

CANADA / JUDGMENT

Teal Cedar Products Ltd. v. Rainforest Flying Squad

2022 BCSC 2281

COURT

Supreme Court of British Columbia

DECIDED

7 December 2022

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2022 BCSC 2281 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 2281 Date: 20221207 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 Corrected Judgment: The text of the judgment was corrected at paragraph 1 on January 4, 2023. Before: The Honourable Justice Thompson Oral Reasons for Sentence - Keith Cherry Counsel for the Crown: N. Melling A. Kaban Counsel for the Contemnor: B. Isitt Place and Date of Hearing: Nanaimo, B.C. December 7, 2022 Place and Date of Judgment: Nanaimo, B.C. December 7, 2022

- [1] THE COURT: I am going to impose sentence and give my reasons now, and my worry in doing so is that I will not do justice to the careful thought that has gone into what Mr. Cherry has put in front of me - but I think there is something to be said for me getting this done today.
- [2] The contemnor was on a logging road on 13 September 2021. He was beside a large log positioned on the roadway. His arm was chained inside a hole in the log and approximately 20 large nails were hammered into the wood around the hole to make it more difficult to cut through. On one side of the road was a rockface and the other a steep drop. The log did not block the full width of the road, but its presence on the roadway had the effect of impeding access by vehicle traffic.
- [3] Mr. Cherry has acknowledged that his actions constitute criminal contempt of Justice Verhoeven's April 2021 order. Mr. Isitt has properly acknowledged that, but for asserted collateral consequences suffered by his client, previous cases in this proceeding such as Kooy, Mawhinney, and Henderson would indicate the appropriate sentence. In each of these cases, 100 hours of community work service was imposed.

- [4] The narrow issue on this sentencing is the effect, if any, of the loss of \$1605 of camping gear possessed by Mr. Cherry at the time of his arrest. I accept Mr. Cherry's affidavit evidence about this loss. He had placed his gear in a ditch at the side of the road before his arrest. It ended up in the middle of the road at and around the time of his arrest, and was repeatedly run over by a road grader.
- [5] Mr. Melling has taken me to the principles set out in *R. v. Suter*, 2018 SCC 34. There is no rigid formula when accounting for this sort of collateral consequence, and foreseeability or state action are not prerequisites or considerations that determine outcomes when conducting the analysis. Collateral consequences cannot reduce a sentence such that it becomes disproportionate. And, where a consequence is "so directly linked to the nature of an offence as to be almost inevitable, its role as a mitigating factor is greatly diminished" (para. 49).
- [6] I agree with Mr. Cherry's point that even when one expects to be arrested that they should not expect that their belongings will be lost or damaged. There are principles, practices, and procedures to safeguard an arrestee's property that I understand police in this country to operate by when they are arrested, and operation by these procedures is what I think citizens have a right to expect. In any event, I agree with counsel that there is room for adjusting the sentence in a case such as this, and I intend to make that adjustment.
- [7] Mr. Cherry is a 34-year-old law professor. He has no criminal record. He has an admirable and extensive history of volunteer service in the community. A non-exhaustive list of his good works includes being the treasurer of Climate Justice Victoria, acting as a youth coordinator with LEAP Victoria, working as an executive board member with the Salish Sea Protectors Fund, and working as a member at large with the Social Environmental Alliance. He provided a thoughtful and eloquent written statement on his actions at Fairy Creek and I think it is fair to describe his essential point as similar to what the late Justice Lambert said on the topic of civil disobedience in his dissenting judgment in *MacMillan Bloedel Ltd. v. Simpson* (1994), 92 B.C.L.R. (2d) 1 (C.A.) at para. 126. I do not intend to repeat all of what I have said on the same subject. I have spoken of it in judgments that have been transcribed and are available to the public. For instance, see *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCSC 659 at paras. 6-12. With respect, I agree with Justice Lambert: the assessment of a person's moral culpability should take account of whether the illegal conduct was rooted in a motivation to help fellow citizens.
- [8] Many persons who have committed non-violent civil disobedience have come forward in this case with the expectation that there will be a consequence imposed, and that is my interpretation of what is happening in this case. Like others, Mr. Cherry admits having committed non-violent civil disobedience. It was an act he saw as necessary, and it was committed with an expectation that a consequence would be imposed. Today is the day for the imposition of the consequence. I suppose it could be argued that that civil disobedience would not be much good at all without such a consequence.

- [9] The consequence for Mr. Cherry, a man of good character, a man without a criminal record who engaged in this act of disobedience, would be 100 hours of community work service but for the loss of his gear. Using a rough and ready approach, a reduction to 70 hours of community work service accounts for this collateral event. This remaining allotment of work service is sufficient deterrence and denunciation of the conduct, yet remains a proportionate sentence that gives due regard to some mitigation of his moral culpability on account of his altruistic intentions and motivations at Fairy Creek.
- [10] There will be a probation order to administer the community work service. Mr. Cherry, you are to report within seven days to the Victoria office by telephone of Community Corrections. You will get a copy of an order which will have the telephone number on it. You will complete the 70 hours of community work service within 11 months of a 12-month probation order. Your only other obligation under the order is to tell the probation officer if you change your telephone number. The order may be entered in the Nanaimo registry.
- [11] Anything for clarification, Mr. Isitt?
- [12] CNSL B. ISITT: Not from me, Mr. Justice.
- [13] THE COURT: Mr. Melling?
- [14] CNSL N. MELLING: No, Mr. Justice. I will have the order done in a moment.
- [15] THE COURT: Very well, thank you. I will sign the order when it is ready.
- [16] Good luck to you, Mr. Cherry. You are doing research in a very important area and I look forward to reading your work. Courts will have to grapple with issues of interaction between state laws and Indigenous laws in the coming months and years. "Thompson J."

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