CITATION: Batty v. City of Toronto, 2011 ONSC 6785
COURT FILE NO.: 11439487-0000
DATE: 20111115

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bryan Batty, Mari Reeve-Newson, Lana Goldberg, Ann Crooke and Dave Vasey, Applicants

AND:

The City of Toronto, Toronto Police Services Board, Toronto Fire Services, Respondents

BEFORE: D. M. Brown J.

COUNSEL: S. Ursel and K. Rowen, for the Applicants

D. Smith and A. Murakami, for the Respondents

HEARD: November 15, 2011

REASONS FOR DECISION

I. Motion for interim injunction by "Occupy Toronto" protestors

[1] For the past month protestors, including the applicants, have encamped overnight in St. James Park as part of the "Occupy Toronto" movement. Around 10:00 a.m. this morning the City of Toronto served many of the protestors with a Notice under the *Trespass to Property Act*. That Notice stated the protestors were prohibited from engaging in the following activities in St. James Park (the "Park") and in any other City of Toronto park:

(i) installing, erecting or maintaining a tent, shelter or other structure; and,

(ii) using, entering or gathering in the park between the hours of 12:01 a.m. and 5:30 a.m.

[2] The Notice went on to spell out what would happen if the protestors did not comply with it:

> The City of Toronto herby directs you immediately to stop engaging in the activities listed above and to remove immediately any tent, shelter, structure, equipment and debris from St. James Park. If you do not immediately remove any and all tents, shelters, structures, equipment and debris from St. James Park, such tents, shelters, structures, equipment and debris shall be removed from St. James Park by or on behalf of the City of

> Toronto. You are further ordered immediately to stop using, entering or gathering in St. James Park between the hours of 12:01 a.m. and 5:30 a.m.

In other words, the City of Toronto has given the protestors notice that if they do not dismantle their tents and other structures and leave the Park by midnight tonight, they risk eviction.

[3] The applicants intend to commence an application challenging the validity of that Notice. According to their Notice of Motion, that challenge will contend that the Notice violates the protestors' rights under sections 2(a) through (d) of the *Canadian Charter of Rights and Freedoms*, that is to say, their rights of freedom of conscience, expression, peaceful assembly and association.

II. Stay of eviction sought by the applicants

[4] The applicants seek an interim stay of the Notice to afford themselves an opportunity to prepare their case and present it before the Court. More particularly, the applicants seek an order containing three operative elements:

(i) A temporary interlocutory declaration that any and all orders or notices evicting or removing the applicants, among other protestors, from the Park are of no force and effect pending determination of the constitutional questions on their merits;

(ii) In the alternative, a temporary interlocutory declaration that the applicants are constitutionally exempted from the application of the *Trespass to Property Act*, the *Provincial Offences Act* or the *City of Toronto Municipal Code and By-laws* as they pertain to their eviction or removal from the Park; and,

(iii) An order that the applicants and fellow protestors be permitted to remain in the Park and maintain their encampments, including overnight, until such time as the constitutional questions have been determined on their merits by this Court.

[5] Given the quick pace of the events of today, no party had time to file any evidence before me.

III. Position of the City of Toronto

[6] The City of Toronto opposes the request for interim relief on the basis that the applicants have failed to make out two elements of the standard three-part test for the granting of interim injunctive relief – proof of irreparable harm and the balance of convenience.

IV. The applicable legal test

[7] In *Canadian Civil Liberties Association v. Toronto Police Service*, 2010 ONSC 3525 (CanLII) I summarized the principles governing the granting of injunctive relief in cases which engage the constitutional rights of a party:

[81] The test articulated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)* remains the one to be applied on motions for interlocutory injunctions containing claims under the *Charter*:

> 77 As indicated in *Metropolitan Stores*, the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.
>
> 78 At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.
>
> 79 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.
>
> 80 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

[82] It is worth repeating that in *RJR-MacDonald* the Supreme Court of Canada acknowledged that "the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim." Consequently:

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[83] In light of the "relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases", the Supreme Court of Canada has recognized that many interlocutory proceedings fall to be decided on the third branch of the test – the balance of convenience, or balance of inconvenience.

[84] Justice Sharpe, in his leading text on injunctions, offers the following summary of the jurisprudence involving requests for injunctions in *Charter* cases:

> The net effect of *Metropolitan Stores* and *RJR-Macdonald* is that interlocutory injunctions will be difficult to obtain in constitutional litigation. There appear to be three situations where interlocutory relief may receive favourable consideration. First are those cases where a pure question of law is presented and the court can as readily decide that issue on an interlocutory application as at trial although the court has said that these cases will be rare. The second is where circumstances giving rise to the litigation are so urgent and transient that the constitutional claim will never be adjudicated upon the merits unless the matter is resolved at the interlocutory stage. Third are the exemption cases where the law or regulation at issue applies to a limited number of individuals and no significant public harm would be suffered…

V. Analysis

A. Serious question to be tried

[8] The applicants' proceeding is neither frivolous or vexatious within the meaning of the *RJR MacDonald* test. Counsel for the City did not suggest otherwise.

B. Irreparable harm

[9] Counsel for the City submitted that the applicants have not demonstrated that they would suffer irreparable harm in the event an interim injunction was not granted. He argued that the Notice permits the applicants to continue their protest, they just have to remove their tents and not occupy the Park during the night. In the event the protestors succeed on the final adjudication of their application, then they would be free to resume their encampment.

[10] Ms. Ursel responded that an eviction of the protestors would infringe their expressive rights, as well as their freedom of assembly, thereby constituting irreparable harm.

[11] As I stated, I have no evidence before me. But, as I read the applicants' notice of motion, they will be arguing that the mode of their expression – an encampment in a public park – is integrally linked with the message they wish to convey. As they put it in their notice of motion:

> An important principle and component of this international political protest movement is the encampment, including overnight, of groups of protesters in public spaces. The "Occupy" encampment and the activities associated with the encampment are in fact exercises by the Applicants of their *Charter* rights of expression, conscience, assembly and association.

Accordingly, as the applicants frame their case, an interruption of their encampment would interrupt their expression of the messages which they wish to convey and interrupt the assembly they have created to convey that message. Such potential harm, in my view, qualifies as harm which would be irreparable in nature, so I conclude that the applicants have met the second part of the *RJR MacDonald* test, at least for the purposes of this interim motion.

C. Balance of convenience

[12] Counsel for the City submitted that I must consider the rights of the public at large when assessing the balance of convenience. Of course I must, and I do. I think I can take judicial notice of reports in the media over the past month that the protesters' use of the Park has interfered with the use of that area by other members of the public and has elicited complaints by neighbouring residents and businesses. As the City put it in its press release earlier today:

> The City recognizes the rights of Canadians to gather and protest. However, the City has determined that it cannot allow the current use of St. James Park to continue. In particular, the City can no longer permit the appropriation of St. James Park by a relatively small group of people to the exclusion of all others wising to use the park and to the detriment of those in the vicinity of the park. In addition, the current use of the park by Occupy Toronto and others occupying St. James Park is causing damage to the park and interfering with necessary winter maintenance of the park.

[13] Ms. Ursel submitted that the applicants are also members of the public and therefore their right to use the Park to protest must weigh in the balance.

[14] The protesters have encamped in the Park for a month. They are now being asked to leave within a day. They have come before this Court, as members of the public, asking the Court to adjudicate on their rights. In these circumstances I think the most appropriate way to balance the interests of all concerned is to maintain the *status quo* for a very short period of time and require the parties to proceed to an early adjudication of this proceeding.

VI. Orders

[15] Accordingly, I make the following orders:

(i) The City and its agencies shall refrain from enforcing the Notice, or taking any other steps to evict or remove the applicants and other protesters from the Park, until such time as I release my reasons for judgment on the merits of the applicants' proceeding;

(ii) I will hear full argument of this application on Friday, November 18, 2011, commencing at 10:00 a.m. at the Courthouse, 361 University Avenue, Toronto. I allocate no more than one day for argument of the application;

(iii) The applicants shall serve and file their application record no later than 4:30 p.m. tomorrow, Wednesday, November 16, 2011;

(iv) The respondents shall serve and file any responding materials no later than 2:00 p.m. on Thursday, November 17, 2011;

(v) Any cross-examinations shall be conducted by 6 p.m. on Thursday, November 17, 2011;

(vi) Written statements of fact and law and any authorities shall be exchanged by midnight on Thursday, November 17, 2011. I leave it to counsel to work out an appropriate schedule;

(vii) Counsel may serve materials by email; they must file one hard copy with the court office;

(viii) Counsel must send my secretary by email Word versions of their affidavits, Pdf copies of any exhibits, and Word copies of their statements of fact and law at the same time as they serve each other with such materials.

[16] I will hear argument from counsel on Friday. I will try to release my reasons for decision no later than 6 p.m. this coming Saturday, November 19, 2011.

[17] Counsel for the City pointed out that the applicants had not filed an undertaking as to damages on this interim motion. Given the *Charter*-based nature of the relief they seek, I dispense with any such requirement.

[18] Counsel for the City expressed concern that if a stay of enforcement of the Notice were granted, the number of protesters in the Park might swell. That is a legitimate concern. The purpose of my interim order is to preserve the *status quo* as it existed at the time the Notice was served earlier today. It is not an invitation to crank up the intensity of the protest. Indeed, as I stated in open court earlier this afternoon, the applicants are seeking equitable relief from the Court. Any efforts by the applicants, or their fellow protesters, to alter the *status quo* could well operate as a factor weighing against their request for final relief. To ensure that the *status quo* remains in place, I therefore issue a further order that the applicants and any other persons having notice of my order are restrained from installing, erecting or maintaining any tent, shelter or other structure which was not in place as of 10:00 a.m. this morning.

[19] I inquired whether the protestors operate a website. I was told that they do: www.occupytoronto.org. Applicants' counsel stated that her clients have access to that website and are able to post materials on it. I direct the applicants to post on that website, no later than 10:00 p.m. tonight, a copy of these Reasons. Such posting should provide notice of my order to many who have participated in, or who have followed, the Occupy Toronto movement.

[20] If any matter arises prior to Friday's hearing upon which a party requires directions, counsel may arrange through my office for a conference call or further attendance.

[21] Costs of today are reserved to the hearing on Friday.

_____(original signed by)_____
D. M. Brown J.

Date: November 15, 2011