

CANADA / JUDGMENT

R. v. Davidson

2025 BCCA 111

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 111 R. v. Davidson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Davidson,

2025 BCCA 111

Date: 20250409

Docket: CA49830

Between:

Rex

Respondent

And

Angela Davidson

Appellant

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of British Columbia, dated

April 24, 2024 (sentence) (Teal Cedar Products Ltd. v. Davidson,

2024 BCSC 662, Vancouver Docket S211602-10).

Counsel for the Appellant:

B. Isitt

Counsel for the Respondent:

L.A. Ruzicka, K.C.

M.W. Dull

Place and Date of Hearing:

Vancouver, British Columbia

February 10, 2025

Place and Date of Judgment:

Vancouver, British Columbia

April 9, 2025

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Justice Donegan

Summary:

This is an appeal from sentence for seven counts of criminal contempt. The appellant was found to have repeatedly violated an injunction prohibiting certain protest-related activities and breached release conditions resulting from her arrests. At sentencing, the then Chief Justice of the Supreme Court imposed a cumulative 60 days' imprisonment and 75 hours of community service, exceeding the 51 days' imprisonment sought by the Crown. The appellant says the judge committed multiple errors in principle, including: misapplication of the "step-up" principle, misapplication of Gladue principles, and a failure to give restrictive bail conditions mitigating weight.

HELD: Appeal allowed. The judge erred in his application of the step-up principle by holding that it requires increasingly severe sentences for repeat offences. Properly applied, this principle is one of restraint rather than mandatory escalation. The error impacted the sentence and warrants a fresh analysis. As a result of that analysis, the Court imposes a sentence of 51 days' imprisonment, 18 months probation, and 75 hours of community service, consistent with the Crown's position at sentencing.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] After a trial, Angela Davidson (the appellant) was found guilty of seven counts of criminal contempt of court. For each count, the (since retired) Chief Justice of the Supreme Court was satisfied beyond a reasonable doubt that Ms. Davidson publicly defied one or more court orders, knowing or being reckless to the fact that by doing so, she would tend to depreciate the authority of the court: *Teal Cedar Products Ltd. v. Davidson*, 2024 BCSC 81 at para. 16, citing *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at 933, 1992 CanLII 99.
- [2] Criminal contempt has long been recognized as an offence that "strikes at the heart of the rule of law": *Larkin v. Glase*, 2009 BCCA 321 at para. 7. In Canada's democracy, laws and court orders apply equally to everyone, both public bodies and private citizens. This fundamental principle holds true regardless of one's belief--no matter how strong--that a particular law, a government policy, or a court ruling is wrong. The rule of law is placed at great risk by conduct of the kind displayed by Ms. Davidson, particularly when that conduct forms part of "organized large-scale deliberate defiance": *MacMillan Bloedel Ltd. v. Brown* (1994), 92 B.C.L.R. (2d) 1 at para. 6, 1994 CanLII 3254 (C.A.), citing *R. v. Bridges* (1989), 61 D.L.R. (4th) 154 at 157, 1989 CanLII 5321 (B.C.S.C.).
- [3] In opposition to old-growth logging on southern Vancouver Island, Ms. Davidson repeatedly violated an interlocutory Supreme Court civil injunction that issued in April 2021, and was intended to protect lawful logging operations at Fairy Creek from unlawful interference by protestors: *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCCA 26 at para. 1 [*Rainforest Flying Squad*]. For at least five of her offences, the appellant was not only bound by the terms of the injunction, but she violated one or more bail orders specifically intended to keep her away from the enjoined area and prevent further offending.
- [4] Ms. Davidson was sentenced to a cumulative 60 days' conventional imprisonment for the seven counts of criminal contempt, along with 75 hours of community work service (necessitating a probation order). She received 12 days' credit for time spent in pre-sentence custody, leaving 48 days left to serve.
- [5] The judge imposed the cumulative sentence on April 24, 2024. The appellant sought leave to appeal from sentence on April 26. She was granted leave and released on bail pending her appeal on April 29.
- [6] Ms. Davidson says the judge committed material errors in principle. She asks that we set aside the conventional jail terms and impose a conditional sentence with 60 days of house arrest, less 21 days' credit for the total amount of time she has now spent in custody. The appellant does not take issue with an 18-month probation order attaching to the first of the seven offences, or a requirement that she complete 75 hours of community service work.

Factual Background

- [7] It is not necessary to detail all of the facts surrounding the appellant's offences. Instead, a brief synopsis of each will suffice, based on the judge's reasons for sentence, indexed at *Teal Cedar Products Ltd. v. Davidson*, 2024 BCSC 662.
- [8] The first of the offences occurred on May 18, 2021. This was less than one month after the injunction issued. The appellant chained herself to a gate in contravention of the injunction and obstructed a public roadway. The second offence took place one month later, on June 23, 2021. The appellant entered the enjoined area with the intention of breaching the conditions of a bail order that resulted from the first violation. The third offence occurred two days later, on June 25, 2021. The appellant once again entered the enjoined area, contrary to the injunction. This time, she interfered with machinery belonging to one of the logging contractors in a "highly visible way": at para. 108. The interference was motivated by a "desire to send a message": at para. 107.
- [9] The appellant's fourth offence occurred on August 10, 2021. With other protestors, she entered the enjoined area for an extended period, "playing a drum and distributing food in [a] continuous and flagrant breach" of both the injunction and her bail: at para. 112. The appellant committed criminal contempt a fifth time on November 28, 2021, by entering the enjoined area and "in plain sight of others", dropping off food for other protestors in violation of the injunction and her bail: at para. 116. A sixth violation occurred on January 15, 2022. The appellant once again entered the enjoined area and joined a larger group, knowing she was acting in contravention of her bail: at para. 120.
- [10] Finally, the seventh offence took place on January 28, 2022. On this occasion, the appellant entered and stayed within the enjoined area "for hours", even though it contravened the injunction and the terms of her bail. At trial, she admitted she knew it was important to closely adhere to the terms of her bail. In fact, she personally promised the judge who granted the bail that she would do so: at para. 123.
- [11] In holding Ms. Davidson guilty of criminal contempt, the judge made a number of factual findings specific to her conduct. These included a finding that she conducted herself in a manner that was "defiant, repeated and public, and certainly not minimal": 2024 BCSC 81 at para. 244. At trial, Ms. Davidson testified that for the sixth and seventh offences, she entered the enjoined area for the specific purpose of assisting in the search for a missing Indigenous person (Kevin Bear Henry). The judge did not accept this explanation, finding she had a different motivation:
- [200] I do not believe Ms. Davidson's evidence that she was motivated to enter the Injunction Area on either January 15 or 28, 2022 to assist in the search for Kevin Bear Henry, and have concluded that her purpose on those days was to continue her opposition to the old growth logging by Teal Cedar.

[Emphasis added.]

- [12] The appellant has not appealed the convictions. As such, these findings of fact are unchallenged and owed deference in our review of sentence. The appellant seeks to have us adopt a different and more sympathetic view of her sixth and seventh violations. This is not open to us. As an appellate court, we are bound by the judge's findings of fact and obliged to give them meaningful effect.

Parties' Positions at Sentencing

- [13] At sentencing, the Crown sought a cumulative 51 days' conventional imprisonment and 75 hours of community work service or a \$2,500 fine. The appellant asked that the cumulative sentence not exceed the time already spent in pre-sentence custody, followed by 12 months' probation with 75 hours of community work service.

Reasons of Sentencing Judge

A. Appellant's personal circumstances

- [14] The judge began his sentencing analysis by reviewing Ms. Davidson's personal circumstances. Among other things, he noted that: (a) she is a member of the Da'naxda'xw First Nation; (b) her maternal grandfather and other extended family members attended residential schools; (c) her maternal grandmother attended an Indian Day School ; (d) the appellant is a cancer survivor; (e) she is an elected member of the Da'naxda'xw First Nation Band Council; (f) in 2022 she became Deputy Leader of the Green Party of Canada; and (g) she actively involves herself in her community:
- [17] She considers it her duty, as an Indigenous woman and Land Guardian, to protect the integrity of the land and particularly the cedar trees. She said that she was chosen by her Elders and others in her community to become involved in protecting the lands, waters, and trees.
- [15] The judge noted that Ms. Davidson had not been accused of violating the injunction or any bail order since January 2022 (more than two years before sentencing), and she "has distinguished herself as a leader in both the Indigenous and non-Indigenous communities": at para. 23. Considerable material was adduced in support of the appellant, including letters from various Indigenous leaders and people committed to active protection of the environment. Those letters, individually and collectively, spoke positively of Ms. Davidson's commitment to her Indigenous teachings, her leadership skills, her many societal contributions, and her general good character. The "common theme" was that the appellant "was and continues to be a passionate environmentalist, in the course of which she adheres to the teachings of her Elders": at para. 27.

B. Sentencing principles considered by the judge

- [16] Consistent with the leading authorities in this area of the law, the judge acknowledged that the principles of denunciation and deterrence "must be at the forefront" when sentencing for criminal contempt: at para. 28, citing *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156 at paras. 56-57 [Mivasair 2019]. Denunciation gives effect to society's condemnation of the offence. The principle of deterrence has both a specific and general aspect to it. It seeks to discourage the person before the court from reoffending, but also discourage other people who "might be tempted to engage" in the same type of activity: *R. v. Bissonnette*, 2022 SCC 23 at paras. 45-47.
- [17] Specific to the latter point, the judge opined that in the criminal contempt context, the "objective of [general] deterrence transcends the breach of any particular court order and is crucial to the protection of the Rule of Law": at para. 29. As such, general deterrence remains a consideration even where specific deterrence may no longer be a concern because of rehabilitative progress made by the individual before the court. If public defiance of court orders does not receive serious attention, it "could be seen as an invitation to ignore other laws and orders, which could only lead to the breakdown of the freedom under the law that we so greatly prize": at para. 29, citing *R. v. Nelson*, 2024 BCCA 72 at para. 32, leave to appeal to the SCC ref'd, No. 41261 (August 29, 2024). As emphasized in *Rainforest Flying Squad*:
- [76] It is not tenable in a democracy for a group to abandon the democratic process and impose their will on others by force. In a complex, pluralistic society, the democratically-elected government makes laws, and the courts interpret and uphold them. Barring constitutional overreach, the laws and decisions flowing from them are to be respected and enforced.
- [Emphasis added.]
- [18] At the same time, the judge recognized that as with other offences, Indigenous people who commit criminal contempt are entitled to Gladue consideration at sentencing (*R. v. Gladue*, [1999] 1 S.C.R. 688, 1999 CanLII 679), even where the principles of denunciation and deterrence carry significant force: at para. 31. Accordingly, the judge instructed himself that Gladue factors must be considered when assessing an Indigenous contemnor's degree of personal responsibility for their offence (otherwise described as moral culpability or moral blameworthiness), as well as the "types of sentencing procedures and sanctions which may be appropriate": at paras. 33-39, quoting from *Nelson* at paras. 43-44 and other cases.

C. Sentencing authorities

- [19] To assist with his task, the judge reviewed various sentencing cases involving criminal contempt in a protest scenario: at paras. 40-63.

- [20] Some of those cases involved Indigenous contemnors who, like the appellant, told the court they were invited to the protest area by the local First Nation, had principled reasons related to their Indigeneity for protecting the land and other aspects of the natural environment at stake, or had an important ceremonial role to play at the protest site. In those cases, it was argued that these contextual features either lessened the contemnor's moral culpability for the offence and/or carried mitigating weight that appropriately informed the length of sentence or its form. Some of the cases involved first-time contemnors. In others, the contemnors were sentenced for repeated conduct or had a prior related history.
- [21] The appellant did not have a criminal record; however, given the fact that she committed criminal contempt on seven separate occasions, the judge decided it was not appropriate to use sentences imposed on first-time contemnors as a benchmark for assessing quantum in the appellant's case: at para. 52. He acknowledged that crafting a proportionate sentence remained fundamental to his task (at para. 58); however, in the authorities he reviewed, "[r]epeated or continued instances of criminal contempt [had] been given increasingly severe sentences": at para. 57. On that basis, the judge instructed himself that:
- [61] The principle that repeated acts of contempt may lead to more severe sentences is no different for Indigenous offenders who are being sentenced in accordance with the Gladue methodology

[Internal references omitted.]

- [22] This did not mean the judge precluded himself from adopting a restrained approach to sentencing the appellant. Indeed, he expressly referred to the principle of restraint in his reasons: at para. 99.

D. Judge's assessment of a fit sentence

- [23] In deciding on a fit sentence, the judge acknowledged that Ms. Davidson is:
- [98] passionate about her Indigenous community and about her beliefs toward protecting the lands, waters, and trees. Moreover, I acknowledge that Ms. Davidson, her family, and her community have endured an array of what, in the context of the matter before me, are referred to as systemic and background factors. The evidence before me demonstrates that these factors have impacted the life and outlooks of Ms. Davidson in innumerable ways
- [24] However, the appellant did not identify an Indigenous law that "permitted, let alone compelled" her to contravene a court order: at para. 76. Specific to this point, the judge excerpted the following passage from his reasons for conviction:

[78] While the evidence demonstrates that Ms. Davidson was invited onto the territory of the Pacheedaht First Nation, nothing before me demonstrates that this invitation gave her some sort of licence to pursue the interests she had as a land guardian in her own First Nation. Moreover, I find that Ms. Davidson's role as a Land Guardian did not entitle her, let alone require her to enter the territory of another First Nation to impose her priorities in such territories.

[Emphasis added.]

[25] The appellant asserted Gladue factors at sentencing. These included the intergenerational impact of family members having attended residential and Indian Day schools, children being removed from their homes, and "an upbringing that resulted in some separation from her community, culture, language, and spirituality": at para. 77. The judge acknowledged the presence of these factors; however, he found that the appellant's unlawful conduct did not "arise" from them:

[98] These systemic and background factors, however, do not give Ms. Davidson licence to disobey the orders of this Court and her promises to it. While I am cognizant that a causal link need not be established, I find that the offences did not arise from the systemic factors of Ms. Davidson's background.

[Emphasis added.]

See also para. 80 of the reasons for sentence.

[26] Consequently, the judge determined that Gladue factors did not "shift the primary objectives of denunciation and deterrence in [the appellant's] case": at para. 81. To the contrary, from his perspective, "accord[ing] leniency" based on Ms. Davidson's Indigeneity could potentially "undermine the important premise of sentencing in criminal contempt proceedings -- denunciation and deterrence": at para. 82, quoting from *Trans Mountain Pipeline ULC v. Mivasair*, 2023 BCSC 925 at para. 102.

[27] The appellant argued that the fact she was bound by strict bail conditions "over the protracted period of her offences" should be treated as a mitigating factor: at para. 83. The judge rejected that submission because Ms. Davidson did not adhere to the terms of her bail. However, he was prepared to treat as mitigating the fact that since her last offence in January 2022, Ms. Davidson had "to a considerable extent, engaged in a positive rehabilitation process": at para. 85, emphasis added.

[28] As aggravating factors, the judge found that the appellant's conduct endangered herself and others: at para. 87. Her offences also formed part of organized, large-scale defiance of the injunction and she "used her breaches and arrest to obtain publicity for her cause": at para. 88. Finally, there were seven instances of criminal contempt: at para. 89. From the judge's perspective, the repeated nature of the appellant's conduct increased the severity of her offending.

- [29] In the event the judge was not prepared to sentence Ms. Davidson to the equivalent of custodial time already served (her primary position at sentencing), the appellant sought a conditional sentence. The judge considered this option inappropriate because the appellant had "shown herself incapable or unwilling to abide by conditions in the past": at para. 91. Moreover, he found that the "personal hardships" Ms. Davidson said would arise from custody were not sufficient to justify a community-based disposition:
- [141] First, Ms. Davidson is one of five band councillors, and the remaining four band councillors will surely be able carry on the business of the band if Ms. Davidson is unable to participate.
- [142] Second, Ms. Davidson's position in the Green Party of Canada is an executive role, and while those wishing to interact with her will generally be unable to do so while she is in custody, there are others in the party who can respond to such individuals. Moreover, even if Ms. Davidson was under house arrest, she would generally be unable to attend in person meetings with elected officials, party officials, stakeholders, and members of the public.
- [143] While Ms. Davidson has positions of leadership and prominence, this is no reason to treat her differently from other contemnors.
- [30] The judge concluded that the appellant's offences were "not part of a linked series of acts within a single endeavour, but were instead separate acts, deliberately committed" over eight months. Consequently, consecutive sentences were in order: at para. 97. The use of consecutive sentences is not an issue in the appeal.
- [31] For the first of the offences, the judge imposed 75 hours of community work service to be completed within 18 months. The second offence received five days' conventional imprisonment. The judge imposed seven days' consecutive imprisonment for the third offence.
- [32] Terms of imprisonment were also imposed for each of the four remaining offences and cumulatively, they exceeded the Crown's position. For the fourth offence, the judge imposed nine days' consecutive imprisonment, two days longer than the sentence recommended by the Crown. For the fifth offence, the judge imposed a consecutive term of 11 days, whereas the Crown sought only seven days' imprisonment. The judge imposed a consecutive 13 days' imprisonment for the sixth offence. The Crown sought 10 days. For the last of the seven offences, the judge imposed a consecutive 15 days' imprisonment.
- [33] The combined effect of these terms was 60 days' imprisonment. The judge asked himself whether the total length of sentence offended the principle of totality, which holds that a cumulative sentence must not exceed the overall culpability of the offender: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 42, 1996 CanLII 230. He found it did not: at para. 135. The judge assigned Ms. Davidson 12 days' credit for time served in pre-sentence custody, which left 48 days to serve.

[34] Ms. Davidson asked the judge to suspend the cumulative sentence, thereby eliminating the need to spend further time in custody. He declined to do so, finding it would be improper in light of the "protracted period" of her misconduct and her "repeated and deliberate acts of contempt": at para. 130. This latter determination has not been challenged on appeal.

Issues on Appeal

[35] The appellant asks that the cumulative sentence be set aside on four primary bases. She says the judge:

- (a) failed to give the parties sufficient notice of a possible cumulative sentence in excess of the Crown's position, contrary to *R. v. Nahanee*, 2022 SCC 37;
- (b) misapplied the "step-up" principle;
- (c) erred in his application of Gladue principles; and,
- (d) failed to give sufficient mitigating weight to the appellant's strict bail conditions while awaiting trial and sentencing.

Standard of Review

[36] The standard of review for appeals from sentence is well-established. The application of this standard in the context of criminal contempt was helpfully set out in *Trans Mountain Pipeline ULC v. Mivasair*, 2023 BCCA 115:

[22] The Criminal Code [R.S.C. 1985, c. C-46] does not directly govern sentences for the common-law offence of criminal contempt. However, the standard of review remains the same as it is for all sentence appeals. Appellate courts cannot interfere with sentencing decisions lightly: *R. v. Parranto*, 2021 SCC 46 at para. 46. Absent an error in principle, failure to consider a relevant factor, or over emphasis on the appropriate factors, a court should only intervene to vary a sentence if it is demonstrably unfit

[23] An error in principle includes "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor" that had an impact on the sentence: *R. v. Friesen*, 2020 SCC 9 at para. 26; *R. v. Sellars*, 2018 BCCA 195 at para. 22.

[24] A sentence is demonstrably unfit or clearly unreasonable when it constitutes a marked departure from the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *R. v. Lacasse*, 2015 SCC 64 at para. 53 and *R. v. Gill*, 2022 BCCA 127 at para. 20.

[25] The weight given to relevant factors, including the mitigating effect of Gladue factors on moral culpability, is not an error requiring intervention unless the balancing is unreasonable: *R. v. Nahanee*, 2021 BCCA 13 at paras. 81-83, *aff'd* 2022 SCC 37.

[Emphasis added, internal references omitted.]

Discussion

A. Did the judge commit a Nahanee error?

- [37] In Nahanee, the sentencing judge imposed a cumulative sentence of two years longer than the upper end of the range recommended by the Crown. Mr. Nahanee pleaded guilty to his offences. However, the parties had different positions on what constituted a fit sentence. On appeal, the question arose as to whether, in those circumstances, the judge could only exceed the Crown's upper end if satisfied that imposing the Crown's proposed sentence would lead a reasonable and informed person to believe that the "proper functioning of the justice system had broken down": *R. v. Anthony-Cook*, 2016 SCC 43 at para. 34. This is the test that must be applied by judges before departing from a joint submission.
- [38] The Supreme Court of Canada answered the question in the negative, holding that Anthony-Cook should be confined to joint submissions. However, the Court went on to hold that if a judge considers it appropriate to impose a sentence in excess of the Crown's position, they should notify the parties and allow an opportunity to make further submissions: at para. 4. In discussing the form of notice required, Justice Moldaver said this on behalf of the majority:
- [45] Adequate notice does not require the judge to set out in detail, or with exactitude, what it is that they find troublesome with the Crown's proposed sentence; they should, however, do so whenever possible. It is enough for a judge to advise the parties that, in their view, the sentence proposed by the Crown appears too lenient, having regard to the seriousness of the offence and/or the degree of responsibility of the accused. Providing comprehensive reasons for this concern may, and often will, prove impossible since the judge's position at this point is unlikely to be fixed. As indicated, the purpose is simply to put the parties on notice that the judge is considering exceeding the Crown's proposed sentence. Notifying the parties can be as simple as saying: I am considering imposing a higher sentence than the Crown is seeking due to the seriousness of this offence (see, e.g., *R. v. Scott*, 2016 NLCA 16, 376 Nfld. & P.E.I.R. 167, at para. 37). While notice need not take a particular form, it must be more than simply asking questions or expressing vague concerns about the parties' sentencing proposals.
- [46] There may be cases where the judge has no thought of imposing a harsher sentence than the Crown has proposed until the sentencing hearing is over and the judge has reserved their decision. When that occurs, the judge should notify the parties as soon as possible and invite further submissions, either orally or in writing. At this juncture, the judge may be able to provide greater detail as to the reasons for their concern.

[Emphasis added.]

- [39] The failure to give notice will not, standing alone, invite appellate interference. Rather, an appellant who alleges a Nahanee error must also show: (a) there was information that could have been provided to the court that would have impacted the sentence; (b) the judge failed to provide adequate reasons for imposing the harsher sentence; or (c) the judge issued erroneous or flawed reasons for the harsher sentence: Nahanee at para. 4.
- [40] In this case, the appellant did not plead guilty to criminal contempt. With this distinction in mind, the parties have different perspectives on whether the Nahanee notice requirement applies. The appellant says it does. The Crown says it does not, in part because the policy rationale underlying the decisions in both Anthony-Cook and Nahanee does not arise here. Various cases were cited to us as informative. See, for example, R. v. El Zein, 2023 CMAC 9 at paras. 69-72, leave to appeal refused, [2023] S.C.C.A. No. 401, and R. v. Wesley, 2025 ONCA 51 at paras. 70-87.
- [41] In my view, it is not necessary to decide whether Nahanee is properly engaged in the appellant's circumstances. This is because I agree with the Crown that the judge did sufficiently flag the possibility of a cumulative sentence in excess of the Crown's position, as well as the reason why. Importantly, the appellant also received ample opportunity to make submissions relevant to the judge's concern.
- [42] The Crown's proposed sentence for the appellant's fourth offence was the same as the proposed sentence for the third offence (seven days' imprisonment). The judge questioned that recommendation, asking whether a seven-day prison term was consistent with the step-up principle:

THE COURT: Well, what about the step-up principle?

THE COURT: This is a series of action[s], contempt of court orders. Why would I give her the same sentence for her fourth offence as you're asking me to give her for her third offence? Surely, if she keeps going back and she keeps flaunting the orders of the court, she keeps disobeying them, each time successively she does that, doesn't the step-up principle oblige me? It doesn't oblige me, but doesn't it suggest that for each successive breach that I've found there has to be an increase in the sanction?

THE COURT: if that's the appropriate sentence for June 25 [the third offence] and she goes back and again is in breach of court orders, why would the step-up principle not suggest an increase in the penalty?

[Emphasis added.]

- [43] The Crown explained its position, stating among other things that its proposed sentences accounted for the step-up principle. The Crown acknowledged, however, that it was "open to the court to impose a sentence that it [saw] to be fit and appropriate".

[44] This discussion between Crown counsel and the judge occurred before counsel for Ms. Davidson began his submissions. In those submissions, he addressed the application of the step-up principle to offences four through seven. Among other things:

- he submitted that this principle had not been used to "impose a heightened sentence" on other contemnors who had been sentenced for violating the same injunction as the appellant;
- he analogized the appellant's situation to a previous case in which a different contemnor received the same sentence for consecutive violations of the injunction. In response, the judge distinguished the previous case on the basis that it involved a joint submission. In doing so, he clearly signalled that without a joint submission, he considered himself to have greater latitude to move away from the Crown's position; and,
- although appellant's counsel acknowledged that "some stepping up could be warranted" for the offences involving a violation of the appellant's bail, he submitted this principle had to be considered in conjunction with the principles of parity and totality, as well as Gladue factors.

[45] On a fair reading of this record, the judge manifestly flagged his concern about the Crown's position on sentence and the reason for that concern, namely, that it did not give proper effect to the repeated nature of the appellant's offending. The appellant also had ample opportunity to address the concern. Her counsel made submissions specific to the step-up principle. As such, even if Nahanee applies to sentencing following a contested trial (something we need not decide), I do not consider the judge to have contravened its notice requirement.

B. Did the judge misapply the step-up principle?

[46] In any event, the appellant does not require Nahanee to challenge the decision to exceed the Crown's overall position by nine days. The parties agree that if the judge misconstrued or misapplied the step-up principle, that error would provide a stand-alone ground for appellate interference if Ms. Davidson were able to show that the error impacted her sentence.

[47] The step-up principle is a principle of restraint and aims to ensure that increases in sentence for repeat offenders remain moderate to avoid discouraging their rehabilitation: *R. v. Louie*, 2017 BCCA 218 at para. 24; *R. v. Hansen*, 2015 BCCA 427 at para. 9.

[48] It is within the discretion of a sentencing judge to apply increasingly stringent sentences for repeat offences. The step-up principle is meant to constrain that escalation. The principle does not direct or oblige a court to impose an increase for each repeat offence. Rather, it works to keep any increases that may be imposed moderate so as to avoid undermining the offender's rehabilitation. This principle is applied case-by-case and generally engaged where rehabilitation is a significant factor at sentencing: *R. v. Kory*, 2009 BCCA 146 at paras. 6-7. It is likely to have reduced or no application in cases where the "dominant sentencing factor" is public protection: *R. v. Vickers*, 2007 BCCA 554 at para. 16, citing *R. v. Robitaille* (1993), 31 B.C.A.C. 7 at paras. 8, 9, 1993 CanLII 2561 and other cases. Or, where the circumstances of

the case call for a strong denunciatory and deterrent sanction. See, for example, *R. v. D.F.B.*, 2006 BCCA 350, in which the step-up principle was found to have no application in a robbery case because, in part, the offender had a "lengthy record for similar offences": at para. 9.

[49] Where rehabilitation is a live issue (as it was here), the step-up principle represents a "short hand way of expressing the idea that sentencing requires a measured approach, even for repeat offenders": *R. v. Jimmie*, 2009 BCCA 215 at para. 20, citing *Kory* at para. 6.

[50] The judge addressed the step-up principle this way in his reasons for sentence:

[54] In *R. v. Bush*, 2006 BCCA 350, at para. 9, Justice Ryan summarized the step-up principle in sentencing as "one that is often used to describe the philosophy that sentences should usually increase in moderate steps since a sudden, large increase in the length of a sentence may interfere with the goal of rehabilitation, if that is the focus of the sentence".

[55] In *College of Physicians and Surgeons of British Columbia v. Ezzati*, 2021 BCCA 422, at para. 65, Justice Fitch commented that:

65 Consistent with the "step-up principle", an offender's unremitting intransigence in the face of past court orders, will generally warrant the imposition of a more severe sentence. But the step-up principle itself has deep roots in the notion of judicial restraint in sentencing: *R. v. McPherson*, 2013 BCCA 551 at para. 16.

[56] The fact that Ms. Davidson was not sentenced on separate occasions for her criminal contempts does not defeat the step-up principle.

[Emphasis added.]

[51] When setting out the sanctions he considered appropriate for Ms. Davidson, the judge described the Crown's proposed sentence of seven days' imprisonment for the third offence as an "escalated" sentence reflecting the step-up principle: at para. 110. However, the Crown also proposed a seven-day sentence for the fourth offence. The judge rejected this position, stating that in his view, "based upon the step-up principle", the appellant's "recurring breaches require[d] some escalation of the resulting sanction". He proceeded to impose nine days' imprisonment, exceeding the Crown's position on the fourth offence by two days: at para. 115, emphasis added. He also exceeded the Crown's position for the fifth and sixth offences, applying the "same" or "consistent" reasoning: at paras. 119, 122. I take this to mean that consistent with his approach to the fourth offence, the judge was concerned that the Crown's position on the subsequent offences did not accord with the step-up principle because the increases proposed by the Crown were too low.

[52] In her factum, the appellant submits the judge misconstrued the step-up principle, failing to appreciate its ameliorative purpose and effectively using it as a sword rather than a shield. Instead of applying the principle as a mechanism of restraint, the judge mistakenly understood that the principle required him to "impose a global sentence of stepped-up consecutive sentences" to ensure that the cumulative sentence had a sufficiently deterrent

effect. The appellant says this approach was incorrect at law and overwhelmed the sentencing analysis, resulting in a cumulative sentence that not only exceeded the Crown's position, but also gave inadequate effect to the principles of parity and totality.

- [53] In its factum, the Crown says the judge did not err in applying the step-up principle. To the contrary, he applied "very modest increases" for offences four through six. Moreover, the Crown submits that after deciding consecutive sentences were appropriate, the judge specifically turned his mind to the principle of totality: at paras.131-142. He was clearly alive to the need for restraint.
- [54] I appreciate that for purposes of an appeal, reasons for judgment must be read functionally and contextually. We are not to "finely parse" reasons in search of error: *R. v. G.F.*, 2021 SCC 20 at para. 69.
- [55] However, the appellant has persuaded me that the judge's application of the step-up principle reflects a misunderstanding of that principle. He appears to have interpreted the principle to require increases in sentence for repeat offences, albeit modest ones. Respectfully, the judge's interpretation of the relevant paragraphs in *R. v. Bush*, 2006 BCCA 350 and *College of Physicians and Surgeons of British Columbia v. Ezzati*, 2021 BCCA 422 does not accord with the binding jurisprudence.
- [56] As made clear at para. 9 of *Hansen*, the step-up principle does not act in furtherance of general or specific deterrence. There is no principle of sentencing that says "sentences must be incrementally increased with each offence": *R. v. McPherson*, 2013 BCCA 551 at para. 16, emphasis in original. Increased sentences for repeat offences are open to a judge in the exercise of their discretion. However, those increases are not required by or imposed on the basis of the step-up principle. Rather, they are imposed for other reasons, including to achieve the sentencing objectives of denunciation, deterrence, and protection of the public.
- [57] I also consider it readily apparent that the misunderstanding of the step-up principle impacted the cumulative sentence. The Crown advised the judge that its position on sentencing took the step-up principle into account. In other words, the increases it sought were intentionally kept moderate. Presumably, this was done in recognition of the fact that the appellant is someone for whom rehabilitation was a live issue at sentencing. Indeed, as noted, the judge found that by the time of sentencing, the appellant had "engaged in a positive rehabilitation process": at para. 85. As I interpret the judge's reasons, he viewed the Crown's proposed increases as insufficient and, explicitly invoking the step-up principle, he proceeded to impose sentences that exceeded the Crown's position because the appellant's "recurring breaches require[d] some escalation in the resulting sanction": at para. 115, emphasis added. It was the judge's application of the step-up principle that led to the appellant receiving a longer cumulative term of conventional imprisonment than the one recommended by the Crown.

[58] Accordingly, I agree with the appellant that the judge committed a material error in principle that allows this Court to sentence afresh: *R. v. Friesen*, 2020 SCC 9 at paras. 26-27.

C. Did the judge err in his application of Gladue principles?

[59] Given my conclusion on the second ground of appeal, it is not strictly necessary to address the appellant's third ground. She has already established a basis for reassessing her sentence.

[60] However, the appellant's counsel spent considerable time before us addressing the application of Gladue principles. Those submissions also formed an integral part of what was said in the Court below, and the appellant adduced evidence in support of her submissions. Given the context, I consider it appropriate to address the issue.

[61] At sentencing, both parties filed extensive written submissions. The appellant's written submissions addressed Gladue principles. Among other things, they stated: (a) the appellant's involvement with the Fairy Creek protests were "driven by her obligations as [an Indigenous] Land Guardian"; (b) she assisted in the search for Kevin Bear Henry out of a "sincere concern" for their wellbeing, but also because of a "sense of duty engendered by a request from an Elder"; and (c) the "historical and ongoing impacts of colonization on her, her family and community, and the connection between these systemic factors and the liquidation of old-growth rainforests" were "front of mind" on the dates she violated the injunction.

[62] As such, it was her position that Gladue principles were highly relevant to her sentencing and the judge was obliged to take a "remedial" approach to her case, recognizing the need to "address the systemic over-representation of Indigenous peoples within the criminal justice system and to support the process of reconciliation between Indigenous peoples, non-Indigenous peoples and the Crown". The appellant's oral submissions at sentencing were to this same effect, as were her submissions on appeal.

[63] When sentencing the appellant, the judge turned his mind to Gladue principles. The appellant acknowledges this fact, but says he erred in his application of those principles by failing to treat her as someone with reduced moral culpability arising from: (a) her personal circumstances as a Da'naxda'xw person; and (b) the fact that for two of her offences, she participated in the search for a missing Indigenous person.

[64] The appellant says she adduced substantial evidence about her Indigeneity and customs and beliefs, both at trial and on sentencing, and that this evidence, her role as a trained Land Guardian, and the ongoing Canadian crisis of missing Indigenous persons, should have resulted in a sentence that, at a minimum, did not exceed the Crown's position. She argues that the judge's imposition of nine additional days of imprisonment gave inadequate effect to her reduced moral culpability within the meaning of Gladue and subsequent cases.

[65] The Crown's written statement in the appeal says this about the appellant's third ground of appeal:

25. Gladue factors may illuminate why the appellant went to Fairy Creek but do not explain her decision to engage in illegal activity once there. An offender does not need to establish a causal link but "there must be some connection between those factors and the circumstances bringing the offender before the courts." The appellant's "circumstances and beliefs certainly inform[ed] her decision to attend" but "there is little in the record to connect those beliefs to her decision to move from observing the logging activities to engaging in the particular unlawful conduct that gave rise to the contempt charge." Her testimony suggested "an intentional act of civil disobedience aimed at conveying a message rather than a manifestation of traditional beliefs."
29. In this case, systemic and background Gladue factors did not displace denunciation and deterrence as primary sentencing objectives. The appellant's qualified expression of remorse (relevant when assessing prospects for rehabilitation) lessens any weight afforded to rehabilitation. [The judge] correctly placed significant weight on the seriousness of the offence and the need to uphold the rule of law. The sentence was consistent with other sentences imposed on Indigenous contemnors. In fact, it was at the low end of the range for a repeat offender and is not demonstrably unfit.

[Internal references omitted.]

[66] The application of Gladue in the context of criminal contempt has been addressed by this Court a number of times, most recently in *R. v. Dick*, 2024 BCCA 272[1]:

[58] s. 718.2(e) of the [Criminal Code] does not apply directly to sentencing for criminal contempt because criminal contempt is a common-law offence. However, this Court has accepted the sentencing principles in s. 718.2(e) provide useful guidance and Gladue principles apply in the criminal contempt context: *Nelson* at para. 42.

[59] Gladue principles flow directly from s. 718.2(e) of the Code. That well known section provides:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[60] This Court summarized Gladue principles in *R. v. Kehoe*, 2023 BCCA 2, as follows:

[36] In *R. v. Gladue*, [1999] 1 S.C.R. 688, 1999 CanLII 679, and *R. v. Ipeelee*, 2012 SCC 13, the Supreme Court of Canada made clear that s. 718.2(e) is remedial and is intended to deal with the continuing crisis of over-representation of Indigenous offenders in the Canadian criminal justice system: *Gladue* at para. 33; *Ipeelee* at para. 59.

- [37] This crisis is driven by the alienation, poverty, substance abuse, lower educational attainment, lower rates of employment, and prejudice experienced by Indigenous people in Canada. Sentencing judges are to take judicial notice of how Canada's colonial history and post-colonial assimilationist policies have translated into these terrible outcomes: Gladue at para. 83; Ipeelee at para. 60. These systemic and background factors do not excuse or justify criminal conduct. Rather, they provide the necessary context for understanding and evaluating case-specific information during the sentencing exercise: Ipeelee at para. 83.
- [38] Systemic and background factors affect the incidence of crime and recidivism for all offenders. However, as the Supreme Court recognized, the circumstances of Indigenous offenders are different from other offenders because many Indigenous people are "victims of systemic and direct discrimination" and "dislocation" and are "substantially affected by poor social and economic conditions": Gladue at para. 68.
- [39] The over-representation of Indigenous people in Canada's prison population is tied to broad societal issues. Nevertheless, the Supreme Court in Gladue and Ipeelee recognized that culturally attuned sentencing for Indigenous offenders has a role to play in addressing this crisis: Gladue at para. 65; Ipeelee at paras. 64-70; R. v. Mero, 2021 BCCA 399 at para. 68.
- [40] Accordingly, Gladue and Ipeelee transformed the approach to sentencing Indigenous offenders. As with all offenders, a judge sentencing an Indigenous offender must take a holistic approach to imposing a fit sentence that is proportionate to the seriousness of the offence and the moral blameworthiness of the offender: Ipeelee at para. 37. However, since the circumstances of Indigenous offenders are "significantly different" from those of non-Indigenous offenders, the judge must pay particular attention to two factors:
1. The unique systemic or background factors that may have played a part in bringing the particular Indigenous offender before the courts; and
 2. The types of sentencing procedures and sanctions that may be appropriate for the offender in the circumstances given their particular Indigenous heritage or connection.

See Gladue at para. 66; Ipeelee at para. 59.

- [41] In considering systemic and background factors, the judge must take account of all the surrounding circumstances, including "the unique circumstances of the offender as an aboriginal person," and display sensitivity to and understanding of the "difficulties aboriginal people have faced with both the criminal justice system and society at large": Gladue at para. 81; Ipeelee at paras. 59-60, 75.

- [42] It is not necessary to establish a direct causal link between systemic and background factors and the offence at issue. How the complex interplay of historical factors impacted a particular Indigenous offender may be difficult or impossible to establish. Nevertheless, the specific systemic or background factors at play are critically important. They may help the court assess the moral blameworthiness of the offender or identify appropriate sentencing objectives: *Ipeelee* at paras. 81-83; [R. v. Hamer, 2021 BCCA 297] at para. 98.
- [43] As for the appropriate sanctions, while restorative sentences may be more appropriate for Indigenous offenders, applying Gladue principles will not necessarily lead to a reduced sentence. There is no automatic heritage-based discount: *Gladue* at para. 88; *Ipeelee* at paras. 71, 75; *Mero* at para. 73. Generally, the more serious or violent the crime, the more likely it will be, as a practical matter, that the terms of imprisonment will be the same for an Indigenous and a non-Indigenous offender: *Gladue* at para. 33; *R. v. Wells*, 2000 SCC 10 at paras. 42-44; *Ipeelee* at paras. 84-85; *Mero* at para. 73.
- [64] systemic factors and an Indigenous contemnor's background are relevant and must be considered in the particular circumstances of the case. While a direct causal connection between systemic and background factors, and the conduct at issue need not be established, likewise a contemnor's Indigeneity does not dictate which sentencing objectives take precedence or mandate a reduced sentence.
- [65] Often, an application of s. 718.2(e) of the Code and Gladue principles will result in a finding of reduced moral blameworthiness, a greater emphasis on rehabilitation and restoration, and the imposition of an alternative or reduced sentence. But, absent a reversible error, that is the front-line judge's call
- [Emphasis and internal citations added.]
- [67] Applying this framework to the case, the appellant has not persuaded me of a material error in principle specific to the judge's "front-line" call.
- [68] The reasons for sentence show he "took guidance" from *Gladue* when sentencing the appellant, "considered the role of systemic and background factors" in her offending, "identified the primary sentencing objectives" that arose in the case, and then weighed and balanced all relevant principles and factors before imposing what he considered to be a proportionate sentence. This is what *Gladue* required of him: *Dick* at para. 62.
- [69] The judge was alive to the appellant's personal circumstances as an Indigenous woman, Land Guardian, and community leader: at paras. 12-26, 31-39, 66, 76-82, 98. He reviewed the specific *Gladue* factors asserted by her and accepted that those factors have "impacted the life and outlooks of Ms. Davidson in innumerable ways": at para. 98. The judge appreciated that as a matter of law *Gladue* factors must inform the sentencing process, including for the offence of criminal contempt, and are relevant to assessing both moral culpability and the length and form of sentence: at paras. 33, 39.

- [70] Ultimately, the judge determined that the principles of denunciation and deterrence remained paramount given the serious and repeated nature of the appellant's conduct while bound by more than one court order. From his perspective, the presence of Gladue factors did not negate or materially detract from the weight of those principles. This conclusion attracts a deferential standard of review on appeal and I cannot say the judge's balancing was unreasonable. The case law allows for the prioritization of denunciation and deterrence in cases involving Indigenous offenders, even with the intended remedial effect of s. 718.2(e) of the Criminal Code, R.S.C. 1985, c. C-46 and the analytical framework established in Gladue and subsequent cases: Dick at para. 63. The fact that a judge does not find reduced moral culpability, prioritize rehabilitation, or impose a lesser sentence on the basis of Gladue factors does not, of its own, mean they must have erred in principle. Gladue factors will "provide the necessary context for understanding and evaluating the case-specific information presented by counsel" (R. v. Ipeelee, 2012 SCC 13 at para. 60, *italics in original*); however, they do not "dictate which sentencing objectives take precedence or mandate a reduced sentence": Dick at para. 64.
- [71] It is beyond dispute and unequivocally appropriate that in some cases, Gladue factors will lead to a finding of reduced moral culpability: Friesen at paras. 91-92. In Ipeelee, the Supreme Court of Canada made this clear:
- [73] systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely -- if ever -- attains a level where one could properly say that their actions were not voluntary and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. As Greckol J. of the Alberta Court of Queen's Bench stated, at para. 60 of R. v. Skani, 2002 ABQB 1097, 331 A.R. 50, after describing the background factors that lead to Mr. Skani coming before the court, "[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled." Failing to take these circumstances into account would violate the fundamental principle of sentencing -- that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender
- [Internal references omitted, *italics in the original.*]
- [72] However, it is also the case that reduced moral culpability does not automatically flow from the presence of Gladue factors. Instead, before making a finding to this effect, a sentencing judge must assess the extent to which Gladue factors actually impacted the offender's personal responsibility for their unlawful conduct, with reference to the particular circumstances of the case. It is the unlawful conduct that brings the Indigenous offender "before the courts": R. v. Kehoe, 2023 BCCA 2 at para. 40; Gladue at para. 66; Ipeelee at para. 59.

- [73] As aptly stated in *R. v. Chanalquay*, 2015 SKCA 141:
- [52] A sentencing judge should not simply stack up all of the Gladue-type considerations at play in a case and, if the list is long or severe, automatically proceed on the assumption such factors have had a substantial limiting effect on the offender's culpability. The required analysis is more demanding than that. To determine the extent to which Gladue factors impact on an offender's moral culpability, a sentencing judge must examine both the nature of the relevant factors and the particulars of the crime in issue. He or she should then consider the extent to which the unique circumstances of the offender "bear on his or her culpability" (*Ipeelee* at para 83) in the specific context of the case at hand. As mandated by the Supreme Court, the search here is not for a cause-and-effect relationship but for circumstances that cast light on the degree of the offender's blameworthiness for the specific offence in issue. It might be that the Gladue considerations impact the offender's culpability a great deal, not at all, or only to some intermediate extent.
- [74] The Supreme Court of Canada provided helpful guidance on how to assess an offender's moral culpability in *R. v. Hills*, 2023 SCC 2:
- [58] [An] offender's moral culpability or degree of responsibility should be measured by gauging the essential substantive elements of the offence including the offence's *mens rea*, the offender's conduct in the commission of the offence, the offender's motive for committing the offence, and aspects of the offender's background that increase or decrease the offender's individual responsibility for the crime, including the offender's personal circumstances and mental capacity

[Internal references omitted.]

- [75] In *R. v. C.K.*, 2023 BCCA 468, this Court took the same approach, emphasizing that any assessment of moral culpability must account for:
- [71] the offender's state of mind and acts at the time of the offence: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 79, 1996 CanLII 230. Relevant factors include: the level of planning and/or intentionality brought to the crime; the degree, nature and extent of the offender's personal participation in the offence; the means or method by which the crime was committed; the motive or reasons for the offender's participation; the offender's awareness of the legal and moral wrongfulness of their conduct; their awareness of the actual or reasonably foreseeable harms flowing from their conduct (immediate and long-term); and their persistence in perpetrating the offence despite that awareness

[Internal references omitted.]

See also *R. v. Maslehati*, 2024 BCCA 207 at paras. 133-135; leave to appeal to the SCC ref'd, 2024 CanLII 125015.

- [76] Gladue factors necessarily form part of an offender's personal circumstances, and consequently, they are relevant to assessing moral culpability. But, they are not determinative, and importantly, they are not assessed in isolation. Instead, Gladue factors are considered along with all other factors that realistically arise in the case and logically inform an assessment of personal responsibility for the offence. In light of the holistic nature of the analysis (Kehoe at para. 40), Gladue factors may carry more or less weight, depending on the particulars of the case, including the substantive elements of the offence in question and factual findings made about the offender's state of mind and the way the offence was committed.
- [77] It is not difficult to find cases in which Gladue factors have had a significant impact on the assessment of moral blameworthiness. See, for example, *R. v. Mero*, 2021 BCCA 399 at paras. 84-89. Mr. Mero was sentenced for drug trafficking and weapons offences. He experienced a tragic childhood involving neglect, emotional abuse, and learning and mental health challenges. He left home at an early age, misused substances, and became engaged in criminal activity. He faced additional challenges as an Indigenous person. The Court found that: "[c]onsistent with the experience of a disproportionate number of Indigenous people in Canada, Mr. Mero's childhood was traumatic, he was unable to complete school, his life was marred by addictions, and he came into conflict with the law". Consequently, "there [was] an evidentiary basis to conclude that Mr. Mero's Métis heritage reduce[d] his moral blameworthiness".
- [78] *R. v. Charlie*, 2020 YKCA 6 provides another example. Mr. Charlie was diagnosed with Fetal Alcohol Spectrum Disorder which, among other things, contributed to "severe and persistent problems with frustration tolerance and impulse control". These difficulties materially contributed to Mr. Charlie's conflicts with the law, including violent offending. His condition was found to be "directly linked to his parents' forced placement in a residential school": at paras. 25-26. Consequently, he was sentenced as an offender with diminished moral blameworthiness: at paras. 61, 63-64. See also: *Wesley* at paras. 107-111 and *R. v. Phillips*, 2023 ABCA 210 at paras. 10, 17-22, 26-29, 50, 54.
- [79] In other cases, Gladue factors will carry less impact in the assessment of blameworthiness. In those cases, the offender's background and systemic factors may explain their belief system and/or customs, their world and life views, their pursuits and relationship with their community, or the importance they assign to past or ongoing crises that disproportionately affect Indigenous peoples. However, the evidence before the court will not show that Gladue factors detrimentally impacted their physical or mental condition at the time of the offence, their ability to appreciate the wrongfulness or harmfulness of their unlawful conduct, or their capacity to refrain from the actus reus of the crime.
- [80] I should not be taken as suggesting that the type of circumstances found to exist in *Mero* and *Charlie* are necessary before background and systemic factors can properly be found to reduce an Indigenous offender's moral culpability. *Mero*, *Charlie*, and the other cases I have cited are examples only. The impact of Gladue factors on moral culpability requires an

individualized assessment and is necessarily informed by the unique features of each case. However, the absence of personal struggles such as those made manifest in Mero and Charlie and an obvious connection between those struggles and the offending conduct may make it more difficult to argue that the presence of Gladue factors favour a finding of reduced personal responsibility. Instead, in these cases, the Gladue factors will likely carry greater analytical significance in assessing "[t]he types of sentencing procedures and sanctions that may be appropriate for the offender in the circumstances given their particular Indigenous heritage or connection": Kehoe at para. 40, emphasis added, citing Gladue at para. 66; Ipeelee at para. 59. This could include, for instance, a "greater emphasis on rehabilitation and restoration" or "the imposition of an alternative or reduced sentence": Dick at para. 65.

- [81] In my view, it is not surprising that the judge in this case did not find reduced moral culpability based on Gladue factors. A Gladue report was prepared to assist with the appellant's sentencing and did not reveal any "diagnosed mental disabilities, cognitive impairments, or addictions". The appellant told the report writer that she grew up in a "stable and loving home with her parents and her sister". She has been able to achieve "numerous educational qualifications". There is no indication she has personally experienced the type of struggles described in Mero, Charlie, and other cases.
- [82] Furthermore, running alongside the Gladue factors in this case were a number of case-specific factors that were also highly relevant to assessing the appellant's personal responsibility for her offences, including findings of: (a) intentional public defiance of court orders while knowing or being reckless as to the adverse impact; (b) persistent defiance over a period in excess of eight months, during which the appellant was repeatedly ordered to stay away from Fairy Creek; and (c) deliberate participation in organized, large-scale opposition to lawful activity for the specific intent of sending a message in support of the appellant's cause.
- [83] Given these factors, considered as a whole, it was open to the judge to conclude that the appellant's unlawful conduct "did not arise from the systemic factors of [her] background" as an Indigenous person: at paras. 80, 98. Rather, based on his findings, the appellant's offences reflected a conscious and voluntary choice to engage in knowingly unlawful conduct rather than pursue legal alternatives, with a clear and specific objective in mind--to send a message in support of her cause by repeatedly and visibly defying court orders. The appellant clearly believed it was important to do this as an Indigenous person; however, that belief--however genuine--does not make her someone of reduced moral culpability.
- [84] Before us, the appellant placed considerable emphasis on the last of her two contempt offences, arguing that at the very least, Gladue principles should have made a material difference to the assessment of moral culpability for those offences in light of the fact that she defied court orders while participating in the search for Kevin Bear Henry. Respectfully, this submission fails to account for the judge's finding of fact at trial that Ms. Davidson did not enter the enjoined areas on these occasions for the specific purpose of assisting in the

search; rather, he found she was there to continue with her opposition to old growth logging. I appreciate that Ms. Davidson sees it differently; however, this was the finding made by the judge and we are obliged to accept it on appeal.

- [85] The appellant's argument about the misapplication of Gladue principles is not unlike the one advanced in *Nelson*, namely, that: "the judge erred in the application of the Gladue analysis by failing to give adequate weight to her Indigenous beliefs and by ignoring the interconnections between the offence and her heritage, including a family history significantly impacted by the intergenerational effects of colonialism and systemic racism": at para. 41.
- [86] In *Nelson*, the Court did not accede to this argument because: (a) Gladue factors were insufficient to explain the choice to engage in illegal activity, as opposed to lawful protest (at paras. 49-51); (b) the appellant was unable to identify an Indigenous law that "compelled" defiance of the injunction (at para. 53); (c) her conduct involved "intentional act[s] of civil disobedience aimed at conveying a message, rather than a manifestation of [her] traditional beliefs" (at para. 54); and (d) at its heart, the appellant's argument in *Nelson* was that the presence of Gladue factors "demanded a lesser sentence than that imposed on non-Indigenous offenders that is not what Gladue require[s]": at para. 56. See also the discussion in *R. v. Leyden*, 2024 BCCA 227 at paras. 59-69, leave to appeal to the SCC ref'd, No. 41342 (January 16, 2025). Based on the judge's findings of fact, the same can be said here.

D. Did the judge adequately consider the appellant's bail conditions?

- [87] The last error in principle alleged by Ms. Davidson is that the judge failed to give sufficient mitigating weight to her strict bail conditions while awaiting trial and sentencing. Again, it is not strictly necessary to address this ground. However, for the sake of completeness, I will briefly do so.
- [88] The appellant acknowledges that a court's assessment of mitigating factors, and importantly, the amount of weight assigned to them, is a matter of discretion. However, she says the judge assigned no mitigating weight to this aspect of the case and it was unreasonable to do so. She points out that from August 2021 to April 2022, she was subject to 24-hour house arrest. From April 2022 to November 2022, she was ordered to comply with an overnight curfew. She was also subject to travel restrictions on southern Vancouver Island from May 2021 to the date of sentencing. Initially, Ms. Davidson did not comply with the terms of her bail (at least five of her seven offences involved a breach of bail); however, she says there were no violations from January 2022 to the date of sentencing and the judge should have considered that fact before deciding to treat her bail conditions as non-mitigating.

- [89] The Crown submits a judge has considerable latitude in deciding whether to treat a contemnor's bail conditions as mitigating and it is an individualized, contextual assessment: *R. v. Cuthbert*, 2007 BCCA 585 at paras. 35-40; *R. v. L.I.*, 2017 BCCA 444 at para. 12. Here, the appellant was found to have engaged in deliberate and repeated violations of her bail. The Crown says it was open to the judge to rely on that fact in denying mitigation, even with two years of compliance before sentencing.
- [90] I agree. The judge was not obliged to assign mitigating effect to the appellant's bail. Furthermore, this is a case in which the appellant's non-compliance with bail was front and center in the majority of her offences. In that context, it was open to the judge to find that notwithstanding the strict bail conditions, the sentencing objectives of denunciation and deterrence had not been accomplished through the bail orders and remained pressing objectives: *R. v. Nghiem*, 2009 BCCA 170 at para. 16. I see no error in principle here.

E. What then, is a fit sentence?

- [91] I have concluded the judge misapplied the step-up principle and it impacted the cumulative sentence. In these circumstances, it is necessary to sentence the appellant afresh: *Friesen* at paras. 26-27. When doing so, we must defer to the judge's findings of fact and to his identification of aggravating and mitigating factors, except to the extent that those findings are affected by an error in principle: *R. v. Nystrom*, 2023 BCCA 232 at para. 16, citing *R. v. Lacasse*, 2015 SCC 64 at paras. 43-44; *Friesen* at paras. 27-29; and *R. v. Parranto*, 2021 SCC 46 at para. 122. For ease of reference, those findings include: (a) the appellant's offences "did not arise from the systemic factors of her background" (at para. 80); (b) they involved "repeated and deliberate [public] breaches of the Injunction and of her release conditions" (at paras. 93, 130, 134); and (c) they were "not part of a linked series of acts within a single endeavour, but were instead separate acts, deliberately committed over a period of eight months": at paras. 97, 130, 134.
- [92] In my view, given these findings and the inherent gravity of criminal contempt, a fit cumulative sentence is the one proposed by the Crown at first instance: 51 days' conventional imprisonment and 75 hours of community work service, managed and supervised through a probation order.
- [93] This sentence gives adequate effect to the principles of denunciation and deterrence (both general and specific), in the context of a case involving Gladue factors, and importantly, the judge's finding of "considerable" rehabilitative progress since January 2022. That progress includes the fact that the appellant has "distinguished herself as a leader in both the Indigenous and non-Indigenous communities": at para. 23.
- [94] At sentencing, the judge found that the appellant's public defiance was "protracted repeated and deliberate": at paras. 83, 89, 97, 130, 134. In his reasons for conviction, he found her offence in May 2021 reflected "advanced planning, as opposed to any transient or casual breach": at para. 98. Specific to the second offence, she testified that "she made no effort to conceal the fact that she was in the Injunction Area or to hide herself, and that she 'didn't

mind' if people saw her breaching her order not to go there": at para. 107. When addressing the third offence, the judge made note of the appellant's testimony that she was likely the "most visible person" at the protest site while standing on equipment. He found that her conduct was "motivated at least in part by the desire to make a statement and to send a message": at paras. 116-118.

[95] For the fourth offence, the judge found that Ms. Davidson was in the enjoined area for an "extended period of time". In fact, it is my understanding she had been living in the enjoined area for the previous 80 days, while subject to court orders that prohibited her from being there. She testified that but for her arrest, she would have stayed longer: at para. 126. The fifth offence involved conduct described in the reasons for conviction as "inflammatory behaviour designed to lessen the public's respect for the court": at para. 135, internal reference omitted. On the date of the sixth offence, Ms. Davidson was in the enjoined area for "many hours", even though she had made a "personal promise" to a judge that she would not violate the terms of her bail: at paras. 144, 149. Her conduct was "continuous and flagrant": at para. 151. Finally, for the seventh offence, Ms. Davidson once again spent "hours" in the enjoined area, "driving across a large part" of it: at para. 162. In addition to violating the injunction on this occasion, the appellant breached two conditions of her bail. This was her fifth breach of a non-attendance condition and a second breach of a curfew condition: at para. 164.

[96] The "extent" of a contemnor's wilful defiance is highly relevant to the determination of a fit sentence for criminal contempt: *Regina (City) v. Cunningham*, 1994 CarswellSask 233 at para. 18, 1994 CanLII 4689 (C.A.). As made clear in *Mivasair 2019*, repeated and protracted defiance calls for a longer sentence in support of general deterrence:

[52] It follows from the nature of criminal contempt that the longer the "open, continuous and flagrant violation of a court order" persists, the more serious the contemptuous acts become. As the circumstances of the offence become more serious, the court will understandably be less inclined to impose a light sentence

[53] in cases of criminal contempt, the concept of parity, as applied to the circumstances of the offence, must take into account the persistence of the "open, continuous and flagrant violation of a court order". The longer the violation continues, the greater the need for general deterrence to preserve the rule of law.

[Emphasis added, internal references omitted.]

[97] When before us, the appellant argued that general deterrence should have played no (or a substantially diminished) role at her sentencing because by April 2024, protests at Fairy Creek had largely wound down. The judge correctly rejected that proposition. The offence of criminal contempt has long been recognized to "transcend" the particular dispute in which it arose and adversely impact the administration of justice, generally: *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, 1988 CanLII 3 at para. 41. Given that reality, general deterrence will always be relevant when sentencing for this offence: *Mivasair 2019*

at para. 57.

[98] This was a case in which the judge also found additional aggravating factors: (a) the appellant's conduct endangered herself and others (at para. 87); (b) she defied the injunction and her bail orders as part of an "organized, large scale" affront to the administration of justice (at para. 88); and (c) she "used her breaches and arrest to obtain publicity for her cause": at para. 88, emphasis added. The judge also cited the appellant's not-guilty pleas as an aggravating factor (at para. 86); however, it was incorrect to do so and I have given that factor no consideration in assessing a fit sentence.

[99] In a Gladue letter prepared for use at one or more of the appellant's bail hearings (dated July 2022), the author noted that:

[Ms. Davidson] has maintained strong ties with her community throughout her life. From learning about her culture through Elders and family members in childhood to returning to her community to provide her services and advocacy work. [Ms. Davidson's] identity as a guardian has weaved its way through her academic, occupational, and spiritual practice by influencing what educational programs to enrol in, her work and volunteer efforts, and through cultural and spiritual ties to her home and neighbouring First Nations communities. With the impact of colonization on her family, [Ms. Davidson] asserts, "I know I have to fight this fight to help rebuild and uplift our people and culture."

[100] I do not question the sincerity of the appellant's beliefs, her commitment to her community, the genuine passion she brings to her various roles, and the importance of her continued advocacy in support of reconciliation between Indigenous people, non-Indigenous people, and the Crown. However, between May 2021 and January 2022, she purposefully chose to give form to her advocacy in a manner that she knew was unlawful, she did so with a specific objective in mind, and she repeatedly and openly demonstrated a flagrant disregard for the authority of the court, even though the importance of complying with the applicable orders had been brought home to her on more than one occasion. As aptly stated in Dick, these voluntary choices "[come] with consequences": at para. 68.

[101] The judge did not find the appellant to be someone with diminished moral culpability. Not only are we bound by that finding, but as explained, I agree with the assessment. In the circumstances of this case, the appellant's asserted Gladue factors do not properly reduce her degree of personal responsibility.

[102] I appreciate that Gladue factors are also relevant to the choice of sanction: Kehoe at para. 40; Gladue at para. 66; Ipeelee at para. 59; Dick at para. 65; Wesley at para. 113. However, the second branch of Gladue, as applied to this case, does not justify a non-custodial sentence or a sentence of lesser duration than the one recommended by the Crown at first instance. The judge emphasized the principles of denunciation and deterrence. He was right to do so given the nature of these offences and the manner in which Ms. Davidson committed them. At the same time, a cumulative 51-day sentence of imprisonment respects the principles of parity and totality, and takes account of the appellant's Gladue factors and

efforts made at rehabilitation. But for the latter two aspects of this case, it is my view a fit cumulative sentence for seven offences of criminal contempt of the nature committed by Ms. Davidson, involving repeated and deliberate violations of more than one court order, would have required a substantially longer period of conventional imprisonment. See, for example, *R. v. Krawczyk*, 2010 BCCA 542, leave to appeal to the SCC refused, 2006 CanLII 39431; *Trans Mountain Pipeline ULC v. Mivasair*, 2021 BCSC 369.

- [103] Despite the able submissions of appellant's counsel, I do not consider serving the sentence conditionally in the community would be consistent with the fundamental purpose and principles of sentencing. Instead, a period of conventional imprisonment is required, albeit for a shorter duration than the cumulative term imposed by the judge.
- [104] I accept that conditional sentences can have a denunciatory and deterrent effect: *R. v. Wells*, 2000 SCC 10. The law is clear on that point. However, sentencing jurisprudence also recognizes that a term of conventional imprisonment will usually provide greater denunciation than a community-based disposition: *R. v. Proulx*, 2000 SCC 5 at para. 102. In my view, this is especially so when the offences at issue include multiple and intentionally public violations of the very type of court orders that are now sought on appeal, namely, ones intended to manage conduct in the community. Ms. Davidson submitted that a custodial sentence would result in undue hardship given her personal circumstances. However, the judge found as a fact that it would not: at para. 140. As with all other of the judge's factual findings, we are bound by this conclusion.

Disposition

- [105] For the reasons provided, I would allow the appeal and vary the cumulative sentence.
- [106] However, I would not impose a conditional sentence as requested by the appellant. Instead, I am satisfied that in light of the serious nature of Ms. Davidson's offending and her deliberate and repeated violation of court orders, a fit cumulative sentence is the sentence proposed by the Crown at first instance, including consecutive conventional terms of imprisonment that amount to a cumulative 51 days. To give effect to the cumulative sentence, I would reduce the sentences imposed to align with the quantum requested by the Crown at sentencing.
- [107] The appellant is entitled to 12 days' credit for time spent in pre-sentence custody. As such, the substituted sentence is a cumulative 39 days, commencing April 24, 2024. For purposes of calculating the amount of custodial time the appellant has left to serve and any earned remission, correctional authorities are directed to account for the fact that before being released on bail pending appeal, the appellant served six days of the 39 days in custody.

[108] The variation in sentence does not affect the 18 months' probation already attached to the first offence. I would make that probation subject to the same terms and conditions as the "Order Against Contemnor" imposed in the Court below on April 24, 2024, including 75 hours of community work service to be completed within the first 17 months of the probation order.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Justice Donegan"

[1] See also: R. v. Nelson, 2024 BCCA 72; R. v. Leyden, 2024 BCCA 227; Trans Mountain Pipeline ULC v. Mivasair, 2023 BCCA 115.

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