Court File No. S-183541
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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 ARTUS BROCINER) KARL PERRIN, YVON RAQUIL, EARLE PEACH, SANDRA ANG, REUBEN GARBANZO (AKA ROBERT ARBESS), GORDON CORNWALL, THOMAS CHAN, LAUREL DYKSTRA, RUDI LEIBIK (AKA RUTH LEIBIK), JOHN DOE, JANE DOE, AND PERSONS UNKNOWN

Defendants

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

Intervenor

NOTICE OF APPLICATION

Names of Applicant: Mairy Beam, Rita Wong

To: Ministry of the Attorney General, BC Prosecution Service, Crown Counsel Suite 500 – 865 Hornby Street, Vancouver, B.C. V6Z 2G3

TAKE NOTICE that an application will be made by the Applicants to the Honourable Mr. Justice Affleck at the Courthouse at 800 Smithe Street, in the city of Vancouver, in the Province of British Columbia on a ~~date and time to be determined~~ for the orders set out in Part 1 below.

Nov 22, 2018, 10 AM

Part 1: ORDERS SOUGHT

1. The Applicants seek the following order:

   We respectfully request that the Honourable Mr. Judge Affleck recuse himself due to a reasonable apprehension of bias by informed observers.

Part 2: FACTUAL BASIS

1. Judge Affleck heard the injunction sought by Kinder Morgan, granted the injunction, and is now enforcing the injunction. He broadened the scope of the injunction on June 1, 2018, and has heard roughly 230 defendants. These proceedings place Justice Affleck in the position of having to judge whether his order was scorned. Accordingly, it may reasonably be perceived that he lacks the neutrality required for fair judicial assessment of the facts and the law and has a self-interest in maintaining his own order.
2. On April 9, 2018, at 10:34 a.m. Judge Affleck stated, "I will tell you there is no doubt in my mind that the conduct which is alleged here amounts to criminal contempt of court. Criminal contempt of court is public defiance of a court order. There's no doubt that's what's happened here." Since this was stated prior to any evidence being presented to the court, it is reasonable to assume that the case has been prejudged.

   Furthermore on April 11, 2018, at 10:45 a.m. the Honourable Mr. Judge Affleck stated, "The conduct involved from the evidence that I heard at the time the injunction was granted and subsequent evidence that I have heard, that conduct is as a matter of law criminal contempt of court. It is not civil contempt." Since the conduct of other parties prior to the injunction being granted is not relevant to the cases of those actually charged with breaking the injunction, it is reasonable to assume that the case has been prejudged.

   Subsequently the Honourable Mr. Judge Affleck clarified his position, notably in the Oral Reasons for Judgement 2018 BCSC 874 "this Court did not raise the contempt allegations from civil to criminal. It has been the conduct itself which has determined if it was civil or criminal contempt of court. The conduct of the alleged contemnors that has been described to me throughout these proceedings has always been criminal contempt." However the perception of bias raised by the earlier statements still exists.

3. On May 8, 2018, Jennifer Ireland, a Cree and Metis woman with fetal alcohol syndrome, appeared before the court with her mother. They both pled guilty. Her mother, Lilian Ireland, was interrupted and not allowed to finish giving her statement, even though she only asked for 3 minutes. At 11:13

a.m. Jennifer Ireland was denied the right to make a statement. At 11:18 a.m. Robert Dramer, was denied the right to make a statement. In an attempt to correct the Court's position on statements at sentencing, the Crown stated at 11:39 a.m.,"Very typically in a criminal sentencing, the court would call on the offender to say anything they wished to before the sentence is imposed." The refusal on the part of Judge Affleck to hear the statements of these three defendants, as well as other defendants later that day after the Crown's comments, reasonably raises the issue of bias. Although Judge Affleck eventually allowed defendants to again make statements, in accordance with their Charter rights, the perception of Judge Affleck's bias against defendants cannot be effaced.

4. On June 18, 2018, Judge Affleck denied Indigenous defendant Kat Roivas's requests for a Gladue report and to be transferred to a Native Court.

5. On Oct 2, 2018, weeks after the federal Court of Appeal quashed approval of the Trans Mountain pipeline expansion, thereby stopping work on the project, three defendants pleaded guilty to contempt. All three defendants argued that without the threat of protests and further breaches to the injunction, the Crown's punitive sentencing recommendations based on deterrence were no longer justified. Yet, Judge Affleck ignored the reasoned arguments, sentenced them all to jail terms, and refused to justify his actions. This can reasonably be perceived as a bias against water protectors standing up against pipeline expansion.

6. The Truth and Reconciliation Commission's Call to Action, number 45, states:
"We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:

   i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius

   ii. Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.

   iii. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.

iv. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements."

The Calls to Action are a bare minimum that Canadians need to accomplish in order for there to be peace and justice in this country. We are far from achieving this, and everyone living on Indigenous land in Canada, including the courts, have a responsibility to do more to achieve reconciliation in our times.

7. Former Chief Justice Lance Finch has written, "In a chapter titled 'Challenges and Opportunities in Recognizing Indigenous Legal Traditions,' Professor Borrows identifies and discusses 'some of the more pressing concerns which judges, lawyers, academics, politicians, journalists, theorists, and Indigenous community members might have about the recognition of Indigenous legal traditions." Under the heading of intelligibility, he notes that "what may be unintelligible to those inexperienced with Indigenous culture may be quite intelligible to those familiar with it. A Eurocentric approach to legal interpretation must not be allowed to undermine Indigenous legal traditions." Following the warning quoted earlier, as to the risks of having Aboriginal legal principles judged by people unfamiliar with their source cultures, Professor Borrows states that

Those who evaluate the meaning, relevance and weight of Aboriginal legal traditions must ... appreciate the potential cultural differences in the implicit meanings behind implicit messages if they are going to draw appropriate inferences and conclusions. They should attempt to grasp their unspoken symbolic aspects in order to evaluate their truth and value. Mastering both these facets of interpretation is a tremendously difficult and complex task.

[https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-253.pdf]

He adds, too, that '[t]his evaluation will be especially fraught with dangers if the interpreter does not recognize the cultural foundation of knowledge, and fails to acknowledge his or her own bias."

[https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-253.pdf]

8. Access to justice is recognized as an important principle to guide the courts. However, by issuing his court-ordered injunction, Judge Affleck favoured the well-resourced Trans Mountain Pipeline ULC over working-class individuals of conscience, reinforcing inequity and keeping justice out of reach for

those without comparable resources. Judge Affleck's apparent bias in this case favouring corporate enterprise does not instil public confidence that defendants will encounter a fair or just process.

9. Over-reliance on injunctions is a matter that judges themselves have differing opinions on. As Ian Mulgrew writes, "The late justice Josiah Wood condemned the practice [of relying too heavily on injunctions to deal with principled dissent], explaining: 'It is only because the obligations of the office of the Attorney General have not been discharged, in connection with mass public protests which are designed to interfere with the exercise of private rights, that in recent years the courts have been drawn into a role which they were never intended to perform, and for which they are ill-suited.'

   Wood maintained these cases don't involve "a legal question, but a question of social policy."

   "It appears to be taken for granted by the authorities that the court's civil jurisdiction is available to the public as a substitute for criminal law enforcement," he said. "This can only be done, however, by characterizing as a dispute between 'parties' what is really nothing of the kind. ... acts of civil disobedience are not, in essence, civil disputes between individuals" (https://vancouversun.com/news/crime/ian-mulgrew-injunction-itis-in-kinder-morgan-debate-gives-rule-of-law-a-black-eye).

Part 3: LEGAL BASIS

1. In **Wewaykum Indian Band v. Canada, 2003 SCC 45,** "The Department of Justice found a number of internal memoranda which indicate that, in late 1985 and early 1986, [Judge] Binnie had received some information concerning the Campbell River Band's claim and that he had attended a meeting where the claim was discussed..."

   Although no reasonable apprehension of bias was established, Judge Binnie recused himself from any further proceedings in this matter. As the summary of the judgement states,

   "The criterion of disqualification is the reasonable apprehension of bias. The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude. Would he think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly?" (page 3)

2. In **Committee for Justice and Liberty et al. v. National Energy Board et al., [1978] 1 SCR 369,** the Supreme Court affirmed that the reasonable apprehension of bias is grounds for challenging a tribunal's application of the principles of natural justice:

"The test of probability or reasoned suspicion of bias, unintended though the bias may be, is grounded in the concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and emphasis is added to this concern in this case by the fact that the Board is to have regard for the public interest" (page 3).

3. **R. v. Kelly, [2005] B.C.J. No. 1559** Appeal by the Crown from a decision that set aside a judge's ruling refusing to recuse himself from Kelly's dangerous offender proceedings. Kelly pleaded guilty to breaking, entering, and robbing a dwelling house. The judge imposed an indeterminate sentence on the basis that Kelly was a dangerous offender. A new hearing was ordered on the basis that the judge failed to consider the long-term offender provisions which came into force after the commission of the offence, but prior to sentencing. The new hearing was before the same judge. Kelly's application for recusal was refused. On review, the decision was set aside and the judge was prohibited from presiding over the new hearing. The reviewing court found that although no actual bias existed, there was a reasonable apprehension of bias that required the judge to recuse himself.
4. **Truckair v. Canada (Attorney General), [2011] NSSC 398** In course of this hearing in which applicant's counsel was present, Provincial Court Judge Whalen made several comments which led to counsel requesting that he recuse himself. The Judge's comments included language to effect that the judge was convinced by Crown's brief that the judge did not have jurisdiction but that the judge could perhaps become unconvinced by applicant's counsel. The Judge refused to recuse himself, suggesting that request amounted to judge shopping. Applicant brought application for judicial review, seeking order of certiori in relation to decision of judge not to recuse himself, and order of mandamus directing that trial be held in front of another judge. Application granted. Test for reasonable apprehension of bias was satisfied. Comments that caused concern related directly to potential outcome of jurisdictional issue, as well as Charter motion overall.
5. In **R. v. S. (R.D.), [1997] 3 SCR 484,** with regard to a Judge's remarks regarding police violence against non-white groups, "a new trial was ordered on the basis that the Judge's remarks gave rise to a reasonable apprehension of bias" (page 2). "Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobussi and Major JJ.: The courts should be held to the highest standards of impartiality. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. The trial will be render unfair if the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer. Judges must be particularly sensitive to the need not only to be fair but also to appear to

all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin" (page 2).

6. It is a well-known principle that justice should not only be done, but it should be seen to be done. In order to ensure public confidence in this court, we are respectfully asking Justice Affleck to recuse himself in the service of justice. We recognize that it takes generosity of spirit as well as compassion to take such a courageous act, and we invite the court to consider acting in such a way that emphasizes the rational, consensual and collegial aspect of the legal system, rather than its coercive, authoritarian aspect. Both aspects exist and are in tension; in this moment, we ask the court to evolve to the more just and fair practices to which it has access.
7. According to the Canadian Judicial Council in the text *Ethical Principles for Judges*, "Judges should avoid comments, expressions, gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone. Examples include irrelevant comments based on racial, cultural, sexual or other stereotypes and other conduct implying that persons before the court will not be afforded equal consideration and respect" (25).

   Inappropriate conduct may arise from a judge being unfamiliar with cultural, racial or other traditions or failing to realize that certain conduct is hurtful to others. Judges therefore should attempt by appropriate means to remain informed about changing attitudes and values and to take advantage of suitable educational opportunities (which ought to be made reasonably available) that will assist them to be and appear to be impartial" (25).

   "Judges should not be influenced by attitudes based on stereotype, myth or prejudice. They should, therefore, make every effort to recognize, demonstrate sensitivity to and correct such attitudes" (25).

   "True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind" (32). (https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf)

PART 4: MATERIAL RELIED UPON

1. The court records relating to the Injunction, Court File No. S-183541
2. The Affidavit of Rita Wong, sworn the 11th Day of October 2018
3. The Affidavit of Mairy Beam, sworn the 11th day of October 2018
4. The Affidavit of Kat Roivas, sworn the 15th day of October 2018
5. The Affidavit of Jim Fidler sworn the 15th day of October 2018

6. The Affidavit of Mark Jacobs sworn the 29th day of October 2018

The Applicants estimate the application will take 2 hours.

Dated at the City of Vancouver, in the Province of British Columbia, October 29, 2018

Applicants' address for service:

342 – 588 East 5th Avenue, Vancouver, BC, V5T 4H6

Signature of Applicant Rita Wong

Signature of Applicant Mairy Beam