IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20131220
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

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	J.G. Yardley A.D. Price
Counsel for the Defendants:	D.K. Wotherspoon D.J. Larkin
Place and Date of Hearing:	New Westminster, B.C. December 17, 2013
Place and Date of Judgment:	New Westminster, B.C. December 20, 2013

[1] **THE COURT:** This is an application by the City of Abbotsford (the "City") for an injunction requiring the defendants to remove themselves and their encampment from Jubilee Park (the "Park") in the City, to cease and desist from lighting fires and placing fuel on fires, and to cease their trespass in the Park. The City also seeks orders for the purpose of enforcing the injunction and the related bylaws.

[2] I want to express at the outset my sincere appreciation to counsel for the assistance they provided and the great professional effort that has obviously been put forth by them. The submissions were sound, thoughtful and worthwhile, and they have been most helpful.

[3] The dispute underlying the matter is one of considerable complexity. At root it is a profound social issue.

[4] In very brief compass the situation is this. In October of this year a group of homeless persons moved into a portion of Jubilee Park in Abbotsford. There they established a tent village. They have remained on that site since that time.

[5] The City takes the position that those activities violate a number of bylaws, that there are unsafe and unacceptable consequences of the conduct and that the court should issue orders to stop the activity and to provide enforcement measures, as well.

[6] The occupants of the site, the defendants, do not dispute that they are in breach of the bylaws, although they argue that the effects of their actions are not nearly as disruptive or harmful as the City alleges.

[7] I note that the first named defendant is Barry Shantz. He is not one of the actual occupants of the site. He is a social activist. He coordinates the Abbotsford Chapter of the BC/Yukon Association of Drug War Survivors. ("DWS"). He meets with members of the group who are in camp and he has clearly expended great energy to assist with the cause of the homeless.

[8] As indicated, the situation has been going on for nearly two months. Initially representatives of the City had discussions with some of the persons in occupation, and particularly with Mr. Shantz, who has taken the role of spokesperson for the cause. No resolution came of those discussions. Subsequently, the City issued and posted notices directing those persons at the site to vacate; an eviction notice, if you will. Again, that measure was of no effect. The City then instituted the present legal proceeding. A notice of civil claim was filed and a notice of an application to seek injunctive relief, returnable on December 16, 2013 was served.

[9] To complete this very brief description of what has gone before, there were two other litigation steps prior to the present application, and one other related on-the-ground development.

a) On December 12, representatives of the defendants appeared before a judge of this Court. They brought an *ex parte* application to stay any action on the eviction notice. That application was granted.

b) During the night of December 11, 2013, a wooden structure was erected on the parking lot adjacent to the Park; the land is owned by the City. My understanding is that the structure was approximately 60 feet in length and had wooden walls approximately seven feet high. A number of the defendants then moved themselves and some of their belongings into that structure.

c) On December 13, the City brought an application on short leave. Mr. Justice Blok of this Court ordered the defendants and all persons having knowledge of the order to vacate and cease occupying the structure by 4:30 p.m. on Saturday, December 14.

d) As I understand, there was not compliance with the order of Mr. Justice Blok. However, when the present application came before me on Tuesday, December 17, it was indicated that the structure had been substantially vacated and the persons and effects have been relocated to the tent

> encampment. Presently that is what I understand to be the state of affairs there. The structure, to my knowledge, remains in place.

[10] This case raises difficult issues. The defendants are a particular and special group of persons. They are marginalized members of the community. Many of them have drug and alcohol issues and suffer from mental illness. The evidence satisfies me that they are not simply persons who have no homes. They are persons whose personal conditions and idiosyncrasies make conventional housing and shelter solutions problematic. The typical shelter alternatives are, for these persons, they say, not really viable options.

[11] The fundamental social issue at hand is this: what provision, what accommodation, if any, is society prepared to make for these particular persons and others like them?

[12] Ultimately the issues raised will be decided by others; a trial court with respect to this particular case; at some point one expects there will be some larger response that will arise in the realm of government.

[13] It is essential to understand that at this particular phase of the litigation it is not this Court's function to try to make final determinations, or to try to decide complex questions of law that are engaged. The trial of the matter is the forum for those things to be done.

[14] The specific matter that I must address is whether or not the City is entitled to the injunctive relief it seeks.

[15] The jurisprudence with respect to this issue, the granting of injunctive relief, is something less than perfectly straightforward. There are two lines of authority, each with a specific and different approach as to how the analysis should be conducted.

[16] It must be recognized that the application at bar seeks an interlocutory statutory injunction, but it is also relevant that the core issue in the underlying

litigation is a challenge to the legislation's effect as a breach of the defendants' *Charter* rights, specifically s. 7 of the *Charter*.

[17] In the absence of the *Charter* dimension, I would be prepared to accept that the appropriate test to apply would be the so-called *Thornhill* test, as set out in *Maple Ridge (District) v. Thornhill Aggregates Ltd.* and in *Vancouver (City) v. Maurice*.

[18] A useful explanation of the *Thornhill* test is found in the decision of the Court of Appeal in *Maurice,* at para. 34:

> Contrary to the submissions made by the appellants, where a public authority, such as the City, turns to the courts to enforce an enactment, it seeks a statutory rather than an equitable remedy, and once a clear breach of an enactment is shown, the courts will refuse an injunction to restrain the continued breach only in exceptional circumstances...

[19] In short, on that test the City is obliged to show that there has been a clear breach of the bylaw. If that is shown, the court will grant the sought injunction, unless there are exceptional circumstances that permit it to use its narrow discretion to deny the application.

[20] However, it is evident to me that the authorities have generally elected not to apply this test where *Charter* arguments are meaningfully raised in the application. For example, in *Vancouver Board of Parks and Recreation v. Mickelson*, Justice Pitfield held that in such cases the appropriate test is that proscribed in *Re Attorney General of Manitoba v. Metropolitan Stores*. That is the same test as set out in *RJR-MacDonald*. Quoting Justice Pitfield, he said this:

> Different principles apply, however, when constitutional validity is in issue whether or not s. 334 of the *Vancouver Charter* authorizes an application for an injunction. In *Re Attorney-General of Manitoba v. Metropolitan Stores* (MTS) Ltd. et al. 1987 CanLII 79 (SCC), (1987), 38 D.L.R. (4th) 321 (S.C.C.), Beetz J., for the court, said the following at p. 330:
>
> > In my view, the presumption of constitutional validity understood in the literal sense...and whether it is applied to law enacted prior to the Charter or after the Charter, is not compatible with the innovative and evolutive character of [*The Charter of Rights and Freedoms*].

Returning to what Justice Pitfield said:

> In *Metropolitan Stores*, the court concluded that the usual conditions for the granting of an injunction should apply with due consideration for the nature of the public interest engaged in the assessment of the balance of convenience. It is that course which I will follow in ruling upon the Parks Board application now before me.

[21] I note that Justice Schultes, in *The Corporation of the City of Victoria v. Thompson* concluded, in a situation not unlike the present one, that the latter test should be applied. In my view that approach is sound and that is the test I find to be appropriate here.

[22] The *RJR-MacDonald* test entails examining the case in the context of three questions:

1. Has the applicant demonstrated that there is a fair question to be tried?

2. Will the applicant suffer irreparable harm if an injunction is not granted?

3. Does the balance of convenience favour the granting of an injunction?

[23] I note that the test is not dissimilar in substance to the two-part test which is set out in the decision of the British Columbia Court of Appeal in *British Columbia (Attorney General) v. Wale*.

[24] For the purpose of the present discussion, I propose to follow the *RJR-MacDonald* formulation.

Serious question to be tried

[25] I do not intend to spend much time at all with this aspect. The answer is yes, the parties both agree that is so.

Irreparable harm

[26] That is defined as harm which cannot be readily compensated by an award of damages. It is the nature of the harm, not the magnitude, which is determinative. In this case the harm is the community's use of public space, the park.

[27] In that regard the circumstances are very similar to those in a number of cases which have been decided in this court over the past number of years. There are four of which I am presently aware:

1. *Vancouver (City) v. O'Flynn-Magee*, (a tent village located at the Vancouver Art Gallery site);

2. *Vancouver Parks Board v. Mickelson*, (a tent village in Thornton Park);

3. *Vancouver Board of Parks and Recreation v. Sterritt*, (a tent village located in Portside Park); and

4. *City of Victoria v. Thompson*, (a tent encampment in Centennial Square).

[28] In each of those cases the court found that the commandeering of public space by those who established a tent community constituted irreparable harm because no amount of damages can compensate the plaintiff for its inability to use the space for its intended purpose, the enjoyment of all members of the community.

[29] The observation of Schultes J. in *Victoria v. Thompson* is apt. He said this at para. 67:

> The manner of the protest arrogates to the respondents the sole decision about how significant portions of this public space is to be utilized and no matter how much they may cooperate with individual requests, there is no compensation possible for that loss. This ground, on balance, also favours the granting of the injunction.

[30] In my view, the second question in the analysis must be answered in the affirmative. The plaintiff, City of Abbotsford, as the representative of the public, will suffer irreparable harm if the injunction is not granted. The harm which would be sustained is not susceptible to compensation by an award of damages.

[31] The third consideration is with respect to the balance of convenience.

[32] The approach to be taken is this. It is for the court to determine which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits of the dispute. In the present matter, the

defendants say that the balance of justice and convenience favours them, as the harm they face by being forced to relocate because of an injunction is greater than any harm facing the plaintiff as a result of allowing them to continue maintaining the camp within the Park until trial.

[33] In support of that position the defendants say they are making efforts to mitigate the risk and deleterious effects that their activities occasion; the matter of fires on the property, refuse collection, and related matters.

[34] In my view, the counterweight to be considered in the balancing must include the harm that is occasioned when the lawful right of government to regulate the use of space for all members of the public, and the fact that the City is ultimately responsible and liable for the activities which occur on that property. Thus, an element of the analysis is the right of the duly-elected municipal government to exercise its authority to allocate and regulate public space in accordance with the applicable bylaws where that purpose is in furtherance of the public good.

[35] I note that in *Sterritt*, even though there was evidence that the camp was kept in a generally clean and orderly state, the court concluded that the injunction should be granted.

[36] In the present case there is a substantial body of evidence concerning a number of the persons who are members of the defendant group, persons in the camp. There is also evidence dealing with the extent of homelessness and the availability of other alternate accommodation for persons who do not have homes. The evidence respecting the number of homeless persons in Abbotsford is somewhat dated and that is something of a problem. There is also evidence that a number of shelter facilities are available and that an agency of government is prepared to find conventional housing for those who make application.

[37] It is difficult to know precisely what conclusions should be drawn from the evidence. I am inclined to the view that an individual in that camp could, if they were to be determined about it, have shelter provided to them. At the same time, I accept

that the conditions that attend that provision of shelter would, for many of them be unacceptable. In the evidence, there is reference to the fact that some facilities, such as the Salvation Army facility, have a 30-day limit, and after that a party is no longer eligible to reside there until a further 30 days have passed. There is also evidence that shelters tend to have rules which make life difficult for persons who have other problems, whether that is a drug dependency, a pet they wish to keep with them, or a similar concern. I accept as well from the evidence that living in shelters of this nature can be a difficult experience, an experience that some are simply not prepared to countenance. In the result, a number of these people will continue to seek out some form of living arrangement which will essentially be outdoors, possibly in a tent, but certainly in circumstances that are challenging.

[38] I understand all of that, and observe that the litigation in this case is important because it may well bring some improvement in those conditions.

[39] The issue was noted by Justice Ross in *Victoria v. Adams*. She found there that there were not enough shelter spaces to accommodate the homeless. She also stated that:

> If there were sufficient spaces in shelters for the City's homeless, and the homeless chose not to utilize them, the case would be different and more difficult.

[40] I return to the issue at hand, which is the balance of convenience here.

[41] In the event the injunction is granted, the persons who are presently staying at this camp would be required to vacate and find some other situation for themselves. Based upon the contents of the affidavit evidence I have seen, that might entail staying with others, it might entail relocating a tent to some other location which is not in the Park, it might involve staying at other available shelters. Those are alternate situations available to these persons, situations they were using prior to the establishment of the camp.

[42] I accept that there will be inconvenience to those who are so displaced, given that it is their view that their present situation is better than the alternatives. However, I conclude there will be places for them to go.

[43] When I look at the matter of the balance, given the considerations I have just set out, I am of the view, although the call is not an easy one, that the balance of convenience favours the granting of the injunction.

[44] Accordingly, the three stages of the *RJR* test have been met and on that basis the plaintiff City is entitled to the injunctive relief sought.

[45] Another issue which was raised in the course of submissions was the allegation of the City that those persons residing in the camp are trespassers.

[46] Section 4 of the *Trespass Act,* R.S.B.C. 1996, c. 462 provides as follows:

> 4.1 A person may not be convicted of an offence under section 4 in relation to premises if the person's action or inaction, as applicable to the offence, was with
>
> (a) the consent of an occupier of the premises or an authorized person,
>
> (b) other lawful authority, or
>
> (c) colour of right.

[47] In the circumstances, given that the City has provided the defendants notice to vacate the camp, to cease lighting fires in the park, to cease being in the park overnight, and to remove the tents and other structures, all of which are activities that are prohibited, I conclude that the defendants are in commission of the offence of trespass.

[48] I will turn shortly to the matter of the relief sought.

[49] As far as an undertaking is concerned, I am of the view that there is no need to order that the plaintiff provide an undertaking for damages in this case. I have reference to what I understand to be the general rule, as articulated in *Wale*. It is neither the practice nor is it appropriate to require an undertaking as to damages

where the Crown seeks to enforce by injunction what is *prima facie* the law of the land.

[50] Before concluding my reasons there are certain observations I wish to make.

[51] This decision has not been an easy one. My conclusion is, I am confident, in accordance with the applicable legal principles and authorities. However, the circumstances of the defendants are compelling. Many of these persons are truly troubled. They are a very marginalized faction of our society. Their hardships are legitimate and constitute a serious social concern. In my respectful view, those who might be inclined to see them as simply troublemakers and malcontents, people looking for a handout or a free ride, fail to understand that this is a societal problem, one that merits the sincere consideration of members of the public. The gravity of the matter seems especially acute given the time of year. It is the Christmas season, when the spirit of caring and the comfort of home and hearth is uppermost in many minds. The weather conditions are difficult. The situations of these persons seem particularly grim.

[52] The evidence indicates that certain events have occurred in respect of these persons and their experiences in Abbotsford. I refer particularly to allegations that some of them have had chicken manure dumped upon their campsites, that bear spray has been dispersed on them, and that their tents have been slashed. The allegations suggest that agents of the state, municipal employees, have been at least in part responsible for such activities.

[53] It is not my responsibility in the context of this application to adjudicate those allegations and I do not purport to do so. However, I will say this: conduct of that sort, if it were to have occurred, is simply and entirely unacceptable. It is deplorable and reprehensible. I cannot imagine that any fair-minded and decent person would think otherwise.

[54] As matters stand the defendants' recourse is best pursued through the litigation process. That is an avenue that is open to them, and in my view if it is to

proceed it should be done with dispatch. In aid of that, I would be prepared to recommend that steps be taken to ensure that it proceeds on an expedited basis and to provide for judicial supervision. If counsel believe that to be a worthwhile means of assistance, then the necessary arrangements can and will be made.

[55] In some cases the order for injunctive relief in matters such as this has been made with a time limit, with the objective of ensuring that the litigation proceeds at a properly active pace. I have not done that here because I consider that the offer of active litigation management will have a similar effect.

[56] Finally, I wish to say that it is my sincere hope that the enforcement provisions of this order will not have to be acted upon. The order has been made and it is to be expected that there will be compliance with its terms. No useful purpose will be served by defiance of it.

[57] Finally, there is the matter of the structure which has been erected upon the parking lot adjacent to the tent area. The evidence indicates that the material and effort to make that happen was provided by well-meaning members of the community. The order that I will make requires that it be dismantled and removed. Hopefully those members of the community who saw fit to provide this shelter can come forward and see to its removal and the material can be salvaged. To that end I propose to allow some extra time for that to occur. If that does not take place, then I expect that will be done by employees of the City. In the circumstances, it is my direction that the dismantling of that structure be done in the most non-destructive way it can, and that the materials be set aside and made available to those persons who initially provided it, assuming they come forward in a reasonable time and lay claim to it. If that particular direction proves problematic, I would be prepared to hear future from counsel.

[58] Now, the other thing I want to say before I pronounce the order is this. I have been told shelter is available. It is reasonable to expect that will be followed up upon in a real and meaningful way.

[59] I turn now to the terms of the order. I was provided with a draft order by counsel for the City and the order that I intend to make largely follows that template.

[60] Counsel, do you take the view that I ought to read in every word of this or can I simply fill in the blanks?

[61] MR. YARDLEY: I think we can fill in the blanks, My Lord.

[62] THE COURT: All right, very well.

[63] Paragraph 1 stands as it is.

[64] Paragraph 2, the date to be inserted is 4:00 p.m. Saturday, December 21.

[65] Paragraph 3, that same date is to be inserted.

[66] Paragraph 4, which I understand to relate to the structure, the time and date to be entered in this is, 2:00 p.m. Monday, December 21.

[67] The same date is to be entered in para. 5 as it, too, relates to the matter of the structure.

[68] MR. YARDLEY: My Lord, I think you said 2:00 p.m. on Monday, December 21st. Is it the 23rd?

[69] THE COURT: I am sorry, it is the 23rd.

[70] MR. YARDLEY: Thank you.

[71] THE COURT: Thank you. So at any rate then para. 5, that same time and date is to be entered, 2:00 p.m., December 23.

[72] I confess para. 6 was not perfectly clear to me. I will ask counsel, is that referring to the tents or is that referring to the structure?

[73] MR. YARDLEY: It's actually intended to deal with filling in the gaps, as it were, with respect to the order of Mr. Justice Blok, which provided for there being no

further tents placed on the parking lot lands. That is the lands referred to in the definition -- or sorry, in the order.

[74] THE COURT: That was my understanding.

[75] MR. YARDLEY: Yes, and so to the extent that there is anything on the parking lot that hasn't been removed, it was to allow enforcement of that by the City, other than the structure. That was the intent behind the provision.

[76] THE COURT: I am going to put the same time and date in there, 2:00 p.m., December 23.

[77] Paragraph 7 and para. 8, the date to be inserted is 4:00 p.m., Saturday, December 21.

[78] Nine, 10, 11 and 12, and 13, are as set out in the draft order.

[79] With respect to the matter of costs, I will not make an order of costs, and accordingly para. 14 is to be deleted.

[80] Are there questions arising from what I have just done?

[81] MR. WOTHERSPOON: My only question is just to clarify the dates, My Lord, in paras. 2 and 3.

[82] THE COURT: Two and three, 4:00 p.m., Saturday, December 21.

[83] MR. WOTHERSPOON: Thank you.

[84] THE COURT: Is that clear?

[85] MR. WOTHERSPOON: Yes. I just didn't get it down the first time.

[86] THE COURT: Okay. Is there any -- no, no, I understand that and often when reasons are given orally there is lots of room for things to slide through the gaps. Is there anything else that has to be dealt with here today?

[87] MR. YARDLEY: I'm just wondering for -- to assist with enforcement, if I could perhaps fill in the blanks, or does Your Lordship have a copy of the order that's signed or would you like --

[88] THE COURT: No. I do not. I have only the draft I was provided and I have marked that up.

[89] MR. YARDLEY: If I can perhaps just over -- for a couple of minutes have a moment here to fill in the blanks, and then I can hand the order up to Your Lordship for entering.

[90] THE COURT: Yes. I will be back in this courtroom at ten o'clock on another matter.

[91] MR. YARDLEY: That would be fine.

[92] THE COURT: Does that work?

[93] MR. YARDLEY: Yes. Thank you.

[94] THE COURT: Okay. You had something, sir?

[95] MR. WOTHERSPOON: No, I didn't. I was just standing up to say I have nothing further.

[96] THE COURT: Oh, okay. Well, that is how that works.

[97] All right. There is nothing else to be said here today. If you believe that there should be some management of the --

[98] MR. WOTHERSPOON: Well, I suppose I should add on that point, yes, I think it is appropriate for an expedited trial and that there be a management, as Your Lordship suggested, and that we all move expeditiously to have this matter heard.

[99] THE COURT: All right. I do not know how you want to do that. If you want to bring that to my attention I am prepared to -- I am going to have no substantive role

in how this matter proceeds from here, but in terms of it proceeding, I am more than happy to make myself available to assist you in seeing that this can go forward on that expedited basis.

"Williams J."