

CANADA / JUDGMENT

Teal Cedar Products Ltd. v. Rainforest Flying Squad

2023 BCSC 201

COURT

Supreme Court of British Columbia

DECIDED

8 February 2023

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2023 BCSC 201 Teal Cedar Products Ltd. v. Rainforest Flying Squad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Teal Cedar Products Ltd. v. Rainforest Flying Squad,

2023 BCSC 201

Date: 20230208

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 Judgment re Ryan Henderson

Counsel for the Crown:

P. Battin

N. Melling

A. Kaban

Counsel for the Alleged Contemnor:

N. Ross

B. Isitt

Place and Date of Trial:

Nanaimo, B.C.

January 17 & 18, 2023

February 1, 2023

Place and Date of Judgment:

Nanaimo, B.C.

February 8, 2023

- [1] THE COURT: Ryan Henderson is alleged to have committed criminal contempt of this Court's injunction order that prohibits interference with use of roads and certain other obstructive activities within a defined large area on southern Vancouver Island. On 20 October 2021, the accused was atop a tripod on the Granite Mainline Forest Service Road, a location in the injunction area. This made the road impassable by vehicle traffic. Pursuant to enforcement terms in the injunction, the RCMP performed an arrest for contempt and removed the accused from the tripod and the road.
- [2] In the moments before arrest, rather than giving a copy of the injunction to the accused, or reading the injunction or its material terms to the accused, the RCMP officer read a short-form script. There is no evidence that the accused had prior knowledge of the injunction or any of its terms - this is common ground. The sole issue is whether the Crown has proved that the accused had actual knowledge of the material terms of the Court's order when interfering with use of the road by continuing to stay in the tripod after the script was read.

- [3] The Crown is prosecuting this case and other contempt cases in this proceeding on the invitation of the Court: *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2021 BCSC 1380. The Crown called the RCMP officer who read the script to the accused, but much of its case consists of written admissions filed as an exhibit. The accused elected not to call evidence.
- [4] The Crown relies on the words in the script to prove actual knowledge of the material terms of the Court's order; in the alternative, the Crown submits that knowledge is proved by way of the doctrine of wilful blindness. For the reasons that follow, I am not satisfied that knowledge of the material terms of the Court's order has been proved.

Gravity of a contempt finding

- [5] The gravity of a finding that a person has acted in defiance of a court order is evident from the utmost procedural protections accorded to an alleged contemnor, and the sanctions faced by a contemnor: *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52 at para. 35. The requirements of the strictissimi juris approach to contempt proceedings was addressed in *Bassett v. Magee*, 2015 BCCA 422 at para. 35:

It requires close adherence to procedural requirements: a precision in pleadings, procedure and evidence appropriate to the nature of the process which engages the court in a conflict with one of the parties. The process must be carried out with great care. The order said to be breached must be clear, for it will be strictly construed.

- [6] The presumption of innocence, the requirement that all elements of contempt be proved beyond reasonable doubt, and the insistence on strict compliance with procedural safeguards are mandated by the rule of law. The prime objectives of a court's exercise of its criminal contempt power relate to another aspect of the rule of law: the goals of affirming the court's authority and deterring others from flouting it: *TG Industries Ltd. v. Williams*, 2001 NSCA 105 at para. 14, per Cromwell J.A. (as he then was). Important rule-of-law safeguards cannot be relaxed in a contempt proceeding that relies on the rule of law for its justification. I respectfully adopt what Justice L. Smith said in *R. v. Billy*, 2003 BCSC 55 at para. 72, in the course of her reasons for acceding to a "technical" defence argument in a contempt prosecution:

It may seem to some that the court's authority has been flouted with impunity and that this decision will invite others to ignore court orders. However, the court is required not only to affirm its own authority but also to uphold the rule of law. In our legal system, the Crown is required to prove criminal allegations against accused persons beyond a reasonable doubt and when it does not do so, acquittals will result.

Elements of contempt of court

- [7] There are three elements which must be established to prove contempt of a court order: (1) the order must state clearly what shall or shall not be done; (2) the person alleged to have breached the order must have had actual knowledge of it; and (3) the person alleged to have

breached the order must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels: *Carey v. Laiken*, 2015 SCC 17 at paras. 32-35. To make out a case of criminal contempt, there must also be proof that the defiance or disobedience was carried out in a public way, and with the intent, knowledge or recklessness as to the fact that the public disobedience would tend to depreciate the court's authority: *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at 932-933.

- [8] These reasons consider the requirement of a clear order and the requirement that the alleged contemnor have actual knowledge, i.e. the first two of the *Carey v. Laiken* elements. The other elements, i.e. proof that the act was done intentionally and the public nature of the act, are conceded by the accused.

The clarity requirement

- [9] The necessity of a clear order has been repeatedly emphasized by our Court of Appeal. I was referred to *Gurtins v. Goyert*, 2008 BCCA 196 at para. 15, wherein Frankel J.A. said:

The rule of law requires that court orders be obeyed. Accordingly, it is of paramount importance that persons who are subject to court orders be able to readily determine their obligations and responsibilities. They do this by having regard to what is on the face of the formal order setting out what they are required to do, or refrain from doing.

I was also referred to *R. v. Dhillon*, 2019 BCCA 373 at paras. 21-22, in which Butler J.A. cited cases such as *Carey v. Laiken* and *Gurtins v. Goyert* for the propositions that the "terms of an injunction order on which a prosecution for criminal contempt rests must be free from ambiguity, vagueness, or uncertainty so that those governed by the injunction will know with precision what actions are forbidden," and "[a]nyone subject to court orders must be able to readily determine their obligations and responsibilities by having regard to what is on the face of the formal order setting out what they are required to do or refrain from doing." In this same vein, in *Halas v. Halas* (1998), 56 B.C.L.R. (3d) 110 (C.A.) at para. 8, Finch J.A. (as he then was) refused to find contempt and thus expose a person to loss of liberty based on an implication or inference that might be drawn from the wording of the order.

- [10] In *Carey v. Laiken*, at para. 33, Justice Cromwell provides important examples of omissions that can lead to unclear orders: "An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies" See also *Boily v. Carleton Condominium Corporation 145*, 2014 ONCA 574 at para. 54.
- [11] In due course, I will set out the terms of Justice Verhoeven's injunction order. As will be seen, there might be said to be some ambiguity arising from the way the list of prohibitions appears in the entered order. However, the accused's argument focuses on the RCMP script rather than the court order. Since this is a case where the evidence does not establish that the accused had read the order or was otherwise familiar with its terms, the argument is that the law requires the order to be clear, so if the RCMP choose to rely on a short-form

script instead of providing a copy of the order or reading the order (or at least its material terms) aloud, then the law must require the script to be clear - otherwise the accused cannot "know with precision what actions are forbidden." Relatedly, the accused argues that if an order may be rendered unclear by missing an essential detail - say, to take an example from *Carey v. Laiken*, the place where the order applies - then it follows that if a script-reading shortcut is adopted, the script must not be missing this essential detail.

- [12] These clarity arguments overlap and support the accused's submissions about lack of proof of actual knowledge, and I will address them further later in these reasons when I consider whether the RCMP's short-form script succeeded in delivering "actual knowledge" of the court order.

The knowledge requirement

- [13] In *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048 at para. 36 [Simpson SCC], the Supreme Court of Canada spoke of the knowledge requirement in the context of disobedience of Clayoquot Sound logging injunctions:

It is fundamental that no state founded on the rule of law can permit members of the public to be detained and punished for violating an order of which they are ignorant. If members of the public are to be charged with obstruction of justice for having disobeyed an injunction, they must first be apprised of the existence and terms of the order and be given an opportunity to comply. That is precisely what was done in enforcing the injunctions here. Before a protestor was arrested, he or she was handed a copy of the order and its terms were read to him or her. The protestor was then asked to quit the blockade. Most complied. Only those who refused were arrested.

[Emphasis added.]

Ms. Simpson and others were brought to trial for and convicted of contempt of court, not obstruction of justice. The reason why Justice McLachlin (as she then was) referred to "obstruction of justice" for disobeying an injunction rather than "contempt of court" is revealed at paras. 27-28 of her reasons. There is no need to delve into these details. Suffice it to say that the requirement to apprise a member of the public of the existence and terms of the injunction order applies with full force to persons in jeopardy of being arrested and accused of contempt of court (and Crown counsel did not argue otherwise).

- [14] The reason that knowledge of the material terms of an injunction order must be transmitted in order to achieve a conviction is that an injunction is a judge-made law, and a law that only applies to particular persons in a particular place. It is a law that is different in a particularly critical respect from a legislative prohibition in the Criminal Code or the Motor Vehicle Act. If the accused had been charged under s. 423(1)(g) of the Criminal Code for obstructing a highway, the Crown would not have to prove knowledge of the Code provision because members of the public are deemed to know the contents of statutes. However, there is no presumption of knowledge of injunction orders. Knowledge of this law, i.e. the terms of the

Court's injunction order, must be proved. Before a person is liable for contempt, they must know the important particulars of the judge-made law, they must know that it applies to them, and they must know that it applies in the place where the alleged act or failure to act occurs. As was made clear in *Simpson SCC*, it is contrary to the rule of law to detain and punish a person ignorant of such information.

- [15] Not only is proof of actual knowledge of the material terms of the order necessary to establish contempt of a court order as a matter of general principle, but on its face the scope of this order extends only to defendants, representatives of the defendants, and "anyone having knowledge of the Court's order." The accused is not a defendant or a representative of a defendant in the civil action in which the injunction order was made. Accordingly, on this basis as well, it must be proved that the accused was a person having knowledge of the Court's order.

How knowledge may be proved

- [16] In *Carey v. Laiken*, at para. 34, Justice Cromwell referred to *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 at 226, and said that it "may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine." In *Bhatnager*, at 225, Justice Sopinka discussed proof of actual knowledge:

On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a precondition to liability in contempt. Almost two centuries ago, in *Kimpton v. Eve* (1813), 2 V. & B. 349, 35 E.R. 352, Lord Chancellor Eldon held that a party could not be held liable in contempt in the face of uncontradicted evidence that he or she had no knowledge of the order. In *Ex parte Langley* (1879), 13 Ch. D. 110 (C.A.), Thesiger L.J. stated the principle as follows, at p. 119:

... the question in each case, and depending upon the particular circumstances of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which had been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.

At 226, Sopinka J. said: "Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases the inference of knowledge will always be available where facts capable of supporting the inference are proved: see *Avery v. Andrews* (1882), 51 L.J. Ch. 414."

- [17] Rule 22-8(14) of the Supreme Court Civil Rules reflects the common law jurisprudence that service of an order is not required to prove contempt for disobedience of the order, but the Court must be satisfied that a person has actual notice of its terms:

If the court is satisfied that a person has actual notice of the terms of an order of the court, it may find the person guilty of contempt for disobedience of the order, even though the order has not been served on the person.

- [18] In *British Columbia Telephone Co. v. Telecommunications Workers' Union* (1981), 121 D.L.R. (3d) 326 at 335 (B.C.S.C.), persons were accused of criminal contempt of a labour injunction. Justice McKenzie held that it was not necessary that the accused had memorized the language of the order for him to be satisfied that each was fully aware of the order and its contents:

I am satisfied wholly that each participant in these incidents was fully aware of the injunction order and its contents. This is not to suggest that each participant had memorized the rather formal language but rather that each knew that such mass demonstrations involving hazing, verbal abuse and generally obnoxious behaviour were forbidden. Such conduct would be included in the meaning of "molesting, assaulting, intimidating or threatening-harm to, or in any way interfering with the employees of the Plaintiff", as those words are contained in para. 3 of the injunction order.

- [19] In another labour case, *Telus Communications Re: Alleged Contempt of Robert Waite*, 2006 BCSC 16 at paras. 21-27 [Waite], Justice Burnyeat referred to several other labour cases that found sufficient proof of knowledge in the absence of personal service of the order. In *Rogers Cable T.V. Ltd. v. International Brotherhood of Electrical Workers (IBEW)*, [1993] B.C.J. No. 2822 (S.C.), the persons were either served with the order or were able to see a copy of the order which was made available by their union or delivered to the picket line by the employer on several occasions. In *Entex Door Systems Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 1928*, [1985] B.C.J. No. 1524 (S.C.), the Court found the picketer had notice because a copy of the injunction order was posted on the fence of the front and rear entrances to the employer's premises, the union president had read out a notice setting out the restrictions put in place by the injunction, and a copy of this union notice was posted. In *Re Tilco Plastics Ltd. v. Skurjat*, [1967] 1 C.C.C. 131 (Ont. H.C.), leave to appeal ref'd [1967] 1 C.R.N.S. 285, notice was found where the sheriff had pointed out pertinent parts of an injunction, but was shouted down by demonstrators when he attempted to read the order aloud; copies of the order were affixed in two conspicuous places at the employer's premises. These cases cited in Waite are useful examples of circumstances where, in the words of Cromwell J. in *Carey v. Laiken*, it "may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine."

- [20] Justice Burnyeat carried on to find that Mr. Waite had actual notice of the order. In doing so, he wrote:

- [27] There is an obligation on those who decide to attend at sites where picketing is undertaken and it does not matter which side of a dispute is supported by a person who decides to attend. That obligation is that those who are attending must understand whether there is an order in effect and, if so, what is prohibited by any such order. That obligation is similar to the obligation imposed on all citizens - an obligation to be aware of the laws which govern our activities. That obligation was imposed on Mr. Waite throughout.
- [28] As the Order was served on Mr. Waite on September 23, 2005, as he acknowledged that he would "strictly comply with the terms of the attached Order", and as the all of Order was read to Mr. Waite at that time, I am satisfied that there has been actual service of the order prior to the Prince George incident on October 1, 2005.
- [29] Regarding the other incidents, I accept the evidence of Constable Pilot that Mr. Waite acknowledged that he was "aware of the injunction", he had seen it posted when he was in Prince George, and he knew of the Order by September 7, 2005 but that he was under the mistaken belief that it did not apply to him because he was not an employee of the Plaintiffs. None of that evidence is denied by Mr. Waite. I am satisfied that Mr. Waite is not in a position to deny that he had actual notice of the prohibitions set out in the Order which are applicable to the incidents alleged against him.
- [30] Mr. Waite was not only aware of the Order but had also seen the Order posted when he was in Prince George. The Order was there to be read and should have been read by Mr. Waite. As someone interested in the dispute and as a former employee of Telus, Mr. Waite would be aware that there would likely be an order in effect and that prohibited activities would be set out in such an order. He was not in a position to be wilfully ignorant to the provisions of the Order.
- [31] In any event, many of the alleged activities, actions and words of Mr. Waite went far beyond what would be prohibited by the Order granted and amount to activity which is generally the subject matter of civil and/or criminal proceedings. Having presented a strong case regarding the question of whether Mr. Waite had actual knowledge of the Order, Mr. Waite has not rebutted that case in the evidence that he has presented on his own behalf.
- [32] Taking into account the obligation that was imposed on Mr. Waite to ascertain what was prohibited under the Order and taking into account the evidence as to whether Mr. Waite was aware of the provisions of the Order, I find that the Plaintiffs have proven beyond a reasonable doubt that Mr. Waite had actual notice of the Order.
- [21] I quoted from Justice Burnyeat in the Waite case at some length because, as I will come to, the Crown relies on the dicta in para. 27 of Waite to argue that those in the injunction area "must understand whether there is an order in effect and, if so, what is prohibited by any such order." Given what follows para. 27, the paragraph may be obiter. In any event, however, I am not persuaded that its rationale extends beyond picketing sites in labour cases to a case such as the one at bar where the injunction area occupies a substantial part of southern Vancouver Island.

The injunction order

[22] The background to Justice Verhoeven's injunction order of 1 April 2021 is set out in an admission:

Teal Cedar Products Ltd. has been conducting logging operations of both old-growth and second-growth trees near the Fairy Creek Watershed in Tree Farm License 46 for the past several years. Various groups have publicly criticized and protested Teal's operations in the area. These groups started setting up blockades within TFL-46 to disrupt operations in August 2020.

[23] Justice Verhoeven pronounced the injunction order in the following terms:

THIS COURT ORDERS that:

1. An interlocutory injunction lasting until midnight on September 26, 2021 is granted requiring that the Defendants (by themselves, and for their officers, members, servants, agents, representatives) and anyone having knowledge of the Court's order, are restrained, enjoined and prohibited from:
 - (a) impeding, physically obstructing, or in any way interfering with any person, including any member of the public, from gaining access to or egress from, or otherwise making use of any road, road construction site or planned road construction site (the "Roads") situate within the area bordered by (i) the E&N Railway Land Grant Boundary to the east, (ii) the San Juan River and the Pacific Rim National Park boundary to the south, (iii) the boundary of the Carmanah Walbran Provincial Park to the west, and (iv) the Nitinaht River and Nitinaht Lake to the north, as indicated on the map attached for illustrative purposes as Schedule A (the "Injunction Area");
 - (b) obstructing, impeding, or otherwise interfering with the safe passage of motor vehicles, equipment or machinery belonging to the Plaintiff, its employees, agents, contractors or suppliers (the "Motor Vehicles"), and in particular, not to come within 50 metres of the Motor Vehicles in the Injunction Area;
 - (c) obstructing, impeding or otherwise interfering with any construction activities conducted on the Roads by the Plaintiff, its employees, agents, contractors or suppliers;
 - (d) obstructing, impeding, or otherwise interfering with timber harvesting activities in the Injunction Area by the Plaintiff, its employees, agents, contractors or suppliers;
 - (e) threatening, harassing, intimidating, assaulting, physically obstructing, or physically interfering with the Plaintiff's employees, agents, contractors or suppliers or their families;
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.
 - 3. Provided the terms of this Order are complied with, the Defendants and other persons are free to participate in a peaceful, lawful and safe protest.
 - 4. Any person affected by the court's order, including the Plaintiff, is at liberty to apply to the Court to set aside or vary this Order on two business days' notice.
 - 5. The Plaintiff shall abide by any order that this Court may make as to damages as a result of obtaining injunctive relief.
 - 6. The Defendants' approval as to the form of this Court's order is dispensed with.
 - 7. The Defendants shall pay costs of this application to the Plaintiff in any event of the cause, payable forthwith and within 60 days from the date of this Order.
 - 8. This order may be entered at the New Westminster registry.
- [24] The list of prohibitions in Term 1 of the order ends with a semi-colon, but this is a simple typographical error. Curiously, however, there is no conjunction placed before Term 1(e), the last prohibition in the list. One would expect either the word "and" or the word "or" or

perhaps, I suppose, "and/or" at the end of Term 1(d) to indicate whether any one of the listed prohibitions is sufficient to breach the order. This is the potential ambiguity in the order I referred to earlier. Nonetheless, after reading the whole order, I think it nearly certain that any one of the prohibited class of actions - and I appreciate that they are not necessarily mutually exclusive - would be a contravention.

- [25] That said, as will be seen from the wording of the short-form script, it may be that its author interpreted the order such that it requires a person to do more than interfere with use of a road to breach the order.
- [26] The terms of the 1 April 2021 order have been proved via admissions to have been in force on 20 October 2021, the date of the alleged offence, notwithstanding the order's stated 26 September 2021 expiry date. On 17 September 2021, I made an interim extension order. On 28 September 2021, I terminated the interim extension order. However, on 8 October 2021, a judge of the Court of Appeal stayed the termination of the extension order. In the result, on 20 October 2021, the terms of the Verhoeven order were in force. (On 20 July 2021, I amended the order to add a term respecting treatment of members of the media by police officers enforcing the injunction, but this additional term is not material to the case at bar.)

The short-form script

- [27] Constable Lahni McWilliams, while dressed in RCMP uniform, read the following script to the accused:

Person in the tripod, this is Constable McWilliams of the Royal Canadian Mounted Police. There is an injunction order in place issued by the Honourable Mr. Justice Verhoeven of the British Columbia Supreme Court. Be informed by you blockading this roadway and preventing Teal Cedar and their contractors from conducting their operations, you are in breach of that injunction order. I ask you to step aside and remove the blockade, or you will be arrested for contempt of court. By not stepping aside, I you confirm you understand your jeopardy. Person in the tripod, would you like to come down at this point?

The reading of the script was video-recorded, and from the manner of Cst. McWilliams' delivery there is no doubt the accused heard these words. (The formal admissions purport to set out what was said by Cst. McWilliams but the admission is not an accurate recitation of what is in the recording. The differences are minor and not material. I have transcribed what Cst. McWilliams actually said to the accused.)

- [28] The Crown submits that the script summarizes the order. Indeed, it must do so in the absence of delivery of the order or reading the order aloud. Otherwise the accused cannot be shown to be in possession of the requisite knowledge. It is the accused's actions after they have actual knowledge of the material terms of the injunction order that makes the accused arrestable and liable to be found in contempt.

- [29] "Be informed by you blockading this roadway and preventing Teal Cedar and their contractors from conducting their operations, you are in breach of that injunction order" - this is the key sentence in the script. The language of "blockading this roadway" may be an attempt to summarize injunction Term 1(a) and the language of "preventing Teal Cedar from conducting their operations" may be an attempt to summarize injunction Terms 1(b) through 1(e). The order does not refer to "blockading," and it does not speak of "preventing", although either would be an example of an action that would run afoul of at least one of the prohibitions listed in Term 1 of the order. It is notable that the references in the script to "blockading" and "preventing" are joined with the conjunction "and", thereby - at least on one tenable interpretation - suggesting that to breach the order, the accused must be both blockading the road and preventing Teal Cedar from conducting its operations.
- [30] The script makes no effort to advise of other important terms of the order, including where it applies and to whom it applies. I will return to these omissions and alleged ambiguities later in these reasons.

The notice of application

- [31] For the reasons I have set out, this trial has been conducted with the procedural trappings of a criminal case. In this Court, the charging document in criminal cases is an indictment. In this and other contempt cases in this proceeding, the Crown has filed a notice of application. One of its functions is to serve as the charging document in the absence of an indictment.
- [32] The notice of application is cast broadly, alleging that the accused "acted knowingly in a manner contrary to any or all of the following terms of the Injunction Order" and the full text of Term 1 of the order is set out. At trial, before arraignment, the Crown sensibly narrowed its case to an allegation of contempt of Term 1(a), i.e. the prohibition against interfering with any person from making use of any road in the injunction area.

The sub-issues

- [33] The overarching issue is whether the Crown has proved the accused had actual knowledge of the material terms of the injunction order. I appreciate that it might be inferred from the passage quoted earlier in these reasons from Simpson SCC, at para. 36, that nothing short of delivery of a copy of the order or reading the order to the member of the public is sufficient to convey the necessary knowledge. I considered and rejected this argument in *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCSC 515 [Kane].
- [34] The accused's first-level submission is that these circumstances require a copy of the order to be delivered or the order read aloud. In the alternative, the accused submits that if a short-form script is an admissible means of conveying knowledge of the contents of the order, the wording of this script does not measure up. I will proceed by addressing the issue of whether knowledge has been proved by considering the following sub-issues:

1. Whether the Kane case determines the outcome of the defence arguments made in this case;
2. Which terms of the order a member of the public must be aware of so as to possess "actual knowledge," and whether the RCMP script transmitted this information to the accused; and
3. Whether the doctrine of wilful blindness applies.

The Kane case is not fully determinative

- [35] From reading the many cases cited to me in this and other Teal Cedar contempt prosecutions, my impression is that the practice in other proceedings has been for the order to be read or delivered to the alleged contemnor to provide notice, i.e. to transmit knowledge of the material terms of the court order. And this practice was followed in one of the contempt matters in this proceeding, *Teal Cedar Products Ltd. v. Rainforest Flying Squad [Daniluk]*, December 1, 2022, unreported. In *Daniluk* the police were not involved in the process of acquainting Mr. Daniluk with the terms of the injunction order because he was blocking a road on 19 April 2021, which was after the injunction order was pronounced but before the police enforcement operation began.
- [36] In *Daniluk*, Teal Cedar vehicles were blocked by a cluster of six people standing on Granite Main. Mr. Daniluk was one of those people. At close quarters, Mark Carter, a Teal Cedar employee, asked the group of protestors if they understood that by blocking the road they were in violation of the injunction. Mr. Carter then said that by blockading the road, they should be aware that they are in contempt of court. He then explained that a process server would read the injunction and hand out copies. The process server read the injunction order and handed copies to the people blocking the road.
- [37] Mr. Daniluk was prosecuted for and convicted of criminal contempt on the basis of Term 1(a) of the injunction order, i.e. interference with use of a road in the injunction area. The evidence available to and called by the Crown in the *Daniluk* case established beyond any doubt that the accused had knowledge of the material terms of the order when he continued to block the road. (Mr. Daniluk did not argue otherwise; arguments unrelated to the knowledge element were advanced on his behalf.)
- [38] In *Kane*, the police read a script that was in all material particulars the same as the one read to the accused in the case at bar. In *Kane*, the script document was in evidence (but is not in the instant case). The script document in *Kane* directed the police officer reading the document to ensure that while the announcement is being read the alleged contemnor is served with a copy of the "full order." This direction was not carried out, and Ms. Kane argued that in the circumstances of her case the police decision not to provide a copy of the order or to read its material terms left the Crown short of being able to prove actual notice (para. 14). I rejected this argument at para. 16:

... I am satisfied that S/Sgt. Ausmus clearly and accurately conveyed to Ms. Kane in plain language that there was an injunction order in place and that it was a breach of the order to blockade the road. I am satisfied beyond reasonable doubt that Ms. Kane thereby had actual notice of the term of the order that prohibited her from impeding, physically obstructing, or in any way interfering with any person, including any member of the public, from gaining access to or egress from or otherwise making use of any road situate within the injunction area.

And, at para. 18:

... I conclude that the transmission of the fact that a court order was in place and the transmission of the material contents of that order - i.e., that the order prohibited obstruction of the road that Ms. Kane was blockading - via an announcement at close quarters in plain language from an evidently reputable source such as this officer of the RCMP is sufficient proof beyond reasonable doubt of actual notice.

- [39] The accused argues that Kane was decided *per incuriam* because the reasoning does not abide by key principles espoused by the Supreme Court of Canada in the Simpson and Bhatnager cases, and that I am therefore free to depart from my ruling in Kane that delivery of a copy of the order or the order being read aloud is not necessary. It is common ground that the principles of horizontal stare decisis allow a judge to depart from the ratio decidendi of *per incuriam* decisions of their court, including a judge's own previous decision. See *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590 at 592 (B.C.S.C.); *R. v. Sullivan*, 2022 SCC 19 at paras. 73-75; *Pereira v. British Columbia (Attorney General)*, 2023 BCCA 31 at para. 37.
- [40] The Crown argues that the conclusions in Kane are binding, including (1) the rejection of the argument that the police decision not to provide a copy of the order or to read aloud its material terms was fatal, and (2) the finding that Ms. Kane had actual notice of the terms of the order.
- [41] My conclusions in Kane must be understood in the context of Ms. Kane's argument. She attacked the Crown's position that a plain-language summary of an order, without more, can be sufficient notice. I agree with the Crown submission on the effect of Kane on the case at bar to this extent: I agree that my decision has not been shown to be *per incuriam*, i.e. that it has not been shown that I "failed to consider some authority such that, had [I] done so, [I] would have come to a different decision" (*Sullivan*, at para. 77). And, I agree that insofar as the use of a script is concerned, the facts in Kane are not distinguishable from the facts in the case at bar. I find that I am bound by the conclusion in Kane regarding use of a script in place of delivering the order or reading the order aloud. And, I continue to think there is much to be said in favour of a functional approach that summarizes in plain language the material terms of a court order, especially from the point of view of a member of the public who is in jeopardy of being arrested for contempt of court.

- [42] However, the submissions advanced in the alternative by the accused in the instant case are different in an important way from the defence argument in the Kane case. The Kane argument did not focus on the language in the script, or explore the distinction between transmission of accurate knowledge of the order's terms to a member of the public (including to whom the order applies, where it applies, and its specific prohibitions) and telling a member of the public the bare facts that there is an order and that their obstructive actions are a breach of the order.
- [43] Reasons for judgment are only authority for what they actually decide. They are not "statutes where every word counts as binding legal authority": R.J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 148. The particular legal issues raised in an earlier case determine the scope of what was decided and how widely its dicta should be read: R. v. Kirkpatrick, 2022 SCC 33 at para. 85. The point of stare decisis is to "stand by things decided" (the translation of the Latin phrase), and the points taken by the accused in the alternative, i.e. based on the wording of the script, were not considered or decided in Kane. The dicta in Kane cannot be read so widely as to prevent consideration of arguments not advanced or considered in Kane.
- [44] Accordingly, my conclusion in Kane on use of a short-form script is determinative against this same argument in the case at bar. On the other hand, Kane does not stand in the way of the accused's argument based on the wording of the script.

The RCMP's short-form script did not deliver "actual knowledge"

- [45] In the course of his able oral submissions, Mr. Kaban said that the key question is properly framed by reasons in another Fairy Creek contempt case, *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCSC 2045 [Buttemer], at para. 83:

Ms. Buttemer was not attached to a sleeping dragon or in a trench or atop a tripod or even part of a line of persons manifestly trying to block access. In those circumstances, it is sufficient to bring the relevant terms of the injunction to the attention of a blockader and, having fixed them with knowledge of the injunction, put them to a prompt decision whether to comply with its terms.

The accused in the case at bar was atop a tripod and manifestly trying to block access. The question that comes into focus is whether the wording of the short-form script, on close examination of the words used, clearly and accurately transmitted knowledge of the material terms of the court order. In particular, it must be decided whether the Crown has proved that (1) all of the relevant terms of the injunction were brought to the accused's attention; and (2) if so, whether the terms were described accurately. Without clear and accurate notice of the material terms of the order, I agree with the accused's submission that the Crown cannot prove the requisite "actual knowledge."

- [46] In particular, I agree with the accused's submission that the clear and unequivocal language required of an order by the principle of clarity must be mirrored in short-form information transmitted to a member of the public in circumstances where the order is not being

distributed or its material terms read aloud. Only then can it be said that the member of the public has actual knowledge. I agree with the accused's point that it makes no sense to demand clarity in the order but, in circumstances where the police do not deliver or read the order, to permit material inaccuracies or material omissions in the description of the order's relevant terms. To allow for material inaccuracies and omissions would be an impermissible retreat from the strict approach called for in contempt cases.

- [47] The accused maintains that the script simply advises that the behaviour of the accused amounts to contempt of Justice Verhoeven's order, and that the accused is subject to arrest. These recitals may be necessary as part of a process to comply with the s. 10(a) Charter obligation to promptly inform a person on arrest of the reasons for the arrest. The accused submits that the script says nothing about the content of the order. Telling someone that they are committing an offence and about to be arrested unless they desist is not the equivalent of transmitting knowledge of the material terms of the injunction order - which, as outlined in an earlier section of these reasons, is what is required.
- [48] The accused may be right about the script's limited aims. I am not certain, but I think the script tries to do more than comply with the arrest-power conditions of Term 2(a) of the order and comply with s. 10(a) of the Charter. I think it may well be an attempt to give notice of the terms of the order. If so, it could be inferred from the script that material terms of the order prohibit blockading roads and prohibit preventing Teal Cedar from conducting its operations. The first point to be made in this connection is that asking members of the public to draw inferences does not align with the principle of clarity and its requirement of avoiding vagueness. I repeat, I accept the argument that if an order has to be clear, then the short-form script standing in place of the order must be clear and contempt proceedings brought on the basis of inferences are on shaky ground.
- [49] In terms of the content of the script, the accused argues that to perform the task of delivering adequate notice of the order to members of the public, it would have to include a long list of information. This list includes items that are probably unnecessary. However, based on *Carey v. Laiken* and the other authorities I have referred to, I think the notice in this road-blocking case would have to include the following information to transmit to the alleged contemnor sufficient actual knowledge:

1. There is a Supreme Court of British Columbia order in effect.

Note: This fulfills the requirement of telling the member of the public that there is an order in place and it sufficiently answers the "when" question.

2. The order applies to Robert Arbess, the defendant in this litigation; however, it also applies to anyone else with knowledge of the order.

Note: This tells the member of the public that the order applies to them even though they are not a party to the litigation, i.e. it answers the "to whom" question.

3. A description of where the order's reach extends to.

Note: This allows the member of the public to understand whether they are within the injunction area, i.e. it answers the "where" question.

4. The order prohibits interfering with any person, including any member of the public, from accessing or making use of any road in this injunction area.

Note: This is a "clear and unequivocal statement about what should not be done."

[50] The RCMP script sufficiently accomplishes the requirement to advise a member of the public that there is a court order. The script says that the order is "in place" which I think tells a member of the public with sufficient clarity that the order applies at the present moment. I do not agree with the accused that it is necessary or helpful to a member of the public to recite the fairly complicated history of orders that result in the Verhoeven injunction order remaining in place on 20 October 2021.

[51] The RCMP script fails to deliver on the "to whom" and "where" questions - important information about the ambit of this order. This is critical information when analyzing whether an order has sufficient clarity (*Carey v. Laiken*, at para. 33) and for the reasons I have given, it is just as important to assessing the adequacy of a short-form script used in lieu of delivery of an order or reading the material terms of an order aloud.

[52] With reference to the statement about what the order prohibits, the reference in the script to "blockading this roadway and preventing Teal Cedar and their contractors from conducting their operations" is problematic. It may aptly summarize why Teal Cedar applied for the injunction, but it is not an accurate statement of the prohibitions in the order. The language of "blockading" or "blockade" does not appear in the order, and it is not synonymous with the prohibitions in Term 1(a) of the order. Likewise, the language of "preventing Teal Cedar from conducting their operations" does not appear in the order, and it is not synonymous with the prohibitions in Terms 1(b) through 1(e) of the order. The script should clearly describe the actual prohibitions, and the use of language that is not synonymous transmits inaccurate information to members of the public about the terms of the order.

[53] I reproduce Term 1 of the order for ready reference:

1. An interlocutory injunction lasting until midnight on September 26, 2021 is granted requiring that the Defendants (by themselves, and for their officers, members, servants, agents, representatives) and anyone having knowledge of the Court's order, are restrained, enjoined and prohibited from:
 - (a) impeding, physically obstructing, or in any way interfering with any person, including any member of the public, from gaining access to or egress from, or otherwise making use of any road, road construction site or planned road construction site (the "Roads") situate within the area bordered by (i) the E&N Railway Land Grant Boundary to the east, (ii) the San Juan River and the Pacific Rim National Park boundary to the south, (iii) the boundary

of the Carmanah Walbran Provincial Park to the west, and (iv) the Nitinaht River and Nitinaht Lake to the north, as indicated on the map attached for illustrative purposes as Schedule A (the "Injunction Area");

- (b) obstructing, impeding, or otherwise interfering with the safe passage of motor vehicles, equipment or machinery belonging to the Plaintiff, its employees, agents, contractors or suppliers (the "Motor Vehicles"), and in particular, not to come within 50 metres of the Motor Vehicles in the Injunction Area;
- (c) obstructing, impeding or otherwise interfering with any construction activities conducted on the Roads by the Plaintiff, its employees, agents, contractors or suppliers;
- (d) obstructing, impeding, or otherwise interfering with timber harvesting activities in the Injunction Area by the Plaintiff, its employees, agents, contractors or suppliers;
- (e) threatening, harassing, intimidating, assaulting, physically obstructing, or physically interfering with the Plaintiff's employees, agents, contractors or suppliers or their families;

[54] The Concise Oxford English Dictionary (12th ed.), defines "blockade" as "an act of sealing off a place to prevent goods or people from entering or leaving." Every road blockade impedes, obstructs, or interferes with use of the road, but not every act of impeding, obstructing, or interference is necessarily "blockading."

[55] It is notable that a breach of Term 1(a) does not require interference with Teal Cedar or its activities. A principal intention of the language in this term is to protect the public's right of access to the roads in TFL 46. See *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2021 BCSC 1554 at paras. 25-26. In this connection, the script can readily be construed as inaccurate or at least ambiguous: to contravene the order, it is not necessary to interfere with use of the road and interfere with Teal Cedar's activities.

[56] Similarly, and in parallel to the difference between "blockading" and "interfering with," to "prevent" something from occurring - in this case, for instance, timber harvesting activities - is to do more than "interfere with" that activity. The Concise Oxford English Dictionary (12th ed.) defines "prevent" as "keep from happening or arising." Every act of preventing timber harvesting activity from occurring is an interference, but not every interference with timber harvesting activity keeps it from happening.

[57] I appreciate that other persons wanting to make use of the road or Teal Cedar employees or contractors need not be present to establish interference with use of the road or interference with Teal Cedar's activities: *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 385 at para. 14. If the accused had been proved to have been possessed of sufficient knowledge of the terms of the order, the absence of proof of traffic would not matter.

[58] The critical omissions in the RCMP script result in a failure to transmit actual knowledge of the terms of the order. The ambiguities and inaccuracies in the script also result in this same failure.

Wilful blindness is not established

- [59] An accused may be imputed with actual knowledge of the terms of a court order by application of the doctrine of wilful blindness: *Carey v. Laiken*, at para. 34.
- [60] The Crown puts its wilful blindness argument on the narrow footing that "being read the shortform script was certainly enough to arouse Mx. Henderson's suspicion that what they were doing was forbidden." For the reasons that follow I find that the Crown falls far short of proving beyond reasonable doubt that this accused was wilfully blind to the terms of the Verhoeven order.
- [61] Wilful blindness is not easily proved. "[T]he concept of wilful blindness is of narrow scope and involves no departure from the subjective focus on the workings of the accused's mind": D. Stuart, *Criminal Law: A Treatise* (5th ed. 2007) at p. 241, quoted with approval by Justice Charron, writing for the Court in *R. v. Briscoe*, 2010 SCC 13 at para. 24.
- [62] The doctrine of wilful blindness was summarized in *R. v. Morrison*, 2019 SCC 15 at para. 98:
- [98] Wilful blindness exists where an accused's "suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries": *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at para. 21 (emphasis in original). Wilful blindness has been characterized as "deliberate ignorance" because it connotes "an actual process of suppressing a suspicion": D. Stuart, *Canadian Criminal Law: A Treatise* (7th ed. 2014), at p. 261. "A court can properly find wilful blindness only where it can almost be said that the defendant actually knew": *Briscoe*, at para. 23, citing G. Williams, *Criminal Law: The General Part* (2nd ed. 1961), at p. 159. This Court has repeatedly held that if an accused is found to be wilfully blind, that state of mind may substitute for actual knowledge: *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at pp. 584-85; *Briscoe*, at para. 21. Indeed, it is "equivalent to knowledge": *Briscoe*, at para. 23, citing Williams, at p. 159.
- [63] Wilful blindness is to be distinguished from recklessness (*Morrison*, at para. 100) or indifference (*R. v. Spencer*, 2017 SKCA 54). It is not enough for the Crown to prove that the accused was reckless or indifferent or recklessly indifferent. The Crown must prove beyond reasonable doubt that the accused was in fact suspicious and saw the need for further inquiries (*Morrison*, at para. 98). "[T]he doctrine of wilful blindness applies in circumstances where it is shown that an accused was in fact suspicious but deliberately refrained from making inquiries so as to remain ignorant of the truth": *R. v. Robertson*, 2019 BCCA 116 at para. 68.
- [64] The Crown argues the accused's suspicion was surely aroused when Cst. McWilliams read the script, and it was this occurrence that triggered an obligation to make further inquiries about the terms of the order. I find that the evidence does not support this conclusion. However, even if the Crown were able to establish that this accused in fact had the requisite suspicion, I find there was no real opportunity to make inquiries on the facts in this case. The tenor of the script and the surrounding circumstances made it clear to the accused that

if they did not get down from the tripod without delay, an arrest for contempt would follow.

- [65] This is not a case where the accused "suppressed a suspicion" or where it can almost be said that the accused actually knew the material contents of the order. It is not a case where the accused "shut [their] eyes because [they] knew or strongly suspected that looking would fix them with knowledge," as Justice Sopinka put it in *R. v. Jorgensen*, [1995] 4 S.C.R. 55 at para. 103. I appreciate that Sopinka J. was speaking figuratively, but when it comes to shutting one's eyes to a court order, this is quite literally what has been done in other cases to provoke a finding of wilful blindness. Here, there was nothing to look at: the accused was not provided with a copy of the injunction; this is not a case where the police delivered a copy and then attempted to summarize it. And, the material terms of the injunction order were not being read aloud; the accused cannot be said to have literally or figuratively plugged their ears because they knew that listening or asking questions of the police would fix them with knowledge.
- [66] I can accept that it would have been wise for the accused to ask some questions of Cst. McWilliams after hearing the short script, including, for example: "I have nothing to do with the litigation Justice Verhoeven issued an order in, so does the order apply to me?" And: "Does the order apply here on Granite Main?" The fact the accused did not ask questions that might have occurred to another person in similar circumstances is far short of establishing the subjective elements of wilful blindness.
- [67] The Crown refers in its argument to para. 27 of Justice Burnyeat's decision in *Waite*. I return to that subject, and I quote the paragraph again for ready reference:
- [27] There is an obligation on those who decide to attend at sites where picketing is undertaken and it does not matter which side of a dispute is supported by a person who decides to attend. That obligation is that those who are attending must understand whether there is an order in effect and, if so, what is prohibited by any such order. That obligation is similar to the obligation imposed on all citizens - an obligation to be aware of the laws which govern our activities. That obligation was imposed on Mr. Waite throughout.

As I said earlier, if this is an accurate statement of the law then I doubt its application beyond the narrow context in which it was made, i.e. a picketing site. In any event, I do not think it proper to relax the Crown's burden on wilful blindness by the application of what was said about the obligations of citizens in *Waite*. Of course, as also noted earlier, the accused is presumed to know that obstructing a highway without lawful authority for the purpose of compelling another person to abstain from doing anything that they have a lawful right to do is an offence under s. 423(1)(g) of the Criminal Code. But this presumption is of no assistance to the Crown in this contempt of court order prosecution.

[68] I am not satisfied beyond reasonable doubt that the accused's suspicions about the terms of the order were aroused by the reading of the script. I am also not satisfied beyond reasonable doubt that the accused chose not to make inquiries after the script was read because they knew or strongly suspected that making inquiries would fix them with knowledge.

Summary

[69] The RCMP are authorized by the injunction order to arrest and remove persons with knowledge of the order who are contravening its terms. The RCMP did not read the injunction order or give a copy of the order to the accused. Instead, the RCMP read its own short-form script to the accused. The Crown contends that the accused was fixed with knowledge of the material terms of the injunction order by the script reading. In the alternative, the Crown argues that the accused is imputed with knowledge of the material terms of the order because the script reading made the accused suspicious and the accused chose not to make inquiries that would confirm the material terms of the injunction order.

[70] The RCMP script did not transmit sufficient information about the terms of the injunction order, and the information that was delivered via this script was not accurate and clear. The Crown has not proved the accused had actual knowledge of the material terms of the order, or that the accused was wilfully blind to those terms. Proof of actual knowledge of the material terms of a court order is necessary before a person may be convicted of contempt of that order. In the absence of proof of actual knowledge, the presumption of innocence prevails and the accused is entitled to an acquittal.

"Thompson J."

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