CANADA / JUDGMENT

# Teal Cedar Products Ltd. v. Rainforest Flying Squad

**2023 BCSC 2245**

COURT
Supreme Court of British Columbia

DECIDED
20 December 2023

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2023 BCSC 2245 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 2245

Date: 20231220

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), Kathleen Code, Carole Tootill, William Jones, Joshua Wright, Glenn Reid, Shawna Knight, Angela Davidson (also known as Rainbow Eyes), Donna Clark, Keith Cherry, Rhia Ironside, Will O'Connell, Steven Daniluk (also known as Yogi Shambu), Saul Arbess, Rani Earnhart, Atleo River Air Service Ltd., 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

Reasons for Judgment

Counsel for the Plaintiff:

A. Hudson

The Defendant, Glenn Reid, appearing in person:

G. Reid

The Defendant, Angela Davidson, appearing in person:

A. Davidson

No other appearances

Place and Date of Hearing and of Ruling with Reasons to Follow:

Nanaimo, B.C.

November 28, 2023

Place and Date of Reasons for Judgment:

Vancouver, B.C.

## December 20, 2023

[1] The defendants Glenn Reid and Angela Davidson apply to set aside default judgments. On the ex parte application of the plaintiff, they were added as defendants to this action (along with several others). They were served with the joinder order and the amended notice of civil claim (the "ANOCC"). Neither retained counsel to defend this action, but each filed a response to civil claim. However, by the time they had done so, the plaintiff had taken default judgments. I granted their application to set aside the judgments with reasons to follow. These are those reasons.

[2] The plaintiff is a forestry company. It holds Tree Farm Licence 46 ("TFL 46"), a forest tenure on southern Vancouver Island. The licence area is nearly 60,000 hectares in size, and it contains stands of old growth. Teal Cedar has permits to cut timber and to conduct road-building activities within certain parts of TFL 46.

[3] Beginning in August 2020, protestors unhappy with the prospect of old-growth logging blocked roads at various locations in and around TFL 46. In February 2021, Teal Cedar commenced this proceeding seeking injunctive relief and damages. An interlocutory injunction order was made in April 2021, which by its terms expired on 26 September 2021. It was twice extended, and it ultimately expired in September 2023.

[4] I was appointed case management judge in May 2021. More than 400 protestors were subject to contempt applications in relation to the interlocutory injunction. The Crown accepted the Court's invitation to assume carriage of the contempt matters, and it has done so since July 2021. The Court has now processed all but a very few of the contempt cases.

[5] In the meantime, the underlying action has moved at a languid pace. In January 2023, the plaintiff applied for and was granted an order adding 15 defendants. In February 2023, the plaintiff filed the ANOCC. Some of the added defendants have been personally served (including the applicants). Others have not, and in September 2023 I granted an alternative service order for some of the new defendants. Eight of the new defendants brought an application to strike the ANOCC and to set aside the order adding them as parties. These strike and set-aside applications were filed on various dates in May, June, and July 2023, and were heard on 30 and 31 August 2023.

[6] These eight new defendants that made strike and set-aside applications were represented by counsel. Sensibly, and with either the consent of the plaintiff or with the comfort of the convention that restrains counsel for a plaintiff from taking default against a person who has consulted counsel without notice to that counsel, these defendants awaited the outcome of the strike and set-aside applications before filing responses to civil claim. One of their essential points at the hearing of the strike and set-aside applications was that it would be unfair to call on them to plead to the ANOCC unless and until it is substantially amended. I agreed that the ANOCC was deficient, and fixed the time for filing responses to civil claim at 21 days after the delivery of a further amended notice of civil claim ("FANOCC"). I adjourned the applications to set aside the joinder order. My reasons are indexed at Teal Cedar Products Ltd. v. Rainforest Flying Squad, 2023 BCSC 1821.

[7] Mr. Reid and Ms. Davidson are without counsel, but they adopted a parallel approach to the eight new defendants with counsel: i.e., they planned to defer filing their responses to civil claim until the hearing of the strike and set-aside applications. They were under the mistaken impression that no action was required on their part until these applications were heard; they were not applicants but both attended the hearing. During the hearing, each heard counsel for the plaintiff refer to a default judgment that had been taken against a new defendant, Atleo River Air Service Ltd. They realized at that point it was important to file a response to the ANOCC as soon as possible. On 31 August 2023, they informed counsel for the plaintiff that they intended to do so. And, in fact, each did so the next day.

[8] What Mr. Reid and Ms. Davidson did not know when they filed their responses to the ANOCC is that the plaintiff had already filed a requisition applying for default judgment against them, and that these judgments for damages to be assessed had already been signed by deputy district registrars in August 2023. The default judgments came to their attention in the latter half of September 2023. Mr. Isitt, the lawyer who helped Mr. Reid and Ms. Davidson prepare their material, appeared at the hearing of these applications to assist Ms. Davidson. He explained that he was in contact with counsel for the plaintiff in the latter part of October 2023 in order to canvass their availability for an application to set aside the judgments. The applications were filed on 8 November 2023, and set down for hearing before me on the earliest date that I was available.

[9] The applicants had neither the consent of the plaintiff to wait for the hearing of the strike and set-aside applications nor the benefit of the same convention that protects persons who the plaintiff knows have consulted lawyers about defending the case. They should have checked their assumption that they were at liberty to defer filing their pleadings until the conclusion of the strike and set-aside applications. An application to strike a pleading or set aside a joinder order does not stay the obligation to file a response. I am mindful of the Canadian Judicial Council's Statement of Principles on Self-represented Litigants and Accused Persons, endorsed by the Supreme Court of Canada in Pintea v. Johns, 2017 SCC 23 at para. 4. The principles include doing whatever is possible to provide a fair and even-handed process for, and prevent unfair disadvantage to, self-represented persons, including guarding against unjustly hindering their interests by the application of procedural rules. There is a recognition that self-represented persons may not have the knowledge to participate effectively in their own litigation, but one of the expectations is that they are expected to familiarize themselves with applicable practices and procedures.

[10] The purpose of pleadings - indeed, the whole of the Supreme Court Civil Rules - is to promote justice and enhance procedural fairness. Pleadings give notice of claims and defences, and frame the issues for the discovery process and trial. See Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc., 2021 BCCA 362 at paras. 21-23.

[11] With the strike and set-aside hearing in near prospect, it would have made little sense to require any defendant to file a response to civil claim in the meantime. It was logical to postpone filing of responses because the landscape could change significantly depending on the outcome of the strike and set-aside applications. As it turned out, the Court held that the ANOCC requires substantial amendment and that the defendants' obligation to file a response to civil claim is postponed until 21 days after a FANOCC is filed and delivered.

[12] The plaintiff acknowledges that it would have granted extensions to Mr. Reid and Ms. Davidson if they had "engaged with the process" and contacted plaintiff's counsel. I accept that if they had sought the same courtesy extended to the defendants with lawyers, the solicitors for the plaintiff would have responded favourably. It would have been senseless, illogical, and unfair to do otherwise. I do not accept the submission that the reason that

these defendants did not contact plaintiff's counsel was that they were ignoring the process. I find that they always intended to defend this action. Their presence at the strike and set-aside hearing and their advice to plaintiff's counsel that they intended to file a response to civil claim corroborates their stated intention, and points away from a desire to ignore the process.

[13] In these circumstances, I think fairness and the interests of justice require that these self-represented applicants be relieved from their procedural misstep and be placed on the same footing as the defendants with counsel. Their obligation to file a response to civil claim should be postponed until after the plaintiff delivers its FANOCC. And, I hold that the discretion in Rule 3-8(11) to set aside a default judgment is broad enough to set aside the judgments in these circumstances.

[14] The starting point in the case law is Miracle Feeds v. D. & H. Enterprises Ltd. (1979), 10 B.C.L.R. 58 at 61 (Co. Ct.) which held that a defendant bears the burden of showing that they did not wilfully or deliberately fail to file a defence, that they made application to set aside the default judgment as soon as reasonably possible or have given a satisfactory explanation for the delay; and that there is a meritorious defence or at least a defence worthy of investigation. The following excerpt from Forgotten Treasures International Inc. v. Lloyd's Underwriters, 2020 BCCA 341, describes the breadth of the R. 3-8(11) discretion and the proper approach to the Miracle Feeds criteria:

[13] Rule 3-8(1) of the Supreme Court Civil Rules provides:

Default in filing and serving a response to civil claim

(1) A plaintiff may proceed against a defendant under this rule if

(a) that defendant has not filed and served a response to civil claim, and

(b) the period for filing and serving the response to civil claim has expired.

[14] Rule 3-8(1) can, in appropriate circumstances, serve a useful purpose. However, reliance on R. 3-8(1), once counsel for the plaintiff becomes aware that the defendant in an action has retained counsel, becomes constrained. The authors of McLachlin & Taylor, British Columbia Practice, 3d ed., loose-leaf (consulted on November 9, 2020), (Markham: LexisNexis Canada Inc., 2006) at 3-138 state:

As a matter of professional courtesy, counsel for a plaintiff should not take out default judgment without warning the defendant or defendant's counsel of his intention to do so unless a notice of response is filed and served within a stated time.

[15] Furthermore, R. 7.2-1, commentary 5 of The Law Society of British Columbia, Code of Professional Conduct, 2013, provides:

A lawyer who knows that another lawyer has been consulted in a matter must not proceed by default in the matter without inquiry and reasonable notice.

[16] Rule 3-8(11) of the Supreme Court Civil Rules provides:

Court may set aside or vary default judgment

(11) The court may set aside or vary any judgment granted under this rule.

[17] Miracle Feeds establishes a framework to address an application to set aside a default judgment. It is important to recognize that the various considerations that are identified in Miracle Feeds are just that: they are factors that a chambers judge should consider and weigh. These factors are not fixed or immutable; rather, they are discretionary. In Andrews v. Clay, this Court recently reviewed a number of relevant authorities and said:

[29] I have described these as factors rather than tests, as they are not intended to be either mandatory or exhaustive of the considerations that are relevant, though in most cases they will be the appropriate indicators of whether it is in the interests of justice to set aside the default judgment.

[30] In H.M.T.Q. in right of the Province of British Columbia v. Ismail, 2007 BCCA 55 (Chambers), for instance, Smith J.A. considered Miracle Feeds in the context of a default judgment in the Supreme Court of British Columbia and made these comments:

[11] In my view the items enumerated in the Miracle Feeds test are not conditions that must be satisfied by an applicant. Rather, they are relevant factors to be taken into account by a chambers judge in exercising the discretion conferred by Rule 17(12). I find support for this view in the remarks of Madam Justice Saunders in Deline v. Whittle, [2002 BCCA 662] where she said,

[12] On the merits, I observe that the order appealed involves the exercise of discretion. Although Mr. Deline vigorously contends that the Miracle Feeds test was not met, and thus there is sufficient merit in the appeal to warrant leave being granted, I do not agree. There are, necessarily, aspects of judgment that must be applied by a chambers judge in the exercise of discretion under Rule 25(15).

[31] In Nichol v. Nichol, 2015 BCCA 278, this Court cautioned against an inflexible application of the Miracle Feeds factors:

[37] The factors set out in the Miracle Feeds decision are not meant to be applied inflexibly, nor are they immutable: see H.M.T.Q. in right of the Province of British Columbia v. Ismail, 2007 BCCA 55 at para. 11. The discussion by Mr. Justice Voith in Director of Civil Forfeiture v. Doe, 2010 BCSC 940 at para. 15 in the context of the R. 17(12) of the previous Supreme Court Rules is apt:

[15] [I]t does not follow as a matter of necessity that the failure of the defendants to expressly address each of the various requirements set out in Miracle Feeds precludes them from being successful on an application under Rule 17(12) [the rule in the previous Supreme Court Rules that permitted a party to apply to set aside default judgment]. These requirements are not immutable. The failure or inability of a defendant to address a

particular factor in Miracle Feeds is not necessarily fatal. Conversely, there may well be additional factors identified by a defendant which are relevant to its application and to the court's discretion.

See also Malik v. Eagle Mountain Farms (A Partnership), 2021 BCCA 379 at para. 22: the Miracle Feeds factors "are neither mandatory nor exhaustive."

[15] The plaintiff contends that these defendants wilfully and deliberately failed to file a timely response to civil claim. I do not agree. These defendants have always intended to defend this action, and the delay in filing responses to civil claim sprung from ignorance - i.e., the mistaken but not irrational belief that they were permitted to follow the same course charted by other defendants with lawyers and defer filing their pleadings until the hearing of the strike and set-aside applications. Blameworthiness is a component of wilful delay: Hubbard v. Acheson, 2009 BCCA 251 at para. 20; Forgotten Treasures, at para. 19. These defendants made a mistaken but understandable assumption about civil practice and procedure, and I reject the plaintiff's unrestrained submission that they were so reckless that the Court should find their actions blameworthy.

[16] The plaintiff submits that these defendants have not made application to set aside the default judgments as soon as reasonably possible or given a satisfactory explanation for the delay. In this connection, the plaintiff objects to the admissibility of the applicants' second affidavits, filed after the plaintiff's material, on the basis that the explanations in these affidavits are not the subject of proper reply. It is not necessary to my conclusion to receive the applicants' second affidavits.

[17] Each case must be decided on its own facts, and commentary, criticisms, and findings in other cases on this delay issue are of limited assistance. The parties were aware that as case management judge I would be the judge hearing these applications. My calendar did not permit an earlier hearing than in fact occurred. In the context of this case, the applications to set aside the default judgments were brought as soon as reasonably possible.

[18] I turn to the Miracle Feeds factor of whether an applicant has shown a meritorious defence or at least a defence worthy of investigation. While none of the Miracle Feeds factors are mandatory, in usual circumstances there is simply no point in setting aside a default judgment where the defendant has not shown at least a defence worthy of investigation: British Columbia (Securities Commission) v. Byer, 2023 BCSC 119 at para. 11.

[19] However, in this case I held on the strike application that the ANOCC had substantial defects. It would not be fair to call upon the defendants to plead to it pending its amendment to properly set out the plaintiff's claims. I think it premature and illogical in these circumstances to insist that the applicants show a meritorious defence to a substantially defective pleading. The applicants believe they have meritorious defences. In a more usual case, without more, this would be insufficient to avoid having this Miracle Feeds consideration tell against them, but in this case, given the defective state of the ANOCC, the absence of detail about the nature of the defences is not impactful.

[20] In all of the circumstances that I have outlined, including the Miracle Feeds indicators, I exercised the discretion to set aside the default judgments and put these benighted in-person litigants in the same position as their represented counterparts. In my view, it was clearly in the interests of justice to do so.

[21] I also struck Mr. Reid's and Ms. Davidson's responses to civil claim and fixed the time for filing their responses at 21 days following delivery of a FANOCC. These responses were essentially bare denials and seemingly filed as "placeholder" pleadings to avoid default judgments. With the delivery of a FANOCC, properly responsive pleadings should be filed in order to give notice of the basis on which the claims are defended and to frame the issues for trial and the discovery process.

[22] I made these orders without costs to any party. The usual order is that a successful applicant is entitled to their costs in the cause. The applicants succeeded in setting aside the default judgments, but their responses to civil claim were late-filed and the plaintiff was by the letter of the Rules entitled to apply to the registrar for judgment without notice to them. The applicants did not press a claim for costs.

[23] The plaintiff sought its costs of this motion, and I appreciate that it is not unusual for an application respondent to receive their costs in connection with an order setting aside a default judgment. As case management judge, I am aware that this litigation is showing some signs of being hard fought. This may account for the forceful opposition to these applications. However, with respect, the plaintiff ought to have consented to set aside these default judgments after the ANOCC was found deficient. In these circumstances, it is appropriate that each party bear their own costs.

"Thompson J."


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