

CANADA / JUDGMENT

## Trans Mountain Pipeline ULC v. Mivasair

2020 BCSC 2301

COURT

Supreme Court of British Columbia

DECIDED

20 August 2020

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2020 BCSC 2301 Trans Mountain Pipeline ULC v. Mivasair

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Trans Mountain Pipeline ULC v. Mivasair,

2020 BCSC 2301

Date: 20200820

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

Intervener

Before: The Honourable Justice Fitzpatrick

Oral Ruling re Judicial Notice (re Stacy Gallagher)

Counsel for Crown Counsel:

M.R. Ruttan

D.J. Pruim

Counsel for Stacy Gallagher:

S.J. Rauch

Place and Date of Trial:

Vancouver, B.C.

August 10-14, 19-20, 2020

Place and Date of Ruling:

Vancouver, B.C.

## August 20, 2020

- [1] THE COURT: This trial began on Monday, August 10, 2020 and involves criminal contempt allegations against Stacy Gallagher. The Crown allege that Mr. Gallagher wilfully disobeyed an injunction granted by Justice Affleck in this proceeding on three separate occasions, namely on November 15, December 2 and 18, 2020. That injunction prohibited certain interference of the operations of the plaintiff, Trans Mountain Pipeline ULC, with respect to various of its operations in the Lower Mainland, including what is known as the Burnaby Terminal, or "tank farm", located in Burnaby, BC.
- [2] On August 12, 2020, an issue arose concerning the defence counsel's understanding or assertion that the Burnaby Terminal, and in particular, the crosswalk/driveway that is the particular location where Mr. Gallagher's actions are alleged to have taken place, were on unceded Indigenous territory. In an attempt to assist Ms. Rauch in her research of the applicable law in the matter of judicial notice (I believe it was on Thursday, August 13, 2020), I provided her with an excerpt of various authorities: an excerpt from Sopinka and Lederman, *The Law of Evidence in Canada*, from p. 1268; *R. v. Spence*, 2005 SCC 71; *R. v. Bornyk*, 2015 BCCA 28; and *R. v. Nelson*, 2020 BCCA 204.
- [3] We have finally got to the stage of this trial where Ms. Rauch has brought forward not an "application" but simply a "request" that the Court take judicial notice of what is alleged to be a fact, namely, that the driveway is on unceded Indigenous territory. This more formal request, as she calls it, arises from the Crown's refusal to concede that as a fact in these proceedings.

- [4] I have now heard submissions from the defence and the Crown on this particular issue.
- [5] I am satisfied that the relevant test is set out in *Spence* and is commonly referred to as the "Morgan criteria", as was adopted in *R. v. Find*, 2001 SCC 32. In para. 53 of *Spence*, the Court cites the criteria from para. 48 of *Find* that suggest that judicial notice can be applied in limited circumstances:

Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy . . .

- [6] Before I get to the application of the test, Ms. Rauch has made substantial submissions about trial fairness. It goes without saying that this trial must be conducted in a fair manner. That is particularly so with respect to Mr. Gallagher, who is entitled to a fair trial and who is entitled to make full answer and defence.
- [7] Trial fairness is a fundamental aspect of any criminal proceedings and this trial is no different. However, trial fairness is not a one-way street. Rather, it cuts both ways and trial fairness also applies to the Crown, who is a full participant in these proceedings and who represents broader societal interests for the purpose of criminal proceedings, such as these.
- [8] As noted in *Find* and *Spence*, the concept of judicial notice is to dispense with the need for proving that fact, by evidence under oath. It avoids an important truth-seeking function in this Court where the parties are generally entitled to test evidence, not only in terms of its relevance (which is certainly a matter that arose in this case with respect to the alleged fact) but also test whether it is a fact or not.
- [9] Under the first part of the *Spence* test, I have to ask myself "Is it notorious or generally accepted?" The Crown acknowledges that it is obvious that Indigenous people occupied some parts of BC before the Europeans arrived on the shores of what is now Canada. The Crown refers to the fact that there are some treaties, but says that it cannot be said that it is "notorious" that Burnaby and, in particular, the driveway of the Burnaby Terminal is in fact something that is unceded, let alone traditional Indigenous territory.
- [10] I agree with the Crown. I do not agree that this alleged fact is "notorious" in the sense that Ms. Rauch suggests. Her repetition of a statement that the driveway is on unceded Indigenous territory does nothing to advance the debate and provide the Court with any assurance that it is "notorious".
- [11] Under the second part of the *Spence* test, I have to ask myself "Is this alleged fact capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy?"

- [12] Ms. Rauch has referred to a number of matters. She refers to repeated statements by various provincial and federal governments officials and their various speeches. Indeed, I myself have heard many of them. I am not aware as to whether those statements are tied to a particular location or not; nor am I aware of any particular statements relating to the Burnaby Terminal driveway or anywhere in or near in the Burnaby Terminal. We often hear these days from the Minister of Health, who apparently is making these same types of statements. I myself have not heard them but I will accept that they have been made. In any event, I hardly think that statements by politicians, which may be made for any number of reasons and not for the purpose of court proceedings, can be taken as a readily accessible source of indisputable accuracy.
- [13] Ms. Rauch also refers to various statements on the City of Burnaby website. She refers to a certain resource guide from the Burnaby Village Museum entitled "Indigenous History in Burnaby", that appears to be from the mid-2019 time frame. My comments as to the statements made by federal and provincial politicians would equally apply to officials of the City of Burnaby, who are no less politicians, although obviously from a different jurisdictional aspect.
- [14] Accordingly, I find that Ms. Rauch has not pointed to any "source of indisputable accuracy" that would allow the Court to conclude that this alleged fact should be accepted as true without proof.
- [15] Other comments found in Spence bear comment.
- [16] The Crown refers to the portion of Spence which discusses the difficulties posed by the proposition of Professor Thayer towards accepting a more robust acceptance of judicial notice. One of those difficulties relates to trial fairness:
- [51] Thayer's approach to judicial notice has its role but I do not think it helps us to solve the issue posed by the African Canadian Legal Clinic. There are at least three difficulties standing in its way. Firstly what "everybody knows" may be wrong. Until Parks, "everybody" knew the solemnity of a criminal trial and careful jury instructions from the judge meant there was little possibility that potential jurors in Toronto would be influenced by racial prejudice (Doherty J.A., at p. 360 of Parks, cites a number of trial decisions where race-based challenges for cause were rejected for that reason). Common law judges in early Tudor England would presumably have taken judicial notice of the "fact" that the sun revolves around the earth. Secondly, there is the problem of trial fairness. Where do these facts come from and how are the parties going to address them? How can parties who are prejudiced by the taking of judicial notice rebut what "everybody" knows unless a plausible source is put to them for their comment and potential disagreement? (See R. v. Parnell (1995), 98 C.C.C. (3d) 83 (Ont. C.A.), at p. 94.) A third problem is that judges occasionally contradict each other about some "fact" that "everybody" knows, even on the same court in the same case. Thus, in Campbell v. Royal Bank of Canada, [1964] S.C.R. 85, Martland and Ritchie JJ., dissenting, pointed out, at p. 91, that the majority and dissenting judges in the court below had taken

judicial notice of flatly contradictory facts, namely whether it was usual or unusual to find water in substantial quantities on the floor of a Manitoba bank in wintertime. More dramatically, in *Clinton v. Jones*, 520 U.S. 681 (1997), where the issue before the Supreme Court of the United States was whether a sitting President is entitled to automatic immunity during his term of office with respect to private conduct prior to his election to the presidency, the court stated with confidence with respect to the Paula Jones affair that "it appears to us highly unlikely to occupy any substantial amount of petitioner's time" (p. 702).

[Emphasis added.]

[17] Ms. Rauch seizes on the emphasis above and then reverses it to the point of asking "what prejudice could the Crown possibly suffer if judicial notice is taken?"

[18] The answer to Ms. Rauch's question is that the Crown can be very prejudiced, as Crown counsel have clearly indicated by their opposition to the Court taking judicial notice. Prejudice could possibly arise in a trial where a fact is put forward which the party does not see as uncontroversial, but the opposing party, potentially the Crown here, could be prejudiced by the taking of judicial notice.

[19] On the other hand, the defence is not prejudiced in the sense that defence counsel has known since late last week that I would not simply be taking judicial notice of that "fact". She was advised that the Court excepted that she would be in a position to proceed with this trial to prove whatever facts Mr. Gallagher needed as part of his defence to this case. I make no further comment about that matter.

[20] One other point arises from *Spence* in the context of the Morgan criteria:

[61] To put it another way, the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria. Thus in *Find*, the Court's consideration of alleged juror bias arising out of the repellant nature of the offences against the accused did not relate to the issue of guilt or innocence, and was not "adjudicative" fact in that sense, but nevertheless the Court insisted on compliance with the Morgan criteria because of the centrality of the issue, which was hotly disputed, to the disposition of the appeal. While some learned commentators seek to limit the Morgan criteria to adjudicative fact (see, e.g., *Paciocco and Stuesser*, at p. 286; *McCormick*, at p. 316), I believe the Court's decision in *Find* takes a firmer line. I believe a review of our jurisprudence suggests that the Court will start with the Morgan criteria, whatever may be the type of "fact" that is sought to be judicially noticed. The Morgan criteria represent the gold standard and, if satisfied, the "fact" will be judicially noticed, and that is the end of the matter.

[Emphasis added.]

- [21] Ms. Rauch has stated time and time again that this alleged fact is dispositive of the seminal issues in this action, namely, whether the Crown has proven the actus reus and the mens rea with respect to Mr. Gallagher's alleged breach of the injunction. To that point, the nature of this alleged fact takes on a very critical aspect and, as Ms. Rauch asserts, provides significant context in which the Court would even approach the judicial notice issue.
- [22] Finally, the Crown refers to another comment in Spence:
- [65] When asked to take judicial notice of matters falling between the high end already discussed where the Morgan criteria will be insisted upon, and the low end of background facts where the court will likely proceed (consciously or unconsciously) on the basis that the matter is beyond serious controversy, I believe a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy.
- [Emphasis added.]
- [23] Again, I do not find that this alleged fact is something that is necessarily answered only one way by "reasonable people". This alleged fact goes very much towards disposition of the central issue in this matter. I do not find that the sources referred to by Ms. Rauch provide the necessary reliability and trustworthiness that the Court is required to consider on the issue of judicial notice.
- [24] Finally, Ms. Rauch refers to the broader Indigenous issues that are faced by our society. She refers to the Truth and Reconciliation Commission and the recommendations that are found in its report, including those relating to the judiciary. She refers to the United Nations Declaration on the Rights of Indigenous Peoples, and in particular, Articles 25 and 26. I do not doubt that those are important matters in the context of the broader discourse that is taking place in Canadian society with respect to these very important issues. Having said that, the fact that those discussions are taking place does not give a litigant such as Mr. Gallagher a pass in respect of a very important part of the trial process, namely proving a fact that he says is important to his defence and that the Crown might wish to challenge.
- [25] Accordingly, I decline to accede to the defence's request to take judicial notice that the Burnaby Terminal driveway is either "unceded indigenous territory" or "Indigenous territory".
- [26] I wish to make one further point on the evidence.
- [27] Ms. Rauch has directed questions on this issue to various Crown witnesses, who are by my recollection, Mr. Marquardt and Mr. Bond. The defence has also led evidence from Mr. Gallagher. He stated in his evidence, as I will paraphrase, that in his view the driveway is unceded territory. He further said something to the effect that "Everybody knows that" the area is unceded territory. Mr. Gallagher's evidence was challenged by the Crown to some

extent on cross-examination. Obviously, all of that evidence remains in the record. The Crown and the defence may make submissions on that evidence at the end of the trial. Where that issues goes I do not know because we have not yet finished with the defence evidence, if there is any more to be introduced, and we have not yet embarked upon final submissions. I want to make it clear that my ruling does not prevent the defence and the Crown from making final submissions concerning that evidence.

"Fitzpatrick J."

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