S-159759

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TEAL CEDAR PRODUCTS LTD.

PLAINTIFF

AND:

WESTERN CANADA WILDERNESS COMMITTEE, TORRANCE COSTE, DAVE CASCAGNETTE, TREVOR SCHINKEL, JENNIFER WHITEHOUSE, MARLENE DOE, JOHN DOE, JANE DOE, AND PERSONS UNKNOWN

DEFENDANTS

NOTICE OF APPLICATION

Name of applicant: Teal Cedar Products Ltd.

21NOV15 1526902 RDSA 80.00
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To: The Defendants

And to: Their Solicitors

TAKE NOTICE that an application will be made by the applicant to the presiding judge at the courthouse at 800 Smithe Street, Vancouver, BC, V6Z 2E1 on November 24, 2015 at 4:00 p.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An interim injunction lasting until midnight on Sunday, December 6, 2015, requiring that the Defendants, by themselves, their officers, members, servants, agents, representatives, and anyone having knowledge of the Court's order, are restrained, enjoined and prohibited from:

   (a) impeding, physically obstructing, or in any way interfering with any person, including any member of the public, from gaining access to or egress from, or otherwise making use of any road, road construction site or planned road construction site situate between (i) the junction of Glad Lake Main Road and

GL9 Road and (ii) the Carmanah Walbran Provincial Park boundary (the "Roads");

(b) obstructing, impeding, or otherwise interfering with the safe passage of motor vehicles belonging to the Plaintiff, its employees, agents, contractors or suppliers, or others in privity of contract with the Plaintiff (the "Motor Vehicles"), and in particular, not to come within 50 metres of the Motor Vehicles;

(c) obstructing, impeding or otherwise interfering with any construction activities conducted on the Roads by the Plaintiff, its employees, agents, contractors or suppliers, or others in privity of contract with the Plaintiff;

(d) interfering with the business, contractual or economic relationships between the Plaintiff and its employees, agents, contractors or suppliers, or others in privity of contract with the Plaintiff;

(e) threatening, harassing, intimidating, assaulting, obstructing, or interfering with the Plaintiff's employees, management staff, agents, contractors or suppliers or others in privity of contract with the Plaintiff, or their families;

(f) conspiring to use unlawful means against the Plaintiff and its employees, agents, contractors or suppliers, or others in privity of contract with the Plaintiff, or their families; and

(g) ordering, aiding, abetting, counselling or encouraging in any manner whatsoever, either directly or indirectly, any person to commit the acts above mentioned or any of them.

2. An order lasting until midnight on Sunday, December 6, 2015:

(a) authorizing any police officer with the Royal Canadian Mounted Police, and/or the appropriate police authority in the jurisdiction in question (the "Police"), to arrest and remove any person who has knowledge of the Court's order and who the Police have reasonable and probable grounds to believe is contravening or has contravened any provision of the Court's order;

(b) that the Police retain discretion as to the timing and manner of enforcement of the Court's order, and specifically retain discretion as to the timing and manner of arrest and removal of any person pursuant to the Court's order;

(c) that the Police retain discretion to detain and release any person without arrest who the Police have reasonable and probable grounds to believe is contravening or has contravened any provision of the Court's order, upon that person agreeing in writing to abide by the Court's order;

(d) authorizing any peace officer and any member of the Police who arrests or arrests and removes any person pursuant to the Court's order to:

(e) release that person from arrest upon that person agreeing in writing to abide by the Court's order;

(f) release that person from arrest upon that person agreeing in writing to abide by the Court's order and require that person to appear before the Court at such place as may be directed by the Court, on a date fixed by the Court;

(g) bring that person forthwith before the Court at Victoria, British Columbia, or such other place as may be directed by the Court;

(h) detain that person in custody until such time as it is possible to bring that person before the Court; and/or,

(i) otherwise take steps in accordance with Form 11.1 of the *Criminal Code*, R.S.C. 1985, c. C-46; and

(j) authorizing the Police to seize and/or remove any vehicle, equipment or other property that the Police have reasonable and probable grounds to believe is or has been parked, placed, abandoned or left so as to contravene or to assist in or facilitate the contravention of the provision of the Court's order.

3. Costs.

4. Any other relief this Honourable Court deems just.

Part 2: FACTUAL BASIS

Background

1. Teal Cedar Products Ltd. ("Teal Cedar") is in the business of harvesting timber and manufacturing primary lumber products.

2. Teal Cedar owns Tree Farm Licence 46 ("TFL 46"), which grants Teal Cedar the exclusive right to harvest Crown timber within the area described in the licence. This area includes land located in the Walbran Valley on Vancouver Island.

3. Teal Cedar harvests timber and engages in related forestry activities within the boundaries of TFL 46 under the terms of a Forest Stewardship Plan. The Forest Stewardship Plan sets out how Teal Cedar will accomplish various legislative objectives (including environmental, cultural, aesthetic, and economic objectives) when conducting its operations within TFL 46.

4. Teal Cedar also owns Road Permit No. R04476 ("R04476"), which grants Teal Cedar the right to construct, use, and maintain roads within TFL 46.

Teal Cedar's recent activities in TFL 46

5. The Ministry of Forests, Lands, and Natural Resource Operations (the "MOF") recently granted Teal Cedar Cutting Permit 7G, which permits Teal Cedar to harvest timber within certain designated cutblocks in TFL 46 (the "7G Cutblocks") for a term of four years.

6. The 7G Cutblocks fall within territory claimed by the Pacheedaht First Nation (the "Pacheedaht") as their traditional territory. Before applying for Cutting Permit 7G, Teal Cedar asked the Pacheedaht to review its proposal to harvest timber in the 7G Cutblocks.

7. The Pacheedaht conducted surveys of each of the 7G Cutblocks and advised that Teal Cedar was permitted to harvest timber in those cutblocks, subject to the laws and procedures of the Crown. The Pacheedaht also indicated that they would not physically oppose Teal Cedar's activities in the 7G Cutblocks.

8. The MOF also recently amended R04476 to allow Teal Cedar to construct roads leading into all but one of the 7G Cutblocks (the "New Roads"). The remaining 7G Cutblock not accessible by the New Roads will be harvested exclusively by helicopter.

9. Teal Cedar has retained Maverick Logging Ltd. ("Maverick") to construct the New Roads. Construction of part of the New Roads is underway.

10. Teal Cedar also intends to upgrade certain existing roads (the "Road Upgrades"). The Road Upgrades are intended to accommodate heli-logging operations in the 7G Cutblocks. These operations are scheduled to begin on November 25, 2015, and continue for 30 days thereafter.

11. Teal Cedar also intends to construct a helicopter service landing in TFL 46 (the "Helicopter Service Landing"). The Helicopter Service Landing will service helicopters conducting heli-logging operations in the 7G Cutblocks.

The Blockade

12. On or before November 9, 2015, a group of approximately 10 individuals, including David Cascagnette, Trevor Schinkel, and Jennifer Whitehouse (the "Blockaders"), established an unlawful blockade of the sole road providing vehicle access to the intended locations of the New Roads, the Road Upgrades, and the Helicopter Service Landing (the "Blockade").

13. The Blockade consists of individuals physically impeding access to the road, vehicles parked on the road, and a rope strung across the road.

14. Members of Maverick's road crew informed Teal Cedar of the Blockade on November 9, 2015. Teal Cedar's representative, Mark Carter, attended the Blockade site that day.

15. Mr. Carter informed that Blockaders that the Blockade was causing the road crew to lose wages and the owner of the road construction equipment to lose revenue. Mr. Carter also indicated to the Blockaders that Teal Cedar was lawfully entitled to continue operations in the area and would return the next day.

16. Some of the Blockaders told Mr. Carter that they were there to prevent further damage to the ecosystem. They also stated that they were acting on behalf of an unnamed First Nations community.

17. Some Blockaders also stated that it was their intention to continue to prevent crews from going to work. They said that the Blockade would remain intact the next day.

18. The Blockaders permitted Teal Cedar personnel to attend the work site where the New Roads were being constructed for the sole purpose of ensuring that there was no damage to the road construction equipment or the site. There was no such damage.

19. On November 10, 2015, Mr. Carter returned to the Blockade site with Sergeant Wes Olsen of the Lake Cowichan detachment of the RCMP. The Blockade was still in place on November 10, 2015.

20. Mr. Carter asked the Blockaders to remove the Blockade. They refused. Mr. Carter then reminded them of the financial losses their actions were inflicting on the road crew and owner of the construction equipment.

21. Sergeant Olsen spoke with the Blockaders at length. He was also unable to convince them to allow the road crew to pass.

22. Teal Cedar and Maverick personnel asked the Blockaders again to allow them to attend the work site where the New Roads were being constructed for the sole purpose of ensuring that there was no damage to the road construction equipment or the site. The Blockaders permitted this. The work site and construction equipment were not found to be damaged.

23. The Blockaders also permitted Maverick to finish applying rock surfacing on an unfinished portion of the New Roads in order to prevent erosion. They permitted this on the condition that the road crew not commence construction of any new segment of road.

24. Teal Cedar finished applying rock surfacing to the incomplete section of the New Roads on Friday, November 20, 2015.

25. The blockade resumed on Monday, November 23, 2015, and is ongoing.

26. As a result of the Blockade, Maverick is unable to continue construction of the New Roads. It is therefore unable to fulfil its contractual obligations to Teal Cedar.

27. Teal Cedar is also unable to perform the Road Upgrades or construct the Helicopter Service Landing while the Blockade is in place, as both are located behind the blockade.

Impact of the Blockade

28. The Blockade has caused, and will cause, Teal Cedar to suffer financial losses and damage to Teal Cedar's business, in addition to preventing Teal Cedar from exercising its rights under TFL 46 and Road Permit R04476.

29. The New Roads and the Helicopter Service Landing cannot be constructed, and the Road Upgrades cannot be performed, once it begins to snow heavily in the Walbran Valley.

30. The Blockade will (i) interfere with Teal Cedar's business as a going concern, (ii) cause Teal Cedar to lose the goodwill and customer loyalty of its customers, and (iii) cause Teal Cedar to lose revenue, as follows:

    (a) if Teal Cedar cannot complete construction of the New Roads before it begins to snow heavily, its conventional logging operations in the 7G Cutblocks, scheduled to commence in the spring of 2016, will be delayed until the road can be completed in the spring;

    (b) if Teal Cedar cannot complete construction of the Helicopter Service Landing and perform the Road Upgrades before November 25, 2015, it will be unable to conduct scheduled heli-logging operations in the 7G Cutblocks this autumn; and

    (c) if Teal Cedar cannot helicopter harvest cedar trees for use as poles from the 7G Cutblocks this autumn, it will be unable to meet certain customer commitments.

31. The Blockade will also cause Maverick and Maverick's road crew to suffer financial losses.

Part 3: LEGAL BASIS

1. Teal Cedar claims against the Defendants in respect of their efforts to impair Teal Cedar's lawful forestry operations.

2. Teal Cedar seeks to enjoin the Defendants from further impairing its lawful forestry operations.

3. On this application, Teal Cedar seeks an interim injunction enjoining the Defendants from further impairing its lawful forestry operations.

Teal Cedar meets the test for obtaining an interim injunction

4. The test for injunctive relief is set out in *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR - MacDonald*"). The applicant must show that:

   (a) there is a serious issue to be tried;

   (b) the applicant will suffer irreparable harm if the relief is not granted; and

   (c) the balance of convenience favours granting the relief.

5. These requirements are met in this case.

6. Although the test in *RJR - MacDonald* sets up irreparable harm as an independent branch of the test, the BC Court of Appeal in *B.C. (A.G.) v. Wale,* ("*Wale*") held that the test for an interlocutory injunction had only two steps: there is a serious issue to be tried; and the balance of convenience favours granting the relief. In the *Wale* formulation, the element of irreparable harm is considered as part of the balance of convenience.

   B.C. (A.G.) v. Wale, (1986) 9 B.C.L.R. (2d) 333, leave to appeal to S.C.C. dismissed: [1991] 1 S.C.R. 62.

7. Mr. Justice Pitfield, in *International Forest Products Ltd. v. Kern* ("*Kern*"), questioned whether the conventional analysis *in RJR - MacDonald* is appropriate in cases of civil disobedience, compared with the context of private disputes.

   International Forest Products Ltd. v. Kern, 2000 BCSC 1141 at paras. 27 to 35.

There are serious issues to be tried

8. The first part of the *RJR - MacDonald* test requires that the applicant show there is a serious issue to be tried.

9. Under this part of the test, "the application must satisfy the court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended."

   Wale at 345.

10. The threshold for this part of the test is a low one. It will suffice if the applicant can satisfy the Court that the claim is not "frivolous or vexatious".

RJR - MacDonald at 337.

11. This case raises a serious issue to be tried. The evidence demonstrates that Teal Cedar has a clear legal right to:

(a) harvest timber in the 7G Cutblocks;

(b) access all roads within TFL 46;

(c) construct the New Roads;

(d) perform the Road Upgrades; and

(e) construct the Helicopter Service Landing.

12. Teal Cedar's interest in TFL 46, the 7G Cutblocks, the New Roads, the roads where the Road Upgrades will take place, and the Helicopter Service Landing is an interest in land in the nature of a *profit à prendre*. The interference with such an interest is sufficient to support an interim injunction.

MacMillan Bloedel Limited v. Simpson, (1993) 96 BCLR (2d) 201 (CA) at paras. 9 and 10.

13. The facts give rise to a claim that the Defendants are committing the torts of trespass, nuisance, unlawful interference with economic relations, interference with contractual relations, inducing breach of contract, intimidation, and conspiracy, by unlawfully impeding access to the 7G Cutblocks, the intended location of the New Roads, the intended location of the Road Upgrades, and the intended location of the Helicopter Service Landing.

Teal Cedar will suffer irreparable harm

14. The second part of the test requires that the applicant establish it will suffer irreparable harm if an injunction is not issued.

15. In *Wale*, McLachlin J.A. (as she then was) noted that "clear proof of irreparable harm is not required. Doubt as to the adequacy of damages as a remedy may support an injunction [...]"

> *Wale* at 346.

16. Interference with a business as a going concern has always been regarded as irreparable harm within the meaning of the injunction test.

> *West Fraser Mills Ltd. v. Members of Lax Kw'Alaams Indian Band*, 2004 BCSC 815 at paras. 21 and 22 ("*West Fraser*").
>
> *Kern* at para. 33.
>
> *MacMillan Bloedel v. Simpson*, 1993 Carswell BC 1040 at para. 33, affirmed (1993) 96 BCLR (2d) 201 (CA) .
>
> *Tlowitsis Nation v. Macmillan Bloedel Ltd.*, (1990) 53 BCLR (2d) 69 (CA) at 78.
>
> *Chingee v. British Columbia*, 1988 CarswellBC 1326 at para. 17.

17. The Blockade is preventing Teal Cedar from completing construction of the New Roads, the Road Upgrades, and the Helicopter Service Landing. As discussed above, this is interfering with Teal Cedar's business as a going concern, causing Teal Cedar to lose the goodwill and customer loyalty of its customers, and causing Teal Cedar to lose revenue.

18. The MOF issued Cutting Permit 7G for a term of four years. It is not renewable and it cannot be extended longer than four years. The longer the Blockade lasts, the more time Teal Cedar loses to harvest timber under its terms.

> *Forest Act*, RSBC 1996, c. 157, ss. 35(1)(f) and 58.1(2).
>
> See also section 58.21 of the *Forest Act*, which permits the Minister of Forests, Lands & Natural Resource Operations to postpone the operation of a cutting permit for up to two years.

19. Because the Blockade is perpetrated by a number of individual Blockaders whose identity is not known to Teal Cedar, it will be very difficult if not impossible for Teal Cedar to recover damages from the Blockaders.

20. In addition, the Blockade is preventing Maverick from meeting its contractual obligation to Teal Cedar to construct the New Roads. This in turn causes Maverick's road crews to lose wages, and Maverick to lose revenue.

The balance of convenience favours granting an injunction

21. The third stage of the test involves "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."

    RJR - MacDonald at 342.

22. The balance of convenience strongly favours the granting of the injunction.

23. If the injunction is not granted, Teal Cedar will be unable to engage in its lawful forestry operations. This would result in significant harm to Teal Cedar, as well as its employees, contractors, and customers.

24. On the other hand, an injunction will not result in significant harm to the Defendants. An injunction will only limit the Defendants from engaging in activity which is a trespass and is thus unlawful in any event. Thus an injunction would not prevent the Defendants from engaging in any activity they are legally permitted to engage in.

25. In any event, an injunction would limit the Defendants' ability to protest only to the extent necessary to ensure that Teal Cedar can conduct its operations unhindered. This is a very minor limitation that would not cause any harm to the Defendants.

26. The protestors have a right to freedom of expression. Their freedom of expression would not be impaired by the order sought by Teal Cedar. As Madam Justice Russell held in *Red Chris Development v. Quock*, 2006 BCSC 1472 at para. 34, "[p]hysical obstruction is not an acceptable demonstration of dissent in a democratic society."

27. *Kern* was also a case of balancing convenience between individuals engaged in a blockade and a forestry company. Pitfield J. noted at para. 34 that:

    > ...the balance of convenience assessment in a case such as this is easily made. The actions of the protestors interfere with the lawful right of the plaintiffs to log the Cut Blocks. The plaintiffs' exercise of those rights does not interfere with any right the protestors might have against Interfor. The protestors are free to express their views and protest in any lawful way they wish but they cannot engage in unlawful activities that deny or affect the capacity of another member of the public to exercise a lawful right.

An Enforcement Order should be included in the Order

28. An enforcement order should be included in the Order authorizing the police or other peace officers to enforce the injunction.

29. Enforcement orders are not always made as a matter of course. In *Canada Post Corp. v. Canadian Union of Postal Worker*, Mr. Justice MacDonald held that an enforcement order should be made only in unusual situations, since the Court normally expects that its orders will be obeyed.

> *Canada Post Corp. v. Canadian Union of Postal Worker* (1991), 61 B.C.L.R. (2d) 120 (S.C.) at 133.

30. However, MacDonald J. also noted that circumstances such as "[l]arge numbers of potential contemners, flagrant disregard of an injunction, events occurring in a remote geographical area, identification difficulties and other such problems" may dictate in favour of an enforcement being issued at the time of issuing an injunction.

> *Ibid.*

31. In *West Fraser Mills*, Madam Justice Gerow issued an enforcement order with the injunction, noting that it was appropriate to do so given the large number of potential participants in the roadblock, the remoteness of the area, identification difficulties and the position of the RCMP that they will not act without an order directing them to do so.

> *West Fraser Mills* at para. 26.

32. Many of the concerns identified by Gerow J. in *West Fraser Mills* also apply in this case. The RCMP have indicated to Teal Cedar that an injunction will not be enforced in the absence of an enforcement order. In addition, there are many potential Blockaders whose identity is not known to Teal Cedar. In addition, the Blockade is in a very remote part of Vancouver Island, the Walbran Valley.

33. Another example where the Court held it was appropriate to make an enforcement order at the same time as an injunction can be found in *Board of Trustees of School District No. 27 (Cariboo/Chilcotin) v. Van Osch*, 2004 BCSC 1827. There the School Board applied for an interlocutory injunction and enforcement order enjoining the defendants from occupying a school. Blair J. ordered the requested injunction and its enforcement. He outlined the circumstances that warranted an enforcement order at paragraph 28:

> With reference to the enforcement order, I consider the large number of persons involved in the School's occupation numbering in excess of 100 persons on occasion, the relative remoteness of the area located as it is some distance from 100 Mile House, the disregard towards the no trespassing notices posted by the School Board in and around the School, the difficulties in identifying the participants occupying the School, the implied threat of harm to the process server, Lorna Gardiner, when she attended the School to post materials relating to this action and the RCM Police's position that the force will not act without an order directing them to do so.

34. Mr. Justice Thackray, then of the BC Supreme Court, held in *B.C. Rail v. Seton Lake Indian Band* (1990) that it was appropriate to issue an enforcement order along with the injunction because a failure to issue an enforcement order would cause the public to "have viewed the justice system with scorn if enforcement of the injunctions was not immediate and decisive." In that case, a BC Rail line was blockaded. Thackray J. noted that the blockaders had no interest in the railway, its passengers or crews, or the freight to be moved, and that there was a public injury resulting from defiance of the court's orders.

> *B.C. Rail v. Seton Lake Indian Band* (1990), 52 B.C.L.R. (2d) 373 (S.C.) at 392.

35. Accordingly, if the injunction is granted, it would be appropriate in this case to issue an enforcement at the same time.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Mark Carter, made November 24, 2015;
2. Affidavit #1 of Greg Ross, made November 24, 2015;
3. Affidavit #1 of Aisha Jeffery, made November 24, 2015;
4. Affidavit #1 of Brian Henderson, made November 24, 2015; and
5. Such further materials as counsel may advise and this honourable court may allow.

The applicant estimates that the application will take approximately 1 to 2 hours.

☐ This matter is within the jurisdiction of a master.

☒ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33;

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding; and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

November 24, 2015
Dated

DLA Piper (Canada) LLP
Signature of ☑ lawyer for filing party(ies)
DLA Piper (Canada) LLP (Dean Dalke)
Lawyer for the Plaintiff

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____ of Part 1 of this notice of application

☐ with the following variations and additional terms:

_____

_____

_____

_____

_____

Date: _____

_____

Signature of ☐ Judge ☐ Master

APPENDIX

The following information is provided for data collection purposes only and is of no legal effect.

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ oral matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts