SUPREME COURT OF YUKON

Citation: *The Hotsprings Road Development Area Residents Association v. Yukon (Government of)*, 2017 YKSC 42

Date: 20170707
S.C. No.: 16–A0047
Registry: Whitehorse

BETWEEN:

THE HOTSPRINGS ROAD DEVELOPMENT AREA RESIDENTS ASSOCIATION

PLAINTIFF

AND

SCOTT KENT in his capacity as Minister of Energy, Mines and Resources, and as the representative of the Government of Yukon, and the GOVERNMENT OF YUKON

DEFENDANTS

Before Madam Justice M.A. Maisonville

Appearances:
Stephen L. Walsh — Counsel for the Plaintiff
Michael Winstanley — Counsel for the Defendants

REASONS FOR JUDGMENT

[1] MAISONVILLE J. (Oral): The plaintiff is before the Court today, represented by Mr. Walsh, seeking a declaration pursuant to Rule 59 of the Yukon *Rules of Court* that the Government of Yukon is in civil contempt of an order of this Court. No fine is sought at this time because that would mean the Government of Yukon paying to the Treasury of the Yukon and, accordingly, would not make much sense. I have Mr. Walsh's submission in that regard. However, he does seek a declaration in regard to certain matters that arise following a judgment that I issued in March of 2017 (see *The*

Hotsprings Road Development Area Residents Association v. Yukon (Government of), 2017 YKSC 14). Rule 59 provides:

> **Power of court to punish**
>
> (2) The power of the court to punish **contempt** of court shall be exercised by imprisonment or by imposition of a fine or both.
>
> **Corporation in contempt**
>
> (3) An order against a corporation wilfully disobeyed may be enforced by one or more of the following:
>
> (a) imposition of a fine upon the corporation;
>
> (b) imprisonment of one or more directors or officers of the corporation;
>
> (c) imposition of a fine upon one or more directors or officers of the corporation.
>
> **Special costs**
>
> (4) Instead of or in addition to making an order of imprisonment or imposing a fine, the court may order a person to give security for the person's good behaviour.

[2] The plaintiff relies, as well, on

> **Service of order not necessary**
>
> (13) Where the court is satisfied that a person has actual notice of the terms of an order of the court, it may find the person guilty of contempt for disobedience of the order, notwithstanding that the order has not been served on the person.

[3] The plaintiff relies additionally on *Gwich'in development Corp. v. Alliance Sonic Drilling* 2009 YKSC 19 of Veale J. at paras. 16 - 19 in which he relies on the comments

of Donald J.A. in *Peel Financial Holdings Ltd. v. Western Delta Lands Partnership*, 2003 BCCA 551, particularly at para. 18.

[4] The issue that was before the Court in the earlier matter concerning the Hotsprings was an interpretation of the Hotsprings Road Local Area Plan. As the reasons are lengthy, I will not reiterate the entirety of the Reasons for judgment. The policy was set out as well as the fact that the Hotsprings Road Local Area Plan had been formally adopted by the Government of Yukon. At para. 11 of the Reasons, the policy provided:

> [11] The Plan confirms in Policy 5.16 that:
>
> > For properties designated *as Commercial - Mixed Use/Tourist Accommodation*, **a maximum of two residences per lot are permitted**.

[5] The plan further set out:

> [12] ...that the ability of landowners of several contiguous properties zoned as CMT Zoning to consolidate the residential development potential of their properties in a single lot is expressly subject to specific conditions set out in Policy 5.17 of the Plan which includes as follows:
>
> ...
>
> - **Any additional residential units beyond what is permitted in this designation would be subject to community consultation, rezoning and site plan approvals.**
>
> [Emphasis already added]

[6] The plan was adopted in the *Hotsprings Road Area Development Regulations*. The history of that legislation is set out at page 4 of the reasons. Again, there was a special provision which set out the permitted uses for the CMT that permitted uses,

including hotel/motel resorts and a number of other categories. Accessory uses included two single family dwelling units, which was the issue that was before the Court on the application as it was set out.

[7] That judgment however, it forms the backdrop for what is before me today.

[8] Mr. Walsh relies upon certain passages in the judgment, in particular:

> [53] That Plan provides in Policy 5.17 that "landowners of several contiguous properties designated as *Commercial – Mixed Use/Tourist Accommodation* may be able to transfer their residential development potential **to a single lot** subject to the following conditions", which include "community consultation, rezoning and site plan approvals".
>
> [54] No community consultation or rezoning has occurred.
>
> ...
>
> [78] I do not agree that there is a significant difference between the wordings "in a single lot" and "to a single lot". In my view, the wordings "to a single lot" simply express moving of the development potential in a different way rather than referring to it as moving the development potential "in a single lot".
>
> [79] The plain reading is that any consolidation of lot development is subject to the Plan, therefore, it must comply with the conditions of the Plan and that includes consultation and rezoning.
>
> ...
>
> [86] I find that the development of more than two residences per lot of lots 1533, 1536 and 1095 has not proceeded in accordance with Schedule A of the *Regulation* and Policy 5.17 of the Plan.
>
> [87] Until there has been compliance with the requirements of consultation and rezoning pursuant to s. 17(2) of the *Regulation*, development is prohibited.
>
> [Emphasis already added]

[9] Mr. Walsh also referred to paras. 91 and 92 of the decision, as did Mr. Winstanley for the Government. Those paragraphs read as follows:

> [91] The Plan, at Policy 5.17, reiterates that owners may be able to transfer their residential development to a single lot, subject to the following condition:
>
> > ... any additional residential units beyond what is permitted in this designation would be subject to community consultation rezoning and site plan approvals.
>
> [92] Again, pursuant to the *Regulation* and the Special Provision contained within, the Plan must be complied with. Accordingly, because there has been no compliance with the Plan, I make the following declaration in accordance with the plaintiff's application:
>
> > That provisions of Schedule B of the Amended Development Agreement which purport to provide for the consolidation of residential potential on lots 1533, 1536 and 1095 beyond the permitted maximum of two residence per lot is inconsistent and in conflict with the plan requirements which require community consultation as set out in the Hotsprings Road Local Area Plan.

[10] I continued at para. 93:

> [93] Again, I do not declare the agreement void as third party interests have been affected and there has been no application brought in respect of those parties. Nor am I declaring the actions of the Government of Yukon in the development would be prohibited. Rather, I am ordering that any such development in suspension until there has been compliance with all provisions in the Plan.

[11] Mr. Winstanley argues that the wording prohibiting "development" in the judgment has to be construed as meaning the construction in relation to the single family dwellings on the three lots that were the subject of the judgment where construction was occurring that are more than two residences per lot. The judgment

was addressing the construction - not capturing the definition of “development” to capture single family rezoned to staff accommodation.

[12] Mr. Walsh, on the other hand, relies upon para. 87, "Until there has been compliance ... development is prohibited."

[13] There is a definition of "development" in the *Area Development Act*, which sets out:

> "development" means:
>
> (a) construction of a building or an addition to, or replacement or repair of a building, or
>
> (b) a change of use of the land or a building;

[14] Accordingly, Mr. Walsh argues that before the Court is evidence of what occurred in this case, that is, shortly after the judgment was rendered, there was an application for a permit to change the use from single-family dwelling to vacation accommodation; and then only some two weeks ago, there was a further permit application to change it to staff accommodation and that development, in the sense of construction, had continued.

[15] Mr. Winstanley submits that what, in fact, occurred by the permits was that the parties had reviewed the language in the judgment and, accordingly, had come to a view that what that meant was that, given that it is already a permitted use by the *Regulations*, that would not be in conflict with the judgment.

[16] Mr. Walsh, on the other hand, argues that the “development” captures the change of use and that there were seriously questionable intentions on the issue of the permit.

[17] Before the Court, there are important matters that must be recalled.

[18] The first is that the earlier argument and judgment did not focus on Mr. Walsh's submission of the meaning of development. Mr. Winstanley argues this means that applying to change the use was not captured - nor was this issue addressed by either counsel. Secondly there has been no formal order has been filed. I appreciate that Mr. Walsh has explained why, and rightly so, if the order has not yet been entered that the matter might properly be reopened to re-pursue different remedies or relief. But in argument today I asked Mr. Walsh if he wished to reopen for that reason and he indicated he did not wish the judgment reopened; it was solely to have placed before the court the new information. However, that would not preclude the Court from rendering any decision in relation to contempt of its orders. Accordingly, that is not a reason solely by itself, given that the nature of the application before the Court today is in the nature of civil contempt, which renders it difficult for the Court to ascertain what meaning to place on it for the purposes of a contempt order. By Rule 59(13) I must be satisfied the party sought to be held in contempt has notice of the court's order.

[19] I note that both counsel argued strenuously for their interpretation of what the judgment means.

[20] Those interpretations were not the focus of the earlier judgment. That matter has not been argued and was not the focus of today's hearing.

[21] It is important to recall the evidentiary and procedural requirements in a civil contempt application. I refer to the decision of Donald J.A. in *Peel Financial Holdings Ltd v. Western Delta Lands Partnership*, 2003 BCCA 551, where he summarized the principles governing a contempt application. At para. 18, he stated:

> [18] The principles governing a motion of contempt are uncontroversial. I would summarize the principles relevant to this case in this way:
>
> > 1. The proceedings are quasi-criminal in nature and the rules of *strictissimi juris* apply, meaning for example that the evidence supporting the motion must conform to the rules of admissibility at a trial; so no hearsay, opinion, conclusions and the like are receivable: *Glazer v. Union Contractors Ltd. and Thornton* (1960), 33 W.W.R. 145 (B.C.S.C.) at 151.
> >
> > 2. The applicants bear the onus of proving the elements of contempt on the criminal standard, viz. beyond a reasonable doubt: *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 at 229.
> >
> > 3. If the order said to be breached is ambiguous, the alleged contemnor is entitled to the most favourable construction: *Melville v. Beauregard*, [1996] O.J. No. 1085 (Gen. Div.) at para. 13; see also *Berge v. Hughes Properties Ltd.* (1988), 24 B.C.L.R. (2d) 1 (C.A.) at p. 8, cited in *Hama v. Werbes* (2000), 76 B.C.L.R. (3d) 271 (C.A.) at para. 8 where the need for clarity and precision in the order to be enforced was discussed.

[22] I am mindful of that decision. In the *Melville v. Beauregard* decision, noted at para. 18 of *Peel* the court reiterated the importance of absolute certainty of the order that was before the court as being in contempt.

[23] The earlier judgment addressed only the issue of single lots and development potential in accordance with the regulations.

[24] Because of the fact that the order has not been settled before the Court — one being an issue of costs; the second Mr. Walsh's fear in relation to what he could or could not do following the entered order — has resulted in there being some ambiguity.

[25] I am not prepared to, without more, settle the terms of the order at this point. Today's focus was on the allegations contained in the affidavits. Settlement of the order was not the focus of this hearing nor a request to the court that it redefine its judgment. But suffice it to say that the order ultimately has to be settled in order that the parties, on a moving-forward basis, can be absolutely certain of what would render a party in contempt or not. It may be that before that argument on development and whether that was captured in the earlier judgment is addressed. That can be done by either a letter seeking directions and setting down a further judicial management conference by which this matter can be set down.

[26] Suffice it to say during the course of this hearing, there was hearsay evidence that was put before the Court that was, I believe, placed before the Court to set out that there are concerns that the judgment pronounced by the Court is being circumvented by collusion with a third party not before the court. Submissions were made on behalf of the plaintiff that there is collusion occurring to circumvent the court's order. I asked counsel for the residents association to clarify given his submission there was "collusion" if there was evidence of collusion and efforts to circumvent were in evidence in the affidavit materials but was advised there was not - it was rather his words for argument.

[27] There is readily accessible case law, in terms of what the definition of single-family dwelling is, as well as what would conform to that. I will not say more. That matter is not before the Court and there are counsel for the parties here who would be able to ensure that anything that was brought in that regard would be done so properly and with notice.

[28] I have endeavoured to make clear today that the order for which a party seeks a person to be held in civil contempt, it must be certain that it has been brought to their attention and it cannot be in a way that is made known to the Court on information or belief. It has to be by a very high standard in order to prove the contempt.

[29] Accordingly, given those circumstances, the application for civil contempt today is dismissed.

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MAISONVILLE J.