Date: 2023 09 26
Docket: S-1-CV-2022 000088

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF an application under section 141 of the *Cities, Towns and Villages Act,* SNWT 2003, c 22

BETWEEN:

MUNICIPAL CORPORATION OF THE TOWN OF FORT SMITH

Applicant/Respondent

-and-

ARMANDO BERTON AND NERINA BERTON

Respondents/Applicants

Application to set aside Restraining Order granted under *Cities, Towns and Villages Act*, SNWT 2003, c 22

Heard at Yellowknife: March 21, 2023

Written Reasons filed: September 26, 2023

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE K.M. SHANER

Counsel for the Respondents/Applicants: Matthew Turzansky

Counsel for the Applicant/Respondent: Christopher Buchanan

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REASONS FOR JUDGMENT

INTRODUCTION

[1] Armando Berton ("Armando") and Nerina Berton ("Nerina") ask the Court to set aside a restraining order granted to the Town of Fort Smith (the "Town"), without notice, under s 141 of the *Cities Towns and Villages Act,* SNWT 2003 c 22 (the "*CTV Act"*).

[2] The grounds the Bertons advance are: the Town did not disclose to the Court all of the factual and legal circumstances within its knowledge at the time the application was made; the Town failed to provide an undertaking as to damages at the time it made the application; and the Town had no basis for seeking and obtaining relief against Nerina.

[3] The Bertons also seek to stay enforcement of an invoice issued to them by the Town, representing costs incurred in enforcing the bylaw. Finally, they seek costs on a solicitor and client or other elevated basis.

[4] For reasons following, the applications are dismissed, save for the application to vary the restraining order to remove Nerina as a respondent. Costs will be shared unequally on a party-and-party basis.

FACTS

[5] In 2001, Armando purchased a building from Parks Canada, located on a lot on Conibear Crescent, in Fort Smith, Northwest Territories. In 2003, he made two applications to the Town for a development permit to allow him to move the building to another property in Fort Smith. The Town denied his applications because the building did not fit into the zoning requirements of the destination property. The building remained at Conibear Crescent until 2017, when Armando moved it to a property owned by the Commissioner of the Northwest Territories (the "Commissioner") in Fort Smith.

[6] Armando and Nerina subsequently made a number of applications to the Town for development permits to allow them to move the building from the Commissioner's land to other properties in Fort Smith. The Town denied these applications for various reasons, including non-conformity, the need for the building to be assessed for fitness and need for one of the proposed lots to be remediated first.

[7] On February 18, 2022, in a separate action, the Commissioner obtained an order from this Court requiring Armando to remove the building from the Commissioner's property by February 28, 2022, failing which the building could be removed or destroyed at the Commissioner's direction. Armando attempted to comply with this order by removing the building from the Commissioner's property on February 24, 2022. He did not first obtain the required permit under the Town's traffic bylaw, believing the order granted to the Commissioner superseded the need for one.

[8] Armando used a public street in Fort Smith to move the building from the Commissioner's property to another property. The building sat upon a trailer, attached to a hauling vehicle. Before arriving at the intended destination, the vehicle and trailer became stuck in a ditch, blocking traffic. Bylaw Officer Adam Wiedrick was called to the scene. He contacted a Highway Patrol Officer who instructed him on how to safely move the building and directed the vehicle, trailer and building be moved to the closest and safest property. That property was 37 Breynat Street, which

is owned by Armando's brother, Gerindo Berton. Officer Wiedrick directed Armando to move the property there. He deposes he understood from a conversation he had with Armando at the time that Armando was dealing with all of Gerindo's properties.

[9] Armando's vehicle suffered numerous mechanical problems during the journey and at one point the building became entangled in power lines at a four-way stop; however, the building was eventually deposited at 37 Breynat Street.

[10] Shortly thereafter, Officer Wiedrick, on behalf of the Town, issued a Notice of Contravention under the *Unsightly Lands Bylaw*, ordering the building be removed from 37 Breynat Street within 30 days. The Notice was served on Nerina, who accepted it on Armando's behalf, on February 25, 2022. There is no evidence it was ever served on Gerindo, the property's registered owner. It appears, however, the Town was operating under the assumption Armando was an "owner" as that term is used in s 2(h) of the bylaw and I note this has not been raised as an issue by the Bertons.

[11] Nerina asked the Town to review the Notice under s 145 of the *CTV Act.* It appears the Town treated this as an appeal under s 9 of the *Unsightly Lands Bylaw.* The basis for the appeal was that the Bertons required more time to move the building than what was set out in the Notice.

[12] The Town conducted the appeal on March 15, 2022. It rejected the Bertons' request for more time. The Town's Senior Administrative Officer, Cynthia White ("Cynthia"), advised Nerina of the result by telephone the next day and followed up with a letter. In the letter, Cynthia re-affirmed the building had to be removed by March 27, 2022 failing which the Town could " . . .carry out the actions required". During cross-examination on her affidavit, Nerina acknowledged she received Cynthia's letter on March 16, 2022.

[13] The Bertons did not remove the building within the time specified in the Notice, nor did they obtain a permit to do so.

[14] On March 28, 2022 personnel from the Town arrived at 37 Breynat Street and began to demolish the building. Work was halted when Armando arrived and brought vehicles onto the property, which he used to prevent the Town's personnel from continuing the demolition. The Town suspended the demolition operation. Photographs taken that day and attached to Cynthia's affidavit of April 14, 2022 depict a dilapidated wooden structure on a trailer. One photograph shows a large part of the building missing, due to the Town's demolition activities.

[15] In an affidavit filed January 12, 2023 in response to this application, Cynthia said it was her understanding from reading the *Unsightly Lands Bylaw* that the Town's decision was final and therefore, it could proceed with enforcement on March 28, 2022 as planned. While this is indeed what the bylaw says, the conclusion was erroneous. This is not disputed by the Town.

[16] Section 146 of the *CTV Act* allows for review decisions made under s 145 to be appealed to this Court within 30 days of service. In turn, s 147 of the *CTV Act* requires, among other things, the appeal period in s 146 to have expired before a municipal corporation can take action to remedy a bylaw contravention. The appeal period would have expired April 15, 2022, some two weeks after the Town began its demolition and removal work. Cynthia deposed she was unaware of the appeal period in the *CTV Act* when she instructed legal counsel to seek the restraining order.

[17] In both her January 12, 2023 affidavit and in cross-examination on it, Cynthia stated neither Armando nor Nerina ever spoke to her about an appeal, although Armando attended at the Town Hall and spoke with her about the Town's decision.

[18] In cross-examination on her affidavit, Nerina said she was unaware of her right to appeal the Town's decision. Armando did not give evidence in this application, so it is not known if he knew about the right to appeal. In any event, no appeal was filed with this Court under the *CTV Act.*

[19] On April 22, 2022, the Town applied without notice under s 141 of the *CTV Act* for an order restraining the Bertons from interfering with the Town's enforcement measures, based primarily on what it considered to be an imminent danger to public health and safety created by the partially demolished building on 37 Breynat Street. Subsection 141(3) specifically allows the Court to hear the application without notice if, in its opinion, there is imminent danger to public health or safety, or it is otherwise warranted by extraordinary circumstances.

[20] Justice Smallwood, as she was then, granted the restraining order on April 22, 2022. The fact the appeal period under s 147 of the *CTV Act* had not expired when the Town began the demolition on March 28, 2022 was not included in the evidence before her.

[21] The restraining order was served on the Bertons on April 26, 2022. They retained a lawyer that day, who contacted the Town's legal counsel immediately and requested and received the materials from the application. The Berton's lawyer also asked that the Town delay enforcement; however, the Town refused and the

following morning the Town completed the demolition, taking the debris to the landfill.

[22] On June 10, 2022, the Town sent the Bertons an invoice for the costs incurred in removing the building in the amount of $19,555.58.

[23] Armando filed a separate suit in this Court on August 2, 2022 seeking damages from the Town for the building's demolition, among other things.

ISSUES

[24] The first issue is whether the restraining order should be set aside. The parties' evidence and submissions raised the following questions:

a. Whether the Town met its obligation to disclose all evidence and legal issues, including anything adverse to its position;

b. Whether the Town was required to provide an undertaking as to damages when it sought the restraining order; and

c. Whether Nerina Berton was properly included as a party in the restraining order application.

[25] The Bertons also raised the issue of mootness, specifically whether the restraining order could be set aside, despite the building already being demolished and removed. Given my conclusion, it is unnecessary to address this argument.

[26] Finally, there is the question of whether an injunction should issue in favour of the Bertons, enjoining the Town from taking steps to enforce payment of the demolition costs.

ANALYSIS

Did the Town meet its disclosure obligations in making an application without notice?

[27] It is helpful to begin with a summary of a presenting party's obligations in seeking relief *ex parte,* that is, without notice.

[28] The right of every party to be heard before a decision affecting rights is taken is a principle that lies at the heart of our legal system. Proceedings held without notice deny the other party the opportunity to present evidence and make representations to the Court. The Court, in turn, lacks the benefit of hearing from

the respondent and is forced to rely solely on the evidence and other materials the presenting party submits. This creates an obvious imbalance, giving rise to an enormous risk of unfairness. Accordingly, proceedings brought without notice are typically entertained only in exceptional circumstances, such as where giving notice to the other party or the delay which would be entailed in doing so could put the safety of the presenting party or others at risk of harm; or where proceeding on notice could lead to the dissipation or destruction of assets. *Ruby v Canada (Solicitor General),* 2002 SCC 75 at para 25, [2002] 4 SCR 3.

[29] It follows that parties who seek relief from the courts without notice have certain responsibilities aimed at minimizing the possibility the proceedings will result in unfairness. Chief among these is the applicant's duty to exercise utmost good faith in presenting evidence and making representations. Subject to privilege, the evidentiary record must be as complete and thorough as possible and must not exclude evidence which may be adverse to the presenting party. *Ruby* at para 27. Failure to make full evidentiary disclosure may constitute grounds to set aside the order. *Secure 2013 Group Inc v Tiger Calcium Services Inc,* 2017 ABCA 316 at para 47.

[30] The Bertons submit the Town breached its disclosure obligations by failing to advise the Court of four related, material facts:

a. First, the Town attempted to enforce the bylaw before the appeal period for its review decision had run under s 146 of the *CTV Act;*

b. Second, the Town contravened the *CTV Act* and its own bylaws by attempting to *demolish* the building, rather than *removing* it;

c. Third, in support of its contention the building posed an "imminent danger to public health or safety", the Town presented evidence the building was "half-demolished" but failed to disclose the building came to be in this condition because the Town had acted illegally by taking enforcement action before the appeal period expired. Moreover, the Town did not disclose the building sat on the Commissioner's land and on Parks Canada's land for many years without being deemed an imminent danger;

d. Fourth, in its application the Town cast Mr. Berton's attempt to prevent the Town from demolishing the building as "interference" as that term is used in s 141 of the *CTV Act*, when in fact Mr. Berton was lawfully

> attempting to protect his property from the unlawful actions of the Town.

[31] The Bertons argue that as a result of the failure to include these facts in the evidentiary record, the restraining order should be set aside.

[32] The Town says it fully discharged its disclosure obligations. With respect to the appeal period, the Town does not dispute it had not yet expired when it attempted to enforce the *Unsightly Lands Bylaw* on March 28, 2022; however, it argues this was not a fact material to the question of whether the Court could issue the restraining order. Additionally, it says the Bertons had clearly interfered with enforcement and the condition of the building when the Town applied for the restraining order was such that immediate action was required.

[33] It is clear the Town was required to wait until the appeal period expired before it took enforcement measures on March 28, 2022. Nevertheless, I have concluded the information about the appeal period and the other evidence the Bertons say ought to have been included were not necessary parts of the evidentiary record on the restraining order application. Moreover, omitting these things did not affect the result.

[34] The Bertons' argument conflates the question of the legality of the Town's attempt to enforce the *Unsightly Land Bylaw* on March 28, 2022, *before* the appeal period expired, with its application to this Court for the restraining order on April 22, 2022, which occurred *after* it expired. The only issues in the restraining order application were these: whether the building, in the condition it was on April 22, 2022, posed an imminent threat to public health and safety; and whether it was reasonably likely the Bertons would interfere with the Town's enforcement activities. Indeed, the question of whether the Town acted illegally when it began demolishing the building on March 28, 2022 was not within the contemplation of either the Town or the Bertons on April 22, 2022.

[35] The evidence the Town submitted with the application set out an accurate and complete chronology of the events leading up to the point where the Town started to demolish the building. The Town's evidence detailed how the building came to be at 37 Breynat Street. It included photographs depicting the building's tenuous structural condition, explained how it came to be "half-demolished" (i.e. by reason of the Town's previous enforcement efforts), and why it posed an imminent threat to public health and safety. The evidence also described the actions Armando took to prevent the Town from continuing to demolish and remove the building.

[36] Importantly, the evidence on these issues did not change in response to the present application. There is no suggestion the building was not as it appeared in the photographs, which Smallwood, J accepted as sufficient proof it posed a risk of imminent harm, nor that Armando's actions were inaccurately described.

[37] The fact that the Town commenced enforcement measures before the appeal period expired, while obviously problematic for other reasons, was immaterial to the questions whether the building posed a risk when the Town applied for the restraining order, and whether it was necessary to grant the restraining order to prevent interference with enforcement. It cannot be said the Court was misled on these key issues by the omission of the information about the appeal period. It was also irrelevant that the Town had not previously taken any action against the Bertons when the building sat on Commissioner's and Parks Canada's lands. Again, what mattered was the condition of the building on the day the Town sought the restraining order.

[38] In short, none of this information would have changed the Court's finding on the condition of the building when the application was heard, nor the conclusion Armando would interfere with the Town's efforts to carry out enforcement. Accordingly, the restraining order will not be set aside on the basis of non-disclosure.

Was the Town required to provide an undertaking as to damages?

[39] The Bertons argue the restraining order should not have been issued because the Town did not provide an undertaking as to damages. In support, they refer to the provisions in the *Rules of the Supreme Court of the Northwest Territories*, R-010-96 respecting applications for interlocutory injunctions and mandatory orders, particularly r 447. Rule 447 requires an applicant to provide an undertaking to abide by any order respecting damages which may be ultimately assessed in favour of the respondent because of the injunction or mandatory order. The Bertons also reference *156190 Canada Ltd v Baroum Drugs Ltd*, 1998 CanLII 2853 (NWTSC) at para 18, where this Court declined to grant an interlocutory injunction in part because the applicant failed to provide the required undertaking, and *Premium Weather Stripping Inc v Ghassemi*, 2016 BCCA 20 at para 9, where the British Columbia Court of Appeal held an interlocutory injunction ought not to have been granted by the court below in the absence of an undertaking.

[40] The Town's position is no undertaking was required. It applied for a restraining order, which is a specific remedy under s 141 of the *CTV Act* to aid municipal corporations in enforcing bylaws. The Town did not seek an interlocutory

injunction under the Court's inherent jurisdiction. The Town points out there is no express or implied requirement in s 141 of the *CTV Act* requiring a municipal corporation to provide an undertaking as to damages in applying for a restraining order, even where it does so without notice. What the Town had to demonstrate in this case was interference with its enforcement of the bylaw (*CTV Act*, s 141(1)(a)) and, because it was proceeding without notice, imminent danger to public health or safety or other extraordinary circumstances (*CTV Act*, s 141(3)).

[41] No undertaking is required in applications under s 141 of the *CTV Act.*

[42] As noted, s 141 does not expressly require an undertaking, nor can such a requirement be implied. This is so even where the municipal corporation proceeds without notice. While the restraining order may be characterized generally as "injunctive" relief insofar as it functions to prevent or enjoin certain activities, it is distinct from an interlocutory injunction granted under the Court's inherent jurisdiction. The two remedies serve different functions and engage different legal considerations. Unlike an interlocutory injunction, a restraining order is not a tool for preserving rights or assets pending resolution of a dispute between private parties; rather, it is a provision through which a municipal corporation can carry out the vital public function of enforcing its bylaws. Requiring an undertaking would be inimical to law enforcement responsibilities. In this context, apprehended damage is simply not a relevant consideration. *Kamloops (City) v Baines*, 1996 CanLII 3505 (BCSC) at para 10; *Thompson-Nicola v Galbraith*, 1998 CanLII 5459 (BCSC) at para 2.

Was Nerina Berton properly included as a respondent?

[43] The Bertons submit Nerina should not have been included as a respondent and that doing so constituted overreach.

[44] The Town argues it was appropriate to include Nerina as a respondent because she frequently represented Armando and other family members in disputes with the Town. The Town says it was reasonably foreseeable Armando would use Nerina to "take steps for him" and thus avoid the legal effects of the restraining order.

[45] Nerina should not have been included as a respondent. The Town's position on her potential involvement lacks a sufficient evidentiary foundation. While Nerina played a role in advocating for Armando with respect to the building, there is no evidence she interfered in any way with the Town's attempt to enforce the bylaw on March 28, 2022, nor is there any basis for the Town to assume she would do so in the future.

Should the Town be enjoined from enforcing the invoice?

[46] The Bertons seek an interlocutory injunction to prevent the Town from taking steps to enforce the invoice for the costs of the demolition.

[47] The Town has represented to the Bertons and to the Court it will not enforce the invoice until this application and Armando's suit against the Town for damages arising out of the demolition are resolved. The Town says it is therefore unnecessary for the Court to issue any form of injunctive relief at this point. The Bertons are concerned the Town will nevertheless take enforcement steps, which could ultimately lead to the property being sold at auction.

[48] I decline to grant the Bertons an injunction to prevent the Town from taking steps to enforce the invoice. First, the Town's agreement to forebear from enforcement makes an injunction unnecessary. Second, this case is restricted to the application for the restraining order and the application to set it aside. It is not about the validity of the Town's actions in demolishing the building, nor its monetary claim against the Bertons. In other words, there is not a sufficient legal link between the injunctive relief the Bertons seek and the subject matter of this case for the Court to grant an injunction.

[49] Finally, s 149 of the *CTV Act* provides the costs a municipal corporation incurs in enforcing a bylaw can be collected through either civil process for debt or against the assessed owner under the *Property Assessment and Taxation Act*, RSNWT 1988 c P-10. In both cases, notice to the debtor is required. Practically, this means no judgment would be obtained, nor would the property be sold, without the interested parties, whether Armando, Nerina or the property owner, Gerindo Berton, having ample prior warning and a fair opportunity to put their position forward.

CONCLUSION

[50] The Bertons' applications to set aside the restraining order and to enjoin the Town from enforcing its invoice are dismissed.

[51] The application to remove Nerina Berton as a respondent is granted and there will be an order directing the restraining order granted by Smallwood, J be varied accordingly.

[52] The Town was substantially successful in defending the Bertons' applications, the exception being the application to have Nerina removed as a respondent. This was a rather minor issue comparatively, but nevertheless an important one. It should

be reflected in the distribution of costs. In the circumstances, I direct the parties to share party-and-party costs with 75% of the total awarded to the Town and the remaining 25% to the Bertons.

K. M. Shaner
JSC

Dated in Yellowknife, NT this
26th day of September, 2023

Counsel for the Respondents/Applicants: Matthew Turzansky

Counsel for the Applicant/Respondent: Christopher Buchanan

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