

CANADA / JUDGMENT

Teal Cedar Products Ltd. v. Mashari

2021 BCCA 353

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2021 BCCA 353 Teal Cedar Products Ltd. v. Mashari COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: Teal Cedar Products Ltd. v. Mashari, 2021 BCCA 353 Date: 20210924 Dockets: CA47552; CA47567 Docket: CA47552 Between: Teal Cedar Products Ltd. Respondent (Plaintiff) And Aida Mashari Appellant And Unknown Persons Operating as the "Rainforest Flying Squad", Robert Arbess (also known as Reuben Garbanzo), John Doe, Jane Doe, and Unknown Persons Respondents (Defendants)

- and - Docket: CA47567 Between: Teal Cedar Products Ltd. Respondent (Plaintiff) And Rainbow Eyes (also known as Angela Davidson) Appellant And Unknown Persons Operating as the "Rainforest Flying Squad", Robert Arbess (also known as Reuben Garbanzo), John Doe, Jane Doe, and Unknown Persons Respondents (Defendants) Corrected Judgment: The text of the judgment was corrected at para. 2 on September 28, 2021. Before: The Honourable Madam Justice Saunders (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated April 1, 2021 (Teal Cedar Products Ltd. v. Rainforest Flying Squad, 2021 BCSC 605, Vancouver Docket S211602). Counsel for the Appellants (via videoconference): D.W. Gibbons M.B. Funt C. Chamberlain Counsel for the Respondent: D.L. Dalke A.R. Hudson J. Lee, Articled Student (July 14, 2021 only) Place and Date of Hearing: Vancouver, British Columbia July 13 and 14, 2021 Place and Date of Judgment: Vancouver, British Columbia September 24, 2021 Summary: The applicants seek an extension of time within which to appeal an interlocutory injunction ordered on April 21, 2021. They contend leave to appeal the order is not required, but if it is required, they seek leave to appeal. Neither applicant was a party to the proceeding. Both were arrested for violating the injunction. Held: Leave to appeal is required; the applications are dismissed. The order is a limited appeal order under R. 2.1 of the Court of Appeal Rules. The applicants lack standing because they were not parties in the action. While a division of the court may grant standing, it will require exceptional circumstances to do so. It is not foreseen that a division would grant standing. The applicants have not established sufficient merit to the appeal or significance of the appeal to the practice to support leave to appeal and it is not in the interests of justice that leave be granted. Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] Aida Mashari (in CA47552) and Rainbow Eyes, also known as Angela Davidson (in CA47567), wish to appeal an interlocutory interim injunction ordered in favour of Teal Cedar Products Ltd. on April 1, 2021, by Mr. Justice Verhoeven in the Supreme Court of British Columbia. That proceeding named "Unknown Persons Operating as the "Rainforest Flying Squad", Robert Arbess (also known as Reuben Garbanzo), John Doe, Jane Doe, and Persons Unknown" as defendants.
- [2] Both Aida Mashari and Rainbow Eyes were arrested for violating the injunction, Rainbow Eyes on May 17, 2021 and June 23, 2021 as a protestor, and Aida Mashari on May 25, 2021 as "legal observer". Contempt proceedings have been brought against Rainbow Eyes for disobedience of the injunction. No contempt proceedings have been brought against Aida Mashari as of the date of the hearing of this application. Neither Aida Mashari nor Rainbow Eyes purport to represent the "Rainforest Flying Squad".
- [3] A notice of appeal of the April 1, 2021 order was filed on April 28, 2021 by three persons self-identified as members of the "Rainforest Flying Squad". That appeal (CA47446) was abandoned on May 21, 2021.
- [4] Both Aida Mashari and Rainbow Eyes apply for an extension of time within which to appeal the injunction. In the course of proceeding, they have questioned the need for leave to appeal and they take the position that they do not require such leave, although if they need leave to appeal, they seek it.
- [5] I will address first the question of the need for leave to appeal.
- [6] Since the enactment of current s. 7 of the Court of Appeal Act, R.S.B.C. 1996, c. 77, an order of the Supreme Court of British Columbia is appealable as of right unless it is a limited appeal order. Prior to current s. 7, an interlocutory order was appealable only with leave, and the jurisprudence resolving which orders were interlocutory and which were not had become a quagmire of fine distinctions as, with increasing refinement of the rules of the Supreme Court, certain applications had the potential to produce a final order or an interlocutory order. Under that scheme, however, an appeal of an interlocutory injunction always required leave to appeal. This feature may account for the absence here, both in the application and the entered order, of any identifying authority for the injunction.
- [7] The current s. 7 of the Court of Appeal Act introduced the concept of a limited appeal order. Limited appeal orders, in turn, are identified in R. 2.1 of the Court of Appeal Rules. Thus, the current framework is, from the Act: 7 (1) In this section, "limited appeal order" means an order prescribed under the rules as a limited appeal order.
- (2) Despite section 6 (1) of this Act, an appeal does not lie to the court from a limited appeal order without leave being granted by a justice.

- (3) In an order granting leave to appeal under this or any other Act, a justice may limit the grounds of appeal. And, from the Rules: 2.1 The following orders are prescribed as limited appeal orders for the purposes of section 7 of the Act:
- (a) an order granting or refusing relief for which provision is made under any of the following Parts or rules of the Supreme Court Civil Rules:
- (i) Part 5 [Case Planning]; (ii) Part 7 [Procedures for Ascertaining Facts], other than Rule 7-7 (6) [application for order on admissions]; (iii) Rule 9-7 (11), (12), (17) or (18) [adjournment or dismissal, preliminary orders, orders and right to vary or set aside order]; (iv) Part 10 [Property and Injunctions];
- (v) Part 11 [Experts]; (vi) Rule 12-2 [trial management conference]; (vi.1) Rule 18-1 [inquiries, assessments and accounts]; (vii) Rule 21-7 [foreclosure and cancellation]; ...
- [8] Part 10 of the Supreme Court Civil Rules, referred to in this court's R. 2.1(a)(iv) (above), includes R. 10-4 addressing injunctions: Rule 10-4 -- Injunctions Applications for pre-trial injunctions
- (1) An application for a pre-trial injunction may be made by a party whether or not a claim for an injunction is included in the relief claimed. Applications for pre-trial injunctions before proceeding started
- (2) An application for a pre-trial injunction may be made before the start of a proceeding and the injunction may be granted on terms providing for the start of the proceeding. Applications for interim injunctions without notice
- (3) If an application for a pre-trial injunction is made without notice, the court may grant an interim injunction. Injunction by court order
- (4) An injunction must be imposed by order of the court. Undertaking as to damages
- (5) Unless the court otherwise orders, an order for a pre-trial or interim injunction must contain the applicant's undertaking to abide by any order that the court may make as to damages. Application for injunction after judgment
- (6) In a proceeding in which an injunction has been or might have been claimed, a party may apply by petition after judgment to restrain another party from the repetition or continuance of the wrongful act or breach of contract established by the judgment or from the commission of any act or breach of a like kind.
- [9] As can be seen, R. 10-4 addresses the issuance of interlocutory (now termed "pre-trial") injunctions. It contains provisions ameliorating problems formerly encountered in the practice of injunctions by allowing an interlocutory injunction to issue before a proceeding is started (once a problem as explained by Mr. Giles in the Advocate article referred to below), and by allowing an application for an interlocutory injunction to be made without notice having been given.

- [10] It is basic that an interlocutory injunction is an extraordinary remedy available in equity and carried into the law of British Columbia by the Law and Equity Act, R.S.B.C. 1996, c. 253: 39 (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.
- (2) An order made under subsection (1) may be made either unconditionally or on terms and conditions the court thinks just. ... [Emphasis added.]
- [11] Aida Mashari and Rainbow Eyes say the authority for the interlocutory injunction is the court's inherent jurisdiction and not R. 10-4 of the Supreme Court Civil Rules.
- [12] In "A Review of the Practice of Applications for Injunctions", The Advocate (Vancouver Bar Association), vol. 31, no. 1, 1973 p. 35, Jack Giles noted that Mr. Justice O'Halloran traced the historical origin of the Court's inherent authority to grant this type of relief in R. v. Hess (No. 2), [1949] 4 D.L.R. 199 (B.C.C.A.). In MacMillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 725, Chief Justice Lamer for the majority, addressing the inherent jurisdiction of courts of general jurisdiction, referred to the "core or inherent jurisdiction of superior courts" (at para. 29) and the "seminal article" on this topic of I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 23. Chief Justice Lamer observed at para. 30: "While inherent jurisdiction may be difficult to define, it is of paramount importance to the existence of a superior court." It includes "the power to control its process and enforce its orders" (at para. 33).
- [13] The point of exceptionality of an interlocutory injunction is that it is a remedy granted before trial. Engaging that temporal quality, it is within the general topic of "court process". In that sense the applicants are correct that the Supreme Court of British Columbia has inherent jurisdiction in respect of interlocutory injunctions. At the same time the rules of the Supreme Court of British Columbia promulgated under the Court Rules Act, R.S.B.C. 1996, c. 80, establish the comprehensive framework for litigation in the court. The Supreme Court's rules and inherent jurisdiction co-exist, and while the relationship between them is not often a source of judicial attention, it may safely be said that the court's rules are procedural, and do not form a complete code: Robertson v. Slater Vecchio, 2007 BCCA 453.
- [14] In this mix we insert s. 7 of the Court of Appeal Act and our R. 2.1. By R. 2.1, limited appeal orders are identified by reference to the compendium of the Supreme Court's rules regulating that court's processes, but within its inherent jurisdiction.
- [15] So I come to the issue before me. The applicants say where the order is made under the inherent jurisdiction of the court and there being no identification of the rule applied in either the application or the entered order, we must take the order as one made pursuant to that inherent jurisdiction and so appealable as of right. In support of this proposition they rely upon cases considering applications for disclosure that were defended on the basis of solicitor-client privilege, a defence that raised the issue of waiver of privilege.

- [16] We are referred to *Kasian Estate v. Kasian*, 2021 BCCA 273, following *Araya v. Nevsun Resources Ltd.*, 2019 BCCA 104. In *Araya*, the authority for the order was not identified and the single judge addressed the alternative theories that it was made under Part 7, referred to in this court's R. 2.1(a)(ii), or that it was made under the inherent jurisdiction of the court. He concluded that because the order had engaged a broad consideration of waiver of privilege, it was made under the inherent jurisdiction of the court, not Part 7, and was appealable as of right.
- [17] In contrast, in *Do Process LP v. Infokey Software Inc.*, 2014 BCCA 470, where the applicants had expressly involved R. 7-1, a single judge concluded that an appeal of an order made under Part 7 of the Supreme Court Civil Rules required leave to appeal, notwithstanding that it included an express declaration of waiver of privilege, an order which might be considered appealable as of right.
- [18] Do was referred to in *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 8.
- [19] In *Bacon v. British Columbia (Minister of Finance)*, 2020 BCCA 218, a single judge considered the need for leave to appeal an order denying an interlocutory injunction on a judicial review petition. There was a question of the correctness of invoking the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, to obtain a declaration of constitutional invalidity of legislation. Setting that procedural issue to the side and taking the case on its face, the competing sources of power for the order sought to be appealed were s. 10 of the Judicial Review Procedure Act and R. 10-4. The judge concluded the order came within R. 10-4; leave to appeal was required.
- [20] I consider that the correct question in such cases is not whether the order invoked the inherent jurisdiction of the court but whether it came through the Supreme Court Civil Rules. In my view, where a particular rule of the Supreme Court of British Columbia addresses the process, the procedure provided by that rule applies for purposes of identifying its character as a limited appeal order. On this view, and consistent with the approach applied in *Bacon*, a judge must identify the rule, or rules, it came through to resolve the application of R. 2.1 of the Court of Appeal Rules. This approach has the benefit of consistency in the application of R. 2.1, takes the appealability of an order away from the vagaries of draftsmanship of applications and orders where the authority for the order sought or obtained may be omitted, and avoids a search for inherent jurisdiction as to which, as I have explained, the Supreme Court's processes naturally invoke.
- [21] I would decline, therefore, to follow the approach of the disclosure cases. Here we have an application for an order that is fully within a rule listed in R. 2.1 of the Court of Appeal Rules. For purposes of process in this court it takes its procedural character from R. 10-4. I conclude leave to appeal the order is required.
- [22] I turn now to the applications for an extension of time and for leave to appeal.

- [23] In his reasons for judgment issuing the interim interlocutory injunction, the judge applied the three-part test for an interlocutory injunction described in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. Under this formulation, irreparable harm (considered as part of the balance of convenience in the two-part test described by Madam Justice McLachlin in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.), *aff'd* [1991] 1 S.C.R. 62) is pulled out as a separate consideration. Applying the three-part test, the judge concluded that Teal Cedar had established a serious issue to be tried, that it would suffer irreparable harm were the injunction not ordered, and that the balance of convenience favoured granting the relief.
- [24] Aida Mashari and Rainbow Eyes say the judge erred: in holding that Teal Cedar had established the irreparable harm of "interference with a business as a going concern"; in failing to give weight to public interest considerations advanced by the defendants when assessing the balance of convenience; and in considering that there was no reasonable prospect that, if the injunction was refused, the company could recover damages for losses in tort.
- [25] The main orders sought are for leave to appeal - the applications for an extension of time simply facilitate that greater objective. Were I to conclude leave should be given, the case for extensions would need to be examined. As I have concluded that the applications for leave do not meet the criteria for granting leave to appeal, the applications for an extension of time are dismissed without further discussion.
- [26] The factors considered in determining whether leave to appeal should be granted are well known. They derive from *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.), conveniently summarized in *Goldman, Sachs & Co. v. Sessions et al.*, 2000 BCCA 326 at para. 10: whether the point on appeal is of significance to the practice; whether the point raised is of significance to the action itself; whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and whether the appeal will unduly hinder the progress of the action. These factors are considered under the overarching consideration of the interests of justice (*Vancouver (City) v. Zhang*, 2007 BCCA 280).
- [27] The order enjoined certain logging protests. Teal Cedar has a tree farm licence allowing it to harvest Crown timber from an area on the southwest coast of Vancouver Island. Its logging in the area is constrained by the requirement to obtain specific logging and road building permits from the Province, and by the area's overlap with the traditional territory of the Pacheedaht First Nation. When Teal Cedar made its application for an interlocutory injunction it had obtained three cutting permits from the Province and planned to apply for three more, and had received several road building permits in 2019 and 2020 that were approved by the Pacheedaht First Nation with some conditions. The events leading to the injunction occurred in an area of the Fairy Creek Watershed which overlaps with one of the cut blocks in the tree farm licence area. Some of that area is old growth forest that was open to logging by Teal Cedar for a period of time.

- [28] A group calling itself the "Rainforest Flying Squad" has protested logging activities in the area and engaged in road blockades. Some of the road blockades were active when the injunction application was heard. The blockades disrupted activities of the company and its contractors, principally by blocking access roads, thereby disrupting logging of old growth forest.
- [29] At the hearing of the application for an injunction, Teal Cedar advanced evidence of the scale of the anticipated logging; the size of areas of protected forest; its purpose in logging to supply the company's cedar orders; its asserted need to log in order to ensure the continued operation of its mills and employment of the many people supported by its mills; the financial value of its contracts with customers; the interrelationship between work on logging roads and erosion and environmental damage; equipment that had been vandalized; fire and safety risks observed coincident with the protesters; and the value of lost wages employees had already experienced as a result of time lost from work as a result of the protest activity.
- [30] The defendants advanced expert opinion evidence on the critical importance of old growth forest, biological diversity, and the relationship of these concerns to climate and environment.
- [31] After referring to the defendants' position more fully, the judge said:
- [49] The problem is, all of the concerns raised by the respondents are for the government to address, and not this Court. Forestry decisions are highly policy driven and require the government to coordinate, balance, and reconcile often competing values and interests. The applicable legal and environmental scheme regarding forestry policy and the use of Crown lands demonstrates this: *Chingee v. British Columbia*, 2017 BCCA 250, at para. 25.
- [50] The protesters' real complaint is with the government's policy choices. They believe that their position should prevail, no matter what the government decides. Their actions are designed to make it so. The respondent Kathleen Code states flatly that in her view the Minister of Forests is incorrect in stating that old growth forestry must continue in order to provide communities and workers with work.
- [51] It is apparent from their public statements that they also hope to pressure the government into making the decisions they want. Their method is to unlawfully interfere with Teal's lawful operations. It is impossible for the Court to go along with this, by refusing Teal's injunction application and leaving it with no remedy.
- [52] As Justice Voith said in *Cermaq*:
- [63] It would mean that persons or entities who conduct their affairs lawfully would have no means to protect their businesses, their property, or themselves. It would suggest that illegal forms of self-help are either justified or potentially effective.

- [65] It is elected governments that decide whether such activity or such development should take place.
- [70] What is not possible, what is simply not on the table, is for individuals to act unilaterally and unlawfully and to choose to forego any political or legal process to achieve their objects.
- [53] Other judges of this court have repeatedly said the same or similar things. Recent examples include: *Red Chris Development v. Quock et al.*; *Husby Forest Products Ltd. v. Jane Doe*; *Marine Harvest Canada Inc. v. Morton*; and *O'Brien & Fuerst Logging Ltd. v. White*. [Citations omitted.] ...
- [55] The public interest that the respondents rely on is the preservation of old growth forests. However, as I have said, that concern is a matter of public policy to be decided by government, and can play no part whatsoever in my decision to grant or refuse the injunction. Rather, the public interest at stake in this case is upholding the rule of law and enjoining illegal behaviour. As noted by Justice Punnnett in [*Red Chris Development 2014*], at para. 77, it is contrary to the public interest to allow the defendants to persist in their blockades.
- [32] In my view the proposed appeal does not meet the merits threshold described in *Power Consolidated* for two reasons: procedurally, the applicants lack standing in this court and in my view are unlikely to be accorded standing by a division, whose decision it would be; and substantively, the challenge to the injunction is weak - I cannot foresee its success before a division of this court.
- [33] As to standing, I recognize that it is within the authority of a division of this court to grant standing. However, the circumstances in which a division will allow a non-party to appeal an order are limited to the exceptional: *The Law Society of British Columbia v. The Society of Notaries Public of British Columbia*, 2014 BCCA 233; *Richard Niebuhr Enterprises Ltd. (c.o.b. Niebuhr Constructions) v. Vancouver (City) Board of Variance*, 2007 BCCA 528; *Coburn and Watson's Metropolitan Home v. Home Depot of Canada Inc.*, 2019 BCCA 308, *Shoolestani v. Ichikawa*, 2018 BCCA 361. In particular, a person does not have standing only because the injunction may apply to her actions: *Hayes Forest Services Limited. v. Krawczyk*, 2006 BCCA 156, leave to appeal to S.C.C. ref'd [2006] S.C.C.A. No. 227. Here the applicants are not parties to the action in the Supreme Court of British Columbia, and in the circumstances I see no likelihood a division would accord them the right to appeal the injunction. I cannot foresee an application for standing succeeding in the circumstances before me.
- [34] I reach the same conclusion on the merits of the substantive issues raised by the applicants. The judge applied the well-known three-part test for injunctive relief. Whether to grant an interlocutory injunction is a matter of discretion, and in considering the merits of the appeal we must consider the high standard of review for a discretionary order.

- [35] The applicants contest the judge's application of the irreparable harm and the balance of convenience criteria. In addressing irreparable harm the applicants take issue with the judge's conclusion that there was "[i]nterference with a business as a going concern". They say the test of a going concern is its solvency so this phrase requires interference with the business as a solvent enterprise, that is, requires that the activity caused such loss as to threaten or impact the solvency of the enterprise.
- [36] I have no hesitation in saying that the summary used by the judge, "[i]nterference with the business as a going concern", does not import a requirement of an impending insolvency. The suggestion it does reads too much into the phrase and takes it out of context. The question is whether the actions sought to be enjoined are damaging or may damage an operating enterprise in a way that cannot be repaired. Usually, but not always, that cure is in damages. The ultimate assessment required of the judge is whether the harm done or being done is curable: RJR-MacDonald at 341. In this case, the judge referred to the harms advanced by Teal Cedar in support of its application and found aspects of the harms, including Teal Cedar's reliance on the timber supply from the protest area, the risks to the employment of many workers absent the timber supply, the potential for loss of market share and its reputation as a viable supplier, the potential for environmental and functional damage to roads, safety risks to employees, and the loss of wages already experienced, amount to irreparable harm. That conclusion sits comfortably in the jurisprudence.
- [37] I conclude that the judge followed a well-travelled path of jurisprudence in finding that the harms that prompted the company's application for an injunction satisfied the requirement of irreparable harm. Likewise the judge's consideration of the balance of convenience. His conclusions represent his application of his judgment, in the context of the materials filed in the hearing of the application and the applicable jurisprudence. I can see no likelihood that a division of this court would interfere with these conclusions.
- [38] Nor, in my view, can there be complaint on the judge's view of the collectability of damages - the third proposed ground of appeal. The potential for damages from the enjoined behaviour is great and easily beyond the means of most individuals to satisfy. In addition, some of the harm complained of will not sound easily in damages.
- [39] In my view, this means the merits of the substantive issues sought to be raised on appeal have only the most remote chance of success. Combined with the standing issue, I see no likelihood a division of this court would interfere with the order the applicants seek to appeal.
- [40] Nor do I consider that the appeal raises issues of significance to the practice. Significance to the practice refers to the contribution that may be made to the law or practice in the courts by pursuing the appeal. Here, the principles upon which interlocutory injunctions are issued are well established and consistently applied.

[41] Considering the weak merits of the substantive issues, the improbability of success on the standing issue, and the mass of consistently applied jurisprudence that reduces the significance of the appeal to the practice, I consider it is not in the interests of justice that leave be granted.

[42] The applications are dismissed. "The Honourable Madam Justice Saunders"

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