

CANADA / JUDGMENT

Trans Mountain Pipeline ULC v. Mivasair

2020 BCSC 1297

COURT

Supreme Court of British Columbia

DECIDED

31 August 2020

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2020 BCSC 1297 Trans Mountain Pipeline ULC v. Mivasair

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Trans Mountain Pipeline ULC v. Mivasair,

2020 BCSC 1297

Date: 20200831

Docket: S183541

Registry: Vancouver

Between:

Trans Mountain Pipeline ULC

Plaintiff

And

David Mivasair, Bina Salimath, Mia Nissen, Corey Skinner (aka Cory Skinner), Uni Urchin (aka Jean Escueta), Arthur Brociner (aka Artur Brociner),

Karl Perrin, Yvon Raoul, Earle Peach, Sandra Ang, Reuben Garbanzo (aka Robert Abress), Gordon Cornwall, Thomas Chan, Laurel Dykstra,

Rudi Leibik (aka Ruth Leibik), Linda Hutchings, John Doe, Jane Doe, and Persons Unknown

Defendants

And

Attorney General of British Columbia

Intervenor

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

(Gallagher/Bige/Leyden - Stay / Sentencing Procedures)

Counsel for the Crown:

M.R. Ruttan

Counsel for the Defendant, James Leyden:

D. Fai

Counsel for the Defendants, Justin Bige and Stacy Gallagher:

S.J. Rauch

Place and Date of Hearing:

Vancouver, B.C.

August 4, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 31, 2020

INTRODUCTION

- [1] In July/September 2019, Justice Affleck conducted a trial to address allegations of contempt against Stacy Gallagher, Justin Bige and James Leyden. The Crown alleged that they were in criminal contempt of court in respect of Affleck J.'s order of March 15, 2018 arising from their actions on August 14, 2018 (re Mr. Bige) and August 21, 2018 (re Mr. Gallagher and Mr. Leyden).
- [1] On October 25, 2019, Affleck J. found Mr. Gallagher, Mr. Bige and Mr. Leyden (collectively, the "Contemnors") guilty of criminal contempt of court pursuant to oral reasons issued on that date.
- [2] On November 5, 2019 and before a sentence was imposed, Affleck J. retired from this Court. His retirement was required pursuant to the Judges Act, R.S.C. 1985, c. J-1 since he had reached age 75. On November 18, 2019, Chief Justice Hinkson appointed me to preside over the ongoing trials in this action and any new matters that may arise in this proceeding. That includes the completion of the trial with respect to the Contemnors as it relates to their sentencing.

- [3] Mr. Gallagher and Mr. Bige seek various relief on this application in advance of the sentencing hearing. They generally describe that the "interruption" caused by the change in judges has the potential to result in an unfair trial as the matter proceeds to sentencing. They seek a judicial stay of proceedings, an order that Affleck J. return to his duties or an order that this Court commence a new trial. In the alternative, they seek certain directions with respect to procedures at the sentencing hearing. Mr. Leyden supports the relief sought in the application, save that I order that Affleck J. return to his duties.
- [4] There have been challenges in scheduling the sentencing hearing. The original dates were set for March 2020; however, the hearing was adjourned at the request of defence counsel to the currently scheduled hearing commencing September 15, 2020. The Crown and defence were both in substantial agreement that, with the later hearing dates, the Court could also then address any further conviction of Mr. Gallagher and Mr. Leyden arising from a trial scheduled for mid-August 2020.
- [5] The later trial with respect to Mr. Leyden did not proceed; the trial has been rescheduled to early November 2020. The trial did proceed with respect to Mr. Gallagher but only completed on August 21, 2020, a result that will not allow the Court to deliver reasons in time for the currently sentencing hearing.
- [6] Accordingly, the scheduled sentencing hearing dates of September 15-18, 2020 will now only address the Contemnors' conviction by Affleck J. from October 2019.

JURISDICTION OF THE COURT TO PROCEED

- [7] As stated above, Affleck J.'s retirement from this Court arose from the mandatory provisions of the Judges Act. Mr. Bige suggests that it was "irresponsible" of Affleck J. to retire, demonstrating a complete lack of understanding as to the basis upon which he did so. Despite Mr. Gallagher/Mr. Bige seeking an order that the now Honourable K. Affleck return to the Court to undertake their sentencing, their counsel did not provide any authority to support that I had the jurisdiction to do so. In my view, no such jurisdiction exists, as acknowledged by Mr. Leyden's counsel.
- [8] My jurisdiction to impose sentence on the Contemnors in place of Affleck J. originates from Hinkson C.J.S.C.'s *Ex Mero Motu* Order issued November 18, 2019. That order was granted pursuant to the Supreme Court Civil Rules, Rule 23-1(10):
- (10) If an application ought to be made to, or any jurisdiction ought to be exercised by, the judge by whom a proceeding has been tried or partly tried, or heard or partly heard, then, if that judge dies or ceases to be a judge of the court during or after the trial or hearing, or if for any other reason it is impossible or inconvenient for that judge to act in the proceeding, the Chief Justice or next senior judge of the court may, either by a special order or by a general order, nominate some other judge to whom the application may be made or by whom the jurisdiction may be exercised.

- [9] Although contempt of court is a common law offence, and therefore prosecuted under the common law, courts have frequently stated that guidance in respect of sentencing for criminal contempt may be sought from the Criminal Code, R.S.C. 1985, c. C-46 (the "Code"): *International Forest Products Ltd. v. Kern*, 2001 BCCA 48 at para. 20.
- [10] In *R. v. Dhillon*, 2015 BCSC 1298, this Court expressed the same view, citing *Kern*:
- [10] Since the court's power to deal with criminal contempt does not derive from the Criminal Code, the provisions in the Criminal Code concerning sentencing do not apply directly, and judges may design remedies different from those for which the Criminal Code provides: *MacMillan Bloedel Ltd. v. Brown et al.* (1994), 88 C.C.C. (3d) 148 at 167-168 (B.C.C.A.), per McEachern C.J.B.C. Nonetheless, sentencing for criminal contempt should generally mirror the conventional practices and procedures of the criminal law, and should take guidance from the principles expressed in the Criminal Code, which, in turn, largely codify the judge-made rules on sentencing: *International Forest Products Ltd. v. Kern*, 2001 BCCA 48 at paras. 19-20 (per Donald J.A.).
- [11] Similar to the jurisdiction under the Supreme Court Civil Rules, the Code provisions recognize that there may be circumstances where a trial judge who convicts a person may not be in a position to continue with the sentencing for any number of reasons.
- [12] Section 669.2(1) and (2) of the Code provide:
- (1) Subject to this section, where an accused or a defendant is being tried by
 - (a) a judge or provincial court judge,
 - (b) a justice or other person who is, or is a member of, a summary conviction court, or
 - (c) a court composed of a judge and jury,as the case may be, and the judge, provincial court judge, justice or other person dies or is for any reason unable to continue, the proceedings may be continued before another judge, provincial court judge, justice or other person, as the case may be, who has jurisdiction to try the accused or defendant.
 - (2) Where a verdict was rendered by a jury or an adjudication was made by a judge, provincial court judge, justice or other person before whom the trial was commenced, the judge, provincial court judge, justice or other person before whom the proceedings are continued shall, without further election by an accused, impose the punishment or make the order that is authorized by law in the circumstances.
- [Emphasis added.]
- [13] As the Crown notes, an example of the application of s. 669.2 of the Code is found in *R. v. Roper*, 2019 BCCA 68. That matter involved a trial and guilty plea before Justice Dickson (as she then was) and a later application to declare Mr. Roper a dangerous offender. Justice Dickson was unable to proceed with the hearing arising from her appointment to the Court

of Appeal. Justice Maisonville was appointed under s. 669.2(1) to continue the hearing. She began the dangerous offender hearing, however, she was later unable to continue after eleven days of hearings. Justice Silverman was appointed to continue the sentencing hearing under s. 669.2(2).

- [14] As Justice Groberman noted in *Roper* at para. 21, where s. 669.2(2) applies, the "replacement judge is required to impose the sentence without recommencing the trial".
- [15] The Contemnors refer to *R. v. Bertucci*, [1984] 2 W.W.R. 459 (Sask. C.A.) where the court upheld the jurisdiction of a provincial court judge to declare a mistrial after conviction and before sentencing. The decision to declare a mistrial in that case was well-founded, following the court's conclusion that there had been prosecutorial misconduct after the conviction (not by the Crown) that undermined the integrity of the sentencing process. No such allegation arises in this matter.
- [16] The Contemnors also refer to *R. v. Pirabakaran*, 2008 ONCJ 607. In that case, the court found that there had been no adjudication of guilt by the judge hearing the trial prior to his retirement. Accordingly, s. 669.2(3) of the Code dictated that the trial commence again as if no evidence on the merits had been taken.
- [17] The reasoning and result in *Pirabakaran* is of no assistance to the Contemnors. There is no suggestion that Affleck J. had not yet adjudicated on the guilt or innocence of the Contemnors. He clearly did find them guilty.
- [18] Mr. Gallagher/Mr. Bige suggest that their application raises the "novel argument" as to whether the trial court and sentencing court can be "interrupted" by a change of justice so as to still afford the Contemnors a fair trial. I disagree. The Court's authority to continue if there is a change of judges is grounded in the Supreme Court Civil Rules and, in the criminal context, the Code. Both contemplate that a sentencing hearing can continue even with such an "interruption", as the Contemnors call it. A change of judges does not give rise to a presumption of unfairness to the Contemnors.
- [19] Accordingly, I have the jurisdiction to continue the trial and proceed to the sentencing of the Contemnors. The central question that remains to be addressed on this application, as I will discuss below, is whether continuing the sentencing hearing in these circumstances is fair to both the Crown and the Contemnors and, if the hearing is to proceed, how it should proceed.

SHOULD THE SENTENCING PROCEED?

- [20] In *R. v. Gardiner*, [1982] 2 S.C.R. 368, Dickson J., for the majority, discusses that sentencing is an inextricable part of the overall trial process. At 415, Dickson J. comments:

To my mind, the facts which justify the sanction are no less important than the facts which justify the conviction; both should be subject to the same burden of proof. Crime and punishment are inextricably linked. "It would appear well established that the sentencing process is merely a

phase of the trial process" (Olah, *supra*, at p. 107). Upon conviction the accused is not abruptly deprived of all procedural rights existing at trial: he has a right to counsel, a right to call evidence and cross-examine prosecution witnesses, a right to give evidence himself and to address the court.

See also Bertucci at para. 13.

- [21] I accept, without hesitation, that the Contemnors are entitled to a fair trial, which includes a fair sentencing hearing. The first issue raised by the Contemnors is whether, as they suggest, it would be unfair that the sentencing proceed at all before another judge in place of Affleck J.
- [22] In order to frame this part of the discussion, it is helpful to outline the circumstances of the allegations before Affleck J. and the evidence considered by him during the trial that led to the findings of guilt.
- [23] The basis for the Contemnors' convictions arose from their actions in the face of Affleck J.'s order (the "Injunction") prohibiting persons from physically obstructing, impeding or otherwise preventing access to various worksites of the plaintiff, Trans Mountain Pipeline ULC ("Trans Mountain"). Justice Affleck found that the Contemnors had breached the Injunction by obstructing access to Trans Mountain's property in Burnaby, BC, known as the "Westridge Marine Terminal". This occurred on August 14, 2018 by Mr. Bige and on August 21, 2018 by Mr. Gallagher and Mr. Leyden.
- [24] On both August 14 and 21, 2018, a police officer operated a handheld video camera that captured the reading of the Injunction to the people present, and specifically, captured the Contemnors' actions in breaching the Injunction by occupying the access driveway to the Westridge Marine Terminal before their arrests. Videotapes of these events were entered as exhibits at trial.
- [25] From July 22-26, 2019, the Crown's evidence included that of various police officers: Cpl. Jaswant Sunner, Cst. Chad Premack (direct testimony by affidavit that was entered as an exhibit), Cst. Dirk Pinto (who took the video of events on August 21, 2018); Cpl. Brian Mulrooney and Cst. Cody Perrin (direct testimony by affidavit that was entered as an exhibit). Cst. Perrin also took the videotape of events on August 14, 2018, that was entered as an exhibit at trial. In addition, the Crown's evidence included the testimony of Randy Beck, Trans Mountain's security manager. Mr. Beck's oral testimony was supplemented by his affidavits, both entered as exhibits.
- [26] On July 26, 2019, the fifth day of trial, the Crown closed its case. For the remainder of that day, the defence evidence consisted of the oral testimony of the Contemnors. On September 20, 2019, the last day of trial, the Crown and defence counsel made their submissions.

- [27] In the usual fashion, an oral recording of the trial is available on the Court's Digital Audio Recording System (DARS). A transcript of the trial was prepared and has been available to the Court and the parties for some months now. Mr. Gallagher/Mr. Bige also refer to video of the trial, however, no videotape of the trial exists.
- [28] The evidence on this application includes the trial transcript and the oral evidence of Mr. Gallagher and Mr. Bige. In addition, Mr. Gallagher and Mr. Bige's Gladue reports are also in evidence. Mr. Leyden did not call any evidence and did not file a Gladue report for this application.
- [29] As noted above, Mr. Gallagher/Mr. Bige seek a judicial stay of proceedings or, in the alternative, a new trial.
- [30] Mr. Gallagher and Mr. Bige argue that, since Affleck J. was the judge who issued the Injunction and heard all of the evidence at trial, only he is in a position to determine an appropriate sentence. They argue that this is particularly so given the Contemnors' status as Indigenous persons. They argue that they are "unknown to the Court" (which I take to be me or any other judge). They say that I am not in a position to continue with the sentencing, not having heard and witnessed the oral trial testimony of the witnesses, including the Contemnors. They contend that it will be "impossible to continue with a fair trial to completion given the retirement of Justice Affleck, in accordance with principles of fundamental justice".
- [31] In my view, this aspect of the relief sought by Mr. Gallagher and Mr. Bige - a judicial stay or a new trial - represents an extreme and unwarranted response to the issues raised by Affleck J.'s retirement.
- [32] The Amended Notice of Application (ANOA) states that the legal basis for the application is "s. 7, of the Charter of Rights and Freedoms; s. 35 of the Constitution Act; and, s. 9 as well as Part XXIII of the Criminal Code".
- [33] However, as the Crown notes, Mr. Gallagher/Mr. Bige's counsel does not articulate any basis upon which s. 35 of the Constitution Act, 1982, s. 9 of the Charter or Part XXIII of the Code establish a basis for the remedy of a judicial stay of proceedings.
- [34] The Crown acknowledges that the Contemnors rights under s. 7 of the Charter are potentially at stake here given that a period of incarceration is a possible sentencing option. The Crown also acknowledges that a breach of a s. 7 right can lead to the granting of a remedy under s. 24 of the Charter. If a breach is proven, a potential remedy would be a judicial stay of proceedings.
- [35] However, Mr. Gallagher and Mr. Bige, either in their ANOA or their written and oral submissions, do not identify any basis upon which I can conclude that a principle of fundamental justice would be violated if a judge other than Affleck J. imposed sentences.

[36] As stated above, no circumstances similar to those addressed in Bertucci are present here that would justify such an extreme remedy. The Supreme Court Civil Rules and the Code provisions expressly contemplate a potential scenario where the sentencing continues before a different judge. The Contemnors have not referred to any case authority where a court found that an offender's s. 7 Charter rights were infringed in circumstances where there was simply a substitution of the sentencing judge.

[37] Even assuming some breach of the Contemnors' s. 7 rights (which I do not), it remains the case that the remedy of a stay of proceedings is an extraordinary one. In *R. v. Carosella*, [1997] 1 S.C.R. 80, the Court stated:

[52] A judicial stay of proceedings has been recognized as being an extraordinary remedy that should only be granted in the "clearest of cases". In her reasons in *O'Connor, L'Heureux-Dubé J.* stated (at para. 82) that:

It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

[38] The comments of the Court in *R. v. Babos*, 2014 SCC 16 are similarly instructive on the nature of the remedy of a judicial stay of proceedings, albeit in the context of an allegation of abuse of process:

[30] A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.

[31] Nonetheless, this Court has recognized that there are rare occasions - the "clearest of cases" - when a stay of proceedings for an abuse of process will be warranted (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) (*O'Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.

[32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:

- (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);

- (2) There must be no alternative remedy capable of redressing the prejudice; and
- (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).
- [39] I agree with the Crown that, even assuming a breach and some impairment of the Contemnors' right to a fair trial (which, again, I do not find here), the circumstances of this case fall far short of the "clearest of cases" that would warrant the extraordinary remedy of a judicial stay of proceedings. This is particularly so when the complete record of the trial is available to me as the sentencing judge and may be considered at the sentencing, along with any other relevant evidence.
- [40] I agree that, ideally, Affleck J. would have completed the sentencing process himself; however, that option is simply not available at this time and never will be. In these circumstances, I cannot see that the Contemnors will suffer any prejudice to their right to make full answer and defence or any impairment of their right to a fair trial if another judge completes the sentencing.
- [41] Simply put, there is no basis upon which a judicial stay of proceedings is warranted.
- [42] Equally unconvincing are the Contemnors' arguments that fairness dictates that they should have a new trial before a single judge who can hear the matter through to sentencing if a conviction arises. I infer, as does the Crown, that this would also involve initially seeking a declaration of a mistrial of the proceedings before Affleck J.
- [43] In *R. v. Muller*, 2013 BCCA 528, the court confirmed an approach to mistrials similar to the approach for a judicial stay of proceedings. The court discussed that a mistrial would be warranted only "in the clearest of cases":
- [66] Having regard to the authorities, I conclude a mistrial is a discretionary remedy of last resort that should not be granted unless other, less extreme, corrective measures are incapable of preventing a miscarriage of justice: *Chiasson* at para. 14. A mistrial should only be granted "in the clearest of cases", where there is a "fatal wounding of the trial process". A "fatal wounding of the trial process" is "a wounding to the administration of justice which cannot be cured by remedial measures": *Paterson* at para. 93, citing *Lawson* at 209.
- [Underline emphasis in original]
- [44] See also *Bertucci* at para. 14, citing *R. v. Lessard* (1976), 30 C.C.C. (2d) 70 at 72-73 for the proposition that a vacating of an adjudication of guilt before sentencing should only be exercised in exceptional circumstances and where its exercise is clearly called for.

- [45] The Contemnors assert that the inability to proceed to sentencing before Affleck J. harms their right to make full answer and defence. They refer to decisions that they made throughout the proceedings, including their participation in the trial before Affleck J. and their decision to testify at the trial in their defence. They assert that all of their decisions took place against the backdrop of their belief that, if Affleck J. convicted them, he would also be the sentencing judge.
- [46] Mr. Gallagher and Mr. Bige both testified on this application that, consistent with their earlier written submissions, they considered themselves to be in a "certain relationship" with Affleck J. arising from the trial process. In particular, Mr. Gallagher/Mr. Bige say that they testified at the trial on the basis that if they did so, Affleck J. would have the benefit of having heard their testimony in the event he convicted them and the matter proceeded to sentencing. They place some emphasis on having explained their reasons to the Court for objecting to Trans Mountain's pipeline project, including their views of their "Indigenous laws and obligations" as might be relevant to their culpability.
- [47] Again, I agree that ideally, Affleck J. would have completed the sentencing. However, in the circumstances here, Mr. Gallagher and Mr. Bige have failed to identify why the sentencing cannot proceed before a new judge. This is particularly so where that judge can review much or all of the trial evidence in order to gain a fulsome understanding and knowledge of the earlier proceedings. In that event, the new judge would similarly be in a position to consider the earlier proceedings at the sentencing, just as Affleck J. might have done.
- [48] As I have noted, the transcript of the entire hearing is available. The exhibits are available for viewing at any time, including the critical video recordings that capture the full breadth of the Contemnors' actions on the relevant dates. As I will discuss below, the Contemnors may seek to draw the Court's attention to any portion of the trial evidence at the sentencing as they wish. They may seek to have portions of the DARS recording or video tape exhibits played, as may be relevant and necessary to the sentencing. It is also open to me, as the sentencing judge, to listen to all or any portion of the trial evidence at any time, including the Contemnors' testimony, upon which they place some emphasis.
- [49] In addition, the Contemnors will have an opportunity to present any other relevant evidence at the sentencing hearing, including providing further oral evidence as to their actions and intentions on the relevant dates that gave rise to the convictions. The Contemnors also refer to other "steps" taken in proceedings prior to the trial that are potentially relevant to the sentencing; however, those were not articulated by defence counsel and I am not aware that those other "steps" were relevant to the trial in respect of having been considered by Affleck J. in his deliberations.

- [50] All of this is to say that the Contemnors have failed to persuade me that a mistrial is the only remedy that would prevent a miscarriage of justice should the sentencing proceed. In my view, clearly a "less extreme, corrective measure" per Muller includes the Court's careful consideration at the sentencing of the evidence adduced at trial, together with any other relevant evidence that may be adduced at the sentencing hearing itself.
- [51] I have no difficulty concluding that a fair sentencing hearing can be conducted and justice can be done in these circumstances, all as contemplated by the Supreme Court Civil Rules and the Code provisions cited above. I cannot conceive of any unfairness in the sentencing process, where a new sentencing judge can familiarize herself with the trial evidence and record in these circumstances.
- [52] Accordingly, I dismiss Mr. Gallagher/Mr. Bige's application for a judicial stay of proceedings or a mistrial/new trial.

CONDUCT OF THE SENTENCING HEARING

- [53] If the sentencing hearing is to proceed before another judge, Mr. Gallagher/Mr. Bige seek a direction or an order that the full audio of the trial proceedings from the DARS be played at the hearing.
- [54] The Crown's position is that, while the Contemnors may seek to bring certain portions of the trial evidence to the attention of the Court, there is no need for the sentencing judge to listen to the entire proceeding, particularly where the transcripts are available and the Court has reviewed them.
- [55] The comments found in Roper, albeit in the context of s.669.2(2) of the Code, are helpful in confirming the Court's discretion in terms of determining how a sentencing hearing will proceed in the event of a substitution of the judge:
- [24] Section 669.2(2) does not explicitly discuss how a judge taking over a trial at the sentencing stage is to proceed. It is implicit in the statutory scheme that the sentencing judge must consider the evidence that was heard prior to the finding of guilt, and to sentence on the basis of the findings that led to the conviction. A judge taking over at the sentencing stage, therefore, will be required to review the evidence admitted at trial. Today, virtually all proceedings are recorded, and so there is a clear record that the judge can consult in order to review the trial evidence.
- [25] Section 669.2 does not indicate how the replacement judge should deal with evidence entered on the sentencing hearing before they took charge of proceedings. Obviously, the judge must ensure that the procedures adopted are fair to the offender, and that the offender is afforded an opportunity to make full answer and defence to the allegations made by the Crown.

[26] In an ordinary sentencing proceeding, it would appear that the replacement judge could admit evidence in the form of transcripts or recordings of the earlier sentencing proceedings, since, under s. 723(5), hearsay evidence is admissible in sentencing proceedings.

[*Italic emphasis in original.*]

[56] In Roper, Silverman J. was facing a more complex situation given that, at the first part of the dangerous offender hearing, Maisonville J. had already heard considerable evidence. Here, the sentencing hearing has not yet begun.

[57] As set out in Roper at para. 19, Silverman J. ordered that the hearing would continue, not recommence. In doing so, Silverman J. gave several directions as to the conduct of the continued hearing in order to ensure fairness to Mr. Roper, including:

- a) He allowed the Crown to recall any witness if it was necessary for him to hear and see them testify;
- b) He required that the Crown recall any witnesses who Mr. Roper wished to have recalled; and
- c) In either event, he directed that the transcript of the witness' earlier evidence could be used in direct or cross-examination of the witness.

[58] The Court of Appeal in Roper agreed that Silverman J. had exercised his discretion appropriately with a view to protecting Mr. Roper's interests: paras. 28-29.

[59] Having considered the background of this matter and the concerns of the Contemnors, I conclude that the following procedures will fully protect trial fairness with respect to the Contemnors at the sentencing hearing:

- a) The transcript of the trial is available for the sentencing. As stated, it has been available for some months now. I had already reviewed the complete transcript prior to this application and have considered it in coming to my decisions in these reasons;
- b) The trial exhibits are also available for consideration at the sentencing. I had already reviewed all of the paper exhibits and viewed the entire videotape exhibits prior to this application and have considered them in coming to my decisions;
- c) I will, prior to the sentencing hearing, listen to the DARS recording of the Contemnors' evidence at the trial;
- d) I reject the Contemnors' suggestion that it is necessary to play the complete DARS recording for the entire trial, including their testimony, as part of the sentencing hearing. I see no benefit or utility in convening another six days of hearing simply to allow the Contemnors to watch me in a courtroom listen to the audio recording and view the videotapes (again) on a small screen. Mr. Gallagher/Mr. Bige suggest that they require that the full recording be played in order to refresh their memories. If that is the case, they have had and still have more than ample opportunity to do so outside of the courtroom and prior to sentencing;

- e) The Contemnors and the Crown will have the opportunity to emphasize certain portions of the trial evidence as might be appropriate and relevant to the sentencing, as they wish; and
- f) In addition, the Contemnors will, in the usual fashion, have a full opportunity to provide further evidence at the sentencing to expand upon matters (including their trial evidence) relevant to their backgrounds and moral culpability in respect of the convictions. This could include further testimony from themselves, as they may determine is necessary and appropriate.

CIRCLE SENTENCING

[60] Mr. Gallagher/Mr. Bige seek an order that they participate in a "circle sentencing", which the authorities also describe as a "sentencing circle", as part of their sentencing hearing.

[61] Their ANOA states:

... this is Notice of an Application made pursuant to s. 7 and 25 of the Charter of Rights and Freedoms, and s. 35 of the Constitution Act and to the sentencing principles as set out in Part XXIII of the Criminal Code of Canada and to Indigenous laws and legal orders including those regarding natural justice, restorative justice and reconciliation that Mr. Bige and Mr. Gallagher participate in a Circle Sentencing, where members of the community including Indigenous community members and Elders familiar with Indigenous law, obligations and legal orders, be invited to attend and to speak to the Court, sharing recommendations regarding proportionate sentences for the defendants.

[62] Mr. Gallagher/Mr. Bige also seek changes to the physical structure of the Court, including that they sit in a circle on the same level as the Court Clerk and the presiding Justice. Finally, they seek a direction that would allow:

... reasonable ceremony and prayer according to the Indigenous cultural and spiritual practices of [Mr. Gallagher/Mr. Bige], including allowing regalia to be brought into the Courtroom and for rituals including appropriate Circles, prayer and song or drumming to become an integral part of the Sentencing process.

[63] The Crown takes no position with respect to Mr. Gallagher/Mr. Bige's application regarding the configuration of the Court for sentencing and defers to the Court on that matter. However, the Crown says that it is inappropriate for lay participants (such as "Indigenous community members and Elders") to comment on or recommend an appropriate or proportionate sentence. The Crown submits that the issue as to a fit and proper sentence is exclusively within the jurisdiction of the Court, having considered submissions from the Crown and defence on that issue in an adversarial system; the Crown says that the hearing should not risk devolving into a poll.

- [64] More generally, the Crown is unable to respond to the appropriateness of any evidence or submissions by "Indigenous community members or Elders" given that it is not clear what these persons may say at the sentencing hearing.

Sentencing Circles Generally

- [65] No discussion of circle sentencing can proceed without reference to *R. v. Moses*, (1992) 71 C.C.C. (3d) 347 (Y.K.T.C.). Territorial Court Judge Stuart was tasked with sentencing Mr. Moses, a young man whose life had, to that time, revolved around an endless cycle of poverty, abuse and crime. Territorial Court Judge Stuart convened a sentencing circle in Mayo, Yukon, where Mr. Moses had grown up and where, after his numerous stints in jail, he had returned to continue the ruinous cycle of his life. Emphasizing rehabilitation and reconciliation as the paramount sentencing objectives in that case (at 351), Stuart T.C.J. stated that this approach called upon communities to become more actively involved and assume more responsibility for the identification and implementation of sentencing measures.
- [66] At 363 and 370, Stuart T.C.J. also stated that a sentencing circle is not necessarily an appropriate sentencing mechanism for all crimes and all offenders. At 363, he stated:
- For purely punitive sanctions, particularly where jail sentences in excess of two years are expected, the circle may be inappropriate. In all other cases where the primary objective is rehabilitation, or reconciliation, the circle in contrast to the court-room creates a more constructive atmosphere.
- [67] Finally, at 367, Stuart T.C.J. stated that the "circle has the potential to accord greater recognition to aboriginal values". This sentiment was stressed by the Contemnors on this application.
- [68] Since *Moses*, courts across Canada have conducted sentencing circles. I am not aware that any court has held that it does not have jurisdiction to proceed in that fashion; rather, the discussion has concerned what circumstances will dictate whether such a procedure is appropriate or not. Many decisions come from Saskatchewan.
- [69] In *R. v. Cheekineew*, [1993] 3 C.N.L.R. 172, Justice Grotzky set out certain non-exhaustive factors that he described as basic requirements:
- [25] In my view, depending always on society's need for protection; and having regard for the need for punishment, general and specific deterrence, and the offender's own reformation and rehabilitation; where, as here, the offender seeks the intervention of a "sentencing circle" for the purpose of sentencing advice and assistance to the presiding judge, then, at the very least, the offender should be:

- a. a fit and proper candidate therefor, including, in the particular circumstances, eligible for either a suspended sentence; or an intermittent sentence; or a short term of imprisonment, coupled in either case with an appropriate term of probation on terms realistically adequate for the particular purpose;

CLEARLY: If the trial judge is, following conviction of the accused, of the view, on the whole of the evidence, that the offender must receive a punitive term of imprisonment of two years or more, then, as such a sentence cannot, by virtue of the provisions of s. 737 of the Criminal Code, be coupled with a probation order, a submission should not, in these circumstances, be heard for the establishment of a sentencing or like circle.

- b. genuinely contrite with respect to the offence of which he stands convicted and faces sentencing;
- c. supported in the request for the establishment of a sentencing circle by the offender's own community willing to participate in the sentencing circle process and to make meaningful sentencing recommendations. As well, to assume responsibility for the supervision and enforcement of the terms of the probation order including the reporting of any breach of the terms thereof. In this context the term "community" ought to receive a wide and liberal construction as the term "community" may be, and probably is, a term capable of different interpretations depending on the residence, or proposed residence, of the particular offender and/or any other factor relevant to that term's interpretation.
- d. a person honestly interested in turning his or her life around with the assistance and supervision of his or her "community".

[Emphasis added.]

[70] In *R. v. Johnson* (1994), 91 C.C.C. (3d) 21 (Y.K.C.A.) at 24, Chief Justice McEachern reiterated that sentencing circles cannot be employed in every case. He stated that, since such procedures are not prescribed by the Code, judges may wish to establish rules under the Code in order to provide guidance to the Crown, the accused and their counsel as to the types of cases that may be tried by that method.

[71] The Contemnors refer to *R. v. Morin*, [1995] 9 W.W.R. 696, 134 Sask. R. 120 (C.A.), discontinued leave to appeal [1995] S.C.C.A. No. 392, where the court discussed certain authorities, including Cheekineew and *R. v. Joseyounen*, [1995] 6 W.W.R. 438, [1995] S.J. No. 362 (P.C.). The court in *Morin* specifically referred to certain criteria from *Joseyounen*:

- (1) The accused must agree to be referred to the sentencing circle.
- (2) The accused must have deep roots in the community in which the circle is held and from which the participants are drawn.
- (3) That there are elders or respected non-political community leaders willing to participate.

- (4) The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing.
 - (5) The court should try to determine beforehand, as best it can, if the victim is subject to battered spouse syndrome. If she is, then she should have counselling made available to her and be accompanied by a support team in the circle.
 - (6) Disputed facts have been resolved in advance.
 - (7) The case is one in which a court would be willing to take a calculated risk and depart from the usual range of sentencing.
- [72] The court in Morin declined to lay out guidelines as to when sentencing circles would be appropriate, noting the comments of McEachern C.J.Y.T. in Johnson. In Morin, the court reversed the lower court, finding that many aspects of the crime, the offender and the community involvement were not consistent with the objectives of a circle sentencing and that the process there had given rise to an unfit sentence.
- [73] Later still, in R. v. Johns, [1995] Y.J. No. 132 (Y.K.C.A.), the court referred to Morin and the Joseyounen criteria and reiterated the call for guidelines. Despite such comments, Yukon and British Columbia courts have not established any rules under the Code.
- [74] The Crown has also referred me to R. v. B.L., 2002 ABCA 44, where at paras. 22-30, the court also declined to set definitive parameters relating to circle sentencing. At paras. 32-44, the court emphasized that disputed facts should be resolved prior to the sentencing circle process. In addition, the court provided helpful comments on the composition of the circle, if one is to be constituted:
- [51] As noted, it is difficult to set a specific formula for the composition of all sentence circles. It may vary depending on the offence, the community services available, whether a community is urban or rural, and the nature of the offence.
- [52] Judges should always carefully consider the composition of a sentence circle. Some of the appropriate considerations include the following: Is there balanced representation of the interested groups? Does the community have a stake and is it prepared to play a role? Does the offender agree to participate? Should there be a representative or a support group for the offender or the victim? Is there a power imbalance between the victim and the offender, for example, does any party suffer an impediment interfering with the ability to speak his or her mind? Where a question of the ability of a party to properly speak for him or herself arises, is there a support group that could assist?
- [53] In the normal case both the offender and the victim will agree to participate. There may be exceptional occasions where a victim is no longer available, or is completely disinterested one way or the other, yet the effected community is still interested in proceeding. If a case proceeds without a victim, a victim's interest should still be represented by the Crown or some other representative that may wish to be heard.

- [54] As the sentencing circle generally involves releasing an offender into the community, it may be important to involve respected members of that non-political community at the hearing. Is there an identifiable community, with the healing and restorative resources, willing to support the offender? Are there impartial members of the effected community represented? (See: Morin for a good discussion of the need for community representation.) The community holds a considerable stake in any sentence imposed as it is interested in community safety, community awareness of the offence, community participation, use of resources, and the support and supervision of any sentence.
- [75] Also of note are the recent comments in *R. v. E.O.*, 2019 YKCA 9, where the court discussed the mention of guidelines found in *Johnson and Johns*. Justice Bennett stated:
- [59] Although I agree that circle sentencing processes are more useful to sentencing judges when they have certain characteristics, I would not go as far as saying that they must conform to the same procedural rules every time they are employed. The idea of imposing guidelines has not always been welcomed: *R. v. C.P.*, [1995] Y.J. No. 186 (Terr. Ct.). Judges who actually hold sentencing circles in Yukon have made clear that, in their eyes, flexibility is necessary: Barry Stuart, *Building Community Justice Partnerships: Community Peacemaking Circles* (Ottawa: Department of Justice Canada, 1997) at 114. In my view, a degree of flexibility should be preserved in order to ensure that sentencing circles can be employed in the varied circumstances of particular cases, which will always involve offenders, victims, and communities with their own needs and experiences. For example, although in some circumstances the victim's voice will be crucial, the victim may not always need to be present: Stuart at 11. I note that sentencing circles held in the Territorial Court can use procedures that have been partially developed by a particular Indigenous community: *R. v. Gingell* (1996), 50 C.R. (4th) 326 (Y.T. Terr. Ct.). A less flexible framework may pose difficulties for proceeding in this way. Ultimately, judges of the Territorial Court can decide whether to enact guidelines that allow for this flexibility if they so choose.
- [60] Even so, sentencing circles should be planned and carried out with the sentencing judge's task in mind--a circle should be planned and run such that it gives the judge confidence in its recommendations. While sentencing circles have the potential to perform multiple functions, the primary function they serve in the criminal justice system is to allow members of Indigenous communities to share information with the sentencing judge. As Jonathan Rudin explains in *Indigenous People and the Criminal Justice System: A Practitioner's Handbook* (Toronto: Emond, 2019) at 208:

... it is important to emphasize that sentencing circles are not an Indigenous practice; rather, they are a way the court system has chosen to obtain information from members of the Indigenous community. If an Indigenous community or nation were given the ability to design their own justice system very few would likely say, "What we would like is for the judge to sit with us and listen to what we have to say and then go away and tell us what the sentence will be."

[Emphasis added.]

- [76] British Columbia courts have convened sentencing circles in the past.
- [77] The BC Provincial Court has established Indigenous courts for the purpose of sentencing. The court's website refers to the creation of a "healing plan" that can be incorporated into the judge's sentence. The purpose of the Indigenous court is to:
- ... assist in rehabilitation and to reduce recidivism while also acknowledging and repairing the harm done to victims and the community.
- [78] Experience with sentencing circles in this Court appears to have been much more limited than that of the Provincial Court. Neither the Crown nor the Contemnors referred me to any BC Supreme Court case authority where sentencing circles were considered. My own limited research has similarly revealed little authority from this Court.
- [79] In *R. v. Coelho* (1995), 41 C.R. (4th) 324 (B.C.S.C.), Justice Saunders (as she then was) at para. 17 confirmed that this type of sentencing procedure may occur only with the consent of the accused.
- [80] In *R. v. Pena*, 1997 CanLII 3770 (B.C.S.C.), Justice Josephson commented that sentencing circles may be appropriate in any given circumstance:
- [3] This unique sentencing process is said to be based upon historic practice in native communities. It was more recently incorporated into the judicial sentencing process for native offenders for whom the usual sentencing process had little effect or meaning. In appropriate cases, the community stepped forward and undertook a large measure of responsibility for accomplishing legitimate sentencing goals, particularly rehabilitation, in place of the public institutions which normally bear that responsibility. There is little question that, in appropriate cases, it provides an effective vehicle for an accused to better understand the impact of his offence on victim and community, to face consequences which all accept as appropriate and to develop a plan of community supervised healing and rehabilitation. It cannot be sought as a means to justify or legitimize an offence.
- [81] I will return later in these reasons to Josephson J.'s discussion and conclusions in *Pena*, as that case involved similar circumstances to those found here.
- [82] In *R. v. Boucher*, 2001 BCSC 1570, Justice Meiklem addressed an appeal of a sentence imposed by the Provincial Court. At para. 4, Meiklem J. noted that the sentencing judge had abandoned a circle sentencing when the community did not endorse that approach.
- [83] In *R. v. Johnson*, 2003 BCSC 907, Justice Williamson addressed breaches of a sentence that had been imposed after a circle sentencing by Justice Parrett. The sentencing resulted in the imposition of a conditional sentence.

- [84] Finally, I am aware that Meiklem J. convened a sentencing circle in September 2012 in Kamloops in respect of Douglas Jensen. Mr. Jensen had pleaded guilty to various offences on the Tk'emlúps reserve. News reports indicate that the sentencing circle was to be convened on reserve lands in a gymnasium. Unfortunately, Meiklem J. did not issue reasons outlining the overall circumstances and why he considered such a sentencing procedure appropriate for that case.
- [85] In conclusion, I accept that I have the authority to convene a sentencing circle for the Contemnors. As noted by counsel, this contempt proceeding does not arise under the Code, although sentencing procedures under the Code provide significant guidance. As a result, the case authorities cited above that arise under the Code provide considerable guidance on the relevant factors to be considered on this issue. The case authorities confirm that the decision to convene a sentencing circle or not will very much depend on a consideration of the overall circumstances. Each case is to be assessed on a case-by-case basis, consistent with the general approach in sentencing in that it is a "highly individualized process": *R. v. Abdulahi-Sabet*, 2020 BCCA 213 at para. 10.
- [86] There is disagreement between the Crown and defence as to whether incarceration is the appropriate remedy. Having said that, in my view, a possible period of incarceration does not necessarily militate against such a procedure: *Cheekineew* at para. 16.
- [87] I conclude that the discussion on this issue can be usefully organized around a consideration of: the offence, the community that is proposed to be involved and the offenders.

The Offence

- [88] The fundamental nature of criminal contempt of court is discussed in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901. Justice McLachlin (as she then was) stated at 932:

What the courts have fastened on in this and other cases where criminal contempt has been found is the concept of public defiance that "transcends the limits of any dispute between particular litigants and constitutes an affront to the administration of justice as a whole": *B.C.G.E.U. v. British Columbia (Attorney General)*, *supra*, at p. 237, per Dickson C.J., Lamer, Wilson, La Forest, and L'Heureux-Dubé JJ. concurring. 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.

- [89] In *Dhillon*, Justice Holmes (as she then was) discussed the application of sentencing objectives and principles in the context of criminal contempt of court. She stated:
- [11] The fundamental purpose of sentencing, as both the Criminal Code and the common law recognize, is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. From that fundamental purpose flow six main objectives of sentencing, namely:

(1) denunciation of the offending conduct; (2) deterrence of the offender and all other people from criminal conduct; (3) separation of the offender from society when necessary; (4) rehabilitation of offenders; (5) reparation to victims or the community; and (6) the fostering of the offender's acknowledgement of responsibility and of the harm done to victims and the community. The relative emphasis to be given to the various objectives will vary according to the particular offence and the particular offender.

- [12] For offences of criminal contempt, deterrence is usually the primary sentencing objective. This is because the purpose of contempt proceedings is to protect the rule of law, the organizing principle which distinguishes civilized society from anarchy. In its struggle to preserve the rule of law and to ensure its own continued effectiveness, the court's only device is its power to punish for contempt: *R. v. Bridges* (No. 2) (1989), 48 C.C.C. (3d) 545 at 548-549 (B.C.S.C.), *aff'd* (1990), 62 C.C.C. (3d) 455 (B.C.C.A.).
- [13] A sentence for criminal contempt will therefore aim to deter other people from similar conduct undermining the rule of law (through what is termed general deterrence): *MacMillan Bloedel v. Simpson* (1993), 84 C.C.C. (3d) 559 at 571-572 (B.C.S.C.). Where the contemnor continues in an attitude of defiance, the sentence may also aim to deter that particular offender from repeating his or her contempt (through what is termed specific deterrence): *Texada Land Corp. v. Shebib et al.*, 2002 BCCA 114 at para. 13.
- [14] The application of these general principles, as well as of the more specific principles that apply to your case, must take account of your personal circumstances as well as the circumstances of your offence.

[Emphasis added.]

- [90] Accordingly, unlike most of the cases where sentencing circles are convened, there is no external victim; here, the victim is the administration of justice itself, as represented by this Court. I accept that the victim does not necessarily have to participate in the sentencing circle process. As noted in *Morin*, citing *Joseyounen*, one potential criteria is that the victim is "willing to participate".
- [91] Where criminal contempt of court is involved, the court is necessarily involved. It represents the "victim" in a broad sense; more importantly, it is also the arbiter of the appropriate sentence in the circumstances.
- [92] In addition, I would adopt the comments of Holmes J. in *Dhillon* in that deterrence, either general or specific, is the primary sentencing objective in these circumstances. This is considerably different from the cases that endorse a sentencing circle where the primary focus is rehabilitation, restorative justice and reconciliation, particularly with community involvement to support the offender's efforts in that respect.

- [93] Pena is a decision that considered the appropriateness of sentencing circles in the context of protest activities. That case involved convictions of Aboriginal persons for weapons and mischief offences arising from a protest/police standoff at Gustafsen Lake. At para. 7, Josephson J. rejected that a sentencing circle was appropriate, commenting that the convictions arose out of "social protest" regarding land claims issues.
- [94] Here, the convictions arose from Affleck J.'s finding that the Contemnors had breached the Injunction in a public way so as to bring the administration of justice into disrepute. In my view, the nature of the offence in these circumstances does not lend itself to a sentencing circle process, particularly given that the main goal sought to be achieved by a circle sentencing rehabilitation of the offender with input and effort by that offender's community.
- [95] The Court's main focus in this sentencing process is to send a clear signal to the Contemnors, and others who may be influenced by them and their actions, that such behavior will not be tolerated. Deterrence is the main sentencing objective here, although I acknowledge that rehabilitation remains a possible consideration.

The Community

- [96] Mr. Gallagher's Gladue report outlines his aboriginal heritage. His father was non-Aboriginal and his mother was of "blended Anishinaabe descent". He is a member of the Serpent River (Anishinaabe) First Nation, located on Lake Huron near Sudbury, Ontario.
- [97] Mr. Gallagher was born and raised in Vancouver. His relationship with local Aboriginal communities seems to have begun in 2018. The Gladue report refers to him providing various "services" to the Tsleil-Waututh and Squamish First Nations, both local Coast Salish First Nations who have connections to Burnaby. The report refers to Tsleil-Waututh Chief Reuben George and Squamish First Nation Spiritual Elder Robert Nahanee.
- [98] Mr. Bige is a young (24-year-old) man who grew up in Surrey, BC. His Gladue report is also before the Court. Like Mr. Gallagher, his father is non-Aboriginal. Mr. Bige's Aboriginal heritage arises on his mother's side. Their Aboriginal community is the Lutsel K'e Dene First Nation, located in the Northwest Territories (NWT). Mr. Bige has visited his First Nation in NWT once, recently in 2018.
- [99] As noted above, the essence of the sentencing circle is to involve the offender's community, not only to provide views or recommendations to the Court as to the sentence, but also to assume some involvement in the carrying out of the sentence itself. In this case, it is somewhat unclear what community is proposed to be involved in the process and how that involvement would take place.
- [100] As set out above, the ANOA refers generally to "Indigenous community members and Elders". In her submissions, Mr. Gallagher/Mr. Bige's counsel referred to Chief George, Elder Nahanee and Shane Point as possible attendees.

- [101] What I take from Mr. Gallagher/Mr. Bige's counsel's written submissions and their counsel's reference to these names is that the community to be involved is Mr. Gallagher's adopted Aboriginal community, not that arising from his heritage. Mr. Gallagher's Gladue report refers to the writer having had a discussion with Chief George; Elder Nahanee did not respond to the Gladue report writer's repeated requests for an interview prior to the completion of the Gladue report.
- [102] In Mr. Bige's Gladue report, he is quoted as stating "I was out there to support the host Nations, to who the land belongs to". However, there is no mention in the report that the local First Nations in Burnaby even know Mr. Bige, let alone support him in respect of his sentencing. The writer of Mr. Bige's Gladue report made efforts to contact his Indigenous community in NWT; however, no one returned his phone calls and social media messages.
- [103] I have no evidence from Mr. Leyden concerning his Aboriginal heritage, including any Gladue report, beyond the bare assertion that he is Aboriginal (as noted by Affleck J.). Accordingly, I have no evidence from him on this application that would allow me to consider whether he has the support of his community for the purpose of a sentencing circle, as a relevant consideration toward determining if it is appropriate.
- [104] Accordingly, it is unclear to me, even assuming that only local First Nations are to be involved, what they intend to offer toward meeting the sentencing circle objectives of fashioning a sentence that they will be involved in. In the words of the judges in Cheekinew and Joseyounen, there is no indication that elders or respected community leaders are "willing to participate".
- [105] Mr. Gallagher's counsel refers to an article by John Burrows, Indigenous Legal Traditions in Canada (Report for the Law Commission of Canada, January 2006). In his paper, Mr. Burrows refers to "Indigenous legal traditions" or "laws", that he mentions are practiced to this day in Canada.
- [106] At pp. 34-53, Mr. Burrows discusses Anishinaabe legal traditions; however, if and in what manner those traditions or laws blend with those of the local First Nations and the common law offence of criminal contempt, to the extent relevant to the involvement of either community in the sentencing, are not clear.
- [107] Again, I would return to Pena and Josephson J.'s comments on this issue:
- [7] . . . The offences occurred in a remote and isolated area on ranch land in the Cariboo. The offenses did not arise out of community social conditions, nor any circumstances such that any "community" would be in a position to work with, monitor and control the behaviour and attitude of the offenders with a view to restoring offenders as a law abiding members of that community. The initiative for this application does not come from any community, but from the applicants. Not all the applicants are from the area where the offences took place.

- [108] The same considerations arise here. The offending behavior of the Contemnors does not necessarily arise from conditions in the local First Nations community. While both Mr. Gallagher and Mr. Bige advised their Gladue report writers that their backgrounds involve the very unfortunate usual trappings of an Aboriginal upbringing, those factors do not seem to have played any part in these offences. At bottom, Mr. Gallagher and Mr. Bige were involved in a public protest of a controversial resource project in the large urban environment in which they both live.
- [109] Even assuming that the local First Nations in Burnaby are aware of this matter, there is no evidence upon which I can conclude that a sentencing circle as proposed by the Contemnors would potentially achieve the objectives identified in Moses. I am not aware that those First Nations have indicated any intention to participate in the sentencing; even if they do, there is no indication that they would participate in "rehabilitating" the Contemnors in their community, consistent with the objectives of such a sentencing process.

The Offenders

- [110] In Cheekineew, Grotsky J. referred to the consideration that an offender must be, at least, "honestly interested in turning his or her life around with the assistance and supervision of his or her 'community'" before a sentencing circle could be considered appropriate in the circumstances.
- [111] The stance of Mr. Gallagher and, to a lesser extent, Mr. Bige, on this application is anything but.
- [112] Mr. Gallagher's Gladue report offers no insight into his attitude following his conviction by Affleck J. Mr. Bige's Gladue report states that Mr. Bige "understood that committing the offence before the Court was wrong" and that he was only there to "support" the local First Nations.
- [113] In this respect, I need not go any further than considering the evidence of Mr. Gallagher and Mr. Bige advanced in support of this application. However, I wish to emphasize that their evidence at the later sentencing hearing may be of a different character and I do not wish to presume that their stance on this application will necessarily be the same. Having said that, I can only evaluate the evidence presented on this application in support of the Contemnors' application that I convene a sentencing circle.
- [114] I can only describe Mr. Gallagher's evidence as combative and aggressive, despite often stating to the Court that he "means no disrespect to the Court". He describes that "you have your rule of law, we have ours", the latter being described as his "natural laws" which he obeys. He refers to "us", which I take to be the Court, as "fake rulers", abiding by "colonial ways" that are very discriminatory and racist. He denies that the Court has any jurisdiction over him. He denies that Canada is a nation, calling it a "corporation"; he argues this would not even allow a "nation to nation" discussion. He proclaims that there is "more to come" in

that thousands of people have signed up to be arrestable (presumably to oppose Trans Mountain's pipeline project).

- [115] Mr. Gallagher says he wants a sentencing circle - or, as he has repeatedly said in these proceedings, a feast hosted by him and his mother - to "resolve all of the matters in keeping with his traditions". However, at its core, I consider that Mr. Gallagher wants such a sentencing process in order to lecture the Court on how "natural laws" dictate his actions, rather than orders of this Court and to argue that he should be excused from his actions for that reason.
- [116] It is nonsensical to suggest that Mr. Gallagher's response to his conviction is one of seeking to rehabilitate himself through the sentencing process toward becoming a law-abiding citizen of Canada.
- [117] Mr. Bige presents a less aggressive and combative stance, although he is clearly taking his lead from his co-defendant, Mr. Gallagher. He now describes that he was "along for the ride". Like Mr. Gallagher, Mr. Bige often repeats that he had no intention to "disrespect the Courts". He now regrets some of the personal consequences of his involvement in these court proceedings. The collision of ideology and reality has now come home to roost for the young and impressionable Mr. Bige, but only to a certain degree.
- [118] Mr. Bige describes that he has requested a sentencing circle to "allow us to be on the same playing field" where "systemic privileges would be lessened". He describes a "nation to nation" relationship in what he describes as a "dysfunctional relationship". He describes the sentencing circle as "mitigation" where there is a "lack of integrity regarding a foreign court system" (also described by him as a "defunct and corrupt system").
- [119] In *Pena*, Josephson J. described similar circumstances where the offenders had not indicated any contriteness or any indication that they would change their attitudes toward court orders:
- [8] There is no indication the applicants are contrite or prepared to consider abandoning the tactics which led to their involvement in the offences. The victims should not be subjected to a risk that a court ordered sentencing process would require them to hear again the oft repeated justification for the actions of the accused nor the oft repeated condemnation of police and the justice system for their roles in relevant events.
- [9] The healing process contemplated in circle sentencing should begin with the acceptance of wrongdoing as found by the jury, not with denials and justifications.
- [10] . . . there is no community, however broadly that term may be defined, which could be expected to fulfill the role required of it in such a process. Furthermore, those most immediately and adversely affected by the actions of the accused do not appear particularly willing to become involved in the process.

- [120] At bottom, the underlying objectives of Mr. Gallagher/Mr. Bige are completely divorced from the fundamental objectives of a sentencing circle.
- [121] Mr. Gallagher/Mr. Bige advanced arguments before Affleck J. that he should adopt Indigenous law in considering the issue of guilt. At paras. 47-48 of his reasons, Affleck J. noted that no such "laws" had been proven. He stated:
- [48] . . . The position of Ms. Rauch appears to be that indigenous law obliged Mr. Bige and Mr. Gallagher to disobey the injunction. No evidence was offered of the content of any aboriginal or indigenous law or laws that may be applicable to the conduct of Mr. Bige and Mr. Gallagher and which is relevant to their prosecution for criminal contempt of court for disobedience of the injunction.
- [122] Similarly, Mr. Gallagher/Mr. Bige now argue and have given evidence on this application that Indigenous law should apply in the sentencing process without any articulation or evidence as to what exactly that Indigenous law entails and how it might be applied in the sentencing process.
- [123] I conclude that Mr. Gallagher and Mr. Bige's clear objective in seeking a sentencing circle is to be on an "equal" footing with the Court. They wish to convene a forum in order to reinforce their position that their convictions were wrong, that this Court has no jurisdiction over them and that they should be excused from their actions, all arising from their mandate to follow "natural laws", rather than the dictates of the Court's order.
- [124] Such an attitude flies in the face of what a sentencing circle is intended to achieve. In addition, Mr. Gallagher/Mr. Bige's call upon the "community" to support them in that respect is anything but clear, but equally objectionable to the extent that any community leader would participate in supporting such a position.

Conclusion re Circle Sentencing

- [125] I acknowledge that, based on the evidence before me, Mr. Gallagher/Mr. Bige have firmly held beliefs as to their "natural laws" and that they view Trans Mountain's pipeline project as objectionable given their duty to protect the environment in accordance with those "natural laws". However, the community that has or continues to object to the pipeline project is not confined to the Aboriginal community; nor is support for the pipeline project divorced from persons in the Aboriginal community, whether local or more broadly situated.
- [126] At bottom, Affleck J. found Mr. Gallagher and Mr. Bige to have publicly disobeyed the Injunction. Their sentence for that offence is to be grounded in the primary need of the Court to publicly denounce such behavior in order to promote compliance by not only the Contemnors, but the larger community. Having said that, I accept that rehabilitation remains a potential consideration at the sentencing.

[127] Mr. Gallagher/Mr. Bige's application for a sentencing circle is based on the fundamental flaw that the "rehabilitation" sought by them is not that of the Contemnors, but rather that of the Court, toward their position that Indigenous laws allow such contumacious behavior. Such a stance is clearly objectionable whether supported by the local First Nations or not. The circumstances here do not warrant any consideration of a sentencing procedure as contemplated in Moses, and as discussed in later case authorities.

[128] I decline to direct a circle sentencing process as part of the Contemnors' sentencing hearing. Mr. Gallagher/Mr. Bige's application for that relief is dismissed.

"Fitzpatrick J."

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