

October 29, 2021

## Considering the Court's Reputation: Injunctions and Civil Disobedience

By: Daniella Marchand\*

**Decision Commented On:** *Teal Cedar Products Ltd. v Rainforest Flying Squad*, [2021 BCSC 1903 \(CanLII\)](#)

On September 28<sup>th</sup>, 2021, Justice Douglas Thompson declined to grant Teal Cedar Products Ltd. an extension to an injunction that was put in place in response to the growing protests, demonstrations, and blockades preventing Teal Cedar's access to Fairy Creek in British Columbia. Fairy Creek is located northeast of Port Renfrew, on the territory of the Pacheedaht First Nation. This judgement came as the protests and blockades entered their second year, and recently led to [the highest number of arrests during an act of civil disobedience in Canadian history](#).

In his decision, Justice Thompson emphasized the need to consider the Court's role in injunctions and the Court's reputation in the public interest analysis (at para 44). By refusing to extend the injunction, Justice Thompson builds upon previous judicial commentary and precedent recognizing that there is a danger that affects the legitimacy and effectiveness of the Court when it is drawn into disputes between corporations and citizens (at paras 42 – 43). The concern lies in having this dispute converted into one between the citizens and the Court (at paras 42 - 43). Rather, this is an issue that could instead be addressed through *Criminal Code*, [RSC 1985, c C-46](#) sanctions or legislative and policy reform by the BC Government, and consultations with affected parties (at para 68). This post focuses on the injunction, the weight Justice Thompson gave to the public interest aspect of the test, and the reasons he provided as to why he declined to grant an extension to the injunction. It must be noted, however, that there are Aboriginal and Indigenous rights issues that are also alive in the larger issues of old growth forests and logging permits in this area - in particular the rights of the Pacheedaht, Ditidaht, and Huu-ay-aht First Nation.

### Request for Injunction Extension Declined

The protests and blockades are all taking place in Tree Farm License 46 (TFL 46), which contains sections of old growth forest and the Fairy Creek watershed. In regulations under the *Forest Practices Code of British Columbia Act*, [RSBC 1996, c 159](#), "Old Growth" has the meaning of trees or timber at least 250 years or older (see the *Stillwater Pilot Project Regulation*, [BC Reg 96/2001, s 1\(1\)](#)).

The issue to be decided in this application was whether to grant Teal Cedar an extension of their existing injunction. In the words of Justice Thompson, the issue was "whether Teal Cedar has established that it remains just and equitable to have [the] injunction in place" (at para 2). In his decision, Justice Thompson balances the public interest in the Court protecting the interest of a private company against the public interest in protecting the reputation of the Court. There were

three other applications before the Court. Two of these applications sought variations on the injunction order, one of which was brought by the Attorney General of Canada seeking greater powers for the RCMP (at para 90). The final application sought a declaration that the RCMP measures had not complied with a previous Court ruling and should be held in contempt (at para 91). These applications were all held until the end of the decision. The ones concerning variation orders and an increase of RCMP powers were rendered moot by the decision not to extend the injunction (at para 90). As for the last application, Justice Thompson declined to make a declaration, as he felt as though it would be unlikely to serve any purpose since the injunction was not extended (at para 91).

In his determination of whether to extend the injunction, Justice Thompson relied upon the test from *RJR-MacDonald Inc. v Canada (Attorney General)*, [\[1994\] 1 SCR 311](#), [1994 CanLII 117](#), with a specific focus on the fact that the Court considers these factors to come to a just and equitable result (at para 23). Justice Thompson was in a unique position when he refused to grant the injunction's extension. He had been the case management Judge while the injunction was in place, and over the course of six months, heard numerous applications and evidence related to the growing tensions in the Fairy Creek area. As he noted, since the initial injunction was granted in April, over 1,000 arrests had been made, the majority of these under the injunction (at para 1).

As such, Justice Thompson concluded that the “serious question” and “irreparable harm” factors were not at issue as they had already been established (at para 26). He spent the majority of his analysis weighing the “balance of convenience”, in which he gave significant weight to how the public interest was being affected in this case. Although Justice Thompson noted that the phrase “serious question to be tried” is an “awkward fit” (at para 47) for the issue at bar, he agreed with Justice Frits Verhoeven's analysis (*Teal Cedar Products Ltd. v Rainforest Flying Squad*, [2021 BCSC 605 \(CanLII\)](#) at para 36) that there continues to be tortious activities taking place on TFL 46 that could be pursued at a trial (at para 47).

Justice Thompson acknowledged the impact of the protests on Teal Cedar and the escalating actions of the protesters (at para 54). Although the actions of the protestors continue to be civil (non-violent) displays of protesting, including the use of blockades, the protesters have since engaged in increasingly extreme methods such as using treetop stands or [tripods](#); [burying their arms in the ground encased with concrete](#); and digging trenches along the forestry road almost 8 feet deep. He remarked that these displays make it evident why the initial injunction included RCMP enforcement power (at para 70). And although Justice Thompson outlined a number of important considerations in his analysis of the balance of convenience, this blog post focuses on the impact on the Court's reputation.

Justice Thompson aligned himself with precedent expressing concern about the Court's role in civil disobedience cases, remarking that “this reputational concern about the Court's legitimacy and effectiveness being compromised by being pressed to the front line of this dispute fits into the legal framework as a public interest to be weighed, with all other relevant circumstances, when deciding whether an injunction is just and equitable” (at para 44). It is this concern that is at the crux of his analysis, and he considered a number of decisions that wrestled the same considerations listed in paragraph 39 of the decision, including but not limited to: *International Forest Products Ltd. v Kern*, [2000 BCSC 888 \(CanLII\)](#), *Alliford Bay Logging (Nanaimo) Ltd. v Mychajlowycz*,

[2001 BCSC 636 \(CanLII\)](#) and most recently, *Beaudoin v British Columbia*, [2021 BCSC 248 \(CanLII\)](#). Justice Thompson emphasized the public interest in having the Court’s reputation upheld, an interest that must be balanced with “standing against interference with private rights by unilateral and unlawful actions” (at para 44).

The primary focus in this consideration is the way in which the RCMP have chosen to enforce the injunction. Although Justice Thompson found that the RCMP have used reasonable force and means to execute their enforcement of the order (at para 74), he was also critical of some of the tactics the RCMP have used throughout the past six months. Of particular note was the impact on the freedom of the press when the RCMP shepherded journalists into exclusion zones or required them to have an escort as they visited protest or blockade sites. He also expressed concern with the fact that most officers at the scene were unidentifiable, operating under a degree of anonymity by removing their names and badge numbers from their uniforms. This was not the choice of individual officers but was an order from the RCMP (at paras 79-80). As Justice Thompson stated, for those in positions of authority, accountability requires that “we identify ourselves” (at para 80).

Justice Thompson’s concerns were further exacerbated by the choice of some officers enforcing the injunction to wear “thin blue line” patches on their uniforms (see [here](#) for context), despite the clear directive by the RCMP that this was not an approved symbol (at para 84). Justice Thompson noted the RCMP had decided not to enforce the directive against wearing the “thin blue line” patch, despite him previously suggesting they do so while enforcing the court order (at paras 84-86). Although Justice Thompson acknowledged that it could be argued that these patches are “just a symbol”, he also addressed the likelihood that “RCMP commanders know that these ‘thin blue line’ patches are seen as provocative and insensitive by some of the citizens they serve” (at para 83). With his decision, Justice Thompson allowed the injunction to expire on September 28<sup>th</sup> at 4:00 pm.

Overall, I found Justice Thompson’s conclusion to be well-reasoned. In my view, the tactics employed to enforce the injunction and defend Teal Cedar’s licenses risked eroding the public’s trust in the Court. This risks the Court essentially becoming a tool of the injunction, rather than the administrator of justice.

### **After the Injunction Expired**

Since the injunction expired, there have been a number of developments. Unsurprisingly, Teal Cedar, under the Teal-Jones Group, filed an appeal. In their [statement about the decision](#), Teal Cedar suggests that “to do otherwise would be to allow anarchy to reign over civil society, and for misinformation campaigns to win over fact.” It is apparent that Teal Jones considers the injunction necessary to continue their work in the Fairy Creek area, notwithstanding that Justice Thompson observed the injunction and related enforcement have driven protestors to further extremes, where all parties agreed “that interactions between police and protestors are becoming more intense” (at para 54).

The decision has also garnered [national](#) and [international attention](#), drawing additional critique of how the RCMP have handled the situation. Additionally, although protestors went a couple days

with smaller or no RCMP presence at the blockade sites, arrests resumed on October 1<sup>st</sup>, 2021, presumably under the powers granted under the *Criminal Code*.

Finally, as of October 9<sup>th</sup>, Justice Sunni Stromberg-Stein, granted an [interim injunction](#) while Teal Jones waits for the appeal of Justice Thompson’s decision to be heard at the BC Court of Appeal. Analysis of that decision is for another day; however, it is notable that, according to submissions by the Flying Rainforest Squad’s lawyer, Matthew Nefstead, the fears Teal Jones had of a gap in enforcement presence had not materialized since Justice Thompson’s decision. As noted above, arrests have continued since the injunction was lifted. On behalf of his clients he presented to the Court “The state of lawlessness the appellant feared would materialize following the expiry of the injunction has not appeared ... Priorities in enforcement may have changed, but the RCMP is still very much present on site, it’s still arresting those that commit criminal offences, and it’s still facilitating access for the appellant and its contractors to do their work” ([CBC News](#)).

Clearly this saga is far from over. The appeal of Justice Thompson’s decision has been set for November 15<sup>th</sup>, 2021 and despite the interim injunction, the Flying Rainforest Squad has stated that protests will continue (CBC News).

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