duty to exercise that discretion when requested to do so in appropriate circumstances...The failure on the part of the treasurer to exercise her discretion under subsection 12(6) of the Act therefore rendered the tax sale proceedings "fatally flawed", as the application judge noted."

The *Cunningham* case also ruled that the subsection 12(6)(b) discretion applies to neglect, error or omission on the part of either the municipality or the taxpayer (owner) so long as the neglect, error or omission is found within the proceedings for the sale of land themselves. The judge stated, "...I see no reason for limiting the discretion to some neglect, error or omission *on the part of the municipality*. I would limit it, as indicated, to some neglect, error or omission on the part of either the municipality or the taxpayer, but within...the tax sale process itself".

The Court of Appeal in *Cunningham* considered the impact of the cancellation of a tax sale during or subsequent to the tendering process on the tax sale process. The judge wrote, "... I do not see the continuing existence of the discretion to cancel a tax sale pending registration of the tax deed, in circumstances that comply with subsection 12(6), as adversely affecting the integrity of the tender process. Tenders are submitted subject to the terms of the Act as a whole, including subsection 12(6). A municipality has no obligation in law to complete the tax sale... Consequently, the interest of a potential purchaser whose tender has been accepted remains subject to the possibility that a cancellation certificate may be granted under subsection 12(6) at any time before the tax deed is registered."

As a result, municipal treasurers appear to have been instructed by the Court of Appeal not to consider the integrity of the tendering process and its impact on the tax sale process in exercising their discretion under subsection 12(6).

In confirming that a municipality does not have an obligation in law to complete a tax sale, the Court of Appeal in *Cunningham* followed the Court of Appeal's earlier ruling in *Deverell v. Anson, Hindon and Minden (Townships)*². In *Deverell*, the court confirmed the treasurer's discretion to cancel or continue a tax sale. The court then concluded that it would not be a reasonable exercise of the treasurer's discretion to continue the tax sale in a situation where a tax deed has not been registered and the owner is attempting to pay the cancellation price, even after the tender process has concluded.

In *Deverell* the Court of Appeal notes that the record does not disclose whether the treasurer in that case had exercised discretion in accordance with subsection 12(6) of the Act, and then concludes, “ In our view, had the treasurer considered the relevant factors, the cancellation certificate that the respondents sought should have issued. No other conclusion would be reasonable in the context of the relieving provisions of s. 12(6). There is nothing in evidence or the appellant’s submissions that would suggest that if the treasurer reasonably took into account the factors set out in s. 12(6)(a) and (b) there was a basis upon which she could form the opinion that the cancellation certificate should not issue.”

The *Cunningham* and *Deverell* decisions appear to extremely limit the occasions when a treasurer can exercise discretion to continue a tax sale when the owner is ready to pay the cancellation price. The court appears to be imposing its determination of the “reasonable” exercise of discretion of municipal treasurers. In neither case did the court offer an example when a treasurer’s discretion should result in the continuation of a tax sale proceeding where a tax deed has not been registered and the owner is ready to pay the cancellation price.

The *Deverell* case was decided prior to *Elliott v. Toronto* ³. In the *Elliott* case the owner’s application to cancel the tax sale prior to registration of a tax deed failed.

Upon first review the *Cunningham* and *Deverell* cases may appear to conflict with the decision in the *Elliott* case. However, in *Cunningham* the judge carefully confirmed that the *Elliott* case did not deal with the treasurer’s discretion found in subsection 12(6) of the Act. Relief under 12(6) of the Act was not sought in the *Elliott* case by the owner’s counsel.

Interestingly, the judge in the *Cunningham* case did not cite the “second” *Elliott* ⁴ case that arose from the same tax sale proceeding and dealt solely with the application of subsection 12(6). The ruling in the “second” *Elliott* case was made by the Ontario Divisional Court, with leave to the Court of Appeal and then to the Supreme Court of Canada refused.

The “second” *Elliott* case confirmed that the tax sale was valid and could proceed to registration of the tax deed because the treasurer of the municipality had applied the discretion found in subsection 12(6) of the Act and had decided that, among other things, the integrity of the tax sale and tender process would be harmed if the tax sale was cancelled.

The *Elliott* cases did have a unique set of facts, in that a tax arrears certificate had previously been registered against the Elliott’s property. That tax arrears certificate was cancelled after the owner paid the taxes. In addition, the owners had defaulted on a subsequent payment arrangement with the City of Toronto, thereby necessitating registration of another tax arrears certificate. Nevertheless, though it is not binding on the Court of Appeal (because the decision was made by a lower court), the “second” *Elliott* case does appear to conflict with the *Cunningham* ruling, or more accurately, it may provide an example where a municipal treasurer properly exercised the discretion to complete a tax sale, consequently leaving open the door to distinguish future cases from the *Cunningham* facts and ruling.

Conclusions

The *Cunningham* and *Deverell* cases confirm that a municipal treasurer retains the discretion to cancel a tax sale under section 12(6) (now subsections 382(6) and 382(7) of the *Municipal Act*, 2001) any time prior to the registration of a tax deed. *Cunningham* also appears to confirm that a municipality does not have an obligation in law to complete a tax sale. Furthermore, this case shows that a treasurer’s justification for canceling a tax sale can be neglect, error or omission on the part of the property owner within the tax sale process. *Cunningham* also demonstrates that tenders are submitted subject to the possibility that the tax sale may be cancelled under subsection 12(6) at any time before the registration of a tax deed.

Is it still possible for a treasurer to reject an owner’s offer of payment of the cancellation price, and continue with the tax sale? In light of the “second” *Elliott* ruling which was not reviewed in the

Cunningham case and the confirmation in the *Cunningham* case that a municipal treasurer does have the requisite discretion and must exercise their discretion, that option may still be open.

Perhaps the most important lesson from the *Cunningham* case is that the treasurer must be able to prove that they have exercised their discretion under subsection 12(6) to cancel or continue with the tax sale. It is essential that the treasurer keep a detailed record of their thought process and rationale at the time of exercising this discretion. Without such a record the municipality won't stand much chance of winning a challenge in court.

If the municipality's priority is to avoid going to court, the most prudent course of action is probably to accept the owner's payment and cancel the tax sale. At the end of the day, a person who is about to lose their property in a tax sale, even though they are ready, willing and able to pay the cancellation price, is more likely to initiate legal action than is a tenderer who was not allowed to buy a property because the treasurer exercised their lawful discretion to cancel the sale.

1 *Cunningham v. Front of Yonge (Township) (Ont. C.A.)*, docket C40818 C40849

2 *Deverell v. Anson, Hindon and Minden (Townships) (1998)*, 110 O.A.C. 372

3 *Elliott v. Toronto (City) (1999)*, 43 O.R. (3d) 392 (C.A.) leave to appeal to the Supreme Court of Canada refused November 16, 2000, Docket #27289

4 *Elliott v. Toronto (City)*, 1999 O.J. No.4791(Divisional Court, Ontario Superior Court of Justice), application for leave to appeal refused, 2000 S.C.C.A. No. 204, File No. 27888

About the author

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