

CANADA / JUDGMENT

Trans Mountain Pipeline ULC v. Mivasair

2022 BCSC 323

COURT

Supreme Court of British Columbia

DECIDED

14 February 2022

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2022 BCSC 323 Trans Mountain Pipeline ULC v. Mivasair

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Trans Mountain Pipeline ULC v. Mivasair,

2022 BCSC 323

Date: 20220214

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 Reasons for Judgment

(Janette McIntosh, Ruth Walmsley, and Catherine Hembling)

Counsel for the Plaintiff:

E. Leno

Janette McIntosh, Ruth Walmsley and Catherine Hembling, appearing in person:

J. McIntosh

R. Walmsley

C. Hembling

Place and Date of Hearing:

Vancouver, B.C.

February 14, 2022

Place and Date of Judgment:

Vancouver, B.C.

February 14, 2022

- [1] THE COURT: The hearing before the Court today is to address three alleged contemnors, Janette McIntosh, Ruth Walmsley and Catherine Hembling. Those persons are accused of being guilty of criminal contempt of Court. As a result of their appearances today, Ms. McIntosh, Ms. Walmsley and Ms. Hembling have voluntarily entered guilty pleas to the charge.
- [2] Accordingly, it now falls to the Court to arrive at a fit sentence with respect to all three individuals.
- [3] The allegations of criminal contempt all arise from the June 1, 2018 order granted by Justice Affleck in this proceeding. That order was an injunction granted at the request of the plaintiff, Trans Mountain Pipeline ULC ("Trans Mountain") to enjoin individuals who were or might be obstructing and blockading certain of its business activities (the "Injunction").
- [4] In March 2018, an earlier iteration of the Injunction was granted. The Injunction granted in June 2018 included additional measures.
- [5] Ms. McIntosh, Ms. Walmsley and Ms. Hembling have now pled guilty to breaching para. 1(a) (iii) of the Injunction, which reads as follows:
1. The Defendants, and 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:

(iii) any other project or operations site of Trans Mountain or its affiliates, contractors, or subcontractors that has been reasonably identified as the same (such as through signage, fencing, flagging or boundary markings situated on or around the perimeter of such site) (the "Markings"),

(the sites and work areas referenced in this (a) being collectively, the "Trans Mountain Sites");

[6] The actions of the contemnors all occurred at a site covered by para. 1(a)(iii) of the Injunction, namely, the site that has an entrance off North Road in Burnaby that was identified through various signage (the "Site"). In fall 2021, Trans Mountain was in the process of clearing trees on the Site for the purpose of its pipeline expansion project.

Circumstances of the Offences

[7] Ms. McIntosh has now pled guilty to having breached the Injunction on September 8, 2021. She was arrested that same date. Around 11:00 a.m., eight protestors, including Ms. McIntosh, were blocking the gate to the Site off North Road. Trans Mountain workers or contractors were in the process of clearing trees on the Site. The Site included various signage to identify it as a Trans Mountain work site, clearly bringing it within the definition set out in the Injunction.

[8] At approximately 12:17 p.m., Cst. Comte of the Burnaby RCMP attended at the Site. He spoke to the group of protestors, including Ms. McIntosh. They were advised of the Injunction and asked if they would leave. They did not, instead asking for ten minutes to pray. Most of the group left, but Ms. McIntosh and a male person remained. Around 12:32 p.m., Cst. Comte read out the Injunction and provided paper copies of the Injunction to both Ms. McIntosh and the male. After the Injunction was read out, the male left. Ms. McIntosh stayed where she was, continuing her violation of the Injunction.

[9] Cst. Comte then completed what has colloquially been called the "five-step process" that is outlined in para. 12 of the Injunction. Cst. Comte asked Ms. McIntosh to cease her unlawful activities and cautioned her that if she continued to do so, she could be arrested and face charges. Notwithstanding the completion of the "five-step process", Ms. McIntosh refused to leave. As a result, she was arrested and subsequently charged. Ms. McIntosh was later released on an undertaking to appear.

[10] Ms. McIntosh does not have a criminal record. I am advised that she has not been charged or convicted of any prior breaches of the Injunction or the previous court order granted in these proceedings.

- [11] Ms. Walmsley's actions also took place with respect to the Site a day later, on September 9, 2021. At the time, tree fallers were working in the area and a large machine was being operated on the Site for logging purposes. Given the danger of those activities, signs had been placed around the Site warning people not to enter the Site as it was dangerous.
- [12] Various Trans Mountain workers noticed people walking in the forested area of the Site. Given the inherent danger to those persons, work by Trans Mountain and its contractors was halted. Trans Mountain security personnel confronted the group of people, advised them that they were in an active work area and that the site was dangerous given their presence. The group was advised of the Injunction and that they were breaching the Injunction.
- [13] The group apparently tried to press forward. As a result, the RCMP were called. I am advised that the group or some members of the group knelt down and prayed and sang.
- [14] At approximately 2:34 p.m., Cst. Comte arrived at the Site. As Cst. Comte did with Ms. McIntosh, he spoke to the protestors and advised them of the Injunction and the fact that their presence was impeding work on the Site. Two people - Ms. Walmsley and another person - refused to leave. Just as he had done the day before, Cst. Comte provided a paper copy of the Injunction to them and he also played a recording of the Injunction over the loudspeaker. Since they still did not leave, Cst. Comte completed the "five-step process". Ms. Walmsley did not leave and she was arrested and read her rights. She was later released on an undertaking to appear.
- [15] Another piece of the evidence in relation to Ms. Walmsley's actions is an article published in the Burnaby Now local newspaper on September 9, 2021. Ms. Walmsley is quoted as making a public statement with respect to the protestors' activities that day.
- [16] Ms. Walmsley does not have a criminal record. I am advised that she has not been charged or convicted of any prior breaches of the Injunction or the previous court order granted in these proceedings.
- [17] Ms. Hembling's actions also took place with respect to the Site on September 23, 2021. On that day, Trans Mountain work activities included clearing of trees. As before, signage around the Site advised persons not to enter the Site as it was dangerous. Around 8:18 a.m., four protestors - including Ms. Hembling - were discovered to be present on the Site. The RCMP were called. As a result of the protestors' presence, Trans Mountain's contractors were unable to continue their tree clearing activities.
- [18] Around 9:16 a.m., Cst. Comte again attended. He found the four protestors, including Ms. Hembling, sitting inside the fenced off work area.
- [19] Cst. Comte again spoke to the protestors, asking them to leave. As before, he provided paper copies of the Injunction and played a recording of the Injunction. Three of the protestors left, leaving Ms. Hembling. Cst. Comte completed the "five-step process". Ms. Hembling did not leave and she was arrested and later released on an undertaking to appear.

- [20] Ms. Hembling does not have a criminal record. I am advised that she has not been charged or convicted of any prior breaches of the Injunction or the previous court order granted in these proceedings.

Sentencing Parameters

- [21] In *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156 at para. 57, the court confirmed that denunciation and deterrence are the principal sentencing objectives in criminal contempt matters. While rehabilitation can be a consideration, it will usually take on lesser importance than that of denunciation and deterrence.
- [22] In this case, the objective of deterrence includes both general deterrence and specific deterrence.
- [23] The Crown seeks a 14-day jail sentence. The guilty pleas entered today are what have been characterized by the Crown as an "early guilty plea". Guilty pleas are obviously a mitigating circumstance that stands to be considered in respect of sentencing principles.
- [24] The Crown's sentencing position is largely informed by the circumstances of this proceeding and the many people that have charged and/or convicted of criminal contempt arising from previous breaches of the Injunction. Between March 2018, when the Injunction was initially granted, and August 2018, over 200 arrests were made. To some degree, one might ascribe that substantial activity as an expression of early exuberance in terms of protesting and opposing Trans Mountain's activities. Clearly, we are well beyond the stage of early exuberance here, in the sense that it is now almost four years since the Injunction was initially granted.
- [25] The Crown notes that, since 2018, during this initial period, the frequency of breaches of the Injunction has substantially decreased. However, unfortunately those breaches have continued to some degree. As the supervising judge in this proceeding since late 2019, I have addressed a number of these matters, so I am well aware of the proceedings to this point in time. I outline the circumstances briefly.
- [26] In October 2020, eight people were arrested in the BC Interior. The trials to address those charges have yet to proceed and are scheduled to begin in March 2022. In January 2021, William George breached the Injunction by placing a vehicle outside of Trans Mountain's Burnaby Terminal to block access. In October 2021, Mr. George was convicted and is yet to be sentenced. In May 2021, Earle Peach pleaded guilty to breaching the Injunction in March 2021; he was sentenced to 14 days in jail. In March 2021, Errol Povah was alleged to have breached the Injunction. In January 2022, I have heard the trial of Mr. Povah's matter and I intend to issue reasons for judgment later this afternoon.

- [27] Finally, we come to the September 2021 infractions by Ms. McIntosh, Ms. Walmsley and Ms. Hembling. In addition, as I understand it, two other persons will be before the Court tomorrow to address allegations against them for criminal contempt of court arising from their actions in September 2021.
- [28] Finally, in November 2021, another individual was arrested and charged with criminal contempt of the Injunction. That matter is still before the Court and it is not clear how that matter will ultimately be addressed.
- [29] Accordingly, I accept the Crown's submission that, while the rate of breaches of the Injunction has certainly lessened since 2018, general deterrence unfortunately remains an issue even after the many years that the Injunction has been in place. I would emphasize at this point that no one disagrees with the proposition that public protest is a constitutional or Charter protected right in terms of people expressing their disagreement or opposition to matters occurring in our society. That right to protest is part of a healthy democracy. In fact, para. 14 of the Injunction specifically provides "persons remain at liberty to engage in a peaceful, lawful and safe protest." Unfortunately, that is not what has happened here.
- [30] The Crown's sentencing recommendation of 14 days' incarceration is informed again by the earlier proceedings in this matter. In early 2018, the Crown developed its sentencing recommendations and those recommendations were revised as matters went on. The latest iteration of the Crown's sentencing position arises from its Third Amended Notice of Motion dated August 3, 2018, which refers to a breach in these circumstances as an "Early Category Five", namely "14 days' imprisonment for persons pleading guilty within one month after their first appearance in court". Ms. McIntosh, Ms. Walmsley and Ms. Hembling did not plead guilty within one month of their first appearance in court, although I am not taking that as detracting from the Crown's description of their circumstances as an "Early Category Five".
- [31] The Crown's sentencing position outlined in public filings has remained intact now for about three-and-a-half years now. Certainly, anyone wishing to understand what the potential consequences of their actions might be would have had no difficulty discerning just that. In fact, previous court decisions have expressly set out those recommendations and endorsed them: *Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 1980; *aff'd Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156 at para. 12.
- [32] The Crown has referred to the history of the arrests, convictions and guilty pleas in this proceeding. I will not go through those in any detail, other than to note that eight people who plead guilty and came within "Early Category Five" were sentenced to 14 days in jail (including those considered in *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156). Another person who plead guilty received a conditional sentence order. In addition, in May 2021, Mr. Peach plead guilty as an "Early Category Five" and was sentenced to 14 days in jail.

Circumstances of the Offenders

[33] Ms. McIntosh, Ms. Walmsley, and Ms. Hembling have all made submissions to me which I will now outline briefly.

Janette McIntosh

[34] Ms. McIntosh takes full responsibility for her actions. She is prepared to abide by the Crown's recommendation, if it is accepted by the Court, for a 14-day jail sentence. Ms. McIntosh advises she is 58 years of age. She is a professional, having worked in the environmental or community health area. She grew up in Japan and apparently speaks fluent Japanese.

[35] As was consistent with all three contemnors before me, Ms. McIntosh spoke about her passion against the Trans Mountain pipeline project. She says she has participated in opposition to the pipeline project in various ways, but was excluded from some parts of the process. She indicates that she is strongly opposed to the project based on her views about the environment.

[36] Ms. McIntosh says that she is a law-abiding citizen. By all accounts, that appears to have been the case until September 2021. She indicates that she did not mean to disrespect the Court. Having said that, such a statement is irrelevant since the only intention required is to act in a manner which in fact is in breach of the Injunction. Inherently, Ms. McIntosh has disrespected the Court by her actions; at best, Ms. McIntosh's actions display a reckless indifference as to the consequences of her public disobedience of a court order.

[37] Ms. McIntosh refers to a "Code Red for Humanity" publication from the United Nations dated August 9, 2021. That statement refers to climate change or "global warming", as various people call it. I need not deal with the specifics of the statement. It is certainly something that informs Ms. McIntosh's view of Trans Mountain's activities and perhaps other commercial activities, and clearly informs her actions to express her disagreement of those activities in an illegal manner.

[38] Ms. McIntosh says that she felt compelled to act both morally and ethically. Unfortunately, she has not chosen to act lawfully although I acknowledge that her actions were peaceful.

Ruth Walmsley

[39] Ms. Walmsley advised me that she is the primary caregiver of her elderly mother. That is an unfortunate situation particularly given that Ms. Walmsley does not appear to have considered that matter before put herself in legal jeopardy by purposely breaching the Injunction.

[40] Like Ms. McIntosh, Ms. Walmsley speaks very passionately about her love of the environment and her opposition to the Trans Mountain pipeline, which she calls her moral imperative.

- [41] Ms. Walmsley also speaks of abiding by the rule of law, as Ms. McIntosh does, and that she meant no disrespect to the Court in terms of her actions. Again, such a statement is irrelevant legally. Again, at best, Ms. Walmsley was recklessly indifferent as to how her illegal and public actions would reflect upon the Court in terms of this Court upholding the laws of our country and province.
- [42] Ms. Walmsley spoke of her acting on her conscience. She supports other factions of our society who dispute or disagree with Trans Mountain's pipeline project. Ms. Walmsley also relayed a message from her 24-year old daughter in terms of her concern for the environment. Like Ms. McIntosh, Ms. Walmsley indicated that she will accept the consequences of her breach in terms of what sentence the Court might impose.

Catherine Hembling

- [43] Like the others, Ms. Hembling does not advance any argument against the sentence sought by the Crown. She was also a law-abiding citizen until September 23, 2021. Ms. Hembling speaks also of her passion for the environment. She describes herself as an old lady who is almost 80 years old. She speaks of how blessed her life has been, how fortunate she has been to have in many ways, including having good health so that she is able to enjoy the environment.
- [44] Ms. Hembling speaks of her faith in terms of being a practising Buddhist and a member of the Unitarian Church. She speaks of being motivated to oppose the Trans Mountain project, including to the level of civil disobedience that is evident here. Like the others, Ms. Hembling speaks of having a "long view" in terms of her actions, in terms of assisting the cause.
- [45] As with the others, it is unfortunate that Ms. Hembling has chosen to assist the cause in a manner that disrespects the Injunction, the rule of law and this Court, rather than engaging in peaceful and lawful protest, which is her constitutional right.
- [46] In summary, all three contemnors, Ms. McIntosh, Ms. Walmsley and Ms. Hembling, were to this point law-abiding citizens who have felt compelled to act. Unfortunately, they have done so in a manner that is simply unacceptable in our society, although it was done peacefully.
- [47] None of the contemnors have indicated any matters that would raise any health issues and which might detract from the Crown's sentencing recommendation. With respect to Ms. Walmsley, if her aged mother is affected in some manner arising from her incarceration, she has only herself to blame. That is not a factor here that detracts from the Court's duty to impose a just sentence.

Disposition

- [48] Before I pass sentence, I would echo the words of our Court of Appeal who recently addressed civil disobedience in our society, albeit in more extreme circumstances that are being addressed here. Those comments are found in *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCCA 26. As with you and your environmental causes, the alleged contemnors were passionate about their opposition to certain commercial activities, namely the cutting of trees. In *Teal Cedar Products*, the court stated:
- [76] It is not tenable in a democracy for a group to abandon the democratic process and impose their will on others by force. In a complex, pluralistic society, the democratically-elected government makes laws, and the courts interpret and uphold them. Barring constitutional overreach, the laws and decisions flowing from them are to be respected and enforced.
- [77] Protests are part of a healthy democracy; criminal conduct is not. In the circumstances of this case, the injunction is all that stands between *Teal Cedar* and a highly-organized group of individuals who are intent on breaking the law to get their way. . . .
- [49] This is exactly what the three of you have done. You have organized yourself to the point of getting in the way of lawful commercial activities to get your way and impose your will. That is unacceptable behaviour and for that you must be punished. I appreciate the stance that all three of you have taken in that you are prepared to accept the consequences of your actions and that is exactly what we will do.
- [50] Ms. McIntosh, I find you guilty of criminal contempt of court arising from your actions on September 8, 2021. You are sentenced to 14 days' incarceration. You can take your seat until you are dealt with by the sheriffs.
- [51] Ms. Walmsley, I find you guilty of criminal contempt of court arising from your actions on September 9, 2021. You are sentenced to 14 days' incarceration. You can retake your seat until you are dealt with by the sheriffs.
- [52] Ms. Hembling, I find you guilty of criminal contempt of court arising from your actions on September 23, 2021. You are sentenced to 14 days' incarceration.

"Fitzpatrick J."

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