

CANADA / JUDGMENT

Teal Cedar Products Ltd. v. Davidson

2024 BCSC 662

COURT

Supreme Court of British Columbia

DECIDED

24 April 2024

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2024 BCSC 662 Teal Cedar Products Ltd. v. Davidson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Teal Cedar Products Ltd. v. Davidson,

2024 BCSC 662

Date: 20240424

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

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Place and Date of Trial:

Nanaimo, B.C.

April 4 and 5, 2024

Place and Date of Judgment:

Nanaimo, B.C.

April 24, 2024

Introduction

- [1] On January 18, 2024, I convicted Ms. Angela Davidson of seven counts of criminal contempt of court, arising out of activities that I found to be in breach of the order of Justice Verhoeven dated April 1, 2021 (the "Injunction"), and/or the bail conditions imposed upon her by Justice Davies on May 19, 2021, and Justice Thompson on November 29, 2021. My Reasons for Judgment for these convictions are indexed at 2024 BCSC 81 [Conviction Reasons], which detail the circumstances of Ms. Davidson's offences.

- [2] Ms. Davidson was arrested for the alleged breach of the Injunction on May 18, 2021, and released from custody by order of Davies J. on May 19, 2021. Her release was conditional on her 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. Justice Davies reiterated at that time that Ms. Davidson was not to enter the Injunction area.
- [3] Ms. Davidson was arrested for a second time on June 23, 2021, on an allegation that she breached the terms of her bail. She was in custody for two days following this arrest.
- [4] Ms. Davidson was again arrested on June 25, 2021, on an allegation that she breached the Injunction but was released from custody the following day by order of Thompson J. She was released on the same terms as her release by Davies J., but with the addition of a \$2,000 cash deposit to be held as security for her compliance with the order.
- [5] Ms. Davidson was arrested on November 28, 2021, for the alleged breach of her bail conditions. On November 29, 2021, Thompson J. ordered her release from custody. Her \$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.
- [6] On December 13, 2021, Thompson J. varied the conditions of Ms. Davidson's curfew from his November 29, 2021 order.
- [7] On January 15, 2022, Ms. Davidson was arrested for an alleged breach of the Injunction but released the following day.
- [8] Ms. Davidson was again arrested for an alleged breach of the Injunction on January 28, 2022, but released that day.

The Positions of the Crown and Ms. Davidson

- [9] Counsel agreed that evidence and submissions respecting the appropriate sanctions for Ms. Davidson's criminal contempt would be made on April 4, 2024. I have now heard that evidence and those submissions on that day, and on April 5, 2024.
- [10] The Crown seeks a sanction of 51 days in custody, together with 75 hours of community service or a fine of \$2,500.
- [11] Ms. Davidson properly argued that, in sentencing her, I should consider the principles of proportionality, parity, restraint, individualization, rehabilitation, totality, denunciation, and deterrence. On this basis, she proposes a sanction of 13 days in custody inclusive of the date upon which her sanctions are imposed. Ms. Davidson suggests that she should receive credit for eight days of time already served, entitling her to credit of up to 12 days pursuant to s. 719(3.1) of the Criminal Code, RSC 1985, c C-46. In consequence, Ms. Davidson would not need to surrender herself to custody, but would serve 12 months probation including 75 hours of community service.

Ms. Davidson's Circumstances

- [12] During the hearing of the contempt charges I received information about Ms. Davidson. I have since received further information from her counsel including supportive letters, a Gladue report relating to her, and from Ms. Davidson herself.
- [13] Ms. Davidson was born in Campbell River, B.C. She is 38 years old and is Indigenous. She is a member of the Da'naxda'xw First Nation, which is described as an amalgamation of the Da'naxda'xw and Awaetlala tribes of Knight Inlet.
- [14] Ms. Davidson's maternal grandfather attended St. Michael's Residential School in Alert Bay, B.C. and her maternal grandmother attended Indian Day School in Campbell River, B.C. At least some of her great uncles and aunts also attended Indian Residential Schools.
- [15] Ms. Davidson enjoyed a positive upbringing. Before her first birthday, her family moved to Leduc, Alberta. Two years later her family moved to Calgary, Alberta, where she attended elementary, junior, and senior high schools. After her high school graduation, Ms. Davidson worked at a bookstore for some three years before receiving training as an Administrative Assistant at CDI College in Alberta.
- [16] Despite living in Alberta, Ms. Davidson remained connected to her culture through regular visits to her community in B.C. She participated in cultural ceremonies during her visits. She reported that, despite the intergenerational impact of the Residential and Day school systems, her family has been a big part of shaping her values, norms, and beliefs, in addition to her connections to culture and community.
- [17] Ms. Davidson gave evidence that she involves herself in her community and others, protecting lands and waters. She considers it her duty, as an Indigenous woman and Land Guardian, to protect the integrity of the land and particularly the cedar trees. She said that she was chosen by her Elders and others in her community to become involved in protecting the lands, waters, and trees.
- [18] Unfortunately, Ms. Davidson was diagnosed with cancer at age 21, but thankfully received successful treatment, following which she volunteered with the Cancer Society.
- [19] Ms. Davidson married in 2013, but separated in 2015, when she returned to B.C. to continue her studies in Non-Profit Management and International Community Development at Mount Royal University. In 2016, Ms. Davidson enrolled in the First Nations Stewardship Technicians Training Program at Vancouver Island University. Thereafter, Ms. Davidson returned to her community and began work as a Ha-ma-yas Stewardship Network Guardian for her First Nation.
- [20] Ms. Davidson is an elected member of the Da'naxda'xw First nation Band Council.
- [21] In 2022, Ms. Davidson became the Deputy Leader of the Green Party of Canada. She currently resides in Campbell River, B.C. with her partner of some three years.

[22] In my Conviction Reasons at para. 69, I acknowledged that:

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.

[23] Ms. Davidson has not been accused of breaching the Injunction order since January of 2022, despite other protestors being arrested in the Injunction area as late as June 29, 2022. She has distinguished herself as a leader in both the Indigenous and non-Indigenous communities since the events that gave rise to her seven convictions for criminal contempt of court.

[24] I received a letter from National Chief Elmer St. Pierre and National Vice-Chief Beaudin of the Congress of Aboriginal Peoples, which challenged the findings in my Conviction Reasons without offering substantive commentary on Ms. Davidson's character or her accomplishments.

[25] A more helpful letter came from Grand Chief Stewart Phillip and Chiefs Don Tom and Marilyn Slett of the Union of B.C. Indian Chiefs that addressed Ms. Davidson's commitment to her teachings and her leadership since the events that originally brought her before me.

[26] I also received supportive letters from individuals who apparently share Ms. Davidson's passion for the protection of the environment. These letters, in various ways, commented on Ms. Davidson's contributions and character, all urging that Ms. Davidson be spared from incarceration. The letters were received from Scott Clark, the President of the Northwest Indigenous Council, Elizabeth May, O.C., M.P., Dr. Cash Ahenakew, the Canada Research Chair in Indigenous Peoples' Wellbeing, Dr. Suzanne W. Simard, Professor of Forest Ecology, Dr. Rachel Holt who holds a Ph.D. in conservation biology, Maite Mumpo, the Spanish Director of Stop Ecocide, Carey Rutherford, the elected Alberta Representative of the Green Party of Canada, Cristina Valacchi, and Ms. Davidson's partner, Glenn Reid.

[27] The common theme to most of the supportive letters was that Ms. Davidson was and continues to be a passionate environmentalist, in the course of which she adheres to the teachings of her Elders.

The Principles to be Applied in Sentencing for Criminal Contempt of Court

[28] Denunciation and deterrence must be at the forefront when sentencing for criminal contempt: *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156 at para. 57 [*Trans Mountain 156*]. In *Trans Mountain 156* at paras. 56-57, Justice Butler discussed the principles of sentencing for contempt:

56 The objectives of separating offenders from society and providing reparation to victims are generally not applicable to sentencing in contempt cases. Rehabilitation is often important in civil contempt cases, where the Court is primarily concerned with securing compliance with its orders: *Larkin v. Glase*, 2009 BCCA 321 at para. 49. However in *Larkin*, Justice Chiasson comments that even in cases of civil contempt deterrence is more important than rehabilitation (at para. 51).

57 Denunciation and deterrence are the principal sentencing objectives in criminal contempt cases. Chief Justice Farris described the underlying rationale in *Canadian Transport (U.K.) Ltd. v. Alsbury* (1952), 6 W.W.R. (N.S.) 473 at 478 (B.C.S.C.), *aff'd* [1953] 1 D.L.R. 385 (C.A.), *aff'd* [1953] 1 S.C.R. 516:

One law broken and the breach thereof ignored is but an invitation to ignore further laws and this, if continued, can only result in the breakdown of the freedom under the law which we so greatly prize.

[29] While Ms. Davidson argued that the need to address general deterrence was no longer necessary, as the Injunction is no longer operative, I agree with the Crown that the objective of deterrence transcends the breach of any particular court order and is crucial to the protection of the Rule of Law. If one law is broken and the breach thereof is ignored, this could be seen as an invitation to ignore other laws and orders, which could only lead to the breakdown of the freedom under the law that we so greatly prize: *R. v. Nelson*, 2024 BCCA 72 at para. 32 [Nelson].

[30] In *R. v. Bridges*, 1989 CanLII 5321 (BC SC), 61 D.L.R. (4th) 154 [Bridges], Justice Wood discussed the role of this Court, and the importance of the Rule of Law, in circumstances where firmly held beliefs cause its challenge by well meaning individuals stating:

As I have previously indicated, I accept that each of you were motivated by a genuine belief in the righteousness of your cause. But that cause, either as a justification for your conduct or as an issue in itself, is not before this Court. It is not for this Court to rule upon the morality of abortion, nor is it for this Court to legislate to fill any void that may be seen by some to exist in the present law. It is the duty of this Court to act upon and to apply the law as it now exists, with legal precedent.

Most of you have indicated that you prefer to follow the law of God. No doubt encouraged by submissions of your counsel, who ought to have known better, some of you have invited me to apply the law of God. This Court does not apply the law of God, irrespective of whose interpretation of that law is offered for consideration. This Court applies the law as it is determined to be by the legislators of this country and by the decisions of this Court, which have accumulated now for over seven hundred years.

What is very much at issue and before this Court is the future survival of the rule of law. It is the rule of law which distinguishes civilized society from anarchy. Everything which we have today, and which we cherish in this free and democratic state, we have because of the rule of law.

Freedom of religion and freedom of expression exist today because of the rule of law. Your right to hold the beliefs you do, to espouse those beliefs with the fervour which you do, and to attempt to persuade others to your point of view, exists only because of the rule of law. Without the rule of law there is only the rule of might. Without the rule of law the Charter of Rights and Freedoms, which some of you sought to invoke, would be nothing but another piece of parchment adrift in the timeless evolution of man's history.

The rule of law exists in this society only because the overwhelming majority of citizens, irrespective of their different views on religion, morality or science, agree to be bound by the law. That agreement, which cannot be found recorded in any conventional sense, has survived the deepest and most profound conflicts of religion, morality and science. In that sense it might be thought that its strength is overwhelming and its future secure. But that is not the case at all, for the continued existence of that agreement is threatened by its own inherent fragility. That fragility was described by former Chief Justice Farris of this Court in the celebrated case of Poje, to which counsel have referred. I quote from page 478 of the report at 6 Western Weekly Reports, New Series, 473:

"Once our laws are flouted and orders of our courts treated with contempt the whole fabric of our freedom is destroyed. We can then only revert to conditions of the dark ages when the only law recognized was that of might. One law broken and the breach thereof ignored, is but an invitation to ignore further laws and this, if continued, can only result in the breakdown of the freedom under the law which we so greatly prize."

Many of you, while assuring me of your respect for the law, have characterized your contemptuous conduct as an act of last resort stemming from frustration brought on by the failure of government to act upon your views and to change the law accordingly. The fragility of the rule of law is such that none of us who seek to enjoy its benefits can be permitted the occasional anarchical holiday from its mandate, no matter how compelling or how persuasive may be the cause that such anarchy seeks to advance. Furthermore it is only through the rule of law that any meaningful, lasting or effective change can be wrought in the law. Thus it is that by seeking to change the law by deliberately disobeying it you threaten the continued existence of the very instrument, indeed the only instrument through which you may eventually achieve the end you seek. Such conduct is not only illegal, it is completely self-defeating.

[31] A court sentencing an Indigenous contemnor must nonetheless have regard to the principles enunciated in *R. v. Gladue*, [1999] 1 S.C.R. 688 [*Gladue*] and *R. v. Ipeelee*, 2012 SCC 13 [*Ipeelee*] and may consider the principle of rehabilitation.

[32] One *Gladue* factor relied upon by Ms. Davidson was that she had family members who survived Indian Residential Schools.

[33] Ms. Davidson argued that, in all its dealing with Indigenous persons, the Crown should always reflect the objectives of reconciliation, and that the gravity of her disobedience and her moral culpability must be weighed in the total framework of a democratic society.

[34] In *R. v. Wells*, 2000 SCC 10 [Wells] at paras. 36-42, Justice Iacobucci emphasized that, within the scope of s. 718.2(e) of the Criminal Code, a court must still consider the matter on a case-by-case basis. To this extent, consideration must be given to the offence, the offender, the victim, and the community. Justice Iacobucci concluded that the fact that an offender is Indigenous does not dictate that a restorative approach is appropriate vis-à-vis rehabilitation.

[35] At para. 44 of Wells, Iacobucci J. stated:

[44] Let me emphasize that s. 718.2(e) requires a different methodology for assessing a fit sentence for an aboriginal offender; it does not mandate, necessarily, a different result. Section 718.2(e) does not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. Furthermore, in Gladue, as mentioned the Court stressed that the application of s. 718.2(e) does not mean that aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice and less weight to goals such as deterrence, denunciation, and separation (at para. 78). As a result, it will generally be the case, as a practical matter, that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders (Gladue, at para. 33). Accordingly, I conclude that it was open to the trial judge to give primacy to the principles of denunciation and deterrence in this case on the basis that the crime involved was a serious one.

[Emphasis in original.]

[36] In the context of s. 718.2(e) of the Criminal Code, Gladue and Ipeelee require that a "different methodology" be used in assessing a fit sentence for Indigenous offenders. That different methodology is to be employed, however, does not demand that a result different from that for a non-Indigenous offender must be reached: Nelson at para. 56. While s. 718.2(e) of the Criminal Code does not apply to the common law offence of criminal contempt, the sentencing principles thereunder provide useful guidance: Nelson at para. 42.

[37] Justice Voith, writing for a unanimous Court in *Trans Mountain Pipeline ULC v. Mivasair*, 2023 BCCA 115, summarized the relationship between the principles surrounding sentencing for criminal contempt and the principles from Gladue and Ipeelee in the following way:

[38] Section 718.2(e) is a remedial provision that is intended to address the crisis of overrepresentation of Indigenous offenders in the Canadian criminal justice system: Gladue at para. 33; Ipeelee at para. 59 (also quoted by the judge). Indigenous offenders are different from other offenders because they are "victims of systemic and direct discrimination" and "dislocation" and are "substantially affected by poor social and economic conditions": Gladue at para. 68; *R. v. Mero*, 2021 BCCA 399 at para. 68-69. Section 718.2(e) recognizes that culturally attuned sentencing for Indigenous offenders has an important role to play in addressing these legacies of colonialism: Gladue at para. 65; Ipeelee at para. 64-70 and Mero at para. 68.

- [39] However, s. 718.2(e) mandates "a different methodology" for assessing a fit sentence for an Indigenous offender. It does not necessarily mandate a different result: Wells at para. 44 (again quoted by the judge); Nahanee at para. 82 quoting from *R. v. Elliott*, 2015 BCCA 295 at para.17. While restorative sentences should, where possible, be prioritized for Indigenous offenders, the application of Gladue principles will not inevitably lead to a reduced or non-custodial sentence: Gladue at para. 88; Ipeelee at paras. 71 and 75; Mero at para. 73.
- [38] In *Reference re An Act Respecting First Nations, Inuit and Metis children, youth and families*, 2024 SCC 5 at para. 90, in discussing the expectations for the legislation, the Supreme Court of Canada observed that:

it is still important to recognize that reconciliation is a long-term project. It will not be accomplished in a single sacred moment, but rather through a continuous transformation of relationships and a braiding together of distinct legal traditions and sources of power that exist (see J. Leclair, "Zeus, Metis and Athena: The Path Towards the Constitutional Recognition of Full-Blown Indigenous Legal Orders" (2023), 27:2 Rev. Const. Stud. 77; cf. H. Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (2009), at pp. 37-38; see also J. Borrows, "Revitalizing Canada's Indigenous Constitution: Two Challenges", in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (2017), 20).

- [39] More recently, Justice Skolrood, writing for the unanimous Court in *Nelson*, revisited the application of s. 718.2(e) of the Criminal Code explaining, at paras. 43-44 that:
- [43] In applying those principles, it is important to keep in mind that an offender need not establish a causal link between relevant background factors and the commission of the offence in issue.
- [44] the focus of the analysis is on those unique circumstances of an Indigenous offender that could reasonably and justifiably impact on the sentence imposed. This requires the sentencing judge to consider: (i) the unique systemic and background factors which may have played a part in bringing the particular Indigenous offender before the courts; and (ii) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of their particular Indigenous heritage or connection: *Ipeelee*. at para. 72.

Sentencing Authorities

- [40] In *MacMillan Bloedel Ltd. v. Baker*, [1994] B.C.J. No. 1458 [*MacMillan Bloedel*], 36 individuals were convicted of criminal contempt of court for their part in a logging protest. They were sentenced to fines and terms of imprisonment. The Court of Appeal struck down the fines, but upheld the terms of imprisonment and found that the range of sentence for those convicted was 30 to 60 days. The Court of Appeal found that in settling upon a uniform custodial sentence at 45 days, with the exception of one of the appellants who was sentenced to 60 days, the sentencing judge made proper allowance within the range for the various differences in circumstances of the offenders and the conduct constituting the offence in

each case.

- [41] In *Texada Land Corp. v. Shebib*, 2002 BCCA 114, the Court of Appeal upheld a custodial sentence of 60 days for a first-time offender who blocked the access of logging trucks in breach of a court order and exacerbate his position in his submissions on sentence by seeking to justify himself by using the rhetoric of protest, and stated that he would again put himself in a position of undertaking civil disobedience if he saw a situation as grave as the one he had protested.
- [42] In *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCSC 1512 [Trans Mountain 1512], Mr. Leyden, along with two other contemnors, interfered with the operations of Trans Mountain on August 21, 2018. In the lead up to his arrest, Mr. Leyden blocked a roadway. He asserted that he was on unceded territory, that he had been asked by the local First Nations to be there, and that the RCMP were acting illegally. Mr. Leyden referred to being asked to stand up for the cause by one Chief Wilson. Much of the evidence adduced at the hearing was directed towards the assertion that they had a spiritual role to protect the land, the people, the animals, and the plants. Ultimately, the Court found that the contemnor's Aboriginal heritage, background, and circumstances, while relevant, did not move the needle in terms of the Court's need to give primacy to the sentencing principles of denunciation and deterrence: Trans Mountain 1512 at para. 129. Mr. Leyden was sentenced to 28 days' incarceration.
- [43] Also in Trans Mountain 1512, Mr. Gallagher breached a Trans Mountain injunction on August 21, 2018. He sat on a roadway, claimed to be "in prayer," and did not voluntarily move from the roadway after his arrest: Trans Mountain 1512 at para. 25. Justice Fitzpatrick found that Mr. Gallagher had made a clear choice to violate the applicable injunction by moving into and staying on the roadway, and that the fact that he then undertook certain prayers or ceremony was of no moment. Justice Fitzpatrick found that Mr. Gallagher's Aboriginal heritage, background and circumstances, while relevant, did not "move the needle" in terms of the need to give primacy to the sentencing principles of denunciation and deterrence: Trans Mountain 1512 at para. 129. Mr. Gallagher was sentenced to 28 days' incarceration.
- [44] Finally in Trans Mountain 1512, Mr. Bige engaged in a protest by sitting as part of a human chain next to banners with anti-pipeline messages. He did not leave after being advised of his potential jeopardy by the RCMP and was arrested and proceeded to a processing tent, holding an eagle feather above his head to the cheers of onlookers. Mr. Bige sought an absolute discharge and expressed considerable remorse, but Fitzpatrick J. concluded that deterrence and denunciation remained central objectives. Mr. Bige was given a sentence of 28 days' incarceration.

- [45] In *Trans Mountain Pipeline ULC v. Mivasair*, 2023 BCCA 115 [Trans Mountain 115], the appellant, Mr. George, had been convicted for involvement in a blockade at the entrance to Trans Mountain's Burnaby Terminal and was sentenced to 28 days' incarceration. He contended that the "underlying theme that could be derived from Gladue is that imprisonment should be avoided if possible and should be reserved for the most serious of offences involving violence": Trans Mountain 115 at para. 27.
- [46] In Trans Mountain 115, the Court of Appeal held that Mr. George's submission ignored the issue of proportionality and the judge's careful efforts to craft a fit sentence that properly considered both (a) the nature of the appellant's offence and (b) his personal circumstances. In dismissing Mr. George's appeal, the Court of Appeal found the sentencing judge's consideration to be proper. While Mr. George's strongly held beliefs reduced his moral culpability, they were not properly before the sentencing judge.
- [47] In *Trans Mountain Pipeline ULC v. Mivasair*, 2023 BCSC 366, Ms. Everett arrived at a Trans Mountain worksite defined in the applicable injunction on May 11, 2022. She and another contemnor entered the injunction area and were ultimately arrested having caused a 20-25 minute delay in Trans Mountain's operations costing the company \$1,240. Ms. Everett acted in a public manner and expressed no remorse. A 21-day custodial sentence was imposed, and Ms. Everett was made jointly and severally liable for the \$1,240 cost of delay with the other contemnor.
- [48] In *Trans Mountain Pipeline ULC v. Mivasair*, 2023 BCSC 410, Ms. Dick gathered with a group of contemnors at a Trans Mountain worksite. She and the other protestors were told of the injunction and advised that they could not block the area. They did not leave, and many blocked the gate, which prevented Trans Mountain from completing a shift change for some time. Ms. Dick was ultimately arrested and walked to a waiting police vehicle. Ms. Dick was considered a first-time offender, and her protest was peaceful. Justice Fitzpatrick accepted that Ms. Dick felt motivated to breach the injunction in the face of her significant objection to the treatment of Indigenous peoples in Canada, and that she was motivated by concerns for the environment and her community. Ms. Dick was nevertheless sentenced to 28 days' incarceration.
- [49] In *Trans Mountain Pipeline ULC v. Mivasair*, 2023 BCSC 412, the contemnor, Saw-ses, was sitting on the ground in front of a gate that normally opened and closed to allow ingress and egress from the injunction site. He was not affixed to the gate but refused to get up and leave. He was arrested. Justice Fitzpatrick found that Saw-ses made a conscious decision to breach of the injunction by purposefully obstructing Trans Mountain's operations to protest and voice his opposition to the pipeline project. Justice Fitzpatrick was also sceptical of the prospect of Saw-ses' rehabilitation, to the extent that the very issues that were said to have driven him to committing the offence would not be fully resolved for some time. He was sentenced to 28 days' incarceration.

[50] In Nelson, the contemnor had blocked a road in the area covered by the same injunction that was breached by Ms. Davidson by lying prone on the road with one arm in a hole attached to a buried cable. Justice Thompson in *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCSC 2328 imposed a suspended sentence with 50 hours of community service and 12 months' probation to conform with principles of judicial comity and horizontal stare decisis. The Court of Appeal held that the sentencing judge erred in considering himself bound to another BC Supreme Court sentencing decision, but concluded that the sentence given was nonetheless appropriate with the application of a proper Gladue analysis.

Parity

[51] Ms. Davidson properly pointed out that the principle of parity holds that fine distinctions are inappropriate to lead to differing sentences but when there is a clear distinction in culpability, differing sentences may be appropriate: *R. v. Sidhu*, 2011 BCCA 246 at para. 20.

[52] But Ms. Davidson's conduct cannot be compared to the sentences imposed on first offenders beyond her first offence. As Justice Butler wrote in *Trans Mountain* 156 at para. 53:

in cases of criminal contempt, the concept of parity, as applied to the circumstances of the offence, must take into account the persistence of the "open, continuous and flagrant violation of a court order". The longer the violation continues, the greater the need for general deterrence to preserve the rule of law. The suggestion that the concept of parity depends upon a contemnor's understanding of the severity of the sentence he or she will receive fails to take into account the nature of the offence and relevance of general deterrence as a sentencing principle for that offence.

[53] In *Teal Cedar Products Ltd. v. Rain Forest Flying Squad*, 2022 BCSC 2388 at para. 6, Thompson J. drew a line before which contemnors were treated more leniently than after that line:

6 The question that Mr. Doyles's case poses is where the line on the calendar ought to be drawn. In the tripod/platform cases of Milne (arrested 19 May 2021), Koutsodimos (arrested 1 June 2021), Harvey (arrested 10 June 2021), Hardy and Chen (arrested 11 June 2021), Zaviceanu (arrested 22 June 2021), and Rainville (arrested 8 July 2021), all persons of good character, each was sentenced to four days' jail. In the tripod cases of Walczak (arrested 28 July 2021), Shaw (arrested 21 August 2021), Dejong (arrested 25 August), and Wills (arrested 4 October 2021), again all persons of good character, I judged that enough time had passed since the injunction order and the beginning of enforcement that ten-day sentences were required to fulfill the principles of sentencing for criminal contempt.

Repeat Contemnors

- [54] In *R. v. Bush*, 2006 BCCA 350, at para. 9, Justice Ryan summarized the step-up principle in sentencing as "one that is often used to describe the philosophy that sentences should usually increase in moderate steps since a sudden, large increase in the length of a sentence may interfere with the goal of rehabilitation, if that is the focus of the sentence"
- [55] In *College of Physicians and Surgeons of British Columbia v. Ezzati*, 2021 BCCA 422, at para. 65, Justice Fitch commented that:
- 65 Consistent with the "step-up principle", an offender's unremitting intransigence in the face of past court orders, will generally warrant the imposition of a more severe sentence. But the step-up principle itself has deep roots in the notion of judicial restraint in sentencing: *R. v. McPherson*, 2013 BCCA 551 at para. 16.
- [56] The fact that Ms. Davidson was not sentenced on separate occasions for her criminal contempts does not defeat the step-up principle.
- [57] Repeated or continued instances of criminal contempt have been given increasingly severe sentences in the context of repeated contempt as discussed in *Trans Mountain Pipe* 156 at paras. 52-53 and 60:
- [52] It follows from the nature of criminal contempt that the longer the "open, continuous and flagrant violation of a court order" persists, the more serious the contemptuous acts become. As the circumstances of the offence become more serious, the court will understandably be less inclined to impose a light sentence. This point was made by McEachern C.J.B.C. in *MacMillan Bloedel*. At para. 4, he noted that in cases involving public protests where citizens have disobeyed the law in support of a cause, "sentences have usually been extremely lenient, mainly because, after initial outbursts of enthusiastic defiance, most citizens resile from unlawful conduct." He went on to observe, at para. 8, that judges have found it "necessary from time to time to warn that repeated disobedience might make it necessary to impose more severe sentences." In *MacMillan Bloedel*, as in the present case, the breaches of the injunction persisted for some time and numerous contemnors were sentenced. McEachern C.J.B.C. upheld the imposition of jail sentences (30 to 45 days) and found that the sentences were fit, stating:
- [52] It must also be remembered that custodial sentences were not sprung suddenly upon these Appellants. As I have already mentioned, there were other trials and other unsuspended custodial sentences imposed before these ones, although they were imposed upon persistent offenders. Everyone who deliberately disobeys the law must accept the risk that courts will not continue to impose lenient sentences if they have proved ineffective in preserving the rule of law.

[Emphasis added.]

- [53] In short, in cases of criminal contempt, the concept of parity, as applied to the circumstances of the offence, must take into account the persistence of the "open, continuous and flagrant violation of a court order". The longer the violation continues, the greater the need for general deterrence to preserve the rule of law. The suggestion that the concept of parity depends upon a contemnor's understanding of the severity of the sentence he or she will receive fails to take into account the nature of the offence and relevance of general deterrence as a sentencing principle for that offence.
- [58] The principle of proportionality, however, remains important: see *Interfor v. Paine and Krawczyk*, 2001 BCCA 48 at paras. 20-23. Ms. Krawczyk had a considerable history in engaging in criminal contempt as the Court set out:
- [7] Mrs. Krawczyk has a history of participating in environmental protests. She has persisted in the protests in the face of court orders and has been convicted of criminal contempt in connection with environmental protests on four previous occasions. She was sentenced to 45 days' imprisonment for her first conviction in 1993. In June 2000, she was sentenced to six weeks' imprisonment in addition to three weeks of pre-sentencing custody. In September 2000, she was sentenced to one year of imprisonment but, on appeal, the sentence was reduced by this Court to four months of time served. Finally, in 2003, she was sentenced to six months' imprisonment without credit for four months of pre-sentencing custody.
- [59] In *R. v. Krawczyk*, 2010 BCCA 542 [Krawczyk], leave to appeal to SCC refused, 2006 CanLII 39431, the contemnor appealed her sentence of 10 months' imprisonment imposed on March 5, 2007, for criminal contempt of court for breaching an injunction on three occasions. Mrs. Krawczyk had been released after each of her three arrests upon giving an undertaking to abide by the injunction. The Crown had sought a sentence of 9 to 15 months. In imposing a 10 month sentence, Justice Brown noted the aggravating factors that Mrs. Krawczyk deliberately breached the injunction to obtain publicity for her environmental cause and that she encouraged others to breach the injunction.
- [60] The Court of Appeal held that although the 10-month sentence was high, it was not demonstrably unfit in the circumstances. At least one of the breaches of the injunction occurred after Mrs. Krawczyk had signed an undertaking to the Court by which she promised to comply with the injunction.
- [61] The principle that repeated acts of contempt may lead to more severe sentences is no different for Indigenous offenders who are being sentenced in accordance with the Gladue methodology: see *Trans Mountain Pipeline ULC v. Mivasair*, 2021 BCSC 369 [Trans Mountain 369] and *Trans Mountain Pipeline ULC v. Mivasair*, 2021 BCSC 1127 [Trans Mountain 1127].

- [62] In Trans Mountain 369, Mr. Gallagher was convicted of breaches of an injunction at one of Trans Mountain's work sites on three separate occasions, being November 15, December 2, and December 18, 2019. Justice Fitzpatrick found that the offences did not arise from systemic factors or the background of Mr. Gallagher. Mr. Gallagher's repeated offences led to a more severe sentence of 90 days' incarceration and one-year probation.
- [63] In Trans Mountain 1127, Mr. Leyden was present during a blockade of the Burnaby Terminal driveway by a number of people on December 2, 2019. For some time, he was not personally on the driveway but was observing from afar. At some point, however, Mr. Leyden joined the others on the driveway and remained there for about 27 minutes. Despite the prospect that Mr. Leyden was praying in the road that he was blocking, Fitzpatrick J. found that he had nonetheless chosen to be there in order to register his protest. In respect of the repeat offence, Fitzpatrick J. referred to a number of authorities where contemnors with multiple convictions had received increased sentences: Trans Mountain 1127 at paras. 60-63. Mr. Leyden was sentenced to 45 days' incarceration with one year of probation.

Discussion

a) The Application of Gladue and Ipeelee Principles

[64] In Nelson, at paras. 51-52, Harris J.A. explained:

51 While I acknowledge, again, that an offender need not establish a causal link between the relevant background factors and the commission of the offence, there must be some connection between those factors and the circumstances bringing the offender before the courts, i.e., the offence. Ms. Nelson's personal circumstances and beliefs certainly inform her decision to attend the Fairy Creek protests but there is little in the record to connect those beliefs to her decision to move from observing the logging activities in issue and participating in peaceful protest to engaging in the particular unlawful conduct that gave rise to the contempt charge.

52 Second, Ms. Nelson's reliance on "Indigenous laws" is framed in very general terms and fails to substantiate a connection between those beliefs and the unlawful conduct. In her address to the sentencing judge she said:

There are more legal systems than just the Canadian government. I was obeying St'at'imc law. I was answering a call to action as supporting other nations is fundamental. In traditional law, our Nt'akmen, our ways, are to be considerate, to only take what you need in a way that will not harm that generation or any to follow. That is our most simple teaching that we live by. Respect for all living beings as well as ourselves, all beings, like animate and inanimate, whichever, is how our people have lived.

...

I do not intend to repeat what I did in placing myself at the mercy of officers. I learned what I needed to, what was happening on the grounds of Fairy Creek, as well as how this type of civil disobedience plays an important role in getting a message across when requests, demands and pleas are met with a wall of paperwork.

- [65] The application of Gladue principles to Indigenous environmental protestors was thoroughly examined by Fitzpatrick J. in *Trans Mountain Pipeline ULC v. Mivisair*, 2023 BCSC 925 [Trans Mountain 925]. In that case two Indigenous women, Ms. Thomas and Ms. Pierre, gathered with others at a work site in defiance a court ordered injunction. Despite warnings, the contemnors interfered with Trans Mountain machinery, and both resisted leaving and were arrested.
- [66] Like Ms. Davidson, Ms. Thomas asserted that she was involved in her community and was particularly involved in what she described as protecting the traditional lands and waters of her people. She stated that it was her duty, as an Indigenous woman, to protect the integrity of the land and that she had an obligation to defend the land, title, and rights of her people and had been "chosen" by Elders and others in her community to become involved in protecting the traditional lands and waters of her people.
- [67] Ms. Pierre gave evidence that she had been involved in her community in terms of volunteering on various matters, including participating in what she described as "Indigenous resistance" since the late 1990s. She referred to Indigenous laws and described that she prayed for the protection of the land and waters not only in her own territory, but also in another territory. Ms. Pierre stated that she had a duty to protect the integrity of the land: *Trans Mountain 925* at para. 39.
- [68] Justice Fitzpatrick accepted that the source of the Contemnors' motivations or belief system was different from non-Indigenous contemnors but concluded that the implementation and outcome of all those beliefs--breaches of the injunction--all essentially arose from a personal desire, if not duty (moral or otherwise), to protect the environment. Ms. Thomas was sentenced to a 32-day jail sentence and Ms. Pierre to 40-day Conditional Sentence Order to be served at home under strict conditions.
- [69] The most analogous sentencing authorities to Ms. Davidson's case are *Trans Mountain 369*, *Trans Mountain 1127*, *Trans Mountain 925*, which I have discussed above.
- [70] In *Trans Mountain 369*, the contemnor was an Indigenous person and was sentenced for three instances of criminal contempt of court. At para. 59, Fitzpatrick J. acknowledged:
59. I accept of course that the conviction here did not arise from any violent offence. Mr. Gallagher's offences here were, however, serious. They were made more serious by the fact that these were repeat offences on Mr. Gallagher's part, who did not seem deterred by his previous conviction and the knowledge that other people had been sent to jail for similar actions. All of these circumstances continue to point to the need for this Court to denounce and deter such behavior, both generally and specifically, as the authorities above indicate.

[71] Also in Trans Mountain 369, at para. 63, Fitzpatrick J. found:

63 It is apparent here that the offences did not arise from systemic factors or the background of Mr. Gallagher, although such is not strictly necessary in applying Gladue principles and s. 718.2(e) of the Criminal Code. While he has clearly faced difficult circumstances in his past, it is commendable that Mr. Gallagher has risen above those difficulties. Mr. Gallagher has achieved sobriety and has chosen to be fully engaged in his communities, particularly his Aboriginal communities, where he provides significant support for others.

[Emphasis added.]

[72] Finally, in Trans Mountain 369 at paras. 67-68, Fitzpatrick J. concluded:

67 I would repeat my comments found in the Previous Sentencing Reasons:

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

[123] I would venture to say that all of the protestors who the police arrested were fervent in their passion toward protecting the environment and their view that Trans Mountain was acting in a fashion that threatened the environment. Passion for a cause does not justify giving an offender a pass from the consequences of their illegal conduct.

[124] In Peter Kiewit Sons Co., Justice B. Brown stated:

[16] I have no doubt that the individuals before me sincerely believe that their cause was just. However, we have many individuals and groups in society who are passionately committed to what they view as just causes. Poverty, homelessness, health care immediately come to mind. If each individual or group chose to break the law and breach court orders to enforce their view of a correct response to a just cause, our democratic society would quickly fail. This is not a frivolous or theoretical concern. As the Newfoundland Supreme Court said in the Health Care case which I have quoted, our courts deal every day with parties who lose; who feel passionately that they should not have to obey the orders of the courts. When a group of citizens chooses to publicly defy the order of the court, they encourage each individual to disobey court orders which they do not like. It is this defiance which undermines the rule of law and brings the administration of justice into disrepute.

[125] Indigenous issues in our society have clearly gained some prominence in the public discourse. However, that does not mean that Aboriginal citizens of Canada have some elevated ability to disregard court orders when they feel like it, or by asserting that they had "no choice" but to act otherwise under Aboriginal laws or traditions. Clearly, Aboriginal people, including the Contemnors, have choice in that respect. Nor does it mean that they have some greater ability to escape the consequences of illegal behavior.

68 While certainly relevant and within the consideration of the Court, I do not find that Mr. Gallagher's status as an Aboriginal person shifts the primary objectives from denunciation and deterrence in this case. In my view, Mr. Gallagher's actions stand on the same plain as protestors already arrested, charged and convicted in this matter, subject to a consideration of course of his relevant individual circumstances.

[73] In *Trans Mountain* 925 at para. 77, Fitzpatrick J. referred to her decision in *Trans Mountain* 369 as follows:

[77] I addressed Mr. Gallagher's similar rationale for breaching the Injunction at trial in *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCSC 2190 at paras. 67-68 and, at para. 118, rejected that such views could form a defence to the prosecution for criminal contempt. Also, such views were rejected as bearing on Mr. Gallagher's moral culpability in relation to his sentencing arising from his three later breaches of the Injunction: *Trans Mountain Pipeline ULC v. Mivasair*, 2021 BCSC 369 at paras. 75-76 and 95.

[74] As in the case of Ms. Davidson, in *Trans Mountain* 925 at para. 91, Fitzpatrick J. wrote:

91 The essence of the Contemnors' argument is that they are Indigenous, they have duties to the land and water, they hold strong views as to what they should do to protect the environment and, that in breaching the law based on those views as to how to protect the lands and waters, they are entitled to a lesser sentence as a Gladue factor.

[75] Justice Fitzpatrick proceeded to reason as follow at paras. 96-104:

96 I accept that the Contemnors are passionate about their Indigenous communities and also passionate about their belief system toward protecting the lands and waters.

97 However, I do not see that this belief system is materially different than the beliefs or views of most other Canadians, including British Columbians, and those whose ancestors have been deeply connected to Canada and its lands and waters for many generations. In BC, there are laws and regulatory schemes, both federal and provincial, that reflect the public's view that protection of the environment (our lands and waters) is important to our society generally -- which includes both our Indigenous citizens and non-Indigenous citizens. Those public views generally have informed the development of the laws that govern the approval of development projects, including *Trans Mountain's* pipeline project.

98 The Contemnors do not suggest that they are immune from these laws, particularly since that proposition was advanced by them earlier in these proceedings and rejected. However, they do assert that they bear a lesser degree of responsibility by reason of holding their beliefs. However, these are the same beliefs that were held by each and every contemnor addressed in these proceedings. These are also similar to the personal and passionate beliefs of other contemnors in other proceedings that were said to have "driven" these persons to breach the law.

99 Our courts have stated numerous times that personal beliefs do not reduce the moral culpability of an offender: *MacMillan Bloedel Ltd. v. Brown* (1994), 92 B.C.L.R. (2d) 1 (C.A.) at para. 45; *Peter Kiewit Sons Co. v. Perry*, 2007 BCSC 305 at para. 16, both as referenced in *Trans Mountain BCCA* 2023 at paras. 74-78.

100 The Contemnors attempt to draw a distinction between themselves and the other non-Indigenous contemnors who want to protect the environment, by reason of their status as Indigenous persons and their beliefs as Indigenous people.

101 I accept that the source of the Contemnors' motivations or belief system is different than non-Indigenous contemnors, but the implementation and outcome of all those beliefs -- breaches of the Injunction -- all essentially arose from a desire, if not duty (moral or otherwise), to protect the environment -- ie. the lands and waters that we all enjoy. And, they arose from the personal choices of the individuals as to how they choose to act on those overarching beliefs.

102 In my view, to accord leniency to only Indigenous persons in these types of scenarios, based on it being a Gladue factor or otherwise, has the very real potential to undermine the important premise of sentencing in criminal contempt proceedings -- denunciation and deterrence. Such an approach will be not to deter such behavior, but encourage more breaches. If this is to be the approach, the potential result will be that Indigenous persons will be more inclined to breach court orders, knowing that, on sentencing, they will be granted a lesser sentence from what would otherwise be the appropriate punishment -- all arising simply because of their Indigenous beliefs that they want to protect the land and water.

103 The Contemnors seek to lessen their responsibility in terms of a deliberate breach of the Injunction because of their personal beliefs, one shared with many of their fellow Canadians.

104 Such an approach also has the real potential to do real harm to people and commercial interests that rely on the rule of law and the courts that protect the rule of law, in terms of allowing law-abiding businesses to operate without illegal interference. This is not an idle concern, in terms of the knock-on effects from interruptions of business operations in that they affect not only the companies involved, but employees and others who rely on those operations for their livelihoods and to support themselves and their families.

[76] Ms. Davidson gave evidence of her beliefs in Kwakwaka'wakw laws, customs, and traditions, but identified no Indigenous law that permitted, let alone compelled the contravention of the orders of this Court. I repeat what I said in my Conviction Reasons at para. 78:

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.

- [77] The substantive and relevant Gladue factors asserted by Ms. Davidson include the intergenerational impact of relatives having attended residential schools, the removal of children from homes, and an upbringing that resulted in some separation from her community, culture, language, and spirituality.
- [78] While Ms. Davidson referred me to the decision of the Court of Appeal for Ontario in *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534, I do not consider the unique facts of that case to be of assistance to her. At paras. 57-63, Justice MacPherson wrote:
- [57] Although Gladue was focused primarily on the serious problem of excessive imprisonment of aboriginal peoples, the case in a broader sense draws attention to the state of the justice system's engagement with Canada's First Nations. I note three factors in particular that were highlighted in Gladue: the estrangement of aboriginal peoples from the Canadian justice system, the impact of years of dislocation and whether imprisonment would be meaningful to the community of which the offender is a member. Those factors were all at stake in this case.
- [58] First, while the appellants did not contest the injunctions and admitted that they were in breach of the orders, the enforcement of the injunctions by imprisonment could not help but emphasize the estrangement of this community and aboriginal peoples generally from the justice system. The use of incarceration as the first response to breach of the injunction dramatically marginalizes the significance of aboriginal law and aboriginal rights. Second, imposing a lengthy term of imprisonment on a first offender fails to recognize the impact of years of dislocation. The fact that persons of the stature of Mr. Lovelace and Chief Sherman saw no meaningful avenues of redress within the justice system and felt driven to take these drastic measures demonstrates the impact of years of dislocation and the other problems discussed in Gladue, at paras. 67-69. Finally, imprisonment, far from being a meaningful sanction for the community, had the effect of pitting the community against the justice system. That the court found it necessary to imprison the leaders of the AAFN simply serves to emphasize the gulf between the dominant culture's sense of justice and this First Nation's sense of justice.
- [59] For these reasons, I cannot agree that the principles underlying the Gladue decision have no application in the civil contempt context. Rather, as in Gladue, the court must look at the unique systemic or background factors at play in this case.
- [60] What then are the unique systemic or background factors that played a part in bringing the AAFN and two of its leaders before the courts to be sentenced for contempt? The first background factor is that there is an existing land-claim negotiation between the Algonquin Nation and Ontario. In *Haida Nation*, the Supreme Court of Canada held, at pp. 532-36 S.C.R., that when the Crown has knowledge that a First Nation community has claimed rights or title in respect of a territory, it must consult the affected community and, where indicated, must accommodate aboriginal concerns before approving any activity that could

have an impact on the claimed rights or title. In *Taku River*, at p. 567 S.C.R., the Supreme Court also held that the fact that a land claim has been accepted by the Crown for negotiation establishes a *prima facie* case that the claim has merit. Ontario accepted the Algonquin land claim for negotiation in 1991: see *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, [2007] O.J. No. 3360 (S.C.J.), at para. 25. *Haida Nation* and *Taku River* together instruct that the existing, and as yet unresolved, Algonquin land claim -- the basis for the AAFN's protest and blockade -- cannot simply be dismissed as illusory, flawed or weak.

- [61] The second background factor that played a part in bringing the appellants before the courts is the nature and content of Ontario's Mining Act. It is a remarkably sweeping law. It establishes a "free entry" system whereby all Crown lands, including those subject to aboriginal land claims, are open for prospecting and staking, without any consultation or permitting required. Anyone with a prospector's licence may stake claims and prospect for minerals on any Crown land. Once a claim has been staked, in accordance with the Act, the Mining Recorder must record the claim. There is nothing in the Mining Act about considering aboriginal land claims or interests.
- [62] The intersection of these two background circumstances creates an obvious problem, indeed the problem that lies at the heart of this case. What Frontenac wants to do on Crown land -- staking and exploration -- is legal under the Mining Act. However, the appellants' response, although in contempt of two court orders, is grounded, at a minimum, in a respectable interpretation of s. 35 of the Constitution Act, 1982 and several recent decisions of the Supreme Court of Canada. In summary, the appellants' character and circumstances, their actual conduct, and the difficult legal context within which it occurred, should have counted as significant mitigation when sentences were imposed on them. The circumstances of the offences and these aboriginal offenders are such that, in accordance with the Gladue principles, sentences of incarceration were inappropriate.
- [63] The third reason for concluding that the sentences imposed on the appellants were too harsh is that they are considerably more severe than the sentences imposed in other protest/blockade cases...
- [79] In Ms. Davidson's circumstances, she was protesting on land that was not within her First Nation, and there was no "sweeping legislation" in issue.
- [80] In result, I find that, despite Ms. Davidson's history, her offences themselves did not arise from the systemic factors of her background, whether as their cause or otherwise. In coming to this conclusion, I have considered all of the unique systemic and background factors pertinent to Ms. Davidson that have been properly put before me.

- [81] Ms. Davidson's Indigenous status does not shift the primary objectives of denunciation and deterrence in her case. The same was true, for example, of Ms. Thomas and Ms. Pierre in *Trans Mountain* 925 at paras. 100-102, Mr. Bige in *Trans Mountain* 1512 at para. 96, and Mr. Gallagher in *Trans Mountain* 369 at para. 68.
- [82] I adopt the view of Fitzpatrick J. that "to accord leniency to only Indigenous persons in these types of scenarios, based on it being a Gladue factor or otherwise, has the very real potential to undermine the important premise of sentencing in criminal contempt proceedings -- denunciation and deterrence. Such an approach will be not to deter such behavior, but encourage more breaches": *Trans Mountain* 925 at para. 102.
- b) Appropriate Sanctions for Ms. Davidson's Contemptuous Conduct
- i. Mitigating Factors asserted by Ms. Davidson
- [83] Ms. Davidson contends, that as she was bound by very strict bail conditions over the protracted period of her offences, including curfews and restrictions on travel, that this should lead to a lesser sentence. The Crown responded by stating that the strict bail conditions were largely imposed after Ms. Davidson had been arrested five times for her activities.
- [84] The Crown additionally argued that the cases upon which Ms. Davidson relies for her submissions, were cases where release conditions were actually complied with. Conversely, the conduct for which I am to sentence Ms. Davidson involves the breach of court orders, including her admitted breaches of her area restriction, and house arrest provisions while on judicial interim release.
- [85] I am unable to accept Ms. Davidson's submission, predominantly because Ms. Davidson failed to adhere to various of the very conditions she now relies on as mitigating factors. I do recognize, however, that Ms. Davidson has, to a considerable extent, engaged in a positive rehabilitation process.
- ii Aggravating Factors Asserted by the Crown
- [86] Ms. Davidson opposed all the counts against her and pleaded not guilty to each.
- [87] Ms. Davidson says that her conduct was non-violent. While this is true, she endangered herself and others by her conduct. Fortunately, no one, including herself was injured, but Ms. Davidson conceded that this was an aggravating sentencing factor.
- [88] Ms. Davidson's conduct was part of what Wood J., as he then was, described in *Bridges* as an "organized, large scale, deliberate defiance of an order of the Court": at para. 11. Similar to Ms. Krawczyk, Ms. Davidson used her breaches and arrest to obtain publicity for her cause.
- [89] I observe as well that Ms. Davidson engaged in seven instances of criminal contempt, being four more than did Mr. Bige in *Trans Mountain* 1512, which I find to be an apt analog.

c) Conditional Sentence

[90] One of Ms. Davidson's alternative arguments was for a conditional sentence. Such a sentence was described in *R. v. Proulx*, 2000 SCC 5 at para. 100, as capable of achieving "both punitive and restorative objectives". Chief Justice Lamer explained:

To the extent that both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration. Where the need for punishment is particularly pressing, and there is little opportunity to achieve any restorative objectives, incarceration will likely be the more attractive sanction. However, even where restorative objectives cannot be readily satisfied, a conditional sentence will be preferable to incarceration in cases where a conditional sentence can achieve the objectives of denunciation and deterrence as effectively as incarceration. This follows from the principle of restraint in s. 718.2(d) and (e), which militates in favour of alternatives to incarceration where appropriate in the circumstances.

[91] As I have already said, Ms. Davidson has shown herself incapable or unwilling to abide by conditions in the past. In the result, I have concluded that a conditional sentence would be inappropriate.

d) Probation

[92] In the alternative to the sanctions that she proposed, which I will discuss below, Ms. Davidson submitted that she be given a term of probation for the first count, a conditional sentence of 10 days' house arrest for the third offence, and a conditional sentence of 30 days house arrest for the other five offences to be served concurrently with the sanction for the third offence.

[93] As I will explain, the repeated and deliberate breaches of the Injunction and of her release conditions, require sanctions that are greater than probation or house arrest, and certainly must be greater than the periods of house arrest proposed by Ms. Davidson.

e) Concurrent or Consecutive Sanctions

[94] In *R. v. Bremner*, 2000 BCCA 345, the offender was convicted of four indecent assaults for offences occurring in the late 1960s or early 1970s. The offences were committed when the offender was in his early twenties and was an officer in a quasi-naval organization. The complainants were Sea Cadets between the ages of 13 to 16 and no violence was used. The offender subsequently married and had two grown sons. He gained stable employment and developed no criminal record.

[95] The offender received four concurrent sentences resulting in 18 months of incarceration. On appeal, his sentence was reduced to a conditional sentence, with conditions to be agreed to by the offender and the Crown, on the basis that such a sentence would satisfy the principles of deterrence and denunciation.

- [96] In *R. v. Li*, 2009 BCCA 85, Justice D.M. Smith, for a unanimous Court, held that the test for the imposition of a consecutive or concurrent sentence is "whether the acts constituting the offence were part of a linked series of acts within a single endeavour": at para. 42.
- [97] I find that the seven counts of contempt for which I convicted Ms. Davidson were not part of a linked series of acts within a single endeavour, but were instead separate acts, deliberately committed over a period of eight months. In the result, I find that Ms. Davidson's sanctions should be consecutive rather than concurrent.
- f) Sanctions for Ms. Davidson
- [98] I accept that Ms. Davidson is passionate about her Indigenous community and about her beliefs toward protecting the lands, waters, and trees. Moreover, I acknowledge that Ms. Davidson, her family, and her community have endured an array of what, in the context of the matter before me, are referred to as systemic and background factors. The evidence before me demonstrates that these factors have impacted the life and outlooks of Ms. Davidson in innumerable ways. These systemic and background factors, however, do not give Ms. Davidson licence to disobey the orders of this Court and her promises to it. While I am cognizant that a causal link need not be established, I find that the offences did not arise from the systemic factors of Ms. Davidson's background.
- [99] I have exercised as much restraint as I feel I can in arriving at individualized sanctions for Ms. Davidson.
- [100] The first count of contempt for which I convicted Ms. Davidson occurred on May 18, 2021. I found that, on this occasion, Ms. Davidson obstructed a public roadway by chaining herself to a gate in defiance of the Injunction. I found that in so doing, 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.
- [101] For this count, the Crown seeks a sanction of a \$2,500 fine or 75 hours of community work service.
- [102] For this first offence I am prepared to accept Ms. Davidson's submission that an appropriate sanction is 75 hours of community work service through the Campbell River Community Corrections office, which I find should be completed within 18 months of this decision.
- [103] The second count of contempt for which I found Ms. Davidson guilty occurred on June 23, 2021, when she deliberately went into the Injunction area with a group of people with the intention of defying the conditions of her release from her May 18, 2021, arrest. I found that she acted with the intention of defying the conditions of her release, thus bringing the administration of justice into disrepute.
- [104] For this second offence, Ms. Davidson submitted that an appropriate sanction would be the two days she served in custody after her arrest.

- [105] The Crown submitted that the appropriate sanction for this count would be a jail term of five days.
- [106] In my view the sanction proposed by the Crown for the second count is a fitting one, and one that I therefore impose on Ms. Davidson.
- [107] The third count of contempt for which I convicted Ms. Davidson occurred on June 25, 2021 in what I found to be deliberate and open defiance of the Injunction, that she said was motivated by the desire to send a message.
- [108] On this occasion she 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.
- [109] For this count, Ms. Davidson submitted that an appropriate sanction would be the five days she served in custody after her arrest.
- [110] The Crown submitted that the appropriate sanction for this count would be a jail term of seven days, escalating from the sanction for the second count on what I infer is the step-up principle.
- [111] In my view, the sanction proposed by the Crown for the third count is a fitting one, and one that I therefore impose on Ms. Davidson.
- [112] The fourth count of contempt for which I convicted Ms. Davidson occurred on August 10, 2021 when, as part of a large group, she returned to the Injunction area for an extended period of time, playing a drum and distributing food in the continuous and flagrant breach of both the terms of the Injunction and the terms of her earlier release.
- [113] For this fourth offence, Ms. Davidson submitted that an appropriate sanction would be the two days she served in custody after her arrest.
- [114] The Crown submitted that the appropriate sanction for this count would be a jail term of seven days, the same term proposed for the third count.
- [115] It is my view that, based upon the step-up principle, Ms. Davidson's recurring breaches require some escalation of the resulting sanction, and I therefore impose a jail term of nine days for this count.
- [116] The fifth count of contempt for which I convicted Ms. Davidson occurred on November 28, 2021, when Ms. Davidson again deliberately returned to the Injunction area in the company of Mr. Reid and in plain sight of others in breach of both the Injunction and the terms of her earlier release, in order to drop of food for other protestors.

- [117] I found that Ms. Davidson knew that her actions that day at the Roadside Camp would be public, and that she was more than reckless as to whether the authority of the Court would be brought into contempt. She acknowledged that "we had gotten the release order changed with Justice Thompson, so I could drive through to get to Elder Bill's house". I rejected her evidence that she was under the belief that she was authorized to travel through the Injunction Area to Bill Jones' home, a few kilometres away from the Roadside Camp.
- [118] For this fifth offence, Ms. Davidson submitted that an appropriate sanction would be the two days she served in custody after her arrest.
- [119] The Crown submitted that the appropriate sanction for this count would also be a jail term of seven days, but for the same reason that I imposed an increasing sanction for the fourth count, I impose a jail term of 11 days for this count.
- [120] The sixth count of contempt for which I convicted Ms. Davidson occurred on January 15, 2022, when Ms. Davidson left her residence and entered the Injunction area, together with Mr. Reid joining a larger group, understanding that in doing so, she was flagrantly and continuously disobeying her release orders.
- [121] For this sixth offence, Ms. Davidson submitted that an appropriate sanction would be the one day she served in custody after her arrest.
- [122] The Crown submitted that the appropriate sanction for this count would be a jail term of 10 days, but applying consistent reasoning, I find that the appropriate sanction for this count is a jail term of 13 days.
- [123] The seventh count of contempt for which I convicted Ms. Davidson occurred on January 28, 2022, when she was inside the Injunction area for hours in breach of the Injunction and her earlier release conditions. Ms. Davidson admitted that she was then aware that it was very important to follow precisely what the release conditions required, and that she had made a personal promise to Thompson J. that she would do so.
- [124] As with the January 15, 2022 breach, this was not the product of a momentary lapse of judgment. She agreed that she advised a journalist that she made a considered choice to put her search for Kevin Bear Henry before her observance of her release order.
- [125] For this seventh offence, Ms. Davidson submitted that an appropriate sanction would be the one day she has appeared today.
- [126] The Crown submitted that the appropriate sanction for this count would be a jail term of 10 days, but again applying consistent reasoning, I find that the appropriate sanction for this count is a jail term of 15 days.

Time Served

[127] Against this total of 60 days' incarceration, the Crown concedes, and I agree that Ms. Davidson is entitled to 12 days' credit for the time she served in pretrial custody.

g) Suspension of Ms. Davidson's Sentences

[128] In respect of the prospect of a suspended sentence, Ms. Davidson referred me to the unreported decisions of Chief Justice McEachern in *Western Forest Products v. Collinson et al* (6 December 1985), Vancouver C854987 (B.C.S.C.) and *Frank Beban Logging Ltd. V. Collinson* (6 December 1985), Vancouver C8549788 (B.C.S.C.) (together, the "Collinson cases"). where eight Haida individuals were sentenced to incarceration for five months each for what would appear to be single counts of criminal contempt of court for breaching the terms of an injunction, blocking a logging road as part of a protest over the ownership of the area of the injunction by the Haida. Having done so, Chief Justice McEachern found that there was "no earthly point to be served" in sending any of the contemnors to jail, and so he suspended the sentences, provided that the contemnors did not to return to the injunction area for six months.

[129] Rule 22-8(15) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 permits me to direct that Ms. Davidson's sentence be suspended as Chief Justice McEachern did in the Collinson cases.

[130] Given the protracted period of Ms. Davidson's misconduct and her repeated and deliberate acts of contempt, I find that it would be improper to suspend her sentences.

h) The Totality Principle

[131] Although the offences upon which Ms. Davidson committed are common law, as opposed to Criminal Code offences, I find that the provisions of s. 718.2(c) of the Criminal Code to be instructive. That section provides that:

A court that imposes a sentence shall also take into consideration the following principles:

[]

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[132] Section 718.2(c) of the Criminal Code was considered by the Supreme Court of Canada in *R. v. M.* (C.A.), [1996] 1 S.C.R. 500 at para. 42, where Chief Justice Lamer, for the Court, wrote:

42 In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D. A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".

Clayton Ruby articulates the principle in the following terms in his treatise, *Sentencing*, *supra*, at pp. 44-45:

The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects.

[133] This passage from *M. (C.A.)* was relied upon by Justice Bennett for the Court of Appeal in *R. v. Anderson*, 2020 BCCA 297 at para. 88.

[134] I discussed the circumstances that led to a ten-month sentence for Ms. Krawczyk above. Like Ms. Davidson, Ms. Krawczyk was released after her arrests on undertakings to abide by the injunction. I found that Ms. Davidson's conduct in her continuing breaches of the Injunction and her bail conditions was public and deliberate.

[135] The total time to be served for my consecutive sentences is 48 days, in addition to the time Ms. Davidson spent in custody following some of her arrests. It is my view that such a period of incarceration, in addition to her required community service does not offend the totality principle.

House Arrest

[136] Ms. Davidson proposed that she be given a period of house arrest for 30 days on conditions similar to some of her prior bail conditions, including that:

- a) She remain at her residence in New Vancouver at all times other than:
 - i) Between the hours of 12:00 p.m. and 3:00 p.m. on Wednesdays and Saturdays to attend to personal needs; or,
 - ii) While attending an emergency medical appointment, or when travelling directly to, or returning directly from an emergency medical appointment.

- b) She must present herself at the door of her residence immediately, and in any event within five minutes, if any peace officer attends at her residence to verify her compliance with this order; and,
- c) If she breaches any term of the order she is to be arrested and brought to Nanaimo Supreme Court to appear before me or another Justice as designated by the Court.

[137] Ms. Davidson argued that subjecting her to traditional incarceration would impose particular hardship upon her due to the following personal circumstances:

- a) As one of five elected Band Councillors of the Da'naxda'xw First Nation, she would be unable to participate in the governance of her Nation if incarcerated due to a lack of access to computing technology; and,
- b) As the Deputy Leader of the Green Party of Canada, she attends frequent meetings with elected officials, party officials, stakeholders, and members of the public, and would be unable to do so if incarcerated due to a lack of access to computing technology.

[138] In *Trans Mountain 925*, Fitzpatrick J. was asked to impose conditional sentences on the two contemnors. With respect to Ms. Thomas, Fitzpatrick J. declined to do so, stating at paras. 153-159:

153 I accept that the imposition of a CSO is available to me in these circumstances: Wells at para. 35. As noted in *R. v. Proulx*, 2000 SCC 5 at paras. 105-107, a CSO can be seen as punitive and onerous and can be designed to meet the sentencing objectives of deterrence and denunciation (see also Wells at paras. 32-33; *R. v. Bremner*, 2000 BCCA 345 at para. 38).

154 CSOs are not unheard of in these proceedings or criminal contempt sentencings generally. As the Crown notes, CSOs have been imposed before in this proceeding, given health reasons that may have been exacerbated by a jail sentence: *Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 2589 at paras. 11 and 29 and *Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 2590 at para. 2. I would add that these breaches occurred in the very early days of the Injunction.

155 In other cases, CSOs have been rejected on the basis of health concerns as an insufficient response to the breach of the Injunction in certain circumstances: see, for example, the discussion in *Dr. Takaro's prosecution at Trans Mountain Pipeline ULC v. Mivasair*, 2022 BCSC 1034 at paras. 75-81, discussing *Trans Mountain Pipeline ULC v. Mivasair*, 2021 BCSC 1127 at paras. 67-82.

156 In addition, some contemnors have advanced arguments against jail sentences, pointing to their care of others in the community. Mr. Gallagher had an elderly mother who he cared for but that circumstance was not put forward to support a CSO: *Trans Mountain Pipeline ULC v. Mivasair*, 2021 BCSC 369 at para. 25. Similarly, Ruth Walmsley was the primary caregiver for her mother but she also received a jail sentence: *Trans Mountain Pipeline ULC v. Mivasair*, 2022 BCSC 323 at para. 39.

157 As the Crown notes, courts have unfortunately often considered an offender's caregiving responsibilities in terms of potential jail sentences in a variety of criminal sentencing hearings. Many judges have expressed the view that impacts of incarceration very often extend not only to the offender, but others in their lives, and that it is an unavoidable consequence of criminal behavior. In that respect, I have considered *R. v. Sandher*, 2008 BCSC 263 at paras. 27 and 57; *R. v. Newson*, 2008 BCCA 28 at para. 18; *R. v. Tran*, 2007 BCCA 405 at para. 36; *R. v. Herrell*, 2014 BCCA 114 at para. 24; and *R. v. Mackay*, 2019 BCSC 1112 at paras. 60-65.

158 In *Newson*, the court stated:

[18] ... It is often the case that a parent's criminal offending creates hardship for members of the family. That children are often deprived of parental guidance and care when a parent is incarcerated is inevitable in cases of serious offending by a parent. Here, even upon his counsel's submissions, Mr. Newson faces a significant period of incarceration. Separation from his daughter is one of the hard realities of the situation Mr. Newson has created, and not one that may be cured in the circumstances before us. I would note, further, that it is not inevitable that Mr. Newson's daughter must reside in an inappropriate situation, if that be the case, as other avenues for assistance are available. For these reasons, I would not allow the application to adduce fresh evidence.

159 I agree that the consequences of a jail sentence to Ms. Thomas' daughter and granddaughter are unfortunate. However, I do not consider that is a sufficient reason to justify a CSO. Like other single mothers, Ms. Thomas' daughter will have to rely on support, perhaps from others in the community or even other family members, whose availability for that reason was not mentioned by Ms. Thomas.

[139] With respect to Ms. Pierre, Fitzpatrick J. did impose a conditional sentence, reasoning at paras. 169-172:

169 However, unlike Ms. Thomas' situation regarding her granddaughter, Ms. Pierre's childcare issues more readily support an imposition of a CSO. As stated above, Ms. Pierre is a single mother who homeschools her child. I am advised from the Gladue report and Ms. Pierre's counsel that the child is seeking trauma treatment, although the reasons for that are not adequately explained by the report, and that the homeschooling is related to some past family trauma in relation to the child. The only alternatives for child care would involve the child moving away from home, either to Vancouver to stay with Ms. Pierre's mother or to Prince George to stay with the child's biological father.

170 In that respect, Ms. Pierre's incarceration would not only have an effect only on the child, such as was commented on in *Newson*. Rather, the effect would also be on Ms. Pierre in terms of being a mother to a child with serious ongoing mental health issues. This scenario also raises a specific Gladue factor in terms of the historical separation of children from their Indigenous family supports.

171 The terms of the proposed CSO for Ms. Pierre are strict and would impose house arrest for the entire 40-day period. In addition to the mandatory requirements, the proposed CSO would prohibit contact with the other Kamloops offenders; prohibit any actions to incite or encourage further breaches of the Injunction; and, prohibit any attendance at Trans Mountain's worksites. It would allow attendance outside of Ms. Pierre's home only for such matters like health emergencies or evacuation orders and, with the permission of her conditional sentence supervisor, attendance to obtain financial support or for educational purposes (and only if there are no remote courses available).

172 As with the other convictions in this proceeding, including those for Indigenous offenders, Ms. Pierre's offence was serious and calls for the Court to denounce and deter her behavior, both generally and specifically. I accept that a CSO is appropriate and sufficient in Ms. Pierre's circumstances to meet the sentencing objectives, however, I only do so on the basis of the exceptional circumstances relating to her and her child, as set out above.

[140] I do not accept that the hardships asserted by Ms. Davidson are personal hardships that warrant a non-custodial sentence.

[141] First, Ms. Davidson is one of five band councillors, and the remaining four band councillors will surely be able carry on the business of the band if Ms. Davidson is unable to participate.

[142] Second, Ms. Davidson's position in the Green Party of Canada is an executive role, and while those wishing to interact with her will generally be unable to do so while she is in custody, there are others in the party who can respond to such individuals. Moreover, even if Ms. Davidson was under house arrest, she would generally be unable to attend in person meetings with elected officials, party officials, stakeholders, and members of the public.

[143] While Ms. Davidson has positions of leadership and prominence, this is no reason to treat her differently from other contemnors.

Conclusion

[144] Ms. Davidson is sentenced to 75 hours of community work service through the Campbell River Community Corrections office to be completed within 18 months of this decision, together with a total of 60 days' incarceration, to be reduced by 12 days' credit for the time she served in pretrial custody.

"The Honourable Chief Justice Hinkson"

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