

CANADA / JUDGMENT

Trans Mountain Pipeline ULC v. Mivasair

2023 BCCA 115

COURT

British Columbia Court of Appeal

DECIDED

15 March 2023

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2023 BCCA 115 Trans Mountain Pipeline ULC v. Mivasair

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Trans Mountain Pipeline ULC v. Mivasair,

2023 BCCA 115

Date: 20230315

Docket: CA48278

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 Leibeck), Linda Hutchings, John Doe, Jane Doe, and Persons Unknown

Defendants

-and-

Between:

Rex

Respondent

And

William George

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia,
dated May 10, 2022 (Trans Mountain Pipeline ULC v. Mivasair, 2022 BCSC 791,
Vancouver Docket S183541).

Counsel for the Appellant:

A. Bajwa

Counsel for the Respondent:

L. Ruzicka, K.C.

C. Lusk

Place and Date of Hearing:

Vancouver, British Columbia

January 24, 2023

Place and Date of Judgment:

Vancouver, British Columbia

March 15, 2023

Written Reasons by:

The Honourable Mr. Justice Voith

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Hunter

Summary:

The appellant was convicted of criminal contempt arising from his breach of an injunction prohibiting interference with the operations of Trans Mountain Pipeline ULC. At sentencing, the appellant sought a probation order and 100 hours of community service. The Crown sought 28

days incarceration. In determining a fit sentence, the judge described contempt of court as a "serious" offence and said the power of the courts to punish it is grounded in the need to uphold the rule of law. She also considered the appellant's circumstances as an Indigenous person, including his difficult upbringing described in his Gladue report. The judge found the sentencing principles of denunciation and deterrence (both general and specific) were primary in the circumstances of the case before her. The appellant was sentenced to 28 days imprisonment.

HELD: Appeal dismissed.

The sentencing judge's reasons demonstrate an attentiveness to both the nature of the offence and the individual circumstances of the appellant. She considered alternatives to incarceration and found them inappropriate on the facts before her. Her weighing of the principles of deterrence and denunciation relative to rehabilitation was reasonable. The sentencing judge expressly recognized numerous Gladue factors applicable to the appellant, but did not err in failing to overtly comment on his 'dislocation' from his heritage or culture. Finally, a judge need only address the live issues before them as raised by the parties. At sentencing, the appellant did not squarely raise the submission that his strong views about the environment ought to reduce his level of moral culpability on account of his Indigeneity. This issue was also not meaningfully advanced on appeal. In the result, there is no basis for this Court to interfere with the sentence.

Reasons for Judgment of the Honourable Mr. Justice Voith:

- [1] On October 15, 2021, the appellant, Mr. George, was convicted of criminal contempt. That conviction arose from his breach of an order prohibiting interference with the operations of Trans Mountain Pipeline ULC. He was sentenced to 28 days incarceration.
- [2] Mr. George is Indigenous. His appeal raises two primary arguments. First, he says the sentencing judge excessively relied on the objectives of denunciation and deterrence and gave inadequate weight to the principle of rehabilitation, a key sentencing objective set out in s. 718(d) of the Criminal Code, R.S.C. 1985, c. C-46. This assertion is intertwined with a second ground of appeal: that the judge failed to give effect to s. 718.2(e) of the Criminal Code, which requires sentencing judges to pay particular attention the circumstances of Indigenous offenders.
- [3] For the reasons that follow, I would dismiss the appeal.

Background

- [4] On March 15, 2018 the Supreme Court of British Columbia granted an injunction to restrain persons from obstructing, impeding and interfering with the operations of the plaintiff, Trans Mountain Pipeline ULC, at its various Lower Mainland locations and facilities. On June 1, 2018 the initial injunction order was amended on the application of Trans Mountain to add additional terms (the "Injunction"). One of the facilities described in the Injunction is known as the Burnaby Terminal.

- [5] On the afternoon of January 6, 2021, Mr. George took part in a blockade at the entrance to the Burnaby Terminal. This occurred some 33 months after Trans Mountain obtained its initial injunction and after more than 220 individuals had been arrested.
- [6] Mr. George, together with several others, placed a vehicle in the middle of the entrance to the Burnaby Terminal and disabled it by removing its tires and wheels. The vehicle had been extensively spray-painted with anti-pipeline messages. Vehicles and personnel were unable to enter or exit the Terminal. Despite being advised the RCMP had been called, Mr. George was not dissuaded from his ongoing involvement in the blockade.
- [7] When the RCMP arrived, Mr. George and others in the group put the wheels back on the vehicle and it was moved. At that point, the entrance to the Burnaby Terminal had been blocked for about three to three and a half hours. The judge found that Trans Mountain had been prevented from conducting its normal activities during that period.
- [8] Mr. George was charged with criminal contempt. He pleaded not guilty and raised several defences the judge did not accept. Mr. George appealed both his conviction and sentence, although he later abandoned his conviction appeal.
- [9] In her sentencing reasons, the judge referred to the history of the Crown's various sentencing recommendations from April 2018 to the date Mr. George was sentenced. As public defiance of the Injunction continued, the Crown sought increased sentences for individuals involved in the protest ranging from fines and community service in 'Category One' for those arrested prior to April 16, 2018, to various periods of incarceration in 'Category Five' for those arrested after August 2, 2018. That history and the Crown's sentencing matrix are detailed in *Trans Mountain Pipeline ULV v. Mivasair*, 2019 BCCA 156 [Trans Mountain BCCA] at paras. 3-12.
- [10] At the appellant's sentencing, the Crown sought a sentence of 28 days imprisonment, consistent with its Category Five framework. The appellant sought a probation order of three months with 100 hours of community work. In the alternative, he submitted any custodial sentence should be served intermittently. On appeal, he seeks a six to 12-month probation order with conditions.

The Judge's Sentencing Reasons

- [11] The primary issues before the sentencing judge arose from the appellant's personal circumstances as an Indigenous offender. There was limited jurisprudence available to the judge that addressed Gladue factors in the specific context of a conviction for criminal contempt. All parties agreed, and the judge accepted, that s. 718.2(e) of the Criminal Code as well as the principles in *R. v. Gladue*, [1999] 1 S.C.R. 688, *R. v. Wells*, 2000 SCC 10, *R. v. Ipeelee*, 2012 SCC 13 and other related authorities governed Mr. George's sentencing.

- [12] The structure of the judge's reasons is relevant. After briefly summarizing the events of the appellant's offence, she dealt at length with his personal circumstances, as explained in his Gladue report. She addressed his childhood and said:
- [16] Mr. George's mother and maternal grandmother were alcoholics and he had unquestionably a very unstable childhood as a result. As the Gladue report writer states, Mr. George experienced poverty, physical and mental abuse, family and community violence, instability, criminal behaviour as a juvenile, a lack of education (Grade 10 only) and finally, alcohol and/or substance abuse by family members and himself. Many of Mr. George's relatives - including his mother, grandparents and uncle - attended residential schools.
- [13] The judge identified that Mr. George first connected with his Indigenous heritage when he was about 10 years old. She addressed his personal relationships and his work history. She noted he had been on social assistance for the last four years and currently spent his time on various community programs as an activist.
- [14] Second, under the heading "Principles of Sentencing" the judge acknowledged the purpose and principles of sentencing set out in the Criminal Code, "particularly at ss. 718, 718.1 and 718.2". Relying on *International Forest Products Ltd. v. Kern*, 2001 BCCA 48 at para. 20, *R. v. Dhillon*, 2015 BCSC 1298 [Dhillon BCSC] at para. 10 and *Trans Mountain* BCCA at para. 55, she identified that although contempt of court is a common-law offence, courts have frequently confirmed that sentencing for criminal contempt is guided by the Criminal Code.
- [15] Under that same heading the judge confirmed that "substantial authority exists that the primary sentencing objectives in relation to criminal contempt are denunciation and deterrence, both general and specific". She quoted from *Dhillon BCSC* and *Trans Mountain BCCA*, and referred to other decisions, in support of that proposition. She emphasized the need for "the Court to restore, maintain and preserve the rule of law and the administration of justice 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".
- [16] Further, and importantly in this case, she accepted the Crown's submissions on proportionality and agreed that "increasing [the] severity of sentences may be appropriate toward meeting the objective of sending increasingly stronger message[s] to protesters if they [chose] to continue openly flaunting and disobeying the Injunction" after it had been in effect for years. Here too, the judge referred to and quoted from relevant authorities.
- [17] Third, under the heading "Aboriginal Background" the judge considered the appellant's background in determining a fit sentence in the circumstances. She confirmed she was "aware of the principles" outlined in *Gladue* and *Ipeelee* and she referred to salient and well-known portions of *Ipeelee* and *Wells*. I have quoted these passages because they evince an understanding of relevant principles that are pertinent to the grounds of appeal the appellant raises:

[50] Accordingly, I have considered Mr. George's Aboriginal heritage in considering and determining a fit sentence in the circumstances. I am aware of the principles outlined in *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13. In summarizing the principles from *Gladue*, the Court in *Ipeelee* stated:

[59] The Court held, therefore, that s. 718.2(e) of the Code is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2 (e) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

[18] The judge quoted the following passage from Wells:

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

[19] Finally the judge relied on the following statement in *Ipeelee* to guide her consideration of "how systemic factors and an Aboriginal offender's heritage, background and circumstances relate to a defence, providing 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. The Aboriginal Justice Inquiry of Manitoba describes the issue, at p. 86:

Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated.

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 by Fitzpatrick J.]

- [20] She agreed with the Crown that "in this case", where denunciation and deterrence were the primary sentencing objectives, an "appropriate sentence for an Aboriginal offender may not necessarily differ from what may be imposed on a non-Aboriginal offender". She accepted that the appellant's offence was not a violent one. Nevertheless, she considered the offence "serious, [and] consistent with the need for this Court to denounce and deter such behaviour, both generally and specifically".
- [21] Finally, under the heading "What is a Fit Sentence?" the judge referred to numerous fact specific circumstances that I will return to, relating to both the appellant's offence and his personal circumstances. She was satisfied, having regard to the various considerations she identified, that denunciation and deterrence remained the primary sentencing objectives. She also explained why she did not consider that either a period of probation and community work or an intermittent sentence was appropriate.

Standard of Review

- [22] The Criminal Code does not directly govern sentences for the common-law offence of criminal contempt. However, the standard of review remains the same as it is for all sentence appeals. Appellate courts cannot interfere with sentencing decisions lightly: *R. v. Parranto*, 2021 SCC 46 at para. 46; see also the further authorities referred to in *Trans Mountain BCCA* at para. 24. Absent an error in principle, failure to consider a relevant factor, or over emphasis on the appropriate factors, a court should only intervene to vary a sentence if it is demonstrably unfit: *Trans Mountain BCCA* at paras. 24-25 and the further authorities referred to therein.
- [23] An error in principle includes "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor" that had an impact on the sentence: *R. v. Friesen*, 2020 SCC 9 at para. 26; *R. v. Sellars*, 2018 BCCA 195 at para. 22.

[24] A sentence is demonstrably unfit or clearly unreasonable when it constitutes a marked departure from the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *R. v. Lacasse*, 2015 SCC 64 at para. 53 and *R. v. Gill*, 2022 BCCA 127 at para. 20.

[25] The weight given to relevant factors, including the mitigating effect of Gladue factors on moral culpability, is not an error requiring intervention unless the balancing is unreasonable: *R. v. Nahanee*, 2021 BCCA 13 at paras. 81-83, *aff'd* 2022 SCC 37.

Grounds of Appeal

[26] The appellant has raised three grounds of appeal, all of which inform his assertion that the sentencing judge failed to give proper effect to ss. 718(d) and 718.2(e) of the Criminal Code. He contends the judge:

- i) "overly relied on the denunciation and deterrent objectives [of the offence] and failed to give adequate weight to the principle of rehabilitation";
- ii) erred in failing to expressly advert to or consider the appellant's disconnection from his heritage, culture and traditional lands; and
- iii) erred in failing to draw a distinction between the appellant, an Indigenous offender, and other protesters who were arrested and faced charges.

Issue 1: Excessive reliance on denunciation and deterrence

[27] The appellant's first ground of appeal relies on the contention that the "underlying theme that can be derived from Gladue is that imprisonment should be avoided if possible and should be reserved for the most serious of offences involving violence". Although he accepts that a criminal contempt conviction is a serious matter, he describes the question before this court as "whether a criminal contempt conviction rises to the level of seriousness as contemplated in Wells". In his submission, this threshold for seriousness is not met in this case. Thus, he says the imposition of a term of imprisonment, particularly given the appellant's Indigeneity, reflects an excessive reliance on the principles of denunciation and deterrence over rehabilitation.

[28] In my view, none of these related contentions is correct and, importantly, none properly captures the question and exercise before the judge. In particular, the appellant ignores the issue of proportionality and the judge's careful efforts to craft a fit sentence that properly considered both (a) the nature of the appellant's offence and (b) his personal circumstances.

The nature of the offence

- [29] The judge's analysis demonstrates she was well aware of the seriousness of criminal contempt of court as embodying a challenge not only to a specific court order, but to the rule of law itself. This underlying observation clearly informed her weighing of the relevant sentencing principles as they applied to the facts before her.
- [30] Early in the judge's discussion of the relevant principles, she referred to each of ss. 718, 718.1 and 718.2 of the Criminal Code. Section 718 states that "[t]he fundamental purpose of sentencing is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives" (emphasis added). Those objectives include, denunciation, deterrence and rehabilitation in subparagraphs (a), (b) and (d) respectively. Section 718.1 confirms that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". Section 718.2 requires that courts impose sentences that take into consideration a number of principles including, in subparagraph (e):
- all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.
- [31] In support of the proposition that "the primary sentencing objectives in relation to criminal contempt are denunciation and deterrence, both general and specific", the judge quoted the following statement from Dhillon BCSC:
- [41] In Dhillon, Justice Holmes (as she then was) stated:
- [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 by Fitzpatrick J.]

[32] These paragraphs establish that deterrence is "usually" the primary sentencing objective for the offence of criminal contempt. This proposition has been confirmed in numerous cases including *Trans Mountain BCCA* at paras. 57-58, *Canadian Transport (U.K) Ltd. v. Alsbury* (1952), 6 W.W.R. (N.S.) 473 at 478 (BCSC), *aff'd* [1953] 1 D.L.R. 385 (C.A.), *aff'd* [1953] 1 S.C.R. 516, and *R. v. Dhillon*, 2021 BCCA 271 [Dhillon BCCA] at para. 28.

[33] These paragraphs also establish that the power of superior courts to punish contempt of court is grounded in the rule of law. In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at 931-932, McLachlin J. (as she then was) explained:

Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be in neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th-century have exercise the power to punish for contempt of court.

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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 it may have on the respect accorded to edicts of the court.

[34] In *Glase v. Glase*, 2009 BCCA 321 this Court reiterated that a refusal to abide by court orders "strikes at the heart of the rule of law at the core of the organization of our society": at para. 7. Contempt of court is therefore an offence that "transcends the dispute between the parties; it is one that strikes at the very heart of the administration of justice": *Glase* at para. 8, citing *Ontario (Attorney General) v. Paul Magder Furs Ltd.*, (1992) 10 O.R. (3d) 46 (C.A.) at 53.

[35] In *R. v. Bridges*, (1989) 61 D.L.R. (4th) 154 (B.C.S.C), cited with approval in *MacMillan Bloedel Ltd. v. Brown*, 92 B.C.L.R. (2d) 1 [MacMillan Bloedel BCCA] at para. 6, Wood J., as he then was, said: "[I]n the whole spectrum of conduct classified as contemptuous, there can be none more sinister or more threatening than that of organized large-scale deliberate defiance of an order of the court": at 157.

[36] Not surprisingly, contempt of court is recognized as a "serious matter" regardless of the context in which it takes place: *Dhillon BCCA* at para. 27; *R. v. Krawczyk*, 2007 BCSC 345 at para. 8, *aff'd* 2010 BCCA 542, leave to appeal *ref'd*, 34063 (5 May 2011).

[37] The appellant's related submission that a conviction for criminal contempt "does not rise to the level of seriousness contemplated in Wells" misapprehends what the court in Wells said. In Wells, at para. 44 (which was quoted by the judge), the Court relied on Gladue and observed that it would generally be the case "as a practical matter, that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders". This does not mean that a judge errs, as a matter of principle, if the

sentence a particular Indigenous offender receives for an offence that is not "particularly violent and serious" is similar to the sentence received by other non-Indigenous offenders for the same offence.

- [38] Section 718.2(e) is a remedial provision that is intended to address the crisis of overrepresentation of Indigenous offenders in the Canadian criminal justice system: Gladue at para. 33; Ipeelee at para. 59 (also quoted by the judge). Indigenous offenders are different from other offenders because they are "victims of systemic and direct discrimination" and "dislocation" and are "substantially affected by poor social and economic conditions": Gladue at para. 68; R. v. Mero, 2021 BCCA 399 at para. 68-69. Section 718.2(e) recognizes that culturally attuned sentencing for Indigenous offenders has an important role to play in addressing these legacies of colonialism: Gladue at para. 65; Ipeelee at para. 64-70 and Mero at para. 68.
- [39] However, s. 718.2(e) mandates "a different methodology" for assessing a fit sentence for an Indigenous offender. It does not necessarily mandate a different result: Wells at para. 44 (again quoted by the judge); Nahanee at para. 82 quoting from R. v. Elliott, 2015 BCCA 295 at para.17. While restorative sentences should, where possible, be prioritized for Indigenous offenders, the application of Gladue principles will not inevitably lead to a reduced or non-custodial sentence: Gladue at para. 88; Ipeelee at paras. 71 and 75; Mero at para. 73.
- [40] It is also simply incorrect to say that incarceration for Indigenous offenders is reserved "for the most serious cases involving violence". Numerous decisions of this Court have imposed imprisonment for non-violent offences: see, for example, R. v. Brown, 2017 BCCA 339; R. v. McKay, 2012 BCCA 477, and the recent decision of the Ontario Court of Appeal in R. v. Mercier, 2023 ONCA 98.
- [41] Finally, the Court in Ipeelee identified the difficulty with drawing a distinction between "non-serious" and "serious" offences, and said:

86 In addition to being contrary to this Court's direction in Gladue, a sentencing judge's failure to apply s. 718.2(e) in the context of serious offences raises several questions. First, what offences are to be considered "serious" for this purpose? As Ms. Pelletier points out: "Statutorily speaking, there is no such thing as a 'serious' offence. The Code does not make a distinction between serious and non-serious crimes. There is also no legal test for determining what should be considered 'serious'" (R. Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons" (2001), 39 Osgoode Hall L.J. 469, at p. 479). Trying to carve out an exception from Gladue for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be 'serious'" (Pelletier, at p. 479). It would also deprive s. 718.2(e) of much of its remedial power, given its focus on reducing overreliance on incarceration. A second question arises: Who are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in Gladue. There is no sense comparing the

sentence that a particular Aboriginal offender would receive to the sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.

- [42] The sentencing judge's consideration of these and other authorities demonstrates her awareness that, while not a violent offence, the appellant's criminal contempt was indeed a "serious" matter. This is principally due to its crucial intersection with respect for the rule of law and, relatedly, the need to prioritise general and specific deterrence and denunciation alongside other sentencing principles, including rehabilitation.
- [43] Further, criminal contempt is an offence that can, as the jurisprudence demonstrates, attract penal sanctions: *Trans Mountain BCCA* at para. 59 and authorities cited therein; *MacMillan Bloedel BCCA* at para. 54; *Dhillon BCCA* at para. 28. Certainly, s. 718.2(e) of the Criminal Code, along with *Gladue* and *Ipeelee*, makes it clear that attention must be paid to the particular circumstances of Indigenous offenders in sentencing. However, this does not mean that, as a matter of principle, Indigenous persons are immune from penal sanctions when convicted for criminal contempt.

The appellant's personal circumstances

- [44] This analysis of the nature of the offence of contempt brings us to a related submission in this appeal. The appellant argues the judge's reliance on *Dhillon BCSC* (which I have quoted at para. 31 of these reasons, and which sets out the primary sentencing objectives for criminal contempt) was misplaced. He says "the Court in *Dhillon* did not contemplate the principles of sentencing in criminal contempt matters as they relate to aboriginal offenders".
- [45] Having identified the general principles and legal framework that were relevant to the offence of criminal contempt, the judge recognized that "the sentencing process is an individualized process and that the Court must consider the particular circumstances of the person before the Court". Proportionality is the "cardinal principle of sentencing": *R. v. L.S.N.*, 2020 BCCA 109 at para. 50, relying on *Lacasse* at para. 12.
- [46] The judge turned to consider the gravity of the offence before her as well as the degree of responsibility of the appellant. She did so to ascertain whether in the particular circumstances before her, and having regard to *Gladue* principles, denunciation and deterrence remained the primary sentencing objectives.
- [47] When considering the gravity of Mr. George's offence, the judge described the need for "the Court to restore, maintain and preserve the rule of law and the administration of justice". She traced the history of the Crown's sentencing recommendations leading to its "Category Five" sentencing position. She also confirmed the appropriateness of increasing the severity of sentences to send increasingly stronger messages to protesters who chose "to continue openly flaunting and disobeying the Injunction for months, if not years, after it had been in effect".

- [48] The judge confirmed that "when Mr. George purposefully breached the Injunction in January 2021, the Injunction had been outstanding for about two-and-a-half years (33 months from the first injunction)." She found that the appellant had known about the Injunction for some time following its issuance in early 2018. She identified that by the time of the appellant's offence, hundreds of other protesters had been arrested and faced charges.
- [49] The judge found that the appellant "chose to disregard the Injunction and then purported to control access to Trans Mountain's property as if he had that right [when] he knew he did not".
- [50] It is relevant that the terms of the order giving rise to the Injunction expressly allowed for buffer zones where lawful protest could occur. The judge also identified that, two days earlier, Mr. George had attended the injunction site to protest, but withdrew after police arrived and an RCMP officer read a copy of the Injunction to him.
- [51] In assessing the appellant's degree of responsibility for the offence, the judge noted he acted as a "leader" of the group that blocked the entrance to the Burnaby Terminal. She noted the appellant's offence was "not a spontaneous incident where Mr. George gave into that emotion in a reactionary way. This operation was well-thought-out the actions of the group were planned and deliberate".
- [52] Elsewhere the judge noted that the appellant and the others involved "made significant efforts to acquire this vehicle and the U-Haul trailer to haul this vehicle to the site, and arrange for the necessary tools to disable the vehicle and paint the messages on the vehicle. This was all done so as to ensure the maximum disruption to Trans Mountain in as public a manner as possible".
- [53] After returning to emphasize that the appellant made a "deliberate and pre-planned choice to participate in this protest activity", the judge noted that "even when confronted by Trans Mountain security personnel, Mr. George persisted in his actions in order to, as he said, 'send a strong message' to Trans Mountain".
- [54] The judge also found the appellant's personal background relevant to his degree of responsibility or moral culpability. When addressing Mr. George's background, the judge referred, as I said earlier, to the Gladue report before her. She described the appellant's difficult upbringing and personal circumstances in some detail. The judge confirmed she had "considered Mr. George's Aboriginal heritage in considering and determining a fit sentence in the circumstances".
- [55] Though the appellant has a criminal record, his offences were dated and the judge treated the appellant as a first offender. She accepted that the appellant's actions on the day of his offence were peaceful and generally polite.

- [56] She identified that the appellant had been convicted after a trial and that he had not expressed any remorse for his actions to either the court or the writer of the Gladue report. This is relevant when assessing the appellant's prospects for rehabilitation: *R. v. May*, 2018 BCCA 391 at para. 35.
- [57] When considering what constituted a "fit sentence" the judge again returned to the appellant's "Aboriginal heritage, background and circumstances". She recognized that Gladue principles do not require that an Indigenous offender's offence be "caused" by systemic factors or their background. She reiterated the appellant had faced difficult circumstances in his past and did not "suggest for a moment that Mr. George has entirely left his extremely unfortunate childhood behind him ". Nevertheless, she observed that he had seemingly risen above his earlier circumstances, gaining a significant history of employment and reconnecting with his heritage. She held this had been the case "for some years, if not decades". She found that his conduct, and the offence before her, did not arise from "the systemic factors or background that inform[ed] his past".
- [58] The judge accepted that in some cases of criminal contempt, rehabilitation remained a relevant consideration. However, she correctly recognized that Gladue considerations "do not mandate that the principles of restorative justice will have primacy in any given case": Gladue at para. 78; *R. v. F.H.L.*, 2018 ONCA 83 at para. 47. Based on her weighing of these considerations, the judge concluded that "[a]lthough Mr. George's Aboriginal heritage, background and circumstances are relevant, I find that these factors do not shift the primary objectives from denunciation and deterrence in this case". (Emphasis added).
- [59] One last set of considerations informed the judge's sentence. When weighing whether a period of probation and community work hours would be an appropriate or sufficient response to the appellant's offence, she observed that the appellant was "already very engaged in the community with this type of work and ha[d] been for years". She expressed the concern that it was "difficult to see how Mr. George would be meaningfully rehabilitated--in the sense of achieving a greater respect for the court's authority--by simply doing more of the same". She had raised this concern with counsel for the appellant during the sentencing hearing.
- [60] In response to the appellant's request that he be permitted to complete his sentence on an intermittent basis the judge found the evidence before her did not "suggest any compelling reason to do so". The appellant was unemployed and he had not pointed to any reason why he was required to be physically present in the community on weekdays. The judge also had some concerns that the Covid-19 induction protocols at jails might "in fact result in Mr. George's sentence becoming more onerous ". The judge's discussions with the Crown at sentencing confirmed there was some basis for these concerns.

[61] In my view, the judge carefully and thoroughly considered both the nature and gravity of the offence as well as the degree of responsibility of the appellant. This included consideration of the unique circumstances the appellant faced as an Indigenous offender. The weight she chose to give to these various factors, including Gladue factors, was within her discretion. Her balancing of these various factors was reasonable. I would not accede to this first ground of appeal.

Issue 2: The judge erred in failing to expressly advert to or consider the appellant's disconnection from his heritage, culture and lands

[62] The appellant contends the judge's Gladue analysis failed to consider expressly how the appellant's disconnection from his heritage, his culture and his traditional lands informed his upbringing and, in particular, his decision to breach the injunction. The appellant submits this oversight reflects an error in principle requiring the intervention of this Court.

[63] This submission is based on the following statements in *R. v. Kehoe*, 2023 BCCA 2:

56 Disconnection is one of the very harms associated with Canada's colonial history and assimilationist policies that Gladue and Ipeelee seek to address. Accordingly, the Crown's reasoning that Gladue principles should play a very limited role in this case because Mr. Kehoe was disconnected from his Indigenous culture, community and supports subverts the remedial purpose of s. 718.2(e) of the Code and penalizes Mr. Kehoe for the success of Canada's destructive policies.

57 Second, when determining whether and how Gladue principles applied to Mr. Kehoe, the issue was never whether he was disconnected from his Métis community, culture and supports. Rather, the issues were: (1) the role Canada's colonial history and post-colonial assimilationist policies played in causing that disconnection; and (2) the role that disconnection played in his coming before the court.

[64] In my view, Kehoe, read carefully and in context, does not support the inflexible principle the appellant advances. In Kehoe the appellant, who was Métis, was convicted of one count of aggravated assault and sentenced to five years imprisonment less time served. The Crown had argued, and the sentencing judge accepted, that s. 718.2(e) and Gladue principles should play a very limited role in sentencing the appellant because he was disconnected from his Métis heritage, community and culture.

[65] Justice Marchand, for the Court, explained that disconnection is one of the very harms associated with Canada's colonial history and assimilationist policies that Gladue seeks to address. The Court found the sentencing judge had erred in principle in failing to turn his mind to (1) whether Canada's colonial history and post-colonial assimilationist policies played a role in the appellant's disconnection from his community and (2) how the instability in the appellant's life may have been related to that disconnection: at para. 59. The Court concluded that these issues, properly considered, reduced the appellant's moral blameworthiness: at para. 70.

- [66] Thus, a central aspect of Kehoe was the appellant's disconnection from his Indigenous roots and the Crown's emphasis on that disconnection to diminish the importance of Gladue principles. Neither Gladue nor Kehoe, however, requires that sentencing judges invariably, and as a matter of principle, expressly address the distinct issue of disconnection when dealing with Indigenous offenders. Put differently, a failure to overtly comment on an offender's disconnection from heritage or community is not necessarily an error in principle. Instead, Gladue requires that judges take notice of the systemic and background factors that affect Indigenous persons in Canada and that are more fully identified both in the authorities the judge referred to and elsewhere in the jurisprudence.
- [67] In this case, there was no suggestion Gladue principles should play a limited role in sentencing Mr. George. The judge recognized numerous Gladue factors including poverty, abuse, addiction, lack of education, violence and intergenerational difficulty that were relevant to the appellant.
- [68] Further, while the judge recognized the appellant's early disconnection from his culture and community, she observed that when he was ten years old he had been cared for by a foster family and it was during this time that he "connected with his Aboriginal heritage, which he fosters to this day". He had lived on the Tseil-Waututh Nation reserve in North Vancouver since he was 21. He was 42 years old when he was sentenced. Since 2018, he had "made further efforts to reconnect with his Aboriginal heritage" when he helped build the Watch House near the Burnaby Terminal. Elsewhere, she noted the appellant had "embraced a new way of life, particularly in terms of reconnecting further with his Aboriginal heritage and becoming a valued member of his community."
- [69] None of this detracts from the significant difficulties the appellant experienced and that are described in the Gladue report that was before the Court and referred to in the judge's reasons. Ultimately, however, the appellant's early disconnection from his community did not meaningfully change the Gladue analysis the judge was required to undertake in the circumstances of this case. In my view, there is no merit to this ground of appeal.

Issue 3: The judge erred in failing to draw a distinction between the appellant, an Indigenous offender, and other offenders who were arrested and faced charges

- [70] The third issue advanced by the appellant is based on the following statements the judge made:
- [69] I have previously stated in these proceedings that allowing the lesser sentence here because of Mr. George's belief in his cause and that he is Aboriginal would be to draw a distinction from the hundreds of other protesters who were arrested and faced charges and from those who were convicted.

- [70] In my view, such a distinction does not exist generally and does not arise in the context of Mr. George's specific background and circumstances, including in relation to Gladue considerations. I find that Mr. George's Aboriginal heritage, background and circumstances, while relevant, do not move the needle in terms of the Court's need to give primacy to the sentencing principles of denunciation and deterrence, in this case.
- [71] The appellant argues that "[b]y not drawing a distinction between the appellant, who is aboriginal", and the "hundreds of other protesters who were arrested and faced charges", the trial judge "erred in principle by lessening the impact of the appellant's indigeneity. As such, she had disregarded the principle put forth in Gladue that emphasizes the avoidance of incarceration for aboriginal offenders whenever possible".
- [72] The resolution of this third issue is governed by two well-established and related principles. First, the reasons of a judge are to be read applying a functional and contextual approach. This means reasons are to be read as a whole and in the context of the record, the live issues at trial, and the positions taken by the parties: *R. v. G.F.*, 2021 SCC 20 at para. 69. The judge's reasons as a whole confirm that she understood that s. 718.2(e) of the Criminal Code and Gladue principles required her to apply a different methodology to assess a fit sentence for Mr. George. She expressly acknowledged that his Indigenous background was relevant to his sentencing. That issue was never in doubt.
- [73] The portion of the judge's reasons now focused on by the appellant addresses a narrow and different question. Earlier in her reasons the judge noted that the "spark" that caused the appellant to breach the Injunction was a podcast in which a politician had spoken about how the Covid-19 pandemic might diminish the level of protest being faced by Trans Mountain and allow the building of the pipeline to proceed more smoothly. The appellant indicated that he felt "angered" by these comments.
- [74] The judge referred to the appellant's strong feelings about the construction of the pipeline and his desire to protect the environment several times. She said that "[l]ike many offenders before the Court in this matter, Mr. George has strongly held views on Trans Mountain's activities in relation to concerns about the environment". Elsewhere she said, "[a]s Mr. George acknowledges, his actions were born from anger. I accept that this emotion, which can be powerful, was the driver for Mr. George's actions".
- [75] In its closing remarks, the Crown submitted, relying on *Peter Kiewit Sons Co. v. Perry*, 2007 BCSC 305, that a sincerely held belief in a cause that motivates an act of contempt is not a mitigating factor. The judge accepted this submission and said:
- [43] As this Court noted in *Perry* at para. 16, the moral culpability of a contemnor is not reduced by the strength of his or her beliefs in or convictions for the cause that motivated the illegal activities in question.
- [76] Later she said:

- [66] In my view, Mr. George stands in no better position than any other contemnor in having passionate views on the environment, as was stated in *Perry*. Mr. George acted so as to protest Trans Mountain's pipeline activities in violation of the Injunction, to register his objection to that activity.
- [77] The judge also referred to the following comments of Chief Justice McEachern in *MacMillan Bloedel BCCA*:
- [45] They were persons who, after knowingly and deliberately committing an offence, were nevertheless asked by a peace officer to walk away. They chose instead to stay and be arrested and charged. Notwithstanding their personal beliefs, they do not qualify for the usual leniency the judge is generally offer to first offenders.
- [Emphasis added.]
- [78] In context, and having regard to both the judge's reasons as a whole and the submissions of counsel, the statements the appellant seeks to impugn were directed to the narrow issue of whether, because the appellant was an Indigenous offender, his strongly held beliefs served to reduce his moral culpability.
- [79] This leads to a second relevant and well-established principle. A judge is required to address the live issues raised by the parties and is entitled to decide a case on that basis: *R v. Zsombor*, 2023 BCCA 37 at para. 45 and the authorities referred to therein. There is no obligation for a trial judge to address matters that were never squarely put before them: *Zsombor* at para. 46.
- [80] A review of the transcript from the appellant's sentencing reveals that both counsel had observed the appellant felt strongly about protecting the environment. For example, the Crown commented that the appellant had a "strongly held and sincere belief in the need to take action to protect nature and, in particular, the Burrard Inlet from the risks from the pipeline expansion". Counsel for the appellant noted that the appellant was "now on the path for standing up for environmental and Indigenous rights". The Gladue report contained similar statements.
- [81] However, neither counsel made any real effort to tie the appellant's strongly-held views to the Gladue analysis the judge was required to undertake. Importantly, the appellant did not contest the application of *Perry* to his case nor did he contend that his beliefs about the environment, or otherwise, diminished his moral culpability. Indeed, at the hearing of the appeal, counsel for the appellant accepted that an Indigenous offender's strongly held beliefs, without more, would not differentiate the offender from other non-Indigenous offenders. Before the sentencing judge, both counsel focused in very large measure on the appellant's difficult early circumstances, his difficulties with addiction issues, his lack of education and other factors commonly raised as part of a Gladue analysis.

- [82] Importantly, the various statements made by the judge, going to the appellant's personal beliefs or the strength of his convictions, and the impact of those beliefs on his moral blameworthiness, were not raised by the appellant as a ground of appeal.
- [83] I raise this because in other cases where these issues are emphasized and presented differently, a different result might, or might not, ensue. There are cases, that will soon be heard by this Court, where Indigenous contemnors have argued that the need for a judge to consider Indigenous background factors, as required for example in Ipeelee at para. 73, includes, for instance, an individual's faithfulness to Indigenous legal principles.
- [84] Such issues were not raised in this case in any meaningful way, either before the sentencing judge or on appeal, and these reasons do not address such questions.
- [85] In my view, there is no merit to this third ground of appeal.

Disposition

[86] For the reasons I have outlined, I would dismiss the appeal.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Hunter"

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