IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***British Columbia (Attorney General) v. Sager et al,*** 2004 BCSC 720

Date: 20040528
Docket: S40511
Registry: Nanaimo

Between:

Her Majesty the Queen in Right of the Province of British Columbia and The Attorney General of the Province of British Columbia

Plaintiffs

And:

Maureen Rose Sager, Nancy Ellen Goldsberry, Susanna Winifred Frazer, Richard Boyce, John Doe 2 through John Doe 50 and Jane Doe 4 through Jane Doe 50

Defendants

Before: The Honourable Madam Justice Quijano

Reasons for Judgment

Counsel for the Plaintiffs:	G. J. Underwood and K. W. Inaya
Counsel for the Defendant Maureen Rose Sager:	A. C. Ward and L. Tessaro
The remaining Defendants Appearing in Person	
Dates and Place of Trial/Hearing:	March 12 and 18, 2004 Nanaimo, B.C.

NARRATIVE

[1] In or about December 2000 the provincial government acquired a parcel of land located adjacent to Cathedral Grove Park, upon which it intended to construct a parking lot for use by visitors to the park (the “Land”).

[2] The government then entered into a contract with a firm to construct the parking lot, with construction to commence in early February 2004. As a necessary adjunct of the construction several old growth trees would have to be removed.

[3] Some local citizens opposed the construction of the parking lot and, by February 12, 2004, a number of individuals participated in daily protests at the

entrance to the Land. In part they protested the loss of old growth trees, but they were also concerned about what they perceived as a lack of public input into the decision.

[4] The presence of the protesters meant that the contractor could not begin the clearing required due to Workers' Compensation Board regulations which require that no trees may be felled if there are persons within certain defined distances.

[5] On February 24, 2004, the Attorney General commenced this action alleging trespass and seeking damages against 50 Jane Does and 50 John Does and, at the same time, brought this application in which he seeks a restraining order preventing any persons with notice of the order from entering on the Land.

[6] On February 25, 2004, a Parks employee attended at the entrance to the subject Crown Land and served some, but not all, of the people there with the pleadings, including notice of this application. The same employee returned a day or two later and handed out copies of the pleadings to whoever was at the site at that time.

[7] Up to this time the Land had not been posted in accordance with the provisions of the ***Land Act***, R.S.B.C. 1996, c. 245 (the "***Land Act***"), nor had any other barrier been created which could have been construed as notice to the public that access to the Land was restricted.

[8] The application for the interlocutory injunction came on for hearing March 12, 2004. By that time the Land had still not been posted. Also by that time there had been a preliminary determination of the names of 5 persons who maintained that they were properly defendants in the action. Those are the named defendants in the style of proceeding.

[9] The hearing did not complete the first day and the remainder of the application was heard the following Thursday, at which time the Land still had not been posted, although some of the trees had been flagged with orange tape.

[10] At some point in time relevant to this application someone built a platform up in one of the trees on the subject land, and someone put a lock on the gate across the access road to the site of the proposed construction.

[11] The plaintiff alleges that a number of offences have been committed by the defendants on Crown land at or near the site of the proposed construction. Section 60 of the ***Land Act*** sets out various offences which may occur on Crown land and reads, in part:

> **60** A person commits an offence if the person does any of the following:
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> (a) occupies or possesses Crown land without lawful authority;
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> (b) uses Crown land without lawful authority;
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> ...
>
> (e) constructs on Crown land a building, structure, enclosure or other works, or does or performs any dredging, excavation or filling, without the authorization of the minister;

[12] The ***Land Act*** contains a statutory penalty for trespass where notice is given. Under s. 59(1), if a person does anything that is an offence specified in s. 60 the Minister may, on notice to that person, require the person to cease the unauthorized occupation of the Crown land. Notice may be given by posting it on the Crown land if the person is unknown. The maximum penalty for non-compliance with the notice is $1,000, and may be imposed multiple times. In all cases, a public officer can initiate legal action against a trespasser, and under the ***Land Act*** penalties include fines of up to $20,000 and jail terms of up to six months. The plaintiff has not provided notice in the form set out in the ***Land Act*** and has not utilized the enforcement provisions in the ***Land Act***.

[13] The plaintiff alleges that the provisions prohibiting trespass on Crown land found in the ***Land Act*** have been breached by the building of a structure and the placing of a lock on the gates to the access road to the proposed parking lot site. In addition, the plaintiff argues that by asking some people to leave the area, or alternatively, by commencing these proceedings, it has served sufficient

notice on the defendants as to the limits placed on access to the Land. The plaintiff asserts that because there are numerous and unidentified protesters frequently impeding the construction of the parking lot on the Land, an injunction ought to be granted "as of right". The plaintiff argues that the public interest in the construction of the parking lot must be protected and this is the most effective way to protect it: by enjoining, in advance, all those who might trespass on the property and thereby interfere with the government's right to build the parking lot.

[14] The defendants state that the ***Land Act*** provides a nearly complete code governing the management of Crown lands and that the plaintiff must first avail himself of the remedies under the Act before applying for injunctive relief.

ISSUE

[15] What is the extent of the entitlement of an Attorney General to injunctive relief at common law where alternative statutory remedies are available?

ANALYSIS

[16] It is clear that the Attorney General, as the representative of the public, has the right to seek redress in the courts whenever a public right is infringed or threatened with infringement. The question raised by this application is whether, in the circumstances of this case, the equitable jurisdiction of this court ought to be invoked to restrict the rights of members of the public to enter on Crown land through the use of a Jane/John Doe injunction where the Attorney General has chosen not to utilize the offence provisions of the ***Land Act***.

[17] Historically, the right of the Attorney General to sue at common law to enforce public rights has been exercised rarely and only on facts clearly warranting granting this powerful remedy. For example, in the early English case of ***Attorney-General v. Harris***, [1961] 1 Q.B. 74 (C.A.), injunctions were granted restraining a husband and wife who had been convicted more than one hundred times in three years for using a flower and fruit stall outside a cemetery which obstructed a pathway. In the Court of Appeal, Sellers L.J. stated:

... It cannot, in my opinion, be anything other than a public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law. The matter becomes no more favourable when it is shown that by so defying the law the offender is reaping an advantage over his competitors who are complying with it.

[18] It is only in more recent history that injunctions have been used to restrain public protest against unnamed and unknown defendants. The practice of issuing Jane/John Doe injunctions was validated by the Supreme Court of Canada in ***MacMillan Bloedel Ltd. v. Simpson***, [1996] 2 S.C.R. 1048. McLachlin J. (as she then was) found that the criminal law remedy offered little assistance to MacMillan Bloedel in restraining protestors in the summer of 1993 as the Attorney General had a specific policy not to lay criminal charges against environmental groups engaging in civil disobedience, but to leave it to affected parties to seek injunctive relief.

[19] McLachlin J. stated in ***Simpson*** that every citizen would endorse the idea that the Attorney General as the chief law enforcement officer in a province has the responsibility to see that the criminal law is enforced, but also went on to say at page 215:

> ... Yet, as this case demonstrates, to state the obligation of the Attorney General is not to ensure that it will be discharged in such a way as to provide the required protection to citizens injured by the conduct of others. It is to fill this gap that the equitable remedy of injunctions -- injunctions which not only the parties but also all others must respect on peril of being found in contempt of court -- has developed.

[20] This statement was interpreted by Williamson J. in ***Alliford Bay Logging (Nanaimo) Ltd. v. Mychajlowycz,*** 2001 BCSC 636 in the following manner:

[14] I read this as suggesting that if there is a gap, that is, if the Attorney General does not ensure that the obligation to uphold the law is fulfilled, assuming other requirements are met the injunction should issue. But I take it as well that the converse would be true. If there were no gap presumably the injunction would be unnecessary and would not issue.

[21] The ability of the Attorney General to create such a gap as a matter of policy was cast into doubt in ***British Columbia (Attorney General) v. Perry Ridge Waters Users Assn.***, [1997] B.C.J. No. 2348 (S.C.)(QL) where McEwan J. stated, in *obiter*, at paragraph 9:

> I summarize a great deal of case law in saying that there appears to be considerable authority for the proposition that the Attorney General's resort to the courts for injunctive relief ought to be a final step and not merely a convenient alternative to the application of criminal or other available sanctions.

[22] A number of cases follow in the footsteps of ***Perry Ridge*** and express concern regarding the use of an injunction as a first choice remedy. These cases are well summarized in ***Alliford Bay Logging*** by Williamson J. starting at paragraph 4:

> [4] Mr. Ward, for one of the defendants, in a compelling submission argues that it is wrong to resort to court injunctions in these circumstances when the simple course is for the police to act to protect the plaintiff's legal rights by advising protesters that they will be charged pursuant to the ***Criminal Code*** if they do not cease to impede the way, and by arresting the protesters if they do not accede to that warning.
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> [5] The police in this province, I understand with the knowledge of the Attorney General, do not adopt that course. This is evident from a review of three recent decisions of this court. I am going to refer to those decisions. The first is a decision of Mr. Justice Vickers in ***International Forest Products Limited v. Kern***, 2000 BCSC 888, a decision handed down on June 6, 2000, [2000] B.C.J. No. 1129. That learned judge dealt with the issue of whether the police should be enforcing the law. He said in paragraph 29:
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> In the circumstances that were then ongoing the court concluded that a bubble zone of 500 metres was required in order to preserve peace and order. All three orders are also a result of a political decision by law enforcement officials that a criminal law will not be enforced in this type of dispute, rather it is considered to be a dispute that need only be responded to if the court grants an injunction. Thus it is the order of the court that becomes the subject of criticism and not the decision of law enforcement officials. In the discharge of its duty the court is drawn into a controversy that could have been resolved by more traditional and less costly law enforcement strategies.
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> [6] The second decision is that of Mr. Justice McEwan in ***Slocan Forest Products Limited v. Doe***, a decision dated July 21, 2000, [2000] B.C.J. No. 1592 [which stated]:
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> In sum, having had the benefit of explanations offered by the Attorney General and the police for the policies now in place, I am simply not convinced that the rule of law is enhanced by the present process which (a) forces innocent bystanders to seek their own protection by manufacturing ill-fitting civil suits; (b) places the court in a position where it must fashion some remedy at the expense of repeatedly putting its authority in issue; and (c) arguably deprives demonstrators of due process.
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> [7] The third decision handed down only about a week later which deals with this issue is ***International Forest Products Limited v. Kern***, Mr. Justice Pitfield, 2000 BCSC 1141, [2000] B.C.J. No. 1533, so all of these decisions are just this past summer. Mr. Justice Pitfield, in a strongly worded judgment, was critical of the policies in place that the police do not enforce the law in these particular sorts of circumstances. Starting at paragraph 57 he said the following:

Whatever decision has been made the result is regrettable. The court is placed in the unenviable position of being asked to respond in order to preserve the rule of law. It is the duty of the Attorney General to ensure respect for and the benefit of laws enacted by the legislature. In this case the law in question is the right to harvest timber from Crown land. There appear to be adequate provisions in the ***Criminal Code*** to permit the Attorney General to ensure the required protection. If the Attorney General doubts the adequacy of the criminal law then the legislature should search for other means to ensure that rights it has lawfully created are not abrogated by actions taken by members of the public. The responsibility to devise a means of ensuring that protection should not be delegated to the courts.

[23] Also of significance in the ***Alliford Bay*** decision is Williamson J.'s analysis of the *obiter* comments of Esson J.A. of the British Columbia Court of Appeal in ***International Forest Products Ltd. v. Kern*** (2000), 144 B.C.A.C. 141, 2000 BCCA 500, which provided some support for the government policy of seeking injunctions to restrain public protest where an alternate criminal law remedy was available. Williamson J. determined that the origin of the court's concern regarding this sort of injunctive relief was valid and based upon earlier case law including ***Everywoman's Health Centre v. Bridges*** (1990), 54 B.C.L.R. (2d) 273 (C.A.) in which Southin J.A. said at page 285:

There is today the grave question of whether public order should be maintained by the granting of an injunction which often leads thereafter to an application to commit for contempt or should be maintained by the Attorney General insisting that the police who are under his control do their duty by enforcing the relevant provisions of the ***Criminal Code***.

[24] Subsequent to ***Alliford Bay***, an application for an injunction as a result of government and police policy was again brought before McEwan J. in ***Central Kootenay (Regional District) v. Jane Doe*** (2003), 228 D.L.R. (4th) 252 (B.C.S.C.). McEwan J. refused to grant the interlocutory injunction restraining the illegal occupation of a certain residence owned by the regional district. He held that the order sought was not a civil claim at all but a form of ad hoc criminal law which had the effect of relieving the Attorney General and the police of investigative and prosecutorial functions in matters they deem politically, or otherwise, sensitive, and handing them over to the Court, the effect being to translate "what are apparently offences against public order ... into attacks on the court's authority."

[25] It is clear that the courts in British Columbia have become increasingly reluctant to grant injunctions to individuals where an alternate criminal or statutory remedy is available and has not proven ineffective. The defendants in this case assert that the Attorney General, in a similar fashion to the cases set out above, is attempting to ignore the statute and subvert the courts processes in order to reach an expedient result.

[26] The plaintiffs say that because the Attorney General is the guardian of the public interest, the test to be applied to a determination as to whether to grant a Jane Doe/John Doe injunction is different than that to be applied to a private plaintiff. In support of this position the plaintiffs point out that courts have issued Jane Doe/John Doe injunctions to restrain persistent breaches of statutory provisions enacted for the public benefit where the statutory remedies have not been fully exhausted or proven inadequate.

[27] In particular, the plaintiffs rely on ***Attorney-General for Ontario v. Grabarchuk*** (1976), 67 D.L.R. (3d) 31 (C.A.) in which the Court granted the Attorney General an interim injunction enjoining the defendants from carrying on a business without a licence contrary to the ***Public Commercial Vehicles Act***. At paragraph 36, Reid J. stated:

There are numerous precedents in England and Australia for the proposition that the Attorney-General, as the protector of public rights and the public interest, may obtain an injunction where the law as contained in a public statute is being flouted. This is so notwithstanding that, (a) the statute itself may contain penalties of a different kind, and (b) all possible alternative remedies have not been exhausted. The position of the Attorney-General as custodian of the public interest is the same whether one speaks of England, Australia or Canada.

[28] Reid J. also suggested that the usual criteria used by the court in exercising its discretion to grant an injunction, namely irreparable harm and the impossibility of adequate compensation and damages, should not be applied in such cases. It must be noted that in ***Grabarchuk*** the statute provided an ineffective remedy as the defendants had been convicted of offences under the ***Public Commercial Vehicles Act*** on seven prior occasions.

[29] The quote from ***Grabarchuk*** set out above was recently cited with approval in ***Vancouver Board of Parks and Recreation v. Mickelson*** (2003), 38 C.P.C. (5th) 110. In ***Mickelson***, the Parks Board was granted an interlocutory mandatory injunction requiring the removal of a tent city from a city park and setting out enforcement procedures, despite the fact that alternative statutory remedies were available to the Parks Board. ***Mickelson*** may be distinguished from the present case by the fact that the ***Vancouver Charter*** specifically authorized the Parks Board to apply for an injunction "where an offence is committed against any by-law passed in the exercise of the powers of ... the Board of Parks and Recreation". Pitfield J. also concluded that an injunction was the only effective way to enforce the city bylaws on the facts of the case and found that it was clear on the evidence that the defendants, including persons unknown, were deliberately flouting the law.

[30] The defendants acknowledge that the fact that the Attorney General represents the public interest may be significant, say that it is not determinative and injunctive relief is not available as of right in such cases. In ***Attorney General for Ontario v. Ontario Teachers' Federation et al*** (1997), 36 O.R.(3d) 367 (Gen. Div.) the Attorney General sought a Jane Doe/John Doe injunction to prohibit teachers from striking. The application was refused. The court pointed out that a negative consequence of granting the injunction was that the very statute that the Attorney General asserted had been violated would be ignored, since the statute provided a clear enforcement mechanism and robust enforcement provisions. The court held that the Attorney General could not ignore the remedy and penalty provisions of that Act. In addition, MacPherson J. found that the courts in Ontario have consistently held that public rights injunctions brought by the Attorney General to restrain an alleged statutory breach will only be granted in exceptional cases where:

(a) there is repeated flouting of the law following determinations of illegality by the body entrusted with making those findings, or there is a serious and established risk to public health and safety;

(b) the court is satisfied that the alleged breach of law is clear; and,

(c) the enforcement provisions of the statute in question have proven ineffective.

[31] Although ***Ontario Teachers' Federation*** is not binding upon this court, I find that the test set out therein is relevant here and reflects a reasonable limit on the availability of such injunctive relief at common law.

[32] Without question the public interest in obtaining compliance with the law is high, but there is a corresponding public interest in ensuring that individuals are not denied due process under existing legislation solely on the grounds that it would be expedient or convenient to do so. As has been pointed out in a number of recent decisions of the British Columbia Supreme Court, an injunction is a powerful remedy which may transform a dispute between a citizen and the government into a dispute between the citizen and the court and it is not to be used as a first choice remedy except in extraordinary circumstances.

[33] In the present case, the ***Land Act*** sets out the rights and responsibilities of the Crown in the administration of public land. The procedures set out in s. 59 of the Act are intended to ensure that adequate notice is given to the public of limits placed by the Crown on access to such lands. The remedies and procedures provided in the relevant sections of the Act are intended to provide due process for those accused of trespass on Crown lands.

[34] The defendants' affidavit materials indicate that they believed they had a right to be on the Land at the times in question. This belief is consistent with the lack of clear notice by way of boundary markings or signs limiting access to

the proposed construction site which the government is obliged to give pursuant to the ***Land Act*** in order to establish a situation of trespass.

[35] While the construction of a platform in one of the trees on the subject land and the placing of a lock on the gate across the access road to the site of the proposed construction are evidence of trespasses under the ***Land Act***, these are single offences and do not demonstrate that the law has been "flouted" in a manner which would support the imposition of the Jane/John Doe injunction sought by the plaintiff.

[36] The fundamental question in the test for a grant of interlocutory injunctive relief in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case: ***Attorney General v. Wale*** (1986), 9 B.C.L.R. (2d) 333 (C.A.). In the absence of extenuating circumstances, to issue a Jane Doe/John Doe injunction and bypass the provisions of the ***Land Act*** would deprive those individuals, who might otherwise be accused of offences under the Act, of the due process to which they are entitled in relation to such an alleged offence.

[37] I am satisfied, therefore, that it would be neither just nor equitable to allow the application. The motion is dismissed.

COSTS

[38] Costs to the defendants on Scale 3.

"G.M. Quijano, J."
The Honourable Madam Justice G.M. Quijano