

CANADA / JUDGMENT

Trans Mountain Pipeline v. Mivasair

2023 BCCA 299

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 299 Trans Mountain Pipeline ULC v. Mivasair

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Trans Mountain Pipeline ULC v. Mivasair,

2023 BCCA 299

Date: 20230725

Docket: CA47529

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

Intervener

- and -

Between:

Rex

Respondent

And

James Leyden

Appellant

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated December 9, 2020 (conviction) (Trans Mountain Pipeline ULC v. Mivasair, 2020 BCSC 2246, Vancouver Dockets S183541 and 31122-2).

Counsel for the Appellant:

M.F. Silongan

Counsel for the Respondent:

M.R. Ruttan

L.A. Ruzicka, K.C.

Place and Date of Hearing:

Vancouver, British Columbia

June 14, 2023

Place and Date of Judgment:

Vancouver, British Columbia

July 25, 2023

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Justice Skolrood

Summary:

This is an appeal from conviction for criminal contempt. The appellant says the trial judge erred in her assessment of mens rea by failing to consider evidence of his state of mind at the time he contravened a court-ordered injunction. Held: Appeal allowed and a new trial is ordered. The trial judge erred in her mens rea determination. The error is understandable in light of the manner in which the defence pursued its case at trial. Nonetheless, in deciding whether the Crown proved mens rea beyond a reasonable doubt, the trial judge failed to consider the appellant's unchallenged assertion that he believed he had police permission to conduct himself as he did. This evidence was relevant to deciding if the appellant intended, had knowledge of, or was reckless as to whether his public act of contravention would tend to depreciate the authority of the court. A new trial is required.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] This is an appeal from conviction for the common law offence of criminal contempt. At issue is whether the trial judge committed reversible error in her assessment of mens rea.
- [2] I have concluded the conviction should be set aside.
- [3] In finding that the Crown proved the mens rea for criminal contempt, the trial judge failed to ask whether unchallenged evidence about the appellant's state of mind at the time he contravened a court-ordered injunction raised a reasonable doubt. In the particular circumstances of this case, that evidence required careful consideration before deciding whether the appellant intended, knew or was reckless as to whether his public contravention of the injunction would tend to depreciate (diminish) the authority of the court.
- [4] The error is understandable in light of the way in which the defence responded to the Crown's case at trial. Nonetheless, for the reasons that follow, it necessitates a new trial.

Factual Background

- [5] The offence of criminal contempt is preserved under s. 9 of the Criminal Code, R.S.C. 1985, c. C-46.
- [6] The appellant, James Leyden, was prosecuted for criminal contempt after conducting an Indigenous pipe ceremony on December 2, 2019 with a group of individuals who were protesting a pipeline under construction by Trans Mountain Pipeline ULC ("Trans Mountain"), and blocking the main entrance of Trans Mountain's tank farm facility in Burnaby (the "Burnaby Terminal").

- [7] The conduct of the protesters contravened an injunction that had been in place since June 1, 2018. Among other things, the injunction prohibited people with notice of the order from "physically obstructing, impeding or otherwise preventing access" to the Burnaby Terminal by Trans Mountain, its contractors, employees or agents.
- [8] Mr. Leyden is 70 years old. He is Métis from the Anishinaabe and Ojibway 4 Nations. He describes himself as a "Sundance elder". At trial, he testified that he was asked by one or more Indigenous elders to assist with "keeping [the] peace" over activities on the lands surrounding the Burnaby Terminal. He was also asked to work "as a watchman at the watch house" near the Terminal. He explained that a "watchman's responsibility is to go around and report what's going on in the territory and report it to the village which [we] may call the media at times ". It was his role to "[look] out for all people, not just [Indigenous] people".
- [9] Mr. Leyden said that when he was at the Burnaby Terminal on December 2, 2019, he was "keeping [the] peace". He interacted with members of the media who were also present, reporting to them that he believed contaminated soil was being removed from Burnaby Mountain and shipped to the land of the Coquitlam Nation.
- [10] Mr. Leyden arrived at the site with the protesters, who proceeded to occupy a crosswalk in a manner that blocked vehicles from entering or exiting the main entrance to the Burnaby Terminal. The crosswalk fell within the scope of the injunction.
- [11] Initially, Mr. Leyden did not join or stand with the protesters. However, he later did so. He interacted with them on the crosswalk for approximately 27 minutes while they were engaged in the blockade. (The whole of the blockade lasted for over an hour.) While Mr. Leyden was standing with the protesters, at least one vehicle attempted to enter the Burnaby Terminal, but was unable to do so.
- [12] Mr. Leyden testified that he was not at the Burnaby Terminal to breach the injunction. He was there to "keep the peace". He brought out his pipe "in peace". He told the protesters he was "going to do the pipe ceremony". He "pulled everybody in a circle so that [they] could have [their] pipe ceremony, and [they] had it". They held hands in prayer, shook hands to thank each other, and then left. It was a "ceremony for peace".
- [13] Importantly, Mr. Leyden also testified that based on one or more previous conversations with police, he understood he had permission to conduct this type of a ceremony. Because of those conversations, "as far as [he] knew on that day [he] wasn't violating anything".
- [14] A Trans Mountain security manager confirmed that when Mr. Leyden joined the protesters in the crosswalk, the group "sort of collapsed a bit to the right and formed a circle". Mr. Leyden then performed a ceremony involving a pipe and a prayer. The security manager said that when the police attended in response to the blockade, they "were offered the pipe and they passed it on". At the end of the pipe ceremony, the group locked hands in a circle. One of the officers joined in the circle. Mr. Leyden testified that this officer is "part Cree".

- [15] In its cross-examination of Mr. Leyden, the Crown confirmed that he was aware of the terms of the June 2018 injunction and that "nobody [physically] forced [him] to do the pipe ceremony". The Crown also confirmed that Mr. Leyden intentionally brought the pipe to the protesters in the crosswalk and that he knew members of the media were present.
- [16] Mr. Leyden's stated reasons for being at the Burnaby Terminal and for gathering with the protesters were not challenged by the Crown. It was not suggested to him that he was at the Burnaby Terminal to protest the pipeline, to defy the injunction, or to do so in a public way. It was not suggested to Mr. Leyden that he breached the injunction as a public expression of defiance of the court's authority, or that he knew his conduct would bring the court's authority into contempt. Nor did the Crown challenge his assertion that he was previously told by police he was allowed to perform pipe ceremonies. In fact, Mr. Leyden testified that he had performed these ceremonies before. He said that apart from one instance, he had not been arrested for breaching the injunction:

We've done ceremonies at other points at other times, pipe ceremonies where there are demonstrations

It was not a blockade when I brought that pipe out, it was not a blockade, it was a ceremony. We were doing our pipe ceremony and the understanding was after we finished that ceremony, that we would move aside.

[Emphasis added.]

- [17] Video evidence adduced by the Crown showed that consistent with his testimony, Mr. Leyden and the protesters moved away from the crosswalk a few minutes after having locked hands in a circle: at para. 23.

Trial Judgment

- [18] The reasons for conviction are indexed as 2020 BCSC 2246.
- [19] The trial judge began her analysis by setting out the background to the injunction, the circumstances surrounding Mr. Leyden's conduct on December 2, 2019, and his personal circumstances.
- [20] In the course of doing so, she noted some parts of Mr. Leyden's testimony referred to earlier, including his assertion that he had no intention of breaching the injunction and that he understood, based on previous discussions with police, that he would not be in breach if he was keeping the peace with a pipe ceremony: at paras. 29-33, 35.
- [21] The trial judge next turned to the elements of the offence of criminal contempt, instructing herself in accordance with the Supreme Court of Canada's decision in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, 1992 CanLII 99 (S.C.C.) [United Nurses].
- [22] She cited the following excerpt from p. 933 of *United Nurses*:

To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt. As in other criminal offences, however, the necessary *mens rea* may be inferred from the circumstances. An open and public defiance of a court order will tend to depreciate the authority of the court. Therefore when it is clear the accused must have known his or her act of defiance will be public, it may be inferred that he or she was at least reckless as to whether the authority of the court would be brought into contempt. On the other hand, if the circumstances leave a reasonable doubt as to whether the breach was or should be expected to have this public quality, then the necessary *mens rea* would not be present and the accused would be acquitted, even if the matter in fact became public. While publicity is required for the offence, a civil contempt is not converted to a criminal contempt merely because it attracts publicity, as the union contends, but rather because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt.

[Emphasis added.]

[23] After setting out this framework, the trial judge proceeded to make her findings.

[24] She found that Mr. Leyden had actual notice of the injunction and its terms: at para. 44. Indeed, Mr. Leyden conceded this point: at para. 43.

[25] Based on the video evidence, the trial judge found that Mr. Leyden's presence with the protesters in the crosswalk "physically, obstructed, impeded and prevented access by Trans Mountain's personnel and contractors to gain access to and exit from the Burnaby Terminal": at para. 47.

[26] She also found that his actions were done "in a public way" -- members of the public witnessed his actions, including media: at paras. 47, 71.

[27] In light of these conclusions, the trial judge found that both the *actus reus* and the *mens rea* for criminal contempt had been proved.

[28] Specific to *mens rea*, she said this:

[75] Mr. Leyden states that it was never his intention to disobey the Injunction and that he was in the crosswalk area simply to conduct the pipe ceremony. Nevertheless, Mr. Leyden concedes, subject to the Crown proving the necessary *actus reus*, that the Crown has proven beyond a reasonable doubt that he intentionally acted in a manner that was in breach of the Injunction, in satisfaction of the [Carey v. Laiken, 2015 SCC 17] test.

[76] Mr. Leyden's conduct supports the finding that he knew that his public disobedience would tend to lower the authority of the court. In the alternative, I find that Mr. Leyden was reckless in that regard. Mr. Leyden knew that his actions were public. While standing in the crosswalk area, he stood with other protestors while in full view of Trans Mountain

personnel and the people streaming past in the continuous traffic at the Intersection. Mr. Leyden also engaged directly with the media before moving to the crosswalk while they continued to observe the protest. An open and public defiance of a court order will tend to depreciate the authority of the court. It can therefore be inferred that Mr. Leyden was at least reckless as to whether the authority of the court would be brought into contempt: *United Nurses at 933*.

[77] I find beyond a reasonable doubt that Mr. Leyden had the intention to stand on Trans Mountain's property to obstruct, impede and block access and with knowledge that his public defiance would tend to diminish the authority of the court and its orders; I find in the alternative that he was reckless in that the latter respect. The Crown has satisfied the mens rea element of the offence beyond a reasonable doubt.

[Emphasis added.]

[29] The conviction was entered on December 9, 2020. Mr. Leyden was sentenced six months later (on June 7, 2021), and received a sentence of 45 days' imprisonment.

Issues on Appeal

[30] On appeal, Mr. Leyden advances two issues. He says the trial judge erred in her approach to proof of mens rea. In the alternative, he argues the trial judge should have stayed the prosecution for officially induced error.

[31] Mr. Leyden's position on appeal is substantially different from the way he framed his defence in the Court below.

[32] At trial, he challenged the prosecution on the ground that the Crown failed to prove the actus reus of the offence. He said the injunction required that he be given an opportunity to stop what he was doing on the crosswalk and to leave the prohibited area before he could be convicted of criminal contempt. He said there was no evidence that this was done, and, consequently, it could not be said he failed to comply with the terms of the court order.

[33] In closing submissions, the trial judge asked Mr. Leyden's lawyer whether this was an actus reus or mens rea argument. He said it was the former:

THE COURT: I don't see your argument as really fitting within the mens rea.

[DEFENCE]: I agree. It's based on the interpretation of what the injunction requires to be done on a breach

[Emphasis added.]

[34] Mr. Leyden's trial counsel was also asked if he was making a claim of officially induced error, which, if established, could excuse his conduct and warrant a stay of the prosecution. He said he was not.

- [35] Because of the defence approach, mens rea was not a primary focus at the trial and a considerable portion of the trial judge's reasons for conviction is directed towards the terms of the injunction and what those terms required for enforcement purposes. See paras. 48-72 of the judgment.
- [36] There was also no analysis of the allegation of officially induced error.
- [37] On appeal, Mr. Leyden is represented by a different lawyer. The challenge to his conviction is now directed at the Crown's proof of mens rea. In addition, Mr. Leyden alleges officially induced error.
- [38] As a general rule, appellate courts do not entertain new issues, including defences, that were not raised at trial: *R. v. Alfred*, 2020 BCCA 384 at paras. 6-9 [Alfred]. This is particularly so where the evidentiary record does not allow for a proper factual or legal analysis of the issue; there has been no relevant determination by the trial judge; raising the issue for the first time on appeal is prejudicial to the other side and procedurally unfair; or allowing it to proceed would undermine the goal of finality: *Alfred* at para. 6, citing *R. v. Gill*, 2018 BCCA 144 at paras. 9-11.
- [39] I appreciate the importance of this general rule; however, in the context of this case, I am prepared to make an exception, specific to the issue of mens rea.
- [40] First, it is not clear to me that the mens rea issue is, in fact, a "new" issue. Although Mr. Leyden's trial counsel focused on the Crown's proof of actus reus, he did make submissions about Mr. Leyden's intent in joining the protesters in the crosswalk and his state of mind at the material time:

[DEFENCE]: And he testified in his role as a watchman and a peacekeeper he'd been at the scenes of many of these protests at the site and but for the time on August 21st of 2018 when he stayed on the road and the five-step process was used, he was never arrested. He was there keeping the peace, doing ceremonies and being a watchman.

It was reasonable for him to assume, based on the wording of the injunction and the actions of the police, that he wasn't breaching the order. He wasn't given the opportunity [to] leave and accordingly, it's my respectful submission that you must acquit him as a result.

[Emphasis added.]

- [41] These submissions put Mr. Leyden's mens rea for criminal contempt into play. As explained below, I am satisfied this essential element of the offence was a live issue at trial.
- [42] Second, the trial judge turned her mind to and analyzed mens rea in her reasons. As such, we have the benefit of her consideration of that issue.
- [43] Third, there is an evidentiary foundation that allows for a full consideration of this first ground of appeal. Mr. Leyden testified about his conduct and state of mind while at the Burnaby Terminal, as well as the underlying reasons.

- [44] Finally, the Crown had the opportunity to cross-examine Mr. Leyden on his state of mind, including the purpose of his attendance at the Burnaby Terminal and his assertion that because of previous conversations with police, "as far as [he] knew on that day [he] wasn't violating anything". Accordingly, there is no prejudice to the Crown in allowing this issue to proceed.
- [45] On balance, I consider it to be in the interests of justice to allow Mr. Leyden to pursue this challenge on appeal, notwithstanding the recasting of his defence: Alfred at para. 7, citing *R. v. Trieu*, 2010 BCCA 540 at para. 56 and *R. v. Roach*, 2009 ONCA 156 at para. 7.
- [46] I have reached a different conclusion in respect of officially induced error.
- [47] Although officially induced error is often referred to as a defence, it is more in the nature of an application for a remedy based on alleged unfairness in being prosecuted. In this sense, it is similar to a claim of entrapment: *R. v. Jorgensen*, [1995] 4 S.C.R. 55 (S.C.C.), 1995 CanLII 85 at para. 37 [Jorgensen]. Once established, officially induced error functions as an excuse for the accused's unlawful conduct and results in a judicial stay of proceedings rather than an acquittal: *Jorgensen* at para. 37.
- [48] The accused bears the onus of proving officially induced error on a balance of probabilities. To do so, they must establish six elements: (1) that an error of law or of mixed law and fact was made; (2) that the accused considered the legal consequences of their actions; (3) that the advice came from an appropriate official; (4) that the advice was reasonable; (5) that it was erroneous; and (6) that the accused relied upon the advice in committing the impugned act: *Lévis (City) v. Tétreault*, 2006 SCC 12 at para. 26. See also *R. v. Rio Tinto Alcan Inc.*, 2017 BCCA 440 at para. 32.
- [49] I would not grant Mr. Leyden leave to advance this claim for the first time on appeal. Because of the way his defence was framed at trial, there was no consideration of the issue by the trial judge, leaving us without the benefit of any factual findings specific to the six elements, cited above, or a legal analysis. In addition, the evidentiary record is not fully responsive to the issue and does not provide a sufficient basis for this Court's assessment. Finally, I consider it unfair to determine this claim on appeal. Officially induced error is not a commonplace issue. It is unique -- procedurally and in its substantive components. It involves a shift in onus, and, for a proper consideration, it generally requires evidence that extends beyond the accused, including evidence that independently confirms (or challenges) the advice said to have been provided and allows for an assessment of its objective reasonableness. It is also the kind of issue for which the Crown may apply to call evidence in reply.
- [50] Given the manner in which the trial unfolded, I am concerned the Crown did not have adequate opportunity to address this issue. Although the Crown anticipated the possibility of Mr. Leyden raising officially induced error, it appears that this anticipation arose only once he gave his evidence about prior conversations with the police. Even then, it was not clear that he was, in fact, pursuing a submission of officially induced error. Crown counsel

appears to have scrambled the night before closing submissions to find some authorities for the trial judge in the event the argument was advanced. Then, in the course of submissions, all attention turned to the *actus reus* and the defence explicitly disavowed reliance on officially induced error as an excuse, such that it became unnecessary for anyone to address the issue. This is an unsatisfactory record for consideration of the issue in the context of appellate review.

- [51] An accused is generally expected to put forward their defences and seek their remedies at trial. Especially where those defences require findings of fact. An accused cannot enter a trial expecting that if the strategy they have chosen to defend against the Crown's allegations does not succeed, it matters not, because they can choose a different approach on appeal and seek a new trial on that basis: *R. v. Vidulich* (1989) 37 B.C.L.R. (2d) 391 at 398 (C.A.), 1989 CanLII 231; *R. v. Lilgert*, 2014 BCCA 493 at para. 15, leave to appeal to S.C.C. ref'd, 36287 (14 May 2015). This rule is not absolute and there are, of course, cases in which the interests of justice warrant an exception. However, specific to this claim of officially induced error, Mr. Leyden has not persuaded me the exception should apply.

Discussion

Did the Trial Judge Err in Her Assessment of *mens rea*?

- [52] Mr. Leyden's first ground of appeal raises a question of law that is reviewable on a standard of correctness. He is challenging the application of a legal standard to an undisputed set of facts: *R. v. Shepherd*, 2009 SCC 35 at para. 20; *R. v. Biniaris*, 2000 SCC 15 at paras. 22-23; *R. v. Araujo*, 2000 SCC 65 at para. 18.

Articulation of the Test for *mens rea*

- [53] In her reasons for conviction, the trial judge set out what she understood to be the test for the *mens rea* of criminal contempt (at para. 73):

The Crown must establish, beyond a reasonable doubt, that [the accused] disobeyed the Injunction in a public way with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court.

[Emphasis added.]

- [54] This articulation is consistent with *United Nurses*, which remains the leading authority on the essential elements of the offence. See *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156 at para. 33 [Cass, Wood et al.] and *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 267 at paras. 22, 32 [Wood, Mobach et al.].
- [55] The requirement to prove an "intent, knowledge or recklessness as to the fact that the [accused's] public disobedience will tend to depreciate the authority of the court" is an important distinction between civil and criminal contempt: *United Nurses* at 933.

[56] The distinction was explicitly noted by the trial judge:

[74] In *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 1247 at para. 89, Affleck J. cited [Carey v. Laiken, 2015 SCC 17] at para. 38 for the required "intent" to establish civil contempt:

It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice . . .

At para. 90, Affleck J. added that the "distinguishing feature of criminal contempt is knowledge or recklessness that public disobedience will tend to lower the authority of the court".

[Emphasis added.]

[57] Since *United Nurses*, this Court has had a number of occasions to articulate the mens rea for criminal contempt.

[58] In *MacMillan Bloedel Ltd. v. Brown*, (1994) 92 B.C.L.R. (2d) 1 (C.A.), 1994 CanLII 3254 at para. 46, for example, the majority cited *United Nurses* and held that the "test for criminal contempt is satisfied when an alleged contemnor who publicly defies an order of the court knows, intends or is reckless as to the fact that the act would publicly bring the court into contempt". See also *Wightman v. Walmsley*, (1997) 41 B.C.L.R. (3d) 99 (C.A.), 1997 CanLII 3141 at para. 20, and *Wood, Mobach et al.* at para. 41.

[59] In *MacMillan Bloedel Ltd. v. Simpson et al.*, (1994) 90 B.C.L.R. (2d) 24 (C.A.), 1994 CanLII 1731, aff'd [1995] 4 S.C.R. 725 (S.C.C.), 1995 CanLII 57 [Simpson], the mens rea inquiry for criminal contempt was described as one that asks "what [is] going on in the [mind]" of the accused when they "deliberately [disobey]" the court order: at para. 24. The Court went on to hold that when an accused "knowing of its existence, publicly and deliberately disobeys a court order, it is not necessary to prove that [they] knew the court's authority would be depreciated": at para. 24. In those circumstances, "[r]ecklessness as to the effect of their conduct on the authority of the court is sufficient": at para. 24.

[60] In *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 385 [Smyth, Massie], the mens rea requirement was described as an intention to engage in conduct that is prohibited by a court order "as a public expression of defiance": at para. 16, emphasis added.

[61] What these cases tell us is that, standing alone, proof that an accused knew of the terms of a court order and intentionally committed an act in public that factually contravenes the order is not sufficient to establish the mens rea for criminal contempt. The Crown must also show that the public contravention was "calculated to lessen societal respect for the courts": *United Nurses* at 931, emphasis added. This latter component of the mens rea requirement is proved through evidence that the accused intended, knew or was reckless "as to the fact that [their] public disobedience will tend to depreciate the authority of the court": *United Nurses* at 933.

[62] In its factum (at para. 20), the Crown acknowledges that United Nurses remains the leading authority on the essential elements of criminal contempt. However, it also appears to suggest (at paras. 3 and 22), that the intent for civil and criminal contempt is the same, as defined in *Carey v. Laiken*, 2015 SCC 17 [Carey].

[63] In *Carey*, the Supreme Court of Canada addressed the elements of civil contempt. Under the sub-heading "The Required "Intent"", Justice Cromwell wrote the following (at para. 38):

It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice to require a contemnor to have intended to disobey the order would put the test "too high"

[Internal references omitted; emphasis added.]

[64] This discussion of intent addresses civil contempt only. In my view, it is not correct to state that *Carey* also defines the mens rea for criminal contempt. The decision speaks to part of the mens rea requirement (an intentional act or omission that breaches a clear order of which the accused has notice); however, as the trial judge properly noted, there is an added mens rea element for criminal contempt. Proof of mens rea for criminal contempt also requires that the Crown establish an intent, knowledge or recklessness as to the fact that the accused's public contravention will tend to depreciate the authority of the court: *Smyth*, *Massie* at paras. 4-5, 10-11, 16.

[65] I agree with Mr. Leyden that a recent decision out of the Supreme Court of British Columbia, *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2023 BCSC 904, correctly sets out all essential elements of criminal contempt:

[6] There are three elements which must be established to prove contempt of a court order: (1) the order must state clearly what shall or shall not be done; (2) the person alleged to have breached the order must have had actual knowledge of its terms; and (3) the person alleged to have breached the order need not have intentionally breached the order, but must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels: *Carey v. Laiken*, 2015 SCC 17 at paras. 32-35, 38. To make out a case of criminal contempt, there must also be proof that the defiance or disobedience was carried out in a public way, and with the intent, knowledge or recklessness as to the fact that the public disobedience would tend to depreciate the court's authority

[Internal reference omitted; emphasis added.]

[66] In most cases, once the Crown has proved that an accused intentionally committed an act in public that contravenes a clear order of which they had notice, that same evidence will strongly support an inference that the accused committed the act with the intent, knowledge, or, at the very least, recklessness as to the fact that their public disobedience would tend to depreciate the court's authority. This much was made clear in *United Nurses* (at 933):

As in other criminal offences, however, the necessary mens rea may be inferred from the circumstances. An open and public defiance of a court order will tend to depreciate the authority of the court. Therefore when it is clear the accused must have known his or her act of defiance will be public, it may be inferred that he or she was at least reckless as to whether the authority of the court would be brought into contempt

[Emphasis added.]

[67] However, the inference of intent, knowledge or recklessness is not mandatory. It is permissive: *United Nurses* at 933. Consequently, there may also be cases in which the circumstances surrounding the particular conduct of the accused, including evidence about their state of mind at the material time, "leave a reasonable doubt as to whether the breach was or should be expected [by the accused] to have this public quality": *United Nurses* at 933. In the latter scenario, the Crown will not have proved the mens rea for criminal contempt, even though the contravention of the court order occurred in public view: *United Nurses* at 933.

[68] Mens rea is assessed case-by-case and in the context of the entirety of the evidence. It is an obligatory individualized inquiry.

[69] In some cases, the evidence surrounding the accused's conduct and the public nature of their contravention will speak for itself in establishing the mens rea for criminal contempt, even where the accused asserts a non-contemptuous intention. See, for example, *Simpson* at para. 25 and *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCSC 2190 at paras. 108-116. In other cases, the accused might testify about an intention or a state of mind connected to their impugned conduct that, after an assessment of credibility and reliability in the context of the record, is found to raise a reasonable doubt.

[70] A helpful example of the first of these two scenarios is found in *Smyth, Massie*. In that case, the appellants were convicted of criminal contempt after participating in a protest that involved blocking access to the Burnaby Terminal. They acknowledged the protest was planned and coordinated. They said they expected to be arrested. They agreed to knowingly disobeying the injunction in the presence of a crowd and the police. However, they each testified that they did not participate in the protest for the purpose of impeding access to the Terminal.

- [71] One of the appellants said she was there to "draw attention to the issue of the pipeline in a peaceful way" and she believed the protest "would have minimal impact on Trans Mountain work on that day": 2019 BCSC 1247 at para. 70. The other testified that although she knew her conduct was in breach of the injunction, she thought of it as a "civil matter": 2019 BCSC 1247 at para. 73.
- [72] This testimony did not preclude convictions for criminal contempt. In dismissing the appeals, this Court found it was open to the trial judge to conclude that notwithstanding this testimony, the Crown had proved the mens rea for criminal contempt: Smyth, Massie at para. 16. The evidence "clearly established that both appellants intentionally put themselves in a position where they obstructed or impeded access as part of a public demonstration. Their intent was to create an obstruction or impediment and to do so in public [both] appellants knew they were breaching a court order": at para. 11, emphasis added. And, importantly, the evidence established that they did so "as a public expression of defiance": at para. 16, emphasis added.
- [73] Mr. Leyden says his case is not the same as Smyth, Massie. Rather, it is one in which his understanding of whether his conduct violated the injunction was not challenged, found support in other evidence, and legitimately could have raised a reasonable doubt about mens rea. However, the trial judge failed to consider this possibility.

The Trial Judge's Application of the Test for mens rea

A Preliminary Comment

- [74] Before addressing the trial judge's approach to mens rea, it is necessary to consider a suggestion by the Crown that at his trial Mr. Leyden conceded that this element of the offence had been proved beyond a reasonable doubt: respondent's factum at para. 25.
- [75] I do not read the transcript that way.
- [76] In his cross-examination, Mr. Leyden acknowledged that he intentionally brought a pipe to the protesters in the crosswalk at the Burnaby Terminal and no one physically forced him to. He also acknowledged that he was aware of the terms of the injunction. In closing submissions, Mr. Leyden's trial counsel told the court that he was not "arguing that [his] client didn't intend to do what he did". As I interpret this statement, counsel conceded that Mr. Leyden intentionally (in other words, knowingly and voluntarily), gathered with the protesters in front of the Burnaby Terminal while they were in contravention of the injunction, interacted with them, and conducted a pipe ceremony.
- [77] Respectfully, this does not amount to a concession of mens rea for the offence of criminal contempt. At best, the statement made by Mr. Leyden's trial lawyer admitted to the mens rea for civil contempt as that requirement has been defined in Carey.

[78] I see no concession that the Crown had proved an intent, knowledge or recklessness on Mr. Leyden's part that his contravention of the injunction in public view would tend to depreciate the authority of the court. Consequently, mens rea remained a live issue.

The Judge's Analysis

[79] Mr. Leyden says that in deciding mens rea, the trial judge made a fundamental error. Rather than asking whether the Crown proved mens rea on the whole of the evidence, including Mr. Leyden's testimony, she erroneously assumed that once he admitted to intentionally and publicly joining and engaging with the protesters while they were blocking access to the Burnaby Terminal, that was the end of the inquiry. Given his knowledge of the order and the presence of media, he must have intended or known, or, at the very least, been reckless to the fact that his contravention would tend to lower the authority of the court.

[80] Mr. Leyden says that because of this assumption, the trial judge did not consider and grapple with the effect of his evidence surrounding the pipe ceremony on the mens rea inquiry. This evidence included his asserted reason for engaging with the protesters (to conduct the ceremony), and, critically, his understanding as to whether doing so would violate the injunction based on one or more previous conversations with police. There was also evidence independent of Mr. Leyden that he says supported his version of events, but was not considered in assessing mens rea. This included steps taken by him before the pipe ceremony to avoid blocking access to the Burnaby Terminal; apparent police participation in the ceremony; and the fact that the blockade ended after the ceremony finished.

[81] As Mr. Leyden correctly notes in his factum:

The trial judge did not find Mr. Leyden's testimony unreliable or lacking credibility. There was nothing manifestly incredible about Mr. Leyden's explanation, nor any reason to doubt his sincerity. There was no testimony to contradict Mr. Leyden's evidence. The Crown did not call any RCMP witnesses to testify about what police said to Mr. Leyden prior to December 2, 2019. They also called no RCMP officers to give evidence about what the RCMP said to Mr. Leyden on [that day].

[82] The Crown says the trial judge did consider the whole of the evidence and that her mens rea finding was "well grounded" in the record: respondent's factum at para. 27. That record is said to have unequivocally established that Mr. Leyden "intentionally put himself in a position where he obstructed or impeded access, which was a clear breach of the injunction": at para. 27. He did so with full knowledge of the terms of the injunction and the fact that his conduct occurred in public view. He knew there was media present. He had spoken directly with them. The Crown submits that on this foundation, there was ample basis for the trial judge to find that all constituent elements of criminal contempt had been proved beyond a reasonable doubt.

- [83] Notwithstanding the evidence highlighted by the Crown, Mr. Leyden has persuaded me that in the particular circumstances of this case, the trial judge erred in her application of the mens rea standard.
- [84] She correctly stated the test for mens rea at para. 74 of her reasons. However, as I read paras. 75-77 (set out earlier), she failed to consider the whole of the uncontradicted evidence of Mr. Leyden's state of mind when she applied the mens rea requirement, and did not ask herself whether this state of mind raised a reasonable doubt about whether Mr. Leyden intended, knew or was reckless as to whether his public conduct would tend to lower the authority of the court.
- [85] To be fair to the trial judge, this was not the argument pressed by the defence at trial. It appears she was also incorrectly told by the Crown in its closing submissions at trial that "Carey is the test for mens rea" for criminal contempt. In taking that position, the Crown encouraged the trial judge to focus her mens rea inquiry on whether there was an intentional act by Mr. Leyden in breach of a clear order of which he had notice. If there was, from the Crown's perspective, a finding of mens rea would invariably follow. It mattered not whether Mr. Leyden testified that he did not personally intend to violate the injunction. That evidence was irrelevant to the question of mens rea because under the Carey test, the Crown does not have to prove an intention to disobey the court order. It is enough if the disobedience voluntarily occurred in fact, coupled with knowledge of a clear order.
- [86] At para. 75 of her reasons, the trial judge notes Mr. Leyden's testimony that it was not his intention to disobey the injunction and that he was in the crosswalk area to conduct a pipe ceremony. She then says this: "Nevertheless, Mr. Leyden concedes, subject to the Crown proving the necessary actus reus, that the Crown has proven beyond a reasonable doubt that he intentionally acted in a manner that was in breach of the Injunction, in satisfaction of the Carey test": at para. 75. She then immediately finds that Mr. Leyden's conduct (intentionally acting in a manner that was in breach of the injunction), "supports the finding that he knew that his public disobedience would tend to lower the authority of the court. In the alternative, [he] was reckless in that regard": at para. 76. The trial judge notes that Mr. Leyden knew his actions were public and that "open and public defiance of a court order will tend to depreciate the authority of the court": at para. 76.
- [87] Respectfully, what is missing from the trial judge's analysis is a consideration of whether, even with intentional conduct that publicly contravened the injunction, Mr. Leyden's evidence about his state of mind, including his understanding about having permission from the police to conduct a pipe ceremony, raised a reasonable doubt about whether he intended, knew or was reckless as to whether that conduct would tend to lower the authority of the court. The trial judge makes no mention of this evidence in para. 76 of her reasons, where she explains why she found mens rea to have been proved. Rather, it appears from the face of her reasons that she grounded her mens rea finding in the fact that Mr. Leyden breached the injunction knowing of its terms and being aware that his actions were public.

- [88] Mr. Leyden's testimony about what he was doing and why was relevant to the mens rea determination. (The Crown concedes this point, even if this same evidence was insufficient to establish officially induced error.) Moreover, the evidence was not contested. If the trial judge accepted that Mr. Leyden believed his conduct did not contravene the injunction because he had previously been told by police that he was permitted to conduct a pipe ceremony, it was open to him to argue that joining the protesters in the crosswalk was not "calculated to lessen societal respect for the courts": *United Nurses* at 931. In other words, he could argue that he did not intend or know that his public non-compliance with the terms of the injunction (as opposed to the violative conduct of other individuals in the crosswalk), constituted an expression of defiance that would tend to lower the court's authority. Nor was he reckless in that regard because of how he viewed his own conduct, in light of what he had been told. Recklessness, within the criminal law context, requires proof of "knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur": *Sansregret v. The Queen*, [1985] 1 S.C.R. 570 (S.C.C.) at 584, 1985 CanLII 79.
- [89] Whether the trial judge found Mr. Leyden's assertions credible was for her to decide. Mr. Leyden's testimony about what he had been told and his understanding of his own conduct had to be assessed and weighed within the context of the rest of the evidence. The trial judge may have found his assertions were not credible, or, even if they were credible, she may have decided that they were insufficient to raise a reasonable doubt in the context of the record as a whole. But, as the Crown has fairly acknowledged in the appeal, this was an assessment the trial judge was obliged to undertake if mens rea was a live issue at trial. I have found that it was.
- [90] Without this analysis, the risk run by the trial judge was that proof of mens rea for criminal contempt flowed automatically from Mr. Leyden's concession that he intentionally engaged in conduct that stood in contravention of the injunction, and that this conduct occurred in public. For the reasons set out earlier, this is not enough to ground a conviction for criminal contempt.

Was the Appellant Entitled to a Stay for Officially Induced Error?

- [91] As explained, I have concluded Mr. Leyden should not be allowed to raise his alternative argument for the first time on appeal. As such, it is not appropriate for us to address the merits.
- [92] This denial of leave does not in any way preclude Mr. Leyden from raising officially induced error at a new trial. That is a choice for him to make. Whether he is able to establish the required elements is for the trier of fact to determine.

Disposition

- [93] For the reasons provided, I would deny Mr. Leyden leave to raise officially induced error on appeal.
- [94] Specific to the issue of mens rea, I find that the trial judge erred in law in her determination of this element of the offence.
- [95] The Crown has not invoked s. 686(1)(b)(iii) of the Criminal Code. As such, the conviction for criminal contempt must be set aside and a new trial ordered.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Justice Skolrood"

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