

CANADA / JUDGMENT

R. v. Leyden

2024 BCCA 227

COURT

British Columbia Court of Appeal

DECIDED

19 June 2024

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2024 BCCA 227 R. v. Leyden

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Leyden,

2024 BCCA 227

Date: 20240619

Dockets: CA47063; CA47079;

CA47080; CA47302

Docket CA47063

Between:

Trans Mountain Pipeline ULC

(Plaintiff)

And

David Mivasair, Bina Salimath, Mia Nissen,

Corey Skinner (aka Cory Skinner), Uni Urchin (aka Jean Escueta),

Arthur Brociner (aka Artur Brociner), Karl Perrin, Yvon Raoul,

Earle Peach, Sandra Ang, Reuben Garbanzo (aka Robert Abress),

Gordon Cornwall, Thomas Chan, Laurel Dykstra,

Rudi Leibik (aka Ruth Leibik), Linda Hutchings, John Doe,

Jane Doe, and Persons Unknown

(Defendants)

And

Attorney General of British Columbia

(Intervener)

And Between:

Rex

Respondent

And

James Leyden

Appellant

- and -

Docket: CA47079

Between:

Trans Mountain Pipeline ULC

(Plaintiff)

And

David Mivasair, Bina Salimath, Mia Nissen,

Corey Skinner (aka Cory Skinner), Uni Urchin (aka Jean Escueta),

Arthur Brociner (aka Artur Brociner), Karl Perrin, Yvon Raoul,

Earle Peach, Sandra Ang, Reuben Garbanzo (aka Robert Abress),

Gordon Cornwall, Thomas Chan, Laurel Dykstra,

Rudi Leibik (aka Ruth Leibik), Linda Hutchings, John Doe,

Jane Doe, and Persons Unknown

(Defendants)

And

Attorney General of British Columbia

(Intervener)

And Between

Rex

Respondent

And

Justin Bige

Appellant

- and -

Docket: CA47080

Between:

Trans Mountain Pipeline ULC

(Plaintiff)

And

David Mivasair, Bina Salimath, Mia Nissen,

Corey Skinner (aka Cory Skinner), Uni Urchin (aka Jean Escueta),

Arthur Brociner (aka Artur Brociner), Karl Perrin, Yvon Raoul,

Earle Peach, Sandra Ang, Reuben Garbanzo (aka Robert Abress),

Gordon Cornwall, Thomas Chan, Laurel Dykstra,

Rudi Leibik (aka Ruth Leibik), Linda Hutchings, John Doe,

Jane Doe, and Persons Unknown

(Defendants)

And

Attorney General of British Columbia

(Intervener)

And Between

Rex

Respondent

And

Stacy Gallagher

Appellant

- and -

Docket: CA47302

Between:

Trans Mountain Pipeline ULC

(Plaintiff)

And

David Mivasair, Bina Salimath, Mia Nissen,

Corey Skinner (aka Cory Skinner), Uni Urchin (aka Jean Escueta),

Arthur Brociner (aka Artur Brociner), Karl Perrin, Yvon Raoul,

Earle Peach, Sandra Ang, Reuben Garbanzo (aka Robert Abress),

Gordon Cornwall, Thomas Chan, Laurel Dykstra,

Rudi Leibik (aka Ruth Leibik), Linda Hutchings, John Doe,

Jane Doe, and Persons Unknown

(Defendants)

And

Attorney General of British Columbia

(Intervener)

And Between

Rex

Respondent

And

Stacy Gallagher

Appellant

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Abrioux

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

October 6, 2020 (sentence, CA47063, CA47079, and CA47080) (Trans Mountain Pipeline ULC v. Mivasair, 2020 BCSC 1512, Vancouver Docket S183541); and

March 2, 2021 (sentence, CA47302) (Trans Mountain Pipeline ULC v.

Mivasair, 2021 BCSC 369, Vancouver Docket S183541).

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Place and Date of Hearing:

Vancouver, British Columbia

May 3, 2023

Place and Date of Judgment:

Vancouver, British Columbia

June 19, 2024

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Abrioux

Summary:

The appellants were convicted of criminal contempt for defying an injunction that prohibited persons from impeding employees and contractors from accessing Trans Mountain Pipeline's worksites. They were each sentenced to 28 days' imprisonment on their first conviction. Mr. Gallagher also received 90 days' imprisonment for a second conviction. The appellants appeal their sentences. The main issue on the appeals is whether the judge used the proper approach for sentencing Indigenous offenders. The appellants also contend that the sentences were unfit.

Held: Appeals dismissed. The judge accepted that the appellants had strong beliefs about the environment and recognized that those beliefs should be viewed through an Aboriginal lens. She rejected the idea that the strength of those beliefs mitigated the offence of contempt of court. Her approach to considerations under s. 718.2(e) of the Criminal Code was correct in law and the sentencing framework she applied was appropriate. It was not an error for the judge to observe that the connection between deprivation and systemic discrimination and the offences at issue in this case was not a strong one, given that she also recognized that the special considerations set forth in Gladue remained in play.

The appellants' reliance on principles of Indigenous law was misplaced. No Indigenous law required them to act as they did in defying the injunction. The sentences were not unduly harsh, nor were they out of proportion to those of others who committed similar offences. They were not unfit.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] Justin Bige, Stacy Gallagher, and James Leyden appeal sentences imposed on them following their convictions for criminal contempt of court. Their contempt consisted of blocking roads and driveways that led to worksites operated by Trans Mountain Pipeline ULC ("Trans Mountain"). This conduct violated an injunction that prohibited persons from impeding Trans Mountain's workers from accessing its premises. Each of the appellants was sentenced to 28 days' imprisonment on their first conviction. In addition, Mr. Gallagher received a 90-day jail sentence for a subsequent conviction.
- [2] As I understand it, Mx. Bige has served their sentence, and Mr. Gallagher has served his original 28-day sentence. Mr. Leyden has yet to fully serve the 28-day sentence, and Mr. Gallagher's 90-day sentence remains outstanding.
- [3] All three appellants identify as Indigenous. The main issue on this appeal is the extent to which considerations applicable to sentencing of Indigenous persons were properly applied in the appellants' cases. Of particular importance is an argument that the appellants ought to have been treated more leniently because of their belief that the injunction did not apply to them, as they say they were acting appropriately under Indigenous law.

Background

- [4] On March 8, 2018, Trans Mountain commenced an action against persons it alleged were illegally blocking access to its worksites. An injunction was granted on March 15, 2018, restraining the original defendants and all others who had notice of the injunction from blocking access to the sites. Despite the injunction, protest activity continued. A previous judgment of this Court (Trans Mountain Pipeline ULC v. Mivasair, 2019 BCCA 156 ("2019 Appeal Reasons")) stated (at para. 6) that over 176 people were arrested in a nine-day period between the time the injunction was granted and mid-April 2018.
- [5] Trans Mountain then initiated civil contempt proceedings against a number of people who were alleged to have violated the injunction. On April 16, 2018, the Attorney General of British Columbia advised that it would intervene to assume conduct of prosecutions for criminal contempt of court for violations of the injunction.
- [6] The injunction was varied on May 31, 2018. It specifically enjoins all persons who have notice of it from "physically obstructing, impeding or otherwise preventing access by Trans Mountain, its contractors, employees or agents" to certain sites and along certain routes. The sites listed include the Westridge Marine Terminal, the Burnaby Terminal, and the routes listed include Bayview Drive.
- [7] Despite prosecutions, public defiance of the injunction continued over the summer of 2018. In order to advance the goals of deterrence and denunciation, the Crown considered that increasingly severe sentences were required. While it had initially generally sought fines of \$3,000 for those convicted after trial, the penalty being sought gradually escalated. By mid-August 2018, when the appellants were arrested, the Crown was typically seeking a sentence of 28 days' imprisonment for those convicted after a trial.

The Circumstances of the August 2018 Offences

- [8] The circumstances of the offences were not complicated. They are described in the reasons for conviction, indexed at 2019 BCSC 2472 ("2019 Reasons for Conviction"). The three appellants were arrested for blocking the entrance to the Westridge Marine Terminal. At the time of their arrests, they were sitting on chairs set up on Bayview Drive and had stretched out a banner in protest of the pipeline, both of which prevented traffic from entering the Terminal.
- [9] Mx. Bige was arrested for violating the injunction on August 14, 2018. Mr. Gallagher and Mr. Leyden were arrested on August 21, 2018.
- [10] The circumstances of Mx. Bige's arrest were straightforward. On the morning of the arrest, about 25 people were protesting on Bayview Drive and obstructing access to the Westridge Marine Terminal. The protesters set up chairs and a banner across the roadway. The police attended, read the injunction to them, and distributed copies of it, warning the protesters that continued blocking of the road would result in arrest. After the injunction was read and

the warnings issued, only nine people remained seated in positions that blocked the roadway. Six of them soon departed. Mx. Bige was among the three protesters who remained seated on the chairs that blocked the road.

- [11] The police followed a five-step process in making the arrest, in accordance with the procedure laid out in the injunction order. First, they asked that those who appeared to be violating the injunction stop blocking the road. Next, they proceeded to inform each individual that their actions in continuing to block the road were unlawful. They then cautioned the individuals that if they continued to act unlawfully, they would be arrested, and they could face charges. The fourth step was to confirm that the individual was aware that they would be arrested and might face charges. The final step was to arrest the individual.
- [12] The circumstances of the arrests of Mr. Leyden and Mr. Gallagher on August 21, 2018 were similar to those of the arrest of Mx. Bige. On that day, there were about 30 people near the entrance to the terminal. A recording of the reading of the injunction was played over a loudspeaker. During the recording, Mr. Leyden left the side of the roadway, where he had been standing, and sat in a chair blocking the road. The police followed the five-step process, and Mr. Leyden was arrested.
- [13] Mr. Gallagher saw Mr. Leyden being arrested and chose to continue the blockade by sitting on the roadway. During the five-step process, he asked that the police not touch him, as he was praying. He continued to pray on the roadway, holding an eagle feather and a smudge pot, for approximately one-half hour, and did not respond to officers, though he also did not resist arrest. Eventually, Mr. Leyden went to Mr. Gallagher and took the smudge pot. Thereafter, Mr. Gallagher was removed from the roadway.
- [14] It is clear that Mr. Gallagher attended at the Westridge Marine Terminal regularly, and he had engaged in protest and prayer there on previous occasions; indeed, he had been at the Terminal at the time of Mx. Bige's arrest, encouraging those blocking the road, though he was not arrested at that time.
- [15] Mr. Leyden had also been at the Terminal during protests before August 21, 2018, but he had not previously put himself in a position where he would be arrested. The circumstances of his arrest are described in the 2019 Reasons for Conviction:
- [28] James Leyden testified that he is a sun dancer who "must walk in peace and humility, in knowledge, wisdom, and truth". Mr. Leyden spoke of his belief in natural law, saying everything is a spirit and we are all connected. He testified that when people who protested were arrested, he and others of like mind would be present "to hold the people and to talk to them about 'walking in peace'", and everyone is invited to pipe ceremonies, including the police.

- [29] James Leyden spoke of the discussions he had had with an important chief of the Coast Salish people, requesting him to take on a role representing indigenous people at the scenes of the protests of the pipeline.
- [30] Mr. Leyden testified he was present prior to August [21], 2018, on 30 or 40 occasions when people were arrested for disobedience of the injunction. On none of those occasions did he put himself in a position to be arrested. But on August 21, 2018, to use his words, "I chose to do this because I could get before the court to speak about unceded territory." He testified that Chief Wilson of the Coast Salish people had told him that it was his duty to speak about unceded territory. His decision to be arrested was, he testified, made immediately after the last person on the line was arrested. He said to the police at that time, "We are on unceded territory and I should not be arrested."
- [31] In cross-examination by Crown counsel, it was put to Mr. Leyden that, "You were standing on the road and at least on one level you expected to be arrested and the court would resolve the matter." In response, Mr. Leyden said, "Yes, I agree with that."
- [16] Mx. Bige and Mr. Leyden pleaded not guilty. Mr. Gallagher declined to plead to the charge, and a plea of not guilty was entered on his behalf. All three had counsel at trial. While they made arguments on both facts and law, the judge concluded that the Crown had proven the elements of the offence beyond a reasonable doubt, and that the legal defences advanced by the appellants had no merit.
- [17] All three appellants filed conviction appeals but all three later abandoned them. The Court formally dismissed the conviction appeals as abandoned in January 2023.

Circumstances of the November and December 2019 Violations

- [18] Mr. Gallagher was also charged with criminal contempt in respect of events that occurred in November and December 2019. The events are described in some detail in reasons for conviction, indexed as 2020 BCSC 2190 ("2020 Reasons for Conviction").
- [19] On November 15, 2019, Mr. Gallagher stood in the middle of Underhill Avenue in Burnaby, blocking traffic from entering the Burnaby Terminal. Later, he stood in a crosswalk, blocking egress from the terminal. He appears to have blocked the entrance and exit for about 40 minutes. The police were called, but he was no longer on the scene when they arrived, so he was not arrested at that time.
- [20] Two weeks later, a similar event occurred, with Mr. Gallagher and other protesters blocking the entrance to the Burnaby Terminal for approximately an hour-and-a-half. Again, he was not arrested.

- [21] On December 18, 2019, Mr. Gallagher and two or three other protesters occupied the crosswalk in front of the entrance to the Burnaby Terminal for approximately one hour, conducting a smudging ceremony, drumming and dancing. These activities prevented Trans Mountain's employees and contractors from entering the terminal. After the police arrived, Mr. Gallagher left within a relatively short period of time. Again, he was not arrested on that day.
- [22] Mr. Gallagher was represented by counsel at his trial. Among other arguments, he contended that because the police did not attend until near the end of his activities, the "five-step" process was not followed, and he could not be found guilty of contempt. The judge rejected that argument. She found that Mr. Gallagher was aware of the injunction and had wilfully and publicly violated it. She found him guilty of contempt.
- [23] Again, although Mr. Gallagher filed a notice of appeal, he abandoned the conviction appeal in January of 2023.

Circumstances of the Offenders

- [24] The sentencing judge describes the circumstances of the three offenders in her sentencing reasons in respect of the August 2018 offences: 2020 BCSC 1512 ("2020 Reasons for Sentence").

Mx. Bige

- [25] Mx. Bige was, at the time of their arrest, 27 years old. They were born and raised in the Lower Mainland. According to a Gladue report prepared for their sentencing, their mother was a member of the Łutsël K'é Dene First Nation in the Northwest Territories. Their father was non-Aboriginal.
- [26] The report states that Mx. Bige's maternal grandparents attended residential schools. Their home life while growing up was marked by poverty, violence and abuse. They left home at the age of 18, and did not maintain a relationship with their biological parents.
- [27] In 2013, Mx. Bige commenced post-secondary studies at Kwantlen College. They graduated with a Bachelor of Arts in 2019. During their time at Kwantlen, Mx. Bige became more interested in their Indigenous heritage.
- [28] On the night before the offence, Mx. Bige stayed at the "Watch House", a place set up by Indigenous groups to monitor the activities of Trans Mountain. The existence of the Watch House is acknowledged in the injunction, and it is afforded protection. Its existence allowed First Nations people to attend in the vicinity of the Westridge Marine Terminal without violating the injunction.
- [29] While at the Watch House, Mx. Bige learned that a protest would be taking place the next day. They wished to join the protest to support local First Nations and "protect the land".

- [30] The judge described Mx. Bige's situation at the time of sentencing as follows:
- [55] [Mx.] Bige now lives in a two-bedroom apartment with roommates in downtown Vancouver. [They describe themselves] as a poet, performer and youth mentorship facilitator. [They support themselves] with various endeavours, including performances and workshops for which, at times, [they] received grants. In recent months, [they have] not been working, but collecting CERB.
- [56] In the past, [Mx.] Bige has struggled with mental health issues. [They are] currently taking medication for ADHD and depression. [They have] provided a letter from a medical clinic that states that [their] mental health condition will be greatly exacerbated and worsened if [they are] incarcerated.
- [57] [Mx. Bige] has clearly had a great impact on [their] community, both in the Aboriginal community and beyond, despite [their] young age. [They have] provided in excess of 50 letters of support from people who know [them] and are involved with [them]. [The letters of support] speak of [Mx. Bige's] art, [their] passion, [their] work (both paid and unpaid) in the community and [their] contribution to [the writers'] lives. Much of [Mx. Bige's] accomplishments are set out in [their] curriculum vitae.

Mr. Leyden

- [31] At the time of sentencing, Mr. Leyden was 68 years old. He was born in Ontario. He indicated that his mother was of blended Anishinaabe and Italian heritage, and that his father was non-Aboriginal. He was apprehended by child protection authorities at the age of three months, and thereafter was in and out of foster care. He indicated that he was abused as a child, and that he also witnessed abuse. At the age of seven, he was sent to be raised by adoptive parents. He says that he suffered physical abuse at the hands of his adoptive father.
- [32] In his teen years, he fell into substance abuse. His life continued to be impoverished until the late 1980s, when he was assisted by the United Native Nations, and connected with Indigenous culture.
- [33] Thereafter he did volunteer work in the Indigenous and addictions recovery community, including working to establish recovery houses. In 2018, he received an invitation from Tsleil-Waututh and Squamish First Nations elders to provide cultural and support services as a Sun Dancer and Sweat Lodge Fire Keeper.
- [34] He is a frequent volunteer and a very respected person in his community.

Mr. Gallagher

- [35] Mr. Gallagher was 58 years old at the time of sentencing. He was born and raised in Vancouver. His mother is said to be of "blended Anishinaabe descent" and his father is non-Aboriginal. He is a member of the Serpent River First Nation, located near Sudbury, Ontario.

- [36] The judge summarized the difficulties through most of Mr. Gallagher's life by quoting his description:
- [44] Mr. Gallagher describes his family life as marred by both substance and sexual abuse, poverty, transience and trauma. He began his own personal history of substance abuse when in Grade 8 and that lifestyle continued until his late 40s.
- [37] In the ten years prior to sentencing, however, Mr. Gallagher had connected to Indigenous communities, doing volunteer work throughout BC. This appears to have turned his life around.
- [38] Like Mr. Leyden, Mr. Gallagher has developed ties with the local First Nations since about 2018. He, too, is described as a sun dancer and pipe carrier.
- [39] At the time of the first sentencing, Mr. Gallagher resided with his elderly mother, who suffered from a variety of medical conditions. He provided care for her. It appears that while he was incarcerated, others assumed the role of caregiver. While he continued to provide care to her at the time of the second sentencing, it appears that he no longer resided in the same place as her.

Sentencing Reasons

- [40] In her 2020 Reasons for Sentence, the judge concluded that each of the defendants should receive a 28-day sentence of imprisonment.
- [41] In doing so, she began by noting that the gradual escalation of sentences as the protests continued was acceptable:
- [74] In *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156, Justice Butler for the court confirmed that escalating sentences can be appropriate:
- [60] It was not unprecedented for the judge to use escalating sentences in a criminal contempt sentencing hearing. In *[MacMillan Bloedel Ltd. v. Brown (1994), 88 C.C.C. (3d) 148 (B.C.C.A.)]* six out of 44 protestors arrested for violating an injunction order in contempt appealed their custodial sentences. McEachern C.J.B.C. held that escalating sentences were sometimes reasonably necessary to preserve the rule of law in contempt proceedings:
- [48] [J]udges may have no alternative but to impose increasingly severe sentences for subsequent offences should the sentences imposed in these cases prove insufficient to convey the message that Canada, as its Constitution states, is a country founded upon the rule of law.
- [42] The judge then considered the principles of sentencing, emphasizing that the primary objectives in sentencing for criminal contempt are typically denunciation and general deterrence, citing *R. v. Dhillon*, 2015 BCSC 1298 at paras. 11-14 and the 2019 Appeal Reasons at paras. 56-58.

- [43] Before turning to the question of what constituted a fit sentence, the judge addressed the Indigenous backgrounds of the appellants. She noted s. 718.2(e) of the Criminal Code, R.S.C. 1985, c. C-46 and the principles arising out of *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13.
- [44] The judge accepted that the sentencing of an Indigenous offender requires considerations that differ from those otherwise applied in sentencing. She referred to *R. v. Wells*, 2000 SCC 10:
- [92] In *Wells*, the Court stated:
- [44] Let me emphasize that s. 718.2(e) requires a different methodology for assessing a fit sentence for an aboriginal offender; it does not mandate, necessarily, a different result. Section 718.2(e) does not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. Furthermore, in *Gladue*, as mentioned the Court stressed that the application of s. 718.2(e) does not mean that aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice and less weight to goals such as deterrence, denunciation, and separation (at para. 78). As a result, it will generally be the case, as a practical matter, that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders (*Gladue*, at para. 33). Accordingly, I conclude that it was open to the trial judge to give primacy to the principles of denunciation and deterrence in this case on the basis that the crime involved was a serious one
- [Emphasis in original.]
- [93] Unlike the facts in *Wells*, I accept of course that the convictions here did not arise from any violent offence. The offences here were, however, serious, consistent with the need for this Court to denounce and deter such behavior, both generally and specifically, as the authorities above indicate.
- [95] The Court in *Ipeelee* discussed how systemic factors and an Aboriginal offender's heritage, background and circumstances relate to an offence, providing context to determine an appropriate sentence:
- [83] As the Ontario Court of Appeal goes on to note in [*R. v. Collins*, 2011 ONCA 182] it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. The interconnections are simply too complex. ... Furthermore, the operation of s. 718.2(e) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[Emphasis added by sentencing judge.]

- [96] Accordingly, although the Contemnors' Aboriginal heritage, background and circumstances are relevant, I find that these factors do not shift the primary objectives from denunciation and deterrence in this case.
- [97] It is apparent here that the offences did not arise from the systemic factors or backgrounds of the Contemnors, although not strictly necessary in applying Gladue principles and s. 718.2(e) of the Code. While each of them has clearly faced difficult circumstances in their pasts, it is commendable that they have risen above those difficulties. Mr. Leyden and Mr. Gallagher have achieved sobriety and have chosen to be fully engaged in their communities, particularly their Aboriginal communities, where they provide significant support for others. The same can be said for [Mx. Bige], who, despite [their] young age, has obtained an education and is similarly fully engaged in [their] community.
- [45] The judge then turned to the question of fitness of sentence. After considering factors individual to each of the appellant's situations, she concluded that a sentence of 28 days -- the same sentence generally applied to other first-time offenders charged with contempt for blocking access to the Trans Mountain facilities, was a fit sentence for Mx. Bige, Mr. Leyden, and Mr. Gallagher.
- [46] The judge gave comprehensive reasons for sentence in respect of the second conviction of Mr. Gallagher in March 2021 (2021 BCSC 369). The reasons, of course, consider the circumstances of the second offence, and also the fact that Mr. Gallagher did not modify his views following his arrest on the first offence.
- [47] The analysis, however, largely parallels that given in the earlier sentencing reasons. While the judge acknowledged the need to consider Mr. Gallagher's Indigenous status, and referred at length to the Gladue report, she found that the circumstances of the case were such that the sentence imposed on Mr. Gallagher should not differ from the sentence she would have imposed on a non-Indigenous offender.

Issues on Appeal

- [48] The major arguments presented on appeal concern the appropriate methodology for sentencing an Indigenous offender in the circumstances of this case. Mx. Bige and Mr. Gallagher argue that the judge "failed to consider the evidence about the appellants' obligations under Indigenous law, strongly held beliefs about the environment, and honest belief that they were exempted from compliance with the injunction". In my view, the sentencing judge's reasons show that she was very much alive to these issues, and that, to the extent that the law required and permitted her to do so, she took them into account.

- [49] The judge accepted that the appellants all had strong beliefs about the environment. She also accepted that respect for the environment ought to be viewed "through the Aboriginal lens", though she noted that there was not uniformity in Aboriginal communities concerning pipeline issues. She rejected the idea that, in the context of this case, the strength of those beliefs mitigated that contempt of court.
- [50] More importantly, she noted that neither the depth of a belief nor the sincerity with which it is held can be a reason to reject the authority of the courts. In that regard, she quoted from *Peter Kiewit Sons, Co. v. Perry*, 2007 BCSC 305:
- [16] I have no doubt that the individuals before me sincerely believe that their cause was just. However, we have many individuals and groups in society who are passionately committed to what they view as just causes. Poverty, homelessness, health care immediately come to mind. If each individual or group chose to break the law and breach court orders to enforce their view of a correct response to a just cause, our democratic society would quickly fail. This is not a frivolous or theoretical concern. As the Newfoundland Supreme Court said in the Health Care case [*Health Care Corporation of Saint John's v. N.A.P.E.* (2000) 196 NFL and PEIR 31], our courts deal every day with parties who lose; who feel passionately that they should not have to obey the orders of the courts. When a group of citizens chooses to publicly defy the order of the court, they encourage each individual to disobey court orders which they do not like. It is this defiance which undermines the rule of law and brings the administration of justice into disrepute.
- [51] Particularly in the argument presented by Mr. Leyden, it is suggested that the appellants were honestly mistaken in thinking that they were exempt from the injunction. Accordingly, it is said that their culpability is reduced, and the need for penal sanctions mitigated.
- [52] As I read the judge's reasons, she did not accept that the appellants acted with the genuine belief that they were exempt from the injunction requirements. She noted that the appellants had seen other Indigenous individuals arrested, and that there was no basis in law for them to believe that the law exempted them from compliance. Further, they admitted that they knew of the injunction, and that, at least in Mr. Leyden's case, he expected to be arrested. Indeed, that was, in some sense his goal, so that he could appear in court and talk about unceded land.
- [53] At best, then, the judge may have accepted that the appellants believed that they ought to be exempted from the scope of the injunction, based on their status as Indigenous persons.
- [54] In analyzing this issue, it is important to note that the five-step process leading to arrest could leave no doubt in the minds of the appellants that the authorities responsible for enforcing the injunction were asserting that it applied to them. If the appellants truly had any doubts as to the correctness of that position, they could easily have sought further legal advice. There was no urgency to blocking the Trans Mountain facilities on that very day. The inescapable conclusion (and, as I read the trial judgments, the one drawn by the trial judges) was that the appellants wished to assert immunity from the injunction, but they must have

been aware that there was a strong likelihood that any such assertion would not succeed.

- [55] Canadian courts have an important role to fill in ensuring that Aboriginal rights are not subverted. A person who believes that they should be exempted from an injunction, or who believes that their Aboriginal rights have not been appropriately considered by the court in issuing an injunction has every right to go to court and apply for an exemption from the injunction or a modification of it.
- [56] What cannot be appropriate, however, is for a person to decide, unilaterally, that they are not subject to a court order. Far from being reasonable, that view is the essence of contempt of court -- it is an assertion that a person or group is entitled to decide whether they are beyond the court's powers.
- [57] In the circumstances, the judge's reference to what was said in *Peter Kiewit* was appropriate. People who defy court orders often believe that the defiance is justified. Certainly in cases of civil disobedience, it is typical for offenders to consider that they are acting for the greater good of society. Those beliefs are not mitigating circumstances, but rather the usual situation. While I accept that some contemnors are simply malicious or acting for personal gain, it seems to me such motives constitute aggravating circumstances. The good intentions of a contemnor should not be treated as mitigating.
- [58] I am also of the view that the sentencing judge made no error in her application of s. 718.2(e) of the Criminal Code and the principles arising out of *Gladue* and *Ipeelee*. She considered the principles thoroughly in her judgment. She observed, rightly in my view, that the connection between deprivation and systemic discrimination and the particular offence or conduct at issue in this case was not conspicuous. Nonetheless, she correctly held that *Gladue* considerations remained relevant, and she considered them in arriving at the sentences imposed. I see no error in her approach.

Recent Jurisprudence on *Gladue* and Criminal Contempt

- [59] Before leaving this issue, reference should be made to two fairly recent decisions of this Court that considered the role of *Gladue* principles in similar circumstances.
- [60] In *Trans Mountain Pipeline ULC v. Mivasair*, 2023 BCCA 115, leave to appeal to SCC ref'd, 40651 (21 September 2023) ("2023 George Appeal"), the contemnor, William George, asserted that the judge failed to give adequate effect to s. 718.2(e) of the Criminal Code and the *Gladue* principles. Mr. George had obstructed the Burnaby Terminal by blocking road access to it. Like the appellants (in respect of the first convictions), the timing of the contempt placed Mr. George in the Crown's "Category 5" for the purposes of sentencing (see 2019 Appeal Reasons at paras. 9-12). As Mr. George pleaded not guilty and was convicted only after a full trial, the Crown had sought a 28-day sentence, which is what the sentencing judge imposed.

- [61] Mr. George had suffered many of the hardships that are all too common among Indigenous offenders. In *Trans Mountain Pipeline ULC v. Mivasair*, 2022 BCSC 791, the sentencing judge noted:
- [16] Mr. George's mother and maternal grandmother were alcoholics and he had unquestionably a very unstable childhood as a result. As the Gladue report writer states, Mr. George experienced poverty, physical and mental abuse, family and community violence, instability, criminal behaviour as a juvenile, a lack of education (Grade 10 only) and finally, alcohol and/or substance abuse by family members and himself. Many of Mr. George's relatives - including his mother, grandparents and uncle - attended residential schools.
- [62] In the 2023 George Appeal, this Court accepted that the judge had given consideration to Gladue principles:
- [57] When considering what constituted a "fit sentence" the judge again returned to the appellant's "Aboriginal heritage, background and circumstances". She recognized that Gladue principles do not require that an Indigenous offender's offence be "caused" by systemic factors or their background. She reiterated the appellant had faced difficult circumstances in his past and did not "suggest for a moment that Mr. George has entirely left his extremely unfortunate childhood behind him ". Nevertheless, she observed that he had seemingly risen above his earlier circumstances, gaining a significant history of employment and reconnecting with his heritage. She held this had been the case "for some years, if not decades". She found that his conduct, and the offence before her, did not arise from "the systemic factors or background that inform[ed] his past".
- [58] The judge accepted that in some cases of criminal contempt, rehabilitation remained a relevant consideration. However, she correctly recognized that Gladue considerations "do not mandate that the principles of restorative justice will have primacy in any given case": Gladue at para. 78; *R. v. F.H.L.*, 2018 ONCA 83 at para. 47. Based on her weighing of these considerations, the judge concluded that "[a]lthough Mr. George's Aboriginal heritage, background and circumstances are relevant, I find that these factors do not shift the primary objectives from denunciation and deterrence in this case".
- [Emphasis added in Court of Appeal judgment.]
- [63] On the appeal, the appellant raised a particular issue beyond the general Gladue principles. He attempted to tie his concern for the environment with his Aboriginal background. This Court considered that the issue did not arise on the record:
- [80] A review of the transcript from the appellant's sentencing reveals that both counsel had observed the appellant felt strongly about protecting the environment. For example, the Crown commented that the appellant had a "strongly held and sincere belief in the need to take action to protect nature and, in particular, the Burrard Inlet from the risks from the pipeline expansion". Counsel for the appellant noted that the appellant was "now on the path for standing up for environmental and Indigenous rights". The Gladue report contained

similar statements.

- [81] However, neither counsel made any real effort to tie the appellant's strongly-held views to the Gladue analysis the judge was required to undertake. Importantly, the appellant did not contest the application of [Peter Kiewit Sons Co. v. Perry] to his case nor did he contend that his beliefs about the environment, or otherwise, diminished his moral culpability. Indeed, at the hearing of the appeal, counsel for the appellant accepted that an Indigenous offender's strongly held beliefs, without more, would not differentiate the offender from other non-Indigenous offenders. Before the sentencing judge, both counsel focused in very large measure on the appellant's difficult early circumstances, his difficulties with addiction issues, his lack of education and other factors commonly raised as part of a Gladue analysis.
- [82] Importantly, the various statements made by the judge, going to the appellant's personal beliefs or the strength of his convictions, and the impact of those beliefs on his moral blameworthiness, were not raised by the appellant as a ground of appeal.
- [83] I raise this because in other cases where these issues are emphasized and presented differently, a different result might, or might not, ensue. There are cases, that will soon be heard by this Court, where Indigenous contemnors have argued that the need for a judge to consider Indigenous background factors, as required for example in Ipeelee at para. 73, includes, for instance, an individual's faithfulness to Indigenous legal principles.
- [84] Such issues were not raised in this case in any meaningful way, either before the sentencing judge or on appeal, and these reasons do not address such questions.
- [64] Mr. Leyden, in particular, suggests that his respect for Indigenous legal principles was raised before the sentencing judge, and it forms a ground of appeal before this Court.
- [65] This Court's decision on the 2023 George Appeal was recently considered by this Court in R. v. Nelson, 2024 BCCA 72. In that decision, Justice Skolrood acknowledged, at para. 39, that the case was "the type of case referred to by Voith J.A." in the 2023 George Appeal. He accepted, at para. 39, that the appellant's "Indigenous background and belief in Indigenous laws [were] central to her actions in Fairy Creek and in turn her position on appeal".
- [66] Justice Skolrood's analysis was as follows:
- [50] The Fairy Creek injunction order issued by Justice Verhoeven expressly contemplated that people were free to "participate in a peaceful, lawful and safe protest" (Order, para. 3), provided that the terms of the Order were otherwise complied with. The principal operational terms prohibited people from "impeding, physically obstructing, or otherwise interfering" with the activities specified in the Order.
- [51] While I acknowledge, again, that an offender need not establish a causal link between the relevant background factors and the commission of the offence, there must be some connection between those factors and the circumstances bringing the offender before the courts, i.e., the offence. Ms. Nelson's personal circumstances and beliefs certainly inform

her decision to attend the Fairy Creek protests but there is little in the record to connect those beliefs to her decision to move from observing the logging activities in issue and participating in peaceful protest to engaging in the particular unlawful conduct that gave rise to the contempt charge.

- [52] Second, Ms. Nelson's reliance on "Indigenous laws" is framed in very general terms and fails to substantiate a connection between those beliefs and the unlawful conduct. In her address to the sentencing judge she said:

There are more legal systems than just the Canadian government. I was obeying St'at'imc law. I was answering a call to action as supporting other nations is fundamental. In traditional law, our Nt'akmen, our ways, are to be considerate, to only take what you need in a way that will not harm that generation or any to follow. That is our most simple teaching that we live by. Respect for all living beings as well as ourselves, all beings, like animate and inanimate, whichever, is how our people have lived.

I do not intend to repeat what I did in placing myself at the mercy of officers. I learned what I needed to, what was happening on the grounds of Fairy Creek, as well as how this type of civil disobedience plays an important role in getting a message across when requests, demands and pleas are met with a wall of paperwork.

- [53] While providing important context for Ms. Nelson's decision to travel to Fairy Creek, her understanding of the traditional laws provides no insight into her decision to illegally impede traffic by attaching herself to a buried cable. Specifically, Ms. Nelson did not identify an Indigenous law that compelled, or even permitted, such conduct. As this Court observed in *R. v. Manuel*, 2008 BCCA 143 at para. 62, "self help" remedies, which I would define to include intentional breaches of an injunction order, are not condoned in Canadian law, which includes Indigenous laws. See also *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 42.

- [54] Further, the second passage from Ms. Nelson's statement set out above suggests an intentional act of civil disobedience aimed at conveying a message, rather than a manifestation of Ms. Nelson's traditional beliefs.

- [67] In my view, the case before us fails for similar reasons. Mr. Leyden's assertion that he was following Indigenous laws is much stronger than that of Mx. Bige or Mr. Gallagher. That said, there is no assertion that Indigenous laws compelled Mr. Leyden to defy the injunction. Rather, he indicated that his goal was to appear before the court to make arguments that the pipeline should not be expanded because it traversed unceded territory. In his evidence at trial, he stated:

So I sat down and I chose to do it, and I chose to do it because I thought I would get in front of the court and I would be able to say this is unceded territory and the court in its wisdom -- in its profound wisdom and -- and in the protecting of the integrity of the Crown would say you're right, this was a mistake, so that's why I'm here and that's what I was doing that for.

[68] Far from being an imperative of Indigenous law, the goal of disobeying the injunction appears to have been to appear before a common law court in order to make an argument about the use of unceded territory. Importantly, such an argument could have been advanced without defying the injunction. Mr. Leyden could have sought to set aside or modify the injunction as it applied to Indigenous people, or, alternatively, could have challenged the approval of the pipeline. In fact, the Tsleil-Waututh and Squamish Nations (with whom Mr. Leyden identifies, though he does not appear to be a member) had already taken such a challenge: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, leave to appeal to SCC ref'd, 38379 (2 May 2019).

[69] In short, Mr. Leyden's attachment to principles of Indigenous law does not serve to diminish his culpability in a manner that could have affected his sentence.

Fitness of Sentence

[70] I turn, finally, to the argument that the sentences imposed were unfit. I am unable to accede to that submission. The 28-day sentences were in keeping with others that have been upheld on appeal to this Court, including cases like Mr. George's appeal, where factors similar to the ones in issue in this case were at play. The judge considered all relevant factors, and reached a conclusion that is entitled to deference.

[71] The 90-day sentence given to Mr. Gallagher on his second conviction is significantly higher than the 28-day sentences, and, given the limited extent of his activities on the dates giving rise to the second conviction, might be seen as toward the high end of the appropriate range. It must be recognized, however, that Mr. Gallagher's history as a leader in the protest and his lack of remorse, played significant roles in his sentence, and that the continued public protest constituted a serious challenge to the authority of a court order. In my view, the sentence cannot be said to be unfit.

Conclusion

[72] I am not convinced that the judge made any error of law or principle in imposing the sentences. I am also not persuaded that the sentences were unfit. I would, therefore, dismiss the appeals.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Mr. Justice Hunter"

I agree:

"The Honourable Mr. Justice Abrioux"

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