

CANADA / JUDGMENT

Teal Cedar Products Ltd. v. Davidson

2024 BCSC 81

COURT

Supreme Court of British Columbia

DECIDED

18 January 2024

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2024 BCSC 81 Teal Cedar Products Ltd. v. Davidson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Teal Cedar Products Ltd. v. Davidson,

2024 BCSC 81

Date: 20240118

Docket: S211602-10

Registry: Vancouver

Between:

Teal Cedar Products Ltd.

Plaintiff

And

Unknown Persons Operating as the "Rainforest Flying Squad", Robert Arbess (also known as Reuben Garbanzo), Kathleen Code, Carole Tootill, William Jones, Joshua Wright, Glenn Reid, Shawna Knight, Angela Davidson (also known as Rainbow Eyes), Donna Clark, Keith Cherry, Rhia Ironside, Will O'Connell, Steven Daniluk, (also known as Yogi Shambu), Saul Arbess, Rani Earnhart and Atleo River Air Service Ltd., John Doe, Jane Doe, and Persons Unknown

Defendants

AND:

British Columbia (Ministry of Forests, Lands, Natural Resource Operations And Urban Development)

Third Party

AND:

The Attorney General of British Columbia

Intervenor

Before: The Honourable Chief Justice Hinkson

Oral Reasons for Judgment

Counsel for the Plaintiff Angela Davidson:

B. Isitt

E. Strain

M. Silongan

Counsel for the Intervenor, Attorney General of British Columbia:

N.G. Melling

A.M. Kaban

G.R. Thompson

M.W. Dull

Place and Date of Trial:

Nanaimo, B.C.

June 5-9, 12-15, September 11-15,

October 25, and November 1, 2023

Place and Date of Judgment:

Nanaimo, B.C.

January 18, 2024

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Introduction

- [1] The defendant Angela Davidson ("Ms. Davidson") is charged with seven counts of criminal contempt of this Court. The counts are rooted in an April 1, 2021 Order After Application by Justice Verhoeven (the "Injunction"), and flow variously from release orders issued thereafter for some of her activities on May 18, June 23 and 25, August 10, and November 28, 2021, and January 15 and 28, 2022.
- [2] For the reasons that follow, I find that Ms. Davidson breached the Injunction, and the bail conditions imposed upon her by Justices Davies and Thompson, as alleged. Neither the de minimus defence or those of necessity or mistake of fact, nor the exercise of my discretion justify the acquittal of Ms. Davidson on any of the seven counts of criminal contempt of this Court that are made out by the Crown.

The Injunction, Release Orders, and Counts

- [3] The Injunction, ordered by Verhoeven J. on April 1, 2021, enjoined the following, with effect until September 26, 2021:
- (a) Impeding, physically obstructing, or in any way interfering with any person from gaining access to or egress from, or otherwise making use of any road situate within the area bordered by (i) the E&N Railway Land Grant Boundary to the east, (ii) the San Juan River and Pacific Rim National Park Boundary to the south, (iii) the boundary of the Carmanah Walbran Provincial Park to the west, and (iv) the Nitinaht River and Nitinaht Lake to the north
- [4] This area will hereafter be described as the "Injunction Area".
- [5] The Injunction further prohibited - inter alia - the obstruction, impeding, or other interference with the safe passage of motor vehicles, equipment, machinery belonging to the plaintiff and associated persons, or construction and timber harvesting activities being conducted by the same. Moreover, Verhoeven J. specifically enjoined:
- (e) threatening, harassing, intimidating, assaulting, physically obstructing, or physically interfering with the Plaintiff's employees, agents, contractors or suppliers or their families
- [6] The Injunction also included police enforcement terms.
- [7] Having been apprehended on an allegation that she breached the Injunction, the defendant was released from custody by order of Davies J. on May 19, 2021. The release was conditional on the defendant's attendance before a judge of the Supreme Court of British Columbia to be dealt with according to law, and her strict compliance with the Injunction. For greater certainty, Davies J. reiterated that the defendant was not to enter the Injunction Area.

- [8] Upon again being apprehended on an allegation that she breached the Injunction, the defendant was released from custody by order of Thompson J. on June 26, 2021. The conditions in this instance were duplicative of those in Davies J.'s May 19, 2021 order, with the addition of a \$2,000 cash deposit to be held as security for the defendant's compliance with the order.
- [9] Finally, on November 29, 2021, Thompson J. ordered that the defendant be released from custody for an alleged breach of the Injunction. The defendant's \$2,000 deposit for security was maintained and a curfew was applied to her in addition to requirements that she strictly comply with the Injunction and not enter the Injunction Area. On December 13, 2021, Thompson J. varied the curfew from the November 29, 2021 and inserted the following:
4. The Alleged Contemnor must obey a curfew by being inside their residence at 150 Pachidah Road, Port Renfrew, BC, 24 hours every day, provided that the existing Prov Ct order is amended to permit residence south of Nanaimo. The Alleged Contemnor may be away from their residence during the house arrest hours:
 - (a) While at, or going directly to, or returning directly from work.
 - (b) While at, or going directly to, or returning directly from a healthcare facility because of a medical emergency or a scheduled medical appointment. If asked, you must provide proof of your attendance at the facility.
 - (c) While at, or going directly to, or returning directly from appointments with legal counsel.
 - (d) While at, or going directly to, or returning directly from the Court.
 - (e) While at, or going directly to, or returning directly from attending to grocery shopping between the hours of 12:00 pm and 4:00 pm on Wednesdays and Sundays;
 - (f) While travelling to, returning from, and residing temporarily in the province of Alberta from December 15, 2021 to January 6, 2022.
- [10] The seven counts of criminal contempt with which Ms. Davidson is charged are as follows:
- i) September 10, 2021: alleging that on May 18, 2021, Ms. Davidson breached the Injunction;
 - ii) November 8, 2021: alleging that on June 23, 2021, Ms. Davidson breached a condition of the release order of Davies J. dated May 19, 2021;
 - iii) November 29, 2021: alleging that on November 28, 2021, Ms. Davidson breached conditions of the release orders of Davies J. dated May 19, 2021 and Thompson J. dated June 26, 2021;
 - iv) March 30, 2022: alleging that on August 10, 2021, Ms. Davidson breached conditions of the release orders of Davies J. dated May 19, 2021 and Thompson J. dated June 26, 2021
 - v) March 30, 2022: alleging that on January 15 and January 28, 2021, Ms. Davidson breached a condition of the release order of Thompson J. dated December 13, 2021; and,

vi) June 20, 2022: alleging that on June 25, 2021, Ms. Davidson breached the Injunction.

[11] Ms. Davidson has entered not guilty pleas to each of the counts.

Civil as Opposed to Criminal Contempt

[12] In *Vancouver Fraser Port Authority v. Doe*, 2021 BCSC 1109 at para. 39, Justice Tammen discussed the purpose of civil contempt as being to secure compliance with a court's order. He also discussed criminal contempt, the purpose of which is to punish contemnors for conduct calculated to bring the administration of justice - as carried out by the courts - into disrepute. Moreover, an element of publicity - public defiance - grounds the distinction between civil and criminal contempt.

[13] Civil contempt proceedings are initiated by a party affected by the order sought to be enforced. To secure compliance in a proceeding for civil contempt, a court may impose a fine or other penalty that will be exacted in the absence of compliance. The object of civil contempt is always compliance, not punishment.

[14] Only allegations of criminal contempt are before me. They may either be proven or not. If proven - which, for the reasons that follow, I find they are - the availability of a civil remedy is irrelevant. Were the criminal charges not ultimately proven, I would not have been inclined to consider - in these Reasons - civil contempt or other possible findings that were not fully argued before me.

Criminal Contempt of Court

[15] The gravamen of the offence of criminal contempt of court was described by Justice McLachlin (as she then was) for the majority in *United Nurses of Alberta v. Attorney General of Alberta et al*, [1992] 1 S.C.R. 901 at 932, 1992 CanLII 99 (SCC) [*United Nurses*] at para. 52:

52 The gravamen of the offence is not actual or threatened injury to persons or property; other offences deal with those evils. The gravamen of the offence is rather the open, continuous and flagrant violation of a court order without regard for the effect that may have on the respect accorded to edicts of the court.

[16] The elements of the offence of criminal contempt of court were agreed by Ms. Davidson and the Attorney General of British Columbia (the "Crown") as set out in *United Nurses* at para. 55:

55 To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt. As in other criminal offences, however, the necessary *mens rea* may be inferred from the circumstances. An open and public defiance of a court order will tend to depreciate the authority of the court. Therefore when it is clear the accused must have known his or her act of defiance will be public, it may be inferred

that he or she was at least reckless as to whether the authority of the court would be brought into contempt. On the other hand, if the circumstances leave a reasonable doubt as to whether the breach was or should be expected to have this public quality, then the necessary mens rea would not be present and the accused would be acquitted, even if the matter in fact became public. While publicity is required for the offence, a civil contempt is not converted to a criminal contempt merely because it attracts publicity, as the union contends, but rather because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt.

[17] A party alleged to have breached an order must have actual knowledge of it. Knowledge of the court order may be inferred based on circumstantial evidence, or liability may be established through the wilful blindness doctrine: *Carey v. Laiken*, 2015 SCC 17 at para. 34 [Carey].

Actus Reus

[18] In *Carey*, Justice Cromwell, for a unanimous Court, explained at paras. 35-36:

[35] the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels: *Sheppard v. Sheppard* (1976), 12 O.R. (2d) 4 (C.A.), at p. 8. The meaning of this element is one of the main points in contention on appeal and I will turn to consider it in more detail momentarily.

[36] The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders: see, e.g., *Hefkey v. Hefkey*, 2013 ONCA 44, 30 R.F.L. (7th) 65, at para. 3. If contempt is found too easily, "a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect": *Centre commercial Les Rivières ltée v. Jean Bleu inc.*, 2012 QCCA 1663, at para. 7. As this Court has affirmed, "contempt of court cannot be reduced to a mere means of enforcing judgments": *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, 1992 CanLII 29 (SCC), [1992] 2 S.C.R. 1065, at p. 1078, citing *Daigle v. St-Gabriel-de-Brandon (Paroisse)*, 1991 CanLII 3806 (QC CA), [1991] R.D.J. 249 (Que. C.A.). Rather, it should be used "cautiously and with great restraint": *TG Industries*, at para. 32. It is an enforcement power of last rather than first resort: *Hefkey*, at para. 3; *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 89 O.R. (3d) 81, at paras. 41-43; *Centre commercial Les Rivières ltée*, at para. 64.

[19] The breach need not be of long duration to be considered "open, continuous and flagrant". In *Macmillan Bloedel Limited v. Simpson*, 1993 CanLII 1333 (B.C.S.C.), Justice MacKenzie concluded that a protest by two teenagers that "was not going to cause more than a few minutes' delay" nonetheless constituted criminal contempt, even though he characterized the resistance as merely "brief and token": at 9.

- [20] In *MacMillan Bloedel Limited v. Simpson*, [1994] B.C.J. No. 580, 1994 CarswellBC 2281 (S.C.), Justice Holmes found that conduct that occurred on "only one day" for "only a few minutes" prior to arrest was continuous. In finding the alleged contemnors liable for criminal contempt, Holmes J. stated at para. 39:
- [39] They overlook, however, the basic effect of their conduct. They clearly would not have given up the blockage of the roadway without arrest. They intended a continuing blockage of the roadway to use by the plaintiff, risked arrest by doing so, and only by arrest was the intended continuity broken.
- [21] In *MacMillan Bloedel Ltd. v. Simpson*, [1994] B.C.J. No. 670, 1994 CarswellBC 162 (C.A.) [MacMillan CA], an alleged contemnor was arrested soon after the reading of the injunction. He argued that "short interruptions of workers' travel to logging sites is not continuous or flagrant": MacMillan CA at para. 28. In rejecting that ground of appeal, Chief Justice McEachern, for a unanimous Court, quoted with approval from the decision of the trial judge, at para. 31, which defined the terms "continuous" and "flagrant":

I take it that the word "continuous" is equivalent to something more than a momentary or trivial act of disobedience. Similarly, the word flagrant means an act done in an inflammatory way. Hence, criminal contempt involves conduct that is more than momentary or trivial and amounts to inflammatory behaviour designed to lessen the public's respect for the court.

- [22] I note also that in *MacMillan CA*, at para. 31, Chief Justice McEachern referred with approval to the finding of the trial judge that "members of the public" - relevant to the issue of whether there has been publicity or public defiance - included "protestors who chose not to get arrested, employees of *MacMillan Bloedel Ltd.*, sub-contractors of *MacMillan Bloedel Ltd.* and RCMP police officers".

Mens Rea

- [23] In *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 385, at para. 10, Justice Willcock, for a unanimous Court, reiterated the principle that Courts may rely on the circumstances surrounding the offence to draw inferences about accused's state of mind with reference to *United Nurses* at 933, excerpted above.
- [24] The inference is permissive, not mandatory: a tenet highlighted in the earlier decision of the Court of Appeal in *Trans Mountain Pipeline ULC v. Mivasair*, 2023 BCCA 299 [Trans Mountain 299] at para. 67. That decision concerned a charge of criminal contempt of court for blocking a road in violation of an injunction. Mr. Leyden appealed his conviction on the basis that the trial judge had erred in her assessment of his mens rea by failing to consider the whole of the evidence, including Mr. Leyden's own testimony about his state of mind.
- [25] Writing for the Court in *Trans Mountain 299*, Justice Dewitt-Van Oosten did not limit the applicability of the mens rea inference set out in *United Nurses*; indeed, she noted that it applied the majority of the time, commenting at para. 66:

- [66] In most cases, once the Crown has proved that an accused intentionally committed an act in public that contravenes a clear order of which they had notice, that same evidence will strongly support an inference that the accused committed the act with the intent, knowledge, or, at the very least, recklessness as to the fact that their public disobedience would tend to depreciate the court's authority
- [26] Justice Dewitt-Van Oosten At para. 88 further held:
- [88] [i]f the trial judge accepted that Mr. Leyden believed his conduct did not contravene the injunction because he had previously been told by police that he was permitted to conduct a pipe ceremony, it was open to him to argue that joining the protesters in the crosswalk was not 'calculated to lessen societal respect for the courts'
- [27] The Court of Appeal agreed and thus ordered a new trial.

Background

Agreed Statements of Fact

- [28] Many of the facts relied upon by the Crown were not disputed by Ms. Davidson. The Crown filed three sets of admissions of fact by Ms. Davidson, the first of these states, in part, that:
1. On May 18, 2021, Ms. Davidson was on a logging road [within the injunction zone].
 2. Ms. Davidson was standing next to a closed metal gate which spanned the entire roadway. She had a bicycle lock around her neck that was chained to the gate. She also had her arm chained inside one end of a pipe; another individual had his arm chained inside the other end of the pipe.
 3. Ms. Davidson was physically obstructing the logging road and preventing any vehicles from passing.
 4. An RCMP officer read Ms. Davidson a short script informing her of the existence of the Order Made After Application of the Honourable Mr. Justice Verhoeven of the British Columbia Supreme Court, dated April 1, 2021, a copy of which is attached to these Admissions of Fact (the "Injunction") [sic] The officer told Ms. Davidson that she was in breach of the Injunction. He said she would be given ten minutes to leave, handed her a paper copy of the Injunction, and departed the scene.

[29] The attachment referred to states:

INJUNCTION ARREST ANNOUNCEMENT CIVIL CONTEMPT OF COURT

Court File: S211602 Order in effect April 1, 2021

ATTEND SCENE:

I am RANK NAME UNIT

INITIATE PROCESS:

There is a civil injunction order in place issued by the Honourable Mr. Justice Verhoeven of the British Columbia Supreme Court. Be informed by you blockading this roadway and preventing Teal Cedar and their contractors from conducting their operations, you are in breach of that injunction order. I ask you step aside and remove the blockade or you will be arrested for Civil Contempt of Court. By not stepping aside I confirm you understand your jeopardy.

*while the injunction order announcement is being read ensure that those contemnors breaching the order are in a position to be arrested are served a copy of the full order.

*If contemnors step aside wait for arrest of those in contempt and follow SOP for TEZ enforcement.

ARREST CONTEMNORS

Arrest contemnors using Arrest and Legal Script.

PROCESS CONTEMNOR

Use Arrest Prisoner Process.

[30] The statement, in part, continues as follows:

5. The same RCMP officer returned over an hour later; Ms. Davidson was still chained to the gate and attached to the same individual through the pipe. The RCMP officer read the same short script a second time. He asked Ms. Davidson and the other individual if they were willing to leave. Both responded "no".
6. An RCMP team detached the bike lock from Ms. Davidson's neck and removed the pipe from her arm after severing the chain inside of it. Ms. Davidson was cooperative throughout this process.
7. Following her arrest, Ms. Davidson was transported to the Lake Cowichan RCMP detachment. After refusing to agree to the conditions of an undertaking, Ms. Davidson was transported to the Nanaimo RCMP detachment and held overnight in custody.

June 25, 2021 Arrest

11. The Facility [where the following events occurred] is not within the geographic area defined at paragraph 1(a) of the Injunction.
12. On June 25, 2021, Ms. Davidson was at the Facility. Ms. Davidson climbed on top of a grader which employees of North View had been planning to use in operations on behalf of Teal that day. By standing on the grader while singing and using a drum, Ms. Davidson prevented these employees from moving it. Other individuals had placed themselves on or in front of the grader. Behind the immobilized grader, a line of other vehicles waited, one of which was owned by the Teal contractor Trinity Trucking.

13. The only other route by which the trucks could have left the Facility - the Pacific Marine Driveway - was simultaneously blocked by other individuals.
15. An RCMP officer read to Ms. Davidson a standard short-form Injunction script. When asked if she would remove herself from the top of the grader, Ms. Davidson continued to sing and bang on the drum. Another officer arrested Ms. Davidson.
16. ERT officers and an employee or agent of Teal removed Ms. Davidson from the grader. Once removed, she was transported by RCMP to the Lake Cowichan RCMP detachment, where she was held overnight in custody.

[31] The Second Agreed Statement of Facts states, in part, that:

1. On May 19, 2021, Ms. Davidson was transported from the Nanaimo RCMP detachment to the Nanaimo Law Courts. Following a judicial interim release hearing, she was released on a release order Ms. Davidson heard and understood the release conditions at the judicial interim release hearing. This release order remained in effect until cancelled on November 29, 2021.
4. On December 13, 2021, Ms. Davidson applied in court to vary the release order of November 29, 2021. The release order of November 29, 2021 was varied. Ms. Davidson heard and understood the release conditions ...

[32] In the Second Agreed Statement of Facts, it is acknowledged that Ms. Davidson "heard and understood the release conditions" of the May 19, 2021, June 26, 2021, November 29, 2021, and December 13, 2021 release order described above.

[33] The Third Agreed Statement of facts states, in part, that:

1. On or about May or June 2021, Elke Luem, a clerk with the Community-Industry Response Group of the RCMP ("CIRG"), obtained a photograph of Angela Davidson from the "Fairy Creek Blockade" Facebook page, and subsequently cropped the photograph and included it in a photobook that the CIRG provided to RCMP members in the field (the "Photobook")
3. Lions Gate Risk Management Group Ltd. prepared a report dated July 8, 2021 on Angela Davidson and her association with the Fairy Creek blockade movement.
4. On August 10, 2021 Constable Greg Catwithen identified Angela Davidson using an arrest photograph provided by Sergeant McGee.
5. On December 2, 2021 the BC RCMP Communications Service stated in a media release that:

"Since enforcement began, the RCMP have arrested 1188 individuals; 110 of whom were previously arrested with a combined total of 261 times. Of the total arrested, 919 were for breaching the injunction (contempt of court), 222 were for obstruction, 22 were for mischief, 10 were for breaching their release conditions, 12 were for assaulting a police officer, 1 for counselling to resist arrest, 1 for causing a disturbance, and 1 Immigration Act."

Viva Voce Evidence

- [34] Ms. Davidson is a Kwakwaka'wakw (Da'naxda'xw) person and a member of the Da'naxda'xw First Nation. That first nation is an amalgamation of the Da'naxda'xw and Awaetlala tribes of Knight Inlet.
- [35] Hereditary Chief Ye-kue-kalas identified the southernmost end of territory occupied by Kwakwaka'wakw tribes as being that of K'omoks and the northernmost end being that of Gwa'Sala Naxdawa'kw.
- [36] Hereditary Chief Walas Namugwis gave northernmost and southernmost locations for the rough outer bounds of Kwakwaka'wakw territories.
- [37] Ms. Davidson's family has resided in and used the Knight Inlet area for an extensive period of time. In this area, they have engaged in cultural practices including potlatching and the processing and trade of t'lina (eulachon grease). Ms. Davidson lived for a number of years in the isolated community of Tzatsisnukomi (New Vancouver) on Harbledown Island near Knight Inlet, learning her peoples' traditional ways.
- [38] Kwakwaka'wakw persons are assigned different roles within their community at a young age. Ms. Davidson said that she was given the role of land guardian and was taught by the Elders the responsibilities of being such a guardian, and acted as a land guardian for a number of years prior to attending at the Injunction Area.
- [39] Ms. Davidson was taught by the Elders of that community, including her grandfather the Hereditary Chief William Glendale, that it was her sacred duty to protect the forests, animals that inhabited the forests, and waterways surrounding and inside Vancouver Island. She was taught how doing so would ensure the ongoing welfare of all of the animals, including humans of not only her nation but also that of her neighbours.
- [40] The thrust of the evidence of Ms. Davidson, Klasom Satlt'xw Losah (Ruby Rose Henry), Hereditary Chief Ye-kue-kalas (David Daniel Hanuse), Hereditary Chief Walas Namugwis (David Knox), and Dr. Isaiah Wilner was that the protection of cedar trees and waterways is an important component of the obligation of a land guardian. Providing these protections reflects the significance of these resources in the customs, traditions, and way of life of Kwakwaka'wakw persons.
- [41] Klasom Satlt'xw Losah, Hereditary Chief Walas Namugwis, Dr. Wilner, and Ms. Davidson gave evidence that cedar trees hold a great significance to the Kwakwaka'wakw peoples as well as the Nuu-chah-nulth (including Pacheedaht and Ditidaht) peoples and Coast Salish peoples. Cedar trees were described as "the most sacred of all trees", and have been "used for medicine and for protecting us".
- [42] Chief Ye-kue-kalas, Hereditary Chief Walas Namugwis, and Dr. Wilner all asserted that Kwakwaka'wakw peoples have a responsibility to respond when an Elder, Matriarch, or a Hereditary Chief request an action of them.

- [43] In his direct evidence, Hereditary Chief Ye-kue-kalas stated that "[o]bligations of the Kwakwaka'wakw are to stand together," as, pre-contact, "all the chiefs were responsible for looking after the forests, the ocean, the rivers, and to ensure that we leave enough for future generations". In response to a question as to the obligations outside of Kwakwaka'wakw territory, Hereditary Chief Ye-kue-kalas said that "[t]he obligations that people from the Kwakwaka'wakw, when they married out to different tribes, they were -- back in the day they had to give a dowry and a potlatch .". With respect to Ms. Davidson's obligations in the role of Gwa'ak'salis in respect of cedar forests in particular, Hereditary Chief Ye-kue-kalas gave evidence that, "[w]ell, all of us are responsible for Mother Earth. All of us have a role with looking after the territories traditionally and pre-contact and like I said they were raised to be that name and that dance".
- [44] Hereditary Chief Ye-kue-kalas' evidence about the organization of Indigenous collectives among the Kwakwaka'wakw was somewhat inconsistent. He described the Kwakwaka'wakw people as consisting of "15 tribes from K'omoks north as far as the Gwa'sala-Nakwada'xw and [that] other bands in between are considered the Kwakwaka'wakw", but he identified himself as being "from the Koskimo people that live in the Quatsino territory."
- [45] Hereditary Chief Ye-kue-kalas denied organizational or political distinctions between the 15 individual collectives, generally based on intermarriage, or political distinctions even between the Kwakwaka'wakw cultural grouping and the large neighbouring cultural groupings of the Coast Salish and the Nuu-chah-nulth. He conceded, however, that he did not live on those territories and was not part of their communities and that those territories' resources were not part of any Kwakwaka'wakw land and resources.
- [46] Hereditary Chief Walas Namugwis is a chief of the Kwakiutl, another Kwakwaka'wakw nation. He said that cedar trees are "so fundamental to us without them we can't be us [w]e have to stand out for the voice of Mother Nature. Without our old growth we are going to be gone". Hereditary Chief Ye-kue-kalas agreed that he would not attempt to direct the affairs of the Kwakiutl on their territory.
- [47] Hereditary Chief Walas Namugwis gave evidence about the centrality of red cedar to his culture and spoke about the extensive grease trails as well as barter and trade that he stated extended to "past California" and as far north as Alaska.
- [48] Like Hereditary Chief Ye-kue-kalas, Hereditary Chief Walas Namugwis discussed intermarriage as a foundation of multiple connections in the region, but conceded that other groups had the right to be stewards of their own lands. He stressed broad regional connections through intermarriage, but conceded that while he has relatives in various communities, his father and grandfather were also Kwakiutl and he "would never be a hereditary chief from somewhere else" as only "the eldest of the eldest or the eldest grandson can take the ranking".

[49] Moreover, Hereditary Chief Walas Namugwis confirmed that his own nation, the Kwakiutl, would not allow others to operate or make decisions over their land. He further acknowledged the Kwakiutl Douglas Treaty and Kwakiutl's determination over its own treaties, describing "18 tribes" among the Kwakwaka'wakw. In cross-examination he described variations among potlatching protocols as being due to distinct nations "within Kwakwaka'wakw":

So sometimes a potlatching protocol is different from Campbell River Wei Wai Kum to let's say 'Namgis in Alert Bay, there is a little bit of differences on -- on protocols of how we potlatch. So that's why -- that's why it's so complex, because every nation has their own story.

[50] Hereditary Chief Walas Namugwis also gave evidence of a tradition of "stewardship" or "being stewards" over the land. As he described, "[o]ur laws are by and binded by the old growth and ocean and -- and just to be stewards, and just to just to cherish and nurture Mother Nature, because Mother Nature is the one that provides for us". He testified that naming ceremonies at potlatch are significant because "we prize our youth so much, because they're the next ones up and coming we're only caretakers for the moment and we're guardians". He described Ms. Davidson's obligations as being those of a people "groomed to be land defenders," "to look after mother nature, to care and nurture and not be greedy," a "grooming" which he describes as belonging to "all First Nation people of the world".

[51] Dr. Wilner, is an historian of culture and ideas with Master of Arts, Master of Philosophy and PhD degrees from Yale University. He was qualified to give expert opinion regarding Kwakwaka'wakw customs and traditions, as well as the duties and roles related to Kwakwaka'wakw land and resources.

[52] Notwithstanding his assertion of compliance with the requirements of Rule 11-2(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 that "[i]n giving an opinion to the court, an expert appointed under this part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party", Dr. Wilner either misunderstood that obligation or was incapable of adhering to it.

[53] Despite several cautions during his evidence, Dr. Wilner used many opportunities to answer questions as a platform from which to expand his opinion or to argue with counsel, rather than responding to the questions he was asked. Dr. Wilner highlighted continuities among Kwakwaka'wakw collectives but downplayed distinctions between them culturally, politically, or with respect to resources. He painted a picture of generous access to t'linamaking sites at Dzawadi and shared resources among the Kwakwaka'wakw and other large groups such as the Nuuchaltnan and the Coast Salish. He painted this picture despite references in the sources he quoted that showed a very strict understanding of real property and resources, which were traditionally zealously guarded. The applicable sources included - inter alia - Franz Boas, *Ethnology of the Kwakiutl* in *Thirty-fifth annual report of the Bureau of American Ethnology, 1913-1914* (Washington: Government Printing Office, 1921)

and the resource maps in Franz Boas, *Geographical Names of the Kwakiutl Indians* (New York: AMS Press, 1969).

- [54] More broadly, when asked about the importance of the cedar trees, Ms. Davidson said "There is a crest on my button blanket the tree of life. It is the tree of life because we can build hats, blankets, mats, canoes. Big Houses are made out of it, tools, nets. Pretty much everything our people needed to survive pre-contact, thousands and thousands of years. [Our] connection to the ancestors is through the trees. They connect to us and they are sacred beings."

The Position of Ms. Davidson

- [55] Ms. Davidson suggested that her primary argument was narrow and specific to her mens rea on the dates of the allegations. Critical to these submissions, she argued, was her position as a land guardian, as recognized:

- (a) in accordance with Kwakwaka'wakw customs and traditions;
- (b) through her completion of Vancouver Island University's First Nations Stewardship Technicians Training Program; and,
- (c) through her employment with the Nanwakolas Council's Ha-ma-yas Stewardship Network Guardian Program.

- [56] Although her counsel advised counsel for the Crown by letter dated May 2, 2023 that Ms. Davidson no longer intended to "to rely on the content of Indigenous laws nor on s. 35 of the Constitution Act, 1982 in respect of her allegation of s. 15(1) Charter breaches", she nonetheless asserted that her obligations were transmitted to her by Elders, Matriarchs and Hereditary Leaders.

- [57] With respect to publicity, Ms. Davidson argued that the Crown failed to prove, beyond a reasonable doubt, that this element was present in respect of the offences alleged on June 23, August 10 and November 28, 2021 and January 15 and 28, 2022. She submitted that the evidence did not prove any breach of a court order that was sufficiently public so as to satisfy the test from *United Nurses for a criminal contempt*, for the following reasons:

- i) There had been no enforcement of the Injunction when she attached herself to the gate on the Hatton Main Line Forest Service Road (the "Hatton Main") on May 18, 2021;
- ii) She had no way of knowing at the time she attached herself to the gate whether her actions would be recorded and reported by members of the media;
- iii) Unlike the circumstances in *Poje v. Attorney General for British Columbia*, [1953] 1 S.C.R. 516, 1953 CanLII 34 (SCC), she was not assembled with a large group of people on the wharves at Nanaimo for the purpose of obstructing the loading of timber onto a ship, in full view of public onlookers;

- iv) The Crown's own evidence shows that she was located on a remote logging road in the interior of south-central Vancouver Island, an hour away from the nearest small town and paved road, with a handful of other individuals;
- v) The exclusion of members of the media from the Hatton Main by RCMP officers on May 18, 2021, which was described by Constable Grabb, prevented her alleged breach from being promoted in a sufficiently public manner to satisfy the United Nurses test for criminal contempt as she was aware of this exclusion of the public and media at the time she attached herself to the gate; and,
- vi) The timing of her arrest on May 18, 2021, as one of the very first extractions in connection with enforcement of the Injunction, was too early in time to constitute a breach of a sufficiently public nature so as to bring the administration of justice into disrepute.
- [58] Ms. Davidson argued that her conduct on the latter dates similarly lacked a public element, particularly on the bail breach allegation dates, January 15, 2022, and January 28, 2022, when she was assisting with the search for the missing Coast Salish person Kevin Bear Henry.
- [59] Moreover, Ms. Davidson denied that her conduct from May 2021 to January 2022 was calculated to bring either the Court, Verhoeven J., Davies J., or Thompson J. into disrepute or to lower their authority.
- [60] Ms. Davidson referred to the decision of Thompson J. in *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCSC 2045 at para. 23, where in acquitting another Fairy Creek accused person of criminal contempt of court, he stated:
- [23] The case at bar stands in marked contrast to these Clayoquot cases where protestors made deliberate decisions to continue defiant actions. I repeat what I said earlier in these reasons: Ms. Buttemer was entitled to be on the road, and entitled to continue her lawful protest on the road, up until a point when she ought to have understood that she was interfering with other traffic. Returning to some of the phrases in the Clayoquot cases that I have just referred to, Ms. Buttemer is not a person who 'clearly would not have given up the blockage of the roadway without arrest' or 'intended a continuing blockage of the roadway,' or that 'there was no doubt [she] knew [she was] breaching a court order' or was 'maintaining her defiance' or is a person who had made a 'deliberate decision.'
- [61] With respect to the June 23, 2021, August 10, 2021, November 28, 2021, January 15, 2022, and January 28, 2022 allegation dates, Ms. Davidson argued that her conduct lacked any quality of defiance that would support imposition of a criminal sanction.

- [62] In the alternative, Ms. Davidson submitted that, if the Crown has proven the elements of the offence beyond a reasonable doubt, she has met her burden of establishing, on a balance of probabilities, that what she terms as a "de minimis defence" applies for the charges arising from her activities on November 28, 2021, January 15, 2022, and January 28, 2022. She also argued that she acted as a matter of necessity in respect of the latter two allegation dates.
- [63] In the further alternative, Ms. Davidson submitted that if the Crown has proven the elements of the offence and she has not met her burden of establishing the de minimis defence, I should decline to enter convictions for criminal contempt on the allegations arising from her activities on June 23, 2021, August 10, 2021, November 28, 2022, January 15, 2022, and January 28, 2022, based on the principle that the power of superior courts to punish for contempt is "an enforcement power of last resort rather than first resort" that should be used "cautiously and with great restraint": Carey at para. 36.

Conflict of Legal Obligations

- [64] As Chief Justice McLachlin set out in *Mitchell v. M.N.R.*, 2001 SCC 33, aboriginal laws, customs, and traditions may form part of the common law:

10 Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them: see B. Slatery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada: see *Calder v. Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), [1973] S.C.R. 313, and *Mabo v. Queensland* (1992), 175 C.L.R. 1, at p. 57 (per Brennan J.), pp. 81-82 (per Deane and Gaudron JJ.), and pp. 182-83 (per Toohey J.).

- [65] Ms. Davidson properly noted that Indigenous laws may be admissible as fact evidence of the Indigenous legal perspective, and submitted that her Indigenous perspective as a Kwakwaka'wakw person is relevant as an interpretive aid to the Court in assessing her mental element on the allegation dates.
- [66] Ms. Davidson argued that she lives with the Indigenous perspective that she has an obligation for stewardship of Aweenak'ola, meaning "the lands we are on". She argued that, given her perspective as a Kwakwaka'wakw person, she reasonably believed she was bound by obligations under Kwakwaka'wakw laws, customs, and traditions with respect to stewardship of land and resources.

- [67] Ms. Davidson contended that her perspective, while mistaken, perhaps, through the lens of the colonial law, was reasonable from the standpoint of assessing her mens rea in light of the fact that she is a Kwakwaka'wakw person who was raised in accordance with Kwakwaka'wakw laws, customs, and traditions. To this extent, she has trained and worked as a First Nations Land Guardian, acquiring specialized knowledge and expertise through her education at Vancouver Island University and her employment with the Nanwakolas Council.
- [68] Ms. Davidson submitted that I should find that there is a reasonable doubt as to whether she intended, knew, or was reckless as to whether her conduct would tend to depreciate the authority of the Court. She contested that any inferences with respect to recklessness must consider the conflict of laws and contradictory obligations that she contended were operative on her on the allegation dates, pursuant to the Kwakwaka'wakw legal order and the common law in British Columbia.

Land Guardian

- [69] Ms. Davidson gave evidence that she believed that her responsibility as a land guardian followed her throughout Vancouver Island and beyond. This belief has been strengthened by her interactions with Indigenous peoples from various territories during her studies with Vancouver Island University's First Nations Stewardship Technicians Training Program and through her employment with the Nanwakolas Council's Ha-ma-yas Stewardship Network Guardian Program.
- [70] Ms. Davidson argued that she was invited to assist with the protection of old-growth rainforests in Nuu-chah-nulth territory on southern Vancouver Island by Pacheedaht Elder Bill Jones and Ditidaht Elder Vera Edgar in May 2021.
- [71] Ms. Davidson led evidence that she had been requested by Elder Bill Jones to protect cedar trees, entities which served as a "connection to her ancestors" and which were in essence "sacred beings" in and of themselves. In light of this obligation, she believed that under Kwakwaka'wakw law, customs, and traditions, her protective actions were required.
- [72] More specifically, Ms. Davidson contested that she was acting in accordance with her obligations as a Kwakwaka'wakw person and land guardian - at the behest of Elder Bill Jones and her Auntie Vera Edgar - when she attended at the Hatton Main Line on May 18, 2021.
- [73] Ms. Davidson resisted recognizing that the role of land guardian is largely observational. Instead she described the role as "a deep traditional role" which is "different for each nation" and moreover that "it's different for each individual to take on the role as a guardian".

- [74] The Crown argued that the expansion of Ms. Davidson's collective from the Danaxda'xw nation to the Kwakwaka'wakw, and further from the Kwakwaka'wakw to an ever-larger group based on intermarriage and language similarities - which even absorbs the Nuu-chah-nulth and the Coast Salish - leaves Ms. Davidson with a pan-Indigenous culture but without a rights-holding collective. This aligns with the evidence of Mr. Knox, who described Ms. Davidson's position as in common with "all First Nation people of the world."
- [75] Dr. Wilner relied on various interviewees for his description of land guardians, none of whom gave any information regarding their stewardship of the land extending beyond the bounds of their own respective nation's territory.
- [76] The Crown argued that at most, the evidence adduced by Ms. Davidson suggests, but does not prove, a sporadic practice or custom according to which an individual is tasked by an authority in some communities with the role of watching the land and natural resources within that community's territory. This may include documenting and reporting changes within the territory to leadership, or, if need be, telling others that their actions in relation to the land or waters are forbidden. Where resolution is not reached through discussion, a land guardian may possibly engage help from the police.
- [77] The Crown argued that Ms. Davidson's counsel blurred the matter of first nation boundaries, leaving an indeterminate image of the collective to which her asserted custom would be tied. If the asserted collective from which Ms. Davidson's draws this custom is the cultural grouping of the Kwakwaka'wakw, then this might be comprised of 15 or 18 individual collectives.
- [78] While the evidence demonstrates that Ms. Davidson was invited onto the territory of the Pacheedaht First Nation, nothing before me demonstrates that this invitation gave her some sort of licence to pursue the interests she had as a land guardian in her own First Nation. Moreover, I find that Ms. Davidson's role as a Land Guardian did not entitle her, let alone require her to enter the territory of another First Nation to impose her priorities in such territories.

The Position of the Crown

- [79] It was the Crown's position that all of the essential elements of the charges of criminal contempt of court for each of the seven counts against Ms. Davidson were made out.
- [80] The Crown argued that Ms. Davidson's defences constituted a collateral attack on the orders of Verhoeven and Thompson JJ. They further argued that the defence of necessity is integrally connected to the concept of moral involuntariness. They suggested that Ms. Davidson had alternative means of responding to the concerns that she said justified her actions.

- [81] Moreover, the Crown disputed that Ms. Davidson's status as a "land guardian" - or her adherence to requests for help by Indigenous elders - endowed her with any right or duty to breach the Injunction or the various release orders prohibiting her from going within the Injunction Area.

Collateral Attack

- [82] Our society works and functions on the basis of the rule of law, which requires that legal processes be followed and not inappropriately circumvented: *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355 at para. 77.
- [83] The Crown suggested that Ms. Davidson is engaged in collateral attacks on treaty making and forestry consultation processes with the Dididaht and Pacheedaht, as well as on the issuance of forestry authorization and the Injunction.
- [84] The rule barring collateral attacks on court orders is fundamental to preserving the rule of law and maintaining the authority of the court: *Hayes Forest Services Limited v. Krawczyk*, 2006 BCCA 156 at para. 69, leave to appeal to SCC refused, 2006 CanLII 39431.
- [85] Underlying the collateral attack doctrine is the principle that an order of a court of general jurisdiction is valid, binding, and must be obeyed until set aside or varied by the court itself (in those limited circumstances in which that course is open) or reversed on appeal. That principle is fundamental to the maintenance of the courts' authority. One of the essential inherent powers of a superior court is the power to maintain its own authority: *B.C. (Attorney General) v. Mount Currie Indian Band*, 1991 CanLII 892 (BC SC) at 11, 54 B.C.L.R. (2d) 129.
- [86] In *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCSC 2304 at paras. 5, 7 and 10, Justice Fitzpatrick discussed the principles relating to collateral attacks in the context of alleged contempt of court proceedings:

5 During the Crown's submissions, Mr. Ruttan referred me to *R. v. Bird*, 2019 SCC 7 as follows:

A. General Principles Regarding Collateral Attacks

- [21] A collateral attack is an attack on an order "made in proceedings other than those whose specific object is the reversal, variation or nullification of the order" (*Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at para. 60). This Court has recognized a general rule against collateral attacks on court orders: with limited exceptions, an order issued by a court must be obeyed unless it is set aside in a proceeding taken for that purpose (*Maybrun*, at paras. 2-3; *R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 71). In *Maybrun*, the Court held that a different analysis was warranted for collateral attacks on administrative orders. As I will explain, however, similar principles underlie both approaches.

1. Collateral Attacks on Court Orders

[22] There is a powerful rationale for the general rule precluding collateral attacks on court orders:

... the rule seeks to maintain the rule of law and to preserve the reputé of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal

(Maybrun, at para. 2, quoting Litchfield, at p. 349)

As this Court noted in Maybrun, the rule against collateral attacks on court orders has been consistently applied in criminal proceedings where the charge involves an alleged breach of a court order (Maybrun, at para. 3, citing *R. v. Domm* (1996), 31 O.R. (3d) 540 (C.A.), at p. 547, leave to appeal refused, [1997] 2 S.C.R. viii). The rule has also been applied where the accused alleges that the court order is unconstitutional. In *Domm*, Doherty J.A., writing for the Ontario Court of Appeal, held that "[e]ven orders that are constitutionally unsound must be complied with unless set aside in a proceeding taken for that purpose" (p. 549). As this Court explained in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, "[i]f people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them" (para. 51, citing McLachlin J. (as she then was), in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at p. 974).

[23] The doctrine of collateral attack, however, recognizes that people must have an effective means to challenge court orders, particularly when those orders are alleged to violate constitutional rights. In *Domm*, Doherty J.A. clarified that "where constitutional rights are implicated, the court must be particularly concerned about the availability of an effective remedy apart from collateral attack when considering whether" to allow a collateral attack (p. 552). Where a collateral attack is the only way to effectively challenge a court order, a collateral attack will be permitted (see *Domm*, at pp. 553-54).

7 The comments in [*R. v. Bird*, 2019 SCC 7] at para. 23 confirm that collateral attack may be permitted if there is no other way to challenge the order. However, as noted by the Crown, para. 17 of the Injunction clearly provides any person affected by the Injunction a path by which they may seek to set aside the order. No such application has been brought.

10 In Justice Macdonald's decision in *B.C.(A.G.) v. Mount Currie Indian Band*, [1991] B.C.J. 616 (S.C.), the Court stated, on a preliminary basis, that defiance of a court order, whether or not the underlying issue is Indian sovereignty, cannot be countenanced. In *Fletcher Challenge Canada Ltd. v. Miller*, [1991] B.C.J. No. 2822, Justice Owen-Flood followed *Mount Currie Indian Band*. The third case is *MacMillan Bloedel Ltd. v. Simpson*, [1994] B.C.J. No. 1250, which dealt with the Clayoquot Sound protests.

- [87] Where a party believes it has standing, that party should raise that at the appropriate time by properly challenging an unwelcome outcome through direct and allowable methods. The Crown argued that the proper step for those who oppose the issuance of authorizations is to challenge them by legal means.
- [88] In *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, the Behn family blockaded a forestry company's access to a logging site. In the Behns' defence, they pleaded that the forestry authorizations were invalid due to a breach of the duty to consult and a breach of treaty rights. The court of first instance found that the Behns did not have standing on the consultation - which is a right of the collective, not of individuals - and struck the Behns' defences as a collateral attack.
- [89] The Supreme Court of Canada pointed to several aspects of the Behns' behaviour as abuse of process. They did not raise their concerns with the contractor and set up camp to blockade access. The Behns objected to the applicable authorizations but did not seek to resolve their standing or contest the validity of the authorizations. Then, on appeal, they nonetheless claimed to have standing to raise the issues.

[90] At para. 42 the Court stated:

To allow the Behns to raise their defence based on treaty rights and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations. The doctrine of abuse of process applies, and the appellants cannot raise a breach of their treaty rights and of the duty to consult as a defence.

- [91] In this case, the Crown argued that Ms. Davidson has much in common with the Behns: she did not have standing, or perhaps did not wish to risk a poor outcome by direct approach, choosing instead to rely on self-help remedies or indirect legal challenges.
- [92] Despite these contentions, I conclude that Ms. Davidson is entitled to raise reasonable defences to the charges of criminal contempt of court. She should not be foreclosed from so doing because she did not previously challenge the orders that she is alleged to have breached.

The Charges against Ms. Davidson

- [93] The Crown acknowledged its burden to prove beyond a reasonable doubt all five essential elements of the offence, including:
- i) Identification: Has the Crown proven that Ms. Davidson is the person whose conduct allegedly breached these orders?
 - ii) Knowledge: Has the Crown proven that Ms. Davidson had actual knowledge of each court order she is alleged to have breached, at the time she is alleged to have breached it?

- iii) Act of contempt: Has the Crown proven, with respect to each alleged act of contempt, that Ms. Davidson breached the order in question on the date alleged?
- iv) Public element: Has the Crown proven, for the purpose of criminal as opposed to civil contempt, that each of Ms. Davidson's respective acts of contempt was committed publicly?
- v) Mens rea: Has the Crown proven that Ms. Davidson acted, in the case of each alleged breach, with intent, knowledge or recklessness as to the fact that public disobedience would tend to depreciate the authority of the court?

[94] I will discuss these elements with respect to each of the seven counts facing Ms. Davidson.

May 18, 2021

- [95] The evidence established that Ms. Davidson was given a paper copy of the Injunction as she stood by the gate on May 18, 2021, which she had approximately 13 minutes to read it before her arrest that day.
- [96] Ms. Davidson's identification for this date was admitted by her, as was her knowledge of the Injunction. When asked "[y]ou were aware, of course, that blocking this road [the Hatton Main Line] by chaining yourself or locking yourself to the gate was breaching the injunction of Justice Verhoeven", Ms. Davidson responded, "I was aware".
- [97] By her own admission, Ms. Davidson was "physically obstructing the logging road and preventing any vehicles from passing". In cross-examination Ms. Davidson admitted, when asked "when you were chained to the gate, you were doing it to protect the trees because you hoped to stop vehicles that would be involved in harvesting trees from going through the gate", Ms. Davidson responded "[g]uess, yes, that was - that was the goal".
- [98] I find that Ms. Davidson's breach of the Injunction of May 18, 2021 was continuous and flagrant. She remained chained to the gate after a uniformed police officer informed her that she was in breach of the Injunction and gave her the opportunity to depart. The time she spent blocking the road ended only due to her arrest, and she testified that but for her removal by police, she would have remained longer: "as long as necessary . [p]otentially all night, all day". Ms. Davidson's decision to chain herself to the gate and to another protester demonstrates advanced planning, as opposed to any transient or casual breach.
- [99] Ms. Davidson's actions on May 18, 2021 were committed openly, within view of other people. Videos in evidence before me show multiple people within view of Ms. Davidson, some of whom appeared to be filming the unfolding scene. Ms. Davidson testified in cross-examination that she was aware of these people, aware that they could see what she was doing, and aware that she was being photographed. When asked about the purpose of her actions on that day, Ms. Davidson testified that "[w]e did it to make a stand and we did it to display our stand, to show what we stood for" and agreed "that [she] was looking to draw public attention to this issue".

[100] Unlike the alleged contemnor in Trans Mountain 299, James Leyden, who believed that he had permission to stand in the road when he did, and that he therefore did not believe that he was in fact breaching the Injunction, Ms. Davidson admitted that the Injunction did not carve out an exception for her and that she knew she was going to be arrested.

[101] As Ms. Davidson obstructed a public road in the view of members of the public, I find that she was more than reckless as to whether the authority of the court would be brought into contempt, and indeed acted with the intention of defying the Injunction, thus bringing the authority of the Court into contempt on May 18, 2021.

June 23, 2021

[102] Justice Davies' release order of May 19, 2021 prohibited Ms. Davidson from entering the Injunction Area.

[103] Cst. Devon Baxter testified that the person that she and others identified as Ms. Davidson was within the geographic boundaries of the order of Davies J. dated May 19, 2021 on June 23, 2021, and Ms. Davidson herself also admitted on cross-examination that she was inside the Injunction Area.

[104] The video recording from June 23, 2021 in evidence before me clearly shows Ms. Davidson, within those geographic boundaries, and she admitted that it was her in the video.

[105] Ms. Davidson "heard and understood the release conditions at the judicial interim release hearing" and admitted on cross-examination that she was "aware that [she was] prohibited by the court from going into that area".

[106] Ms. Davidson was inside the Injunction Area for an extended period of time, ended only by her arrest. She testified that but for her arrest, she would have continued her walk and remained longer in the prohibited area. I find that this was not merely a token or technical breach, as it was Ms. Davidson's evidence that she spent roughly 80 days within the Injunction Area between May 19 and August 10, 2021, while subject to first one and later two court orders prohibiting her from being there. I find that her breach of the order was continuous and flagrant.

[107] I also find that Ms. Davidson acted openly, within view of other people. The video recorded by Cst. McIlveen and introduced in evidence before me shows Ms. Davidson in the middle of a group of people as multiple police officers approached. In the video, one police officer explained to the group that police had confirmed there was a person present who was in breach of conditions prohibiting her from being in the area. Ms. Davidson made no effort to hide the fact of her breach from others, and played a drum during her arrest. She called and gestured to other members of her group as she was led away by police. She admitted that she made no effort to conceal the fact that she was in the Injunction Area or to hide herself, and that she "didn't mind" if people saw her breaching her order not to go there.

[108] Given that Ms. Davidson went into the prohibited area in the company of a group of people, I am satisfied that she knew that her act would be public. She was more than reckless as to whether the authority of the court would be brought into contempt, and indeed acted with the intention of defying the conditions of her release, thus bringing the administration of justice into disrepute on June 23, 2021. She knew she was breaching her release order, and that she might be arrested, and that there was a risk that the people around her would see her be arrested.

June 25, 2021

[109] As with the May 18 and June 23, 2021 allegations, Ms. Davidson gave evidence that she believed that she was acting in accordance with her obligations as a Kwakwaka'wakw person and land guardian and at the behest of Elder Bill Jones and her Auntie Vera Edgar when she attended at the Teal Cedar yard in Mesachie Lake on June 25, 2021.

[110] Ms. Davidson admitted that on June 25, 2021 she was in the Injunction Area, and that several photographs taken that day depict her standing on top of a grader in that area.

[111] When asked in cross-examination whether she knew she was breaching the Injunction on June 25, 2021 Ms. Davidson responded "[y]eah, I knew it".

[112] Ms. Davidson had previously been given a paper copy of the Injunction as she stood by a gate in the Injunction Area on May 18, 2021. The Injunction prohibited "obstructing, impeding, or otherwise interfering with the safe passage of motor vehicles, equipment or machinery belonging to the Plaintiff, its employees, agents, contractors or suppliers (the "Motor Vehicles")...".

[113] In cross-examination, Ms. Davidson agreed with the proposition that the grader could not be safely driven as a result of her standing on it, and admitted that she understood that on June 25, 2021.

[114] I find that, as she admitted, Ms. Davidson was interfering with machinery that belonged to one of Teal Cedar's contractors.

[115] Sgt. Arbulich gave evidence that he observed Ms. Davidson standing on top of the grader for approximately 45 minutes, and Ms. Davidson testified that it was "at least" that long, and that it "felt like a long time". The time she spent blocking the road was only ended by her arrest, and she agreed that but for her removal by police, she would have remained longer, adding "as long as they were there we would stay there, yeah". I find that Ms. Davidson's breach of the Injunction was continuous and flagrant.

[116] Ms. Davidson's actions on this day were committed within view of other people. Sgt. Arbulic testified that there was upwards of 25 police officers, up to a dozen industry employees, and approximately a dozen protestors within view of Ms. Davidson on the grader. In cross-examination, Ms. Davidson agreed that there was no one higher up than she was, and that it was "fair to call her the most visible person at the [Teal Cedar] facility" while she was standing on the grader.

[117] From her own testimony, it is clear that Ms. Davidson's actions on June 25, 2021 were motivated at least in part by the desire to make a statement and to send a message. On cross-examination, she testified as follows:

Q: And - and you wanted people to see and hear you while you were up there.

A: Our main reason for doing this, and my main reason for getting on top of here, was to show that this needed to stop, that the cutting of the old growth trees had to stop, and we did everything that we could to -- to show it

[118] I find that the manner and duration of Ms. Davidson's open defiance of the Injunction on that day was deliberate. She admitted to being motivated by the desire to send a message.

[119] Given that Ms. Davidson interfered with machinery belonging to one of Teal Cedar's contractors at the Mesachie Lake facility, in a highly visible way, and in the presence of numerous police officers, protestors, and industry employees, I am satisfied, beyond any reasonable doubt that she must have known that her act would be public.

[120] I find that Ms. Davidson was more than reckless as to whether the authority of the Court would be brought into contempt by her conduct that day, especially in light of her open acknowledgment as having breached the Injunction.

August 10, 2021

[121] Ms. Davidson and Glenn Reid ("Mr. Reid") both testified that Ms. Davidson did not engage in any obstructive conduct or conduct contrary to any of the terms of the Injunction when Ms. Davidson attended at the Granite Main Line on August 10, 2021.

[122] On August 10, 2021, Ms. Davidson asserts that she attended at the Granite Marine Forest Service Road to bring food the Elders and others she described as protecting old-growth cedar trees. In doing so, she believed that she was acting in accordance with her obligations as a Kwakwaka'wakw person and in a manner consistent with the request for help from Elder Bill Jones and her Auntie Vera Edgar.

[123] Cpl. Martin gave evidence that she participated in the arrest of Ms. Davidson on August 10, 2021, and identified her in court. Ms. Davidson confirmed in her own testimony that she was arrested by Cpl. Martin (and other officers) on that day.

[124] Ms. Davidson "heard and understood the release conditions" at her judicial interim release hearings on both May 19 and June 26, 2021. In cross-examination, she testified as follows:

Q: So by August 10th, 2021, you'd already been arrested three times for your activities within the injunction zone and -- area and outside it.

A: Yes.

Q: You were subject to two different Supreme Court release orders.

A: Yes.

Q: You knew how these orders worked by this point.

A: Yes.

Q: You understood the conditions on them.

A: Yes.

[125] Both Davies J.'s release order of May 19, 2021 and Thompson J.'s release order of June 26, 2021 prohibited Ms. Davidson from entering the Injunction Area. Cpl. Martin testified that Ms. Davidson was within this area when she was arrested and Ms. Davidson admitted in cross-examination that she was inside the Injunction Area that day.

[126] Moreover, Ms. Davidson was inside the Injunction Area for an extended period of time. Cpl. Martin estimated that she saw Ms. Davidson over the course of about four hours, while Ms. Davidson herself testified that she was at the Granite Main Line location starting in the morning and into the afternoon, and that she was within view of the police for "hours". She had also been living in the Injunction Area, while subject to court orders forbidding her from being there, for approximately the previous 80 days. Her presence within the Injunction Area on August 10, 2021 was only ended by her arrest, and she testified that, but for her arrest, she would have continued her walk and remained longer in the prohibited area. This was not merely a token or technical breach, and I find that her breach of the order was continuous and flagrant.

[127] Ms. Davidson's actions on August 10, 2021 were committed openly, within view of other people. She admitted she was "part of a large group" for much of that day and that she made no effort to hide or conceal the fact that she was in the Injunction Area. In addition to the people in her group, she was also observed by multiple police officers. Ms. Davidson testified that she "knew there would be witnesses for [her] arrest".

[128] Given that Ms. Davidson went into the prohibited area in the company of a group of people, she had to have known that her act would be public. I find that she was more than reckless as to whether the authority of the Court would be brought into contempt.

November 28, 2021

- [129] On November 28, 2021, Ms. Davidson went to the "Roadside Camp" on the shoulder of Pacific Marine Road, stopped on the side of Pacific Marine Road where one Barbara Precious was cooking, and dropped off some food.
- [130] Mr. Reid testified that he and Ms. Davidson dropped off a small amount of food at a roadside tent. Ms. Davidson helped unload the food and she also had a "bathroom break". Likewise, Ms. Davidson asserted that, on November 28, 2021, she attended at the Granite Marine Forest Service Road to bring food the Elders and others she considered to be protecting old-growth cedar trees.
- [131] Cst. Cutler testified that he arrested Ms. Davidson on November 28, 2021, near the southern boundary of the Injunction Area. Ms. Davidson confirmed that police arrested her at the "Roadside Camp", which is where Granite Main Line intersects Pacific Marine Drive.
- [132] Ms. Davidson had "heard and understood the release conditions" at her judicial interim release hearings on both May 19 and June 26, 2021 and she agreed that, on November 28, 2021, she was aware that she was on court-ordered conditions not to be within the Injunction Area. Moreover, she acknowledged that she knew she could be arrested for doing so.
- [133] In light of my discussion above, I reject as untrue Ms. Davidson's evidence that she believed she was acting in accordance with her obligations as a Kwakwaka'wakw person and in a manner consistent with the request for help from Elder Bill Jones and her Auntie Vera Edgar when she attended at Ms. Precious' Pacific Marine Road to drop off food on November 28, 2021.
- [134] Both Davies J.'s release order of May 19, 2021 and Thompson J.'s release order of June 26, 2021 prohibited Ms. Davidson from entering Injunction Area. Cst. Cutler testified that the location where he arrested Ms. Davidson was inside the Injunction Area. Ms. Davidson admitted in cross-examination that Roadside Camp, where she and Mr. Reid drove that day, was inside the Injunction Area.
- [135] I find that Ms. Davidson's breach of her two release orders was "something more than a momentary or trivial act of disobedience", and amounted to inflammatory behaviour designed to lessen the public's respect for the court: MacMillan CA at para. 31.
- [136] Ms. Davidson conceded, through her counsel, that looking back on August 10, 2021 or November 28, 2021, she should not have attended to distribute food, but asserts that it is hard to envision how this action should occasion the sanction of criminal misconduct, when she was not committing any breach of the Injunction or breaching the peace in any way.

- [137] Ms. Davidson further asserted that it cannot be said that there was much, if any publicity attached to these incidents, in as much as Ms. Davidson was not involved in a protest of any kind nor was there any press involved, and she was simply delivering food.
- [138] This was Ms. Davidson's third alleged breach of the same release conditions, however, and I have no doubt that, by this time, she was aware of the importance of following court orders in general and the prohibited area condition in particular. Notwithstanding her awareness, she chose to travel into the Injunction Area in a vehicle to the Roadside Camp, get out of the car, unload food, and interact with at least some of the 20 people present at the camp. She admitted that she could have remained in the vehicle while Mr. Reid or others unloaded the food, or she could have stayed away entirely in accordance with her release orders.
- [139] Mr. Reid testified that he and Ms. Davidson were at the Roadside Camp for ten to 15 minutes or half an hour before Ms. Davidson was arrested on November 28, 2021. Ms. Davidson admitted that if police had not arrested her when they did, she would have remained within the Injunction Area "somewhat longer".
- [140] Ms. Davidson's conduct on November 28, 2021 was committed openly, within view of Mr. Reid, the roughly 20 people already at the camp, and the police who attended. When it was put to her on cross-examination that "[t]here was a chance people would see you arrested for breaching the release order on November 28th", Ms. Davidson replied "[p]eople would see me, yes".
- [141] I find that Ms. Davidson knew that her actions that day at the Roadside Camp would be public, and she conceded that "people would see [her]". I also find that she was more than reckless as to whether the authority of the Court would be brought into contempt. I reject the assertion of Ms. Davidson and Mr. Reid that Ms. Davidson was not involved in any protests on November 28, 2021, nor engaged in any activity that was prohibited under the Injunction.
- [142] Ms. Davidson stated in her evidence that "we had gotten the release order changed with Justice Thompson, so I could drive through to get to Elder Bill's house", where she and Mr. Reid had been invited to reside for the winter months. I find, however, that while the process was underway on the November 28, 2021 allegation date, this amendment to Ms. Davidson's release order was not completed until December 13, 2021. I do not believe Ms. Davidson's evidence that she was under the belief - which she concedes appears to have been mistaken - that she was authorized to travel through the Injunction Area to Bill Jones' home, a few kilometres away from the Roadside Camp, where she was staying.

January 15, 2022

- [143] Justice Thompson's release order of December 13, 2021 prohibited Ms. Davidson from entering the Injunction Area except when in a moving vehicle on her way to a place outside of its bounds. The release order also required Ms. Davidson to remain inside her residence 24 hours a day, subject to a list of six exceptions. Ms. Davidson admitted in cross-examination that none of these exceptions applied to her actions on January 15, 2022.
- [144] On January 15, 2022, Ms. Davidson rode in a vehicle with Mr. Reid to Granite Gate, which she admitted was within the Injunction Area. There, she exited the vehicle. She testified that she remained at the gate in a group of approximately ten people for "about an hour". Ms. Davidson acknowledged that if her group had been able to pass through the gate, she would have continued deeper into the Injunction Area via the Granite Main Line. Because the group was denied access, however, they drove to a different entrance point and proceeded into the Injunction Area from there. She agreed that she was inside the Injunction Area "for many hours that day".
- [145] Ms. Davidson and Elder Rose Henry arrived at Pacific Marine Road and Granite Main. They assert that they had received permission from Teal Cedar to take their vehicle up the road to search for Kevin Bear Henry. On that date, there was no logging at that location and Teal Cedar had no equipment or personnel on site, except for security, so the situation was not a public one, nor was it made known to the public. To this extent, Ms. Davidson argues that she was not violating any applicable conditions.
- [146] Ms. Davidson contends that, having been told by Teal Cedar and the police that the group was allowed past the gate, together with her sacred responsibility as a Kwakwaka'wakw person to respond when requested by an Elder to assist in the search for a relative, the Crown has not proven beyond a reasonable doubt that Ms. Davidson had the mens rea needed to convict on this allegation date.
- [147] With respect to her activities on both January 15 and 28, 2022, Ms. Davidson gave evidence that she was responding to the requests of Elder Klasom Satlt'xw Losah to assist with the search for her missing nephew Kevin Bear Henry on southern Vancouver Island within the Injunction Area. Ms. Davidson expressly admitted her presence in the Injunction Area.
- [148] When asked why at the time she assisted Elder Klasom Satlt'xw Losah in January 2022, she did not apply to change her bail conditions, Ms. Davidson initially had no response. Later in the trial, however, she replied that she did not believe she had time to enter into the court process again because the winter conditions were very harsh, Kevin Bear Henry had been missing for a long time, and although she sincerely believed that he was still alive, she was also concerned that Kevin Bear Henry was in grave danger. Finally, she believed that she was unable to turn down a reasonable request from her Elders.

- [149] I find that, as she admitted, Ms. Davidson "heard and understood the release conditions" at her judicial interim release hearing on November 29, 2021. At that hearing, Ms. Davidson made a personal promise to Thompson J. that she would abide by the conditions. She acknowledged in cross-examination that she "realized then that it was very important to follow precisely what these conditions were saying".
- [150] Ms. Davidson later applied to vary the release order. As a result, on December 13, 2021, Thompson J. issued a new release order which added two new exceptions to two of the release conditions, without other changes. Ms. Davidson admitted that she "heard and understood the release conditions" at the December 13, 2021 appearance, and she agreed that she "paid attention to the precise boundaries of what the court allowed [her] to do and not do". She further admitted that as of January 2022, she "had a strong understanding of how the whole release system worked" and testified that "I understood I was disobeying the release orders" on January 15 and 28, 2022.
- [151] During all of the time Ms. Davidson was at the Granite Gate on January 15, 2022, she was breaching both her area restriction condition and her 24-hour curfew condition. Her conduct that day was continuous and flagrant. She was inside the Injunction Area (and outside her residence) for many hours. This was Ms. Davidson's fourth alleged breach of the Injunction Area condition, and it was accompanied by a breach of a second condition. Such a violation of the release order cannot be characterized as trivial, or as the product of a momentary lapse of judgment; rather, Ms. Davidson admitted that she was aware that it was very important to follow precisely what these conditions required, and she had made a personal promise to Thompson J. that she would do so.
- [152] Ms. Davidson argued that Teal Cedar's private security guards following her in their truck does not come close to satisfying the requirements for a public contempt worthy of the exercise of the rare contempt power, and that the presence of one or two witnesses to a technical breach does not fulfill the public element needed for a conviction for criminal contempt.
- [153] In her arguments on publicity, Ms. Davidson referred to examples from family law matters where one or more individuals are frequently witnesses to breaches of court orders governing financial payments or parenting arrangements. She argued that the degree of publicity in these cases does not displace courts from treating such breaches as civil (rather than criminal) contempts. Ms. Davidson stated that the same principle applies with respect to the bail breach allegations against her, in which her impugned conduct is sharply distinguished from the category of harm the Court sought to prevent in *Poje, B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, 1988 CanLII 3 (SCC) [BCGEU] and *United Nurses*.

[154] Ms. Davidson admitted on cross-examination, however, that, in her conduct, she made no effort to hide herself. She stood in the Injunction Area outside a moving vehicle, within the view of Mr. Reid, and the roughly ten people assembled at the gate, in addition to the two security guards.

[155] Given that Ms. Davidson left her residence and entered the Injunction Area together with Mr. Reid, where they joined a larger group, she had to have known that her act would be public. I find that she was more than reckless in respect of the allegation against her. Ms. Davidson testified that she "understood [she] was disobeying the release orders" on January 15 and 28, 2022, and that there was a chance that people outside her group would see her doing the same.

January 28, 2022

[156] Prior to January 28, 2022, Ms. Davidson had been involved putting up flyers and coordinating with other searchers for Kevin Bear Henry outside of the Injunction Area. Elder Rose Henry had advised Ms. Davidson that Kevin Bear Henry had last been seen around the Mesachie Lake, Nitinat Lake, and Carmanah-Walbran areas. Portions of these areas were within the Injunction Area.

[157] As on January 15, 2022 incident, there was no logging occurring on January 28, 2022. Teal Cedar had no personnel in the woods that day. The only representatives of Teal Cedar were in a vehicle following Ms. Davidson and Mr. Reid and they were not engaging in logging activity. Ms. Davidson argued that - in the absence of logging activities - she was not violating any conditions of the Injunction, and that there was no evidence that the incident was ever made public.

[158] On January 28, 2022, Ms. Davidson gave evidence that the roads that she and Mr. Reid were travelling on were deserted except for one vehicle that they recognized as Teal Cedar security. At one point, Mr. Reid and Ms. Davidson determined that they would turn back in light of dangerously snowy conditions. Mr. Reid exited the vehicle to inform the Teal Cedar security guards that the road was not passable. Thereafter, the security guards continued to follow Ms. Davidson and Mr. Reid until they were on the Island Highway north of Duncan, several dozen kilometres outside the Injunction Area.

[159] Brad Jones, one of the security individuals, testified that he recognized Ms. Davidson, together with Mr. Reid, in the Nissan Xterra driven by Mr. Reid on January 28, 2022, and that he took a photograph of them while their vehicle was stopped. Moreover, he testified that Ms. Davidson exited the vehicle twice in the Injunction Area.

- [160] It is clear that Ms. Davidson knew of the release order, understood its conditions, and was aware that her actions of January 28 contravened it. With respect to this offence date, there is the additional evidence that she admitted to telling a journalist, Katharine Lake Berz, that "she had a calling to find [Bear] Henry that was more important than her house-arrest rules", and that this statement "accurately characterizes [her] thinking at the time".
- [161] The particular conditions that Ms. Davidson breached are described at paras. 3-9 of these reasons. With respect to the 24-hour curfew condition, Ms. Davidson admitted in cross-examination that none of the allowable exceptions applied to her actions on January 28, 2022. She was breaching this condition for the entire time she was outside her residence that day.
- [162] Ms. Davidson admitted that on January 28, 2022, she spent "hours" in the Injunction Area, driving across a large part of the prohibited zone.
- [163] Although she spent most of that time in a moving car, she does not fall within the allowable exception for vehicle travel set out at para. 3 of the December 13, 2021 release order, which only applied to travel through the Injunction Area to a place outside the Injunction Area. Both Mr. Reid and Ms. Davidson testified that they were searching for Kevin Bear Henry within the Injunction Area, rather than passing through to search somewhere outside of it.
- [164] I find that Ms. Davidson's breach of her release order was continuous and flagrant. She was inside the Injunction Area for hours. Although she may have only been briefly outside the vehicle, she was nonetheless in breach of both conditions 3 and 4 of the order for an unbroken period of time. This was Ms. Davidson's fifth alleged breach of the no-go condition, and the second alleged breach of the curfew condition. As with the January 15, 2022 breach, it was not the product of a momentary lapse of judgment. Ms. Davidson admitted that she was aware that it was very important to follow precisely what these conditions required, and that she had made a personal promise to Thompson J. that she would do so. As evidenced by her comment to the journalist, she had evidently made a considered choice to put her search for Kevin Bear Henry before her observance of her release order.
- [165] Ms. Davidson's conduct on January 28, 2022 was committed openly. She testified that she was travelling through the Injunction Area as part of a group of six people (later amended to five), and she agreed that her bail conditions "were not a secret" to these people. Ms. Davidson was also observed in the course of breaching her release order by Dean Meikle and Brad Jones, the Teal Cedar security guards.

Defences Raised by Ms. Davidson

1) Conflicts of Law

Necessity Defence

- [166] Ms. Davidson did not argue that she was not bound by the Injunction on May 18, 2021 or June 25, 2021 or the various release orders on the other allegation dates. In cross-examination, she agreed with the statement "if a court makes an order and everyone follows it, that's a sign that the court - the court's order - has authority, has weight".
- [167] Instead, she submitted that the Court must apply a framework of analysis when assessing her subjective mens rea that accounts for this conflict of laws which Ms. Davidson says traps her in the untenable position of being unable to abide by both regimes of laws. In this view, she either had to breach the Injunction or breach her traditional or natural laws, the latter in light of, particularly, her role as a land guardian.
- [168] Accordingly, because of this conflict, Ms. Davidson submitted that her actions belong in a distinct category of analysis from the conduct described by the Court in cases such as Poje and BCGEU on account of her specific responsibilities within the Kwakwaka'wakw community.
- [169] The Crown argued that Ms. Davidson's description of her own role as a land guardian is at odds with her own overall description of the broader role of such a guardian. Ms. Davidson described the broader role as "to become experts, knowledge holders of our territory, to know the streams, the waterways, the fish, the archaeology, all areas of our territory to be intimately because this is where we come from". The Crown further relied upon Ms. Davidson's acknowledgment that her affiliated territory was the Da'naxda'xw territory, which did not include the territories comprising Fairy Creek and the lands around it.
- [170] I find that the breaches alleged by the Crown were not due to any conflict between Ms. Davidson's legal obligations. Her obligations did not entitle her or require her to protect territories of other First Nations; rather, any choice she made was to act contrary to the Injunction and the orders of Davies and Thompson JJ. I find it is fair, to refer to her actions as having arisen from choice.
- [171] Ms. Davidson raised the defence of necessity in respect of the charges against her that relate to incidences of her assistance in the search for Kevin Bear Henry on January 15 and 28, 2022.
- [172] The Supreme Court of Canada has outlined three requirements to establish the defence of necessity:
- a) there must be imminent peril or danger;
 - b) the accused must have no reasonable legal alternative to the course of action he or she undertook. In other words, compliance with the law must be demonstrably impossible; and,
 - c) there must be proportionality between the harm inflicted and the harm avoided.

See *Perka v. The Queen*, [1984] 2 S.C.R. 232 at 259 [Perka] and *R. v. Latimer*, 2001 SCC 1 at para. 28 [Latimer].

[173] In *Latimer*, the Court wrote:

29 To begin, there must be an urgent situation of "clear and imminent peril": *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 678. In short, disaster must be imminent, or harm unavoidable and near. It is not enough that the peril is foreseeable or likely; it must be on the verge of transpiring and virtually certain to occur. In *Perka*, Dickson J. expressed the requirement of imminent peril at p. 251: "At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable". The *Perka* case, at p. 251, also offers the rationale for this requirement of immediate peril: "The requirement ... tests whether it was indeed unavoidable for the actor to act at all". Where the situation of peril clearly should have been foreseen and avoided, an accused person cannot reasonably claim any immediate peril.

[174] The first and second requirements are evaluated on the "modified objective standard": *Latimer*, at para. 33. The modified objective standard was described as follows:

[33] While an accused's perceptions of the surrounding facts may be highly relevant in determining whether his conduct should be excused, those perceptions remain relevant only so long as they are reasonable. The accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open. There must be a reasonable basis for the accused's beliefs and actions, but it would be proper to take into account circumstances that legitimately affect the accused person's ability to evaluate his situation. The test cannot be a subjective one, and the accused who argues that he perceived imminent peril without an alternative would only succeed with the defence of necessity if his belief was reasonable given his circumstances and attributes

[175] The third requirement is measured on a purely objective standard: *Latimer* at para. 34.

[176] The Supreme Court of Canada has recognized that the defence of necessity needs to be "strictly controlled and scrupulously limited": *Perka* at 250; *Latimer* at para. 27. The defence must "be restricted to those rare cases in which true 'involuntariness' is present": *Latimer* at para. 27.

[177] In applying the defence of necessity, the Court must consider whether "the wrongful act was truly the only realistic reaction open to the actor or whether [that actor] was in fact making what in fairness could be called a choice. If [the actor] was making a choice, then the wrongful act cannot have been involuntary in the relevant sense": *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 255 at para. 85 [Trans Mountain 255], citing *Perka* at 250.

[178] In *Perka*, under the heading "Limitations of the Defence", Dickson J., as he then was, stressed the concept of involuntariness at 252:

The question to be asked is whether the agent had any real choice: could he have done otherwise? If there is a reasonable legal alternative to disobeying the law, then the decision to disobey becomes a voluntary one, impelled by some consideration beyond the dictates of "necessity" and human instincts.

The importance of this requirement that there be no reasonable legal alternative cannot be overstressed.

[179] The standard for establishing involuntariness is a high one. In *R. v. English*, 2010 BCCA 564, the Court of Appeal observed cases of "true involuntariness" are "rare": at para. 32.

[180] The Crown argued that before I can consider the defence of necessity in respect of the June 25, 2021 and January 15 and 28, 2022 allegations, I must be satisfied that there is an "air of reality" to that defence: *R. v. Cinous*, 2002 SCC 29.

[181] The air of reality test is a two-prong threshold inquiry in which the Court must consider "whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true": *Trans Mountain* 255 at para. 60. It is not incumbent on the Crown to negative all conceivable defences no matter how fanciful or speculative they may be. The air of reality threshold must be met before the issue is "put in play": *Cinous* at para. 52.

[182] An accused bears an evidentiary burden to demonstrate that there is some evidence on the record from which the trial judge "could reasonably draw the inferences necessary to acquit the accused": *Cinous* at para. 61; *Trans Mountain* 255 at paras. 60, 62. Where the "inferences required for the defence to succeed cannot reasonably be supported by the evidence, the defence lacks an evidential foundation and has no air of reality": *Cinous* at para. 62.

[183] The Crown conceded that, when assessing the evidence to determine whether there is an air of reality, the trial judge "must not engage in a credibility analysis, weigh the evidence, make any findings of fact, or draw factual inferences that have determinate impact": *Trans Mountain* 255 at para. 62. If, however, there is direct evidence on the required elements of the defence beyond a mere assertion of its applicability by the accused, there is an air of reality to the defence and it must be considered.

[184] If, conversely, there is no direct evidence on every element of the defence, or the defence mandates an assessment of reasonableness, "the question becomes whether the remaining elements of the defence -- that is, those elements of the defence that cannot be established by direct evidence -- may reasonably be inferred from the circumstantial evidence": *Cinous* at para. 89.

Imminent Peril or Danger

- [185] With respect to the "imminent peril or danger" requirement, as Ms. Davidson admitted in cross-examination, Kevin Bear Henry had been missing since November 27, 2021, some 49 days before January 15, and 62 days before January 28. Ms. Davidson gave no explanation for why it should have suddenly become a matter of "imminent peril" that she participate in the search on the applicable days. Indeed, Ms. Davidson admitted that there was nothing particular about either of these two days that made it imperative for her to search then, as opposed to other days.
- [186] The Crown cautioned that it does not suggest that Kevin Bear Henry's own ordeal in the forest was not a severe or alarming one, but argued that there is no air of reality to the argument that his disappearance constituted an "imminent peril or danger" for Ms. Davidson on January 15 and 28, 2022 such that "compliance with the law [was] demonstrably impossible: Latimer at para. 28.
- [187] I accept that Ms. Davidson did not tender sufficient evidence upon which it could be established - on the applicable modified objective standard - that Kevin Bear Henry was in imminent peril or danger on January 15 or 28, 2022.
- [188] The Crown argued, and I accept, that Ms. Davidson's testimony made clear that the sense of obligation she felt to search within the Injunction Area on the two dates was not necessarily based on the peril or danger posed to Kevin Bear Henry on those precise dates, but rather the fact that Klasom Satlt'xw Losah asked for her help.
- [189] Ms. Davidson agreed that she did not search on other days because it was not requested that she search on other days. She stated that she "never had to make the choice" about searching on a day other than those two days.

Reasonable Alternatives

- [190] On the question of whether there were any reasonable alternatives to her actions, Ms. Davidson was asked in cross-examination about many other roles she could have played in the search for Kevin Bear Henry. Alternatives were canvassed including calling to check locations outside the Injunction Area, coordinating the search efforts of other volunteers, liaising with other groups such as Cowichan Search and Rescue and the RCMP who were carrying out searches, organizing the delivery of food and supplies to the searchers on the ground, and relaying information back to Kevin Bear Henry's family, none of which would have required her to breach her release conditions. Ms. Davidson agreed that she could have helped in any of these ways, but did not do so, because that was not what Ms. Henry had requested.

[191] Moreover, Ms. Davidson agreed that she could have applied to vary her release order and requested an exception to allow her to search for Kevin Bear Henry. She had applied to vary two different release orders by that time, and that she had some experience doing so. Her response as to why she chose not to make this application did not provide a clear answer to the question.

Q: There was nothing to stop you from applying to vary your release order to add an exception to allow you to search for Bear Henry inside the Injunction Area.

A: I wasn't coming up to Nanaimo or - or to a court to vary a court order. For this it was - I don't know. I - I understand what you're saying, but I was - I was - I was asked by Grandma Losah. She called and - and we went. And we always had the feeling that what if we went out and we found him, and that's - that's what we were going on, based on. And I knew about the court order and changing them, but I was never coming out to a courtroom to do that at the time, and when Grandma called I was like, "Yes, okay, yeah, I will come help you find your - your lost nephew" when she - when she called. And then - and then she called again at the later date, we - we haven't -- we didn't make a - a change, so I went again. It - it was - Bear Henry's life was - was the priority in this whole situation.

[192] The Crown argued that, based on Ms. Davidson's own evidence, she made several choices in arriving at her considered decision to breach her release conditions on January 15 and 28, 2022. She chose to do what Klasom Satlt'xw Losah requested of her, as opposed to taking an alternative role that would have allowed her to assist with the search while still complying with her release conditions. She did not attempt to vary her release conditions, and that Ms. Davidson's acts were not "involuntary in the relevant sense": *Trans Mountain* 255 at para. 85 citing *Perka* at 250).

[193] I find that there is no basis upon which I could find, on the basis of the applicable modified objective standard, that there were no reasonable alternatives to the course of action Ms. Davidson undertook.

Proportionality

[194] The Crown contended that the final prong of the test - whether there was proportionality between the harm inflicted and the harm avoided - is also not met on the facts of this case. It argued that the harm inflicted by Ms. Davidson's actions on January 15 and 28, 2022, as with any case of criminal contempt, was the effect that her breaches "may have on the respect accorded to edicts of the court": *United Nurses* at 932. In this case, the Crown argued that the harm was exacerbated by Ms. Davidson's decision to share the fact of her breach with a journalist for a national publication, as she admitted on cross-examination.

- [195] As Kevin Bear Henry was thought to have driven their van to the Injunction area, it was unreasonable to expect that their van would be off the roads in the area, and even if they had left their van, it should still have been visible on or near the roads to the air search. I find that Ms. Davidson seized upon the absence of Kevin Bear Henry as an excuse to continue her opposition to the old growth logging by Teal Cedar, and that her defence of necessity cannot succeed.
- [196] In terms of the beneficial effects of her actions, Ms. Davidson was not the only person looking for Kevin Bear Henry. She herself agreed that the RCMP were also searching for them - albeit ineffectively in her view - along with what she agreed was a "large-scale effort to find Kevin Bear Henry within the community" comprising "close to 100 people".
- [197] On January 15, 2022, Mr. Reid agreed that the vehicles participating in the search for Kevin Bear Henry were likewise driving in convoy, within view of each other.
- [198] With respect to her actions on January 28, 2022, Ms. Davidson agreed that she rode "kind of in convoy" with another vehicle and that everyone in the convoy were looking for Kevin Bear Henry in the same areas. This contingent of the search party did not disperse to look for clues.
- [199] The Crown argued that in these circumstances, the incremental benefit of having Ms. Davidson participate in the search is unclear. While in a hunt for a missing person in the wilderness, every additional pair of eyes may have some value, I find that the evidence does not establish that Ms. Davidson's contributions to the search were proportionately beneficial.
- [200] I do not believe Ms. Davidson's evidence that she was motivated to enter the Injunction Area on either January 15 or 28, 2022 to assist in the search for Kevin Bear Henry, and have concluded that her purpose on those days was to continue her opposition to the old growth logging by Teal Cedar. It was not established that there was immediate peril or danger, there were reasonable legal alternatives to Ms. Davidson's actions, and there was not sufficient proportionality between the harm inflicted and the harm avoided. Even if there is an air of reality to the defence of necessity, which I find there is not, the defence could not succeed.

2) Mistake of Fact

- [201] The Crown conceded that a defence of mistake of fact can apply, in general, to charges of criminal contempt. It argued, however, that the defence does not apply in Ms. Davidson's case because the beliefs that she testified to do not relate to an actus reus of any of the seven alleged offences, and do not negate the mens rea of any of those offences.
- [202] Mistake of fact is a common law defence preserved by s. 8(3) of the Criminal Code, RSC 1985, c C-46. The defence "is established if the accused has an honest belief in the existence of circumstances which, if true, would negate the mens rea of the offence": *R. v. Manuel*, 2008 BCCA 143 at paras. 13-14 [*Manuel*]. The defence can apply to circumstances where the

belief in question involves a mistake of mixed fact and law: Manuel at paras. 16-17. Where the accused asserts beliefs based on their "aboriginal perspective" (which includes "evidence of the history, culture, use of land and resources, and aboriginal systems of law") those beliefs are properly characterized as beliefs in legal, as opposed to moral, rights: see Manuel at paras. 47-54.

- [203] In order for the defence of mistake of fact to have an air of reality, "the accused must generally hold a mistaken belief as to an essential element of the actus reus of the offence in question": R. v. Elton, 2016 BCCA 440 at para. 19 [Elton]. It is the honesty of the belief, not its truth, that is at issue. Whether reasonable grounds existed for the accused's beliefs is a relevant consideration as to whether those beliefs were honest: Manuel at para. 19.
- [204] The Crown found only one reported decision which addressed the applicability of the mistake of fact defence to a charge of criminal contempt of court: R. v. Toth, [1991] B.C.J. No. 506, 63 C.C.C. (3d) 273 (C.A.) [Toth]. In that case, the accused was convicted of criminal contempt for having obstructed access to the door of a health clinic, while being aware of a court order prohibiting anyone with knowledge of that order from doing so. On appeal, he argued that the trial judge had erred in failing to consider mens rea and in refusing to consider the defence of mistake of fact in relation to ss. 25 [protection of persons acting under authority] and 27(b) [use of force to prevent commission of offence] of the Criminal Code.
- [205] Justice Anderson, for the Court, rejected both arguments. With respect to s. 25 and 27(b) of the Criminal Code, Anderson J.A. found that s. 25 did not apply because the accused "was not required or authorized by law to do anything" and s. 27(b) was not applicable because the accused's conduct did not involve the use of force.
- [206] With respect to mens rea, Anderson J.A. wrote:
- [m]ens rea in respect of criminal contempt of court was knowledge of the injunction and intention to act contrary to it. These facts have been clearly proved. There is nothing in the mistake of fact argument that would make the mistake alleged directly relevant to the mens rea of contempt.
- [207] The decision in Toth predates United Nurses, which established a different mens rea for criminal contempt, but I accept that Toth still stands for the principle that a mistake of fact is not relevant to the questions of whether the accused had knowledge of the court order and whether they intended to act contrary to it, where those facts have been proven by the Crown.
- [208] Since Toth, Courts have considered the mistake of fact defence based on an Indigenous perspective, with respect to various Criminal Code offences.
- [209] In R. v. Billy, 2004 BCSC 1474 [Billy], there was an injunction in place that enjoined anyone from impeding access to certain land in protest against the expansion of the Sun Peaks. Four accused, all Secwepemc women, claimed aboriginal title in respect of the expanded

area. The four accused set up a roadblock on the road that provided access to the applicable land, and were convicted of intimidation under s. 423(1)(g) of the Criminal Code. Two of the accused were served personally with a copy of the injunction, one accused testified that she was aware of the injunction, and one accused admitted she knew she was breaking the law by blockading the highway.

[210] The sole issue at trial was whether the accused persons were acting under a colour of right, or mistake of fact, at the time of the roadblock. In convicting the accused of intimidation, the trial judge rejected their asserted belief of entitlement to the land.

[211] On their summary conviction appeal, the accused advanced three grounds of appeal, arguing that the trial judge erred: (1) in importing a requirement that aboriginal title must be proven in order for the accused to believe that it exists; (2) in concluding that because the accused were knowingly in violation of a court injunction, they could not believe that they were acting lawfully; and, (3) in failing to analyze the evidence from an aboriginal perspective.

[212] Justice Cole found that the trial judge correctly used the legal status of the accused's claims to the land as a factor in his assessment of the honesty of their beliefs.

[213] Justice Cole accepted the trial judge's conclusion that the accused could not have honestly believed that Canadian law recognized their right to block the highway, given their knowledge of the injunction and other legal orders, and their assertions that they did not recognize court orders which had the effect of removing them from their land. Justice Cole found that the trial judge had correctly weighed the honesty of the accused's asserted beliefs against the external evidence, including the existence of the injunction, which would have informed them that their beliefs were not recognized at law, adopting the rationale of two Newfoundland provincial court cases:

[38] In both *R. v. Penashue* (1991), 90 Nfld. & P.E.I.R. 207, [1991] N.J. No. 356 (P.C.) and *Roche* [*R. v. Roche* (1990), 90 Nfld. & P.E.I.R. 199, [1990] N.J. No. 395 (P.C.)], *supra*, LeBlanc J. was faced with similar circumstances. In *Penashue*, the Court stated at [paragraph] 27:

It is clear from the evidence the accused was involved in a protest. Furthermore, even using a subjective test, while he felt that he and his people owned the land it is clear he also knew that by fences, signs, a barricade, etc. that he was not authorized or permitted to go inside the fence and to do so would mean he was committing a breach of the law. ... While his belief need not be reasonable, there is no air of reality in saying he would be allowed to remain and that he didn't know he was involved in breaking the law.

[39] In *Roche*, *supra*, the Court stated at [paragraph] 17:

For the accused to show an honest belief in a mistaken set of facts or law which if true would have afforded a legal justification or excuse, they must satisfy the court that they felt their acts were lawful. Thus I agree with the principle asserted by Crown counsel in his brief filed with this court that the last thing an accused person would expect acting under colour of right in law is to be arrested as a result of his or her acts.

[40] And at [paragraph] 32 of Roche, supra:

[R]eality is reality and nonacceptance of the fact of Canadian sovereignty and jurisdiction of Canadian court [by] the accused is not a reasonable or practical assertion ...

[]

[42] I would apply the reasoning in each of these statements to the accused in the case at bar. Each of the accused in her testimony acknowledged to some extent that she knew that she was breaking Canadian law in her actions on December 28, 2001. A claim of colour of right is incompatible with this acknowledgment. Evidence regarding the injunction was merely one factor in determining that there was no air of reality to the appellants' claim that they had a legal right to act as they did.

[214] Finally, Cole J. found that the trial judge properly considered the evidence from an aboriginal perspective in concluding that the accused did not have an honest belief in a legal right to block the highway.

[215] Manuel, , is a case that also dealt with charges of intimidation by blocking or obstructing a highway. On their appeal, the accused's primary argument was that the trial and summary conviction appeal court judges had erred "in failing to recognize the place of the 'aboriginal perspective' on the ownership and use of the lands in question in their analyses of whether the appellants honestly believed they had the right to block the road": Manual at para. 39.

[216] The Court of Appeal addressed mistake of fact in the context of the aboriginal perspective, but in dismissing the appeal, as in Billy, found that the accused knew that their peoples' claims in title to the land were neither resolved nor ongoing at the time of the blockade. They were aware of the attendant uncertainties associated with the reconciliation of Indigenous and common law perspectives on land ownership, and they knew that the lawful process for reconciling those perspectives did not include blockading a roadway.

[217] In Elton, , at para. 19, Justice Dickson, for the Court, determined that in order for such a defence to have an air of reality, the accused "must generally hold a mistaken belief as to an essential element of the actus reus of the offence in question". At para. 19, Dickson J.A. provided the example of a hunter who honestly believed he was shooting a deer, when in fact he was shooting a person and said that such a mistake of fact would negate the mens rea for murder.

- [218] By contrast, Crown argued that none of the beliefs Ms. Davidson has asserted relate to the actus reus of the offences with which she is charged, which would generally be material to there being an air of reality: Elton at para. 19. Her testimony was that she believed she had good reasons for disobeying the court orders, but that does not suggest she was mistaken either about the applicability of the orders or the character of her actions in breaching them.
- [219] Ms. Davidson argued that based upon her evidence, I may infer that she acted as she did because she believed that the actions she undertook, in violation of court orders, were more important than her obligation to abide by these orders. As the Court of Appeal noted in Manuel, however, "[s]uch 'self-help' remedies are not condoned anywhere in Canadian law, which includes aboriginal, common, and criminal law, and they undermine the rule of law": at para. 62.
- [220] In these proceedings, Ms. Davidson led evidence to support her argument that she had a right or a duty to breach both the Injunction of Verhoeven J. and the various release orders prohibiting her from going within the Injunction Area, based on her status as a land guardian or her adherence to requests for help by Indigenous elders. While Ms. Davidson argued that she was asked by Nuuchahnulth Elders Bill Jones, Klasom Satlt'xw Losah and Hereditary Chief Victor Peter to protect the cedars on their territory, their evidence fell short of that assertion, and went no further than establishing that they invited and welcomed Ms. Davidson onto their territory.
- [221] Unlike the accused in Manuel, Ms. Davidson's beliefs, even if honestly held, do not amount to a mistake of fact that would ultimately negate the mens rea of any of the offences with which she stands charged.
- [222] The Crown argued, and I accept, that Ms. Davidson's assertion that she had some right to breach the Injunction and the release orders of Davies and Thompson JJ. were not honestly held. I have reached this conclusion based upon Ms. Davidson's acknowledgement that the Injunction did not carve out an exception for her; her acknowledgment that, in each of the seven instances upon which the charges are based, she knew she was breaching the orders in question; her acknowledgement, with respect to all seven allegations of criminal contempt, that she could or would be arrested for her actions; her acknowledgement that the lands on which the alleged acts of criminal contempt occurred were within the traditional territory of the Pacheedaht and Ditidaht First Nations, and that no other third First Nation, such as the Da'naxda'xw, had a claim to the area; her acknowledgement that she was aware of a joint declaration by representatives of the governments of the Pacheedaht, Ditidaht, and Huu-ay-aht First Nations stating that third parties have no right to speak on their behalf or on behalf of their land, waters, and resources; and, her acknowledgement that she did not have the authority to make decisions on behalf of the Pacheedaht, Ditidaht, or Huu-ay-aht First Nations, including the decision of who should represent these Nations.

3) The De Minimis Defence

[223] Ms. Davidson referred me to the unreported decision of the Honourable Judge Craig in *R. v. Alvey* (28 December 1989), Vancouver 13372C2 (B.C.P.C.). In *Alvey*, Craig J. acquitted three individuals charged with mischief for interfering with a US nuclear-powered aircraft carrier when it prepared to drop anchor in English Bay in Vancouver.

[224] Judge Craig found that the act of spray-painting a sign on the side of the vessel was not mischief, or was de minimis at most, and that climbing the stern ladder of the vessel did not interfere with the operation of the vessel and was not mischief. In his reasons for judgment, Craig J. stated that it was proper for people to protest government actions and policy, including through direct action, provided they do not take it too far:

We tend not to react to government action and policy decisions as vocally and as actively as we might. It's become the Canadian personality, I suppose, to react too passively. So that these persons, doing what they're doing, were doing something which is rather unusual in the Canadian temperament, but which is perfectly proper, provided, as I say, they don't carry it too far.

[225] In closing submissions, counsel for Ms. Davidson argued that the Court could apply the principle of de minimis non curat lex to criminal contempt charges. He cited *R. v. Hinchey*, [1996] 3 S.C.R. 1128, 1996 CanLII 157 (SCC), where the Supreme Court of Canada commented on the availability of the de minimis defence in criminal proceedings:

69 there might be another method to avoid entering a conviction: the principle of de minimis non curat lex, that "the law does not concern itself with trifles". This type of solution to cases where an accused has "technically" violated a Code section has been proposed by the Canadian Bar Association, in *Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code of Canada* (1992), and others: see Professor Stuart, *Canadian Criminal Law: A Treatise* (3rd ed. 1995) at pp. 542-46. I am aware, however, that this principle's potential application as a defence to criminal culpability has not yet been decided by this Court, and would appear to be the subject of some debate in the courts below. Since a resolution of this issue is not strictly necessary to decide this case, I would prefer to leave this issue for another day.

[226] Counsel for Ms. Davidson cited a list of other cases where the de minimis doctrine has been discussed or applied:

- *R. v. McBurney*, 1975 CanLII 1399 (B.C.C.A.);
- *R. v. Battie*, 1985 CanLII 3507 (B.C.S.C.);
- *R. v. Brett*, 1985 CanLII 3522 (B.C.S.C.);
- *R. v. Nagel-Joseph*, 1999 CanLII 5351 (B.C.S.C.);
- *R. v. Dejong*, 2005 BCPC 546;

- R. v. A.S.B., 2006 BCPC 598;
- R. v. Reddy, 2007 BCPC 384;
- R. v. J.K.H., 2008 BCPC 13;
- R. v. Symington, 2008 BCPC 362;
- R. v. M.M.C., 2009 BCPC 290;
- R. v. Kalebaba, 2011 BCPC 1;
- R. v. Thorton, 2012 BCPC 360;
- R. v. Creighton, 2012 BCPC 238;
- R. v. Etherington, 2016 BCPC 186;
- R. v. Toor, 2019 BCPC 282; and,
- R. v. Fraser, 2021 BCPC 229.

[227] While each of these cases involved criminal charges, none involved a charge of criminal contempt of court.

[228] Given that the charge of criminal contempt only applies to conduct that is "open, flagrant, and continuous", the Crown submitted, and I accept, the de minimis doctrine has no application to this offence. If the conduct was open, flagrant, and continuous, then it cannot have been de minimis; conversely, if the conduct was not open, flagrant, and continuous, then the offence is not proven, and there is no need to apply the doctrine.

Declining to Exercise the Power of Contempt

[229] Counsel for Ms. Davidson argued that even if all elements are proven beyond a reasonable doubt, I have a discretion to decline to make a finding of criminal contempt. In support of this position, he cited several civil contempt cases, but no decisions in which a court exercised this discretion in a case of criminal contempt of court.

[230] Ms. Davidson contends that there is evidence to show that she was subjected to disproportionate policing resources and private surveillance resources on account of her identity as a visibly identifiable Indigenous person. She suggests that this evidence is a relevant factor weighing in favour of my declining to exercise my contempt power.

[231] Ms. Davidson cited a number of civil contempt cases in support of the availability of this discretion including Carey; the numerous decisions referred to in Carey at para. 36; Hokhold v. Gerbrandt, 2016 BCCA 6; and Bassett v. Magee, 2015 BCCA 422.

- [232] I note that *Campbell v. Cowper*, [1935] 1 D.L.R. 633, 1934 CanLII 263 (A.B.C.A.) [*Campbell*] is a case of criminal contempt, but it does not stand for the proposition that a court can or should exercise its discretion not to make a finding of criminal contempt after the case has been proven. Rather, the portion cited by counsel for Ms. Davidson states that the court should take "scrupulous" care in making sure that the offence is proven: *Campbell* at 654.
- [233] The Crown argued that the use of a court's discretion in cases of civil contempt cases is unsurprising in light of the difference in function from criminal contempt: civil contempt is primarily concerned with securing compliance with a court order, while criminal contempt serves to punish conduct which tends to depreciate the authority of the court. As this Court held in *Vancouver Fraser Port Authority*:
- [39] Criminal contempt is distinguishable from civil contempt, the distinction resting upon the element of public defiance. While the purpose of civil contempt is to secure compliance with a court's order, the purpose of criminal contempt is to punish for conduct calculated to bring the administration of justice by the courts into disrepute. Civil contempt proceedings are initiated by a party affected by the order sought to be enforced. In order to secure compliance in a proceeding for civil contempt, a court may impose a fine or other penalty that will be exacted in the absence of compliance. The object is always compliance, not punishment.
- [234] The Crown argued that, in cases of civil contempt, it is easy to think of scenarios along the lines of a hypothetical set out in *Carey*: "[f]or example, where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt": *Carey* at para. 37. Conversely, it is difficult to envision an instance of criminal contempt in which a contemnor acts in good faith to take reasonable steps to comply.
- [235] The Crown concluded with the assertion that, even if I have a discretion to decline to enter a finding of criminal contempt after all elements have been proven, it should not be exercised in this case. Criminal contempt of court, particularly involving organized defiance and repeated violations, is a matter of great public interest. The Crown argued that there is nothing minimal about Ms. Davidson's conduct: she chose to breach four different court orders a total of seven times. After the fifth breach, she made a personal promise to a judge that she would not do so again. The Crown argues that I should not decline to make a finding of contempt of court when the elements were otherwise made out.
- [236] I turn to the instances relied upon by Ms. Davidson.

- [237] First, she contends that she was the first person charged with breach of a release condition at Fairy Creek. This, she suggests, was after RCMP Inspector Jeff Preston singled her out from among 271 arrestees and implemented a targeted enforcement operation on June 23, 2021. The fact that 270 other individuals were arrested at this time does not support the argument that Ms. Davidson was somehow targeted inappropriately.
- [238] Second, while there was evidence that the RCMP relied on a "photo book" that the member responsible for evidence gathering described as methodologically flawed, is not, in my view any answer to the charges against Ms. Davidson. She made no secret of her attendances in the Injunction Area, and was recognizable and quickly recognized by the RCMP without reference to the "photo book". Indeed, as she argued, many RCMP officers gave evidence that they were familiar with Ms. Davidson, whom they knew as "Rainbow Eyes", because of her visual appearance and/or this "photo book" but could not name any other Fairy Creek arrestees off the tops of their heads.
- [239] Third, Ms. Davidson also argued that those officers who could recall names of other purported Fairy Creek protesters disproportionately recalled names of Indigenous persons. This included Elder Bill Jones, an Indigenous person known as "Lady Chainsaw", and an Indigenous person named Shawna Knight. I received no evidence, however, that the others so identified were the subject of the charges faced by Ms. Davidson. I do not consider that this is of assistance to Ms. Davidson in her defence of the charges against her.
- [240] Fourth, Ms. Davidson argued that, because she might have been subjected to further police enforcement - a process she indicates was facilitated by her Indigenous identity and visually identifiable characteristics as a Kwakwaka'wakw person in respect of her initial arrest on an allegation of breach of a release condition on June 23, 2021 - I should decline to exercise the criminal contempt power. In my view, however, there is not sufficient evidence to support her argument that these enforcement procedures were disproportionate to her.
- [241] Fifth, Ms. Davidson was singled out for arrest by RCMP Staff Sergeant Branden Brady on the Pacific Marine Road on November 28, 2021. This, however, was her fifth arrest at the Injunction Area, and I find that any singling out was in recognition of her unwillingness to respect the various orders of this Court to which she was subject. The singling out does not appear to have been facilitated by her Indigenous identity or any visually identifiable characteristics as a Kwakwaka'wakw person.
- [242] Sixth, Ms. Davidson argued that an additional factor to be weighed in determining whether I should exercise the contempt power is the Crown's decision to stay proceedings against Ms. Davidson for the August 10, 2021 allegation of breach of a court order under Section 127(1) of the Criminal Code in April 2022.

[243] In respect of this stay, Ms. Davidson has not tendered sufficient evidence upon which I could find that the instant charges amount to some patent unfairness or an abuse of process. The matter related - inter alia - to distinctions between the RCMP and Teal Cedar's private security contractors. Ultimately, the fact that these charges were stayed on April 11, 2022 does not assist Ms. Davidson.

[244] I agree with the Crown that Ms. Davidson's conduct was defiant, repeated and public, and certainly not minimal. In the result, I decline not to exercise my powers of contempt.

Conclusion

[245] I find that Ms. Davidson breached the Injunction, and the bail conditions imposed upon her by Davies and Thompson JJ., as alleged, and that the defences of de minimus, mistake of fact or necessity, nor the exercise of my discretion justify the acquittal of Ms. Davidson of the seven counts of contempt of this Court that have been made out by the Crown.

[246] In light of my findings, I decline to exercise my discretion to acquit Ms. Davidson.

[247] I will therefore entertain submissions from counsel as to appropriate sanctions for Ms. Davidson's criminal contempt of court.

"The Honourable Chief Justice Hinkson"

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