Citation: 6165347 Manitoba Inc et al v Vandal et al, 2017 MBCA 81
Date: 20170830
Docket: AI17-30-08905

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Mr. Justice Alan D. MacInnes
Mr. Justice William J. Burnett

B E T W E E N :

6165347 MANITOBA INC. and 7138793 MANITOBA LTD.	)	***D. G. Hill*** *and*
	)	***K. D. Toyne***
	)	*for the Appellants*
	)	
(Plaintiffs) Appellants	)	***H. I. Pollock, Q.C.***
	)	*for the Respondent*
	)	*D. Hoeppner*
- and -	)	
	)	***K. L. Unruh*** *and*
	)	***C. Poapst***
JENNA VANDAL, CAL DUECK, LAURA PEARSON, DIRK HOEPPNER, PARKER WETLANDS CONSERVATION COMMITTEE, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, JANE DOE #1, JANE DOE #2, JANE DOE #3, JANE DOE #4 AND PERSONS UNKNOWN	)	*for the Respondent C. Dueck*
	)	
	)	***J. Vandal***
	)	*on her own behalf*
	)	
	)	***N. G. Thomas***
	)	*on behalf of the Respondent L. Pearson*
(Defendants) Respondents	)	
	)	*Appeal heard and*
	)	*Decision pronounced:*
	)	***August 30, 2017***

CHARTIER CJM (for the Court):

[1] The plaintiffs appeal the motion judge's decision to adjourn their motion for injunctive relief (to remove the defendants from their property) to a date approximately three and one-half months later, rather than hear it on an urgent basis.

[2] Some background is necessary. The plaintiffs are the lawful owners of a large piece of land situated in the City of Winnipeg (the property). It is currently zoned industrial and is surrounded by the CN main rail line on one side and residential and commercial development on the other sides. The plaintiffs are in the process of developing the property by clearing some of the trees. The defendants oppose the development for a number of reasons, including: to save the trees and the wildlife therein; to protect wetlands; and because of alleged Indigenous and Métis claims to the property. The defendants have set up an encampment on the property to prevent the tree-clearing operation to continue. The plaintiffs cannot develop their property because of the defendants' action and suffer harm as a result. The defendants have refused to leave despite repeated requests by the plaintiffs. The Winnipeg Police Service has advised the plaintiffs that it will not remove the defendants from the property, unless ordered by a court.

[3] The plaintiffs want to set aside the motion judge's decision to adjourn the matter until November so that the merits of their injunctive relief motion can be heard and determined on an urgent basis. To that end, they requested, and I granted, an expedited hearing of this appeal (see 2017 MBCA 75).

[4] The motion judge's decision that the matter did not have to be heard on an urgent basis is an exercise in judicial discretion and is owed considerable deference. Absent misdirection on the part of the judge, a court of appeal should only intervene if satisfied that the decision was clearly wrong or results in an injustice.

[5] In his reasons, the motion judge explained that the motion need not "be heard on an urgent basis during the [summer] recess, because [he was] not satisfied that the plaintiff[s] could not be compensated in damages for any economic harm that they might suffer."

[6] The plaintiffs submit that the motion judge's decision cannot be allowed to stand. They argue that there was no direct or circumstantial evidence before the motion judge that could allow him to conclude that the defendants were in any position to compensate the plaintiffs in damages.

[7] We agree. The motion judge misapprehended the evidence in a material way. There was no evidence on the record before him, inferentially or otherwise, to support that conclusion. As a result, appellate intervention is justified and we may substitute our view.

[8] As a rule, parties want their matters heard expeditiously. Whether a matter deserves urgent consideration will be determined by the facts of each particular case. Relevant considerations will include: i) the seriousness of the issue raised; ii) the nature of the relief sought; iii) the irreparable harm or damages that may be suffered; and iv) whether the moving party has proceeded with due dispatch. Indeed, the analysis is very similar to the one used by appellate courts when deciding whether to expedite the hearing of an appeal. We are persuaded that, in the circumstances of this case, the plaintiffs' motion ought to be heard on an urgent basis.

[9] First, there can be no doubt that this matter raises serious issues involving property rights and the enforcement of those rights. There is evidence, albeit hearsay at this point, that the police were ordered by the "executive" to take no steps to remove the defendants from the property,

unless ordered by a court. If there is any credence to this, we find it alarming because when police are engaged in the enforcement of the law, they are to act independently. As a rule, persons have no right of access to private property except with the owner's permission. Absent permission, trespassers are subject to civil action for trespass and prosecution under *The Petty Trespasses Act*, CCSM c P50 (see *Myran v The Queen*, [1976] 2 SCR 137). As stated by Lord Denning in *R v Metropolitan Police Comr, Ex parte Blackburn*, [1968] 1 All ER 763 at 769 (CA), "[the Commissioner of Police] should be, and is, independent of the executive" and "he is not the servant of anyone, save of the law itself." The principle of the independence of the police was reaffirmed by the Supreme Court of Canada in *R v Campbell*, [1999] 1 SCR 565 (at para 29):

> [I]n that regard the police are independent of the control of the executive government. The importance of this principle, which itself underpins the rule of law, was recognized by this Court in relation to municipal forces as long ago as *McCleave v. City of Moncton* (1902), 32 S.C.R. 106. That was a civil case, having to do with potential municipal liability for police negligence, but in the course of his judgment Strong C.J. cited with approval the following proposition, at pp. 108-9:
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> > Police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted are derived from the law, and not from the city or town under which they hold their appointment.
>
> [emphasis added]

[10] Second, the nature of the relief sought favours an expedited consideration on the merits. The plaintiffs are seeking injunctive relief. The type of relief sought is for an order pending final determination of the law suit. It is temporary in nature, not permanent. Unless requests for interlocutory injunctions are frivolous, they typically should be heard expeditiously and the relief either granted or refused.

[11] Third, on the issue of harm and damages, the record shows that the defendants' actions are delaying the plaintiffs' ability to develop the property. We are satisfied that the cost of delay is real and that the plaintiffs will suffer substantial harm. Moreover, and as stated by The Honourable Mr. Justice Robert J Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters, 2016) (loose-leaf release no 25, November 2016) at 4.10, where property rights are concerned, damages are generally presumed to be inadequate.

[12] Finally, the injunctive relief the plaintiffs are seeking is an equitable relief. As the English translation of the Latin maxim of equity states, equity aids the vigilant and not those who sleep on their rights. A court will not be inclined to proceed on an urgent basis if the moving party has not been vigilant in seeking to enforce its rights. It is our opinion that the plaintiffs have proceeded with due dispatch.

[13] We make one last comment. In our view, the motion judge's reference to the Court of Queen's Bench's "summer recess" in the ratio of his decision is unfortunate as it is a completely immaterial consideration. As stated in a notice and a practice direction issued by the Chief Justice of the Court of Queen's Bench, *Notice: Court of Queen's Bench of Manitoba: Re:*

Hearing of Civil Motions During Summer Court Recess (5 May 2017); and *Practice Direction: Court of Queen's Bench of Manitoba*: *Re: Civil Uncontested List—Urgent Matters* (7 December 2015), contested matters, if found to be urgent, are to be heard irrespective of the time of year (the notice and practice direction are reproduced and attached as Appendix A).

[14] In the result, the plaintiffs' appeal is granted and the order of the motion judge is set aside. We order that the motion for an injunctive relief be set down for hearing on the merits in the Court of Queen's Bench on Thursday, September 14, 2017; that the defendants' responding affidavits be filed and served by Thursday, September 7, 2017; and any further affidavits by the plaintiffs be filed and served by Monday, September 11, 2017.

[15] With respect to the issue of costs regarding this appeal, as this appeal is interlocutory, we have the option of leaving costs to be in the cause and that is what we order (see *Woods et al v Attorney General of Canada et al*, 2004 MBCA 95).

Chartier CJM

MacInnes JA

Burnett JA

Appendix A

NOTICE

COURT OF QUEEN'S BENCH OF MANITOBA

RE: HEARING OF CIVIL MOTIONS DURING SUMMER COURT RECESS

During the summer court recess from July 4 to September 4, 2017, the uncontested civil motions list will sit on Wednesdays and Fridays each week. Emergency matters during these days will first need to be placed on an uncontested list. Emergency matters outside those days can be arranged by contacting the Civil Motion Coordinator or, if unavailable, calling the court's off-hours emergency number.

ISSUED BY:

"Original signed by Chief Justice Joyal"

The Honourable Chief Justice Glenn D. Joyal
Court of Queen's Bench (Manitoba)

DATE: May 5, 2017

PRACTICE DIRECTION

COURT OF QUEEN'S BENCH OF MANITOBA

RE: CIVIL UNCONTESTED LIST—URGENT MATTERS

Civil applications and motions which are considered by a moving party to be urgent should be set at first instance on the Civil Uncontested List. When the matter is called on the List, the first issue for the moving party to address will be urgency. If the presiding judge concludes that the matter is in fact urgent, the judge will adjudicate the merits of the matter at that time or schedule an appropriate time before him or herself to adjudicate the merits. If the presiding judge concludes that the matter is not urgent, the matter will be adjourned to the Contested List in the ordinary course.

In those situations where the nature of the potential immediate harm suggests some demonstrable merit to the moving party's position that the matter is urgent, but the matter cannot be adjudicated at that time, the presiding judge may grant interim relief and/or set early timelines for the filing of further material, with the matter next returnable on the Civil Uncontested List. When the matter next appears, the moving party will need to address the issue of urgency as a preliminary issue.

In those rare and exceptional circumstances where it is the moving party's position that a matter is of such urgency it cannot wait until the next sitting of the Civil Uncontested List, counsel may contact the Civil Motion Coordinator and/or the Trial Coordinator to discuss the possibility of alternative arrangements.

Coming into effect

This Practice Direction comes into effect immediately.

ISSUED BY:

"Original signed by Chief Justice Joyal"

The Honourable Chief Justice Glenn D. Joyal
Court of Queen's Bench (Manitoba)

DATE: December 7, 2015