

CANADA / JUDGMENT

R. v. Stevikova

2022 BCSC 2094

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 2094 R. v. Stevikova

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Stevikova,

2022 BCSC 2094

Date: 20221201

Docket: 32051

Registry: Vancouver

Rex

v.

Zuzana Stevikova

Before: The Honourable Justice Gropper

On appeal from: An order of the Provincial Court of British Columbia, dated September 29, 2021 (R. v. Stevikova, 2021 BCPC 235, No. 68088).

Reasons for Judgment

Counsel for the Crown:

M. Mereigh

Counsel for appellant:

I. Donaldson, K.C.

Place and Date of Hearing:

Vancouver, B.C.

July 27, 2022

Place and Date of Judgment:

Vancouver, B.C.

December 1, 2022

Introduction

- [1] Zuzana Stevikova appeals the sentence imposed upon her by the Honourable Judge Smith of the Provincial Court of British Columbia on September 29, 2021.
- [2] Ms. Stevikova pleaded guilty to two counts in the indictment for offences under the Wildlife Act, R.S.B.C. 1996, c. 488:

Count 2

Zuzana STEVIKOVA, from the first day of June, 2018 to the 31st day of August, 2018, inclusive, at or near Whistler, Province of British Columbia, did leave or place an attractant in, on or about any land or premises where there are or where there are likely to be people, in the manner in which the attractant could attract dangerous wildlife to the land or premises, and be accessible to dangerous wildlife, contrary to Section 33.1(2) of the Wildlife Act.

Count 3

Zuzana STEVIKOVA, from the 1st day of June, 2018 to the 31st day of August, 2018, inclusive, at or near Whistler, Province of British Columbia, did intentionally feed or attempt to be dangerous wildlife, to wit, bear(s), contrary to Section 33.1(1) of the Wildlife Act.

- [3] The parties made a joint submission on sentence. It proposed a total penalty of \$10,500 with fines of \$500 on each count and contributions to the Habitat Conservation Trust Foundation (Foundation) of \$3,000 and \$6,500, respectively.
- [4] The judge did not accept the joint submission and imposed a sentence of a fine of \$1,000 plus a contribution to the Foundation of \$59,000.
- [5] Ms. Stevikova asserts that the judge was wrong to reject the joint submission and erred in imposing a sentence that would have been "unhinged" even in the absence of a joint submission.
- [6] The Crown supported the joint submission before the judge. However, it has resiled from that position and now takes the position that the sentence imposed was fit.

Standard of Review

- [7] The Supreme Court of Canada set out the standard of review for the fitness of a sentence in *R. v. Shropshire*, 1995 SCC 47 and *R. v. M. (C.A.)*, 1996 SCC 500. A court may only intervene if it can be said that the sentence under review is "clearly unreasonable": *Shropshire* at para. 46.
- [8] A sentence is clearly unreasonable or demonstrably unfit if the sentencing judge has erred in principle by employing an irrelevant factor, overlooking or overemphasizing a relevant factor, or imposing a sentence "in substantial and marked departure" from the range of sentences imposed for similar offences and facts: *Shropshire* at para. 50; *M. (C.A.)* at paras. 90, 92.

Joint Submissions

- [9] Because the parties made a joint submission in this matter and the judge departed from it, I am required to consider whether the judge erred in applying the guidance provided in *R. v. Anthony-Cook*, 2016 SCC 43.
- [10] In *Anthony-Cook*, the Court clarified the legal test where there is a joint submission before the sentencing judge. It is a stringent test. The test is not merely a "fitness of sentence" test, but whether the proposed sentence would bring the administration of justice into disrepute, or would otherwise be contrary to public interest (at paras. 5, 32). The reviewing court must consider whether the joint submission ought to have been accepted, adopting the test outlined.
- [11] The Court discusses rejection of a joint submission on sentence at para. 34:

Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. [It is] an undeniably high threshold

- [12] The stringent test to be applied to reject joint submissions is necessary for many reasons: for an accused, "maximizing certainty as to the outcome is crucial -- and a joint submission, though not inviolable, offers considerable comfort in this regard" (at para. 36); for the Crown, there are several benefits that flow from "the certain or near certain acceptance of joint submissions on sentence", including the guarantee of a conviction, potential access to invaluable information or testimony the accused may be able to offer with respect to other investigations or prosecutions and the ability to resolve a particular case for the sake of the victims or witnesses (at para. 39).

- [13] The Court notes that joint submissions on sentencing "play a vital role in contributing to the administration of justice at large". Efficient resolutions of criminal proceedings "save the justice system precious time, resources, and expenses, which can be channeled into other matters" (at para. 40).
- [14] In order for these (and other) benefits to be realized, the parties "must have a high degree of confidence" that a joint submission on sentence will be accepted (at para. 41). It is important for trial judges to show "restraint, rejecting joint submissions only where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system" (at para. 42).
- [15] A high threshold for departing from a joint submission on sentence is also "appropriate" given that Crown and defence counsel, by virtue of their knowledge of the case and of the accused person, "are well placed to arrive at a joint submission that reflects the interests of both the public and the accused" (at para. 44).
- [16] In applying the principles set out, the Court found that the sentencing judge failed to apply the proper test (at para. 61): "he asked only whether the joint submission was fit -- he failed to take into account the important systemic benefits of joint submissions, and the corresponding need for them to be reasonably certain."
- [17] The Court recognized that joint submissions are not sacrosanct. If the sentencing judge finds that the proposed sentence is unduly harsh or lenient and departs from it, the judge must provide clear and cogent reasons for doing so. "These reasons will help explain to the parties why the proposed sentence was unacceptable, and may assist them in the resolution of future cases. Reasons will also facilitate appellate review" (at para. 60).
- [18] In *R. v. Cheema*, 2019 BCCA 268, the Court found that while the judge stated the Anthony-Cook test correctly, she did not apply it. She addressed the sentencing as if there was no joint submission. She did not consider the "significant systemic benefits that flowed to the justice system and the Crown from the joint submission." She did not consider a potential flaw in the Crown's case, that the Crown acknowledged was a factor in the agreement of counsel. She did not consider the time, resources and expenses required to conduct a full trial (at para. 26).
- [19] The Court continued at para. 27:

Nor did the judge give "clear and cogent reasons" for departing from the joint submission. The proposed five-year sentence fell within the sentencing range established in the case law, as counsel below fully explained at the hearing. Despite that explanation, the judge cited no authority to justify the eight-year sentence she imposed relative to the five-year sentence jointly proposed by counsel. Instead, she seemingly relied primarily on her view that drug trafficking and associated violence are problems of epic proportion and that, in consequence, a strong message must be sent to Mr. Cheema and others of like mind.

[20] The Court considered the range of sentences that had been imposed for similar offences (at para. 29):

In my view, given the established range of sentences that applied, it cannot reasonably be argued that the joint submission was unhinged from the circumstances of the offences and the offender to an extent that would bring the administration of justice into disrepute. As in *Anthony-Cook*, there was no basis for the judge to substitute her opinion as to an appropriate sentence for the considered agreement reached by counsel based on their knowledge and negotiations with respect to the guilty pleas.

[21] A similar conclusion was reached in *R. v. C.R.H.*, 2021 BCCA 183, where the Court determined that the sentencing judge failed to demonstrate a consideration of the benefits of the joint submission process. It noted that the Crown had conceded "certain vulnerabilities that left a conviction uncertain" that the sentencing judge did not address (at para. 87). Rather than consider the various benefits of accepting the joint submission, the sentencing judge only focused on the length of incarceration proposed, commenting during the submissions that it was "extraordinarily lenient".

[22] The Court concluded: "I do not see a cogent consideration of the suggested sentence in its entirety or the specific advantages accruing by its acceptance in this case" (at para. 91).

The Sentencing Hearings and Reasons for Judgment

January 25, 2021 - Sentencing Hearing, Day 1

[23] On January 25, 2021 Crown counsel, defence counsel and the accused Mr. Duggan and Ms. Stevikova appeared remotely in North Vancouver Provincial Court before the Honourable Judge Smith. The application for a remote appearance was filed in accordance with the COVID-19 procedures of the Provincial Court.

[24] The judge noted, however, that she had not approved of the remote appearance.

[25] At the outset of the hearing, Crown advised the judge that Ms. Stevikova would be entering guilty pleas to Counts 2 and 3 and that the counts against Mr. Duggan would be stayed "at the conclusion of the proceedings today."

[26] The judge informed Ms. Stevikova that she was not bound by the joint submission, although it would be highly persuasive. Ms. Stevikova then pleaded guilty to Counts 2 and 3.

[27] The Crown began its submission by referring to the penalty agreed to in the joint submission that included a fine and a contribution to the Foundation in respect of each count.

[28] The Crown outlined the agreed statement of facts:

Pursuant to section 724(1) of the Criminal Code, R.S.C. 1985, c. C-46, incorporated in these proceedings by virtue of section 133 of the Offence Act, R.S.B.C. 1996, c. 338, the Crown and the defendant, Zuzana Stevikova, agree to the following facts for the purpose of the sentencing proceedings on North Vancouver Information 68088-1:

1. On July 12, 2018 the Conservation Officer Service ("COS") received an anonymous complaint to the Report All Poachers and Polluters hotline advising that the residents of 2919 Ancient Cedars Lane in Whistler, B.C. (the "Property") had been feeding black bears for a considerable amount of time. The COS investigated and found that Oliver Dugan and Suzanna Stevikova were the owners of the Property.
2. The COS followed up on the complaint by visiting the Property on September 19, 2018 [when two conservation officers] attended the Property and spoke with Mr. Dugan who confirmed that: he lived at the property; that bears used his property to travel through; that the bears have been on the property because he (Mr. Dugan) thinks they feel protected from the construction happening in the area; the bears had caused damage to the doors of his house and there was electric fencing installed to deter them from further damaging the house. Mr. Dugan then advised that there were bears present at that moment (a sow and two cubs). [One conservation officer] observed a sow black bear in the driveway with two cubs nearby in a tree. The bear was approaching the house with caution and appeared habituated to people. Mr. Dugan was observed opening the Property's metal gate and the sow bear approached him. The [conservation officer] attempted to "haze" the bear (scare it away) but it did not respond and did not show any fear of the officers. The officers had to tranquilize the bears in order to remove them from the Property. During that process they observed "bear scat" (bear feces) within the property boundary containing orange coloured material, suggesting the presence of carrots.
3. The bears were subsequently euthanized. The COS concluded that the bears had to be removed from the population for public safety reasons. When bears are fed, they associate food with people and will approach people or human spaces for food. In this case, when [the conservation officers] attended the site, there were 5 bears (sow and two cubs and two yearlings) on site. The sow was approaching them within a couple meters. The yearlings that were not removed also approached them within a few meters, despite hazing efforts. The sow was previously tagged meaning she had some form of previous history with the COS. The two yearlings were untagged and had no previous history - they were not removed from the Property by the COS and it is unknown what became of them.
4. Whistler is a "bear smart" community and internationally recognized for its efforts. Bear calls per year have decreased such that the five-year average number of calls is 50 percent of the 15-year average. Thus, bears are tolerated by the community much more than in other locations. Despite this, the COS used their Bear Response Matrix to conclude that the bears' behaviour was such that they needed to be destroyed. The bears behaviour and location fit category 4E which recommends "remove from population". The cubs are taught by their mother and research/experience shows that they continue similar behaviour and patterns

that their mother taught them.

5. After this encounter at the Property, the COS undertook a subsequent, extensive investigation which revealed that Ms. Stevikova had been feeding black bears over a period of time spanning two summers, in 2017 and 2018.
6. Numerous witnesses, most of whom had worked in the neighbourhood or who had worked at the Property in question, provided statements from which the following is noted:
 - a) Bears were observed on a regular basis at the Property, often on a daily basis, with up to five bears being observed at once. Pressure washing to clean up bear scat was heard frequently [name deleted].
 - b) Apples or carrots [name deleted] were observed at different times on the Property, spread out over a certain areas of the property. Bright orange scat was also frequently observed on the Property [name deleted].
 - c) During both of the summers of 2017 and 2018, apples were seen strewn about the property; bears were observed eating apples; and bears were observed on many days, on or near the property [name deleted].
 - d) In the summer of 2018, bears were seen coming and going from the Property frequently [name deleted].
 - e) Some witnesses feared for their safety [names deleted].
 - f) Some witnesses unexpectedly found themselves in uncomfortably close proximity with the bears [names deleted].
 - g) The bears appeared to be habituated to people [names deleted].
 - h) Ms. Stevikova was observed in close proximity to the bears (within a few feet) and appeared to be comfortable with them [name deleted].
 - i) Ms. Stevikova made statements to, or in the presence of various witnesses:
 - a. [name deleted] - who observed her calling a bear by a name ("Lilly").
 - b. [name deleted] to whom she admitted to feeding the bears and said she felt the bears needed help, looked skinny and she was concerned for their welfare.
 - c. [name deleted] to whom she admitted feeding the bears (at least one of whom she named) and said that she did so, so that people in Whistler could not complain about the bears and the conservation officers could not kill them.

7. One witness, who had carried out renovations on the Property several years prior and who had continued to work for the Property owners as time went on, explained that he had to repair the garage door and cedar fence several times due to damage caused by bears. This witness was responsible for constructing an electric fence that ran across the front of the house where the garage door and front doors are located.
8. COS interviewed staff members at the nearby grocery store who described being familiar with the Property owners, who would purchase bulk produce mainly between August and November each year, including up to 10 cases of apples, 50 pounds of carrots and pears, and up to 15 dozen eggs - all on a weekly basis.
9. The mitigating factors in this case are the following:
 - a. A donation in the amount of \$5000 has been made to the "Get Bear Smart Society".
 - b. Early guilty plea.
 - c. No form of record or history of non-compliance.
9. The aggravating factors in this case are the following:
 - a. Duration of the offence.
 - b. Actual and potential harm (three bears were euthanized, public safety put at risk).
 - c. Planning and deliberateness.
- [29] Ms. Stevikova acknowledged placing food out on the property that was eaten by the bears and that it was common knowledge in Whistler that if bears came to the village to eat they might be destroyed. The Crown noted that Ms. Stevikova fed the bears to try and avoid this and save their lives. The Crown described this as a "misguided attempt to save the bears".
- [30] The Crown outlined the mitigating factors including Ms. Stevikova's clean record, her previous donation of \$5,000 to the Great Bear Smart Society, an early guilty plea and her personal circumstances.
- [31] The Crown reviewed the range of decisions under the Wildlife Act, noting that higher fines are usually imposed in cases involving hunters, intentional harm to wildlife and trafficking in bear parts, all of which involved a profit motive.
- [32] When the Crown explained that the proposed penalty was higher or was one of the highest fines imposed for this offence known to the Crown and to the COS, the judge intervened (Transcript of Proceedings at page 22, line 34 to page 23, line 2):

THE COURT: But -- so I'm just going to stop you there. I'm just going to stop you. You can't walk through Whistler without seeing on the garbage cans, on the trailheads. There is -- you would have to be -- like how, how am I supposed to accept that residents of Whistler didn't know that feeding bears would result in their death? I mean, how am I supposed to accept that as a fact? I can't. I mean, I'll hear submissions, but that is a steep hill, and --

MS. FARINELLI: Yes, and I -- I wouldn't --

THE COURT: -- you've got a bunch of people watching this behaviour, and the outcome is the bears are killed and it was -- I mean, what could have been more foreseeable? So how do I -- I'm really struggling with this submission.

[33] At the conclusion of the sentencing proceedings on January 25, 2021 the judge said that she was not sure that the sentence proposed would not bring the administration of justice into disrepute. She directed that the parties provide submissions regarding whether she ought to accept the agreed statement of facts and the proposed penalty.

February 8, 2021 Reasons for Judgment (RFJ #1)

[34] On February 8, 2021 the Honourable Judge Smith issued reasons addressing the joint submission.

[35] The judge began by outlining the maximum fine at para. 4:

The maximum fine for each day that an offence under s. 33.1(2) of the Act is committed is \$50,000. There is also a provision for a maximum jail sentence of 12 months. The maximum fine for each day that an offence under s. 33.1(1) of the Act is committed is \$100,000. Again, a jail sentence is provided for.

[36] The judge reviewed the Anthony-Cook decision. She then referred to the joint submission and particularly Ms. Stevikova's exposure: the offending period was not limited to one day and therefore the judge was not limited from imposing the maximum fine. She referred to several paragraphs of the agreed statement of facts to support that conclusion at para. 9:

Relevant to a consideration of the proposed joint submission is the provision of the Wildlife Act which says that for each day that the offence occurs, the maximum sentence applies. It is clear from the agreed statement of facts that the events underpinning the charges to which Ms. Stevikova has pleaded guilty occurred on more than a single day. That is to say, her exposure with regard to sentencing was not limited to the maximum \$100,000 or \$50,000.

[37] At para. 11 the judge outlined the Crown's "very strong case":

Based on the agreed statement of facts, it appears to me that the Crown has a very strong case. I will itemize five factors:

(i.) the circumstantial evidence of the grocery store which is consistent with planning and deliberation and an expenditure of funds to execute the offenders' intentions;

- (ii.) scat with orange consistent with ingestion of carrots by the bears;
- (iii.) admissions by Ms. Stevikova and no obvious basis to think that they would be inadmissible with regard to either s. 10(a) or (b) of the Charter or issues with regard to voluntariness;
- (iv.) damage to the property requiring repeated repair and expense by the offender;
- (v.) witnesses seeing apples and carrot strewn.

[38] The judge referred to the "special approach" required in environmental offences outlined in *R. v. Brown*, 2010 BCCA 225 and *R. v. Terroco Industries Ltd.*, 2005 ABCA 141:

[14] With regard to the applicable sentencing principles, Ms. Farinelli for the Crown referred to *R. v. Brown*, 2010 BCCA 225, at paragraph 13, noting that the court concluded that a "special approach" is required in environmental offences having regard to areas of culpability, past involvement with authorities, acceptance of responsibility, harm, and deterrence

[15] My recollection of submissions is that she did not read from paragraph 14 of *Brown* which refers to paragraph 53 of *Terroco*, an Alberta Court of Appeal decision which has been accepted by our Court of Appeal as the leading case with regard to environmental offences. At paragraph 53 of *Terroco*, the court observed:

... that deterrence is a [and I underline the words] key component of sentences for breaches of environmental protection statutes.

[16] Paragraphs 17 and 19 of *Brown* show that the focus of the Court of Appeal is deterrence - general and specific - as well as denunciation. The Crown's lack of focus here on deterrence, which, as I say, is noted as "key" in the leading cases, was not explained in counsel's submissions. Without compelling, case-specific information, I am of the view that general deterrence is a significant factor in this case in arriving at an appropriate sentence. I am of the view that specific deterrence is also relevant.

[Emphasis in original]

[39] At para. 19, the judge referred to the decision of *R. v. Little*, 36 M.V.R. (2d) 201, 1992 CanLII 1063 (B.C.S.C.):

In *R. v. Little*, 1992 [CanLII] 1063, Justice Preston discussed the concept of judicial notice in discussing what was common knowledge in Dawson Creek. He stated:

The basis of the rule of evidence relating to judicial notice was stated by O Hearn, Co. Ct. J., in *R. v. Bennett* ... 1971 CanLII 1224 ... as follows:

Courts will take judicial notice of what is considered by reasonable men of that time and place to be indisputable either by resort to common knowledge or to sources of indisputable accuracy easily accessible to men in the situation of members of the Court.

In *R. v. Potts* ... 1982 CanLII 1751 (ON CA), Thorson J.A. of the Ontario Court of Appeal said of judicial notice (at p. 228):

... the point which the cases make is that what constitutes common knowledge is to be judged by reference to that which is common knowledge in the community where and when the issue is tried.

...

Where judicial notice of some matter is taken by a trial court, the trier of the facts (whether judge alone or jury) may or may not share the knowledge that is said to be common knowledge in the community or in a particular class of the community. If it happens that the court does share a personal knowledge of that which is commonly known in the community, well and good. If not, however, the matter may still be judicially noticed, but the court is put on its enquiry as to whether the matter is or is not one which may properly be made part of the case before it without formal proof thereof.

[40] At paras. 20 and 23, the judge took further judicial notice:

[20] I take judicial notice that there is messaging throughout the Town of Whistler communicating clearly that "a fed bear is a dead bear." There are signs on trails, by garbage cans, at the parks that clearly state that wildlife including bears are not to be fed. Ms. Stevikova has made a decision to make Whistler her part-time home. She has a responsibility, as do all users of the community, to abide by the rules such that I am not satisfied that counsel in their submissions have adequately addressed the issue of specific deterrence and, as I said earlier, in relation to Brown and Terroco, have not satisfied me with regard to the sentencing principle of general deterrence.

[23] Further, I take judicial notice that Whistler is an international destination which attracts many visitors and users, many of whom have no prior experience with wilderness or wildlife. For all users of the area, including those new to the area, the rules must be followed or, as here, the animals who inhabit the area with people will be the ultimate losers. It is a privilege to share that environment.

[41] The judge noted that Ms. Stevikova had not made a personal court appearance at para. 22.

[42] At paras. 27-28, the Court stated that counsel did not address that the offence was committed in an intentional and repeated manner:

[27] Counsel did not address the fact that, on the agreed statement of facts, it is clear that the offence was committed in an intentional and repeated manner. [Defence counsel] submitted that his client ought not to be, in effect, penalized for being financially well off. I agree with that. However, at paragraph 20 of Brown, the offender's "situation" is noted as a relevant factor to be considered along with the nature of the offences. There, the B.C. Court of Appeal upheld a fine of \$30,000 under the Fisheries Act for Ms. Stevikova's whose annual income was approximately \$60,000. The offender's financial situation was a factor taken into account

no doubt in relation to deterrence, both general and specific, and denunciation; (see: paragraph 17 and paragraph 19).

[28] At Terroco at paragraph 60, the court notes that:

What will be a severe fine for one Ms. Stevikova may be a pittance to another.

It is in that paragraph where the court says that the consequence must be more than a slap on the wrist, or words to that effect.

[43] The judge considered that the accused spent significant sums on repairs and safety measures to their property and on groceries to feed the animals.

[44] At para. 30 the judge expressed:

In my respectful view, what is being proposed falls within the unusual situation as to be a submission that is so unhinged from the circumstances of the offender and the offence that its acceptance would lead reasonable and informed persons aware of all of the relevant circumstances including the importance of promoting certainty and resolution discussions to believe that the proper function of the justice system had broken down.

[45] The judge followed the process set out at para. 58 of Anthony-Cook by inviting further submissions relating to the judge's concerns before sentence is imposed. A date was set for hearing those further submissions on May 26, 2021.

Further Submissions

[46] The Crown and defence each filed lengthy and detailed submissions. Each referred extensively to Anthony-Cook and the benefits of the joint submission on sentence.

Crown

[47] The Crown's submission addressed the concerns expressed and referred to specific paragraphs in RFJ #1:

- a. the emphasis on general and specific deterrence, including having regard for Ms. Stevikova's financial situation (paras. 14-16, 20, 27-29);
- b. the strength of the Crown's case and the diminished value of an early guilty plea (paras. 11-13);
- c. the number of days associated with the offence, thereby increasing the statutory maximum penalties (paras. 9-10);
- d. Ms. Stevikova's high moral culpability (paras. 17, 22); and
- e. other factors such as actual harm (para. 25) and that the offence was committed in an intentional and repeated manner (para. 27).

[48] The Crown also addressed the judge's concern that she had not approved of a remote hearing pointing out that the Provincial Court's revised COVID-19 procedures at the time allowed for sentencing hearings to occur by telephone if they were by joint submission, no jail was sought and the proceeding could be completed within 45 minutes. The application for remote hearing did not require leave of the court. The Crown pointed out that "the parties opted for this mode of proceeding in light of the pandemic". The Crown noted that because of the time limit (45 minutes) and because it was a joint submission, counsel was brief in their submission. The Crown noted:

This context is important because some of the concerns raised by the Court relate to counsel not considering or applying various principles in the case law although the relevant cases were put before the Court in presenting the joint submission.

[49] The Crown addressed general and specific deterrence. With regard to general deterrence, the Crown stated again, as it had argued in the oral submissions, it is one of the factors to be considered, along with: (1) culpability, (2) past involvement with the authorities, (3) acceptance of responsibility, (4) harm, and (5) deterrence, as enunciated in *Terroco* and *Brown* and addressed by the parties in their joint submission.

[50] With regard to specific deterrence, the Crown submitted that Ms. Stevikova would not commit the offence again. She took the sentencing proceeding before the court seriously and there were significant collateral consequences arising from the media and the stigma associated with the offence. She also had to come to terms with the fact that three bears were dead as a result of her actions.

[51] The Crown raised that Ms. Stevikova ought not be penalized based upon her perceived ability to pay a substantial fine.

[52] The Crown was candid about the strength of its case:

- a. Bears were observed at the property regularly but this fact alone did not establish that the bears were being fed.
- b. Many of the key observations were made by one witness who later expressed reluctance to testify and that he misunderstood in assuming his statement would be kept confidential. This witness observed the presence of scat, food materials scattered about the property, Ms. Stevikova in close proximity to the bears and the bears eating the scattered food on the property. However, the witness did not specify exactly when he made these observations and was vague in terms of months and even years.
- c. Although the presence of scat indicated that bears were being fed carrots due to its orange colour, it did not go towards establishing the identity of the defendants and that either or both of them were the individuals feeding the bears.

- d. Ms. Stevikova made inculpatory statements to two witnesses. Although there is no voluntariness or admissibility issue with these statements, credibility could have been challenged at trial and the witnesses did not specify when the statements were made.
- e. For all of the key witnesses, they did not provide any detail regarding the circumstances in which statements or observations were made. Many were interviewed long after the events occurred. In addition, the passage of time to trial, would have weakened this evidence given the lack of detail in the original statements.
- f. Grocery store witnesses confirmed that the defendants were purchasing bulk food such that it could be inferred the food was for the purpose of feeding bears. However, this evidence was not devoid of risk - it had been several years since the events in question and the defendants might have offered an alternative, reasonable explanation for their purchases. This evidence was not considered the "smoking gun" in the Crown's case.
- g. Some witnesses feared for their safety or found themselves in close proximity to bears. This evidence is relevant towards impact but did not establish identity or that the bears were being purposely fed, it simply supported the fact that there were multiple bears in the area.
- h. The witness who carried out repairs on the property did not see the bears being fed. A concern with his evidence was that it could also have been interpreted as the defendants taking measures to guard their property against bears.
- i. The observations of the Conservation Officers on September 19, 2018, when they attended the property did not include any useful admissions by the defendants with respect to feeding the bears. It only confirmed that the bears were, and had been present on the property, in the past.

[53] The Crown disclosed other significant concerns:

- 1. There was a live controversy about the practice of the Conservation Officer Service (COS) euthanizing bears that was discussed by counsel in negotiating the joint submission and whether a trial or sentencing hearing could become a platform for criticizing the COS.
- 2. Some of the admissions that Ms. Stevikova was willing to make for the purposes of a joint submission, that were considered by the judge to denote high culpability on the part of Ms. Stevikova (e.g., consulting with someone that she viewed as an expert rather than the COS and that she spent money constructing an electric fence to deter the bears from parts of her property) did not form part of the Crown's case. The Crown cautioned:

The underlying concern here is the reliance on candid admissions made by counsel in the course of the sentencing hearing, versus evidence that would have to be proven at trial. The distinction is important to the purpose of applying Anthony-Cook.

- 3. If Ms. Stevikova withdrew her guilty plea and a trial was required, the Crown's case could be jeopardized by the passage of time:

This matter is scheduled for a decision on sentencing on June 15, 2021. The information was sworn on June 1, 2020 and proceeded by warrant. The warrant was executed on August 16, 2020. The institutional/Crown delay to June 15, 2021 will be 10 months. If the proceedings result in the withdrawal of a guilty plea (thus necessitating a trial), the Crown will have less than 8 months to conclude the matter. The prospect of this matter having to be stayed as a result of a breach of Ms. Stevikova's section 11(b) rights is an increasing concern for the Crown.

- [54] The Crown also dealt with the number of days during which the offence was committed: based upon the "scarcity of evidence" it could be at most three to four days.
- [55] The Crown pointed to the judge's description of the penalty as 'nominal' and pointed out that it was not, in light of the cases involving deliberate and intentional killing of bears for commercial purposes.
- [56] The Crown addressed the judge's view that Ms. Stevikova had a high degree of moral culpability, having taken judicial notice of the messaging in Whistler that "a fed bear was a dead bear" and that the link to moral culpability is based on the fact that Ms. Stevikova knew or ought to have known that her actions would result in the death of the bears that she was feeding. The Crown submitted:

As alluded to above, the issue of how bears are handled by the COS is subject to controversy. As well, the COS has taken the position that euthanizing bears is a last resort and its "Bear Response Matrix", which was referred to in the Agreed Statement of Facts, is an illustration of this - "removal of bears from population" is one of several responses that may be utilized. Accordingly, the Crown would not have urged the Court to take judicial notice of the fact that "a fed bear is a dead bear" (or that there is messaging to that effect) because death of bears is not necessarily, always the outcome of COS intervention.

- [57] The Crown urged the judge to take into account the relevant authorities under the Wildlife Act, in addition to Brown and Terroco. The Crown pointed out that it may have been objectively foreseeable that the bears would be euthanized, but it was not Ms. Stevikova's subjective view and that must be taken into account in determining moral culpability. The Crown submitted:

Despite what occurred in this case, it appears that protection and preservation of the environment and wildlife resources is a closely-held value of the defendant. Of course, there is also a certain irony to what occurred in this case that would inform her remorse and likely regret, for what happened. Ms. Stevikova, through her counsel, expressed a very early interest in resolving this matter and in doing so, demonstrated her remorse.

- [58] The Crown submitted that Ms. Stevikova's level of moral culpability was low rather than high.

[59] In addition, the Crown submitted that in the sentencing hearing it had argued that Counts 2 and 3 were not duplicative, that is, they did not substantially relate to the same event or circumstances, potentially resulting in multiple convictions (the Kienapple principle). It now took the view that they were duplicative and that Ms. Stevikova should only be convicted of the more serious offence of intentionally feeding wildlife.

Defence

[60] The defence began its submission by describing the benefits of joint submissions and the unique analysis that applies: fitness of sentence is not the test. Application of the public interest test requires the court to consider the strength of the Crown's case, the weight of a guilty plea and its benefit to the criminal justice system's function.

[61] The defence reviewed the mitigating factors and culpability, stressing that although Ms. Stevikova was misguided, she was attempting to prevent the bears from being euthanized. It also referred to the substantial world-wide media attention to which Ms. Stevikova was exposed and the significant punishment that it represented.

[62] The defence acknowledged the harm: feeding the bears ultimately led to the conservation officers destroying them. It emphasized that this had not been Ms. Stevikova's intention but "rather, a genuine, misguided attempt to help the environment."

[63] In respect of the form of the charges, the defence agreed with the Crown's Kienapple analysis. It also pointed out that the charges do not specify multiple particular days because the evidence the Crown could provide was based upon limited circumstantial evidence on a small number of days. The defence submitted that the charge was intended to be treated as one transaction and not to attract a sentence for each day.

[64] The defence also addressed both general and specific deterrence. It pointed out that Ms. Stevikova's financial means are of limited relevance where the offence was not motivated by profit and where she did not seek a lower fine.

[65] In distinguishing Brown, the defence stated:

In addressing the quantum of the fine, [RFJ #1] makes reference to R v. Brown in stating that the offender's "situation" is noted as a relevant factor that must be considered. It is submitted that the analysis in Brown was in the context of an appeal as to whether the fine imposed by the summary conviction appeal judge was too high; not that it should be increased because of Defendants' means. In upholding a higher fine than that imposed by the trial judge, the Court noted that there had been no claim of hardship, the appellants had managed to spend the same amount of money on the alterations to the property that caused the damage, as well as the aggravating factors - "flouting the law" and the scope of the damage. It is further noted that this was damage to habitat, not just individual animals.

[66] Regarding specific deterrence, the defence noted that Ms. Stevikova has taken responsibility for the offence, has expressed remorse and there is no evidence that the offending had or would continue.

[67] The defence provided a chart summarizing the various precedents that had been placed before the court:

Case

Offence

Max

Sentence

Harm

Agg

Mit

Trial/ [Guilty Plea (GP)]

R. v. Suchy, 2003 BCPC 557

Intentionally Feeding Wildlife (Bears)

\$100,000

\$3,000

1 Bear dead

? 2 cubs

Deliberate;

Ongoing;

For entertaining guests;

GP

R. v. Kim, 2016 BCPC 113

Trafficking - 7 counts (Bear parts)

\$250,000 per count; Min \$2,500

\$3,200 per count = \$22,400

Intentional killing of bears for parts

Sophisticated commercial enterprise

Early GP;

No CR

GP

R. v. Terroco Industries Ltd., 2005 ABCA 141

Release of [dangerous] chemical substance;

Unsafe transportation of dangerous goods

\$500,000

\$50,000

\$150,000

\$5,000

Permanent serious injury to person's respiratory system from chlorine gas;

Pollution to ground

Company conduct created risky situation;

Serious harm to individual;

Potential for serious harm to nearby village

Cooperation with authorities;

Clean-up of spill

Trial

R. v. Brown, 2010 BCCA 225

Destruction of fish habitat

-two counts

\$300,000 plus unlimited remedial costs

\$30,000

Impaired 8,000 m2 of fish habitat

Warned in advance - "clear flouting of the law"; enhancement of property;

None

Trial

R. v. Bayliff, B.C. Prov. Ct., Williams Lake Registry 36160-1, December 16, 2020 (unreported)

\$4,000 each

Habitat destruction of threatened species - "potentially devastating impact

Helicopter chase - cost and endangering authorities; drove sled at officer prompting pointing of firearm; resisted arrest

GP during COVID; history of living lives in harmony with environment; prosecution by information in Court;

GP

R. v. Jenicia Holdings Ltd., B.C. Prov. Ct., Port Coquitlam Registry 23904-1, April 6, 2016 (unreported)

s.33.1(2)

\$3,000

8 bears euthanized in the area plus one cub died

Corporate defendant (i.e. profit motive); many prior warnings; one prior ticket; many bear complaints

"fairly early" GP

R. v. Knapik, B.C. Prov. Ct., Port Coquitlam Registry 100205-1, May 9, 2019 (unreported)

s.33.1(2)

\$50,000

\$3,000

Sanctioned previously; Commercial operation

Financially struggling; no Record;

GP in Trial

R. v. Chalupiak, 2018 BCPC 82

Killing Grizzly out of season

\$50,000

\$8,000

Loss of reproductive female grizzly

Intentional killing of grizzly

Cooperated; No CR; GP

GP

R. v. Wiens, B.C. Prov. Ct., Penticton Registry 44876-1, 45060-1, April 8, 2019

Baiting bears; leaving attractants; shooting from MV.

\$50,000

\$100,000

\$100,000

\$18,500

Commercial enterprise; Breach of Trust - Hunting guide knows better; high degree of planning; encouraging others to commit offenses

GP; media attention in local community

GP

R. v. Clemett, 2016 ABPC 248

Importing head and hide of Brown (grizzly) bear

?

\$13,500

Illegally killed Brown bear in Alaska

Endangered species

Trial

May 26, 2021 - Sentencing Hearing Day 2

[68] The parties appeared virtually before the judge and reviewed their submissions.

July 20, 2021 - Reasons for Judgment (RFJ #2)

[69] The judge began her reasons with a discussion of the application of the Kienapple principle to Counts 1 and 2. While the Crown had taken the view that Kienapple did not apply, as Ms. Stevikova had pleaded guilty to both offences and entered a joint submission, along with the Crown's submissions of January 25, 2021, the judge was persuaded that there was not duplication in the charges. Count 2 related to feeding or attempting to feed wildlife contrary s. 33(1) of the Wildlife Act. In contrast, Count 3, a breach of s. 33(2), related to leaving or placing an attractant in or about any land or premises where there are or where there are likely to be people, in a manner in which the attractant could attract dangerous wildlife to the lands or premises and be accessible to dangerous wildlife.

- [70] In respect of the submissions of counsel, the judge stated: "I have considered all of the submissions made by counsel on January 25 and May 26, as well as the evidence submitted and the case law" (at para. 30).
- [71] The judge expressed her view, again, that in environmental cases, the key sentencing principle was deterrence. She addressed the maximum penalties in the Wildlife Act. She observed that in the filed admissions, the offences involved planning, deliberateness, they occurred for a significant duration and created actual and potential harm. The judge identified that the Crown's case was strong and that the destruction of the bears was clearly foreseeable (at paras. 38-39).
- [72] The judge referred to the mitigating factors of an early guilty plea, but did not consider that her pre-hearing donation to the Get Bear Smart Society was mitigating as Ms. Stevikova had "wilfully" taken herself out of the provincial management wildlife scheme (at para. 40).
- [73] The judge reiterated: "the proposed sentence here, a penalty, in total, of \$10,500 for the conduct described, would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system, in all of the circumstances of this case" (at para. 41).
- [74] The judge concluded (at para. 43):

In my view, the submissions here would "give rise to a dramatically unfit sentence", which trumps all of the perceived advantages of the joint submission (see: paragraph 63 of *R. v. C.R.H.*, 2021 BCCA 183). In the result, we are at paragraph 59 of *Anthony-Cook*, which reads:

Fifth, if the trial judge's concerns about the joint submission are not alleviated, the judge may allow the accused to apply to withdraw his or her guilty plea.

September 29, 2021- Reasons for Judgment (RFJ #3)

- [75] Because Ms. Stevikova did not withdraw her guilty plea, the judge issued her reasons indexed at 2021 BCPC 235.
- [76] After reviewing the charges and the provisions of the Wildlife Act, the judge referred to the agreed statement of facts.
- [77] In the portion of the judgment dealing with Ms. Stevikova's circumstances, the judge noted that "she has never appeared personally on this matter" (at para. 25).
- [78] At para. 27, the judge refers to the description of Ms. Stevikova's annual income of \$36,000, but concluded that both counsel sought to minimize Ms. Stevikova's income, adding:

I have been provided with no clear evidence or information of those circumstances, the facts outlined, including the exclusive nature of the neighbourhood in which the offences were committed and her ceasing to work as described above, make it clear that an annual salary of \$36,000 does not come close to accurately reflecting her financial reality.

- [79] The judge also noted that Ms. Stevikova is vegan; that she along with "her spouse" have contributed \$20,000 to animal charities, worldwide; she is described by both counsel a well-intentioned; that the publicity surrounding the offences has caused her distress and impacted her; she made a pre-sentence donation of \$5,000 to the Great Bear Smart Society; and she is remorseful and has no record.
- [80] The judge reviewed the chronology of the sentencing hearings. In respect of the submissions of May 26, 2021, she said (at paras. 42-47):
- [42] At the outset of the May 26th appearance, Crown counsel advised that, having heard defence counsel's submissions on January 25th, the Crown was now of the view that the rule against multiple convictions did apply here and sought a judicial stay of proceedings or to be permitted to withdraw the charge in Count 2.
- [43] Counsel then presented, jointly, submissions that there should be a financial penalty of \$10,500 in relation to Count 3, only.
- [44] Counsel identified as further benefits to society arising from the guilty pleas factors which I believe are appropriate to examine in the context of potentially mitigating factors, at this stage: (i) avoiding a public examination at trial of the Conservation Officer Service's practice of euthanizing animals determined to be dangerous; (ii) an enhanced value to the criminal justice system from guilty pleas during the Covid-19 pandemic (iii) the borderless reality of media; (iv) varying potential outcomes for habituated bears.
- [45] As well, counsel argued that Ms. Stevikova's motivation for committing the offences was well-intended, if "misguided," and thus, her culpability reduced.
- [46] Counsel stated that due to weaknesses in the Crown's case, the Crown was of the view that it could likely not prove that the offence occurred on more than three to four days. (I understand this submission to have been in relation to Count 3, only - intentionally feeding the bears, or attempting to).
- [47] Counsel were of the view that the proposed sentences were not nominal.
- [81] Counsel had presented joint submissions that there should be a financial penalty of \$10,500 in relation to Count 3, only. The judge disagreed. She did not consider that the rule against multiple convictions applied.
- [82] At para. 50, the judge referred to R. v. Mack, 2008 BCSC 520 regarding judicial notice. She stated: "A judge is presumed to be familiar with the community in which he or she works and thus be in a position to take judicial notice of concerns particular to a given community."

- [83] Next, the judge described the community of Whistler, where the offences took place. At para. 51, she referred to R. v. Suchy, stating: "I think that there are some very serious problems facing that community, one of which clearly is how to survive and coexist in a way that is healthy for the animals."
- [84] The judge continued, again by taking judicial notice:
- [52] Since 2003, the human presence and pressure on Whistler's surrounding wild habitat has increased markedly: in 2010, Whistler hosted the Olympics, increasing its international profile and attracting travellers as a result. Since 2003, the Sea to Sky Highway, leading to the populous Vancouver Lower Mainland, has become a corridor for easy and quick access to Whistler, including by visitors with no knowledge of how to properly and safely conduct themselves in the wilderness which surrounds and is a part of the community.
- [54] The messaging that people must not feed bears and must not leave food and other attractants accessible to bears appears throughout Whistler and on the highway leading to it: the messaging is by way of signs at the parks and paths and trailheads throughout the community and sometimes by way of articles or ads in the local newspaper. The garbage cans throughout the municipality are bear-proof so that bears cannot eat the garbage and be attracted to the parks and paths where the garbage cans are located.
- [85] In the context of Count 2, the Court addressed the factors that she considered in sentencing.
- [86] The judge reiterated her view that the key factor in the case was deterrence, referring again to Terroco.
- [87] While recognizing the principle of parity, that is that similar circumstances ought to attract similar ranges of sentence, the judge found that the sentencing authorities provided by both counsel were of limited value, noting (at paras. 75-76):
- [75] Counsel for Ms. Stevikova helpfully summarized the sentencing cases relied upon by counsel to support their sentencing positions; while many are from within this province, apart from the Suchy case, none of the offences occurred in Whistler. None of them deal with factors such as the immense risk posed to the user-population that is a reality in this case; none of them deal with a flagrant disregard for community-messaging and provincial wildlife management scheme as here, with the repetition involved.
- [76] With regard to the cases relating to the offence of leaving attractants, I found Weins the most helpful. There, while in the context of a hunting business, the offender left attractants with the intention that they attract bears. From my reading of the case, it appears that attractants were left on three occasions. One bear was shot dead. The Crown there sought fines in the range of \$25,000 to \$30,000, along with forfeiture of a vehicle and the return of funds spent during the investigation.
- [88] The judge reviewed the case authorities cited to her, but does not refer to sentences imposed, except for Weins, where the penalty imposed was \$18,500.

- [89] The judge then set out her discussion of Count 1.
- [90] From paras. 81-93, the judge referred to Ms. Stevikova's culpability: it was at the gravest end of the continuum from "virtual due diligence" to "virtual intent" (at para. 81); the offensive conduct occurred throughout the summer of 2018 (at para. 84); she made a decision to commit the offence (at para. 87); she did her own research and did not consult COS (at para. 88); harm to the bears was the "obvious foreseeable outcome given the message in the community" (at para. 90); the message is set out clearly for all users and residents of the Whistler community (at para. 91); "[Ms. Stevikova's] culpability it at the very high end" (at para. 93).
- [91] Under the heading "Prior records and past involvement of an offender with the authorities", the judge refers to Ms. Stevikova not having a prior record and accepts that as a mitigating factor, but adds (at paras. 95-97):
- [95] However, I find that the significance of this factor is attenuated by the reality that everyone who visits or lives in Whistler has some involvement with the wildlife management authorities, as, as I have noted above, the community has signage throughout it, forbidding people to leave attractants or feed bears.
- [96] Ms. Stevikova, like many people, has chosen to move to Whistler, at least part time; this was a voluntary step taken by her for her own purposes.
- [97] In other contexts, where people voluntarily undertake activities in a regulated sphere, they have been found to have a heightened obligation to familiarize themselves with and adhere to the rules of conduct apposite to their chosen activity. In my view, there are parallels to be drawn.
- [Emphasis in original]
- [92] The judge then turned to Ms. Stevikova's early guilty plea, accepting that it was a sincere acceptance of responsibility and remorse. However, the judge found that it was not a particular benefit to the criminal justice system:
- [98] in some situations a guilty plea may have additional benefit to the criminal justice system where that system is stressed due to something like the current pandemic, the practical reality is that that was not the situation at this Courthouse in early 2021: At this Courthouse, it seemed that the trial load lessened, often as a result of litigants settling matters; adjourning them and the like. As a result, the practical benefit derived by the criminal justice system in this case could not be said to have been significantly more than the usual benefit that such a step occasions: a guilty plea is always a significant mitigating factor.
- [93] The judge moved to "Damage/harm". She found the death of the bears to be a significant aggravating factor "because it was so sorrowfully foreseeable to anyone with a modicum of sense and any interest in or experience of the British Columbia wilderness" (at para. 102).

[94] Under the heading "Other Considerations", the judge addressed three matters: first, the controversy over provincial practices relating the destruction of dangerous wildlife, which she rejected as a mitigating factor, finding that it was irrelevant and referring to the court's "ability to curtail irrelevant issues from taking over the proceedings" (at para. 106); second, the collateral consequences of negative media coverage, which she found to be widespread, but not particularly impacting on Ms. Stevikova; and third, the \$5,000 donation that Ms. Stevikova made before the January 25, 2021 hearing, which she found to be an attempt to lessen the sentence imposed and demonstrated that Ms. Stevikova had the resources to make a donation that was out of reach for many of those who appear in Provincial Court.

[95] In support of the sentence imposed, the judge said (at paras. 118-119):

[118] Returning to the fundamental principle of sentencing, and having regard to the special approach to be taken here, I view Ms. Stevikova's culpability as on the highest end and I view the offence as grave, in relation to the foreseeability of the harm to the bears and to the public, as well as the actual harm to the wildlife, and the repetitive and deliberate nature of the offence of her leaving attractants on her property throughout the summer of 2018.

[119] Taking all of the factors into account, the sentence for the offence in Count 2 is a financial penalty of \$35,000; it will be apportioned as a \$500 fine and a \$34,500 contribution to the Foundation.

[96] Regarding Count 3, the judge adopted her reasoning in support of the sentence imposed for Count 2. She recognized that there were "only three or four times of actual feeding" (at para. 126) and imposed the following sentence (at para. 127):

The sentence on Count 3 is a financial penalty in the amount of \$25,000, comprised of a fine of \$500 and a contribution to the Foundation of \$24,500. While a more serious offence than the offence in Count 2, and while subject of a higher potential penalty under the Wildlife Act - by both fine and imprisonment - I accept that this offence was not repeated as often as was the leaving of the attractants and as result the risk of harm to the public was less foreseeable as well.

[97] The judge acknowledges her consideration of the totality principle without further comment.

[98] She continued at para. 129:

Finally, if only the offence in Count 3 were before me, (if the rule against multiple convictions had applied), on all of the facts, a financial penalty of \$60,000 in relation to that charge, by way of a \$500 fine and an order that the remainder be by way of a contribution of \$59,500 to the Foundation is the sentence that I would have imposed, to address the offender's culpability and gravity in this case, with the special approach to sentencing in mind.

Analysis

Overview

- [99] The Honourable Judge Smith, in an attempt to strongly denounce the conduct in this case, committed the errors discussed in *Cheema*, C.R.H. and *Anthony-Cook*. The judge failed to give clear and cogent reasons for departing from the joint submission and as to why the proposed sentence would offend justice. In doing so, the judge did not consider the benefits of joint submissions and how they specifically applied in this case: C.R.H. at para. 60. This error led the judge to overlook the Crown's submissions regarding the vulnerabilities of its case.
- [100] Like the sentencing judges in *Cheema* and C.R.H, the judge referred to *Anthony-Cook* extensively, but she failed to apply the stringent test that governs departing from a joint submission. She did not provide a demonstrated consideration of the joint submission process, most particularly by not addressing the submissions made by counsel in advancing the joint submission.
- [101] The judge erred in not considering that counsel, with their intimate knowledge of the case, had negotiated the agreed statement of facts and the appropriate penalty to be derived from them. Rather, the judge treated the agreed statement of facts as facts proven at trial, used judicial notice to make improper inferences and reached the sentence she considered was fit.
- [102] The judge treated Ms. Stevikova's conviction as inevitable if the matter had gone to trial. She did not acknowledge the vulnerabilities that the Crown and defence had set out in their submissions. Those vulnerabilities left a conviction uncertain. The judge considered that the Crown had a very strong case, as did the judge in C.R.H., but a thorough review of the agreed statement of facts, along with the submissions of counsel, demonstrated that there were matters of credibility and other significant triable issues.
- [103] Ultimately, the sentence in the joint submission was, as the judge accepted, at the high-end of the range for Wildlife Act offences: RFJ #3 at para. 35. When this is the case, the sentence is unlikely to offend the public and, therefore, should have been accepted: *Anthony-Cook* at para. 63, C.R.H. at paras. 66-67, *Cheema* at para. 29.

A "Fed Bear is a Dead Bear"

- [104] The overwhelming theme in the reasons for judgment was the foreseeability of the bears being euthanized as a result of Ms. Stevikova's actions.
- [105] The judge signalled her view in the first sentencing hearing of January 25, 2021. She intervened in the Crown's submission and pointed out that "you can't walk through Whistler without seeing garbage cans on the trailheads" and that "residents of Whistler must know that feeding bears results in their death."

[106] In RFJ #1 those statements form part of her reasoning. The judge takes judicial notice of the supposed "messaging throughout the town of Whistler" communicating clearly that a "fed bear is a dead bear" (at para. 20).

[107] The Crown pointed out that euthanizing the bears found on Ms. Stevikova's property was not the inevitable result and cited the COS's bear response matrix. The judge dismissed the Crown's concern, then, with the aid of her judicial notice, found Ms. Stevikova's moral culpability to be of the highest degree, because of the foreseeability that the bears would be euthanized if they were fed on her property.

[108] The judge refers to two cases involving judicial notice.

[109] In Little, the provincial court judge took judicial notice that the town in which the offence took place in British Columbia, four minutes from the police station in Dawson Creek. The judge sitting on the summary conviction appeal, found that there was ample evidence to support the judge's finding that the offence took place in Rolla, British Columbia, based upon the evidence of the police officer involved and the accused. The appeal judge stated:

Considering the evidence at trial in combination with the matters of which the court could take judicial notice I have concluded that there was sufficient evidence upon which the learned trial judge could come to the conclusion that the crown had proved that the offence occurred in the Province of British Columbia. I reach that decision having in mind the combination of the evidence that the trip from the accused's automobile to the police station took only four minutes and the other evidence relating to geographical locations and place names. This body of evidence, when considered against the background of the facts of which the learned trial Judge was entitled to take judicial notice, is sufficient to support the conclusion which I imply from his reasons for judgment.

[110] In Mack, the Court referred to judicial notice that is taken in sentencing aboriginal offenders (at para. 10):

Justice Cory and Mr. Justice Iacobucci said at paragraph 83 of Gladue that "[i]n all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders". The ability of a sentencing judge to take judicial notice of those factors derives from the judge's presumed familiarity with the community in which he or she works and his or her knowledge of the law.

[111] Here, the judge apparently took judicial notice of a message on a sign that she had observed in Whistler, at an unknown place and time. It was not in any way comparable to the judicial notice taken in the cases that she cited. In Little, there was evidence to support the judge's taking of judicial notice that Rolla was within British Columbia. In Mack, the judicial notice was of the systemic background factors that are commonly referred to in the sentencing of aboriginal offenders.

- [112] Even if it were permissible, Crown's submissions made clear that taking judicial notice that a "fed bear is a dead bear" was wrong "because of the death of the bears is not necessarily, always the outcome of COS intervention." The inferences regarding the fitness of the sentence flowing from the judicial notice are, therefore, also incorrect.

Applicability of Case Authorities

- [113] The sentence proposed in the joint submission totaled \$10,500. The judge accepted that this would be one of the highest fines levied under the Wildlife Act: RFJ #3 at para. 35. Despite this, it was the foreseeability that the judge deemed to exist in this case which led her to conclude that Ms. Stevikova's moral culpability was at the highest level. The judge compared Ms. Stevikova's actions to those which existed in the cases of Brown and Terroco.
- [114] Terroco involved the sentencing of a corporation that released dangerous chemical substances and engaged in the unsafe transportation of dangerous goods. The company created a risky situation, including serious harm to an individual and the potential of serious harm to a nearby village. Terroco was a mid-size corporation that had annual gross revenues in the \$20 million range. The Court emphasized that general deterrence was engaged as other businesses must be aware not to do what may appear to be cost-effective but risky behaviour. Terroco did not plead guilty, but rather was sentenced after a full trial. The facts in Terroco bare no resemblance to the facts in this case.
- [115] The judge also relied heavily on Brown. The Browns were charged with two counts of harmful alteration and destruction of a fish habitat contrary to the provisions of the Fisheries Act, R.S.B.C. 1985, c. C-4. Hatchery Creek and an unnamed tributary to that creek ran on the Brown's ten-acre property. The Browns cleared the land, covered one of the tributaries and drained the property to prepare it for building their house. In doing so, they were found to have impaired approximately 800 m² of fish habitat. They had also been warned by representatives of the Department of Fisheries and Oceans not to take the steps that led to the impairment of the fish habitat. The Browns' actions caused permanent damage to the tributaries. The Browns were fined \$30,000, half of the penalty Ms. Stevikova received. The facts of Brown are entirely distinguishable.
- [116] The judge was invited by both counsel to consider other authorities. The judge briefly referred to them. She considered that the Wiens decision was the "most helpful" and referred to the \$18,500 penalty: RFJ #3 at paras. 76-80. Wiens concerned a hunting guide leaving attractants for bears and then intentionally shooting them. The sentence in Wiens was a quarter of the penalty levied against Ms. Stevikova. The judge did not consider whether the penalty that she imposed should reflect a similar sentence, despite the clearly more blameworthy content in Wiens.

- [117] The judge also referred to Suchy, but only in respect of its description of the Whistler community. She did not consider the similar facts: the feeding of bears to entertain guests in Whistler, which in Suchy was intentional, resulting in the deaths of the bears. Nor did she consider the \$3,000 penalty in Suchy.
- [118] Instead, the judge briefly referred to the caselaw as a basis for her view that deterrence was the primary sentencing objective in environmental offences. Deterrence is of primary importance, however, the cases that were cited to her were not cited to her only for that principle. The cases demonstrated judicial responses in sentencing similar cases. The judge did not consider that in most of those cases the actions of the accused were motivated by profit and involved intentional killing of bears or hunting for sport, which was not the case before her.
- [119] This was an error identified in Cheema: the proposed penalty fell within the sentencing range established in the case law, as counsel fully explained at the hearing. Instead, like Cheema, the judge appears to impose a sentence to strongly denounce and deter those who might engage in feeding bears at Whistler, without any evidence of the prevalence of such conduct: see Cheema at para. 26.
- [120] While the judge referred to parity, she concludes that the sentencing precedents are of little value, because of her taking judicial notice of the messaging at Whistler. Again, the judge's judicial notice of "a fed bear is a dead bear" supports her notion that Ms. Stevikova's actions were of the highest moral culpability, indeed, higher than those of intentionally feeding wildlife for the purpose of entertaining guests resulting in the euthanization of one bear or more as in Suchy, trafficking in bear parts as in Kim, or intentional killing as in Jenicia, Bayliff, Chalupiak and Wiens.
- [121] The proposed sentence was three-times higher than in Suchy, a similar case and was one of the highest under the Wildlife Act. Ms. Stevikova received a sentence that was twenty-times higher than in Suchy. In this context, it is difficult to say the proposed sentence was so "unhinged" as to bring the administration of justice in to disrepute.

Strength of the Crown's Case

- [122] The Crown pointed out that their evidence would not necessarily result in a conviction at trial. There was a lack of direct evidence about whether the bears that were euthanized were fed by Ms. Stevikova. The witnesses were vague and potentially unavailable. The passage of time between the witnesses' statements to conservation officers and trial would impair the impact of the evidence. Indeed, the Crown, in its submissions supporting the joint submission, stated that the evidence proving the elements of the offence "was actually quite scarce and vulnerable".

- [123] The judge did not consider the Crown's submissions regarding the strength of its case, but rather treated the agreed statement of facts as provable to the requisite standard. Rather than accepting that the agreed statement of facts represented the Crown's best evidence, she embellished upon it by taking judicial notice.
- [124] While the Crown pointed out that the evidence of the duration of the offence was likely limited to three or four days, the judge considered that Ms. Stevikova's actions were deliberate and planned and that she repeated the offending behaviour throughout the summer of 2018 for her own purposes. The judge went so far as to refer to Mr. Dugan as an offender: RFJ #1 at para. 28. Mr. Dugan never pleaded guilty and the judge had little to no evidence of his involvement in the impugned conduct.
- [125] In sum, the reasons do not adequately consider the vulnerabilities of the Crown's case and the large specific benefit of the joint submission in this case of ensuring conviction. As a result, the reasons fail to give cogent and clear justification for departing from the joint submission.

Mitigating and Aggravating Factors

- [126] Again, informed by the judge's particular view of the foreseeability of the euthanization of the bears, she treated the mitigating and aggravating factors unusually.
- [127] The judge considered that in spite of Ms. Stevikova's guilty plea, it should not be a significantly mitigating factor because the court at the time was not particularly busy: RFJ #3 at para. 98. Again, the judge is engaging in judicial notice of this. The logic appears to be derived from Anthony-Cook and the statement that efficient resolutions of criminal proceedings save the justice system precious time, resources and expenses (at para. 40). Whether the court is busy or not at a particular time cannot be used to diminish the mitigating effect of a guilty plea. Neither party, particularly the accused, is aware of how busy the courts are. Even if there is a peculiar lull in proceedings at a particular time, it does not detract from the significance of a guilty plea.
- [128] In respect of the use of the court's resources, this sentencing took three full days of hearing, required lengthy and detailed submissions from counsel and the judge provided three sets of reasons over a nine-month period.
- [129] Other factors, such as Ms. Stevikova's lack of prior involvement with COS, were not considered sufficiently mitigating because the judge found that Ms. Stevikova ignored the messaging of the Whistler community.

Ms. Stevikova's Financial Circumstances

- [130] The judge also considered Ms. Stevikova's financial circumstances in the context of specific deterrence: RFJ #1 at paras. 27-28, RFJ #3 at paras. 72-73. There was limited evidence of Ms. Stevikova's financial circumstances, however, the judge concludes that Ms. Stevikova's financial circumstances were far greater than Ms. Stevikova maintained, in spite of the lack of evidence.
- [131] The judge finds that the penalty that is proposed is nominal. Yet at another part of her judgment, she refers to \$5,000 being a significant amount of money when referring to the donation that Ms. Stevikova gave before trial. It is unclear whether a penalty of \$10,500 is nominal or is not.
- [132] The severity of the fine relative to Ms. Stevikova's supposed wealth appears to have been used to justify a higher penalty. The judge relied on Terroco and Brown for this principle: RFJ #1 at paras. 27-28, RFJ #3 at paras. 72-73. However, Terroco discussed comparing the amount of the fine to the income of the offender in the context of deterring corporate offenders and how the fine should not bankrupt the firm: Terroco at para. 60. Brown discussed the amount of the fine to determine if it was too high -- not too low based on the offender's wealth -- and might cause undue hardship: Brown at para. 20.
- [133] Here, the judge appears to consider Mr. Stevikova's financial position as a reason to increase the penalty.

Kienapple

- [134] The parties have raised other matters including the applicability of the Kienapple principle. I do not intend to address that because I have found that the judge's sentence is not fit and does not comply with the direction of Anthony-Cook or C.R.H.

Change in the Crown's Position

- [135] I also decline to determine the case on the basis that the Crown's position in this hearing is a repudiation of its previous position and improper. Instead, I reject the Crown's position that the sentence imposed by the judge was fit.

Conclusion

- [136] In the circumstances, I must find that while the judge was attuned to the Anthony-Cook and C.R.H. decisions, she did not properly apply them. She made findings of fact which were not supported by the agreed statement of facts, would be difficult for the Crown to prove, or were not based on evidence but rather her own judicial notice. She then fashioned a sentence based on her extrapolation of the facts before her. She erred in applying the stringent test set out in those cases.

[137] To adopt the test set out in Anthony-Cook at para. 34: The proposed sentence set out in the joint submission was not:

so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down

[138] Neither is the sentence imposed fit. The sentencing judge has erred in principle by employing irrelevant factors and overemphasizing relevant factors. The sentence imposed was far from the range of sentences imposed for similar offences and facts.

[139] I allow the appeal and substitute the joint submission in place of the sentence imposed. In respect of Count 2, I impose a \$500 fine and a \$3,000 contribution to the Foundation; and in respect of Count 3, I impose a \$500 fine and a \$6,500 contribution to the Foundation.

"Gropper J."

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