

CANADA / JUDGMENT

R. v. Soranno

2024 BCCA 230

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 230 R. v. Soranno

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Soranno,

2024 BCCA 230

Date: 20240624

Dockets: CA48615; CA48616

Docket: CA48615

Between:

Rex

Respondent

And

Amy Elysia Soranno

Appellant

- and -

Docket: CA48616

Between:

Rex

Respondent

And

Nicholas Steven George Schafer

Appellant

Corrected Judgment: The text of the judgment was corrected at paragraph 90 on July 2, 2024.

Before:

The Honourable Madam Justice Saunders

The Honourable Justice Griffin

The Honourable Mr. Justice Voith

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

October 12, 2022 (sentence) (R. v. Soranno, 2022 BCSC 1795,

Chilliwack Docket 70994).

Counsel for the Appellants:

P. Sankoff

Counsel for the Respondent:

M. Richards

Place and Date of Hearing:

Vancouver, British Columbia

May 31, 2024

Place and Date of Judgment:

Vancouver, British Columbia

June 24, 2024

Written Reasons by:

The Honourable Justice Griffin

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Voith

Summary:

The appellants are animal rights activists who appeal from their sentences for the offences of breaking and entering and mischief, after they organized a large-scale protest at a hog farm. They were each sentenced to a 30-day intermittent sentence, followed by 12 months' probation. Held:

Appeal allowed. The sentencing judge did not err. However, the appellants are entitled to the benefit of the legislative amendment to the sentencing provision that now permits a conditional sentence order for these offences. Incarceration is not necessary to meet the relevant sentencing goals in this case, and the sentence is varied to a 120-day conditional sentence order followed by 12 months' probation.

Reasons for Judgment of the Honourable Justice Griffin:

- [1] The appellants, Amy Soranno and Nicholas Schafer, are animal rights activists who were convicted by jury of breaking and entering and committing the indictable offence of mischief at Excelsior Hog Farm in Abbotsford. The events took place on April 28, 2019.
- [2] The judge sentenced them each to a 30-day intermittent jail sentence, followed by 12 months' probation: 2022 BCSC 1795 ("Reasons for Sentence").
- [3] The appeal from conviction was dismissed, with reasons indexed at: 2024 BCCA 5 ("Soranno Conviction Appeal").
- [4] This is an appeal from sentence.

Background

- [5] The appellants organized busloads of people to come to the farm and by their numbers, overwhelm anyone who might resist their presence. Ms. Soranno led about 50 people to break into the barn where they would not leave until their demands were met. The police were called and Ms. Soranno insisted that media be allowed to come to the barn and film the conditions of the pigs. Under compulsion, the farmers met the protesters' demand and allowed media to access the facility. Afterwards, the protesters who had taken over the barn voluntarily left it, and police arrested them.
- [6] It is an element of the offence of mischief that the offender "obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property", or with any person engaged in such lawful use, enjoyment or operation: s. 430(1). The appellants interfered with the operation of the hog farm, namely, the ability to do farm chores and breed animals in the barn that day: Soranno Conviction Appeal at paras. 101-102.
- [7] The protesters were in the barn for about two hours, but additional time was needed to arrest them. One of the farm owners testified that the length of time the protest disrupted operations that day was around six hours. The breeding that was planned that day could not take place.
- [8] The appellants did not damage property or harm the pigs. However, they could have harmed the pigs by introducing disease into the barn. They tried to limit this risk by wearing booties, coveralls and masks.

- [9] The motive of the appellants was not at issue: they believed that the pigs were kept in cruel conditions and they intended to attract media attention to those conditions.

Reasons for Sentence

- [10] In the Reasons for Sentence, the judge reviewed the circumstances of the appellants. Neither one had a criminal record. They are spouses.
- [11] Ms. Soranno's circumstances include: she was 26 years old at the time of the offence; has a college degree; has a debilitating chronic illness that has kept her from working and that made the legal proceedings more distressing to her; and has letters of support describing her as a compassionate and kind person, and a leader and inspiration to others who care about animal rights.
- [12] Mr. Schafer was 36 at the time of sentencing. He is employed as a freelance photographer, filmmaker and videographer. He was described in letters of support as a person of integrity and compassion, dedicated to nonviolent activism on behalf of animals.
- [13] The judge noted the sincere belief shared by both appellants:
- [49] [Mr. Schafer] 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".
- [14] The defence sought absolute or conditional discharges. They argued that their protest was peaceful and nonviolent, and that they have suffered the detriment of the legal proceedings and finding of guilt.
- [15] The Crown emphasized general and specific deterrence, as well as denunciation, as the reasons why the court should enter convictions against both Ms. Soranno and Mr. Schafer. The Crown suggested that the court should consider additional consequences such as fines or imprisonment for a period of up to 90 days, which could be served intermittently.
- [16] The judge listed what he considered to be the 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.
- [17] The judge described the events as not a mere protest but as a carefully planned, organized and orchestrated mass invasion and occupation of the private farm premises: paras. 68, 71. The appellants were among the small group of key planners and organizers, and incited and encouraged many other persons to break the law.
- [18] The judge found that the protest had the potential for violence because the protesters planned to overwhelm any persons present by their sheer numbers: para. 72. The judge felt that the owners of the farm showed "considerable self restraint" in the face of the protesters entering the barns: para. 75.
- [19] The judge considered the effect on the farm and farmers: the activities planned for the day were disrupted and some chores were not done; one of the farmers suffered anxiety during the event and afterwards; and the farmers were forced to allow a media tour.
- [20] Also, the judge considered the fact that several police officers had to attend and the protesters refused to leave the property.
- [21] The mitigating factors included the facts that: the appellants had no prior criminal convictions and were otherwise law-abiding and of good character; and the appellants cooperated with the police once their objectives were satisfied: paras. 80-82.
- [22] The judge then considered proportionality, holding:
- [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.
- [23] The judge was concerned that should the appellants receive no "real sentence", they would not be deterred: para. 91. The judge felt that their behaviour of "deliberately breaking the law in order to achieve political purposes must be firmly and strenuously denounced": para. 92. The judge indicated that the "most important single factor is general deterrence":
- [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.
- [24] The judge noted that rehabilitation was not a significant factor because the appellants were generally law-abiding.
- [25] The judge recognized that an absolute or conditional discharge would mean that the appellants would have no convictions or criminal records for their conduct. He cited the framework relating to the imposition of absolute and conditional discharges in *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 at 454-455, 1973 CanLII 1412 (B.C.C.A.):
- [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.
- [26] The only adverse effect of a criminal record that the appellants pointed to was the impediment it might pose to travel: para. 98.
- [27] Because of the need for specific and general deterrence, the judge felt that a discharge would be contrary to the public interest, as it "would send entirely the wrong message to the public at large, and in particular, like-minded persons, or potentially like-minded persons": para. 101.
- [28] The judge distinguished another case of civil disobedience, where the offender had sincere remorse, apologized, pleaded guilty, and there was evidence of negative collateral consequences if a sentence was imposed: para. 116. These factors were not present.

- [29] The judge noted that a conditional sentence was unavailable: s. 742.1(f)(ix), but even if it was available he would find it inappropriate in this case: para. 150. I pause to note that the parties agree on this appeal that the prohibition on a conditional sentence has since been repealed.
- [30] The judge stated that were it not for Ms. Soranno's health condition, he would impose a 60-day sentence. However, because imprisonment is likely to take a toll on her health, he imposed a 30-day intermittent sentence with a term of probation of 12 months. A condition of probation included a prohibition on attending an agricultural property where the primary activity is the raising of animals for food. Based on the parity principle, he imposed the same sentence on Mr. Schafer.

Grounds of Appeal

- [31] The appellants each say that the judge erred in three ways:
- a) Concluding that the validity of their beliefs was irrelevant in measuring their culpability;
 - b) Treating an element of the offence as an aggravating factor; and
 - c) Concluding that a conditional sentence was not available.
- [32] In addition, Ms. Soranno advances as a ground of appeal that the sentencing judge erred in unduly limiting her pre-sentence right to speak to the court. She submits that because of this, her sentence should be reduced to an absolute or conditional discharge. I will start with this ground first, and then address the other three grounds.

Did the Judge Unduly Limit Ms. Soranno's Right to Speak Before Sentence?

- [33] During the sentencing hearing, Ms. Soranno's counsel advised the judge that she would like to speak, and the judge permitted her to do so. Her remarks touched on what made her an activist for animal rights, her views that people inflict cruelty on animals, that she felt an urgency to help animals, and had researched into a mass scale of atrocities inflicted on animals by the agriculture industry. She spoke about the agriculture industry broadly, and cruelty to chickens, cows, turkeys, and pigs. She said that the reason she was in court was because she knew she had to do something to expose the atrocities. After speaking to these things, she then said:

I'm about to share with you what we discovered at Excelsior Hog Farm. Walking into Excelsior felt like walking into a dungeon.

- [34] The judge interrupted her, stating:

You know, I'm going to interrupt you which I'm reluctant to do, but this is not a platform for you. I understand your views. I've said already the issue is not before me. The sincerity of your views, what motivated you, that's fine, but now you're going off into other matters that really are not relevant at all. So, I'd like you to move on, please.

- [35] Counsel for Ms. Soranno followed this exchange with submissions that relevance was not a requirement for a person speaking to sentence. Ms. Soranno added that she wanted to speak about her experiences at Excelsior Hog Farm. The judge stated that what Ms. Soranno saw at the farm was not going to assist him in the sentencing decision, and he just wanted to hear what might bear upon the sentencing decision.
- [36] Ms. Soranno then advised the court through counsel, that in light of the judge's position, the rest of her submissions would make no sense without the context she was trying to provide, and so she ended her submissions.
- [37] In his Reasons for Sentence, the judge addressed this in more detail:
- [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 [Criminal Code, R.S.C. 1985, c. C-46] 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.
- [38] It is clear that there is an obligation on the Court to ask the offender if they have "anything to say" before sentence: s. 726.

- [39] The right of allocution has a historical basis in the English common law courts, dating back to the 17th century. In *R. v. Geary*, [1689] 89 E.R. 495 (K.B.), the court held that denying a capital offender the right to speak before judgment was considered a reversible error, "for he might have a pardon to plead, or he might move in arrest of judgment".
- [40] In Canada, that right is codified for all offenders in s. 726 of the Criminal Code. The provision "serves several purposes beyond simply ensuring that the court has all the information it needs before imposing sentence [including] as an opportunity for the accused to personally and publicly express remorse" and "a reminder to the courts and to the public that the accused is a real human being, and not an abstract concept": *R. v. Rigler*, 2013 BCCA 117 at para. 19. However, a sentencing judge's failure to comply with s. 726 does not always constitute an error in principle that justifies appellate intervention. In cases where the error was caused by inadvertence, it has been found only relevant if it is shown to have caused substantial prejudice or resulted in a miscarriage of justice: *R. v. Andel*, 2014 BCCA 158 at para. 21; *R. v. MacMillan*, 2003 BCCA 372 at para. 8.
- [41] Ms. Soranno submits that the judge erred in finding that the right of allocution is limited to speaking to matters that are relevant to sentencing, relying on *R. v. Gavin*, 2009 QCCA 1 at para. 17; and *R. v. Gouthro*, 2010 ABCA 188 at paras. 39-40. In my view, these authorities do not stand for the proposition that an offender must be accorded a wide latitude to speak at length on topics that are irrelevant to sentencing.
- [42] Ms. Soranno recognizes that a judge is permitted to control the courtroom. Her counsel is unable to articulate the parameters for when a judge should limit an accused's right to speak at sentencing, if the matters being spoken to are not relevant to sentencing. He submits at its outer limits that the right of allocution should not venture into hate speech. I accept that would be a prudent limit but I do not accept that it can or should be the only limit.
- [43] I note that in the times we are in, it is not unusual for some litigants to try to use the courtroom to make political speeches, whether it be against taxes, vaccines, or government measures, or whether it be to advance fanciful and unfounded allegations of widespread corruption and conspiracy, or something else. The process in the courtroom is designed to resolve disputes, not to give people a captive audience and to force others to listen to whatever they want to say for however long they want to say it. On the other hand, the justice system is not damaged if an offender briefly ventures into an irrelevant topic when speaking to sentence.
- [44] Ms. Soranno was permitted to speak about her motives to protect farm animals from cruelty, and this was relevant and was reflected in the sentencing reasons.

- [45] The only aspect of Ms. Soranno's speech that the judge did not allow, was Ms. Soranno's attempt to describe what she saw at the hog farm after she entered the barn. This was a sensitive topic in this case, as the appellants had sought to introduce evidence on this topic during the trial but were not permitted to do so as the judge had concluded it not relevant to the charges. Equally the question of whether or not the hog farm in fact mistreated animals was not relevant to the sentence.
- [46] Furthermore, the farmers were not on trial, they were in fact the victims of the break and enter with intent to cause mischief. The farmers would have no right of reply to Ms. Soranno's remarks, and yet they might contest her descriptions of the farm conditions.
- [47] I agree with Ms. Soranno that the right of allocution before sentence is an important right. I do not find it necessary to decide what the exact parameters are of the content of the right to speak as this could vary on a case by case basis. Given that it is a right of the offender, a judge has to be flexible in approach because most offenders are not legally trained and before facing the loss of their liberty may wish to speak to matters of the heart that are not within the narrow parameters of legal relevance. It is regrettable that Ms. Soranno and her counsel did not confer briefly after the judge directed Ms. Soranno that he did not wish her to speak to the conditions she observed on the farm, as perhaps her counsel could have obtained a time estimate from her and counselled her to speak to matters more generally. For example, her counsel might have been able to encourage her to continue to speak to her motives and her intentions for the future. However, it was Ms. Soranno who chose not to continue to speak about these latter topics when the judge gave her an opportunity to do so.
- [48] In the circumstances of this case, I do not find that there was any legal error or miscarriage of justice in the way Ms. Soranno's right to speak to sentence unfolded. I do not accede to the argument that because she was not permitted to speak about specific conditions on the farm encountered by her after she committed the offence, there was a miscarriage of justice.
- [49] The appellants filed an application to introduce fresh evidence on appeal, by way of an affidavit from Ms. Soranno attaching the speech she wished to give at sentencing but did not complete. The framework in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8 applies under s. 687(1) of the Criminal Code when an appellate court decides whether to receive fresh evidence to decide an appeal against a sentence: *R. v. Lacasse*, 2015 SCC 64 at paras. 115-116; see also *R. v. A.E.S.*, 2018 BCCA 478 at paras. 33-34; *MacMillan* at paras. 11-17.
- [50] To the extent the body of the affidavit speaks to Ms. Soranno's feelings when the judge directed her not to describe the farm conditions during sentencing, this affidavit evidence does not assist and I will ignore it.

- [51] I would admit the statement attached to the affidavit as evidence that Ms. Soranno wished to say at the time of sentencing that she has learned lessons over the past few years of legal proceedings, and will adapt her activism accordingly to avoid crossing the line into criminal acts. These remarks are relevant to the availability of a conditional sentence order for Ms. Soranno, which is something this Court must consider afresh on this appeal when addressing the final ground of appeal.

Did the Judge Err in His Treatment of The Appellants' Beliefs?

- [52] The appellants say that the judge erred when he held:
- [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.
- [53] The appellants say that their sincere beliefs that hogs were being mistreated at the farm, and their desire to serve as a voice for the voiceless, is what caused them to act, and that this was relevant to their motives for the offence and should have been considered a mitigating factor in sentencing. The judge therefore erred in ignoring their motives.
- [54] This argument cannot overcome a fair reading of the sentencing reasons as a whole. When the judge's entire reasons are read, it is quite obvious that the judge was not saying that the appellants' motives were irrelevant. Rather, at para. 4 he was stating that he was not able to pass judgment on whether their political beliefs are correct. In other words, it was not the judge's task to decide on the morality of the hog-raising industry, or the practice of raising animals for food. As he said at para. 8, his personal views on the issues could have no bearing on the sentencing decision.
- [55] Because of the rule of law, which includes the concept that the law applies equally to everyone, judges in Canada are required to apply the law in an independent, unbiased way, and they cannot decrease or increase a sentence depending on whether the political cause of an offender is one they agree with.
- [56] However, the judge's reasons make it quite clear that he did accept that the appellants' beliefs were sincerely held, and provided the motive for their actions. This is set out at paras. 2-3:
- [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.
- [57] The judge further noted the sincerity of the appellants' beliefs in the morality of their cause elsewhere, at paras. 36, 40, 42, 48, 49-50. The judge understood the motives of the appellants. Motives can be relevant. The appellants were not motivated by greed or personal profit, unlike some criminal offenders who break and enter, for example.
- [58] Nevertheless, a belief in the morality of their cause does not immunize offenders from the consequences of their crimes. To hold otherwise, of course, would invite people who hold beliefs quite opposite to these appellants to break the law in ways that could directly and adversely impact the appellants. I doubt that the appellants would accept that proposition.
- [59] On appeal, the appellants argue that their belief in their cause and in particular their belief that pigs were being mistreated at the Excelsior Hog Farm is a mitigating factor and the judge erred in not considering it so. I disagree. Their motives are relevant, and were not as selfish as some motives for crimes, but that does not make their motives a mitigating factor that should reduce the sentence. Remorse can be a mitigating factor, but here the appellants have the opposite of remorse: they feel their actions were justified.
- [60] It cannot be said that the judge misapprehended or overlooked the motives of the appellants. He properly considered their motives. Their motives were relevant, but not mitigating. I would therefore not accede to this ground of appeal.

Did the Judge Treat an Element of the Offence as an Aggravating Factor?

- [61] As an additional ground of appeal, the appellants submit that the judge erred in treating an element of the offence--that their actions interfered with the farm's operations--as an aggravating factor.
- [62] Two related arguments are advanced. First, the appellants submit that the judge overstated the degree to which the farm's operations were affected by the protest, by stating that the appellants' actions interfered with the farm's operations "for the day": para. 76. Second, the appellants submit that since interference with the operations is an element of the mischief offence, it cannot at the same time be treated as aggravating. It is an error in principle to characterize an element of the offence in itself as an aggravating factor: *Lacasse* at para. 83.
- [63] I start by noting that when crafting a proportionate sentence, a sentencing judge is required to consider the gravity of the offence and this includes looking at the precise circumstances of the offence. Further, a judge is entitled to consider the impact of the crime on the victim, which can be an aggravating factor: *R. v. A.G.*, 2015 ONCA 159 at para. 73. For example, where the offence is assault, when crafting a just and proportionate sentence the judge considers the severity of the assault and its impact on the victim. Where interference is part of the offence, it is a legitimate exercise for the sentencing judge to consider the degree and nature of the interference.

- [64] The judge's summary of the impact of the protest, at paras. 76-77, was from the perspective of the impact on the victims. It was under the heading "effects on the farm operations and the farmers". The judge's description of the farm's operations being interfered with for the day was a general summary of how the protest affected the farm owners, Calvin and Jeff Binnendyk, and it was a fair summary.
- [65] Calvin Binnendyk's evidence regarding the protest's impact on the farm's operations was summarized in the Soranno Conviction Appeal:
- [25] During the trial, Calvin Binnendyk was called as part of the Crown's case. He was working at the farm on the day of the protest, and testified as to what happened that day.
- [26] His evidence was that normally there are two people working in the barns and sometimes as many as five people at a time. The farm owners restrict who can go into the barns for biosecurity reasons, to keep "outside bugs" from coming into the barns and making the animals sick. They never allow large groups of people into the farm.
- [27] He said on the day of the protest, there were 30 to 40 protesters in the barn. He said they were at the farm or in the barn for around six hours that day.
- [28] When he was asked in his direct examination by Crown counsel what effect the protesters presence had on normal operations, he said:
- Yeah, there was a bunch of chores that definitely didn't get done. The breeding never got done that day. And probably a bunch more that didn't get done that [sic] didn't even realize at the time because we're a bit kerfuffled.
- [29] Calvin Binnendyk explained that the breeding is done in the breeding barn and they have different areas of the barn for different stages of a pig's life. He said that the pigs that were not bred that day might have had an extended three weeks in the breeding barn.
- [30] He testified that because of the protesters' occupation of the barn, he was unable to proceed with a breeding task he had planned to do that day, involving walking a boar up and down a breeding aisle behind the sows to see which ones were ready to be artificially inseminated. Because the protesters were in the way, the breeding planned for that day did not occur. In cross-examination he denied that he still had time that day to complete that breeding task after the protesters left, stating that pigs have short breeding cycles, sometimes within 12 hours. He also stated in cross-examination that some chores were delayed and not completed to their full potential.
- [66] The sentencing judge also noted the evidence of Calvin Binnendyk that he suffered anxiety during the event and afterwards. Jeff Binnendyk had to spend the day engaged at the farm, even though he usually takes Sundays off: Reasons for Sentence at para. 76. The judge also noted that the owners were forced to allow a media tour of their premises.

- [67] As I read the judge's reasons, he was attempting to describe the large scale and invasive nature of the protest, and its impact on the victims.
- [68] Regardless, it simply cannot be said that the judge's sentence was materially affected by the impact on the victim farmers.
- [69] When one reads the whole of the judge's reasons, the driving force for the sentence that was imposed was the need for general and specific deterrence and the judge's concern for maintaining public order: para. 152.
- [70] I cannot accede to this ground of appeal.

Did the Judge Fail to Adequately Consider a Conditional Sentence?

- [71] Lastly, the appellants advance as a ground of their appeal from sentence that the judge did not adequately consider the option of a conditional sentence order.
- [72] At the time of sentencing, a conditional sentence for this offence was not available, pursuant to s. 742(f)(ix) of the Criminal Code, as noted by the judge at para. 150. The judge added that "[e]ven if available, conditional sentences would be inconsistent with the fundamental purpose and principles of sentencing for the reasons I have given".
- [73] The Crown concedes that the provision prohibiting a conditional sentence for a break and enter (non-dwelling house) was repealed effective November 17, 2022. The appellants filed their appeal on October 13, 2022, and therefore are entitled to the benefits of any amendments to sentencing provisions: *R. v. Bunn*, 2000 SCC 9 at para. 15.
- [74] When an amendment of the Criminal Code permits a conditional sentence order to be given on appeal, this Court must proceed as if the judge committed an "error in principle", even if there is no such error: *R. v. Henry*, 2024 BCCA 132 at para. 20.
- [75] Unlike in a case where the sentencing judge commits a true error in principle, when there is an amendment to the Criminal Code that permits a previously unavailable sentence, the appeal court should proceed to re-sentence "in light of the new principles": *Bunn* at para. 21. Therefore, an appellate court is not required to defer to the lower court's determinations with respect to the relative weight to assign the various goals of sentencing.
- [76] An appellate court must show the usual deference to the sentencing judge's findings of fact. Nonetheless, the ultimate issue is whether this Court, not the trial court, would impose a conditional sentence order now that such an order is available: *Henry* at paras. 3, 25.
- [77] I agree entirely with the judge's comments regarding the seriousness of the offence and the need for the sentence to meet the goals of specific deterrence, general deterrence, and denunciation. However, I would approach the sentencing differently than did the sentencing judge, in light of the availability of a conditional sentence.

- [78] It appears to me from his reasons that the judge was very much of the view that a case such as this, involving a large-scale protest that invaded private property and forced the owners to submit to a media presence, in circumstances where the offenders do not regret their actions, requires a penalty to properly deter others and the offender from such conduct in the future.
- [79] There appear to be few precedents resulting in a custodial sentence involving like circumstances. There are cases where protesters have continued a protest in the face of a court order, and then faced contempt charges and convictions, see for example: *Trans Mountain Pipeline ULC v. Mivasair*, 2023 BCCA 115; *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156; *MacMillan Bloedel Ltd. v. Simpson* (1993), 106 D.L.R. (4d) 540, 1993 CanLII 1068 (B.C.C.A.). In some of those cases jail sentences have been imposed. However, those cases are of limited utility in sentencing the appellants. Here the appellants were not deliberately breaching a court order.
- [80] There is precedent for concluding that a deliberate action taken as part of a protest does not necessarily require a sentence of incarceration for multiple days. For example, in *R. v. Holt*, 2023 BCPC 18, the offender received a 60-day conditional sentence order and a one-day custodial sentence for mischief and breach of a release order after he blocked traffic as part of environmental protests. Although, unlike the appellants in this case, Mr. Holt entered a guilty plea, he was convicted of three counts of mischief and one count of breaching a release order after four illegal protests. In *R. v. King*, 2018 ABCA 156, an offender who broke into a swine barn and removed the pins from pens housing wild boars received a six-month conditional sentence order.
- [81] In my view, incarceration is not necessary to meet the relevant sentencing goals in this case, given the circumstances of these offenders and the offence. An important and relevant sentencing principle is the principle of restraint codified in s. 718.2(e), namely, that all available sanctions other than imprisonment be considered for all offenders.
- [82] A conditional sentence is a "meaningful alternative to incarceration for less serious and non-dangerous offenders": *R. v. Proulx*, 2000 SCC 5 at para. 21. The punitive impact of a conditional sentence order should "not be understated" and this type of sentence, carefully crafted, can have both a general and specific deterrent effect. It can also serve to denounce conduct: *R. v. Maslehati*, 2024 BCCA 207 at para. 110; *R. v. T.H.*, 2024 BCCA 123 at para. 62, citing *R. v. R.S.*, 2023 ONCA 608 at para. 71 (Paciocco J.A., concurring); *Proulx* at para. 22.
- [83] Here the appellants were first-time offenders; they caused no physical damage or injury; they remained polite and calm during the protest; their motives were not profit-based; and the protest was a relatively short and temporary interruption of less than one day. One of these appellants, Ms. Soranno, suffers from poor health that could be exacerbated by incarceration. While the appellants' actions created a risk of violence and much greater harm, and the impact of the protest on the victims and the farm owners was very real, the actual impact turned out to be relatively modest as the farm operations were able to resume

the next day. Further, while they do not have remorse because they feel their actions were morally justified, Ms. Soranno and Mr. Schafer have otherwise acted respectfully towards the police and the justice system.

- [84] In my view, it cannot be said that sentencing principles require the appellants to be taken into custody to maintain respect for the administration of justice.
- [85] In their plea for a conditional discharge, the appellants clearly recognize that if this Court imposes a conditional sentence order they will be subject to punishment. Not only will they be subject to strict surveillance in the community and have their liberty constrained by the conditions of the sentence, they will have criminal records and this will have a serious impact on them by limiting their future options for employment and possibly for travel. They are young persons, and so this impact will be long-lasting.
- [86] A pre-condition to a conditional sentence order is that the court must be satisfied that having the offender serve the sentence in the community would not endanger its safety: Proulx at para. 63. If there is a real risk of recidivism, a conditional sentence order would be inappropriate. Ms. Soranno has, in her statement now seen by this Court, expressed an intention to obey the law in the future. Both she and Mr. Schafer have been released on bail since their charges in 2019 and have been compliant with all bail conditions imposed on them.
- [87] For these reasons, I am of the view that sentencing the appellants to a carefully crafted conditional sentence order, with appropriate conditions, will properly denounce their conduct and act as a deterrent to them and others in the future. It will, in contrast to a discharge, still make them pay a significant price for their actions, by way of a criminal record.
- [88] During the hearing of this appeal, we invited submissions from counsel as to what might be an appropriate conditional sentence order, should we reject other arguments. Counsel for the appellants submitted that a conditional sentence order for a term of 120 days plus a one-year term of probation would meet sentencing goals. I agree.

Disposition

- [89] I would allow the appeal based on the legislative amendment making a conditional sentence order available, set aside the sentences appealed from, and vary the sentences on the terms I will now outline.
- [90] In my view, the appropriate sentence for each appellant is a 120-day conditional sentence, plus one year of probation. In addition to the usual condition that the appellants report to a supervisor within two working days and thereafter as and when required by the supervisor, the terms of the conditional sentence order would include the same terms as imposed by the judge as the terms of probation, and would include conditions that the appellants must:

- a) Keep the peace and be of good behaviour;
- b) Appear before the court when required to do so by the court;
- c) Notify the court or their conditional sentence supervisors in advance of any change of name or address and promptly notify the court or supervisors of any change in employment or occupation;
- d) Remain in British Columbia unless they have prior written permission from the court or their conditional sentence supervisor to leave the province;
- e) Have no contact, directly or indirectly, with the Binnendyks or family members;
- f) Not be within 5 km of the Excelsior Hog Farm;
- g) Not attend any agricultural property where the primary activity is the raising of animals for food;
- h) Remain for 30 days within their residence at all times at an address to be provided to and approved by the sentence supervisor; unless they have the express written consent of their supervisor, or are travelling directly to and from their place of employment, or are working outside of the community where they reside with the written permission of their supervisor;
- i) After 30 days, remain subject to an evening curfew requiring them to stay in their residence between the hours of 9:00 p.m. and 6:30 a.m. daily; and
- j) Both the house arrest and curfew imposed under conditions (h) and (i) are subject to the following exceptions:
 - i. at any time with the express written consent of their supervisor, which will include for employment approved by the supervisor;
 - ii. at any time for medical emergencies or medical appointments for themselves or their family; and
 - iii. three times per week for a maximum of three hours on each occasion to attend to shopping or other personal business, with the prior written consent of their supervisor.

[91] The terms of the one-year probation would include all of the above terms except for conditions (h), (i) and (j) (the house arrest and curfew).

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Voith"

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