

## **Court Decision Respecting Clarity Outdoor and the Applicability of s.771-8.K of Chapter 771, Taxation, Third Party Sign Tax**

**Date:** June 27, 2017

**To:** City Council

**From:** City Solicitor

**Wards:** Ward 19 - Trinity Spadina and all wards

### **REASON FOR CONFIDENTIAL INFORMATION**

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This report is about litigation or potential litigation that affects the City or one of its agencies or corporations.

This report contains advice or communications that are subject to solicitor-client privilege.

### **SUMMARY**

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This report summarizes the decision of Justice Ferguson of the Ontario Superior Court of Justice dated May 31, 2017 (the "Judgment") and seeks instructions regarding the Judgment. Justice Ferguson granted an application brought by Clarity Outdoor Media Inc. ("Clarity") against the City seeking an interpretation of the tax exemption set out in s. 771-8.K of Chapter 771, Taxation, Third Party Sign Tax, of the City of Toronto Municipal Code ("Chapter 771") which provides that no third party sign tax ("TPST") is payable by a sign owner who has entered into a revenue sharing agreement with the City of Toronto during the term of said agreement. Clarity's position on the application, which was adopted by the court, was that s. 771-8.K (the "Revenue Sharing Exemption") applied to Clarity's operation of a third party ground sign at 2 Strachan Avenue on Exhibition Place grounds (the "Sign") pursuant to a revenue sharing agreement with the Board of Governors of Exhibition Place (the "Ex Place BOG"), which is a city board and agent of the City pursuant to *City of Toronto Act, 2006* ("COTA"). As a result, Clarity was found not to owe any TPST to the City in connection with its operation of the Sign.

The revenue sharing agreement between Clarity and the Board of Governors of Exhibition Place respecting the Sign was approved by City Council on August 25, 2010 and is for a term of 15 years. Clarity operated the Sign from 2010 to May of 2014 after which time its interest in the Sign was assigned to another sign company. Clarity was assessed by the City for the payment of TPST for the taxation years 2011 to 2014. However, it has been Clarity's position that the revenue sharing agreement with the Ex Place BOG is effectively a revenue sharing agreement with the City by virtue of the statutory agency relationship between the City and the Ex Place BOG such that Clarity is exempt from the payment of TPST pursuant to the Revenue Sharing Exemption. It was the City's position that the exemption relates only to revenue sharing agreements entered into with the City directly and does not apply to revenue sharing agreements entered into with city boards.

The potential impact of the Judgment is discussed further in Confidential Attachment 1.

## **RECOMMENDATIONS**

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The City Solicitor recommends that:

1. City Council adopt the recommendations contained in Confidential Attachment 1.
2. City Council authorize the public release of the recommendations in Confidential Attachment 1, if adopted by Council and direct that the remaining confidential information contained in Confidential Attachment 1 remain confidential in its entirety, as it contains advice which is subject to solicitor-client privilege.

## **FINANCIAL IMPACT**

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If the Judgment is not appealed, the City will be required to refund to Clarity the total amount of \$97,078.34 which constitutes the principal of taxes ultimately paid by Clarity for the taxation years 2011, 2012, 2013 and 2014. The City will be further required to pay Clarity its legal costs of the court application in the amount of \$20,000. If an appeal is pursued by the City, the requirement to make these payments is stayed pending appeal.

Additional financial impacts are discussed in Confidential Attachment 1.

## **DECISION HISTORY**

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Chapter 771 was added to the Municipal Code by the enactment of By-law No. 197-2010 on February 23, 2010 following the adoption by City Council on November 30, December 1, 2, 4 and 7, 2009 of Planning and Growth Management Committee Item 33.10, entitled "New Sign Regulation and Revenue Strategy for the City of Toronto", as amended.

It was the City's position that Clarity was required to avail itself of the administrative remedies available in Chapter 771 before it could seek a remedy in court. Clarity agreed to do so in January of 2017. Prior to the hearing of the court application, Clarity paid the principal of TPST owing and applied pursuant to s. 771-9 of Chapter 771 to the Chief Building Official (the "CBO") for a refund on the ground that the Revenue Sharing Exemption applied to it. The CBO issued a Statement of Disallowance refusing the refund, and Clarity further objected to said Statement of Disallowance pursuant to Article IX of Chapter 771. The disallowance was confirmed by the CBO on February 1, 2017, and Clarity thereafter appealed the statement of disallowance to City Council through Government Management Committee ("GMC") pursuant to Article X.

A hearing was held before GMC at its meeting of February 21, 2017 at which time GMC recommended against granting a refund to Clarity thereby adopting the position of the Acting Chief Building Official set out in his report of February 7, 2017.

GMC's recommendation was adopted by City Council at its meeting of March 28, 29 and 30, 2017.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.GM18.3>

The court application was thereafter heard in the Superior Court of Justice on May 9, 2017, and Justice Ferguson's reasons for decision were released on May 31, 2017. A copy of the reasons for decision is available from the City Clerk.

## **COMMENTS**

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### **ISSUE BACKGROUND**

Clarity commenced a court application against the City in the Ontario Superior Court of Justice pursuant to Rule 14.05 of the Rules of Civil Procedure for a declaration that the Revenue Sharing Exemption applied to it and that TPST was therefore not payable. The primary issue on the application was whether the Revenue Sharing Exemption applied to it by virtue of the revenue sharing agreement entered into with the Ex Place BOG in respect of the Sign.

Pursuant to s. 407(1) of COTA, the Ex Place BOG is a city board with the purposes of the operation, management and maintenance of Exhibition Place. Pursuant to s. 142 of COTA, a city board is an agent of the City. In brief, it was Clarity's position on the court application that pursuant to the common law principles of agency, Clarity's revenue sharing agreement with the Ex Place BOG was effectively an agreement with the City. As such, it was Clarity's position that the Revenue Sharing Exemption applied to it and that no TPST was payable.

In putting forth this position, Clarity further relied on the various measures of control asserted by the City over the Ex Place BOG in the City's delegation of powers to the Ex Place BOG in Chapter 63, Exhibition Place, Governance, of the City of Toronto

Municipal Code and the Relationship Framework adopted by City Council which further guides the relationship.

In response, it was the City's position on the court application that the Revenue Sharing Exemption does not apply to Clarity's operation of the Sign in the years in question and that TPST is owing. In brief, it was the City's position that the Revenue Sharing Exemption does not and was not intended to apply to revenue sharing agreements entered into with city boards and only applies to revenue sharing agreements with the City directly. Had the City intended for the Revenue Sharing Exemption to apply to city boards, it would have done so expressly. It was the City's position that the City differentiated, and expressly intended to differentiate, in this regard between itself and its city boards for specific and valid policy reasons and that said differentiation was authorized by subsection 10(1) of COTA. Subsection 10(1) of COTA provides that a by-law passed under COTA may be general or specific in its application and may differentiate in any way and on any basis the City considers appropriate. The City submitted that the power to so differentiate includes the right to differentiate between the City and city boards notwithstanding the existence of a statutory agency relationship. It was the City's position that it is open to the City to differentiate as it sees fit in granting exemptions to the payment of TPST in order to further its municipal objectives.

Nevertheless, the court adopted Clarity's position and held that the Revenue Sharing Exemption applied to Clarity such that no TPST is payable.

Confidential Attachment 1 provides legal advice and comment on the issues arising from the Judgment.

## **CONTACT**

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## **SIGNATURE**

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Wendy Walberg  
City Solicitor

## **ATTACHMENTS**

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Confidential Attachment 1 - Clarity Court Decision respecting s.771-8K