

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of the Planning Act,  
R.S.N.W.T. 1988, c.P7, as amended;

BETWEEN:

MUNICIPAL CORPORATION OF THE TOWN OF FORT SMITH

Applicant

- and -

902906 NWT LTD.

Respondent

MEMORANDUM OF JUDGMENT

A) INTRODUCTION

[1] In this application, the Municipal Corporation of the Town of Fort Smith (“the municipality”) seeks to enforce Cease Work Orders issued to 902906 NWT Ltd. (“the corporation”) in May of 2006. The Cease Work Orders required the corporation to cease using four properties for the storage of various items. The municipality claims that the corporation has not complied with the Cease Work Orders and wants to take steps to enforce them.

B) ADMISSIBILITY OF MATERIALS PRESENTED ON BEHALF OF  
THE CORPORATION ON THE DAY OF THE HEARING

[2] Armando Berton is an officer of the corporation. He was served with the Originating Notice and supporting affidavits on January 10, 2007. He was served with the Authorities in support of the Originating Notice on January 22, 2007. He appeared before this Court on behalf of the corporation on January 26, 2007 and February 16, 2007, before the hearing was scheduled to proceed on May 31, 2007. He also appeared on behalf of the corporation at the hearing.

[3] The corporation did not file any materials at any point before the hearing date. At the beginning of the hearing, Mr. Berton advised that he wanted to file certain materials with the Court. I asked counsel for the municipality whether he had seen these materials before and what his position was about the Court receiving them. Counsel advised that he had not been given any notice that these materials would be filed, and that he had just seen them for the first time that morning. His position was that quite apart from notice issues, the materials were inadmissible and should not be received. In response, Mr. Berton stated that he was not a lawyer, was not familiar with the court processes, and did not know he had to provide these materials in advance or what format they should be in.

[4] My understanding from the submissions I heard is that Mr. Berton wanted to present an unsworn letter to the Court setting out his version of events; a draft Consent Order that had been the subject of discussions between the parties at some point before the hearing but was never signed; letters that he sent to the municipality seeking further extensions to comply with the Cease Work Orders; and a series of photographs of the properties which are the subject of the Cease Work Orders.

[5] I understand that lay people are often not familiar with the procedural requirements set out in the *Rules of the Supreme Court of the Northwest Territories*. The Court can give parties some leeway in certain circumstances. That leeway, however, cannot extend to allowing clearly inadmissible materials to be filed. As for procedural rules, while they are intended to be somewhat flexible and subject to the Court's overriding discretion, flexibility should never be extended to one party to the point of causing blatant unfairness to the other. In the general context of civil proceedings, a party is entitled to have adequate notice about the gist of the evidence that the other party will rely on at a hearing. In addition, where affidavits are adduced, the opposing party is entitled to test the evidence by cross-examining the affiant. The purpose of those rules is to ensure that a party not be taken completely by surprise by another.

[6] To the extent that the draft Consent Order reflects failed settlement negotiations between the parties, it is inadmissible. Unsworn written materials are also inadmissible. The photographs may have been admissible, had they been accompanied by an affidavit setting out who took them and when they were taken, but they could not be filed on their own. For those reasons I did not permit Mr. Berton to file any of the materials he proposed to file on behalf of the corporation.

## C) STATUTORY FRAMEWORK

[7] To put the municipality's application in context, it is useful to briefly set out the statutory framework that underlies this case.

[8] Sections 16 to 19 of the *Planning Act*, R.S.N.W.T. 1988, c.P-7 ("the *Act*") provide that municipal corporations have the power to enact zoning by-laws. The municipality has exercised that power and has enacted the *Town of Fort Smith Zoning By-Law* No. 673 ("the *By-Law*"). The *By-Law* creates different zones within the municipality's territory and sets out the permitted uses for land and buildings within each of the zones. Schedule "A" (Schedule of Zone Regulations) of the *By-Law* sets out the details of the permitted uses in each zone. Three of the properties that are the subject-matter of this application are located in the Multi-Dwelling Residential Zone. The fourth is located in the Town Centre Zone.

[9] In addition to the specifications about permitted and conditional uses in each zone, Schedule "A" of the *By-Law* sets out general rules and prohibitions, including the following:

- 1.(...)
  - (8) Garbage and waste material shall be stored in weatherproof and animal-proof containers. Such containers shall be visually screened from all adjacent sites and public roads.
  
3. (1) No yard (or part thereof) in a non-industrial zone shall contain
  - (...) (b) any dismantled or wrecked vehicle for more than seven days without the written permission of the Development Officer;
  - (c) objects that are unsightly or tend to adversely affect the amenities of the zone;
  - (d) materials relating to the construction stage;
  - (e) improperly stored garbage and waste material.
- (...)

[10] Section 20 of the *Act* provides that where land is being used or developed in a manner that contravenes a zoning by-law, the municipal council can, by written notice given to the owner, require the cessation of that use or development. Pursuant to section 15 of the *By-Law*, a Development Officer can exercise this power on behalf of the municipality.

[11] Cease Work Orders can be appealed to the Development Appeal Board. This must be done within fourteen days of the receipt of the Cease Work Order. No such appeal was filed in this case.

[12] Where a Cease Work Order has not been complied with, Subsection 20(3) of the *Act* gives the municipality the power to enter on the property and carry out its terms. It also provides that the municipality may recover the expenses it incurs in doing so.

#### D) SUMMARY OF THE EVIDENCE

[13] The evidence adduced on this application is that on April 24, 2006, By-Law Enforcement Officer Ronnie Schaefer conducted inspections at four properties owned by the corporation. He observed that these properties were being used for the storage of old vacant buildings, wood, and miscellaneous debris.

[14] On May 19, 2006, the Development Officer for the municipality issued Cease Work Orders for each of the four properties. The Cease Work Orders were served on Mr. Berton the same day. The terms of the Orders are the same for all properties and include the following:

You are hereby notified that you are to forthwith cease the development and use of the following lands for the purpose of storage of lumber, miscellaneous wood products, barrels, fuel tanks, shacks, derelict vehicles and other metal parts

(...)

You are hereby further ordered to remove or demolish all lumber, miscellaneous wood products, barrels, fuel tanks, shacks and other metal parts from the lands within thirty (30) days of service of this Cease Work Order and Notice of Enforcement

(...)

You are required to do the foregoing for the following reasons:

1. The development or use of the Lands for the purpose of storage of lumber, miscellaneous wood products, barrels, fuel tanks, shacks, derelict vehicles and other metal parts is not a permitted or conditional use of the Lands (...)
2. No Development Permit has been issued permitting the development or use of the Lands for the purpose of storage of lumber, miscellaneous wood

products, barrels, fuel tanks, shacks, derelict vehicles and other metal parts;  
and

3. The development or use of the Lands for the purposes of storage of lumber, miscellaneous wood products, barrels, fuel tanks shacks, derelict vehicles and other metal parts is unsightly and tends to adversely affect the amenities of the district in which the Lands are situate.

[15] Mr. Berton had discussions with officials from the municipality and as a result of those discussions, the deadline for compliance with the Cease Work Orders was extended to August 3, 2006. Mr. Berton was served with a letter advising him of this extension on July 10, 2006.

[16] Mr. Schaefer conducted a visual inspection of the four properties on August 8, 2006. He noted that the properties still appeared to be used in contravention of the *By-Law*.

#### E) RELIEFS SOUGHT BY THE MUNICIPALITY

[17] The municipality seeks a number of reliefs. Those reliefs are all aimed at enforcing the Cease Work Orders and the *By-Law*.

1. Declaration of contravention of the *By-Law* and of breach of the Cease Work Orders issued on May 19, 2006

[18] Many of the photographs attached as Exhibits to the Affidavit of Mr. Schaefer are of poor quality. I find it difficult to identify all the things depicted in many of the photographs. However, some photographs show various items such as buildings, vehicles, and debris on the properties. Mr. Schaefer personally attended and saw what items were being stored on the lands. I am satisfied, based on his Affidavit and my review of the *By-Law*, and in particular Schedule "A", that the storage of at least some of the items observed at the time of the April 2006 inspections was not permitted by the *By-Law*. Similarly, I am satisfied that as of the August 2006 inspections, the properties were continuing to be used for purposes not permitted by the *By-Law*.

[19] In his submissions, Mr. Berton conceded that many of the items still on the properties had to be moved. He asked for a further extension to enable him to do so. With respect to Lot 39, Plan 14, he argued that the *By-Law* was not binding. He argued that historically, and before the Town of Fort Smith came into legal existence, there was a gas station on that property. Mr. Berton argued that as a result, the *By-Law*

which was adopted subsequently is of no force or effect as far as preventing the continued use of that property for that purpose.

[20] There is no evidence before me to support this argument. No evidence was adduced to show that the property was being used as a gas station before the Town of Fort Smith came into existence as a legal entity. No evidence was adduced about who owned the land then or about when and how the ownership was transferred to the corporation. No evidence was adduced to show when the property was last used to operate a gas station.

[21] I am satisfied that the properties in question were, at the time the Cease Work Orders were issued, being used in a manner that contravened the *By-Law*. I am also satisfied that these Orders, which were never appealed, were not fully complied with by August 3, 2006. Mr. Berton has made submissions that he has removed many of the impugned items since the August inspections took place. I do not have the benefit of recent evidence about what changes might have occurred since the August inspections were conducted. It is quite possible that some items have been removed and that there has been some progress towards compliance. Still, the Orders were not complied with within the required time frame and the municipality is entitled to have a declaration to that effect.

## 2. Enforcement of Cease Work Order

[22] The municipality seeks authorization to enter the properties and carry out the terms of the Cease Work Orders. It seeks an Order stating that the costs of removal of the items will be recovered from the corporation pursuant to Subsection 20(3) of the *Act*. It also seeks an Order directing the Royal Canadian Mounted Police to attend with agents of the corporation to assist it with the enforcement of the Orders.

- a) Authority to enter properties and carry out terms of Cease Work Orders

[23] Subsection 20(3) of the *Act* reads as follows:

20.(...)

(3) Where an owner of property to whom [a cease work order] is given fails to comply with the requirements of the [order], the council, by its officials, may enter on the property and carry out or effect the removal, demolition, alteration, filling in or cessation of use that the notice requires to be done or effected, and may recover the expense of that from the owner by action.

(...)

[24] The municipality does not require an Order from this Court to have the lawful authority to enter the properties and carry out the terms of the Cease Work Orders. Subsection 20(3) of the *Act* gives it that authority. However, section 33 of the *Act* also makes it clear that a zoning by-law may be enforced by Order of this Court. The municipality is therefore entitled to obtain a declaration from this Court confirming the powers already set out in the *Act*. The existence of a Court Order expands the potential consequences should anyone attempt to interfere with the municipalities' enforcement efforts.

[25] Mr. Berton acknowledged in his submissions that some of the items on the properties ought to be removed. He explained that he had carried out some work already, but that some of it could not be completed during the winter months. He argued that he can do the work at little or no cost, whereas having the municipality do it could lead to very high costs. He also argued that some of the buildings and vehicles that are on the properties are not derelict or abandoned. He expressed concerns about the municipality's intent to destroy property that may be of value. He asked to be given until the end of the month of July 2007 to complete the work.

[26] Leaving aside the fact that Mr. Berton's submissions included a number of factual matters that should have been the subject of evidence, there are some fundamental difficulties with his position. He was served with the Cease Work Orders in May 2006. He has had considerable time to carry out this work himself, and he appears to concede that he has not removed all that should be removed. The submission that the winter months impeded the work would be more persuasive if he had been served with the Cease Work Orders in the late fall or during the winter, but he received them in May. The corporation has already had over ten months since the expiration of the deadline to complete the work. Because I reserved my decision on this application, it has had a few more weeks since the hearing to do some of the work, and at the conclusion of the hearing, I indicated to Mr. Berton that he should make the most of that time.

[27] I am satisfied that an Order should issue confirming the municipality's authority to enter the properties and carry out the terms of the Cease Work Orders. I will not grant Mr. Berton a further extension to the end of July. I will build a short "grace period" into my Order to give the corporation one last opportunity to remove items from the properties and mitigate the costs to the municipality.

- b) Instruction to Royal Canadian Mounted Police to assist with enforcement of Order

[28] The next relief that the municipality seeks is a direction to the Royal Canadian Mounted Police to assist the municipality in the enforcement of the terms of this Court's Order. In support of this request the municipality relies on section 27 of the *Judicature Act*, R.S.N.W.T. 1988, c. J-1, which gives this Court general powers to grant remedies:

27. A court in the exercise of its jurisdiction in every cause or matter pending before it has the power to grant and shall grant either absolutely or on reasonable terms and conditions that it considers just, all remedies that any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the cause or matter, so that as far as possible all matters so in controversy between the parties respectively may be completed and finally determined and all multiplicity of legal proceedings concerning those matters be avoided.

[29] The Royal Canadian Mounted Police are not a party to these proceedings. They were not given notice of these proceedings, and did not have an opportunity to make submissions about what they should or should not be ordered or instructed to do. In my view, it would not be appropriate, in these circumstances, to instruct the Royal Canadian Mounted Police to do anything.

[30] I am mindful that disobedience of a Court Order arising from civil proceedings can constitute a criminal offence. *Criminal Code* R.S.C. 1985, c. C-46, s. 127. To that extent, the Royal Canadian Mounted Police could at some point be called upon to have some involvement if there are issues with compliance with the Order arising from these proceedings. Given this, it is appropriate for the Order to be endorsed with the wording of section 127 of the *Criminal Code*, and for the Order to be served on the Fort Smith Detachment of the Royal Canadian Mounted Police for their information.

- c) Recovery of costs incurred to carry out terms of the Cease Work Orders and registration of lien on properties

[31] The municipality seeks an Order stating that it is entitled to recover the costs incurred respecting these proceedings, including the costs reasonably incurred in enforcing the terms of the Cease Work Orders, issuing time extensions, and obtaining Orders in this Court. The municipality relies on Subsection 20(3) of the *Act*, quoted at Paragraph 23, *supra*.



[32] In my view, Subsection 20(3) is aimed at the recovery of expenses incurred to carry out the work, as opposed to a broader range of costs. I do not interpret that provision as including more general costs such as the costs of inspections, of issuance and service of Cease Work Orders or extensions. Similarly I do not interpret this provision as replacing the general regime for ordering costs in litigation.

[33] I have not been referred to any case where this provision, or a similarly worded provision, has been used to obtain an order for the recovery of costs yet to be determined. Subsection 20(3) refers to the municipality's entitlement to recover these costs from the owner "by action". This appears to contemplate a recovery of costs that have already been incurred. While I do not think that the words "by action" necessarily mean that the municipality should be forced to initiate separate proceedings to recover the costs of the work to be done on the properties, the provision does not, in my view, contemplate issuing an order for unspecified costs that have not yet been incurred and cannot be quantified.

[34] The municipality will be entitled to recover from the corporation the costs of carrying out the terms of the Cease Work Orders. Once the work has been completed, the municipality can present evidence on that issue and have the matter brought back before me, on notice to the corporation, to have these costs quantified. If the evidence about the extent of the costs is in issue, the matter can be set for a hearing with *viva voce* testimony.

[35] The costs, once quantified, will be a charge and lien against the lands in question. The municipality is authorized to register a Caveat or Special Encumbrance against the titles of the properties immediately.

### 3. Registration of Order against titles of properties

[36] The municipality seeks to register the Order arising from these proceedings against the titles of the properties. This, the municipality argues, will protect potential purchasers of the property by advising them of these proceedings. It will also ensure that the Order is enforceable even if the ownership of the land changes.

[37] The municipality relies on section 175 of the *Land Titles Act*, R.S.N.W.T.1988, c.8 (Supp.), which reads as follows:

In any proceeding in respect of land, (...) a judge may, by order, direct a Registrar

- (a) to cancel, correct, substitute or issue any certificate of title or duplicate certificate;
- (b) to make any memorandum or entry on a certificate of title or duplicate; and
- (c) to do every act necessary to give effect to the order.

[38] The municipality also relies on section 27 of the *Judicature Act*, quoted at Paragraph 28, *supra*.

[39] In addition, the municipality points to section 34 of the *Act* and subsection 15(7) of the *By-Law*. These provisions allow, where a person is convicted of having undertaken illegal development, the filing of a notification of illegal development against the title of the property. The municipality argues that by analogy, it should be permitted to register the Order arising from these proceedings against the titles of the properties.

[40] If the combined effect of section 175 of the *Land Titles Act* and of section 27 of the *Judicature Act* is to permit the registering of an Order such as the one the municipality seeks, one might wonder whether there is a need for specific provisions such as section 34 of the *Act* or 15(7) of the *By-Law*. Nevertheless, the purposes of registering this Order are the protection of eventual purchasers and ensuring that the Order can be enforced. These are important objectives, consistent with the overall purposes of the legislation invoked by the municipality. I am satisfied that the municipality should be permitted to register the Order arising from these proceedings with the land titles' office.

## F) CONCLUSION

[41] For the above reasons, an Order will issue with the following terms:

1. The Respondent 902906 NWT Ltd. is hereby found in breach of the *Town of Fort Smith Zoning By-Law No. 673*, as amended, including Sections 7 and 8 and Sections 1, 3, 8, 10 and 13 of Schedule "A", concerning the following properties:
  - (a) Lot 39, Plan 14, Fort Smith, bearing Certificate of Title No. 27868;
  - (b) Lot 1029, Plan 1397, Fort Smith, bearing Certificate of Title No. 30866;

- (c) Lot 1030, Plan 1397, Fort Smith, bearing Certificate of Title No. 30867;
  - (d) Lot 1102, Plan 1472, Fort Smith, bearing Certificate of Title No.30868.
2. The Respondent 902906 NWT Ltd. is hereby found in breach of the Applicant's Cease Work Orders issued on May 19, 2006 in respect of the properties described in Paragraph 1 herein, for failing to remove or demolish all lumber, miscellaneous wood products, barrels, fuel tanks, shacks and other metal parts from the properties in compliance with the Cease Work Orders and any subsequent time extensions issued by the Applicant.
  3. Effective at 10:00 a.m. on Friday, June 29, 2007, the Applicant, its employees, contractors and agents are permitted to take such steps as are reasonably necessary to enforce the terms of the Cease Work Orders issued on May 19, 2006. This permission includes the authority to enter the properties described at Paragraph 1 herein to remove the unauthorized development and to ensure compliance with the *By-Law*.
  4. A copy of this Order shall be delivered by the Applicant to the Officer in Charge of the Fort Smith Detachment of the Royal Canadian Mounted Police for his or her information. The terms of section 127(1) of the *Criminal Code* shall be endorsed upon this Order.
  5. The Applicant is hereby authorized to register the present Order against the Certificates of Title of the properties described at Paragraph 1 herein with the Registrar of Land Titles and the Registrar is directed to accept the registration of the Order upon the Applicant's request.
  6. This Order may be discharged from any or all the Certificates of Title upon the Applicant's request, or upon further Order of this Court.
  7. The Applicant is entitled to recover from the Respondent the costs incurred in carrying out the work described at Paragraph 2 herein. The Applicant is granted leave, on seven day's notice to the Respondent 902906 NWT Ltd., to bring the matter before this Court to have a hearing to quantify this costs entitlement.

8. The costs referred to at Paragraph 7 shall be a charge and lien against the properties described at Paragraph 1 herein. The Applicant is hereby authorized to immediately register a Caveat or Special Encumbrance respecting these costs against the Certificates of Title for the said properties. The Registrar of Land Titles is directed to accept the registration of said Caveat or Special Encumbrance.

L.A. Charbonneau  
J.S.C.

Dated at Yellowknife, NT, this  
20<sup>th</sup> day of June 2007

Thomas D. Marriott appeared for the Applicant  
Armando Berton appeared for the Respondent

S-0001-CV2007000006

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MEMORANDUM OF JUDGMENT OF THE  
HONOURABLE JUSTICE L.A. CHARBONNEAU

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