

CANADA / JUDGMENT

Victoria (City) v. Smith

2020 BCSC 2201

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Supreme Court of British Columbia

DECIDED

6 November 2020

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2020 BCSC 2201 Victoria (City) v. Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Victoria (City) v. Smith,

2020 BCSC 2201

Date: 20201106

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

Corrected Judgment: The front page of the judgment was corrected March 24, 2021 to replace "Counsel for the Attendee" with "Counsel for the Applicant"

and add C. Moffatt as Counsel for the Petitioner

Before: The Honourable Mr. Justice G. Gaul

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

T. Zworski

C. Moffatt

by teleconference

Counsel for the Respondent Smith:

C. Boies Parker, Q.C.

C. Kanigan, Articled Student

by teleconference

Counsel for the Applicant,

Friends of Beacon Hill Park:

L.R. LeBlanc

by teleconference

Place and Date of Hearing:

Victoria, B.C.

October 19, 20, 23, 29, 2020

Place and Date of Judgment:

Victoria, B.C.

November 6, 2020

- [1] THE COURT: Homelessness is a sad and chronic reality in our community, our province, and our nation. This troubling situation has been exponentially exacerbated by the coronavirus pandemic that we are currently experiencing.
- [2] The City of Victoria, nicknamed "The Garden City," is blessed with a wide variety of parks for all to use. The largest and perhaps the most popular park in Victoria is Beacon Hill Park. The City owns the park pursuant to an 1882 Crown Grant (the "Crown Grant"). This grant stipulates that the City holds the park in trust "for the use, recreation, and enjoyment of the public under the provisions of the Public Parks Act, 1876" (the "Trust").
- [3] In *Victoria (City) v. Adams*, 2008 BCSC 1363, reversed in part 2009 BCCA 563, the court struck down specific provisions of the City bylaw that, amongst other things, prohibited sheltering in public parks. In doing so, the court recognized the need and right of the homeless to erect temporary shelters in public parks where there are no other options available. In light of this

decision, the City amended its bylaw to temporarily permit sheltering in parks between 7:00 p.m. and 7:00 a.m. The amended Parks Regulation Bylaw continued to prohibit sheltering in specific identified parks and/or certain areas of parks.

- [4] On 18 March of this year, the Provincial Government declared a state of emergency on account of the coronavirus pandemic. In response to this declaration and in an effort to address the plight of the homeless, the City suspended enforcement of the provisions of the Parks Regulation Bylaw that prohibited daytime sheltering in City parks.
- [5] The number of people sheltering in City parks, including Beacon Hill Park, has grown noticeably since the spring of this year. In light of the emergent situation, the City began these proceedings by filing a petition on 10 July 2020. At the same time, the City filed an application seeking an interim injunction prohibiting the respondents from sheltering in the environmentally and culturally sensitive areas of Beacon Hill Park and an order requiring anyone doing so to remove their personal belongings and to vacate these areas.
- [6] The Friends of Beacon Hill Park is a not-for-profit society that was incorporated in July of 1989 (the "FBHP"). The FBHP's constitution indicates that its purpose is, amongst other things:

To promote and protect the natural and cultural history of Beacon Hill Park with the following:

- a) To preserve and maintain Beacon Hill Park in the City of Victoria in the Province of British Columbia in accordance with the terms of the Trust agreement made between the Province of British Columbia and the City of Victoria dated February 20th, 1882.
- e) To oppose all establishments and activities that are in the interests of profit, irrespective of where said profit is realized, or that are in the interests of utility that is not needful to nor incidental to the physical maintenance of Beacon Hill Park, or that are in any way in contravention of the intent or the objectives of the Trust or any of its terms, or of the rulings of Begbie, J. (1883) and Wilson, J. (1998).
- [7] The City's interim injunction application came before Mr. Justice Mayer on 27 July of this year. At the outset of the hearing, counsel for the FBHP addressed the court as follows:

THE COURT: All right. So, Ms. LeBlanc, in what -- in what capacity do you appear before me today? Are you seeking to apply to intervene?

MS. LEBLANC: Not at this application. I have discussed that with my friend and the instructions are to apply for intervener status with respect to the petition, but not with respect to this application --

THE COURT: Ah --

MS. LEBLANC: -- so as not to take court time. The society takes no position with respect to the application. In fact, consents to the relief sought by the city. The society will be commencing its own petition and seeking intervener status at a later date. I am here merely to advise the court of two decisions, but I'll let my friend speak first and then I wish to have two minutes of court time to address the two court - two prior court decisions with respect to the park.

[8] At a later point in the proceeding Ms. LeBlanc added:

My issue was that if the court was not aware that these lands were held pursuant to a trust and there be a description of the lands with respect to any reasons for judgment coming out of today that the court should just be aware of those two prior decisions. I'm not here to make any submissions with respect to those decisions, nor advance my clients' argument with respect to any subsequent proceedings.

[9] While Justice Mayer was made aware of the terms of the Crown Grant and the Trust relating to Beacon Hill Park, the two decisions that Ms. LeBlanc referenced were not provided to the court. In both of those decisions, the court had examined the Crown Grant and the terms of the Trust (See: *Anderson v. Victoria (City)* (1884), 1 B.C.R. (Pt. 2) 107 (S.C.); and *City of Victoria v. Capital Region Festival Society et al.* (1998), 62 B.C.L.R. (3d) 143.)

[10] On 28 July 2020, Justice Mayer granted the interim injunction sought by the City. His written reasons indexed at 2020 BCSC 1173 were delivered on 12 August 2020. In those reasons, Justice Mayer observed:

[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.

[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

[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.

[11] Justice Mayer was satisfied that the criteria for an interim statutory injunction had been met and, consequently, he granted the order sought. I will add parenthetically that I am satisfied he was aware of the Crown Grant and the Trust. Justice Mayer concluded that the terms of the Trust were not relevant to the questions before him.

[12] On 14 September 2020, the City amended its Parks Regulations Bylaw so as to allow a 24-hour sheltering in designated areas, including certain identified parks. Beacon Hill Park is not one of those parks. This provision of the bylaw will be automatically rescinded 30 days after the expiry or cancellation of the last extension of the provincial state of emergency.

[13] On 23 September 2020, the City filed an amended petition removing the reference of the petition being brought by the City in its capacity as the owner of Beacon Hill Park.

[14] That brings us to the present hearing.

Nature of the Application

[15] In its notice of application filed 15 September 2020, the FBHP sought the following relief:

- a) An order that it be added as a respondent to these proceedings;
- b) An order granting it leave to bring an application returnable at the hearing of the within petition or otherwise to:
 - i. Seek declarations and orders enforcing or otherwise construing the Beacon Hill Park trust;
 - ii. Set aside Mr. Justice Mayer's order of 28 July 2020;
 - iii. Seek costs of the respondents participating in the proceeding including special costs as public interest litigants; and
 - iv. For directions as to the hearing of the petition and the respondents' application if permitted. It also seeks an order granting it public interest standing in these proceedings and costs of the application.

[16] During his submissions, counsel for the FBHP explained that only the order adding the FBHP as a respondent to these proceedings and an order for costs of the application were being sought. The second and third areas of relief were not being sought, though counsel explained that I should consider the second area when assessing the nature of the issues before the Court and the need to have the FBHP as a party to these proceedings.

Position of the FBHP

[17] The FBHP submits that it should be added as a party to this proceeding on two grounds. First, it maintains its participation is necessary to ensure that all matters in the proceeding may be effectually adjudicated on; and second, it says a question or issue relating to and connected with the relief claimed in the proceeding exists between the petitioner and the applicant.

[18] The FBHP says that as the present litigation relates directly to the occupation and use of Beacon Hill Park, the terms of the Trust must be considered when deciding whether to grant the City the relief it seeks in its amended petition.

- [19] As counsel for the FBHP explained, the FBHP ought to be added as a respondent in these proceedings to ensure that, in respect of the matters raised by the City in its role as owner and trustee of the park, there is appropriate representation of the beneficiaries of the Trust. In other words, the FBHP submits this will ensure appropriate representation of the general public. With this in mind, the FBHP contends it is the natural choice to be the representative voice of those who use and enjoy all of Beacon Hill Park.
- [20] Moreover, the FBHP contends that there is a substantial issue between the City and public users the park relating to the City's obligations as trustee. The FBHP further submits this issue is directly related to the relief being sought in the petition. The FBHP maintains that its participation as a party to the proceedings will ensure that all matters that ought to be adjudicated, including the proper construction of the terms of the Trust, are addressed effectively and efficiently.

Position of the City

- [21] The City recognizes the role that the FBHP has played over the years in addressing issues relating to the park. However, it opposes adding the FBHP as a respondent to these proceedings. It does so because the proceedings relate to a statutorily-based injunction and the enforcement of City bylaws and not the interpretation of the Trust. In other words, the City maintains the FBHP's participation as a party to these proceedings is not necessary to ensure all matters in dispute are effectively adjudicated.
- [22] The City acknowledges the arguments advanced by the FBHP are based upon its perception of the Trust. However, the City maintains those arguments are not germane to the principal issue of whether the court should or should not grant a statutory injunction relating to Beacon Hill Park. Allowing the proposed arguments of the FBHP relating to the Trust to be incorporated into these proceedings will, in the words of counsel for the City, hijack the proceedings and significantly expand the scope of the litigation.
- [23] In the City's view, if the FBHP wishes to have the terms of the Trust judicially considered and interpreted, then it is for them to commence their own separate proceeding for that purpose.

Position of the Respondent Smith

- [24] The respondent, Mr. Smith, adopts the City's positions on this application and, in particular, agrees with the City that these proceedings relate to bylaw enforcement and not, as claimed by the FBHP, land use. Specifically, Mr. Smith maintains that there is no need to have the terms of the Trust interpreted in this case because they are irrelevant to the subject matter before the Court, that is, whether a statutory injunction enforcing a bylaw should be granted.

The Law

[25] Rule 6-2(7) of the Supreme Court Civil Rules governs the addition of parties to existing litigation. The relevant portions of the Rule read as follows:

- (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10)
 - (b) order that a person be added or substituted as a party if
 - (i) that person ought to have been joined as a party, or
 - (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
 - (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[26] The decision to add a party under Rule 6-2(7) is a discretionary one that should be exercised generously so as to allow the effective determination of the issues in dispute in a timely way without inconvenience to the parties (See: *Delta Sunshine Taxi (1972) Ltd. v. Vancouver (City)*, 2014 BCSC 2100).

[27] In *Alexis v. Duncan*, 2015 BCCA 135, Mr. Justice Goepel explained the purpose of Rule 6-2(7) as follows:

[14] Rule 6-2(7) governs the addition and substitution of parties. A court may add a party if one of three circumstances exist. Two of the circumstances are set out in R. 6-2(7)(b). Rule 6-2(7)(c) sets out the third circumstance.

[15] Rule 6-2(7)(b) is concerned with remedying defects in the proceedings as they stood prior to the application to add a party. It has a narrow application. Under R. 6-2(7)(b) the court must decide if the person ought to have been joined as a party or the person's participation in the proceeding is necessary to ensure that all matters may be effectually adjudicated: see *Enterprise Realty Ltd. v. Barnes Lake Cattle Co. Ltd.* (1979), 13 B.C.L.R. 293 (C.A.). The discretion to add a party under R. 6-2(7)(b) exists if one of the conditions in subsections (i) and (ii) is established: *Enterprise Realty Ltd.* at 296. However, "if neither of the prerequisite conditions is established then there is no discretion in the chambers Judge and he must refuse the application": *Enterprise Realty Ltd.* at 296.

- [17] Under R. 6-2(7)(c) the court can order a person be added as a party if there exists, between the person sought to be added and any party to the proceeding, "a question or issue relating to or connected with the relief claimed in the proceeding or the subject matter of the proceeding" and, "if in the opinion of the court, it would be just and convenient to do so" (emphasis added). The decision as to whether to add a party under R. 6-2(7)(c) is discretionary. It is up to the presiding judge to determine whether or not joinder of the new defendant is just and convenient in any particular case: see e.g., *Letvad v. Fenwick*, 2000 BCCA 630. It cannot be said with any assurance that a claim for professional negligence will automatically be joined: see *Zymtech Development Inc. v. Sport Central Enterprises Ltd. et al.*, 2004 BCSC 309. [Emphasis in original]

Discussion

Is the FBHP's participation necessary to ensure that all matters in the proceeding may be effectually adjudicated on?

- [28] The FBHP contends that the City's petition addresses the permitted use of Beacon Hill Park and that, in obtaining the interim injunction from Justice Mayer, the City has materially altered the manner in which the park can be used. This, says the FBHP, requires consideration of the terms by which the City, as trustee of the park, is supposed to manage it.
- [29] The FBHP argues the terms of the Trust govern the permitted use of the park and there is presently no other party to this proceeding who will raise the rights of the public as beneficiaries of the Trust, the obligations of the City as trustee, or the jurisprudence that has already judicially considered the terms of the Trust (See: *Anderson, supra.* and *Capital Region Festival Society, supra.*)
- [30] The FBHP says the City's claim that the terms of the Trust are irrelevant to these proceedings went unchallenged before Justice Mayer and will remain so unless they are granted party status in these proceedings. It also argues that compelling it or some other person or organization to start a separate legal proceeding to have the terms of the Trust considered would be a wasteful duplication of effort and potentially lead to an order that runs contrary to, or conflicts with, Justice Mayer's order thus risking the embarrassment of the court. The court in *Kitimat (District) v. Alcan Inc.*, 2016 BCCA 526 acknowledged that these factors militate in favour of granting an order adding the party to the litigation.
- [31] I am not persuaded that FBHP's participation in the present litigation is necessary. The matter of these proceedings is the City's bylaw relating to the regulation of parks and its ability to enforce that bylaw. In my opinion, the existence of the Crown Grant and the terms of the Trust are not relevant to whether the City is entitled to a statutory injunction enforcing the bylaw or bylaws in question.

[32] Moreover, I am not persuaded that there is a real risk that an order granted in the proceeding, where the court is asked to interpret or construe and potentially enforce the terms of the Trust, could conflict with Justice Mayer's order and thus lead to judicial embarrassment. In my opinion, Justice Mayer's order creates no positive or enforceable rights for anyone wishing to shelter in parks. It simply delineates where sheltering in Beacon Hill Park is prohibited. If, in another proceeding, a court concludes that the terms of the Trust mean that the City cannot permit any sheltering anywhere in the park, then such an order, in my opinion, would not clash or contradict Justice Mayer's order. As I say, the FBHP's worry about conflicting decisions and judicial embarrassment is, in my view, unfounded.

Is there a question or issue between the FBHP and the City relating to or connected with any relief claimed in the proceeding or the subject matter of the proceeding?

[33] The FBHP argue that the City has created a situation where there is a genuine question to be adjudicated regarding the scope of Beacon Hill Park's use in light of the Trust terms. The FBHP submits that adding it as a party to these proceedings will allow for this question to be determined fairly and efficiently.

[34] I am not persuaded that that is so.

[35] In my opinion, counsel for the City is correct that the subject matter of the petition is the City's bylaw relating to the regulation of parks. It is not the Crown Grant or the Trust. I agree with the City that the relief sought in the petition is a statutory injunction sought to enforce a bylaw and that the terms of the Trust agreement in question have no bearing on the enforceability of the bylaw.

[36] Additionally, I accept the City's submission that the relief sought in its petition does not rely upon the terms in the Trust nor does it require the court to interpret any of those terms. Although the City brought its application for the interim injunction as both the owner of the park and as the public authority in power to regulate the use of parks, Justice Mayer found the Trust conditions were not relevant to the application before him. In any event, following the decision of Justice Mayer, the City amended its petition to remove the reference to the City as owner of the park. This, in my view, made sense because the injunction was being sought pursuant to s. 274 of the Community Charter, S.B.C. 2003, c. 26, and the only entity that can obtain such a statutory remedy is a municipality. In other words, the fact that the City is the owner of the park was, and continues to be irrelevant, to the City seeking and obtaining a statutory injunction.

[37] I do not accept the FBHP's submission that Mr. Justice Mayer's order effectively rezones Beacon Hill Park. While the order refers to permitted uses and the map of the park that is attached to the order as Appendix A has an area that is noted as temporary sheltering permitted, I do not read the order as granting the respondents or anyone with a positive and enforceable right to shelter in the park. That was not the purpose of the relief sought in the petition, nor was it the relief sought on the application before Justice Mayer that resulted in

the interim injunction. The injunction tells people where they cannot shelter. It does not, in my view, positively say that there is a right to shelter elsewhere in the park.

- [38] In my view, this case is distinct from the Kitimat case. There, the court found Alcan was entitled to be added as a party because it would be directly impacted by the results of the litigation. I say, respectfully, that is not the situation in this case. The City seeks a statutory injunction prohibiting sheltering in certain areas of Beacon Hill Park. The interim injunction that Justice Mayer granted in July, and any permanent injunction that may result from the City's petition, will not directly impact any of the rights or interests of the FBHP or the public in general.
- [39] This case is also not like Delta Sunshine Taxi. In that case, the court was satisfied that the applicant had shown that if they did not become part of the litigation, the matters in dispute could not be effectively adjudicated. In ordering that the applicant be added as a party to the proceeding, Madam Justice Dillon concluded:
- [18] It is difficult to appreciate how this matter could be completely understood without the perspective of the Vancouver taxi companies.
- [40] That, I say respectfully, is not the situation in the present case. The case presently before the Court relates to the City's bylaw that regulates sheltering in parks and, in particular, Beacon Hill Park. The question that the Court will need to address when hearing the petition is whether the statutory injunction the City seeks ought to be granted. I am not persuaded that the FBHP's perspective on this question is necessary in order to properly address the issues and answer the question, nor am I satisfied that there is a question or issue between the FBHP and the City that is connected to the subject matter of the petition or the relief it seeks.
- [41] Finally, I am not convinced that it would be just and convenient to add the FBHP and the issues it wishes to raise to the current proceedings. As a matter of fact, I find it would be inefficient and unfair to the City and the respondents to have these additional issues added to the current proceedings especially since they are directly focused on the enforcement of a City bylaw.

Decision

- [42] In their written submissions, counsel for the FBHP notes:

Given two previous applications in respect of the public's right as "beneficiaries" under the Trust have been adjudicated on, it cannot be said that this is a matter that should not be adjudicated. It leaves only the question of how to do so effectively, by whom, and in what proceeding.

- [43] I agree with counsel for the FBHP that this is an important question. Who can or should take the lead on having the terms of the Trust judicially interpreted is a question that I do not need to answer in these proceedings. It seems to me that the FBHP is a serious and legitimate contender for that role. However, it may be that some other person or entity is more suited to the task. As such, I will say no more about that issue.
- [44] As for how to adjudicate the terms of the Trust and in what proceeding that should occur, I am not convinced that the FBHP's concerns should be piggybacked on the City's petition seeking to enforce its bylaw. To put it in a different or more definitive light, I find the present proceedings are not the appropriate vehicle to have the concerns and complaints of the FBHP considered by the court. In doing so, I am not suggesting that the issues involved in interpreting the Trust are unimportant. I am simply saying that, in my view, they are not relevant to whether the City ought to be granted a statutory injunction prohibiting sheltering in parks. While the FBHP may very well have a legitimate complaint with respect to the manner in which the City has acted as trustee of the park, I am not convinced it ought to be added as party to these particular proceedings. In my opinion, the FBHP has not met any of the thresholds articulated in Rule 6-2(7) of the Rules of Court.
- [45] In summary, I am not satisfied that it would be just or efficient to add the FBHP and the issues it wishes to raise to the present proceedings. On the contrary, I am of the firm belief that to do so would unnecessarily complicate the matter to a significant degree. If the FBHP wishes to have the terms of the Trust relating to Beacon Hill Park interpreted and enforced, then in my respectful view, it will have to commence a separate legal proceeding.

Order

- [46] For all of the foregoing reasons, the FBHP's application is dismissed.
- [47] Finally, unless the parties wish to address the issues of costs, in my view, it is appropriate that each party bear their own costs of the application.

"G.R.J. Gaul, J."

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