SUPREME COURT OF THE YUKON

Citation: *City of Whitehorse* v. *Cunning* 2009 YKSC 48

Date: 20090609
S.C. No. 08-AP017
Registry: Whitehorse

BETWEEN

CITY OF WHITEHORSE

APPELLANT

AND

PATRICIA CUNNING

RESPONDENT

Before: Mr. Justice E.D. Johnson

Appearances:

André Roothman — Counsel for the appellant
Ron Cherkewich — Counsel for the respondent

REASONS FOR JUDGMENT

I. INTRODUCTION

[1] The substantive ground of this appeal is that the trial judge erred in ruling that he had jurisdiction to preside over the trial of the small claims action commenced by the respondent.

[2] The appellant argues that trial judge acting as a judge of the Territorial Court presiding under the *Small Claims Court Act*, R.S.Y. 2002, c. 204 ("the *Act*") lacks the jurisdiction to hear the claim of the respondent because it is a claim "in which an interest in land comes into question" under section 2(2)(a) of the *Act*.

[3] The second ground of appeal is that the trial judge erred in awarding the respondent costs of $1,000.

II. FACTUAL BACKGROUND

[4] The respondent resides at a house she bought on July 19, 2004, that is located at 34 Arnhem Road in the Takhini North subdivision in the City of Whitehorse (the "Property").

[5] The Property was encumbered by a document filed against the title of all lots in the subdivision that was called a "transfer of easement agreement" (the "Easement Agreement").

[6] On April 11, 2008, the respondent and 73 other plaintiffs commenced an action for damages against the appellant in the Supreme Court. The plaintiffs also requested a declaration and an injunction.

[7] On the same day the respondent filed an identical statement of claim in the Small Claims Court. The respondent filed an amended statement of claim on June 24, 2008, and limited the claim to $25,000 to meet the monetary limit to the jurisdiction of the court.

[8] The Reply filed by the appellant on July 8, 2008, disputed the jurisdiction of the Small Claims Court to adjudicate the action.

[9] On August 26, 2008, the appellant filed a notice of motion ("first motion") requesting that the court dismiss or stay the action for want of jurisdiction.

[10] At the hearing of the first motion the respondent abandoned the claim for a declaration and injunction.

[11] On October 2, 2008, the trial judge filed Reasons for Decision and held that the respondent could not proceed with both actions. He stayed the action in Small Claims Court until the respondent discontinued the action in Supreme Court.

[12] Contemplating that the respondent would discontinue the action in Supreme Court and revive the action, the trial judge considered whether the Small Claims Court would be the appropriate forum to adjudicate the issues between the parties. He decided the Supreme Court *Rules of Court* gave that court a superior capacity to handle the litigation and indicated he was inclined to transfer the action to that court.

[13] However, relying on *Shaughnessy v. Roth,* 2006 BCCA 547, the trial judge concluded that section 10.1 of the *Act* precluded him from transferring the action because the respondent had limited the claim to the $25,000 maximum.

[14] At a case management conference held on November 21, 2008, counsel for the appellant objected to setting a trial date because he intended to file a second motion on another jurisdictional issue. The conference adjourned and on December 11, 2008, the appellant filed a second motion ("second motion") returnable on January 7, 2009. This motion raised the 'interest in land' concern that is at issue here.

[15] The trial judge filed his Reasons for Decision on the second motion on January 23, 2009, and the appellant filed the Notice of Appeal on February 19, 2009.

[16] The Appeal Record was filed on April 9, 2009.

[17] On April 14, 2009, the appellant filed an amended Reply and Third Party Notice.

III. STANDARD OF REVIEW

[18] Section 9 of the *Act* authorizes an appeal to this court from a final order of the Small Claims Court on questions of fact and on questions of law.

[19] The issues in this appeal are questions of law and subject to appellate review on the standard of correctness: *Housen v. Nikolaisen,* 2002 SCC 33**.**

IV. GROUNDS OF APPEAL

A. Jurisdiction

(a) Consideration of Amended Reply On Appeal

(i) Argument of Appellant

[20] Counsel for the appellant objected when the respondent argued that the appeal on the jurisdictional issue was moot because of the way the appellant worded the amended Reply. The amended Reply deleted all of paragraphs 1, 2, 3, 4 and 5 of the original Reply, which raised the jurisdictional issue.

[21] Counsel for the appellant told the court that the respondent had pressed the appellant to proceed to trial as soon as possible. At a pretrial conference Chief Judge Ruddy imposed the April 14 date to file the amended Reply and Third Party Notice. When the respondent refused to consent to a stay of proceedings until the appeal had been heard, the appellant filed the amended Reply and Third Party Notice as a precaution instead of filing a formal stay of proceeding application.

[22] Counsel for the appellant argued that it was improper for the court to consider the content of the amended Reply because the clerk of the court filed it after the clerk filed the content of the Appeal Record.

(ii) Argument of Respondent

[23] Counsel for the respondent argued that counsel for the appellant had opened the door for the court to consider these pleadings in the appeal because he referred to his

filing of the Third Party Notice in his argument on section 2(2) of the *Act*. The Third Party Notice is based on the amended Reply.

[24] Counsel for the appellant argues that the pleading renders this court *functus officio* on this ground of appeal.

(iii) Analysis

[25] Neither counsel cited any case law in support of their argument nor have I been able to find anything on point. There is an abundance of authority on the rules for new evidence on an appeal. If I could construe the pleadings as new evidence they would likely be admissible. However, a pleading is not evidence, and I am satisfied that I should not consider them in my analysis. I accept the explanation from counsel for the appellant that he filed these pleadings as an alternative to another court application for a stay of proceedings if the appeal not successful. If counsel for the respondent had consented to the stay, which a judge would likely have been granted, this issue would never have come up. Under these circumstances I believe it would be improper for me to consider these pleadings.

(b) Issue Estoppel, Abuse of Process and Collateral Attack

(i) Analysis of Trial Judge

[26] The threshold issue the respondent raised before the trial judge on the second motion was issue estoppel. The respondent also argued collateral attack and abuse of process.

[27] While the respondent satisfied the trial judge that issue estoppel had been established, the trial judge based his decision on abuse of process stating:

> "[13] With apologies to counsel, who dealt with the matter of issue estoppel at some length, I think this aspect of the

> matter can be quickly disposed of. The defendant's conduct would incline any court to consider invoking the doctrine of issue estoppel. Even if the court ultimately found that doctrine inapplicable, this is clearly a case where the court would exercise its discretion against allowing a rehearing on the grounds that the applicant was seeking to make arguments that it should have made at the time of the first. Such an application is an abuse of process."

[28] However, his comments were *obiter dictum* (incidental to the case) because he ultimately considered that neither issue estoppel nor abuse of process could work to confer a jurisdiction that the Court did not otherwise have under its governing statute. Accordingly, he proceeded to analyze the merits of the jurisdictional issue concerning an "interest in land" under section 2(2) of the *Act*.

[29] Nevertheless, both counsel argued the issue of issue estoppel and I agree that it is still a live issue arising from the judgment. Counsel for the respondent also argued abuse of process and collateral attack.

(ii) Argument of Appellant

[30] Relying on *Pocklington Foods Inc.* v. *Alberta (Provincial Treasurer)* (1995), 123 D.L.R. (4th) 141 (Alta. C.A.), the appellant argued that the learned trial judge erred in holding that issue estoppel and abuse of process were applicable to the second motion. The appellant submitted that the motion came within all the situations discussed in *Pocklington*, except the one dealing with new evidence.

[31] *Pocklington* was applied in *Global Petroleum Corp.* v. *Point Tupper Terminals Co*., [1998] N.S.J. No. 408, 170 N.S.R. (2d) 367 (C.A.).

[32] In *Buschau* v. *Rogers Cablesystems Inc*., 2003 BCSC 1718, Groberman J. noted that while *res judicata* was applicable to interlocutory motions the judge has more discretion and generally will apply it less stringently.

(iii) Argument of Respondent

[33] The respondent argues that the trial judge was correct in deciding that issue estoppel and abuse of process applied.

[34] As stated by the Supreme Court of Canada at para. 18 in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the doctrine of issue estoppel requires the applicant to "put its best foot forward to establish the truth of its allegations when first called upon to do so". As such, the appellant was only entitled to "one bite at the cherry".

[35] The Court noted at para. 33 of *Danyluk* that issue estoppel requires a two-step analysis. First, the court must determine whether the appellant meets the preconditions for issue estoppel. Second, the court must still decide whether it should exercise its discretion to apply issue estoppel. The preconditions are that a court has decided the same question between the same parties and that it was a final disposition.

[36] The only condition in issue in this appeal is whether the trial judge decided the same question.

[37] The respondent relied on *Maynard* v. *Maynard,* [1951] S.C.R. 346, to argue that the principle also extends to every point which properly belonged to the subject of the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[38] Parties to the litigation must bring forward their whole case. A court will not permit a party to raise a subject of litigation that they could have earlier raised as part of the subject in contest, but did not because of negligence, inadvertence or even accident.

[39] The respondent submits that the appellant could have raised the land jurisdiction issue under s. 2(2)(a) of the *Act* during argument on the first motion but did not raise the issue through inadvertence. Both motions deal with the same issue of the jurisdiction of the court to entertain the claim. The difference between the motions is that the appellant advanced different arguments.

[40] The only real issue is whether the Court should exercise its discretion to refuse to apply issue estoppel. As noted at para. 63 of *Danyluk,* the Court should consider whether there is something in the circumstances of this case that would work an injustice if it applied the principle.

[41] As noted at paras. 62 and 80 of *Danyluk* the exercise of this discretion “must be very limited in application”. The court should only exercise its discretion it finds “special circumstances” are present.

[42] The respondent argues that there are no such special circumstances in this appeal and, in any event, the appellant has the onus of proof. On the other hand the second motion prejudiced the respondent. She has suffered delay and added costs. More significantly she is severely, if not fatally prejudiced, as she is likely out of time and without a court to pursue her remedy because she discontinued her action in Supreme Court.

[43] The respondent distinguishes the cases relied on by the appellant because they dealt with the estoppel argument in the context of an interlocutory motion. Relying on *Gilbert* v. *Endean* (1878) 9 Ch. D. 259, and *Silicorp Ltd. V. KJK holdings Inc.* [1992] S.J. No. 155, 90 D.L.R. (4th) 488 (C.A.), the respondent submitted the first motion was final because it would have ended the litigation.

[44] The respondent stressed that, regardless of the comments of the trial judge on issue estoppel, he based the judgment on abuse of process. There is also an issue of collateral attack because, instead of appealing the first judgment, the appellant filed a second motion that raised the jurisdiction issue for the second time.

[45] The respondent noted the discussion in *AB Hassle v. Apotex Inc.* [2005] 4 F.C.R. 229, 2005 FC 234, about the interrelationship between issue estoppel, abuse of process and collateral attack. The facts fit all three principles but the trial judge chose to deal with it as an abuse of process and he should be upheld.

(iv) Analysis

[46] I am satisfied the trial judge was correct in holding that issue estoppel was satisfied.

[47] The first and second motions are virtually identical. Both request the court to stay or dismiss the claim for "want of jurisdiction". They differ in the evidence and arguments. The affidavit supporting the first motion attached the Supreme Court Statement of Claim and stated that both actions were essentially identical. It further noted that the declaratory relief claimed exceeded the jurisdiction of the court.

[48] However, para. 6 of the second affidavit states:

> "Upon further review of the Plaintiff's Amended Statement of Claim, it now further appears that the matter also falls outside of the jurisdiction of this Court on the grounds that the claim involves an action in which an interest in land comes in question."

[49] The amendments to the Statement of Claim were minor and essentially provided better details as new evidence came to the attention of the respondent.

[50] *Maynard* is right on point. Cartwright J. approved the following statement from *Green v. Weatherill,* [1929] 2 Ch. 213 (quoting Wigram V.C. in *Henderson v. Henderson* (1843), 3 Hare 100):

> "I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

[51] Cartwright J. then approved of the following statement from *Hoystead v. Commissioner of Taxation*, [1926] A.C. 155 at 165:

> “Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.”

[52] The cases relied upon by the appellant about interlocutory applications are not applicable. Jurisdiction is an all or nothing issue. The trial judge resolved the issue about the declaratory and injunctive relief with a stay that was not necessarily final.

However, if the appellant had raised the land issue in the first motion the trial judge could have ended the action.

[53] The appellant had the opportunity to argue both jurisdictional issues at the hearing of the first motion but through oversight neglected to raise the argument about an interest in land under section 2(2)(a) of the *Act.* Issue estoppel is applicable and the appellant has not satisfied the special circumstances outlined in *Danuluk*. In addition the second motion prejudiced the respondent because she suffered delay, extra costs and lost her action in Supreme Court.

[54] The trial judge was correct that the appellant should not be permitted to re-litigate an issue already decided.

[55] Issue estoppel is the most technical of the three principles and a court can decide it by careful analysis of the pleadings, the relief requested and the reasons for judgment. Collateral attack is a fairness issue between the parties, while abuse of process is a systemic concern for the court.

[56] As noted by Layden-Stevenson J. in *Apotex,* the policy grounds underlying both issue estoppel and abuse of process are the same.

> "[94] While critics have argued that when the doctrine of abuse of process is used as proxy for issue estoppel it obscures the true question, while adding nothing but a vague sense of discretion, that is not so. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative function of courts. The focus is less on the interests of the parties and more on the integrity of judicial decision making as a branch of the administration of justice. When the focus is properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate cannot be a decisive factor."

[57] Since there is more discretion involved in a finding an abuse of process, the trial judge had sufficient grounds to make the finding on the facts before him. Instead of dismissing the motion he properly chose to analyze it on the merits because of its potential impact on the parties if an appellate court overturned his decision for want of jurisdiction. However, he did consider the abuse of process of the appellant on the question of costs as discussed later.

(c) Interest in Land

(i) Analysis by Trial Judge

[58] The appellant argued before the trial judge that the pleadings raised an issue in which “an interest in land comes into question” because the respondent disputed the interpretation of the Easement Agreement. The respondent argued that the Easement Agreement was not a true easement but a colourable attempt by the developers to transfer the costs of upgrading the sewer and water infrastructure to the purchasers.

[59] The trial judge focused on the nature of the relief requested by the respondent and noted that the Easement Agreement was not in dispute. The respondent was not asking the court to interpret it, declare it invalid, or make any orders that would affect the title, but rather to award her damages. She alleged the appellant was negligent in allowing the developer to encumber the property with the easement and accompanying responsibility to pay for the cost of upgrading the sewer and water infrastructure.

[60] Judge Faulkner concluded from *Re Chilliwack (District)*, [1984] B.C.J. No. 2935 (B.C.S.C.) and *Lou Guidi Construction Ltd.v. Fedick*, [1994] B.C.J. No. 2409 (B.C.P.C.), that an interest in land did not come into question in the action stating:

> "In my view, an interest in land "comes into question" in a law suit if, and only if, the judgment the court makes could affect an interest in land."

[61] The trial judge buttressed his conclusion by considering if a court would have allowed the respondent to file a *lis pendens*. Relying on *Tkalych v. Tkalych,* 2001 SKQB 208, he held he would not have allowed the respondent to file one in this action.

(ii) Argument of Appellant

[62] The Appellant distinguishes *Chilliwack* and *Lou Guidi*. In *Chilliwack,* the plaintiff claimed damages in nuisance for blackberry bushes situated on the defendant's land that were spreading onto the plaintiff's land. The defendants claimed that they did not own the land. The provincial court judge held he did not have jurisdiction because a similar section of the British Columbia *Small Claims Act* (now R.S.B.C. 1996, c. 430) stated he had no jurisdiction where "title to land comes into question". In a judicial review, Proudfoot J. held the lower court had jurisdiction because title to land was not in dispute. The only issue was which party should be liable for the damages suffered. She went on to contrast the facts in that case with other situations where the court would not have jurisdiction, such as cases involving easements.

[63] The appellant argues that the interpretation of the Easement Agreement is a substantial part of the claim of the respondent and therefore comes within the exception noted by Proudfoot J.

[64] In *Lou Guidi* the subject matter of the litigation was a contract of purchase and sale of land, and the court had to adjudicate on whether there had been a breach of contract. The defendant counterclaimed for the return of the deposit paid and argued the court had no jurisdiction because the court would have had to make a determination

of disputed interests in land. Stansfield Prov. Ct. J. held that he had jurisdiction because the plaintiff had restricted the claim to damages.

[65] The appellant notes the legislature amended the *Small Claims Act* after the *Chilliwack* judgment to remove the restriction on adjudicating where “title to land comes into question”. Judge Stansfield nevertheless decided the restriction was applicable.

[66] The appellant argues that Judge Stansfield had the choice of focusing on the relief “claimed” because of his interpretation of the legislation. However, the appellant argued that Judge Faulkner had to squarely face words virtually identical to those considered in *Chilliwack*. The appellant argues that he erred in looking at the relief claimed rather than at whether the action touched on questions where title to land comes into question.

[67] The appellant distinguishes *Tkalych* because it was a case that dealt with matrimonial property. The court ruled the wife could file a *lis pendens* because she claimed a condominium was matrimonial property and a court could make an order affecting the title. The appellant submitted, in this appeal, the trial judge confused the analysis by deciding he could not issue a *lis pendens* and that this was a factor in deciding whether an interest in land came into question.

[68] The appellant argues that the words used in the *Act* gave it a wider interpretation than the words “where the title comes into question” in *Chilliwack*. As a result the Small Claims Court has no jurisdiction where an interest in land comes into question.

[69] The appellant submits that an examination of the Statement of Claim reveals numerous paragraphs where the respondent claims the Easement Agreement does not create a true easement known to law thereby challenging the validity and effect of the

Easement Agreement. These paragraphs prove the Easement Agreement is in pith and substance at the heart of the claim of the plaintiff and therefore brings an interest in land into question that is beyond the jurisdiction of the court.

(iii) Argument of respondent

[70] The respondent argues the trial judge captured the pith and substance of the claim at paragraph 3 of the second judgment.

[71] The respondent submits that the primary import of the Easement Agreement on the claim is that it exists. The secondary import is that the appellant accepted it instead of the usual statutory approvals and by-law controls required during the subdivision approval processes of the appellant. The respondent submits that she is not asserting a claim based on fraud or a fraudulent instrument but rather for negligence. It may well be that the appellant relied upon this instrument to “fob” off the costs of correcting the water and sewage systems on subsequent owners such as the respondent. However, the question to be tried is whether this is tortious conduct (malfeasance, misfeasance or nonfeasance) subject to sanctioning by the court.

[72] The respondent also notes the different wording in the legislation. The *Act* adds the words “in which an interest in land comes in question” after the words “any action for the recovery of land or”. The legislation in *Chilliwack* has the words “where the title to land comes into question” by itself. Principles of statutory interpretation suggest the words “recovery of land” modify the later “interest in land” and suggest possession arising out of ownership. In other words, the *Act* only precludes the court from considering a dispute over title to land as opposed to the broader interpretation suggested by the appellant.

[73] The respondent also argues the word use of “into” in *Chilliwack* gives a broader meaning than the word “in” used in the *Act*. Despite this broader wording Proudfoot J. found that the title did not come into question.

(iv) Analysis

[74] In *Chilliwack,* Proudfoot J. held the Provincial Court had jurisdiction because the only issue the court had to decide was whether the defendants or another property owner were liable for the damages claimed. There was no dispute over title to land. She went on to talk about other situations stating:

> “[6] Surely that section can only refer to a set of circumstances where right to ownership, title or some similar right comes in question. I refer here for example to cases involving landlord and tenants (leases), easements, restrictive covenants, trusts, etc., these types of matters which may well directly affect title or ownership, to me, would be outside the jurisdiction of the Provincial Court. On the other hand, liability flowing as a result of ownership or no liability as a result of no ownership of land is quite something different. There appears to be no question of who owns the lands which are involved in these actions.”

[75] She did not say that issues involving leases, easements etc. would automatically result in a loss of jurisdiction. She was only talking about those situations as they might affect title.

[76] As noted by Judge Stansfield in *Lou Guidi,* the Small Claims Court has no inherent jurisdiction and must draw its jurisdiction from the statute that created it. Small Claims courts usually have jurisdiction to hear claims for debt or damages up to a monetary limit. The legislation considered in *Lou Guidi* stated:

> 3(1) The Provincial Court has jurisdiction in a claim for
> a) debt or damages,
> b) recovery of personal property,
> c) specific performance of an agreement relating to

> personal property or services, or
> d) relief from opposing claims to personal property
>
> if the amount claimed or the value of the personal property or services is $10,000.00 or less, excluding interest and costs.
>
> (2) The Provincial Court does not have jurisdiction in a claim for libel, slander, or malicious prosecution.

[77] Judge Stansfield decided that by excluding defamation and malicious prosecution the legislature must have intended to vest jurisdiction in all other claims for "debt or damages" so long as they fell within the monetary jurisdiction of the court. He felt a judge of the court should assume jurisdiction to hear every claim for "debt or damages" up to $10,000 unless a party could prove a statutory bar to jurisdiction. The legislature had amended the legislation to remove the words considered in *Chilliwack* "where title to land comes into question". He nevertheless concluded he had no jurisdiction to exercise jurisdiction in a claim for parallel relief relating to real property, stating:

> "[18] … But I stress that the section refers to "a claim for..."; in other words the focus of the jurisdictional inquiry is the nature of the relief sought, not whether the matter touches upon certain issues."

[78] By focusing on the nature of the relief claimed, Judge Stansfield decided he had jurisdiction because there was no relief claimed that would affect title.

> "[23] In this case the property in issue has been sold to a third party, and titles conveyed to that person. I cannot imagine any determination which might be undertaken in the course of deciding whether the claimant is entitled to retain the deposit, or to award damages in respect of the alleged deficiency, which could affect title to land. …"

[79] The *Act* bestows similar jurisdiction as the legislation in British Columbia stating:

> "2(1) Subject to subsection (2), the Small Claims Court
> (a) has jurisdiction in any action for the payment of money if the amount claimed does not exceed $25,000 exclusive of interest and costs;
> (b) has jurisdiction in any action for the recovery of possession of personal property if
> the value of the property does not exceed $25,000; and
> (c) shall perform any function assigned to it by or under any other Act; and
> (d) The Commissioner in Executive Council may by Order increase the monetary jurisdiction of the Small Claims Court under paragraphs 2(1)(a) and 2(1)(b).
>
> (2) The Small Claims Court does not have jurisdiction in
> (a) any action for the recovery of land or in which an interest in land comes in question;
> (b) any action against the personal representatives of a deceased person or in which the validity of a devise, bequest, or limitation under a will or settlement is disputed; or
> (c) any action for libel or slander."

[80] Both *Chilliwack* and *Lou Guidi* demonstrate a pragmatic approach focused on the nature of the relief claimed. I believe both judges recognized that the intention of the legislature was to remove from the jurisdiction of the small claims court the analysis and interpretation of the myriad and complex rules surrounding title to land under English common law. However, they were also aware of the purpose of the small claims rules and the need to respect the choice of the plaintiff. As stated in *Shaughnessy v. Roth*, *supra*:

> "[34] In addition, if the obligation to transfer as stated in Rule 7.1(1) related only to the claim of a claimant, the Court could be faced with a counterclaim in excess of its monetary jurisdiction. The mandate of the legislation and the *Rules* is to provide an informal and efficient process for the disposition of claims up to $25,000. Beyond that amount the legislature intended that claims should be dealt with in the Supreme Court, but the right of parties to have their cases

> dealt with in the forum of their choice is respected. This is why they are given the right to abandon amounts in excess of $25,000."

[81] Both appellant and respondent have proposed different interpretations of the *Act* and have stressed differences in the wording of the legislation. The appellant argued that the use of the word "interest" instead of "title" expanded the limitation on jurisdiction to issues such as the Easement Agreement at the heart of this action. While there may be some merit to this argument, there is also some merit to the argument of the respondent about the textual interpretation of the words "any action for the recovery of land or in which an interest in land comes in question".

[82] As stated at p.173 of R. Sullivan, *Driedger on the Construction of Statutes,* 4th ed. (Markham: Butterworths, 2002) at 235 (hereafter "Sullivan"):

> "The associated words rule is properly invoked when two or more terms linked by "and" or "or" serve an analogous grammatical and logical function within a provision. This parallelism invites the reader to look for a common feature among the terms. This feature is then relied on to resolve the ambiguity or limit the scope of the terms."

[83] Sullivan used the words of Martin J.A. from *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.) to illustrate the principle:

> "When two or more words which are susceptible of analogous meanings are coupled together they are understood to be used in their cognate sense. They take their colour from each other, the meaning of the more general being restricted to a sense analogous to the less general."

[84] The use of the word "recovery of land" limits and colours the more general "interest in land". The common law remedy to recover possession of land was the writ of possession and a court could issue it in many situations including landlord-tenant and

mortgagor-mortgagee disputes. The *Rules of Court* of all common law Superior Courts have a rule for this type of relief. As held in *Reference Re Constitutional Questions Act and Possession Orders* (1978), 89 D.L.R. (3d) 460, 11 A.R. 451 (S.C.), only a Superior Court judge can grant writs or orders for possession of land. The legislature used the words of the *Constitutional Questions Act* to clearly indicate that a provincially appointed judge could not adjudicate this type of problem.

[85] I think the legislature here used the word “interest in land” to recognize the multiple types of situations where possession of land could be in dispute. It likely does not include easements. As stated in: B. Ziff, *Principles of Property Law*, 3rd ed. (Scarborough: Thomson Canada Ltd., 2000) at 341:

> “The need for a grant stems from the treatment of easements as incorporeal rights: because a transfer of possession is not possible, a grant is required in order to pass ownership.”

[86] This interpretation is consistent with the approach in *Chilliwack* and *Lou Guidi* that focused on the remedy requested. Where the plaintiff only seeks damages it does not matter that the litigation peripherally involves land.

[87] As noted by the respondent, the pith and substance of this dispute is as described at paragraph 3 of the judgment by the trial judge:

> “On April 11, 2008, Ms Cunning and 73 other Takhini North landowners filed an action in the Supreme Court of Yukon seeking damages and other relief from the defendant City of Whitehorse. The allegation, put briefly and bluntly, is that the developers of the subdivision, who purchased the area from the federal Government, were allowed by the City to fob off onto the current landowners their responsibility to upgrade the water and sewer system. The device used was a “transfer of easement agreement” which was registered against the titles to the lots in the subdivision. This occurred,

> say the plaintiffs, through the City's negligence and in breach of its statutory duties.

[88] The use of the Easement Agreement instead of the usual statutory approvals and by-law controls required during the subdivision approval processes of the appellant is the issue. The litigation will likely involve some analysis of the Easement Agreement but only in the context of what the appellant ought to have done as a prudent municipality.

[89] As a result I am satisfied that the trial judge came to the correct conclusion on his jurisdiction and I deny the appeal on this ground.

B. Costs

(i) Arguments

[90] Under section 38(2) of the *Small Claims Court Regulations* (O.I.C. 1995/152) the trial judge awarded $1,000 costs plus the travel disbursements of counsel for the respondent from Saskatchewan to Yukon stating:

> "[29] This is clearly a case where the motion was necessitated by the default of a party. This is also a case where special circumstances make it just as clear that $50.00 would be grossly inadequate compensation to the injured party. In addition to the ordinary trouble and expense of responding to the motion is the fact that Mr. Cherkewich resides and practices in Saskatchewan. He had to travel to Whitehorse specifically to deal with this motion."

[91] The appellant argues the trial judge erred in holding that special circumstances were present to trigger a higher award of costs. It also submitted that the trial judge should not have awarded the respondent the travel costs incurred by her lawyer because the respondent did not follow the practice established in *Minet v. Kossler* 2009 YKSC 18, *Swyers v. Drenth,* 1995 CanLII 2810 (B.C.S.C.), *McRae v. Santa,* [2002] O.J. No. 3539 (S.C.) and *Dennis v. Northwest Territories,* [1990] N.W.T.R. No. 97 (S.C.).

This practice requires the respondent to establish by affidavit evidence that the local bar does not have the expertise required to handle the litigation.

[92] The respondent submitted that every court has the discretion to control its own processes. The trial judge exercised his discretion and did not overreach in awarding the costs. He also acted consistent with the principles set out in *Oleskiw v. Regina (City)*, (1994), 125 Sask. R. 226 (C.A.).

[93] The respondent submits that the appellant did not address the trial judge's abuse of process finding as the foundation for the special circumstances and travel costs.

(ii) Analysis

[94] As held earlier, there were grounds for an abuse of process finding by the trial judge. Although that finding was not necessary because he went to consider the merits of the jurisdiction issue, it was the foundation for the special circumstances justifying a greater costs award. The appellant through default or inadvertence did not raise an obvious argument at the hearing of the first application.

[95] The actions of the appellant caused the respondent significant added costs and delay that gave the trial judge enough grounds for an award based on special circumstances. The 'special circumstances' contemplated in the *Regulation* clothe the Small Claims Court with discretion similar to a Supreme Court Judge to express disapproval of the actions of one of the parties by awarding the other party increased costs. One option is to award the equivalent of solicitor-client costs. However, courts only use this option to sanction outrageous or high-handed conduct and rarely use it. It is more common for a court to increase party-party costs. As I stated in *Rennie v. Northwest Territories and Nunavut (Workers' Compensation Board),* 2007 NUCJ 22:

> "[22] The usual reason for an increase in the amount of costs awarded is misconduct by one of the parties in the litigation that falls short of the conduct required for an award of solicitor-and-client costs. A good example of this can be seen in Canadian Egg Marketing Agency v. Richardson(3), [1996] N.W.T.J. No. 85 (NWT. S.C.), where the misconduct of the respondent consisted of the overzealous and unnecessary actions of revoking the egg licences of the applicants, and seeking interlocutory injunctive relief to prevent the applicants from trading in eggs. Wachowich J. quadrupled the tariff stating:
>
> > [14] Having determined that neither a full indemnity nor a lump sum of costs are in order, several factors lead me to the conclusion that an increased scale of party-party costs is justified. The complexity and importance of issues, the amount of damages claimed, and the conduct of the parties are all relevant factors in determining whether a costs award should exceed the amounts set out in the Rules of Court ..."

[96] I agree with the statement from *Oleskiw* that a Superior Court judge has a wide discretion in awarding costs. The same is true for a Small Claims Court judge operating under the special circumstances of *Regulation* s. 38 (2). In *Oleskiw,* the Saskatchewan Court of Appeal described the role of the appeal court as follows at para. 21 (quoting from Cameron J.A. in *Benson v. Benson* (1994), 120 Sask. R. 117 (C.A.):

> "That, combined with the nature of our function in relation to appeals concerning the exercise of judicial discretion, serves to significantly narrow the scope for appeal. The discretion is vested in the trial judge, not us. And our function, at least at the outset, is one of review only, review for error vitiating the exercise by the judge of that discretion. The obvious aside, vitiating error is to be found either in misapplication of some governing principle or rule or in disregard of some critical fact or other consideration. Either that or it is to be assumed in the case of an order so obviously unjust as to invite intervention. But in the absence of something of that sort we are not to wade in, substituting our discretion for that of the trial judge."

[97] Here, the trial judge had good reason to find that the engagement of outside counsel was necessary stating:

> "[32] In my view, engaging outside counsel was entirely reasonable in this case as it involves matters that would put many members of the resident bar in a conflict of interest, or at least discomfort."

[98] In a footnote to this statement the trial judge noted:

> "The Claim alleges, amongst other things, that the principals of the development corporation were concurrently members of the firm of solicitors providing legal services to the City. In addition, many members of the local bar would have acted for purchasers or mortgagees of the lots in Takinni North or for real estate agents involved in the sales."

[99] *Minet* and *Dennis* establish a local custom that has not yet evolved into a rule of court or practice directive. There is no requirement to file affidavits about the availability of local expertise. However, if a party retains outside counsel they may be required to justify the expense in a taxation.

[100] Accordingly I deny the appeal on this ground.

V. COSTS OF APPEAL

[101] Rule 60 (14) of the *Rules of Court* authorizes the award of costs in a lump sum. The appeal issues were complex and I do not want further costs incurred on a taxation. I therefore award the respondent lump sum costs of $2,500.00 plus disbursements.

_____
Johnson J.