SUPREME COURT OF YUKON

Citation: *Yukon (Energy, Mines and Resources) v. Yukon Municipal Board*, 2010 YKSC75

Date: 20101202
S.C. No. 10-A0029
Registry: Whitehorse

Between:

THE MINISTER OF ENERGY, MINES AND RESOURCES, as represented by George Stetkiewicz, Director, Lands Planning Branch

Petitioner

And

YUKON MUNICIPAL BOARD and TULLIO ALBERTINI

Respondents

Before: Mr. Justice L.F. Gower

Appearances:

Michael Winstanley — Counsel for the Petitioner
Kyle Carruthers — Counsel for the Respondents

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for judicial review of a decision of the Yukon Municipal Board (the "Board") on April 21, 2010. The respondent, Tullio Albertini ("Albertini"), appealed to the Board from a decision by the petitioner, Yukon Government Lands Planning Branch ("Lands Branch"), refusing Albertini's application, made on January 11, 2010, to subdivide his rural property north of Whitehorse. The issue before the Lands Branch was whether Albertini had satisfied the statutory requirement that he must have owned the land for at least 10 years prior to the subdivision application. The Director of

the Lands Branch determined that, in looking for proof of duration of ownership, he could look no further than the current Certificate of Title for the property, which was dated July 25, 2007. Accordingly, the Lands Branch refused the application. On appeal, the Board relied on s. 2 of the *Land Titles Act*, R.S.Y., 2002, c. 130, to look at Albertini's prior Certificates of Title for the land, and established that it had been owned by him for the minimum 10 year period. Accordingly, it quashed the Lands Branch decision and directed it to reconsider the subdivision application.

ISSUES

[2] The issues on this judicial review are:

1. Whether the standard of review is correctness or reasonableness;
2. Whether the Board erred in relying upon s. 2 of the *Land Titles Act*, without also considering ss. 137 and 169 of that *Act*; and
3. The proper interpretation of the words "A person who owns a parcel of land…" in s. 3 of the *Subdivision Act*, R.S.Y., 2002, c. 209, as amended by S.Y. 2007, c. 17.

FACTS

[3] On April 19,1996, Albertini and his wife purchased Lot 1292, a 71.9-hectare agricultural parcel of land, about 10 km north of Whitehorse. He has lived in a residence on the property continuously since July 1997.

[4] At some point prior to 2006, Albertini obtained a license of occupation, which authorized him to use 6.9 hectares of Yukon Government land immediately adjoining the southern boundary of Lot 1292. He constructed a pond on the additional land to irrigate Lot 1292.

[5] In the spring or early summer of 2006, Albertini purchased this adjoining land from the Yukon Government. It is undisputed that a letter from the Agriculture Branch of the Department of Yukon Energy Mines and Resources to Albertini, dated June 26, 2006, referred to this purchase and directed Albertini to proceed with a consolidation of the 6.9 hectares with Lot 1292. The letter states:

> "This preliminary approval is subject to the following conditions, which must be met prior to the survey and disposition of the subject lands:
>
> - Agriculture application 783 [the adjoining 6.9 hectares] shall be consolidated by survey with Lot 1292 ..." (my emphasis)

[6] On September 13, 2006, following the death of Albertini's spouse, title to Lot 1292 was transferred from Albertini and his spouse, as joint tenants, to Albertini alone, under Certificate of Title No. 2006Y0935.

[7] Albertini subsequently complied with the direction from the Agriculture Branch to consolidate Lot 1292 with the adjoining 6.9 hectares. A further letter from the Agriculture Branch, dated July 24, 2007, authorized the Registrar of Land Titles to proceed with the consolidation and to issue a new Certificate of Title for the consolidated lands, as Lot 1495. Pursuant to that letter, the Certificate of Title for Lot 1495 was issued July 25, 2007, as No. 2007Y0789.

[8] On January 11, 2010, Albertini applied to subdivide his home site parcel from Lot 1495, pursuant to s. 3(3) of the *Subdivision Act*. On January 21, 2010, that application was refused by the Lands Branch on the basis that Lot 1495 had not been owned by Albertini for the minimum period of 10 years. On April 21, 2010, the Board allowed Albertini's appeal, and relied on the prior Certificate of Title for Lot 1292 to determine

the duration of Albertini's ownership of the land. Finding that Albertini had been the owner since 1996, the Board rescinded the refusal by the Lands Branch and directed it to reconsider Albertini's application.

[9] The Lands Branch now applies for an order quashing the Board's decision, and also seeks a declaration that Albertini is not eligible to subdivide his property.

ANALYSIS

Issue 1: Is the standard of review correctness or reasonableness?

[10] The leading case in this area is *Dunsmuir v. New Brunswick*, 2008 SCC 9. At para. 64, Bastarache and Lebel JJ., for the majority, stated that the standard of review analysis must be contextual and is dependant on the application of a number of relevant factors, including:

> "(1) the presence or absence of a privative clause;
>
> (2) the purpose of the tribunal as determined by interpretation of enabling legislation;
>
> (3) the nature of the question at issue, and;
>
> (4) the expertise of the tribunal."

[11] Brown and Evans, in their text, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998) (loose-leaf), at p. 14-17, suggest the approach to take in determining the applicable standard of review should begin either with the nature of the issue or with past judicial determinations. In the case at bar, there has been no prior judicial consideration of one of the key provisions at issue, namely s. 3(3) of the *Yukon Subdivision Act*. Thus, the first step is to determine whether the ground upon which the administrative decision is impugned raises a question of fact, a question of law or a question of mixed fact and law. If the question is one of law, or one of mixed

fact and law, then the standard of review analysis will have to be continued. If the question is one of fact, the standard of review is automatically reasonableness.

[12] In my view, this case turns on the statutory interpretation of s. 2 of the *Land Titles Act* and other related provisions in that *Act*, and the interplay between these sections and s. 3(3) of the *Subdivision Act*. There were no contested findings of fact made by the Board. Indeed, the factual context before the Board, as before this Court, was entirely non-contentious. Albertini's counsel submitted that the Board had decided a question of mixed fact and law, because of the contextual circumstances and the unique facts in this case. However, I find that the Board's rationale for its decision turned not on the uncontested facts, but rather on the Board's interpretation of s. 2 of the *Land Titles Act* in deciding whether s. 3(3) of the S*ubdivision Act* had been complied with. This is purely a question of law.

[13] The second step in this standard of review analysis is to note the existence of a privative clause in subsection 324(3) of the *Municipal Act*, R.S.Y., 2002, c.154. Subsection 324(1) of the *Municipal Act* authorises an applicant, whose subdivision application under the S*ubdivision Act* has been refused, to appeal to the Board. Subsection 324(3) then states:

> "A decision made under subsection (2) is final and binding and there is no further appeal from it. ..."

As noted by Brown and Evans, cited above, at p. 14-22, this type of clause indicates "some" evidence of legislative intention with respect to the level of deference to be given to the Board, but it is not determinative of the standard of review.

[14] The third step in the standard of review analysis is to look at the purpose of the Board as set out in its enabling legislation. The jurisdiction of the Board arises from s.

330 of the *Municipal Act*, which authorizes it to hear appeals and perform duties assigned to it under a number of statutes, including the *Subdivision Act*, the *Lands Act* and the *Municipal Act*, and to determine all questions of law or fact on such matters. There is little else in the relevant legislation to assist in assessing the purpose of the tribunal. However, I generally agree with the submission of Albertini's counsel that the scheme of the *Subdivision Act*, in particular, suggests that it is designed for the orderly subdivision of rural land in Yukon, in accordance with set procedures and sensitivity to the character of given areas and the interests of neighbours. The *Land Titles Act*, on the other hand, is designed to establish certainty of ownership of real property (through registration), to provide for the determination of adverse claims to interests in lands, and to allow for the registration of interests against titles to lands. Thus, it seems to me that the kinds of issues which the Board is likely to deal with, under these two statutes at any rate, could as easily be decided by courts of general jurisdiction. As Brown and Evans state at p. 14-25, an administrative tribunal whose task is to decide disputes of a type that could have been allocated to the courts is more likely to be reviewed for correctness.

[15] The last related step in the standard of review analysis is to assess the expertise of the tribunal relative to that of the courts on the question at issue. Once again, where the tribunal's expertise is not seen as more relevant than that of an independent generalist court, then a court will likely conclude that it can review the tribunal's interpretation for correctness: Brown and Evans, cited above, at p. 14-27. There is no evidence of the Board's expertise before me.

[16] In summary, notwithstanding the existence of the privative clause, I am of the view that the question of law decided by the Board is not one in which it has particular expertise, and that its competence to decide such a question of statutory interpretation is no greater than that of this Court. Accordingly, I find that the standard of review is one of correctness.

Issue 2: Did the Board err in relying upon s. 2 of the Land Titles Act,* without also considering ss. 137 and 169 of that *Act?

[17] Section 2 of the *Land Titles Act* states:

> "Holder of prior certificate
>
> A person shall be deemed to claim under a prior certificate of title who is a holder of, or whose claim is derived directly or indirectly from a person who was the holder of, an earlier certificate of title, even though the certificate of title has been surrendered and a new certificate of title has been granted on any transfer or other instrument."

[18] The main argument by counsel for the Lands Branch is that the Board erred in applying s. 2 of the *Land Titles Act*, without also referring to ss. 137 and 169 of that *Act* for guidance. Those sections are set out respectively below:

> "Protection Against Ejectment
>
> 137(1) No action of ejectment or other action for the recovery of any land for which a certificate of title has been granted lies or shall be sustained against the owner thereof under this Act, except in the case of
>
> (a) a mortgagee as against a mortgagor in default;
>
> (b) an encumbrancee as against an encumbrancer in default;
>
> (c) a lessor as against a lessee in default;

(d) a person deprived of any land by fraud as against the owner of the land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value, from or through the owner through fraud;

(e) a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of the other land or of its boundaries, as against the owner of the other land; or

(f) an owner claiming under an instrument of title prior in date of registration under this Act, in any case in which two or more grants, two or more certificates of title or a grant and certificate of title are registered under this Act in respect of the same land.

(2) In any case, other than a case described in subsection (1), the production of the certificate of title or a certified copy thereof is an absolute bar and estoppel to any action against the person named in the certificate of title as owner or lessee of the land described therein.

…

Certificate conclusive evidence of title

169 Every certificate of title granted under this Act is, except

(a) in case of fraud in which the owner has participated or colluded;

(b) as against any person claiming under a prior certificate of title granted under this Act in respect of the same land; and

(c) in so far as regards any portion of the land, by wrong description of boundaries or parcels included in the certificate of title, so long as the certificate remains in force and uncancelled under this Act,

conclusive evidence in all courts, as against Her Majesty and all persons whomever, that the person named therein is entitled to the land included in the certificate, for the estate or interest therein specified, subject to the exceptions and reservations implied under this Act." (emphasis added)

The Board made no mention of either of the above provisions in its reasons.

[19] Counsel for the Lands Branch rests his argument on the centrality of registration of title, and the concurrent indefeasibility of title, under the Torrens land system, in contrast to the registry system where the operation of a deed rests on the deed itself. There is no dispute that under the Torrens system, it is registration which gives validity and operation to certificates of title and other instruments affecting interests in land. Section 137 of the *Land Titles Act* is an example of how a certificate of title can act as an "absolute" defence to any action against an owner of land named in a certificate of title, unless one of the specified exceptions applies, such as a mortgagee seeking to recover land from a mortgagor in default. In s. 169, a certificate of title is "conclusive evidence" as against the Crown and all persons claiming an interest in the title to the lands specified in the certificate, except in cases of: (1) fraud; (2) another person claiming under a prior certificate of title with respect to the same land; and (3) misdescription of land. Thus, these two provisions deal generally with situations involving claims for the recovery of land and/or claims of adverse possession of land.

[20] However, I once again agree with the submission of Albertini's counsel that neither of these provisions are applicable to the case at bar since: (a) this is not a claim for recovery or adverse possession of land; and (b) neither provision assists in determining the length of time that a person has been an owner of specific land. Thus, the Board did not err in failing to refer to either ss. 137 or 169 in its reasons.

Issue 3: What is the proper interpretation of the words "A person who owns a parcel of land…" in s. 3(3) of the Subdivision Act?

[21] For the sake of convenience, I will set out all of s. 3 of the *Subdivision Act*:

> "Subdivision of land
>
> 3(1) Land may not be subdivided unless
>
> (a) the proposed subdivision complies with this Act and the regulations and is approved in the manner prescribed in this Act and the regulations;
>
> (b) the land, in the opinion of the approving officer, is suited to the purpose for which the subdivision is intended and may reasonably be expected to be developed for that purpose within a reasonable time after a plan or other instrument effecting the subdivision is registered;
>
> (c) the proposed subdivision conforms to any existing or proposed planning scheme that affects or will affect the land or adjacent land; and
>
> (d) the applicant proposing the subdivision provides, if required by the approving officer, for the installation and construction at the applicant's own expense of all necessary highways, sidewalks, curbs, culverts, drainage ditches, utility systems, easements, or other public facilities that may be required under the regulations.
>
> (2) Despite subsection (1) but subject to subsections (3) and (5), a parcel of land may not be subdivided into smaller parcels if
>
> (a) the parcel
>
> (i) was granted on the basis of a lease or an agreement for sale a condition of which was that the lessee or purchaser was to use the land for agricultural purposes or for agricultural and other purposes,
>
> (ii) has not been divided since the grant, and

(iii) had not been transferred since the grant to a bona fide purchaser for value without notice of the condition in the lease or the agreement for sale before the coming into force of this subsection; or

(b) the parcel

(i) was created by the division of a parcel granted on the basis of a lease or agreement for sale a condition of which was that the lessee or purchaser was to use the land for agricultural purposes or for agricultural and other purposes, and

(ii) when this subsection came into force was titled to the person who had created the parcel by dividing the original parcel granted to them.

(3) A person who owns a parcel of land described in subsection (2), who has owned this parcel for at least ten years, and whose primary residence is located on this parcel may subdivide from this parcel a home site parcel which will be the minimum size for an agricultural lot in the development area in which the original parcel is located. The person shall be refused subdivision if the development area prohibits subdivision and the person shall be limited to 6 hectares if the original parcel is not located within a development area. The proposed subdivision shall also be subject to the following

(a) both parcels must remain zoned agricultural;

(b) the resulting configuration of both parcels must not impede access to the parcels or impair their agricultural use; and

(c) the subdivision must conform to all applicable enactments and may be denied if it does not comply with any applicable

(4) Subject to subsection (6), neither of the two parcels referred to in subsection (3) may be further subdivided.

(5) For the purposes of subsection (6), 'the public benefit' includes rights-of-way, bridgeheads, protected areas, conservation areas, lands for public use, and lands for recreational, institutional or public facilities or infrastructure.

> (6) Lands described in subsection (2) may be subdivided for the public benefit provided that
>
> (a) the owner of the lands agrees to this subdivision;
>
> (b) the owner of the lands transfers the lands intended for the public benefit to the Commissioner of Yukon; and
>
> (c) the subdivision conforms to all applicable enactments.
>
> (7) Lands removed from an agricultural parcel for the public benefit shall no longer be zoned as agricultural land and shall be re-zoned to another use in conformity with the applicable enactments." (my emphasis)

[22] The essential submission by counsel for the Lands Branch on this issue is that s. 2 of the *Land Titles Act* should only be applied in claims involving the recovery of land or adverse possession. Otherwise, the Lands Branch should be entitled to rely on the currently registered certificate of title for a parcel of land as conclusive evidence of the duration of ownership by the title holder. On the facts of this case, counsel urged that, following the consolidation in 2007 of Lot 1292 with the adjoining 6.9 hectares, a new "parcel of land" was created under the Certificate of Title dated July 25, 2007, No. 2007Y0789. Further, since that parcel of land had not been owned by Albertini for the minimum 10-year period, the Lands Branch was correct in denying him the opportunity to subdivide under s. 3(3) of the *Subdivision Act*. In other words, there was no obligation on the Lands Branch to look at prior certificates of title, because s. 2 of the *Land Titles Act* did not apply.

[23] With respect, if this argument were accepted, it could have led to an absurd result. I appreciate that s. 3(3) of the *Subdivision Act* was not enacted until December 13, 2007. However, I will assume, for the sake of this analysis, that s. 3(3) was in force

in 2006, at the time title to Lot 1292 was transferred from Albertini and his deceased spouse, to Albertini alone. Had Albertini applied to subdivide following that transfer, he presumably would have been refused on the basis that the then Certificate of Title, dated September 13, 2006, No. 2006Y0935, did not establish that he owned the land for at least 10 years prior. Further, according to the same argument, Albertini could not have relied upon his prior Certificate of Title from April 1996, because of the inapplicability of s. 2 of the *Land Titles Act*.

[24] When I challenged counsel for the Lands Branch on this point, he seemed to respond by saying that the circumstances in 2006 were distinguishable from those in the case at bar, since the Certificate of Title issued on September 13, 2006 was for the same "parcel of land", i.e. Lot 1292, as in the prior Certificate of Title from April 1996. However, it seems to me that this is a distinction without a difference. If Lands Branch is not required to look beyond the current registered Certificate of Title, then had s.3(3) of the *Subdivision Act* been in force in 2006, absent the exercise of some discretion by Lands Branch, which has formed no part of its argument in the case at bar, it would make no difference that the Certificates of Title from 1996 and 2006 described the same parcel of land, because proof of duration of ownership could only be determined from the 2006 Certificate of Title. Thus, Albertini would have been denied the opportunity to subdivide, notwithstanding that it was clear that he owned the land for the previous 10 years.

[25] Putting it another way, and to use the submissions made by counsel for the Lands Branch at the hearing, the words "parcel of land" in s. 3(3) of the *Subdivision Act*, must only mean the lot identified on the current Certificate of Title and nothing else.

Once again, if that is correct, then the scenario I have imagined taking place in 2006 would still have prevented the subdivision from taking place, because the Certificate of Title then registered did not establish ownership for 10 years.

[26] Finally, it must be remembered that, at common law, the right to subdivide property and sell part rather than the whole is an ordinary incident of ownership: *Oakwood Development Ltd. v. Saint-François Xavier (Rural Municipality)*, [1985] 2 S.C.R. 164, at para. 7. Thus, s. 3 of the *Subdivision Act* purports to abrogate that common law right by restricting subdivision to certain exceptional circumstances. In this context, it is especially important that s. 3(3) of the *Subdivision Act* be given the "fair, large and liberal interpretation" required by s. 10 of the *Interpretation Act*, R.S.Y. 2002, c. 125, that best insures the attainment of the objects of the *Subdivision Act*. In assessing the objects of that *Act*, I am to apply the purposive approach to statutory interpretation, as stated in *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), at p. 35, according to the following rules:

> "(1) All legislation is presumed to have a purpose. It is possible for courts to discover, or to adequately reconstruct, this purpose through interpretation.
>
> (2) Legislative purpose should be taken into account in every case and at every stage of interpretation, including the determination of ordinary meaning.
>
> (3) Other things being equal, interpretations that are consistent with or promote legislative purpose should be preferred and interpretations that defeat or undermine legislative purpose should be avoided.
>
> (4) The ordinary meaning of a provision may be rejected in favour of an interpretation more consistent with the purpose if the preferred interpretation is one the words are capable of bearing."

[27] According to the Yukon Legislative Assembly *Hansard*, dated November 1, 2007, the comments of the then-Minister of Energy Mines and Resources, on the enactment of s. 3(3) of the *Subdivision Act* indicate that the intention of the legislation was to allow an individual who has been residing on and farming agricultural land for several years to remain on the land by subdividing out the residential parcel, while allowing a sale of the rest of the land, with the continuing requirement that it be used for agricultural purposes:

> "Through the phased consultation on the Yukon agricultural policy, the government heard from respondents that good, arable land should not have to retire with the farmer. That is not an arguable thing here in the House because we all understand the nature of the industry. We all grow older, we have different needs, and farming is not an industry that is easy to maintain through your old age. Also, as one of the members said here today, this bill will give the flexibility to that farmer who wants to stay on the land -- in other words, he wants to retire in his home -- but in turn, the land will become dormant if it's not being farmed. The value of that land is tied up in dormant land and we on this side of the House want to encourage that farmland to be productive. How do you do that? You put it in the hands of people who are willing and able to put it into productivity. That in itself is good news.
>
> For these reasons, Community Services is bringing forward this *Subdivision Act*. These amendments provide for tightly controlled subdivision of agricultural properties in two circumstances.
>
> The members opposite were talking about the continuation of the subdivision of land after the first subdivision. In fact, that is covered in this Act. They can subdivide once, and both pieces of property have to stay in agriculture.
>
> In other words, we're putting checks and balances in place so that individuals can do this, but it doesn't create a subdivision effect in our hinterland, nor do we want to tie up agricultural land in subdivision land when we have adequate land for both.

> And, of course, there is a restriction: it has to be an individual who has owned the land for 10 years. So, they already have a commitment. They met the commitment by staying on the land for 10 years. So they would qualify for this subdivision." (my emphasis) (Yukon, Legislative Assembly, *Hansard*, No. 49 (1 November 2007) at 1385 (Hon. Archie Lang)

[28] "Parcel" with respect to land is defined in *Black's Law Dictionary*, 9th Edition, as: "A tract of land; esp., a continuous tract or plot of land in one [as written] possession, no part of which is separated from the rest by intervening land in another's possession." In the case at bar, there is no dispute that Albertini has been in possession of the tract of land at issue since 1996.

[29] "Owner" is defined in s. 1 of the *Land Titles Act* to include "any person ... entitled to any freehold or other estate or interest in land ...". A "freehold estate" is a right of title to land: *Black's Law Dictionary*, 5th Edition. While it is technically correct for the Lands Branch to state that, because of the amalgamation, Albertini's fee simple title to Lot 1495 in Certificate of Title, dated July 25, 2007, is for a different parcel of land than that which Albertini owned in fee simple under Lot 1292 on the Certificate of Title dated September 13, 2006, there is absolutely no question that the physical lands which Albertini wants to subdivide have been owned by him continuously since April 1996. Therefore, in that sense he has also had the "right of title" to those same lands from that time.

[30] By applying s. 2 of the *Lands Title Act*, as the Board concluded, Albertini can be deemed to be claiming under the prior original Certificate of Title, dated April 19, 1996, since he is a joint holder of that earlier Certificate, even though the Certificate has since been cancelled and new Certificates granted. Once again, in that sense there is no

question that Lot 1292, as it then was, has been “owned” by him for at least 10 years. Thus, Albertini is an owner of a parcel of land which is eligible for subdivision under subsection 3(3) of the *Subdivision Act*.

CONCLUSION

[31] The application for judicial review is dismissed. The order of the Board is upheld. Costs are not awarded as none were sought.

GOWER J.