

CANADA / JUDGMENT

Trans Mountain Pipeline ULC v. Mivasair

2019 BCSC 71

COURT

Supreme Court of British Columbia

DECIDED

4 February 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCSC 71 Trans Mountain Pipeline ULC v. Mivasair

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Trans Mountain Pipeline ULC v. Mivasair,

2019 BCSC 71

Date: 20190204

Docket: S183541

Registry: Vancouver

Between:

Trans Mountain Pipeline ULC

Plaintiff

And

David Mivasair, Bina Salimath, Mia Nissen, Corey Skinner (aka Cory Skinner), Uni Urchin (aka Jean Escueta), Arthur Brociner (aka Artur Brociner),

Karl Perrin, Yvon Raoul, Earle Peach, Sandra Ang, Reuben Garbanzo (aka Robert Arbess), Gordon Cornwall, Thomas Chan, Laurel Dykstra,

Rudi Leibik (aka Ruth Leibik), John Doe, Jane Doe, and Persons Unknown

Defendants

Before: The Honourable Mr. Justice Affleck

Oral Reasons for Sentence

Re: Noah Gotfrit and Cynthia Nugent

Counsel for the Provincial Crown:

M. Ruttan

S. Hulko

Counsel for the Defendants Noah Gotfrit, and Cynthia Nugent:

D. Turko, Q.C.

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 6, 2018

Place and Date of Judgment:

Vancouver, B.C.

February 4, 2019

[1] On November 6, 2018, Noah Gotfrit and Cynthia Nugent pleaded guilty to criminal contempt of court. These are my reasons on sentencing. Each has signed an agreed statement of facts.

[2] Mr. Gotfrit's agreed statement of facts reads:

Overview and Injunction Order

1. Kinder Morgan operates the Trans Mountain pipeline system which transports petroleum products from Edmonton, Alberta to Burnaby, British Columbia. Kinder Morgan has been seeking to expand its pipeline system by twinning the existing pipeline.
2. There has been continuing national and provincial media coverage of opposition to the project in the months leading up to March of 2018. There have been media reports of arrests of Protestors in March, April, May, June and August of 2018. Prior to August 14, 2018, 156 individuals convicted of contempt of court arising out of these Protests had been sentenced to community work service, fines or periods of jail. There were media reports in respect of the imposition of these sentences.
3. On March 15, 2018, an Injunction Order was granted by Mr. Justice Affleck of the Supreme Court of British Columbia. On June 1, 2018, Mr. Justice Affleck of the Supreme Court of British Columbia granted a further Order Made After Application (the "Injunction Order").
4. Attached to this Agreed Statement of Facts is a copy of the Injunction Order.

August 14, 2018

5. One of the Trans Mountain Pipeline ULC ("Trans Mountain") facilities is located at 7056 Bayview Drive, Burnaby, B.C. This facility is referred to in the Injunction Order as the "Westridge Marine Terminal" or the "WMT."
6. On August 14, 2018, at 7:16 a.m. the presence of individuals in the injunction zone at the WMT was reported to the Royal Canadian Mounted Police ("R.C.M.P").
7. Bayview Drive leads directly to the gate of the WMT. When members of the R.C.M.P. arrived at the WMT at 9:00 a.m. they observed approximately 25 protestors at the side of Bayview Drive. Nine individuals were seated on chairs across the width of Bayview Drive (the "Protestors").
8. The Protestors were breaching the Injunction Order by physically obstructing, impeding, or otherwise preventing access by Trans Mountain, its contractors, employees, or agents to the WMT.
9. Several videographers were at the scene and appeared to be operating their video cameras.
10. An RCMP officer offered paper copies of the Injunction Order to the Protestors, and then at 9:44 a.m., a member of the R.C.M.P., Constable Premack, played an audio recording of a reading of the Injunction Order to the Protestors. It took approximately nine minutes to play the Injunction Order.
11. The R.C.M.P. then gave the Protestors a reasonable opportunity to comply with the Injunction Order before commencing any arrests. During this period six of the Protestors voluntarily moved off of Bayview Drive.
12. Three individuals remained on Bayview Drive. A member of the RCMP conducted the five step process described in paragraph 12 of the Injunction Order with each of the three remaining Protestors. These three remaining Protestors would not voluntarily leave and were arrested.
13. Prior to the third remaining Protestor being arrested, another individual walked onto Bayview Drive and sat on a chair near to the remaining Protestor. An RCMP officer provided a paper copy of the Injunction Order to this individual. At 10:33 a.m., Constable Premack played the audio recording of the reading of the Injunction Order to this individual. The RCMP then provided this individual with an opportunity to comply with the Injunction Order. Then an RCMP officer conducted the five step process described in paragraph 12 of the Injunction Order with this individual. This individual would not voluntarily leave and at approximately 10:46 a.m. was arrested.
14. The four arrested individuals were processed and released at an area set up for this purpose approximately 50 metres from the site of the arrest. Each arrested individual was released on an Undertaking Given to a Peace Officer or an Officer in Charge, and a Promise to Appear.

15. As each of the arrested individuals was led to the processing area, other individuals in the area cheered in support.
 16. By 12:02 p.m. Bayview Drive was no longer obstructed or impeded contrary to the Injunction Order.
 17. In total, four Protestors were arrested and released on August 14, 2018.
 18. The act of blocking access to the WMT was done in full view of video cameras and various members of the public. The overall actions of the Protestors defied the Injunction Order in a public way and thereby brought the authority of the court into contempt.
- [3] The "five steps" were read to Mr. Gotfrit prior to his arrest and he signed a form acknowledging them. The five steps read:
1. I am asking you to stop breaching the injunction order. Are you willing to leave the area?
 2. By being here and refusing to leave your actions are unlawful as you are currently breaching the injunction order.
 3. If you continue to refuse to leave you will be arrested and you could be charged with criminal contempt for breaching the injunction order. This could cause you personal inconvenience in terms of time spent in court and associated costs. In addition if you are found guilty you could be sentenced to community service or a fine or jail time.
 4. Do you understand if you don't leave you will be arrested and could be charged with criminal contempt? Is there anything I can reasonably do to make you cooperate and leave?
 5. You are currently under arrest for criminal contempt for breaching the injunction order.
- [4] Mr. Gotfrit admits he was one of the individuals arrested on August 14, 2018.
- [5] Ms. Nugent's agreed statement of facts reads:

Overview and Injunction Order

1. Kinder Morgan operates the Trans Mountain pipeline system which transports petroleum products from Edmonton, Alberta to Burnaby, British Columbia. Kinder Morgan has been seeking to expand its pipeline system by twinning the existing pipeline.
2. There has been continuing national and provincial media coverage of opposition to the project in the months leading up to March of 2018. There have been media reports of arrests of Protestors in March, April, May, June and August of 2018. Prior to August 20, 2018, 166 individuals convicted of contempt of court arising out of these Protests had been sentenced to community work service, fines or periods of jail. There were media reports in respect of the imposition of these sentences.

3. On March 15, 2018, an Injunction Order was granted by Mr. Justice Affleck of the Supreme Court of British Columbia. On June 1, 2018, Mr. Justice Affleck of the Supreme Court of British Columbia granted a further Order Made After Application (the "Injunction Order").
4. Attached to this Agreed Statement of Facts is a copy of the Injunction Order.

August 20, 2018

5. One of the Trans Mountain Pipeline ULC ("Trans Mountain") facilities is located at 7056 Bayview Drive, Burnaby, B.C. This facility is referred to in the Injunction Order as the "Westridge Marine Terminal" or the "WMT."
6. On August 20, 2018, at 8:13 a.m. the presence of individuals in the injunction zone at the WMT was reported to the Royal Canadian Mounted Police ("R.C.M.P.").
7. Bayview Drive leads directly to the gate of the WMT. When members of the R.C.M.P. arrived at the WMT at 8:36 a.m. they observed approximately 30 individuals standing on or near the side of Bayview Drive. By 9:13 five individuals had sat on chairs lined up across most of the width of Bayview Drive (the "Protestors").
8. The Protestors were breaching the Injunction Order by physically obstructing, impeding, or otherwise preventing access by Trans Mountain, its contractors, employees, or agents to the WMT.
9. A few videographers were at the scene and appeared to be operating their video cameras.
10. At 9:44 a.m., a member of the R.C.M.P., Constable Letwin, played an audio recording of a reading of the Injunction Order to the Protestors. It took approximately nine minutes to play the injunction Order. As the reading was being broadcast another RCMP officer offered paper copies of the Injunction Order to each of the Protestors.
11. The R.C.M.P. then gave the Protestors a reasonable opportunity to comply with the Injunction Order before commencing any arrests.
12. The five Protestors remained on Bayview Drive. A member of the RCMP conducted the five step process described in paragraph 12 of the Injunction Order with each of the Protestors. The Protestors would not voluntarily leave and were arrested.
13. The five arrested individuals were processed and released at an area set up for this purpose approximately 50 metres from the site of the arrest. Each arrested individual was released on an Undertaking Given to a Peace Officer or an Officer in Charge, and a Promise to Appear.
14. As each of the arrested individuals was led to the processing area, other individuals in the area cheered in support.
15. By 11:02 p.m. Bayview Drive was no longer obstructed or impeded contrary to the Injunction Order.

16. In total, five Protestors were arrested and released on August 20, 2018.
17. The act of blocking access to the WMT was done in full view of video cameras and various members of the public. The overall actions of the Protestors defied the Injunction Order in a public way and thereby brought the authority of the court into contempt.
- [6] Ms. Nugent also signed the document containing the "five steps". She admits she was one of the individuals arrested on August 20, 2018.

The Crown's Position on Sentencing of Mr. Gotfrit

- [7] On August 3, 2018, the Crown filed its third amended notice of motion #1, setting out the "initial" and "later" sentencing positions it would propose to the Court for those convicted at trial or who pleaded guilty to criminal contempt of court. Those who pleaded guilty were divided into several categories. "Early category one" contemnors were defined as those arrested before April 16 and who pleaded guilty no later than the week of May 28, 2018. The Crown submits they should be subject to modest fines or community work service orders under the direction of a probation officer. Fines and the length of the community work service orders would escalate until reaching "category five". Contemnors in "early category five" were those arrested after August 2, 2018, and who pleaded guilty within a month of their first appearance in court or, in exceptional circumstances, who pleaded guilty at a later date, and that date had been determined within a month of their first appearance in court. The Crown would recommend those persons be sentenced to 14 days imprisonment. Despite the stated categories, the Crown reserved the right to exercise a discretion to make different submissions to the Court depending on the circumstances.
- [8] Mr. Gotfrit was arrested after August 2, 2018. The Crown's position is that he ought to be considered as an "early category five" contemnor, subject to a jail term of 14 days.
- [9] The Crown submits, and Mr. Gotfrit accepts, that prior to his arrest he was advised by the RCMP that, if he did not cease defying the injunction, he could be subject to a sentence of 14, 20 or 28 days imprisonment. The Crown emphasizes the gravity of the offence of criminal contempt of court, which involves public defiance of a court order. In *Everywoman's Health Centre Society (1988) Victoria Drive Medical Clinic Ltd. v. Bridges* (1989), 61 D.L.R. (4th) 154 (B.C.S.C.), Mr. Justice Wood stated:

In the whole spectrum of conduct classified as contemptuous, there can be none more sinister or more threatening than that of organized large-scale deliberate defiance of an order of the Court.

- [10] In *MacMillan Bloedel Ltd. v. Brown* (1994), 92 B.C.L.R. (2d) 1 (C.A.) at para. 45, Chief Justice McEachern wrote:

Every accused person is entitled to be considered separately from every other accused person, but a sentencing judge is not required to blind himself to the obvious fact that these were not ordinary first offenders and that they were acting in concert. They were persons who, after knowingly and deliberately committing an offence, were nevertheless asked by a peace officer to

walk away. They chose instead to stay and be arrested and charged. Notwithstanding their personal beliefs, they do not qualify for the usual leniency that judges generally offer to first offenders.

[11] Chief Justice McEachern also commented that many judges have found it necessary from time to time to warn that repeated disobedience of court orders may make it necessary to impose more severe sentences.

[12] Although the sentencing principles found in section 718 of the Criminal Code, R.S.C. 1985 c. C-46, do not apply to the common law offence of criminal contempt of court they nevertheless serve as a useful guide. That section reads:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[13] In *R. v. Lacasse*, 2015 SCC 64 at para. 54, Mr. Justice Wagner, now the Chief Justice, wrote:

The determination of whether a sentence is fit also requires that the sentencing objectives set out in s. 718 of the Criminal Code and the other sentencing principles set out in s. 718.2 be taken into account. Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality.

[14] Section 718.2 speaks of the sentencing Judge taking into account aggravating and mitigating factors.

[15] The Crown refers to the observation of Madam Justice Holmes (now Associate Chief Justice) in *R. v. Dhillon*, 2015 BCSC 1298 at para. 12, that in matters of criminal contempt of court, deterrence is usually the primary sentencing objective.

- [16] The Crown submits that its third amended notice of motion #1, in which it advised of its intended approach to sentencing submissions in circumstances such as those of Mr. Gotfrit, takes into account various sentencing factors, including an early guilty plea; the absence of a prior criminal record; and other principles of sentencing. Thus the Crown submits that a sentence of 14 days imprisonment is appropriate.

The Submissions of Mr. Gotfrit

- [17] Mr. Gotfrit is 23 years old. He resides with his parents and attends school. He is a musician and has lived in New Orleans on at least two occasions where he has worked as a musician. He holds both Canadian and American citizenship. One of his goals is to obtain a bachelor's degree in music.
- [18] His Rabbi has written a letter of reference, which speaks well of Mr. Gotfrit. I also have a letter from his family physician, who speaks of Mr. Gotfrit's deep sense of social justice and civic responsibility and a letter from a lawyer who has known Mr. Gotfrit since birth and who speaks of his sense of moral responsibility.
- [19] Ms. Turko, on behalf of Mr. Gotfrit, submits the appropriate sentence is a conditional discharge. Ms. Turko submits that, if Mr. Gotfrit goes to jail, his imprisonment will create a form of record within the corrections system, which may cause difficulties for him when he wishes to cross the border into the United States. It is submitted that a conditional discharge can be fashioned with sufficiently onerous terms to have the deterrent effect that the Crown submits is appropriate.
- [20] In reply, the Crown submits that a conditional discharge is not in the public interest and further points out that orders have been made by this Court that no record of a conviction is to be kept for any of those persons who have either pleaded guilty, or have been found guilty, of criminal contempt. Further, no record of a conviction for criminal contempt is to be kept by the Canadian Police Information Centre. The Crown submits that any other concerns about impediments to Mr. Gotfrit crossing the border into the U.S. from Canada are speculative.

Discussion of the Appropriate Sentence for Mr. Gotfrit

- [21] Mitigating factors with Mr. Gotfrit are his peaceful conduct when arrested and his decision to plead guilty. Aggravating factors include his failure to cease defying the injunction when requested to do so by the police. By blocking access to the worksite of Trans Mountain Pipeline in defiance of the injunction on August 14, 2018, he had already made his opposition to the pipeline publicly known. Nothing further was to be gained by requiring public resources to be wasted to effect his arrest.

- [22] Mr. Gotfrit was aware that he faced a term of imprisonment when he insisted on being arrested. I have no basis to reject the Crown submission for the appropriate sentence of Mr. Gotfrit, as it is on a parity with other contemnors in Mr. Gotfrit's circumstances. I sentence Mr. Gotfrit to 14 days imprisonment.

The Submission of Ms. Nugent

- [23] Ms. Nugent is 64 years old. She is on the faculty of the Emily Carr University of Art and Design. She is a freelance illustrator of considerable distinction and has been frequently published.
- [24] While the Crown takes the same position on sentencing of Ms. Nugent as it has with Mr. Gotfrit a distinction between Ms. Nugent and Mr. Gotfrit is that Mr. Gotfrit acknowledges he was aware of the time of his arrest that, if he was convicted of criminal contempt of court, he faced a term of imprisonment of 14 days, whereas Ms. Nugent submits she was not aware of that likely sentence. She submits that media accounts of the sentences of imprisonment this Court has imposed on other contemnors do not demonstrate that she was aware of those sentences. Ms. Turko, on behalf of Ms. Nugent, submits that a suspended sentence is appropriate.
- [25] The Crown submits that, when she was read the five steps prior to her arrest, Ms. Nugent was aware that, if she chose to be arrested and was subsequently convicted or pleaded guilty to criminal contempt of court, she could be sentenced to perform community work service, or to be fined or to serve a period of imprisonment.

Discussion of the Appropriate Sentence for Ms. Nugent

- [26] I agree that whether or not Ms. Nugent was aware she could be sentenced to a specific sentence is irrelevant to her knowledge that, at the time she chose to defy the injunction, she could be sentenced to imprisonment. When Ms. Nugent chose to remain on the roadway on August 20, 2018, prior to her arrest for disobedience of the injunction, she consciously accepted that she risked a term of imprisonment if she was convicted of criminal contempt of court. It is an unusual case where a person who is about to commit an offence has any knowledge of the Crown's position on sentencing before the offence is committed. I accept her guilty plea is a mitigating factor but I also accept the Crown submission that the recommended 14-day sentence has taken a guilty plea into account. Like the sentence imposed on Mr. Gotfrit, the recommended sentence is on a parity with the sentences of other contemnors in similar circumstances.
- [27] I sentence Ms. Nugent to 14 days imprisonment.

"The Honourable Mr. Justice Affleck"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/19/00/2019BCSC0071.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/trans-mountain-pipeline-ulc-v-mivasair-2019-bcsc-71>

Prepared on 26 October 2026 · Esheria