

CANADA / JUDGMENT

Teal Cedar Products Ltd. v. Rainforest Flying Squad

2022 BCCA 26

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 26 Teal Cedar Products Ltd. v. Rainforest Flying Squad

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Teal Cedar Products Ltd. v. Rainforest Flying Squad,

2022 BCCA 26

Date: 20220126

Docket: CA47775

Between:

Teal Cedar Products Ltd.

Appellant

(Plaintiff)

And

Unknown Persons operating as the "Rainforest Flying Squad",

Robert Arbess (also known as Reuben Garbanzo), John Doe, Jane Doe, and Persons Unknown

Respondents

(Defendants)

And

British Columbia (Ministry of Forests, Lands, Natural Resource

Operations and Rural Development)

Respondent

(Third Party)

And

Members of the "Rainforest Flying Squad", Kathleen Code,

Carole Toothill, William Jones, Keith Cherry, Rani Earnhart,

Saul Arbess, Warren Kimmitt, Donna Clark, and Attorney General of Canada

Respondents

And

Huu-ay-aht First Nations

Intervenor

Before:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Butler

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

September 28, 2021 (Teal Cedar Products Ltd. v. Rainforest Flying Squad,

2021 BCSC 1903, Vancouver Docket S211602).

Counsel for the Appellant:

D.L. Dalke

A.R. Hudson

E.J. Snow

Counsel for the Respondent, Robert Arbess (aka Reuben Garbanzo):

D.I. Turner, Q.C.

Counsel for the Respondent British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development):

K.A. Reilly

D.G. Cowie

Counsel for the Respondents, Kathleen Code, Carole Toothill and William Jones:

M.B. Funt

C. Chamberlain

Counsel for the Respondents Keith Cherry and Rani Earnhart:

M. Nefstead

Counsel for the Respondent Attorney General of Canada:

T.D. Timberg

D. Nuñez

Counsel for the Intervenor Huu-ay-aht First Nations:

M.M. Giltrow

N.D. Sudeyko

Place and Date of Hearing:

Vancouver, British Columbia

November 15-16, 2021

Place and Date of Judgment:

Vancouver, British Columbia

January 26, 2022

Written Reasons of the Court

Summary:

The appellant appeals from an order refusing to extend an injunction restraining the conduct of protesters interfering in the appellant's logging operations. The chambers judge found that the absence of an enforcement gap (given the probable use of the criminal law) diminished the weight to be given to the public interest in upholding the rule of law by enjoining the protesters from engaging in unlawful activity. The judge concluded that the balance of convenience lay in denying an extension of the injunction taking into account the countervailing public interest in protecting the reputation of the court from depreciation through being pulled into the dispute and by being associated with the manner in which police were enforcing the injunction. The appellant contends on appeal that the judge erred in using an enforcement gap analysis, in his conclusion that the reputation of the court would be diminished by continuing the injunction, and in his weighing of the public interest in upholding the rule of law.

Held: Appeal allowed. The availability of the criminal law is not a factor weighing against the granting or extension of a civil injunction to a private entity. The court's reputation, properly characterized, is not depreciated by the grant and enforcement of an injunction to stop unlawful conduct. The conduct of police does not tarnish the reputation of the court; the court and police are constitutionally independent. The public interest in upholding the rule of law continues to be the dominant public interest in cases involving civil disobedience against a private entity.

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Reasons for Judgment of the Court:

- [1] This appeal arises from a judge's refusal to extend an interlocutory civil injunction that protected lawful logging operations from unlawful interference by protesters.

- [2] The case is not about the wisdom of government forest policy. It is decidedly not about the Court's views on whether and where old-growth logging should occur in this province, even in the context of climate change. In an injunction application, those are matters outside of the constitutional competence of the courts and exclusively within the constitutional purview of the government elected by the citizens of British Columbia.
- [3] This case is, rather, about the principles that apply when a court is asked to enjoin significant and persistent unlawful conduct by those who choose to abandon the democratic process and impose their will on others by force. That is the nature of the conduct sought to be addressed by the injunction, not peaceful protest that occurs within the law. There is a clear demarcation between the type of conduct displayed in this case and the actions of lawful protesters who use peaceful means to persuade the government to change policy.

The unlawful conduct in issue

- [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.

The history of the injunction orders

- [11] Justice Verhoeven granted the injunction in issue on April 1, 2021, enjoining the blockades. Appropriately, and consistent with the Supreme Court of Canada's endorsement of the practice in *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048 at para. 41 [Simpson], he included enforcement terms authorizing the police to arrest and remove people who breach

the injunction. When Teal's application for the injunction came before him in March 2021, the protesters had created eight blockades at various locations throughout TFL 46 and adjacent access roads: 2021 BCSC 605 at para. 25. Some of the blockades had remained in place for many months.

- [12] Verhoeven J. concluded Teal would suffer irreparable harm if the injunction was not granted, saying:
- [38] Teal employs approximately 450 people within its processing and manufacturing facilities. If Teal is unable to log within the area of TFL 46, it will not have an adequate timber supply for its mills. It may be forced to shut down its mills, resulting in layoffs of employees, and Teal's inability to supply its customers. Teal estimates that the end product value of the products that it will produce from the timber sourced from TFL 46 is approximately \$20 million. Teal stands to lose market share, and to suffer damage to its reputation as a reliable supplier of its products.
- [40] The blockades have prevented Teal's road contractor, Stone Pacific, from winterizing logging roads located in steep mountainous terrain, which is necessary to prevent road washouts, erosion, and environmental damage. Some of the protestors' activities have caused safety risks. Some protestors have ignored signage and entered active work areas while blasting and other construction work is taking place. They have left fires unattended in dry conditions. Some of Stone Pacific's equipment has been vandalized. They have not kept a safe distance away from Stone Pacific's trucks. A female Stone Pacific truck driver was harassed and intimidated by a protestor named Hans on December 17, 2020. The incident was reported to the RCMP.
- [41] The losses extend to Teal's contractors and their employees. Stone Pacific lost \$3,500 per day for each day its operations were prevented, and its employees lost wages of \$350 to \$400 each for every day of work lost.
- [13] By May 2021 the proceedings had been assigned to the judge below to case manage. Police had begun enforcement operations in mid-May 2021 and hundreds had been arrested for allegedly violating the injunction order. Some had been released with a warning. Some had been released after entering into a police-issued undertaking that included promises to appear in court and not to return to the injunction area. Those who had refused to sign the police undertakings had been brought before judges of the court and released on terms considered appropriate in the circumstances. The judge concluded that the BC Prosecution Service should be invited to assume conduct of contempt proceedings against those protesters who refused to comply with the terms of the injunction order. In doing so, he noted that there was in the case before him an "important public interest in fostering respect for the rule of law, including the ability of courts to enforce their processes and maintain their dignity and respect": 2021 BCSC 1380 at para. 16 [Conduct of Prosecution Reasons].

- [14] The matter came before the judge again on July 14-15, 2021 when a consortium of media organizations and two respondents, Saul Arbess and Susan Gage, applied to limit the RCMP's access to TFL 46, use of checkpoints, and large exclusion zones. In reasons indexed at 2021 BCSC 1554 [Variation Reasons], the judge found that the RCMP had not shown that their exclusion zones and checkpoints were reasonably necessary to carry out their enforcement duties, and went beyond what was lawful under the common law "ancillary powers" doctrine.
- [15] The judge recognized that the exclusion zones, checkpoints, and searches were all effective rational strategies for preventing people from breaching the order, and that, if the public were allowed vehicle access, and searches were not conducted, the transport of persons inclined to breach the injunction, and transport of material to be used for this purpose, would likely accelerate. He agreed that in order to prevent escalation of injunction violations, it was difficult to conceive of effective measures short of a police blockade. But he concluded that when the order was read accurately as "arrest and remove," rather than "prevent", the police could not show that their use of geographically and temporally expansive exclusion zones and associated access checkpoints were reasonably necessary: at para. 63. He described the resulting impact on the right of citizens to be left alone, on freedom of movement, and on peaceful assembly and freedom of the press as "substantial and serious" (at para. 54), but noted it was open to the RCMP to apply to vary the order if public access to the roads in the injunction area was making the arrest and removal duty unsafe: at para. 65.

The hearing below

- [16] On September 14, 2021, the parties were once more before the court.
- [17] The RCMP took up the judge's suggestion and applied to amend the terms of the order to include more expansive measures to prevent protesters from engaging in unlawful activities. Two individuals applied to constrain the RCMP in the methods used to do extractions; other individuals sought a declaration that the RCMP's access control measures were unlawful and sought a declaration that they be found in contempt. Teal Cedar sought a one-year extension of the injunction--the application underlying this appeal.
- [18] At the request of the judge, the contempt application was adjourned before the hearing. The judge heard the other three applications, but ultimately addressed only Teal Cedar's motion, concluding the others were moot given his refusal to extend the injunction.
- [19] The judge began his analysis by referring to the well-known three-part test governing applications for an injunction set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311:
1. Is there a serious issue to be tried?

2. Will the person applying for the injunction suffer irreparable harm if the injunction is not granted?
3. Does the balance of convenience favour granting the interlocutory injunction or denying it?

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.

[20] The judge concluded "without hesitation" that Teal Cedar met the first two branches of the RJR-MacDonald test. The application to extend the injunction failed on the third branch. The judge found the balance of convenience favoured refusing the injunction given his weighing of various factors affecting the public interest. The judge squarely (and correctly) rejected the respondents' contention that the protesters' goal of protecting a rare ecosystem in the context of a climate crisis should be weighed as a public interest factor, saying:

[65] [T]o take account of this type of public interest would amount to contempt of constitutional constraints on judicial powers. To borrow a phrase from Justice Voith's judgment in *Cermaq*, such considerations are "not on the table."

[21] In terms of "legally relevant public interest considerations" under the third branch, the judge recognized that the public interest most often considered, and weighed heavily in civil disobedience cases, is the protection of the exercise of private rights from illegal obstruction--more succinctly described as the public interest in the rule of law: at para. 32. He observed that in many cases the importance of upholding the rule of law may be the only public interest consideration. But he found that was not so in the present case. The judge identified several countervailing public interest factors:

1. The public's prima facie right to access the roads in TFL 46 (at para. 32);
2. Whether public order should be maintained by enforcement of the Criminal Code rather than by injunction (at para. 32); and
3. The strong public interest in maintaining the court's reputation by keeping it away from the front lines of the dispute and protecting it from being tarnished by police conduct: at paras. 44, 66.

[22] The judge suggested that the way to balance these public interests and the public interest in protecting persons trying to exercise a lawful interest from those using unlawful actions to stop them, is to ask whether there is an "enforcement gap." If the applicant has established that a gap exists, the scales tip towards issuing an injunction to protect the applicant; if the applicant fails to establish an enforcement gap, less weight should be given to the protection of private rights: at paras. 28, 45. In other words, the judge concluded that if other means of stopping the unlawful conduct exist, there is less need for an injunction and less weight should be given to the fundamental concern about upholding the rule of law. The judge concluded such was the case in the matter before him, finding that the unlawful conduct

could be dealt with by prosecuting the people responsible for Criminal Code offences, since "Parliament has spoken in clear terms about damaging, destroying, or interfering with the use of property, and about blocking or obstructing roads for the purpose of compelling others to abstain from doing what they have a lawful right to do," relying on ss. 423 and 430 of the Criminal Code: at para. 33.

- [23] The judge was, of course, being asked to extend an existing injunction. He recognized that Verhoeven J. had placed a lot of weight on the need to stop illegal interference with Teal's lawful rights "and the rule-of-law implications of allowing the illegal behaviour to continue." The judge noted that standing behind lawful rights "promotes the rule of law and is undoubtedly in the public interest", as Verhoeven J. found: at para. 50.
- [24] Although Verhoeven J. had not assessed the original application for an injunction using the judge's "enforcement gap" analysis, the judge inferred that Verhoeven J. must have concluded there was an enforcement gap since he said that refusing the application would leave Teal Cedar with no remedy. He assumed that the behaviour of those blocking the roads in the period leading up to the hearing before Verhoeven J. "may not have risen to the level required to make criminal charges a real prospect": at para. 51.
- [25] The judge's enforcement gap analysis caused him to significantly reduce the weight to be given to the "rule of law" public interest concern posed by continued illegal interference with Teal Cedar's lawful activities. But he did not take it off the scales entirely, recognizing that there was still a risk that the criminal law would not be used or would not be effective in addressing the illegal behaviour that continued to plague Teal Cedar: at para. 60.
- [26] Continuing with the balancing exercise, the judge noted the significant impact of the illegal activity on Teal Cedar's operations and on the First Nations who had approved the logging and stood to financially benefit from it: at paras. 61 and 62. Despite according significant weight to these considerations favouring the extension of the injunction, the judge found the following countervailing factors outweighed them:
1. Government and police could and should use provincial laws such as the Forest and Range Practices Act, S.B.C. 2002, c. 69 and the criminal law, as well as lawful preventive policing measures such as patrolling the roads, to stop unlawful activity (at para. 68);
 2. The court's reputation had been depreciated by the manner in which the police enforced the injunction order (at para. 69), primarily:
 - (a) The use of overly expansive exclusion zones;
 - (b) Interference with media rights to freely access TFL 46;
 - (c) Command decisions to remove individual identification of officers because of concerns about harassment on social media (at paras. 79-81); and

- (d) Failure of command to enforce an RCMP directive not to wear "thin blue line" patches on their uniforms which "deeply offend some citizens" including some Indigenous protesters: at paras. 82-86.

The judge therefore concluded that it was not just and equitable in all the circumstances of the case to extend the injunction: at para. 89.

On Appeal

[27] Teal contends the judge made three significant errors:

1. Requiring it to establish an enforcement gap and finding that a gap no longer existed;
2. Concluding that the reputation of the court would be diminished by continuing the injunction; and
3. Giving insufficient weight to the public interest in upholding the rule of law and preventing irreparable harm to Teal Cedar and others.

[28] The judge's refusal to extend the injunction is discretionary and entitled to significant deference. An appellate court may only interfere if the judge erred in principle, gave no or insufficient weight to relevant considerations, considered irrelevant factors, or made a decision that is so clearly wrong as to amount to an injustice: *Barrie v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2021 BCCA 322 at para. 87.

[29] We conclude, with great respect to the judge below, that these errors have been established on appeal and formed the basis of his decision. We would accordingly allow the appeal and extend the injunction.

Analysis

1. Did the judge err in conducting an enforcement gap analysis and in concluding there was no enforcement gap?

[30] In our view, the judge made two errors in this part of his analysis. First, he erred in law by considering the availability of charges and prosecution for Criminal Code offences as a factor weighing against the granting of an injunction to a private applicant. Second, he committed a palpable and overriding error of fact by finding that the criminal law would be used in this case to prevent ongoing harm to Teal Cedar. The result has been to upend the law of injunctions by considering, under the third branch of the RJR MacDonald test, matters unrelated to the interests of the parties before the court.

- a) Considering the availability of the criminal law as a factor in the balance of convenience

[31] In conducting this analysis, the judge recognized that the availability of the criminal law to stop the type of conduct engaged in by the protesters was not a bar to the court issuing an injunction: at para. 37. That point had been settled by *Simpson*, a case arising out of similar logging protests in which injunctions had been issued and upheld by a majority of this Court.

[32] At issue in *Simpson* was whether the court had jurisdiction to enjoin criminal conduct. Wood J.A., in dissent, was of the view that the court did not, observing that it is the function and responsibility of the Attorney General as the chief law officer to see that the criminal law is enforced: *MacMillan Bloedel Ltd. v. Simpson*, [1994] 10 W.W.R. 705, 96 B.C.L.R. (2d) 201 (C.A.) at para. 155. The Supreme Court of Canada disagreed. McLachlin J. (as she then was) writing for the Court, observed that the Attorney General of British Columbia "had a specific policy not to lay criminal charges against environmental groups engaging in civil disobedience, but to leave it to affected parties to seek injunctive relief" (emphasis in original): *Simpson* at para. 18. Responding to Wood J.A.'s opinion that it is the responsibility of the Attorney General to enforce criminal law, she said:

35 Every citizen would endorse these words. Yet, as this case demonstrates, to state the obligation of the Attorney General is not to ensure that it will be discharged in such a way as to provide the required protection to citizens injured by the conduct of others. It is to fill this gap that the equitable remedy of injunctions -- injunctions which not only the parties but also all others must respect on peril of being found in contempt of court -- has developed.

[Emphasis added.]

[33] It was on the basis of McLachlin J.'s reference to injunctions "filling the gap," that the judge concluded an important consideration in deciding whether to continue Teal Cedar's injunction was "whether the enforcement gap that existed in the *Simpson* case is present in current circumstances": at para. 38. If a gap is established, the judge concluded, then the public interest in the "need to stand against those using unlawful actions to interfere with lawful interests and thus avoid leaving the applicant without a remedy" (at para. 45) must be given greater weight than the "reputational concern about the court's legitimacy and effectiveness being compromised by being pressed to the front line" of the dispute between protesters and a logging company: at paras. 43, 44, 66. Put another way, the judge found the public interest in granting an injunction to protect legal rights should be given less weight when the criminal law could be used to stop the unlawful behaviour.

[34] In our view, the enforcement gap principle applied by the judge is not consistent with *Simpson*. In that case, the Supreme Court of Canada recognized that equitable injunctions are the means by which parties who cannot enforce the criminal law obtain protection for the exercise of their lawful rights. In other words, because a private applicant cannot ensure that the police and prosecutors will initiate and pursue criminal law proceedings to provide the required protection, there will always be a gap, and it is for that reason that the remedy of an injunction exists. *Simpson* squarely rejected the argument that an injunction ought not

to issue when the alternative remedy of the criminal law may be available, as noted by this Court in *Interfor v. Simm*, 2000 BCCA 500 at para. 21 [Simm] and by Vickers J. in *International Forest Products Ltd. v. Kern et. al.*, 2000 BCSC 888 at para. 30 [Kern #1].

- [35] In the present case, the judge found it was likely the criminal law would be enforced by the police and BC Prosecution Service because of the nature of the conduct in issue. However, he did not go on to examine whether that course of action, even assuming he was correct, would be effective in protecting Teal Cedar's rights. Teal's concern is to stop the unlawful activity so that it can get on with exercising its rights. As this Court observed in *Simm*, an injunction and the use of contempt powers to enforce it are a more effective, relatively expeditious remedy, devoid of the legal requirements and added process burdens of trying to enforce sections of the Criminal Code: at paras. 22-23.
- [36] An injunction, unlike the criminal law, can be tailored to the facts of a given situation. It can be time-limited, geographically limited, and varied on application. As the judge noted in an earlier ruling, it can serve a valuable educational and informational purpose, providing greater clarity to both the public and the police regarding the limits of permissible activities and police enforcement: *Variation Reasons* at paras. 76-80. In contrast, the criminal law is a blunt instrument that moves more slowly and may be less effective in solving the immediate problem of blockades that interfere with lawful activity. For example, the injunction in this case addressed safety concerns by prohibiting protesters from coming within 50 metres of certain vehicles, equipment, and machinery. The criminal law has no equivalent in the absence of an arrest and release on conditions. The injunction also gives the RCMP authority to remove illegal blockades in a clearly delineated area and prohibits specific illegal behaviour. The Criminal Code provisions--such as ss. 423(1)(g) and 430(1)--are more equivocal.
- [37] The judge drew support for his approach from a long line of cases in which judges have decried the perceived failure of the police and BC Prosecution Service to fulfil their unique and independent roles in enforcing the criminal law in the face of persistent civil disobedience. However, in every one of those cases, the court determined that the injunction sought must issue because the rule of law, and fairness to the applicant, demanded no less. In short, despite judges expressing trenchant criticism of police and prosecution policies, none suggested the private applicant should be left to rely on the criminal law.
- [38] In *Alliford Bay Logging (Nanaimo) Ltd. v. Mychajlowycz*, 2001 BCSC 636, one of the cases cited by the judge in support of his approach, Williamson J. commented that an injunction would be unnecessary if there were no gap in criminal law enforcement, i.e., if the Attorney General ensured the effective use of criminal proceedings that would actually prevent irreparable harm. In a subsequent decision in the same proceeding, 2001 BCSC 147, Williamson J. said:

[23] Thus, when law enforcement authorities fail to protect the legal rights of litigants such as the plaintiff, the Court, if all other aspects of the requisite test for the granting of an injunction have been met, must come to the aid of the wronged party. That that is the law in this province has been settled by the Supreme Court of Canada in *MacMillan Bloedel Ltd. v. Simpson* []

[Emphasis added.]

[39] We conclude the weight of the jurisprudence is entirely against the approach taken by the judge in the present case. The respondents could not identify a single case in which a court refused to enjoin persistent illegal interference with private rights on the basis that the applicant could not establish that the criminal law would not suffice. As the respondents candidly acknowledged on appeal, the enforcement gap principle adopted by the judge would lead inevitably to the conclusion that the more egregious the behaviour of the protesters, the less likely it is that an injunction will be granted--a principle entirely at odds with the court's obligation to uphold the rule of law.

[40] That is not to say that the availability of means other than an injunction to prevent unlawful conduct--such as provincial statutory offences, new legislative initiatives or protective remedies, or demonstrated, consistent, and effective engagement of the criminal law in a particular scenario--can never be relevant to the injunction analysis. If those means were being employed in a manner that caused unlawful protesters to stand down, that would be relevant to whether an applicant could establish irreparable harm. The availability of other options is particularly relevant when it is government seeking to obtain an injunction because it has greater ability to access and enforce alternative remedies, as in *Beaudoin v. British Columbia*, 2021 BCSC 248, *Interior Health Authority v. Statham*, 2005 BCSC 1243, and *British Columbia v. Sager*, 2004 BCSC 720. But the applicant in the present case is not a government entity. Teal Cedar, as a private entity, cannot exert any control over whether the police or BC Prosecution Service enforce the criminal law. Nor can Teal Cedar use provincial laws to fine the protesters or legislate more effective remedies--options described by the judge at para. 68 of his reasons.

[41] The intervenor Huu-ay-aht First Nations (HFN) emphasized the difference between government applicants and others seeking an injunction. As a modern treaty nation with jurisdictional rights over resource use, HFN depends on courts to enforce its laws and uphold its rights. It cannot mobilize the criminal law or find a legislative solution to interference with its resource management decisions. HFN opposes the imposition of any additional evidentiary burden on an applicant seeking an injunction to enforce rights, such as proof that the criminal law could not be used instead--a burden it says would make it more difficult to exercise its hard-fought treaty rights and would therefore cut against the overarching object of reconciliation.

- [42] We note parenthetically that the impact of the blockades on First Nations illustrates the importance of the democratic process and the rule of law. Unlike the protesters, whose single-minded goal is to end old-growth logging, the government must consider and balance many competing interests and objectives in developing forest policy and in granting or refusing licences.
- b) The judge's finding that the criminal law would stop the harm
- [43] We turn now to the judge's conclusion that there was no need for an injunction because the criminal law would be used to put an end to the unlawful conduct of the protesters.
- [44] As noted above, the judge accepted that Verhoeven J. must have found an enforcement gap when he issued the injunction in April 2021, but concluded that was no longer so for two reasons. First, he thought the behaviour of those blocking the roads before April "may not have risen to the level required to make criminal charges a real prospect at that time": at para. 51. The judge observed that "the methods of those impeding Teal Cedar have escalated to the point where serious property damage has been done and risk of serious personal injury has emerged" (at para. 54), leading him to "think there is every chance criminal law remedies will be employed": at para. 87.
- [45] Second, the judge noted that the BC Prosecution Service's charging policy specific to civil disobedience changed in 2009. Previously, the policy read: "the use of criminal sanctions in these situations is generally not appropriate": at para. 56. He concluded the present version left more room for using criminal sanctions, because it states that "the use of criminal sanctions in these situations may not always be in the public interest": at para. 55. The judge also relied on a letter from a Director with the BC Prosecution Service confirming that each case referred by police for the purpose of charge approval "is considered on its merits": at para. 20.
- [46] The judge accepted that the police have control over whether to investigate for Criminal Code offences and recommend charges, and the Prosecution Service has authority and discretion over whether to approve those charges, but under the enforcement gap analysis he found it necessary to assess the relative likelihood that police and prosecutors would pursue criminal enforcement measures: at para. 58. He was of the view that the conduct of the protesters was now so egregious that "the clear terms of the [BC Prosecution Service] policy would favour a decision to prosecute": at para. 59. Finding that outcome probable, the judge was not persuaded that there continued to be an enforcement gap.
- [47] In our view, the judge erred in so concluding. Nothing in the record before him supported the inference he drew that the police and BC Prosecution Service would now employ the criminal law to effectively stop the unlawful conduct. First, the conduct of the protesters did not differ materially from the behaviour that Verhoeven J. found to justify an injunction six months earlier. The number and complexity of the blockades had increased, and the conduct had endured for an additional period, but it was in essence as it had been from the outset: significant, persistent and in breach of the criminal law.

[48] Second, the evidence before the judge supported the contrary inference. Blockades began in early August 2020. Teal Cedar reported them to the police in mid-December 2020, but no criminal charges or arrests followed. It was not until May 17, 2021, after the injunction was obtained and the RCMP had developed a plan to respond to it, that police began dealing with the blockades. As the judge himself observed in the Conduct of Prosecution Reasons:

[24] at the time the injunction order was pronounced, many months of road blockades and interruption of lawful Teal Cedar activities had not been met with a police response. The injunction application was made and granted. The injunction is in place and there is evidence that the order is often being defied. The public interest in avoiding depreciation of the Court's authority has emerged. The fact that the Crown has options other than to prosecute for criminal contempt is of little moment at this stage in the process.

[Emphasis added.]

[49] Third, the 2009 changes to the wording of the prosecution policy relied on by the judge were minor. McEwan J. described them in *Galena Contractors Ltd. v. Zarelli*, 2014 BCSC 1256 at para. 8 [Galena #2], as "not materially different". Indeed, the general practice of restraint in invoking the criminal law against those engaged in civil disobedience continued unchanged after the amendment: *Galena Contractors Ltd. v. Zarelli*, 2014 BCSC 324; Galena #2; Beaudoin.

[50] It is also noteworthy that the revised policy was in place throughout the 12-month period during which unlawful protests in the present case occurred, yet by the time of the judge's decision to deny the injunction extension, the BC Prosecution Service had approved only three of the 159 charges recommended by the police under the Criminal Code: at para. 20.

[51] The judge proceeded on the basis that the gap identified by the Supreme Court of Canada in *Simpson* did not exist when the application to extend the injunction came before him. But it was, in our view, precisely the same. The protesters had engaged in significant, persistent, unlawful behaviour and the criminal law had not been used to stop them. It was for that reason that Teal Cedar sought to "fill the gap" with an equitable injunction.

[52] Finally, and importantly, although the judge acknowledged that both the police and BC Prosecution Service have independent authority to decide when, whether and how they might engage the criminal law in responding to allegedly unlawful conduct, he failed to give that independence meaningful effect in his analysis. Instead, based on the wording of a policy intended to guide prosecutorial assessment of the public interest in initiating a criminal proceeding, the judge invoked his own understanding and assessment of the public interest and assumed it is more likely than not that the police and BC Prosecution Service would see it the same way. This perspective overlooks the independent lenses brought to bear by the police and prosecutors in fulfilling their respective roles, the fact that there may be public interest considerations relevant to the exercise of their authority in a given scenario that a court is not alive to, and the case-by-case, individualized nature of their discretion. Respectfully, the approach taken here is contrary to long-standing judicial

authority that the courts are "not as competent [as the Attorney General] to consider the various factors involved in making a decision to prosecute": *Krieger v. Law Society of Alberta*, 2002 SCC 65 at para. 32; *Miazga v. Kvello Estate*, 2009 SCC 51 at para. 46; *R. v. Nixon*, 2011 SCC 34 at para. 20; *R. v. Anderson*, 2014 SCC 41 at para. 47; *Ontario (Attorney General) v. Clark*, 2021 SCC 18 at paras. 29, 33, 41.

- [53] In summary on this ground of appeal, we conclude the judge erred in principle by considering the availability of the criminal law as a factor weighing against the granting of an injunction. He also erred in finding, as a fact, that the criminal law would be employed to address ongoing unlawful conduct.
2. Did the judge err by finding that the court's reputation would be diminished by continuing the injunction?
- [54] The judge identified a "strong public interest in maintaining the court's reputation for legitimacy and effectiveness": at para. 44. He concluded that the court's reputation was being damaged in two ways. First, by being pulled into the middle of the dispute between "citizens on one side and a logging company and the government on the other" (at para. 43); and second, by the manner in which the police were enforcing the injunction.
- a) The court's continued involvement in the injunction proceedings
- [55] The first reputational concern is closely linked to the judge's view that the police and BC Prosecution Service should be using the criminal law to sanction significant civil disobedience, rather than leaving it to the courts to enforce civil injunctions which put courts on the "front line of these civil disobedience events": at para. 40. He described the criminal contempt proceedings that followed against those who refused to comply with the injunction as the conversion of the dispute into one "between citizens and the court": at para. 43.
- [56] There is little doubt that the type of prolonged and significant civil disobedience demonstrated in this case, and the refusal of many protesters to comply with the injunction, places great demands on the court, both in terms of recalibrating the injunction, and in overseeing criminal contempt hearings and sentencing. But, with respect, it is wrong to say that the court's role in upholding the law, which is the court's obligation, means that its reputation is being harmed.
- [57] The making of an order enjoining interference with the applicant's lawful rights does not imply approval of the activity--the court is not "taking sides". From such questions, the court stands aloof. The purpose of the injunction is not to protect the activity, but to uphold the rule of law. It is only to the extent that the public misapprehends the role of the court that the court's reputation for impartiality and independence from the interests of the parties could be affected. But that is a matter of perception. The answer is to address the misperception head-on, as Chief Justice Esson did in *MacMillan Bloedel Ltd. v. Simpson*, [1994] 4 W.W.R. 24, 87 B.C.L.R. (2d) 154 (S.C.) when he determined to "climb on his bench"

and make a statement to address the public's misunderstanding about the court's role in prosecuting criminal contempt proceedings against unlawful protesters. As Pitfield J. stated in *Interfor v. Kern et. al.*, 2000 BCSC 1141:

60 At the end of the day, however, no matter how distasteful the task, the court cannot shirk its responsibility to ensure the rule of law. As affirmed by the Court of Appeal and the Supreme Court of Canada in *MacMillan Bloedel Ltd. v. Simpson*, the court will intervene when conduct which may be criminal in nature interferes with the exercise of private property rights. It will do so notwithstanding that the public perception may be that the court is favouring the rights of one party to the detriment of another.

[Emphasis added.]

- [58] The judge was faced with the complex and challenging task of managing a case involving large scale civil disobedience. As the Supreme Court of Canada observed in *Simpson*, the task of the court in these circumstances "is to find a way to protect the legitimate exercise of lawful rights while preserving maximum scope for the lawful exercise of the right of expression and protest": at para. 13. It is a task well within the scope of the court's expertise and one that it cannot refuse to undertake.
- [59] The court's reputational interest lies in its legitimacy and effectiveness, as the judge observed at paras. 43-44. Legitimacy is grounded in the court being independent and impartial: *Ell v. Alberta*, 2003 SCC 35 at para. 23. Effectiveness is grounded in the court having its orders enforced. No reasonable citizen reading the judge's numerous decisions in this case could question the court's impartiality, independence, or thoughtful concern for the various interests and rights in play before it. As to effectiveness, the injunction order was being enforced by police, and through prosecutions for criminal contempt.
- [60] The court's reputational interest is not concerned with the popularity of its decisions. Countless disputes require the court to make unpopular decisions, whether in staying serious criminal charges because of a breach of the Charter, or in upholding public health orders.
- [61] Further, in considering that the court's reputation would be protected by extricating the court from the dispute and leaving enforcement to "the police and those responsible for their direction" (at para. 58), the judge did not consider the reputational harm to the court from both leaving Teal Cedar victim to illegal blockades without a remedy, and in failing to uphold the rule of law. In cases of persistent and significant civil disobedience, the court has a constitutional role to fulfil. The rule of law demands access to independent courts with the power to enforce the law by granting effective remedies to those individuals whose rights have been violated: *R. v. Domm* (1996), 111 C.C.C. (3d) 449 at 455, 95 O.A.C. 262 (ON CA), leave to appeal ref'd [1997] S.C.C.A. No. 78.

- [62] To the extent that the judge identified a reputational concern with the court's ongoing involvement in the prohibition and sanctioning of unlawful conduct by the protesters, we respectfully conclude that he erred. The court's involvement in enjoining unlawful conduct is a necessary and fundamental aspect both of civil society and of the rule of law: *Cermaq Canada Ltd. v. Stewart*, 2017 BCSC 2526 at para. 71 [Cermaq].
- b) The effect of police misconduct on the court's reputation
- [63] We turn now to the second reputational concern the judge identified--the depreciation of the court's reputation by the conduct of the RCMP in enforcing the court order. In our view the judge's conclusion that the court's reputation can be tarnished by the conduct of police officers is a clear error of law.
- [64] The judiciary is one of three branches of government; a second is the executive, made up of the premier and cabinet; a third is the legislature. The RCMP answers to the executive branch, in particular to the solicitor general. The court and the police are thus constitutionally independent of each other. An example assists in demonstrating this principle. 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, as the respondents contend, 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.
- [65] Nor does continuation of the injunction amount to an endorsement of unlawful police conduct, as the respondents submit. Both cases cited by the respondents in support of the proposition that improper police actions undermine judicial authority and independence are cases in which the court found police to be in contempt for failing to comply with court orders to deliver an accused to the court to participate in a criminal proceeding: *Royal Canadian Mounted Police No. 2 (Re)*, 2008 NWTTC 5; *R. v. Peel Regional Police Service* (2000), 149 C.C.C. (3d) 356, 48 W.C.B. (2d) 162 (Ont. S.C.J.). They do not by any stretch support the submission that the court and the police are indistinguishable components in the administration of justice.
- [66] The judge's focus on police conduct was perhaps not surprising in light of the record before him. One of the three applications argued at the hearing concerned alleged excesses by police in enforcing the injunction. However, the only application addressed by the judge was Teal Cedar's application to extend the injunction. Police conduct in that context should not have been the central focus. The conduct of an applicant may be relevant in determining whether it is just and equitable to grant an injunction (Kern #1 at para. 63) but the judge made no finding of misconduct by Teal Cedar. Rather, the judge determined that the conduct of a third party, entirely independent of the applicant, weighed against the granting of the

injunction. In effect, Teal Cedar was denied a remedy because of the court's concerns about police conduct in enforcing the injunction--conduct Teal Cedar cannot control.

- [67] We note that ending the injunction and relying on the police to recommend criminal charges and the BC Prosecution Service to approve them would not, in any event, put an end to concerning police conduct. It would simply remove one level of oversight from the interactions between protesters and the RCMP. Nor would it ensure the logging roads would be open to the public, another public interest identified by the judge: at paras. 7, 15. As the judge noted, the Forest and Range Practices Act permits gates across industry-built logging roads: at paras. 8-10, 16-17. In addition, the protesters' ongoing barricades on public roads do not conduce to public access.
- [68] While it was open to the judge to address some aspects of police enforcement, such as the size of exclusion zones and restrictions on media access (at para. 78) by altering terms of the injunction, 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. Further, as the judge recognized at para. 86, the court has no jurisdiction over police uniforms and identification. It is not the place of the court to oversee "police compliance with police policy" on such matters: *R. v. Bacon*, 2020 BCCA 140 at para. 45.
- [69] Despite this, the judge expressed considerable frustration with these aspects of police behaviour, addressing in detail at paras. 79 to 87 the command decisions of the RCMP to allow front-line members to remove individual identification and to not enforce the directive against wearing "thin blue line" patches. The judge noted that he had addressed this issue informally at a case management conference, suggesting that the RCMP consider asking their members to remove the patch when enforcing a court order. In response to the Attorney General of British Columbia's position that matters relating to RCMP attire were for the Commissioner of the RCMP, and that the thin blue line patch was a labour relations matter in which the court should not become involved, the judge said:
- [86] Of course, I have no jurisdiction or inclination to make orders about RCMP attire or otherwise become involved in its labour relations. But the RCMP has made a choice not to enforce their direction against the wearing of a symbol that it knows is divisive. It must realize that in circumstances where RCMP members are enforcing the Court's order, the wearing of this symbol reflects on the Court. I intend to do no more than to consider the effect of this regrettable RCMP decision on the Court's reputation, which is a relevant public interest consideration on this application.

[Emphasis added.]

- [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.
- [71] By focusing on RCMP conduct, the judge effectively turned a private law matter into a public law one, assessing whether there had been an abuse of authority by police rather than focusing on Teal Cedar's interests as a private litigant. The balancing of harms in this civil case was between Teal Cedar and the respondents. As between them, "there is no contest regarding the magnitude of relative harm": *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355 at para. 78. Accepting that there is a public interest in protecting lawful protest, "there are no competing equities" to weigh or balance as between protesters engaged in illegal acts and Teal Cedar with its legal right to use logging roads and harvest timber: *Cermaq* at paras. 60-61.
- [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.
- [73] In addition, there are forums for the court to perform judicial oversight of RCMP enforcement of an injunction order. Members of the public who take issue with RCMP conduct and are harmed by it can bring civil claims against the RCMP. In addition, the RCMP is subject to nonjudicial oversight. Members of the public can make complaints against the RCMP to the Independent Civilian Review and Complaints Commission and the Independent Investigations Office. Although the judge was of the view that these forums would take considerable time to address concerns, they are tasked with accountability of the RCMP and have processes that allow for a complete investigation into allegations. In contrast, an interlocutory injunction in which the RCMP is not a party is a difficult forum within which to assess the competing allegations made by the protesters and the police.
- [74] In summary on this issue, the judge erred in concluding that RCMP conduct diminished the court's reputation and was a factor to be weighed in the balance of convenience.
3. Did the judge err by giving insufficient weight to the public interest in upholding the rule of law?
- [75] In our view, little need be said on this ground of appeal. The judge reasoned that less weight should be given to the public interest in upholding the rule of law because Teal Cedar had failed to establish an enforcement gap, and because there were countervailing public interests in preserving the court's reputation by keeping it away from the front line of this type of dispute and from association with certain police conduct. Having found that the judge erred in principle in considering these factors, it follows that he did not give sufficient

weight to the public interest in having the court uphold the rule of law--when the irrelevant considerations are removed from the scales, the rule of law interest resoundingly tips the scales in favour of extending the injunction.

- [76] It is not tenable in a democracy for a group to abandon the democratic process and impose their will on others by force. In a complex, pluralistic society, the democratically-elected government makes laws, and the courts interpret and uphold them. Barring constitutional overreach, the laws and decisions flowing from them are to be respected and enforced.
- [77] Protests are part of a healthy democracy; criminal conduct is not. In the circumstances of this case, the injunction is all that stands between Teal Cedar and a highly-organized group of individuals who are intent on breaking the law to get their way. That the criminal law may be used in such circumstances remains a possibility, but it is within the control of neither Teal Cedar nor the court to compel the police and the BC Prosecution Service to charge and prosecute offences under the Criminal Code.
- [78] In conclusion, and with respect, we are of the view that the judge erred by giving weight to irrelevant considerations and by giving too little weight to the public interest in upholding the rule of law, which must be the dominant consideration in all cases involving significant and persistent acts of civil disobedience.
- [79] In their written submissions, the respondents submitted the judge's order should be upheld nonetheless and Teal Cedar denied an injunction because "he who comes into equity must come with clean hands": *Elford v. Elford* (1922), 64 S.C.R. 125. The respondents concede, however, that to justify refusal of relief there must be "such an 'immediate and necessary relation' between the relief sought and the delinquent behaviour in question that it would be unjust to grant the relief": *Wang v. Wang*, 2020 BCCA 15 at paras. 46-47. The remedy sought will not be granted if the applicant is relying on its own misconduct to establish a claim. In this case, Teal Cedar relies on irreparable harm caused to its business by the unlawful acts of protesters, not on its own conduct. In our view, no "clean hands" issue can arise in this case, quite apart from the absence of any finding by the judge that Teal Cedar had engaged in any improper conduct.
- [80] Finally, Teal Cedar applied to adduce fresh evidence to show that the judge's assumption that police would use the criminal law to keep the roads open was unfounded, and that police presence markedly diminished over the ten days between the injunction ending and the stay obtained in this Court. We are of the view that the new evidence is not likely to affect the result and we would accordingly not admit it. The respondents applied to adduce new evidence in reply only in the event that Teal Cedar's application were to be allowed. That application accordingly need not be addressed.

Disposition

- [81] The appeal is allowed, the order made September 28, 2021 is set aside, and the interlocutory injunction extended to midnight on September 26, 2022. The applications to adduce new evidence are dismissed.
- [82] For clarity, we confirm that the Supreme Court retains jurisdiction to vary the terms of the injunction order on application by any party. Teal Cedar is entitled to its costs against the respondents other than the Attorney General of Canada and British Columbia. No costs are payable either by or to the intervenor HFN.

"The Honourable Madam Justice Fenlon"

"The Honourable Mr. Justice Butler"

"The Honourable Madam Justice DeWitt-Van Oosten"

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