SUPREME COURT OF YUKON

Citation: *Faro (Town) v. Knapp*, 2011 YKSC 43

Date: 20110516
S.C. No. 10-A0109
Registry: Whitehorse

Between:

TOWN OF FARO

Petitioner

And

ANGELIKA KNAPP dba A. KNAPP ACCOUNTING SERVICES and NORTH STAR ADVENTURES, a partnership between Angelika Knapp and Eric Dufresne, ANGELIKA KNAPP and ERIC DUFRESNE

Respondents

Before: Mr. Justice L.F. Gower

Appearances:

Debbie P. Hoffman	Counsel for the Petitioner
Angelika Knapp and Eric Dufresne	Self-represented

REASONS FOR JUDGMENT

INTRODUCTION

[1] In these reasons I am addressing a petition by the Town of Faro ("the Town"), for a permanent injunction to prevent the respondents from using and occupying, as a full-time residence, their property at Lot 1028, located on Johnson Lake, within the Town boundaries ("the property").

[2] The respondents have filed a cross-application asking that the petition filed by the Town be dismissed.

[3] The dealings between the parties, and the conflict giving rise to the application for an injunction, goes back to 2002. The respondents operate an outdoor tourism business offering canoe rentals and guided canoe and hiking trips. The business is operated on a property within a municipal zone designated as “Hinterland” under the Town's Zoning Bylaw. The Town takes the position that the respondents’ business is a “discretionary use” under the Zoning Bylaw, and therefore any residential accommodation associated with that discretionary use is, in turn, a “discretionary accessory use”, for which the respondents have not applied. In other words, the respondents have not obtained the Town's permission to reside on the property, and accordingly they are in violation of the Zoning Bylaw.

[4] The respondent's position is more difficult to clearly discern. At one point, they referred to their home on the property as a “caretaker residence”, the purpose of which is to secure the buildings and assets on the site, not only during the summer business season, but also during the business’ off-season. However, the Zoning Bylaw does not define the term “caretaker residence”. At other times, the respondents have argued that they have not yet applied to the Town for permission to reside on the property because the Town has failed to provide them with certain information that they require in order to perfect their application. Therefore, it would be unfair, unjust and inequitable to grant the injunction. They also challenge the validity of the Town’s petition on a number of technical grounds, which I will come to shortly.

[5] In 2008, the respondents filed a petition seeking certain relief in relation to this dispute. The petition went to a hearing before Deputy Justice Groberman of this Court, who released his reasons for judgment on April 28, 2009. Those reasons were followed

by an order on April 29, 2009. Groberman J. found for the respondents on two points relating to their previous unsuccessful applications to the Town for a business license and a development permit. However, all the other applications for relief were dismissed.

[6] The respondents appealed from Groberman J.'s decision to the Yukon Court of Appeal. The appeal was dismissed.

[7] The respondent's technical grounds for dismissing the petition are as follows:

1. The Town is "estopped" from seeking the injunction (presumably, the respondents mean a type of equitable estoppel or estoppel by representation arising from the history of dealings between the parties);
2. Groberman J.'s reasons for judgment and the order arising therefrom are "moot";
3. The petition is not valid under Rule 10 of the *Rules of Court*;
4. The petition is not valid under Rule 51(6); and
5. There is no evidence of any breach of the Zoning Bylaw before this Court. (I interpret this last ground as a submission that there is no evidence of the continuance of any "wrongful act" in order to justify the application of Rule 51(6)).

SUMMARY OF THE FACTS

[8] Groberman J. set out the extensive factual background in this dispute at paras. 5 through 44 of his reasons, cited at 2009 YKSC 34.

[9] The Court of Appeal reviewed Groberman J.'s findings of fact and the background circumstances at paras. 10 through 22 of its reasons for judgment, cited at 2010 YKCA 7.

[10] Therefore, the facts and circumstances are well-known to the parties and there would be little utility in engaging in yet another detailed recitation in that regard. However, to the extent this decision may be of interest to someone besides the parties, for the sake of completeness I will attempt a thumbnail sketch.

[11] In the early summer of 2002, Ms. Knapp took over a Yukon Government lease of the property from a floatplane operator. She purchased the floatplane dock, as well as a cabin and a shed on the property for approximately $40,000. She registered her outdoor tourism business as a sole proprietorship under the name of North Star Adventures. Ms. Knapp made some improvements to the cabin, including adding a loft and sleeping quarters. She applied for a land grant from the Yukon Government in late 2002, but it was denied. Rather, the Yukon Government allowed the lease to be renewed with an option to purchase, upon Ms. Knapp meeting certain conditions, including one that she obtain the Town's agreement to re-zone the property to a "Commercial" zoning.

[12] It is important to note that Groberman J. made the following finding of fact at para. 13:

> "… From the outset, the Town was concerned to ensure Ms. Knapp did not turn the property into a primarily residential one, having ostensibly acquired it for a commercial purpose…"

[13] Ms. Knapp and Mr. Dufresne next re-registered North Star Adventures as a partnership and started their business operations in 2003, while continuing to maintain their principal residence in Whitehorse.

[14] In June 2004, the Town decided that it was no longer necessary for the property to be re-zoned from Hinterland to Commercial because the Hinterland zoning already permitted the discretionary use of "Outdoor Recreation Pursuits". Also in 2004, Ms.

Knapp obtained confirmation from the Yukon Government that it did not consider a residence on the property to violate the lease. As a result, Ms. Knapp and Mr. Dufresne took up full-time residence on the property in December 2004.

[15] In September 2005, the respondents applied to exercise their option to purchase under the lease. The Town was again asked to confirm that it did not require the property to be re-zoned Commercial. The Town confirmed that it did not require such a re-zoning, but expressed concerns that the respondents, while carrying on with their seasonal tourism business, were residing on the property year-round.

[16] The respondents disagreed with the Town's view that the Hinterland Zoning did not permit residential use.

[17] In 2007, the Yukon Government granted title to the land to the respondents. However, the issue of the residential use of the property remained unresolved.

[18] Also in 2007, while issues concerning the application for a grant of land were under consideration, the respondents applied for renewal of their business license and for a development permit to construct a structure to cover the well on the property. The Town refused both applications on the basis that the property was being used for residential purposes beyond the uses prescribed in the Hinterland zoning designation. Those refusals formed the part of the respondent’s petition resolved in their favour by Groberman J.. However, all of the other relief sought in the petition was dismissed and the Court of Appeal upheld that decision.

ANALYSIS

A. The Respondents’ Cross-Application to Dismiss the Petition

1. Estoppel?

[19] "Estoppel by representation" is a form of equitable estoppel and is defined in *Black's Law Dictionary*, 9th edition, as meaning a defence that arises when one's words or conduct induce another person to believe something that results in that person's reasonable and detrimental reliance on the belief.

[20] When the respondents raised this issue at the hearing before me, their submissions quickly turned into what I perceived to be a re-arguing of the matters before Groberman J. That led to a discussion about "issue estoppel" and whether the respondents were prevented from re-litigating what was already judicially determined by Groberman J.

[21] In *574409 B.C. Ltd. v. Spring Creek Aggregates Ltd.*, 2008 BCSC 1205, Hinkson J., at paras. 21-24, discusses the distinction between issue estoppel and *res judicata*.

> "[21] *Res judicata* is a doctrine that prevents a party from relitigating an action on a matter or matters that have already been judicially determined.
>
> [22] Issue estoppel operates to prevent the relitigation of an issue that has been judicially resolved between the same parties or their privies.
>
> [23] The difference between what are often referred to as *res judicata* and issue estoppel was explained by Dickson J., as he then was, for the majority in *Angle v. M.N.R.*, 1974 CanLII 168 (S.C.C.), [1975] 2 S.C.R. 248 at 253-254, 47 D.L.R. (3d) 544 [*Angle* cited to S.C.R.]:
>
> > In earlier times *res judicata* in its operation as estoppel was referred to as estoppel by record, that is to say, estoppel by the written record of a court of record, but now the generic term more frequently found is estoppel *per rem judicatam.* This form of estoppel, as Diplock L.J. said in *Thoday v. Thoday* [[1964] P. 181.], at p. 198, has two species. The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. …The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of

> Australia in *Hoy stead v. Federal Commissioner of Taxation* [(1921), 29 C.L.R. 537.], at p. 561:
>
> > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").
>
> [24] Dickson J. referred with approval at page 254 to the following portion of the speech of Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at 953, with respect to the preconditions for the application of issue estoppel:
>
> > …(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised [or] their privies…. " (my emphasis)

[22] A side issue was also raised by Mr. Dufresne on the question of how the respondents were named in the proceeding before Groberman J., in comparison with how they have been named by the Town in its petition. The former refers to them as "Angelika Knapp dba A. Knapp Accounting Services and North Star Adventures, a partnership between Angelika Knapp and Eric Dufresne". The within proceeding refers to them as "Angelika Knapp dba A. Knapp Accounting Services and North Star Adventures, a partnership between Angelika Knapp and Eric Dufresne, Angelika Knapp and Eric Dufresne". The difference, of course, is that in the within proceeding, the respondents are expressly named in their individual capacities, as opposed to being associated with Ms. Knapp's proprietorship and their partnership. One could ask whether that is a distinction without a difference, but the respondents say that this issue is important because of how the owner of Lot 1028, Johnson Lake is identified on the certificate of title. Unfortunately, although I have reviewed all of the affidavit material on this

application with some care, I have been unable to find any evidence which clearly specifies how the owner of Lot 1028 is identified on the title. It would seem that the original correspondence regarding the assignment of lease to Ms. Knapp in 2002 was addressed to her business proprietorship name, North Star Adventures. The applications for building permits and the building permits obtained in 2002 specify the “owner” of the property (which did not then have a lot number, but was described as lease number NR 813) as North Star Adventures. Clearly, her lease with the Yukon Government dated July 11, 2003 specified North Star Adventures as the lessee. I have therefore assumed that the name of the owner specified on the certificate of title for Lot 1028 is also North Star Adventures.

[23] Groberman J. found as a fact that North Star Adventures was re-registered as a partnership between Ms. Knapp and Mr. Dufresne in 2003 (see para. 21). It is trite law that the members of an ordinary partnership do not receive any protection from liability by virtue of their membership in the partnership.

[24] Further, *Black's Law Dictionary*, 9th edition, speaks of the concept of “privity” as pertaining to the connection or relationship between two parties, each having a legally recognized interest in the same subject matter, and a “privy” as a person who is in privity with another. In other words, a privy in a law suit would have an interest in the action such that he would be bound by the final judgment as if he were a party. Finally, the doctrine of issue estoppel applies to the parties to a judicial decision “or their privies”: see *Spring Creek*, cited above, at para. 24.

[25] In the result, while the proceeding before Groberman J. did not name each of the respondents as individuals, as was expressly done in the within proceeding, nothing

turns on this difference. If the partnership known as North Star Adventures is the designated legal owner of Lot 1028, then any liability arising against the owner would be a legal liability against each of Angelika Knapp and Eric Dufresne. Consequently, there is no significance to the distinction between how the respondents were referred to in the style of cause in the two proceedings. Put another way, if an injunction is granted in the within proceeding, it will be binding on Ms. Knapp and Mr. Dufresne in precisely the same way as it would if it were granted in the proceeding before Groberman J.

[26] Returning to the matter of issue estoppel, in their cross-application, the respondents have not commenced a new action. Rather, they are merely raising their objections to the validity of the petition in a separate application. In any event, to the extent their objections overlap with what they argued before Groberman J., they are prevented from re-litigating those questions because of the doctrine of issue estoppel.

[27] When I raised this point with the respondents at the hearing, we took a brief adjournment for the parties to consider their respective positions. When we returned, the respondents did not pursue their estoppel argument. I have therefore assumed that they have abandoned this ground in their application to dismiss the petition.

[28] Having said that, the respondents have demonstrated a remarkable tenacity in this and other related litigation, as well as a determination to raise every conceivable legal or factual argument in support of their case. Therefore, out of an abundance of caution, and in the event that I am incorrect about the respondent’s intentions in that regard, I will briefly touch upon the only factual point raised that, in my view, could possibly give rise to an estoppel argument.

[29] The minutes of a Town Council meeting on June 1, 2004 include some business about the Johnson Lake campground, which is next to the respondent's property on the lake. The minutes include the following:

> "…The Town of Faro was aware of North Star Adventures plan to start-up a business for canoe rentals with possible expansion to an outdoor adventure business with plans to live at their business year-round (starting in 2006) and encouraged business activities at Johnson Lake area. This area is zoned Hinterland and as a lease agreement condition, it was stated that it would have to be re-zoned Commercial in order for title to the land to be approved…." (my emphasis)

As stated above, the Town Council subsequently decided that it was unnecessary to change the zoning from Hinterland to Commercial.

[30] Relating to the question of Ms. Knapp's possible reliance on the Town's decision in that regard, Groberman J., at paras. 23-25, made the following findings of facts:

> "[23] …Ms. Knapp says that she believed that council's decision to leave the zoning as "Hinterland" was based on the council's understanding that a permanent residence would be established on the property.
>
> [24] That belief is not entirely well-founded. The Town's position at that time is set out in a letter dated June 7, 2004, which includes the following statements:
>
> > The Town of Faro has contacted Yukon Energy Mines and Recourses [sic] Lands Branch in order to discuss the requirement, stated in the lease contract between North Star Adventures Ltd. [sic] and YTG that the Town of Faro has to rezone the mentioned parcel to appropriate commercial zoning in order for North Star Adventures Ltd. to title the land. Land Branch representative made it clear that this requirement in the lease agreement is subject to the preferences of the Town of Faro and directions given to Lands Branch by the Town of Faro.
> >
> > The current Town of Faro Zoning bylaw 96-06 allows discretionary use of Outdoor Recreation Pursuits in Hinterland zoned areas. Therefore North Star Adventures Ltd. under current Zoning Bylaw 96-06, meets the conditions to carry out their current recreation commercial activities. In light of the above, the Town of Faro

> Municipal Council, under current conditions, does not see the need for re-zoning the mentioned property or area to another zoning category under the current bylaw.
>
> Yukon Energy, Mines and Recourses, Lands Branch will be notified that the Town of Faro does not require rezoning of parcel #813 in order for North Star Adventures Ltd. to title this property.

[25] I do not read this letter as endorsing the position that a permanent residence could be established on the land without further application to council." (my emphasis)

[31] Nowhere have the respondents pointed to any particular words or conduct by the Town on which they reasonably relied to their detriment regarding their residential use of the property. They may indeed have raised the issue before the Town Council in 2004, but that in itself does not give rise to any form of equitable estoppel. To the extent that Ms. Knapp may have relied upon the Town's decision not to re-zone the area as an implicit endorsement of her intention to reside on the property year-round, Groberman J., in the paragraphs I just quoted above, effectively determined that such reliance was unreasonable and unsupportable.

[32] Therefore, the respondents have not made out a case of estoppel against the Town and this ground must fail.

2. Are Groberman J.'s reasons for judgment or order moot?

[33] Once again, I confess that I really did not understand the respondent's argument on this point.

[34] *Black's Law Dictionary*, 9th edition, defines "moot case" as follows:

> "A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights"

[35] In his reasons for judgment, Groberman J. stated at para. 4 that the first of the two issues before him was "…whether the Town is acting improperly in taking the position that no residential use of the property is authorized." Further, just ahead of para. 41 he posed the following question "Is Residential Use of the Property Allowed?" Groberman J. then immediately stated:

> "I will begin my analysis by dealing with the biggest issue raised by the parties, that is, whether the full-time year-around [as written] occupation of the property for residential purposes is contrary to the zoning bylaw."

[36] Groberman J. pursued his analysis of the Bylaw at paras. 42-47. After determining that "Outdoor Recreational Pursuits" is a discretionary use under the Zoning Bylaw, he reasoned that any residential use connected with the respondents' business must also be discretionary. At paras. 48 and 51 he concluded:

> "[48] There is no evidence before me to suggest that Town Council has ever exercised its discretion to allow residential use of the lands in question in this case. Accordingly, such use is, at best, a use which the petitioners can apply to make of the property.
>
> …
>
> [51] The Town, therefore, must succeed on the question of whether the use of the land as a full-time residence by the petitioners is a permitted use. It is not. At best, it might arguably be a discretionary use, though even that is doubtful. In any event, if it is a discretionary use, council has not exercised its discretion to permit it to date." (my emphasis)

That is a clear statement of the issue and Groberman J.'s decision on the issue.

[37] However, in arguing their mootness point, as I understood them, the respondents seemed to focus on the remarks made by the Court of Appeal, that the appeal could only

be from Groberman J.’s order and not from his reasons for judgment. The argument seems to be that, if the Court of Appeal did not expressly uphold the above conclusions of Groberman J. about whether residence by the respondents on the property is a permitted use within the zone, then those conclusions have no legal effect and cannot support the Town's application for a permanent injunction.

[38] The discussion about the relationship between the reasons for judgment and the order arose because of the way the order was drafted. It purported to remit the respondents’ applications for a business license and a development permit back to the Town for fresh consideration “in accordance with the Reasons for Judgment”. The Court of Appeal frowned on this practice, commenting, at para. 6, that “an order ought not to recite or include either arguments or reasons.” Hence, the Court’s remark that “an appeal may only be brought from an order, and not from reasons for judgment.” (para. 6).

[39] Two of the items of relief sought by the respondents in the Court of Appeal were found by the Court to be an attempt to appeal Groberman J.'s reasons for judgment (see paras. 5 and 6) and therefore, beyond the scope of an appeal (see para. 8). That left a single arguable item of relief on the appeal which was that “the decision to dismiss the application for all declarations be set aside” (see para. 5). After disposing of other matters not at issue on the appeal, Saunders J.A., speaking for the Court, said this at para. 9:

> “…This leaves as the substance of the appeal the judge’s refusal to make any of the declarations sought, and I have addressed the appeal focussing upon this aspect of the petition. I would note that while, as I have explained, the reasons for judgment are not, by themselves and unrelated to an order, appealable, to the extent that the appellants’ objections to the reasons concerning the permissibility of residential use relate to the application for declarations, they may be engaged on appeal.” (my emphasis)

[40] Following upon this approach, at para. 32 Saunders J.A. noted that Groberman J., in considering the issue of discrimination, "… was required, as a starting point, to first determine whether the zoning bylaw permitted full-time residential use." Saunders J.A. then reviewed Groberman J.'s reasoning at his paras. 45-48 (I quoted the last of these at para. 32 above), and concluded, at paras. 35 and 36 of the Court of Appeal decision:

> "In my view the judge was entirely correct in this analysis. The Town, in seeking to limit residential occupancy on this land, absent an application for residential use, was not acting improperly.
>
> The appellants challenge the judge's conclusion that they had not applied for permission to use the property for full-time residential use. It is self evident in the materials, and in their submission, that the appellants did not apply to use the property for residential use, taking instead the position that they were entitled to use the property in that fashion, absent express authority. I see no proper basis upon which to interfere with the judge's conclusion on this factual matter." (my emphasis)

[41] In my view, this was a clear endorsement by the Court of Appeal of the conclusions reached by Groberman J.; specifically, that while residency on the property might be allowable as a discretionary accessory use, as the respondents had not applied for such a use, they remained in violation of the Zoning Bylaw. Therefore, Groberman J.'s reasons cannot be said to involve issues in which there is no actual controversy or which present only an abstract question. On the contrary, the continuing residential use of the property by the respondents represents an ongoing dispute between the parties, and Groberman J.'s reasons are dispositive of that dispute. Thus, they are clearly not moot.

[42] I pause here to address a point of potential confusion, which was not raised at the hearing, or if it was, I failed to make note of it. The petition specifically asks for an order

that the respondents immediately discontinue their use and occupation of the property “as a full-time residence”. I assume that language comes from the use of the same words by both Groberman J. and the Court of Appeal. However, a closer inspection of Groberman J.’s reasons for judgment reveals that he concluded that “any residential use” of the property, whether full-time or part-time, had to receive the prior permission of the Town in order to be lawful. See for example, paras 47 and 48. It is also evident that the Court of Appeal agreed with Groberman J. on that point. At para. 23, Saunders J.A. stated:

> “He concluded that any residential use connected with the North Star Adventures business was not a permitted use but was, at most, a discretionary use that the appellants could apply to make of the property." (my emphasis)

See also paras. 34 and 35.

[43] Before leaving this question of mootness, I wish to address a point that was tangentially raised by the respondents as one of significance for them. Through the course of case managing this petition in preparation for a hearing, it became obvious that one of the potential resolutions would be for the respondents to make an application for discretionary accessory use, in relation to the residence on the property. Obviously, in the event of an approval of such use, the conflict between the parties on the point would come to an end. However, the respondents expressed some frustration over the fact that there was no form under the Zoning Bylaw for an application for discretionary accessory use.

[44] Ultimately, the chief administrative officer for the Town wrote a letter to the respondents dated November 23, 2010, in response to previous specific questions from

them about the application process. The letter invited the respondents to make their application on the form otherwise designated for development permits, and included certain recommendations as to the information that should be included with the application. As has been fairly typical of the exchanges between the parties over the years, one answer by the Town inevitably led to further questions by the respondents, without any appearance of progress. This was again the case in the letter from the respondents to the Town dated November 26, 2010, which requested “All relevant documents relating to the approval of the “seasonal accessory caretakers residence”, as well as a “Copy of the original development permit and supporting documents issued to Horizons North Ltd. or Morning Star Exploration”. As I understand it, these latter two entities were previous occupiers of the property. The respondents informed me at the hearing that they have yet to receive a reply to that letter, although a letter of the same date from the Town to the respondents apparently crossed with the respondent’s letter, and it seemingly deals with the same request for additional information. In that letter the Town asked the respondents to identify the relevance of the information sought.

[45] In his decision, Groberman J. acknowledged that there was some evidence of occasional use of the cabin as overnight accommodation by previous occupiers (see para. 49). However, his comments immediately following that acknowledgement effectively render the information sought by the respondents irrelevant:

> “…I do not ignore the fact that there is some evidence of occasional use of the cabin as overnight accommodation for float plane pilots prior to the petitioners taking possession of the land. There is no evidence as to when that use commenced, nor is there any evidence as to the nature of the authority for such use. It is possible that such a use predated the zoning bylaw, and so that it is a legal non-conforming use. It is equally possible that Council may have, at least at some stage, exercised its discretion to make occasional overnight use of the cabin an approved

> discretionary use. Finally, it is possible that such use of the cabin was simply unlawful. Whichever of these scenarios is the case, however, it would not support the use of the cabin as a permanent full-time residence." (my emphasis)

[46] Saunders J.A., at para. 37 of her reasons, specifically acknowledged the above quote and concluded that it was “entirely correct”.

[47] Accordingly, it is difficult to understand how the evidence sought by the respondents relating to the previous occupiers’ use of the property could be relevant in support of an application for permanent residence. In any event, I fail to see how the respondents’ outstanding request for such information could possibly invalidate the petition.

[48] For all of the above reasons, the assertion that Groberman J.'s reasons for judgment or his order are moot must fail.

3. Is the petition invalid for being in contravention of either Rule 10 or Rule 51(6) of the Rules of Court?

[49] Although the respondents submitted that the petition was invalid for non-compliance with both Rules 10 and 51(6), they framed the issues arising under each of the two Rules separately. However, in my view the issues arising are connected and are most appropriately dealt with together.

[50] The first point raised by the respondents is that none of the grounds in Rule 10(1)(a) to (i) are applicable in this case. The response from the Town's counsel is that Rule 51(6) specifically states that a party seeking an injunction under that sub-rule “may apply by petition” and, therefore, under Rule 10(1)(a) this is “an application [which] is authorized to be made to the court". Subject to my comments below on the applicability of Rule 51(6) to this application, I accept the Town’s position on this point.

[51] The next point raised by the respondents is that the *Municipal Act*, R.S.Y. 2002, c. 154, as amended, does not authorize the Town to enforce its bylaws by way of an application by petition. The response from the Town's counsel is that the provisions in ss. 338-344 of the *Municipal Act*, respecting the enforcement of bylaws by prosecution under the *Summary Convictions Act*, are very heavy-handed and can result in massive financial penalties. Further, says counsel, there is nothing in those provisions or elsewhere in the *Municipal Act* which limits the Town to proceeding by way of prosecution. Indeed the Town's counsel points to s. 345 of the *Municipal Act*, which states, "Conviction of an offence under this Act or a bylaw does not exonerate a person from civil liability". Thus, counsel submitted that the Town had a choice of proceeding civilly or by way of prosecution and, on this occasion, chose the former. I agree with the submissions of the Town's counsel on this point.

[52] The third argument raised by the respondents is that Rule 51(6) applies only to temporary injunctions, and because the Town has pleaded its reliance on Rule 51(6) in support of its application for a permanent injunction, then the petition must be invalid. The respondents rely on *A.L. Scott Financial (Newton) Inc. et al. v. Vancouver City Savings Credit Union*, 2000 BCCA 143. At para. 4 of that case, Esson J.A., speaking for the Court, referred to British Columbia Rule 45, which is very similar to our Rule 51, and stated that it "deals only with interlocutory injunctions". There is no doubt that most of the sub-rules in Rule 45 apply to interlocutory Injunctions, just as our Rule 51 primarily deals with pre-trial injunctions. However, I find the *A.L. Scott* case to be distinguishable, because there was no specific judicial consideration given to the interpretation of Rule 45(7), which is identical in its wording to our Rule 51(6). Further, the case of *Loewen v.*

Coquitlam (City), 2000 BCSC 714, specifically dealt with an application for what was seemingly a permanent post-judgment injunction under Rule 45(7), and there was no issue raised as to the Court's jurisdiction to do so. In any event, the wording of our Rule 51(6) is broad enough to include applications for permanent injunctions. Indeed, it presupposes that a party may apply for an injunction after obtaining a judgment to prevent the continuance of a wrongful act established by a judgment. Rule 51(6) states:

> "In a proceeding in which an injunction has been or might have been claimed, a party may apply by petition after judgment to restrain another party from the repetition or continuance of the wrongful act or breach of contract established by the judgment or from the commission of any act or breach of a like kind."

[53] The last point raised by the respondents in this area is that Rule 51(6) should be interpreted to mean that the Town should have applied for the permanent injunction under the "proceeding" before Groberman J. (S.C. No. 08-A0125). Further, say the respondents, since the Town chose to commence a fresh application by way of its petition in the within matter, the Town is in contravention of Rule 51(6). In response, the Town's counsel agrees that the Town could have applied for a permanent injunction within the proceeding before Groberman J., but says that there is nothing in Rule 51(6) preventing the Town from commencing a fresh application "by petition", which is what Rule 51(6) expressly permits. Further, in the proceeding before Groberman J., since the Town could have cross-applied for an injunction, that was a proceeding "in which an injunction… might have been claimed…", and therefore the condition precedent in Rule 51(6) has been met. Finally, submits the Town's counsel, since Groberman J. has delivered his judgment in that proceeding, the Town may now apply "by petition after [that] judgment to restrain [the respondents] from the…continuance of the wrongful

act…established by the judgment…". Of course, the wrongful act alleged is the occupancy of the property by the respondents as their residence. I agree with the Town's submission on this point.

[54] In the event I am wrong about the respondents' arguments relating to Rule 10 or Rule 51(6), I note that Rule 2(1) states:

> "(a) Unless the court otherwise orders, a failure to comply with these rules shall be treated as an irregularity and does not nullify a proceeding, a step taken or any document or order made in the proceeding."

Further, Rule 2(3) states:

> "The court shall not wholly set aside or stay a proceeding on the ground that it was required to be commenced by an originating process other than the one employed."

In my view, these sub-rules are broad enough to protect the validity of the petition, in the event that it somehow contravenes either Rule 10 or 51(6).

4. No evidence of breach of the Zoning Bylaw?

[55] Unfortunately, the respondent's argument on this point was again very difficult to follow. They firstly referred to para. 15 of the petition which reads:

> "The town of Faro hereby applies for an injunction to restrain the Respondents from continuing to use the Property as a full-time residence in non-compliance with the Bylaw as per the decisions made by the Supreme Court of Yukon and the Yukon Court of Appeal."

The respondents then submitted that this statement is "false", because there is no proven breach of the Zoning Bylaw by them, only an "alleged breach". They next referred to para. 49 of Groberman J's reasons for judgment in support of their proposition. That was the paragraph where he stated that he was not ignoring the fact that there was

some evidence of occasional prior use of the cabin on the property as overnight accommodation for floatplane pilots (the full text of the paragraph is found at para. 45 above). Frankly, I find the respondent's submissions on this point unintelligible.

[56] The respondent's oral argument then veered into the topic of their request that the Town provide them with the documents associated with the previous occupancy of the property, which I discussed and resolved at paras. 43-47 above.

[57] Next the respondents pointed to s. 305 of the *Municipal Act*, which states:

> "The use of land, a building, or other structure is not affected by a change of ownership or tenancy of the land or building or other structure".

Although the respondents did not clearly elaborate on the relevance of this provision, presumably their argument is that the previous occupancy of the property by floatplane pilots established a form of use of the land which was unaffected by the subsequent transfer of the land to Ms. Knapp. However, that argument conveniently ignores s. 1.6(2) of the Zoning Bylaw, which contains the general prohibition that "No land, building or structure shall be used, and no development is permitted for any purpose, except in conformity with this Bylaw." The respondents also failed to acknowledge s. 297 of the *Municipal Act*, which states:

> "297(1) Council shall not enact any provision or carry out any development contrary to or at variance with a zoning bylaw.
>
> (2) No person shall carry out any development that is contrary to or at variance with a zoning bylaw. S.Y. 1998, c.19, s.297."

[58] The respondents' defence then turned to s. 2.1(3)(c) of the Zoning Bylaw which states:

> "The Development Officer shall…keep a register of all applications made under this Bylaw, for public inspection during office hours, together with their applicable decisions."

The respondents submitted that they attended at the Town Office to ask for documents from this registry and were advised that the registry does not exist. While that is unfortunate and may be the basis for a legal remedy in other circumstances, I fail to see how it is relevant to the question of whether there is evidence that the respondents are in breach of the Zoning Bylaw.

[59] The respondents then attacked the affidavit of Mayor Heather Campbell in the following five ways:

1. At para. 4 of her affidavit, Mayor Campbell deposed:

   > "Residential use of the Property is not a permitted use of property zoned as Hinterland."

   The respondents claim this statement is "false" and "too broad and confusing";

2. At para. 5 of her affidavit, Mayor Campbell deposed:

   > "The Respondents petitioned the Court seeking a number of declarations which would ultimately result in the Respondents being allowed to use and occupy the Property as their residence."

   The respondents submitted that this statement was also untrue, because their petition was general and not specific to their property;

3. At para. 9 of her affidavit, Mayor Campbell deposed:

> "The Respondents have continued to use and occupy the Property as their residence following the Supreme Court and Court of Appeal decisions."

The respondents submitted that there is "no evidence" to support that statement. However, when I challenged Ms. Knapp by suggesting that such a proposition was wholly unsustainable, she seemed to resile from that position;

4. At para. 19 of her affidavit, Mayor Campbell deposed:

> "The Town has reached the point where, due to the Respondents' non-compliance with the Bylaw, their refusal to make application to the Town, and their stance that residential use of the property is "legitimate", the Town has no alternative but to take enforcement proceedings and seek an injunction."

The respondents submitted that this statement is "misleading", because the Town had already tried to prosecute the respondents for breaching the Zoning Bylaw under the *Municipal Act* in 2008. However, that enforcement route never reached fruition, as the charges were soon after withdrawn by the Town;

5. Finally, at para. 20 of her affidavit, Mayor Campbell deposed:

> "The Town asks the Court to Order the Respondents to immediately discontinue use and occupation of the Property as their residence, and relocate from the property forthwith. Given the repeated attempts made by the Town to gain compliance without going to Court, we are asking for the Court to award the Town the costs of our lawyer from the date of the appeal to the date of the injunction hearing."

The respondents seemed to suggest that this statement was also misleading, because the Town was already awarded its costs for the

> appeal. That submission simply misses the point. While the Town may have received its costs in partial compensation for the legal fees it incurred up to the release of the reasons for judgment from the Court of Appeal, what the Town is seeking now are additional costs from that point in time to the date of this hearing. In any event, this has no possible relevance to the question of whether there is evidence of a breach of the Bylaw before this Court.

[60] The sum-total of the points raised by the respondents in relation to Mayor Campbell's affidavit amount to nothing. They are not actually arguments, but rather a somewhat incomprehensible exhibition by them of denial. The most absurd position taken was the suggestion that there is no evidence that they continue to use and occupy the property as their residence. The entire record indicates that this is the case. Indeed, each of the respondents swore two affidavits in opposition to the Town's petition and each of those affidavits refer to themselves as being “of Lot 1028, Johnson Lake, Town of Faro”. Further, at the outset of the hearing, Ms. Knapp unsuccessfully applied for an adjournment for various medical reasons. One of the reasons was stress which she was experiencing from the “possible eviction” from her premises as result of the Town's petition, which I also take as an admission that she continues to reside on the property.

[61] In any event, the affidavit of Mayor Campbell is clear evidence that the parties continue to breach the Zoning Bylaw by residing on the property. That evidence is uncontradicted in any meaningful way by the evidence of the respondents. Accordingly, this ground must also fail.

B. The Town's Application for an Injunction

[62] I have determined above that the petition is valid. I have also determined that there is evidence before this Court that the respondents continue to be in breach of the Town's Zoning Bylaw by residing on the property. This was previously established by Groberman J. and confirmed by the Court of Appeal. As well, I have referred to the fact that although the Town could have sought an injunction in the proceeding before Groberman J., it is open to them now to apply by petition to restrain the respondents from the continuance of their wrongful act of breaching the Bylaw. Accordingly, all the requirements of Rule 51(6) are met and I order that the respondents shall immediately discontinue their use and occupation of the property as a residence. Should the respondents wish to continue to reside on the property, either part-time or permanently, they will have to make an application to the Town for permission to do so as a discretionary accessory use under the Bylaw. In the absence of such an application and the Town’s permission being granted, and in the absence of a change to the zoning in which the property is located, the respondents are prohibited from residing on the property.

COSTS

[63] The Town seeks special costs on a solicitor and client basis from the date of the Court of Appeal’s release of its reasons for judgment, which was on August 19, 2010, to the date of the injunction hearing, which was April 18, 2011.

[64] The Town's reasons for seeking special costs include the following:

- the number of court appearances required since the Court of Appeal released its decision;

- the fact that the Town has attempted to be reasonable by giving the respondents an opportunity (not once, but twice) to apply for discretionary accessory use of the property;
- the respondents' apparent willingness to use any means available to them under the Rules of Court to remain on the property; and
- their continuing denial that they are residing on the property is evidence of their bad faith and may constitute an abuse of process.

[65] A brief review of the dealings between the parties since the Court of Appeal decision is instructive. The initial offer by the Town to receive an application from the respondents for discretionary accessory use was by way of a letter from the Town's counsel dated September 23 of 2010. That offer was rejected by the respondents' counsel on the appeal, by letter of October 16, 2010, on the on the basis that no form existed under the Bylaw for such an application and that, in any event, the respondents use of the property was "a legitimate use" under the Hinterland zoning. The Town's counsel replied by her letter of October 27, 2010, indicating that the Town would be seeking an injunction to compel the respondents from discontinuing their residential use of the property. The respondents' counsel replied by letter of October 28, 2010, indicating that she had no instructions to represent the respondents on any injunction application.

[66] The original petition was filed on October 29, 2010, with a designated hearing date of November 2nd. On that date, the respondents appeared, representing themselves, seeking an adjournment. I allowed that adjournment in reasons cited at 2010 YKSC 72. One of my reasons for doing so was to give the respondents a further

opportunity to make an application to the Town for a discretionary accessory residential use of the property under the Bylaw. In those reasons, I originally stated I was going to adjourn the matter to November 23, 2010, however the Town's counsel indicated she was unavailable on that date, so I varied the date from November 23rd to November 30th.

[67] Notwithstanding that the respondents were aware the Town's counsel would not be available on November 23rd, they insisted on speaking to the matter on that date with a query regarding an extension on the filing of their response to the petition. At that case management conference, I confirmed with the respondents that they should be prepared to proceed to a hearing on November 30th, or to make a formal application for an adjournment supported by an affidavit.

[68] Also on November 23, 2010, the Town wrote to the respondents setting out the details it would expect in any application by the respondents for discretionary accessory use of the property. That letter specified that any such application would have to be received by the Town by January 4, 2011, and, if such an application was received by the Town on that date, then the Town would make its decision within 40 days.

[69] Accordingly, when the matter was next spoken to on November 30, 2010, before Mr. Justice Veale, the hearing of the petition was adjourned and a new case management date of January 13, 2011 was set, for the purpose of scheduling a new hearing date, if required.

[70] On January 13, 2011, the Town confirmed that the respondents had not filed their application for discretionary accessory use and therefore the Town would be proceeding with its petition. I scheduled the hearing of the petition to be heard on April 18, 2011, principally to accommodate the absence of Mr. Dufresne in the interim, due to work

commitments in the far North. I further directed that the respondents file their Response in Form 11 by January 31st.

[71] On January 24, 2011, the respondents requested a further case management conference seeking to adjourn the hearing date of April 18, 2011, because of some unresolved issues in a previous unrelated action commenced by Ms. Knapp arising from a motor vehicle accident in 1999. I dismissed that application, noting that the within matter involved an element of public interest, and had to be given priority over Ms. Knapp's private personal injury action.

[72] On April 13, 2011, Mr. Buchan appeared as Ms. Knapp's agent, seeking an adjournment of the hearing of the petition due to Ms. Knapp's illness. Mr. Buchan represents Ms. Knapp in her personal injury action. The application was dismissed by Veale J. and the hearing date of April 18, 2011 was confirmed.

[73] On April 18, 2011, as I noted above, Ms. Knapp again asked for an adjournment for medical reasons. Approximately 1.5 hours of court time was occupied in addressing that application, which I ultimately dismissed.

[74] While I can appreciate that this has been a frustrating conflict for both sides, it is nevertheless apparent from my review of the numerous pieces of correspondence exchanged between the parties over the years that the Town has made several efforts to settle the matter with the respondents. Indeed, the respondents included a formal Offer to Settle dated January 13, 2009, by the Town to them in one of Ms. Knapp’s affidavits.

[75] A brief review of the case law on special costs in *British Columbia Annual Practice, 2010*, indicates special costs may be ordered against a party where they have, among other things:

- made meritless, specious and ridiculous applications;
- acted reprehensibly;
- persisted in taking a position that is completely without merit;
- fabricated evidence;
- carelessly prosecuted a claim that was bound to fail;
- not been candid with the court;
- promoted theories are completely devoid of merit;
- repeatedly filed nonsensical documents;
- persisted with indefensible self-justifying litigation;
- deliberately intended to suppress evidence;
- made misleading submissions to the court; or
- failed to obey an order of the court.

[76] On this costs application I have considered:

- the entirety of the evidence before me:
- the number of case management conferences required;
- the number of applications for adjournments by the respondents;
- the fact that the respondents have failed to make an application to the Town for discretionary accessory use; and
- the number of frivolous arguments put forward in response to the petition.

[77] I recognize that, from the respondents' perspective, they feel that the "rules of the game" have changed from time to time, depending on the personalities of the Town's chief administrative officer or the elected Town Council. It is also understandable that the

respondents would be passionate in their attempts to resist eviction from a property which has been their home for the last seven years.

[78] In all of the circumstances, while special costs are clearly justifiable here, I am going to exercise my discretion against such an award, as it would likely have a disproportionately punitive effect upon the respondents. On the other hand, the Town does deserve their costs as the successful party, and they also deserve a certain end to this proceeding. Therefore, as I have the authority under Rule 60(14) to fix a lump sum as the costs of the proceedings, I do so in the amount of the $3,000, to be paid within six months of the date of the order arising from these reasons.

[79] As for the order, pursuant to Rule 43(2), I hereby dispense with the signature of the respondents approving the form of the order, but I direct that it be provided to me for review before it is issued.

Gower J.