

BC'S COURT OF APPEAL WADES INTO FAIRY CREEK

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A unanimous decision from British Columbia's Court of Appeal has extended an interlocutory injunction restraining unlawful interference by protesters with logging operations in the Fairy Creek watershed.

This is the latest occasion where British Columbia's courts have been called upon to issue an injunction to respond to civil disobedience affecting a private entity. Though the dispute over logging in the Fairy Creek watershed on southern Vancouver Island has attracted significant national and international attention (raising a reported one million dollars through social media), there is a long history in British Columbia of civil courts being called upon to provide relief where protests against natural resource extraction cross the line from peaceful protest to unlawful conduct.

As said by the Supreme Court of Canada in upholding an injunction arising from the historically significant protests in Clayoquot Sound in the early-1990s, "the task of the courts is to find a way to protect the legitimate exercise of lawful private rights while preserving maximum scope for the lawful exercise of the right of expression and protest".^[1] In this latest ruling, British Columbia's Court of Appeal emphasizes that the court's role in issuing injunctions is not about the wisdom of governmental forest policy nor its own views on old-growth logging. Those are matters for elected governments. Nevertheless, the court's involvement in enjoining unlawful conduct is a necessary and fundamental aspect both of civil society and of the rule of law. In the case of the Fairy Creek watershed, the public interest in having the court uphold the rule of law resoundingly tipped the scales in favour of extending the injunction.

Supreme Court Grants Injunction

Teal Cedar Products Ltd. ("**Teal Cedar**") is the holder of tree farm licence 46, a forest tenure located on southern Vancouver Island. The licenced area is almost 60,000 hectares and contains old-growth forest. Teal Cedar also holds permits that allow it to cut timber and conduct road-building activities within certain parts of its licence area.

Beginning in August 2020, Teal Cedar's forestry operations faced road blockades, which interfered with Teal Cedar's operations.^[2] Teal Cedar sought an injunction against unknown persons operating as the "Rainforest Flying Squad", the organizers of the blockades, on the basis that its business would suffer irreparable harm if

the blockades were permitted to continue.

The British Columbia Supreme Court granted the interlocutory injunction on April 1, 2021, prohibiting interference with the injunction area for a period of six-months. An interlocutory injunction is one made for a limited period of time prior to the final trial of the matter. The court found that Teal Cedar had met the three-part test for an interlocutory injunction:

1. a serious issue to be tried, as Teal Cedar alleged trespass, nuisance, unlawful interference with economic relations and contractual relations, and other torts against the defendants;
2. Teal Cedar would suffer irreparable harm if the injunction was not granted, as there was no reasonable prospect that Teal Cedar could recover damages for its losses from the defendants; and
3. the balance of convenience favoured granting the injunction, as refusing the injunction application would leave Teal Cedar with no remedy and allow the defendants to unlawfully interfere with Teal Cedar's lawful operations.

In granting the injunction, the Supreme Court held that the protestors were free to protest, demonstrate, and attempt to influence the government in any lawful way they may choose. However, no one has the right to disobey a court order, no matter how passionately they may believe in their cause.^[3]

Supreme Court Denies Application to Extend the Injunction

On September 28, 2021, a different judge of the British Columbia Supreme Court denied Teal Cedar's application to extend the interlocutory injunction for an additional 12 months.^[4] The extension was denied on the grounds that the harm to the company was outweighed by the public interest in protecting the court's reputation. The judge was of the view that there is a substantial risk to the court's reputation whenever an injunction pulls the court into this type of dispute between citizens and the government.

Application for an Interim Stay

Ten days later, the British Columbia Court of Appeal granted an interim stay, effectively extending the injunction pending the outcome of an application for leave to appeal and appeal.^[5] The interim stay was granted by the Court of Appeal with the aim to preserve the status quo – in this case, the long-standing injunction and the continuation of Teal Cedar's permitted and licensed activities.^[6]

In granting the stay, the Court of Appeal underscored the difference between peaceful protest and unlawful and dangerous interference. The Court of Appeal found that there were serious public safety concerns absent the injunction, partly because this was a situation where the criminal law had not been effective, and that without the stay Teal Cedar would face serious prejudice.^[7]

Court of Appeal Extends Injunction

On January 26, 2022, the Court of Appeal allowed the appeal and extended the interlocutory injunction to September 26, 2022.^[8]

In a judgment written by “the Court” (which is a departure from the usual practice of attributing a judgment to a particular judge on the panel), the Court of Appeal strongly rejected the suggestion that courts are “taking sides” by enforcing civil injunctions. In cases of persistent and significant civil disobedience, the court has a constitutional role to fulfil. The rule of law demands access to independent courts with the power to enforce the law by granting effective remedies to those individuals whose rights have been violated.^[9]

The Court of Appeal noted that the judge’s refusal to extend the injunction was discretionary and entitled to significant deference,^[10] but concluded that the judge had made three errors in refusing to extend the injunction:

1. the judge erred in conducting an enforcement gap analysis and in concluding there was no enforcement gap;
2. the judge erred by finding that the court’s reputation would be diminished by continuing the injunction; and
3. the judge erred by giving insufficient weight to the public interest in upholding the rule of law.^[11]

In considering whether the court’s reputation would be diminished by continuing the injunction, the Court of Appeal stated that it is wrong to say that the court’s role in upholding the law, which is the court’s obligation, means that its reputation is being harmed.^[12] The court’s reputational interest is not concerned with the popularity of its decisions. Countless disputes require the court to make unpopular decisions, whether in staying serious criminal charges because of a breach of the Charter, or in upholding public health orders.^[13]

The Court of Appeal further weighed in on the difficult issue of concerns about alleged excesses by the police in enforcing the injunction. While noting that there were remedies for concerns legitimately raised by the judge about police conduct, the Court of Appeal found that the judge had erred in turning a private law matter into a public law one. As it was a civil case, the proper balancing of harms was between Teal Cedar and the protesters.^[14]

Lastly, the Court of Appeal addressed whether the availability of the criminal law to charge and prosecute offences should preclude Teal Cedar from obtaining a civil injunction. The Court of Appeal rejected this suggestion, finding that while the criminal law may be used, neither Teal Cedar nor the court could compel the police and the prosecution service to charge and prosecute offences. An injunction was all that stood between Teal Cedar and those intent on breaking the law.^[15]

Conclusion

While an injunction is now in place until September 2022, there is no reason to believe that protests in the Fairy Creek watershed will diminish anytime soon. Protests continue notwithstanding recent announcements by British Columbia's provincial government that logging of certain old-growth forests (including in the Fairy Creek watershed) will be deferred. It is in this context that the Court of Appeal has made a strong statement that, though the courts have no role to play in political debate about forest policy, courts will continue to issue civil injunctions to protect private rights from unlawful interference.

[1] *MacMillan Bloedel Ltd. v. Simpson*, [\[1996\] 2 SCR 1048](#).

[2] *Teal Cedar Products Ltd v Rainforest Flying Squad*, [2021 BCSC 605](#).

[3] *Ibid* at paras 74-75.

[4] *Teal Cedar Products Ltd v Rainforest Flying Squad*, [2021 BCSC 1903](#).

[5] *Teal Cedar Products Ltd v Rainforest Flying Squad*, [2021 BCCA 387](#).

[6] *Ibid* at para 16.

[7] *Ibid* at para 17.

[8] *Teal Cedar Products Ltd. v Rainforest Flying Squad*, [2022 BCCA 26](#).

[9] *Ibid* at para 61.

[10] *Ibid* at para 28.

[11] *Ibid* at para 27.

[12] *Ibid* at para 56.

[13] *Ibid* at para 60.

[14] *Ibid* at paras 71-72.

[15] *Ibid* at paras 75-77.

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A Cautionary Note

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