

CANADA / JUDGMENT

Vancouver Coastal Health Authority v. Adamson

2020 BCCA 145

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 145 Vancouver Coastal Health Authority v. Adamson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Vancouver Coastal Health Authority v. Adamson,

2020 BCCA 145

Date: 20200511

Docket: CA46303

Between:

Vancouver Coastal Health Authority

Respondent

(Petitioner)

And

Eurassia Mae-Lin Adamson also known as Eurassia Lin and Asia Lin,

doing business as Canadian Accelerated Daycare Association

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated August 8, 2019 (Vancouver Coastal Health Authority v. Adamson, 2019 BCSC 1502, Vancouver Docket S194682).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

P.T. Busch

Counsel for the Respondent

(via videoconference):

R. Hrabinsky

Place and Date of Hearing:

Vancouver, British Columbia

May 7, 2020

Place and Date of Judgment:

Vancouver, British Columbia

May 11, 2020

Summary:

In breach of the provisions of the Community Care and Assisted Living Act, the appellant operated a daycare facility where she provided care to three or more children who were not related to her. She continued to operate the daycare, and hold herself out as operating an authorized daycare, after being advised that it was unlawful for her to do so. The Vancouver Coastal Health Authority, having identified safety concerns with the facility and noted that the number of children under her care was increasing over time, brought an injunction to restrain the appellant from operating the daycare, instead of attempting to bring proceedings under the Offence Act. The chambers judge granted the injunction. Held: Appeal dismissed. The appellant was unable to establish any apprehension of bias on the part of the chambers judge and was unable to demonstrate any palpable error in findings of fact. The respondent established its right to obtain final injunctive relief and the judge applied the correct test when considering whether the statutory remedy was adequate.

- [1] BUTLER J.A.: The appellant, Eurassia Lin, carrying on business in the name of Canadian Accelerated Daycare Association, seeks to set aside a permanent injunction restraining her from operating a daycare without a licence under the Community Care and Assisted Living Act, S.B.C. 2002, c. 75 ("Act"). The Vancouver Coastal Health Authority (the "VCHA") brought the petition seeking the injunction. The VCHA is the authority for licensing daycares within its regional boundaries. The appellant says the order should be set aside because the chambers judge was biased and erred in fact and law. She also argues that the judge applied the wrong test for injunctive relief. For the reasons that follow, I would dismiss the appeal.

Background

- [2] A community care facility is defined in s. 1 of the Act:

"community care facility" means a premises or part of a premises

- (a) in which a person provides care to 3 or more persons who are not related by blood or marriage to the person and includes any other premises or part of a premises that, in the opinion of the medical health officer, is used in conjunction with the community care facility for the purpose of providing care,

- [3] Section 5 of the Act prohibits any person from operating, or holding themselves out as operating, a community care facility without a licence:

A person who does not hold a licence must not

- (a) operate, or hold themselves out as operating, a community care facility,
- (b) provide, or hold themselves out as providing, care in a community care facility, or
- (c) accommodate, or hold themselves out as accommodating, a person who, in the opinion of a medical health officer, requires care in a community care facility.

- [4] It is not contentious that a daycare is a community care facility under the Act. Accordingly, pursuant to these provisions, a daycare operator must obtain a licence under the Act if the daycare is providing care "to 3 or more persons who are not related by blood or marriage to the person" operating the facility.

- [5] Licensing officers of VCHA received a complaint about the appellant's daycare and visited that facility on Hudson Street in Vancouver (the "Daycare") on four occasions between January 31, 2019 and March 15, 2019. On each occasion, the officers observed that the appellant was providing care to at least five or more children who were not related to her by blood or marriage. The licensing officers informed the appellant that by operating without a licence, she was operating illegally. On January 31, she was provided with formal notice to that effect. The formal notice set out relevant provisions of the Act and advised her that information about her unlicensed facility would be published on an official website, and that she could be subject to a penalty under s. 33 of the Act. The appellant indicated that she intended to continue to operate the Daycare and suggested she was in the process of

obtaining a licence.

- [6] On April 9, 2019, the VCHA brought the petition seeking an interim and permanent restraining order enjoining the appellant from operating, or holding herself out as operating, a community care facility contrary to the Act. In the court below, the VCHA acknowledged that the Act specifically provides for prosecution under the Offence Act where someone operates a community care facility without a licence, but contains no provision for injunctive relief. It argued that the health and safety of children in daycares is an important societal concern and that the court should exercise its inherent jurisdiction to grant an injunction or do so either pursuant to s. 39 of the Law and Equity Act, R.S.B.C. 1996, c. 253, or R. 10-4 of the Supreme Court Civil Rules, B.C. Reg. 168/2009. The VCHA sought a permanent injunction that would restrain the appellant from operating a daycare facility without a licence but would not preclude her from obtaining a licence to operate a daycare.
- [7] The appellant opposed the relief sought, arguing that VCHA should follow a "less intrusive and more effective method of regulating daycare facilities in Vancouver". She argued there is a shortage of daycare spaces in Vancouver and said that her Daycare provides a higher standard of care than that which is provided at licensed daycare facilities. In these circumstances, she said the court should not grant injunctive relief. She also argued that VCHA was acting unfairly in attempting to shut down the Daycare when other daycare facilities are permitted to operate without licences. She also argued the VCHA had delayed issuing her a licence for the Daycare.

Reasons of the Chambers Judge

- [8] In *Vancouver Coastal Health Authority v. Adamson*, 2019 BCSC 1502 (the "Reasons"), the judge accepted the VCHA's position that there is a societal interest in ensuring that children are cared for properly in daycare facilities. He referred to para. 7 of *Interior Health Authority v. Turner*, 2005 BCSC 1540, in which Justice Barrow set out the purpose of the Act:

The purpose of the Community Care and Assisted Living Act is, in my view, at least to a significant degree, directed towards ensuring that those responsible for the care of others, particularly children, do so in a safe and secure environment

- [9] The judge rejected the appellant's argument that she should be exempt from obtaining a licence, noting that she did not challenge the validity of the Act. The judge also rejected the appellant's arguments based on *Roncarelli v. Duplessis*, [1959] S.C.R. 121, *Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41 and *Richard v. Red Deer (City)*, (1983), 8 Alta.L.R. (3d) 345 (Q.B.). There was no evidence that she had been denied a licence, whether for legitimate reasons or otherwise. There was no evidence to support arguments that VCHA: acted out of an improper motive; improperly exercised a discretion by refusing to issue a licence; or attempted to limit the number of licences. Indeed, the evidence supported the inference that the appellant could obtain a licence if she complied with the licensing requirements: at paras. 21-23.

[10] The judge then turned to the central issue of whether an injunction was appropriate or necessary. He noted that just because the appellant was non-compliant with the statutory provision did not mean that an injunction should issue: at para. 28. The judge found, at paras. 29-30, that an injunction was an appropriate remedy because the VCHA had limited enforcement powers under the Act and because of the public interest in ensuring daycares meet certain minimum standards:

The legislation provides for very limited powers of enforcement, and while each case necessarily has to be adjudicated on its merits, it follows that prosecution under the Offence Act provides for very limited remedy. First it requires proof beyond a reasonable doubt. Second, prosecution depends upon the willingness of the Crown to take on the case, which is beyond the control of the petitioner. Third, a prosecution necessarily takes some time.

If the public interest dictates that certain minimum standards must apply to daycare facilities, it would not be logical to require that a prosecution proceed and be completed before anything could be done to ameliorate any concerns with a non-compliant facility. Moreover, a finding of guilt and a fine by way of a summary conviction under the Offence Act would not, absent additional terms, have the effect of closing down a facility that was, for example, unsafe.

[11] The judge observed that after the VCHA began to investigate the appellant's Daycare, she actually increased the number of children in her care: at para. 34. Further, contrary to the prohibition in s. 5(a) of the Act, the appellant continued to hold herself out as operating a community care facility and stated, untruthfully, that the Daycare was a government accredited facility. The judge referred to the appellant's comment that she was ignoring the directions from Vancouver Coastal Health as a "silent protest": at para. 35. In these circumstances, the judge concluded, at para. 38, that the injunction was necessary because the appellant intended to continue to operate without a licence:

I am satisfied that the injunction as sought is necessary on the facts here because the respondent has clearly made the conscious decision to operate without a licence despite having been told that a licence is required. The respondent is well aware of the requirement for a licence and has chosen to ignore it.

[12] The judge granted a permanent injunction restraining the appellant from operating or holding herself out as operating or providing care in a community care facility without a licence.

On Appeal

[13] In her factum, the appellant alleges the judge made seven errors. Her arguments that the judge erred by "misapplying [the parties'] case law" and "exercising discretion too stringently" are without any merit. I will not comment further on those alleged errors, except to say that the judge was correct in finding there was no evidence that could support arguments based on Roncarelli, Mount Sinai Hospital and Richard. As the judge observed, there was no evidence the appellant had been denied a licence, or that the VCHA acted out

of an improper motive, or that it improperly exercised a discretion. The Act prohibits a person from operating a community care facility without a licence and contains no provisions that permit a person to operate a facility while in the process of applying for a licence.

[14] I would not give effect to the other grounds of appeal, which I would restate as follows:

- i. The record, including the Reasons, discloses a reasonable apprehension of bias on the part of the judge;
- ii. The judge erred in finding that the appellant had not applied, and did not intend to apply, for a licence; and
- iii. The judge erred by applying the incorrect test for a permanent injunction or, alternatively, by misapplying the test for a permanent injunction.

Reasonable Apprehension of Bias

[15] The appellant argues that the judge approached her arguments with a closed mind. She says the judge had a predetermined, unshakeable view that the appellant's case lacked merit. In support of this argument, she points to a number of comments made by the judge in discussions with counsel that she says evidence bias and a refusal to consider the appellant's arguments.

[16] The test for reasonable apprehension of bias was reaffirmed in *Yukon Francophone School Board, Education Area # 23 v. Yukon (Attorney General)*, 2015 SCC 25 at para. 37:

whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias. . .

[17] The threshold for bias is high because our system of justice presumes fairness, impartiality and integrity in the performance of the judicial role.

[18] I would not give any effect to this ground of appeal. I have reviewed the impugned exchanges between the judge and counsel in the transcript. She is correct in stating that the judge directly challenged her counsel on his submissions. However, the judge's questions and comments were directed at the substance of the submissions, appropriately asking whether counsel's arguments were consistent with the evidence or relevant to the issues the judge had to decide. As this Court observed, at para. 59, in *R. v. Sanghera*, 2015 BCCA 326, leave to appeal ref'd [2015] S.C.C.A. No. 375:

Repeatedly, it has been said that little should be taken from the exchange of counsel and a trial judge during submissions. There is little wrong in a judge challenging assertions of counsel or expressing preliminary thoughts on issues in order to give counsel an opportunity to address the judge's concerns.

- [19] There is no merit to the suggestion that the judge approached the issues raised by this case with a closed mind. It is evident from the Reasons that he gave due consideration to the evidence before the court and the arguments advanced by the appellant.

Licence Application

- [20] The judge concluded, at para. 38, that the appellant had made a "conscious decision to operate without a licence despite having been told that a licence is required. The [appellant] is well aware of the requirement for a licence and has chosen to ignore it." The appellant says this is a palpable error, unsupported by the evidence and that it is overriding because it was central to the judge's conclusion that an injunction was required.
- [21] I agree with the appellant that the judge's finding that the appellant decided to operate without a licence knowing of the statutory requirement was significant to his determination that he should grant the injunction. However, I am of the view that the finding was not only available on the evidence, but is unassailable.
- [22] At the first visit to the Daycare on January 31, 2019, the licensing officers observed the appellant providing care to seven children, five of whom were not related to her by blood or marriage. The officers noted a number of concerns about the safety and hygiene of the premises, including that the facility had an indoor swimming pool. They advised the appellant that she was operating unlawfully and served her with a formal notice to that effect. The officers contacted the parents of the children and informed them that the operation was unlicensed and not legal. The appellant was informed that she had to reduce the number of unrelated children at the facility to two. The appellant was appropriately provided with relevant information about the provisions of the Act. Having received the notice, she indicated that she did not intend to comply with the statutory provisions. The licensing officers attended the next day and observed the appellant continuing to operate the daycare with five children who were not related to her.
- [23] On February 8, 2019, licensing officers again attended at the Daycare. On this occasion, the appellant was providing care to 10 children, only two of whom were related to her. In accordance with s. 15.3 of the Act, the VCHA published a report on its website indicating that the appellant was operating a daycare facility without a licence. The Senior Licensing Officer wrote to the parents of the eight unrelated children advising that the appellant was operating unlawfully. In response, the appellant wrote to the parents whose children were attending the Daycare. She stated that there was a "misunderstanding" with the licensing office and that "Community Care Licensing was very friendly and supportive." She wrote:

However, due to their regulations they must send all the parents a letter reminding them that we are technically operating unlawfully as we are supposed to shut down to only 2 children until licensing is complete. Kitty Minions, Vancouver's Senior Licensing Officer was very understanding and said that they will continue to wait to hear from our government officials. In the meantime, you may disregard the letter as it is not applicable to our situation.

- [24] In this time period, the VCHA became aware that the appellant was continuing to advertise the Daycare. On March 1, 2019, a VCHA representative wrote to the appellant to advise that her advertisements also contravened s. 5(a)-(c) of the Act.
- [25] On March 15, 2019, the representative attended again and observed that the appellant was providing care to 14 children at the Daycare, 12 of whom were not related to her.
- [26] While the appellant argued, both below and in this Court, that she was in the process of obtaining a licence, there is no evidence to support that suggestion. The affidavit of Ms. Minions refers to a licence application that the appellant submitted in early February. However, Ms. Minions wrote to the appellant advising that her application was for "In-Home Multi-Care for 18" which exceeded the permitted maximum capacity under the regulations. The appellant was provided with the correct application form and given additional information on the requirements. There is no evidence that the appellant subsequently submitted a proper application.
- [27] In summary, the appellant is unable to demonstrate that the judge made any error, let alone a palpable error in arriving at his findings. I would dismiss this ground of appeal.

The Test for a Permanent Injunction

- [28] Whether the judge applied the correct test for a permanent junction is a question of law and is reviewable on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 48. Whether the judge properly exercised his discretion in granting the injunction is reviewable on a deferential standard: *Penner v. Niagara Regional Police Services Board*, 2013 SCC 9 at para. 27.
- [29] The appellant argues that the judge either failed to apply the correct test for granting the injunction or that he erred in exercising his discretion to grant the injunction. The appellant did not develop the argument about the application of the wrong test, but says the judge should have exercised his discretion to order a "less intrusive" remedy, by which I take her to mean, something less than an injunction. As the appellant notes, the Act specifically provides for an alternate remedy in s. 33:
- (1) A person who contravenes section 5, 6, 18(2) or (3) or 26(1) of this Act or a term or condition attached to a licence commits an offence.
 - (2) A person who commits an offence under subsection (1) is liable to a fine of up to \$10,000.
 - (3) If an offence under subsection (1) is of a continuing nature, each day that the offence continues constitutes a separate offence.

- [30] While the judge did not specifically articulate the test he applied, he approached the question of whether to grant a permanent injunction by referring to the approach taken in the two British Columbia decisions that have considered Interior Health Authority applications for injunctions against unlicensed daycare facilities: *Turner*; *Interior Health Authority v. Statham*, 2005 BCSC 1243.
- [31] In *Statham*, the respondent had repeatedly breached the Act by operating a daycare facility with as many as four unrelated children in her care on a number of occasions. The respondent had signed an undertaking agreeing to limit the number of unrelated children in her care to no more than two children, but continued to breach the undertaking and the provisions in the Act. When the health authority petitioned for an injunction, she did not appear at the hearing. The court declined to grant an injunction. In doing so, the judge reasoned there was no basis on the evidence for concluding that the penalties provided in the statute were ineffective. At para. 10, the court summarized the test to be applied for the grant of an injunction where a statute creates an offence and applies a penalty for the same breach:

The court has the discretion to issue an injunction in appropriate circumstances. The remedy remains extraordinary, however, and the nature of the wrong, the availability of other sanctions, and the relative effectiveness of those sanctions, are all matters the court should consider before deciding whether an injunction ought to issue.

- [32] In *Turner*, the court granted an injunction restraining the respondent from operating a daycare without a licence. License inspectors had observed her operating a daycare with as many as eight children in circumstances that raised safety concerns. The children were seen playing without adult supervision in a backyard with a pool, a hot tub and a trampoline. The respondent advised the court that she intended to apply for a licence but had not done so.
- [33] The court in *Turner* was referred to the decision in *Statham* and applied the same test. However, the court distinguished *Statham* because of the safety concerns presented in the affidavits of the licence inspectors. At para. 20, the court reasoned that the extraordinary remedy of an injunction was appropriate given the concerns about safety of children and the relative speed with which an injunction could be obtained compared to a prosecution.
- [34] The clearest description of the test to be applied when a court is asked to grant injunctive relief for the breach of a statutory obligation is set out in *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396. The Court allowed an appeal from an order granting final injunctive relief on the basis that the chambers judge applied the test for an interlocutory injunction, as opposed to the test for a final injunction. Justice Groberman, writing for the Court, at para. 28, emphasized the need of an applicant for a final injunction to establish its legal rights:

In order to obtain final injunctive relief, a party is required to establish its legal rights. The court must then determine whether an injunction is an appropriate remedy. Irreparable harm and balance of convenience are not, per se, relevant to the granting of a final injunction, though some of the evidence that a court would use to evaluate those issues on an interlocutory injunction application might also be considered in evaluating whether the court ought to exercise its discretion to grant final injunctive relief.

[35] Once a party has established its legal right to the relief sought, the court must exercise its jurisdiction carefully, particularly when the legislation contains other methods of enforcement. In those situations, an injunction should only be granted where the statutory remedy is shown to be inadequate. Justice Groberman explained the proper approach at paras. 34-36:

While courts have jurisdiction to grant injunctions to enforce statutory obligations, the jurisdiction must be exercised carefully. Where, as here, there is a clear method of enforcement set out in the statute, the court should not grant injunctive relief unless the statutory provision is shown to be inadequate in some respect.

There are a number of respects in which a statutory regime may be inadequate. For example, the penalty for breach of the statute may be so limited that a party chooses to treat it as a cost of doing business, and therefore flout the law [Citations omitted.]

A statutory provision may also prove inadequate where a party who suffers harm is unable to invoke the provision (*MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048), or where serious danger or harm would result from the delay inherent in invoking a statutory remedy. There are, undoubtedly, other situations in which deficiencies in a statutory remedy militate in favour of the granting of an injunction.

[Emphasis added.]

[36] In summary, before granting a permanent injunction for the breach of a statutory obligation, a court must find that the party seeking the relief has established its legal right to the injunctive order. If the right is established, the discretion to grant an injunction must be exercised cautiously. If the statute provides another method of enforcement, a permanent injunction should not be granted unless the statutory remedy is inadequate in some respect. To determine if the remedy is inadequate, the court should consider the circumstances of the breach, the limitations of the statutory remedy, the nature of the potential harm caused by not issuing the injunction, and any other matter that could affect the utility, or lack thereof, of the statutory remedy. In exercising discretion, the court may also take into account, where appropriate, the balance of convenience and the extent to which harm is irreparable.

- [37] While the judge did not set out the test, it is clear that he followed the approach described in *Statham and Turner* as explained in *Cambie Surgeries*, and that he applied the correct test. First, he considered and found that the appellant was prohibited from operating the Daycare without a licence and that VCHA was entitled to seek an injunction. He noted that the mere fact of non-compliance did not mean that an injunction should issue: at para. 28. He then considered the circumstances, and whether an injunction was the appropriate remedy.
- [38] The judge found that a prosecution under the Offence Act may not be effective: at para. 29. He had before him an affidavit of the Regional Manager of Community Care Facilities Licensing for VCHA indicating that it had recently sought to proceed with a prosecution for a similar contravention of the Act and Crown Counsel had refused to proceed. He believed that the Crown had not changed its position. The judge recognized that the willingness of the Crown to pursue a case is beyond the control of the VCHA and that, in any event, a prosecution would take more time.
- [39] The judge also considered the safety considerations highlighted in the material before him and observed that a conviction and fine under the Offence Act may not ameliorate those concerns: at para. 30. Finally, he considered his finding that the appellant consciously set out to operate without a licence and had continued to expand the Daycare and advertise for new clients when told she could not do so. Further, he recognized that the appellant was operating without a licence as a form of protest. In her affidavit she stated that "licensed daycares are insufficient and often neglectful of the children" and that "licensing potentially increases risk of harm to a child" by driving up the cost of such facilities.
- [40] The judge concluded that it was appropriate to grant the permanent injunction sought by VCHA. I am not persuaded that the judge erred in his approach to relevant considerations or that he exercised his discretion unreasonably. I would not interfere with his exercise of his discretion.
- [41] In summary, I would dismiss the appeal.
- [42] HUNTER J.A.: I agree.
- [43] ABRIOX J.A.: I agree.
- [44] HUNTER J.A.: The appeal is dismissed.
- "The Honourable Mr. Justice Butler"

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