

CANADA / JUDGMENT

Teal Cedar Products Ltd. v. Rainforest Flying Squad

2022 BCSC 659

COURT

Supreme Court of British Columbia

DECIDED

25 April 2022

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2022 BCSC 659 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 659

Date: 20220425

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

Oral Reasons for Sentence -- Jonaven Moore

Counsel for the Crown:

M. Crisp

R. Robinson

Counsel for the Contemnor:

B. Zargarian

P. Herrerra

Place and Date of Hearing:

Nanaimo, B.C.

April 21, 2022

Place and Date of Judgment:

Nanaimo, B.C.

April 25, 2022

- [1] Jonaven Moore has admitted criminal contempt of this Court's April 2021 injunction order that prohibits certain obstructive activity in a defined area of southern Vancouver Island. The plaintiff logging company holds a forest tenure in this area.
- [2] On 28 May 2021, a vehicle was found parked on a bridge inside the injunction area. Its front wheels rested on one end of a long metal pole and were chained in place. The other end of the pole extended a considerable distance over the side of the bridge where there is a steep drop. A narrow wooden platform was mounted to the far end of the pole. Mr. Moore was sitting on this platform, hanging over the cliff. One of his arms was attached to the pole with a sleeping dragon.
- [3] The vehicle that held down the pole blocked the bridge. The RCMP removal team conducted a fairly complicated operation to swing the metal pole back to solid ground where Mr. Moore could be separated from the pole. This operation featured acquiring a large excavator, putting two members of the removal team in the excavator's bucket and delivering them to Mr. Moore's end of the pole. After placing a helmet and safety harness on Mr. Moore, they attached heavy-duty straps to the pole. Meanwhile, other police officers were taking steps to allow Mr. Moore's end of the pole to be swung back to the bridge.

- [4] It is an admitted fact that Mr. Moore put himself at significant risk and that he was concerned for the police officers' safety but put them at risk regardless. Mr. Moore told me that if the police had chosen a different piece of equipment, the risks would have been mitigated. Whether or not that is so, Mr. Moore engaged in a particularly dangerous stunt and it does not lie in his mouth to criticize the means by which he was safely brought back to solid ground. Needless to say, the ideal piece of rescue equipment might not always be readily at hand in a remote area like this bridge over a creek in the injunction area.
- [5] Mr. Moore is 42 years old. He resides in East Sooke. He is employed as a carpenter, and does volunteer work building trails in the Jordan River area. Mr. Moore is also studying environmental science and political science at the University of Victoria. He has traveled widely and has seen the impact of climate change around the world. Like all others I have sentenced in this case, approximately 40 contemnors to this point, Mr. Moore is a good citizen. He is a first offender. The letters provided by his supporters are impressive; they describe him as a generous and compassionate man, a man of deep principle and integrity.
- [6] Mr. Moore's contempt of court conduct was undertaken with the hope of influencing change. In his remarks to the Court he referred to the latest Intergovernmental Panel on Climate Change assessment report. António Guterres, the United Nations Secretary-General, made these remarks when the report was released:

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.

- [7] 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: *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para. 2.
- [8] The principles of sentencing for criminal contempt are referred to at length in the Crown's written submission. This submission, which was made an exhibit at the hearing, refers to leading cases and well-established principles. These principles are not the subject of controversy on this sentencing. The Court's inherent jurisdiction in contempt matters allows for the imposition of a wide range of penalties, but denunciation and deterrence must be in the first rank of sentencing considerations so as to carry out the Court's responsibility to maintain the rule of law as a necessary part of a just, democratic society.
- [9] There have been many judicial statements about the dangers presented by wilful breaches of court orders because of their corrosive effect on the rule of law. I accept these instructive statements without hesitation. But how should a sentencing court react in practical terms in circumstances where the infringement of a court order is an altruistic act of civil disobedience? For a useful discussion of the notion of extending some tolerance to the civilly disobedient, see Vinit Haksar, "The Right to Civil Disobedience" (2003) 41 *Osgoode Hall L.J.* 407.

[10] The moral culpability of the offender is a key consideration when imposing sentence in any case. I respectfully agree with what Mr. Justice Lambert said on the subject of the gravity of contempt offences in a Clayoquot Sound sentencing appeal, *MacMillan Bloedel Ltd. v. Simpson* (1994), 92 B.C.L.R. (2d) 1 (C.A.) at paras. 122-128:

Assessing the Gravity of the Offences in this Case

The major component in assessing the gravity of these acts of criminal contempt of court must surely rest on the moral culpability of the offenders in relation to their deliberate public acts undertaken with some degree of foresight that those deliberate, public acts would depreciate the authority of the courts, and with reckless indifference about whether that would occur. (The fact of conviction of criminal contempt must be taken to have established those facts beyond a reasonable doubt.)

There are four points that should be borne in mind in relation to the moral culpability of the offenders in this case.

The first is that the courts must place the correct significance on the position of the rule of law in a democratic society. It is important. Indeed, it is very important. But it is not the only support on which democratic institutions rest. It is one of many. To lawyers and judges it may seem more important than other principles of democracy because we work always in a court and law centred environment. But, in my opinion, we must avoid the tendency to think that the rule of law is at risk every time there is a public breach of a court order. We must assess the gravity of the disobedience and the moral culpability for that disobedience in the total framework of a democratic society and not just in the framework of the rule of law itself.

The second point is that the public acts in this case were undertaken as public acts of protest against the Clayoquot Sound Land Use Decision and not as public acts of protest against what the courts had done. There is very little on which to base a conclusion that the six protestors had any focused foresight that their actions would depreciate the authority of the courts. To the extent that they may be considered to have had that foresight they were not deterred by that foresight, or by any weighing of the extent of the potential depreciation of the authority of the courts, from their true purpose of protesting against the Clayoquot Sound Land Use Decision made by the Provincial Cabinet. So their acts of criminal contempt of court were not so much deliberate acts of defiance as political acts incidental to political protest.

The third point is that all six of the appellants considered that they were acting in accordance with the political principle of civil disobedience. That political principle contemplates that a public and, as far as possible, passive act of resistance to a law that is perceived to be unjust, coupled with an embracing of the appropriate punishment for the offence, is consistent with the procedures for bringing about democratic change, and when properly understood indicates the highest respect for the rule of law as a benign and necessary part of the structure of a just and democratic society. Acting in accordance with the principle of civil disobedience is not a defence in law. But surely it must be a relevant factor in assessing moral culpability for the offences. It

will not always be a mitigating factor. Particularly in the case of repeat offenders, it may be an aggravating factor. But the fact that the act is motivated, not by self-interest, but by a desire on the part of the offenders to promote their perception of the public good, however inappropriately insistent, must affect the assessment of moral culpability.

The fourth point is that it is important to ask to what extent the authority of the courts may be thought to be depreciated by these acts of protest in an overall context where the courts find that some protestors have been prosecuted and not others, in particular not Mr. Robinson, and in an overall context where the courts find themselves the instruments for upholding the Clayoquot Sound Land Use Decision which, according to the Provincial Ombudsman, was made without consulting the Nuu-chah-nulth peoples whose constitutionally guaranteed aboriginal rights may be deeply affected by the Decision and who may themselves have been denied the protection of the rule of law as it relates to administrative fairness.

The Sentences in This Case

When the six appellants were before the court for sentencing they could properly have been assessed as intelligent, peaceful, principled young persons who were led by their consciences and by their understanding of the political principle of civil disobedience to commit acts of contempt of court as part of a public protest, with recklessness about the extent to which their acts would tend to undermine the authority of the courts. They undertook those acts not in order to defy the courts but in pursuit of their goal of preserving what they see as a national treasure and the heritage of future generations.

[Emphasis added.]

[11] I respectfully agree with Mr. Justice Lambert's dicta on the significance and importance of the rule of law, and the interrelationship between civil disobedience and moral culpability. It is notable that Lambert J.A. was expressly speaking of a conception of civil disobedience that is non-violent and of disobedient who embrace the appropriate punishment for the offence. His judgment was written in dissent, but Lambert J.A. makes it clear that civil disobedience is in no sense a legal excuse or defence. He does not define civil disobedience as a "right", and he observes that it is not always a mitigating factor in sentencing. I do not read the majority judgment as disagreeing with Lambert J.A.'s seemingly inarguable foundational proposition that the assessment of a person's moral culpability should take account of whether the illegal conduct was motivated by greed or other selfish reasons, or whether it was rooted in a motivation to help fellow citizens.

[12] I accept that Mr. Moore's conduct was an act of conscience of a good and caring citizen. The cause of climate activists is a rational one, and finds support in the Supreme Court of Canada's recent dicta and a series of IPCC reports. The rule of law seeks to promote and safeguard peace and order, but clear warnings are being sounded that on the present course the future will be disordered in ways that are scarcely imaginable. A reasoned assessment of the appropriate punishment for conduct that corrodes public order must account for the

activists' motivation to provoke action that might avoid the societal disorder that will likely result from short-sighted inaction.

- [13] All that said, Mr. Moore's act of conscience put others at immediate risk. While I am prepared to take account of Mr. Moore's selfless motivation because it reduces his moral culpability, this mitigating effect is overborne by the foreseeable creation of substantial immediate risk to others.
- [14] The Crown acknowledges that Mr. Moore is a first offender who has admitted his contempt at an early stage, and his actions occurred only ten days after police enforcement of the injunction began. The Crown submits that a seven-day jail sentence is the proper disposition.
- [15] In arriving at a penalty, the overarching principle of proportionality must be observed; I must consider the circumstances of the contempt and the circumstances of the contemnor. Jail sentences for first contempt offences are comparatively rare, but first offenders have received custodial sentences in British Columbia in mass protest cases. One example is *Slocan Forest Products Ltd. v. John Doe*, 2000 BCSC 1337, in which a young first offender received a 14-day jail sentence for an act of contempt somewhat similar to Mr. Moore's. A forestry company obtained an injunction in June of 2000 after demonstrators blocked a number of their crews from reaching their work sites. Less than a month after the imposition of the injunction, the contemnor occupied a platform approximately forty feet up a tree, in an effort to obstruct a road-building crew.
- [16] Mr. Moore's case is one of several affected by an administrative slip in the Crown office. Some alleged contemnors who had made use of tripods or other dangerous devices received by mistake a plea offer that the Crown would seek a fine rather than jail if contempt was admitted by a certain date. The Crown offer in Mr. Moore's case was to seek a \$3000 fine or 150 hours of community work service. In fact, it was never the Crown's intention to take such a lenient position. When discovered, I understand that the fact of the mistake was communicated to alleged contemnors. In some cases, however, the offers had already been accepted. Mr. Moore's case is one of these.
- [17] The Crown's position is that it cannot urge an unfit sentence. But for the mistake, Mr. Crisp advises that the Crown would have sought more than a seven-day sentence but it has taken the mistake into account by making a submission that is the least sentence that properly balances the applicable principles of sentence in this case.
- [18] Mr. Moore's submission is based on parity with sentences imposed on other Fairy Creek contemnors, and he urges that some weight be put on the Crown not following through with its plea offer after it had been accepted by his client. He submits that 150 hours of community work service is a proper sentence; his alternative submission is that if a jail sentence is required, it ought to be four days.

- [19] Mr. Moore does not argue abuse of process. Rather, he submits that the Court should consider that the Crown's change of position when arriving at a fit sentence. Mr. Zargarian argues that the rule of law is a centrepiece in this proceeding and in such a case the Crown ought not to resile from its agreements and risk degrading the honour of the Crown. He cites *R. v. Nixon*, 2011 SCC 34 at para. 63, where the Supreme Court of Canada emphasized that it is of crucial importance to the proper and fair administration of justice that plea agreements be honoured.
- [20] In the case at bar the Crown has advised the Court of the circumstances and reasons behind its decision to back away from the agreement. In *Nixon*, the judgement of a line prosecutor was overruled by an Assistant Deputy Minister. The case at bar is much different: an administrative error was made and the Crown has endeavored to remedy it. And, the Crown has taken the mistake into account by seeking a more lenient sentence than it would have but for the mishap in the plea negotiations. I think in these circumstances I should remain focused on achieving the goals of sentencing in this particular case, by imposing a fit and proportionate sentence.
- [21] Mr. Zargarian referred to several recent sentencing decisions in this Fairy Creek proceeding. He places heavy emphasis on the unreported case of Stephanie O'Neill who was sentenced on 12 January 2022. Ms. O'Neill was arrested on 21 June 2021. An RCMP removal team brought her down from a seat at the top of a tall pole erected on a road in the injunction area. The Crown sought a \$3000 fine or equivalent community work service. She was a first offender. The Crown would have sought a jail sentence but for an offer made in error, accepted by the contemnor, to seek a \$3000 fine or equivalent community work service if an admission of criminal contempt were made. The Crown understandably chose to stand behind its plea offer in the O'Neill case because the error was discovered approximately one hour before the sentencing hearing was set to begin. I imposed a sentence of 100 hours of community work service (which, on the conversion arithmetic I have been using, is the equivalent sentence to a \$3000 fine). The important distinguishing fact is the degree of risk presented by Mr. Moore's conduct far exceeded the risk that resulted from Ms. O'Neill's conduct.
- [22] I was referred to the sentence imposed on Kylie Milne on 22 February 2022 (unreported). Ms. Milne committed her offence on 19 May 2021 - the second day of arrests for contempt of the Fairy Creek injunction order. She was on top of a 15-foot-high tripod on a bridge, and she was removed by an extraction team using climbing accessories. Ms. Milne was a first offender, with a remarkable history of community volunteer work. Ms. Milne had also received and accepted a mistake-based offer from the Crown to seek a fine rather than jail. The Crown sought a seven-day jail sentence. I imposed a four-day sentence. She was entitled to three days' credit for time in custody, and I imposed an additional day. Again, I distinguish Ms. Milne's case on the basis that the contraption she used did not create the level of risk associated with Mr. Moore's behaviour.

- [23] Mr. Zargarian also referred me to two other cases in which fines were imposed: Nicole Jaques (Teal Cedar Products Ltd. v. Rainforest Flying Squad, 2021 BCSC 2288) and Soobin Kim, unreported, 12 January 2022. Each of these cases is similar to Mr. Moore's in the sense that Ms. Jaques and Mr. Kim used sleeping dragons and in doing so substantially inconvenienced the RCMP arrest and removal teams, but neither of those contemnors took any action that created significant risk. Neither case is an apt comparator.
- [24] It is no small thing to jail a first offender. However, I agree with the Crown that it is necessary to do so in this case to give adequate weight to the principles of denouncing Mr. Moore's dangerous conduct, and deterring others who might be so reckless. While I think that a seven-day sentence is on the verge of being inadequate to punish such reckless behaviour, it is not in my estimation a sentence that brings the administration of justice into disrepute or is otherwise contrary to the public interest. The Crown has taken a lenient approach for understandable reasons that I have outlined, and I am not inclined to impose a longer sentence than is sought.
- [25] The Crown does not oppose a credit of one-day for the time that Mr. Moore remained in custody before being released on the same day as his arrest, and he shall receive this one-day credit. Mr. Moore, your sentence is a further six days in jail.

"Thompson J."

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