

CANADA / JUDGMENT

A.J.B. Investments Ltd. v. Elphinstone Logging Focus

2016 BCSC 734

COURT

Supreme Court of British Columbia

DECIDED

22 April 2016

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2016 BCSC 734 A.J.B. Investments Ltd. v. Elphinstone Logging Focus

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.J.B. Investments Ltd. v. Elphinstone Logging Focus,

2016 BCSC 734

Date: 20160422

Docket: S162942

Registry: Vancouver

Between:

A.J.B. Investments Ltd.

Plaintiff

And

Elphinstone Logging Focus, Hans Penner, Ross Muirhead, Jane Doe,

John Doe and Persons Unknown

Defendants

Further Corrected Judgment: Subsequent to the corrected judgment on

April 25, 2016, the text of the judgment was further corrected

at paragraphs 31, 34 and 35 on May 13, 2016

Corrected Judgment: The text of the judgment was corrected on the front page

on April 25, 2016

Before: The Honourable Mr. Justice Greyell

Oral Reasons for Judgment

Counsel for the Plaintiff:

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G.J. Roper

Counsel for the Defendants, Hans Penner

and Ross Muirhead:

P.C. Canning

Counsel for the Defendants, Elphinstone Logging Focus, Jane Doe, John Doe and Person Unknown:

No Appearance

One of the Person Unknown,

Douglas Fugge:

In Person

The Other Party, David Quinn

In Person

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 19, 2016

Place and Date of Judgment:

Vancouver, B.C.

April 22, 2016

[1] The plaintiff, A.J.B. investments Ltd. ("AJB"), owns some 996 hectares of land in the Sunshine Coast Regional District (the "SCRD") which are "private managed forest lands" under the Private Managed Forest Land Act, S.B.C. 2003, c. 80 (the "PMFLA"), upon which it harvests and sells timber on a number of cut blocks.

- [2] The PMFLA provides for the establishment of a Council the function of which is to "encourage forest management practices on private managed forest land, taking into account the social, environmental and economic benefits of those practices":(s. 5). The PMFLA sets objectives for soil conservation (s. 12); water quality (s. 13); fish habitat and critical wildlife habitat (s. 15); and provides a scheme for enforcement should an owner or contractor contravene the Act or the Regulations.
- [3] AJB has been harvesting timber on its private managed forest lands for a number of years under a "Management Commitment" with the Private Managed Land Forest Council, the independent provincial agency established under the PMFLA to administer forest management practices on private lands within British Columbia.
- [4] The Management Commitment sets out AJB's forest management objectives in the use of its lands for the production and harvesting of timber. Those objectives include ensuring minimal soil erosion occurs and to mitigate the impacts on soil productivity; to ensure streams are maintained in their natural or existing courses, and that no harm to fish or habitat occurs on the property. In addition AJB's objectives include providing local employment opportunities to the communities of the Sunshine Coast District, to ensure reforestation and other requirements and objectives specified in the PMFLA.
- [5] One of the cut blocks within AJB's lands and upon which it plans to harvest timber is "DR7".
- [6] The Chapman Creek watershed is located within the SCRD and on AJB lands. Chapman Creek flows close to and its tributary creeks flow through DR7. DR7 is located east of Chapman Creek, approximately 1.5 kilometers northeast of a licenced water intake on Chapman Creek operated by the SCRD and within the geographical area known as the Chapman Creek Watershed.
- [7] Elphinstone Logging Focus ("ELF") is an unincorporated association of individuals who believe; as do the defendants Messrs. Penner and Muirhead two of ELF's principal advocates, that "every standing tree provides a positive environmental contribution to a public drinking watershed". It is Mr. Muirhead' s belief that "the public good through the transfer of groundwater back to the immediate environment, thereby providing a contribution to the water supply trumps a private need to sell timber".
- [8] The objective of Mr. Muirhead and Mr. Penner and likely the other persons participating in the blockade for establishing the blockade is contained a statement the two drafted on February 18, 2016 (see Muirhead affidavit filed April 14, 2016):

The Sunshine Coast needs the same standard of protection that MetroVancouver drinking watersheds are afforded - full protection from logging, locked gates, de-activation of old roads, ban of firearm shooting, hunting and dog-walking

- [9] Chapman Creek and the preservation (and non-contamination) of its watershed has been a matter of concern of a number of citizens of the SCRD and indeed of the SCRD for a number of years. The history of the Chapman and Gray Creek Watershed Reserves is attached to the

affidavit of Mr. Penner demonstrates there have been ongoing concerns raised by the SCRD, community groups, First Nations and concerned citizens with the Ministry of Forests and various logging companies active in the area over the issue of timber harvesting in the watershed areas.

- [10] The concern of the protesters and the position they take in defence of this application is founded on "public health" issues and a focus on the quality of drinking water and in particular the turbidity of the water in Chapman Creek and its tributaries caused or contributed to by AJB's harvesting activities.
- [11] As a result of protests which occurred in 2014 and a blockade established by the defendant's Penner and Muirhead on a road leading into another cut block on which the plaintiff was harvesting timber, several reports were done in late 2014 and 2015 by the SCRD and the Managed Forest Council. A SCRD staff report concluded "harvesting activities will not pose a risk to water quality at this time". An investigation conducted by the Managed Forests Council concluded there was "no evidence that a material adverse effect on water quality had occurred at the licence water works intake downstream on Chapman Creek in October 2014 and consequently, there was no contravention of the Private Managed Forest Land Council regulation found". A further Managed Forest Council inspection in July, 2015 concluded "[h]arvesting is carried out reasonably well water management is well done now roads and trails have been rehabilitated [and] streams and a downstream LWI are materially protected".
- [12] The defendants rely on one of the reports, the Madrone Report, prepared by consultants the Managed Forest Council retained to investigate which reported that while there had been no contravention of the regulations:

Although there had been no clear contraventions of the regulations it is clear to me that industry standards for protecting water quality have not been met in; CH1. The short comings are substantially more serious given the fact that this logging has been carried out in a highly sensitive watershed supplying a large population.

- [13] A more recent commentary on AJB's current logging operations was contained in an e-mail from Mr. Bryan Shoji, SCRD Manager, Infrastructure Services to the Managed Forest Council, reporting on two site visits which discovered "several hundred meters of new road installed with no sedimentation control or prevention measures installed" and that the existing roads "have very limited sedimentation control measures installed and are visually eroding and extremely muddy". He noted AJB staff had not responded to SCRD staff request for more information.
- [14] On January 25, 2016, AJB notified the SCRD and the Managed Forest Council that it would commence harvesting timber in DR7 and on February 1, 2016 AJB and its contractor's commenced operations and the construction of roads on the cut block. All timber which has been harvested, being the some 1,520 m3 remains on the ground in the cut block.

- [15] On February 12, 2016 and continuing to the present date a group of approximately seven individuals including the defendants Hans Penner and Ross Muirhead have established a blockade across the forest service road (the Sechelt-Airport FSR) used by AJB and its contractors to access DR7.
- [16] On February 14 counsel representing Messrs. Penner and Muirhead advised AJB he was acting. Counsel requested copies of any court material to be filed and requested AJB immediately cease logging and resume negotiations with the SCRD.
- [17] The blockade consists of vehicles parked on the FSR, temporary shelters, campfires and other obstacles erected on the FSR. Individuals attending the blockade physically impede persons and vehicles from access to DR7 along with the FSR
- [18] According to material filed by the defendants the blockade has had broad public support with many local citizens being of the view the SCRD "has not done enough to keep logging out of their watershed".
- [19] Mr. Carwithen, AJB's supervisor of harvesting operations has attended the blockade and has asked the persons blockading the FSR to move. He was advised by those present it was their intention to continue to prevent AJB from performing its operations; that they would prevent contractors and various employees from going to work and that the blockade would remain intact. The blockaders have permitted some AJB employees to attend DR7 for the sole purpose of monitoring water conditions.
- [20] AJB has filed a police report with the Sechelt detachment of the RCMP, but has been advised the police would not remove the blockaders unless they were provided with a court order ordering the protesters to disperse and the blockade be removed.

The Legal Tests Applicable to the Issuing of an Interlocutory Injunction

- [21] An applicant for an interlocutory injunction such as that sought in this case must establish the three factors set out by the Supreme Court of Canada in *RJR -MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311:
1. There is a serious case to be tried; that is, the applicant must establish "a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended": *B.C.(A.G) v. Wale*, (1986) 9 B.C.L.R. (2d) 333.
 2. The applicant will suffer irreparable harm if the relief is not granted; and
 3. The balance of convenience favours the granting of the relief.
- [22] I will consider each of these factors in turn.

Discussion and Decision

- [23] The parties agree there is a serious case to be tried. I am in agreement with this assessment. The blockade is clearly intended to and does interfere with the plaintiff's contractual rights established under the Management Commitment. In addition there are serious claims raised regarding claims of trespass, nuisance, intimidation, unlawful interference with economic relations and inducing breach of contract: I adopt the statement by Mr. Justice Punnett in *Red Chris Development Company Ltd. v. Quock*, 2014 BCSC 2399 at para. 59.
- [24] The applicant says it will suffer irreparable harm if the relief is not granted for a number of reasons: if the blockade continues it will lose income arising from its contractual rights to harvest timber in 2016 and into the future as the timber it harvests will be replanted; such replanting will be delayed and hence the loss will be not only as present, but also a future loss as the company cannot replace the revenue from a lost year of operation. The applicant also says it will lose value in the timber which has been harvested but which remains on the ground on the cut block as a result of the onset of Ambrosia Symbiosis, the result of a beetle infestation and resulting fungus and that over time the logs become checked (which can start within two months of falling) and water logged. In addition the applicant says new road spurs are incomplete and will become susceptible to erosion and sediment discharge; that it will lose the loyalty of its contractors, the employees of those contractors and its own employees who are not being paid.
- [25] The applicant says it is losing its ability to harvest its timber during the optimum months for logging, April through June as a result of the blockade.
- [26] The defendants have offered to mitigate the plaintiff's losses by permitting the plaintiff access to the cut block for the purpose of removing harvested trees if the plaintiff agrees to stop logging for a period of four to twelve months and during that period negotiate with the SCRD. The blockade would be dismantled and Messrs. Muirhead and Penner would "instead apply pressure to the SCRD to resolve the issue by buying out the Plaintiff's interest in the lands they own in the watershed".
- [27] The defendants, Muirhead and Penner, have also made what their counsel describes as a "viable offer to settle" which was made publically through a local newspaper to dismantle the blockade and allow AJB to remove cult timber if AJB would agree to stop further timber falling in the cut block, to set in place "the highest sediment control measures available in cooperation with SCRD water staff" and agree to "meaningful discussions with the SCRD on a protocol agreement, including options that would allow future control of the lands by the SCRD".
- [28] The defendants say AJB has not established "clear and unspeculative irreparable harm": *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129: that there has been no interference with AJB's business as a going concern and that by accepting the offer to settle and negotiating with the SCRD, AJB can mitigate any harm to it.

- [29] The defendant also say the courts must proceed cautiously when issuing injunctive relief in cases involving the public protest and should grant injunctive relief "only when the conduct has reached the stage where there is no other way to prevent irreparable damage to interests in private property" at para. 28 of the Court of Appeal decision in *Greenpeace Canada Ltd. v. MacMillan Bloedel Ltd.* (1993), 96 BCLR (2d) 201.
- [30] On the issue of balance of convenience the defendants say two things: first, that if the injunction is not granted the plaintiff may lose money if they choose not to mitigate their losses (in the manner suggested by the defendants) but if the injunction is granted "the public could lose the safety of their water supply" and "because the public water source is at stake, the public interest strongly in favour of not granting the injunction and (t)herefore the balance of convenience favours not granting the injunction because the potential harm to a public watershed outweighs any harm to AJB investments" which are "purely economic" and "which AJB can substantially mitigate".
- [31] I am of the view the plaintiff has established that it has and will suffer irreparable harm should the injunction not be issued. There are many decisions of this court which stand for the proposition that interference with a business as an ongoing concern has been regarded as irreparable harm within the context of the test for an injunction: *West Fraser Mills v. Members of Lax Kw'Alaams*, 2004 BCSC 815 at paras. 21-22; *International Forest Products Ltd. v. Kern*, [2000] B.C.J. No. 1533 (S.C.); *MacMillan Bloedel Ltd. v. Simpson*, [1993] B.C.J. No. 1798 (S.C.), affirmed (1993), 96 B.C.L.R. (2d) 201 (C.A.); *Tlowitsis-Mumtagila Band v. MacMillan Bloedel Ltd.* (1990), 53 B.C.L.R. (2d) 69 (C.A.) at p. 78; and *McLeod Lake Indian Band v. British Columbia*, [1988] B.C.J. No. 2058 (S.C.) at p. 4.
- [32] In *Trans Mountain Pipeline ULC v. Gold*, 2014 BCSC 2133 at para. 118 the court stated:
- As to the question of irreparable harm, I am satisfied that the failure to grant the injunction would cause the plaintiff irreparable harm. The plaintiff has advanced essentially uncontradicted evidence that the delays occasioned by the activities at issue have and will continue to cause the substantial costs and potential losses of revenues which are not recoverable. The harm although primarily economic, is thus, nonetheless, irreparable.
- [33] In *Red Chris* the court stated at para. 68:
- As well, irreparable harm may be caused when a blockade forces a company to downsize, as a result of unemployment which affects workers, their families, and their communities. The emotional and psychological effects of long-term unemployment are harms that cannot be compensated through damages: *Snuneymuxw First Nation et al v. HMTQ et al*, 2004 BCSC 205, at para 35.

- [34] When assessing the balance of convenience the Court must consider whether it is just or convenient to grant the injunction. This assessment usually involves a number of elements. As noted recently by Mr. Justice Butler in *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355 [*British Columbia Hydro and Power Authority*] at para. 68 the elements usually considered include an examination of the status quo, the strength of the plaintiff's case, the relative magnitude of the harm and whether the public interest is engaged.
- [35] I have already said the plaintiff has established a strong case to be tried and accordingly this is a factor which must weigh heavily in favour of granting the injunction. In addition ramifications of the blockade extend beyond the plaintiff to its contractors and their employees and their families.
- [36] The defendants have no legal right to do what they are doing by preventing the plaintiff lawful access its land and to carry out activities on its property it is lawfully entitled to carry out. It cannot be said to be just, convenient or appropriate to permit the defendants to continue the blockade. The defendants are attempting to hold the plaintiff hostage in an effort to achieve their social/ political objectives: that is to bring pressure on the SCRD to purchase (and indirectly on the Provincial government to enable the purchase) of the private forest lands held by the plaintiff and/or to take steps to prevent logging on private land within the Chapman Creek watershed. While some of the defendant's submissions were couched in terms of preservation of health, there is no evidence before me that the plaintiff's operations have resulted or are likely to result in health related issues other than some apparently occasional turbidity in the water which the plaintiff has worked to mitigate.
- [37] The "offers to settle" are in my view meaningless. They would require the plaintiff to forego its legal right to harvest timber.
- [38] If the court were to give effect to the arguments of Messrs. Penner and Muirhead it would be tantamount to condoning the use of self-help remedies to achieve social/political objectives and would bring the administration of justice into disrepute: *British Columbia Hydro and Power Authority* at para. 76I.
- [39] The court is not the proper place to make the arguments being made by Messrs. Penner, Muirhead and their supporters.
- [40] In my view the proper steps for Mr. Penner and Mr. Muirhead and those who support them to take is to continue to put political pressure on the SCRD through the involvement of the citizens of the SCRD to try to effect the changes they seek and to address issues of water quality arising from logging operations with the appropriate SCRD and those provincial departments charged with such responsibilities as was done in 2014. Given the mandate of the Council established under the PMFLA as well as Mr. Shoji's email it is apparent there are regulations and mechanisms in place through which to at least address the water quality concerns raised by the defendants.

- [41] During the hearing one person of First Nations descent made brief submissions and requested the court adjourn these proceedings until local First Nations had an opportunity to review the materials filed. There has been no action commenced by any First Nations in the area of the SCRD concerning the plaintiff's lands. I do not considerate appropriate to adjourn the granting of relief.
- [42] I note from the material filed the Sechelt First Nation is a party to a Joint Watershed Management Agreement which created a Joint Watershed Management Advisory Committee in 2005. The purpose of the Committee is "to co-manage the Chapman and Gray Watershed Reserves for the purpose of protecting community drinking water resources". Given the local community profile of this case it would be surprising if the Committee were not aware of these proceedings. In any event, the order made below may be set aside upon the giving of seven days' notice of an application to do so.
- [43] In conclusion, I find the plaintiff has demonstrated it proper, just and convenient to order the injunction sought by the plaintiff.
- [44] I also find it is appropriate to include an enforcement provision within the injunction order. In British Columbia Hydro and Power Authority, Mr. Justice Butler at para. 81 summarized when it is appropriate to include such an order in an injunction.

Enforcement orders are generally granted in circumstances where the location of the protest is remote; the number of participants varies from day to day and may be difficult to identify; the protesters have disregarded signs, or indicated they will disobey an injunction order; there are safety concerns; the time for the plaintiff to perform the work being blocked is limited; and, the RCMP have indicated they will not enforce the injunction order without enforcement terms.

- [45] I find many of these circumstances are applicable in the present case.
- [46] I have reviewed the order sought by the plaintiff and make the following additions/ amendments to the Order following paragraph 1 to read:

By 4 pm on April 24, 2016, the Defendants, and all other persons having notice of this Order shall remove all structures, shelters, objects and things owned, constructed, maintained, placed or occupied by them which are located on AJB Lands;

AJB shall cause copies of this Order to be posted in prominent places at the locations denoted in paragraph 1 as AJB Lands with yellow stickers at any time AJB is conducting work on such locations;

Notice of this Order may be given to the Defendants by posting this Order in the fashion described in the preceding paragraph;

This Order shall be in effect from pronouncement until further Order of this Court;

Any person applying to set aside any term of this Order must do so upon application giving 7 days' notice of hearing to the plaintiff.

[47] This concludes my reason for judgment.

"Greyell J."

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