

CANADA / JUDGMENT

R. v. Cavanaugh

2025 BCCA 252

COURT

British Columbia Court of Appeal

DECIDED

18 July 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCCA 252 R. v. Cavanaugh

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Cavanaugh,

2025 BCCA 252

Date: 20250718

Dockets: CA48897; CA49081; CA49102

Docket: CA48897

Between:

Rex

Respondent

And

Romilly Cavanaugh

Appellant

And

Chief (Kukpi7) Rosanne Joan Casimir, Former Chief (Kukpi7) Darrel Draney,

and Chief (Kukpi7) Helen Henderson

Interveners

- and -

Docket: CA49081

Between:

Rex

Respondent

And

April Thomas

Appellant

And

Chief (Kukpi7) Rosanne Joan Casimir, Former Chief (Kukpi7) Darrel Draney,
and Chief (Kukpi7) Helen Henderson

Interveners

- and -

Docket: CA49102

Between:

Rex

Respondent

And

Jocelyn Pierre

Appellant

And

Chief (Kukpi7) Rosanne Joan Casimir, Former Chief (Kukpi7) Darrel Draney,
and Chief (Kukpi7) Helen Henderson

Interveners

Before:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Grauer

The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated
December 7, 2022 (conviction) (Trans Mountain Pipeline ULC v. Mivasair,

2022 BCSC 2386, Vancouver Docket S183541).

Counsel for the Appellants:

R. Smith

B. Isitt

Counsel for the Respondent:

L.A. Ruzicka, K.C.

M. Richards

Counsel for the Interveners, Chief (Kukpi7) Rosanne Joan Casimir, Former Chief (Kukpi7) Darrel Draney:

S.D. Hansen

M.C. Gargaro

Counsel for the Intervener, Chief (Kukpi7) Helen Henderson:

O.C. Hanson

A.J. Piercy

Place and Date of Hearing:

Vancouver, British Columbia

March 3, 2025

Place and Date of Judgment:

Vancouver, British Columbia

July 18, 2025

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Mr. Justice Grauer

The Honourable Justice Riley

Summary:

The appellants appeal convictions for contempt of court after interfering with a Trans Mountain pipeline site in breach of an injunction. Two of the appellants are Indigenous. All argue the trial judge erred by failing to take Indigenous laws into account when assessing the mens rea element of criminal contempt. They also contend the judge improperly quashed subpoenas, was biased,

failed to provide adequate assistance to them as self-represented litigants, and erred in finding the Crown had proved a breach of the injunction given that there were no signs marking the location as a Trans Mountain site.

Held: Appeals dismissed. The judge did not err in quashing the subpoenas. The evidence the appellants sought to adduce from the Elected Chiefs was not relevant and amounted to a collateral attack on the court order. The judge did not err in finding that the appellants did not have a colour of right defence grounded in an honest belief that an Indigenous law gave them a right to enter the work site. There is no air of reality to such a defence where the accused is aware of a court order prohibiting specific conduct and engages in that very conduct in a public act of defiance. At a minimum the accused in such cases is reckless as to whether the breach will depreciate the authority of the court.

The appellants were not denied a fair trial, nor was the judge biased. She was managing complex proceedings with multiple scheduling issues. The judge also did not fail to provide adequate assistance to the self-represented appellants. Finally, the judge did not err in finding that the Crown had proved the *actus reus* of the offences. Although it was not open to the judge to rely on the appellants' motivation for attending the site to determine whether the site was covered by the injunction, the judge's factual findings that the site was within the injunction area and that the appellants were aware they were contravening the injunction are supported by the remaining evidence.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

- [1] The appellants were convicted of criminal contempt for breaching an order prohibiting interference with the worksites of Trans Mountain Pipeline ULC ("Trans Mountain"). Two of the appellants are Indigenous. The primary issue on appeal is whether the judge failed to take Indigenous laws into account when assessing the *mens rea* element of the offence and deciding to quash subpoenas issued by the appellants.

The Offences

- [2] The events giving rise to the convictions occurred in Kamloops on October 15, 2020. On that day, the appellants Romilly Cavanaugh, Jocelyn Pierre, and April Thomas participated in a protest opposing drilling under the Thompson (Secwépemc) River for the Trans Mountain Pipeline. The criminal contempt related to an injunction issued by Justice Affleck on June 1, 2018 restraining persons from obstructing or impeding the work of Trans Mountain's contractors, employees, or agents at any Trans Mountain project or operations site.
- [3] On the day in issue, Trans Mountain was engaged in construction activity at a site on the south shore of the Thompson River near Kamloops, referred to as "the Mission Flats" area. An entrance just off Mission Flats Road running adjacent to the river led to a Trans Mountain drill site a short distance away (the "Drill Site"). The Drill Site was surrounded by a fence, with a gate. Signs were posted along the fence and gate, including a prominent one reading "Trans Mountain Property" and indicating that anyone who obstructed access to the

site would be in breach of the injunction and subject to immediate arrest and prosecution.

- [4] Across the road from the Drill Site, Trans Mountain was conducting work where the pipeline track was to continue from the Drill Site after crossing under the river. On the day in issue, it had three pieces of equipment actively working on top of a hill (the "Hillside Area"): an excavator, a bulldozer, and an ATV. Trans Mountain's assistant security manager, Karen Delorey, attended the site after learning that a group of protesters had assembled and were approaching the worksite. The RCMP were called to the site to enforce the injunction.
- [5] Ms. Cavanaugh zap strapped herself to the gate at the Drill Site, blocking the route into the work area. She refused to leave when asked by the RCMP to do so and was arrested. She had to be carried to the police vehicle.
- [6] Ms. Pierre went to the Hillside Area and climbed onto a bulldozer that had been turned off and abandoned as workers retreated in the face of the approaching protesters. She attached her arm to the bulldozer with a zap strap. Ms. Pierre is Nlaka'pamux. She testified she was there to "pray privately and be in ceremony", and did not realize this was an active worksite. Ms. Pierre refused to leave when asked to do so by Ms. Delorey and the RCMP. She had to be forcibly removed from the equipment, resisted strenuously, and refused to walk--forcing the officers to carry her down the steep slope.
- [7] Ms. Thomas is Secwépemc. She said she went to the encampment to pray and provide support by being a "legal observer." She too attended the Hillside Area, climbing onto the bulldozer beside Ms. Pierre before moving onto an excavator where she took selfies to post online. Ms. Thomas ignored the requests of Ms. Delorey and the RCMP to leave. She too was then arrested.

Procedural History

- [8] The appellants' trial was delayed repeatedly, first because of the COVID pandemic, and then due to natural disasters including forest fires, floods, and road closures due to heavy rain. Trial dates were initially set for August 2021, but on July 30 the trial had to be adjourned because of forest fires in the area. The trial was rescheduled to begin on November 15, 2021, but on November 12 there was a joint application for an adjournment, which was granted. The trial was then rescheduled to January 17, 2022. On January 13, 2022, the appellants again applied to adjourn. That application was denied, but on January 17, the first day of trial, they were granted an adjournment due to illness. The trial was then reset for April 25 to 29, 2022, but on April 1 the trial dates were cancelled after the appellants advised that they intended to file a Charter application seeking a stay of proceedings. That application was heard on April 27 and 28, 2022. The trial finally commenced on October 3, 2022, but had to be adjourned on October 5 when Ms. Thomas had a medical issue in the courtroom. The trial was adjourned for continuation on December 5 to 7, 2022.

- [9] After the trial adjourned on October 5, 2022, the appellants issued subpoenas to four Chiefs (the "Elected Chiefs"), three of whom are interveners on this appeal. On November 24, 2022, the Elected Chiefs sought short leave to quash the subpoenas. The application to quash was heard and granted on November 30 on two bases: first, because the subpoenas had not been served properly, and second, because the evidence sought was not relevant to the issues before the Court: *Trans Mountain Pipeline ULC v. Mivasair*, 2022 BCSC 2241 [Subpoena Reasons].
- [10] On November 30, 2022, the appellants applied to adjourn the continuation of the trial set for December 5 to 7 because Ms. Thomas's sister had passed away on November 27 and Ms. Thomas wished to participate in traditional ceremonies associated with her sister's death. The judge denied that request given the number of delays that had already occurred.

At Trial

- [11] The judge began her reasons for conviction by reviewing the terms of the injunction which state:

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:
 - (i) the Westridge Marine Terminal (the "WMT"), as indicated in the map attached at Schedule "A";
 - (ii) the Burnaby Terminal (the "BT"), as indicated in the map attached at Schedule "B"; or
 - (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");

- [12] The judge reviewed the elements of criminal contempt, quoting from *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at 933 [United Nurses]:

To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt. As in other criminal offences, however, the necessary *mens rea* may be inferred from the circumstances. An open and public defiance of a court order will tend to depreciate the authority of the court. Therefore when it is clear the accused must have known his or her act of defiance will be public, it may be inferred

that he or she was at least reckless as to whether the authority of the court would be brought into contempt. On the other hand, if the circumstances leave a reasonable doubt as to whether the breach was or should be expected to have this public quality, then the necessary mens rea would not be present and the accused would be acquitted, even if the matter in fact became public. While publicity is required for the offence, a civil contempt is not converted to a criminal contempt merely because it attracts publicity, as the union contends, but rather because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt.

[Emphasis added.]

[13] The judge concluded the Crown had proved the elements of criminal contempt. Ms. Cavanaugh and Ms. Thomas were sentenced to 32 days in jail. Ms. Pierre was sentenced to 40 days of house arrest. All three have been released on bail pending the outcome of these appeals from conviction.

On Appeal

[14] The appellants seek to set aside the convictions and have the matters remitted for a new trial. They contend the judge made five errors, all of which they describe as errors of law:

1. Quashing the subpoenas, thereby denying the appellants relevant evidence needed to make full answer and defence;
2. Dismissing a defence of colour of right grounded in Indigenous law;
3. Denying them a fair trial because of bias;
4. Failing to provide adequate assistance to them as self-represented litigants; and
5. Concluding that the Crown had proved the actus reus even though there were no signs or markers on the Hillside Area as required by the injunction.

[15] The first two grounds of appeal are related--both concern the appellants' reliance on Indigenous laws to raise a reasonable doubt as to their state of mind when they breached the injunction.

1. Did the judge err in quashing the subpoenas?

[16] As noted, the judge quashed the subpoenas for two reasons: first, because they were not properly issued and served, and second, because the subpoenaed witnesses were not likely to give material evidence.

- [17] The appellants contend the judge should have overlooked the procedural irregularities in service of the subpoenas because the appellants were self-represented and mistakenly assumed that the Supreme Court Civil Rules, B.C. Reg. 168/2009 governed. I will not address this argument because I find the judge's second basis for quashing the subpoenas to be dispositive.
- [18] The appellants submit the judge made two errors in assessing whether the subpoenas were likely to result in material evidence. First, they say she used the mens rea formulation for civil contempt described in *Carey v. Laiken*, 2015 SCC 17 [Carey], which, unlike the mens rea requirement for criminal contempt, does not include proof of intent to publicly flout the law in a way that would depreciate the authority of the court. The appellants say this is the same error the same judge made in *Trans Mountain Pipeline ULC v. Mivasair (re Leyden)*, 2023 BCCA 299 [Leyden], which led this Court to overturn Mr. Leyden's conviction.
- [19] This argument can be dealt with summarily. With respect, the appellants are parsing the judge's reasons and misreading this Court's decision in *Leyden*. Although the judge referred to *Carey* at one point in her Subpoena Reasons, she clearly identified the correct mens rea element for criminal contempt elsewhere. Further, in *Leyden*, this Court did not find that the same judge "got the mens rea element wrong." Rather, the Court found the judge had properly identified the mens rea element for criminal contempt (*Leyden* at para. 64) but had erred in its application by failing to consider Mr. Leyden's evidence that he understood he had permission from police to conduct a pipe ceremony in the injunction area (*Leyden* at paras. 83-84, 87).
- [20] Second, the appellants contend the judge erred by failing to recognize that the subpoenas were needed to enable the appellants to elicit evidence from the Elected Chiefs going to the individualized mens rea assessment for each appellant--i.e., whether they honestly believed they had a right to be on the worksite based on Indigenous laws applicable to that territory.
- [21] The fundamental problem with this submission is that it is a new argument raised for the first time on appeal. At the subpoena hearing, the appellants did not argue that the Elected Chiefs could provide evidence that would help the appellants prove an Indigenous law that contradicted the injunction. Rather, the appellants submitted that the Elected Chiefs' evidence was needed to establish that:
1. The courts did not have jurisdiction over Secwépemc people on unceded territory;
 2. The appellants were only subject to Secwépemc law on Secwépemc territory;
 3. The Elected Chiefs who signed agreements with Trans Mountain did not have the consent of their members to do so and were giving away rights in violation of Indigenous rights and title; and
 4. The injunction did not apply on unceded territory.

(At para. 29.)

[22] This focus is evident from the wording of the subpoenas, one of which is set out here in part:

TAKE NOTICE that you are required to attend to testify as a witness at the place, date and time set out below. You are also required to bring with you all documents in your possession or control relating to the matters in question in this proceeding and please bring the following physical objects:

1. Secwepemc Government to Government Letter of Commitment (Qwelminté) on Reconciliation (Adams Lake IB, Little Shuswap IB, Shuswap IB, Simpcw FN, Splatsh, Skeetchestn IB, Tk'emlups te Secwepemc [Kamloops IB]) - 2019
2. Fight for our Rights: Aboriginal Title and Rights Appeals for Justice (2nd Edition). Shuswap Nation Tribal Council. Updated August 2015
3. Under the terms of the 1763 Royal Proclamation of King George III, the province of British Columbia, through its judicial system, is illegally imposing jurisdiction (CCC) on Secwepemc Qelmučtkwe. Bring any documents verifying that there is no treaty or purchase of Secwepemc territory.
4. The Supreme Court of Canada observed that Aboriginal title constituted an ancestral right protected by section 35(1) of the Constitution Act, 1982. (Delgamuukw v. British Columbia). Please bring all evidence to satisfy Delgamuukw Test: Demonstrating Aboriginal Title, including:
 - a. Documentation proving the Secwepemc people occupied the territory before the declaration of sovereignty or before 1846.
 - b. In April 2005 an article in the Secwepemc Daily News references that there are "400 items added to the inventory in the M3 CAT database which provides a comprehensive bibliography of research materials, TUS studies, archeology reports, historical journals and records relevant to the traditional comprehensive territorial claim." Please bring all of these documents.
 - c. Evidence of a continuous ownership of the land.

[23] The judge quite correctly rejected the relevance of such evidence. It is well-established that, in the absence of a treaty, Indigenous persons are generally subject to the laws of Canada, including criminal laws, whether on or off reserve lands and whether or not the land is unceded: R. v. Ignace, 1998 CanLII 4485 (BC CA), 156 D.L.R. (4th) 713 (B.C.C.A) at para. 12, leave to appeal ref'd (1998) 120 B.C.A.C. 62 (note) (S.C.C.); R. v. Williams (1994), 52 B.C.C.A. 296. Indeed, the judge addressed and rejected the same jurisdictional arguments in the appellants' pre-trial stay application: Trans Mountain Pipeline ULC v. Mivasair, 2022 BCSC 792 at paras. 14a, 25-30.

[24] It was also open to the judge to reject the appellant's intended use of the evidence they sought, which amounted to a collateral attack on the validity of the injunction. It is well-settled law that a court order is valid until it is set aside, varied, or expires on its own terms.

The rule barring collateral attacks on court orders is fundamental to preserving the rule of law and maintaining the authority of the court. The citizen's safeguard against an unlawful order is to seek to set it aside or to vary it through a legal process that squarely addresses the validity of the order--it does not lie in disobeying the order and then challenging its validity in criminal proceedings: *Hayes Forest Services Limited v. Krawczyk*, 2006 BCCA 156 at para. 69; *R. v. Domm* (1996), 31 O.R. (3d) 540 (C.A.), leave to appeal ref'd [1997] S.C.C.A. No. 78; *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 385 at paras. 17-23.

- [25] In cases such as this, the collateral attack doctrine serves as an essential means of preserving the rule of law. To repeat, once a court has issued an order, the proper way to challenge its validity is to bring a proceeding to set it aside by due process of law. Instead of proceeding in that manner--which would have required the appellants to establish among other things that they had standing to raise the Indigenous rights issues they sought to pursue through the issuance of the subpoenas--the appellants chose to publicly defy the injunction in a most disorderly way, and then later attempt to question its legitimacy in these contempt proceedings. Such "self-help" remedies cannot be condoned by the Courts, because they undermine the rule of law, and thereby bring the administration of justice into disrepute: *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 42.
- [26] Further, the Supreme Court of Canada has repeatedly cautioned that criminal and regulatory proceedings are neither the optimal nor preferred forums for litigating Indigenous rights issues: *R. v. Desautel*, 2021 SCC 17 at paras. 2, 90; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at paras. 11-12. That is so because: (1) the affected rights holding collectives are not party to such proceedings; (2) the issue of Indigenous rights and laws are not squarely before the court; and (3) a trial judge could potentially make findings of fact on a limited evidentiary record that could bind later courts in civil proceedings. In short, Indigenous rights should preferably be determined with all affected parties present, on a full record, applying the principles developed in the s. 35 jurisprudence.
- [27] Even if the subpoenas were not sought in furtherance of an impermissible collateral attack on the injunction, the trial judge was well within her authority to quash them on the basis that the appellants failed to articulate a basis on which the proposed witnesses could have provided material evidence. The appellants acknowledge they relied on jurisdictional challenges to the validity of the injunction to support the relevance of the Elected Chief's evidence at the subpoena hearing, but contend they also relied on contradictory Indigenous laws. They point to references in the transcript of the subpoena hearing where the appellants say they wish to obtain evidence from the Elected Chiefs "going to [the appellants'] mens rea." However, the appellants did not clearly identify an intention to elicit evidence about specific Indigenous laws. The judge understood the references concerned the appellants' belief that the injunction did not apply to unceded land. I see no error in the judge's assessment of the argument made before her. She was not required to speculate about what other possible evidence the subpoenaed witnesses might give. Rather, it was the

appellants' burden to identify both the nature of the evidence they wished to elicit from the Elected Chiefs, and its relevance to the arguments they wished to make at trial.

- [28] In this regard, it is noteworthy that even at the hearing of the appeal counsel for the appellants could not describe with any particularity the nature of the evidence the appellants were denied as a result of the quashing of the subpoenas. When pressed, he suggested the Elected Chiefs' evidence could show they had not held a referendum or obtained consent of the hereditary leaders before entering into the benefits agreement, which would "speak to [Ms. Thomas's] credibility." In reply submissions, counsel submitted that the appellants were denied the opportunity to develop their arguments concerning reliance on particular Indigenous laws because the Elected Chiefs succeeded in limiting the record.
- [29] I pause here to note that whether a specific contradictory Indigenous law could raise a reasonable doubt about the mens rea element of criminal contempt is very much a live issue--one to which I will return in addressing the second ground of appeal. I will say here only that, assuming reliance on a specific Indigenous law could raise a reasonable doubt about the mens rea element, the Indigenous law would at a minimum have to be known to the contemnors at the time of the offence. That is so because it is the appellants' state of mind when they breached the injunction that matters. Logically, an Indigenous law unknown to the accused at that time, but subsequently discovered, could not assist. It follows that, even if the judge failed to assess the potential for the Elected Chiefs to provide evidence about specific contradictory laws, that error had no material effect on the trial.
- [30] To the extent that the appellants' argument rests on their intention to elicit evidence to support their reliance on general obligations under Indigenous law, that argument too must fail. The Elected Chiefs were granted leave to intervene on this appeal in part to address the relationship between Indigenous laws and the responsibilities of Indigenous peoples to protect the land and environment. They point out that such responsibilities are not determined by generalizations. Rather, there must be a relationship between the Indigenous laws and the impugned conduct, and a description of the precise law the appellants say permitted or compelled their actions--something the appellants did not provide in this case. Further, the person relying on the Indigenous law must be bound by it, which was not the case here: Ms. Cavanaugh is not Indigenous; Ms. Thomas and Ms. Pierre relied on Secwépemc and Nlaka'pamux law, respectively, but the offences did not occur on Nlaka'pamux territory and Ms. Thomas, who is from Canim Lake, is not a member of the Secwépemc division which claims Aboriginal rights at the Trans Mountain site. Moreover, the Tk'emlúps te Secwépemc did not endorse the appellants' actions at the Trans Mountain site.

- [31] A decision to quash a subpoena is a discretionary one. It is entitled to deference absent an error in law or principle, or an unreasonable exercise of discretion: *R. v. Samaniego*, 2022 SCC 9 at paras. 25-26. In this case, I cannot agree that the judge erred in deciding to quash the subpoenas on the basis that they would not elicit relevant evidence.
2. Did the judge err in her assessment of the mens rea element by failing to consider the availability of a colour of right defence grounded in Indigenous law?
- [32] I turn now to the "live issue" flagged but not addressed in my reasons on the first ground of appeal: whether it is open to an alleged contemnor to rely on a colour of right defence based on an honest belief that a law contradicting the injunction allowed them to engage in the impugned conduct, thereby negating the mens rea for criminal contempt.
- [33] Because the appellants failed to identify a particular Indigenous law they relied on to justify their contravention of the injunction, it is not strictly necessary for us to address this issue. However, given that the jurisprudence reflects some confusion on the availability of a colour of right defence of this type in a criminal contempt prosecution, it is in my view preferable to address it.
- [34] A colour of right defence is based on an honest belief in facts which, if true, would be a legal justification or excuse for the conduct engaged in: *R. v. Creaghan* (1982), 31 CR (3d) 277 (ONCA). The belief must be an honest one, though it may be unfounded in law or in fact: *The Queen v. Shymkovich*, [1954] S.C.R. 606 at 615. The defence encompasses both errors of fact and errors of law but does not extend to a belief that one has a moral right to ignore a law: *R. v. Manuel*, 2008 BCCA 143 at paras. 48-49 [Manuel].
- [35] That the defence may be asserted to negate the mens rea of the offence of criminal contempt is evident from *Leyden*. Mr. Leyden attended a protest at a Trans Mountain worksite in Burnaby as a "watchman" at the request of Indigenous elders who had directed him to assist in keeping the peace: *Leyden* at paras. 8, 87. This Court found that, in assessing mens rea, the judge should have considered Mr. Leyden's evidence that he honestly believed he had police permission to perform a pipe ceremony in the area covered by the injunction-- a ceremony which included one of the police officers responsible for enforcing the court order.
- [36] The appellants contend *Leyden* stands for the proposition that the mens rea for contempt will not be made out if an Indigenous person honestly believes they have a right under Indigenous law to act as they did. Respectfully, this is a misreading of the case. Mr. Leyden's defence did not rely on his belief that Indigenous law gave him a right to perform a pipe ceremony in contravention of the injunction. Rather, he relied on his honest belief that he had been given permission to act as he did by those with authority to enforce the injunction.
- [37] The appellants rely on a number of other cases in support of their argument that an honest belief in a contradictory law can negate the mens rea for criminal contempt. However, most of those cases involve Criminal Code offences, such as mischief and intimidation, and are

accordingly of little assistance: see for example *R. v. Manuel*, BCSC 1475; 2008 BCCA 143; and *R. v. Billy*, 2004 BCSC 1474. In contradistinction to laws of general application, criminal contempt concerns: (1) breach of a court order; (2) directed at the accused; and (3) prohibiting the specific conduct engaged in.

- [38] The mens rea element for criminal contempt consists of a public act with intent, knowledge, or recklessness as to whether the act of breaching the court order will tend to depreciate the authority of the court. The trier of fact must be satisfied beyond a reasonable doubt that the accused has adverted to the risk that public defiance of the order will tend to depreciate the court's authority, and has chosen to proceed despite that risk. However, as the Supreme Court stated in *United Nurses*, "[a]n open and public defiance of a court order will tend to depreciate the authority of the court" and thus it may be inferred that the accused "was at least reckless as to whether the authority of the court would be brought into contempt": at para. 12. It is evident that recklessness can be inferred even when the accused honestly believes there exists a law that contradicts the court order, because in "preferring" the law, the accused also chooses to ignore and defy the court's order.
- [39] The appellants could point to only two cases involving convictions for criminal contempt in which a colour of right defence based on belief in a contradictory law was even considered: *R. v. Toth*, 1991 CanLII 184 (B.C.C.A.) [Toth] and *Teal Cedar Products Ltd. v. Davidson*, 2024 BCSC 81 [Davidson]. In both cases, the defence was rejected.
- [40] In *Toth*, the accused was convicted of criminal contempt for having obstructed access to an abortion clinic while being aware of a court order prohibiting such conduct. He argued that the mens rea of the offence was not made out because he honestly believed the law allowed him to prevent commission of an offence occurring inside the building. In rejecting the defence, the court found it sufficient that the accused acted in a public manner, thereby satisfying the mens rea element as it stood before *United Nurses*. The case is therefore of limited relevance.
- [41] Davidson applied the *United Nurses* formulation for the elements of criminal contempt. Ms. Davidson was charged with impeding logging operations in Fairy Creek contrary to a court order. She asserted an honest belief in a right to act as she did because she was a land guardian in accordance with Kwakwaka'wakw customs and traditions, and worked with the Nanwakolas Council's Ha-ma-yas Stewardship Network Guardian Program--obligations transmitted to her by elders, matriarchs and hereditary leaders: Davidson at paras. 55-56.
- [42] As in *Toth*, the judge considered but rejected the defence, finding that Ms. Davidson did not hold an honest belief that she had a right to breach the injunction because she knew the injunction applied to her and that she would be arrested if she breached it. Further, the judge found that whether she honestly believed she had obligations under Indigenous law was not relevant to the central question of whether she had knowledge of the court order and intended to act contrary to it in a manner that she knew would depreciate the authority of the Court.

- [43] In my view, Davidson demonstrates that a colour of right defence based on an honest belief in a contradictory law is not available in a criminal contempt proceeding. Once the Crown proves the accused: (1) had knowledge of a court order prohibiting certain conduct; and (2) intentionally engaged in that conduct in a public manner, there can be no air of reality to the defence that the accused did not intend, know, or act recklessly as to whether that conduct would tend to depreciate the authority of the court even if they honestly believed that a law permitted the impugned conduct.
- [44] At most, as in Davidson, the appellants in this case could say they honestly believed it was more important to follow a competing Indigenous law than to abide by the court order. But that cannot negate their knowledge that--or at a minimum recklessness as to whether--publicly contravening the court order would tend to depreciate the Court's authority.
- [45] It bears repeating that court orders must be obeyed. Indeed, it is in the interests of everyone that this rule be respected and enforced through the criminal contempt power.
- [46] As this case demonstrates, court orders protect the legal interests of both Indigenous and non-Indigenous rights holders. The Secwépemc people entered into benefit agreements with Trans Mountain and want the project to proceed so that they can realize on the benefits they have contracted for. It is not for individuals, Indigenous or otherwise, to impose their own views about land use on other Indigenous groups by force. Those who disagree may express their views and engage in lawful protest, but are bound to respect court orders prohibiting them from interfering with the lawful rights of others.
- [47] The importance of court orders being available to resolve disputes and protect Indigenous rights is also evident from *Coastal GasLink Pipeline Ltd. v. Huson*, 2019 BCSC 2264. In that case, Indigenous communities were deeply divided over construction of a pipeline in northwestern British Columbia, with many wanting it to proceed and others vehemently opposed. If the superior courts of this province are not available to resolve such disputes and to enforce court orders through the contempt power, we are left with the prospect of differences being resolved through force. It is no exaggeration to say that down that path lies anarchy, the end of the rule of law, and any hope of a peaceful and democratic society. On this point, the comments of Justice Wood in *Everywoman's Health Center Society* (1988) v. *Bridges* (1989), 48 C.C.C. (3d) 545 (B.C.S.C.) bear repeating:
- [10] Many of you, while assuring me of your respect for the law, have characterized your contemptuous conduct as an act of last resort stemming from frustration brought on by the failure of government to act upon your views and to change the law accordingly. The fragility of the rule of law is such that none of us who seek to enjoy its benefits can be permitted the occasional anarchical holiday from its mandate, no matter how compelling or how persuasive may be the cause that such anarchy seeks to advance. Furthermore it is only through the rule of law that any meaningful, lasting or effective change can be wrought in the law. Thus it is that by seeking to change the law by deliberately disobeying it you threaten the continued existence of the very instrument, indeed the only instrument

through which you may eventually achieve the end you seek. Such conduct is not only illegal, it is completely self-defeating.

- [48] I turn next to the appellants' reliance on sentencing decisions in support of their argument that an honest belief in Indigenous laws can negate the mens rea for criminal contempt: *R. v. Dick*, 2024 BCCA 272 [Dick]; *R. v. Nelson*, 2024 BCCA 72 [Nelson]; and *R. v. Davidson*, 2025 BCCA 111 [Davidson CA]. With respect, these cases are of no assistance to the appellants.
- [49] When an Indigenous person is sentenced for criminal contempt, Gladue factors must be considered in assessing the offender's moral culpability and what constitutes a fit sentence: *R. v. Gladue*, [1999] 1 SCR 688; Davidson CA at para. 66; Nelson at para. 10.
- [50] This Court has recognized that, in conducting the Gladue assessment, a contemnor's belief about specific Indigenous laws could, in particular circumstances, lessen (not entirely negate) moral culpability, thereby warranting a lesser sentence: Dick at para. 65; Nelson at paras. 40, 47; Davidson CA at para. 86.
- [51] In contrast, where the issue before the court is whether an accused has committed an offence, including the offence of criminal contempt, the specific degree of blameworthiness--i.e., moral culpability--is not the issue. Rather, the issue before the court is whether the Crown has proved the actus reus and mens rea of the offence beyond a reasonable doubt. In the result, the Crown need only prove that the accused had the fault element (mens rea) necessary to secure a conviction, without any need to weigh or calibrate the accused's degree of fault. In short, conviction and sentencing are distinct processes, involving distinct principles, and care must be taken not to conflate the two.
- [52] I return finally to the judge's assessment of the mens rea element in this case. She found the appellants intentionally chose to breach the injunction rather than peacefully protest or challenge the injunction by legal means. The judge concluded that all three defied the injunction in a public way with intent, knowledge, or recklessness as to whether that conduct would tend to depreciate the Court's authority. Those findings are amply supported by the evidence.
- [53] In summary on this ground of appeal, the appellants have not demonstrated an error in the judge's analysis of the mens rea component of the offence.
3. Were the appellants denied a fair trial?
- [54] The appellants cite a litany of complaints about the way the judge managed the trial and conducted herself in the courtroom. Respectfully, I conclude that these complaints do not rise to the level of a miscarriage of justice and can be dealt with summarily.
- [55] The appellants claim the trial judge was biased, displaying a pattern of partiality, intemperance, and impatience toward them as self-represented litigants. They say the judge treated the Crown more generously, sympathetically, and deferentially. Examples of the impugned conduct include:

1. January 20, 2021: Refusing to accept documents from the appellants at their first appearance. However, the judge was concerned that the appellants might retain counsel who would want to decide whether to put such documents into the record.
 2. March 15, 2021: Setting trial dates before the Crown provided full disclosure. However, the judge denied the request to delay setting the trial dates because the Crown was to send out disclosure by the end of the week and the trial dates were six months away. In any event, full disclosure is not required before trial dates may be set.
 3. November 12, 2021: When both the appellants and Crown counsel sought an adjournment, the judge ultimately granted the adjournment based on Crown counsel's wish to attend a friend's funeral, discounting the appellants' request for time to consult counsel as "weak." However, the judge's description of this request was immaterial. She had before her a joint application to adjourn. Ms. Thomas sought an adjournment for five reasons, and the adjournment was consented to by the Crown.
 4. November 30, 2022: The judge dismissed Ms. Thomas's adjournment application to enable her to participate in traditional ceremonies associated with her sister's death which had occurred on November 27. However, the November 30th adjournment application was the fifth such application. The trial was set to resume on December 5 and the funeral for Ms. Thomas's sister was to be held on December 2. The judge expressed concern about the delays in prosecuting the proceeding, noting that an adjournment would delay the trial for many months into the winter season, which could lead to more delays given weather-related issues. She also noted that Ms. Thomas had already testified.
- [56] The test for bias is whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 20-22, 37 [Yukon]. There is a "strong presumption of judicial impartiality that is not easily displaced": Yukon at para. 25.
- [57] The judge was required to manage the complex proceedings before her to ensure they were heard in a timely way. The proceedings involved eight self-represented alleged contemnors who worked together as a group but had two separate trials. The proceedings had to be scheduled around the COVID pandemic, forest fires, flooding, winter roads, in-court medical emergencies, and the deaths of appellants' family members. Having considered all of the events raised by the appellants, I conclude that the appellants have not displaced the strong presumption of judicial impartiality.
- [58] The other complaints raised go to trial fairness. In particular, the appellants argue the judge failed to address inadequate and late disclosure by the Crown and failed to ensure that the Crown provided the appellants with its initial sentencing position. Again, I will address only some of the particular complaints here, but have considered all of them:

1. March 18, 2022: The judge insisted that the trial proceed on April 25-29, 2022 despite the Crown having received a substantial body of new disclosure that it had yet to provide to the appellants. The judge, too, expressed frustration with the Crown's disclosure at the late stage of the proceedings. She adjourned the matter to April 1, 2022 to confirm the status of disclosure, at which point she confirmed that it had been delivered to the appellants by March 28, 2022. In any event, the appellants then raised a Charter application seeking a stay of proceedings, which the judge directed to be heard during dates set aside for trial. As a result, the April trial dates were adjourned.
 2. April 27, 2022: The appellants say they were arraigned and asked to enter pleas without notice or opportunity to consult with counsel regarding how they wished to plead, a situation made worse by late disclosure and the absence of an initial sentencing position from the Crown. However, Ms. Thomas had earlier objected to the trial judge not taking their plea. She took the position that to move ahead without doing so violated the appellants' Charter rights. The Crown had provided its initial sentencing position to counsel who had been retained briefly by the appellants, and there was at no point any suggestion that the appellants wished to consider guilty pleas.
 3. October 3, 2022: The appellants assert that on this, the first day of trial, the judge admitted evidence not disclosed by the Crown. However, the photographs in issue were part of the disclosure package that had been discussed extensively at the March 18 and April 1, 2022 appearances. That disclosure had been couriered by the Crown to the appellants on or about March 25, 2022. Ms. Thomas confirmed she received the disclosure; Ms. Cavanaugh did not pick up her disclosure package; and Purolator was not able to arrange delivery to Ms. Pierre. The judge had directed the appellants to contact the Crown if they had not received the disclosure by April 4, 2022. Neither Ms. Pierre nor Ms. Cavanaugh did so. In these circumstances, it was reasonable for the judge to conclude that the Crown had made appropriate efforts to provide the disclosure to the appellants.
- [59] Although the appellants perceived some of these decisions as unfair, the fairness of a trial is not assessed only from an accused's perspective - fairness is also assessed from the perspective of the community: *R. v. J.J.*, 2022 SCC 28 at paras. 125, 184 [J.J.]. An accused is entitled to a trial that is fundamentally fair, not "the most favourable procedures imaginable": *J.J.* at paras. 125, 184. I am satisfied that the appellants received a fundamentally fair trial and accordingly would not accede to this ground of appeal.
4. Failure to provide adequate assistance to the appellants
- [60] The appellants say that, as self-representative litigants, they were entitled to a reasonable degree of assistance from the judge. They submit she failed to provide that assistance in three ways by: (1) not explaining the criminal versus civil nature of the proceedings; (2) not ensuring they received adequate and timely disclosure from the Crown; and (3) allowing the Crown to resile from the promise to call all of the witnesses on their witness list. The appellants contend they were prejudiced because they did not have the benefit of cross-

examining those witnesses.

- [61] A trial judge's decisions about how to assist self-represented litigants involves the exercise of discretion and is entitled to deference. An appellant must demonstrate both a failure to assist and that the failure gave rise to a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Criminal Code: *R. v. Woolsey*, 2021 BCCA 253 at para. 59.
- [62] The judge explained the criminal nature of the proceedings to the appellants on numerous occasions. She did so on their first appearance in Court, ensuring they had a copy of the notice of motion and reading it out to them. At that appearance, she explained that the charge was criminal in nature, that it was a complicated and serious matter that could lead to a jail sentence, and she described the procedure that would be followed moving forward. On March 1, 2021, November 12, 2021, and April 28, 2022, the judge repeated the explanation that the proceedings were criminal in nature. I can see no merit in the appellants' argument that the judge provided inadequate assistance on this issue.
- [63] Concerning disclosure, which has already been addressed to some extent, the Crown acknowledges there were some complications and delays. However, the judge was ultimately satisfied the Crown had made appropriate efforts. The appellants have not established a reasonable possibility that non-disclosure affected the outcome of the trial or the overall fairness of the trial process: *R v. Johnston*, 2019 BCCA 107 at paras. 72-74.
- [64] As to the appellants' assertion they were prejudiced by the Crown's decision not to call some of the police witnesses identified on their witness list, the Crown acknowledges that it said it would subpoena every witness on the disclosure list. However, there is no evidence in this case that the Crown was acting for any oblique or improper motive. Further, apart from a general assertion that they were prejudiced, the appellants did not identify what evidence they anticipated eliciting from any of the witnesses who were not called, nor did they articulate how the absence of those witnesses led to an unfair trial. Moreover, when the appellants raised this issue at trial on October 4, 2022, before the Crown's case was closed, the trial judge informed the appellants that they could subpoena any witness they wished to have at trial. There was also a two-month gap in the trial during which the appellants could have subpoenaed the witnesses in issue, but did not do so.
- [65] In summary, the appellants have not established inadequate assistance from the trial judge.

5. The Crown's proof of the actus reus

- [66] The appellants submit the judge erred in finding the Crown had proved that the Hillside Area was a Trans Mountain worksite covered by the injunction. They rely on the wording of the injunction, which I repeat here for ease of reference:
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:
- (i) the Westridge Marine Terminal (the "WMT"), as indicated m the map attached at Schedule "A";
- (ii) the Burnaby Terminal (the "BT"), as indicated m the map attached at Schedule "B"; or...
- (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"); []
- [Emphasis added.]

[67] The appellants say there was no signage, fencing, flagging, or boundary markings at the Hillside Area. They say the trial judge's interpretation of the injunction as applying to an expansive and geographically undefined injunction area is inconsistent with the requirement that an order should be clear and that an accused should be convicted only if they were able to know with complete precision what it is that they were required to do or abstain from doing, as far as is possible: *Gurtins v. Goyert*, 2008 BCCA 196 at para. 16.

[68] The appellants also say the judge erred by relying (at para. 80 of her reasons) on the irrelevant consideration of their motivation in attending the Hillside Area to support her finding that it was reasonably identified as a Trans Mountain site.

[69] Although I agree with the appellants that the judge could not rely on the appellants' motivation for attending the site to determine whether that area was encompassed by the injunction, that error was immaterial. The judge found:

1. There was a large gate that blocked access to the Drill Site from the road;
2. There were large signs on the gate/fence that clearly identified the construction area as Trans Mountain property;
3. The Hillside Area was across the road from the Drill Site and the signs and was largely inaccessible;
4. Ms. Thomas and Ms. Pierre were within the buffer zone near the Drill Site signs prior to moving to the Hillside Area;
5. Construction equipment belonging to Trans Mountain was visible on the Hillside Area;
6. Workers fled the equipment when Ms. Pierre and Ms. Thomas approached;

7. Both Ms. Pierre and Ms. Thomas passed by survey stakes suggestive of construction activity; and
8. Ms. Delorey told the appellants it was an active Trans Mountain site and asked them to leave.
- [70] The description in 1(a)(iii) applies to any project or operations site that has been reasonably identified. The injunction sets out an example of how such identification may be achieved, saying "such as through signage, fencing, flagging or boundary markings." It does not restrict the identification of a worksite to those particular means. It follows that the judge did not err in finding that the Hillside Area was encompassed by the injunction and that the Crown had proved the appellants acted contrary to the injunction. As for their knowledge of the prohibition, the judge made ample findings in support of the appellants' awareness that they were prohibited from being in the area and knew they were contravening that prohibition.
- [71] In summary on this ground of appeal, I would not accede to the appellants' arguments. To the extent that the judge erred in relying on the appellants' motivation in deciding whether entry into the area covered by the injunction had been proved, that error is inconsequential, and I would accordingly apply the curative provision under s. 686(1)(a)(iii) of the Criminal Code.

Disposition

[72] For the reasons given, I would dismiss the appeals.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Justice Riley"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/25/02/2025BCCA0252.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-cavanaugh-2025>

Prepared on 29 October 2026 · Esheria