

CANADA / JUDGMENT

R. v. Smyth

2020 BCCA 141

COURT

British Columbia Court of Appeal

DECIDED

15 May 2020

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2020 BCCA 141 R. v. Smyth

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Smyth,

2020 BCCA 141

Date: 20200515

Docket: CA46312; CA46313

Docket: CA46312

Between:

Regina

Respondent

And

Susan Marta Smyth

Appellant

- and -

Docket: CA46313

Between:

Regina

Respondent

And

Pia Massie

Appellant

Before:

The Honourable Mr. Justice Abrioux

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated

June 7, 2019(Trans Mountain Pipeline ULC v. Mivasair, 2019 BCSC 1247,

Vancouver Docket S-183541).

Counsel for the Appellants,

Susan Marta Smyth and Pia Massie:

D.N. Fai

Counsel for the Respondent:

L. Ruzicka

M. Crisp

Counsel for the Proposed Intervenors,

Climate Convergence and 350 Vancouver

Climate Action Association:

A. Singh

M. Silongan

Written Submissions Received:

March 16 and April 20, 2020

Place and Date of Judgment:

Vancouver, British Columbia

May 15, 2020

Summary:

The applicants, Climate Convergence and 350 Vancouver Climate Action Association, apply for leave to intervene in the underlying appeals arising out of criminal contempt convictions for breach of an injunction in the context of protests against the expansion of the Trans Mountain Pipeline. Held: Application dismissed. The applicants do not have a unique and different perspective. The applicants share the appellants' view that the injunction violated freedom of

expression and peaceful assembly in s. 2(b) and (c) of the Charter, and that courts should protect these rights by staying criminal contempt proceedings arising from unconstitutional injunctions. While the applicants offer a broader perspective by virtue of their membership, their proposed submissions will not assist the Court on the narrow legal issues involved.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

I. Introduction

- [1] The applicants, Climate Convergence and 350 Vancouver Climate Action Association ("350 Vancouver"), seek an order pursuant to Rule 36 of the Court of Appeal Rules, B.C. Reg. 297/2001 [Rules] that they be granted leave to intervene in the appeals of R. v. Smyth and R. v. Massie. Both Ms. Smyth and Ms. Massie were convicted by Affleck. J of criminal contempt of court for breaching an injunction in favour of Trans Mountain Pipeline ULC, which was in effect at the Burnaby Terminal in the Lower Mainland of Vancouver, British Columbia.
- [2] With the consent of the proposed intervenors and the parties, I decided that the application could proceed in writing in accordance with the Court's modified processes articulated in its notice issued March 17, 2020: "Limitation of Court Operations" (since replaced by a notice issued March 30, 2020, which was subsequently replaced by the current notice issued April 20, 2020).
- [3] Ms. Smyth and Ms. Massie consent to the application, which is opposed by the Crown.
- [4] The conviction appeals are currently scheduled for hearing on June 26, 2020. The appellants' factum was filed on March 2, 2020. The Crown's factum is scheduled to be filed on May 15, 2020.
- [5] For the reasons that follow, the application is dismissed.

II. Background

- [6] On June 7, 2019, the appellants, among others, were found guilty of criminal contempt of court: *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 1247 ("Reasons").
- [7] On March 15, 2018, an injunction was granted enjoining the appellants and others from "physically obstructing, impeding, or otherwise preventing access by Trans Mountain, its contractors, employees, or agents, to work in any of the sites", which included a site referred to as the "Burnaby Terminal": *Reasons* at para. 3. The injunction enjoined the appellants and others from coming within five metres of the Burnaby Terminal.
- [8] After the injunction was granted, numerous persons were arrested by the RCMP for alleged disobedience of the injunction. The appellants were arrested on April 12, 2018, near the Burnaby Terminal.
- [9] Trans Mountain ULC applied for orders that those who disobeyed the injunction be found guilty of contempt of court.

- [10] On April 16, 2018, the Attorney General of British Columbia intervened in the proceedings to conduct the prosecution of the alleged contemnors for criminal contempt of court on the basis that those who disobeyed the injunction did so publicly to draw attention to their opposition to the pipeline expansion.
- [11] The judge made the following findings with respect to the appellants:
- [99] The following are my conclusions concerning Ms. Massie and Ms. Smyth. Mr. Fai submits that both Ms. Massie and Ms. Smyth testified credibly that they did not believe they were obstructing or impeding access to the Burnaby Terminal on April 12, 2018. Therefore, Mr. Fai submits that a reasonable doubt arises as to whether they defied the injunction. I do not agree.
- [100] Susan Smyth is shown in police video taken on April 12, 2018, sitting in front of the entry gate to the Burnaby Terminal. She testified that no vehicles were attempting to go through the entry gate. I will repeat what I stated earlier. The fact that no vehicle was attempting to enter the gate at that time cannot demonstrate that the injunction was not disobeyed. Actual stoppage of a vehicle is not necessary to demonstrate there was an intent to impede access to the Burnaby Terminal. The law does not impose an obligation on a company in the position of Trans Mountain in this instance to attempt to force its way through a group of persons disobeying an injunction before those persons can be found in contempt of court. To impose that obligation on Trans Mountain would be to create a risk of a confrontation or violence. Moreover, as I have described earlier in these reasons, it is irrelevant for the purpose of these protestors that no vehicle attempted to enter the Burnaby Terminal as Ms. Massie and Ms. Smyth sat in front of the entry gate.
- [101] Both Ms. Smyth and Ms. Massie testified their involvement in the April 12, 2018, protest was planned and coordinated. Both testified they expected to be arrested. Both testified they disobeyed the injunction. Both did so in the presence of a crowd of protestors and of the police. I am persuaded beyond a reasonable doubt that the elements of the common law offence of criminal contempt have been proven against Ms. Smyth and Ms. Massie. Nevertheless, their guilt or innocence is subject to my conclusions on the constitutional arguments they advance.
- [12] Following their convictions for criminal contempt of court, Ms. Smyth was sentenced to one year probation and 100 hours of community service; Ms. Massie was sentenced to six months' probation and 100 hours of community service.
- [13] On August 16, 2019, the appellants filed their notices of appeal, alleging various errors involving constitutional questions and a number of rights set out in the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter]. Of significance to this application is the following ground of appeal: that the judge erred in failing to grant a judicial stay of proceeding under s. 24(1) of the Charter on the basis that the injunction infringed the appellants' right to freedom of expression and peaceful assembly as guaranteed by s. 2(b) and (c) of the Charter.

III. Position of the Parties

- [14] The applicants seek leave to intervene in these appeals. 350 Vancouver is a non-profit society focused on climate emergency, which exists in over 180 countries worldwide. 350 Vancouver deals with front-line communities, Indigenous peoples, environmental groups, and others with a public interest in these appeals. Climate Convergence is a coalition of organizations and individuals dedicated to educating, organizing, and mobilizing for climate justice.
- [15] The applicants claim to have a direct interest in some of the issues engaged by these appeals including the limits on peaceful protest, the overreaching effect of injunctions, and the unconstitutional limits on the appellants' rights to freedom of expression and peaceful assembly under s. 2 of the Charter. They assert that, given their broad and diverse membership, they can provide the Court with a larger perspective on the specific issues raised in these appeals and seek to make submissions on the s. 2 Charter issue set out at para. 13 above.
- [16] The Crown opposes the application, arguing that the applicants:
- have not identified a unique and different perspective on the s. 2(b) Charter issue (freedom of expression) from the appellants;
 - appear to take a position on the outcome of the appeal; and
 - intend to refer to materials that were not referenced in the court below, which would expand the evidentiary record.

IV. Legal Framework

- [17] Any person interested in an appeal may apply, under Rule 36(1) of the Rules, to a justice for leave to intervene on any terms and conditions that the justice may determine. Further, pursuant to s. 10(2)(a) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, a justice may grant leave to intervene as an order incidental to the appeal. The applicants complied with Rule 36(2) in the filing of this application.
- [18] An applicant seeking intervenor status must show either that it has a direct interest in the outcome of the proceeding or that it represents a public interest in a public law issue: *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 8 at para. 2 (Fenlon J.A. in Chambers). Climate Convergence and 350 Vancouver apply under the public interest category. In allowing intervenors on this basis, the Court attempts to ensure that important points of view are not overlooked: *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2012 BCCA 330 at para. 5 (Groberman J.A. in Chambers).
- [19] The public interest route engages the following criteria, summarized by Garson J.A. (in Chambers) in *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCCA 282 at para. 14 as follows:

- a) Does the proposed intervenor have a broad representative base?
- b) Does the case legitimately engage the proposed intervenor's interests in the public law issue raised on appeal?
- c) Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?
- d) Does the proposed intervenor seek to expand the scope of the appeal by raising issues not raised by the parties?

[20] This application turns on the third criterion.

V. Analysis

- [21] I accept that the applicants claim to have a broad representative base, as 350 Vancouver has a presence in 180 countries and Climate Convergence is a coalition of organizations and individuals.
- [22] I also accept that these appeals legitimately engage the applicants' interests in the public law issue surrounding the limits that courts may place, through injunctions, on freedom of expression and peaceful assembly guaranteed in s. 2 of the Charter, and whether criminal contempt of court proceedings should be stayed where the charges relate to the breach of an unconstitutional injunction.
- [23] I am not satisfied, however, that the applicants have identified a unique and different perspective that will assist the Court. They intend to make submissions on the importance of peaceful assembly and protest to their environmental activism, as well as the "larger chilling effect" that could be caused by the alleged violation of the appellants' Charter rights.
- [24] Without commenting on the merits of the ground of appeal, the judge's findings on the s. 2 Charter issue were set out in the Reasons as follows:
- [134] In response to the applicants' submission that the injunction infringes their right to freedom of expression and of peaceful assembly and association contrary to s. 2 of the Charter, the Crown submits this is a collateral attack on the injunction and ought to be summarily dismissed. In *R. v. Krawczyk*, 2007 BCSC 345, aff'd 2009 BCCA 250, before Madam Justice Brown, rejected a similar submission in that case by the defendant.
- [135] The applicants submit that this Court ought to apply the Federal Court of Appeal's decision in *Tsleil-Waututh v. Canada (Attorney General)*, 2018 FCA 153 [Tsleil-Waututh], to support their argument that their right to peaceful assembly guaranteed by s. 2 of the Charter has been violated. However, as the Crown points out, the applicants were arrested on April 12, 2018, whereas *Tsleil-Waututh* was decided on August 30, 2018.

- [136] Further, though the Federal Court of Appeal quashed the decision of the National Energy Board which had approved the expansion of the pipeline, that decision had no effect on the injunction of March 15, 2018, which remained in force.
- [25] The applicants' proposed submissions do not address the legal issues engaged such as the doctrine of collateral attack, the applicability of the Federal Court of Appeal decision referred to in para. 135 of the Reasons, and/or the s. 24(1) stay of proceedings analysis. The only unique position that the applicants assert is--by virtue of their diverse membership--a broader, global perspective on how any infringement of the appellants' s. 2 Charter rights could have a larger chilling effect on political activism and democratic institutions. While the applicants' submissions may assist the Court in appreciating the broader context and ramifications of these appeals, I agree with the respondent that they are unlikely to assist the Court on the core legal issues. As Groberman J.A. (in Chambers) stated in *R. v. Bornyk*, 2014 BCCA 450 at para. 11:
- [11] Prospective intervenors must demonstrate more than the Court's decision will have broad ramifications. There is a real danger that intervenors that do not propose to do more than point out the importance of the Court's decision will simply be a burden to the parties and the Court.
- [26] The applicants have not shown that they can bring a perspective that is different and useful to the Court in resolving the issues: *Garcia v. Tahoe Resources Inc.*, 2016 BCCA 320 at para. 7 (Savage J.A. in Chambers). While the applicants may offer a broader perspective through their representation and engagement with diverse community interests, the substance of their proposed submissions is not sufficiently distinguished from the appellants' position in these proceedings.
- [27] Furthermore, intervention should not be granted if it would unjustly result in legal or financial prejudice to the parties or widen the scope of the appeal: *Ward v. Clark*, 2001 BCCA 56, aff'd 2001 BCCA 264; *British Columbia v. Philip Morris International Inc.*, 2016 BCCA 363 at para. 26, rev'g in part 2016 BCCA 203. While the respondent takes issue with some of the evidence that the applicants may refer to, this could be remedied by a condition that the intervenors may only refer to evidence in the trial record and the parties' factums on appeal.
- [28] Finally, the respondent raises a further issue; namely, that the applicants appear to take a position on the outcome of the appeals. I agree. There is no question that the applicants align themselves with the appellants. As some examples, in an affidavit of a representative of the applicants in support of this application, the affiant says:

We are supporting the appeal brought forward by Pia Masse ("Pia") and Susan Marta Smyth ("Marta") because they have supported our group and been involved in climate advocacy for many years. They have spoken for us, at their TMX performance and many times before and since. We are taking this opportunity to speak for them

Marta and Pia have responded in the only way available to them, in the frame most appropriate: public performance art at the TMX gates. To meet the dire threat of the climate crisis, we need that artistic message that brings everyone together.

At the TMX gates, Marta and Pia were speaking for everyone.

[29] In their memorandum of argument, the applicants say:

The desire and ability of Climate Convergence to intervene in this court matter is its ongoing engagement with both Pia Masse ("Pia") and Susan Marta Smyth ("Marta") to make art a constant and vital aspect of its organizing.

[30] Furthermore, in their memorandum of argument, the applicants "agree" with the appellants' submission that the trial judge erred when he failed to find a s. 2(b) Charter breach or direct a stay of proceedings.

[31] In the words of Hunter J.A (in Chambers) at para. 20 in *Squamish Nation v. British Columbia (Environment)*, 2019 BCCA 65, these submissions illustrate "a misunderstanding of the intervenors' role". Intervenors in this court are not intended to take a position on the result of the appeal or to support the position of one party or another".

[32] An intervenor whose interests appear to align with one of the parties may still be granted intervenor status where the intervenor provides a unique perspective that might assist the Court in resolving the appeal: *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 402. A clear order limiting the intervenor's participation can mitigate concerns about partiality: *Araya* at paras. 17-18.

[33] Intervenor status has been granted to community organizations whose views align with one party's position. In *R. v. Kapp*, 2005 BCCA 247, Levine J.A. (in Chambers) granted leave to Aboriginal groups and a coalition of fishing groups to intervene in a criminal appeal involving a challenge to the validity of Aboriginal fishing regulations. In *Carter v. Canada (Attorney General)*, 2012 BCCA 502, Neilson J.A. (in Chambers) granted leave to intervene to a variety of organizations ranging from disability rights groups to Christian fellowships, each of which supported a particular position on the issue of physician-assisted dying. However, the proposed intervenors had a unique perspective that would assist in resolving the issues before the Court.

[34] In my opinion, while the applicants only seek leave to make submissions on the s. 2 Charter issue, they do so without identifying a unique perspective that will assist the Court on the core legal issues involved in the appeals.

Disposition

[35] For these reasons, the application is dismissed.

[36] Under the circumstances, I extend the time for the filing of the respondent's factum from May 15, 2020 to May 29, 2020.

"The Honourable Mr. Justice Abrioux"

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