IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Wharf on Fourth* v. *The City of Whitehorse*
2004 YKSC 38

Date: 20040528
Docket No.: 04-AP0005
Registry: Whitehorse

Between:

WHARF ON FOURTH

Appellant

And

THE CITY OF WHITEHORSE

Respondent

Before: Mr. Justice L.F. Gower

Appearances:
James R. Tucker — For the Appellant
Daniel S. Shier — For the Respondent

REASONS FOR JUDGMENT

[1] This is an application by the appellant, the Wharf on Fourth, for a stay of execution pending the hearing of its appeal. The appellant was convicted at trial of violating a by-law of the respondent, City of Whitehorse, restricting the use of billboard signs. That conviction was entered April 23, 2004 and the Wharf was ordered to remove the offending sign at its own expense within a period of 35 days. The Wharf filed its Notice of Appeal in this summary conviction matter on May 19, 2004. It argues that it will suffer irreparable financial harm if it is required to remove the sign prior to the hearing of the appeal, assuming the appeal is successful.

[2] Counsel are agreed that in order to obtain a stay of execution pending a hearing of the appeal, the onus is on the appellant to show:

> 1) that there is some merit to the appeal, in the sense that there is a serious question to be determined;
>
> 2) that irreparable harm would be occasioned to the appellant if the stay is refused; and
>
> 3) on balance, the inconvenience to the appellant, if the stay is refused, would be greater than the inconvenience to the respondent if the stay is granted.[1]

[3] Although the appellant could have done more to frame the issues in this application for the purposes of persuading the Court that there is a serious question to be decided, I have been able to make that determination from a review of the reasons of the trial judge and the Notice of Appeal. The respondent City did not strongly oppose the appellant on this point. In short, I am persuaded that there is a serious question to be tried.

[4] With respect to the criterion of irreparable harm, the appellant relies on the Affidavits of Jodi Richardson. In her first Affidavit, Ms. Richardson deposed that if the appellant is forced to remove the sign before the appeal is heard, and if the appeal is successful, it will be “very expensive” for the appellant to replace the sign at its present location. No further information was provided as to the extent or any particulars of that anticipated expense. When I questioned the appellant’s counsel about the point, I understood him to concede that it would probably be an amount less than $1,000. Counsel for the respondent argued that it may be significantly less than that, as it would

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[1] *Gonder* v. *Gonder*, 2001 YKCA 4, at para 14; and *R.J.R*. – *MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311, at 333 - 347

only involve unscrewing a few bolts to remove the 12’ X 8’ billboard from its posts, and that it could easily be replaced if the appellant is successful in the appeal. In the absence of further evidence from the appellant on this point, I am unable to conclude that this anticipated expense would be anything more than a nominal amount.

[5] In her second Affidavit, Ms. Richardson deposed that the appellant conducts approximately 75% of its annual business between May and September each year. She then said:

> … while it is very difficult to accurately assess how much business is brought to the Appellant by the sign …, during the last two years in the summer months I have inquired with customers routinely as to why they came to the … store and approximately 65% of the people *who I have asked* have informed me that they have came to the Wharf of Fourth store because they saw the sign … (emphasis added)

In conclusion, Ms. Richardson deposed that the appellant would suffer irreparable harm “in that it will likely suffer significant business losses which will be practically impossible to accurately assess”.

[6] On this point, it is important to note that the appellant made a similar argument at trial. However, the trial judge found the evidence in support of that argument to be weak and she was not persuaded that the appellant could not offset any financial loss resulting from the removal of the sign by the use of other forms of advertising. At paragraph 35 of her reasons for judgment she said:

> There was evidence presented that the defendant believes if the sign is removed, the store will suffer significant financial loss. I found the evidence on that point to be weak, based on conversations with newcomers to the store. Mrs. Richardson

> agreed that she uses other forms of advertising, including other signs.

[7] In my view, these comments should have been a signal to the appellant that a stronger case would have to be made on the question of irreparable harm on this application. It is unhelpful for Ms. Richardson to have deposed that approximately 65% of the people whom she asked noted that they came to the store because the sign. We have no information about how many people she asked relative to the total number of customers attending at the store. It is also important to note that, pursuant to the summary conviction appeal rules, this appeal should be heard within approximately two months. And the sign has remained in place, pending this Court's decision on the application. Consequently, if the sign is removed until the appeal is heard, and assuming the appeal is successful, the appellant would only be adversely affected for a period of approximately two months. We have no information whatsoever as to what percentage of the appellant's gross annual revenue would be adversely affected by such a temporary removal of the sign. Indeed, both Ms. Richardson and her counsel stated that it would be practically impossible to accurately assess the amount of business loss anticipated. If that is so, then it is difficult for the Court to accept the argument that such business losses would be "significant".

[8] In *R.J.R. – MacDonald Inc*., cited above, Sopinka and Corey JJ. said at p. 341, S.C.R.:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include the instances where

> one party will be put out of business by the court's decision …; [and] where one party will suffer permanent market loss or irrevocable damage to its business reputation …

[9] On this application, I am not satisfied that the appellant would suffer irreparable harm if the stay is not granted. The appellant did not tender evidence or argue that it would be "put out of business" if the sign is ordered removed for a period of approximately two months. Nor is there any particular evidence that the appellant would suffer permanent market loss or irrevocable damage to its business reputation by the sign's temporary removal. It is simply insufficient for the appellant to suggest that any amount of loss, no matter how small, would be "irreparable" because the appellant will never be able to recover that loss from the City. When challenged on the point, the appellant's counsel conceded that it would obviously make a difference if the loss was only a few percentage points of the appellant's gross annual revenue, compared to something more significant. Once again, the Court is unable to express any informed opinion about the amount of the anticipated loss, because of the lack of helpful evidence.

[10] Even if I am wrong about the second criterion of the three part test, I would also tend to conclude that on the "balance of convenience" criterion, the public interest in having the by-law obeyed generally tips the balance of convenience in favour of refusing the stay: see *North Cowichan (District)* v. *Jopp Ventures Corp.*, [2000] B.C.J. No. 996 at paras. 10 and 11. I am sympathetic with the City's argument that the public would likely perceive it to be unfair if the appellant was allowed to retain its sign, even though it has been found guilty of violating the by-law by the trial court, when other businesses in Whitehorse are expected to comply with the by-law. And without prejudging the merits

of the appeal, I simply note the trial judge said at paragraph 35 of her reasons for judgment:

> There are many other businesses represented by the Chamber of Commerce, and citizens of Whitehorse who are in favour of the bylaw. The City through their Director of Operations said in evidence that the City wished to be fair to all the businesses in town and could not allow one business to put up a sign contrary to the bylaw without allowing others to do the same. I agree that is fair …

[11] As was said by the Supreme Court of Canada in *R.J.R. – MacDonald*, cited above, at p. 343 S.C.R., in quoting *Ainsley Financial Corp.* v. *Ontario Securities Commission* (1993), 14 O.R. (3d) 280 (Gen. Div.), the public interest is a special factor to be considered in constitutional cases:

> The interests of the public, which the [law enforcement] agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

[12] Thus, even if I had not found against the appellant on the question of irreparable harm, I would have been inclined to rule against it on the balance of convenience.

[13] In conclusion, I dismiss the appellant's application for a stay of execution pending the hearing of this appeal.

[14] Costs may be spoken to at the hearing of the appeal. However, I would note that the respondent City, at the outset of the hearing on this application, objected to the jurisdiction of this Court to hear the appeal and filed a total of five case authorities. Neither the Court nor the appellant had a previous opportunity to review the cases. This necessitated an adjournment from the morning until the afternoon. When we

reconvened, counsel for the respondent candidly conceded that he since realized the cases were irrelevant and he withdrew his jurisdictional objection. As a result, if I were asked to decide the question today, I would rule that each party should bear its own costs for this application.

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GOWER J.