# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Abbotsford (City) v. Shantz,*
2014 BCSC 2385

Date: 20141217
Docket: S156820
Registry: New Westminster

Between:

**City of Abbotsford**

Plaintiff

And

**Barry Shantz, John Doe, Jane Doe and other persons unknown erecting, constructing, building or occupying tents, shelters or other constructions on the lands known as Jubilee Park, Abbotsford, British Columbia**

Defendants

Before: The Honourable Mr. Justice Williams

## Reasons for Judgment

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| Counsel for Plaintiff: | J.G. Yardley and A.D. Price |
| Counsel for Defendants: | D.K. Wotherspoon and D.J. Larkin |
| Place and Date of Hearing: | New Westminster, B.C. December 5, 2014 |
| Place and Date of Judgment: | New Westminster, B.C. December 17, 2014 |

[1] The applicant Barry Shantz seeks an order of this Court dissolving an interim injunction that was made on December 20, 2013. The reasons for judgment granting that injunction are indexed as *Abbotsford (City) v. Shantz* (20 December 2013), New Westminster 156820 (B.C.S.C.) – oral reasons for judgment – not published. Those reasons should be read in order to have a full context of the present application.

[2] A useful starting point is to review the background of this matter.

[3] In the latter part of 2013, a number of homeless persons were living in tents and other temporary structures in Jubilee Park in the City of Abbotsford. In early December, they also they erected a wooden structure in a parking lot adjacent to Jubilee Park. The structure was made of plywood sheeting and was approximately 60 feet in length and had walls some seven feet high.

[4] The persons in question are not part of any formal identifiable organization in the usual sense but, as the situation developed, their nominal representative was an individual named Barry Shantz (an activist for homeless persons in Abbotsford) and an organization with which I understand he is affiliated, the BC/Yukon Association of Drug War Survivors ("DWS").

[5] On November 28, 2013, the City of Abbotsford ("Abbotsford") filed an action against Mr. Shantz and unnamed persons who were camped in Jubilee Park. The action sought to enforce provisions of the *Parks Bylaw, 1996*, as enacted by Abbotsford and the *Trespass Act*, R.S.B.C. 1996, c. 462, to prevent persons from camping overnight and erecting structures in Abbotsford's parks.

[6] On December 17, 2013, this Court heard an application by Abbotsford for an interlocutory injunction. On December 20, 2013, an order was granted requiring the removal of the camp from Jubilee Park and enjoining those persons from camping in the park other than in accordance with the relevant by-laws.

[7] Those persons who were in occupation dispersed as the order required.

[8] The reasons for judgment contained certain observations with respect to the homeless people living in Abbotsford and made clear that the Court contemplated that the underlying legal action would proceed in an expeditious way.

[9] Mr. Shantz, in his response to both Abbotsford's action and application for injunctive relief, challenged the constitutionality of the *Parks Bylaw*, alleging violation of the s. 7 *Charter* rights of those affected by its enforcement.

[10] Since that order was made on December 20, there have been developments in the progress of the litigation. Those developments include the appointment of a Trial Management Judge, as well as the institution of a second related action, brought by the DWS against Abbotsford, alleging *Charter* breaches and seeking a number of measures as relief.

[11] I will make reference to the particulars of the progress of the litigation later, but I note that there have been steps taken, including an application by Abbotsford to strike the DWS action. That application was dismissed and the trials of both actions will proceed together. A six-week trial is scheduled to commence June 29, 2015.

[12] Pre-trial discovery activity is now underway.

As for those who were immediately impacted by the order of December 20, 2013 - that is, the persons who were camped in Jubilee Park and who were required to vacate - the present circumstances as I understand are that some of them continue to be homeless and have located themselves on a strip of land owned by Abbotsford and located adjacent to Gladys Avenue. The Court was advised that the persons currently at this site number between eight and twenty. I infer that others who were formerly in Jubilee Park have found shelter in a variety of ways - using existing available shelter spaces, staying in whatever outdoor spaces there are, or making some other arrangements.

## Discussion

[13] At the outset, I believe it is appropriate to articulate the legal principles which have application here.

[14] However, before doing so, I wish to address two preliminary objections that were raised by Abbotsford.

[15] The first is that Mr. Shantz lacks standing to maintain this application, as he seeks relief not for himself personally but on behalf of Abbotsford's homeless.

[16] The matter of standing in this case was examined at some length by Chief Justice Hinkson when he dealt with the application to strike the DWS action. Based upon his analysis of the issue and conclusions he reached, and given the somewhat fragmentary nature of the group of person whose interests are involved, I am not prepared to dismiss this application on the objection as to standing.

[17] In my view, the fact that Mr. Shantz is the nominal applicant should not stand as a bar to the application being considered on its merits. I will consider this to be an application on behalf of and for the benefit of homeless persons in Abbotsford.

[18] That concern does, however, segue into another issue that has some uncertainty: the precise effect of an order dissolving the current injunction. Would such an order permit all persons identifying as homeless to establish camps, erect structures and have open fires in Jubilee Park? Or would its effect be more limited?

[19] In the course of submissions, I raised this issue with counsel for the applicant. His response was that the practical consequence would be that those persons currently camped at Gladys Avenue would be permitted to set up camp in a portion of Jubilee Park, presumably pending the trial decision.

[20] The second preliminary objection raised by Abbotsford has to do with the propriety of certain of the affidavit evidence that the applicant seeks to rely upon. Abbotsford maintains that much of that evidence is replete with hearsay, speculation, argument and opinion.

[21] The subject of affidavit evidence that courts encounter every day in a host of different contexts is an area of considerable concern and more than a little consternation. Improper hearsay, opinion and argument are commonplace. I dare say that if the situation were scrupulously monitored and strict compliance enforced, the amount of affidavit evidence that courts would take into account would be dramatically diminished. However, as a general practice, such affidavits are routinely filed and considered although, I expect, that consideration entails an element of "judicial filtration". Courts often subject such materials to a weighting that recognizes and makes allowance for these defects and deficiencies.

[22] In the matter at bar, there is no doubt that there are aspects of the affidavit material to which objection can properly be made. I have taken the time to examine the voluminous record which has been filed and I have assessed it in a way that I believe is generous and fair. For reasons which I will explain, much of the material is relevant to a broader issue than this application actually entails.

[23] Turning now to the substance of the present application, there are two concepts which are key.

[24] The first is with respect to the circumstances in which a court should reconsider injunctive relief it has granted, where that order is made following a properly thorough examination of the circumstances and the evidence, and with the benefit of detailed submissions, which is how I consider the original order in this matter to have been made.

[25] The general rule is that such reconsideration is an extraordinary measure, and it will be successful only where the evidence establishes that there has been a material change in the facts or circumstances that constituted the basis for the original order to issue. In *Business Depot Ltd. v. Canadian Office Depot Inc.,* [2000] F.C.J. No. 1405, 259 N.R. 390, a decision of the Federal Court of Appeal, Décary J.A. affirmed that a party seeking an order for the dissolution of an interlocutory injunction seeks an extraordinary remedy, and has to establish"… on the balance of probabilities, that the true facts are now substantially different from

the facts present when the interlocutory injunction was granted, or that the facts have changed so dramatically that the factual underpinnings of the earlier order are simply no longer valid. That burden is a particularly heavy one."

[26] It must of course be noted that, in the instant case, this Court's order granting the injunction was never appealed.

[27] Without such a threshold before reconsideration may occur, it would be open to parties to essentially re-argue, time and again, matters where they had been previously unsuccessful, simply on the basis of some new evidence, or on the basis of some refined analysis of the evidence previously tendered. The onus on the applicant to establish a material change in circumstance is a substantial one.

[28] That brings me to the second concept, which is related to the first.

[29] A delay in the prosecution of the underlying litigation can constitute the necessary basis for a court to re-visit the propriety of the injunctive relief continuing in effect.

[30] There is an onus on the party who has attained the benefit of the injunctive order to see that the underlying action is brought to trial in a reasonably expeditious way, without undue delay. That is because, from the perspective of the other side, the "loser", the party adversely affected by the injunction, the *status quo* that the order creates, against its interests, is made without the merits of the case having been fully examined in the crucible of the trial, and it may well be perceived as an unfair state of affairs. The best means for justice to be achieved is a timely trial on the merits.

[31] Those, to my mind, are the concepts which are most relevant to the application at bar.

**Analysis**

[32] I propose to deal with this application by posing and answering two questions:

- Question 1: Has the applicant shown a material change in circumstances, other than delay, which warrants the injunction being dissolved?

- Question 2: Has Abbotsford been dilatory in its prosecution of this litigation, such that the court should dissolve the injunction.

In the event that the answer to either is in the affirmative, then this Court must examine, on the merits of the case, whether the injunction should continue or whether it should be dissolved.

[33] The applicant has put before this Court a considerable volume of evidence, speaking at some length and quite eloquently to the general social plight of homeless persons in the community of Abbotsford and, indeed, more broadly as well.

[34] It is clear that there is a hard-core faction of people who are homeless, whose situations are particularly difficult to address, because of factors such as mental health and substance abuse. These are persons whose difficulties make the matter of finding acceptable shelter and other fundamental services profoundly challenging. The present application is but a small part of a much greater, much bolder campaign, one that seeks to secure judicial recognition that this faction of persons is entitled to constitutional recognition of a right to certain services – shelter, outreach and substantive help for their problems and conditions.

[35] If the answer is to be found through a judicial decision, it is obvious that the complexity of the matrix of issues can only fairly be considered and dealt with in the trial of these actions. Clearly, these are not matters that this Court can meaningfully adjudicate in the context of this present application.

[36] While I have taken the entirety of the applicant's affidavit evidence into account, notwithstanding the criticism of its non-compliance with the rules of evidence, the real problem is that it is very much focused on the larger issue to which I have referred – the plight of the homeless as a societal problem. It is, in fact, of quite modest relevance to the particular issue that this Court is called upon to

decide in this application – the matter of those persons presently at the Gladys Avenue site, seeking to relocate to Jubilee Park.

[37] I turn now to consider whether the evidence which has been adduced demonstrates that there has been a material change in circumstances as would warrant the Court to embark on a substantive reconsideration of the order of December 20, 2013.

[38] When this matter was before this Court in December 2013, there were a number of homeless persons camped in Jubilee Park; some of them I understand are the same persons who are now staying at the Gladys site. For the reasons that were articulated in my reasons for judgment of December 20, 2013, those persons at Jubilee Park were required to vacate the site. This Court recognized that would constitute a difficulty for them. The Court also concluded that there was a variety of alternative solutions available - none of them ideal - but that some shelter would be available for those persons if they elected to avail themselves of it.

[39] The situation today is not materially different. There are a relatively few homeless persons who are camped at the Gladys Avenue location. There are some alternate shelter accommodations available in Abbotsford – not many, that is true, and not of the sort that these persons consider acceptable. I acknowledge as well that the Gladys site is not seen as a good one. It is not as spacious as Jubilee Park; it is more cluttered, not well-maintained; it is exposed to passing traffic. For a number of reasons, it undoubtedly leaves much to be desired. However, realistically, camping at the Gladys site is not a great deal different or worse than camping in Jubilee Park.

[40] In the result, I am unable to conclude that the applicant has met the test of establishing that here has been a material change of circumstances since the injunction was ordered, and so I will not undertake a reconsideration of my order on that basis.

[41] In my view, the stronger argument that the applicant has to advance in the present application is the complaint that Abbotsford has not been sufficiently conscientious in prosecuting this action in a timely and diligent fashion.

[42] That then brings me to the second question posited, whether Abbotsford has been dilatory in its prosecution of this litigation, such that the Court should dissolve the injunction.

[43] In the present case, when I granted my order on December 20, 2013, I made abundantly clear that there was an expectation that the litigation would be prosecuted in an expeditious fashion.

[44] From the time this matter was before me in December 2013 until the commencement of its anticipated six-week trial will be 18 months.

[45] Given the fact that this Court made clear that there was an expectation that the matter would be brought on for trial in a timely way, and particularly given the extra discomfort and extraordinary inconvenience of being homeless in winter conditions entails, the applicants say that this delay is inordinate and that it constitutes real prejudice to them. They contend that, on this basis, this Court should dissolve the injunction.

[46] For its part, Abbotsford denies that it has been other than properly diligent in the conduct of the lawsuits.

[47] Reading between the lines of the materials and evidence, it would seem that there has been something of an undercurrent of tension. The applicant has pushed hard for early dates and early developments. I believe it is fair to say that Abbotsford has been less zealous to move the case along quickly at all costs. There is some basis for the applicant to believe that the trial could have been scheduled sooner than June 2015.

[48] However, when I look at all of the evidence through a lens of what is reasonable, I am not prepared to conclude that Abbotsford has failed to diligently

move this matter forward such as to disentitle it from the continuation of the injunction that it obtained in December 2013.

[49] The factors which inform my conclusion are these:

1. Since March of 2014, when Mr. Shantz initiated his action, there have been two cases, not one. I note that after some wrangling and discussion, there is now an order that the two actions will be tried together.

2. These two cases raise issues of substantial complexity.

3. The scope and magnitude of discovery and disclosure is large. For example, the applicant has required disclosure of a number of categories of documents, extending over a lengthy period of time, some ten years. As well, disclosure of records of the Abbotsford Police Department has also been sought and that is now being provided.

4. This matter has been subject to active case management since February of 2014. I note that there was a Judicial Management Conference ("JMC") in March 2014, a Trial Management Judge was appointed and there were two Case Planning Conferences, in April 2014. A third was planned. Because of the appointed trial judge being unavailable for an early trial date, an application was set to seek an order for an expedited trial date. Before that could be heard, Abbotsford brought an application to strike the applicant's *Charter* action. That was heard over three days in July 2014. On account of that development, the Case Planning Conference was quite sensibly adjourned. The decision with respect to the application to strike the action was rendered on September 29, 2014. Since then, there have been subsequent appearances and discussions resulting in orders with respect to discovery issues and having the two actions tried together.

[50] This is, by any measure, a complex and substantial litigation project. When that fact is considered, and when the details of the steps and measures that are necessarily entailed in that process are taken into account, I am unable to conclude

that Abbotsford has been dilatory in its role in respect of bringing this matter on to trial in a responsible and timely way.

## Conclusion

[51] I find that the applicant has not established a basis upon which this Court ought to consider dissolution of the injunction order of December 20, 2013. Neither the "material change in circumstances" nor the "unacceptable delay" thresholds have been met, and so I will not subject the previous ruling to a reconsideration by applying the substantive tests that are ordinarily applied in deciding whether injunctive relief is warranted.

[52] Accordingly, this application stands adjourned.

"The Honourable Mr. Justice Williams"