CANADA / JUDGMENT

Teal Cedar Products Ltd. v. Rainforest Flying Squad

2022 BCSC 1661

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2022 BCSC 1661 Teal Cedar Products Ltd. v. Rainforest Flying Squad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Teal Cedar Products Ltd. v. Rainforest Flying Squad,

2022 BCSC 1661

Date: 20220921

Docket: S211602

Registry: Vancouver

Between:

Teal Cedar Products Ltd.

Plaintiff

And

Unknown Persons Operating as the "Rainforest Flying Squad",

Robert Arbess (also known as Reuben Garbanzo), John Doe,

Jane Doe, and Persons Unknown

Defendants

And

British Columbia (Ministry of Forests, Lands,

Natural Resource Operations and Rural Development)

Third Party

Before: The Honourable Justice Thompson

Reasons for Judgment re Application to Extend Injunction

Counsel for the Plaintiff:

D. Dalke

A. Hudson

Counsel for the Application Respondents, Kathleen Code and William Jones:

P. Harrison

P. Dwyer

Counsel for the Third Party:

K. Reilly

No other appearances

Place and Dates of Hearing:

Nanaimo, B.C.

September 12-13, 2022

Place and Date of Reasons for Judgment:

Vancouver, B.C.

September 21, 2022

[1] This is Teal Cedar Products Ltd.'s application for a further extension of a time-limited interlocutory injunction first issued by Justice Verhoeven in April 2021. The injunction was set to expire on 26 September 2021. Before expiry, Teal Cedar applied to extend it for one year; the Court of Appeal reversed my refusal of this 2021 extension application, and ordered the injunction be extended to 26 September 2022: Teal Cedar Products Ltd. v. Rainforest Flying Squad, 2022 BCCA 26, rev'g 2021 BCSC 1903. An application for leave to appeal to the Supreme Court of Canada awaits determination.

Further Background

[2] Teal Cedar holds Tree Farm Licence 46 ("TFL 46"), a forest tenure on southern Vancouver Island. The licence area is nearly 60,000 hectares in size, and it contains stands of old growth. Teal Cedar has been granted permits to cut timber and to conduct road-building activities within certain parts of TFL 46.

[3] Beginning in August 2020, protestors unhappy with the prospect of old-growth logging blocked roads at various locations in and around TFL 46. In February 2021, Teal Cedar commenced this proceeding seeking, inter alia, injunctive relief, and an interlocutory injunction order was made in April 2021. Justice Verhoeven's reasons for granting the injunction are indexed at Teal Cedar Products Ltd. v. Rainforest Flying Squad, 2021 BCSC 605, leave to appeal ref'd 2021 BCCA 353.

[4] The injunction order contains police enforcement terms. The police began enforcement operations in mid-May 2021. I was appointed the management judge for this litigation in May 2021, and I have decided a series of applications including Teal Cedar's application seeking a Court invitation to the Attorney General to become involved in the prosecution of the contempt allegations. I issued that invitation in July 2021 and my reasons for doing so are indexed at Teal Cedar Products Ltd. v. Rainforest Flying Squad, 2021 BCSC 1380.

[5] Later in July 2021, I heard applications by members of the public and a consortium of media organizations aggrieved by the RCMP restricting access to the injunction area by means of expansive exclusion zones, checkpoints, and searches - an exercise of powers akin to those employed in Ottawa earlier this year, pursuant to the Proclamation Declaring a Public Order Emergency, SOR/2022-20, issued pursuant to the Emergencies Act, R.S.C. 1985, c. 22 (4th Supp). The media applicants also complained about the RCMP policy of shepherding journalists while they were in these exclusion zones. In ruling on these access applications, I concluded that the RCMP's expansive exclusion zones, and associated checkpoints and searches, were unlawful, and that the degree of interference with liberties of members of the public and the media was substantial and serious: Teal Cedar Products Ltd. v. Rainforest Flying Squad, 2021 BCSC 1554. And, I granted the media consortium's application for a variation of the injunction order to add a direction intended to control interference by police with the work of journalists.

[6] Approximately 1200 persons have been arrested in the course of police enforcement of the injunction order. Not all of the arrests have been for contempt. Many in the first three months of enforcement were for "obstruction" on the basis of arrestees failing to leave police-established exclusion zones. I gather that charge approval has been withheld by the Crown in the vast majority, if not all, of these obstruction cases.

[7] The British Columbia Prosecution Service, on behalf of the Attorney General of British Columbia, took up this Court's invitation to assess whether prosecutions for criminal contempt of court should be pursued in relation to alleged contempt of an injunction order. Approximately 400 prosecutions have been launched. A few of these cases have proceeded to trial; many have admitted contempt and received punishment for their civil disobedience: as of this week, I have conducted more than one hundred sentencing hearings.

The Test on an Extension Application

[8] I addressed the test on an application to extend an interlocutory injunction at paras. 21-22 of my September 2021 extension reasons:

The majority judgment of the Supreme Court of Canada in Google Inc. v. Equustek Solutions Inc., 2017 SCC 34 at paras. 22-23, affirmed well-established principles surrounding interlocutory injunctions. It is an equitable remedy, both flexible and drastic, and the decision whether or not to grant an injunction is a discretionary one. Justice Abella's judgment also referred with approval to the well-known test for whether the discretion should be exercised:

[25] RJR -- MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, sets out a three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction: is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.

I conclude that the principles expressed by Justice Abella in the Google case apply to the question of whether an existing injunction ought to be extended. My attention was drawn to the Alberta Court of Appeal's reasons in Dreco Energy Services Ltd. v. Wenzel, 2008 ABCA 290 at para. 27. The Court held that the usual RJR -- MacDonald considerations apply on a motion to continue or set aside an interlocutory injunction, plus "additional factors as well, including delay, inequitable conduct, and policy considerations." I do not regard this as a different test, but a reflection of the reality that a consideration of all of the circumstances at the time of an application to extend will naturally include an examination of what has occurred since the injunction was first imposed.

At para. 19 of its reasons, the Court of Appeal affirmed that the Google Inc. approach should be applied to extension applications: "The fundamental question on both an initial application for an injunction and a request to extend is whether the granting of an injunction is just and equitable in all of the circumstances of the case."

[9] The respondents submit that Teal Cedar ought to have to meet a "more exacting test" in this case, particularly because of the impact of methods of enforcement of the injunction on civil liberties. Although I have held that enforcement methods have had a substantial and serious effect on civil liberties, I cannot agree that I should apply any test other than whether the extension is just and equitable in all the circumstances.

[10] The respondents point to Justice Gropper's observation in Revolution Infrastructure Inc. v. Lytton First Nation, 2017 BCSC 468 at para. 5, that there is a dearth of authorities concerning the test to be applied when determining whether to extend an injunction. Of course, the Revolution Infrastructure case predated the Court of Appeal's statement of the test at para. 19 of its reasons on the 2021 extension application. In British Columbia, any uncertainty as to the test applicable to an extension application has now been resolved.

The Respondents' Arguments

[11] The respondents on this application make three arguments to oppose the further extension: (1) the RJR-MacDonald test is not met because irreparable harm has not been established; (2) the plaintiff has failed to pursue the underlying action with any diligence, disentitling it to an extension of the injunction; and (3) there is no need to continue the injunction because road blocking and other prohibited interference with Teal Cedar's activities has ceased.

[12] The first two of these arguments have little merit, and may be disposed of summarily. I will treat the third and strongest argument in more detail.

Irreparable Harm

[13] Justice Verhoeven found that Teal Cedar had established irreparable harm when he made the order in April 2021, and I found irreparable harm when I heard the September 2021 extension application. I acknowledge that these findings do not render the question of irreparable harm res judicata - "it makes sense in the context of a time-limited injunction to address a changing or changed situation": Revolution Infrastructure Inc. v. Lytton First Nation, 2016 BCSC 2586 at para. 20. However, the case on irreparable harm has not changed in any material way since this Court made findings of irreparable harm in April 2021 and September 2021. Road blocking and other obstructive activity has caused and will continue to cause irreparable harm.

[14] Since the September 2021 extension hearing, Teal Cedar has produced some financial statements relating to its division that conducts activities in TFL 46 for the period from 31 December 2016 to 28 May 2022. In each period, the statements show losses for this division. On this basis, the respondents submit that Teal Cedar cannot establish that it will suffer harm if the injunction is not extended. The short answer to this submission is that illegal action imposing additional costs on a company with the effect of increasing its losses is as much a species of harm as is imposing additional costs on a company in a situation where it has the effect of reducing profit.

Delay in Pursuing the Action

[15] Dreco Energy Services Ltd. v. Wenzel, 2008 ABCA 290 at para. 27, is authority for the proposition that delay on the part of a plaintiff in prosecuting its action is relevant to the analysis of whether it is just and equitable that an interlocutory injunction remains in place. See also Abbotsford (City) v. Shantz, 2014 BCSC 2385 at paras. 29-30.

[16] Delay causing serious prejudice may result in dismissal of an action for want of prosecution. If dismissal resulted in a case where the plaintiff had obtained an interlocutory injunction, the injunction would dissolve. Given this reality as to the potential impact of delay on the continuation of an interlocutory injunction, I think it would make little sense to say that delay is never a relevant consideration on an application to extend an injunction. (And, I do not understand Teal Cedar to take this position.) I conclude that it is open to a judge on an

injunction extension application to take account of delay in prosecuting an action, and in some cases it may be an important consideration when deciding whether the continuing presence of an injunction is just and equitable.

[17] The respondents submit that Teal Cedar has made no progress toward trial of this action. Teal Cedar submits that there has been no dilatoriness - it has made disclosure of documents; argued its request for the Court to invite the Attorney General to take conduct of prosecutions for contempt of the injunction; argued various applications to vary the injunction order; made applications to extend the injunction order; argued appeals and applications for leave to appeal in relation to the injunction order and the September 2021 extension application; and attended numerous judicial management conferences. Teal Cedar submits that its priority to this point has been to obtain and defend the injunction order, and that its resources are not unlimited.

[18] Teal Cedar also submits that until recent slowing of obstructive activity in the injunction zone, the pool of potential defendants has been growing. It has elected not to make a succession of applications to add defendants. It submits that any approach other than waiting for the situation to stabilize would be chaotic and would not result in getting the action to trial any faster.

[19] I agree that the pace of the litigation is slow, but the delay on the part of Teal Cedar is driven by the circumstances and is not inordinate. Moreover, I agree with Teal Cedar's submission that the effect of the Court of Appeal's judgment on the 2021 extension application is that the public interest in upholding the rule of law that is in play when civil disobedience interferes with the lawful rights of a private entity dominates all other considerations. With this rule-of-law trump card in play, it is hard to envision any delay short of meeting the stringent test for want of prosecution that could have a material effect on the "just and equitable" analysis in a case such as this.

The Lull in Recent Obstructive Activity

[20] There has been much less obstructive activity in the injunction area in 2022 than there was in 2021, but it has not stopped. In March 2022, there was a social media callout for people to continue the blockades in anticipation of resumption of logging after the winter season. Between 18 April and 20 April 2022, a blockade was erected on Granite Mainline. It involved more than ten persons and a 25-foot high tripod. The blockade was dismantled by the RCMP.

[21] On 13 May 2022, another blockade was established on Granite Mainline. It involved about 15 persons, with blockaders locked into devices within a large pile of wood. This blockade was abandoned after several days, but on 28 May 2022 there was another one established at a bridge on the same road.

[22] On 10 June 2022, construction began on "Sassin Camp," a large blockade on Carmanah Road. On 29 June 2022, the RCMP attended and dismantled this blockade. A social media post of that same day described the collapse of Sassin Camp as temporary. However, from the time that Sassin Camp was dismantled on 29 June 2022 up until the time that the record for this application was assembled in mid-August 2022, there is no evidence of obstructive activity in the injunction area.

[23] On 10 August 2022, a Capital Daily article under the headline, "Two years after Fairy Creek blockades began, old-growth battle continues" contains this passage:

'The movement may be on a bit of a lull, but that lull won't last,' Joshua Wright told Capital Daily on Tuesday. Wright, a teenager from Washington [State], has been a coordinator with the protest movement from the beginning. He was one of the first people who raised the alarm when he noticed a new logging road on satellite images that was being built into the emerald green expanse near Fairy Creek.

[24] The respondents submit that there has been no obstructive conduct within the bounds of TFL 46 since late May 2022. Strictly speaking, this is true. The injunction area corresponds only roughly to the large area of southern Vancouver Island that is subject to TFL 46. The Sassin Camp blockade in June 2022 was outside the TFL 46 boundary, but within the perimeter designated in the injunction order.

[25] The activity at Sassin Camp that apparently contravened the injunction order by blocking roads in the defined injunction area is not rendered irrelevant because it impeded the operations of a logging company other than Teal Cedar. Rather, it is evidence that the obstructive activities in and around TFL 46 that began in August 2020 continued until up until six weeks before this extension application was filed. And, it is evidence relevant to a consideration of whether this longstanding effort to block Teal Cedar's access to stands of old growth is likely to continue.

[26] I accept the general proposition that the longer the elapsed time since obstructive activity, the greater the likelihood that the obstructive activity has come to an end. I also accept that if the Court were to be satisfied that obstructive activity has ended, the case for continuing the injunction weakens or dissolves. Put another way, after a long enough period of inactivity, an application to extend might take on a quia timet complexion requiring a plaintiff to establish that there is a high probability that the harm-causing activity will recur: Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441 at paras. 35-36. However, in my estimation a lull of six weeks in this long campaign of civil disobedience is far short of what is required to trigger a quia timet analysis.

[27] I conclude that there is likely to be continued activity to obstruct old-growth logging in and around TFL 46. My conclusion is based on what has occurred since August 2020, and is fortified by the surrounding context in which this further extension application occurs.

[28] To come to grips with the degree of likelihood that the obstructive activity will continue requires an appreciation of the motivations and commitment of those engaged in this civil disobedience campaign. The climate crisis is accelerating. The important role that temperate rainforests play in mitigating global heating has come into sharp focus. António Guterres, the Secretary-General of the United Nations, issued this stark warning in August 2021 upon the release of an Intergovernmental Panel on Climate Change report:

Today's IPCC Working Group 1 report is a code red for humanity. The alarm bells are deafening, and the evidence is irrefutable: greenhouse gas emissions from fossil fuel burning and deforestation are choking our planet and putting billions of people at immediate risk.

The Supreme Court of Canada has recognized the reality of climate change caused by human activities and the grave threat it poses for humanity's future: Reference re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 at para. 2.

[29] Conducting over one hundred sentencing hearings has given me insight into the character of the injunction-order contemnors. Those engaged in the Fairy Creek civil disobedience are militant in the sense of being deeply committed to doing what they can to stave off the impending disasters resulting from ecological degradation and global heating. Moreover, they have an abiding reverence for what remains of coastal old-growth ecosystems. They are not radicals that oppose forestry, but they do seek to preserve critical old-growth habitat. They feel the same obligation that Clayoquot contemnors did three decades ago: a duty to protect a "treasure and the heritage of future generations" (as described by Lambert J.A. in his dissenting judgment in MacMillan Bloedel Ltd. v. Simpson (1994), 92 B.C.L.R. (2d) 1 (C.A.) at para. 128). And, they feel betrayed by leaders who have repeatedly promised to protect what is left of these ancient rainforests.

[30] I have come to understand what at first blush seems counterintuitive: the people I have sentenced value and appreciate the importance of obeying the law. Not a single person of the more than one hundred I have sentenced has previously committed an offence. They are highly intelligent people, non-violent and principled by nature. They are not naïve and misguided dupes of some shadowy organization aiming to break down the rule of law. They are not trouble-makers with nothing better to do. Most are well educated with fulfilling and important jobs, often in occupations focused on helping others. Most have a notable history of volunteer service. Their motives are altruistic and compassionate.

[31] These intelligent people are not oblivious to the importance of the rule of law. They understand the role of the law in promoting and safeguarding peace and order. At the same time, they hear the sounding of clear warnings by IPCC scientists and others, and they fear that on the present course the future will be profoundly disordered for our species and others. They perceive that their conventional efforts to focus the attention of society's leaders on this existential issue have failed. They have decided that these desperate times call for desperate measures.

[32] Notwithstanding the consensus of climate scientists or warnings of the Secretary-General, Teal Cedar is entitled to stand on its legal rights to log old-growth forests. And, it goes without saying that this Court's role is to denounce and not endorse the methods of persons obstructing lawful activity. The purpose of outlining what I have come to know of the motives, nature, and character of those engaged in this civil disobedience is to explain why I think it likely that obstructive activity will continue, and why I agree with Teal Cedar's submission that it is unrealistic to place emphasis on six weeks' quiet in the injunction area in the context of this long-running and nearly continuous campaign against its logging of old-growth forests.

The Injunction Must be Extended

[33] Although I have structured my reasons around addressing the respondent's arguments, I know that Teal Cedar must carry the burden of persuasion that an extension of the injunction is just and equitable. The respondents properly concede that there is a serious question to be tried. Teal Cedar has established the element of irreparable harm. And, yielding to the Court of Appeal's 2021 extension decision, I must find that there is nothing of any significance to place in the balance against the dominant interest of upholding the rule of law. Accordingly, the application for a further extension must be allowed.

Length of Extension

[34] The Court has the discretion to extend the interlocutory injunction until trial. This is the order sought by Teal Cedar, and it points to British Columbia cases where an interlocutory injunction has been put in place until the trial of the action.

[35] However, Teal Cedar has not yet moved the case forward in any appreciable degree. And, I must acknowledge the possibility that what I perceive to be a temporary lull in obstructive activity in and around TFL 46 may turn out to be permanent. I think the best course in this case is to require Teal Cedar to periodically demonstrate that it remains just and equitable to leave in place the "drastic remedy" (Google Inc., at para. 23) of an interlocutory injunction. I exercise my discretion to adopt Teal Cedar's alternative position of extending the injunction for a further year, i.e. until midnight on 26 September 2023.

Applications to Vary the Injunction Order

[36] Term 4 of the injunction order provides that any person affected by the order may apply to set aside or vary it on two business days' notice. At the time the order was pronounced, a case management judge had not been assigned. I vary this term of the order so that it reads as follows:

4. Any person affected by this Order, including the Plaintiff, is at liberty to apply to the Court to set aside or vary this Order on two business days' notice unless there is a case management judge assigned, in which case the person making application to set aside or vary this Order will deliver to Supreme Court Scheduling a request to appear before the case management judge who may issue directions related to the application, including as to notice.

Costs of this Application

[37] The respondents submit that a costs order ought not to be made against them because counsel has appeared for them on a pro bono basis, and their motivation for opposing the application is grounded in serving a general public interest about environmental issues. I accept that the respondents' motives in opposing the extension are rooted in genuine concerns about ecology and climate change. However, I think the singular emphasis that I am bound to place on the rule-of-law interest dictates a costs result in favour of Teal Cedar.

[38] However, the injunction was scheduled to lapse on 26 September 2022. Apart from any opposition, in order to obtain an extension Teal Cedar needed to bring this application and assemble evidence to establish the continuing need for this extraordinary remedy. That said, I appreciate that a measure of additional preparation time was spent by counsel for Teal Cedar in order to meet the respondent's arguments. And, the application took longer to hear than it would have if it proceeded uncontested: I estimate that without opposition, the application would have been completed within one day instead of two. In these circumstances, Teal Cedar will have one-half of its costs against the respondents to this application in any event of the cause, and the other half of its costs as costs in the cause.

"Thompson J."

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