

CANADA / JUDGMENT

Trans Mountain Pipeline ULC v. Mivasair

2020 BCSC 2304

COURT

Supreme Court of British Columbia

DECIDED

21 August 2020

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2020 BCSC 2304 Trans Mountain Pipeline ULC v. Mivasair

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Trans Mountain Pipeline ULC v. Mivasair,

2020 BCSC 2304

Date: 20200821

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 Justice Fitzpatrick

Oral Ruling

(Evidence re Unceded Territory at Burnaby Terminal)

Counsel for the Crown:

M.R. Ruttan

D. Pruim

Counsel for the Defendant, Stacy Gallagher:

S.J. Rauch

Place and Date of Hearing:

Vancouver, B.C.

August 12 and 20, 2020

Place and Date of Ruling:

Vancouver, B.C.

August 21, 2020

- [1] THE COURT: Last Wednesday, the defence raised the issue as to whether or not the driveway of the Burnaby Terminal was or was not on unceded Indigenous territory, as that phrase has been used.
- [2] Yesterday afternoon, I ruled on the defence request that I take judicial notice of that fact. I declined to take judicial notice, based on the applicable principles relating to judicial notice: see *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCSC 2301.
- [3] My earlier ruling has led to defence counsel advising the Court today that Ms. Rauch still intends to seek to introduce evidence towards that alleged fact. Ms. Rauch indicated that she is not in the position, if such evidence is to be introduced, to proceed with respect to that matter today. Yesterday, she referred to the need to seek further funding from the Legal Aid for Stacy Gallagher.
- [4] In any event, with Ms. Rauch confirming this morning that her intention is to seek to call such evidence, the Crown has in turn has raised an objection on the issue of relevance and therefore, admissibility of such evidence. The Crown's submissions are that the evidence that the defence is seeking to introduce at this trial is a collateral attack.
- [5] During the Crown's submissions, Mr. Ruttan referred me to *R. v. Bird*, 2019 SCC 7 as follows:

A. General Principles Regarding Collateral Attacks

[21] A collateral attack is an attack on an order "made in proceedings other than those whose specific object is the reversal, variation or nullification of the order" (*Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at para. 60). This Court has recognized a general rule against collateral attacks on court orders: with limited exceptions, an order issued by a court must be obeyed unless it is set aside in a proceeding taken for that purpose (*Maybrun*, at paras. 2-3; *R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 71). In *Maybrun*, the Court held that a different analysis was warranted for collateral attacks on administrative orders. As I will explain, however, similar principles underlie both approaches.

(1) Collateral Attacks on Court Orders

[22] There is a powerful rationale for the general rule precluding collateral attacks on court orders:

... the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal

(*Maybrun*, at para. 2, quoting *Litchfield*, at p. 349)

As this Court noted in *Maybrun*, the rule against collateral attacks on court orders has been consistently applied in criminal proceedings where the charge involves an alleged breach of a court order (*Maybrun*, at para. 3, citing *R. v. Domm* (1996), 31 O.R. (3d) 540 (C.A.), at p. 547, leave to appeal refused, [1997] 2 S.C.R. viii). The rule has also been applied where the accused alleges that the court order is unconstitutional. In *Domm*, Doherty J.A., writing for the Ontario Court of Appeal, held that "[e]ven orders that are constitutionally unsound must be complied with unless set aside in a proceeding taken for that purpose" (p. 549). As this Court explained in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, "[i]f people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them" (para. 51, citing *McLachlin J.* (as she then was), in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at p. 974).

[23] The doctrine of collateral attack, however, recognizes that people must have an effective means to challenge court orders, particularly when those orders are alleged to violate constitutional rights. In *Domm*, Doherty J.A. clarified that "where constitutional rights are implicated, the court must be particularly concerned about the availability of an effective remedy apart from collateral attack when considering whether" to allow a collateral attack (p. 552). Where a collateral attack is the only way to effectively challenge a court order, a

collateral attack will be permitted (see Domm, at pp. 553-54).

- [6] Accordingly, the doctrine of collateral attack remains very much a potential issue in respect of enforcement of orders of the court, such as is sought here.
- [7] In addition, the comments in Bird at para. 23 confirm that collateral attack may be permitted if there is no other way to challenge the order. However, as noted by the Crown, para. 17 of the Injunction clearly provides any person affected by the Injunction a path by which they may seek to set aside the order. No such application has been brought.
- [8] That brings me to the substantial case law that has been addressed in these proceedings some time ago, arising from the Court's research last Wednesday night, now supplemented by the cases provided by the Crown later last week. A series of BC cases address the issue of whether or not land is unceded territory and the rights of Indigenous people in relation to enforcement of orders by this Court.
- [9] I will set out the various cases that I have considered as recently as last night and which are before me this morning.
- [10] In Justice Macdonald's decision in B.C.(A.G.) v. Mount Currie Indian Band, [1991] B.C.J. 616 (S.C.), the Court stated, on a preliminary basis, that defiance of a court order, whether or not the underlying issue is Indian sovereignty, cannot be countenanced. In Fletcher Challenge Canada Ltd. v. Miller, [1991] B.C.J. No. 2822, Justice Owen-Flood followed Mount Currie Indian Band. The third case is MacMillan Bloedel Ltd. v. Simpson, [1994] B.C.J. No. 1250, which dealt with the Clayoquot Sound protests.
- [11] The decision in R. v. Ignace, [1998] B.C.J. 243 (C.A.), and in particular paras. 11-12 are of some importance:
- [11] Nothing in the Supreme Court of Canada's recent decision in Delgamuukw v. British Columbia, 1997] S.C.J. No. 108 (Q.L.), casts doubt on that reasoning. In Delgamuukw, in para. 141, the Supreme Court confirmed that "the purpose of s. 35(1) [of the Constitution Act, 1982] is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty...". The court also reaffirmed, at para. 170, its statement in R. v. Pamajewon, [1996] 2 S.C.R. 821 that "rights to self-government, if they existed, cannot be framed in excessively general terms". The appellants claimed immunity to prosecution in this case is framed in excessively general terms.
- [12] It is well established that the courts of British Columbia have jurisdiction over aboriginal accused where an offence has allegedly been committed within the Province, regardless of whether or not the territory could be said to be "beyond the treaty frontier", or is "unsurrendered ground", as that terminology is used by the appellants in their argument before this Court.

[Emphasis added.]

- [12] The next case is *Hayes Forest Services Ltd. v. Forest Action Network*, 2006 BCCA 156. At para. 70, the court cited *Mount Currie Indian Band*. Further, the court states:
- [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.).
- [13] The final decision is *Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 1909. In that case, Justice Affleck was faced with a similar argument, namely that the Court lacked jurisdiction because of an accused person's aboriginal status (para. 21). At paras. 22-24, the Court rejected that argument, citing para. 12 of *Ignace*.
- [14] The Crown has quite rightly emphasized the elements of criminal contempt, as set out in *United Nurses of Alberta v. Alberta Attorney General*, [1992] 1 S.C.R. 901 at para. 25. Another important decision is *Carey v. Laiken*, 2015 SCC 17. At para. 38, the Court clarified what the Crown is required to prove beyond a reasonable doubt in respect of intent, namely the mens rea aspect of the alleged offence.
- [15] I have asked Ms. Rauch repeatedly to articulate why this issue is important, and she has made submissions along those lines a number of times. However, for all that she has said, I am still very much in the dark in terms of how this issue could possibly be relevant to the issues that are before me - namely, the issue as to whether the Crown has proven the elements of criminal contempt of court beyond a reasonable doubt.
- [16] Ms. Rauch continues to refer to the required actus reus and mens rea, as discussed in *United Nurses* and *Carey*. Ms. Rauch states that it is important to establish what Mr. Gallagher was doing and why. I do not disagree with that statement; however, I cannot conclude that whether Mr. Gallagher was standing on unceded Indigenous territory or not has anything to do with what the Crown is required to prove for criminal contempt in respect of the Injunction. Nor can I discern any basis upon which that issue might be relevant to any affirmative defence that Mr. Gallagher might raise.
- [17] Ms. Rauch has stated to the Court time and time again that Mr. Gallagher is not advancing a collateral attack on the Injunction. She states that Mr. Gallagher does not disagree that he is subject to the Injunction with respect to the Burnaby Terminal location.
- [18] That being the case, the issue remains whether or not Mr. Gallagher did act in violation of the Injunction (actus reus) and what his intention was in that respect (mens rea). I can discern no relevance as to whether or not Mr. Gallagher was right or wrong as to whether he

was standing on unceded Indigenous territory. It is a simple proposition as to what he was doing there and why, as Ms. Rauch herself characterized it. I see no basis upon which the issue as to whether the location is "unceded Indigenous territory" has any relevance to the matter.

[19] It might be, as Ms. Rauch has suggested in her submissions over the course of the trial, of some importance to elements of Canadian society and in particular, the aboriginal community. That may be the case, but my focus in this trial concerns what is relevant with respect to the issues in this trial. It is not for this Court in this trial to resolve issues that do not need to be resolved.

[20] Accordingly, my ruling is that any evidence concerning whether or not the driveway to the Burnaby Terminal is or is not unceded territory is irrelevant and it is therefore, inadmissible.

"Fitzpatrick J."

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