

CANADA / JUDGMENT

Victoria (City) v. Smith

2020 BCSC 1173

COURT

Supreme Court of British Columbia

DECIDED

12 August 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1173 Victoria (City) v. Smith IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Victoria (City) v. Smith, 2020 BCSC 1173 Date: 20200812 Docket: S202291 Registry:

Victoria Between: The Corporation of the City of Victoria Petitioner And Shae Smith, Dennis

Davies, Deborah Brisbois, Jane Doe, John Doe, and Other Unknown Persons Respondents Before:

The Honourable Mr. Justice Mayer Reasons for Judgment Counsel for the Petitioner: J.W. Locke K.

Crawford The Attendee, Alexander John Fisher appearing own his own behalf: A.J. Fisher

Counsel for the Attendee, Friends of Beacon Hill Park: L. LeBlanc Place and Date of Trial/

Hearing: Victoria, B.C. July 27 and 28, 2020 Place and Date of Judgment: Victoria, B.C. August 12, 2020

- [1] On July 27, 2020, I heard the application of the petitioner, the Corporation of the City of Victoria (the "City") for an interim injunction prohibiting and enjoining the respondents from sheltering in the environmentally sensitive and culturally sensitive areas of Beacon Hill Park (the "Park"), and to require them to remove their personal property and refuse from such areas.
- [2] The City brought its application in its dual capacities as both the owner of the Park and as the public authority which, through the City of Victoria Parks Regulation Bylaw No. 07-059 (the "Parks Bylaw"), is authorized to regulate the uses and activities which may occur in the Park.
- [3] The City alleges that it was suffering harm both in the form of the physical damage to the Park as well as the ongoing and flagrant breaches of the Parks Bylaws.
- [4] At the hearing on July 27, 2020, a response had not been filed by the named respondents despite service of the City's application materials having been properly made upon them.
- [5] Alexander James Fisher, who was not one of the named respondents, appeared and advised that he was one of the individuals who had been sheltering in the Park. I allowed Mr. Fisher to make oral submissions despite the fact that he had not filed a response or any affidavit evidence.

- [6] After hearing submissions from the City and Mr. Fisher on July 27, 2020, I adjourned the matter to the next day for delivery of oral reasons.
- [7] On July 28, 2020, I granted the relief sought by the City with reasons to follow. These are my reasons. Background and Statutory Framework
- [8] The City is the owner of the lands comprising the Park, pursuant to a Crown Grant made February 20, 1882. The City acknowledges that it holds the Park on certain trust conditions which are not relevant to the application currently before me.
- [9] The Park is 183 acres in size, the largest of the City's parks by area and is described by the City as "a gem of the City's parks network" for reasons including its ecological and cultural significance including to the Esquimalt and Songhees First Nations.
- [10] Under its statutory powers set out in the Community Charter, S.B.C. 2003, c. 26, the City has enacted the Parks Bylaw, which was amended in 2009, following an earlier court decision *Victoria (City) v. Adams*, 2008 BCSC 1363, reversed in part, 2009 BCCA 563 [Adams (BCCA)]. The Park is a "park" under the Parks Bylaw.
- [11] The 2009 amendment to the Parks Bylaw allows temporary sheltering within City parks, between the hours of 7:00 p.m. (or 8:00 p.m. during daylight savings time) and 7:00 a.m. the following morning, with the exclusion of specifically identified parks and areas of parks, including environmentally and culturally sensitive areas.
- [12] Relevant passages of the Parks Bylaw are as follows: Definitions 2. "culturally sensitive area" means any part of a park that is
- (a) a heritage site as defined in the Heritage Conservation Act whether designated or not; or
 - (b) identified in a plan, map or City bylaw as having historical or cultural significance to British Columbia or an aboriginal people; "environmentally sensitive area" means any part of a park that has any of the following characteristics:
 - (a) areas or landscape features identified in Sensitive Ecosystems Inventory for Eastern Vancouver Island and the Gulf Islands, published by the British Columbia Ministry of the Environment;
 - (b) areas or landscape features identified in a plan, map or City bylaw as environmentally significant, an environmental protection area, a development permit area for protection of the environment, or for another similar purpose that is compatible with the conservation of ecological features and functions of the site; Damage to environment, structures 13 (1) A person must not do any of the following activities in a park:
 - (a) cut, break, injure, remove, climb, or in any way destroy or damage,
 - (i) a tree, shrub, plant, turf, flower, or seed
 - (f) dispose of household, yard, or commercial waste in a park

- (2) A person may deposit waste, debris, offensive matter, or other substances, excluding household, yard, and commercial waste, in a park only if deposited into receptacles provided for that purpose. Overnight Shelter 16A
- (2) A homeless person must not place, secure, erect, use, or maintain in place, in a park, a structure, improvement or overhead shelter, including a tent, lean-to, or other form of overhead shelter constructed from a tarpaulin, plastic, cardboard or other rigid or non-rigid material:
 - (a) Subject to sub-section (b), except between the hours of:
 - (i) 7:00 o'clock p.m. of one day and 7:00 o'clock a.m. of the next day when Daylight Saving time is not in effect; and (ii) 8:00 o'clock p.m. of one day and 7:00 o'clock a.m. of the next day when Daylight Saving time is in effect
 - (b) At any time, in
 - (i) a playground, sports field, footpath or road within a park,
 - (x) an environmentally or culturally sensitive area
- [13] More than half of the Park, 93 acres, has been identified by the City as environmentally sensitive and are identified as such in the Ministry of Environment's Sensitive Ecosystems Inventory for Eastern Vancouver Island and the Gulf Islands. As well, in its Official Community Plan Bylaw No. 12-013, the City has identified these unique ecosystems within the Park as deserving of protection and restoration. As a result the environmentally sensitive areas within the park subject to the prohibition against use set out in s. 16A(2)(b)(x) of the Parks Bylaw.
- [14] In addition the Park contains a number of areas of cultural significance, falling within the definition of a heritage site set out in the Heritage Conservation Act, R.S.B.C. 1996, c. 187. All of the culturally sensitive areas within the Park fall within the Park's environmentally sensitive areas.
- [15] Shortly after the Province declared a provincial state of emergency on March 18, 2020 in response to the COVID19 pandemic, local shelters began suspending or reducing their services. At this time, the City suspended enforcement efforts relating to the prohibition on "daytime sheltering" (i.e. between the hours of 7:00 a.m. and 7:00 p.m.) in City parks in the interests of supporting the ability of people to self-isolate and continue to shelter in place in accordance with advisories from public health authorities.

- [16] Approximately 50 acres of the Park have been authorized by the City for sheltering and camping. Sheltering is prohibited on 133 acres which includes environmentally and culturally sensitive areas and other prohibited areas including playing fields, horticultural areas, footpaths and roads. These areas are set out on a map prepared by the City which is attached as an appendix to these reasons. In addition, the City has signage posted in many spots throughout the park identifying environmentally and culturally sensitive areas.
- [17] As at July 20, 2020, 115 improvised shelters were located in the Park, including 51 in environmentally sensitive areas. This represented an increase of 9 shelters in environmentally sensitive areas, when compared with the number present in those areas on July 8, 2020.
- [18] Sheltering in the environmentally sensitive areas has resulted in significant damage including, but not limited to the following:
- a) significant ground disturbances related to improvised latrines and improvised rainwater management (i.e. ditches dug directing water away from shelters);
 - b) ground disturbance due to staking of structures and/or tarps;
 - c) significant compaction and degradation of soil profiles and structure related to excessive foot traffic in and out of the sites and shelters remaining in place;
 - d) contamination of soils due to bodily fluids and human excrement, fuels, cigarette butts and other contaminants and/or waste products;
 - e) impacts to soil biology because of the above noted disturbances;
 - f) denuding ground of vegetative cover;
 - g) erosion of sites due to excessive clearing and denuding of groundcovers;
 - h) exposed root masses because of erosion and soil degradation;
 - i) breaking and damaging of shrubs for access and/or egress;
 - j) shrubs dug out and removed for clearing purposes;
 - k) damage to soils and adjacent plant species because of fire;
 - l) cutting of live and/or dead material for the purposes of clearing sites, barricades, fencing, and firewood;
 - m) cutting and clearing of live and dead material for the purposes of clearing out sites capable of supporting structures;
 - n) spray painting of trees and shrubs;
 - o) damage to trees from saws, hatchets, and axes;
 - p) tying materials, tarps and/or shelters to trees;

- q) excessive material and subsequently waste hauled into these areas meaning not only the associated ecological impact, but further disturbance occasioned by parks staff continually needing to enter these spaces for waste management;
 - r) significant consequential increase in foot traffic in the areas being used as shelters meaning increased compaction and disruption to sensitive species; and
 - s) evidence of rat infestations.
- [19] In some of the environmentally sensitive locations of the Park where shelters are located there is evidence of campfire pits, cigarette smoking, broken glass, combustible refuse and the use of gas powered devices including a generators and cook stoves. These areas of the Park containing dense, highly combustible vegetation and are at greater risk of a rapidly spreading, catastrophic wildfire. The Fire Danger Rating for southern Vancouver Island was "moderate" as at July 1, 2020.
- [20] The named respondents, Shae Smith, Dennis Davies, and Deborah Brisbois, and the John and Jane Doe respondents, including Mr. Fisher, have established shelters and campsites within the Park in areas which have been designated as environmentally and culturally sensitive or where sheltering is otherwise prohibited within the Park.
- [21] Despite the City's request to assist those sheltering in areas of the Park where sheltering is prohibited to move to areas which have been approved for overnight camping, identified in the map prepared by the City, many campers, including the named respondents, have refused to move. The occupants of 43 tents or temporary shelters have voluntarily moved from environmentally and culturally sensitive areas.

Issues

- [22] The threshold issue to be decided is has the City met the test for grant of a statutory injunction for which there are no exceptional circumstances justifying not granting such an injunction?
- [23] If the City is not entitled to a statutory injunction, does the City satisfy the test for an equitable injunction?

Analysis

Is a statutory injunction warranted based on breaches of the Parks Bylaw?

- [24] As a municipality, the City is statutorily authorized to seek a statutory injunction to "enforce, or prevent or restrain the contravention of a bylaw" when a breach of a bylaw is shown: Community Charter, s. 274(1).

- [25] Factors that may considered by a court in an application for an equitable injunction will have limited, if any, application to the application for a grant of a statutorily based injunction. Where an injunction is sought to enforce a public right, the courts will be reluctant to refuse it on discretionary grounds. *Maple Ridge (District) v. Thornhill Aggregates Ltd.*, 1998 CanLII 6446 (B.C.C.A.) at paras. 7 and 9.
- [26] Where a public authority, such as the City, turns to the courts to enforce an enactment by way of a statutory 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. *Vancouver (City) v. Maurice*, 2005 BCCA 37 at para. 34 [Maurice].
- [27] I find that the respondents have placed, maintained, and used tents and other forms of shelters in environmentally and culturally sensitive area and other prohibited areas of the Park, which is a clear breach of the Parks Bylaw.
- [28] The next question to be answered is, are there exceptional circumstances justifying a decision refusing to grant the statutory injunction sought by the City?
- [29] This Court has identified the following instances as examples of "exceptional circumstances":
- a) where there was a right that pre-existed the enactment contravened;
 - b) where there is a clear and unequivocal expression that the unlawful conduct will not continue;
 - c) where there is such uncertainty that it can be said that the breach is not being flouted;
 - d) where the events do not give rise to the mischief the enactment was intended to preclude; or
 - e) where the respondent has ceased the majority of its offending activities and carried on, only in a limited way, with activity that is not harmful in the way that the bylaw was intended to prevent: *Maurice*, at para. 20.
- [30] I do not find that any of these exceptional circumstances exist in this case, justifying the Court's use of its narrow discretion to refuse a statutory injunction.
- [31] Mr. Fisher, who as I indicated above appeared and identified himself as one of the individuals sheltering within one of the prohibited areas of the Park, submitted, in summary, as follows:
- a) He is homeless by choice and is camping within the Park in order to isolate from the COVID-19 virus;
 - b) Although there has been impact to environmentally sensitive areas of the Park from others, who have abused Park lands, his impact has been minimal; and

- c) That his right to have a home within the park is being infringed by City staff who are harassing campers staying within the prohibited areas.
- [32] Mr. Fisher requested that the Court suspend imposition of the statutory injunction sought by the City until November 2020 after the Province lifts the emergency order concerning the COVID-19 pandemic.
- [33] Although Mr. Fisher made his submissions with passion, they do not constitute admissible evidence of exceptional circumstances. Is it necessary to consider the requirements for an equitable injunction?
- [34] In this case, I do not find that a meaningful Canadian Charter of Rights and Freedoms [Charter] issue has been raised. Accordingly, an analysis of whether the test for an equitable injunction on the test, as set out in *RJR--MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 is not required.
- [35] Nonetheless, if a Charter issue had been raised I would have found that the requirements for an equitable injunction have been met.
- [36] First, the City has demonstrated a fair question to be tried, being whether the respondents' activities constitute a breach of the Parks Bylaw.
- [37] Second, the City is suffering irreparable harm through the physical damage occurring in environmentally and culturally sensitive areas. If further damage occurs it may not be remediable. The risk of fire damage is of particular concern.
- [38] Finally, the balance of convenience favours the granting of an equitable injunction. The public interest in protecting the environmentally and culturally sensitive areas of park from further damage and having unimpeded access to the other prohibited areas including playing fields and pathways through enforcement of the Park Bylaw outweighs the impact to those camping in the prohibited areas by having to move to the other locations within the Park designated by the City for such use.
- [39] There is no evidence on which I can conclude that moving from the prohibited campsites to areas within which 24/7 camping has been authorized will have a significant impact on campers. As submitted by the City the area which has designated for camping is large, close to restroom facilities and public roadways making delivery of services easier. In addition, the City has agreed to help campers move their possessions from the prohibited areas.

Disposition

- [40] For the reasons set out above, I grant the City's application for a statutory injunction pursuant to s. 274 of the Community Charter. "Mayer J." Appendix "A"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/11/2020BCSC1173.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/victoria-city-v-smith-2020-bcsc-1173>

Prepared on 27 October 2026 · Esheria