

CANADA / JUDGMENT

Teal Cedar Products Ltd. v. Rainforest Flying Squad

2021 BCCA 387

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 387 Teal Cedar Products Ltd. v. Rainforest Flying Squad COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Teal Cedar Products Ltd. v. Rainforest Flying Squad, 2021 BCCA 387 Date: 20211008 Docket: CA47775 Between: Teal Cedar Products Ltd. Appellant (Plaintiff) And Unknown Persons operating as the "Rainforest Flying Squad", Robert Arbess (also known as Reuben Garbanzo), John Doe, Jane Doe, and Persons Unknown Respondents (Defendants) And British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development) Respondent (Third Party) And Members of the "Rainforest Flying Squad", Kathleen Code, Carole Toothill, William Jones, Keith Cherry, Rani Earnhart, Saul Arbess, Warren Kimmitt, Donna Clark, and Attorney General of Canada Respondents Before: The Honourable Madam Justice Stromberg-Stein (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated September 28, 2021 (Teal Cedar Products Ltd. v. Rainforest Flying Squad, 2021 BCSC 1903, Vancouver Docket S211602). Oral Reasons for Judgment Counsel for the Appellant (via videoconference): D.L. Dalke A.R. Hudson E.J. Snow Counsel for the Respondent, Robert Arbess (also known as Reuben Garbanzo) (via videoconference): S.M. Kelliher Counsel for the Respondent, British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development) (via videoconference): K.A. Reilly Counsel for the Respondents, Kathleen Code, Carole Toothill, and William Jones (via videoconference): P.C. Canning P. Dwyer C. Chamberlain Counsel for the Respondents, Keith Cherry and Rani Earnhart (via videoconference): M. Nefstead Counsel for the Respondent, Attorney General of Canada (via videoconference): D.G. Nygard T.D. Timberg Place and Date of Hearing: Vancouver, British Columbia October 8, 2021 Place and Date of Judgment: Vancouver, British Columbia October 8, 2021 Summary: The applicant, Teal Cedar, applies for a stay of execution of an order of a judge made on September 28, 2021, ending the interim extension of an interlocutory injunction. Held: Application granted. Applying the three-part test set out in RJR-MacDonald v. Canada (Attorney General), the applicant has established there is some merit to the appeal; the applicant will suffer irreparable harm if a stay is not granted; and the balance of convenience favours the granting of a stay. Pending judgment on the application for leave to appeal and the appeal, which will be heard together on an expedited basis, there will be a stay of execution of the judge's order. STROMBERG-STEIN J.A.:

Facts

- [1] The applicant, Teal Cedar Products Ltd. ("Teal Cedar"), is a logging company. Its operations on Vancouver Island, which include an area with old-growth forest, have been disrupted by protests. The respondents include both protesters and interested or concerned parties.
- [2] In April 2021, Justice Verhoeven issued an interlocutory injunction, prohibiting the respondents and anyone having knowledge of the order from interfering with use of the roads, the construction, or the timber-harvesting activities in, effectively, Teal Cedar's forest tenure. It also authorized the RCMP to arrest and remove persons contravening the order. The injunction was set to expire at midnight on September 26, 2021.
- [3] The RCMP began to enforce the injunction in May 2021, using methods including exclusion zones, checkpoints, searches, and security gates. Most of the protesting was peaceful and legal. However, some protesters engaged in destructive and unlawful methods of protest. At the same time, while most of the RCMP enforcement was respectful and peaceable, some involved use of force.
- [4] In July 2021, after hundreds of arrests related to the contravention of the injunction, Justice Thompson invited the British Columbia Prosecution Service to review the evidence relating to the actions of the alleged contemnors and assume conduct of contempt proceedings. The British Columbia Prosecution Service accepted.
- [5] Following a hearing in July 2021, Justice Thompson concluded some of the RCMP's actions were unlawful and varied the injunction order by adding a direction intended to control interference by the RCMP with the work of journalists.
- [6] On September 17, 2021, following a hearing on the application of Teal Cedar to extend the injunction for 12 months, Justice Thompson ordered the injunction, as modified in July 2021, "remain in place until further order". In an order given on September 28, 2021, he ruled this interim extension order would end at 4:00 p.m. the same day.
- [7] Despite finding merit to the injunction and the potential for irreparable harm, Justice Thompson found the balance of convenience lay with the respondents. He found that although harm might befall Teal Cedar and the rule of law might face degradation in the absence of an injunction, the enforcement of the injunction seriously infringed civil liberties and the reputation of the Supreme Court. He also found there was no "enforcement gap" between the illegal actions of some protesters and the lack of criminal enforcement measures pursued by the Crown.
- [8] Since the end of the injunction, I am told RCMP enforcement and presence has declined. Meanwhile, some protesters have created new camps, called for reinforcements, and restricted access to the area for the RCMP and Teal Cedar employees and contractors.

- [9] Teal Cedar now applies for an interim stay of execution of Justice Thompson's September 28, 2021, order ending the interim extension of the injunction. For the reasons that follow, I would grant an interim stay. Relevant Law
- [10] Pursuant to s. 18 of the Court of Appeal Act, R.S.B.C. 1996, c. 77, a justice may stay all or part of any proceedings. Section 10(2)(b) of the Court of Appeal Act provides that a justice may make an interim order to prevent prejudice to any person.
- [11] The test for a stay is the same as the test for an interlocutory injunction. It is the three-part test set out in *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334, 337, 340-42. The applicant must demonstrate:
- (1) there is some merit to the appeal;
 - (2) the applicant will suffer irreparable harm if the stay is not granted; and
 - (3) the balance of convenience favours granting the stay.
- [12] The overarching consideration is the interests of justice.
- [13] The first criterion is modified when the appeal is from a discretionary order. The applicant must demonstrate the judge erred in principle, the order is not supported by the evidence, it appears that the order will result in an injustice, or the judge's decision was "clearly wrong": *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 at 344, 1986 CanLII 171, *aff'd* [1991] 1 S.C.R. 62; *Sullivan v. Strata Plan BCS-251*, 2005 BCCA 630 (Chambers) at para. 12. Stay of Execution
- [14] With respect to the merits of the appeal, Teal Cedar has outlined seven grounds of appeal. These can be sorted into two overarching issues. First, whether an applicant must establish an enforcement gap to succeed in an application for injunctive relief. Second, whether or to what degree it is acceptable to weigh concerns about the court's reputation when considering the balance of convenience in such an application. Jurisprudence would benefit from having this Court weigh in on these questions.
- [15] Regarding irreparable harm, the blockades erected by the protesters have had, and continue to have, a significant and detrimental economic impact on Teal Cedar's operations. Teal Cedar has had difficulty undertaking its typical logging activity, which in turn has led to: a potential loss of clients and degradation of its reputation; the inability to winterize logging roads; potential unemployment and permanent loss of workers; economic harm to their First Nations partners, which receive a stumpage fee; the wasting of felled timber; and similar impacts on its contractors. Teal Cedar has also incurred security costs and costs associated with vandalism. The injunction is aimed directly at those protesters engaging in unlawful activities. Contrary to the protestors' submissions, the inability to do so in the presence of an injunction is not irreparable harm.

- [16] Lastly, the balance of convenience in this instance lies with Teal Cedar. When considering a stay of execution, this Court strives to preserve the status quo. Here, that status quo is Teal Cedar engaging in government-authorized, legal activity, unobstructed by unlawful actions. The status quo is the long-standing injunction. No matter how unsavoury the protesters find Teal Cedar's logging, their quarrel is with government policy.
- [17] There is a stark difference between peaceful protest and unlawful and dangerous interference. The issue here is a serious concern for public safety since the refusal of Justice Thompson to extend the injunction. Issuing a stay would revive the injunction of Justice Verhoeven, as modified by Justice Thompson, thus enjoining this unlawful activity. In a situation where the criminal law has not been effective, it is in the interests of justice to grant this interim stay to prevent serious prejudice to Teal Cedar. This is an urgent matter, especially in light of the upcoming long weekend, which I have been told may bring the potential for a surge in numbers of protesters.

Disposition

- [18] I would stay the execution of Justice Thompson's order, pronounced September 28, 2021, pending judgment on the application for leave to appeal and the appeal.
- [19] The application for leave to appeal will be heard with the appeal.
- [20] All parties have indicated they are available for the matter to proceed on November 15, 2021. I will ask the registry to set aside November 16 as well. Do the parties need any assistance with timelines for filing the materials? [Discussion with counsel re: filing timelines]
- [21] STROMBERG-STEIN J.A.: Materials should be filed one week in advance of the hearing. "The Honourable Madam Justice Stromberg-Stein"

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