

CANADA / JUDGMENT

Trans Mountain Pipeline ULC v. Mivasair

2020 BCCA 385

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 385 Trans Mountain Pipeline ULC v. Mivasair

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Trans Mountain Pipeline ULC v. Mivasair,

2020 BCCA 385

Date: 20201201

Dockets: CA46312; CA46313

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)

- and -

Between:

Regina

Respondent

And

Susan Marta Smyth and Pia Massie

Appellants

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Voith

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

June 7, 2019 (Trans Mountain Pipeline ULC v. Mivasair, 2019 BCSC 1247, Vancouver Docket S-183541).

Oral Reasons for Judgment

Counsel for the Appellants

(via videoconference):

D.N. Fai

Counsel for the Respondent

(via videoconference):

L.A. Ruzicka

M.L. Crisp

Place and Date of Hearing:

Vancouver, British Columbia

November 26, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 1, 2020

Summary:

The appellants challenge their criminal contempt convictions for publicly breaching a court order enjoining persons from obstructing access to Trans Mountain Pipeline ULC work sites. They argue that the Crown failed to prove that they had the requisite mens rea, and that the judge erroneously dismissed their arguments that the injunction breached their s. 2(b) Charter rights and that s. 9 of the Criminal Code is an invalid delegation of the exclusive federal jurisdiction over criminal law. Held: Appeal dismissed. To prove the required mens rea for criminal contempt, the Crown must only show that the accused publicly disobeyed a court order with knowledge or recklessness that public disobedience would tend to lower the court's authority. An order enjoining obstruction is breached when the obstruction or impediment is created, regardless of whether individuals seek access or whether access is completely obstructed. The trial judge properly dismissed the appellants' challenge to the injunction order as an impermissible collateral attack. Finally, Parliament's exclusive jurisdiction over criminal law does not compel it to codify the common law of crime; accordingly, s. 9 is not an invalid delegation.

WILLCOCK J.A.:

The Issues

- [1] On June 7, 2019, Justice Affleck found the appellants and others guilty of criminal contempt of court for reasons indexed as *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 1247. The contempt was a public breach of a court order enjoining persons from obstructing, impeding, or preventing access to a number of sites or work areas, including the Burnaby Terminal of Trans Mountain Pipeline ULC (the "Injunction Order"). They appeal their convictions on the grounds the trial judge erred:
- a) in finding that the Crown had proved they had the requisite mens rea;
 - b) in dismissing the argument the conduct that resulted in their convictions was protected speech and the injunction a breach of their s. 2(b) Charter Rights; and
 - c) in dismissing their argument s. 9 of the Criminal Code, R.S.C. 1985, c. C-46, which preserves the common law offence of contempt of court and the jurisdiction of the courts to impose punishment for contempt is an invalid delegation of the exclusive federal jurisdiction with respect to criminal law and procedure.
- [2] A fourth ground of appeal has been abandoned.

The Judgment

- [3] I will not repeat the trial judge's extensive review of the evidence; it is set out in the reasons for judgment at paras. 14-79.
- [4] After that extensive review, and before turning to the case against the appellants, the judge noted (at para. 89) that in *Carey v. Laiken*, 2015 SCC 17, Justice Cromwell described the required intent in a contempt case as follows, at para. 38:

It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice ...

- [5] The trial judge noted the description of the required intent in a civil contempt case applies equally to criminal contempt proceedings, the distinguishing feature of which is knowledge or recklessness that public disobedience will deprecate the authority of the court. He then made the following findings with respect to the case against the appellants, primarily founded upon their own admissions at trial:
- [101] Both Ms. Smyth and Ms. Massie testified their involvement in the April 12, 2018, protest was planned and coordinated. Both testified they expected to be arrested. Both testified they disobeyed the injunction. Both did so in the presence of a crowd of protestors and of the police. I am persuaded beyond a reasonable doubt that the elements of the common law offence of criminal contempt have been proven against Ms. Smyth and Ms. Massie.
- [6] Turning to the constitutional arguments, the judge agreed with the Crown's submission with respect to the argument the Injunction Order infringed the appellants' right to freedom of expression and of peaceful assembly and association protected by s. 2 of the Charter. Relying on *R. v. Krawczyk*, 2007 BCSC 2011, he found the argument to be a collateral attack on the Injunction Order that should be summarily dismissed.
- [7] He also accepted the submissions of the Crown in response to the challenge to the constitutional validity of s. 9 of the Criminal Code, including, in particular, the following submission (at para. 137):

The Parliament of Canada has the exclusive legislative capacity to enact criminal law. Canada inherited the common law of crime from England and the Parliament of Canada left that common law largely intact until codification in the late 19th century. Parliament could have avoided codification and left the common law crime to be developed incrementally by the judges as conditions changed. It would be false to characterize that approach, if it had been adopted, as an abdication of its legislative role by Parliament to the judges of the superior courts.

Mens Rea

- [8] The appellants' counsel says the trial judge did not address the argument that the appellants did not intend to obstruct a particular person or vehicle or intend to obstruct all access to the terminal. He says no one tried to enter the terminal at the point of access the appellants obstructed and the appellants thought there were other means of accessing the terminal.
- [9] The Crown says this argument is, in substance, a submission that the *actus reus* -- obstruction in fact -- was not established. The Crown argues this misconception of the offence results in a mischaracterization of the requisite intent.

[10] The elements of criminal contempt were described in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 by Justice McLachlin (as she was) as follows (at 933):

To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt. As in other criminal offences, however, the necessary *mens rea* may be inferred from the circumstances. An open and public defiance of a court order will tend to depreciate the authority of the court. Therefore when it is clear the accused must have known his or her act of defiance will be public, it may be inferred that he or she was at least reckless as to whether the authority of the court would be brought into contempt.

[11] The evidence in the case at bar clearly established that both appellants intentionally put themselves in a position where they obstructed or impeded access to the Shellmont Street entrance to the terminal on April 12, 2018 as part of a public demonstration. Their intent was to create an obstruction or impediment and to do so in public. There is no suggestion the impugned actions were not intentional. Both appellants knew they were breaching a court order. Ms. Smyth testified at trial as follows:

Q. it would seem to me that you must have anticipated you were going to get arrested on April 12th before you even arrived at the tank farm?

A. That's true.

Q. And you knew that your actions, when you were arrested - you were breaching the injunction?

A. Yes.

Q. [Y]ou decided that you were going to impede their access to the main gate because you thought you had a more important issue to draw [attention] to?

A. Yes.

[12] Ms. Massie testified as follows:

Q. You knew that your actions were breaching the injunction, the court order?

A. Yes, I understood that there was an injunction and that we were not supposed to be there and that we would get arrested for our actions, but I believed at that time that it was a civil matter and, therefore, I thought that it was almost like being parked in the wrong place.

[13] An order enjoining obstruction is breached when the obstruction or impediment is created, regardless whether there are persons then present who seek access: *Krawczyk; MacMillan Bloedel Ltd. v. British Columbia (Attorney General)* (1996), 22 B.C.L.R. (3d) 137, [1996] B.C.J. No. 730 (C.A.).

- [14] That is so, in my view, for two reasons. First, the presence of the obstruction or impediment may have the effect of dissuading individuals from seeking access. Second, as this Court pointed out in *MacMillan Bloedel*, and the trial judge pointed out in related proceedings (*Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 1070, at paras. 31-38), an order enjoining obstruction may be breached without physical conflict. The law does not impose an obligation on one who obtains an injunction for the purpose of protecting access to property to attempt to force a way through persons disobeying the injunction before the obstructers can be found in contempt of court. Justice Affleck properly observed in the case at bar (at para. 100): "To impose that obligation on Trans Mountain would be to create a risk of a confrontation or violence".
- [15] It was not necessary for the Crown to establish the appellants had completely obstructed access or made access to the work site or work area impossible. Were it otherwise, the Injunction Order would be completely ineffectual as no one individual could completely obstruct access to the sites described in the order.
- [16] In my view, the trial judge did not err in concluding the requisite mens rea, the intent to obstruct or impede a means of access to any one of the work sites or areas described in the Injunction Order as a public expression of defiance, was proved beyond a reasonable doubt in this case.

Breach of Section 2(b) Charter Rights

- [17] The appellants say the effect of the Injunction Order was to preclude them from exercising their right to engage in speech protected by s. 2(b) of the Charter. In my opinion, the trial judge correctly considered this an impermissible collateral attack on the Injunction Order.
- [18] It is settled law that, with limited exceptions, an order issued by a court must be obeyed unless it is set aside in a proceeding taken for that purpose. The contempt proceedings were not brought with the object of reversing, varying, or nullifying the order, and the constitutional challenge was therefore a collateral challenge: *R. v. Bird*, 2019 SCC 7 at para. 21.
- [19] The rule against collateral attacks has been consistently applied in criminal proceedings where the charge involves an alleged breach of a court order: *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *R. v. Domm* (1996), 31 O.R. (3d) 540 (C.A.) at 547, leave to appeal ref'd [1997] S.C.C.A. No. 78; *Krawczyk*.
- [20] The rule was found to preclude a challenge to the validity of an injunction in *Hayes Forest Services Limited v. Krawczyk*, 2006 BCCA 156 (also a criminal contempt case), where Justice Rowles, writing for the Court, said as follows:
- [71] The collateral attack doctrine has been applied repeatedly by this Court in criminal prosecutions wherein the accused has attempted to challenge the validity of a court order (recognizance or undertaking) which the accused was convicted of breaching.

Notwithstanding the Court's acknowledgement that the court order which had been breached may have been invalid or may have violated the Charter, this Court upheld the convictions finding that the challenges constituted impermissible collateral attacks on the court orders: *R. v. Conkin* (1998), 52 B.C.L.R. (3d) 315 (C.A.); *R. v. Pheiffer* (1999), 139 C.C.C. (3d) 552, 1999 BCCA 558; *R. v. Swanson*, 2000 BCCA 177; *R. v. Reed* (1994), 91 C.C.C. (3d) 481 (B.C.C.A.).

- [72] The rationale for the collateral attack doctrine in preserving the rule of law is engaged in this case. The appellant chose to ignore the court process and elected the route of a "flagrant defiance of an extant court order" in order to take "direct action" and not "capitulate".
- [21] The same can fairly be said in this case and is an answer to the argument that to some extent the position taken by the appellants with respect to the pipeline dispute that led to their protest was vindicated by the decision of the Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada* (Attorney General), 2018 FCA 153.
- [22] The appellants' counsel contends the judge's consideration of whether the Charter argument amounted to a collateral attack on the Injunction Order was insufficient, because the judge did not address the factors enumerated in *Maybrun Mines*, and the companion case, *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737, as applied in *Bird* at paras. 33-86 and referred to as the "Maybrun Factors". In response, the Crown points out, correctly in my view, that those factors are applicable in relation to appeals from administrative tribunals. The Court says as much at para. 25, where Justice Moldaver writes:
- [25] In *Maybrun*, the Court held that a different framework was warranted for collateral attacks on administrative orders, given the major differences that exist between court orders and administrative orders in relation to their legal nature and the institutions that issue them (para. 4). ...
- [23] In conclusion, in my opinion, the trial judge did not err in summarily dismissing the Charter challenge.

The Common Law Contempt Provision in the Criminal Code

- [24] Finally, I would not accede to the argument that s. 9 of the Criminal Code is an invalid delegation of the exclusive federal jurisdiction with respect to criminal law and procedure. The trial judge was correct to say that Parliament's exclusive jurisdiction does not compel it to codify the common law of crime. A Charter challenge to s. 9 founded upon the argument that fundamental justice requires codification of all crimes was rejected in *United Nurses*.

[25] Further, however, as the Court pointed out in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, criminal contempt is an offence sui generis. The power to prosecute for contempt is part of the "core or inherent jurisdiction" integral to the role of s. 96 courts, essential to the maintenance of their independence, and a power that cannot be removed from them "by either level of government, without amending the Constitution". As Chief Justice Lamer noted at para. 15:

[T]he power of superior courts to fully control their own process is, in our system where the superior court of general jurisdiction is central, essential to the maintenance of the rule of law itself.

[26] Therefore, not only is Parliament not required to codify all criminal law, the contempt power of s. 96 courts has a constitutional dimension that limits Parliament's power to do so. As Chief Justice Lamer later observed in *MacMillan Bloedel Ltd. v. Simpson* (at para. 22):

While it is indeed possible to conceive of a system where all of the contempt powers are transformed into codified offences, such a system would be antithetical to ours, where the superior court of general jurisdiction plays the central role.

[27] In my view, there is no merit to the appellants' submission that Parliament's preservation of the existing power, jurisdiction, or authority of courts, judges, justices or provincial courts to impose punishment for contempt, in s. 9 of the Criminal Code, is ultra vires.

[28] I would dismiss the appeals.

[29] FENLON J.A.: I agree.

[30] VOITH J.A.: I agree.

[31] WILLCOCK J.A.: The appeals are dismissed.

"The Honourable Mr. Justice Willcock"

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