

CANADA / JUDGMENT

Trans Mountain Pipeline ULC v. Mivasair

2021 BCSC 1127

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1127 Trans Mountain Pipeline ULC v. Mivasair

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Trans Mountain Pipeline ULC v. Mivasair,

2021 BCSC 1127

Date: 20210607

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

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

(Leyden - Sentencing)

Counsel for the Crown:

M.R. Ruttan

M. Crisp

Counsel for the Defendant, James Leyden:

D. Fai

Place and Date of Hearing:

Vancouver, B.C.

May 17, 2021

Place and Date of Judgment:

Vancouver, B.C.

June 7, 2021

INTRODUCTION

- [1] The matter before the Court is the sentencing of James Leyden.
- [2] On December 9, 2020, I convicted Mr. Leyden of criminal contempt arising from his most recent and second breach of an order granted in this proceeding on June 1, 2018 (the "Injunction"). In general, the Injunction prohibited interference with the operations of the plaintiff, Trans Mountain Pipeline ULC ("Trans Mountain"). My reasons are indexed at Trans Mountain Pipeline ULC v. Mivasair, 2020 BCSC 2246 (the "Conviction Reasons").
- [3] Mr. Leyden's conviction arose from his breach of the Injunction at one of Trans Mountain's work sites on December 2, 2019.
- [4] The Crown seeks a sentence of a period of incarceration and probation. Mr. Leyden seeks a non-custodial sentence.

CIRCUMSTANCES OF THE OFFENCES

- [5] The circumstances of the offences are outlined in the Conviction Reasons.
- [6] In mid-March 2018, Justice Affleck granted an injunction to address protest activity against Trans Mountain and its pipeline expansion project. In broad terms, the initial injunction prohibited obstruction of access to and from various Trans Mountain work sites, including its tank farm facility in Burnaby, BC (the "Burnaby Terminal"). Protests continued and arrests of protestors began almost immediately after the granting of the initial injunction. On June 1, 2018, the Injunction was granted, essentially incorporating provisions from the earlier orders.

- [7] All told, the police arrested in excess of 200 people for breaching the injunctions granted in this proceeding, including the Injunction. As I will discuss in more detail below, protest activity concerning Trans Mountain's project continues to this time.
- [8] Mr. Leyden's personal knowledge of the Injunction and its terms was established at trial by reason of his attendance at an earlier protest at another of Trans Mountain's work sites. On August 21, 2018, Mr. Leyden was present when the Injunction was read out over a loudspeaker to those persons who had gathered on the roadway. In addition, at this trial, Mr. Leyden confirmed that he was well aware of the Injunction and its terms: Conviction Reasons at para. 29.
- [9] On December 2, 2019, Mr. Leyden was present during a blockade of the Burnaby Terminal driveway by a number of people where, for some time, he was not personally on the driveway but observing from afar. However, at some point, Mr. Leyden joined the others on the driveway and remained there for about 27 minutes. The entire protest and obstruction of the driveway lasted about 1 hour, 15 minutes. Mr. Leyden was present in the crosswalk and driveway area outside the main gate entrance to the Burnaby Terminal where, with others, he was participating in protest activities against Trans Mountain. In the Conviction Reasons at para. 47, I found that his presence in the crosswalk/driveway resulted in the obstruction and impediment of people and vehicles from entering and exiting the Burnaby Terminal.
- [10] I found that the protest activities in which Mr. Leyden was involved on that day were peaceful, although clearly unlawful. The video evidence shows that Mr. Leyden was involved in or organized a pipe ceremony while he was on the driveway.

CIRCUMSTANCES OF MR. LEYDEN

- [11] Information as to Mr. Leyden's circumstances is found in his trial evidence and evidence presented by Mr. Leyden at this sentencing, including his Gladue report dated April 4, 2020. Although the Gladue report was completed for an earlier sentencing hearing, Mr. Leyden was content to rely on that document without any update for the purposes of this hearing.
- [12] It is common ground that the sentencing process is an individualized process and that the Court must consider the particular circumstances of the person before the Court.
- [13] Mr. Leyden's personal circumstances were outlined at the earlier sentencing hearing in fall 2020 relating to his previous offence, indexed at *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCSC 1512 (the "Previous Sentencing Reasons"). Those circumstances remain relevant at this sentencing:
- [35] Mr. Leyden is 68 years old. He was born in Ontario.

- [36] Mr. Leyden's Gladue report indicates that he has only a few memories of his family life, which unfortunately included abuse, both substance and sexual. The authorities apprehended him at three months of age. He believes that his mother was of a blended Anishinaabe/Italian heritage; his father was non-Aboriginal.
- [37] Mr. Leyden was adopted at age seven by a non-Aboriginal family who did not expose him to his Aboriginal heritage.
- [38] Mr. Leyden began a life of drug and alcohol abuse starting at age 12, which involved some element of a criminal lifestyle. In the 1970s, he moved west, eventually ending up in Vancouver where, unfortunately, his drug and alcohol abuse continued. In the 1980s, when he was around 34 years old, Mr. Leyden began to embrace his Aboriginal heritage, a change of direction that allowed him to attain sobriety that he maintains to this day. Since then, Mr. Leyden has worked and volunteered in the Indigenous and addictions recovery community.
- [39] Mr. Leyden is currently single. He has fathered six children, two of whom have passed away. He is not involved in the lives of his other four children. He states that he has taken a pledge of poverty; currently, he is supported financially by a small pension while living in a van in a church parking lot.
- [40] Mr. Leyden reports that he has a variety of ailments, including heart issues. He takes medication every day.
- [41] In 2018, Mr. Leyden's connection to the Trans Mountain matter arose when, Tsleil-Waututh and Squamish First Nation elders asked him to provide services at the Watch House, including "keeping the peace". He is described as a "sun dancer" and "pipe carrier", titles within the Aboriginal community, as was discussed by Affleck J. in the Conviction Reasons at paras. 28-29.
- [14] Mr. Leyden does not have a criminal record.
- [15] However, as noted above, this is not Mr. Leyden's first breach of the Injunction. In October 2019, Mr. Leyden was convicted of criminal contempt arising from his similar protest activity at another of Trans Mountain's work sites on August 21, 2018: *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 2472. On October 6, 2020, he was sentenced to 28 days in jail: see *Previous Sentencing Reasons* at para. 170.
- [16] Commencing October 6, 2020, Mr. Leyden spent some days in jail at the North Fraser Pretrial Center until he was discharged for medical reasons. The reason appears to have arisen from an adverse reaction to a spider bite.
- [17] At this hearing, Mr. Leyden raised various health concerns that he contends may arise from any further incarceration of him, as I will discuss below.

CROWN / DEFENCE POSITIONS

[18] The Crown and Mr. Leyden's counsel have very different views as to what sentence is fit for Mr. Leyden's latest breach of the Injunction.

The Crown

[19] The Crown seeks a sentence of 45 days incarceration plus a one-year period of probation with a condition restricting his presence at Trans Mountain work sites.

[20] As I have noted in earlier sentencing reasons in this matter, the Crown's sentencing positions with respect to the protestors convicted of criminal contempt for violating the Injunction have evolved over time. That progression has occurred over spring/summer 2018 when approximately 200 people were arrested at various Trans Mountain work sites.

[21] I will not repeat the entire history of the Crown's sentencing positions, as it is discussed (at least to that point) in *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156 [Trans Mountain BCCA] beginning at para. 3. As noted by the Court of Appeal, beginning in late April 2018, the Crown began formalizing its sentencing position in a Notice of Motion filed with this Court. This was seen as necessary since the Crown was required to address hundreds of people arrested in protests who eventually came before the Court.

[22] From April-July 2018, the Crown indicated an initial sentencing position of varying degrees, described as Category One to Category Five. During that time, the sentences imposed reflected each particular circumstance and offender. The Crown's sentencing position set out an escalating range of sentences involving fines, community service and jail time, dependent at least in part, on how long the injunction had been in place, whether there was a guilty plea and, if so, when any guilty plea was entered.

[23] On August 3, 2018, the last iteration of the Crown's sentencing position - "Category Five" - was added. Category Five would apply to defendants arrested after August 2, 2018. If convicted at trial, the Crown would consider recommending 28 days' imprisonment. At that time, the Crown also stated it may seek longer jail sentences for Category Five at any time without further notice.

[24] A number of people were convicted and sentenced within this later period of time, which the Crown describes as Category Five. The sentences included Conditional Sentence Orders (CSOs), 28-day jail terms and also lesser jail terms for persons who had health conditions.

[25] In my view, the increasing severity of the sentences sought by the Crown over that time - which I am told were usually accepted by the Court - were in keeping with the need to send an escalating stronger and, hopefully, more successful message to the protestors who continued to openly flaunt and disobey the requirements of the Injunction even months after it was granted. There is substantial authority to support such an approach: *MacMillan Bloedel Ltd. v. Brown* (1994), 88 C.C.C. (3d) 148 (B.C.C.A.) at paras. 21 and 45.

[26] In *Trans Mountain BCCA*, Justice Butler (for the court) confirmed that escalating sentences over the lifetime of the injunction can be appropriate:

[46] Finally, the appellants must be presumed to know that when individuals, in the course of an ongoing public protest, continue to defy a court order, the court may impose stiffer sentences for contempt the longer the court order is defied: *MacMillan Bloedel* at para. 52.

...

[60] It was also not unprecedented for the judge to use escalating sentences in a criminal contempt sentencing hearing. In *MacMillan Bloedel*, six out of 44 protestors arrested for violating an injunction order in contempt appealed their custodial sentences. *McEachern C.J.B.C.* held that escalating sentences were sometimes reasonably necessary to preserve the rule of law in contempt proceedings:

[48] ... [J]udges may have no alternative but to impose increasingly severe sentences for subsequent offences should the sentences imposed in these cases prove insufficient to convey the message that Canada, as its Constitution states, is a country founded upon the rule of law.

[27] The Crown submits that, in the present case, the circumstances of the offence call for an even harsher penalty for Mr. Leyden than what he received on his previous conviction. The Crown submits that when the offence occurred on December 2, 2019, Mr. Leyden had been convicted only weeks before (October 25, 2019) on the earlier charge from August 2018. In addition, at the time of his earlier conviction, Mr. Leyden was well aware that jail sentences were being sought by the Crown and had been often imposed by the Court in respect of persons who had been convicted prior to that time.

Defence Position

[28] Mr. Leyden seeks a CSO for a short period of time to be served at the building run by the Longhouse Council of Native Ministry located in Vancouver, BC. Mr. Leyden currently lives there, where he helps with cooking and provides other services.

[29] Mr. Leyden suggests a curfew that would allow him to attend at the Watch House, a structure maintained by some Indigenous persons near the Burnaby Terminal entrance and intended to allow them to "watch" *Trans Mountain's* activities and observe any irregularities. In the alternative, Mr. Leyden suggests that a CSO involving house arrest for a short period of time (say 45 days) with Mr. Leyden having the ability to leave for medical reasons or once a week for grocery shopping.

[30] Mr. Leyden submits that a jail sentence is neither warranted nor necessary in that a CSO can adequately serve the sentencing objectives of denunciation and deterrence: *R. v. Proulx*, 2000 SCC 5 at paras. 105-107. He submits that a jail term would be unduly harsh for him, given his medical conditions, while in the midst of the pandemic.

PRINCIPLES OF SENTENCING

- [31] 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 "Criminal Code"): *International Forest Products Ltd. v. Kern*, 2001 BCCA 48 at para. 20; *R. v. Dhillon*, 2015 BCSC 1298 at para. 10; and, *Trans Mountain BCCA* at para. 55.
- [32] I am aware of the purpose and principles of sentencing set out in the Criminal Code, particularly at ss. 718, 718.1 and 718.2.
- [33] Substantial authority exists that the primary sentencing objectives in relation to criminal contempt are that of denunciation and deterrence, both general and specific.
- [34] In *Dhillon*, Justice Holmes (as she then was) 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.
- [Emphasis added.]
- [35] In *Trans Mountain BCCA*, the court recently expressed this same sentiment:

[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.

[58] General deterrence was the primary objective of sentencing in *MacMillan Bloedel*, where the focus was likewise on securing respect for the rule of law. A summary of sentencing principles for contempt was set out in *Transportation Lease Systems Inc. v. Viridi*, 2009 BCSC 695 at para. 17, citing *Health Care Corp. of St. John's v. Newfoundland and Labrador Assn. of Public and Private Employees*, [2001] N.J. No. 17 (S.C.T.D.) at para. 2:

1. The inherent jurisdiction of the court, as a superior court, allows for the imposition of a wide range of penalties for civil and criminal contempt;
2. Deterrence, both general and specific, but especially general deterrence, as well as denunciation, are the most important factors to be considered in the imposition of penalties for civil, as well as criminal, contempt;

. . .

9. In setting the overall level of penalty, the court may take account of the level of penalty imposed in similar cases in the past and may adjust the penalty upwards or downwards, depending on the court's assessment as to whether previous levels of penalty have had an effective general deterrent effect; . . .

[36] All of the above authorities emphasize the need for the Court to restore, maintain and preserve the rule of law and the administration of justice by this Court by punishing those people who would choose to threaten its existence by taking matters into their own hands and in doing so, encourage others to do the same.

[37] Accordingly, the Court's main focus in this sentencing process is to send a clear signal to Mr. Leyden and others who may be influenced by him and his actions, that such behavior will not be tolerated. Denunciation and deterrence are the main sentencing objectives here, including general and specific deterrence. I acknowledge that rehabilitation, although not a primary focus, remains a possible relevant consideration, although Mr. Leyden does not raise any such issues in that respect.

ABORIGINAL BACKGROUND

[38] It is uncontroverted that Mr. Leyden's Aboriginal heritage is a relevant consideration at this sentencing. Pursuant to s. 718.2(e) of the Criminal Code, in fashioning a fit sentence for Mr. Leyden, this Court must consider:

... all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community. . . with particular attention to the circumstances of Aboriginal offenders.

[39] I am aware of the principles outlined in *R. v. Gladue*, [1999] 1 S.C.R. 688 and the statements of the Court in *R. v. Ipeelee*, 2012 SCC 13, including at para. 59, regarding the requirement to use a different method of analysis in determining a fit sentence for an Aboriginal offender.

[40] In *R. v. Wells*, 2000 SCC 10 at paras. 36-42, the Court emphasized that, within the scope of s. 718.2(e), the Court must still consider the matter on a case-by-case basis, considering the offence, the offender, the victim and the community. The fact that an offender is Aboriginal does not dictate that a restorative approach is appropriate or should be given priority over other sentencing objectives, such as are relevant here. At para. 44, the Court in *Wells* reiterated that the provision dictates a different methodology, not a different result.

[41] Unlike the facts in *Wells*, Mr. Leyden's actions were not violent. However, Mr. Leyden's offences here were serious. They were made more serious by the fact that this was a repeat offence on Mr. Leyden'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.

[42] The Crown submits that, in this case, where denunciation and deterrence are key concerns, there is no principled basis upon which to distinguish Mr. Leyden as different from a non-Aboriginal person.

[43] The Court in *Ipeelee* discussed how systemic factors and an Aboriginal offender's heritage, background and circumstances relate to an offence and provide context to determine an appropriate sentence:

[83] As the Ontario Court of Appeal goes on to note in *Collins*, it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. The interconnections are simply too complex. . . . Furthermore, the operation

of s. 718.2(e) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[Emphasis added.]

[44] Mr. Leyden's Aboriginal heritage, background and circumstances are clearly relevant. Indeed, they form the context of his stated reasons for his actions on the day in question: Conviction Reasons at para. 28.

[45] It is apparent here that the offence did not arise from systemic factors or the background of Mr. Leyden, although such is not strictly necessary in applying Gladue principles and s. 718.2(e) of the Criminal Code. Mr. Leyden has clearly faced difficult circumstances in his past and his recovery has now allowed him to provide support to others in his community, including his Aboriginal communities.

[46] Mr. Leyden's counsel emphasizes that he was present on the driveway to conduct prayer and ceremony. However, there is no explanation as to why Mr. Leyden had to conduct his pipe ceremony in the middle of Trans Mountain's driveway. I would comment as I did in the Previous Sentencing Reasons:

[127] Mr. Leyden and Mr. Gallagher speak often of their spiritual activities at the Watch House; Mr. Leyden speaks of his role as a peacekeeper there. Again, no difficulty arises because their activity at the Watch House was not in violation of the Injunction. Moreover, if the Contemnors had chosen to be in prayer or ceremony while on the side of the road and not blocking traffic to or from the Terminal, no issue would have arisen. Defence counsel did not offer any explanation, let alone a reasonable one, as to why the Contemnors could not have been in prayer or ceremony in any place save in the middle of the roadway while blocking access to Trans Mountain's work site.

[128] The point is that the Contemnors made a clear choice that they were going to violate the Injunction by moving into and staying on the roadway. The fact that they then undertook certain prayers or ceremony is of no moment.

[47] Mr. Leyden would not have been in violation of the Injunction if he had chosen to be in prayer or ceremony while on the side of the road and not blocking traffic to and from the Burnaby Terminal.

- [48] At bottom, Mr. Leyden was there to protest the activities of Trans Mountain in violation of the Injunction and to register his objection to that activity in defiance of the Injunction. He had a choice as to whether not he would obey the Injunction: Previous Sentencing Reasons at paras. 122-125. Unfortunately, Mr. Leyden chose to breach its requirements.
- [49] While certainly relevant and within the consideration of the Court, I do not find that Mr. Leyden's status as an Aboriginal person shifts the primary objectives from denunciation and deterrence in this case. In my view, Mr. Leyden's actions stand on the same plain as protestors already arrested, charged and convicted in this matter, subject, of course, to a consideration of his relevant individual circumstances.

WHAT IS A FIT SENTENCE?

- [50] I acknowledge that Mr. Leyden was involved in a peaceful protest. However, this is a serious offence. This is particularly so given the flagrant manner in which the protest occurred and the very public manner in which it occurred: Conviction Reasons at para. 76.
- [51] The first injunction was granted in March 2018, over three years ago. The Injunction remains in place for a reason. The need for general deterrence remains at this time.
- [52] As the Crown notes, the frequency of arrests for violations of the Injunction has lessened, particularly since August 2018. However, to this day, arrests are continuing as Trans Mountain continues its work at various Lower Mainland sites and throughout BC. The most recent include:
- a) In October 2020, various individuals were arrested near Kamloops on two separate days. Criminal contempt proceedings are underway with respect to eight of them and are scheduled for trial in August 2021;
 - b) On January 6, 2021, the main gate to the Burnaby Terminal was blocked when a person towed a vehicle onto the driveway and disabled it. The Crown is pursuing criminal contempt proceedings and the matter is scheduled for trial in September 2021; and
 - c) The Crown is also pursuing two criminal contempt convictions in respect of protest activity at other Trans Mountain sites in March 2021. On May 17, 2021, an individual was convicted after entering a guilty plea and he was sentenced to a jail term. The second person is scheduled to be tried in September 2021.
- [53] I have no difficulty concluding that general deterrence remains highly relevant at this time. Unfortunately, the Court is required to signal the continuing need to respect the Injunction as a means of general deterrence to others.
- [54] There is also the matter of specific deterrence of Mr. Leyden that I conclude remains a highly relevant factor here.

- [55] I acknowledge that Mr. Leyden is very passionate in his opposition to Trans Mountain's activities, as he perceives the consequences that those activities might have in our communities, including Aboriginal communities.
- [56] Mr. Leyden's current offence took place on December 2, 2019, almost two years after the first injunction was granted. This was also after his breach of the Injunction in August 2018 and his conviction for that offence only weeks earlier.
- [57] Mr. Leyden was well aware of what he was doing at the time. Mr. Leyden was well aware that he could face criminal contempt proceedings if he violated the Injunction again. He was also well aware after his October 2019 conviction that he was possibly facing imprisonment. Despite all of this, Mr. Leyden made the deliberate choice to openly and flagrantly disobey the Injunction.
- [58] As I did in the past, I acknowledge the significant contributions by Mr. Leyden to his communities, including through his volunteer work. It is unfortunate that the consequences he must now face will detract him from those efforts, albeit temporarily.
- [59] On the issue of proportionality, the Crown cites Trans Mountain BCCA for the proposition that it is not unusual for custodial sentences to be imposed for criminal contempt:
- [59] In *Lacasse*, the Supreme Court of Canada affirmed that "proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate": at para. 53. It is not unusual for custodial sentences to be applied for criminal contempt: see Justice Burnyeat's review of British Columbia decisions where contemnors were given carceral sentences in *Transportation Lease Systems* at para. 13. As stated by McLachlin J., "[t]here is no doubt that criminal contempt may result in imprisonment, constituting a denial of liberty": *United Nurses* at 930. Indeed, in *The Law of Contempt in Canada* (Toronto: Carswell, 1997), Jeffery Miller states "the general principle is that criminal contempts are to be answered with penal sanctions" (at 129).
- [60] In an earlier sentencing decision relating to Stacy Gallagher (*Trans Mountain Pipeline ULC v. Mivasair*, 2021 BCSC 369 at paras. 94-96), I discussed previous sentencing decisions in criminal contempt matters, including those involving Trans Mountain. The Crown submits that Mr. Leyden's culpability can be considered in relation to other convictions discussed in that decision and the sentence imposed on Mr. Gallagher. The Crown highlights that:
- a) In relation to Terry Christenson's various convictions, his third conviction garnered 90 days in jail; and

- b) In relation to Mr. Gallagher, his second conviction arose from three separate incidents, one of which was the same protest that involved Mr. Leyden on December 2, 2019. On that date, Mr. Gallagher's protest activities far surpassed those of Mr. Leyden, both in terms of scope and duration. On March 2, 2021, Mr. Gallagher was sentenced to 90 days in jail and one-year probation.
- [61] The Crown concedes that Mr. Christenson and Mr. Gallagher's convictions involved a higher level of culpability than those relating to Mr. Leyden here. Hence, the Crown's submissions that an appropriate sentence is 45 days in jail.
- [62] It must also be remembered that Mr. Leyden's first conviction led to this Court imposing a 28-day jail sentence, a result that I understand is under appeal. A second conviction for the same offence would normally support an increased sentence.
- [63] In that regard, the Crown relies on further statements from Trans Mountain BCCA on the application of the parity principle where "open, continuous and flagrant violation of a court order" persists:
- [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.
- [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.

[Emphasis added in original.]

- [64] In Trans Mountain BCCA, the court upheld 14-day jail sentences for various first offenders as appropriate in the circumstances there.
- [65] I accept that the imposition of a CSO is available to me in these circumstances: Wells at para. 28. I also accept that, as noted in Proulx at paras. 102-107, 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).
- [66] I have considered a CSO as a possible sentence. However, I cannot conclude that a CSO is an appropriate or reasonable response to this offence and Mr. Leyden in these circumstances, even after having considered the mandatory provisions of s. 718.2(e): Wells at para. 30. I do not find that a CSO would adequately address the principles of denunciation and general and specific deterrence called for here.

Health Issues

- [67] I accept that any jail sentence must be considered in the context of the impact on Mr. Leyden being incarcerated arising from the COVID-19 pandemic or other health issues.
- [68] The Crown has presented a factsheet dated May 10, 2021 from the Ministry of Public Safety and Solicitor General (the "Factsheet") describing BC Corrections' response to COVID-19. As one would expect, BC Corrections has followed the recommendations and guidelines of the Provincial Health Officer and other BC health authorities.
- [69] The Factsheet indicates that, at intake, everyone completes a questionnaire and has a temperature check. Any person with symptoms is medically isolated. All other persons are placed in an induction unit for a 14-day period and, while there, they are allowed outside of their cell as much as possible. Those persons in the induction unit are in a "bubble" and are able to socially interact, while physically distancing. No visits are allowed although phone access is provided from time to time with family and friends and phone/video access is allowed for legal counsel.
- [70] The Factsheet also indicates that, after the 14-day isolation, all asymptomatic persons are integrated into the general population within a living unit.
- [71] At the time of this hearing, there was only one case of the COVID-19 virus among the inmates at one of the three potential facilities where Mr. Leyden would be sent. In addition, BC Corrections advises that the inmates are offered a vaccine and the majority of them have been partially or fully vaccinated in all three of those institutions. The majority of BC Correction staff have also been partially or fully vaccinated.

- [72] BC Corrections is, of course, statutorily required to ensure that an inmate is given health care, as appropriate: Correction Act Regulation, B.C. Reg. 58/2005, s. 2(1)(h) (the "Regulation").
- [73] I acknowledge Mr. Leyden's health concerns. His medical records reveal cardiac issues, for which he takes medication. He also has recurrent pancreatitis, which gave rise to hospital visits in 2017 and 2020. I have already referred to his hospitalization in October/November 2020 after his spider bite and ensuing skin infection.
- [74] In February 2021, Mr. Leyden was diagnosed with COVID-19, although that condition did not appear to require his hospitalization. He has now received at least one shot of the vaccine.
- [75] At the commencement of today's hearing, Mr. Leyden's counsel provided the Court with a further document said to be relevant to Mr. Leyden's health issues. That is a letter dated June 4, 2021, from Dr. Heather O'Donnell, an ophthalmologist:

To Whom it may concern,

The above named patient has a medically necessary surgery on the 21st of June he will require ongoing medical care for 6 weeks following the operation.

- [76] Unfortunately, there is no further information forthcoming to the Court to provide some understanding about what this surgery entails and why it is medically necessary. Mr. Leyden's counsel advises that he received the letter late last Friday (June 4, 2021). The timing of this letter is unusual. Therefore, I have no context in which to understand how this proposed "necessary" surgery came about only late in the day and on the eve of this Court's pronouncement on sentence.
- [77] I agree that, if particular health concerns are present, they should be considered in light of heightened risks of COVID-19 infection, even if jail time would otherwise be appropriate: *R. v. McKibbin*, 2020 BCCA 337. In *McKibbin*, a jail sentence was reduced to a suspended sentence in very unusual circumstances, including where there was an elevated risk of death while the offender was in jail with the pandemic underway (as of mid-November 2020).
- [78] The extreme circumstances addressed in *McKibbin* are not present here.
- [79] The Crown also refers to *R. v. Lawson*, 2019 BCCA 290. The offender had significant health issues. However, at para. 22, the court noted that his health concerns did not amount to an "overriding consideration" to warrant a CSO in the face of a jail term that was otherwise warranted. At para. 23, the court also noted that such health concerns are not appropriately addressed indirectly through the sentencing process, but rather left with the health care professionals who work in or with BC Corrections.

- [80] As I have stated before in these proceedings, Mr. Leyden is not the first and will not be the last to be incarcerated while dealing with medical issues or possible medical issues during the pandemic.
- [81] Mr. Leyden's evidence relating to his health, while relevant, does not support that incarceration will put him at significant risk during the pandemic or that it presents a risk that cannot be managed by BC Corrections. While incarceration is not an entirely risk-free matter regarding a COVID-19 infection, neither is anyone's general movement outside of jail in our communities. In addition, risks arising from insect bites can occur whether a person is in or out of jail.
- [82] I accept the Crown's submissions in light of the newly produced letter of Dr. O'Donnell. If Mr. Leyden is, in fact, required to undergo any medically necessary surgery, that matter can be addressed by BC Corrections within their mandate to provide health care under the Regulation.
- [83] In my view, the circumstances and history of this proceeding, the nature of this repeat offence and Mr. Leyden's personal circumstances all support that a period of incarceration for Mr. Leyden is an appropriate and fit sentence. I conclude that a jail sentence is supportable in recognizing the parity principle and the authorities referred to by the Crown.
- [84] Mr. Leyden, you are sentenced to 45 days' incarceration. At the end of that period, you will be subject to a period of probation for one year with the conditions consistent with s. 732.1(2)(a), (b) and (c) of the Criminal Code. In addition, consistent with s. 732.1(3)(a) of the Criminal Code, within 72 hours of your release, you will report to a probation officer at 275 East Cordova Street, Vancouver, BC and thereafter as directed by the probation officer.
- [85] Consistent with s. 732.1(3)(h) of the Criminal Code, I impose a further condition. While on probation, you are not to be within 500 meters of:
- a) Trans Mountain's Westridge Marine Terminal at 7065 Bayview Drive, Burnaby, BC; or
 - b) Trans Mountain's Burnaby Terminal at 8099 Shellmont Street, Burnaby, BC; or
 - c) Any other project or operations site of Trans Mountain Pipeline ULC or its affiliates, contractors or subcontractors that have been reasonably identified as the same through signage, fencing, flagging or boundary markings situated on or around the perimeter of such sites.
- [86] In addition to the standard terms of probation, during the term of probation, there will be no exception to allow for your presence at the Watch House that I understand is located within 500 meters of Trans Mountain's Burnaby Terminal. I appreciate that, as an elder, you provide some community support and assistance while at the Watch House; however, the penalty I am imposing is intended to convey to you that you cannot expect to be granted any such indulgences in the future given your repeat offending.

"Fitzpatrick J."

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