

CANADA / JUDGMENT

Teal Cedar Products Ltd. v. Rainforest Flying Squad

2022 BCSC 1912

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1912 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 1912

Date: 20221101

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 Mr. Justice Baird

Reasons for Judgment

Counsel for the Crown:

L. Phipps

C. Peel

A. Kaban

Counsel for the Applicants:

K. Mirsky

J. Schacter (A/S)

N. Ross

B. Isitt (A/S)

No other appearances

Place and Dates of Hearing:

Nanaimo, B.C.

August 16-18, 2022

Place and Date of Judgment:

Nanaimo, B.C.

November 1, 2022

INTRODUCTION

- [1] On April 1, 2021, in a decision indexed at 2021 BCSC 605, Justice Verhoeven of this Court granted Teal Cedar Products Ltd.'s ("Teal Cedar") application for an injunction ("the injunction") against interference with its logging operations on southern Vancouver Island, including in the Fairy Creek watershed. The injunction includes an enforcement clause that authorises the RCMP to arrest and remove persons contravening its prohibitory terms. Since approximately mid-May, 2021, there have been over 1,200 arrests. The Crown Prosecution Service has charged approximately 400 individuals with criminal contempt of court for violating the terms of the injunction.
- [2] As I understand it, of the 100 or so contemnors whose charges have been disposed of to date, all but a handful have pleaded guilty. The overwhelming majority have received non-custodial sentences comprised of fines or community work-service. A small minority have

been sentenced to jail terms. None of these custodial sentences has exceeded 10 days in length. All of those proceedings have been dealt with by my colleague Justice Thompson ("the case management judge"), who was assigned by the Chief Justice to deal with Teal Cedar's action and along with it the legal issues arising from the operation and enforcement of the injunction.

- [3] A joint application has now been filed seeking a judicial stay of proceedings on behalf of 121 alleged contemnors whose criminal contempt charges remain outstanding. The application is based on alleged systemic misconduct by the RCMP in enforcing the injunction. The applicants seek this remedy, not because they cannot receive a fair trial without it, but because they say it is necessary to preserve and protect the integrity of the justice system. On July 11, 2022, they filed an application seeking a formal order of joinder of their criminal contempt trials for this purpose.
- [4] As things stand, the Crown has exercised its discretion to charge the 121 individuals in separate sub-groups depending on their date of arrest. It proposes to proceed with 73 discrete trials organised on that basis. The applicants, for their part, seek an order that all of their charges should be joined together for the purpose of establishing a full record of the various ways in which they say the RCMP operation enforcing the injunction has exceeded the limits of reasonable and acceptable law enforcement, and to lay a proper foundation for a stay application based on a theory of systemic abuse of process.

BACKGROUND

- [5] The general background of the case is, I believe, reasonably well-known. It is mapped out in previous judgments of this Court and the Court of Appeal, and has been the subject of much press reportage and public discussion. On September 28, 2021, in a decision indexed at 2021 BCSC 1903, the case management judge dismissed Teal Cedar's application to renew or extend the injunction on the basis, principally, that the Court's reputation was "depreciated" by the manner in which it had been enforced by the RCMP.
- [6] The judgment referred, in particular, to "disquieting lapses in reasonable crowd control", unnecessary force used to subdue protesters, the establishment of unlawfully expansive exclusion zones and checkpoints, improper constraint of the media's right of access to the injunction area, a command order issued to and followed by front-line officers to remove individual identification from their uniforms - that is, name badges or regimental numbers - coupled with a decision not to enforce an RCMP directive to its members not to wear "THIN BLUE LINE" patches on their uniforms. The case management judge concluded at paras. 87-89 as follows:

- [87] In the balance, I attach weight to the combination of the prospect of significant harm to Teal Cedar and others, and accompanying damage to the rule of law, if the injunction is not extended. I acknowledge the risk that the police may not seek Criminal Code charges or the Crown may exercise its discretion against charge approval. However, having regard to recent escalation of tension and obstructive behaviour, I think there is every chance that criminal law remedies will be employed.
- [88] On the other hand, methods of enforcement of the Court's order have led to serious and substantial infringement of civil liberties, including impairment of the freedom of the press to a marked degree. And, enforcement has been carried out by police officers rendered anonymous to the protesters, many of those police officers wearing "thin blue line" badges. All of this has been done in the name of enforcing this Court's order, adding to the already substantial risk to the Court's reputation whenever an injunction pulls the Court into this type of dispute between citizens and the government.
- [89] In the current circumstances, I am not persuaded that the balance of convenience favours extending the injunction. The factors weighing in favour of extension do not outweigh the public interest in protecting the Court from the risk of further depreciation of its reputation. It is not just and equitable in all the circumstances of the case to make the order sought. I exercise my discretion by declining to extend the injunction. The interim extension order that I made at the close of the hearing on 17 September 2020 shall expire at 4:00 p.m. today, 28 September 2021.
- [7] Teal Cedar's appeal of this decision was allowed. The order dismissing the application to renew the injunction was set aside, and the injunction was extended to September 26, 2022. The Court of Appeal judgment, indexed at 2022 BCCA 26, instead of focusing on the RCMP's manner of enforcing the injunction, emphasised the concerted, organised, well-funded and aggressively illegal conduct of protestors intended to substantially obstruct or prevent Teal Cedar from pursuing lawfully permitted commercial activities and private law rights. The Court observed as follows at paras. 4-10:
- [4] The unlawfulness of the conduct Teal Cedar seeks to enjoin is not in dispute. Indeed, the respondents argue that an injunction is not needed because the conduct is criminal in nature and thus can be dealt with under the Criminal Code, R.S.C. 1985, c. C-46: destroying or damaging property (s. 430(1)(a)); rendering property dangerous (s. 430(1)(b)); obstructing or interfering with use of property (s. 430(1)(d)); mischief that causes actual danger to life (s. 430(2)); and blocking or obstructing a highway (s. 423(1)(g)).
- [5] In plain language, the conduct in issue involves protesters:
- digging trenches in roads, sometimes at cliff edge, which impede emergency vehicles and put roads at risk of collapse. Protesters lock themselves into the bottom of trenches, some of which are up to eight feet deep; the occupants and the RCMP officers who remove them are at risk of being smothered should the trench walls fail;

- chaining themselves into "sleeping dragon" devices, which are sometimes encased in concrete, embedded in a metal box, fortified with metal hazards, barbed wire or spikes, and filled with dry oats to prevent police use of scoping cameras;
 - constructing barricades to make the road impassable for vehicles. One barricade was covered with piles of human feces and jars of urine, which RCMP members had to remove;
 - placing objects on helicopter landing pads, which poses grave safety risks;
 - suspending themselves over roadways, and over and under bridges in devices called tripods, bipods, and cantilevers. The tripods reach heights of 30 feet, are hastily constructed and structurally unsafe. Occupiers armour the legs of their tripods with railroad spikes or chicken wire to prevent RCMP from using tools to dismantle the tripods from the bottom. Some tripod-sitters place nooses around their necks with climbing ropes, chains, and bicycle locks. One protester locked himself to a tripod with his face close to an array of nails, so the nails would injure him if an arresting officer touched him. Protesters have poured jars of urine down from atop of the tripods, to force the RCMP to leave them in place; and
 - occupying "tree sits", which are structures suspended high in trees. To extract these protesters, specialized RCMP officers must climb the trees or conduct an aerial removal using a helicopter and a line hoist apparatus. Protesters have more recently fortified the bottoms of the trees in which they sit with barbed wire or metal structures to make extraction more difficult.
- [6] Teal Cedar also describes harassment of its employees, incidents of vandalism and theft, and damage to safety equipment and machinery used by police to extract the protesters from tripods. It also says protesters have partially cut trees to create a risk to police in areas where they are enforcing the injunction.
- [7] There is no doubt that one or more of the respondents form part of a protesting group that is committed, sophisticated, and well-organized. Protesters have used social media to raise over \$1 million to date. They make use of the Internet to recruit individuals for specific tasks such as camp support, obstacle construction, transportation, and occupation of obstacles. They have a command and control network, a communication system to coordinate their activities, a transportation network, and dedicated construction areas and supply camps. They use drones to surveil the police and have used helicopters to resupply their camps. The methods used by those obstructing the roads have become more extreme over time. The police have removed 350 protesters from "sleeping dragons" and at least 100 from tripods set up in the middle of the roads.
- [8] These actions are intended to prevent Teal Cedar from exercising rights granted to it by the provincial government under Tree Farm Licence 46 ("TFL 46"), to log on southern Vancouver Island, including a portion of the Fairy Creek watershed.

- [9] The respondents began blockading roads at various locations in and around TFL 46 in August 2020, citing opposition to old-growth logging in Fairy Creek. In September 2020 the government announced a deferral of old-growth logging in nine areas throughout the province, but TFL 46 was not one of them. In June 2021 the government announced a two-year deferral of old-growth logging in the Fairy Creek watershed. Despite these changes in forest policy, the respondents' road blockages continued in order to prevent Teal Cedar from logging activities in areas that remained available to them.
- [10] The actions of the respondents and like-minded protesters have affected the rights of others as well. TFL 46 overlaps with the traditional territories of the Pacheedaht First Nation and the Ditidaht First Nation, both of which have consented to and support the planned logging. These Nations have asked the protesters to leave their territory, and to respect their right to decide how best to manage their resources. Those requests have not been heeded.
- [8] The Court ruled at para. 63 that it was an error in law for the case management judge to conclude that the Court's reputation could be "tarnished" by the conduct of police officers, and illustrated the point with the following example at para. 64:

When a judge issues a search warrant, and the police infringe a citizen's rights in executing that warrant, no one could sensibly suggest that the court's reputation has been depreciated. The administration of justice may be said to have been brought into disrepute by the police conduct, but that overarching systemic impact is not synonymous with the court's reputation. Indeed, where police misconduct has occurred, the court's role is to hold the police accountable. That can be done by ruling evidence obtained in an illegal search inadmissible, or by staying criminal proceedings because of improper conduct by the police in investigating or in conducting arrests.

[Emphasis in the original]

- [9] The Court went on to say, at para. 68 that:

the police as independent actors have discretion as to when and how to enforce court orders. The injunction contains an enforcement clause which expressly recognizes that independence by preserving police discretion on the manner and steps of enforcement.

- [10] The Court rejected the respondents' contention that the main issue was whether the police were acting outside the law at paras. 70 and 72:

70 Counsel for the respondents submitted in argument that the rule of law concern in this case is primarily whether the police are acting "outside the law." We do not agree with that submission. The rule of law demands that everyone obey the law. Significant, organized, deliberate and persistent defiance of the law and court orders is a serious threat to the rule of law which is both the foundation of a functioning democracy and the refuge of every citizen.

72 The concerns legitimately raised by the judge about police conduct are not without remedy. Misconduct affecting the rights of protesters can be addressed both in the prosecution of contempt proceedings and in sentencing. Individuals arrested under an injunction may raise RCMP conduct in their trial and seek Charter remedies.

[11] The injunction remains in force and effect. On September 21, 2022 it was extended by the case management judge until September 26, 2023. He decided, on the basis of recent instances of renewed "obstructive activity", that ongoing organised violations of the injunction were likely to continue: see 2022 BCSC 1661, especially at para. 20-32. More recently, the Supreme Court of Canada refused to hear an appeal from the Court of Appeal judgment to which I have just referred: [2022] S.C.C.A. No. 168.

STAY APPLICATIONS

[12] On January 5, 2022, six alleged contemnors filed a notice of application seeking a stay of the criminal contempt proceedings against not only themselves, but against all other persons with contempt charges still outstanding. The case management judge directed that there should be a "screening hearing" to determine if the stay application should be permitted to proceed. On this hearing the Crown sought summary dismissal on the basis that the application had no reasonable prospect of success. The case management judge heard the matter on February 9, 10, 11 and 17, 2022.

[13] On February 23, 2022, in a decision indexed at 2022 BCSC 429, the case management judge ruled that the application by the six alleged contemnors, insofar as they sought a stay of the contempt charges against themselves, but not against others, had enough prospect of success, at least, to survive the screening hearing. His order was clear that their application was to proceed on the basis of the "residual category" of abuse of process, under which a stay of proceedings may be warranted in the clearest of cases where state misconduct, even though it creates no threat to trial fairness, risks undermining the integrity of the justice system: *R. v. Babos*, 2014 SCC 16 at para. 31.

[14] As I have said, the allegation made by each of the six applicants, and now by a large group of others, is that the conception, design and execution of the police operation to enforce the injunction amounted to a systemic and ongoing abuse of the court's process. In *Babos* at para. 41 the Court discussed such a case in the following terms:

Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/

or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

[Emphasis added]

[15] The case management judge agreed with Crown counsel that there was no legal basis upon which the six applicants could apply for a stay of proceedings for anyone but themselves. He allowed that additional parties may wish to join in making the application once they became aware of it, but on my reading of his judgment, the form of the application and the manner in which it would ultimately proceed was not addressed or decided. I do not understand the case management judge to have permitted the application to proceed on a joint, combined or "omnibus" basis, but left such things to the discretion of the judge assigned to hear it.

[16] The case management judge summarised the scope of the state misconduct alleged by the applicants in the following terms at para. 19:

- 1) Actions taken to circumvent lawful oversight, such as the use of unlawful exclusion zones, removal of access of journalists and legal observers, and removal of means of identifying individual police officers.
- 2) Systematic seizure, conversion, or destruction of personal property in the absence of judicial authorization, including vehicles, food, shelter, and communication devices.
- 3) Unreasonable use of force during arrests and detentions, including use of chemicals, punching, kicking, hair pulling, and pain compliance techniques.
- 4) Unsafe treatment of arrestees including exposure to the elements, denial of necessities including medical assistance, and unsafe extractions.
- 5) Targeting individuals who are not breaching the injunction order by camp raids, detentions, threats of violence or arrest, intimidation, and "stimming."

[17] The case management judge concluded at paras. 41- 43 of his reasons as follows:

[41] The stay applicants criticize the design and implementation of the police enforcement operation. Earlier applications have required that I draw conclusions on these subjects. I nevertheless decided to hear this screening application because the framework of analysis requires the screening judge to accept the truth of the stay applicants' factual assertions.

[42] While I understand that a different record might emerge in the stay application than those records that were before me on earlier applications, I think the proper course in the circumstances is to pass the stay application to fresh eyes. Accordingly, I have asked the Chief Justice to assign another judge to hear the stay application.

[43] All case management decisions in relation to the stay application will be for the judge hearing the application. I anticipate that the judge hearing the stay application will convene a prehearing conference to receive advice and deliver directions, and I expect that counsel will soon hear from Supreme Court Scheduling in that respect.

[Emphasis added]

CASE MANAGEMENT

[18] The stay application has come to me in this way, and I have been asked to decide how it should proceed. I dealt with it for the first time at a case management conference on April 12, 2022. By that time, counsel for the applicants indicated that there might be as many as 60-80 alleged contemnors who wanted to join in an "omnibus" application. Then, on May 19, 2022, a notice of application was filed on behalf of 121 charged individuals seeking the following relief:

1. Upon a finding of common law abuse of process and pursuant to the Court's ability to control its process and/or a finding of breach under sections 2 (a-d), 7, 8, 9, 10(a) and (b), 11(e) and (f) and 24(1) of the Canadian Charter of Rights and Freedoms, being Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, the applicants seek a stay of proceedings for criminal contempt of court allegations that relate to the [injunction]

The applicants are agreeable to a stay of proceedings being considered globally or on an individualized basis as per the Court's direction; and

2. Such further relief as this Honourable Court deems just and appropriate.

[Emphasis added]

[19] I would note as a preliminary matter that this notice of application has much to do with alleged infringements of the applicants' Charter rights. The case management judge made it clear that the application was being permitted to proceed based only upon the residual common law doctrine of abuse of process, under which the focus of inquiry is not the violation of individual rights, but whether a stay of proceedings is merited because of a course of police conduct that goes beyond acceptable law enforcement and constitutes an affront to society's sense of fair play and decency.

[20] To this extent, in my view, the application proposed here is misguided. If the various applicants wish to seek Charter remedies they must do so individually in discrete proceedings. The Charter provides remedies against unconstitutional police conduct that can be invoked only by the party directly impacted. The alleged infringement of someone else's rights is irrelevant: *R. v. Ferguson*, 2008 SCC 6. Counsel for the applicants have reconsidered their pleadings and now take the position that there will be no Charter arguments. They confirm that the common law doctrine of abuse of process will be the exclusive focus of the inquiry.

- [21] In this connection, the 121 applicants submit that the balancing exercise mandated in Babos, by which they will seek to establish that state misconduct committed against each of them personally was not a matter of isolated behaviour, but rather was part of a persistent and ongoing systemic abuse of process, can only be performed by hearing and recording their evidence collectively within a single proceeding. Such a record cannot be created, they say, by multiple discrete proceedings each of which will yield only fragments of the whole picture. They maintain it was not on the basis of such a fragmentary procedure that the case management judge permitted the stay application to proceed.
- [22] Their various complaints are set out in the notice of application as follows under the heading "The Applicants' Position":
11. Upon a consideration of the BCCA's direction [ie. that RCMP conduct can be raised at trial], the applicants, all of whom are individuals affected by the RCMP's enforcement of the Injunction, now raise their concerns in the course of their trials. All are before the court on allegations of criminal contempt. All have been subject to a greater or lesser degree by enforcement measures that have been found to infringe on their fundamental rights or appear to be violations of the same.
 12. Their allegations of misconduct reflect the manner in which police have chosen to enforce this Court's Order. They are sweeping in nature.
 13. Some allegations involve police actions that appear to be the result of coordinated implementation, suggesting they were not the actions of individual officers. These include:
 - a. transport out of the Injunction area to off-site locations, especially transport to locations where the police knew or ought to have known the applicants were unsafe in the community and/or otherwise vulnerable due to a lack of clothing, shoes, communications devices, identification, money, transportation or a reasonable means of acquiring such. This also includes locations where police knew or ought to have known there was no Wifi or cell phone service; and
 - b. personal, vehicle and camp searches that were not supported by judicial authority or common law police powers;
 - c. Organized and systemic seizure, conversion and/or destruction of personal property without due process - the applicants will adduce evidence of the seizure of personal property in the absence of judicial authorization or process, including necessities for survival in the back country. Items include vehicles, food, shelter, communications devices, medications, fuel and other items, some of which have been turned over to Teal Cedar for storage and/or conversion;
 - d. Conditions of detention that were unsafe or dangerous -- the applicants will adduce evidence of conditions of detention in two main areas -

- i. Hard-block device extractions that utilized extractors, circular saws, cherry pickers, and other machines, tools or methodologies that failed to give proper regard for the life and safety of the applicants and put them at risk of grievous harm, including psychological harm;
- ii. Incidents where detained or arrested persons were denied food, water, medication or medical assistance and/or maliciously exposed to the elements. This area includes the detention and transport of applicants in police vehicles under conditions that compromised their health or safety while under police control. It also includes a failure of the RCMP to abide by Covid protocols when dealing with those who are detained or arrested.
- e. detention over-holds;
- f. Failures to facilitate access to counsel;
- g. Actions taken to circumvent lawful oversight - the applicants will adduce evidence of the removal of regimental identifications, the use of exclusion zones and the removal of access of journalists and legal observers from situations where misconduct occurred or was likely to occur. Such actions occurred in a manner that supports an inference that the RCMP did so to circumvent civilian, legal, and media oversight;
- h. Actions not captured by other allegations articulated herein, yet were nonetheless an abuse of the authority granted to the RCMP by this court by engaging in conduct meant to undermine the psychological and/or physical integrity of those in the Injunction area, including but not limited to -
 - i. arbitrary use of exclusion zones to effect arrests or detentions;
 - ii. camp raids, wellness checks, walk-throughs;
 - iii. using threats of violence or arrest where no such grounds exist;
 - iv. the use of tactics meant to intimidate or destabilize applicants, including tactics referred to as "stimming" that include, but are not limited to, preventing applicants from sleeping by shining lights, using noise, flying helicopters low over applicants, camp walk-throughs at all hours of the night or other tactics that employed psychological elements such as singling out individuals for threat of violent arrest; and
 - v. any other actions which call into question the RCMP's commitment to uphold the rule of law or abide within their lawful authority.
- 14. The applicant's assert that some enforcement actions appear to be the actions of individual officers, but in circumstances created by the RCMP that allowed such officers to act without fear of reprisals. Incidents include threats, assaults and unreasonable use of force during an arrest or detention where s. 25 of the Criminal Code is not in available - the applicants will adduce evidence of unreasonable force that includes pepper spraying, punching, kicking, dragging, hair pulling, and "pain compliance" techniques. This also includes assaults that

were not done pursuant to an arrest or detention;

15. The applicant's further assert that the RCMP abused the discretionary powers given to them in the Order. The RCMP's authority to enforce the Order is derived from the Injunction's enforcement clause as outlined in section 2, This reads -

2. An order lasting until midnight on September 26, 2021 is granted:

- (a) authorizing any police officer with the Royal Canadian Mounted Police, and/or the appropriate police authority in the jurisdiction in question (the "Police"), to arrest and remove any person who has knowledge of this Order and who the Police have reasonable and probable grounds to believe is contravening or has contravened any provision of this Order;
 - (b) that the Police retain discretion as to the timing and manner of enforcement of this Order, and specifically retain discretion as to the timing and manner of arrest and removal of any person pursuant to this Order;
 - (c) that the Police retain discretion to detain and release any person without arrest who the Police have reasonable and probable grounds to believe is contravening or has contravened any provisions of this Order, upon that person agreeing in writing to abide by this Order;
 - (d) authorizing any peace officer and any member of the Police who arrests or arrests and removes any person pursuant to this Order to:
 - i. release that person from arrest upon that person agreeing in writing to obey this Order;
 - ii. release that person from arrest upon that person agreeing in writing to obey this Order and require that person to appear before this Court at such place as may be directed by this Court, on a date to be fixed by this Court;
 - iii. bring that person forthwith before this Court at any location where the Court may sit;
 - iv. detain that person in custody until such time as it is possible to bring that person before this Court; and/or
 - v. otherwise take steps in accordance with Part XVI of the Criminal Code, R.S.C. 1985, c. C 46.
16. Under the authority granted in the clause 2, approximately 1200 individuals in and around the Injunction area between May 18th and December 31st, 2021 have been arrested and/or detained. This is according to communications from the RCMP. The specific numbers are unavailable to the applicants but can be broken down into the following categories -
- a. Category A - Arrests of individuals alleged to be in breach of the Injunction on reasonable grounds. Individuals in this category were issued process and release documents with conditions governing their behavior in the community. Category A arrests were forwarded to the BC Prosecution Service ("BCPS") to initiate formal process for criminal contempt of court. These totalled between 400-500 separate arrests. All applicants fall into this category.

- b. Category B -The arrest/detention of individuals who were purported to be in breach of the Injunction on grounds that, if known to the applicants, do not appear to be reasonably supported. Individuals in this category were issued process and released with conditions governing their behavior in the community. Despite the imposition of release conditions, the RCMP did not forward charges of criminal contempt to the [BCPS] for formal charge approval. The total number of these arrests are unknown to the applicants however, these numbers are likely incorporated into the RCMP's total of approximately 1200 arrests.
- i. Category B also includes arrests/detentions of individuals where there appeared to be reasonable grounds for arrest but whose files were not forwarded to the BCPS for reasons unknown to the applicants.
- ii. Many Category B arrests/detentions which are known to the applicants feature RCMP enforcement that appears to involve unreasonable force, unlawful enforcement of an exclusion zone, and/or other alleged misconduct.
- c. Category C - Arrests/detentions of an unknown number of individuals who were purported to be in breach of the Injunction on grounds, if known to the applicants, do not appear to be reasonably supported. Category C arrests feature individuals who were released without charge or process. The total number of arrests in this category is not known to the applicants and may or may not be included in the approximately 1200 individuals claimed to have been arrested by the RCMP.
- i. Category C includes arrests/detentions of individuals where there appeared to be reasonable grounds for an arrest; and
- ii. Many Category C arrests/detentions which are known to the applicants feature RCMP enforcement that appears to involve unreasonable force, unlawful enforcement of an exclusion zone, and/or other alleged misconduct.
- 17. Category B and C include some of the applicants as well as persons who are not a party to this Application, both known and unknown.
- 18. The applicants will assert that this "catch-and-release" system of preventative enforcement used by the RCMP in the absence of grounds for contempt of court amounts to an abuse of the discretionary clauses of the Injunction.
- 19. The applicants will assert that the "catch-and-release" system of enforcement used by the RCMP in circumstances where a contempt of court has clearly occurred, but no charge was laid or submitted, and where there were incidents of police misconduct, amounts to an abuse of the discretionary clauses of the Injunction.
- 20. The applicants will assert that when arrested and released on conditions, such conditions were not in accordance with clause 2(d) of the Injunction. The applicants will argue that the imposition of conditions that do not accord with the injunction's authority or Part XVI of the Criminal Code amounts to an abuse of the discretionary clauses of the injunction.

21. In this way, RCMP enforcement effected hundreds of individuals who are not applicants herein because they do not have standing before the court. Abuses of RCMP discretion and its release powers are directly tied to the language in the injunction and directly implicate the court's integrity.
22. Some allegations do not directly relate to the injunction or pursuant to an organized operation. Such allegations reflect the actions of individual officers in circumstances that suggest they were facilitated by a culture of disregard for the rights and safety of those in the Injunction area. This culture was created and supported by the RCMP-approved removal of regimental identifications, the curtailment of media access, and a disregard for the role of legal observers. In some cases, the RCMP appear to act with impunity, using unreasonable force, outright violence and other tactics to effect the arrests of hundreds with and/or without reasonable cause. The applicants will argue that the way the RCMP have used their discretionary powers has shielded the court from the full impact its enforcement measures, which include unreasonable force, arbitrary arrests and detentions, and failures to provide access to counsel, and systemic disregard for the rights of those in the area.
23. While no one applicant experienced every form of alleged misconduct, all applicant's experienced at least one form of alleged misconduct and many experienced multiple forms on multiple dates. It is the repetitive, overlapping nature and frequency of the allegations that require this court to consider the cumulative effect of the enforcement of its injunction on the applicants and others.
24. The applicants advance their claims under the common law. Much of the evidence that will be led also reflects breaches of various provisions of the Charter, including those relating to fundamental freedoms. It is the applicant's stated position, however, that the cumulative effect of the allegations is an abuse of this court's process and triggers its inherent jurisdiction to control its own process.
25. The applicants seek to establish that this deprivation of fundamental freedoms was an objective of the RCMP's enforcement operation, whether stated or unstated, by leading evidence that these violations occurred with the knowledge, willful blindness, acquiescence and, at times the participation, of senior supervising officers.
26. Ultimately, the applicants assert that police conduct was so shocking that it effects the integrity of this court so much so that it must dissociate itself to protect its reputation.
- [23] The evidence adduced on the present application includes will-say statements from all 121 applicants summarising the sort of mistreatment referred to in the pleadings to which each of them claims to have been subjected by the RCMP. Crown counsel have advised me that many if not most of these allegations are vigorously denied, hotly contested, and will require responsive evidence from a large demographic of police witnesses, at least as many as there are applicants and possibly more.

[24] As I have said, the Crown has preferred criminal contempt charges against each of the 121 applicants across 73 different notices of application according to the day upon which they were arrested between May 17 and December 31, 2021. The Crown submits that the only practical and procedurally admissible way of dealing with the applicants' charges is to have 73 separate trials, and to run these trials sequentially, from the first to the last arrest date. This will allow the Court to conduct trials of the earliest alleged offences, based on the narrow factual scope revealed by the direct evidence called therein, including details of alleged state misconduct and the police response thereto, with proven police misconduct "carried forward and applied in subsequent trials, if patterns of state misconduct emerge".

[25] This fundamental and irreconcilable difference in the approach proposed by each side - that is, essentially, whether there should be a unified hearing or multiple sequential proceedings - has led to the application before me now, filed on July 11, 2022, in which the 121 applicants seek a formal order of joinder of their criminal contempt trials. The Crown is opposed to this application. To be specific, the applicants seek the following relief:

The applicants seek an order granting formal joinder of their criminal contempt trials for the purpose of bringing an application for abuse of process, and in particular, joinder for the evidentiary portion of the application and subsequent legal argument relating to the principles of abuse of process and its [remedies].

[26] It was only in the midst of argument that counsel for the applicants announced that each and every one of the 121 applicants intends to plead guilty. All of them are poised, that is, to admit or at least not to dispute their responsibility for committing criminal contempt by knowingly and wilfully violating the injunction in precisely the manner alleged by the Crown. In practical terms, I was told, the proposed joint proceeding would have nothing to do with criminal liability in individual cases, but would focus exclusively on alleged systemic police misconduct committed before, during and after each applicant was arrested on lawful grounds.

[27] In other words, each of the applicants admits criminal wrongdoing but each seeks a remedy that will benefit them personally by permanently cancelling the imposition of penal consequences for their conduct. It is well settled, however, that this is a very rare and drastic remedy available in only the clearest of cases where it appears that the ongoing prosecution of criminal offences against an individual citizen will offend society's sense of justice: *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at para. 91. Furthermore, in cases which fall into the residual category of stay applications, the remedy is not granted to provide redress for past wrongs done to individual applicants, but to dissociate the court system from police misconduct: *Babos* at para. 39. The burden of persuasion incumbent upon every applicant is an onerous one: *Babos* at para. 44.

DISCUSSION

- [28] The applicants' will-say statements amount to an inventory of the various forms of police conduct which the case management judge thought depreciated the court's reputation, but which the Court of Appeal ruled did not - the "systemic impact" of police conduct bringing the administration of justice into disrepute is not synonymous with the court's overall reputation, and to hold otherwise is an error of law. The police are independent actors for which the executive branch of government is responsible, and the court's role in relation to their activities is one of oversight and not partnership.
- [29] As the Court of Appeal has stated, the manner in which the court dissociates itself from police misconduct and preserves public confidence in the integrity of the administration of justice is to grant individual remedies in specific cases where the circumstances require it, including, in rare and exceptional circumstances, a stay of proceedings where police mistreatment of an individual citizen is part of a systemic or ongoing problem that cannot be condoned or excused. The applicants say in their pleadings that they "are agreeable to a stay of proceedings being considered globally or on an individualized basis as per the Court's direction", but in my view the latter course is the only legally admissible option. I maintain that there is no such thing as a "global" stay of proceedings in a case involving a multitude of differently situated defendants engaged with different police officers in different circumstances on different days over a span of eight months.
- [30] While I agree with the case management judge's ruling that the applicants should be entitled to advance their several claims for a stay of proceedings under the residual category described in *Babos*, I do not accept the applicants' submission that an "omnibus" or collective proceeding is the proper way to go about it. The charges against the applicants herein are criminal in nature and must be dealt with on established rules of criminal evidence and procedure. Each applicant must respond independently to the charge of criminal contempt, and each seeks the benefit of a substantial and exceptional remedy in their individual circumstances. In my view the allegation that subjective mistreatment was part of a generalised system or campaign of police misconduct does not alter the fact that, in every case, the question is whether the individual applicant is eligible to be granted a stay of proceedings.
- [31] Separate charges involving multiple defendants can be tried together at the instance of either side, but joinder should only be ordered where, in the opinion of the court, it is in the interests of justice to do so and the offences or defendants could initially have been jointly charged: *R. v. Clunas*, [1992] 1 S.C.R. 595 at para. 33. Such decisions have to be made by the trial judge: *R. v. Litchfield*, [1993] 4 S.C.R. 333. The applicants take the position that the case management judge approved the stay application to proceed in an "omnibus fashion". I do not think he did; he expressly left all case management decisions in relation to the stay application to the judge hearing the application. But in any event, I agree with counsel on both sides - and I would refer to the applicants' concession set out expressly in their pleadings, even if their legal advisors have since reconsidered it - that I am not bound to

follow such a course if I conclude that it would result in a fundamentally flawed procedure.

- [32] Even if all of the 121 criminal contempt allegations before me now had been jointly charged, which is technically possible, I suppose, but practically inconceivable, it is certain that, in short order, the Court would have broken them up into manageable separate proceedings. It is my strong opinion that any kind of joint hearing involving these 121 applicants, many of whom are making claims of police misconduct that are vigorously disputed, is completely out of the question. A criminal proceeding of the magnitude proposed would be wholly unmanageable by virtue of its size and complexity and would inevitably and ignominiously collapse. What the applicants propose, in effect, is a wide-ranging ad hoc public inquiry into the RCMP enforcement operation which is beyond the institutional competence and capacities of an ordinary criminal court.
- [33] In any event, such a vast undertaking is unnecessary, in my view, to create the sort of record that the applicants claim will be necessary to advance their claims of systemic abuse of process. The anterior judgments both of this Court and the Court of Appeal have described the conduct of both police and protestors in detailed terms based on an overall evaluation of the record of strife at Fairy Creek from May to December, 2021. This general background or context is well established and, in my respectful view, it does not need to be endlessly repeated.
- [34] As I have said, a stay of proceedings under the residual abuse of process category is to be considered in individual circumstances, though it can be based, in part at least, on alleged systemic misconduct unrelated to the personal experiences of the applicant. The challenge lies in affording applicants who have an arguable claim to the remedy the opportunity to do so within the compass of a manageable and reasonably expeditious procedure that is fair to all concerned.
- [35] If, as advertised, all 121 applicants intend to plead guilty, then as far as I am concerned the process can begin immediately on a "first come, first served" basis. On the other hand, if any of the applicants change their minds and require a full trial on the merits, then these must proceed in a logical, orderly and procedurally viable fashion. In my view, to do so on the basis proposed by Crown counsel of separate trials involving sub-groups of defendants arranged by arrest date makes sense and is not controversial.
- [36] Either way, it will be open to individual applicants to file separate notices of application for a residual category stay of proceedings. I stand ready to adjudicate any such application. The availability, scope and configuration of the hearing related to individual applications may be decided after hearing submissions from both defence and Crown counsel. Where an individual application is permitted to proceed, it is to be expected that the applicant would testify about the manner in which they claim to have been mistreated by the police, in light not only of the well-known general background of the case, but also, with the court's approval, as amplified by testimony from a reasonable but limited cross-section of other witnesses tending to show, in the sense described in Babos, that the alleged mistreatment of

the applicant was not isolated, but part of a systemic problem from which the court should dissociate itself.

- [37] The Crown would naturally be entitled to call such responsive or rebuttal evidence as it thinks fit and the court will allow, followed by a determination whether the applicant has established that a stay of proceedings should be ordered as the only available remedy that will preserve the integrity of the justice system. I foresee that the result of an individual stay application conducted in this way would act as a valuable guide to the viability of subsequent ones, and I doubt that a multiplicity of initial proceedings would be required before the likelihood of success is clearly established for cases waiting in the queue. This method of approach strikes me as fair, accessible, realistic, logical, proportionate, and in accordance with accepted principles of criminal law and procedure.

DISPOSITION

- [38] The application for joinder is dismissed. The May 19, 2022 joint application for a stay of proceedings is also dismissed, with leave granted to each of the 121 individuals named in it to file separate applications in their individual cases seeking the same relief.

"Baird J."

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