SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Glow Signs and Promotions Limited*, 2021 NSSC 226

Date: 20210713
Docket: Halifax, No. 496621
Registry: Halifax

Between:

Glow Signs and Promotions Limited

Appellant

v.

Her Majesty the Queen

Respondent

DECISION

Judge:	The Honourable Justice John P. Bodurtha
Heard:	January 11, 2021, in Halifax, Nova Scotia
Written Decision:	July 13, 2021
Counsel:	Ian D. Hutchison, Counsel for the Appellant Joshua Judah, Q.C., Counsel for the Respondent

By the Court:

Overview

[1] The Appellant, Glow Signs and Promotions Ltd. ("Glow Signs"), is a company that, among other things, provides temporary signage to individuals, businesses, and other entities in the Halifax Regional Municipality ("HRM"). Between June 20-28, 2017, Theresa Hickey ("Hickey"), a compliance officer for HRM, investigated signs at five locations belonging to Glow Signs. She determined that these signs infringed upon various sections of Halifax Regional Municipality By-law S-801, "By-law for Temporary Signs", for which Glow Signs was convicted by a Provincial Court Judge.

[2] The Appellant appeals its convictions on the grounds that the trial judge erred in concluding that the facts and factual inferences do not amount to an abuse of process requiring a stay. It also appeals its sentence.

[3] For the reasons that follow, the appeal is dismissed because the trial judge did not err in her legal conclusions that there was no abuse of process in this case. The sentence is fit and proper.

Facts

[4] The facts in this case are largely agreed upon by the parties. The Appellant says that it does not appeal the trial judge's findings of fact, only the extricable question of law.

[5] Between June 20-28, 2017, Hickey investigated five locations where the Appellant's signs were located. She investigated these locations on the basis of complaints made to her department, either by the public or from another municipal department. These complaints were assigned to her to investigate.

[6] In December 2020, Hickey laid five Informations against Glow Parties regarding these signs, totalling ten offences:

- 560 Windmill Road – sign without a licence;
- 461 Windmill Road – failure to remove sign with expired licence; sign less than 4.6 metres from inside of curb;

- 225 Cobequid Road – sign within Daylight Triangle; sign less than 4.6 metres from inside of curb;
- 984 Cole Harbour Road – failure to remove sign with expired licence; sign less than 4.6 metres from inside of curb; sign less than 30.5 metres from any other sign; and
- 214 Bedford Highway – sign within Daylight Triangle.

[7] At trial the Crown withdrew one offence related to the Daylight Triangle at 225 Cobequid Road. The trial judge found that she was left with reasonable doubt regarding the Daylight Triangle charge at 214 Bedford Highway and held that Glow Signs was not guilty. Glow Signs was subsequently convicted of the other eight infractions. The trial judge concluded that the appropriate fine for each infraction was $500, plus costs of $122.50, and a Victim Fine Surcharge of $75 each. Each infraction therefore resulted in a fine of $697.50, for a total of $5,580.00.

[8] Hickey testified regarding a personal conflict she has in regards to another sign company, Hyper Signs. Her brother is a long-time friend of the owner of this company. Mr. O'Connor ("O'Connor") for Glow Signs testified that Hyper Signs is one of his biggest competitors. Hickey explained that, because of this conflict, she does not investigate Hyper Signs. Her supervisor at the time, Scott Hill, testified that he did not view this relationship as a "conflict".

[9] At trial, it was shown that, at each location where Hickey investigated a Glow Signs sign, there were other signs within view that also possibly infringed upon the By-law. The evidence showed that several of these other signs were too close to the road, were too tall by the standards set out in By-law S-801, or did not have a valid permit. There was no evidence before the trial judge that these other signs had been prosecuted.

[10] It was also shown that, after HRM changed its policy to require sign licence applications be delivered in person, it agreed to give Glow Signs special permission to submit its applications electronically.

[11] The trial judge conducted a *voir dire* to hear the abuse of process application, and the parties agreed that the evidence heard in the *voir dire* would become part of the record for the trial as a whole.

Issues

[12] There are two issues on appeal:

1. Did the trial judge err in finding that there was no abuse of process in the prosecution of Glow Signs?
2. Did the trial judge err in principle by overemphasizing denunciation and deterrence regarding the sentence imposed on Glow Signs?

Standard of Review

[13] The Appellant says that the standard of review in this case is correctness. It does not take issue with the facts as found by the trial judge, nor does it take issue with the legal test for abuse of process that the trial judge applied. Glow Signs says that it is the conclusion – the finding of no abuse of process – that is under appeal.

[14] The Respondent says that the legal conclusion of no abuse of process cannot be extricated from the factual inferences drawn by the trial judge. Therefore, this is a question of mixed fact and law and must be reviewed on a standard of palpable and overriding error.

[15] While the distinction can be difficult to explain, the law is clear: where facts are not in dispute, the ultimate legal conclusion reached by the trial judge is a question of law. There are several Supreme Court of Canada decisions confirming this. In *R v. Shepherd*, 2009 SCC 35, McLachlin C.J. and Charron J., for the Court, concluded that the trial judge erred in declining to admit certain breath samples. The Court discussed the applicable standard of review holding that, despite the factual analysis required, the issue of whether the officer had reasonable and probable grounds was a question of law:

> 18 In the courts below, the issue arose as to whether the standard of reasonable and probable grounds involves a question of fact or a question of law. This issue bears on the question of the appropriate standard of review of the trial judge's decision. If reasonable and probable grounds are a question of law, then the standard of review is, of course, correctness. On the other hand, if reasonable and probable grounds are a question of fact, the standard of review is that of palpable and overriding error. The issue may also be relevant in determining whether a court has jurisdiction to hear the appeal, although jurisdiction is not an issue before us.
>
> 19 The summary conviction appeal judge characterized the trial judge's conclusion that the officer did not have objective grounds to make the breath demand as a "factual finding", and thus deferred to the trial judge's finding (para.

> 16). The majority in the Court of Appeal concluded that the issue of reasonable and probable grounds involved a question of law. Smith J.A., in dissent, adopted an intermediate position. While she recognized that the question of whether a legal standard is met is, in a general sense, a question of law, she also held that the summary conviction appeal judge "did not err in according deference to the conclusion of the trial judge" regarding the lack of reasonable and probable grounds (para. 53).
>
> 20 While there can be no doubt that the existence of reasonable and probable grounds is grounded in the factual findings of the trial judge, the issue of whether the facts as found by the trial judge amount *at law* to reasonable and probable grounds is a question of law. As with any issue on appeal that requires the court to review the underlying factual foundation of a case, it may understandably seem at first blush as though the issue of reasonable and probable grounds is a question of fact. However, this Court has repeatedly affirmed that the application of a legal standard to the facts of the case is a question of law: see *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992 (S.C.C.), at para. 18; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381 (S.C.C.), at para. 23. In our view, the summary conviction appeal judge erred in failing to distinguish between the trial judge's findings of fact and his ultimate ruling that those facts were insufficient, at law, to constitute reasonable and probable grounds. Although the trial judge's factual findings are entitled to deference, the trial judge's ultimate ruling is subject to review for correctness.

[16] See also *Housen v. Nikolaisen*, 2002 SCC 33, at paras. 26 to 39.

[17] The Nova Scotia Court of Appeal has also held that the ultimate finding of whether there was an abuse of process should be reviewed on the correctness standard. In *R v. Potter*, 2020 NSCA 9, one of the issues on appeal was whether the trial judge erred in finding that there was no abuse of process resulting from the investigative delay. Concluding that the issue should be reviewed on a standard of correctness, the Court said:

> 227 We must be mindful of the lens through which we consider allegations of error. A trial judge's determination as to whether a *Charter* right has been infringed is a question of law attracting a standard of correctness. The same applies to a finding of abuse of process. A judge must consider and apply the correct legal principles in making these determinations. However, this Court must defer to a trial judge's factual findings that underlie the ultimate legal question unless an appellant demonstrates a finding is based on a palpable and overriding error or produces an outcome so clearly wrong that it results in an injustice.
>
> [footnote removed]

[18] In *R. v. Derbyshire*, 2016 NSCA 67 (leave to appeal ref'd, 2017 CarswellNS 215), the Nova Scotia Court of Appeal held that it is a question of law whether an abuse of process occurred and the appropriate standard of review is correctness. With respect to findings of fact that inform the legal question to be answered, these findings are subject to deference and reviewable under the standard of palpable and overriding error unless there is an extricable legal component: see paras. 72-73 and also *Housen v. Nikolaisen*, *supra*, at paras. 25, 26 and 36.

[19] Where a pure question of law can be extracted from the underlying factual findings, it should be reviewed on a standard of correctness. I believe that is the case here. That being said, the trial judge is entitled to deference regarding her findings and inferences of fact.

Law

[20] Glow Signs was charged and convicted of various infractions under By-law S-801, as it was in effect between June 20-28, 2017. Specifically:

> 9 (1) Every sign requires a Sign License issued under this By-law, except as herein provided.
>
> (2) Upon expiry, cancellation, suspension or revocation of a Sign License, the sign shall be removed by the owner.
>
> 10 (1) No Sign License shall be issued for a sign not listed in this By-law.
>
> (2) Unless otherwise provided for in this By-law, no Person shall place or permit a sign that:
>
> …
>
> (l) is located within a Daylight Triangle;

[21] The "Daylight Triangle" is defined as follows:

> 2 (g) "Daylight Triangle" means a triangular area on a corner lot which is formed by front lot line and a flankage lot line and a straight lot line which intersects 6.1 metres from the corner where they meet;

[22] There are also specific provisions dealing with the dimensions and requirements of certain types of signs. The most relevant to this case are:

(a) a Mobile Sign (which is a sign designed to be readily moved and is not affixed to a building) shall not exceed 4.64 square metres per

surface and must be set back 4.6 metres from the curb or, if there is no curb, 7 metres from the edge of the pavement (s. 12(3)(a) and (c)).

(b) a Box Sign, which has a wooden box base and a decorative header, must not exceed 3.6 metres, or 12 feet, in height (s. 12(4)(b)). On the other hand, a Sandwich Board sign does not require a licence if it comes within the statutory size parameters and is removed from display after business hours (s. 13(1)).

The Trial Decision

[23] After hearing final submissions, the trial judge issued her decision orally. As the parties agreed that the evidence heard in the *voir dire* should be applicable to the decision as a whole, she first dealt with whether an abuse of process had been made out, and then decided whether the charges against Glow Signs had been proven beyond a reasonable doubt.

[24] On the issue of abuse of process, the trial judge reviewed the cases provided by counsel, following the test for the residual category of abuse of process discussed in *R. v. Babos*, 2014 SCC 16. She referred to several decisions (as outlined below) where no abuse of process was found due to selective prosecution.

[25] The trial judge heard from 11 witnesses, including O'Connor. She referenced the credibility of testimony that she heard and the test in *R. v. W.(D.)*, [1991] 1 SCR 742. The following is the trial judge's analysis regarding the abuse of process issue, see Book of Materials – Part 1, pp. 267-269:

> Mr. O'Connor complained of different interpretations of the by-laws, feeling frustrated or mistreated, I should say, late approval of permit application, changes in by-laws, the authority under development agreements, grandfathering clauses for by-laws, but none of that testimony equates to an abuse of process.
>
> On the contrary, the evidence I heard shows that Mr. O'Connor has not been selectively prosecuted. He even went so far as to try and besmirch the By-law Officer Hickey's reputation. When he found out her brother was involved with a competitor, he testified: "I knew she must have a friend." There is absolutely no evidence that this influenced her in any way to lay an Information. It is mere speculation on Mr. O'Connor's part. All of the charges before the Court are as a result of a complaint either from the public or the HRM permit office. There is no evidence Mr. O'Connor's company was investigated for any other reason.
>
> It should be noted that because Mr. O'Connor filed so many applications, at least 500 particularly during this period, he was given a special arrangement from

> HRM. He could fax in his applications. I understand that as a business owner, Mr. O'Connor wants to provide services to his customers in a timely fashion and working with bureaucracy can be difficult and frustrating but that does not amount to abuse of process. It is no defence to say that there are other cases of breach that have not been prosecuted. In reality, no municipality can prosecute and enforce every breach any more than the police can charge every speeder on our highways.
>
> The failure to charge others under the by-law would have to be outrageous and shock the conscience of community and such prosecutorial conduct would have to amount to the clearest of cases. There is no evidence that Mr. O'Connor has been singled out. The sheer volume of applications would cause him to have multiple interactions with the department responsible and there's absolutely no evidence that the prosecution was motivated by malice or any other improper purpose. Based on all of the evidence before me, Mr. O'Connor's applications fails.

[26] The trial judge found that there was no abuse of process because Glow Signs was not selectively prosecuted. The Respondent's conduct was not outrageous, nor did it have the effect of shocking community standards. In short, this was not the "clearest of cases". She based her conclusions on "all of the evidence", but relied heavily on O'Connor's own testimony. She found that Hickey was not biased against Glow Signs and that each charge was laid following a complaint made by the public or the HRM permit office. Any bias amounted to mere speculation on O'Connor's part. While the Respondent did fail to investigate the variety of possible infractions called into evidence, that is no defence in this case. It is simply unrealistic to expect a municipality to prosecute every breach of its by-laws.

[27] The trial judge found that O'Connor was given preferential treatment by the Respondent because it allowed Glow Signs to submit its applications by fax, whereas everyone else has to submit them in person. She was sympathetic to O'Connor's evident frustration with HRM's procedure, which appears to be somewhat inconsistent; however, that does not equate to an abuse of process, let alone one resulting in a stay.

[28] Having found that there was no abuse of process, the trial judge turned to whether the Crown had proven the offences against Glow Signs beyond a reasonable doubt. Regarding the charge that the sign at 214 Bedford Highway was located in the Daylight Triangle, the trial judge concluded that it had not been proven beyond a reasonable doubt. The evidence supported that there was internal confusion regarding how the Daylight Triangle was calculated and it was therefore unclear which calculation method should be used. She found Glow Signs not guilty of this charge but guilty on all others outlined above.

Parties' Positions

[29] The Appellant's position regarding the trial judge's alleged errors can be summarized as follows: (a) the other offending signs and (b) Hickey's conflict, which it says indicates bias against Glow Signs. The Appellant says that it takes no issue with the trial judge's findings of fact; however, these facts, as found by the trial judge, must lead to the conclusion that there was an abuse of process and a stay is warranted.

[30] The Appellant argues that the other offending signs (which were in the vicinity of Glow Signs' infractions at the time they were investigated), were so numerous and obviously infringing upon the by-law that they shocked community standards of justice. It says the evidence establishes that By-law Officers are under a positive duty to investigate all potential infractions that are observed. The fact that Hickey's brother's friend runs Glow Signs' biggest competitor further proves that the Respondent was biased against Glow Signs, resulting in its selective prosecution. Lastly, the Appellant argues that departmental confusion regarding how the Daylight Triangle is defined (or whether signs can be "grandfathered in") also muddies the waters. The Appellant called evidence purportedly showing that the Respondent's policies have harmed Glow Signs' business prospects. For example, Glow Signs says it was told its sign outside the Lacewood Drive Sobeys was too close to the curb and had to be removed. Sometime later, a competitor put a sign in the same or similar place without issue.

[31] The Respondent submits that the trial judge did not err in finding that there was no abuse of process in the prosecution of Glow Signs. Glow Signs was not unfairly singled out but, rather, the By-law Officer carried out her duty to investigate the complaints she was assigned and, if necessary, prosecute infractions. In fact, the Respondent says that Glow Signs was given special treatment. Glow Signs submitted a high volume of sign applications (somewhere between 500-600 per year). As a result, the Respondent offered Glow Signs to submit its applications by email, whereas other companies must still submit their sign applications in person.

[32] The Respondent adds that the evidence does not support that Hickey was under a positive duty to enforce By-law S-801. The enforcement of by-laws is discretionary and, absent a finding of bad faith, that discretion ought to be respected. The Respondent submits that the trial judge considered this and concluded that there was no bad faith in this case.

Analysis

[33] The Appellant seeks a stay of proceedings on the grounds that the selective prosecution on the part of the Respondent amounted to an abuse of process. Specifically, Glow Signs says that its situation falls within the “residual category”, in that, while the Respondent’s conduct does not affect its ability to receive a fair trial, the conduct was so egregious as to shock societal notions of justice. The test for this is from *R. v. Babos*, *supra*:

> 32 The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> > 1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (Regan, at para. 54);
> >
> > 2) There must be no alternative remedy capable of redressing the prejudice; and
> >
> > 3) Where there is still uncertainty over whether a stay is warranted after steps 1) and 2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).
> >
> > …
>
> 44 Undoubtedly, the balancing of societal interests that must take place and the "clearest of cases" threshold presents an accused who seeks a stay under the residual category with an onerous burden. Indeed, in the residual category, cases warranting a stay of proceedings will be "exceptional" and "very rare" (*Tobiass*, at para. 91). But this is as it should be. It is only where the "affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases" that a stay of proceedings will be warranted (*R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.), at p. 1667).

[34] For the residual category of abuse of process, I must first decide whether proceeding with a trial on the merits would harm the integrity of the justice system and render the impression that the justice system condones conduct that offends society’s sense of fair play (*Babos*, para 35). The Court refers to a stay as “the most drastic remedy a criminal court can order” and, therefore, the matter must be “the clearest of cases” (*Babos*, paras 30-31).

[35] Where the conduct is alleged to amount to selective prosecution, the bar is even higher. I accept that selective prosecution may amount to an abuse of process

in some cases, but the claim should be grounded in evidence of bad faith or misconduct on the part of the state. Abuse of process based in selective prosecution is a legal doctrine whereby the claimant admits they committed the offence, but others who also committed the offence were not prosecuted, and this omission is so unfair as to nullify the claimant's commission of the offence altogether. Courts have repeatedly indicated that law enforcement cannot be expected to prosecute every commission of every crime. This is why this doctrine is rarely successful.

[36] In fact, the Supreme Court of Canada cautions against inquiring into prosecutorial discretion at all – that is the state's discretion to charge, or not to charge, someone with an offence: *R. v. Power*, [1994] 1 SCR 601. "Since a myriad of factors can affect a prosecutor's decision eitherto [*sic*] bring charges, to prosecute, to plea bargain, to appeal, etc., courts are ill-equipped to evaluate those decisions properly", wrote L'Heureux-Dubé J. for the majority (para. 43). The majority in *Power* said that, generally speaking, an allegation of selective prosecution should be supported by evidence of bad faith or malice on the part of the state:

> 17 To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice. As will be developed in more detail further in these reasons, the Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision. Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.

[37] See also *R. v. Cole*, 2000 NSCA 42, where a decision was overturned for interfering with the prosecutorial discretion to enter a stay. Bateman J.A. set out a list of examples where it was found that prosecutorial discretion was based on an improper motive:

> 48 Donna C. Morgan, in "*Controlling Prosecutorial Powers — Judicial Review, Abuse of Process and Section 7 of The Charter*" (1986-87), 29 Crim. L.Q.

> 15, at pp. 39 to 43 reviews some situations in which courts have found that the prosecutor acted with an improper motive, i.e., one not consonant with the spirit of the criminal justice process:
>
> > 1. Where the criminal justice process is being used to enforce a civil claim;
> >
> > 2. Where the Crown acts with deliberate intention of prejudicing the accused's ability to make full answer and defence;
> >
> > 3. Where the Crown has acted to circumvent an adverse ruling, otherwise improve on an unfavourable result or cure some procedural defect;
> >
> > 4. Where the Crown has breached an undertaking to the accused who has acted in reliance upon it;
> >
> > 5. In situations of entrapment.

[38] None of these examples apply in this case.

[39] This requirement for evidence of bad faith is supported by other cases considered by the trial judge. For example, in *R. v. Johnston*, 1996 CarswellOnt 2038 (ONCJ), the accused alleged that the prosecution against him was an abuse of process because other prominent members of the community had not been charged with s. 212(4) of the *Criminal Code* which, at the time, referred to soliciting the sexual services of an individual under the age of 18. The Court said:

> 23 Similarly, in the case at Bar, there is no evidence that the prosecutor's conduct or the conduct of the police, vis-a-vis the applicant, was prompted by bad faith or an improper motive as opposed to the cogency of the evidence with respect to the applicant. It is troubling that the police have not appeared, on the evidence, to be vigorous in enforcing 212(4). However, it does not follow that even if the police have turned a blind eye to this offence in the past, and even if such conduct can amount to neglect of duty, that such police conduct can vitiate the present charges unless it can be shown that the present charges have been laid in bad faith or for improper motives. This, in my opinion, the applicant has not shown.
>
> 24 Nor has an improper or discriminating exercise of discretion been demonstrated by the mere fact that other prominent citizens, who have been implicated, have as yet not been charged.
>
> 25 In my view, the evidentiary basis on this ground is, at present, far from demonstrating the clearest of cases as required by the authorities. […]

[40] The Court then found that, although the police did not appear to be "vigorous" in enforcing that particular offence, which is arguably more serious than a municipal sign infraction, that alone did not suffice.

[41] In *R. v. McLellan*, 2015 ONCJ 165, the Court held that prosecutorial decisions that are unusual, or even have the effect of frustrating certain aspects of the case, may not amount to abuse of process. Furthermore, mere speculation of improper motive is not enough – actual evidence of bad faith or improper motive is required:

> 50 In this case while I found that certain decisions or actions of the Crown were unusual or perhaps mistakes and caused delay and that there were difficulties with the prosecution of this case for reasons I've outlined above in my decision regarding section 11(b), I find that there is no evidence that such actions of the Crown were undertaken with any bad faith, improper motive or with mal intent.
>
> 51 Courts are not allowed to second guess the decisions of prosecutors without conspicuous evidence of bad faith, improper motives or decisions so obviously wrong that shock the conscience of the community. In this case there is speculation but no evidence. It is arguable that the Crown did not have to provide reasons for some of the controversial decisions it made in this case as they were decisions relating to core prosecutorial decisions which are within the discretion of the prosecutor however it did provide reasons and explanations. While I may have found those reasons or tactics curious ones and that they caused delay that does not equate with abuse of process and I find no reason not to accept the Crown at their word with respect to the reasoning behind the decisions they made.

[42] See also *R. v. Frederick C. Fisher Professional Corp.*, 2000 ABPC 69, at para. 9, and *R. v. S.(M.)*, 1994 CarswellBC 2008 (B.C.S.C.), at para. 8, which were referred to by the trial judge. In each of these cases, the Court found that evidence of bad faith or improper motive is necessary to ground a defence of selective prosecution.

[43] The trial judge also considered some factually-similar cases where selective prosecution is claimed against a municipality enforcing its by-laws. In *Coquitlam (City) v. Aweryn*, 2000 BCSC 777, the City of Coquitlam ("Coquitlam") received a complaint of an illegal, multi-unit building erected in a single-family residential zone. It was unclear when the multi-unit was built, but Coquitlam only commenced its investigation after receiving a complaint, eventually charging the Respondents in the case. The Respondents argued that it was an abuse of process to charge them

when Coquitlam failed to charge other similar units. The British Columbia Supreme Court disagreed, saying:

> 13 The cases confirm that the failure to prosecute great numbers of owners of illegal suites is irrelevant. In this case, as in the Burnaby case, I find no basis for concluding there was discriminatory prosecution. Reality tells us that no municipality can prosecute and enforce every by-law with respect to every breach, any more than the police can prosecute every speeder on our highways.
>
> 14 But when the City of Coquitlam receives a complaint, that complaint is investigated, as this one was, and the process is begun to find the respondents in breach of the zoning by-law, so there can be an order requiring compliance.

[44] Another similar situation was heard in *Vancouver (City) v. Dewberry*, 2008 BCPC 212. The City received a complaint about a tree fort and an investigation ensued. Following exchanges between the City and homeowners, the City eventually concluded that the homeowners required a permit for the fort and, when they applied, the permit was refused. The City issued an order for removal of the tree fort but the homeowners did not comply and were subsequently charged. The homeowners argued they were selectively prosecuted. The British Columbia Provincial Court said:

> 61 Every prosecution is "selective" to at least some degree in the sense that discretion is applied by the authorities at a number of stages in the process. There is nothing improper in that. Indeed, the exercise of prosecutorial discretion has been repeatedly approved by the Supreme Court of Canada. It is fundamental to both the criminal and the quasi-criminal law.
>
> 62 It is unclear to me why the defendants believe they have been singled out for prosecution. There is absolutely no evidence here that this prosecution was motivated by malice or any other improper purpose.

[45] In the present case, the trial judge concluded that there was no evidence of bad faith or bias and I concur with that finding. The only evidence linking Hickey's conflict with Hyper Signs to the prosecution of Glow Signs in this case is O'Connor's speculation, and that is not enough. Furthermore, there were instances where Hickey decided not to prosecute Glow Signs at all. Hickey said that the complaints actually included a sixth location where she used her prosecutorial discretion not to lay a charge. She also testified that, while a sign at 214 Bedford Highway did not have a valid permit when she investigated it, she believed that the permit was pending. She therefore decided not to prosecute it because "consideration" was given to the timing of the matter.

[46] The Appellant argued that By-law Officers are under a positive duty to investigate all potential infractions observed in the course of their work. I cannot agree because the Appellant has provided no legal basis for this assertion. While it may be that compliance officers are generally required by their superiors to investigate signs that appear to be unlawfully placed (particularly for safety concerns) that does not mean that a failure to do so is an abuse of process. In light of the case law discussed above, and the context in which these prosecutions arose, there is no duty imposed on these officers to investigate every sign that they see; society does not expect this and justice does not require this. It is simply unrealistic and unreasonable, and I will not interfere with this use of prosecutorial discretion.

[47] The HRM By-law Enforcement Department consists of about 20 to 30 By-law Compliance Officers who enforce several by-laws throughout HRM, including signs, animals, dangerous or unsightly properties, taxis and limousines, and parking. They receive approximately 15,000 complaints per year and, as a result, their investigations are primarily complaint-driven. The Appellant's 2017 prosecutions occurred sometime after HRM compliance officers engaged in an effort to educate the various sign companies about the By-laws, the expectations, and inform them that tickets would soon be issued.

[48] Hickey testified that the "education" aspect of this departmental shift "went on for quite some time, and then it wasn't until maybe the next year when we received complaints – that's when we started issuing the tickets." This was corroborated by Ted Hyland, Manager of the Appellant's sign division at the time, who testified that there was a meeting held wherein HRM representatives explained the upcoming changes to the various sign companies. When asked by counsel for the Respondent why she did not give warnings before issuing the tickets against Glow Signs, she replied:

> Up until these charges, I had been with HRM for 12 years, and we went that route probably about 10 years ago, where all the sign companies – there was Brite, there was Glow, there was Hyper, there was Giant – they were all notified, via us, the officers, via our supervisor, that they would start being charged for not getting – we also had investigated a fraud case where a sign company was collecting the money for the permit and not actually getting the permit from HRM.

[49] Prior to the convictions that are the subject of this appeal, Glow Signs had been convicted of similar infractions a total of 15 times. There is no doubt that O'Connor and the Appellant knew the rules.

[50] I do not intend to delve into each possibly-offending sign that would have been in view of Hickey's investigations. Some may have been the subject of a development agreement or fallen under the purview of another HRM department. However, I take notice that at least some of the signs that were not investigated by Hickey did, in fact, infringe upon the by-law; however, that is not the end of it. The trial judge did not hear evidence that no compliance officers ever investigated any of those other offending signs in the intervening time. Furthermore, the trial judge did not hear evidence that HRM ignored complaints that were made regarding those signs. There was no evidence that anyone related to Glow Signs made complaints that were ignored. In fact, Stephanie Boudreau, an employee of Glow Signs, attended the various locations subject to this proceeding. She measured and took photos of the other offending signs but testified that she did not make any complaints herself.

[51] The trial judge heard ample evidence of departmental confusion regarding interpreting By-law S-801, particularly regarding how the Daylight Triangle is measured. Understandably, O'Connor is frustrated by some of HRM's policy decisions and some of the specific actions taken by individuals working for HRM. Those frustrations, however valid, do not amount to an abuse of process, let alone one of the "clearest cases" requiring a stay and I dismiss Glow Signs' appeal.

Sentence

[52] Sentencing judges hear the evidence as it unfolds during the trial and are best suited to impose a fit and proper sentence for the accused. As such, they are given broad discretion that should not be interfered with lightly. Wagner J. reminded us in *R. v. Lacasse*, 2015 SCC 64:

> 39 This Court has reiterated on many occasions that appellate courts may not intervene lightly, as trial judges have a broad discretion to impose the sentence they consider appropriate within the limits established by law: s. 718.3(1) of the *Criminal Code*; see also *R. v. Shropshire*, [1995] 4 S.C.R. 227 (S.C.C.), at para. 46; *R. c. M. (L.)*, 2008 SCC 31, [2008] 2 S.C.R. 163 (S.C.C.), at para. 14; *R. v. W. (L.F.)*, 2000 SCC 6, [2000] 1 S.C.R. 132 (S.C.C.), at para. 25; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206 (S.C.C.), at paras. 43-46.

[53] The By-law's penalty section includes anyone who "violates or contravenes a provision of this By-law, a license issued in accordance with this By-law or an Order issued in accordance with this By-law" (s. 42(1)(a)). The By-law continues:

> 42 (2) A person who commits a first offence is liable upon summary conviction to a penalty of not less than two hundred and fifty dollars and not more than ten thousand dollars and in default of payment, to imprisonment for a term of not more than two months.
>
> 43 Every day during which an offence pursuant to section 42 continues is a separate offence.

[54] The trial judge imposed a sentence of a $500 fine for each of the eight convictions, plus costs of $122.50 and a victim surcharge of $75 each, totalling $5,580.00. The Appellant conceded that its past 15 convictions under the By-law are relevant to sentencing, but argues that the trial judge overemphasized denunciation and deterrence. It argued before me that, since the fine far exceeds the profit that Glow Signs would obtain from each sign permit, the sentence imposed at trial ought to be overturned.

[55] I am not persuaded by this argument. There is no reason in argument or in evidence before me that compels me to overturn the trial judge's sentence. She was aware of the mitigating factors, including that no further tickets have been laid against the Appellant since 2017. The range for first offences under the By-law is $250 to $10,000. The Appellant has been convicted of similar infractions 15 times before these offences, and can now add another eight convictions to its record. Although deterrence is always a key principle in sentencing, it cannot be said that an increase of $250 per conviction "overemphasizes" this factor when the Appellant now stands convicted 23 times. This aspect of the appeal is also dismissed.

Conclusion

[56] Glow Parties has not shown why this case is so exceptional, so rare, that a stay is warranted. The trial judge assessed the facts and applied them to the legal test, correctly concluding that there was no abuse of process warranting a stay.

[57] The Appellant's appeal is dismissed on both the grounds of abuse of process and sentence. The Respondent informed the Court at the outset of this appeal that it would not be seeking costs in this matter and, accordingly, no costs are awarded.

[58] I would ask counsel for HRM to prepare the Order.

Bodurtha, J.