

CANADA / JUDGMENT

Trans Mountain Pipeline ULC v. Mivasair

2022 BCSC 1034

COURT

Supreme Court of British Columbia

DECIDED

15 June 2022

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2022 BCSC 1034 Trans Mountain Pipeline ULC v. Mivasair

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Trans Mountain Pipeline ULC v. Mivasair,

2022 BCSC 1034

Date: 20220615

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 Justice Fitzpatrick

Oral Reasons for Sentence

(Takaro Sentencing)

Counsel for the Plaintiff:

E. Leno

Counsel for Dr. Timothy Takaro:

N. Chantler

Place and Date of Hearing:

Vancouver, B.C.

June 13, 2022

Place and Date of Judgment:

Vancouver, B.C.

June 15, 2022

- [1] THE COURT: These are my reasons arising from the sentencing hearing of Dr. Timothy Takaro. On Monday of this week, Dr. Takaro plead guilty to the charge of criminal contempt of court.
- [2] On June 1, 2018, Justice Affleck granted an injunction in these proceedings (the "Injunction"). The overall objective of the Injunction was to prevent persons from obstructing and impeding the activities of the plaintiff, Trans Mountain Pipeline ULC ("Trans Mountain"), in respect of its pipeline expansion project. The Injunction was the second iteration of an order/injunction granted by Affleck J. earlier on March 14/15, 2018, and it included the same terms and further provisions.
- [3] The relevant portions of the Injunction breached by Dr. Takaro are:
1. The Defendants, and any other person having notice of this Order, are hereby restrained and enjoined from:
 - (a) physically obstructing, impeding or otherwise preventing access by Trans Mountain, its contractors, employees or agents, to, or work in, any of the sites or work areas as set out below:
 - (iii) any other project or operations site of Trans Mountain or its affiliates, contractors, or subcontractors that has been reasonably identified as the same (such as through signage, fencing, flagging or boundary markings situated on or around the perimeter of such site) (the "Markings"),
- (the sites and work areas referenced in this (a) being collectively, the "Trans Mountain Sites");

2. The Defendants, and any other persons having notice of this Order, are hereby restrained and enjoined from coming within five (5) meters of:

(c) the Markings, as set out in paragraph 1(a)(iii) of this Order.

(collectively, the "Buffer Zones").

CIRCUMSTANCES OF THE OFFENCE

- [4] In late November 2021, Trans Mountain was working at a temporary worksite just off Lougheed Highway and Gagliardi Way in Burnaby, BC. The site was reasonably identified by various signs posted on the perimeter fence surrounding the worksite. Accordingly, the worksite was a "Trans Mountain Site" within the definition of para. 1(a)(iii) of the Injunction (the "Site"). At the time, work at the Site included tree cutting and removal.
- [5] Only months earlier in September 2021, a Trans Mountain worksite was the subject of other illegal protest activities in the Lower Mainland. Earlier in these proceedings, five contemnors were sentenced after entering guilty pleas: *Trans Mountain Pipeline ULC v. Mivasair*, 2022 BCSC 323 and 338 (the "September 2021 Contemnors").
- [6] Also, in September 2021, Dr. Takaro was involved in a protest at a Trans Mountain worksite in the Lower Mainland. On September 28, 2021, Dr. Takaro was allegedly breaching the Injunction by conducting a "tree sit" by which he had climbed a tree so as to interfere with Trans Mountain's operations. The RCMP were required to attend and play a copy of the Injunction to him. Dr. Takaro avoided arrest and charge only by climbing down the tree and leaving the area after the RCMP conducted the "Five Step" process set out in para. 12 of the Injunction.
- [7] Accordingly, there was no question in this matter but that Dr. Takaro had full knowledge of the Injunction and its terms by no later than late September 2021.
- [8] The offence in question took place from November 23-26, 2021.
- [9] In the morning of November 23, 2021, Randy Marquardt, a Trans Mountain regional security manager, attended at the Site. He observed a tent suspended in a tree, with a sign that read "Doctors say: StopTMX.ca". The Crown advises that this tent was suspending some 100 feet above the ground. Dr. Takaro was known to Mr. Marquardt. Mr. Marquardt explained to Dr. Takaro that work was being diverted to other areas of the Site as a result of his actions, which were in breach of the Injunction. This effort was to no avail and Dr. Takaro remained in the tree.

- [10] In the meantime, Mr. Marquardt became aware that Dr. Takaro had posted a video of his activities on Facebook while he was in the tree that day. In the video, Dr. Takaro can be heard saying that he is "blocking the pipeline" and he actively invited people to come to join him and in doing so, breach the Injunction themselves, although he advised how they could leave later to avoid arrest. The Facebook posting garnered hundreds of views and comments by others.
- [11] As was no doubt expected by Dr. Takaro, the RCMP did arrive. They were advised that Trans Mountain could work around the tree in question but that Dr. Takaro would need to be removed by Friday, November 26, 2021 so as to allow Trans Mountain to continue its planned activities on the Site.
- [12] In the meantime, Dr. Takaro's supporters did arrive, as he had asked. Both he and his supporters berated the Trans Mountain employees who were continuing some work on the Site. One supporter arrived on November 24, 2021 and climbed a fence and blocked equipment.
- [13] Dr. Takaro remained in the tree.
- [14] On November 26, 2021, the RCMP attended the Site again, this time with an aerial extraction team. Again, a copy of the Injunction was played to Dr. Takaro and the "Five Step" process was completed. When Dr. Takaro remained in the tree, he was advised that he was under arrest.
- [15] While this activity took place, Dr. Takaro posted another video to the same Facebook page, described as his "arrest statement". Given the earlier process with respect to his actions in September 2021, it is no surprise that Dr. Takaro said this was "déjà vu" for him. Dr. Takaro's defiant comments to others were that "there was more to come" and "I will not back down". As with the previous Facebook post, this post attracted hundreds of views and comments by others.
- [16] Soon thereafter, the RCMP officers ascended the tree. The officer confirmed that Dr. Takaro had secured himself to the tree with a waist harness and anchor. After some difficulties, the officers lowered Dr. Takaro to the ground for his safety. He was then arrested and charged.
- [17] Consistent with his broadcast activities on Facebook on November 23 and 26, 2021, Dr. Takaro made use of the media both before and after this incident to broadcast his messages and intended illegal actions.
- [18] On February 11, 2021, an article in SaskToday.ca outlined a then planned "tree sit" and Dr. Takaro's intentions with respect to the Injunction in conducting a "tree sit". Following the dismantling of that structure by Trans Mountain, Dr. Takaro proclaimed his intention to further disobey the Injunction by erecting another structure, saying "we're not going to get caught with our pants down again" and "[w]e're not coming down".

- [19] On October 15, 2021, after avoiding arrest and charge for allegedly breaching the Injunction only two weeks earlier, Dr. Takaro was quoted in a Burnaby Beacon online article regarding that incident. Again, Dr. Takaro broadcast his further planning of more breaches of the Injunction, in that he was quoted as saying "We're definitely planning stuff. We have work planned all along the route". Dr. Takaro declined to comment on what specifically was planned, stating that it would not be "very strategic to do at this time".
- [20] There were two online articles published on November 26, 2021 regarding Dr. Takaro's activities and subsequent arrest that day - one from Burnaby Now and one from the Burnaby Beacon. As stated by the Crown, these articles amply demonstrate the public nature of Dr. Takaro's actions, as was intended by him.

CIRCUMSTANCES OF THE OFFENDER

- [21] Dr. Takaro made submissions to the Court on his personal circumstances, as did his counsel.
- [22] Dr. Takaro is 65 years old. He was born in the United States but I am advised that he has dual citizenship. He is married with two adult children.
- [23] In the 1980s, Dr. Takaro was trained as physician in the US. He obtained two master's degrees in public health and toxicology. He appears to have begun work in BC around 2005. Until 2020, Dr. Takaro had a clinical practice at Vancouver General Hospital.
- [24] I am advised that Dr. Takaro just recently retired. Even so, he maintains positions at the University of Washington in Seattle, Washington and also, at the Faculties of Medicine at Simon Fraser University and University of British Columbia.
- [25] Dr. Takaro describes himself as a physician-scientist with speciality training in occupation, environmental medicine and epidemiology and that his primary research relates to health impacts from what he describes as "global heating".
- [26] I have reviewed Dr. Takaro's extensive Curriculum Vitae (CV). His CV outlines in great detail his involvement and positions held with various professional organizations. Dr. Takaro's publication list is extensive and there is no doubt that he has made significant contributions to his community and in his professional life.
- [27] Dr. Takaro is a member in good standing of the Health Officers Counsel of British Columbia, which represents medical health officers involved in public health in BC. At this hearing, Dr. Takaro introduced a letter from the organization's Chair, Dr. Meena Dawar. Dr. Dawar speaks to Dr. Takaro's long-standing professional commitment to planetary health and his important contributions in the field of public health in BC.
- [28] It also appears to be the case that Dr. Takaro has been an activist for a very long time, or since the 1980s. One of his causes is clearly opposing Trans Mountain's pipeline expansion project. He was an intervenor in the review process and in 2018, he submitted an expert report to the National Energy Board (now the Canada Energy Regulator) in what he considered to be the health implications that arose from the project. As such, it is clearly the

case that Dr. Takaro has been involved in the opposition to the pipeline project for some time, and importantly, his participation has been done in a legal manner.

- [29] Dr. Takaro's CV also reveals that civil disobedience has been on his mind for some time. He lists an August 2020 television news cast with CBC, CTV, Global TV and Omni TV which he describes in his CV as:

Protect the Planet Stop TMX. Interviews regarding civil disobedience to block Trans Mountain pipeline expansion project.

- [30] "Protect the Planet Stop TMX" is the same organization, if that is what it can be called, that has the Facebook page where Dr. Takaro posted his videos during the offence.
- [31] Dr. Takaro does not have a criminal record. However, at the time of the incident, Dr. Takaro had protested Trans Mountain's pipeline project at the time of his September 28, 2021 incident where he was allegedly breaching the Injunction by another "tree sit" and when he avoided arrest and charge only after RCMP involvement.

POSITIONS OF THE CROWN / DR. TAKARO

The Crown

- [32] The Crown seeks a jail sentence of 30 days.
- [33] The Crown has helpfully summarized the history to provide some context to this sentencing hearing.
- [34] Between March 2018 (when the first iteration of the Injunction was granted) and August 2018, over 200 arrests were made. As some case authorities describe it, one might ascribe that substantial illegal activity as an expression of early exuberance in terms of protesting and opposing Trans Mountain's activities. At the time, the Crown's sentencing recommendation upon conviction was either a fine or community work hours.
- [35] Beginning in spring 2018, the Crown developed sentencing positions that were presented to the Court upon any guilty plea or conviction. These were considered in *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156 [Trans Mountain BCCA] at paras. 9-12.
- [36] The Crown says that its position with respect to Dr. Takaro's sentencing falls within "Category Five" in that he was arrested after August 2, 2018. Under "Category Five" (see *Trans Mountain BCCA* at para. 12), the Crown indicated a general sentencing position of 20-days jail time if there was a guilty plea no later than the first day of trial ("Late Category Five") or 28 days' jail time if convicted after trial.
- [37] However, the "Category Five" recommendations, developed almost four years ago, where conditioned on the status of the matter at the time. The Crown's stated sentencing recommendations also came with the proviso that the Crown:

may seek longer jail sentences for Category Five defendants in respect of arrests occurring after August 2 [2018] at any time without further notice.

[38] Dr. Takaro falls within this "proviso" in that the Crown is seeking further jail time. The Crown advises that, if a conviction had arisen after trial, the Crown would have been seeking a 60-day jail sentence for Dr. Takaro.

[39] Despite the mitigating factor of a guilty plea before trial, the Crown points to various aggravating factors, including:

- Dr. Takaro's comments in the Facebook videos and in the media articles that increased the public nature of his contemptuous behavior;
- Dr. Takaro's "advertising" of his illegal activities by the sign displayed on his tent in the tree;
- Dr. Takaro's actions were planned well in advance and were obviously the result of a sophisticated climbing exercise;
- The "tree sit" was clearly intended to bring maximum interference to Trans Mountain's operations for as long as possible and it did have that effect to a degree; and
- The Injunction had been outstanding for over three years when the offence occurred.

[40] The Crown points to similar circumstances involving William Winder, who was the first offender to go beyond the "Category Five" recommendations and is one of the September 2021 Contemnors. On February 15, 2022, Mr. Winder plead guilty to a "tree sit" at another Trans Mountain site in September 2021. This incident also involved aggravating factors in that it was also necessary for the RCMP to extract Mr. Winder from his perch and, like Dr. Takaro, Mr. Winder sought to later promote his illegal activities in the press. Mr. Winder was sentenced to 21-days' jail time: *Trans Mountain Pipeline ULC v. Mivasair*, 2022 BCSC 338.

Dr. Takaro

[41] Dr. Takaro submits that a non-custodial sentence is appropriate, particularly given what he describes as his "serious" health issues. He submits that a jail sentence is neither warranted nor necessary in that a conditional sentence order (CSO) can adequately serve the sentencing objectives of denunciation and deterrence. His counsel cites s. 742.1 of the Criminal Code, R.S.C., 1985, c. C-46, as supporting that a CSO may be imposed here.

[42] Dr. Takaro's counsel suggests a 30-day CSO at his residence by way of 24-hour house arrest, to be followed by 90-days probation, during which time he could perform 120 community work hours.

[43] Dr. Takaro has also agreed to a term of any CSO that he seek the removal of his Facebook postings, which he says can be taken down at his request.

- [44] Dr. Takaro indicates that he is remorseful of his actions, in that they were in breach of the Injunction and the Court's authority.

SENTENCING PARAMETERS

- [45] In *Trans Mountain BCCA* at para. 57, the court confirmed that denunciation and deterrence are the principal sentencing objectives in criminal contempt matters. While rehabilitation can be a consideration, it will usually take on lesser importance than that of denunciation and deterrence. In this case, the objective of deterrence includes both general deterrence and specific deterrence.
- [46] I agree with the Crown that general deterrence and denunciation remain key sentencing objectives here. Specific deterrence with respect to Dr. Takaro is also to be considered and I will address that aspect in the context of his remarks to the Court.
- [47] The potential appropriateness of an increasing severity of a sentence--including a jail sentence--was endorsed in *Trans Mountain BCCA*:
- [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.
- ...
- [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.
- ...
- [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.

- [48] I have said many times at hearings in this proceeding that we are well beyond the stage of early exuberance in the time after the granting of the Injunction. While the frequency of breaches of the Injunction has substantially decreased since summer 2018, unfortunately breaches have continued, as I will discuss below.
- [49] When Dr. Takaro breached the Injunction in November 2021, it had been extant for over three years.
- [50] Based on the above authorities, it is not unprecedented for judges to use escalating sentences in criminal contempt sentencing proceedings. The underlying rationale is that if the message from the Court has not been heard and understood, there must be an increasing severity of the sentence to bring home to people the message that this type of activity and these breaches will not be taken lightly and will not be tolerated.
- [51] On the issue of parity, the Crown refers to the sentences received by previous contemnors in this proceeding. I briefly summarize the history of those matters.
- [52] As stated above, in the early days of the Injunction, many offenders received sentences of fines or community work service hours. The first jail sentence for criminal contempt convictions under the Injunction did not occur until August 2018. Since August 2018, the RCMP have made a number of arrests at Trans Mountain's worksites that have resulted in convictions. Most were first offenders.
- [53] In October 2020, eight persons were arrested in the BC interior. All have plead not guilty and their trials are expected to proceed later this year.
- [54] In 2021, breaches of the Injunction continued at a fairly rapid pace - in January, March and finally, in September 2021 which saw the September 2021 Contemnors arrested and charged and Dr. Takaro was almost in that category. Most of these people plead guilty, just as Dr. Takaro has done. For those first-time contemnors who plead guilty, most sentences were for 14-days jail time, save for Mr. Winder who received a 21-day jail term given the aggravating circumstances that I have noted above.
- [55] In other words, the fairly recent breaches of the Injunction speak to the fact that this Court must continue to send the message, and likely an increasing message to others, that this civil disobedience will not be tolerated and consequences will follow.

DISCUSSION

- [56] At the time of this offence, the Injunction had been in place for over three years. I have no doubt that Dr. Takaro was well-aware of the continuing efficacy of the Injunction throughout most, if not all, of that time.

- [57] Dr. Takaro must also be taken to have known of the sentences given to other contemnors who breached the Injunction and that the Crown could seek an increased sentence in relation to any breach. Alternatively, Dr. Takaro was recklessly indifferent to that potential result.

Aggravating / Mitigating Factors

- [58] I agree with the Crown that Dr. Takaro's actions include various aggravating circumstances, as noted above, that demand a stronger response from the Court.
- [59] Dr. Takaro was very familiar with the Injunction and it is unquestionably the case that he had been aware for some time before this incident. As early as 2020, he was participating in newscasts with respect to "civil disobedience" regarding Trans Mountain. Further, in the September 2021 incident, he was fully aware of the "Five Step" process in terms of avoiding arrest and being charged.
- [60] Dr. Takaro's actions were very public, as he had planned. His intentions were clearly to cause as much interference as he possibly could in the circumstances. He specifically and publicly invited others to join him in his illegal activity, which had the desired effect to some degree. His comments in the various media articles and the nature of his breach speak to the planning and deliberate nature of his actions on November 23-26, 2021.
- [61] Dr. Takaro's actions were clearly risky, evidenced at least in part by the fact that he had secured himself to the tree, like Mr. Winder. The steps necessary to remove him also exposed the RCMP officers to some risk. Finally, I agree with the Crown that these "tree sits" also pose risks to others in the area. The Crown advised that, in the past, these tree structures have been dismantled after a Trans Mountain worker was hit in the head by a falling branch.
- [62] I agree that Dr. Takaro's actions were passive, but only to a degree. He did not voluntarily come down the tree after his arrest. Instead, the physical intervention of RCMP officers was required to extract him in a risky operation. These are all aggravating factors, just as they were with Mr. Winder.
- [63] I agree that Dr. Takaro was cooperative when the officers confronted him in the tree and later arrested him.
- [64] I also agree that the mitigating factors include Dr. Takaro's guilty plea before trial and his lack of a criminal record or any previous conviction of criminal contempt in respect of the Injunction.

Rehabilitation

- [65] I accept that Dr. Takaro has expressed his remorse to the Court.

- [66] Having said that, even when he was being arrested on November 26, 2021, he defiantly stated that he will "not back down". In those same statements, he also clearly identifies and supports other convicted contemnors, some of whom are repeat offenders.
- [67] The best I can say is that I remain unsure about whether Dr. Takaro's stated remorse will have the effect of deterring him from offending again, particularly given his many statements over the years expressing his intention to act in that manner in respect of Trans Mountain and the Injunction.

CSO / Health Issues

- [68] I accept that the imposition of a CSO is available to me in these circumstances, as being consistent with the parameters that relate to criminal offences under s. 742.1 of the Criminal Code. I also accept that a CSO can be structured so as to be punitive and onerous and can be designed to meet the sentencing objectives of deterrence and denunciation: *R. v. Proulx*, 2000 SCC 5 at paras. 102-107.
- [69] Firstly, Dr. Takaro states that a CSO is appropriate since he "acted alone" and since the manner of his "protest" is unlikely to be repeated due to the unusual nature of a "tree sit". I confess to some confusion as to how such statements can be made. Although Dr. Takaro says he acted alone, he certainly hoped that he wouldn't be alone for long, by the advertisement of his illegal actions and his express invitation for others to not only join him, but to do so illegally. Further, this November 2021 "tree sit" can hardly be described as a one-off incident. The media releases reveal that Dr. Takaro has been involved in other "tree sits" or attempted "tree sits" since early 2021. Only weeks before this incident, he was involved in a "tree sit" on a Trans Mountain worksite.
- [70] Secondly, Dr. Takaro submits that a CSO is an appropriate sentence here, largely premised on what he describes as his "serious" health issues.
- [71] The Crown has provided a BC Corrections Factsheet dated June 10, 2022 from the Ministry of Public Safety and Solicitor General describing BC Corrections' continuing response to COVID-19. Some changes have occurred over the last months, but it is largely unchanged from before. As one would expect, BC Corrections continues to follow the recommendations and guidelines of the Provincial Health Officer and other BC health authorities.
- [72] Dr. Takaro does not raise any issues with respect to being incarcerated within the context of the COVID-19 pandemic, or what is now being described more as an endemic situation.
- [73] Dr. Takaro raises health concerns, relating to high blood pressure, high cholesterol and his heart. His counsel provided a letter from Dr. J.H. Charania dated May 10, 2022 relating to those health issues. Dr. Charania has treated Dr. Takaro for the last three years and he states in the letter:

.. [Dr. Takaro] has had stents to repair multiple arteries of his heart in July 2010 in addition to high blood pressure and high cholesterol. Both of these are managed well with medications.

Although he has had normal exercise stress tests done in the last two years, it is my understanding that he will be subjected to significant physiological stress while he is a resident at the North Fraser Pretrial facility.

His risk of suffering from a heart attack would be minimized if he is able to avoid excessive and repetitive loud noises during the day and night and if he is able to avoiding chronic sleep deprivation.

[74] BC Corrections is 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).

[75] I accept that any jail sentence must be considered in the context of the impact on Dr. Takaro being incarcerated arising from any health issues. As the Crown notes, I addressed the imposition of a CSO, particularly in light of asserted health issues, with respect to another contemnor, James Leyden: *Trans Mountain Pipeline ULC v. Mivasair*, 2021 BCSC 1127 [Leyden Reasons]. I agree with Dr. Takaro's counsel that the circumstances addressed in the Leyden Reasons are distinguishable, as is the result, particularly since sentencing is an individualized exercise.

[76] Dr. Takaro's counsel refers to two case authorities that he argues justifies a non-custodial sentence in this case.

[77] The first case is *Law Society of British Columbia v. Bryfogle*, 2016 BCSC 2188. In that case, there were serious breaches of court orders by a persistent contemnor who plead guilty to contempt charges, apparently civil contempt. Defence counsel points to the Court accepting various mitigating or ameliorating features, including that the person was 75 years old and not in good health and that he had accepted that he was in contempt (para. 25). Rather than a custodial sentence, the Court imposed a longer CSO with various conditions, followed by probation.

[78] Dr. Takaro's counsel also refers to *R. v. McKibbin*, 2020 BCCA 337, which was discussed in the Leyden Reasons. In *McKibbin*, a jail sentence was reduced to a suspended sentence in very unusual circumstances, including that a jail sentence would have been harsher and that the person had an elevated risk of death if he went to jail while the pandemic was underway (as of mid-November 2020).

[79] The Crown also refers to *R. v. Lawson*, 2019 BCCA 290, discussed in the Leyden Reasons at para. 79. In *Lawson*, the court stated:

[22] the appellant has a significant health issue. But absent those factors where conditional sentences have been imposed in like cases, we are not of the view that Mr. Lawson's health concerns amounted to an overriding consideration which would warrant a conditional sentence .

[23] In that regard, we note Justice Groberman's conclusion in *R. v. Swope*, 2015 BCCA 167 at para. 39, that:

Any deficiencies in the accommodation of [the appellant's] medical condition in prison is best dealt with directly through appropriate administrative or legal channels rather than indirectly through sentence modifications.

[80] In my view, the unique circumstances presented in *Bryfogle and McKibbin* have no relevance to Dr. Takaro.

[81] I can only presume that, if Dr. Takaro is to be incarcerated, he will have full access to whatever medications he is currently taking or might take while there. In addition, I accept that serving a jail sentence can and often will be a stressful experience for persons, particularly if they are a first offender. However, that can be hardly be a significant factor as to whether a jail sentence is warranted; if that were the case, I would dare to suggest that most people would seek to avoid a jail sentence in most cases for that reason. Lastly, Dr. Takaro's speculation, supported by his physician, that he might experience loud noises while in jail and have some sleep deprivation is just that, speculation. Again, if these events should occur, and if Dr. Takaro requires medical attention as a result, I have no doubt that BC Corrections will address it.

[82] Just as with Mr. Leyden, Dr. Takaro's evidence as to his health issues, while relevant, does not support that incarceration will put him at significant risk while in jail or that it presents a risk that cannot be managed by BC Corrections. In short, I reject Dr. Takaro's characterization of his health issues as "serious". As stated in *Lawson*, those health issues are not an "overriding consideration" that would support a CSO when otherwise, incarceration is called for.

[83] I also find it somewhat ironic that these same so-called "serious" health issues had no apparent impact on Dr. Takaro's ability to scale 100 feet up a tree while hauling equipment and supplies all on his own and then survive in a small tent for three days, no doubt involving some considerable exertion and stress.

[84] Dr. Takaro also argues, in support of the granting of a CSO, that his actions do not attract the same level of moral culpability since he was acting in aid of his cause against the pipeline. He cites *MacMillan Bloedel Ltd. v. Brown*, [1994] B.C.J. No 268 (C.A.) [*Macmillan Bloedel*], which is the case authority referred to and relied upon in *Trans Mountain BCCA*, as cited above.

[85] Dr. Takaro describes himself as a "law abiding citizen" with having a "lifelong respect for the law and its institutions" - clearly a statement that can no longer stand as true after November 23, 2021. He argues that he was only acting to fight the cause of which he is passionate and where the government has failed to act, as he has requested, if not demanded, they do. He seeks change in government policy by his illegal actions or as he describes it, his "direct actions".

- [86] Dr. Takaro refers particularly to the following comments in MacMillan Bloedel of Justice Lambert as supporting that morally, his breach of the Injunction was justified, as follows:
- [126] The third point is that all six of the appellants considered that they were acting in accordance with the political principle of civil disobedience. That political principle contemplates that a public and, as far as possible, passive act of resistance to a law that is perceived to be unjust, coupled with an embracing of the appropriate punishment for the offence, is consistent with the procedures for bringing about democratic change, and when properly understood indicates the highest respect for the rule of law as a benign and necessary part of the structure of a just and democratic society. Acting in accordance with the principle of civil disobedience is not a defence in law. But surely it must be a relevant factor in assessing moral culpability for the offences. It will not always be a mitigating factor. Particularly in the case of repeat offenders, it may be an aggravating factor. But the fact that the act is motivated, not by self-interest, but by a desire on the part of the offenders to promote their perception of the public good, however inappropriately insistent, must affect the assessment of moral culpability.
- [87] There are a number of difficulties with respect to Dr. Takaro's reliance on Lambert J.A.'s statement. Firstly, Lambert J.A.'s opinion was in dissent and was one of the bases for his minority decision that lesser sentences were warranted in the Clayoquot Sound protests.
- [88] In that event, Lambert J.A.'s statement is hardly compelling, let alone, binding on me, given that the majority opinion, authored by Chief Justice McEachern, did not endorse that statement. To the contrary, at para. 6, McEachern C.J. confirmed in no uncertain terms that public protest "self-dignified as 'civil disobedience'" has never prevailed as a lawful defence. At para. 7, the McEachern C.J. adopts and quotes comments in *R. v. Bridges* (No. 2) (1989), 61 D.L.R. (4th) 154 (B.C.S.C.) at 156, on the rule of law and the role of the court in upholding that rule of law by its orders. In seeming counterpoint to Lambert J.A.'s reasoning and minority decision, the majority's adopted quotation from *Bridges* was:

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

- [89] Secondly, Dr. Takaro, as I have concluded above, can hardly be described as standing on his principles in undertaking his illegal actions while also "embracing ... the appropriate punishment for the offence", as stated by Lambert J.A. in *MacMillan Bloedel*. To the contrary, Dr. Takaro now seeks a non-custodial sentence so that he may lessen the punishment of a jail term by staying in his comfortable home for 30 days with all its amenities and avoid the ordeal of jail time.
- [90] The simple fact is that Dr. Takaro's supposed respect for the law and the Court is anything but. Many contemnors have said the same thing to this Court, but that respect only seemingly arises after they have sought to impose their own will on other Canadians who are legally operating within our democratic system.
- [91] It is also the case that Dr. Takaro's passion for his cause against Trans Mountain is indistinguishable from the many other contemnors who have appeared in this proceeding and who have met the consequences of their actions. These include the September 2021 Contemnors who all plead guilty and who, unlike Dr. Takaro, faced, if not "embraced", the known consequences of their actions, which included jail time.
- [92] In summary, while I have considered a CSO as a possible sentence, I cannot conclude that a CSO is an appropriate or reasonable response to this offence and Dr. Takaro in these circumstances. I do not find that a CSO would adequately address the principles of denunciation and general and specific deterrence called for here.
- [93] This is a serious offence. It occurred not months, but years after the granting of the Injunction. Dr. Takaro set out to breach it and he did so and did so very publicly for maximum exposure of his disobedience. As discussed in *Proulx* at paras. 106-107, the need for denunciation and deterrence is so pressing that jail time is the only suitable way to express the Court's condemnation of Dr. Takaro's conduct and hopefully, deter others who might follow his path. Dr. Takaro has not presented any personal circumstances that detract from what is, in my view, the proper approach in his case.
- [94] I conclude that the circumstances and history of this proceeding, the nature of this offence and Dr. Takaro's personal circumstances all support that a period of incarceration is an appropriate and fit sentence, not a CSO followed by probation and community work service. Denunciation and general deterrence, and possibly specific deterrence, can be addressed through the sentence to be imposed on Dr. Takaro.
- [95] Dr. Takaro's counsel states that Dr. Takaro has "now made his point". That is true, but now the Court has responded, hopefully in a way that will drive a more positive attitude by Dr. Takaro and others toward respecting and obeying the Injunction. Those persons need look no further than para. 14 of the Injunction, which confirms a person's right to protest, including protesting Trans Mountain's activities, but in a peaceful, safe and lawful manner.

DISPOSITION

[96] Dr. Takaro, please stand.

[97] I conclude that a jail sentence for Dr. Takaro is supportable in recognizing the parity principle and the authorities referred to by the Crown.

[98] This Injunction had been granted three years and five months before this incident. Another aspect of the circumstances are that Dr. Takaro's breach occurred after five other people were arrested at a Trans Mountain worksite in September 2021. The fact that convicted contemnors, even after a guilty plea, were likely facing custodial sentences was not "sprung" on Dr. Takaro: see comments of McEachern C.J. noted in MacMillan Bloedel at para. 52.

[99] The September 2021 Contemnors received either 14-day jail sentence or, in the more aggravating circumstances of Mr. Winder, a 21-day jail sentence. The elevated circumstances relating to Dr. Takaro call for a stronger response from the Court, which is unfortunate, but apparently necessary. The fact that convicted contemnors, even after a guilty plea, were likely facing custodial sentences was not "sprung" on Dr. Takaro, similar to what the McEachern C.J. noted in MacMillan Bloedel at para. 52.

[100] I accept the Crown's submission that a 30-day jail sentence is warranted in Dr. Takaro's circumstances. You are sentenced to 30-days' jail time for your breach of the Injunction on November 23-26, 2021. I will also make the usual direction to the Crown to not distribute the conviction for police to enter on their databases, but that it shall of course be distributed to BC Corrections given the jail time imposed.

"Fitzpatrick J."

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