

CANADA / JUDGMENT

Trans Mountain Pipeline ULC v. Mivasair

2020 BCSC 2246

COURT

Supreme Court of British Columbia

DECIDED

9 December 2020

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2020 BCSC 2246 Trans Mountain Pipeline ULC v. Mivasair

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Trans Mountain Pipeline ULC v. Mivasair,

2020 BCSC 2246

Date: 20201209

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 Abress), Gordon Cornwall, Thomas Chan, Laurel Dykstra,

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

Defendants

And

Attorney General of British Columbia

Intervenor

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

(Re James Leyden)

Counsel for the Crown:

M. Crisp

Counsel for James Leyden :

D. Fai

Place and Date of Trial:

Vancouver, B.C.

December 7-8, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 9, 2020

INTRODUCTION

- [1] On June 1, 2018, Justice Affleck of this Court granted an injunction to restrain persons from obstructing, impeding and interfering with the operations of the plaintiff, Trans Mountain Pipeline ULC ("Trans Mountain"), at its various Lower Mainland locations (the "Injunction"). One of those locations was Trans Mountain's tank farm facility in Burnaby, BC, defined in the Injunction as the "Burnaby Terminal" or "BT". For the purposes of this judgment, I will refer to the facility as the "Burnaby Terminal".
- [2] In this trial, the Crown alleges that James Leyden is guilty of criminal contempt of court in respect of the Injunction, arising from his presence and activities at the Burnaby Terminal on December 2, 2019.
- [3] The Crown alleges that Mr. Leyden publicly disobeyed the term of the Injunction that provides:
1. The Defendants, any other person having notice of this Order, are hereby restrained and enjoined from:
 - a) physically obstructing, impeding or otherwise preventing access by Trans Mountain, its contractors, employees or agents, to, or work in, any of the sites or work areas as set out below:

...

(ii) The Burnaby Terminal (the "BT"), as indicated in the map attached as Schedule "B"

[4] Mr. Leyden has pleaded not guilty.

THE EVIDENCE

[5] For the most part, the Crown's evidence consisted of two video recordings and photographs of the relevant events on December 2, 2019 and, on an earlier date, August 21, 2018.

[6] Randy Marquardt is one of Trans Mountain's regional security managers. He has responsibility for Trans Mountain's operations in the Lower Mainland. Mr. Marquardt gave evidence at this trial in support of the Crown's case, as did an RCMP officer, Cst. Dirk Pinto, who filmed the August 21, 2018 video.

[7] Mr. Leyden was the only defence witness.

August 21, 2018

[8] The Crown relies on video evidence from August 21, 2018 solely to establish that Mr. Leyden had notice and was aware of the Injunction and its terms.

[9] On August 21, 2018, another protest against Trans Mountain and its operations occurred on Bayview Drive in Burnaby. Bayview Drive leads to the entrance to another of Trans Mountain's properties known as the "Westridge Marine Terminal", another location protected by the Injunction. A portion of the video tape of that protest, as recorded by Cst. Pinto, was played at this trial.

[10] In the morning of August 21, 2018, a large group of people were gathered on Bayview Drive. Mr. Leyden is identifiable in the video. The video recording shows a number of people on the roadway and on the side of the road. Mr. Leyden can be seen moving between the roadway and the side of the road.

[11] An RCMP officer began playing a pre-recorded recitation of the Injunction over a loudspeaker. Around that time, a number of persons began forming a line across the roadway and setting up chairs behind those persons directly in front of this police officer.

[12] During the broadcasting of the preamble of the Injunction, Mr. Leyden can be seen on the side of the road but shortly thereafter, he joins the line of protestors on the road. Although Mr. Leyden moves off to the side of the road after a short time, he then again moves back onto the road with various objects, including a chair that he carries as he joins the line of protestors on the road. At some times, during the broadcasting of the remaining terms of the Injunction, Mr. Leyden moves in front of the line of protestors but in front of the loudspeaker held by the police officer. Most of the time, Mr. Leyden is seen standing with the line of other protestors facing the RCMP officers and, in particular, the officer holding the loudspeaker over which the Injunction is being played. At some later point, an RCMP officer hands copies of the Injunction to the protestors who have formed the line across the road, including Mr. Leyden.

- [13] Mr. Leyden is on the roadway or close by on the side of the road throughout the reading of the entire Injunction broadcast over the loudspeaker. The audio recording on the video indicates that it was played at a reasonably loud level. I accept Cst. Pinto's direct evidence that it was loud enough so that everyone at the scene could hear.

The Burnaby Terminal Intersection

- [14] The entrance to the Burnaby Terminal is located at an "L" shaped intersection where Shellmont Street (running east/west) and Underhill Avenue (running north/south) meet (the "Intersection"). Trans Mountain's property line is immediately north of the Intersection and runs east/west just to the north of Shellmont Street, as pictured on Schedule "B" to the Injunction.
- [15] Immediately north of the Intersection is Trans Mountain's driveway or entrance to the Burnaby Terminal. Signage on both sides of the driveway/entrance provide notice of the south property line of the Burnaby Terminal. There are two property signs visible in the video: on the west, facing Shellmont Street to the south; and, on the east, just to the north of a dirt road leading east from the Intersection. Trans Mountain's guardhouse is situated north of the Intersection and the property line and to the west of the driveway/entrance. A gate adjacent to the guardhouse at the end of the driveway/entrance allows ingress and egress from the Burnaby Terminal.
- [16] To the east of the driveway and gate area is a large white sign that gives notice of the Injunction. The sign reads in part:

Trans Mountain Property

Any person who obstructs access to this site is in breach of an injunction order and may be subject to immediate arrest and prosecution.

A copy of the order is posted at: transmountain.com. . . .

- [17] Between the Intersection and the gate, but within Trans Mountain's property line as part of the driveway, is a crosswalk. Trans Mountain's property also includes a trail that the public is allowed to use. The trail runs east/west just to the north of both the Intersection and the property line. The public are allowed to traverse the crosswalk when they are using the trail in order to cross Trans Mountain's driveway/entrance to the Burnaby Terminal.
- [18] As of December 2, 2019, there was a large stop sign just to the north of the trail and crosswalk area for vehicles that are exiting the gate of the Burnaby Terminal. In addition, there is a second smaller stop sign south of the crosswalk area just before the Intersection.
- [19] Mr. Marquardt confirms that this entrance is the main entrance to the Burnaby Terminal that allows ingress and egress for a variety of vehicles involved in Trans Mountain's operations. This includes construction vehicles, employees and various other equipment that come and go from the site. Mr. Marquardt's evidence was that this main entrance

accommodated larger construction vehicles to access the site. Mr. Marquardt also confirmed that lighter vehicles could use an entrance on the eastern part of the Burnaby Terminal situate near the regional office.

December 2, 2019

- [20] The events of December 2, 2019 were video recorded by Trans Mountain. The video is approximately one hour, 42 minutes long.
- [21] Around 1:11 p.m., Mr. Marquardt observed Mr. Leyden walking up Underhill Avenue toward the Intersection. Mr. Marquardt also observed Mr. Leyden conversing with a person who Mr. Marquardt understood was with the media. Mr. Marquardt and Mr. Leyden had a short discussion. These events occurred before those shown on the video.
- [22] Mr. Marquardt was able to positively identify Mr. Leyden given his numerous interactions with Mr. Leyden in the past. Mr. Marquardt's identification applied to pictures taken of Mr. Leyden that day on Underhill Avenue, Mr. Leyden as seen in the video recording and, finally, Mr. Leyden's presence in the dock.
- [23] The events recorded on the video recording at Trans Mountain's gate at the Burnaby Terminal can be summarized as follows (most times indicated are the time from the start of video, not actual time unless otherwise indicated):
- a) Various media types are huddled across the street from the Intersection with camera equipment on tripods trained on the Intersection. One person in that group is the same person who Mr. Marquardt saw earlier speaking to Mr. Leyden;
 - b) After ten minutes (video), a group of protestors (about nine in total) approach from the east along the trail. Mr. Leyden is part of that group;
 - c) The group moves across Trans Mountain's driveway at the Burnaby Terminal. A person from the group begins standing in the middle of the crosswalk, effectively blocking any vehicle from entering or exiting the Burnaby Terminal at the main gate. Mr. Leyden crosses the Intersection and joins the media types;
 - d) While a tent is being set up across the road from Trans Mountain's entrance, other persons congregate in the crosswalk area. Mr. Leyden is still with the media types across the road;
 - e) The video shows actual evidence of a truck attempting to access the Burnaby Terminal main gate, but is unable to do so given the presence of the protestors;
 - f) Around 1:38 p.m., Mr. Marquardt called the RCMP for assistance. After being put on hold, he reported the incident to the RCCP at 1:50 p.m. (both actual times);

- g) After 38 minutes (video), Mr. Leyden crosses the Intersection and walks toward the protestors. He immediately crosses in front of the line of protestors and then walks away from the Intersection to stand on the dirt road that runs to the east. Mr. Leyden can be seen bending down to tend to something;
 - h) At 54 minutes (video), Mr. Leyden moves into the Intersection and joins the group of protestors in the middle of the crosswalk. Almost immediately after he does so, another white truck attempts to enter the Burnaby Terminal entrance, but is unable to do so given the presence of the protestors, including Mr. Leyden;
 - i) Around 2:30 p.m. (actual time), while the protestors are still huddled on the crosswalk, two RCMP officers arrive on the scene. This occurs after the blockade is in place for about 50 minutes (video);
 - j) The RCMP officers engage with some of the protestors and then one officer leaves the group and converses with Trans Mountain personnel, including Mr. Marquardt;
 - k) With the two RCMP officers looking on, the protestors pass a pipe amongst themselves; at times, the pipe is passed to the officers who pass it along;
 - l) After about 13 minutes after the arrival of the RCMP officers, the protestors shake each other's hands and the hand of the female police officer;
 - m) After about 15 minutes after the arrival of the RCMP officers, the group of protestors and the female officer hold hands in a circle;
 - n) After a few minutes in the circle, the group breaks up and the protestors, including Mr. Leyden, move off to the east of the Intersection on the dirt road; and
 - o) Almost immediately, traffic beings moving in and out of the Burnaby Terminal main gate.
- [24] The blockade of the Burnaby Terminal main gate was in place for about one hour, 15 minutes. Mr. Leyden is part of that blockade, having been present on the Trans Mountain driveway and the crosswalk area for about 27 minutes of that time.
- [25] Mr. Marquardt states that he asked the RCMP officers to enforce the Injunction. Mr. Marquardt did not have any direct contact with the protestors, including Mr. Leyden, while they were blocking the main gate in the crosswalk area. Specifically, there is no evidence that Mr. Marquardt or any other Trans Mountain personnel asked them to leave.
- [26] There is also no evidence from the RMCP officers as to their discussions with the protestors, or Mr. Leyden specifically.

Defence Evidence

- [27] Mr. Leyden is Indigenous on his mother's side. After a difficult early life, Mr. Leyden was adopted by a non-Indigenous family. He describes that he was not exposed to his Indigenous culture as a child. However, he became involved in Indigenous culture in his early 30s after having moved to BC. He describes himself as a "Sundancer".
- [28] Mr. Leyden states that he became involved in the movement against the Trans Mountain pipeline project when he was asked by an elder to do so. He was asked to keep the peace and bring his teachings to the people. He was also asked to act as a "Watchman" watching over certain areas. He describes living in a structure near the Burnaby Terminal main entrance, known as the "Watch House". He says that his role was to provide supervision of Trans Mountain's activities and report any issues or concerns.
- [29] By December 2, 2019, Mr. Leyden concedes that he was well aware of the Injunction and its terms.
- [30] On December 2, 2019, Mr. Leyden intended to be at the protest at the Burnaby Terminal. His intention was to draw attention to what he described as Trans Mountain's illegal actions in shipping contaminated soil from the Burnaby site to Coquitlam. His initial activities at the Intersection involved speaking to the media and providing photographs to them.
- [31] Mr. Leyden says that he had no intention of breaching the Injunction. In fact, he says he wanted to avoid breaching the Injunction and he purposely did that by staying off Trans Mountain's property for most of the protest.
- [32] Mr. Leyden says he joined the protestors in the crosswalk area so that he could conduct a pipe ceremony. The video shows Mr. Gallagher passing a pipe among the protestors after he joins them in the crosswalk area. Mr. Leyden says that the RCMP officers were part of the ceremony in terms of passing the pipe along to the next person.
- [33] Mr. Leyden states that, based on his previous discussions with police officers, he understood that he would not be in breach of the Injunction if he was keeping the peace in a pipe ceremony. Mr. Leyden denies that he could have conducted the pipe ceremony on the grassy area beside the crosswalk area and, by doing so, not impede the traffic in and out of the Burnaby Terminal. He states that he was "required" to go where the people were, namely, the other protestors in the crosswalk area, and that it was the "norm" that pipe ceremonies were allowed on the roadway.
- [34] Mr. Leyden acknowledges that, on one earlier occasion in 2018, he was arrested at a Trans Mountain protest after he stood on the roadway. His arrest took place after the police officers had undertaken the "five step process" outlined in para. 12 of the Injunction.
- [35] Mr. Leyden says that no one from Trans Mountain asked him to leave. He understood that he was being allowed to conduct the pipe ceremony and that, after it concluded, he and the others would leave.

DISCUSSION AND FINDINGS

[36] I will address the issues below, and in doing so, address the Crown and defence submissions.

Criminal Contempt

[37] The law of criminal contempt was set out by the Supreme Court of Canada in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901. Justice McLachlin, later Chief Justice of Canada, wrote for the majority at 931-933 as follows:

It is my view that a clear distinction exists between civil and criminal contempt and that the law of criminal contempt is sufficiently certain to meet the requirements of fundamental justice. The distinction between civil and criminal contempt rests in the concept of public defiance that accompanies criminal contempt.

Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.

These same courts found it necessary to distinguish between civil and criminal contempt. A person who simply breaches a court order, for example by failing to abide by visiting hours stipulated in a child custody order, is viewed as having committed civil contempt. However, when the element of public defiance of the court's process in a way calculated to lessen societal respect for the courts is added to the breach, it becomes criminal. This distinction emerges from *Poje v. Attorney General for British Columbia*, [1953] 1 S.C.R. 516 at p. 527, per Kellock J.:

The context in which these incidents occurred, the large numbers of men involved and the public nature of the defiance of the order of the court transfer the conduct here in question from the realm of a mere civil contempt, such as an ordinary breach of injunction with respect to private rights in a patent or a trade-mark, for example, into the realm of a public depreciation of the authority of the court tending to bring the administration of justice into scorn. [Emphasis added.]

What the courts have fastened on in this and other cases where criminal contempt has been found is the concept of public defiance that "transcends the limits of any dispute between particular litigants and constitutes an affront to the administration of justice as a whole" The gravamen of the offence is not actual or threatened injury to persons or property; other offences deal with those evils. The gravamen of the offence is the open, continuous and flagrant violation of a court order without regard for the effect that may have on the respect accorded to edicts of the court.

[Underline Emphasis in original.]

[38] At 933, the Court in *United Nurses* set out the elements of criminal contempt:

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. On the other hand, if the circumstances leave a reasonable doubt as to whether the breach was or should be expected to have this public quality, then the necessary *mens rea* would not be present and the accused would be acquitted, even if the matter in fact became public. While publicity is required for the offence, a civil contempt is not converted to a criminal contempt merely because it attracts publicity, as the union contends, but rather because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt.

[39] *United Nurses* was recently accepted by the British Columbia Court of Appeal in this proceeding as the leading authority on the law of contempt: *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 267 at para. 22.

Notice of the Injunction

[40] In *Carey v. Laiken*, 2015 SCC 17, the Court stated that a party must be shown to have actual or inferred knowledge of the order:

[34] The second element is that the party alleged to have breached the order must have had actual knowledge of it: *Bhatnager*, at p. 226; *College of Optometrists*, at para. 71. 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 (*ibid.*).

[41] Paragraphs 9-10 of the Injunction address how notice of it is to be given. Paragraph 10(c) provides that notice of the Injunction may be given by the reading of the order, including over an amplification system. Paragraph 11(a) provides that a person is deemed to have knowledge and notice of the order if a copy of the Injunction is read to them, including over an amplification system.

[42] The Crown alleges that Mr. Leyden was well aware of the Injunction and its terms arising from his presence at the Westridge Terminal entrance on August 21, 2018, when a recording of the entire Injunction was played over a loudspeaker.

[43] Mr. Leyden concedes that, on December 2, 2019, he had actual notice of the Injunction and its terms when he attended at the Burnaby Terminal.

- [44] I am satisfied beyond a reasonable doubt that Mr. Leyden had actual notice of the Injunction and its terms, based on the Crown's video evidence from August 21, 2018 and Mr. Leyden's admission of that fact.

Actus Reus

- [45] The Crown must establish, beyond a reasonable doubt, that Mr. Leyden disobeyed the Injunction in a public way (United Nurses at 933). The Injunction prohibits persons from:
- ... physically obstructing, impeding or otherwise preventing access by Trans Mountain, its contractors, employees or agents, to, or work in, ... [t]he Burnaby Terminal ...
- [46] The Crown alleges that, on December 2, 2019, Mr. Leyden physically obstructed, impeded and prevented access to the Burnaby Terminal by his presence on the driveway, including in the crosswalk area.
- [47] The video evidence conclusively shows Mr. Leyden's presence in the crosswalk area, an area that Mr. Marquardt confirms is owned by Trans Mountain and is noted as a prohibited site area in Schedule "B" of the Injunction. In addition, Mr. Marquardt's uncontradicted evidence, which I accept, is that Mr. Leyden's presence in the crosswalk area physically obstructed, impeded and prevented access by Trans Mountain's personnel and contractors to gain access to and exit from the Burnaby Terminal. This blockading included preventing specific vehicles from doing so, as seen on the video during Mr. Leyden's time in the crosswalk area. Finally, it is clear that Mr. Leyden's actions in the face of the Injunction were done "in a public way" given the public who viewed his actions, including the media types.
- [48] Mr. Leyden's sole argument at this trial is that the specific terms of the Injunction, if not its "spirit", required that someone first ask him to leave the area and provide him an opportunity to leave, before he would be breaching the Injunction.
- [49] Essentially, Mr. Leyden argues that an interpretation of the Injunction is that this "request to leave" or, as I would describe it, the warning, must be conveyed to any person before any breach could occur sufficient to constitute the actus reus of criminal contempt under the Injunction. Mr. Leyden submits that, if someone is not asked to leave the areas noted in the Injunction, the Crown has failed to prove the actus reus of the offence. In the alternative, Mr. Leyden submits that the Injunction is ambiguous with respect to whether a person must be asked to leave and, in that event, the ambiguity should be resolved in his favour.
- [50] In Carey, the Court discusses what clarity is required in the order before criminal contempt can be established:
- [33] The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done": Prescott-Russell, at para. 27; Bell ExpressVu, at para. 28, citing with approval Jaskhs Enterprises Inc. v. Indus Corp., 2004 CanLII 32262 (Ont. S.C.J.), at para. 40. This requirement of clarity ensures that a party will not be found in contempt where an order is unclear: Pro Swing, at para. 24; Bell ExpressVu,

at para. 22. 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; if it incorporates overly broad language; or if external circumstances have obscured its meaning: *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, 326 D.L.R. (4th) 463, at para. 21.

[Emphasis added.]

[51] Another helpful authority that discusses the clarity requirement is *Gurtins v. Goyert*, 2008 BCCA 196. *Gurtins* supports Mr. Leyden's assertion that he is entitled to the most favourable interpretation of the order:

[14] . . . [A]n order alleged to have been breached must be precise and unambiguous in its direction, and the alleged contemnor is entitled to the most favourable interpretation of it: *Hama v. Werbes*, 2000 BCCA 367, 76 B.C.L.R. (3d) 271 at para. 8. . . .

[15] 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. As stated in *Arlidge, Eady & Smith on Contempt* (London: Sweet & Maxwell, 2005) (at para. 12-55), "[a]n order should be clear in its terms and should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation". See also: *Northwest Territories Public Service Association v. Commissioner of the Northwest Territories* (1979), 107 D.L.R. (3d) 458 (N.W.T.C.A.) at 478, 479; *In re A Bankrupt*; *Rudkin-Jones v. The Trustee of the Property of the Bankrupt* (1965), 109 Sol. Jo. 334 (C.A.).

[16] A concise and most helpful summary of the principles applicable to the interpretation of an order in contempt proceedings is found in *R. (Mark Dean Harris) v. The Official Solicitor to the Supreme Court*, [2001] EWHC Admin 798 (Q.B.D.), wherein Mr. Justice Munby stated (at para. 68):

(i) No order will be enforced by committal unless it is expressed in clear, certain and unambiguous language. So far as this is possible, the person affected should know with complete precision what it is that he is required to do or to abstain from doing.

(ii) It is impossible to read implied terms into an injunction.

(iii) An order should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation. Looking only at the order the party enjoined must be able to find out from the four walls of it exactly what it is that he must not do.

(iv) It follows from this that, as Jenkins J said in *Redwing Ltd v Redwing Forest Products Ltd* (1947) 177 LT 387 at p 390,

a Defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question.

[Underline emphasis in original.]

- [52] The principles from Gurtins were further discussed in *R. v. Dhillon*, 2019 BCCA 373. In *Dhillon*, the court discusses that the order is to be interpreted in context, without reference to external matters and with a view to the ordinary meaning of the words used:
- [21] 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: *Oak Bay Marina Ltd. v. Haida Nation* (1995), 17 B.C.L.R. (3d) 229 at para. 12 (C.A.); *Hama v. Werbes*, 2000 BCCA 367 at para. 8; *Gurtins* at para. 14. Where a finding of contempt is founded on the breach of a court order, that order must state clearly and unequivocally what is required or prohibited to ensure that an individual will not be convicted of contempt if the court order is vague: *Carey* at para. 33.
- [22] It is an error for a judge to look beyond the four corners of an order, including at transcripts from relevant court proceedings, to decide what legal obligations the order creates. Anyone 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. Terms cannot be implied or read into an injunction order: *Gurtins* at paras. 14-16.
- [23] A person alleged to have committed criminal contempt is entitled to the most favourable interpretation of the order alleged to have been breached: *R. (Mark Dean Harris) v. The Official Solicitor to the Supreme Court*, [2001] EWHC Admin. 798 at para. 68 (Q.B.D.), cited in *Gurtins* at para. 16. This does not mean, however, that the alleged contemnor is entitled to have the courts contort the language of an order to narrow its ambit. The court will interpret the order in accordance with its ordinary meaning, taking into account its context. It is only within those limits that the alleged contemnor is entitled to the most favourable interpretation of the order: *Fraser Health Authority v. Schmidt*, 2015 BCCA 72 at para. 4.
- [53] The Crown does not suggest that its interpretation of the Injunction requires any reference to external material. Nor does the Crown allege that any terms should be implied into the Injunction.
- [54] Both the Crown and Mr. Leyden rely on the Injunction itself. Mr. Leyden contends that his interpretation should be accepted; in the alternative, Mr. Leyden contends that the Injunction is ambiguous as to whether he had to be asked to leave before he could be found in breach of its terms.

- [55] Following from the comments in Dhillon, I have carefully reviewed the entire Injunction in light of the context in which it was granted.
- [56] I agree with Mr. Leyden's suggestion that the Injunction was designed to allow people to express their views on this controversial project by way of peaceful protest. That is exactly what para. 14 of the Injunction expressly states with the caveat that the protest must also be lawful. However, the Injunction is also clear that any protest activities - whether peaceful or not - are barred from Trans Mountain's property, including the Burnaby Terminal. This would include any such activities that have the effect of obstructing, impeding or preventing access to those Trans Mountain sites.
- [57] The operative provisions of the Injunction are found in paragraphs 1-3. Paragraph 1 of the Injunction specifically prohibits obstruction, impeding and otherwise preventing access to these work sites. Paragraph 2 of the Injunction specifically prohibits anyone from coming within five meters of the property lines of these sites, including the Burnaby Terminal (called the "Buffer Zones"). Paragraph 3 of the Injunction carves out exceptions from the Buffer Zone areas.
- [58] There is absolutely no reference in paragraphs 1-3 of the Injunction to any requirement that a person acting contrary to those provisions must be asked to leave. The Injunction provides for an absolute prohibition, subject to other terms of the Injunction.
- [59] When considering the Injunction as a whole, I do not consider that the other provisions of the Injunction detract from the clear requirements as to what a person should not do, as set out in paragraphs 1-3:
- a) Paragraph 6 refers to a police officer's operational authority where that officer has reasonable and probable grounds to believe that a person is contravening the Injunction in terms of making any decision to arrest that person;
 - b) Paragraphs 7-8 confirm the authority of police officers in dealing with persons after arrest;
 - c) Paragraphs 9-11 address the giving of notice of the Injunction. Paragraph 10(c) confirms the actual means of notice by which Mr. Leyden obtained notice (reading of the order). Paragraph 11 addresses how notice of the Injunction will be deemed to have been given to a person. That deeming occurs when a person is shown or read a copy of the Injunction and they are "provided a brief opportunity to comply with this Order";
 - d) Leaving aside the unidentified basis for Mr. Leyden's admission that he had actual notice of the Injunction prior to December 2, 2019, he was certainly deemed to have notice on August 21, 2018 when it was read to him over the loudspeaker and he was then given a brief opportunity to comply;
 - e) I fail to see the relevance of paragraph 11 to the current circumstances. In August 2018, Mr. Leyden was deemed to have notice of the Injunction and he was given an opportunity to comply. By December 2, 2019, 16 months after Mr. Leyden was deemed to have received

notice, he saw fit to block access to the Burnaby Terminal by his presence in the crosswalk area. By December 2, 2019, Mr. Leyden acknowledges being well aware that obstruction of the Burnaby Terminal was prohibited, including by the presence of protestors in the crosswalk. It would be redundant to give Mr. Leyden further time to comply in those circumstances;

- f) I see nothing in paragraph 11 to detract from the clear provisions of paragraph 1 of the Injunction that prohibited his actions. Paragraph 1 makes absolutely no reference to any requirement that a person must be asked to leave and that the person be given an opportunity to leave;
 - g) Paragraph 12 addresses the "five step process" that police officers will follow before arresting a person:
 - i. Paragraph 12(a) and (b) requires that the officer ask the person to cease the unlawful act;
 - ii. Paragraph 12(c) requires that the officer caution the individual that, if they continue to act unlawfully, they will be arrested and could face charges; and
 - iii. Paragraph 12(d) requires that an officer confirm that the person is aware of that jeopardy; and
 - h) Notwithstanding, paragraph 12 does not limit the clear provisions of paragraphs 1-3 of the Injunction. To the contrary, the preamble to paragraph 12 states that it applies "without limiting the foregoing", referring to previously stated terms of the Injunction, which would include paragraphs 1-3. The arrest procedure is simply an additional measure of enforcement that may apply under a police officer's operational discretion.
- [60] The history of the criminal contempt aspect of these proceedings has generally arisen in the context of the arrest of various individuals. In that event, the "five step process" was relevant in most cases.
- [61] There have been, however, exceptions. In two applications concerning Terry Christianson, Mr. Christianson was arrested after he had breached the property boundaries of Trans Mountain's properties and then entered the work sites in violation of the Injunction:
- a) Mr. Christianson was convicted of criminal contempt with respect to his arrival at the Westridge Terminal (Trans Mountain Pipeline ULC v. Mivasair (Unreported, October 25, 2019)). Justice Affleck made no mention in his reasons of the "five step process" having been undertaken prior to Mr. Christianson's arrest; and
 - b) Mr. Christianson was also convicted of criminal contempt after his entry into the Burnaby Terminal. He was arrested by the RCMP without the RCMP having undertaken the "five step process" (Trans Mountain Pipeline ULC v. Mivasair, 2019 BCSC 2122). In my reasons on October 25, 2019, I found that whether the "five step process" was a requirement must be considered in the context of Mr. Christianson's earlier and continuing breach of the Injunction:

- [70] I find as a fact that, Cst. Rolland did not follow the 5-step process during his interaction with and later arrest of Mr. Christenson. However, I agree with the Crown, that, in the circumstances relating to Mr. Christenson, it would have been a process without meaning. The 5-step process was clearly intended to provide some warning to persons of their imminent arrest should they choose to continue to act unlawfully. Here, Mr. Christenson had already been acting unlawfully in breach of the Injunction for some 40-45 minutes before the arrival of Cst. Rolland. At that point, there was little utility in attempting to warn Mr. Christenson of the consequences of his actions, given that the elements of criminal contempt were complete and Mr. Christenson, knowing of his imminent arrest, was fully cooperating in proceeding to the police vehicle to meet his fate.
- [71] I do not consider the failure of Cst. Rolland to undertake the 5-step process as fatal to the validity of Mr. Christenson's arrest in these circumstances. To consider otherwise would be to allow form to triumph over substance. A reasonable interpretation of the Injunction still would allow for an arrest of an offender such as Mr. Christenson in these circumstances.
- [Emphasis added.]
- [62] As the Crown argues, the Injunction recognizes that persons may be charged with breaching the order even if no arrests are made by police officers, just as in other criminal cases. The fact that enforcement measures may be taken by police officers by arrest does not detract from the fact that, prior to that time, a person was in fact in breach of the Injunction.
- [63] Arguments similar to those raised by Mr. Leyden were also advanced by Stacy Gallagher in this proceeding (*Trans Mountain Pipeline ULC v. Mivasair* (Unreported, November 13, 2020)). Mr. Gallagher argued that, despite blocking access to the Burnaby Terminal, he was not "at risk" under the Injunction unless the police had undertaken the "five step process". I convicted Mr. Gallagher after rejecting that and other arguments (paras. 131-132). At para. 133, I also rejected Mr. Gallagher's contention that he was not in breach unless he refused to leave after someone asked to him to leave.
- [64] In my view, Mr. Leyden's arguments fly in the face of the clear terms and import of the Injunction. To countenance such arguments would invite the Court to see ambiguity in the Injunction that simply doesn't exist. Who is to ask a person to leave? How much time was to be given before a person is in breach? These issues simply do not arise upon a consideration of the express terms of paragraphs 1-3 of the Injunction.
- [65] In my view, such an interpretation of the Injunction would invite protestors to behave in exactly the manner that the order seeks to prohibit. My comments in the November 13, 2020 reasons, equally apply to Mr. Leyden's arguments:

- [131] I reject the defence suggestion that the protestors were entitled to disobey the Injunction so long as they did so before any arrest. To allow this argument to succeed would invite the type of guerilla tactics that Mr. Gallagher and his cohorts chose to use on these occasions. It makes little sense to have an Injunction in place if the breach can occur and, just before the authorities arrive, the offenders scurry away and flee into the adjoining neighbourhood without consequences.
- [66] Mr. Leyden emphasizes that the RCMP officers did not arrest him following their arrival at the Burnaby Terminal. However, the Injunction does not require that a person be arrested under the "five step process". Nor does the Injunction require that a police officer ask a person to leave before this Court's order can be said to have been breached. It is ultimately up to this Court, not the RCMP, to uphold the authority of this Court through its orders.
- [67] It would also be anomalous that a litigant whose property is protected by an injunction would be required to warn every person who might act in a manner prohibited by that injunction. That litigant is entitled have confidence that the Court's order will have effect from pronouncement and that it will be enforced, possibly with police arrests, but always in the end by the Court.
- [68] As Mr. Marquardt stated, it was not his job as one of Trans Mountain's security managers to enforce the Injunction; that's why he called the RCMP and that's why Trans Mountain relies on the authority of this Court to enforce its orders.
- [69] The process suggested by Mr. Leyden would devolve into a thicket of evidentiary issues about who told who to leave, what was said and whether the person understood it as a request to leave. More concerning is that Mr. Leyden's arguments would allow protestors to thumb their nose at the Injunction and the authority of the Court until a litigant engages with people who may not be peaceful before securing the benefits of the order. Worse yet, it would, as I stated above, allow for protestors to engage in guerilla tactics without consequence where they flee before being told to leave. This is not the intention of the Injunction.
- [70] The clear terms of the Injunction provide notice to persons as to what they are not entitled to do. Mr. Leyden was clearly aware of the prohibition, having taken care most of the time on December 2, 2019 not to block Trans Mountain's access to the site. His vague personal and self-interested "understanding" about when he would be in jeopardy under the Injunction is unsupportable in the face of its clear terms.
- [71] I am satisfied beyond a reasonable doubt that Mr. Leyden acted in violation of paragraph 1(a) (ii) of the Injunction on December 2, 2019 when he was physically present on the Trans Mountain driveway at the main gate of the Burnaby Terminal. I am also satisfied beyond a reasonable doubt that Mr. Leyden's breach of the Injunction was done "in a public way".
- [72] I conclude that the Crown has proven the actus reus of criminal contempt beyond a reasonable doubt on Mr. Leyden's part in these circumstances.

Mens Rea

[73] The Crown must establish, beyond a reasonable doubt, that Mr. Leyden disobeyed the Injunction in a public way with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court.

[74] In *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 1247 at para. 89, Affleck J. cited Carey at para. 38 for the required "intent" to establish civil contempt:

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 . . .

At para. 90, Affleck J. added that the "distinguishing feature of criminal contempt is knowledge or recklessness that public disobedience will tend to lower the authority of the court".

[75] Mr. Leyden states that it was never his intention to disobey the Injunction and that he was in the crosswalk area simply to conduct the pipe ceremony. Nevertheless, Mr. Leyden concedes, subject to the Crown proving the necessary *actus reus*, that the Crown has proven beyond a reasonable doubt that he intentionally acted in a manner that was in breach of the Injunction, in satisfaction of the Carey test.

[76] Mr. Leyden's conduct supports the finding that he knew that his public disobedience would tend to lower the authority of the court. In the alternative, I find that Mr. Leyden was reckless in that regard. Mr. Leyden knew that his actions were public. While standing in the crosswalk area, he stood with other protestors while in full view of Trans Mountain personnel and the people streaming past in the continuous traffic at the Intersection. Mr. Leyden also engaged directly with the media before moving to the crosswalk while they continued to observe the protest. An open and public defiance of a court order will tend to depreciate the authority of the court. It can therefore be inferred that Mr. Leyden was at least reckless as to whether the authority of the court would be brought into contempt: *United Nurses* at 933.

[77] I find beyond a reasonable doubt that Mr. Leyden had the intention to stand on Trans Mountain's property to obstruct, impede and block access and with knowledge that his public defiance would tend to diminish the authority of the court and its orders; I find in the alternative that he was reckless in that the latter respect. The Crown has satisfied the *mens rea* element of the offence beyond a reasonable doubt.

CONCLUSION

[78] The Crown has met its burden in proving its case against Mr. Leyden beyond a reasonable doubt. I find Mr. Leyden guilty of criminal contempt of court arising from his actions on December 2, 2019 at the Burnaby Terminal.

"Fitzpatrick J."

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