

CANADA / JUDGMENT

Miller v. Qualicum Beach (Town)

2020 BCSC 1412

COURT

Supreme Court of British Columbia

DECIDED

22 September 2020

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2020 BCSC 1412 Miller v. Qualicum Beach (Town)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Miller v. Qualicum Beach (Town),

2020 BCSC 1412

Date: 20200922

Docket: S182737

Registry: Victoria

IN THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT

Between:

Kurt Anthony Miller

Petitioner

And

Town of Qualicum Beach

Respondent

Before: The Honourable Mr. Justice Punnnett

Reasons for Judgment

Counsel for the Petitioner:

L.R. LeBlanc

Counsel for the Respondent:

J.A. Plonka

Place and Date of Hearing:

Victoria, B.C.

September 11, 2020

Place and Date of Judgment:

Victoria, B.C.

September 22, 2020

- [1] The petitioning property owner seeks an interim injunction restraining the respondent town (the "Town") from removing from the petitioner's property certain materials pursuant to an administrative order under its Property Maintenance and Standards Bylaw.
- [2] The application was dismissed at the conclusion of the hearing with reasons to follow. These are those reasons.

Background

- [3] In 2015, the petitioner took out a building permit to construct a single-family dwelling on the property. Since then there have been multiple stop work orders. In 2017, the Town declared the structure was a hazard. Pursuant to a remedial action order (the "2017 Order"), the Town required the petitioner to demolish and remove the structure, failing which the Town would do so at the expense of the petitioner.
- [4] The petitioner requested an extension to comply, and that extension was granted in 2018. Subsequently, the petitioner brought this proceeding to seek a judicial review of the Town's decision not to grant him a building permit. The Town did not enforce the 2017 Order pending disposition of that review. The review was ultimately dismissed by consent order in January 2019.
- [5] In February 2019, the Town wrote to the petitioner advising that it would require compliance with the 2017 Order by March 2019. In February 2019, the petitioner requested a further extension to comply, citing difficulties arising from residing in the United States, and difficulty in securing contractors.
- [6] In or about the spring of 2019, the Town discovered the garage slab constructed on the property was sinking. This was a newly-discovered hazard and was not covered by the 2017 Order. An order substantially the same as the 2017 Order was made in June 2019 which included removal of the garage slab (the "2019 RAR".)
- [7] The material terms of the 2019 RAR included:

- a) the petitioner was required to demolish the building on the property, and to remove the garage slab,
- b) the petitioner was required to apply for a building permit to perform that work within 30 days of the date of the 2019 RAR;
- c) the petitioner was required to complete the removal work within the time required by the Town's Building Bylaw, i.e. 90 days;
- d) the demolition must otherwise comply with the Town's Building Bylaw;
- e) if the petitioner did not comply, the Town would undertake that action at the petitioner's expense as permitted by the Community Charter.

[8] The Building Bylaw includes a provision that states:

...the site of the demolition will be left in a safe and neat condition, free from debris and compatible with neighbouring properties to the satisfaction of the building official...

[9] The petitioner did not request a reconsideration of the 2019 RAR, nor did he seek a judicial review of it or otherwise challenge it. Rather, the petitioner sought clarification concerning demolition requirements, and requested further extensions.

[10] The Town issued the petitioner a demolition permit in September 2019. Demolition work took place in the autumn of 2019, substantively concluding in November 2019. As of that date, the demolition work had been performed insofar as the building had been removed. However, the garage slab had not been removed, and materials associated with the demolition of the building were stored in open-air piles around the property.

[11] In December 2019, the Town wrote the petitioner, advising that each of these issues contravened the 2019 RAR, and that the Town intended to undertake removal of these items at the expense of the petitioner, without further notice.

[12] On January 6, 2020, the petitioner applied for a building permit and "Sea Cans" were placed on the property to store building materials. In about the second week of January 2020, the Town rejected the petitioner's building permit application. The Town stated the 2019 RAR had not been satisfied, the application was incomplete and the proposed building did not conform to setback and building code requirements.

[13] On March 4, 2020, the petitioner was also issued a separate administrative order pursuant to the Town's Property Maintenance and Standards Bylaw (the "2020 Order"). The 2020 Order required the petitioner to complete the following within 30 days:

- a) Cut and maintain all brush, grass and other landscaping which is predominately dead or unmaintained;
- b) Remove all discarded items, junk and rubbish, as defined in the Bylaw from 263 Buller Road, Qualicum Beach;

c) Remove all "Building Materials" as defined in the Bylaw, from 263 Buller Road, Qualicum Beach, B.C. This includes all materials in open air piles as well as all materials inside the "Sea Cans"; and

d) Remove all "Sea Cans" from 263 Buller Road, Qualicum Beach.

[14] The 2020 Order is issued pursuant to section 5 of the Property Maintenance and Standards Bylaw. That bylaw provides that a property owner who wishes to "contest" such an order must first notify the Town's corporate administrator of that intention in writing within five days. That bylaw further provides that after hearing the owner, town staff and other affected parties, Council can affirm, vary or revoke the order.

[15] Separately, on March 20, 2020, counsel for the Town wrote to the petitioner's current counsel as a courtesy advising of the 2020 Order, and that the 2019 RAR remained unsatisfied.

[16] The petitioner did not challenge the 2020 Order using the procedure under the Property Maintenance and Standards Bylaw. Rather, the petitioner, through counsel, wrote on March 27, 2020 to the Town's bylaw enforcement officer (not its corporate administrator). He did not request an appearance before Council for a reconsideration, instead describing his intentions:

...as soon as [the petitioner] is able to safely travel back to Canada he will be travelling to the Town of Qualicum Beach to consider the content of your March 4, 2020 letter. ... [Emphasis added]

[17] Separately, the petitioner was present in Qualicum Beach shortly before (and continuing shortly after) the Covid-19 travel restrictions were implemented.

[18] Through counsel, the Town wrote to the petitioner on July 20, 2020, warning that both the 2019 RAR and the 2020 Order had not been satisfied, and providing a further 30 day "courtesy" extension for that work to be completed before the Town performed it at the petitioner's expense.

[19] This application is brought to restrain the Town from doing so now that the Town has confirmed no further courtesy extensions will be granted.

Law

[20] The test for an interim injunction is the three part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The three factors to be established by the petitioner are: (1) there is a serious question to be tried; (2) the petitioner will suffer irreparable harm if the relief is not granted; and (3) the balance of convenience is in the petitioner's favour. The Court may also use the two part test in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.) in which the irreparable harm and balance of convenience tests are essentially combined.

Discussion

- [21] Somewhat unusually, the petitioner has not satisfied the first part of the test, that there is a serious question to be tried. The only serious question raised by the petitioner is whether the state of emergency in British Columbia and the Canadian Government's closure of the border with the United States prevents him from complying with the Town's orders.
- [22] Nothing in the petitioner's material suggests the provincial state of emergency has prevented him from complying with the orders. His evidence regarding the border closure is limited to his assertion that it prevents him from complying with the 2020 Order. This "evidence" is nothing more than an assertion or conclusory statement. It fails to even raise a *prima facie* case.
- [23] During submissions it was argued the petitioner had to be physically in British Columbia to inventory the contents of the "Sea Cans" (in order to ship them out of Canada) and to arrange for their removal along with the building material. The petitioner further argued that removal of these items was a problem due to a lack of contractors in Qualicum, First, the evidence does not support such, and further, it is the "Sea Cans" removal from the property, not a requirement they are shipped out of the country that is in issue. Second, the petitioner provides no evidence of his efforts to locate a contractor to remove and store the "Sea Cans" and materials, and apparently has not sought one from outside Qualicum.
- [24] His obligation to show greater effort is particularly the case, where here at issue is his compliance with the 2020 Order. The validity of the order is not challenged. Nor did the petitioner seek reconsideration of the order as he was entitled to do. It is expected if someone is ordered to do something "he or she must use sufficient diligence to perform or have the act performed" (*Michel v. Fafrentz*, 1998 ABCA 231 at para. 21.)
- [25] In addition, the petitioner has established no risk of harm, irreparable or otherwise. He asserts that the items may be removed and destroyed while he cannot enter Canada. While he attributes a monetary value to them, there is no assertion they are of sentimental or unique value. The Town does not intend to destroy the items. They intend to remove them at the expense of the petitioner and may cause their sale. In any event, the "harm" the petitioner refers to is financial, not harm that "cannot be quantified in monetary terms" (*RJR-MacDonald* at para. 59.)
- [26] The petitioner has provided no evidence as to why the building materials and the "Sea Cans" cannot be removed and placed in storage. Nor has he produced any evidence of why a third party cannot carry out the tasks required by the 2020 Order. His assertion he needs to list their contents is an action that is not required at this stage.
- [27] Turning to the balance of convenience, several factors arise.

- [28] The injunction sought seeks to restrain the exercise of valid legislation, regulation or activity in the public interest. Therefore, the petitioner faces a higher hurdle and the Town, as a public body, a "minimal" requirement. This is because the Court "should in most cases assume that irreparable harm to the public interest would result from the restraint of that action." Otherwise, the Court would effectively be tasked with an "inquiry into whether the government is governing well" (RJR-MacDonald at paras. 71-72.)
- [29] Also, as noted earlier, the petitioner did not seek a reconsideration of the 2020 Order which could have been an adequate alternative remedy (Shuswap Lake Utilities Ltd. v. Mattison, 2008 BCCA 176 at paras. 51-52.). Nor does the petitioner come before the court with clean hands given his failure to adhere to the 2019 RAR.
- [30] More generally, as noted earlier, the Covid-19 submission lacks merit as the petitioner has failed to show a third party could not take steps to comply with the 2020 Order on behalf of the petitioner.

Conclusion

- [31] In summary, the petitioner has failed to establish there is a serious question to be tried, that he will suffer irreparable harm if the relief is not granted and that the balance of convenience is in his favour. Hence the application was dismissed. No costs are sought by either party.

"The Honourable Mr. Justice Punnnett"

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