

SUPREME COURT OF YUKON

Citation: *Whitehorse (City of) v Annie Lake Trucking Ltd.*,
2022 YKSC 54

Date: 20221013
S.C. No. 21-A0084
Registry: Whitehorse

BETWEEN:

CITY OF WHITEHORSE

PLAINTIFF

AND

ANNIE LAKE TRUCKING LTD., also known as ANNIE LAKE TRUCKING 2021

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff

Nathan Lapper (by videoconference)

Appearing for the Defendant

No appearance

This decision was delivered in the form of Oral Reasons on October 13, 2022. The Reasons have since been edited for transcription without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): These are two applications by the City of Whitehorse in the matter of their claim against Annie Lake Trucking.

[2] The first application is for a declaration of contempt of a consent order entered into by the parties on March 22, 2022, and an imposition of a fine of \$5,000 on each of the partners of Annie Lake Trucking and special costs.

[3] The second application is for an enforcement order allowing the RCMP or a peace officer in the exercise of their discretion to arrest and remove from the lands any

person with knowledge of the consent order who police have reasonable and probable grounds to believe is contravening or has contravened one or more provisions of paras. 2 to 5 of the consent order. The proposed enforcement order also sets out a number of options for police upon arrest.

[4] At the hearing of these applications, counsel for the City of Whitehorse appeared by videoconference. No one appeared for Annie Lake Trucking. All three partners in Annie Lake Trucking — Trevor Hunziker, Richard Hunziker, and Charlene Armstrong — had been duly served with the notices of application and materials. None of the three filed any appearance or responding materials. As a result, in accordance with the *Rules of Court*, they did not receive a notice of hearing and did not appear.

[5] I will first review the facts.

[6] This matter arises from the lawful termination of a lease of lands located near Ear Lake, between the City of Whitehorse (owner of the lands) and Annie Lake Trucking Ltd., also known as Annie Lake Trucking 2021. I will refer to the company as “Annie Lake” or “Annie Lake Trucking”. The lease was originally entered into on November 4, 2008, for a term of 10 years, effective January 1, 2007, and ending December 31, 2016. The purpose of the lease was for quarry and quarry-related purposes; the exclusive right to excavate for and remove gravel, sand, stone, and associated products from the lands; and the right to crush, quarry and produce concrete from a concrete plant on the lands.

[7] On December 6, 2016, Annie Lake wrote to the City to request a renewal of the lease for another 10 years. The City consented to Annie Lake remaining an overholding lessee who is permitted to occupy the lands as a monthly lessee on the same terms

as in the lease, except for the condition that the tenancy could be terminated on 30 days' notice by either party under s. 16.

[8] The City noted various breaches of the lease by Annie Lake in late 2020. The City sent letters to Annie Lake advising them of breaches and requiring them to take action to comply. The City received no response to these letters.

[9] The City's letter of January 11, 2021, advised Annie Lake that the quarry activities were at variance with the Official Community Plan designating this area as greenspace available for commercial recreation opportunities and parks.

[10] On or about July 24, 2021, the City sent a formal notice of termination of the lease effective August 23, 2021, thereby complying with the 30-day notice requirement under s. 16 of the lease.

[11] A site inspection on September 3, 2021, by the City revealed ongoing occupation of the lands by Annie Lake. The partners stated during the inspection they did not intend to vacate the lands.

[12] On September 10, 2021, City officials again attended the lands after providing formal notice to Annie Lake of trespass and reservation of their rights to seek damages for various breaches as well as the trespass. The City officials put barricades at the entrance to the lands and posted notices of trespass. They observed stability concerns on the slope in the excavation area causing safety risks to employees. On that same day, one of the partners confronted two City officials, uttered profanities, threatened to sue, and drove off at high speed very close to the City workers.

[13] As a result of the ongoing quarrying use of the lands by Annie Lake and the continued occupancy by residential tenants, the City initiated a statement of claim

alleging a breach of the lease and unlawful trespass. At the same time, the City filed an application for an interim injunction seeking an order enjoining Annie Lake from trespass on or interfering with the lands.

[14] The City granted Annie Lake's legal counsel an extension to respond to the City's filings and discussions between counsel began. These discussions resulted in a consent order entered into on March 22, 2022, that provided among other things the termination of the lease; that Annie Lake Trucking would have no ongoing or other rights to the lands; that Annie Lake Trucking was required to cease immediately all commercial operations and fully vacate the lands, including the residential tenants, equipment, and materials by June 30, 2022.

[15] Annie Lake Trucking did not vacate the premises by June 30, 2022, and they continued commercial and other activities, including carrying out quarrying and extraction operations.

[16] On June 30, 2022, an article appeared in the *Whitehorse Star* in which the partners stated they were refusing to relocate their operations from the lands unless and until they were arrested and forced to do so. That same day, their legal counsel advised he was no longer representing them and Annie Lake Trucking then filed a notice of self-representation.

[17] During July and August 2022, the City Land Development supervisor attended at or observed the lands four times, accompanied by other City personnel. On each occasion, she observed Annie Lake undertaking excavation activities or she saw Annie Lake equipment and vehicles on the lands.

[18] The City legal counsel sent a letter dated July 15, 2022, advising Annie Lake that they were in breach of the consent order and if they did not vacate the lands by July 18, 2022, the City would apply to have the partners held in contempt of court and seek to enforce the consent order.

[19] The first questions legally, are: whether the test for a civil contempt order has been met; and is the requested fine of \$5,000 per partner appropriate in this situation?

[20] The test for civil contempt has three elements, and this is based on the case of *Carey v Laiken*, 2015 SCC 17. First, the order allegedly breached must state clearly and unequivocally what should and should not be done. Second, the party alleged to have breached the order must have had actual knowledge of it — and this can include knowledge that is inferred or if the party is wilfully blind. And third, the party allegedly in breach must have intentionally done the act the order prohibits. In other words, it is not necessary to prove the party intended to breach the order; it is only necessary to prove the party intentionally committed an act which has the effect of breaching the order.

[21] In this case, the order is clear about what Annie Lake shall and shall not do. First, the order states the lease is terminated and Annie Lake has no ongoing rights. Second, Annie Lake is enjoined from any commercial activities at the lands. Third, Annie Lake must make best efforts to remove from the lands any subtenants, sublicensees, and others invited onto the land by Annie Lake. Fourth, Annie Lake will by June 30, 2022, remove any items and materials stored or kept on the land and remove any residential tenants from the land and cease all residential use. There is also a clause that speaks to the forfeits of their rights and interests in rehabilitation fees and royalties on the material extracted from the lands.

[22] Second, Annie Lake had knowledge of this order because their lawyer negotiated and signed the consent order on their behalf.

[23] And third, as noted, there is much affidavit evidence provided in the materials from the City about various visits by City officials to the property in July and August 2022, during which they observed ongoing quarrying activities, the presence of Annie Lake equipment and materials, and residential tenants. Photographs are attached to the affidavits as exhibits in support of these observations. In addition, the partners reportedly declared that they would not be complying with the order.

[24] As a result, I find that the elements of a contempt order have been met.

[30] ... the purpose of a contempt order is “first and foremost a declaration that a party has acted in defiance of a court order”. [citations omitted]

That is from *Carey v. Laiken*, para. 30, quoting from *Pro Swing Inc. v Elta Golf Inc.*, 2006 SCC 52. It is a discretionary order arising from the inherent jurisdiction of the court, which includes the power to control its processes, enforce orders, and maintain their dignity and respect. The rule of law is directly dependent on this ability.

[25] A contempt order, though, is to be used “cautiously and with great restraint” (*TG Industries Ltd. v Williams*, 2001 NSCA 105 at para. 32). “It is an enforcement power of last ... resort” (*Carey v. Laiken* at para. 36).

[26] Turning to penalty, it is necessary to impose a penalty to ensure societal respect for the courts and to enforce compliance with the court order. Rule 59(2) of the *Rules of Court* of the Supreme Court of Yukon allows for punishment by imprisonment or fine or both. Rule 59(3), in the case of a corporation, allows for fine or imprisonment or both against directors or officers of the corporation.

[27] Factors to be considered in deciding on a sentence or a penalty were thoroughly set out in the case of *Health Care Corp. of St. John's v Newfoundland and Labrador Assn. of Public and Private Employees*, [2001] NJ No 17 (Nfld. T.D.) (*Langford (City) v dos Reis*, 2016 BCCA 460 (“*City of Langford*”) at Tab 6 of the Book of Authorities). The factors relevant to this case are as follows:

1. the inherent jurisdiction of the court, as a superior court, allows for the imposition of a wide range of penalties for civil and criminal contempt;
2. deterrence, both general and specific — but especially general deterrence — as well as denunciation are the most important factors to be considered in the imposition of penalties for civil as well as criminal contempt;
3. the impact that the contemptuous act has had on the general public, particularly in relation to health and safety matters, is a relevant consideration in determining the level of penalty;
4. it is the defiance of the court order and not the illegality of any actions which led to the granting of the court order in the first place, which must be the focus of the contempt penalty;
5. imprisonment is normally not an appropriate penalty for civil contempt where there is no evidence of active public defiance (such as public declarations of contempt; obstructive picketing; and violence) and no repeated unrepentant acts of contempt; and

6. where a fine is to be imposed, the level of the fine may appropriately be graduated to reflect the degree of seriousness of the failure to comply with the court order.

[28] So here, as I said, the City is seeking a fine of \$5,000 against each of the three partners. No submissions were received about proportionality, aggravating or mitigating circumstances, or the ability of the partners to pay.

[29] The following factors, in my view, are most relevant to the imposition of a penalty in this case:

1. the need for deterrence and denunciation, especially in the context of the defiance of the court order voluntarily agreed to and on the advice of legal counsel;
2. the health and safety concerns created by the ongoing excavations in the area of the unstable slope;
3. at least one instance of public defiance through the *Whitehorse Star* report, as well as threatening behaviour to City officials on at least one occasion; and
4. previous cases where penalties have been imposed.

[30] While public defiance can provide a basis for ordering imprisonment, here the City is not requesting this but they are asking for the act of public defiance to be taken into account in setting the fine.

[31] The one previous case from this jurisdiction, *Gwich'in Development Corporation v Alliance Sonic Drilling Inc. et al.*, 2009 YKSC 19 ("*Gwich'in*"), was referred to at this

hearing. In that case, the Court imposed a fine of \$1,000. It was a private commercial dispute where the party in contempt disobeyed a court order.

[32] In our neighbouring jurisdiction of British Columbia, the 2016 decision of *City of Langford* set out a range of fines that they canvassed from other cases imposed for contempt orders, and that range was between \$1,500 and \$7,500.

[33] The \$5,000 requested is at the higher end of the penalties imposed. Taking into account the factors I have noted as well as the range of fines in other cases, I find that the appropriate amount is \$2,500 against each partner, for a total of \$7,500 as a fine.

[34] The City has requested that the amount be made payable to it. However, as noted by the courts both in the *Gwich'in* case and the *City of Langford* cases, contempt is an offence against the authority of the court and the administration of justice and is a matter between the entity or the person in contempt and the court, not between litigants, so the fines shall be paid to the Territorial Treasurer.

[35] The City has requested special costs to which they are entitled under Rule 59(4) and at common law. The court in *City of Langford* — found, again, at Tab 6 of the Authorities — stated at para. 28, quoting from *North Vancouver (District) v Sorrenti*, 2004 BCCA 316:

[28] It is axiomatic that contempt of a court order is reprehensible conduct, the signal feature of a special costs award. Such an award also serves to indemnify a party who is required to bring contempt proceedings to have an order obeyed. Therefore, such an award should be concomitant to a finding of contempt. I refer to this Court's disposition in *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316:

[20] In her able submissions, however, Ms. Marzari referred us to the comments of Southin J.A. for the Court in *Everywoman's Health Centre Society (1988) v. Bridges* (1991), 54 B.C.L.R. (2d) 294, where she

observed that it is a long-standing practice to award solicitor-client costs to the successful applicant in a civil contempt proceeding. She added that “[t]he practice is sound. A person who obtains an order from the court is entitled to have it obeyed without further expense to himself.” ...

[36] So I therefore award the City special costs for the contempt proceedings.

[37] The second application is for the enforcement order. The City says this is necessary to provide a mandate to the RCMP to enforce the terms of the consent order. While the purpose of the contempt order is to draw attention to and increase awareness of the need to respect the integrity of a court order, the enforcement order is necessary to ensure compliance. The City says the order represents a compromise of the remedy sought by the City in its claim and injunction proceedings. It gave up its pursuit of damages in order to obtain the consent order. The City says its sole goal from the outset has been to remove Annie Lake from the lands and to take back the lands they lawfully own. The refusal of Annie Lake to do so, despite multiple opportunities provided by the City through multiple letters, offers to negotiate, compliance with the consent order in exchange for not pursuing the claim and injunction, means that enforcement action is required.

[38] Further, the RCMP have advised that they require specific language in an order to implement the enforcement of the order. That language is reflected in the relief set out in the Notice of Application as amended after review by the federal Department of Justice on behalf of the RCMP.

[39] Enforcement orders are not automatically granted. Factors considered by courts in other circumstances include:

- a. the number of people participating in the defiant act;

- b. the remoteness of the area;
- c. the disregard of a no-trespassing notice;
- d. implied threats of harm to officials attempting to implement or enforce the order; and
- e. the RCMP's position that they will not act without an order directing them to do so.

Those factors are set out in two cases in the Authorities, one at Tab 3, *Coastal GasLink Pipeline Ltd. v Huson*, 2019 BCSC 2264, and the other at Tab 1, *Board of School Trustees of School District No. 27 (Cariboo-Chilcotin) v Van Osch et al*, 2004 BCSC 1827.

[40] In this case, several of these factors exist. First, the RCMP require specific enforcement language in order to assist with the enforcement of the order. Second, the partners of Annie Lake have consistently disregarded the trespass notices, as well as the consent order and many other requests by letters and in person from the City. Third, some City officials have felt threatened when on site and attempting to obtain compliance with the order. Fourth, although the location is not remote, as it is within City limits, there are not many other entities or individuals located in the area of Ear Lake. Finally, the public statement pledging defiance of the order, as reported in the *Whitehorse Star*, combined with the ongoing activity in contravention of the order up to the date of filing material for these applications suggest Annie Lake's ongoing unwillingness to comply with the provisions of the order.

[41] As a result, I am satisfied on the facts of this case that an enforcement order is in the interests of justice.

[DISCUSSION]

[42] The wording of that order shall be as set out in the Notice of Application, with the following amendments. In para. 1, after “to arrest and remove,” it should say “to arrest and remove from the lands any person who has knowledge of the consent order.” And also in para. 1 in the second-last line, “reasonable and probable grounds to believe is contravening or has contravened one or more of provisions 2, 3, 4, and 5 of the consent order.” And in para. 4, the amendment is on the second line: “arrest and removes from the lands” is added “any person” and then the rest up to the end of para. 4 shall remain as written.

[DISCUSSION]

[43] Out of an abundance of caution, I will issue an order dispensing the signatures of the partners of Annie Lake Trucking.

DUNCAN C.J.