

CANADA / JUDGMENT

R. v. Soranno

2022 BCSC 1795

COURT

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2022 BCSC 1795 R. v. Soranno

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Soranno,

2022 BCSC 1795

Date: 20221012

Docket: 70994

Registry: Chilliwack

Rex

v.

Amy Elysia Soranno

and Nicholas Steven George Schafer

Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Sentence

Counsel for the Crown:

S. Quendack

Counsel for Amy Soranno:

B.D. Vaze, as agent for L. Salloum

Counsel for Nicholas Schafer:

B.D. Vaze

Place and Date of Hearing:

Abbotsford, B.C.

August 26, 2022

Place and Date of Sentence:

Abbotsford, B.C.

October 12, 2022

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Introduction

- [1] Amy Soranno and Nicholas Schafer were convicted by a jury of breaking and entering a barn at 33133 Harris Road, Abbotsford, and committing an indictable offence therein, mischief, contrary to s. 348(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46, [the Code].
- [2] The offenders are animal rights activists. They believe that raising animals for meat is morally wrong, is cruel and unnecessary, and harmful to the environment. They also believe that standard industry practices involved in what they describe as factory farming of animals for meat are cruel and constitute animal abuse. They believe that if the public were made better aware of industry practices, the public would agree. They would like to see a world in which animals were not raised for meat production.
- [3] In order to further their political goals, together with others, the offenders organized and carried out a very large-scale break and enter together with mischief at the farm premises of Excelsior Hog Farm, Abbotsford on April 28, 2019.
- [4] As I was compelled to state during the course of the trial and at the sentencing hearing, the validity of the offenders' beliefs and the moral and environmental issues they raise are not issues for this court. Those issues are for the political forum.

- [5] As Canadians, we are fortunate to live in a democracy. Freedom of belief and expression is a fundamental freedom under s. 2(b) of the Canadian Charter of Rights and Freedoms. The offenders and every other citizen have the right to protest, to express themselves, and to attempt to influence others by any lawful means, within the democratic process. They have no right to break the law.
- [6] There is no shortage of people who believe that their cause is just, who are impatient with democratic processes, and who believe that higher moral values should entitle them to disobey the law in furtherance of their goals. However, as s. 718 of the Code states, the fundamental purpose of sentencing is to protect society and contribute to respect for the law and the maintenance of a just, peaceful and safe society. Allowing citizens to break the law as they see fit in order to achieve political objectives is anathema to the maintenance of a just, peaceful and safe society.
- [7] In *R. v. Drainville* (1991), 5 C.R. (4th) 38, [1991] O.J. 340 (C.J.), Justice Fournier quoted Chief Justice Howland in saying that:

It is one of the fundamental principles of our democratic society that no one is above the law, and everyone is equal before the law. The rule of law is based on the fact that our current laws represent the will of the majority of the people. If a law no longer represents the will of the majority, then it should be changed but until it is changed by lawful means, it must be obeyed. Defiance of the law is not the answer.

- [8] My own personal views on the issues the offenders are concerned with, or of the law, can have no bearing on the sentencing decision: *R. v. Arcand*, 2010 ABCA 363, at para. 70; *R. v. Song*, 2009 ONCA 896, at paras. 10 - 13. Judges are bound to apply the law as it stands.
- [9] In his statement to the court, Mr. Schafer referred to his concerns about the effects of animal agriculture on the global environment. If our environmental future is as bleak as many people fear, we will need the rule of law to protect us more than ever.

Circumstances of the Offence

- [10] Although often referred to during the course of the proceedings as a "protest" or "demonstration", the events of April 28, 2019 were more than that. The primary purpose was to stage a media event, in order to obtain as much publicity as possible. The plan was to invade and occupy the farm's pig barns with a large number of persons. The organizers hoped for as much media attention as possible for the event itself. They also planned to force the farmers to allow television news journalists with television cameras into the farm facilities, in order to view, record and publicly broadcast the farm's operations and practices. Their plans were successfully achieved.

- [11] While it might be more accurate to refer to the events of April 28, 2019 as an "invasion" and "occupation" of the farm facilities, for convenience, in the course of these reasons I will refer to the events of April 28, 2019 simply as "the event". I will refer to the participants as the "protestors".
- [12] Several weeks before the occupation, animal rights activists broke into the same hog farm premises and covertly recorded activities at the farm. Video recordings obtained were released to the media. Television and other media coverage followed.
- [13] The offenders were charged with break and enter and mischief offences relating to these prior break-ins, but were acquitted at the trial on a directed verdict. They are not to be sentenced in relation to matters of which they have been acquitted: *R. v. Suter*, 2018 SCC 34, at para. 35. However, the facts of the placement of the cameras and the release of video to the media are relevant background for the sentencing decision with respect to the event. Evidence on this trial makes it quite clear that the offenders had access to the video evidence previously obtained from the farm, and knew the layout of the barns and points of access.
- [14] In the weeks leading up to the occupation, the offenders recruited and organized approximately 200 people to be involved in the planned event.
- [15] April 28, 2019 was a Sunday. On that day, the protesters arrived in two buses early in the morning, at about 6:30 a.m. The buses stopped on Harris Road, adjacent to the farm property, and discharged the protestors.
- [16] Armed with detailed information about the premises, and led by Ms. Soranno, a large group of protesters marched to the rear of the property, broke open a door, and entered the pig barns. They moved as quickly as possible, so as to take the farmers by surprise and ensure that their entry could not be prevented.
- [17] The Excelsior Hog Farm is a family business that has been in operation for approximately 45 years. It is owned by three brothers, Calvin, Jeff, and Raymond Binnendyk. Their father started the farm business, and still works there. The farm also has other workers. It is a large operation. At any given time, approximately 13 to 15 thousand pigs are present. The farmers and their families all live on the farm property.
- [18] As it was a Sunday, farm operations were reduced. It was Calvin Binnendyk's turn to work that Sunday. He was inside the barn working with his son when the protesters arrived on the property and began approaching the barn. He had no view outside and so he did not see the protestors approaching. He was alerted by a telephone call from his wife to the presence of protesters on the farm property.

- [19] Jeff Binnendyk was awakened by an alert on his telephone from the farm security system. He was not scheduled to work that day. He rushed to meet up with his brother Calvin. By the time they reached the rear of the barns where the protesters were entering, many protesters had already entered the barns. They attempted to prevent more protesters from entering. The police were called. Abbotsford police arrived approximately 15 minutes later. By then, approximately 50 protesters had entered the barns. The offenders were among them.
- [20] The remaining group of protesters, consisting of about 150 persons, remained outside the barns, and congregated on Harris Road adjacent to the farm.
- [21] Jeff and Calvin Binnendyk and their father arrived at the entrance that had been forced open, where protestors were rushing through. Jeff Binnendyk and his father attempted to physically block more of the protestors from entering. They were not able to stop them completely. Calvin Binnendyk repeatedly shouted "Private property, please leave". The protestors shouted back, saying, "We're not going anywhere". They also said, "This is a peaceful protest" and "You can't touch us". It was a very highly charged and tense situation. Fortunately, there was no significant physical violence. The police arrived shortly afterwards.
- [22] The 50 protesters inside the barn refused to leave. They occupied a breeding area of the barn. Ms. Soranno was their leader and spokesperson. When the police arrived, they soon realized that they did not have the resources to forcibly remove the protesters. They entered into discussions with Ms. Soranno, on behalf of the protesters, which soon turned into negotiations. Ms. Soranno demanded that the television news media who were stationed outside be permitted an unrestricted tour of the facility, including use of cameras. This demand was conveyed by the police to the farm owners, who were initially resistant, but later agreed to allow the media tour, in exchange for the protesters leaving the barn peacefully. Their agreement was made under duress, in circumstances of practical compulsion.
- [23] Three veterinarians were called to give advice about management of the persons inside the barns, and management of the persons who were expected to attend the media tour. Bio security hazards to the pigs was a significant concern. Normally only a very few people are inside the barns at any given time.
- [24] It took a few hours for the media tour to be approved, organized and conducted. It took place at about 11 a.m.
- [25] Following the media tour, the police carried out a mass arrest of all of the persons in the barn. They were all released on scene, except for Ms. Soranno, who was taken to the Abbotsford Police Department station and processed there. She was released on a promise to appear with conditions. Her cell phone was seized, and later searched pursuant to a warrant. Mr. Schafer's camera was seized on scene, and digital media storage removed from the camera. The digital media storage (SD cards) were also later searched pursuant to a warrant.

- [26] The lead Abbotsford Police Department officer on scene, Sgt. Kevin Murray, returned to the Abbotsford Police Department station to deal with Ms. Soranno's arrest at about 1 p.m.
- [27] The interference of the firm's operations lasted about six hours. The protest interfered with breeding of sows and other chores planned for that day. Breeding of sows is done by artificial insemination. It is time sensitive, in that the insemination must be done when the sows are in the right time of their cycle. However details of economic consequences related to the disruption of the farm's activities are not in evidence.
- [28] The offenders were among the small group of key planners and organizers of the event. During the event itself, Ms. Soranno directed the protesters as to where to go, and what to do. Mr. Schafer videographed and photographed the events.
- [29] Ms. Soranno also recorded and narrated the day's events on her cell phone. During her narration she states several times that, "This is Canada's first Meat the Victims action. It is a mass lockdown and protest action. We are here to expose the realities of animal farming here in Canada", and other similar statements.
- [30] All the protesters wore T-shirts displaying the name of an animal rights action group, "Meat The Victims", on the front. On the back, the T-shirts said, "One has a moral responsibility to disobey unjust laws".
- [31] The occupation was planned and organized by the offenders for at least several weeks in advance. Ms. Soranno's cell phone contained group chat messages involving the offenders and others. From this, it is manifest that the offenders fully understood that their behaviour would be illegal, and that breaking and entering, and mischief charges could occur. They carefully considered whether the police might be on scene prior to their arrival, or whether private security might be present. They considered how they would break into the premises.
- [32] Counsel for Mr. Schafer sought to minimize his client's role by suggesting that, while admittedly he was a participant, his role was essentially as the videographer for the event, as opposed to an organizer. However there is evidence that Mr. Schafer was deeply involved in the planning and organization of the event. The warranted search of Ms. Soranno's cell phone revealed a WhatsApp group chat in which Mr. Schafer participated. He joined the group on April 1, several weeks before the event. The messages show that Mr. Schafer was among the key organizers planning the event. The group chat was used to discuss organizing the event, and how to obtain maximum media exposure.

Circumstances of the Offenders

- [33] Neither offender has a criminal record.
- [34] Many supporters of the offenders attended the trial, including the sentencing hearing.

A. Amy Soranno

- [35] Ms. Soranno was approximately 26 years of age when she committed the offence. She is now approximately 29 years of age. She is a lifelong resident of British Columbia. She has resided at Kelowna since 2011. She has a college degree in interior decorating and design psychology. As a youth, she was an active volunteer, and worked in a variety of jobs. In 2012, at approximately 19 years of age, she was struck with a debilitating illness which has no definitive diagnosis. This has prevented her from working in paid employment since. She also has severe celiac disease.
- [36] Her counsel's submissions and the many letters of character reference and support indicate that she is an intelligent, compassionate and kind person, who cares deeply and sincerely about animal rights and welfare. Her counsel describes her as a leader and an inspiration to many others in this respect.
- [37] I have carefully reviewed all the letters of support.
- [38] Her mother's letter of support indicates that the legal proceedings have been very difficult for Ms. Soranno to endure, in view of her serious chronic medical condition. She describes the effect on Ms. Soranno of the proceedings as "punishment" and severe distress.
- [39] She describes her daughter's efforts to develop a campaign to bring awareness to the public.
- [40] Several other letters of support described Ms. Soranno as thoughtful, compassionate, kind, nonviolent, peaceful, and a dedicated advocate.
- [41] As I mentioned during the course of the sentencing hearing, the letters of support are useful in relation to matters such as the personal characteristics and circumstances of Ms. Soranno. However insofar as the letters extend to submissions to the court as to a fit sentence or pleas for leniency, they are inappropriate. I have ignored those portions of the letters.
- [42] Ms. Soranno made an oral statement to the court at the sentencing hearing. She explained that she is a political activist who cares deeply and sincerely for the animals. She feels compelled to expose what she describes as atrocities. She said that she was unable to apologize for her actions. As Mr. Schafer had already done in his statement to the court, Ms. Soranno began to describe in detail the practices which she considers abhorrent and wrongful.
- [43] At this point, I interrupted Ms. Soranno, and explained that no purpose would be served by carrying on in this respect. After briefly consulting with legal counsel, she elected to terminate her remarks.
- [44] There is no question about the sincerity of Ms. Soranno's beliefs or her motivation for committing the offence.

- [45] While an offender should be permitted wide latitude in addressing the court as part of the sentencing proceeding, the court cannot permit itself to be used as a platform for expression of political views which in and of themselves have no bearing on the court's decision.
- [46] Section 723(1) of the Code provides that before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed. Section 726 says that before determining the sentence to be imposed, the court shall ask whether the offender, if present, has anything to say. Section 726.1 requires the court to consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender, in determining the sentence. While the words "anything to say" as found in section 726 are unconstrained, in view of the statutory scheme, it is clear that a court is required to consider relevant evidence or information. The court is not required to allow the offender to go beyond what is relevant.

B. Nicholas Schafer

- [47] Mr. Schafer is 36 years of age. He is the spouse of Ms. Soranno. He described his upbringing as being average or typical. His early years were spent in Langley. When he was about 10 years of age, his family moved to Kelowna, where his father operated a McDonald's restaurant. He graduated from a private school. For 11 years he worked in autobody repair. He left that employment in 2020. He met Ms. Soranno in 2012, just before she fell ill in 2013. He works as a freelance photographer, filmmaker, and videographer.
- [48] In a statement to the court, he explained that he seeks a world of peace and acceptance with compassion for all life. He is horrified by what he says are standard industry practices in the animal farming industry. In his view, standard practices of the industry constitute animal abuse. He is also concerned about the effects of raising and exploiting animals by humans on the planetary environment.
- [49] He shares with Ms. Soranno a belief that the public has a right to know about standard animal industry practices, and that if the public were made aware of them, the public would find them inherently cruel. He believes the industry does not want the public to see the suffering inflicted on the animals. He would like to see an end to animal agriculture. He says that ending animal agriculture is the most important thing human beings can do, environmentally. He feels compelled to do something; that "things need to change".
- [50] There are many letters of support for Mr. Schafer. He is described as a person of integrity and compassion, dedicated to nonviolent activism on behalf of animals.

- [51] As in the case of Ms. Soranno, many letters of support come from people who share their goals and are supporters of their animal activism. As in the case of Ms. Soranno, many of the letters stray into blatant advocacy. I am obliged to ignore the inappropriate parts of the letters.

Legal Principles

- [52] After a jury verdict of guilty, the sentencing judge is obliged to make the findings of fact necessary to impose sentence: *R. v. Ward*, 2009 BCCA 409, at para. 11.
- [53] The purposes and principles of sentencing are set out in sections 718 through 718.2 of the Code.
- [54] The fundamental principle of sentencing is set out in s. 718.1: "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." This is referred to as the fundamental principle of proportionality, which must be respected in every case: *R. v. Nasogaluak*, 2010 SCC 6, at para. 40.
- [55] The gravity of the offence and the moral blameworthiness of the offender are two separate factors. The principle of proportionality requires that full consideration be given to each of them: *R. v. Proulx*, 2000 SCC 5, at para. 83; *R. v. Lacasse*, 2015 SCC 64, at para. 129 (per Gascon J. in dissent, but not as to this point).
- [56] The "gravity of the offence" includes two components:
1. the harm or likely harm to the victim; and
 2. the harm or likely harm to society and its values.
- [57] The gravity of the offence is generally assessed with reference to the essential elements of the offence including the requisite mens rea, the degree of harm that can flow from the prohibited conduct, and the legislated penalty provisions: *R. v. Ellis*, 2022 BCCA 278, at paras. 129 - 130.
- [58] The "degree of responsibility of the offender" includes the level of mens rea or intent of the offender in committing the crime, the degree of harm intended, and other factors affecting moral culpability such as the other sentencing principles enumerated in s. 718.2: *Arcand*, at para. 58.
- [59] Section 718 sets out the fundamental purpose and objectives of sentencing:
- The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[60] A proportionate sentence must take into account the sentencing principles set out in section 718.2. The section provides, among other things, that:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender

[61] Section 718.2(b) also includes reference to what is called the "parity principle". That is, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[62] Finally, sections 718.2(d)-(e) provide that:

[]

- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
 - (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.
- [63] Pursuant to s. 348(1)(e) of the Code, the maximum term of imprisonment for the offence of breaking and entering a place and committing an indictable offence therein is 10 years, where the offence is committed in relation to a place other than a dwelling house.

Crown and Defence Positions

[64] The offenders contend that they should be granted absolute discharges, or alternatively, conditional discharges. They emphasize what they describe as peaceful, respectful, nonviolent protest activities. They emphasize the suffering, cost and other detrimental effects of the proceedings themselves, and the significance of the finding of guilt by the jury. They argue that these consequences are sufficient to fulfil the purposes of denunciation and deterrence, both general and specific. They argue that the consequences of a criminal record should not be imposed on them.

[65] The Crown contends that the primary factors deserving emphasis in sentencing in this case are general and specific deterrence. In addition to deterrence, the Crown also emphasizes the need for denunciation of unlawful conduct. The Crown opposes granting of discharges

considering the aggravating facts in this case. The Crown submits that granting of discharges would be contrary to the public interest and the need to deter others, as well as the need to specifically deter the offenders from engaging in future offences. The Crown submits that in addition to entering convictions against both offenders, the court should consider additional consequences such as fines or imprisonment for a period up to 90 days, which could be served intermittently.

Analysis

A. Aggravating Factors

[66] The aggravating factors are as follows:

1. The roles of the offenders in planning, organizing, and leading others in the event, including incitement of many other persons to break the law;
2. The large-scale invasion and occupation of private farm premises;
3. The potential for violence;
4. Refusal to leave the property upon demand;
5. Effects on the farm operation, and the farmers;
6. Expenditure of police resources.

[67] I will discuss these factors in turn.

1. Roles of the Offenders in Planning, Organizing and Leading Others in Carrying out the Event

[68] As I stated, it is inaccurate to refer to the event as being merely a "protest". It was a carefully planned, organized and orchestrated mass invasion and occupation of private farm premises. The offenders were among the small group of key planners and organizers.

[69] In planning and organizing the event, the offenders incited and encouraged many other persons to break the law. The plan depended upon the successful recruitment of a large group of people.

2. Large-Scale Invasion and Occupation of Private Farm Premises

[70] The offenders are responsible for the large scale of the invasion and occupation of the premises.

[71] The break-in and occupation were of private premises.

3. The Potential for Violence

[72] Although the offenders certainly hoped to avoid physical violence, and there was no significant violence, the potential for violence was inherent in their plans. They planned to overwhelm any persons present with their sheer numbers. The group chat messages reveal that they discussed the possibility that the farmers might have hired security guards or that police might be present. As to the possible presence of security guards, Mr. Schafer wrote:

But I also think what is one or two shitty little security guards really going to do for two giant buses full of 200 plus people LOL. All they're going to do is call the police just like the farmers probably would.

[73] They were concerned that Excelsior Hog Farm might be suspicious of some kind of an incident occurring, due to the previous placement of the video cameras in their barns. They obtained advice from a retired RCMP corporal, Dan Moskaluk. Mr. Moskaluk advised them that the participants should be able to overwhelm the police, should they be present, and that the local police would have limited resources. On April 11, 2019, via the group chat, he wrote:

If police are there before us, they would instruct the activists that stepping onto the property will lead to arrest and then stand and hold the line to see if the activists move onto the property. Given the numbers of activists that will move onto the property they wouldn't be able to hold everyone back and many would get past. As it's Abbotsford PD a municipal force they will not have a huge amount of resources in the first instance however once we are on site and they see the number of activists they may request assistance from nearby RCMP resources including the Lower Mainland Tactical Team Assembling the Tac team would take a little bit of time as the members come from everywhere.

[74] As turned out, there were no security guards or police present.

[75] As noted, Jeff and Calvin Binnendyk and their father attempted to physically block the participants from entering the barns, but were unsuccessful. Violence could have occurred at this point, in particular. The farmers were in fact overwhelmed by the number of participants, and showed considerable self-restraint.

4. Effects on the Farm Operation and the Farmers

[76] The farm's operations were interfered with for the day. There is no specific evidence as to financial repercussions of the event, if any. Rather than having the Sunday off, as planned, Jeff Binnendyk spent the day engaged in farm activities in order to make up for lost time. Calvin Binnendyk said that the operations were interfered with and disrupted. Some chores were not done. He suffered anxiety during the event, and afterwards.

[77] The farmers were compelled to allow a media tour of their premises as a condition of the participants peacefully leaving the property. They were given no effective choice.

5. Significant Police Resources

[78] Several Abbotsford Police Department officers were needed to respond to the event, over the course of approximately six or seven hours. The use of police resources was minimized as the police elected to negotiate with the protestors rather than attempting to use force to eject them, and the farmers agreed to their demands.

6. Refusal to Leave the Property

[79] As planned, the offenders and their other participants refused to leave until their demands were met. This took several hours. They refused to leave until their objectives were achieved.

B. Mitigating Factors

[80] The mitigating factors are as follows:

1. The offenders have no prior criminal convictions, and are otherwise law-abiding persons of good character;
2. Cooperation with the police, once their objectives were satisfied.

[81] Both offenders say that they have no personal animosity towards the farmers in this case. They emphasize that they attempted to achieve their objectives in a respectful, peaceful and nonviolent manner. This as an absence of an aggravating factor, rather than a mitigating factor. As noted, they planned to force their way into the barn by overwhelming the farmers, workers or others present including security guards or police. This plan entailed an inherent risk of violence. However the Crown is correct to note that once their key objectives were met, the protestors, led by Ms. Soranno, were cooperative. Their interactions with the police were polite and cooperative.

[82] The absence of aggravating factors does not equate to mitigation: *R. v. S.J.B.*, 2018 MBCA 62, at para. 20. Had there been actual violence caused by the offending behaviour, that would have been an aggravating factor. However the absence of a mitigating or aggravating factor is neutral to the determination of sentence.

[83] Similarly, absence of a mitigating factor, such as a guilty plea or indications of genuine remorse and acceptance of responsibility, is not an aggravating factor.

[84] I accept that the offenders are generally persons of good character, who are generally peaceful and law-abiding citizens. This is clear enough from the contents of the ample letters of support I have reviewed, relating to both of them. In keeping with this, they have no criminal records.

[85] Of course I can place no weight on the validity or merit of their cause, or lack thereof. As I have stated, these are not matters for the court to decide.

[86] The offenders both argue that the stress of the proceedings, the anxiety, the financial toll, and in the case of Ms. Soranno, the effect on her health, are mitigating factors. Other than the factor of Ms. Soranno's health, which I will discuss later, I put no weight on these

considerations. They do not substantially differ from anyone else having no previous criminal record who faces a serious criminal charge. The offenders knew full well that they were deliberately breaking the law when they chose to do what they did. They certainly knew that they would be arrested. They ought to have known that they would likely be charged with criminal offences, and that criminal proceedings would follow. It is impossible to feel sympathy for the predictable consequences of their own deliberate actions, or to consider them as mitigating.

C. Proportionality - Gravity of Offence and Degree of Responsibility of the Offender

- [87] In the circumstances of this case, the gravity of the offence relates primarily to the harm to society and its values, rather than the harm to the victim. Section 718 emphasizes the need for sentencing to contribute to respect for the law and the maintenance of a just, peaceful and safe society. The offenders deliberately organized a mass invasion and occupation of private property, lasting several hours, in order to illegally achieve their political ends. There was a risk of violence which, thankfully, did not occur. The offenders are not youthful. They are intelligent, well-educated adults who fully understood what they were doing, and that it was illegal. They felt justified in breaking the law for what they saw as higher purposes. The moral responsibility of the offenders is at the highest end.
- [88] The harm to society's values lies in the pernicious and misguided idea that breaking the law for political purposes, or higher moral purposes, is acceptable.
- [89] This kind of behaviour must be denounced and deterred in the most emphatic of terms. Sentencing must reflect these principles.
- [90] The offence for which the offenders have been convicted involves both breaking and entering, and mischief. As noted, the maximum penalty for the offence is 10 years imprisonment.

D. Other Relevant Sentencing Factors and Principles

- [91] Specific deterrence refers to deterring the offender from committing other offences. This factor deserves some weight in this case. The offenders are clearly committed to their cause. Should they receive no real sentence, as they urge should occur, they could be inclined to believe that the law endorses their view that breaking the law for political or moral purposes is acceptable. More significantly, given their influence in the animal-rights community, they might be tempted to encourage others to follow in their footsteps, and break the law in order to achieve their objectives. The offenders are unrepentant, and have not renounced their views that personal moral principles supersede their obligation to obey the law.
- [92] Denunciation is another important factor. As I have said, the behaviour of the offenders in deliberately breaking the law in order to achieve political purposes must be firmly and strenuously denounced.

- [93] The most important single factor is general deterrence; that is, deterring others from committing a similar offence. The public at large, and in particular political activists of all kinds, must understand that breaking the law for political purposes is unacceptable and will result in real sanctions, including significant punishment.
- [94] Apart from the related factor of specific deterrence, rehabilitation is not a significant factor in this case. The offenders are generally law-abiding persons.

Absolute or Conditional Discharges, and other Decisions

- [95] As noted, the offenders both submit that they should receive absolute or conditional discharges.
- [96] A discharge means that the offender is not convicted of the offence, and has no criminal record: s. 730(1) of the Code; *Chu v. Canada (Attorney General)*, 2017 BCSC 630, at para. 159. So far as is material, s. 730(1) states:

the court may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order

- [97] A leading authority in British Columbia relating to discharges is *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 at 454 - 455, 1973 CanLII 1412 (B.C.C.A.). There, the court stated:
- (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
- (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
- [98] The offenders both argue that entering a conviction and saddling them with a criminal record would be disproportionate to the gravity of the offence and their degree of responsibility. They also argue that a criminal record will be an impediment to them in the future. No specific circumstances are referred to in that respect, except the possibility that a criminal record may impede their ability to cross borders. No evidence was led in this respect.
- [99] Although several of the case authorities cited to me refer to concerns about a criminal conviction making international travel more difficult, consideration of this factor would require evidence, not just speculation, or judicial notice: *R. v. Relph*, [1991] B.C.J. No. 298 at paras. 7 - 12, 1991 CanLII 1236 (C.A.); *R. v. Charlebois*, 2011 ABPC 238, at para. 102; *R. v. Turner*, 2022 ABCA 11, at para. 23.

[100] As specific deterrence is a concern in relation to these offenders, and the possibility of significant adverse repercussions has not been established, I am not satisfied that the first condition for granting a discharge is met.

[101] In any event, however, the second condition is not met. A discharge would be wholly inappropriate in this case, for either offender. A discharge would be contrary to the public interest. As I have already said, the need for general deterrence is the most important sentencing factor in this case. Discharging the offenders, which would be akin to acquitting them, would send entirely the wrong message to the public at large, and in particular, like-minded persons, or potentially like-minded persons. It would undermine the public's confidence in the administration of justice.

Case Authorities

[102] In coming to that conclusion, I have considered the various case authorities cited to me by counsel at the sentencing hearing.

[103] I will now discuss the cited authorities that I consider pertinent.

1. R. v. Luba, 2022 BCPC 49

[104] The offender pleaded guilty to two charges:

1. mischief by wilfully obstructing, interrupting or interfering with lawful use of property of Polaris Realty Canada Limited at 999 West Hastings Street;
2. mischief by wilfully defacing the wall of the church, property of St. Jude's Parish, with paint, resulting in damage not in excess of \$5,000.

[105] The first charge had to do with blocking the entrance to the building, in company with others. The offender was a follower of a group known as the "Braided Warriors" who defined themselves as a group of Indigenous youth warriors fighting for Indigenous sovereignty. The Vancouver police were called and attended. Protesters were provided with opportunities to leave to avoid arrest but refused. The offender was handcuffed and had to be carried to the police wagon. She refused to identify herself. The property was closed down for the day, at significant financial cost.

[106] The second offence involved the offender and her sister defacing a church with paint. The offender and her sister were subsequently identified when the police were able to trace their purchase of the paint from a store. Their actions were connected to the discovery of unmarked graves at a former residential school in Kamloops in May 2021. One of the two vandals was wearing a jacket that had the words "the church is complicit" written on the back. The offender was 27 years of age. She was intending to pursue a Masters degree in counselling at SFU. She filed ten letters of support indicating that she was committed to working with the homeless and the indigenous community in Vancouver. She was undergoing counselling to address issues related to her mental health.

- [107] The offender pleaded guilty early in the proceedings. In addition there was strong evidence of sincere remorse. She addressed the court through a lengthy letter of apology, referring to her personal anxieties and how those anxieties led her into making poor decisions. She extended an apology to those who were affected by the protest at the Polaris property. She also apologized to the parishioners of the St. Jude's Parish church.
- [108] At para. 63, Judge Rideout noted that generally in cases involving civil disobedience, the objectives of general and specific deterrence and denunciation will be paramount: Charlebois, at para. 44. Rehabilitation has little application if the accused's beliefs are entrenched: R. v. Avrett, 2001 BCPC 281 at para. 63.
- [109] Judge Rideout referred fairly extensively to the decision of Judge Burgess of the British Columbia Provincial Court in R. v. Panganiban (8 December 2021), Vancouver 32605-1 & 262312-1 (B.C.P.C.). In Panganiban, the accused pled guilty to one count of mischief. The accused was a part of a group of protesters, associated to the "Braided Warriors" who blockaded the intersection of Clark Drive and Hastings Street in Vancouver for more than 24 hours. Panganiban and a co-accused, Woodhouse, also pled guilty to committing mischief on another occasion by completely blocking entry into or out of 250 Howe Street in Vancouver. That was taking place at the same time as the protest at the Polaris property being dealt with in Luba.
- [110] In Panganiban, the court found that neither of the two accused acknowledged the harm done to the community. There was an absence of any thought for the people in the community who would have suffered anxiety or mental distress as a result of their conduct.
- [111] Judge Burgess held that granting a conditional discharge was contrary to the public interest. She imposed a suspended sentence with probation, for both accused.
- [112] By distinction, in Luba, Judge Rideout concluded that the offender was profoundly and sincerely remorseful. He stated:
- 82 A failure to acknowledge harm done to individuals or to express genuine regret arising from unjustified civil disobedience will impact the public interest component in determining whether or not a conditional discharge would be in the public interest: Panganiban at para 42, and Markiewicz at para 58.
- [113] Although not an aggravating circumstance, lack of remorse is a relevant factor in relation to availability of a discharge: R. c. Medlej, 2022 QCCA 891, at para. 9 (on sentence); R. c. Edgar, 2019 QCCQ 4821, at para. 138. Lack of remorse can disentitle an accused from a lenient sentence treatment, such as a discharge.
- [114] This principle applies in this case. A discharge is the most lenient sentence that could be imposed.

[115] Judge Rideout accepted that imposition of a criminal record would likely have a significant negative effect on the offender's goal of earning a Master's Degree. He imposed a conditional discharge, with 12 months probation.

[116] Luba is easily distinguishable on the basis of the findings of sincere remorse, the apology, early guilty plea, and findings of negative collateral consequences.

2. R. v. Charlebois, 2011 ABPC 238

[117] The seven offenders pleaded guilty to a single count of mischief arising out of an environmental protest organized by Greenpeace. Some of the offenders rappelled down the outside of the Calgary Tower and hung a banner criticizing the relationship alleged to exist between the Alberta and the Canadian governments, and the oil industry.

[118] None of the offenders had a criminal record. All participated in the offending behaviour as a result of the opinions they held in relation to environmental issues.

[119] Judge Fradsham reviewed a number of authorities, in concluding that discharges were inappropriate, as being contrary to the public interest. The Court entered convictions, and fined each offender the sum of \$2,000.

[120] The Court reviewed a large number of authorities in reaching its conclusions. One of the authorities the Court relied on is the decision of the British Columbia Court of Appeal in *MacMillan Bloedel Ltd. v. Brown* (1994), 88 C.C.C. (3d) 148, 1994 CanLII 3254 (B.C.C.A.) [Brown], where the court dealt with sentence appeals brought by offenders who had been convicted of charges of criminal contempt. The criminal conduct arose from logging protestors violating court orders prohibiting conduct which prevented logging crews from carrying out their work.

[121] In *Brown*, Chief Justice McEachern noted that the protests were carefully planned and deliberately carried out for the purpose of preventing logging, and to obtain local, national and international publicity for the views of the protestors.

[122] Judge Fradsham quoted from *Brown*, as follows (para. 83 of *Charlebois*):

First, it would be naive to consider these sentences, even for first offenders, in isolation from the larger picture of events at these blockades. These Appellants were not guilty of youthful exuberance or rash judgment, which are the usual hallmarks of first offenders. With foolish, herd bravery, the Appellants chose to join in what they knew was an unlawful disobedience of the law. Every accused person is entitled to be considered separately from every other accused person, but a sentencing judge is not required to blind himself to the obvious fact that these were not ordinary first offenders and that they were acting in concert. They were persons who, after knowingly and deliberately committing an offence, were nevertheless asked by a peace officer to walk away. They chose instead to stay and be arrested and charged. Notwithstanding their personal beliefs, they do not qualify for the usual leniency that judges generally offer to first offenders.

[123] Citing *R. v. MacFarlane* (1976), 55 A.R. 222, 1976 ALTASCAD 6 (CanLII) (Alta. S.C.), Judge Fradsham noted, at para. 77, that "one of the strongest deterrents to criminal activity, particularly in the case of those who have no records, is the fear of the acquisition of a criminal record."

3. *R. v. Avrett*, 2001 BCPC 281

[124] The four offenders pleaded guilty on the first day of trial to two offences, arising out of a "concerted, sophisticated and premeditated scheme to prevent International Forest Products Ltd. from conducting its lawful logging operations".

[125] The offenders expressed no remorse, and felt justified in their behaviour. Chief Judge Baird Ellan concluded that discharges were inappropriate. She referred to the comments Chief Justice McEachern in *Brown*. The Court imposed a suspended sentence with a term of 12 months' probation.

4. *R. v. Sauls*, 2002 BCPC 693

[126] The facts set out in the reasons are somewhat sparse. It appears the four offenders played a significant role in a roadblock that lasted three-and-a-half hours. There was a significant risk of provocation and violence from those affected by the roadblock. The offenders wore masks and military fatigues. The roadblock was dismantled by the police but the offenders then committed another similar offence. The offenders were Indigenous. They believed they were acting in defence of Indigenous rights. There were no guilty pleas or expressions of remorse.

[127] The offenders maintained they were entitled to block any road or interfere with any property in furtherance of their political and ideological objectives. Although mindful of Gladue principles as reflected in s. 718.2(e) of the Code, the Court imposed sentences of 90 days in jail, together with probation of 18 months. The court ruled that discharges or conditional sentences were inappropriate.

5. *R. v. Schortinghuis*, 2022 BCPC 161

[128] The offender was involved in three road blockades on behalf of a group calling itself "Save Old Growth". Due to non-compliance with undertakings, he had been previously detained for 17 days.

[129] Judge Bakan imposed a conditional discharge, including probation for a term of 24 months.

[130] Judge Bakan described the offender as being learning disabled, with limited intelligence, low sophistication, who was "used", "seduced" and "preyed upon" by the protest organizers: *Schortinghuis* at paras. 47, 48 and 64. He was a "sacrificial lamb" who showed genuine remorse: *Schortinghuis* at para. 21.

- [131] In effect, the court found that Mr. Schortinghuis was taken advantage of because of his disability. Judge Bakan noted that the principle of general deterrence had been met due to the 17 days of incarceration the offender had already served.
- [132] In contrast, of course, in the case before me the offenders are intelligent, educated persons, who planned and organized the event, and induced many others to participate.
6. R. v. Waters (1990), 54 C.C.C. (3d) 40, 1990 CanLII 7561 (Sask. Q.B.)
- [133] This was an appeal of a provincial court decision. The offender was described as a "Greenpeace activist". He and three companions in the cause lowered a large banner from the roof of a commercial office tower in Saskatoon. The building housed the offices of a mining company which was involved in uranium mining that the offenders were protesting.
- [134] The court imposed a conditional discharge. The case has limited analysis. The court notes that the offender was remorseful. He had apologized to the property manager for the trouble he had caused. Not a lot of trouble had been caused. The tenant was somewhat inconvenienced and distracted by the fluttering banner and by other persons coming in and out of his office, but he was not otherwise prevented from working.
7. R. v. Anderson, 2004 BCSC 1745
- [135] This again is an appeal decision, where Justice Morrison of this Court affirmed the decision to grant absolute discharges to the numerous defendants. All of them were commercial fisherman who were frustrated with decisions of the Department of Fisheries and Oceans. They staged a "protest fishery" where they caught minimal, nominal amounts of fish. They were fully cooperative. All entered guilty pleas. None sold the fish. The charge was fishing during a closed fishing time, a relatively minor offence.
8. R. v. Kernerman, [1997] O.J. No. 1974, 1997 CarswellOnt 1828
- [136] The two offenders were involved in a student protest at the Ontario legislature regarding education cutbacks and increases in tuition fees. Both pleaded guilty to a single count of committing mischief by damaging the door to the legislature. Kernerman also pled guilty to a charge of assault against a police officer, who was attempting to arrest him on a mischief charge. He had struggled with the police when they had attempted to arrest him.
- [137] The court noted that both offenders were youthful, remorseful and pleaded guilty. They were both young students whose actions were not premeditated and were out of character. The court ordered conditional discharges with 24 months probation, as well as community service and restitution orders. Kernerman was required to apologize to the police officer and copy the letter to the student newspaper.
9. R. v. Paul (1994), 145 N.B.R. (2d) 272, 1994 CanLII 6421 (C.A.)
- [138] This was an appeal decision where the New Brunswick Court of Appeal restored the decision of the provincial court judge to grant absolute discharges.

- [139] The offenders were Indigenous. They blocked the TransCanada Highway in a protest against provincial tax changes that might affect them. The blockade was peaceful, and brief.
- [140] The decision of the Court of Appeal is very brief. Both the provincial court judge and the Court of Appeal stated that the decision would have limited application to future similar offences.

Commentary re case authorities

- [141] Sentencing is an individualized process and every sentencing decision turns on its own specific facts and circumstances. However a review of the case authorities demonstrates that in serious cases of planned and deliberate civil disobedience having significant consequences, generally, discharges are not considered appropriate, and are not granted in the absence of strong evidence of remorse. The courts are overwhelmingly concerned with the need for denunciation and general deterrence, and discharges are seen as inconsistent with these pressing objectives.
- [142] This accords with established principles. Achieving the objectives of deterrence and denunciation generally requires that a term of imprisonment be imposed: Ellis at para. 169.

Charter Breach - Ms. Soranno

- [143] Counsel for Ms. Soranno argues that the breach of Ms. Soranno's Charter rights I previously found ought to be taken into account, and militates in favour of a discharge in her case.
- [144] In Nasogaluak, the Supreme Court of Canada held that a sentencing judge may take into account police violence or other state misconduct while crafting a fit and proportionate sentence. However, the incidents giving rise to the breach must be relevant to the usual sentencing regime: para. 55.
- [145] In previous reasons for judgment, indexed as R. v. Sasano, 2022 BCSC 714, I found that aspects of the warranted search of Ms. Soranno's cell phone seized upon her arrest were in breach of s. 8 of the Charter. However, I concluded that the evidence should not be excluded, based upon the factors outlined in R. v. Grant, 2009 SCC 32. I concluded that the breaches were at the lower end of the scale, and not profoundly intrusive or seriously undermining of Ms. Soranno's charter protected interests. I concluded that admission of the evidence would not bring the administration of justice into disrepute, while its exclusion would be more likely to do so.
- [146] In my view nothing in the particular breaches established by Ms. Soranno has any bearing on the purpose and principles of sentencing applicable to her as I have outlined them in this case.

Summary of conclusions - Fit sentence

- [147] While as I have said sentencing is an individualized process. Generally speaking, sentencing should be considered separately and individually for each offender.
- [148] However in the circumstances of this case, there is little basis to distinguish between Ms. Soranno and Mr. Schafer. While it is true that they played different roles in the event itself, and Mr. Schafer's role in the actual event was less prominent than that of Ms. Soranno, they planned the event together, in all aspects. They were effectively co-principals in the commission of the offence. The gravity of the offence is the same for both, and their moral blameworthiness is the same. Their personal circumstances are similar, except in relation to the factor of Ms. Soranno's serious illness.
- [149] The aggravating factors substantially outweigh the mitigating factors in this case. However, the most significant factor is the strong need for denunciation and general deterrence. For this reason, as I have said, discharges are inappropriate.
- [150] A conditional sentence is unavailable: section 742.1(f)(ix) of the Code. Even if available, conditional sentences would be inconsistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2, for the reasons I have given.
- [151] The real question is whether a term of imprisonment is required, or whether some lesser sentence such as a suspended sentence with probation or fines would be sufficient to satisfy the principles and purposes of sentencing in this case.
- [152] In my view nothing less than a term of imprisonment would be appropriate in this case. As I have explained, in terms of the threat to public order, and maintenance of a just and peaceful, safe society, the offence was grave. The moral blameworthiness of both offenders is high. The aggravating circumstances substantially outweigh the mitigating circumstances, and there is a pressing need for clear and robust denunciation and for general deterrence. The sentence must send a message that deters others. Lesser punishment such as a fine, or suspended sentence, or probation alone, would not be fit, and would not serve the needs.
- [153] Were it not for Ms. Soranno's health condition, a fit sentence would be 60 days incarceration. In my view a lesser sentence of, for example, 14 or 30 days in custody would be overly lenient and would not achieve the objectives of denunciation and deterrence. 60 days in custody is the minimum necessary.
- [154] However the information provided by Ms. Soranno's mother in her letter describes in detail the precarious nature of her health and the toll that imprisonment is likely to take on her health. This is not a sufficient reason however, to decline to impose a sentence of imprisonment. Given all the facts and circumstances, I impose a sentence of 30 days imprisonment upon Ms. Soranno.

- [155] While I accept that the offenders did not breach their bail conditions, the circumstances of an accused person awaiting trial are not the same as those of an offender who has been sentenced. A term of probation is warranted. Therefore I also impose a term of probation of 12 months, following completion of the custodial portion of the sentence.
- [156] In consideration of the parity principle, I impose the same prison term on Mr. Schafer: 30 days imprisonment, together with a term of probation of 12 months, thereafter.
- [157] Given Ms. Soranno's health condition, I will allow her to serve the sentence intermittently, pursuant to s. 732(1)(a) of the Code. I grant the same order to Mr. Schafer, again, in recognition of the parity principle.
- [158] The terms of the probation order will be those suggested by the Crown in its submissions, in addition to the compulsory conditions set out in s. 732.1(2) of the Code:
1. No contact with Calvin, Jeff or Ray Binnendyk, or any member of their immediate family;
 2. Not to be within 5 km of 33133 Harris Rd., Abbotsford, BC; and
 3. Not to attend any agricultural property where the primary activity is the raising of animals for food.

Ancillary Orders

- [159] A victim surcharge of \$200 is applicable under s. 737(2)(b) of the Code. Each offender will pay that victim surcharge.
- [160] Section 348(1)(e) of the Code is a secondary designated defence under s. 487.04. The Crown seeks an order under s. 487.051 that the offenders provide a sample of their DNA for the national data bank. I make that order. In making an order I note that the offenders have not disavowed the belief that their conduct was morally right, or indicated that they would never again engage in illegal behaviour in furtherance of their cause. Given these concerns, the best interests of the administration of justice override their interests in privacy and security of the person.
- [161] The offenders were also convicted of count five on the indictment, a charge of mischief contrary to s. 430 of the Code, which related to precisely the same circumstances as count four, the charge of breaking and entering the barn and committing an indictable offence therein, mischief, contrary to s. 348(1)(b) of the Code.
- [162] For this reason, at the sentencing hearing on August 26, 2022, the Crown agreed that count five should be conditionally stayed, pursuant the principles set out in *R. v. Kienapple*, [1975] 1 S.C.R. 729, 1974 CanLII 14, and the rule against multiple convictions for the same or substantially the same conduct. Therefore I direct a conditional stay of proceedings of count five.

"Verhoeven J."

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