

CANADA / JUDGMENT

R. v. Nelson

2024 BCCA 72

COURT

British Columbia Court of Appeal

DECIDED

6 March 2024

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2024 BCCA 72 R. v. Nelson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Nelson,

2024 BCCA 72

Date: 20240306

Docket: CA48787

Between:

Rex

Respondent

And

Lexlixatkwa7 Nelson

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Stromberg-Stein

The Honourable Justice Skolrood

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

November 30, 2022 (sentence) (Teal Cedar Products Ltd. v.

Rainforest Flying Squad, 2022 BCSC 2328,

Vancouver Docket S211602).

Counsel for the Appellant:

E.J. Olmstead

Counsel for the Respondent:

L.A. Ruzicka, K.C.

Place and Date of Hearing:

Vancouver, British Columbia

November 29, 2023

Place and Date of Judgment:

Vancouver, British Columbia

March 6, 2024

Written Reasons by:

The Honourable Justice Skolrood

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Stromberg-Stein

Summary:

The appellant, Lexlixatkwa⁷ Nelson, pleaded guilty to criminal contempt for violating an injunction prohibiting certain protest-related activities directed towards logging in Fairy Creek. While the injunction order permitted lawful, peaceful protests, the appellant unlawfully impeded traffic. The sentencing judge imposed a suspended sentence with 50 hours of community service and 12 months' probation. The appellant now appeals her sentence on the basis that the judge erred by failing to give effect to her Indigenous heritage and belief in Indigenous laws as required by Gladue and Ipeelee.

Held: Appeal dismissed. To the extent that an Indigenous offender's beliefs are rooted in or informed by their Indigenous background, sentencing judges must take those unique beliefs into account when fashioning an appropriate sentence. However, a proper application of the Gladue analysis does not establish that the sentencing judge erred in this case. While the appellant's Indigenous heritage and belief in Indigenous laws explain her reasons for attending the protest site, they do not explain why she engaged in the illegal conduct of flouting the injunction. The appellant's reliance on Indigenous laws is framed in very general terms and contains no suggestion that those laws required her to intentionally breach an injunction order.

Reasons for Judgment of the Honourable Justice Skolrood:

- [1] On July 15, 2021, the appellant, Lexlixatkwa7 Nelson, pleaded guilty to one count of common law criminal contempt for violating an injunction (the "Injunction") prohibiting certain protest-related conduct directed towards the logging activities being carried out by Teal Cedar Products Ltd. ("Teal") in an area known as Fairy Creek on Vancouver Island.
- [2] Ms. Nelson blocked a road in the area covered by the Injunction by lying prone on the road with one arm in a hole attached to a buried cable.
- [3] On November 30, 2022, the sentencing judge imposed a suspended sentence with 50 hours of community service and 12 months' probation.
- [4] Ms. Nelson now appeals her sentence on the basis that the judge erred by failing to give effect to her Indigenous heritage and belief in Indigenous laws as required by the leading Supreme Court of Canada decisions in *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13.
- [5] For the reasons that follow, I would dismiss the appeal.
- [6] I will add at the outset that Ms. Nelson did not seek a suspension of her sentence pending appeal and she has completed the 50 hours of community service. The Crown, however, does not seek to have the appeal dismissed as moot based on this Court's reasoning in *R. v. Krawczyk*, 2010 BCCA 542 at para. 15, leave to appeal refused [2011] S.C.C.Z. No. 29.

Background

- [7] The following facts are taken from an agreed statement of facts submitted to the sentencing judge:
 - 1. Teal has been conducting logging operations of both old-growth and second-growth trees near the Fairy Creek watershed in Tree Farm Licence 46 ("TFL-46") for the past several years. Various groups have publicly criticized and protested Teal's operations in the area. These groups started setting up blockades within TFL-46 to disrupt operations in August 2020.
 - 2. On April 1, 2021, an Injunction order was granted by Mr. Justice Verhoeven of the Supreme Court of British Columbia (the "Injunction"). The Injunction contained provisions prohibiting the blocking of roads or the impeding of logging operations within a defined area in TFL-46 (the "Injunction Area").
 - 4. There has been continuing national and provincial media coverage of the opposition to Teal's operations in the months both before and after April 1, 2021. In the time since the granting of the Injunction, there have also been media reports concerning arrests of protestors for contempt of court in TFL-46.

5. These arrests commenced on May 18, 2021. By the time of Ms. Nelson's arrest on July 15, there had already been a total of 412 arrests in and around TFL-46, including arrests for both contempt and for Criminal Code offences. Ms. Nelson was unaware of the total number of arrests. Not all arrests led to prosecution.

July 15, 2021

6. On the afternoon of July 15, 2021, Lexlixatkwa⁷ Nelson was lying on a logging road in the Injunction Area. Her left arm was in a hole in the ground, with her wrist attached by a carabiner to a cable buried under the road. Ms. Nelson's presence on the road impeded traffic along it.
7. Ms. Nelson did not attend the Fairy Creek area intending or planning to breach the Injunction when she arrived on July 15, 2021. She attended to support the protest against the logging of old growth forests. While there, she decided to take the actions that she did after witnessing the protests because of her concern for the trees that would be logged.
8. Another individual lay on the road a short distance away, within view of Ms. Nelson. Numerous police officers and other individuals were likewise able to see Ms. Nelson from their positions on and adjacent to the roadway.
9. At 12:09 pm, an officer read Ms. Nelson a short script informing her of the existence of the Injunction and the fact that she was breaching it by blockading the road. Ms. Nelson remained where she was.
10. At 2:04 pm, another officer arrested Ms. Nelson and informed her of her Charter rights.
11. An RCMP obstacle removal team used hand tools to dig around and sever the cable, allowing Ms. Nelson to be removed from the road.
12. Following her extraction, Ms. Nelson refused to walk with police officers to the vehicle intended to transport her to the RCMP mobile command post. Four police officers carried her away on a tarpaulin. Onlookers cheered as she was removed from the scene.
13. The act of blocking the roadway was done in full view of multiple onlookers. The overall actions of the protestors defied the Injunction in a public way and thereby brought the authority of the court into contempt.
14. Enforcement of the Injunction at Fairy Creek was a significant undertaking that required numerous RCMP officers to be on the site. Officers were taken away from their regular duties at detachments across the province, as well as from Alberta, Saskatchewan, and Manitoba, to work at Fairy Creek.
15. Lexlixatkwa⁷ Nelson was arrested on July 15, 2021, for breaching the Injunction and agrees with this Statement of Facts.

Circumstances of Ms. Nelson

- [8] Ms. Nelson was 21 years old at the time of sentencing. She is a member of the Lil'wat First Nation, lives on her ancestral lands, and is strongly connected to her Lil'wat heritage. She has studied First Nations and Endangered Languages at the University of British Columbia, but at the time of sentencing, was on a break from her studies while she focussed on cultural and language work in her community, including learning Ucwalmicwts, a Lil'wat language.
- [9] Considerable information concerning Ms. Nelson's family background, personal circumstances and connection to her Indigenous heritage and community was provided to the sentencing judge through a Gladue report. The judge summarized some of the key facts set out in the Gladue report as follows (at para. 11):

The Gladue report discloses that family members including her father suffered terrible abuse at the Mount Currie Indian Day School and at residential schools. She is, however, a member of a family that developed her sense of social and Indigenous responsibility, including the responsibility to protect their Lil'wat culture and society.

The Judge's Sentencing Reasons: 2022 BCSC 2328

- [10] The judge cited this Court's decision in *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156 at para. 57 [*Mivasair (Cass/Wood/McLean/Morrice)*] where it was held that the principles of denunciation and deterrence must be at the forefront when sentencing for criminal contempt (at para. 4). However, the judge acknowledged, and the Crown agreed, that the Court must have regard to the principles enunciated in *Gladue* and *Ipeelee*. The judge said:
- [7] the Supreme Court of Canada judgments underscore the principle that in order to arrive at a proportionate punishment, described as the *sine qua non* of a just sentence, a sentencing judge must consider the degree of moral culpability of the offender. And, to comply with this obligation in the case of an Indigenous offender the Court must "give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts": *Gladue*, at para. 69.
- [11] It is important to note that the sentencing judge has had primary responsibility for the many contempt proceedings that have arisen out of the Fairy Creek protests. As he noted (at para. 14), at the time of Ms. Nelson's sentencing hearing, he had sentenced approximately 120 other contemnors. Many of those contemnors, whose conduct was similar to that of Ms. Nelson, had been sentenced to a fine of \$1500 or 50 hours of community service (at para. 2).
- [12] The judge noted the common altruistic motives of the contemnors, shared by Ms. Nelson, of protecting what is left of the ancient temperate rainforests. However, the judge also noted an added dimension to Ms. Nelson's motives--her resolve to preserve traditional language and law and her sincere and deeply held beliefs about the requirements of Indigenous law (at para. 15).

[13] The judge stated that in light of the Gladue and Ipeelee principles, he would be inclined to reduce the community service hours from 50 to 30. Notwithstanding that "strong inclination", the judge found that he was constrained by the principles of judicial comity and horizontal stare decisis, which required him to align his decision with the sentencing decision of Justice Fitzpatrick in *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCSC 1512 [Mivasair (Gallagher/Bige/Leyden)] which dealt with three Indigenous contemnors convicted for breaching an injunction relating to the operations of Trans Mountain Pipeline. Like the judge here in respect of Fairy Creek matters, Fitzpatrick J. had primary responsibility for contempt proceedings arising out of the Trans Mountain protests.

[14] The judge noted that the submissions made on behalf of Ms. Nelson were similar to those made on behalf of the contemnors in the *Mivasair (Gallagher/Bige/Leyden)* case, which the judge described in these terms (at para. 17):

Ms. Nelson's genuine desire to follow what she understands to be obligations imposed by Indigenous law, obligations that overlap and are in conflict with the requirements of an injunction order by a resource extraction company, helps explain why she is before the Court and reduces her moral culpability as explained in *Gladue*.

[15] The judge indicated (at para. 18) that Fitzpatrick J. had "firmly rejected" the submission that these circumstances required or supported a sentence different from that imposed on other, similarly placed non-Indigenous persons. Justice Fitzpatrick said (*Mivasair (Gallagher/Bige/Leyden)*):

[122] To allow a lesser sentence here because of the Contemnors' beliefs in their cause through the Aboriginal lens would be to draw a distinction from the hundreds of other protestors who were arrested and faced charges. In my view, such a distinction does not exist.

[16] The judge disagreed with Fitzpatrick J. on this point:

[19] I cannot, with great respect, agree with Justice Fitzpatrick's essential reasoning. In my opinion, the distinction she refers to in para. 122 of her reasons exists and it is an important distinction. Moreover, my understanding of *Gladue* and *Ipeelee* leads me to conclude that this distinction ought to be given meaningful effect in cases such as these. In short, and respectfully, I think the description of those contemnors' cases for a lesser punishment as rooted in "beliefs in their cause through the Aboriginal lens" does not adequately capture the *Gladue* point, at least as I understand it. I think the reality of the continuing existence of Indigenous law - despite strong historical headwinds - coupled with the fact of a contemnor's motivation to abide by their understanding of what that law requires, is a form of unique background that played a part in bringing these offenders before the Court and it impacts in a significant way on their moral culpability.

[17] The judge then referred to the well-known principles established in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590 at 592 (B.C.S.C.) that in his view constrained him from departing from Fitzpatrick J.'s interpretation and application of *Gladue* and *Ipeelee* (at para. 20).

- [18] Finally, the judge did not accept Ms. Nelson's submission in favour of a discharge upon completion of her community service. He referred (at para. 24) to his reasons given in the related case of *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCSC 2344 (Hayden Mebs), released the same day, where he held that a discharge was not appropriate as it would "dilute the necessary messages of denunciation and deterrence in what was a large-scale and organized campaign of action contrary to the injunction order" (at para. 11).

Issues on Appeal

- [19] Ms. Nelson alleges that the sentencing judge erred by:
- a) Failing to consider and give effect to her Indigenous beliefs and the existence of Indigenous laws as Gladue factors that informed Ms. Nelson's actions and bore upon her moral culpability; and
 - b) Failing to consider and give effect to the complex and interwoven background and systemic Gladue factors that extended beyond Ms. Nelson's beliefs and the relevance of Indigenous laws in sentencing.
- [20] Both of these alleged errors can be addressed under the single issue of whether the judge erred in his interpretation and application of the Gladue principles.
- [21] Based upon the alleged errors, Ms. Nelson asks this Court to allow the appeal and substitute a sentence of a discharge with 20 hours of community service.

Standard of Review

- [22] This Court described the standard of review for sentence appeals in *R. v. Agin*, 2018 BCCA 133:
- [56] Appellate intervention is justified when an appellate court identifies a material error that has impacted the sentence, in that the sentence would have been different absent the error. The court will then assess the fitness of the sentence by conducting its own sentencing analysis. If the sentence is unfit, the court may vary the sentence and impose a fit sentence.
- [57] Where there is no error, or the error had no impact on the sentence, appellate intervention can still be justified if the sentence is demonstrably unfit.
- [23] In *Trans Mountain Pipeline ULC v. Mivasair*, 2023 BCCA 115 [Mivasair (George)], Justice Voith succinctly summarized the principles governing the standard of review in the specific context of criminal contempt:
- [22] The Criminal Code 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; see also the further authorities referred to *Trans Mountain BCCA* at para. 24. 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: Trans Mountain BCCA at paras. 24-25 and the further authorities referred to therein.

- [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.

Analysis

- [24] While not explicitly stated in her framing of the alleged errors as set out above, central to Ms. Nelson's position on appeal is that the sentencing judge erred in applying Fitzpatrick J.'s analysis in Mivasair (Gallagher/Bige/Leyden). Ms. Nelson submits that Fitzpatrick J. erred by improperly discounting the contemnors' Indigenous beliefs and Indigenous laws and by failing to consider the totality and complexity of the circumstances informing the contemnors' conduct. She submits that the sentencing judge here erred in the same manner and, in doing so, failed to give proper meaning and force to the analysis required by Gladue and Ipeelee.
- [25] An appeal from Fitzpatrick J.'s decision in Mivasair (Gallagher/Bige/Leyden) is currently under reserve with another division of this Court. As such, I will not comment to any great length on Fitzpatrick J.'s reasons.
- [26] As discussed above, the judge believed he was bound by Fitzpatrick J.'s analysis by reason of the Hansard Spruce Mills principles. This Court has held that it is generally not its role to review a trial judge's compliance with the Hansard Spruce Mills principles since we are not bound to follow previous Supreme Court of British Columbia decisions: Kunzler v. The Owners, Strata Plan EPS 1433, 2021 BCCA 173 at para. 126, citing Ludwig v. Bos, 2010 BCCA 203 at paras. 18-19; and John Carten Personal Law Corp. v. British Columbia (Attorney General) (1997), 153 D.L.R. (4th) 460 (B.C. C.A.) at para. 7.
- [27] In the present case, however, it is my respectful view that Hansard Spruce Mills had no application, principally because I do not read Fitzpatrick J.'s reasons in Mivasair (Gallagher/Bige/Leyden) as establishing general principles of law intended to apply in all cases to the sentencing of Indigenous offenders convicted of criminal contempt. The passage at para. 122 of her reasons cited by the sentencing judge (see para. 15 above) was made in response to specific submissions advanced by the contemnors who were before Fitzpatrick J. about

their particular beliefs. Further, it is well established that sentencing is an individualized process and that a sentencing judge is not bound by the sentences given in other, similar cases nor by sentencing ranges established in the case law: *R. v. G.T.A.*, 2021 BCCA 425 at paras. 69-72; *R. v. Friesen*, 2020 SCC 9 at para. 37; and *R. v. Lacasse*, 2015 SCC 64 at para. 57. Therefore, there was no rule of law or general principle articulated in *Mivasair* (Gallagher/Bige/Leyden) for the judge to be bound by.

- [28] For these reasons, it is my view that the judge erred in principle in considering himself bound by Fitzpatrick J.'s analysis, particularly as it related to the application of Gladue principles to the sentencing of Ms. Nelson. It is an error that impacted the sentence imposed by the judge in that, as he stated, he would otherwise have ordered fewer community service hours (see para. 13 above).
- [29] It is also important to note that the judge, at the time of sentencing, did not have the benefit of this Court's decision in *Mivasair* (George), which was released approximately four months after the judge released his sentencing reasons. The Court in *Mivasair* (George) addressed issues that are similar, although not identical, to those that arise on this appeal. One significant difference is that unlike Ms. Nelson, Mr. George was given a custodial sentence. Nonetheless, it is useful to consider that decision in some detail.
- [30] Mr. George was convicted of criminal contempt for breaching the Trans Mountain Pipeline injunction and he was sentenced to 28 days incarceration. On appeal, he argued that the sentencing judge relied excessively on the objectives of denunciation and deterrence, gave inadequate weight to the principle of rehabilitation, and failed to give effect to s. 718.2(e) of the Criminal Code, R.S.C. 1985, c. C-46, which requires sentencing judges to pay particular attention to the circumstances of Indigenous offenders (at para. 2).
- [31] In dismissing the appeal, Voith J.A. cited a number of authorities establishing that deterrence is usually the primary sentencing objective for the offence of criminal contempt: at para. 32 citing *Mivasair* (Cass/Wood/McLean/Morrice) at paras. 57-58; *Canadian Transport (U.K.) Ltd. v. Alsbury* (1952), 6 W.W.R. (N.S.) 473 at 478 (BCSC), *aff'd* [1953] 1 D.L.R. 385 (C.A.), *aff'd* [1953] 1 S.C.R. 516; and *R. v. Dhillon*, 2021 BCCA 271 [Dhillon CA] at para. 28.
- [32] Justice Voith also cited a number of authorities for the proposition that a refusal to abide by court orders strikes at the "heart of the rule of law" and the proper administration of justice: *Larkin v. Glase*, 2009 BCCA 321 at para. 7 and *Ontario (Attorney General) v. Paul Magder Furs Ltd.*, (1992) 10 O.R. (3d) 46 (C.A.) at 53. As such, criminal contempt is a "serious matter": at para. 36, citing *Dhillon CA* at para. 27 and *R. v. Krawczyk*, 2007 BCSC 345 at para. 8, *aff'd* 2010 BCCA 542, leave to appeal *ref'd*, 34063 (5 May 2011). He also cited *R. v. Bridges*, (1989) 61 D.L.R. (4th) 154 (B.C.S.C.) at 157 to the effect that there is nothing "more sinister or more threatening than that of organized large-scale deliberate defiance of an order of the court".

- [33] The principles identified by Voith J.A. are all well-established and are not challenged by Ms. Nelson in this appeal. Rather, the issue is the relationship of those principles to the analysis required by Gladue and Ipeelee. On this point, Voith J.A. summarized some of the key principles emanating from those decisions:
- [38] Section 718.2(e) is a remedial provision that is intended to address the crisis of overrepresentation of Indigenous offenders in the Canadian criminal justice system: Gladue at para. 33; Ipeelee at para. 59 (also quoted by the judge). Indigenous offenders are different from other offenders because they are "victims of systemic and direct discrimination" and "dislocation" and are "substantially affected by poor social and economic conditions": Gladue at para. 68; R. v. Mero, 2021 BCCA 399 at para. 68-69. Section 718.2(e) recognizes that culturally attuned sentencing for Indigenous offenders has an important role to play in addressing these legacies of colonialism: Gladue at para. 65; Ipeelee at para. 64-70 and Mero at para. 68.
- [34] Justice Voith went on to observe that s. 718.2(e) mandates a "different methodology" for assessing a fit sentence for Indigenous offenders, although that does not necessarily mandate a different result (at para. 39, citing R. v. Wells, 2000 SCC 10 at para. 44).
- [35] Justice Voith rejected the three grounds of appeal raised by the appellant. First, he found that the sentencing judge did not err in relying excessively on the principles of denunciation and deterrence over rehabilitation. This ground of appeal was largely directed at the imposition of a term of imprisonment (at paras. 27, 61).
- [36] Second, he found that the judge did not err in failing to expressly advert to or consider the appellant's disconnection from his Indigenous heritage, culture, and lands, a factor required to be considered as part of a Gladue analysis pursuant to R. v. Kehoe, 2023 BCCA 2 at paras. 56-57. Justice Voith held that the appellant's early disconnection from his community "did not meaningfully change the Gladue analysis the judge was required to undertake in the circumstances of this case" (at para. 69).
- [37] Third, Voith J.A. rejected the argument that the judge erred in failing to draw a distinction between the appellant and other offenders based upon the appellant's Indigeneity. He noted the sentencing judge's reference to Peter Kiewit Sons Co. v. Perry, 2007 BCSC 305, where the court held that a sincerely held belief in a cause that motivates an act of contempt is not a mitigating factor (see also MacMillan Bloedel Ltd. v. Brown, 1994 CarswellBC 218, 92 B.C.L.R. (2d) 1 at para. 45). Justice Voith stated that the appellant did not attempt to tie his strongly-held views to the Gladue analysis, nor did he contend that his beliefs about the environment diminished his moral culpability (at para. 81).
- [38] Despite this finding, Voith J.A. went on to state:

- [83] 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.
- [39] While Ms. Nelson did not address the *Mivasair* (George) decision in any detail in her submissions, it is apparent that this is the type of case referred to by Voith J.A. Ms. Nelson's Indigenous background and belief in Indigenous laws are central to her actions in Fairy Creek and in turn her position on appeal.
- [40] Before turning to Ms. Nelson's arguments, I will address the sentencing judge's observation that had he not felt bound by Fitzpatrick J.'s decision in *Mivasair* (George), he would have been strongly inclined to reduce Ms. Nelson's required community service hours from 50 to 30 (see para. 13 above). Respectfully, I place no weight on this observation. Having found that the sentencing judge erred in principle in a manner that impacted the sentence imposed by the judge, it is open to this Court to engage in the sentencing analysis afresh: *Friesen* at paras. 26-27 and *R. v. Ellis*, 2022 BCCA 278 at para. 150. Further, given the judge's reliance on Fitzpatrick J.'s analysis, he did not engage in a full consideration of how Ms. Nelson's Indigenous history, background, and beliefs impacted her moral culpability. Nor did he explain how a reduction in community service hours would better reflect a proper Gladue analysis. Finally, I note that Ms. Nelson does not ask this Court to substitute 30 community service hours in accordance with the judge's comments, rather she seeks a discharge alongside 20 hours of community service.
- [41] The central argument advanced by Ms. Nelson in support of her position is 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.
- [42] As the Crown notes, s. 718.2(e) of the Criminal Code does not apply to a criminal contempt sentencing given that criminal contempt is a common law offence. Nonetheless, the sentencing principles set out therein provide useful guidance: *Mivasair* (Cass/Wood/McLean/Morrice) at para. 55. Further, both parties agree that the Gladue principles apply.
- [43] In applying those principles, it is important to keep in mind that an offender need not establish a causal link between relevant background factors and the commission of the offence in issue. As Justice Lebel stated in *Ipeelee* (at para. 83, citing *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. The Aboriginal Justice Inquiry of Manitoba describes the issue, at p. 86:

Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated.

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.

[44] Rather, the focus of the analysis is on those unique circumstances of an Indigenous offender that could reasonably and justifiably impact on the sentence imposed. This requires the sentencing judge to consider: (i) the unique systemic and background factors which may have played a part in bringing the particular Indigenous offender before the courts; and (ii) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of their particular Indigenous heritage or connection: Ipeelee at para. 72.

[45] In considering systemic and background factors, Justice Lebel observed (at para. 73) that they may bear on an offender's culpability to the extent that they shed light on their moral blameworthiness:

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.

[Emphasis in original].

[46] The Crown acknowledges that Ms. Nelson has strongly held beliefs that informed her decision to participate in the Fairy Creek protest. However, the Crown submits that strongly and sincerely held beliefs do not attenuate moral culpability.

[47] Respectfully, characterizing Ms. Nelson's connection to her Indigenous heritage and her related commitment to protecting the natural environment as simply a "strongly held belief" does not give adequate meaning and effect to her unique circumstances as required by the Gladue analysis. To the extent that an Indigenous offender's beliefs are rooted in or informed by their Indigenous background, sentencing judges must take those unique beliefs into account when fashioning an appropriate sentence.

[48] However, a proper application of the Gladue analysis in the circumstances of this case does not, in my respectful view, lead to a finding that the sentencing judge erred in imposing the sentence he did on Ms. Nelson. I reach this conclusion for the following reasons.

[49] First, the factors canvassed in the Gladue report, and Ms. Nelson's own statement to the sentencing judge, help illuminate the reasons that she travelled to Fairy Creek, but do not explain her decision to engage in illegal activity once there. For example, in the Gladue report under the heading "Understanding of the Index Offence(s)", the report author concludes (at p. 15):

Lexlixatkwa7 made the decision to attend the Fairy Creek protests. She learned of the protest through social media posts. She said in weeks leading up to her leaving to participate, "I kept seeing post after post, and finally made the decision to attend. Simply posting won't effect change, so I made the decision to go".

[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.
- [55] I turn finally to Ms. Nelson's submission that a discharge with 20 hours of community service would be a more appropriate sentence. She submits that, in addition to the factors discussed above, the sentencing judge failed to account for the fact that Ms. Nelson was a young, first-time offender who acted without planning, pleaded guilty, accepted responsibility, and who has indicated that she will not repeat her actions. Based on these factors, Ms. Nelson submits that rehabilitative goals should be prioritized over the principles of denunciation and deterrence.
- [56] As noted above (at para. 18), in refusing to grant a discharge, the judge referred to his sentencing reasons in the case of Mr. Mebs that were released the same day. There, the judge again held that a discharge would "dilute the necessary messages of denunciation and deterrence in what was a large-scale and organized campaign of action contrary to the injunction order". The sentencing judge was aware of Ms. Nelson's personal circumstances when he declined to order a discharge. Further, despite the judge's reference to the principles of denunciation and deterrence, it is important to note that the sentence imposed on Ms. Nelson had a significant rehabilitative component to it given that the principal penalty imposed was 50 hours of community service. Respectfully, Ms. Nelson is essentially arguing that application of the Gladue analysis to her circumstances demanded a lesser sentence than that imposed on non-Indigenous offenders. However, that is not what Gladue and Ipeelee require. While those authorities call for the application of a different method, they do not necessarily require a different result.
- [57] For all of the above reasons, it is my view that the application of the principles established in Gladue and Ipeelee, and a consideration of Ms. Nelson's Indigenous history and unique personal circumstances, do not support a finding that the sentence imposed by the judge was unfit.

Conclusion

- [58] I would therefore dismiss the appeal.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

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