CA47302
Vancouver Registry

COURT OF APPEAL

Between:

Trans Mountain Pipeline ULC

Plaintiff

v.

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 Garbazo (aka Robert Arbess), Gordon Cornwall, Thomas Chan, Laurel Dykstra, Rudi Leibik (aka Ruth Leibik), John Doe, Jane Doe, and Persons Unknown

Defendants

And:

Attorney General of British Columbia

Intervenor

And Between:

Regina

Respondent

v.

Stacy Gallagher

Appellant

RESPONDENT'S MEMORANDUM OF ARGUMENT ON BAIL APPLICATION

Self-Represented Appellant/Applicant:

STACY GALLAGHER
1213 – 207 West Hastings Street
Vancouver, BC V6B 1H7
Tel: (604) 609-7707

Agent for Appellant/Applicant:

RITA WONG
342 – 588 East 5th Avenue
Vancouver, BC V5T 4H6
Tel: (604) 653-4006

Counsel for the Respondent:

CHRISTIE LUSK
BC Prosecution Service
Criminal Appeals & Special Prosecutions
600 – 865 Hornby Street
Vancouver, BC V6Z 2G3
Tel: (236) 558-4938

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CA47302
Vancouver Registry

COURT OF APPEAL

Between:

Trans Mountain Pipeline ULC

Plaintiff

v.

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 Arbess), Gordon Cornwall, Thomas Chan, Laurel Dykstra, Rudi Leibik (aka Ruth Leibik), John Doe, Jane Doe, and Persons Unknown

Defendants

And:

Attorney General of British Columbia

Intervenor

And Between:

Regina

Respondent

v.

Stacy Gallagher

Appellant

RESPONDENT'S MEMORANDUM OF ARGUMENT

Overview

1. The appellant/applicant (the "applicant") seeks his release on bail pending conviction and sentence appeal. The respondent understands that the self-represented applicant is seeking an order of a justice, pursuant to Rule 19 of the Criminal Appeal

Rules, that he be permitted to make submissions on this application other than in writing, and asking that Ms. Wong be permitted to appear as his agent. This Court should be aware that Ms. Wong has herself been convicted of criminal contempt for breaching the same Trans Mountain Injunction. She is not an appropriate surety. However, the respondent does not oppose Ms. Wong appearing as the applicant's agent for the purposes of this bail application only given the respondent's position. The respondent also consents to short notice, on the condition set out at paragraph seven of the applicant's memorandum.

2. This is the second appeal that the applicant has outstanding before this Court (x-ref CA47080 filed October 29,2020). He served the 28-day sentence on that matter and did not apply for bail pending appeal. The appellant is represented by counsel on that matter. It is currently scheduled for case management before the Registrar on March 18,2020. Although the applicant has now been convicted of four separate offences, he has been on an undertaking since January 9,2020 and not been charged with or convicted of any new offences since then.

3. The respondent accepts that the applicant has met the test for release. Even though the applicant's grounds of appeal from his convictions for criminal contempt have very little merit in the respondent's assessment, the short duration of the sentence (90 days) favours bail. The grounds of appeal on the sentence appeal are also weak, but the applicant raises an issue with respect to the application of *Gladue* in the context of a sentencing for criminal contempt, which is an issue that this Court has not yet specifically addressed. Should bail not be granted, the sentence appeal will arguably be moot. In the result, the respondent consents to bail on the terms set out at the end of this memorandum, informed by Appendix A of the applicant's argument, but with some modifications.

4. The respondent takes issue with the applicant's characterization (Gallagher Affidavit, at paras. 4,5 and 12), of his conditions of incarceration in North Fraser Pre-Trial Centre in October 2020. The respondent also takes issue with the opinions expressed in

Dr. Yassi's and Dr. Pastran's letters, including with respect to sources of information and understanding of correctional measures and procedures, and particularly with the extent to which they may be erroneously referring to induction unit placement with others in a cohort as solitary confinement and mischaracterizing the conditions of an induction unit. The respondent understands from trial Crown that Dr. Yassi's January 22, 2021 letter was among the materials filed with the sentencing judge, and that the Crown filed a September 2020 factsheet from BC Corrections which outlines Correction's response to Covid-19. The respondent also relies on a more recent Corrections' factsheet from March 1, 2021: **TAB 6, CORRECTIONS SEPTEMBER 2020 and MARCH 2021 FACTSHEETS RE: COVID-19 RESPONSE.**

5. Further, the respondent is advised that the sentencing judge concluded that Dr. Yassi's January 22,2021 letter was found by the judge to have overstated the applicant's medical risks – particularly because it conflicted with the applicant's *viva voce* testimony about his health and a *Gladue* report, dated March 2020, in which the applicant stated he was in generally good health except for a back injury.

6. The respondent does not dispute that Covid-19 may be a relevant factor under the public interest criterion, but the weight it will be given is case-dependent: *R. v. Mohsenipour*, 2020 BCCA 205 (Chambers), paras. 8-10. A court will consider whether there is clear and compelling evidence of particular susceptibility, and evidence of risk within the specific institution at issue: *Mohsenipour*, para. 10; *R. v. Myles*, 2020 BCCA 105, paras. 26,40.

7. If this Court is considering placing any weight on the applicant's Affidavit or the letters of Dr. Yassi or Patran (including characterizations about the applicant's previous conditions of confinement at North Fraser Pre-trial centre which the respondent takes issue with the accuracy of and which do not relate to Fraser Regional Correctional Centre, where he is expected to serve this sentence)), then the respondent asks to rely on the two clear days notice in Rule 17 of the Criminal Appeal Rules, and seeks an adjournment of the bail application to allow Corrections to review and respond to Dr. Yassi's opinions.

8. However, given the respondent's acknowledgement that the applicant has met the test for release, the respondent submits it is not necessary for this Court to consider, or place any weight on, the disputed aspects of the applicant's affidavit or letters or on COVID-19 as a relevant factor.. The respondent is consenting to release on the basis that the applicant has otherwise shown that reviewability outweighs enforceability, primarily given the short length of sentence and lack of any surrender or public safety concerns that cannot be met by conditions.

History of Proceedings

9. By way of background, the convictions under appeal represent the applicant's second, third and fourth convictions for criminal contempt. The history is as follows:

- August 21, 2018: alleged criminal contempt in breaching a March 15, 2018 court order (varied June 1, 2018) granting an injunction prohibiting interference with the operations of the plaintiff Trans Mountain Pipeline ULC (the "Injunction"), at the West Ridge Marine Terminal Location (**TAB 2: June 1, 2018 INJUNCTION)**;
- October 25, 2019: following trial, applicant convicted of August 21, 2018 criminal contempt: *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 2472;
- November 15, December 2, and December 18, 2019: alleged criminal contempt in breaching the Injunction, at the Burnaby Terminal location;
- January 9, 2020: released on a court undertaking in relation to the above charges (**TAB 3: January 9,2020 UNDERTAKING**);
- October 6, 2020: applicant sentenced to 28 days' jail for the August 21, 2018 offence: *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCSC 1512;
- October 29, 2020: Notice of Appeal from Conviction and Sentence filed by counsel Ms. Rausch: CA47080 (**TAB 4, Oct. 29, 2020 NOTICE OF APPEAL**);
- The applicant served his sentence and did not apply for bail pending appeal;
- November 13, 2020: following trial, applicant convicted of November 15, December 2, and December 18, 2019 criminal contempt: *Trans Mountain Pipeline ULC v. Mivasair*, (13 November 2020), Vancouver Registry No. xx (B.C.S.C.) **(TAB 5, REASONS FOR JUDGMENT);**
- March 2, 2021: applicant sentenced to 90 days jail and one year probation for the three above 2019 offences; and,
- March 2, 2021: Notice of Appeal from Convictions and Sentence filed by applicant: CA47302.

Despite concerns about the strength of the grounds of appeal, the respondent agrees the appellant meets the test for release

10. Criminal contempt of court is not an offence found in the *Criminal Code*, R.S.C. 1985, c. C-46. It is a common law offence. However, s. 10 of the *Criminal Code* provides a right of appeal from a conviction for contempt in respect of both conviction and sentence, and by virtue of s. 10(3), the provisions of Part XXI of the *Code* -- procedure on appeals by indictment -- apply, with such modifications as the circumstances require. Release pending determination of appeal is governed by Part XXI, s. 679(1): see *Trans Mountain Pipeline ULC v. Mivasair* (appellants Cass, Morrice, Wood, McLean), 2018 BCCA 424 (Fisher J.A., *In Chambers*).

11. The merit threshold under s.679(3)(a) on appeal against conviction ("not frivolous") is lower than that under s. 679(4)(a) on appeal against sentence only ("sufficient merit"): *R. v. Ali,* 2008 BCCA 147 (Chambers), paras. 19. Leave to appeal sentence is also required before bail pending sentence appeal can be granted: s. 679(1)(b).The usual practice of this Court is that where a conviction is upheld, the applicant, who would have surrendered himself into custody, is obliged to apply for judicial interim release meeting the requirements of s.679(4): *R. v. Dawydiuk,* 2008 BCCA 243, para. 14. The respondent submits there is no reason to depart from this usual practice.

12. The respondent does not dispute that the applicant has established based on history that he will surrender himself and there are no public safety concerns that cannot be met by conditions. The respondent's position is that even though the grounds on conviction appeal are weak at best, reviewability outweighs enforceability given the short sentence and lack of public safety concerns that cannot be met by conditions. Enforceability is an important public interest in this serious type of case, involving a lack of respect for the rule of law. However, as stated by Fischer J.A. in her decision with respect to bail pending sentence appeal for earlier contemnors (2018 BCCA 424), in balancing the tension between enforceability and reviewability, appellate judges should be mindful of the anticipated delay in deciding an appeal, relative to the length of the sentence: *R. v. Oland,* 2017 SCC 17*,* at para. 48.

13. The respondent is prepared to make further submissions with respect to the merits of both the conviction and sentence appeals should this Court consider it necessary to resolving this application. In brief, with respect to conviction, the applicant has not identified how the judge erred or reached an unreasonable verdict in finding the requisite *mens rea*, and the alleged error with respect to whether the appellant was acting pursuant to a statutory duty or authority amounts to an impermissible collateral attack on the Injunction and its authority over Aboriginal persons: see RFJ, paras. 108-124.

14. It is more difficult to assess the merits of the sentence appeal as reasons were not given until March 2, 2021 and a written decision is not yet available. Some of the applicant's grounds are frivolous. For example, there is no evidence the Crown did not abide by policy but even if it did not, policy is not law and neither policy nor the Crown's position binds the sentencing judge: *R. v. Anderson*, 2014 SCC 41, para. 56. Further, the remedy of discharge "with conditions deemed to be met by the 28 days previously served in jail" is not an available remedy.

15. While the respondent does not wish to take a position at this point that would render a sentence appeal moot, the grounds appear at best weak and the sentence appears fit and at the low end of the range. This Court has upheld a four month sentence for a third conviction for criminal contempt and a ten month sentence for a fifth conviction: *R. v. Krawczyk*, 2010 BCCA 452, leave to appeal to SCC dismissed, at paras. 26-28. In this case, the sentencing judge correctly considered *Gladue* factors. However, the 90 days sentence properly reflected the applicant's previous conviction and the fact that he was being sentenced for this second, third and fourth convictions for criminal contempt. Comparing the applicant's situation to that of other contemnors who pleaded guilty to a single offence and offended earlier in the proceedings is unhelpful, especially as the Crown gave the contemnors notice of increasing sentencing positions as protests continued: see e.g. **TAB 7 Notice of Motion (Third amended).** A sentence of fourteen days each for four contemnors who pleaded guilty to criminal contempt occurring before August 2018 has been previously upheld by this Court: *TransMountain Pipeline ULC v. Mivasair*, 2019 BCCA 156. The respondent would ask that the question of leave to appeal sentence and bail pending sentence be left for another day.

Conclusion

16. The respondent proposes a release order with a promise by the applicant to pay $5000 if he fails to comply with any of the following conditions:

(a) The appellant will keep the peace and be of good behaviour;
(b) The appellant will report to a bail supervisor at 275 East Cordova Street by telephone within 72 hours of his release from custody and thereafter as and when directed by his supervisor;
(c) The appellant will obey the Injunction pronounced on June 1, 2018, which is attached to the release order;
(d) The appellant will not be within 500 metres of: The Westridge Marine Terminal at 7065 Bayview Drive, Burnaby, BC, The Burnaby Terminal at 8099 Shellmont Street, Burnaby BC, and any other project or operation site of Trans Mountain Pipeline ULC or its affiliates, contractors or subcontractors that have been reasonably identified as the same by signage or boundary markings situated on or around such sites;
(e) The appellant will diligently pursue his appeal from conviction;
(f) The appellant will remain within the province of British Columbia; and
(g) The appellant will surrender himself into custody at the Sheriff's Office, the Law Courts, 800 Smithe Street at 9:00 am on October, 2021 or the date of release of judgment in this conviction appeal, whichever first occurs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

_____
Christie Lusk
Crown Counsel

March 2, 2021
Vancouver, British Columbia

Court File No. S-183541
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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 ARBESS), GORDON CORNWALL, THOMAS CHAN, LAUREL DYKSTRA, RUDI LEIBIK (aka RUTH LEIBIK), JOHN DOE, JANE DOE, AND PERSONS UNKNOWN

DEFENDANTS

ORDER MADE AFTER APPLICATION

BEFORE THE HONOURABLE JUSTICE K.N. AFFLECK on June 1, 2018

ON THE APPLICATION of the Plaintiff, Trans Mountain Pipeline ULC (**"Trans Mountain"**), coming on for hearing at 800 Smithe Street, Vancouver, British Columbia on June 1, 2018, and on hearing: Maureen Killoran, Q.C. and Shaun Parker, counsel for Trans Mountain; Martin Peters, counsel for Mia Nissen; Neil Chantler, counsel for Gordon Cornwall; Casey Leggett, counsel for Karl Perrin; and no one appearing for the remaining Defendants;

THIS COURT ORDERS THAT:

1. The Defendants, and any other person having notice of this Order, are hereby restrained and enjoined from:

(a) physically obstructing, impeding or otherwise preventing access by Trans Mountain, its contractors, employees or agents, to, or work in, any of the sites or work areas as set out below:

(i) the Westridge Marine Terminal (the "**WMT**"), as indicated in the map attached at Schedule "A";

(ii) the Burnaby Terminal (the "**BT**"), as indicated in the map attached at Schedule "B"; or

(iii) any other project or operations site of Trans Mountain or its affiliates, contractors, or subcontractors that has been reasonably identified as the same (such as through signage, fencing, flagging or boundary markings situated on or around the perimeter of such site) (the "**Markings**"),

(the sites and work areas referenced in this (a) being collectively, the "**Trans Mountain Sites**");

(b) physically obstructing, impeding or otherwise preventing access by Trans Mountain, its contractors, employees or agents, to the Reed Point Marina in Port Moody, B.C.;

(c) physically obstructing, impeding or otherwise preventing access by Trans Mountain, its contractors, employees or agents, to any of the roads identified and labelled in the map attached hereto as Schedule "C", any road that leads directly or indirectly to any of the Trans Mountain Sites, or any of the following roads:

(i) Bayview Drive;

(ii) Inlet Drive/Barnet Highway/Highway 7A;

(iii) Cliff Avenue; or

(iv) Reed Point Way,

(the roads referenced in this (c) being collectively, the "**Critical Roads**"); and

(d) burning, defacing, tearing down, or otherwise harming, any and all signage, fencing, flagging or boundary markings situated on or around the perimeter of any of the Trans Mountain Sites or the Critical Roads, including without limitation the copies of this Order that are to be posted pursuant to paragraph 9 of this Order.

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

(a) the fence line of the WMT;

(b) the property line of the BT, which property line shall be clearly marked and delineated by Trans Mountain;

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

(collectively, the "**Buffer Zones**").

3. Without limiting the terms of paragraph 1, the Buffer Zones shall not apply to: (a) any private property, public trail, or public roadway; (b) the encampments, objects and structures located at or near the intersection of Underhill Avenue and Shellmont Street, at the location/area currently known as "Camp Cloud" ("**Camp Cloud**"); or (c) the structure currently known as the "Watch House", which is located near the south east corner of the BT.

4. If the encampments, objects or structures at Camp Cloud obstruct, impede, or otherwise prevent physical access by Trans Mountain to the Trans Mountain Sites or the Critical Roads, Trans Mountain may apply to this Court for an Order to remove Camp Cloud.

5. In the event of an emergency, Trans Mountain may remove the structure currently known as the "Watch House," which is located near the south east corner of the BT, provided that Trans

Mountain shall rebuild such structure if this Court determines that there was not a reasonable emergency.

6. Any police officer is hereby authorized to arrest and remove any person who the police officer has reasonable and probable grounds to believe is contravening or knowingly has contravened the provisions of this Order. For the sake of clarity, such police officer retains his or her operational discretion as to whether or not to arrest or remove any person pursuant to this Order.

7. Any police officer who arrests and removes any person pursuant to this Order is hereby authorized to:

(a) release that person from arrest upon the police officer being satisfied that the person will no longer contravene the provisions of this Order;

(b) release that person from arrest upon the person agreeing in writing to not breach this Order and to appear before this Court at such a time and place as may be fixed for the purpose of being proceeded against for contempt of court or for fixing a date for such a proceeding;

(c) where such a person has refused to give a written undertaking pursuant to paragraph 7(b) above, or where in the circumstances the police officer considers it appropriate, to bring forthwith such person before this Court at the Supreme Court Registry in Vancouver, or any such other place, or in any such manner, as the Court may direct for the purpose of being proceeded against for contempt of court, or for fixing a time for such proceedings; or

(d) detain such person until such time until they can be brought before this Court.

8. A police officer and/or the BC Sheriffs Service is entitled to detain and transport any person in order to give effect to paragraph 7(c) above.

9. Trans Mountain shall cause copies of this Order to be posted on or around the Trans Mountain Sites.

10. Notice of this Order may be given to the Defendants by any of the following:

(a) posting this Order in the fashion described in paragraph 9 of this Order;

(b) posting a sign in a conspicuous location within 5 metres of any Trans Mountain Site (a "**Warning Sign**"), with text that is no less than 10 centimeters in height which states:

> Any person who obstructs access to this site is in breach of an injunction order and may be subject to immediate arrest and prosecution.
>
> A copy of the order is posted at: www.transmountain.com.
>
> For further information, call 1.888.876.6711 or info@transmountain.com.

(c) this Order is read to them, including but not limited to being read over an amplification system.

11. Without limiting paragraphs 6 or 10 of this Order, for the purposes of enforcing this Order, any person, regardless of whether they are in breach of this Order, shall be deemed to have knowledge and notice of this Order if:

(a) a copy of this Order is shown to them or read to them (including but not limited to being read over an amplification system), and they are provided a brief opportunity to comply with this Order; or

(b) they come within 10 metres of any Warning Sign.

12. Without limiting the forgoing and further to paragraph 11 above, any persons who breach the Order will be arrested in accordance with the RCMP's "five step process" which is:

(a) ask the individual to cease the unlawful act;

(b) inform the individual their action is unlawful;

(c) caution the individual that if they continue to act unlawfully they will be arrested and could face charges;

(d) confirm that the individual is aware they will be arrested and could face charges; and

(e) arrest the individual in accordance with appropriate Charter obligations.

13. This Order shall not apply to persons acting in the course of or in the exercise of a statutory duty, power or authority.

14. Provided the terms of this Order are complied with, the Defendants and other persons remain at liberty to engage in a peaceful, lawful and safe protest.

15. Trans Mountain undertakes to this Court that it will abide by any Order of this Court as to damages payable by it to the Defendants named or subsequently named in this Action as a result of the granting of this Order, or as otherwise ordered by this Court.

16. This Order is in effect until the trial of this Action.

17. Trans Mountain is at liberty to apply to vary the terms of this Order. Any person affected by this Order shall have the liberty to apply to set aside or vary this Order on not less than 48 hours' notice to Trans Mountain.

18. This Order supercedes and replaces the Order of this Court filed March 16, 2018.

Certified a true copy according to the records of the Supreme Court at Vancouver, B.C.
DATED: JUL 22 2020
Chris Gilmour
Authorized Signing Officer

CHRIS GILMOUR
Deputy District Registrar

BY THE COURT:

SCHEDULE "A"

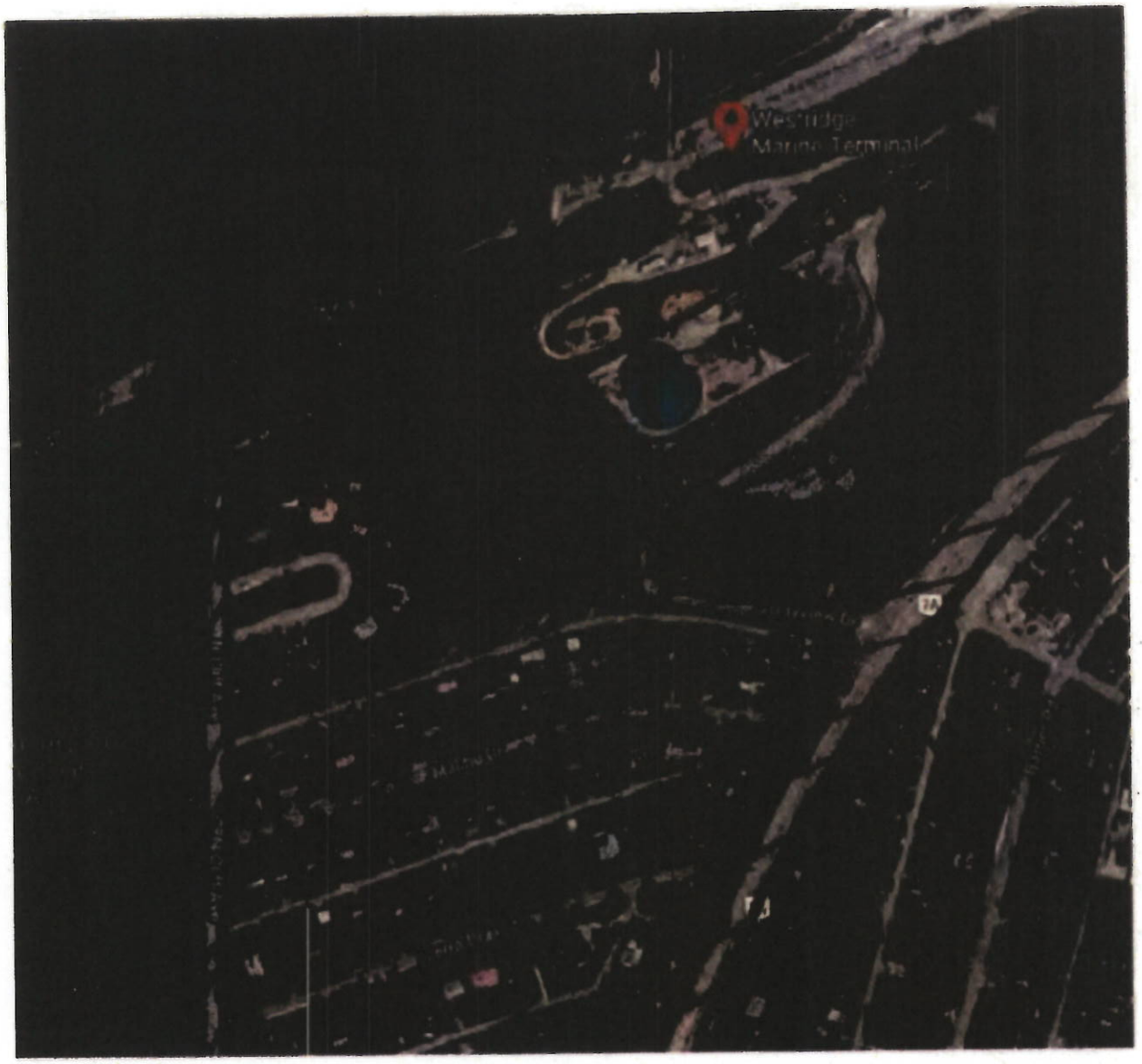
THE WESTRIDGE MARINE TERMINAL

SCHEDULE "B"

THE BURNABY TERMINAL

SCHEDULE "C"

CRITICAL ROADS



SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

JAN 09 2020

ENTERED

FORM 117
(RULE 22-8 (10))

No. S183541
Vancouver Registry

In the Supreme Court of British Columbia

Between

TRANS MOUNTAIN PIPELINE ULC — Plaintiff(s)

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 ARBESS), GORDON CORNWALL, THOMAS CHAN, LAUREL DYKSTRA, RUDI LEIBIK (aka RUTH LEIBIK), JOHN DOE, JANE DOE, AND PERSONS UNKNOWN — Defendant(s)

and

ATTORNEY GENERAL OF BRITISH COLUMBIA — Intervenor

RELEASE ORDER

BEFORE THE HONOURABLE MADAM JUSTICE FITZPATRICK JANUARY 9, 2020

ON THE APPLICATION of Stacy Gallagher who has been apprehended on an allegation that he violated an order of the Supreme Court dated June 1, 2018

THIS COURT ORDERS that Stacy Gallagher be released from custody on his undertaking made and dated January 9, 2020, a copy of which undertaking is attached to this order.

Date: 09/Jan/2020

By the Court.

Registrar

30December2011

Court File No. S-183541
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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 ARBESS), GORDON CORNWALL, THOMAS CHAN, LAUREL DYKSTRA, RUDI LEIBIK (aka RUTH LEIBIK), JOHN DOE, JANE DOE, AND PERSONS UNKNOWN

DEFENDANTS

-and-

ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENOR

UNDERTAKING AND PROMISE TO APPEAR

I (print name legibly) _____ of

_____(address)

UNDERSTAND that:

(1) I have been arrested for alleged breach of the Order of the Supreme Court of British Columbia, a copy of which is attached as Schedule A.

(2) I am to be tried for criminal contempt of the court.

(3) To be released from custody pending my trial I must undertake and promise that:

(a) I will strictly comply with the terms of the order attached hereto as Schedule A; and

(b) I will attend as required to do so before a judge of the Supreme Court of British Columbia at 800 Smithe Street, in the city of Vancouver, Province of British Columbia to be dealt with according to law. My next appearance date is January 29, 2020 at 9:00 am.

(c) I promise that

1. I will obey the Order Made After Application pronounced on June 1, 2018 in these proceedings, a copy which is attached to his released document;
2. I will not to be within 500 meters of: The Westridge Marine Terminal at 7065 Bayview Drive, Burnaby, BC, The Burnaby Terminal at 8099 Shellmont Street, Burnaby, BC and any other project or operation site of Trans Mountain Pipeline ULC or its affiliates, contractors or subcontractors that have been reasonably identified as the same by signage or boundary markings situated on or around such sites.

(4) If I breach this undertaking or fail to appear before this Court as required a warrant may be issued for my arrest.

Dated at the Law Courts 800
Smithe Street
Vancouver, British Columbia
this 9th day of January 2020

_____
Signature

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

JUN 01 2018

ENTERED

Court File No. S-183541
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

B E T W E E N:

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 ARBESS), GORDON CORNWALL, THOMAS CHAN, LAUREL DYKSTRA, RUDI LEIBIK (aka RUTH LEIBIK), JOHN DOE, JANE DOE, AND PERSONS UNKNOWN

DEFENDANTS

ORDER MADE AFTER APPLICATION

BEFORE THE HONOURABLE JUSTICE K.N. AFFLECK on June 1, 2018

ON THE APPLICATION of the Plaintiff, Trans Mountain Pipeline ULC ("**Trans Mountain**"), coming on for hearing at 800 Smithe Street, Vancouver, British Columbia on June 1, 2018, and on hearing: Maureen Killoran, Q.C. and Shaun Parker, counsel for Trans Mountain; Martin Peters, counsel for Mia Nissen; Neil Chantler, counsel for Gordon Cornwall; Casey Leggett, counsel for Karl Perrin; and no one appearing for the remaining Defendants;

THIS COURT ORDERS THAT:

1. The Defendants, and any other person having notice of this Order, are hereby restrained and enjoined from:

(a) physically obstructing, impeding or otherwise preventing access by Trans Mountain, its contractors, employees or agents, to, or work in, any of the sites or work areas as set out below:

(i) the Westridge Marine Terminal (the "WMT"), as indicated in the map attached at Schedule "A";

(ii) the Burnaby Terminal (the "BT"), as indicated in the map attached at Schedule "B"; or

(iii) any other project or operations site of Trans Mountain or its affiliates, contractors, or subcontractors that has been reasonably identified as the same (such as through signage, fencing, flagging or boundary markings situated on or around the perimeter of such site) (the "**Markings**"),

(the sites and work areas referenced in this (a) being collectively, the "**Trans Mountain Sites**");

(b) physically obstructing, impeding or otherwise preventing access by Trans Mountain, its contractors, employees or agents, to the Reed Point Marina in Port Moody, B.C.;

(c) physically obstructing, impeding or otherwise preventing access by Trans Mountain, its contractors, employees or agents, to any of the roads identified and labelled in the map attached hereto as Schedule "C", any road that leads directly or indirectly to any of the Trans Mountain Sites, or any of the following roads:

(i) Bayview Drive;

(ii) Inlet Drive/Barnet Highway/Highway 7A;

(a) Claimants or

(b) Relief Sought

the mark referred to in that paragraph by the United Kingdom; and

(c) thereby claiming ownership of, or alternatively having any sort of rights, including property or boundary markers situated on or around the perimeter of any of the Twin Mountain Sites in the United Kingdom, including within the areas of those Sites that are to be painted pursuant to paragraph 5 of this Order.

any other persons having notice of this Order are hereby restrained from:

2. The Defendants and

(a) the Twin Mountain Sites;

(b) the Twin Mountain Sites, which property is

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

(collectively the "Public Areas")

3. Without limiting the terms of paragraph 2, the Public Areas shall not apply to (a) any private property, public toilets or public transport; (b) the arrangements which are located at or near the intersection of Underhill Avenue and Stadium Drive, at the locations usually known as "Camp Chaos 1" ("Camp Chaos 2") or (c) the structure currently known as the "[illegible] Tower" near the south east corner of the BT.

Camp Chaos

4. If the occupiers

owners of private land access to Twin

Twin Mountain may apply to this Court to

5. In the event of an emergency, Twin Mountain may

of the Wicked Hoax Website is located near the south east corner

Legal Department

Mountain shall rebuild such structure if this Court determines that there was not a reasonable emergency.

6. Any police officer is hereby authorized to arrest and remove any person who the police officer has reasonable and probable grounds to believe is contravening or knowingly has contravened the provisions of this Order. For the sake of clarity, such police officer retains his or her operational discretion as to whether or not to arrest or remove any person pursuant to this Order.

7. Any police officer who arrests and removes any person pursuant to this Order is hereby authorized to:

(a) release that person from arrest upon the police officer being satisfied that the person will no longer contravene the provisions of this Order;

(b) release that person from arrest upon the person agreeing in writing to not breach this Order and to appear before this Court at such a time and place as may be fixed for the purpose of being proceeded against for contempt of court or for fixing a date for such a proceeding;

(c) where such a person has refused to give a written undertaking pursuant to paragraph 7(b) above, or where in the circumstances the police officer considers it appropriate, to bring forthwith such person before this Court at the Supreme Court Registry in Vancouver, or any such other place, or in any such manner, as the Court may direct for the purpose of being proceeded against for contempt of court, or for fixing a time for such proceedings; or

(d) detain such person until such time until they can be brought before this Court.

8. A police officer and/or the BC Sheriffs Service is entitled to detain and transport any person in order to give effect to paragraph 7(c) above.

9. Trans Mountain shall cause copies of this Order to be posted on or around the Trans Mountain Sites.

(c) caution the individual that if they continue to act unlawfully they will be arrested and could face charges;

(d) confirm that the individual is aware they will be arrested and could face charges; and

(e) arrest the individual in accordance with appropriate Charter obligations.

13. This Order shall not apply to persons acting in the course of or in the exercise of a statutory duty, power or authority.

14. Provided the terms of this Order are complied with, the Defendants and other persons remain at liberty to engage in a peaceful, lawful and safe protest.

15. Trans Mountain undertakes to this Court that it will abide by any Order of this Court as to damages payable by it to the Defendants named or subsequently named in this Action as a result of the granting of this Order, or as otherwise ordered by this Court.

16. This Order is in effect until the trial of this Action.

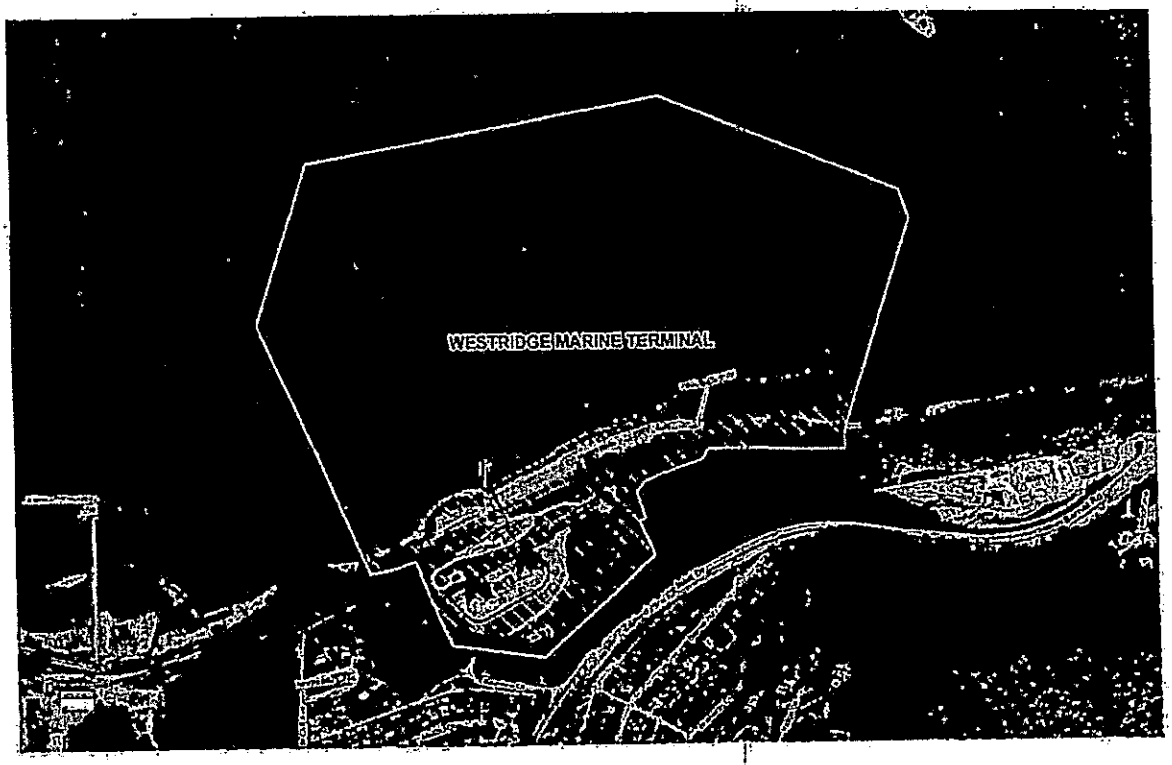
17. Trans Mountain is at liberty to apply to vary the terms of this Order. Any person affected by this Order shall have the liberty to apply to set aside or vary this Order on not less than 48 hours' notice to Trans Mountain.

18. This Order supercedes and replaces the Order of this Court filed March 16, 2018.

BY THE COURT:

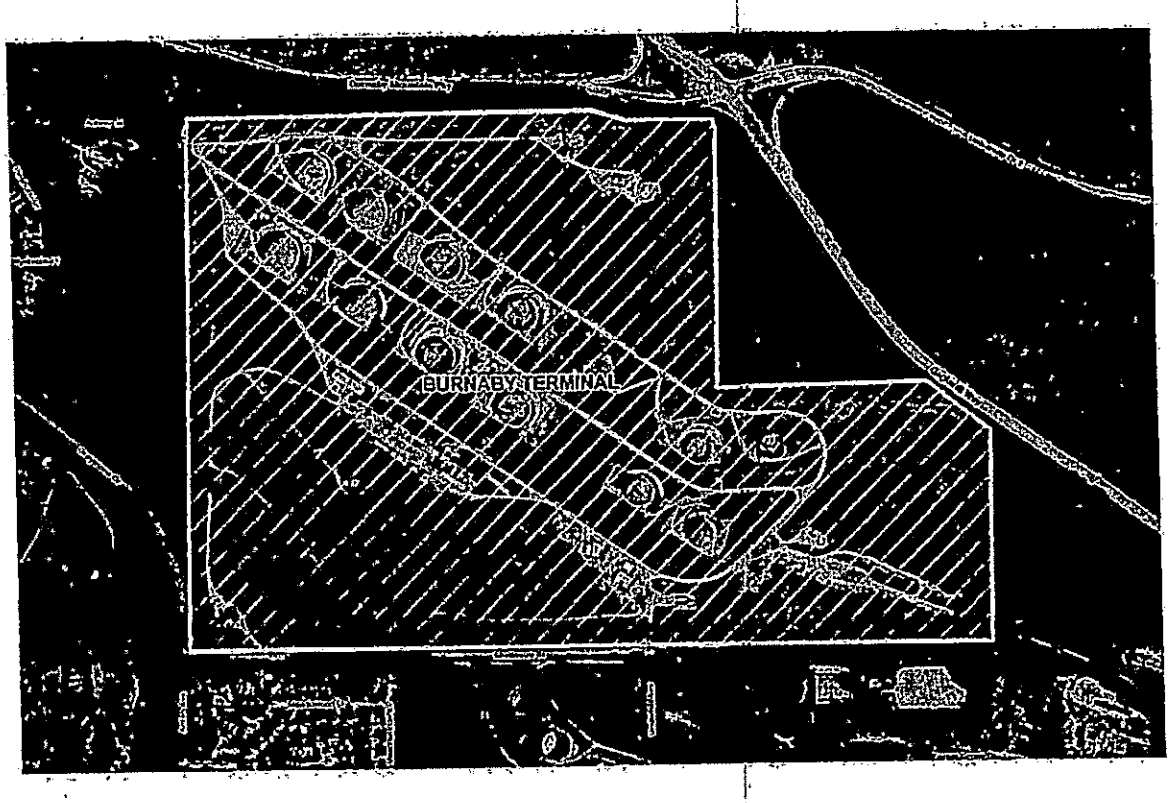
SCHEDULE "A"

THE WESTRIDGE MARINE TERMINAL



SCHEDULE "B"

THE BURNABY TERMINAL



SCHEDULE "C"

CRITICAL ROADS

Form 1

NOTICE OF APPEAL OR APPLICATION FOR LEAVE TO APPEAL

CA 47080

Lower Court Registry Number: S183541,
Criminal File 31122
Lower Court Registry Location: Vancouver

COURT OF APPEAL

Between

Trans Mountain Pipeline ULC

Plaintiff

and

David Mivasair, Bina Salimath, Mia Nissen, Corey Skinner (aka Cory Skinner), Uni Urchin (aka Jean Escueta), Arthur Brociner (aka Artur Brociner), Karl Perrin, Yvon Raoul, Earle Peach, Sandra Ang, Reuben Garbanzo (aka Robert Abress), Gordon Cornwall, Thomas Chan, Laurel Dykstra, Rudi Leibik (aka Ruth Leibik), Linda Hutchings, John Doe, Jane Doe, and Persons Unknown

Defendants

and

Attorney General of British Columbia

Intervenor

– and –

Regina

Respondent

vs.

Stacy Gallagher

Appellant

PARTICULARS OF CONVICTION

1 Place of conviction: Vancouver Supreme Court

2 Name of Judge: Conviction: Mister Justice Affleck

Sentence: Madam Justice S. Fitzpatrick

3 Offence(s) of which appellant convicted: Criminal contempt of court

4 Section of *Criminal Code* or other *Act* under which appellant was convicted:
section 8(3) which preserves the common law crime of criminal contempt of cour

5 Plea at trial: not guilty

6 Whether or not jury trial: Judge alone

7 Length of trial: 6 days

8 Sentence imposed: 28 days jail

9 Date of conviction: October 25, 2019

10 Date of sentence: October 6, 2020

11 If appellant in custody, place of incarceration: n/a

TAKE NOTICE that the appellant (strike out inapplicable provisions):

a) appeals against his conviction upon grounds involving question of law alone.
b) applies for leave to appeal his conviction upon grounds involving a question of fact alone or a question of mixed law and fact, and if leave be granted hereby appeals against the conviction.
c) applies for leave to appeal against sentence, and if leave be granted hereby appeals against the sentence.

The grounds for appeal are

1) The Learned Trial Judge erred in fact in law by finding that there was any intention or recklessness to support the criminal conviction of contempt of court;

2) The Learned Trial Judge erred in fact and law in determining that the appellant was not acting in the course of a statutory duty or authority pursuant to s. 25 of the *Charter of Rights and Freedoms* and s. 35 of the *Constitution Act*;

3) The Sentencing Judge erred in fact and law by denying the Appellants application for circle sentencing in order to assist in determining a fit sentence in accordance with the sentencing principles of the *Criminal Code of Canada;*

4) In particular, the Sentencing Judge erred in fact and law by failing to consider alternatives to incarceration as available sanctions that would meet the principles of sentencing pursuant to all of Part XXIII of the Criminal Code, in particular, s 718.2 (e) of the Criminal Code of Canada.

5) The Sentencing Judge failed to consider s. 718 of the Criminal Code and in particular s. 718 (c) which requires separation of society to be a just sanction *where necessary.*

6) Furthermore, the Sentencing Judge erred in law and fact when she failed to consider the application of Indigenous laws and legal authority in determining the level of moral culpability, pursuant to s 726.1.

7) The Sentencing Judge erred in law and fact when she failed to apply ss. 717, 718, 718.1, 718.2 718.3, 724, and 730 of the *Criminal Code of Canada* in order to impose a just, fit, and appropriate sentence in alignment with the fundamental principles of sentencing.

8) The Sentencing Judge erred in fact and law by not considering the impact of Covid 19 on the degree of punishment imposed on the appellants, including severe isolation, especially in light of evidence of the impact of the pandemic on each of the appellants personally.

9) The Sentencing Judge erred in fact and law by not considering community work service as an alternative to jail, or the imposition of a fine.

10) The Sentencing Judge erred in fact and law by not considering the effects of incarceration due to medical reasons.

11) The Sentencing Judge erred in fact and law by not considering family responsibilities to manage severe health challenges.

12) The Sentencing Judge did not take into account the Indigenous status of the appellants, their responsibilities and obligations as Indigenous people, or the information provided in their Gladue reports, in determining a just, fit, and appropriate sentence.

The relief sought is: an acquittal for each appellant

In the alternative, a new trial before a different Judge

In the further alternative, a new sentencing hearing before a different Judge

In the further alternative, a reduction of sentence to a discharge, or conditional discharge, with the conditions deemed to be met by the 28 days served in jail.

The appellant's address for service is Suite 1213 - 207 West Hastings St., Vancouver, BC V6B 1H7

Dated this 28 day of October 2020.

Solicitor on behalf of appellant

To the Registrar

Sarah J. Rauch
Barrister & Solicitor
1213-207 W. Hastings
Vancouver, B.C. V6B 1H7

Form 1

NOTICE OF APPEAL OR APPLICATION FOR LEAVE TO APPEAL

CA 47079

Lower Court Registry Number: S183541,
Criminal File 31122
Lower Court Registry Location: Vancouver

COURT OF APPEAL

Between

Trans Mountain Pipeline ULC

Plaintiff

and

David Mivasair, Bina Salimath, Mia Nissen, Corey Skinner (aka Cory Skinner), Uni Urchin (aka Jean Escueta), Arthur Brociner (aka Artur Brociner), Karl Perrin, Yvon Raoul, Earle Peach, Sandra Ang, Reuben Garbanzo (aka Robert Abress), Gordon Cornwall, Thomas Chan, Laurel Dykstra, Rudi Leibik (aka Ruth Leibik), Linda Hutchings, John Doe, Jane Doe, and Persons Unknown

Defendants

and

Attorney General of British Columbia

Intervenor

– and –

Regina

Respondent

vs.

Justin Bige

Appellant

PARTICULARS OF CONVICTION

1 Place of conviction: Vancouver Supreme Court

2 Name of Judge: Conviction: Mister Justice Affleck
Sentence: Madam Justice S. Fitzpatrick

3 Offence(s) of which appellant convicted: Criminal contempt of court

4 Section of *Criminal Code* or other *Act* under which appellant was convicted:
section 8(3) which preserves the common law crime of criminal contempt of cour

5 Plea at trial: not guilty

6 Whether or not jury trial: Judge alone

7 Length of trial: 6 days

8 Sentence imposed: 28 days jail

9 Date of conviction: October 25, 2019

10 Date of sentence: October 6, 2020

11 If appellant in custody, place of incarceration: n/a

TAKE NOTICE that the appellant (strike out inapplicable provisions):

a) appeals against his conviction upon grounds involving question of law alone.
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The grounds for appeal are

1) The Learned Trial Judge erred in fact in law by finding that there was any intention or recklessness to support the criminal conviction of contempt of court;

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3) The Sentencing Judge erred in fact and law by denying the Appellants application for circle sentencing in order to assist in determining a fit sentence in accordance with the sentencing principles of the *Criminal Code of Canada;*

4) In particular, the Sentencing Judge erred in fact and law by failing to consider alternatives to incarceration as available sanctions that would meet the principles of sentencing pursuant to all of Part XXIII of the Criminal Code, in particular, s 718.2 (e) of the Criminal Code of Canada.

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6) Furthermore, the Sentencing Judge erred in law and fact when she failed to consider the application of Indigenous laws and legal authority in determining the level of moral culpability, pursuant to s 726.1.

7) The Sentencing Judge erred in law and fact when she failed to apply ss. 717, 718, 718.1, 718.2 718.3, 724, and 730 of the *Criminal Code of Canada* in order to impose a just, fit, and appropriate sentence in alignment with the fundamental principles of sentencing.

8) The Sentencing Judge erred in fact and law by not considering the impact of Covid 19 on the degree of punishment imposed on the appellants, including severe isolation, especially in light of evidence of the impact of the pandemic on each of the appellants personally.

9) The Sentencing Judge erred in fact and law by not considering community work service as an alternative to jail, or the imposition of a fine.

10) The Sentencing Judge erred in fact and law by not considering the effects of incarceration due to medical reasons.

11) The Sentencing Judge erred in fact and law by not considering family responsibilities to manage severe health challenges.

12) The Sentencing Judge did not take into account the Indigenous status of the appellants, their responsibilities and obligations as Indigenous people, or the information provided in their Gladue reports, in determining a just, fit, and appropriate sentence.

The relief sought is: an acquittal for each appellant

In the alternative, a new trial before a different Judge

In the further alternative, a new sentencing hearing before a different Judge

In the further alternative, a reduction of sentence to a discharge, or conditional discharge, with the conditions deemed to be met by the 28 days served in jail.

The appellant's address for service is Suite 1213 - 207 West Hastings St., Vancouver, BC V6B 1H7

Dated this 28 day of October 2020.

Solicitor on behalf of appellant

To the Registrar

Sarah J. Rauch

Sarah J. Rauch
Barrister & Solicitor
1213-207 W. Hastings
Vancouver, B.C. V6B 1H7

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20201113
Docket: S183541
Registry: Vancouver

Between:

Trans Mountain Pipeline ULC

Plaintiff

And

David Mivasair, Bina Salimath, Mia Nissen, Corey Skinner (aka Cory Skinner), Uni Urchin (aka Jean Escueta), Arthur Brociner (aka Artur Brociner), Karl Perrin, Yvon Raoul, Earle Peach, Sandra Ang, Reuben Garbanzo (aka Robert Abress), Gordon Cornwall, Thomas Chan, Laurel Dykstra, Rudi Leibik (aka Ruth Leibik), Linda Hutchings, John Doe, Jane Doe, and Persons Unknown

Defendants

And

Attorney General of British Columbia

Intervener

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment (Re Stacy Gallagher)

Counsel for the Crown:	M.R. Ruttan D.J. Pruim
Counsel for Stacy Gallagher:	S.J. Rauch
Place and Date of Trial:	Vancouver, B.C. August 10-14 and 19-21, 2020
Place and Date of Judgment:	Vancouver, B.C. November 13, 2020

INTRODUCTION

[1] On June 1, 2018, Justice Affleck of this Court granted an injunction to restrain persons from obstructing and interfering with the operations of the plaintiff, Trans Mountain Pipeline ULC ("Trans Mountain"), at its various Lower Mainland locations (the "Injunction"). One of those locations was Trans Mountain's tank farm facility in Burnaby, BC, defined in the Injunction as the "Burnaby Terminal" or "BT". For the purposes of this judgment, I will refer to the facility as the "Burnaby Terminal".

[2] In this trial, the Crown alleges that Stacy Gallagher is guilty of criminal contempt of court in respect of the Injunction, arising from his presence and activities on or near the Burnaby Terminal on three separate dates, namely November 15 and December 2 and 18, 2019.

[3] The Crown alleges that Mr. Gallagher publicly disobeyed the term of the Injunction that provides:

> 1. The Defendants, any other person having notice of this Order, are hereby restrained and enjoined from:
>
> a) physically obstructing, impeding or otherwise preventing access by Trans Mountain, its contractors, employees or agents, to, or work in, any of the sites or work areas as set out below:
>
> . . .
>
> (ii) The Burnaby Terminal (the "BT"), as indicated in the map attached as Schedule "B"

[4] Mr. Gallagher declined to plead to the allegations at the commencement of this trial; as a result, the Court entered a not guilty plea for him.

THE EVIDENCE

[5] For the most part, the Crown's evidence consisted of video recordings and photographs of the relevant events on the three separate dates noted above and, additionally, on an earlier date, being August 21, 2018. Mr. Gallagher is clearly identifiable in all of the videos played at this trial.

[6] Randy Marquardt is a regional security manager who works for Trans Mountain. He has responsibility for Trans Mountain's operations in the Lower Mainland, known as "Spread 7". Daniel Bond is another regional security manager who works for Trans Mountain in another region, known as "Spread 5". Mr. Bond assists with matters relating to Trans Mountain's operations in the Lower Mainland, as required.

[7] Both Mr. Marquardt and Mr. Bond gave evidence at this trial in support of the Crown's case, along with one police officer.

[8] Mr. Gallagher testified on his own behalf.

August 21, 2018

[9] The Crown's evidence begins well before the late fall/winter 2019 dates, when the Crown alleges that Mr. Gallagher interfered with access to and from the Burnaby Terminal. The Crown relies on video evidence from this earlier date solely to establish that Mr. Gallagher had notice of the Injunction and its terms.

[10] On August 21, 2018, another protest against Trans Mountain and its operations occurred on Bayview Drive in Burnaby. Bayview Drive leads to the entrance to another of Trans Mountain's properties known as the "Westridge Marine Terminal", a further location protected by the Injunction.

[11] A portion of the video tape of that protest, recorded by Cst. Dirk Pinto of the RCMP at that time, was played at this trial.

[12] In the morning of August 21, 2018, a large group of people were gathered on Bayview Drive. One of them was Mr. Gallagher. The video recording shows a number of people on the roadway holding various objects. Banners were also placed on the roadway. Mr. Gallagher is seen speaking to a number of people.

[13] An RCMP officer began playing a pre-recorded recitation of the Injunction over a loudspeaker. Around that time, a number of persons began forming a line across the roadway. Mr. Gallagher moved on and off the roadway. At some point,

other persons began placing chairs behind the people lined up on the roadway. All this was clearly visible to Mr. Gallagher and he interacted with various persons who were lined up.

[14] The audio recording on the video indicates that it was played at a loud level. I accept Cst. Pinto's direct evidence that it was "loud". In addition, the loudspeaker was close enough to the persons on or near the roadway such that anyone with normal hearing capability, including Mr. Gallagher, would have been able to hear the recorded voice.

[15] Approximately one minute into the reading of the Injunction, around the time when the recording included the wording of para. 1(a)(ii) of the Order (referring to the "Burnaby Terminal"), a woman on the side of the road began also speaking to the crowd of people using a megaphone. Despite her speaking in this manner, I accept Cst. Pinto's evidence that he could still clearly hear the reading of the Injunction.

[16] Later, the people lined up on the roadway began holding signs. Again, Mr. Gallagher continued to interact with these persons, while the RCMP loudspeaker continued to broadcast the reading of the terms of the Injunction.

The Burnaby Terminal Intersection

[17] The entrance to the Burnaby Terminal sits at an "L" shaped intersection where Shellmont Street (running east/west) and Underhill Avenue (running north/south) meet (the "Intersection"). Trans Mountain's property line is immediately north of the Intersection and runs east/west just to the north of Shellmont Street.

[18] Immediately north of the Intersection is Trans Mountain's driveway or entrance to the Burnaby Terminal. Signage on both sides of the driveway/entrance provide notice of the south property line of the Burnaby Terminal. There are two property signs visible in the video: on the west, facing Shellmont Street to the south; and, on the east, just to the north of a dirt road leading east from the Intersection. A guardhouse is situated north of the Intersection and the property line and to the west

of the driveway/entrance. A sliding metal gate controls access at the end of the driveway/entrance that allows ingress and egress from the Burnaby Terminal itself.

[19] To the east of the driveway and gate area is a large white sign (approximately 8 feet high and 8 feet wide) that gives notice of the Injunction. The sign reads:

> Any person who obstructs access to this site is in breach of an injunction order and may be subject to immediate arrest and prosecution.
>
> A copy of the order is posted at: transmountain.com. . . .

[20] Between the Intersection and the gate, but within Trans Mountain's property line as part of the driveway, is a crosswalk. A trail used by the public runs east/west just to the north of both the Intersection and the property line. The public traverse the crosswalk when they are using the trail in order to cross Trans Mountain's driveway/entrance to the Burnaby Terminal. This raised crosswalk is about 30 yards from the gate.

[21] Normally, a flag person monitors the area toward ensuring the safe movement of trucks and other vehicles in and out of the Burnaby Terminal and the safe passage of the public over the crosswalk in light of that traffic. On two of the dates in question here (November 15 and December 2, 2019), there is a large stop sign just to the north of the trail and crosswalk for vehicles that are exiting the gate of the Burnaby Terminal. On all three 2019 dates, there is a second smaller stop sign south of the crosswalk and located just before a vehicle would enter the Intersection.

[22] Mr. Marquardt and Mr. Bond confirm that the main entrance to the Burnaby Terminal allows ingress and egress for a variety of vehicles with respect to Trans Mountain's operations. This includes construction vehicles, employees, crew buses and various other equipment that come and go from the site all day long.

[23] Mr. Bond's evidence was that this entrance was the only entrance to the Burnaby Terminal that larger construction vehicles could use to access the site. Mr. Marquardt confirmed that lighter vehicles could also use the entrance on the eastern part of the Burnaby Terminal situate near the regional office; however, as did Mr. Bond, he said that larger vehicles, such as double axle trucks with or without

trailers would only typically use the entrance at the Intersection. While physically possible, with great planning and shuffling of equipment, larger vehicles could access the regional office entrance but this was not a practical option and Trans Mountain did not do this.

November 15, 2019

[24] In the afternoon of November 15, 2019, Mr. Bond was with a Trans Mountain assistant security manager, Lorne Schwartz. Mr. Bond observed a number of protestors moving northbound on Underhill Avenue just south of Forest Grove Drive. Forest Grove Drive is a side street that runs off the east side of Underhill Avenue about 225 meters south of the entrance to the Burnaby Terminal.

[25] Mr. Bond observed three people holding an "Extinction Rebellion" sign who moved into the north bound lane of Underhill Avenue and began blocking traffic moving in that direction. A photograph captures a large dump truck that is blocked by their presence on the road. This activity lasted for about ten minutes. Mr. Bond says that most, if not all, construction vehicles were destined for the Burnaby Terminal, but he is not sure about the destination of the vehicles stopped at this time.

[26] Mr. Schwartz called the Burnaby RCMP to report the matter.

[27] After that time, a red vehicle approached the persons. Mr. Bond observed Mr. Gallagher exiting the red vehicle along with other persons and these new people then joined the protestors who had by then moved to the side of the roadway. Mr. Bond recognized Mr. Gallagher, having met him previously.

[28] After a short time on the east sidewalk of Underhill Avenue, the persons holding the "Extinction Rebellion" sign again moved into the north bound lane of the road. Mr. Bond's photographs capture Mr. Gallagher in front of that sign, banging on a drum and facing oncoming northbound traffic that had again stopped. That stopped traffic included various construction vehicles, such as tandem dump trucks.

Mr. Gallagher is readily recognizable as the person standing in the middle of Underhill Avenue with a drum, from pictures Mr. Bond took at the time.

[29] This second blockade of Underhill Avenue, in which Mr. Gallagher participated, lasted about five minutes. After that time, the group, including Mr. Gallagher, moved onto the sidewalk and they began walking northbound along Underhill Avenue toward the Burnaby Terminal entrance. Mr. Bond then observed that the stopped traffic, including the dump trucks, began to move northward again although he did not see where the vehicles went.

[30] Shortly thereafter, around 3:15 p.m., Mr. Marquardt observed Mr. Gallagher walk up to the crosswalk area along with other people who Mr. Marquardt understood were Danish radio personalities. Mr. Marquardt was very familiar with Mr. Gallagher before this time, having met him more than 20 times before. Mr. Marquardt identified Mr. Gallagher during his testimony.

[31] After walking north of the Intersection, Mr. Gallagher is the first person to move into the crosswalk area just south of the gate to the Burnaby Terminal. Again, Mr. Gallagher is readily identifiable on the video taken at the gate area for this incident. Another person is with Mr. Gallagher and this person appears to be holding video and/or audio recording equipment. Both of them move to the middle of the driveway and crosswalk area. Other persons are to the east of the Intersection on the gravel road, on the trail to the west of the driveway and across the street on the other side of the Intersection.

[32] Around this time, Mr. Gallagher remarked to Mr. Marquardt something to the effect that Mr. Marquardt "might as well make your calls". Mr. Bond phoned the RCMP for assistance regarding this protest.

[33] Just after Mr. Gallagher and this other person moved into the crosswalk area, a large truck and trailer full of gravel was pulling up to the large stop sign just north of the crosswalk area after exiting the gate. The truck driver was clearly trying to exit the Burnaby Terminal at the Intersection but the driver could not do so given

Mr. Gallagher's presence in the middle of the driveway on or near the crosswalk, including north of the crosswalk. At this point, the male person standing to the west on the trail holds up a sign facing the truck driver that says "Time is Up", which sign is also, at times, faced toward the Intersection and passing vehicles.

[34] At various times, Mr. Gallagher is seen drumming and moving on his feet, while being shadowed by the other person with the media equipment who is near him, while both are on or just north of the crosswalk and in front of the truck. After about four minutes, another two people come onto the crosswalk area and join Mr. Gallagher in front of the truck; these people were holding a large banner that reads "Extinction Rebellion". Soon, the two people holding the "Extinction Rebellion" sign turn around and face the Intersection, along with Mr. Gallagher, all in front of the truck.

[35] Mr. Marquardt asked the construction manager to stop any traffic coming to the site.

[36] Other people arrived at the site, including some persons who were located on the other side of the Intersection. At various times, Mr. Gallagher and the other two persons are waving to passing vehicles, again while in the crosswalk area and facing away from the waiting truck. The person with the video/audio equipment continued to either face all of these people and the truck or move to the back of the protestors in front of the truck. Mr. Gallagher began to hold one end of the sign at a point.

[37] At about 3:35 p.m., Mr. Marquardt had the truck move forward to allow the gate to close behind it. In addition, Mr. Marquardt wanted to test the resolve of the protestors as to whether they intended to remain. Despite the truck moving forward to just before the crosswalk, they did not move. At one point, a white truck heading east on Shellmont Street stopped just before the Intersection, paused, then drove away. Mr. Marquardt thinks, but is not sure, that this vehicle was trying to come into the entrance and onto the Burnaby Terminal.

[38] In addition, later interactions between the driver of the blocked truck and Mr. Gallagher, then still immediately in front of the truck, made no difference.

[39] After about 26 minutes, Mr. Marquardt had a discussion with Mr. Gallagher and asked him and the others to let the truck get through so the driver could go home. Mr. Gallagher replied that he was "in prayer" and he continued to occupy the area between the truck and the crosswalk. Minutes later, Mr. Gallagher is seen smoking a cigarette and waving to passing vehicles, while still holding his drum.

[40] After about 32 minutes, the protestors, including Mr. Gallagher, formed what appeared to be a circle on the crosswalk just in front of the truck. Mr. Marquardt described this as a "group prayer" or "group hug". After a few minutes, they moved out of the crosswalk area along with their signs. The truck was then able to leave the driveway and exit at the Intersection.

[41] The blockade ended around 3:51 p.m., after about 40 minutes. The RCMP arrived shortly thereafter. The RCMP did not arrest Mr. Gallagher since, by the time of their arrival, he and the other protestors had left the scene, walking to the east.

December 2, 2019

[42] The events of December 2, 2019, only two weeks later, were similar to those on November 15, 2019. As with the previous protest, Trans Mountain recorded the events that day on video.

[43] In the early afternoon, persons who appeared to be media types were standing across the street on the Intersection with cameras and tripods facing Trans Mountain's entrance to the Burnaby Terminal. Initially, Mr. Marquardt identified some individuals gathering across the street who he described as "well known protestors".

[44] At approximately 1:27 p.m., a group of protestors (about nine in total) approach from the east along the trail. Mr. Gallagher is part of that group. No identification issue arises, as Mr. Gallagher is readily identifiable in the video.

[45] The group moves across Trans Mountain's driveway at Burnaby Terminal. Mr. Gallagher is the first person to begin standing on the crosswalk. Around this time, Mr. Marquardt again called the construction superintendent to hold any incoming vehicles in another location to prevent traffic from "stacking up and down" on Underhill Avenue.

[46] Mr. Marquardt also called the RCMP to attend.

[47] Mr. Gallagher begins by smoking a cigarette and waiving to passing vehicles. Later still, Mr. Gallagher brought out a purple jacket and a drum. After hugging a few of his fellow protestors, Mr. Gallagher stands again in the crosswalk area, along with other persons, and begins banging his drum.

[48] As the events unfold, Mr. Gallagher is mostly at the front and centre of the persons blocking the driveway, sometimes waving to people driving by. Other persons are beside the crosswalk and across the street. Mr. Gallagher sometimes moves to the side of the roadway and then returns to the crosswalk area with the others.

[49] It is apparent from the video that some vehicles slow down in front of the Intersection or near the protestors, giving rise to the inference that they were trying to enter Trans Mountain's premises but were unable to do so or that they were distracted by these activities. One vehicle in particular pulls up and then parks along the north side of Shellmont Street. Mr. Marquardt recognized the driver of this truck, who was a Trans Mountain employee or contractor. Mr. Marquardt told the driver of this truck that Trans Mountain had called the police and he hoped the protestors would be moving along "shortly". Minutes later, this truck left.

[50] This group of protestors, including Mr. Gallagher, continued to be on or in front of the crosswalk, leaving aside brief interludes at the side from time to time.

[51] Another white truck pulls up at the Intersection facing north on Underhill Avenue just before turning onto Shellmont Street. Mr. Marquardt believed that this was another Trans Mountain employee or contractor trying to access the site. After

about a minute, while blocking the road, this truck moved off and, like the first truck, parked on the north side of Shellmont Street just by the Intersection.

[52] After about an hour, two Burnaby RCMP officers arrived. The police walked up to and engaged with the protestors, including Mr. Gallagher, who were still in the crosswalk area. During the next 20 minutes or so, the protestors are seen shaking each other's hands and hugging. They pass a pipe around the group members and the police officers in a circle. After holding hands in a circle, the group broke up and moved to the east side of the Intersection, allowing access to the Burnaby Terminal.

[53] The video shows that, almost immediately, vehicles, including many large trucks, began entering and exiting the Burnaby Terminal. The police officers eventually left the scene, even before some of the protestors, without having arrested anyone. Mr. Gallagher was one of the last persons to leave, heading east along the trail.

[54] All told, the December 2, 2019 blockade was up for about one-and-a-half hours. Mr. Marquardt confirms that at no time did he ask Mr. Gallagher to move aside or leave, as he did on November 15, 2019.

December 18, 2019

[55] On December 18, 2019, Mr. Bond was on duty at the Burnaby Terminal in place of Mr. Marquardt. Trans Mountain personnel contacted Mr. Bond and advised that there was further protest activity at the Burnaby Terminal.

[56] Around 9:34 a.m., Mr. Bond arrived at the entrance. He observed two females and Mr. Gallagher standing just to the south of the crosswalk. These people were banging on drums and chanting. Mr. Bond took videos of the incident and a video recording captured the events at the gate area. Again, Mr. Gallagher is readily identifiable in all of the videos.

[57] Mr. Bond called the RCMP for assistance.

[58] The videos of the events that day clearly show a large truck with flashing lights coming north on Underhill Avenue that pulls over on the east side of the road facing north toward the entrance of the Burnaby Terminal. While this first truck was still stopped on the side of the road, another tanker truck heading east on Shellmont Street came along and stopped parallel to the first truck. Then, the second truck pulled away after a few minutes and moved south on Underhill Avenue. After having stopped for about ten minutes, the first truck also leaves and continues west on Shellmont Street after Mr. Gallagher approached the driver's side and either spoke or gestured to the driver.

[59] Early on, Mr. Bond asked Mr. Gallagher how long "we" are going to be there that day. Mr. Gallagher did not respond. At one point, Mr. Bond spoke to Mr. Gallagher while pointing at the large sign at the entrance giving notice of the Injunction. Mr. Bond said something to Mr. Gallagher to the effect "Stacy, you realize there is an injunction".

[60] Mr. Bond called the Burnaby RCMP and asked for assistance.

[61] While Mr. Bond was on hold on that call, another female came west along the trail. That female arrived at the crosswalk and joined the other two females and Mr. Gallagher. Mr. Gallagher handed her his drum. Mr. Bond observed that these people, including Mr. Gallagher were singing, dancing and drumming and performing what Mr. Bond thought was a smudging ceremony. These protestors faced both the Trans Mountain entrance and the passing vehicles.

[62] At various points, Mr. Gallagher walks around the group and almost into the Intersection. Mr. Bond observed Mr. Gallagher using his cell phone at least twice and that he held up his cell phone in the direction of the chanting females.

[63] Around 10:18 a.m., the RCMP pulled up in their vehicle. Mr. Bond then observed Mr. Gallagher say something to the females. Mr. Gallagher then picked up his knapsack and the entire group moved off the crosswalk area and started walking

eastbound along the trail. By the time the officers came up to the crosswalk area, Mr. Gallagher and the females had all left.

[64] As he left, Mr. Gallagher said to Mr. Bond "good night, I'll see you tomorrow".

[65] Mr. Bond's evidence is that this activity at the Burnaby Terminal entrance effectively blocked the entry and exit of various vehicles from that location. As with the other incidents, Mr. Bond stated that once the blockade ended, traffic began again moving in and out of the Burnaby Terminal, a fact evident from the video.

[66] This activity - or lack of activity - at the Burnaby Terminal entrance on December 18, 2019 lasted around 53 minutes, all as captured on the video taken that day.

Defence Evidence

[67] Mr. Gallagher concedes that he was present on all three days in question. In general, he indicates that, as a guest of unceded territory (including the location of the Burnaby Terminal entrance), he was there to follow "natural laws".

[68] Regarding his attendances on November 15 and December 2, 2019, Mr. Gallagher says that he was there because he was asked to be; he refers to having the permission of the "grandmothers" to be there as a "good relative". His intention was to support his relatives in ceremony.

[69] The same applies to his attendance on December 18, 2019. Mr. Gallagher says he was there with the women to sing, dance and pray for the protection of the land.

[70] The defence also called John Clarke. Mr. Clarke lives near the northwest corner of the Burnaby Terminal property. He confirms that the "main entrance" to the Burnaby Terminal is at the Intersection. Consistent with Mr. Marquardt, he says that the office entrance further west on Shellmont Street could be used by trucks in an emergency. He also confirms a third entrance near his residence that is now in disuse and only used by Trans Mountain for emergencies.

DISCUSSION AND FINDINGS

[71] I will address the issues below, and in doing so, address the Crown and defence submissions.

Criminal Contempt

[72] The law of criminal contempt was set out by the Supreme Court of Canada in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901. Justice McLachlin, later the Chief Justice of Canada, wrote for the majority at 931-933 as follows:

> It is my view that a clear distinction exists between civil and criminal contempt and that the law of criminal contempt is sufficiently certain to meet the requirements of fundamental justice. The distinction between civil and criminal contempt rests in the concept of public defiance that accompanies criminal contempt.
>
> 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 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 exercised the power to punish for contempt of court.
>
> These same courts found it necessary to distinguish between civil and criminal contempt. A person who simply breaches a court order, for example by failing to abide by visiting hours stipulated in a child custody order, is viewed as having committed civil contempt. However, when the element of public defiance of the court's process in a way calculated to lessen societal respect for the courts is added to the breach, it becomes criminal. This distinction emerges from *Poje v. Attorney General for British Columbia*, [1953] 1 S.C.R. 516 at p. 527, per Kellock J.:
>
> > The context in which these incidents occurred, the large numbers of men involved and the *public* nature of the defiance of the order of the court transfer the conduct here in question from the realm of a mere civil contempt, such as an ordinary breach of injunction with respect to private rights in a patent or a trade-mark, for example, into the realm of a public depreciation of the authority of the court tending to bring the administration of justice into scorn. [Emphasis added.]
>
> What the courts have fastened on in this and other cases where criminal contempt has been found is the concept of public defiance that "transcends the limits of any dispute between particular litigants and constitutes an affront to the administration of justice as a whole" ... 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 ... the open, continuous and

> flagrant violation of a court order without regard for the effect that may have on the respect accorded to edicts of the court.
>
> [Emphasis in original.]

[73] At 933, the Court in *United Nurses* set out the elements of criminal contempt:

> 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.

[74] The British Columbia Court of Appeal recently confirmed in this proceeding that *United Nurses* continues to be the leading authority on the law of contempt: see *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 267 ("*Trans Mountain #15*") at para. 22.

Notice of the Injunction

[75] In *Carey v. Laiken*, 2015 SCC 17 at para. 33, the Court stated that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done". Actual knowledge is also a requirement per *Carey*:

> [34] The second element is that the party alleged to have breached the order must have had actual knowledge of it: *Bhatnager*, at p. 226; *College of Optometrists*, at para. 71. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine (*ibid.*).

[76] The concept of inferring actual knowledge based on willful blindness arose in respect of the Clayoquot Sound protests in BC in the early 1990s.

[77] In *MacMillan Bloedel Ltd. v. Simpson*, [1993] B.C.J. No. 2869 (S.C.) ("*MacMillan #1*"), many of the protestors said that they didn't read the injunction that was provided to them and suggested that they did not grasp what was being said to them when the injunction was read over a loudspeaker. At paras. 20-22, Justice Bouck dismissed such arguments, stating that they could not, though "studious or reckless indifference", escape responsibility by "feigning ignorance".

[78] In *MacMillan Bloedel Ltd. v. Simpson*, [1994] B.C.J. No. 542 (S.C.) ("*MacMillan #2*"), Justice Collver stated the test for actual notice as "did [the] defendant know, or was he or she wilfully ignorant, about the terms of the injunction". In that case, a person read the words of the injunction into a microphone which was broadcast over an amplifier where the protestors were present. A process server also handed a copy of the order to any remaining protestors. At para. 16, the Court found that actual notice had been proven:

> Given the circumstances in which the injunction was read before the arrest of each defendant as well as the manner in which each defendant came to be at the blockade site and, with others, took his or her place on the road to prevent vehicles from passing, I am satisfied beyond a reasonable doubt that, notwithstanding either distractions or hearing difficulties attributable to the numbers or activities of protesters at the blockade site, all defendants knew or were wilfully ignorant about the terms of the injunction.

[79] Paragraph 10(c) of the Injunction provides that notice of the Injunction may be given by the reading of the order, including over an amplification system. Paragraph 11(a) provides that a person is deemed to have knowledge and notice of it if a copy of the Injunction is read to them, including over an amplification system.

[80] The Crown alleges that Mr. Gallagher was aware of the Injunction because of his attendance on August 21, 2018, when a recording of the entire wording of the Injunction was played over a loudspeaker. The Crown also alleges that various aspects of Mr. Gallagher's attendances at the entrance to the Burnaby Terminal confirm that he had or then received notice of the Injunction, generally or specifically.

[81] I am satisfied beyond a reasonable doubt that Mr. Gallagher had actual notice of the Injunction based on the Crown's evidence, that I accept as follows:

a) Based on my review of the August 21, 2018 video, Mr. Gallagher was clearly there with other protestors who were forming a blockade across the road in the presence of police officers;

b) It was one of those police officers who was holding the loudspeaker over which the Injunction was read. The recording could be plainly heard by anyone within a reasonable distance, including Mr. Gallagher who was near the loudspeaker. There is no suggestion that Mr. Gallagher had any issues with his hearing that day;

c) In my view, it would have been impossible for Mr. Gallagher not to have heard the recording and understood that the RCMP was there to address the protestors as being in breach of the Injunction, as was being read out by the RCMP officer. I find as a fact that he did hear the recording of the Injunction terms over the loudspeaker and chose not to obey;

d) The first part of the recorded Injunction that was played for the gathered protestors was done without any other significant noise and before the woman started speaking into the megaphone; those words included the key elements of alerting those persons that there was an order prohibiting anyone from obstructing or impeding or preventing access to Trans Mountain's work sites;

e) Defence counsel's suggestion that Mr. Gallagher was paying attention to the woman and not the RCMP recording is unsupported by any evidence;

f) Mr. Gallagher is not in position to argue that the woman's words over the megaphone distracted him, which would again be willful blindness

or indifference as to the circumstances: see *MacMilian #1* at para. 22 and *MacMillan #2* at para. 16;

g) In any event, the video recording supports that a person on the scene could hear both her voice and the police recording clearly, as confirmed by Cst. Pinto's evidence;

h) On all three 2019 dates, when Mr. Gallagher was present at the entrance to the Burnaby Terminal, he was standing very near the large white sign posted there by Trans Mountain to alert people to the Injunction. The large words copied key portions of the Injunction and advised persons that anyone obstructing access may be subject to immediate arrest;

i) On November 15, 2019, Mr. Gallagher remarked to Mr. Marquardt to the effect that Mr. Marquardt "might as well make your calls", clearly implying that he knew he was not supposed to be present there and that there would be consequences; and

j) On December 18, 2019, Mr. Bond gestured to the sign in an attempt to draw Mr. Gallagher's attention to the fact that his presence on the driveway was in violation of the Injunction. Despite these efforts, Mr. Gallagher did not change his behavior, strongly suggesting that he either already knew of the Injunction and did not care or that he then refused to make any efforts to confirm the terms of the Injunction, as relevant to his actions that day. Again, at the least, this was willful ignorance or indifference: see *MacMillan #1* at para. 21.

[82] Leaving aside the Crown's evidence, Mr. Gallagher 's direct testimony confirms that he was well aware of the Injunction and its terms prior to his attendance at the Burnaby Terminal on November 15, 2019 or was, in the alternative, willfully blind or indifferent to it:

a) He refers to having the permission of others to be present at the Burnaby Terminal, noting that this was in conflict with a "different system". This statement implies that he knew that he was not supposed to be present there, particularly in light of his then statement that "no one tells me where to go";

b) He concedes in his direct testimony that he was aware of a "spiritually violent restriction" that "someone was trying to impose on him" to restrict his access to unceded land, namely the entrance to the Burnaby Terminal. In making this concession, he again notes that he wasn't at the entrance to the Burnaby Terminal to challenge anything; rather he was just there to do "what he does" in following natural laws. I find that all of these statements are referring to the Injunction;

c) He plainly concedes that he knew there was an order and that injunctions are "racist". He states that he knew he was at risk if he went "against" the Injunction; and

d) He says that he would not claim ignorance of the order. He claims that no one has ever read the order to him. However, he refers to it as possibly having been "blasted at me", which I find is a clear reference to the broadcasting of the Injunction that he heard on August 21, 2018.

[83] Mr. Gallagher says that he considered that, before he was at risk, someone would ask him to leave and that he would have an opportunity to leave. He says that this is consistent with his understanding of the "five step" process set out in paragraph 12 of the Injunction that the police are to follow before making any arrest.

[84] In *Telus Communications Re: Alleged Contempt of Robert Waite*, 2006 BCSC 16 at para. 25, Justice Burnyeat cited *British Columbia Telephone Co. v. Telecommunications Workers Union* (1981), 121 D.L.R. (3d) 326 where union members in violation of an order refused a copy that was offered to them. In the latter decision, Justice McKenzie stated at para. 45:

> I am satisfied wholly that each participant in these incidents was fully aware of the injunction order and its contents. This is not to suggest that each participant had memorized the rather formal language but rather that each knew that such mass demonstrations involving hazing, verbal abuse and generally obnoxious behaviour were forbidden.

[85] All of Mr. Gallagher's evidence, as above, overwhelmingly supports that, at the very least, he had a general understanding of the terms of the Injunction, well beyond that the Injunction existed. He could not have learned of the "five step" process outlined in the Injunction without also being alerted to the existence of the Injunction and its overall objectives in prohibiting certain behavior at Trans Mountain's work sites. If, after learning of the Injunction, he did not take any reasonable steps to confirm any of the other specific terms, that is willful blindness or indifference: see *MacMillan #1* at para. 21.

[86] In conclusion, I find beyond a reasonable doubt that Mr. Gallagher had actual notice of the Injunction and its specific terms on August 21, 2018. Also, he was deemed to have knowledge and notice of the Injunction on that date. Mr. Gallagher did not by any stretch of the imagination "forget" about the Injunction some 15 months later in November/December 2019. I reject defence counsel's submission that there is some "ambiguity" about what portions of the Injunction applied after October 2018. Mr. Gallagher did not express any doubts in that respect; if he had, he need only have read the Injunction, arising from clear notice of it when he arrived at the site on November 15, 2019.

[87] In addition, he received a clear reminder on those later dates that the Injunction remained in place from Mr. Bond and from the large white sign visible at the Burnaby Terminal entrance where he stood nearby. At the very least, Mr. Gallagher was willfully blind and indifferent to the Injunction and its terms.

Actus Reus

[88] The Crown must establish, beyond a reasonable doubt, that Mr. Gallagher disobeyed the Injunction in a public way (*United Nurses* at 933). The Injunction prohibits persons from:

> . . . physically obstructing, impeding or otherwise preventing access by Trans Mountain, its contractors, employees or agents, to, or work in, . . . [t]he Burnaby Terminal . . .

[89] The Crown alleges that Mr. Gallagher:

a) On November 15, 2019, physically obstructed or impeded access to the Burnaby Terminal by participating in a blockade of the northbound lane of Underhill Avenue;

b) On November 15, 2019, physically obstructed, impeded and prevented access to the Burnaby Terminal by his presence on the driveway, including the crosswalk;

c) On December 2, 2019, physically obstructed, impeded and prevented access to the Burnaby Terminal by his presence on the driveway, including the crosswalk; and

d) On December 18, 2019, physically obstructed, impeded and prevented access to the Burnaby Terminal by his presence on the driveway, including the crosswalk.

[90] Defence counsel argues that Mr. Gallagher was careful where he stepped on the driveway, being on the crosswalk and in front of the crosswalk. She asserts that the crosswalk is a public trail and that the area south of and in front of the crosswalk is also a public area.

[91] The evidence is contrary to this assertion. Mr. Marquardt's evidence is that the driveway, which includes the crosswalk that allows people to cross while using the trail, is on Trans Mountain's property since it is north of the property signs just to the north of Shellmont Street. Mr. Marquardt was unshaken on cross-examination in that respect and there is no contrary evidence.

[92] Defence counsel refers to the members of the public who are shown in the videos as traversing the crosswalk across the driveway to continue along the trail.

That is true, but what is also true is that none of these people chose, like Mr. Gallagher, to stand in the middle of the driveway and not move in order to block traffic going in and out of the gate.

[93] I find as a fact that the crosswalk area, including the entire driveway which includes the crosswalk where Mr. Gallagher is seen on all three days, is on Trans Mountain's property. In any event, Mr. Gallagher, as part of his activities, was standing on many areas of the driveway and not at times on the crosswalk, particularly when he was standing just in front of the truck trying to leave through the gate on November 15, 2019. The defence does not dispute that Mr. Gallagher was present on the driveway and off the crosswalk, all of which is Trans Mountain's property.

[94] Defence counsel also argues that, since there were two other entrances to the Burnaby Terminal, there could be no physical obstruction by Mr. Gallagher as a result of his presence on the driveway and crosswalk area.

[95] The evidence clearly supports that this was the main entrance to Burnaby Terminal and the *only* one used by heavy vehicles, such as large trucks and other construction vehicles. Mr. Marquardt confirmed that Trans Mountain could have possibly used the office entrance for large trucks and vehicles, but only with considerable difficulty in planning and execution. I do not see this scenario as feasible given the sudden nature of Mr. Gallagher's attendance at the Burnaby Terminal. There was no evidence that Trans Mountain could have used the third emergency entrance for its regular large sized and heavy vehicle traffic, beyond Mr. Clarke's very vague and speculative evidence that I do not accept.

[96] As I read the Injunction, there need only be physical obstruction, impeding or preventing of access of the work sites. The main gate allowed Trans Mountain to do just that and I have no doubt that access there was chosen for various reasons, including safety. I do not read paragraph 1 of the Injunction as allowing persons to block access such that they choose how, where and when Trans Mountain accesses its own sites. The clear import of the Injunction is to prevent Trans Mountain from

undertaking its normal operations; allowing access through the main gate is part of those operations.

[97] Mr. Marquardt's evidence was that, as soon as a blockade happened, he made efforts to call off trucks to other locations or to delay their arrival. Such reasonable efforts do not undermine the fact that Mr. Gallagher's presence on the driveway had the immediate effect of physically obstructing, impeding and preventing access to and from the Burnaby Terminal. It is not necessary in the circumstances to prove that vehicles were, in fact, diverted or delayed at other locations.

[98] It is not necessary in the circumstances to require that Trans Mountain have all these vehicles stacked up the neighbourhood, no doubt with ensuing road chaos, safety issues and cost considerations, before any breach can be alleged. This Court came to the same conclusion in *Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 1070 at paras. 37-38, citing *Newfoundland (Attorney General) v. N.A.P.E.*, [1988] 2 S.C.R. 204 at 212.

[99] Leaving aside what happened to diverted or delayed vehicles, the videos clearly show that a large truck was prevented from leaving the Burnaby Terminal on November 15, 2019 when Mr. Gallagher was present on the driveway. Similarly, I find as a fact that the two trucks that stopped in front of the Burnaby Terminal on December 2, 2019 and the large truck that stopped on the roadway in front on December 18, 2019 were trying to enter the Burnaby Terminal on those dates. All of these vehicles were impeded or blocked given Mr. Gallagher's presence on the driveway.

[100] The Crown also alleges that, while not blocking access, on November 15, 2019, Mr. Gallagher impeded traffic to the Burnaby Terminal when he stepped into the middle of Underhill Avenue and stopped large construction trucks who were travelling northbound at a spot that is just south of the Burnaby Terminal entrance. The photographs clearly show that Mr. Gallagher's presence on the roadway had that effect.

[101] Mr. Bond's evidence was that most, if not all, construction vehicles heading up Underhill Avenue were destined for the Burnaby Terminal, but he is not sure about the destination of the vehicles stopped by Mr. Gallagher's actions.

[102] I am satisfied beyond a reasonable doubt that Mr. Gallagher was acting in violation of paragraph 1(a)(ii) of the Injunction on November 15 and December 2 and 18, 2019 when he physically occupied the Trans Mountain driveway at the main gate of the Burnaby Terminal. However, given the uncertainty about the destination of the stopped vehicles on Underhill Avenue just south of the Burnaby Terminal entrance on November 15, 2019, I am unable to conclude beyond a reasonable doubt that Mr. Gallagher's actions earlier that day were in breach of the Injunction.

[103] I am also satisfied beyond a reasonable doubt that Mr. Gallagher's breaches of the Injunction were done "in a public way".

[104] On all three occasions, Mr. Gallagher would have been well aware of other members of the public who witnessed his open violation of the Injunction. The public who did so included the people who viewed the activity from across the Intersection, other protestors who stood to the side of the driveway, people who drove by the Intersection and Trans Mountain's employees and contractors: see *MacMillan Bloedel Ltd. v. Simpson*, [1994] B.C.J. No. 670 (C.A.) ("*MacMillan #3*") at para. 31-32. I find that Mr. Gallagher was keenly aware of this public presence, being more often than not facing the Intersection. He often waved at the continual stream of traffic moving along the roadway, some of which slowed or stopped at the Intersection, either as the initiator or in response to an acknowledgement from the drivers and/or occupants of those vehicles.

[105] As with the defendants in *MacMillan #3* at para. 31, Mr. Gallagher claims that he never contacted the media to attend on any of the three 2019 dates in question. That may be so, but he does not appear to have had any difficulty continuing with his flagrant violation of the Injunction while being recorded and observed in a very public fashion. It is apparent enough that a "media" person of some stripe was shadowing him on November 15, 2019.

[106] Finally, on November 15, 2019, Mr. Gallagher is clearly seen holding the "Extinction Rebellion" sign while facing the Intersection. The only reasonable explanation for this action, together with his other public actions, was to engage the public with his cause.

[107] I conclude that the Crown has proven the *actus reus* of criminal contempt in these circumstances beyond a reasonable doubt in respect of his actions, as alleged in paragraph 88(b)-(d) above.

Mens Rea

[108] The Crown must establish, beyond a reasonable doubt, that Mr. Gallagher 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.

[109] In *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 1247 ("*Trans Mountain #13*") at paras. 89-90, Affleck J. adopted the statement in *Carey* as to what is the required "intent" to establish civil contempt:

> [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 . . .

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".

[110] Mr. Gallagher states that it was never his intention to stop work at the Burnaby Terminal. His intention was to be there for ceremony and prayer. He says that he was aware that there were other ways for trucks to access the Burnaby Terminal.

[111] I have no hesitation finding that the only reasonable inference is that Mr. Gallagher, with full knowledge of the Injunction, fully intended to present himself

at the entrance to the Burnaby Terminal on these three occasions and that he intended to occupy the crosswalk area in a public way.

[112] I appreciate Mr. Gallagher had his own personal intentions and reasons for disobeying the Injunction, arguably said to be his adherence to "natural laws" and concerns for the environment and citizens of Canada. Similar arguments by defendants, to the effect that their intention was to protect the environment and not disobey the order, have been rejected: see *Trans Mountain #13* at paras. 89-94; *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 2122 at paras. 63-64; and *MacMillan #3* at para. 25.

[113] Mr. Gallagher's assertions that he was in prayer or ceremony after having arrived at the crosswalk area are, with respect, irrelevant. There is no evidence that Mr. Gallagher, even while conducting prayer or ceremony, lost his senses as to where he was and what he was doing. In any event, it is not clear to me how Mr. Gallagher's praying and ceremony goes hand in hand with holding protest signs and smoking cigarettes.

[114] The Crown's case would certainly also support a finding that Mr. Gallagher was at least reckless in terms of the effect that his actions would have on the respect accorded to the court and its orders.

[115] In *Trans Mountain #15*, a similar protest and blockade of the Burnaby Terminal was considered. At para. 41, the court confirmed that, following *United Nurses*, recklessness as to the effect of publicly disobeying the Injunction is sufficient to satisfy the *mens rea* element of the offence:

> [41] As mentioned above, the gravamen of criminal contempt is the continuous and flagrant violation of a court order without regard for the effect that conduct may have on the respect accorded the courts. That is precisely what the appellants admitting doing. There is, therefore, no basis on which to interfere with their convictions.

[116] I find beyond a reasonable doubt that Mr. Gallagher had the intention and the knowledge that his public defiance would tend to diminish the authority of the court and its orders, including the Injunction; in the alternative, I find that he was reckless

in that respect. Both findings support that the Crown has satisfied the *mens rea* element of the offence.

Indigenous Issues

[117] Defence counsel has made substantial submissions concerning "Indigenous law" and that Mr. Gallagher is bound by those laws which are different that those laws applied by the Court.

[118] That said, no evidence was adduced of any Aboriginal or Indigenous laws that may be applicable to Mr. Gallagher's conduct here. More importantly, no evidence of any other relevant laws relating to this criminal contempt prosecution under the Injunction are evident. I reject the suggestion from defence counsel that Mr. Gallagher, in following what he considered as "natural laws", was free to ignore the Injunction. In a previous matter in this proceeding, Affleck J. rejected similar arguments: *Trans Mountain Pipeline ULC v. Mivasair* (Unreported; October 25, 2019) at paras. 47-49.

[119] In addition, Mr. Gallagher has failed to identify any statutory authority that would excuse his behavior in the face of the Injunction. Paragraph 13 of the Injunction provides that it does not apply to persons "acting in the course of or in the exercise of a statutory duty, power or authority". Similar arguments failed in *Trans Mountain #13* at paras. 91-94 and *Trans Mountain Pipeline ULC v. Mivasair* (Unreported; October 25, 2019) at para. 40. Defence counsel's suggestion that the "grandmother's permission" provided that statutory duty is entirely without merit.

[120] There was considerable controversy during this trial concerning the defence assertion that the Burnaby Terminal was on unceded Aboriginal territory. The Crown did not concede that assertion as a fact. I ruled against Mr. Gallagher's request that the Court take judicial notice of that matter on the basis of the well settled law, including that found in *R. v. Spence*, 2005 SCC 71.

[121] Having failed in that respect, Mr. Gallagher then indicated that he wished to adjourn the trial in order to call evidence on the issue. The Crown objected and as a result, I heard arguments as to whether such evidence was admissible at this trial.

[122] I ruled that such evidence could only have been relevant in support of Mr. Gallagher's argument that, since he was on unceded territory, he was immune from the effect of the Injunction. Such an argument flies in the face of well-established BC authority that this Court has jurisdiction over Aboriginal persons and any such argument is a collateral attack on the validity of the order: see, for example, *British Columbia (Attorney General) v. Mount Currie Indian Band*, [1991] B.C.J. No. 616 (S.C.) at paras. 52-54 and *R. v. Ignace*, [1998] B.C.J. No. 243 (C.A.) at paras. 11-12.

[123] The same argument was made and rejected by this Court in this very proceeding. In *Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 1909 at paras. 21-24. Justice Affleck stated:

> [24] Another argument that might have been made by S.B. is that the injunction is invalid so far as it purports to apply to S.B. because he enjoys aboriginal status, and the document spoken of by Mr. Manuel may provide some form of immunity from the injunction. There are many difficulties with this potential argument. One I have already mentioned is that the courts of this province have jurisdiction over aboriginal accused persons where it is alleged an offence has been committed. Another difficulty is that the injunction must be accepted as valid and enforceable by its terms unless it is set aside or varied.

[124] I acknowledge Mr. Gallagher's statements that he considered that he was standing on unceded Indigenous territory. However, even if true, the Injunction still applied to him and he was subject to the authority of this Court and governed by the restrictions in that order. He cannot argue that this Court had no jurisdiction to grant the Injunction to govern his actions at the Burnaby Terminal, as it would be an impermissible collateral attack on the validity of the Injunction.

Fairness

[125] Mr. Gallagher also complains about the fact that he is the only one before the Court when there were numerous other persons at the Burnaby Terminal doing the same thing that he was.

[126] Evidence on that issue is found in the testimony of Cst. Daniel Comte, a Burnaby RCMP officer. During the November/December 2019 period, Cst. Comte was the lead investigator with respect to protest activity at the Burnaby Terminal.

[127] Cst. Comte said that, after his review and assessment of Trans Mountain's evidence as to the activities on those three days, he formed the view that Mr. Gallagher was arrestable. Principally, Cst. Comte's assessment was based on his ability to identify Mr. Gallagher in the videos and the record of the activities in the video recordings. Cst. Comte then sent the disclosure to the Crown. Cst. Comte also had evidence as to Mr. Gallagher's knowledge of the Injunction, a key point that had to be proven at any trial.

[128] Again, Affleck J. addressed this "selective enforcement" issue in one of his previous decisions in this matter: *Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 1239. At paras. 4-6, this Court, following *R. v. Armstrong*, 2012 BCCA 242, held that no defence arose because of alleged inconsistent enforcement of the order. The same applies here if, in fact, any inconsistent enforcement issues arises.

Arrest Issue

[129] Mr. Gallagher also argues that, in order to be "at risk" under the Injunction, the police had to perform for him the "five step" process under paragraph 12 of the Injunction. He asserts that he was "denied" that process in terms of being asked to stop his illegal activities and being advised of his potential jeopardy. In the alternative, Mr. Gallagher says that, at the least, someone in authority had to ask him to leave the site.

[130] This argument makes little sense in the context of the November 15 and December 18, 2019 incidents. By the time the RCMP arrived, after having been

called by Trans Mountain personnel, Mr. Gallagher had left and he was no longer there to be arrested after the "five step" process.

[131] I reject the defence suggestion that the protestors were entitled to disobey the Injunction so long as they did so before any arrest. To allow this argument to succeed would invite the type of guerilla tactics that Mr. Gallagher and his cohorts chose to use on these occasions. It makes little sense to have an Injunction in place if the breach can occur and, just before the authorities arrive, the offenders scurry away and flee into the adjoining neighbourhood without consequences.

[132] Even so, the Injunction does not require any arrest before a breach occurs. Paragraph 6 of the Injunction plainly authorizes a police officer to arrest subject to that officer exercising his or her operational discretion. In addition, as the Crown notes, paragraph 12 of the Injunction (i.e. the "five step" process before arrest) does not detract from the overall import of the Injunction, given its opening words as not "limiting the foregoing", which would include paragraph 1.

[133] Mr. Gallagher's complaint that someone had to ask him to leave is also without merit. The Injunction and breaches under the Injunction are not subject to this requirement. As an adult person, he knew he was not supposed to be present in the crosswalk area. The Trans Mountain personnel did not consider that they had the authority to deal with Mr. Gallagher; that is why they called the RCMP to deal with him by enforcing the requirements under the Injunction, if necessary.

[134] Further, Mr. Gallagher's assertion that no Trans Mountain personnel asked him to leave borders on the nonsensical.

[135] It is an incredible proposition that Mr. Gallagher did not understand on November 15, 2019 that, when he was facing down the truck that wanted to leave the Burnaby Terminal, *he* was being asked to get out of the way. Mr. Marquardt specifically asked him to let the truck leave. The same can be said for December 18, 2019 when Mr. Bond specifically engaged with Mr. Gallagher, including pointing to the Injunction and asking him how long he was going to be there. It belies common

sense to suggest that Mr. Gallagher did not know that Trans Mountain personnel wanted him to get out of the way so that ordinary operations in and out of the Burnaby Terminal could resume.

[136] If Mr. Gallagher is suggesting that he did not understand that Trans Mountain personnel were asking him to leave, I reject that evidence as entirely lacking in credibility and without support within the context of the body of evidence at this trial.

CONCLUSION

[137] The Crown has met its burden in proving its case beyond a reasonable doubt. I find that Mr. Gallagher is guilty of criminal contempt of court on November 15 and December 2 and 18, 2019.

"Fitzpatrick J."

BRITISH COLUMBIA

FACTSHEET

September 1, 2020 Ministry of Public Safety and Solicitor General

Facts about BC Corrections' response to COVID-19

- From the outset of the pandemic being declared, BC Corrections has followed the recommendations and guidelines of the Provincial Health Officer (PHO), health authorities and the Provincial Health Services Authority - Correctional Health Services team (PHSA-CHS), which is responsible for the healthcare of individuals in provincial custody.
- To date, one individual in provincial custody has tested positive for COVID-19. This case did not result in subsequent, positive cases and the individual has fully recovered.
- Protocols remain in place, and continue to evolve as new information becomes available, to help keep COVID-19 out of provincial correctional centres and, in the event of an infection, contain its spread among individuals in custody and those that support them.
- This starts at intake for everyone coming into BC Corrections' custody, with a questionnaire, a temperature check, medical isolation for anyone with symptoms, and placement of all new asymptopmatic admissions – including those returning from in-person court appearances etc. – in induction units for a 14-day period (as authorized under the *Emergency Program Act* by Ministerial Order M193).
- Individuals in induction units are provided as much time out of their cells as possible, with as many amenities as can be reasonably accommodated under the circumstances. This includes social interaction with others in the same cohort (bubble) while physically distancing.
- Following the 14-day period in an induction unit, individuals who remain asymptomatic are integrated with the rest of the population within the centre on a living unit.
- Currently, the decrease in correctional centres' inmate counts is eliminating the need to double-bunk in some centres and leading to very few double-bunkings in others.
- Ongoing monitoring for symptoms continues for all individuals in custody. Anyone who develops COVID-19 symptoms on a living unit is quickly assessed by BC Corrections and PHSA-CHS staff and if required is medically isolated immediately. This applies to suspected or confirmed cases of COVID-19, as well as those found to be close contacts of suspected or confirmed cases through contract tracing. Medically isolated individuals are promptly tested for COVID-19 where determined appropriate by medical staff, with quick-turnaround test results.
- To protect against possible transmission between correctional centres, BC Corrections has decreased movement within and between centres.
- Staff and contractors who exhibit symptoms or have travelled outside Canada within the last 14 days are restricted from centres. BC Corrections is actively screening everyone at the entries to its centres, including all staff and essential contractors as they come on shift, to exclude anyone presenting symptoms.

- Other ongoing risk-reduction measures include a ban on in-person visits (unless there are urgent, exceptional circumstances), keeping contracted services like supply delivery at essential levels, and encouraging lawyers to meet with clients in custody by video or phone – or with glass separating the parties.
- In response to the visitor limitations, BC Corrections has made it easier for individuals in custody to keep in touch with family and friends by making local and long-distance phone calls free of charge. In addition, BC Corrections has also doubled the number of mail items for which postage will be paid.
- BC Corrections is facilitating court appearances by video or phone, unless directed otherwise by a judge, and is exploring ways to facilitate safe video visits with family and friends.
- BC Corrections is working with BC Housing to develop a referral process for those at risk of being homeless upon release from custody.

Physical distancing within centres:

- BC Corrections' correctional centres have space to support physical distancing. The reduction in inmate count has further facilitated physical distancing.
- All staff or contractors must wear an approved face mask when within the centre when physical distancing is not possible. Different grades of masks are available to mitigate the risk of transmission or protect the wearer in different scenarios. This extra mitigation measure came into effect as a result of an extensive risk assessment, consultation with and advice from PHSA-CHS, the BC Public Service Agency's Workplace Health, and WorksafeBC, to mitigate the possibility of an inmate contracting the virus from a staff member.
- No mask requirement applies to individuals in custody, all of whom either went through a 14-day period in an induction unit upon admission or have been in custody for longer. Living units, like households, contain people who have self-isolated as a group and no longer pose a transmission threat to one-another. There is an exception for those in medical isolation on droplet protocols or attending an outside medical escort to a receiving agency that requires them to wear personal protective equipment (PPE) such as a mask.
- BC Corrections has implemented physical distancing in unit activities and program delivery by dividing individuals into smaller groups to align with public health guidelines and recommendations.

Food preparation and meal service:

- Each correctional centre is ensuring physical distancing in food preparation, serving and eating. While measures undertaken vary with layout differences at each centre, spacing out food preparation stations is maximizing distancing in kitchens, complemented by strict cleaning and personal hygiene practices informed by the BC Centre for Disease Control and World Health Organization.
- During meals, centres are taking a number of actions, such as dividing individuals in custody into smaller groups and separating them using lines marked on floors for

mealtime line-ups. Signs and verbal reminders from staff supplement written materials provided to individuals in custody about distancing, frequent handwashing and not sharing food or utensils. Individuals in custody are also given the option to eat their meals in their cells.

- Reduction of the overall inmate count is helping to facilitate physical distancing during mealtimes.

Presumptive cases:

- Out of an abundance of caution, any individual with COVID-19 symptoms, however mild, is considered presumptive and assessed by PHSA-CHS to determine whether testing is required.
- Any questions about COVID-19 testing should be directed to PHSA-CHS as BC Corrections' healthcare provider. Notably, the PHSA-CHS does not discuss presumptive case numbers.

Reduction in Adult Custody count:

- In recent months, BC Corrections has collaborated with justice partners to reduce the number of individuals in custody, and has granted temporary absences (TAs) in cases where staff assessed that doing so was both appropriate and safe.
- BC Corrections' in-custody count declined from approximately 2,200 in mid-March to just over 1,400 in mid-June and has remained stable since that time.
- This reduction was mostly in the remand count (that is, people in custody pending outstanding court matters), to approximately 940 individuals from approximately 1,430 as of mid-June, and in the sentenced population, to 460 from approximately 665.
- Both reductions relate to the courts prioritizing trials and sentencing at the height of the pandemic, people completing existing sentences, and fewer admissions into custody.
- Across B.C.'s 10 provincial correctional centres, the sentenced population is approximately 30% of the total inmate population.
- Temporary absence permits provide in-custody, sentenced individuals with temporary absences for a specified purpose or treatment, where appropriate or necessary.
- BC Corrections does not have discretion to proactively release people remanded in custody pending outstanding court matters. This discretion rests with the courts.
- Between mid-March and mid-June, about 25 individuals, all with fewer than 60 days left of their custodial sentences, were assessed as appropriate for release on a TA.
- Because single-bunking and physical distancing remain achievable within provincial correctional centres, in mid-June, BC Corrections paused proactive assessments of individuals for TAs, other than individuals serving intermittent sentences.
- TAs continue for people serving intermittent sentences, as appropriate. This is because having people come and go (for example, to serve an intermittent sentence on weekends) could heighten COVID-19 transmission risk and would require placement in an induction unit each time they returned to the centre.
- If an increase in the in-custody count changes these circumstances, BC Corrections may resume proactively assessing other sentenced individuals for TAs, as needed.

- Any sentenced inmate has the right to request a TA based on their circumstances and health, and regardless of sentence length with risk to public safety a paramount consideration.
- The assessment for a TA considers criminal history, sentence length (typically, fewer than 60 days remaining), offence type and any other relevant information, with risk to public safety. As well, staff considered whether the person would have necessary supports in place – whether family, community, or on-reserve, recognizing 30% of B.C.'s in-custody population is Indigenous.

Cleaning protocols:

- Mandatory handwashing and cleaning protocols are in place for staff, essential contractors, and at intake for individuals coming into custody.
- As well, there is increased, frequent cleaning of inmate and staff areas and all high-touch surfaces that individuals regularly touch, like door knobs, light switches, railings, counters/table tops and telephones.
- Correctional centres have enough supplies to conduct proper cleaning.

Keeping staff and people in custody informed:

- BC Corrections is taking the advice of the PHO seriously and continues to communicate with staff and individuals in custody about the importance of pandemic-related protocols.
- Frequent communication, information sessions and handouts for staff and individuals in custody about COVID-19 prevention are being provided in partnership with PHSA-CHS partners.

Community Corrections:

- BC Corrections is engaged in ongoing pandemic planning meetings with its health and justice partners to address topics related to community supervision.
- Probation officers and bail supervisors continue to supervise approximately 20,000 individuals on community supervision orders.
- BC Corrections transitioned most community clients to telephone reporting based on case-specific factors like the level of risk they posed and their offence type.
- In addition, probation officers are using Skype and Teams for video supervision and to assist with case management and program delivery.
- Any and all in-person reporting takes place with glass separating clients and staff. (In June, coinciding with Phase 3 of B.C.'s Restart Plan, BC Corrections began increasing in-person visits for community clients).
- To support physical distancing and staff safety, BC Corrections suspended placing electronic supervision bracelets on the ankles of new clients for approximately three months at the height of the pandemic (March-June) and worked with the courts and other justice partners to meet client and public safety needs using other measures.

- For clients who were already fitted with ankle bracelets as a court-ordered condition of release, remote monitoring continued throughout the pandemic.
- With the protocols and safety precautions noted below established, BC Corrections resumed new intakes in the Electronic Supervision Program as of July 2, 2020:
    - Screening all clients for COVID-19 symptoms and re-booking appointments until they are symptom-free.
    - Extensive use of personal protective equipment (PPE) for probation officers, including masks, shields, eye protection and gloves, wipes and sanitizer, and adjustable and/or flexible physical barriers, as needed.
- The completion of a Technical Suitability Report (TSR) is critically necessary ahead of an individual's release or sentencing with electronic supervision, for two reasons:
    - to ensure a probation officer can investigate and confirm for the court that the client can be electronically supervised, and;
    - with the necessary PPE, assess the proposed residence and subsequently affix the electronic supervision equipment.

Contact: Media Relations
Ministry of Public Safety and Solicitor General
250 213-3602

BRITISH COLUMBIA

FACTSHEET

March 1, 2021 Ministry of Public Safety and Solicitor General

Facts about BC Corrections' response to COVID-19

- From the outset of the pandemic, BC Corrections has followed the recommendations and guidelines of the Provincial Health Officer (PHO), health authorities and the Provincial Health Services Authority - Correctional Health Services team (PHSA-CHS), which is responsible for the healthcare of individuals in provincial custody.
- Protocols remain in place and continue to evolve as new public health information becomes available, to help keep COVID-19 out of provincial correctional centres and, in the event of an infection, contain its spread among those in custody and those who support them.
- This starts at intake for everyone coming into BC Corrections' custody, with a questionnaire, a temperature check, medical isolation for those identified by the questionnaire or for anyone with symptoms, and placement of all new asymptomatic admissions – including those returning from in-person court appearances – in induction units for a 14-day period (as authorized under the *Emergency Program Act* by Ministerial Order M193).
- Following the 14-day period in an induction unit, individuals who remain asymptomatic are integrated with the rest of the population within the correctional centre.
- Individuals in induction units receive as much time out of their cells as possible, with as many amenities as can be reasonably accommodated under the circumstances. This includes social interaction with others in the same cohort (bubble) while physically distancing.
- Ongoing monitoring for symptoms continues for all individuals in custody. Anyone who develops COVID-19 symptoms on a living unit is assessed by BC Corrections and PHSA-CHS staff, and if required, is medically isolated immediately. This applies to suspected or confirmed cases of COVID-19, plus those found to be close contacts of suspected or confirmed cases through contact tracing. Medically isolated individuals are tested for COVID-19 where deemed appropriate by medical staff.
- To protect against possible transmission between correctional centres, BC Corrections has limited movement between centres.
- BC Corrections is actively screening everyone at the entrances to its centres, including all staff and essential contractors as they attend the centre. In addition to screening for those who have been directed to self-isolate and those who have been in direct contact with someone who has tested positive, staff and contractors who exhibit symptoms outlined in the most current public health information are also restricted from access into the correctional centres.
- Other ongoing risk-reduction measures include a ban on in-person visits (unless there are urgent, exceptional circumstances), keeping contracted services like supply delivery at essential levels, and encouraging lawyers to meet with their clients in custody by video or phone – or with glass separating the parties.

- In response to the visitor limitations, BC Corrections has made it easier for individuals in custody to keep in touch with family and friends by making local and long-distance phone-calls within North America free of charge. In addition, BC Corrections has also doubled the number of mail items for which postage will be paid.
- BC Corrections is facilitating court appearances by video or phone, unless directed otherwise by the courts, and exploring ways to facilitate safe video visits with family and friends.
- BC Corrections is working with BC Housing, the John Howard Society and other community partners to identify and support those at risk of being homeless upon release from custody.

Physical distancing within centres:

- BC Corrections' correctional centres have space to support physical distancing. The reduction in the number of incarcerated people has further facilitated physical distancing; however, in some instances, double-bunking is occasionally required.
- All staff and contractors must wear an approved face mask within the centre. Different grades of masks are available and are required to mitigate the risk of transmission or protect the wearer in different scenarios. This extra mitigation measure came into effect as a result of an extensive risk assessment, plus consultation with and advice from PHSA-CHS, the BC Public Service Agency and WorkSafeBC, to mitigate the possibility of an incarcerated individual contracting the virus from a staff member.
- Within the correctional centre, no mask requirement applies to individuals in custody, all of whom either went through a 14-day period in an induction unit upon admission or have been in custody for longer. Living units, like households, contain people who have self-isolated as a group and do not pose a transmission threat to one-another. There is an exception for those placed on droplet protocols. There may also be unique circumstances where an individual in custody is provided PPE. The provision of PPE for individuals in custody is determined by PHSA-CHS.
- Individuals in custody who attend an escorted appointment <u>outside</u> of the correctional centre are required to wear a mask, as directed by the current BC public health orders.
- BC Corrections has implemented physical distancing in living unit activities and program delivery by dividing individuals into smaller groups to align with public health guidelines and recommendations.

Food preparation and meal service:

- Each correctional centre is ensuring physical distancing in food preparation, serving and eating. While measures undertaken vary with layout differences at each centre, spacing out food preparation stations is maximizing distancing in kitchens, complemented by the requirement to wear masks along with strict cleaning and personal hygiene practices informed by the BC Centre for Disease Control and the World Health Organization.
- To support physical distancing during meals, several strategies are in place, including dividing incarcerated individuals into smaller groups and marking the floors to create separate physically distanced line-ups during meal distribution.

- Signage and verbal reminders from staff supplement written materials provided to individuals in custody about physical distancing, frequent handwashing and not sharing food or utensils. Individuals in custody are also given the option to eat their meals in their cells.

Presumptive cases:

- Out of an abundance of caution, any individual with COVID-19 symptoms, however mild, is considered presumptive and is isolated and assessed by PHSA-CHS to determine whether testing is required.
- Any questions about COVID-19 testing should be directed to PHSA-CHS as BC Corrections' healthcare provider. Notably, PHSA-CHS does not discuss presumptive case numbers.

Reduction in Adult Custody count:

- BC Corrections' in-custody count declined from approximately 2,200 in mid-March, 2020 to between 1,400-1,500 by mid-June 2020. The current daily count is approximately 1,550 and continues to gradually increase as courts resume their regular operations.
- The reduction in count has been associated primarily with the remand population (that is, people in custody pending outstanding court matters). Across BC's 10 provincial correctional centres, the remand population is approximately 65% of the total incarcerated population.
- Reductions in the sentenced population since the outset of the pandemic relate to the courts prioritizing trials and sentencing, individuals completing existing sentences, and fewer admissions into custody.
- Sentenced individuals may apply for a temporary absence (TAs) for a specified purpose or treatment, where appropriate or necessary.
- BC Corrections does not have discretion to release people remanded in custody pending outstanding court matters. This discretion rests with the courts.
- Between mid-March and mid-June, about 25 individuals, all with fewer than 60 days left of their custodial sentences, were assessed as appropriate for release on a TA.
- Since single-bunking and physical distancing have been achievable, and the correctional centres have had the ability to safely manage the risk of COVID-19 within the centres, in mid-June, BC Corrections paused proactive assessments of individuals for TAs, other than for individuals serving intermittent sentences, as appropriate.
- Individuals serving intermittent sentences are assessed for a TA to mitigate against having individuals come and go (e.g., required to serve a sentence on weekends only), which increases the COVID-19 transmission risk within the correctional centre. If the custody count increases substantially, BC Corrections may resume proactively assessing other sentenced individuals for TAs, as needed.
- Sentenced individuals continue to retain the right to request a TA based on their personal circumstances, regardless of their sentence length.
- The assessment for a TA considers criminal history, sentence length (typically, fewer than 60 days remaining), offence type and any other relevant information, including any

underlying health concerns and risk to public safety. As well, staff consider whether the person would have necessary supports in place through family or within the community.

Cleaning protocols:

- Mandatory handwashing and cleaning protocols are in place throughout all areas of correctional centres.
- There is frequent cleaning of living units and staff areas and all surfaces that individuals regularly touch, such as doorknobs, light switches, railings, counters, tabletops and telephones.
- When required, high-intensity professional disinfecting occurs throughout a correctional centre when a positive case is identified among staff or an individual in custody.

Keeping staff and individuals in custody informed:

- BC Corrections follows the PHO's and WorkSafeBC's advice and continues to communicate with staff and individuals in custody about the importance of pandemic-related protocols.
- In partnership with PHSA-CHS, BC Corrections is providing frequent communication, information sessions and handouts about COVID-19 prevention to staff and those in custody.

Community Corrections:

- BC Corrections is engaged in ongoing pandemic planning meetings with its health and justice partners to address topics related to community supervision.
- Probation officers and bail supervisors continue to supervise approximately 18,000 individuals on community supervision orders.
- At the outset of the pandemic, BC Corrections transitioned most community clients to telephone reporting based on case-specific factors, such as the level of risk they posed and their offence type.
- In response to BC's Restart Plan, community corrections clients who require more intensive supervision and interventions resumed in-person reporting as part of their ongoing case management.
- In-person reporting takes place with glass separating clients and staff and/or following physical distancing guidelines.
- In addition, probation officers are using various virtual technology for video supervision and to assist with case management and program delivery.
- After briefly suspending new intakes between March and June 2020, BC Corrections resumed the Electronic Supervision Program as of July 2, 2020, with the following protocols in place:
    - Screening all new program intakes for COVID-19 symptoms and re-booking in-person appointments until they are symptom-free.
    - Use of personal protective equipment (PPE), including masks, shields, eye protection and gloves, wipes and sanitizer, and adjustable and/or flexible

physical barriers, as needed, when attaching and removing ankle bracelets, and when conducting home visits for the completion of a Technical Suitability Report.

- Electronic supervision of clients fitted with an ankle bracelet before the program's brief suspension of new intakes was uninterrupted.

Contact: Media Relations
Ministry of Public Safety and Solicitor General
250 213-3602

CORRECTION ACT REGULATION

[Last amended June 8, 2020 by B.C. Reg. 124/2020]

Standards for confinement

2 (1) Subject to subsection (2), the person in charge must ensure that an inmate is given

(a) regular meals of the type ordinarily served to inmates,

(b) the opportunity for at least 2.5 hours per day out of the inmate's cell, including the opportunity for a daily exercise period of at least one hour that is in the open air if weather and security considerations allow,

(c) clothing, a mattress and bedding,

(d) access to reading materials,

(e) reasonable access to mail and to the telephone,

(f) postage for

(i) all privileged communication made by mail, and

(ii) up to 7 letters a week for other communication made by an inmate by mail,

(g) access to personal visits,

(h) access to health care,

(i) access to personal washing or shower facilities at least once a day, and

(j) access to toilet articles that are necessary for the inmate's health and cleanliness.

(2) Subsection (1) does not apply if

(a) the person in charge believes on reasonable grounds that one or more of the privileges referred to in subsection (1) cannot be given to the inmate because it may endanger the inmate or another person, or

(b) the inmate is confined separately from other inmates under section 17, 18 or 19 or confined in a cell in the segregation unit under section 24 or 27 (1) (d) and one or more of the privileges cannot reasonably be given to the inmate, having regard to the limitations of the area in which the inmate is confined and the necessity for the safe and effective operation of that area.

(3) The person in charge may pay an inmate for work done in a work program.

Court File No. S-183541
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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, RUEBEN GARBANZO (aka ROBERT ABRESS), GORDON CORNWALL, THOMAS CHAN, LAUREL DYKSTRA, RUDI LEIBIK (aka RUTH LEIBIK), JOHN DOE, JANE DOE, AND PERSONS UNKNOWN

DEFENDANTS

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENOR

THIRD AMENDED NOTICE OF MOTION #1
(FURTHER CROWN SENTENCING POSITIONS – CATEGORY 5)

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OVERVIEW

1. The Crown seeks direction respecting the establishment of a guilty plea court and its processes. In that context, the Crown is prepared to offer an initial sentencing position (ISP) to a certain category of defendants and to engage in a guilty plea court as of April 30 and periodically thereafter. The ISP does not prevent the Crown from considering unique facts in the exercise of its discretion. This amended notice also includes a full range of sentencing submissions as underlined below.

APPLICABLE LAW & GENERAL PROCEDURE

2. It is possible to plead guilty to civil or to criminal contempt. In response to the invitation of the Court, the Crown is engaged in criminal prosecutions but is not a party to any civil action. The Court, of its own motion, may receive and consider civil contempt guilty pleas and sentence accordingly.

3. The Crown is prepared to accept guilty pleas to criminal contempt based on agreed to facts. Facts making out the events of each arrest days will be available as of April 23 for consideration.

4. Based on the category of offenders set out in this Motion, the Crown may submit an ISP for the court to consider. This ISP was developed in accordance with our *Resolution Discussions & Stays of Proceedings* policy (RES1) and is in keeping with the established sentencing range.

5. If the individual falls in the eligible category, the ISP will be offered. It is not necessary for the defendant to agree with this ISP and the defendant may ask for a lower or different penalty or go to trial. The ISP is not conditional on a joint submission.

6. However, where the parties agree on a sentence, courts do not typically intervene unless the proposed sentence amounts to a "breakdown in the proper functioning of the justice system." When a court decides it must intervene, the parties receive notice and the plea may be withdrawn: *R. v. Anthony-Cook*, 2016 SCC 43 at para. 42, 59.

7. The ISP would be on offer at the first guilty plea date and would be maintained until planned supplemental disclosure is made to that particular defendant. Thereafter, RES1 specifies:

> at law, a plea of guilty is generally considered a mitigating factor on sentence, especially where the accused pleads guilty at the earliest opportunity ...
>
> after fix date or arraignment, as the trial or hearing date approaches, and the work, cost, and impact on witnesses and victims associated with preparing for trial mount, the mitigating effect of the guilty plea lessens and the Crown's position on the range of

sentence should approach more closely the legally appropriate after-trial range barring exceptional circumstances, or a significant change in circumstances or the strength of the Crown's case, the full benefit offered for an early guilty plea should generally not be offered for a guilty plea that comes on, or very shortly before, the trial or hearing date.

8. As the Crown stated on April 16:

> For those prepared to plead on the disclosure they have received through the civil process that brought them to court, the Crown will draft Admissions of Fact that can be reviewed and agreed to as part of early disposition of their case.

9. As of the filing of this motion, disclosure preparation continues. An initial review indicates that not all arrests and processing of arrested persons was captured on police video. The absence of video does not mean the Crown will not proceed to trial based on other evidence (including eye-witness, affidavit and accompanying documents) but the ISP will remain on offer until the expected police video is disclosed should defendants wish to postpone their pleas.

10. The Crown makes no representation as how a criminal contempt finding may be expressed or retained in police records or may effect travel or immigration status. However, in *MacMillan Bloedel Ltd. v. Brown* (1994), 88 C.C.C.(3d) 148 (B.C.C.A.) at para. 85, McEachern C.J.B.C. held that summary convictions for criminal contempt "did not impose permanent or any criminal records." (para. 86).

INITIAL SENTENCING POSITION AND LATER SENTENCING POSITIONS

11. The sentencing for criminal contempt relating to injunction breaches and mass demonstrations generally varies from imprisonment to fines or both: *Peter Kiewit Sons Co. v. Perry*, 2007 BCSC 305 at para. 23(1); *MacMillan Bloedel Ltd. v. Brown* (1994), 88 C.C.C.(3d) 148 (B.C.C.A.) at para. 66. However, other options are available: *International Forest Products v. Kern*, 2001 BCCA 48 at para. 19-20. Lesser penalties such as suspended sentences or 'binding over' (a form of extended undertaking) have been seen: *Morris v. Crown Office*, [1970] 1 All E.R. 1079 (C.A.) at p. 1083.

12. Though it was a civil case, the full range of contempt sentences were canvassed in *Peter Kiewit Sons Co. v. Perry*, depending on the person's antecedents and conduct. That case involved a prolonged protest against a highway over the Eagleridge Bluffs. There were "public, flagrant, repeated breaches" of the court's injunction (para. 3). Single-arrest defendants who "did not engage in open, flagrant and continuous violation of the court order" were fined $250 or 24 hours of community service, $500 if there was a record of prior contempt (para. 28). Wealthier individuals who admitted the contempt but carried it on for ten days were fined $5,000 (para. 24-25). One prominent defendant who did not admit her contempt and showed no remorse received 14 days (para. 27). There were special costs as well for some.

13. An inveterate contemnor with multiple convictions was sent to jail for ten months: R. v. Krawczyk, 2010 BCCA 542, leave to appeal denied [2011] S.C.C.A. No. 29.

14. *MacMillan Bloedel Ltd. v. Brown* dealt with anti-logging protests at Clayoquot Sound in the early 1990s. The initial sentences were suspended $500 fines and suspended terms of imprisonment (para. 16, 20) but sanctions eventually grew. Fines escalated in the face of continued disobedience to $1,000 (para. 40). The Court of Appeal ultimately imposed custodial sentences of 30 and 45 days (para. 61, 64-65) but lifted the fines because the trial court had failed to inquire into the ability to pay (para. 71-72).

15. The applicable range of sentence may also increase over the course of the protest or demonstration in the face of continued or prolonged disobedience (even for "first offenders"): *MacMillan Bloedel Ltd. v. Brown* (1994), 88 C.C.C.(3d) 148 (B.C.C.A.) at paras. 8, 13-21, 45, 52, 53, 65.

16. The following offers are restricted to the following categories of individuals who (all conditions cumulative):

a. have only been arrested once at this site since March 17; and
b. have no prior convictions for contempt of court or administration of justice offences in the last five years; and
c. acted peaceably leading up to, upon and after arrest; and
d. are not accused of related acts of violence or property damage; and
e. are not the subject of the appointment of Special Prosecutors (who are returning on April 30 to address the Court).

EARLY CATEGORY ONE [qualified defendants arrested before April 16 and pleading guilty no later than the week of May 28 or, exceptionally, on a later date but fixed the week of May 28]

17. After careful consideration, in all of the circumstances, the Crown is prepared to offer an ISP of a $500 fine, subject to the ability to pay. If the offender is unable to pay, there would be an order of 25 hours community service under the ISP. The community service would be under the direction of a probation officer. This ISP is in keeping with the sentencing range for similar conduct and recognizes the effect of a guilty plea.

LATE CATEGORY ONE [qualified defendants arrested before April 16 and pleading guilty no later than the first day of their trial]

18. After careful consideration, in all of the circumstances, the Crown is prepared to offer a submission of a $1500 fine, subject to the ability to pay. If the offender is unable to pay, there would be an order of 75 hours community service. The community service would be under the direction of a probation officer. This offer is in keeping with the sentencing range for similar conduct and recognizes the effect of a later guilty plea.

19. At the end of trial, if convictions result for Category One defendants, the Crown is considering a general sentencing submission (subject to individualization) of $3000 fine, subject to the ability to pay. If the offender is unable to pay, there would be an order of 150 hours community service.

EARLY CATEGORY TWO [qualified defendants arrested after April 16 but before May 8 and pleading guilty before June 25 or, exceptionally, on a later date but fixed before June 25]

20. After careful consideration, in all of the circumstances, the Crown is prepared to offer a submission of a $1500 fine, subject to the ability to pay. If the offender is unable to pay, there would be an order of 75 hours community service. The community service would be under the direction of a probation officer. This offer is in keeping with the sentencing range for similar conduct and recognizes the effect of a guilty plea.

LATE CATEGORY TWO [qualified defendants arrested after April 16 but before May 8 and pleading guilty no later than the first day of their trial]

21. After careful consideration, in all of the circumstances, the Crown is prepared to offer an submission of a $4500 fine, subject to the ability to pay. If the offender is unable to pay, there would be an order of 225 hours community service. The community service would be under the direction of a probation officer. This offer is in keeping with the sentencing range for similar conduct and recognizes the effect of a later guilty plea.

22. At the end of trial, if convictions result for Category Two defendants, the Crown is considering a general sentencing submission (subject to individualization) of seven days jail.

EARLY CATEGORY THREE [qualified defendants arrested after May 8 <u>but before May 28</u> and pleading guilty a month before their trial date or, exceptionally, on a later date but fixed no later than a month before their trial date]

23. After careful consideration, in all of the circumstances, the Crown is prepared to offer a submission of a $5000 fine, subject to the ability to pay. If the offender is unable to pay, there would be an order of 240 hours community service. The community service would be under the direction of a probation officer. This offer is in keeping with the sentencing range for similar conduct and recognizes the effect of a guilty plea.

LATE CATEGORY THREE [qualified defendants arrested after May 8 <u>but before May 28</u> and pleading guilty no later than the first day of their trial date]

24. After careful consideration, in all of the circumstances, the Crown is prepared to offer a submission of a seven days' jail. This offer is in keeping with the sentencing range for similar conduct and recognizes the effect of a later guilty plea.

25. At the end of trial, if convictions result for Category Three defendants, the Crown is considering a general sentencing submission (subject to individualization) of 14 days' jail.

EARLY CATEGORY FOUR [qualified defendants arrested after May 28, 2018 but before August 2, 2018 and pleading guilty within one month after their first appearance in court or, exceptionally, on a later date but fixed within that one month after their first appearance in court.]

26. After careful consideration, in all the circumstances, the Crown is prepared to offer an ISP of seven days' jail. This ISP is in keeping with the sentencing range for similar conduct and recognizes the mitigating effect of a guilty plea.

LATE CATEGORY FOUR [qualified defendants arrested after May 28, 2018 but before August 2, 2018 and pleading guilty no later than the first day of their trial date.]

27. After careful consideration, in all the circumstances, the Crown is prepared to offer an ISP of ten days' jail. This ISP is in keeping with the sentencing range for similar conduct and recognizes the mitigating effect of a later guilty plea.

28. At the end of a trial, if convictions result for Category Four defendants, the Crown is considering a general sentencing submission (subject to individualization) of fourteen days' jail.

EARLY CATEGORY FIVE [qualified defendants arrested after August 2, 2018 and pleading guilty within one month of their first appearance in court or, exceptionally, on a later date but fixed within that one month after their first appearance in court.]

29. After careful consideration, in all the circumstances, the Crown is prepared to offer an ISP of fourteen days' jail. This ISP is in keeping with the sentencing range for similar conduct and recognizes the mitigating effect of a guilty plea.

LATE CATEGORY FIVE [qualified defendants arrested after August 2, 2018 and pleading guilty no later than the first day of their trial date.]

30. After careful consideration, in all the circumstances, the Crown is prepared to offer an ISP of twenty days' jail. This ISP is in keeping with the sentencing range for similar conduct and recognizes the mitigating effect of a later guilty plea.

31. At the end of a trial, if convictions result for Category Five defendants, the Crown is considering a general sentencing submission (subject to individualization) of twenty-eight days' jail.

32. For all of these categories and timeframes, the Crown expects to exercise its discretion in respect of all guilty pleas (and sentencing) and is open to discussing individual cases with unique facts, including defendants who may have many but not all of the characteristics listed above.

33. **The Crown may take the position that a longer jail sentence than described for Category Five defendants is appropriate in respect of arrests occurring after the filing of this Notice of Motion AT ANY TIME AND WITHOUT FURTHER NOTICE.**

PROPOSED PROCEDURE SUBJECT TO DIRECTION

34. The Crown proposes that the guilty plea court be conducted as follows:

a. On the appointed day for guilty pleas, defendants may come forward on the basis of the disclosure they have received to date.

b. The Crown will be prepared to deal with guilty pleas to criminal contempt and to have them heard by the Court.

c. If the individual seeks to plead guilty only to civil contempt, the Court will conduct such inquiries it deems fit. The Crown will not participate in that process or make submissions on civil matters. If asked, the Crown will read out facts it alleges amount to criminal contempt for that individual and the relevant arrest day.

d. If the Court accepts a plea to civil contempt, the Crown would not be involved in the sentencing hearing and the Court may conduct the sentencing at that point or later.

e. If the civil plea is not accepted, the defendant may choose to plead guilty to criminal contempt or have the case go over to the scheduled trial date or such other date as may be fixed.

f. If the guilty plea to criminal contempt proceeds, the procedure should follow s. 606 of the *Criminal Code*. The Crown will read out and/or file the alleged facts for the relevant arrest day.

g. If, on the plea day in question, there are several defendants pertaining to the same arrest day, the underlying facts may be read out for the whole group. Defendants remain entitled to make individual submissions.

h. Once the plea and facts are entered, it may be appropriate to proceed to immediate sentencing, unless there are reasons advanced to adjourn the matter. Defendants may agree to the ISP, other offer set out above, or make other submissions on sentence.

i. Since the ISP and other offers involve a fine, the Court should make an inquiry into the ability to pay in a manner consistent with s. 734(2) and *MacMillan Bloedel Ltd. v. Brown*,

para. 71. Under the ISP, if the individual is found not able to pay the $500, the Crown will submit that 25 hours community service under the direction of probation is appropriate. Other community service hours set out above will follow the same process.

35. The Crown may put the parties on notice or seek to modify this procedure as the cases progress.

DATED at the City of Vancouver, Province of British Columbia, this 2nd day of August, 2018.

MONTE RUTTAN, Crown Counsel

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***R. v. Ali,***
2008 BCCA 147

Date: 20080229
Docket: CA035817

Between:

Regina

Respondent

And

Mohammed Sayid Ali

Appellant/Applicant

Before: The Honourable Mr. Justice Chiasson
(In Chambers)

Oral Reasons for Judgment

R. Peck, Q.C.
E. Gottardi — Counsel for the Appellant

W.P. Riley — Counsel for the (Crown) Respondent

Place and Date: Vancouver, British Columbia
29 February 2008

[1] **CHIASSON, J.A.**: On 8 November 2007, Morrison J. convicted Mr. Ali of trafficking and possession for the purpose of trafficking. He was sentenced to six months' incarceration on 15 February 2008. A Notice of Appeal from conviction and Notice for Leave to Appeal from both conviction and sentence were filed on 18 February 2008.

[2] This is Mr. Ali's application for judicial interim release.

[3] The application is governed by ss. 679(1)(a) and (3) of the ***Criminal Code***, R.S.C. 1985, c. C-46, because the appeal is from conviction and sentence and the required notice of appeal and application for leave have been filed.

[4] Section 679(3) requires Mr. Ali to establish:

> (a) the appeal or application for leave to appeal is not frivolous;
> (b) he will surrender himself into custody in accordance with the terms of his release; and
> (c) his detention is not necessary in the public interest.

[5] The Crown takes no issue with the second requirement.

[6] There is no transcript of the proceedings before Morrison J. or of her reasons for judgment on the conviction or sentencing. Counsel for Mr. Ali and the Crown provided to me their understanding of the circumstances of the crime.

[7] Mr. Ali was the driver of a vehicle involved in a dial-a-dope operation. A Mr. Osborne was a passenger in the vehicle. An undercover police officer had arranged a meeting to purchase a "rock" of cocaine for $30. He had a conversation with Mr.

Osborne through the passenger window of the vehicle in which Mr. Ali participated. At trial, Mr. Ali testified and did not deny the conversation. He asked the officer whether he was a cop. The officer sought information how he could buy additional drugs. Mr. Osborne gave him a name, as did Mr. Ali. After the officer left, a marked police car appeared and Mr. Ali drove away. A short distance away, Mr. Osborne exited the car and ran. He was apprehended as was Mr. Ali.

[8] The police found 54 packages of cocaine and 41 packages of heroin. A sum of money was found on Mr. Ali, including the $30 paid by the undercover officer. The vehicle had been rented by Mr. Ali.

[9] Mr. Osborne pleaded guilty and was sentenced to a nine month conditional sentence.

[10] Mr. Ali and Mr. Osborne testified at Mr. Ali's trial. The defence position was that Mr. Ali merely was driving Mr. Osborne to a destination when Mr. Osborne asked him to make a stop. Mr. Ali knew nothing about the planned drug transaction. The trial judge did not accept this contention.

[11] Mr. Ali's grounds for his conviction appeal are: the verdict is unsafe, or is unreasonable; it is not supported by the evidence; the judge misapprehended the evidence. Counsel for Mr. Ali acknowledged these are difficult grounds to sustain, but in the absence of the reasons of the judge and a transcript of the proceedings, he is unable to advance other grounds at this time.

[12] Mr. Peck stated fairly he cannot attest to the strength of the conviction appeal, but he asserts the appeal from sentence is not frivolous and Mr. Ali's detention is not required in the public interest.

[13] The Crown contends there is no question of law and no apparent issue of fact that would permit this Court to interfere with the conviction and the sentence is within the range for dial-a-dope operations.

[14] In my view, the appeal from sentence is not frivolous.

[15] The Crown relies on ***R. v. Tran***, 2007 BCCA 613, [2007] B.C.J. No. 2845 (QL), in which this Court upheld a sentence of nine months' incarceration in a dial-a-dope case. Mr. Ali relies on ***R. v. Charlie***, 2008 BCCA 44, [2008] B.C.J. No. 149 (QL), in which this Court upheld an 18 month conditional sentence in a dial-a-dope situation. The Crown notes that Mr. Charlie was an aboriginal offender and there was consideration of rehabilitative efforts he had made. An aggravating factor was the offence had been committed when Mr. Charlie was serving a conditional sentence. At para. 28 Frankel J.A. noted that each case must be decided on its own facts and "not all those convicted of drug offences committed while serving a conditional sentence need to be incarcerated".

[16] These cases serve as an example of legitimate variability in sentencing. It may be, as the Crown asserts, that six months' incarceration is within the range, but the question is whether it is a fit sentence in the circumstances of this case.

[17] Mr. Ali is married with two children. Two children from his wife's previous marriage live with him in the family home as do other relatives. He has a small business and no criminal record. Mr. Peck advises that it will be contended that Mr. Ali's sentence offends parity when compared with the conditional sentence of Mr. Osborne who does have a criminal record.

[18] On the material available to me, I am unable to decide whether the appeal from conviction is frivolous or not frivolous. I am told it is not possible to obtain a transcript of the trial proceeding or the reasons of the judge, which I find unsatisfactory. If, through his own fault, an applicant fails to provide sufficient information to the Court to decide whether his appeal is frivolous, he should bear the consequences of failing to do so, but it is quite another situation if the failure results from the administration of the judicial system. In this case, I believe, that the problem arises mainly as a result of the timing of the retainer of counsel to undertake the appeals.

[19] One reading of ss. 679(1)(a) and (3) is that interim judicial release can be ordered on a sentence appeal without the need to obtain leave to appeal pursuant to s-s. (b) and without meeting the criteria in s-s. (4) – the merits threshold of which is more stringent than is required for release pursuant to s-s. (3) (***R. v. Wilder***, 2007 BCCA 344, 36 M.P.L.R. (4th) 179 at para. 14 (Chambers, Prowse J.A) – even without the Court being satisfied that release should be ordered on the conviction appeal. This would be so merely because the application for leave to appeal the sentence is coupled with a conviction appeal, even a frivolous conviction appeal, although it is likely if that were the case that circumstance would be a factor in the

Court's consideration of the public interest when considering release pursuant to the sentence appeal. As noted, in this case, I am unable to reach a conclusion whether the conviction appeal is frivolous.

[20] I am not aware of authority that directly addresses the situation in the present case, although there is authority that facts relevant to conviction may show it is not in the public interest to release an offender pending a conviction appeal that is without merit, even though the appeal against sentence is meritorious (***R. v. Al-Maliki***, 2003 BCCA 698, 190 B.C.A.C. 304 at para. 15 (Chambers, Oppal J.A.). There are examples of release being ordered where the conviction appeal does not meet the merits threshold under s. 679(3), but the sentence appeal, being not certain of failure, does (***R. v. Alexander***, 2002 BCCA 203, [2002] B.C.J. No. 603 (QL) (Chambers, Saunders J.A.).

[21] I suggested to counsel that, with their concurrence, I could treat this application as an application for leave to appeal the sentence and, if leave were granted, an application for judicial interim release pursuant to s. 679(4).

[22] To grant leave to appeal, Mr. Ali must satisfy me his appeal is not frivolous and has a reasonable chance of success (***R. v. Hawthorne*** (1992), 21 B.C.A.C. 173 at para. 6 (Chambers, Gibbs J.A.). Mr. Riley, for the Crown, expressed concern that a consideration of leave should not be addressed in the absence of the reasons for sentencing, particularly when the sentence is within the range of sentence for the offence in issue. Defence counsel notes there is a parity issue. While that may be correct, an examination of the reasons for sentencing likely is required to determine

whether there is any basis on which it can be contended the judge erred in considering or not considering the different sentences imposed on Messrs. Ali and Osborne.

[23] Mr. Ali relies on a decision of Mr. Justice Goldie in Chambers, ***R. v. G.H.W.*** (1997), 95 B.C.A.C. 140, which is a case with some similarity to the present case. The case concerned an application for an order appointing counsel to represent the applicant on a conviction and sentence appeal. The applicant also sought bail pending appeal. Mr. Justice Goldie declined to appoint counsel on the conviction appeal and stated in para. 9 the conviction appeal was "founded on a misunderstanding of the nature of an appeal". He appointed counsel on the sentence appeal. When considering bail, Goldie J.A. stated at paras. 14 and 15:

> The applicant also sought release pending his appeal. I declined to make an order pending the adjourned application under s. 684 as the information before me was insufficient for the purposes of determining whether the requirements of s-s. (3) and (4) of s. 679 of the Code could be met.
>
> While I did not characterize the conviction appeal as frivolous its merits are so questionable that I would prefer to consider the application for release under s-s. (4) of s. 679 where the appeal is limited to sentence.

[24] This resulted essentially in a severance of the sentence appeal which was dealt with as an appeal under s. 679(1)(b) of the ***Criminal Code***. In para. 18, Goldie J.A. granted leave to appeal. It is clear that at least the trial transcript was available (para. 8), which distinguishes that case from this case.

[25] I accede to the Crown's position that leave to appeal should be considered only with sentencing reasons at hand. I shall deal with the application as presented,

that is, under s. 679(3), but ***G.H.W.*** does support the idea that where it is not possible to conclude a conviction appeal is frivolous or not frivolous, if there were a finding a sentence appeal is not frivolous, an offender should be subjected to a somewhat more rigorous standard than otherwise would apply under s. 679(3). In my view, in this case, this includes considering the offence on which Mr. Ali was convicted.

[26] I have concluded the sentence appeal is not frivolous.

[27] The second criterion is not in issue.

[28] The strength of the applicant's case is an important factor in considering the public interest (***R. v. Dhaliwal,*** 2006 BCCA 43, 225 B.C.A.C 1 (Chambers, Saunders J.A.).

[29] In addition, this Court has stated that the public interest involves two considerations: one, the protection and safety of the public; two, maintenance of the public's confidence in the administration of justice (***R. v. J.W.R.***, 1999 BCCA 574, 129 B.C.A.C. 232 at 239 (Chambers, Saunders J.A.). In this case, the protection and safety of the public is not a concern.

[30] Referring to Smith J.A. in ***R. v. Burd***, 2005 BCCA 620, [2005] B.C.J. No. 2722 (QL) (Chambers), Gower J.A. in ***R. v. Silver***, 2006 YKCA 4, 226 B.C.A.C. 107, identified in para. 20 four circumstances to be considered in addition to the strength of the grounds of appeal:

1. the likelihood of further offences occurring;

2. the appellant's prospects of rehabilitation;
3. the appellant's criminal record and personal circumstances; and
4. the appellant's performance during pre-trial bail.

[31] There is nothing before me to suggest that Mr. Ali is likely to re-offend pending the determination of his appeal.

[32] Similarly, there is nothing before me to suggest Mr. Ali is not a good candidate for rehabilitation.

[33] He has no previous criminal record and he performed fully his obligations while he was on bail pending his trial.

[34] I am entitled to consider the effect of incarceration. Mr. Ali's wife filed an affidavit attesting to her dependency and the dependency of others on Mr. Ali. In addition, it is probable that if he were not released, Mr. Ali will have served all or a significant portion of his sentence before his sentence appeal is heard. In para. 15 of ***Wilder***, Madam Justice Prowse stated:

> The objective of releasing an applicant on bail pending a sentence appeal is primarily to ensure that the time the applicant spends in custody pending his sentence appeal is not greater than the time, if any, he/she would have spent in custody under a fit sentence.

(See also ***R. v. Adamson*** (31 May 2007), Vancouver CA035098 (C.A. Chambers) at para. 23).

[35] Public confidence in the administration of justice has been said to include two components: enforceability - assurance that the guilty will serve sentences imposed

on them; and reviewability – assurance that judgments are reviewed to ensure that they are correct (***R. v. Crockett***, 2001 BCCA 707,161 B.C.A.C 114). The Crown points to the need for a reviewability and enforceability analysis and relies on this Court's consideration of the concept in ***United States of America v. Cheema***, 2007 BCCA 624, [2007] B.C.J. No. 2677 (QL) at para. 19, quoting from ***R. v. Mapara*** (2001), 158 C.C.C. (3d) 312 (B.C.C.A.). The applicant must establish that enforceability is outweighed by reviewability.

[36] Perhaps relevant to this analysis is Mr. Ali's immigration status. He is under a deportation order, but evidence was presented to me that it is unlikely his removal from Canada is imminent.

[37] Relevant to the analysis in this case are the facts concerning and the nature of the offence for which Mr. Ali was convicted. He participated in a dial-a-dope operation. Such operations rightly have been soundly condemned, but Mr. Ali's personal situation, which I have discussed, is entitled to consideration.

[38] In my view, Mr. Ali has a sentence appeal that is not frivolous. He is at risk that, absent release, he will serve his sentence before his appeal can be determined. He poses no risk and his incarceration will work a hardship on others. Taking all factors into account, I do not think his detention is necessary in the public interest, but I do think it is essential that his appeals be prosecuted as quickly as is feasible.

[39] I order that Mr. Ali be released on terms to be addressed by counsel.

(discussion with counsel)

[40] Conditions of release are recognizance in the amount of $10,000 with a $10,000 cash deposit with a 20 June 2008 end date. I agree with the terms proposed by the Crown, including the surrender of Mr. Ali's passport.

"The Honourable Mr. Justice Chiasson"

CORRECTION – 27 August 2008

Para. [34] The final sentence: "(See also ***R. v. Anderson*** (31 May 2007), Vancouver CA035098 (C.A. Chambers) at para. 23)" should be "***R. v. Adamson*** (31 May 2007), Vancouver CA035098 Chambers) at para. 23".

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***R. v. Dawydiuk,***
2008 BCCA 243

Date: 20080609
Docket: CA036132

Between:

Regina

Respondent

And

Michael Neil Dawydiuk

Appellant

Before: The Honourable Mr. Justice Chiasson
(In Chambers)

J. Duncan — Counsel for the Appellant

F. Tischler — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
30 May 2008

Place and Date of Judgment: Vancouver, British Columbia
9 June 2008

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] This is an application for judicial interim release pending an appeal.

[2] In the early morning of April 14, 2004, the applicant was involved in an altercation with a number of men outside a bar in Prince George. Subsequently, he got into his motor vehicle, drove onto the sidewalk and through a crowd of people who were exiting and assembled outside the bar. At least one person was injured. The applicant drove away from the scene. He was charged with the following counts:

> Count 1
>
> Michael Neil DAWYDIUK, on or about the 14th day of April, 2004, at or near Prince George, in the Province of British Columbia, did by criminal negligence, in the operation of a motor vehicle, cause bodily harm to Ashley Sevigny, contrary to Section 221 of the Criminal Code.
>
> Count 2
>
> Michael Neil DAWYDIUK, on or about the 14th day of April, 2004, at or near Prince George, in the Province of British Columbia, did commit aggravated assault of Ashley Sevigny, contrary to Section 268(2) of the Criminal Code.
>
> Count 3
>
> Michael Neil DAWYDIUK, on or about the 14th day of April, 2004, at or near Prince George, in the Province of British Columbia, did operate a motor vehicle, in a manner that was dangerous to the public having regard to all the circumstances including the nature, condition and use of the place at which the motor vehicle was being operated, and the amount of traffic that at the time was or might reasonably be expected to be at that place, and thereby did cause bodily harm to Ashley Sevigny, contrary to Section 249(3) of the Criminal Code.

Count 4

Michael Neil DAWYDIUK, on or about the 14th day of April, 2004, at or near Prince George, in the Province of British Columbia, while his ability to operate a motor vehicle was impaired by alcohol or a drug, did have the care or control of a motor vehicle, contrary to Section 253(a) of the Criminal Code.

Count 5

Michael Neil DAWYDIUK, on or about the 14th day of April, 2004, at or near Prince George, in the Province of British Columbia, did in committing an assault upon Ashley Sevigny, use a weapon, to wit: a motor vehicle, contrary to Section 267(a) of the Criminal Code.

Count 6

Michael Neil DAWYDIUK, on or about the 14th day of April, 2004, at or near Prince George, in the Province of British Columbia, in committing an assault upon Ashley Sevigny, did cause bodily harm to her, contrary to Section 267(b) of the Criminal Code.

Count 7

Michael Neil DAWYDIUK, on or about the 14th day of April, 2004, at or near Prince George, in the Province of British Columbia, did sexually assault Ashley Sevigny, contrary to Section 271 of the Criminal Code.

Count 8

Michael Neil DAWYDIUK, on or about the 14th day of April, 2004, at or near Prince George, in the Province of British Columbia, having the care, charge or control of a vehicle that was involved in an accident with another person, did, with intent to escape civil or criminal liability, fail to stop his vehicle and give his name and address and offer assistance, contrary to Section 252(1)(a) of the Criminal Code.

[3] After a nine day trial, the applicant was convicted on counts one, five and eight. He was acquitted on counts four and seven and a conditional stay was entered on counts two, three and six pursuant to ***R. v. Kienapple***, [1975] 1 S.C.R. 729, 15 C.C.C. (2d) 524. The applicant was sentenced to 12 months in jail on each

of counts one and five, the latter to be concurrent with the former and to six months in jail on count eight, to be consecutive.

[4] The applicant appeals his conviction on count five – assault with a weapon – and his sentence on all three counts. He contends he should have been given a conditional sentence.

Positions of the parties

[5] The main focus of the applicant's position is that the trial judge did not address properly the intent required for a conviction of assault with a weapon. He asserts the judge discounted the only witness who gave direct evidence of the applicant's intent to injure, but gave no adequate reasons for concluding he threatened the crowd by his actions.

[6] The Crown contends the judge was entitled to conclude from the applicant's action of driving on the sidewalk that he intended to threaten the crowd, but asserts that even if the applicant were to meet the requirements for release on his conviction appeal on count five, he would not meet the requirements for release on his sentence appeals on counts one and eight. It is the Crown's position that on this application each count must be treated as a discrete appeal. Leave to appeal is required on counts one and eight because these appeals are from sentence alone. The Crown does not oppose leave.

Discussion

[7] The criteria for judicial interim release pending an appeal are set out in s. 679 of the ***Criminal Code***, R.S.C., 1985, c. C-46:

> **679.** (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,
>
> (*a*) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;
>
> (*b*) in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; or
>
> [….]
>
> (3) In the case of an appeal referred to in paragraph (1)(*a*) or (*c*), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
>
> (*a*) the appeal or application for leave to appeal is not frivolous;
>
> (*b*) he will surrender himself into custody in accordance with the terms of the order; and
>
> (*c*) his detention is not necessary in the public interest.
>
> (4) In the case of an appeal referred to in paragraph (1)(*b*), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that
>
> (*a*) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;
>
> (*b*) he will surrender himself into custody in accordance with the terms of the order; and

(*c*) his detention is not necessary in the public interest.

[8] The merits threshold under s-s. 4 is higher than under s-s. 3: ***R. v. Ali***, 2008 BCCA 147, at para.19 (Chambers).

[9] Time was given to the parties to make additional submissions on the Crown's position that each count should be treated as a discrete appeal.

[10] The Crown asserts:

> …if one were to give the Applicant the benefit of a best case scenario - success on the one count that is the subject of the conviction appeal - this case would boil down to a sentence appeal for the remaining offences, under which s. 679(4) would clearly apply in determining whether the Applicant has met the 'merits threshold' for being granted bail.

[11] There is some logic in the Crown's position.

[12] If the division hearing this appeal were to quash the applicant's conviction for assault, he still would be required to succeed on his sentence appeals on counts one and eight to avoid jail. Had he not appealed his sentences on counts one and eight he would be obliged to serve those sentences notwithstanding a successful appeal on count five.

[13] The latter situation is not before me.

[14] As to the former situation, if this Court were to allow the applicant's conviction appeal and not deal with his sentence appeal at that time, which is the usual practice of this Court where a conviction is upheld, the applicant, who would have

surrendered himself into custody, would be obliged to apply for judicial interim release meeting the requirements of s. 679(4).

[15] The Crown and the applicant refer to ***Ali*** and cases noted in that case. The Crown contends ***Ali*** offers some loose parallels to the case at bar. While that may be correct, in my view, the parties misconstrue ***Ali***.

[16] ***Ali*** was an application for judicial interim release where the applicant appealed his conviction and sentence for possession for the purpose of trafficking. Because of the absence of information, it was not possible for the court to decide whether the conviction appeal was frivolous as required by s. 679(3). In its submission the Crown states:

> At the suggestion of the Court, and with the agreement of counsel, the Court treated the application for judicial interim release as an application for release under s. 679(4) – applying the "merits threshold" of a sentence appeal…everyone agreed that, even though the applicant had failed to meet the lower threshold for release under s. 679(3), he could still request his release under the higher threshold for release under s. 679(4).

This is not what occurred.

[17] The applicant refers to ***R. v. L.D.M.***, 2000 NSCA 79, in which the appellant sought release pending his appeal of one of four counts. He also appealed his sentence. Counsel agreed to proceed under s. 679(1)(b) and to determine whether leave to appeal should be granted. In para. 7, Roscoe J.A. expressed reservations whether the section was applicable because there was a sentence appeal, but he

granted leave because he did not want to deny bail for want of leave "in case it might not be even applicable when there is a conviction appeal at the same time".

[18] The applicant asserts that the same issue was raised in ***Ali*** and states:

> Again, the issue of which Subsection applies in cases where the conviction appeal is without merit or where only certain counts are under appeal was not decided. Instead, the appeal proceeded in much the same way as the court proceeded in *L.D.M.*, by reference to the more stringent requirements of Section 679(4).

The court did not proceed on this basis.

[19] In para. 19 of ***Ali***, the court noted the conundrum faced by a court when a conviction appeal does not meet the non-frivolous test and release then must be based only on a sentence appeal that is attached to the conviction appeal. In para. 21 the court stated:

> I suggested to counsel that, with their concurrence, I could treat this application as an application for leave to appeal the sentence and, if leave were granted, an application for judicial interim release pursuant to s. 679(4).

Essentially, this is what was done in ***L.D.M***. and ***R. v. G.H.W.*** (1997), 95 B.C.A.C. 140 (Chambers, Goldie J.A.), in the circumstances of that case.

[20] The suggestion to counsel was not adopted because the court accepted the position of Crown counsel that leave to appeal should not be determined in the absence of sentencing reasons (para. 25). In that same paragraph the court stated: "I shall deal with the application as presented, that is, under s. 679(3)" and in para. 26 concluded the sentence appeal was not frivolous.

[21] In para. 25 the court noted:

> …where it is not possible to conclude a conviction appeal is frivolous or not frivolous, if there were a finding a sentence appeal is not frivolous, an offender should be subjected to a somewhat more rigorous standard than otherwise would apply under s. 679(3).

That more rigorous standard was brought into play in considering the public interest. The case did not proceed on the basis of s. 679(4).

[22] In my view, ***Ali*** is of little assistance to the parties.

[23] The applicant refers to ***R. v. Alexander***, 2002 BCCA 203 (Chambers, Saunders J.A.), which was noted in ***Ali***. There the court found the conviction appeal frivolous, but released the applicant on the basis his sentence appeal was "not certain of failure" (para. 7). The applicant states, "[i]t is not clear…whether the court applied Section 679(3) or (4) coming to this decision." In my view, it is obvious the court proceeded under s. 679(3). There was no discussion of leave, the merits threshold appears to have been whether the appeal was frivolous and there was no discussion of hardship. The result is consistent with the analysis and result in ***Ali***.

[24] The applicant states that if it were necessary he would consent to proceed on the basis the requirements of s. 679(4) apply. In my view, in this case that is neither necessary nor desirable, even if it were possible.

[25] I am not prepared to treat the counts as separate appeals on this application.

[26] There is one appeal. It includes conviction and sentences. It is not "an appeal…against sentence alone" as dealt with in s. 679(1)(b). The sentences are

interrelated, that is, concurrent and consecutive. The applicant sought and seeks a conditional sentence regardless of the conviction appeal outcome. Conviction on the assault count was a factor in the judge refusing to order a conditional sentence. In passing sentence the judge was bound by the totality principle.

[27] In my view, if the assault conviction were set aside, the applicant's chances of success in obtaining a conditional sentence would improve, if for no reason other than the fact the judge did not consider a conditional sentence absent the assault conviction. Conversely, if the conviction were upheld, the full force of the judge's sentencing reasons would come into play in any consideration of the merits threshold for release pending the sentence appeal. The process of appeal is interconnected. Conceptually it is wrong to compartmentalize it for the purpose of considering release at this stage of the proceeding. The plain wording of s. 679 requires consideration of release in this case pursuant to s. 679(3).

[28] Although the circumstances of this appeal are somewhat unusual, as a matter of policy, I find it difficult to accept that an offender who meets the requirements for release on a conviction appeal should find himself remaining in jail because he does not meet the criteria for release on sentences interrelated with the conviction sentence because he did not appeal all convictions. How would the merits of the sentence appeals be assessed: on the basis the conviction for assault stands or on the eventuality that it is overturned? The former is somewhat artificial, in that it ignores the fact of the appeal and the conclusion it is not frivolous; the latter is speculative.

[29] In this case, the applicant acted responsibly by not appealing convictions, which on the record presently available, have little prospect of success. To accede to the Crown's position would encourage frivolous conviction appeals by linking them to sentences as a means of avoiding the need for leave and merits criteria for stand-alone sentence appeals.

[30] I do not accede to the Crown's position and shall consider the application pursuant to the criteria in s. 679(3).

[31] The Crown concedes the applicant is likely to surrender himself into custody as required. He has a home and a job in Prince George and a minor criminal record. The incident appears to have been an aberration. The Crown's focus is on the merits of the appeal and the public interest. As to the latter, the Crown emphasizes that the merits are of considerable significance.

[32] The applicant's position is grounded in paras. 93 – 95 of the judge's reasons:

> [93] In relation to each alleged assault, Crown must establish intent beyond a reasonable doubt. The only evidence that the Accused intended to injure someone while driving down the sidewalk is that of Chantal Desharnais. She testified that Michael Dawydiuk told her he intended to hit his aggressors with his vehicle. He denies such a statement. On that issue I cannot decide whose evidence to believe, and I give no weight to the evidence of Chantal Desharnais.
>
> [94] Section 26(1) of the *Criminal Code* defines assault as follows:
>
> Any person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes

> that other person to believe on reasonable grounds, that he has, present ability to effect his purpose.
>
> [95] I am satisfied on all of the evidence of Crown witnesses that by driving his truck down the sidewalk, Michael Dawydiuk threatened to apply force to another person. Clearly Mark Choliastos felt he could have been hit, and he saw another person "pinned" by the vehicle, even before the truck struck Ashley Sevigny. He testified that they had to move to avoid being hit. I am satisfied the actions of the Accused fit the definition of assault set out in Section 265(1)(b).

[33] It appears to me that the judge dealt with s. 265(1)(a) in para. 93 and with s. 265(1)(b) – "threatening" – in para. 95. Threatening was the basis for the conviction.

[34] The applicant asserts that the judge's reasons do not make clear why his conduct was assault as opposed to criminal negligence. He contends there is no analysis of the elements of intent: subjective and objective. He asserts the pathway to conviction for assault is not clear. He also challenges the sufficiency of the evidence to convict for assault and contends the judge misapprehended the evidence.

[35] The accused testified. There is no discussion in the judge's reasons of ***R. v. W.(D.)***, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397, or this Court's judgment in ***R. v. H.(C.W.)*** (1991), 3 B.C.A.C. 205, 68 C.C.C. (3d) 146. Relying on the latter case, the applicant asserts that if the judge did not know who to believe, she should have acquitted.

[36] Although a credible case can be made that driving onto the sidewalk and through a crowd containing persons who had harassed and assaulted the applicant was an act of threatening, I cannot say that the applicant's appeal is frivolous. The

elements of assault differ considerably from those of criminal negligence. A division of this Court should consider whether the elements of assault were met in this case.

[37] In my view, detention of the applicant is not necessary in the public interest.

[38] There is little doubt that the incident attracted considerable public interest when it occurred, but I have been given little to suggest that the public would consider it a compromise of the proper administration of justice to release the applicant at this time pending his appeal. As noted, he owns a home, has full time employment and a limited criminal record. There is nothing to suggest that the incident represents a common occurrence in his life. He does not contest the conclusion his conduct constituted criminal negligence and leaving the scene of an accident. Regardless of the outcome of this appeal, he will be obliged to serve a sentence for those offences. If he were acquitted of assault, this Court would consider whether the remaining sentences should be served in the community.

[39] I order the applicant released. His release will be on the terms proposed by the applicant and attached to these reasons as Appendix “A” as modified by the suggestion of Crown counsel that the applicant be obliged to surrender himself at 9:30 a.m. on the morning his appeal is scheduled to be heard, or December 5, 2008, whichever is the earliest.

[40] Although it is not a condition of my order, I express the strong wish that the appeal be brought on without delay.

“The Honourable Mr. Justice Chiasson”

APPENDIX A

Mr. Dawydiuk proposes that he be released on surety bail in the amount of $10,000, with a cash deposit by the accused of $5,000 with the following conditions:

1. He will keep the peace and be of good behaviour;
2. He will report to court when required to do so;
3. He will report as directed to a bail supervisor;
4. He will provide his bail supervisor with his residential address and not change his residential address without advance written notice to the bail supervisor;
5. He will remain in British Columbia at all times;
6. He will obey of curfew 10:00 pm to 7:00 am except for purposes of attending employment or for medical emergency situations as they arise;
7. He will not consume alcohol or non-prescription drugs;
8. He will not be found in any liquor, beer or wine store or any place where the primary commodity sold is liquor;
9. He will have no contact or communication with Ashley Sevigny;
10. He will not possess weapons or firearms;
11. He will not drive a motor vehicle.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Krawczyk,*
2010 BCCA 542

Date: 20101202
Docket: CA034884

Between:

Regina

Respondent

And

Betty Krawczyk

Appellant

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Bennett

On appeal from: Supreme Court of British Columbia, March 5, 2007
(*R. v. Krawczyk*, 2007 BCSC 345)

Appellant appearing on her own behalf:	B. Krawczyk
Counsel for the Respondent (Crown):	M. J. Brundrett
Place and Date of Hearing:	Vancouver, British Columbia September 22, 2010
Place and Date of Judgment:	Vancouver, British Columbia December 2, 2010

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Madam Justice Bennett

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

[1] Mrs. Krawczyk appeals her sentence of 10 months' imprisonment imposed on March 5, 2007, for contempt of court. She was convicted of criminal contempt for breaching an injunction on three occasions.

[2] Mrs. Krawczyk was part of a group of protesters who were demonstrating against the re-routing of the Sea-to-Sky Highway through Eagleridge Bluffs near Horseshoe Bay in West Vancouver. On application of the contractor, an injunction was granted by the Supreme Court on May 15, 2006, restraining the interference with the construction and prohibiting protesters from being in certain construction areas. Mrs. Krawczyk was arrested on three occasions, May 25, May 31 and June 27, 2006, for violating the area restriction contained in the injunction.

[3] The judge described the circumstances surrounding Mrs. Krawczyk's arrests as follows (2007 BCSC 2011):

> [21] The arrests on May 25 were described by Staff Sergeant Almas as a media frenzy. The video taken that day shows that to be correct. There was a significant crowd of onlookers as well as a large media presence. As many of the videos placed in evidence show, Ms. Krawczyk courted media attention. Ms. Krawczyk was among those shouting, "We plead sovereign immunity," and shouting over a peacekeeper who was trying to speak to her. She sat on the ground and linked arms when she was arrested and she refused to walk from the area. She insisted on being carried.
>
> [22] The media were present again on May 31 when Ms. Krawczyk was within the prohibited area impeding construction vehicles and refusing to leave. Again, she insisted on being carried to the police vehicle on arrest. Again, this was photographed by the media. On June 27, Ms. Krawczyk entered the construction site when construction was underway and blasting was planned. She was accompanied by a freelance documentary filmmaker. She was wearing a microphone when arrested. Members of the media attended. Her arrest was shown on television news. In that broadcast, Ms. Krawczyk states that:
>
> > The court system of this province by injunction, by contempt of court, deprives citizens of a fair trial.

[4] Mrs. Krawczyk was released after each of her three arrests upon giving an undertaking to abide by the injunction. However, on July 7, 2006, she was

incarcerated when she effectively withdrew her undertaking. She was released 26 days later when she renewed her undertaking.

[5] Mrs. Krawczyk made an application on August 24, 2006 to be tried by judge and jury. Relying on the decision of this Court in *MacMillan Bloedel Ltd. v. Simpson* (1994), 113 D.L.R. (4th) 368, 90 B.C.L.R. (2d) 24 (C.A.), the judge dismissed the application on the basis that a contempt charge is to be tried summarily and the accused does not have the right to elect trial by judge and jury.

[6] By reasons pronounced on February 8, 2007, indexed as 2007 BCSC 2011, the judge found Mrs. Krawczyk to have committed criminal contempt on each of May 25, May 31 and June 27, 2006. Her appeal from conviction was dismissed by this Court on May 29, 2009 (the reasons are indexed as 2009 BCCA 250).

[7] Mrs. Krawczyk has a history of participating in environmental protests. She has persisted in the protests in the face of court orders and has been convicted of criminal contempt in connection with environmental protests on four previous occasions. She was sentenced to 45 days' imprisonment for her first conviction in 1993. In June 2000, she was sentenced to six weeks' imprisonment in addition to three weeks of pre-sentencing custody. In September 2000, she was sentenced to one year of imprisonment but, on appeal, the sentence was reduced by this Court to four months of time served. Finally, in 2003, she was sentenced to six months' imprisonment without credit for four months of pre-sentencing custody.

[8] At the sentencing hearing, the Crown sought a prison sentence of between 9 and 15 months. Mrs. Krawczyk, acting on her own behalf, did not make any submissions with respect to the length of the sentence and indicated that she would not pay a fine or comply with conditions in any conditional sentence order.

[9] In imposing the ten-month sentence, the sentencing judge noted the aggravating factors that Mrs. Krawczyk deliberately breached the injunction to obtain publicity for her environmental cause and that she encouraged others to breach the injunction. The judge also noted the mitigating factors that Mrs. Krawczyk was 78

years old, that she had contributed to society by raising children and grandchildren, that her protests were not violent and that her criminal record was restricted to contempt convictions. The judge stated that the sentence must be sufficient to deter Mrs. Krawczyk and others from breaching court orders and must reflect the seriousness of the offence. She noted that Mrs. Krawczyk has been warned by the courts (including this Court in *International Forest Products Ltd. v. Kern*, 2001 BCCA 48, 151 C.C.C. (3d) 520 at paras. 23 and 26) that she will face increasingly longer sentences for breaching court orders.

[10] The sentencing judge found 10 months to be a fit sentence without deduction in respect of Mrs. Krawczyk's 26 days of pre-sentencing custody. In deciding not to give any credit in respect of Mrs. Krawczyk's pre-sentencing custody, the judge followed the lead of the judge who sentenced Mrs. Krawczyk in 2003 without giving her credit for her pre-sentencing custody (*Hayes Forest Services Ltd. v. Forest Action Network*, 2003 BCSC 1569). The judge reasoned that Mrs. Krawczyk was confined, not by an order of the court, but as a result of her own decision not to abide by the injunction.

[11] Mrs. Krawczyk was refused interim judicial release pending her appeals, and she has served her sentence.

Discussion

[12] In her factum, which dealt with both her conviction and sentence, Mrs. Krawczyk says the trial judge erred "in the way in which my trial was criminalized without my lawyer being present which I submit was an abuse of process and may have resulted in a harsher prison sentence". Mrs. Krawczyk subsequently filed a notice of constitutional question, raising the following question:

> Is it against the notion of fundamental justice and against the Constitution for an accused person whose case is raised from that of civil disobedience to criminal disobedience, to be devested [sic] of all rights to a trial by judge and jury when facing serious prison time?

The notice also makes reference to s. 787 of the *Criminal Code*, which stipulates a maximum sentence of six months' imprisonment (or a fine of $5,000 or both) for a conviction of an offence punishable by summary conviction. Mrs. Krawczyk submits in the notice that "the legal provisions for denying a trial by judge and jury to an accused of Criminal Contempt of Court who is facing more than six months of prison time should be struck down".

[13] In its reply statement, the Crown submits the appeal ought to be dismissed because the sentence "has essentially become moot" in view of the fact that Mrs. Krawczyk has fully served her sentence. The Crown also argues Mrs. Krawczyk was not improperly denied legal counsel at the trial and she chose to represent herself at the sentencing hearing.

[14] It is the position of the Crown that there is no basis for this Court to interfere with the sentence and, in support of its position, the Crown refers to the decisions in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327 at para. 90, and *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163 at para. 14, for the proposition that an appellate court may only interfere with a sentence if there has been an error in principle, if there was a failure to consider a relevant factor, or an overemphasis of the appropriate factors, or if the sentence is demonstrably unfit. At the hearing of the appeal, Mrs. Krawczyk indicated that she was offended by the comparison of her case to those of the offenders in these decisions. As the Crown indicated at the hearing, those cases are relevant for the legal principles they contain concerning the limits of the scope of appellate review in sentence appeals, and not for any other purpose.

[15] I would not give effect to the Crown's position that this appeal ought to be dismissed on the basis of mootness. The sentencing judge in this case considered not only Mrs. Krawczyk's previous convictions for criminal contempt but also the length of the sentences imposed on her. In my opinion, the length of the effective sentence given to Mrs. Krawczyk is a matter of public importance, raising as it does

the fitness of a sentence imposed for wilful disobedience of a court order when the offender has previously committed like offences.

[16] At the hearing of this appeal, Mrs. Krawczyk did not address the point raised in her factum about the fact that her lawyer was not present for part of the trial and for the sentencing hearing. Although the Crown responded to the point in its reply statement, I do not read her factum as asserting that Mrs. Krawczyk received a harsher sentence because she was improperly deprived of counsel at the sentencing hearing. I think the point she was making was that the absence of her lawyer at the trial resulted in her being convicted of criminal contempt rather than civil contempt.

[17] This argument relates to her conviction for criminal contempt, and only indirectly relates to the length of her sentence in the sense that punishment for criminal contempt is generally harsher than punishment for civil contempt. If this argument was to be pursued, it needed to have been raised on Mrs. Krawczyk's appeal from her conviction, and it was not. It is not an argument that can be entertained on this appeal from her sentence.

[18] In the event Mrs. Krawczyk was intending to rely on the absence of counsel at her sentencing hearing, I note that her counsel withdrew part-way through the trial and did not attend at the sentencing hearing. Mrs. Krawczyk did not request an adjournment of the sentencing hearing in order to obtain counsel and stated that she had chosen not to seek legal advice. The sentencing judge explained the purposes and principles of sentencing to Mrs. Krawczyk. In these circumstances, the sentencing judge did not err in proceeding with the sentencing in the absence of counsel acting on behalf of Mrs. Krawczyk.

[19] Mrs. Krawczyk's submissions at the hearing of the appeal focused on the notice of constitutional question. However, as with the point in her factum about the lack of counsel for part of the trial, the question raised by Mrs. Krawczyk pertains to her conviction and, if it was to be pursued, it needed to be raised on her conviction appeal. Her complaint is that she was deprived of a trial by a judge and jury in

circumstances where she was in jeopardy of receiving a sentence in excess of six months. This complaint relates to the manner of her conviction, not to the length of sentence. Sentencing hearings are not conducted by juries and, even if Mrs. Krawczyk's trial had been before a judge and jury, her sentence would have been determined by the judge alone. The question raised by the notice is not one that can properly be pursued on a sentence appeal.

[20] At the hearing of the appeal, it was pointed out to Mrs. Krawczyk that her submissions were really going to the question of her conviction, and she agreed with the suggestion that an alternate way of casting her argument was that, as contempt proceedings are summary in nature, then the sentence should be commensurate with the maximum sentence of six months under s. 787 of the *Criminal Code* for offences punishable on summary conviction.

[21] This alternate submission raises the issue of the fitness of Mrs. Krawczyk's sentence and whether s. 787 acts to limit the sentence to a period of six months. In my opinion, s. 787 does not apply to the offence of criminal contempt. Section 787 applies to offences that the *Code* specifies are punishable on summary conviction. The offence of criminal contempt is not one of those offences. Rather, it is an offence at common law that is preserved by s. 9 of the *Code.*

[22] The *Canadian Charter of Rights and Freedoms* expressly stipulates the maximum punishment in cases where the accused does not have the right to elect a trial by judge and jury. Section 11(f) of the *Charter* provides that a person charged with an offence has the right to the benefit of a jury trial where the maximum punishment is imprisonment for five years or a more severe punishment.

[23] The effect of s. 11(f) was considered in the decision of *R. v. Cohn* (1984), 13 D.L.R. (4th) 680, 42 C.R. (3d) 1 (Ont. C.A.), which was cited with approval by this Court in *MacMillan Bloedel Ltd. v. Simpson*. In that case, the Ontario Court of Appeal held that, in view of s. 11(f), the maximum sentence is less than five years where summary procedure has been invoked in the trial of contempt of court. The

Ontario court also suggested that the maximum sentence for contempt of court is two years' imprisonment.

[24] Hence, the maximum sentence for contempt of court is not the six-month period referred to in s. 787. The question remains, however, whether the sentence of ten months imposed on Mrs. Krawczyk is demonstrably unfit.

[25] The two-year maximum referred to in *R. v. Cohn* was the sentence also imposed in *R. v. Johnston*, [1976] O.J. No. 1144 (C.A.), a case involving the refusal by a witness to answer questions in a murder trial. That decision is clearly distinguishable from the present circumstances.

[26] I earlier made reference to the decision in *MacMillan Bloedel Ltd. v. Simpson*, which was an appeal from conviction by 44 protesters. A related decision is *MacMillan Bloedel Ltd. v. Simpson* (1993), 106 D.L.R. (4th) 540, 84 C.C.C. (3d) 559 (B.C.C.A.), which was the appeal by Ms. Simpson of her sentence of six months' imprisonment for a conviction of contempt of court in respect of an environmental protest. Ms. Simpson had two previous convictions for civil contempt. After reviewing sentences for similar contempts in British Columbia and noting that the highest sentence had been a suspended sentence of five months, this Court allowed the appeal and reduced Ms. Simpson's sentence to four months' imprisonment.

[27] Another relevant authority is the 2001 appeal of the one-year sentence imposed on Mrs. Krawczyk (*International Forest Products Ltd. v. Kern*, *supra*). That appeal related to Mrs. Krawczyk's third sentence for contempt. In reducing the sentence to the four months of time served, Mr. Justice Donald stated that "[t]his is at the top of the range for like cases" (para. 23). However, both Donald J.A. and Chief Justice McEachern commented that Mrs. Krawczyk would face progressively longer terms for future violations of the law (paras. 23 and 26).

[28] Mrs. Krawczyk was convicted of contempt of court for her breach of the May 15, 2006, injunction on three separate occasions. At least one of the breaches of the injunction occurred after Mrs. Krawczyk had signed an undertaking to the

court by which she promised to comply with the injunction. Although the ten-month sentence was high, I am not persuaded that it was demonstrably unfit in the circumstances.

[29] There is one further point I wish to touch upon. Following the precedent set at Mrs. Krawczyk's previous sentencing, the sentencing judge did not give a credit to the sentence in respect of the 26 days in which she had been held in custody prior to her sentencing hearing. The rationale was that it was Mrs. Krawczyk's decision to remain in custody. I have reservations as to whether this approach is correct in principle. This point was not raised by Mrs. Krawczyk, and it was not addressed by the Crown. I think the point should be left to another occasion when the court has the benefit of full submissions.

[30] For these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Rowles"

I agree:

"The Honourable Madam Justice Bennett"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Mohsenipour,*
2020 BCCA 205

Date: 20200608
Dockets: CA45957; CA45961

Docket: CA45957

Between:

Regina

Respondent

And

Kasra Mohsenipour

Appellant

- and -

Docket: CA45961

Between:

Regina

Respondent

And

Tamim Albashir

Appellant

Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainants in this matter. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Mr. Justice Fitch
(In Chambers)

On appeal from: Orders of the Supreme Court of British Columbia, dated January 29, 2018 (conviction) (*R. v. Albashir*, 2018 BCSC 736, Vancouver Docket 27174).

Oral Reasons for Judgment

Counsel for the Appellant Kasra Mohsenipour (CA45957) (via teleconference):	J. Narwal
Counsel for the Appellant Tamim Albashir (CA45961) (via teleconference):	M.E. Sandford, Q.C. (on May 29, 2020 only) A. Tolliday
Counsel for the Respondent (via teleconference):	J.A.M. Dickie L.A. Vizsolyi
Place and Date of Hearing:	Vancouver, British Columbia May 29 and June 3, 2020
Place and Date of Judgment:	Vancouver, British Columbia June 8, 2020

Summary:

The appellants reapply for bail pending appeal based on a material change in circumstances. Held: Applications granted. The appellants have demonstrated a material change in circumstances due to ongoing delay in the prosecution of the appeals as well as proposed alterations to their release plans, including electronic monitoring and, with respect to one appellant, a newly proposed surety.

[1] **FITCH J.A. (via teleconference)**: The appellants, Tamim Albashir and Kasra Mohsenipour, renew their applications for release pending appeal based on a material change in circumstances.

[2] The appellants applied for release pending appeal in March 2020 but were detained on public interest grounds. In oral reasons for judgment indexed as 2020 BCCA 112 (Chambers), I concluded that both appellants had established they would surrender into custody in accordance with the terms of a release order, and that their appeals surpassed the “not frivolous” threshold of the merit component of the test for bail pending appeal.

[3] In dismissing the applications, I expressed concern about both the public safety and public confidence components of the public interest criterion set out in s. 679(3)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46. Among other things, I was not satisfied that the proposed release plans were sufficiently robust to guard against the risk that the appellants would reoffend or seek to interfere with the administration of justice. The context in which this decision was reached was detailed in my earlier judgment, which should be read in conjunction with these reasons.

[4] A judge hearing a subsequent bail application premised on a material change in circumstances is called upon to determine whether the considerations that animated the dismissal of the earlier application—in this case, public interest considerations—have been adequately addressed or overtaken by new circumstances that shift the evaluation and justify the making of a release order: *R. v. Daniels* (1997), 119 C.C.C. (3d) 413 at para. 21 (Ont. C.A.); *R. v. Baltovich*

(2000), 144 C.C.C. (3d) 233 at para. 6 (Rosenberg J.A. in Ont. C.A. Chambers); *R. v. Shevalev*, 2018 BCCA 388 at para. 10 (Groberman J.A. in Chambers).

[5] In support of the applications, both appellants submit that the considerations set out below constitute a material change in circumstances post-dating their first bail applications that speak directly to the public interest ground:

1. Ongoing delay in the appellate process;
2. The emergence and spread of the novel coronavirus (COVID-19) in federal correctional centres in British Columbia; and
3. The addition of privately funded electronic monitoring to the release plans being proposed. On this issue, I have been advised that BC Corrections is not affixing electronic monitoring bracelets to offenders (or accused), nor is it providing any electronic monitoring services during this phase of the current provincial state of emergency. Since the original applications, the appellants have, at their own expense, engaged private companies who are prepared—if release is granted—to attach to them an electronic monitoring bracelet and supply electronic monitoring services. The appellants propose this further condition as a means of supplementing other terms designed to address public safety considerations.

[6] In addition, Mr. Mohsenipour proposes modifications to his release plan which include an additional surety and an increase in the amount of the promise to pay if he fails to comply with a condition of the release order.

[7] The Crown concedes that the appellants have demonstrated a material change in circumstances relating to the grounds upon which the applications were previously dismissed. Specifically, the Crown concedes that further delay in the prosecution of these appeals attributable to unresolved disclosure issues pertaining primarily—but not exclusively—to the involvement of James Fisher in the investigation of the offences with which the appellants stand convicted, coupled with the fresh proposals made by the appellants concerning their release plans, tips the

balance in favour of reviewability and justifies an order admitting both appellants to bail pending appeal.

[8] In support of these applications, the appellants filed a substantial volume of material relating to the enhanced risks associated with the spread of COVID-19 in federal custodial institutions. While I acknowledge that this is a factor that can properly be taken into account in considering the public interest criterion, the weight to be assigned to this factor is very much case-dependent.

[9] I am persuaded that the appellants have demonstrated a material change in circumstances post-dating the dismissal of their first applications. The material change is rooted in two things: (1) ongoing delay in having their appeals heard; and (2) proposed alterations to their release plans.

[10] As a result, I need not definitively resolve whether our current knowledge of the risks associated with the spread of the virus in federal correctional institutions constitutes a material change in circumstances that justifies an order admitting these two appellants to bail pending appeal. I will say only that I am doubtful that a change in circumstances has occurred since the applications were dismissed in March, let alone a change material to the grounds upon which the applications failed at first instance. I note, in this regard, that the state of emergency was declared in this province on March 18, 2020, about two weeks before the bail applications were dismissed. Further, the appellants have been convicted of very serious offences involving the sexual exploitation and abuse of women in the sex trade, one of whom was underage. They no longer have the benefit of the presumption of innocence. There was no compelling evidence before me that either appellant has a particular susceptibility to the virus, and there was no evidence before me that the virus is currently active in the institution at which they are housed.

[11] As I said in my reasons on the appellants' first bail applications, delay is a factor judges must keep in mind in determining whether the public interest in reviewability outweighs the public interest in enforceability and tips the balance in favour of a release order. I am now satisfied that further significant delay will be

occasioned before these appeals can be heard. Mr. Albashir has been in custody since his arrest in April 2016. Mr. Mohsenipour has been in custody since his arrest in September 2016. It is now clear that these appeals are unlikely to be heard before the appellants pass their full parole eligibility dates. The delay does not lie at their feet. As was observed in *R. v. Oland*, 2017 SCC 17 at para. 48, "[w]here it appears that all, or a significant portion, of a sentence will be served before the appeal can be heard and decided, bail takes on greater significance if the reviewability interest is to remain meaningful."

[12] In addition to the impact of ongoing delay in the prosecution of these appeals, both appellants have proposed more robust release plans to address public safety concerns.

[13] As noted, both appellants have agreed to engage private companies to facilitate the electronic monitoring of them while on release. While electronic monitoring is not a panacea, it does add a degree of confidence that the appellants will abide by the terms of a release order, or be detected—most particularly if they violate what amounts to a house arrest term I am imposing as part of these orders.

[14] With respect to Mr. Mohsenipour, my public safety concerns have also been alleviated to some extent by the return of his father to British Columbia and by his father's preparedness to act as surety for his son. When Mr. Mohsenipour's application came before me in March, his father was in Iran. His mother was the proposed surety. For reasons that are addressed in my earlier judgment (at paras. 46, 115–117 and 140), I was not prepared to name Mr. Mohsenipour's mother as a surety and no other surety was proposed. While I continue to have concerns about the ability of Mr. Mohsenipour's (and Mr. Albashir's) parents to exercise effective control over their sons, I have more confidence that Mr. Mohsenipour's father will be able to faithfully discharge the obligations of a surety.

[15] In light of the further delays that will be occasioned in the hearing of these appeals and the revised release plans proposed by both appellants to address my

public safety concerns, I am satisfied that a material change in circumstances has been shown to have taken place and that release orders should now be granted.

[16] Accordingly, and unless they are detained for some cause other than the sentences that are the subject of the offences under appeal, the appellants shall be released from custody pending the determination of their conviction appeals upon each appellant entering into a release order with a promise to pay $250,000 if they fail to comply with a condition of the order. In the case of Mr. Mohsenipour, there will be one surety: namely, H.M. In the case of Mr. Albashir, there will be two sureties: namely, A.A. and K.N.

[17] The terms of release with respect to each appellant are onerous but necessary in the public interest.

[18] Although I have concluded that there has been a material change in circumstances justifying the release of both appellants on bail pending appeal, this was, for reasons which should be apparent from my earlier judgment, a “close call.” The appellants should govern themselves with knowledge that they will be monitored closely and that any established breach of these release orders will likely be dealt with severely.

“The Honourable Mr. Justice Fitch”

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Myles,*
2020 BCCA 105

Date: 20200331
Docket: CA46639

Between:

Regina

Respondent

And

Nathan Clifford Kenneth Myles

Appellant

Before: The Honourable Madam Justice DeWitt-Van Oosten
(In Chambers)

On appeal from: Orders of the Supreme Court of British Columbia, dated October 11, 2019 (*R. v. Myles*, 2019 BCSC 2333, Duncan Docket 41763-2) and January 15, 2020 (*R. v. Myles*, Duncan Docket 41763-2).

Oral Reasons for Judgment

The Appellant, appearing in person (via videoconference):	N.C.K. Myles
Counsel for the Respondent (via teleconference):	J. Dyck
Place and Date of Hearing:	Vancouver, British Columbia March 27, 2020
Place and Date of Judgment:	Vancouver, British Columbia March 31, 2020

Summary:

Following a Supreme Court trial, the appellant was convicted of firearms and property offences. He was sentenced to 21 months' imprisonment. He has appealed the convictions and sentence and applies for release pending the hearing. Held: Application for release pending appeal is dismissed. The appellant has not met his burden under s. 679(3) of the Criminal Code. There are serious concerns that if released, the appellant will not surrender himself into custody in accordance with the terms of any bail order. Moreover, release on the form of bail proposed by the appellant would raise issues of public safety and adversely impact public confidence in the administration of justice. Although release pending appeal is denied, it is appropriate to direct that the appeals from conviction and sentence be expedited.

[1] **DEWITT-VAN OOSTEN J.A.:** The appellant seeks release pending his appeals from conviction and sentence. The Crown opposes the application.

[2] The appellant applied to the Legal Services Society ("LSS") for funding to assist with his appeals; however, the application was denied. He subsequently filed an application for the appointment of counsel under s. 684 of the *Criminal Code*, R.S.C. 1985, c. C-46. That application has not proceeded because since then LSS has indicated that it will reconsider the funding request. I understand LSS will likely complete its reconsideration this week.

[3] In light of the circumstances, Mr. Myles was asked if he wanted to adjourn the application for release to await the possibility of legal representation. He declined. As he received the Crown's response to his bail application only one day prior to the hearing on March 27, 2020, he was granted permission to provide additional submissions in writing. Those submissions have been received and reviewed.

Trial Background

[4] The appellant was tried before a judge of the British Columbia Supreme Court for multiple firearms and property offences. He was in custody pending his trial. The offences occurred at the beginning of January 2019. The trial took place in October 2019. Convictions were entered on 16 counts. Three of the counts were then judicially stayed, applying *R. v. Kienapple*, [1975] 1 S.C.R. 729. A global sentence of 21 months' imprisonment was imposed on January 15, 2020. The

appellant received 255 days' credit for time spent in pre-sentence custody, leaving approximately one year to serve.

[5] A summary of the circumstances surrounding the offences appears at the start of the reasons for conviction:

> [2] The offences in question arose as a result of observations by Constable Laing, a member of the Duncan-Cowichan RCMP, and the primary investigating officer on the matter. He observed Mr. Myles driving a red Chevrolet Cavalier vehicle on January 2, 2019. He conducted a traffic stop to serve Mr. Myles with a notice of driving prohibition. As a result of his investigation and a subsequent search of that vehicle, three firearms and a crossbow were located in the trunk of the vehicle, along with other items, primarily identification belonging to other persons that the Crown alleges are stolen.
>
> [3] Mr. Myles has testified in his own defence on the trial, and denied that he was driving the vehicle at the date and time in question. He admitted purchasing the vehicle a few weeks prior to the alleged offences, but testified that he was not driving the vehicle on the date of the alleged offence, or on any of the other dates when he was allegedly seen by officers.
>
> [4] Therefore, the central issue raised by the defence is whether Mr. Myles was the owner of the red Chevrolet Cavalier, and as outlined in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, whether I believe Mr. Myles' evidence, whether his evidence raises a reasonable doubt, or whether the evidence as a whole raises a reasonable doubt.
>
> [5] I have concluded that I do not believe Mr. Myles, and neither his evidence nor the evidence as a whole raises a reasonable doubt. I have determined on the totality of the evidence that I do accept, that I am satisfied beyond a reasonable doubt that Mr. Myles should be convicted of the offences he is charged with, subject to hearing submissions with respect to the counts that are *Kienappled.*
>
> *R. v. Myles,* 2019 BCSC 2333

Grounds for Appeal

[6] The appellant's notice of appeal alleges an "unreasonable" verdict and "excessive" sentence. In his affidavit filed in support of the application for release, as well as in the additional written submissions, the appellant offers greater particularization. He says:

- the trial judge erred in accepting the evidence of the primary investigator (Cst. Laing) and rejecting the appellant's testimony, as Cst. Laing's evidence has "serious credibility and reliability issues" and involves police corruption;

- the trial judge misapprehended evidence and/or rejected exculpatory evidence without explanation or good reason; and,
- the evidence, as a whole, was not sufficient to prove that the appellant was the driver and owner of the vehicle on the day police took the vehicle into custody and located firearms and stolen property.

[7] In support of these grounds, the appellant provided the Court with excerpts from the closing submissions at trial, setting out the challenges that defence counsel made to Cst. Laing's evidence. Defence counsel drew the judge's attention to internal inconsistencies in the officer's evidence; inconsistencies between his testimony and other statements made during the related police investigation; and other aspects of the officer's testimonial narrative that were said to be less than forthright.

[8] It is the appellant's position that in light of those inconsistencies, some of which were acknowledged by Cst. Laing, there was no reasonable basis for the judge to accept the officer's version of events, including his identification of the appellant as the driver of the vehicle carrying the firearms. The appellant says that, instead, the judge should have accepted the appellant's evidence and concluded that his denial of involvement in the offences provided an "overwhelming" basis from which to acquit.

Appellant's Antecedents

[9] Mr. Myles is 40 years old. He has an 18-year-old daughter and an elderly father. I do not understand Mr. Myles to ordinarily reside with either of those family members.

[10] Mr. Myles has a lengthy criminal record, dating back to 1997. The record contains more than 50 convictions that predate the offences at issue on this appeal. These include convictions for property offences; failing to comply with an undertaking, recognizance or probation order (x 12); obstructing or resisting a peace officer (x 7); drug offences; unlawful possession of explosives and firearms, and possession contrary to a prohibition order (x 5); fleeing from police (x 2); and offences involving violence (assault, uttering threats, forcible confinement and

assault causing bodily harm). His record also contains an entry as "parole violator" from 2000.

[11] I understand that Mr. Myles is currently awaiting trial for two counts of possession of drugs for the purposes of trafficking (heroin, fentanyl and methamphetamine), and one count of possession of cocaine. Those offences are said to have occurred in June 2018 and are set for trial in October 2020. According to the related record of proceedings, Mr. Myles was initially on bail for the drug offences. Then, in January 2019, the bail was revoked and Mr. Myles was rendered subject to a detention order.

[12] The Public Prosecution Service of Canada has conduct of the drug prosecution and has told Mr. Myles that it will consent to his release on the federal charges. The appellant says this arrangement was made in exchange for a later trial date and the federal Crown agreed to his release without conditions, even though they were aware of the convictions on the firearms offences. However, the matter has not been addressed in court; as such, the detention order currently remains in place. The provincial appellate Crown has been in touch with the federal prosecutor, who confirmed the agreement to release, but contrary to Mr. Myles' understanding of the situation, said that the prosecutor and Mr. Myles' lawyer on the drug charges are "negotiating" possible release conditions.

[13] The Crown advises that Mr. Myles' anticipated release date on the firearms and property offences is September 27, 2020. His warrant expiry date is February 1, 2021.

Parties' Positions on Bail

[14] The appellant contends he should be released because he has strong grounds of appeal with "obvious" merit; he is prepared to abide by court-ordered conditions; and, consistent with the federal Crown's decision to consent to release on the outstanding drug charges, he does not present a risk to the public. He says it is unfair for the federal Crown to agree to his release, but not the provincial Crown with conduct of his appeal.

[15] Mr. Myles says that if released, he plans to work for Juggernaut Resources (a mineral exploration company) and live at a residence on Shawnigan Lake Road on Vancouver Island. This property belongs to a friend of Mr. Myles and there is a trailer on the property in which the appellant can reside.

[16] For the three years prior to his current incarceration, when not in custody, Mr. Myles stayed at a residence on Chemainus Road on Vancouver Island. The residence was described at trial as a "dope house", with more than one dealer residing there and customer traffic. Mr. Myles was self-employed, although the details of what his employment consisted of are unclear to me. I believe, but am not certain, that it involved mechanics.

[17] The Crown is opposed to release, submitting that the appellant is unlikely to surrender himself into custody and presents significant public safety concerns.

[18] In putting their positions forward, both sides have focused their arguments on the appeal from conviction and the grounds raised in support of that appeal.

Discussion

[19] Release pending an appeal from conviction is governed by s. 679(3)(a)–(c) of the *Code.* As explained in *R. v. Oland*, 2017 SCC 17, the applicant for release bears the burden of establishing the *Code* criteria on a balance of probabilities (at para. 19). The presumption of innocence is no longer an informing principle because one or more convictions has been entered.

[20] A three-pronged analysis is required:

> [20] The first criterion [for release] requires the appeal judge to examine the grounds of appeal with a view to ensuring that they are not "not frivolous" (s. 679(3)(a)). Courts have used different language to describe this standard. While not in issue on this appeal, the "not frivolous" test is widely recognized as being a very low bar ….
>
> [21] The second criterion requires the applicant to show that "he will surrender himself into custody in accordance with the terms of the [release] order" (s. 679(3)(b)). The appeal judge must be satisfied that the applicant will not flee the jurisdiction and will surrender into custody as required.

> [22] The third criterion requires the applicant to establish that "his detention is not necessary in the public interest" (s. 679(3)(c)). …
>
> *Oland.* [Internal references omitted].

[21] With reference to this framework, the Crown concedes that Mr. Myles has met his burden under s. 679(3)(a) to show that the appeal from conviction is not frivolous, although it says the grounds for challenging the verdict do not rise much above that. I agree with that assessment, based on the material before me.

[22] Mr. Myles' predominant complaint on the appeal from conviction is that the judge was wrong to accept the evidence of the main police investigator and reject his. He repeatedly emphasized that point before me, as well as in his written submissions. In his view, Cst. Laing's evidence was untruthful, unreliable, and the problems with the officer's evidence—as detailed in the closing submissions by defence counsel—should have been obvious to the trial judge. He argues that the judge's assessment of Cst. Laing's credibility is materially flawed. The appellant contends that the judge ignored (or failed to give adequate consideration to) inconsistencies in Cst. Laing's evidence, inconsistencies between his testimony and descriptions provided by other witnesses, mid-stream testimonial changes when the officer was confronted in cross-examination, and the fact that Cst. Laing misrepresented the circumstances relevant to this case in an investigative affidavit.

[23] It is apparent from the reasons below that the judge was aware of the legal principles governing the assessment of evidence where an accused testifies (*R. v. W.(D.)*, [1991] 1 S.C.R. 742) and instructed herself accordingly. She did not believe Mr. Myles; nor did his evidence leave her with a reasonable doubt. She provided specific reasons for finding that the appellant's evidence was "entirely unbelievable." She then found, on the whole of the Crown's case, that Mr. Myles had "both knowledge and control of the firearms, crossbow, ammunition and stolen property found in the vehicle". The Crown's case included the evidence of Cst. Laing. The judge acknowledged the credibility and reliability concerns raised by the defence in respect of Cst. Laing's evidence, but, ultimately, she found the officer

to be a credible witness, describing him as "an honest officer [who] was prepared on many occasions to make concessions during his evidence."

[24] Relying on her credibility findings, the judge found as a fact that:

- Mr. Myles purchased the vehicle in which the firearms were located in December 2018 (he acknowledged this fact in his testimony and it was independently confirmed);
- Mr. Myles was seen by police driving that vehicle on December 18;
- the vehicle was towed on December 23 and Mr. Myles was the person who retrieved it;
- on the date of the offences, January 2, 2019, he was again seen driving the vehicle;
- when the vehicle was stopped and being dealt with by police on January 2, Mr. Myles was in the vicinity, standing on the other side of the road;
- Mr. Myles' personal property was located in the vehicle when it was searched by police;
- a .22 calibre semi-automatic rifle was in plain view in the trunk of the vehicle. A Harrington and Richardson shotgun and bolt-action rifle, along with a crossbow and ammunition, were found in a hockey bag in the vehicle; and,
- the appellant's personal belongings were "strewn throughout the car".

[25] Appeals from conviction that challenge a judge's credibility findings are assessed through a deferential lens. In *R. v. Gagnon,* [2006] 1 S.C.R. 621, the majority affirmed that in these cases, the appeal court must:

> 10 … defer to the conclusions of the trial judge unless a palpable or overriding error can be shown. It is not enough that there is a difference of opinion with the trial judge (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at paras. 32-33; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at para. 74). A succinct description of the overall approach appears in *R. v. Burke*, [1996] 1 S.C.R. 474, at para. 4, where this Court stated that "it is only where the Court has considered all of the evidence before the trier of fact and determined that a conviction cannot be reasonably supported by that evidence that the court can . . . overturn the trial court's verdict". With respect to the credibility of witnesses, the same standard applies. In *Lavoie v. R.*, [2003] Q.J. No. 1474 (QL), at para. 37, Nuss J.A. of the Quebec Court of Appeal stated that a trial judge's assessment of the credibility of witnesses "will not be disturbed unless it can be demonstrated that he committed a palpable and overriding error" (citing *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33).
>
> [Emphasis added.]

[26] It will be for a division of this Court to determine the merits of the appeal from conviction and whether the convictions should be upheld or set aside. However, based on my review of the reasons below and the transcript excerpts provided by the appellant, I do not consider the appeal from conviction to be strong. If there is overriding and palpable error here, it is not obvious from the face of the material before me. (I do not have access to the evidence called at trial.) A trial judge has considerable latitude in making her credibility findings. And she is not obliged, in her reasons, to detail every piece of evidence she has considered or evidentiary frailty she has reconciled: *R. v. M. E-H.,* 2015 BCCA 54 at para. 68.

[27] The second criterion for release requires that Mr. Myles establish he will not flee the jurisdiction and will surrender himself into custody when required, in accordance with the terms of the bail order (s. 679(3)(b)). Mr. Myles has an extensive criminal record, including multiple convictions for failure to comply with bail, breach of other court orders, obstructing a peace officer, flight from police and a conviction for failing to appear in court (from 1999). I have significant concerns that in the absence of a robust release plan mandating close and frequent supervision and, importantly, one or more sureties to provide a compelling incentive for Mr. Myles to comply, there is a likelihood that Mr. Myles will not adhere to the terms of his bail, including attending court when required.

[28] Mr. Myles has no surety to offer. He told the Court that he is able to make a $1,500 cash deposit, or a promise to pay in that amount (he prefers the latter). He says he received money for his birthday in February that he can use for this purpose. (I note that in his application for the appointment of counsel, dated and signed on March 4, 2020, after his birthday, Mr. Myles stated that he had no cash available to him and owes $10,000 in debts. He put his income at $3,960 per year and stated that he owns nothing of value.)

[29] In a previous appearance before this Court, the appellant was asked about the possibility of a surety. He said he does not wish to pursue that avenue. He does not have a “close connection” with family members situated in British Columbia, who

might be in a position to play that role. In my view, the release plan proposed by Mr. Myles, in light of his substantiated criminal history for not respecting court orders, is insufficient to meet his burden under s. 679(3)(b).

[30] That brings me to the third prong of the release analysis, namely, whether Mr. Myles has shown that "his detention is not necessary in the public interest" (s. 679(3)(c)).

[31] In deciding whether this burden is met, I must consider two issues: (1) public safety; and (2) public confidence in the administration of justice. On the second of these issues, I am obliged to weigh the interest in enforceability of the verdict against the interest in reviewability: *Oland* at paras. 22–24. It is generally understood that judgments should be immediately enforced. At the same time, society recognizes that the justice system is not infallible. Accordingly, when assessing bail, the appeal court must be mindful of the fact that persons who seek to challenge the legality of their convictions should be entitled to a meaningful review process that does not require them to serve a substantial part or the whole of their sentence, only to find that the conviction on which that sentence was based was unlawful: *Oland* at para. 25.

[32] Factors for consideration in weighing enforceability against reviewability include the apparent strength of the grounds of appeal, the seriousness of the offences for which the appellant has been convicted, the circumstances surrounding those offences, and the length of sentence imposed.

[33] I do not have access to the reasons for sentence where the trial judge likely would have addressed the gravity of Mr. Myles' offending conduct and made findings about his level of moral blameworthiness. However, Mr. Myles was found guilty of multiple offences involving the unlawful possession of firearms. One of the firearms contained an altered, defaced or removed serial number. The guns were stored in a careless manner. For example, one of them had a magazine with 59 bullets inserted into it and no trigger lock. There was a round in the chamber. The appellant was prohibited from possessing firearms and ammunition at the time of his offences.

[34] As noted by Dickson J.A. in *R. v. Kachuol,* 2017 BCCA 292:

> [25] In recent years, Canadian courts have become increasingly concerned by the proliferation of handguns, gun violence and the dire consequences for our society. Guns are inherently, often lethally, dangerous, all the more so when they are possessed for an illicit purpose. As a result, their possession and use is highly regulated and, if unlawful, criminalized to ensure public safety, express society's condemnation and punish offenders. …

[35] These were serious offences. Mr. Myles was subject to court orders at the time. He has a substantial record of offending, including crimes of violence and prior convictions for firearms offences. In 2016, he received a global 28.5 months' imprisonment for forcible confinement and three counts of assault. There have been periods in which the offending appears to have stopped; however, since 2015, Mr. Myles has exhibited steady recidivism. Based on the record, including breaches of court orders, I find there is a substantial likelihood that if released, Mr. Myles will re-offend. Moreover, it is my view that, realistically, his offending will put the safety of the public at risk.

[36] The appellant says he has not used drugs while incarcerated, nor has he engaged in violence, and that this weighs in favour of his release. At trial, Mr. Myles acknowledged a history of using illicit substances, including heroin. In December 2018, he was hospitalized for heroin withdrawal. He also says he is prepared to abide by bail conditions, including conditions relating to employment and/or maintaining a particular residence. Although this concern was not pressed in oral submissions, the appellant has also raised the issue of being incarcerated during the public health circumstances surrounding COVID-19.

[37] I have no confirmation of Mr. Myles' intended employment with Juggernaut Resources or details of what it might consist of, when it would start, or the expected duration. He says he last spoke to a representative of that company in January. Nor has Mr. Myles provided independent confirmation of his intended residence, including the property owner's willingness to have him reside there. The Crown has gathered information indicating that, over time, there have been multiple incidents of police interaction with the Shawnigan Lake Road address. These have included

attendance for allegations of break and enter, mischief, “unwanted persons”, assault, theft, uttering threats and “suspicious” persons or vehicles. The Crown’s information raises serious questions about whether the Shawnigan Lake Road property is an appropriate place for Mr. Myles’ to be while on bail.

[38] A police officer who is familiar with Mr. Myles, and his past offending, indicates that responding to him has previously required “multi-members”. The proposed place of residence is a long distance from a larger police detachment, a heavily treed property, and said to pose a “greatly increased risk” to police officers if they need to attend and deal with Mr. Myles without sufficient backup availability. There are multiple trailers on the property and it would be difficult for police to know, at any given time, where the appellant is situated. Mr. Myles confirms the existence of multiple trailers and says some of them are likely rented out to others. However, he says this residence is his only option. He contests the reliability of the police information about the property and says that if they are concerned about going there, he can meet them on the road for the purpose of a check-in.

[39] I do not consider the grounds of appeal put forward by Mr. Myles’ on his convictions to be strong. There is, in my view, a significant interest in immediate enforceability of the verdict below, given the nature of the offences and Mr. Myles’ history of offending. Regrettably, I have little confidence that he will comply with the terms of his bail in the absence of a robust, tightly structured form of community supervision that carries a compelling incentive for adherence. In my view, a promise to pay $1,500 or even a cash deposit in that amount, is not sufficient. I appreciate that the federal Crown has agreed to judicial interim release on Mr. Myles’ outstanding drug charges. However, I do not know the rationale underlying that position; the terms of the contemplated release; and/or when the release might actually take effect.

[40] I am alive to the concerns surrounding COVID-19; however, I have received no information about the specific level of risk faced by Mr. Myles in his current circumstances, health vulnerabilities he may have, or steps taken by the custodial

institution to mitigate the risk. As a result, I have no evidentiary foundation, particular to Mr. Myles, from which to make an informed assessment of the impact that this factor should appropriately, and realistically, have on the bail analysis in this case.

[41] In any event, it is my view that in the circumstances of this case, as a whole, the principle of enforceability outweighs reviewability and a reasonably informed member of the public would lose confidence in the administration of justice were Mr. Myles to be released pending appeal on the basis of the plan put forward.

[42] I recognize that if not released, Mr. Myles may serve a substantial portion of his sentence before his appeal from conviction is heard, possibly the majority of it. There has been no suggestion that the sentence imposed falls outside the generally accepted range of sentences for persons with the background of Mr. Myles and/or the nature of the offences for which he stands convicted. However, delay is something I must take into account in the balancing required under s. 679(3)(c): *Oland* at para. 48. It is not determinative. See, for example, *R. v. Ferwerda,* 2018 NLCA 14 (Chambers) at para. 109.

[43] I am satisfied that this is one of the situations contemplated in *Oland,* where the appellant simply cannot be released on the basis of the proposed order, even though a decision to this effect materially impacts the principle of reviewability. As a result, the appropriate step for me to take, in the alternative, is to direct that the appeal be expedited pursuant to s. 679(10) of the *Code*.

Disposition

[44] For the reasons provided, the appellant has failed to meet his onus for release under s. 679(3) of the *Code.* Accordingly, the application for bail pending appeal is dismissed.

[45] This appeal is already subject to case management. Subject to the discretion of the assigned case management judge to set timelines, I direct that the appeals from conviction and sentence be expedited. A case management conference should

be held within 10 days for consideration of a schedule that will enable an expedited appeal. Accordingly, I ask Crown counsel to contact the Court registry at their earliest convenience and arrange for a conference by telephone.

"The Honourable Madam Justice DeWitt-Van Oosten"

Dennis James Oland *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta and Criminal Lawyers' Association (Ontario) *Interveners*

Indexed as: R. *v.* Oland

2017 SCC 17

File No.: 36986.

2016: October 31; 2017: March 23.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Criminal law — Interim release — Appeals — Appeal judge dismissing application for release pending appeal because applicant failed to establish that detention "not necessary in the public interest" under s. 679(3)(c) of Criminal Code — Principles and policy considerations by which appellate courts should be guided in deciding whether someone convicted of serious crime and sentenced to lengthy term of imprisonment should be released on bail pending determination of appeal — Proper interpretation and application of s. 679(3)(c) of Criminal Code — Criminal Code, R.S.C. 1985, c. C-46, s. 679(3)(c).

Criminal law — Interim release — Review hearing — Standard of review — Appeal judge dismissing application for release pending appeal — Chief Justice of Court of Appeal directing review of dismissal decision by three-judge panel under s. 680(1) of Criminal Code — Test to be applied by Chief Justice in deciding whether to direct panel review — Standard of review to be applied by

Dennis James Oland *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, procureur général de l'Alberta et Criminal Lawyers' Association (Ontario) *Intervenants*

Répertorié : R. *c.* Oland

2017 CSC 17

N° du greffe : 36986.

2016 : 31 octobre; 2017 : 23 mars.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

EN APPEL DE LA COUR D'APPEL DU NOUVEAU-BRUNSWICK

Droit criminel — Mise en liberté provisoire — Appels — Rejet par le juge d'appel d'une demande de mise en liberté en attendant l'issue de l'appel au motif que le demandeur n'a pas établi que sa détention n'est « pas nécessaire dans l'intérêt public » suivant l'art. 679(3)c) du Code criminel — Considérations de politique générale et principes qui devraient guider les cours d'appel lorsqu'elles sont appelées à décider si une personne qui a été déclarée coupable d'un crime grave et condamnée à une longue peine d'emprisonnement devrait être mise en liberté sous caution en attendant qu'il soit statué sur son appel — Interprétation et application appropriées de l'art. 679(3)c) du Code criminel — Code criminel, L.R.C. 1985, c. C-46, art. 679(3)c).

Droit criminel — Mise en liberté provisoire — Audience de révision — Norme de contrôle — Rejet par le juge d'appel d'une demande de mise en liberté en attendant l'issue de l'appel — Juge en chef de la Cour d'appel ordonnant la révision de cette décision par une formation de trois juges conformément à l'art. 680(1) du Code criminel — Critère applicable par le juge en chef lorsqu'il

reviewing panel — Criminal Code, R.S.C. 1985, c. C-46, s. 680(1).

Appeals — Mootness — Application for release pending appeal dismissed — Appeal against conviction subsequently allowed and new trial ordered — Accused released pending re-trial — Appeal from decision refusing bail pending determination of appeal rendered moot — Whether Court should exercise discretion to hear appeal.

O applied for release pending the determination of his appeal against conviction on a charge of second degree murder involving the death of his father. His application was denied under the third criterion set out in s. 679(3)(c) of the *Criminal Code*, which requires the applicant to establish that "his detention is not necessary in the public interest". While public safety was not in issue in this case, the appeal judge was not persuaded that public confidence would be maintained if O were to be released. Accordingly, he dismissed O's application. A review of that decision by a three-judge panel, as directed by the Chief Justice of the Court of Appeal under s. 680(1) of the *Criminal Code*, was unsuccessful. The Court of Appeal later allowed O's appeal from conviction and ordered a new trial. Because he was then released pending his re-trial, O's appeal of the review panel's decision to this Court was rendered moot. However, in accordance with *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the Court determined that it would proceed to hear the appeal on its merits because of the unanimous position taken by the parties and interveners that guidance was needed to resolve conflicting jurisprudence on the issue of bail pending appeal, which is otherwise evasive of appellate review.

Held: The appeal should be allowed.

Following *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32, the public interest criterion of s. 679(3)(c) of the *Criminal Code* consists of two components: public safety and public confidence in the administration of justice. The public confidence component involves the weighing of two competing interests: enforceability and reviewability. While the *Farinacci* framework has withstood the

est appelé à décider s'il convient ou non d'ordonner une révision par une formation — Norme de contrôle applicable par la formation de révision — Code criminel, L.R.C. 1985, c. C-46, art. 680(1).

Appels — Caractère théorique — Rejet d'une demande de mise en liberté en attendant l'issue de l'appel — Appel de la déclaration de culpabilité subséquemment accueilli et nouveau procès ordonné — Accusé mis en liberté en attendant l'issue de son nouveau procès — Pourvoi formé contre la décision refusant une mise en liberté sous caution en attendant l'issue de l'appel devenu théorique — La Cour devrait-elle exercer son pouvoir discrétionnaire et entendre le pourvoi?

O a présenté une demande de mise en liberté en attendant qu'il soit statué sur l'appel qu'il a interjeté contre sa déclaration de culpabilité pour le meurtre au deuxième degré de son père. Sa demande a été rejetée en raison du troisième critère énoncé à l'al. 679(3)c) du *Code criminel*, qui oblige le demandeur à établir que « sa détention n'est pas nécessaire dans l'intérêt public ». Bien que la sécurité du public n'ait pas été en cause en l'espèce, le juge d'appel n'était pas convaincu que la confiance du public serait préservée si O était libéré. Il a par conséquent rejeté la demande de O. La révision de cette décision, effectuée par une formation de trois juges sur l'ordre du Juge en chef de la Cour d'appel en application du par. 680(1) du *Code criminel*, n'a pas été favorable à O. La Cour d'appel a subséquemment accueilli l'appel de la déclaration de culpabilité de O, et a ordonné la tenue d'un nouveau procès. Comme O a ensuite été libéré en attendant l'issue de son nouveau procès, le présent pourvoi qu'il a formé devant la Cour contre la décision de la formation de révision est devenu théorique. Cependant, conformément à l'arrêt *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342, la Cour a décidé d'entendre le pourvoi sur le fond en raison de la position unanime des parties et des intervenants selon laquelle celle-ci se devait de fournir des indications qui permettent de résoudre les contradictions de la jurisprudence sur la question de la mise en liberté sous caution en attendant l'issue de l'appel, question par ailleurs non susceptible de révision en appel.

Arrêt : Le pourvoi est accueilli.

Suivant l'arrêt *R. c. Farinacci* (1993), 86 C.C.C. (3d) 32, le critère de l'intérêt public énoncé à l'al. 679(3)c) du *Code criminel* comporte deux volets : la sécurité publique et la confiance du public envers l'administration de la justice. Le volet relatif à la confiance du public suppose la mise en balance de deux intérêts opposés : la force exécutoire des jugements et le caractère révisable

test of time and remains good law, appellate judges continue to have difficulty resolving the tension between enforceability and reviewability, especially in cases like the present one, where they are faced with a serious crime on the one hand, and a strong candidate for bail pending appeal on the other.

In section 679(3)(c) of the *Criminal Code*, Parliament has not provided appellate judges with any direction as to how a bail pending appeal order is likely to affect public confidence in the administration of justice. Fortunately, it has done so in s. 515(10)(c) for the admittedly different but related context of bail pending trial. With appropriate modifications, the s. 515(10)(c) factors are also instructive in the appellate context.

In assessing public confidence under s. 515(10)(c) in the pre-trial context, the seriousness of the crime for which a person has been convicted plays an important role and is determined by three factors: the gravity of the offence; the circumstances surrounding the commission of the offence; and the potential length of imprisonment. In considering the public confidence component under s. 679(3)(c), the seriousness of the crime should play an equal role in assessing the enforceability interest. The remaining factor that Parliament has identified as informing public confidence under s. 515(10)(c) is the strength of the prosecution's case. In the appellate context, this translates into the strength of the grounds of appeal, which informs the reviewability interest. For this assessment, appellate judges should examine the grounds of appeal for their general legal plausibility and their foundation in the record to determine whether they clearly surpass the minimal standard required to meet the "not frivolous" criterion.

When conducting the final balancing of the factors that inform public confidence, including the strength of the grounds of appeal, the seriousness of the offence, public safety and flight risks, appellate judges should keep in mind that public confidence is to be measured through the eyes of a reasonable member of the public. This person is someone who is thoughtful, dispassionate,

de ceux-ci. Bien que le cadre établi par l'arrêt *Farinacci* ait résisté à l'épreuve du temps et demeure valable en droit, les juges d'appel continuent d'éprouver de la difficulté à résoudre la tension entre le principe de la force exécutoire des jugements et celui de leur caractère révisable, particulièrement dans des affaires comme celle en l'espèce où ils sont en présence, d'une part, d'un crime grave et, d'autre part, d'un bon candidat à une mise en liberté sous caution en attendant l'issue de l'appel.

À l'alinéa 679(3)c) du *Code criminel*, le législateur n'a donné aux juges d'appel aucune indication sur la manière dont une ordonnance de mise en liberté sous caution en attendant l'issue de l'appel pourrait porter atteinte à la confiance du public envers l'administration de la justice. Heureusement, il l'a toutefois fait à l'al. 515(10)c) dans le contexte, certes différent mais connexe, de la mise en liberté sous caution en attendant l'issue du procès. Avec les adaptations qui s'imposent, les facteurs énumérés à l'al. 515(10)c) sont également utiles dans le contexte d'un appel.

La gravité du crime pour lequel une personne a été reconnue coupable joue un rôle important lorsqu'il s'agit d'apprécier, en vertu de l'al. 515(10)c), la confiance du public dans le contexte antérieur au procès. La gravité du crime est déterminée au moyen de trois facteurs : la gravité de l'infraction, les circonstances entourant sa perpétration et la durée possible de l'emprisonnement. En ce qui concerne le volet de l'al. 679(3)c) relatif à la confiance du public, la gravité du crime devrait jouer un rôle équivalent dans l'appréciation de l'intérêt relatif à la force exécutoire des jugements. Le dernier facteur que le législateur reconnaît, à l'al. 515(10)c), comme facteur qui sous-tend la confiance du public est la solidité du dossier du poursuivant. Dans le contexte d'un appel, cela correspond à l'existence de moyens d'appel solides, lesquels jouent un rôle dans l'appréciation de l'intérêt relatif au caractère révisable des jugements. Lors de cette appréciation, les juges d'appel devraient examiner les moyens d'appel en tenant compte de leur plausibilité générale en droit et des éléments au dossier sur lesquels ils reposent afin de déterminer s'ils vont clairement au delà des exigences minimales requises pour qu'il soit satisfait au critère de « non-futilité ».

Lorsqu'ils effectuent la mise en balance finale des facteurs qui sous-tendent la confiance du public, notamment la solidité des moyens d'appel, la gravité de l'infraction, la sécurité du public et les risques que l'accusé s'enfuie, les juges d'appel devraient garder à l'esprit que la confiance du public doit être mesurée du point de vue d'un membre raisonnable du public. Il s'agit d'une

informed of the circumstances of the case and respectful of society's fundamental values. There is no precise formula that can be applied to resolve the balance between enforceability and reviewability. A qualitative and contextual approach is required. Where the applicant has been convicted of murder or some other very serious crime, the public interest in enforceability will be high and will often outweigh the reviewability interest, particularly where there are lingering public safety or flight concerns and/or the grounds of appeal appear to be weak. On the other hand, where public safety or flight concerns are negligible, and where the grounds of appeal clearly surpass the "not frivolous" criterion, the public interest in reviewability may well overshadow the enforceability interest, even in the case of murder or other very serious offences.

A panel review under s. 680(1) of the *Criminal Code* should be guided by the following three principles. First, absent palpable and overriding error, the panel must show deference to the judge's findings of fact. Second, the panel may intervene and substitute its decision for that of the judge where it is satisfied that the judge erred in law or in principle, and the error was material to the outcome. Third, in the absence of legal error, the panel may intervene and substitute its decision for that of the judge where it concludes that the decision was clearly unwarranted. It follows that the Chief Justice should consider directing a review under s. 680(1) where it is arguable that the judge committed material errors of fact or law in arriving at the impugned decision, or that the decision was clearly unwarranted in the circumstances.

In this case, the appeal judge was satisfied that there were no appreciable public safety or flight risk concerns and the grounds of appeal were "clearly arguable" — meaning that they clearly surpassed the "not frivolous" criterion. In addition, as found by the trial judge, O's crime gravitated more toward the offence of manslaughter than to first degree murder, which attenuated the seriousness of the crime and hence the enforceability interest. The cumulative effect of these considerations made O's detention clearly unwarranted. The appeal judge erred in law by looking for grounds of appeal that

personne réfléchie, impartiale, bien informée sur les circonstances de l'affaire et respectueuse des valeurs fondamentales de la société. Il n'existe pas de formule précise qui puisse être appliquée pour résoudre la tension entre le principe de la force exécutoire des jugements et celui du caractère révisable de ceux-ci. L'application d'une approche qualitative et contextuelle est requise. Lorsque le demandeur a été déclaré coupable de meurtre ou d'un autre crime très grave, l'intérêt du public relatif à la force exécutoire des jugements sera élevé et l'emportera souvent sur l'intérêt lié au caractère révisable de ceux-ci, particulièrement dans les cas où il existe des préoccupations persistantes en matière de sécurité publique ou de risques de fuite, où les moyens d'appel semblent faibles, ou les deux. En revanche, lorsque les préoccupations en matière de sécurité publique ou de risques de fuite sont négligeables, et que les moyens d'appel vont clairement au delà des exigences du critère de « non-futilité », l'intérêt du public lié au caractère révisable des jugements peut très bien l'emporter sur l'intérêt lié à la force exécutoire de ceux-ci, même en cas de meurtre ou d'une autre infraction très grave.

La révision effectuée par une formation en vertu du par. 680(1) du *Code criminel* devrait être guidée par les trois principes suivants. Premièrement, en l'absence d'erreur manifeste et dominante, la formation doit faire preuve de déférence à l'égard des conclusions de fait du juge. Deuxièmement, elle peut intervenir et substituer sa décision à celle du juge lorsqu'elle est convaincue que celui-ci a commis une erreur de droit ou de principe, et que cette erreur était importante quant à l'issue de l'affaire. Troisièmement, en l'absence d'une erreur de droit, la formation peut intervenir et substituer sa décision à celle du juge dans les cas où elle conclut que celle-ci était clairement injustifiée. Il s'ensuit que le juge en chef devrait envisager d'ordonner une révision fondée sur le par. 680(1) dans les cas où il est possible de soutenir que le juge a commis des erreurs importantes de fait ou de droit lorsqu'il a rendu la décision contestée, ou que celle-ci était clairement injustifiée dans les circonstances.

En l'espèce, le juge d'appel était convaincu qu'il n'existait aucune préoccupation importante en matière de sécurité publique ou de risques de fuite et que les moyens d'appel pouvaient « nettement être soutenus », ce qui signifie qu'ils allaient clairement au delà des exigences du critère de « non-futilité ». En outre, comme l'a conclu le juge du procès, le crime commis par O se rapprochait davantage de l'infraction d'homicide involontaire coupable que de celle de meurtre au premier degré, ce qui atténuait la gravité du crime et, partant, l'intérêt lié à la force exécutoire des jugements. Cumulativement, ces considérations

would have virtually assured a new trial or an acquittal. The review panel erred in failing to intervene.

Cases Cited

Applied: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32; **referred to:** *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *R. v. Ponak*, [1972] 4 W.W.R. 316; *R. v. Iyer*, 2016 ABCA 407; *R. v. D'Amico*, 2016 QCCA 183; *R. v. Gill*, 2015 SKCA 96, 465 Sask. R. 253; *R. v. Xanthoudakis*, 2016 QCCA 1809; *R. v. Manasseri*, 2013 ONCA 647, 312 C.C.C. (3d) 132; *R. v. Passey*, 1997 ABCA 343, 121 C.C.C. (3d) 444; *R. v. Matteo*, 2016 QCCA 2046; *R. v. Sidhu*, 2015 ABCA 308, 607 A.R. 395; *R. v. Porisky*, 2012 BCCA 467, 293 C.C.C. (3d) 100; *R. v. Parsons* (1994), 117 Nfld. & P.E.I.R. 69; *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309; *R. v. Rhyason*, 2006 ABCA 120, 208 C.C.C. (3d) 193; *R. v. Roussin*, 2011 MBCA 103, 275 Man. R. (2d) 46; *R. v. Allen*, 2001 NFCA 44, 158 C.C.C. (3d) 225; *R. v. Delisle*, 2012 QCCA 1250; *R. v. Meda* (1981), 23 C.R. (3d) 174; *R. v. Olsen* (1996), 94 O.A.C. 62; *R. v. Roe*, 2008 BCCA 253, 256 B.C.A.C. 308; *R. v. Lees*, 1999 BCCA 441, 127 B.C.A.C. 280; *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328; *R. v. Baltovich* (2000), 47 O.R. (3d) 761; *R. v. Mapara*, 2001 BCCA 508, 158 C.C.C. (3d) 312.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 11(*e*).
Criminal Code, R.S.C. 1985, c. C-46, ss. 469, 515(1), (10)(c), 520, 521, 679(3), (4)(a), (10), 680(1).

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Trotter, Gary T. "Bail Pending Appeal: The Strength of the Appeal and the Public Interest Criterion" (2001), 45 C.R. (5th) 267.
Trotter, Gary T. *The Law of Bail in Canada*, 3rd ed. Toronto: Carswell, 2010 (loose-leaf updated 2016, release 1).

APPEAL from a judgment of the New Brunswick Court of Appeal (Drapeau C.J. and Larlee and Quigg JJ.A.), 2016 NBCA 15, 446 N.B.R. (2d) 325, 1168 A.P.R. 325, [2016] N.B.J. No. 70 (QL), 2016 CarswellNB 126 (WL Can.), affirming the decision of Richard J.A. denying bail to the appellant pending the determination of his appeal against conviction,

rendaient la détention de O clairement injustifiée. Le juge d'appel a commis une erreur de droit en recherchant des moyens d'appel qui auraient garanti pour ainsi dire la tenue d'un nouveau procès ou un acquittement. La formation de révision a commis une erreur en n'intervenant pas.

Jurisprudence

Arrêts appliqués : *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342; *R. c. Farinacci* (1993), 86 C.C.C. (3d) 32; **arrêts mentionnés :** *R. c. McNeil*, 2009 CSC 3, [2009] 1 R.C.S. 66; *R. c. Ponak*, [1972] 4 W.W.R. 316; *R. c. Iyer*, 2016 ABCA 407; *R. c. D'Amico*, 2016 QCCA 183; *R. c. Gill*, 2015 SKCA 96, 465 Sask. R. 253; *R. c. Xanthoudakis*, 2016 QCCA 1809; *R. c. Manasseri*, 2013 ONCA 647, 312 C.C.C. (3d) 132; *R. c. Passey*, 1997 ABCA 343, 121 C.C.C. (3d) 444; *R. c. Matteo*, 2016 QCCA 2046; *R. c. Sidhu*, 2015 ABCA 308, 607 A.R. 395; *R. c. Porisky*, 2012 BCCA 467, 293 C.C.C. (3d) 100; *R. c. Parsons* (1994), 117 Nfld. & P.E.I.R. 69; *R. c. Hall*, 2002 CSC 64, [2002] 3 R.C.S. 309; *R. c. Rhyason*, 2006 ABCA 120, 208 C.C.C. (3d) 193; *R. c. Roussin*, 2011 MBCA 103, 275 Man. R. (2d) 46; *R. c. Allen*, 2001 NFCA 44, 158 C.C.C. (3d) 225; *R. c. Delisle*, 2012 QCCA 1250; *R. c. Meda* (1981), 23 C.R. (3d) 174; *R. c. Olsen* (1996), 94 O.A.C. 62; *R. c. Roe*, 2008 BCCA 253, 256 B.C.A.C. 308; *R. c. Lees*, 1999 BCCA 441, 127 B.C.A.C. 280; *R. c. St-Cloud*, 2015 CSC 27, [2015] 2 R.C.S. 328; *R. c. Baltovich* (2000), 47 O.R. (3d) 761; *R. c. Mapara*, 2001 BCCA 508, 158 C.C.C. (3d) 312.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 11*e*).
Code criminel, L.R.C. 1985, c. C-46, art. 469, 515(1), (10)c), 520, 521, 679(3), (4)a), (10), 680(1).

Doctrine et autres documents cités

Trotter, Gary T. « Bail Pending Appeal : The Strength of the Appeal and the Public Interest Criterion » (2001), 45 C.R. (5th) 267.
Trotter, Gary T. *The Law of Bail in Canada*, 3rd ed., Toronto, Carswell, 2010 (loose-leaf updated 2016, release 1).

POURVOI contre un arrêt de la Cour d'appel du Nouveau-Brunswick (le juge en chef Drapeau et les juges Larlee et Quigg), 2016 NBCA 15, 446 R.N.-B. (2e) 325, 1168 A.P.R. 325, [2016] A.N.-B. no 70 (QL), 2016 CarswellNB 127 (WL Can.), qui a confirmé la décision du juge Richard refusant à l'appelant une mise en liberté sous caution en attendant

2016 CanLII 7428, [2016] N.B.J. No. 25 (QL), 2016 CarswellNB 42 (WL Can.). Appeal allowed.

Alan D. Gold, *Gary A. Miller*, *Q.C.*, and *James R. McConnell*, for the appellant.

Kathryn A. Gregory and *Derek Weaver*, for the respondent.

Gavin MacDonald and *Leslie Paine*, for the intervener the Attorney General of Ontario.

John M. Gordon, *Q.C.*, for the intervener the Attorney General of British Columbia.

Christine Rideout, for the intervener the Attorney General of Alberta.

Michael W. Lacy, *Susan M. Chapman* and *Andrew Menchynski*, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of the Court was delivered by

MOLDAVER J. —

I. Overview

[1] This appeal provides the Court with an opportunity to consider and clarify the statutory regime in the *Criminal Code*, R.S.C. 1985, c. C-46, which governs bail pending appeal. In particular, we are concerned with the principles and policy considerations by which appellate courts should be guided in deciding whether a person, like the appellant Dennis James Oland, who has been convicted of a serious crime and sentenced to a lengthy term of imprisonment, should be released on bail pending the determination of his appeal against conviction.

[2] The debate in this appeal focuses on the interpretation and application of two relatively brief

la décision sur l'appel de sa déclaration de culpabilité, 2016 CanLII 7428, [2016] A.N.-B. nº 25 (QL), 2016 CarswellNB 42 (WL Can.). Pourvoi accueilli.

Alan D. Gold, *Gary A. Miller*, *c.r.*, et *James R. McConnell*, pour l'appelant.

Kathryn A. Gregory et *Derek Weaver*, pour l'intimée.

Gavin MacDonald et *Leslie Paine*, pour l'intervenant le procureur général de l'Ontario.

John M. Gordon, *c.r.*, pour l'intervenant le procureur général de la Colombie-Britannique.

Christine Rideout, pour l'intervenant le procureur général de l'Alberta.

Michael W. Lacy, *Susan M. Chapman* et *Andrew Menchynski*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Version française du jugement de la Cour rendu par

LE JUGE MOLDAVER —

I. Aperçu

[1] Le présent pourvoi donne à la Cour l'occasion d'examiner et de clarifier le régime légal établi par le *Code criminel*, L.R.C. 1985, c. C-46, à l'égard de la mise en liberté sous caution en attendant l'issue de l'appel. Nous nous intéresserons en particulier aux considérations de politique générale et aux principes qui devraient guider les cours d'appel lorsqu'elles sont appelées à décider si une personne qui, comme l'appelant Dennis James Oland, a été déclarée coupable d'un crime grave et condamnée à une longue peine d'emprisonnement devrait être mise en liberté sous caution en attendant qu'il soit statué sur l'appel qu'elle a interjeté contre sa déclaration de culpabilité.

[2] Dans le présent pourvoi, le litige porte principalement sur l'interprétation et l'application de

provisions of the *Code* — s. 679(3) and s. 680(1). They read as follows:

679 . . .

(3) In the case of an appeal [against conviction], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that

(a) the appeal . . . is not frivolous;

(b) he will surrender himself into custody in accordance with the terms of the order; and

(c) his detention is not necessary in the public interest.

. . .

680 (1) A decision made by a judge under section . . . 679 may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,

(a) vary the decision; or

(b) substitute such other decision as, in its opinion, should have been made.

[3] In the present case, Mr. Oland applied for bail pending appeal following his conviction on a charge of second degree murder involving the death of his father. His application was denied under the public interest criterion set out in s. 679(3)(c). While public safety was not in issue, the appeal judge was not persuaded that public confidence in the administration of justice would be maintained if Mr. Oland were to be released. A review of that order directed by the Chief Justice of New Brunswick under s. 680(1) proved unsuccessful. In the opinion of the three-judge review panel, the decision of the appeal judge to detain Mr. Oland was "neither unreasonable nor the product of any material error of fact, law or mixed law and fact" (2016 NBCA 15, 446 N.B.R. (2d) 325, at para. 15).

deux dispositions relativement brèves du *Code*, les par. 679(3) et 680(1), qui sont rédigées ainsi :

679 . . .

(3) Dans le cas d'un appel [d'une déclaration de culpabilité], le juge de la cour d'appel peut ordonner que l'appelant soit mis en liberté en attendant la décision de son appel, si l'appelant établit à la fois :

a) que l'appel [. . .] n'est pas futile;

b) qu'il se livrera en conformité avec les termes de l'ordonnance;

c) que sa détention n'est pas nécessaire dans l'intérêt public.

. . .

680 (1) Une décision rendue par un juge en vertu de l'article [. . .] 679 peut, sur l'ordre du juge en chef ou du juge en chef suppléant de la cour d'appel, faire l'objet d'une révision par ce tribunal et celui-ci peut, s'il ne confirme pas la décision :

a) ou bien modifier la décision;

b) ou bien substituer à cette décision telle autre décision qui, à son avis, aurait dû être rendue.

[3] En l'espèce, après avoir été déclaré coupable du meurtre au deuxième degré de son père, M. Oland a présenté une demande de mise en liberté sous caution en attendant qu'il soit statué sur l'appel. Sa demande a été rejetée en raison du critère de l'intérêt public énoncé à l'al. 679(3)c). Bien que la sécurité du public n'ait pas été en cause, le juge d'appel n'était pas convaincu que la confiance du public envers l'administration de la justice serait préservée si M. Oland était libéré. La révision de cette ordonnance effectuée sur l'ordre du Juge en chef du Nouveau-Brunswick en application du par. 680(1) n'a pas été favorable à M. Oland. Selon la formation de trois juges qui a siégé en révision, la décision du juge d'appel de garder M. Oland en détention n'était « ni déraisonnable, ni le produit d'une erreur importante de fait, de droit, ou mixte de droit et de fait » (2016 NBCA 15, 446 R.N.-B. (2e) 325, par. 15).

[4] For the reasons that follow, I am respectfully of the view that detaining Mr. Oland on the public interest criterion was clearly unwarranted in the circumstances. Moreover, in his reasons, the learned appeal judge made a material legal error that affected the outcome. It follows, in my respectful view, that the review panel erred in failing to intervene.

[5] As it turns out, prior to Mr. Oland's appeal being argued in this Court, the Court of Appeal of New Brunswick heard and allowed his appeal from conviction and ordered a new trial. In consequence, Mr. Oland was released on bail pending his re-trial. Accordingly, his appeal to this Court from the order of the review panel upholding his detention order was rendered moot. However, for reasons which I will explain, we chose to hear the appeal on its merits — and having done so, we would allow the appeal but make no further order.

II. Factual Background

[6] On July 7, 2011, Mr. Oland's father, Richard Oland, was found bludgeoned to death at his office in Saint John, New Brunswick. During the ensuing police investigation, Mr. Oland became the primary suspect. He was eventually arrested and charged with second degree murder on November 12, 2013.

[7] On November 18, 2013, following a contested hearing, Mr. Oland was released on bail pending trial upon entering into a surety recognizance in the amount of $50,000, with conditions. On December 19, 2015, after a three-month trial by judge and jury, he was convicted of second degree murder. On February 11, 2016, the trial judge sentenced him to life imprisonment with no chance of parole for 10 years.

[4] Pour les motifs qui suivent et, soit dit en tout respect, j'estime que le fait de fonder la détention de M. Oland sur le critère de l'intérêt public était clairement injustifié dans les circonstances. De plus, dans ses motifs, le juge d'appel a commis une erreur importante de droit qui a eu une incidence sur l'issue de l'affaire. Il s'ensuit, à mon avis, que la formation de révision a commis une erreur en n'intervenant pas.

[5] Il s'avère qu'avant même que le pourvoi de M. Oland ne soit débattu devant notre Cour, la Cour d'appel du Nouveau-Brunswick a entendu et accueilli l'appel qu'il a interjeté de sa déclaration de culpabilité, et a ordonné la tenue d'un nouveau procès. M. Oland a donc été mis en liberté sous caution en attendant l'issue de son nouveau procès. Par conséquent, le pourvoi qu'il a formé devant notre Cour contre la décision de la formation de révision de confirmer son ordonnance de détention est devenu théorique. Toutefois, pour des raisons que j'expliquerai plus loin, nous avons décidé d'entendre l'appel sur le fond et, après l'avoir fait, nous sommes d'avis de l'accueillir, mais de ne rendre aucune autre ordonnance.

II. Contexte factuel

[6] Le 7 juillet 2011, le père de M. Oland, Richard Oland, a été trouvé battu à mort dans son bureau à Saint John, au Nouveau-Brunswick. Lors de l'enquête policière qui a suivi, M. Oland est devenu le suspect principal. Le 12 novembre 2013, il a finalement été arrêté et accusé de meurtre au deuxième degré.

[7] Le 18 novembre 2013, à l'issue d'une audience contestée et après avoir contracté un engagement de caution de 50 000 $ assorti de conditions, M. Oland a été mis en liberté sous caution en attendant l'issue de son procès. Au terme d'un procès de trois mois devant juge et jury, il a été déclaré coupable de meurtre au deuxième degré le 19 décembre 2015. Le 11 février 2016, le juge du procès l'a condamné à l'emprisonnement à perpétuité sans possibilité de libération conditionnelle avant 10 ans.

[8] In his sentencing reasons, the trial judge found that apart from the offence for which he now stood convicted, Mr. Oland was "a well-educated 47 year old husband and devoted father without a criminal past", and "a loving/caring man; a man at the heart of his family and a contributing member of his community" (2016 NBQB 43, 447 N.B.R. (2d) 7, at paras. 14 and 18). In the opinion of the trial judge, Mr. Oland posed no realistic risk of future dangerousness and his prospect of successfully reintegrating into society after serving his sentence was excellent. As for the offence, the trial judge characterized it as "brutal", noting approximately 40 blunt and sharp force injuries inflicted to the deceased's head. On the other hand, the crime involved a spontaneous outburst that was the product of a long-standing dysfunctional family dynamic and immense stress. For this reason, the trial judge found that it fell at the "lower end" on the continuum of moral culpability for second degree murder, closer to manslaughter than to first degree murder.

[9] On January 20, 2016, Mr. Oland filed a notice of appeal from conviction with the Court of Appeal of New Brunswick. He advanced numerous grounds of appeal relating to three principal areas: errors in the jury charge; errors in admitting certain evidence; and the reasonableness of the verdict. At the same time, he applied under s. 679(3) of the *Code* for bail pending the determination of his appeal. The outcome of that application is the focus of this appeal.

III. Decisions Below

A. *Decision of the Appeal Judge, 2016 CanLII 7428 (Richard J.A.)*

[10] Mr. Oland's application for release pending appeal proceeded before a single judge of the Court of Appeal. In support of his application, Mr. Oland filed numerous affidavits attesting to his good character, past compliance with release conditions, and

[8] Dans ses motifs de détermination de la peine, le juge du procès a conclu que, mis à part l'infraction dont il venait d'être reconnu coupable, M. Oland était [TRADUCTION] « un époux et un père de 47 ans dévoué, instruit et sans antécédents judiciaires », ainsi « [qu']un homme aimant et attentionné; une figure centrale au sein de sa famille et une personne active au sein de sa collectivité » (2016 NBQB 43, 447 R.N.-B. (2e) 7, par. 14 et 18). À son avis, M. Oland ne présentait aucun risque réaliste de dangerosité future et avait d'excellentes chances de réussir sa réintégration dans la société après avoir purgé sa peine. Quant à l'infraction, le juge du procès l'a qualifiée de « brutale », faisant remarquer que quelque 40 blessures contondantes et pénétrantes avaient été infligées à la tête de la victime. Il a toutefois souligné que le crime avait été commis lors d'un emportement spontané qui découlait d'une dynamique familiale dysfonctionnelle de longue date et d'un stress énorme. Pour cette raison, le juge du procès a conclu que le crime se situait à « [l']extrémité inférieure » du continuum de la culpabilité morale pour un meurtre au deuxième degré, et qu'il s'apparentait davantage à un homicide involontaire coupable qu'à un meurtre au premier degré.

[9] Le 20 janvier 2016, M. Oland a déposé un avis d'appel de la déclaration de culpabilité devant la Cour d'appel du Nouveau-Brunswick. Il a invoqué de nombreux moyens d'appel portant sur trois points principaux : erreurs dans l'exposé au jury, erreurs liées à l'admission de certains éléments de preuve et caractère raisonnable du verdict. Parallèlement, il a demandé, en vertu du par. 679(3) du *Code*, sa mise en liberté sous caution en attendant qu'il soit statué sur son appel. Le présent pourvoi porte sur l'issue de cette demande.

III. Décisions des juridictions inférieures

A. *Décision du juge d'appel, 2016 CanLII 7428 (le juge Richard)*

[10] La demande de mise en liberté en attendant la décision sur l'appel présentée par M. Oland a été entendue devant un juge de la Cour d'appel siégeant seul. À l'appui de sa demande, M. Oland a déposé de nombreux affidavits témoignant de sa

his roots in the community. In addition, he filed affidavits from two family members who were prepared to act as sureties and risk substantial sums of money should he breach the terms of his release order. Finally, he submitted excerpts from the trial transcripts pertinent to his grounds of appeal.

[11] In ruling on the application, the appeal judge found that Mr. Oland had discharged his onus on the first two criteria for release under s. 679(3)(a) and (b) of the *Code*, namely: his appeal was not frivolous and he would surrender into custody as required. The appeal judge then considered the public interest criterion under s. 679(3)(c), dividing it into two parts — public safety and public confidence in the administration of justice.

[12] Commencing with public safety, the appeal judge was satisfied that Mr. Oland posed "no danger to the public at large" (para. 15). In this regard, he adopted the findings of the sentencing judge that Mr. Oland was a man of prior good behaviour, without criminal record, and that the offence was largely the product of unique relational and situation-specific difficulties existing between him and his father.

[13] Turning to public confidence, the appeal judge found that the gravity and brutality of the offence weighed in favour of Mr. Oland's detention. And while the grounds of appeal put forward by him were "clearly arguable", they were not of such unique strength as to "virtually assure a new trial or an acquittal" (paras. 30 and 32). On balance, the appeal judge was not persuaded that public confidence in the administration of justice would be maintained if Mr. Oland were to be released. Accordingly, he dismissed the application for release pending appeal.

bonne moralité, de son respect antérieur des conditions de sa mise en liberté et de son enracinement dans la collectivité. Il a en outre déposé des affidavits de deux membres de sa famille qui étaient disposés à se porter caution et à risquer de perdre des sommes importantes d'argent en cas de manquement aux conditions de l'ordonnance de mise en liberté. Enfin, il a présenté des extraits de la transcription du procès qu'il estimait pertinents pour étayer ses moyens d'appel.

[11] Dans sa décision sur la demande, le juge d'appel a conclu que M. Oland s'était acquitté de son fardeau relativement aux deux premiers critères de la mise en liberté prévus aux al. 679(3)a) et b) du *Code* : son appel n'était pas futile et il se livrerait au besoin. Le juge d'appel a ensuite examiné le critère de l'intérêt public énoncé à l'al. 679(3)c), et l'a divisé en deux volets : la sécurité du public et la confiance du public envers l'administration de la justice.

[12] Tout d'abord, en ce qui concerne la sécurité publique, le juge d'appel a estimé que M. Oland ne présentait pas de « danger pour le public » (par. 15). À cet égard, il a souscrit aux conclusions du juge ayant statué sur la peine, à savoir que M. Oland avait eu jusque-là une bonne conduite, qu'il n'avait pas d'antécédents judiciaires et que l'infraction était en grande partie le fruit de difficultés singulières existant entre lui et son père, difficultés imputables à leurs relations et à la situation.

[13] Pour ce qui est de la confiance du public, le juge d'appel a conclu que la gravité et la brutalité de l'infraction militaient en faveur de la détention de M. Oland. En outre, même si les moyens d'appel qu'il avait présentés pouvaient « nettement être soutenus », ils n'étaient pas à ce point solides qu'ils « garanti[ssaient] » pour ainsi dire « un acquittement ou la tenue d'un nouveau procès » (par. 30 et 32). Tout bien considéré, le juge d'appel n'était pas convaincu que la confiance du public envers l'administration de la justice serait préservée si M. Oland était libéré. Il a par conséquent rejeté la demande de mise en liberté en attendant la décision sur l'appel.

B. *Decision of the Review Panel, 2016 NBCA 15, 446 N.B.R. (2d) 325 (Drapeau C.J. and Larlee and Quigg JJ.A.)*

[14] On application by Mr. Oland under s. 680(1) of the *Code*, the Chief Justice of New Brunswick directed a review of his detention order before a three-judge panel of the court.

[15] In arriving at its decision, the panel adopted a deferential approach to the review, characterizing the appeal judge's decision to detain Mr. Oland as a "judgment call". While the panel recognized that the grounds of appeal put forward by Mr. Oland were "serious", he nonetheless stood convicted of a brutal murder for which he had received a mandatory life sentence. In the circumstances, denying him bail would not render his appeal pointless. Of primary significance, Mr. Oland had failed to show any error in the reasons of the appeal judge that would warrant interference; nor had he persuaded the panel that his detention in the circumstances was clearly unreasonable. Accordingly, the application for review was dismissed.

IV. Analysis

A. *Mootness*

[16] On October 24, 2016, the Court of Appeal of New Brunswick allowed Mr. Oland's appeal from conviction and ordered a new trial. On October 25, 2016, he was granted bail pending his re-trial. In view of these events, the parties were alerted that they should be prepared to address the issue of mootness.

[17] At the commencement of the hearing, the Court raised the issue of mootness and we were urged by the parties and interveners to hear the appeal on its merits. Mr. Oland and the respondent

B. *Décision de la formation de révision, 2016 NBCA 15, 446 R.N.-B. (2e) 325 (le juge en chef Drapeau et les juges Larlee et Quigg)*

[14] À la suite d'une demande présentée par M. Oland en vertu du par. 680(1) du *Code*, le Juge en chef du Nouveau-Brunswick a ordonné la révision de son ordonnance de détention devant une formation de trois juges de la cour.

[15] La formation a pris sa décision en appliquant une approche empreinte de déférence, considérant que la décision du juge d'appel de détenir M. Oland découlait d'un « jugement personnel », autrement dit qu'il s'agissait d'une question d'appréciation. Bien qu'elle ait reconnu que les moyens d'appel présentés par M. Oland étaient « sérieux », elle a rappelé que M. Oland avait néanmoins été reconnu coupable d'un meurtre brutal pour lequel il s'était vu imposer une peine obligatoire d'emprisonnement à perpétuité. Dans les circonstances, le fait de lui refuser une mise en liberté sous caution ne rendrait pas son appel vain. Une importance primordiale a été accordée au fait que M. Oland n'avait pas su démontrer l'existence, dans les motifs du juge d'appel, d'erreurs justifiant une intervention, et qu'il n'avait pas non plus convaincu la formation que sa détention était clairement déraisonnable dans les circonstances. Par conséquent, la demande de révision a été rejetée.

IV. Analyse

A. *Caractère théorique*

[16] Le 24 octobre 2016, la Cour d'appel du Nouveau-Brunswick a accueilli l'appel de la déclaration de culpabilité de M. Oland, et a ordonné la tenue d'un nouveau procès. Le 25 octobre 2016, M. Oland a obtenu une mise en liberté sous caution en attendant l'issue de son nouveau procès. Dans ces circonstances, les parties ont été averties qu'elles devraient être prêtes à débattre de la question du caractère théorique.

[17] Au début de l'audience, notre Cour a soulevé la question du caractère théorique, et les parties comme les intervenants nous ont demandé instamment d'entendre le pourvoi sur le fond. M. Oland et

Crown submitted that this Court's decision was potentially of significance to them, as Mr. Oland might find himself in the same situation following his re-trial. In addition, all concerned submitted that guidance was needed from this Court to resolve inconsistent approaches to bail taken by appellate courts across the country. And as bail pending appeal was, by its temporary nature, evasive of appellate review, this was an appropriate case to resolve the conflicting jurisprudence: see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 2.

[18] In view of the unanimous position taken by the parties and interveners, and considering that the appeal meets the criteria established in *Borowski*, the Court determined that it would proceed to hear the appeal on its merits.

B. *Bail Pending Appeal Under Section 679(3) of the Criminal Code*

(1) The Three Statutory Criteria

[19] The three statutory criteria for bail pending appeal are found in s. 679(3) of the *Code*:

679 . . .

(3) In the case of an appeal [against conviction], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that

(a) the appeal . . . is not frivolous;

(b) he will surrender himself into custody in accordance with the terms of the order; and

(c) his detention is not necessary in the public interest.

The applicant seeking bail bears the burden of establishing that each criterion is met on a balance

le ministère public intimé ont fait valoir que la décision que nous rendrions pourrait revêtir une certaine importance pour eux, car M. Oland risquait de se retrouver dans la même situation à l'issue de son nouveau procès. De plus, tous les intéressés ont soutenu que notre Cour se devait de fournir des indications qui permettent de trancher parmi les approches contradictoires adoptées par des cours d'appel dans les diverses régions du pays à l'égard de la mise en liberté sous caution. En outre, étant donné que, du fait de sa nature temporaire, la mise en liberté sous caution en attendant la décision sur l'appel ne peut être révisée en appel, la présente affaire constituait une occasion propice pour résoudre les contradictions de la jurisprudence (voir *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342; *R. c. McNeil*, 2009 CSC 3, [2009] 1 R.C.S. 66, par. 2).

[18] Vu la position unanime des parties et des intervenants, et étant donné que le pourvoi satisfait aux critères établis dans l'arrêt *Borowski*, notre Cour a décidé d'entendre le pourvoi sur le fond.

B. *Mise en liberté sous caution en attendant la décision sur l'appel prévue au par. 679(3) du Code criminel*

(1) Les trois critères établis par la loi

[19] Les trois critères pour la mise en liberté sous caution en attendant la décision sur l'appel sont énoncés au par. 679(3) du *Code* :

679 . . .

(3) Dans le cas d'un appel [d'une déclaration de culpabilité], le juge de la cour d'appel peut ordonner que l'appelant soit mis en liberté en attendant la décision de son appel, si l'appelant établit à la fois :

a) que l'appel [. . .] n'est pas futile;

b) qu'il se livrera en conformité avec les termes de l'ordonnance;

c) que sa détention n'est pas nécessaire dans l'intérêt public.

Il incombe au demandeur qui sollicite une mise en liberté sous caution d'établir, selon la prépondérance

of probabilities: *R. v. Ponak*, [1972] 4 W.W.R. 316 (B.C.C.A.), at pp. 317-18; *R. v. Iyer*, 2016 ABCA 407, at para. 7 (CanLII); *R. v. D'Amico*, 2016 QCCA 183, at para. 10 (CanLII); *R. v. Gill*, 2015 SKCA 96, 465 Sask. R. 253, at para. 14.

[20] The first criterion requires the appeal judge to examine the grounds of appeal with a view to ensuring that they are not "not frivolous" (s. 679(3)(a)). Courts have used different language to describe this standard. While not in issue on this appeal, the "not frivolous" test is widely recognized as being a very low bar: see *R. v. Xanthoudakis*, 2016 QCCA 1809, at paras. 4-7 (CanLII); *R. v. Manasseri*, 2013 ONCA 647, 312 C.C.C. (3d) 132, at para. 38; *R. v. Passey*, 1997 ABCA 343, 121 C.C.C. (3d) 444, at paras. 6-8; G. T. Trotter, *The Law of Bail in Canada* (3rd ed. (loose-leaf)), at pp. 10-13 to 10-15.

[21] The second criterion requires the applicant to show that "he will surrender himself into custody in accordance with the terms of the [release] order" (s. 679(3)(b)). The appeal judge must be satisfied that the applicant will not flee the jurisdiction and will surrender into custody as required.

[22] The third criterion requires the applicant to establish that "his detention is not necessary in the public interest" (s. 679(3)(c)). It is upon this criterion that Mr. Oland's bid for bail pending appeal failed — and it is on this criterion that guidance from the Court is sought. In particular, the parties ask this Court for guidance on how the strength of the grounds of appeal from a conviction should be considered in determining whether detention is necessary in the public interest.

(2) The *Farinacci* Approach to the Public Interest Criterion

[23] In *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont. C.A.), Arbour J.A. (as she then was) considered the meaning of the words "public interest" in

des probabilités, que chacun de ces critères est respecté (*R. c. Ponak*, [1972] 4 W.W.R. 316 (C.A. C.-B.), p. 317-318; *R. c. Iyer*, 2016 ABCA 407, par. 7 (CanLII); *R. c. D'Amico*, 2016 QCCA 183, par. 10 (CanLII); *R. c. Gill*, 2015 SKCA 96, 465 Sask. R. 253, par. 14).

[20] Le premier critère requiert du juge d'appel qu'il examine les moyens d'appel en vue de s'assurer qu'ils ne sont « pas futile[s] » (al. 679(3)a)). Les tribunaux ont utilisé des termes différents pour décrire ce critère. Bien que cette question ne soit pas en litige dans le présent pourvoi, il est largement reconnu que le critère exigeant que l'appel ne soit « pas futile » (ci-après le critère de « non-futilité ») est très peu exigeant (voir *R. c. Xanthoudakis*, 2016 QCCA 1809, par. 4-7 (CanLII); *R. c. Manasseri*, 2013 ONCA 647, 312 C.C.C. (3d) 132, par. 38; *R. c. Passey*, 1997 ABCA 343, 121 C.C.C. (3d) 444, par. 6-8; G. T. Trotter, *The Law of Bail in Canada* (3e éd. (feuilles mobiles)), p. 10-13 à 10-15).

[21] Suivant le deuxième critère, le demandeur doit démontrer « qu'il se livrera en conformité avec les termes de l'ordonnance [de mise en liberté] » (al. 679(3)b)). Le juge d'appel doit être convaincu que le demandeur ne fuira pas le ressort du tribunal et qu'il se livrera au besoin.

[22] Le troisième critère oblige le demandeur à établir que « sa détention n'est pas nécessaire dans l'intérêt public » (al. 679(3)c)). C'est le critère sur lequel se fonde le rejet de la demande de mise en liberté sous caution de M. Oland en attendant la décision sur l'appel, et le critère à l'égard duquel on a demandé à notre Cour de fournir des précisions. En particulier, les parties demandent à la Cour de donner des indications sur la façon dont il convient d'examiner la solidité des moyens invoqués pour interjeter appel d'une déclaration de culpabilité lorsqu'il s'agit de déterminer si la détention est nécessaire dans l'intérêt public.

(2) Le critère de l'intérêt public selon l'arrêt *Farinacci*

[23] Dans *R. c. Farinacci* (1993), 86 C.C.C. (3d) 32 (C.A. Ont.), la juge Arbour, qui siégeait alors à la Cour d'appel, a examiné la signification des mots

the context of s. 679(3)(c). In the course of her careful analysis, she determined that the public interest criterion consisted of two components: public safety and public confidence in the administration of justice (pp. 47-48).

[24] Justice Arbour did not delve into the public safety component. She found that it related to the protection and safety of the public and essentially tracked the familiar requirements of the so-called "secondary ground" governing an accused's release pending trial (pp. 45 and 47-48). The public confidence component, on the other hand, was more nuanced and required elaboration. It involved the weighing of two competing interests: enforceability and reviewability.

[25] According to Arbour J.A., the enforceability interest reflected the need to respect the general rule of the immediate enforceability of judgments. Reviewability, on the other hand, reflected society's acknowledgement that our justice system is not infallible and that persons who challenge the legality of their convictions should be entitled to a meaningful review process — one which did not require them to serve all or a significant part of a custodial sentence only to find out on appeal that the conviction upon which it was based was unlawful (pp. 47-49).

[26] Almost a quarter of a century has passed since *Farinacci* was decided. The public interest framework which it established has withstood the test of time. It has been universally endorsed by appellate courts across the country: see, e.g., *R. v. Matteo*, 2016 QCCA 2046, at para. 20 (CanLII); *R. v. Sidhu*, 2015 ABCA 308, 607 A.R. 395, at paras. 5-6; *R. v. Porisky*, 2012 BCCA 467, 293 C.C.C. (3d) 100, at paras. 8 and 14-15; *R. v. Parsons* (1994), 117 Nfld. & P.E.I.R. 69 (C.A.), at paras. 30-34. Moreover, all of the parties and interveners in this appeal are content with the *Farinacci* framework. None has spoken against it; none has asked us to revisit it — and I see no reason to do so. *Farinacci* remains good law in my view.

« intérêt public » dans le contexte de l'al. 679(3)c). Dans sa minutieuse analyse, elle a statué que le critère de l'intérêt public comportait deux volets : la sécurité publique et la confiance du public envers l'administration de la justice (p. 47-48).

[24] La juge Arbour ne s'est pas attardée au volet de la sécurité publique. Elle a conclu qu'il avait trait à la protection et à la sécurité du public et reprenait essentiellement les exigences bien connues de ce qu'on appelle le « motif secondaire » qui régit la mise en liberté d'un accusé en attendant l'issue de son procès (p. 45 et 47-48). Le volet relatif à la confiance du public était quant à lui plus nuancé et requérait des précisions. Il supposait la mise en balance de deux intérêts opposés : la force exécutoire des jugements et le caractère révisable de ceux-ci.

[25] Selon la juge Arbour, l'intérêt basé sur la force exécutoire des jugements reflétait la nécessité de respecter la règle générale du caractère exécutoire immédiat des jugements. L'intérêt fondé sur le caractère révisable des jugements traduisait quant à lui la reconnaissance par la société que notre système de justice n'est pas infaillible et que les personnes qui contestent la légalité de leurs déclarations de culpabilité devraient avoir droit à un processus véritable de révision, à savoir à un processus qui ne les oblige pas à purger l'ensemble ou une partie appréciable de leur peine d'emprisonnement, pour se rendre compte au terme de l'appel que la déclaration de culpabilité sur laquelle cette peine reposait était illégale (p. 47-49).

[26] Presque un quart de siècle s'est écoulé depuis l'arrêt *Farinacci*. Le cadre qu'il a établi relativement à l'intérêt public a résisté à l'épreuve du temps. Il a été universellement adopté par des cours d'appel de diverses régions du pays (voir, p. ex., *R. c. Matteo*, 2016 QCCA 2046, par. 20 (CanLII); *R. c. Sidhu*, 2015 ABCA 308, 607 A.R. 395, par. 5-6; *R. c. Porisky*, 2012 BCCA 467, 293 C.C.C. (3d) 100, par. 8 et 14-15; *R. c. Parsons* (1994), 117 Nfld. & P.E.I.R. 69 (C.A.), par. 30-34). De plus, toutes les parties et tous les intervenants au présent pourvoi sont satisfaits du cadre établi dans *Farinacci*. Personne ne l'a contesté ni ne nous a demandé de le revoir, et je ne vois aucune raison de le faire. Cet arrêt continue d'exposer valablement le droit selon moi.

[27] In so concluding, I should not be taken to mean — nor do I understand *Farinacci* to have said — that the public safety component and the public confidence component are to be treated as silos. To be sure, there will be cases where public safety considerations alone are sufficient to warrant a detention order in the public interest. However, as I will explain, where the public safety threshold has been met by an applicant seeking bail pending appeal, residual public safety concerns or the absence of any public safety concerns remain relevant and should be considered in the public confidence analysis.

[27] En concluant ainsi, je ne veux pas dire — et je ne considère pas non plus qu'il ressort de l'arrêt *Farinacci* — que le volet de la sécurité publique et celui de la confiance du public doivent être considérés isolément. Il y aura assurément des cas où des considérations de sécurité publique seront à elles seules suffisantes pour justifier une ordonnance de détention dans l'intérêt public. Toutefois, comme je vais l'expliquer plus loin, lorsque la personne qui sollicite sa mise en liberté en attendant la décision sur l'appel satisfait au critère préliminaire de la sécurité publique, l'existence de préoccupations résiduelles en matière de sécurité du public ou l'absence de telles préoccupations demeurent des considérations pertinentes, dont il convient de tenir compte dans l'analyse relative à la confiance du public.

[28] The challenge with *Farinacci* arises not from its framework, but from its application in cases where the public confidence component is raised. Appellate judges continue to have difficulty resolving the tension between enforceability and reviewability, especially in cases like the present one, where they are faced with a serious crime on the one hand, and a strong candidate for bail pending appeal on the other.

[28] Le problème que pose *Farinacci* ne tient pas à son cadre, mais à son application dans des affaires où la confiance du public est invoquée. Les juges d'appel continuent d'éprouver de la difficulté à résoudre la tension entre le principe de la force exécutoire des jugements et celui de leur caractère révisable, particulièrement dans des affaires comme celle qui nous occupe où ils sont en présence, d'une part, d'un crime grave et, d'autre part, d'un bon candidat à une mise en liberté sous caution en attendant l'issue de l'appel.

[29] Fortunately, cases like this tend to be more the exception than the rule. Appellate judges across the country deal with applications for bail pending appeal on a regular basis. Of those, only a fraction are likely to involve the public confidence component. Rarely does this component play a role, much less a central role, in the decision to grant or deny bail pending appeal. As Donald J.A. observed in *Porisky*, at para. 47:

[29] Heureusement, les affaires de cette nature relèvent davantage de l'exception que de la règle. Même si des juges d'appel de partout au pays entendent régulièrement des demandes de mise en liberté sous caution en attendant l'issue de l'appel, une fraction seulement de celles-ci est susceptible de mettre en cause la confiance du public. Cette question joue rarement un rôle — et encore moins un rôle central — dans la décision d'accorder ou de refuser une telle demande. Comme l'a fait remarquer le juge d'appel Donald dans l'arrêt *Porisky*, par. 47 :

> Not every offence is serious enough to engage an assessment of the merits. There is no need to go beyond the frivolous threshold in cases unlikely to arouse a concern about public confidence. . . . [W]e should expect Crown counsel to recognize that the continuum runs from petty theft to first degree murder and to exercise good judgment

> [TRADUCTION] Les infractions ne sont pas toutes suffisamment graves pour justifier un examen au fond. Dans les affaires qui ne sont pas susceptibles de soulever une préoccupation relative à la confiance du public, il n'est pas nécessaire d'aller au delà du critère préliminaire de non-futilité. [. . .] [I]l est permis de penser que les avocats

in raising public confidence only in those cases where the offence is at the serious end of the scale.

[30] That said, difficult cases do occasionally arise in which the public confidence component is raised. In the hope of assisting appellate judges, I propose to elaborate somewhat on the competing interests of enforceability and reviewability identified in *Farinacci*. In particular, I will point out some of the key factors that inform these interests and provide appellate judges with guidance as to how to weigh them in any given case.

(3) Section 515(10)(c) of the *Criminal Code* Identifies Factors That Inform the Public Confidence Analysis

(a) *The Rationales for Considering Section 515(10)(c)*

[31] In section 679(3)(c) of the *Code*, Parliament has not provided appellate judges with any direction as to how a release pending appeal order is likely to affect public confidence in the administration of justice. Fortunately, it has done so in the admittedly different but related context of bail pending trial. Under s. 515(10)(c), Parliament has identified four factors that judges may consider in assessing whether a detention order is necessary to maintain public confidence in the administration of justice:

515 . . .

(10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

. . .

(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

du ministère public sont conscients que le continuum va du menu larcin au meurtre au premier degré et font preuve de jugement en ne soulevant la question de la confiance du public que dans le cas des infractions les plus graves.

[30] Cela dit, il survient effectivement à l'occasion des cas difficiles où se pose la question de la confiance du public. Dans l'espoir d'aider les juges d'appel, je propose d'apporter quelques précisions sur les intérêts opposés mentionnés dans *Farinacci*, à savoir la force exécutoire des jugements et le caractère révisable de ceux-ci. Je soulignerai en particulier certains des facteurs clés qui sous-tendent ces intérêts et qui fournissent aux juges d'appel des indications sur la façon de les soupeser dans un cas donné.

(3) L'alinéa 515(10)c) du *Code criminel* fait état de facteurs susceptibles de guider l'analyse relative à la confiance du public

a) *Les raisons d'examiner l'al. 515(10)c)*

[31] À l'alinéa 679(3)c) du *Code*, le législateur n'a donné aux juges d'appel aucune indication sur la manière dont une ordonnance de mise en liberté en attendant l'issue de l'appel pourrait porter atteinte à la confiance du public envers l'administration de la justice. Heureusement, il l'a toutefois fait dans le contexte, certes différent mais connexe, de la mise en liberté sous caution en attendant l'issue du procès. À l'alinéa 515(10)c), le législateur a énuméré quatre facteurs dont les juges peuvent tenir compte lorsqu'ils décident si une ordonnance de détention est nécessaire pour ne pas miner la confiance du public envers l'administration de la justice :

515 . . .

(10) Pour l'application du présent article, la détention d'un prévenu sous garde n'est justifiée que dans l'un des cas suivants :

. . .

c) sa détention est nécessaire pour ne pas miner la confiance du public envers l'administration de la justice, compte tenu de toutes les circonstances, notamment les suivantes :

(i) the apparent strength of the prosecution's case,

(ii) the gravity of the offence,

(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

[32] While these factors are tailored to the pre-trial context, a corollary form of the interest underlying each exists in the appellate context. In my view, these same factors — with appropriate modifications to reflect the post-conviction context — should be accounted for in considering how, if at all, a release pending appeal order is likely to affect public confidence in the administration of justice.

[33] Approaching the matter this way advances an important policy consideration. It has the virtue of promoting consistency and harmony between the trial and appellate contexts so that, together, they may be seen as providing a cohesive and comprehensive statement of the law governing bail in Canada. Importantly, it accords with the basic principle that, in general, bail should not be more readily accessible for someone who has been convicted of a crime than for someone who is awaiting trial and is presumed innocent. Approaching the two contexts in that fashion can only serve to foster the goals of fairness and coherence and enhance society's confidence in the administration of justice.

[34] Greater accessibility to bail pending trial is rooted in the presumption of innocence. Accused persons charged with an offence in Canada are presumed to be innocent, and they remain so unless and until their guilt is proved beyond a reasonable doubt. With this in mind, the framers of the *Canadian*

(i) le fait que l'accusation paraît fondée,

(ii) la gravité de l'infraction,

(iii) les circonstances entourant sa perpétration, y compris l'usage d'une arme à feu,

(iv) le fait que le prévenu encourt, en cas de condamnation, une longue peine d'emprisonnement ou, s'agissant d'une infraction mettant en jeu une arme à feu, une peine minimale d'emprisonnement d'au moins trois ans.

[32] Bien que ces facteurs soient adaptés au contexte qui précède le procès, l'intérêt qui sous-tend chacun d'eux a son corollaire dans le contexte de l'appel. À mon avis, ces mêmes facteurs doivent être pris en considération — avec les adaptations qui s'imposent pour tenir compte du contexte postérieur à la déclaration de culpabilité — afin de déterminer de quelle manière, si tant est qu'elle ait un tel effet, une ordonnance de mise en liberté en attendant l'issue de l'appel pourrait porter atteinte à la confiance du public envers l'administration de la justice.

[33] Le fait d'examiner la question de cette façon favorise une considération de politique générale importante. Cette approche a en effet l'avantage de promouvoir l'uniformité et l'harmonie des règles applicables dans le contexte du procès et dans celui de l'appel, afin qu'il soit possible de considérer que, conjointement, elles énoncent de façon cohérente et exhaustive le droit régissant la mise en liberté sous caution au Canada. Facteur important, cette façon de faire est compatible avec le principe fondamental selon lequel, en règle générale, la mise en liberté sous caution ne devrait pas être plus facile à obtenir par une personne qui a été déclarée coupable d'un crime que par une personne qui attend son procès et qui est présumée innocente. Envisager les deux contextes de cette manière ne peut que favoriser les objectifs d'équité et de cohérence, et accroître la confiance de la société envers l'administration de la justice.

[34] La possibilité accrue d'obtenir une mise en liberté sous caution en attendant l'issue du procès repose sur la présomption d'innocence. Les personnes accusées d'une infraction au Canada sont présumées innocentes et elles le demeurent tant et aussi longtemps que leur culpabilité n'a pas été prouvée hors

Charter of Rights and Freedoms saw fit to include in s. 11(*e*) the right of every person charged with an offence "not to be denied reasonable bail without just cause": *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, at para. 13.

[35] By contrast, once a conviction is entered, the presumption of innocence is displaced and s. 11(*e*) of the *Charter* no longer applies. This is reflected in the shift in onus which occurs when a person who has been convicted and sentenced applies for bail pending appeal. Unlike the pre-trial context, where by and large the onus rests on the Crown to establish that an accused should be detained in custody, for appeal purposes, Parliament has seen fit to reverse the onus onto the applicant in all cases.[1]

[36] With these thoughts in mind, I turn to the enforceability and reviewability interests to explain how, with appropriate modifications, the public confidence factors listed in s. 515(10)(c) are instructive in identifying the factors that make up the public confidence component in s. 679(3)(c).

(b) *The Enforceability Interest*

[37] In assessing whether public confidence concerns support a pre-trial detention order under s. 515(10)(c), the seriousness of the crime plays an important role. The more serious the crime, the greater the risk that public confidence in the administration of justice will be undermined if the accused is released on bail pending trial. So too for bail pending appeal. In considering the public confidence

[1] Whereas s. 679(3) requires an applicant "to establish" that the three statutory criteria have been met, s. 515(1) generally places the onus on the Crown to "sho[w] cause . . . why the detention of the accused in custody is justified".

de tout doute raisonnable. Dans cette optique, les auteurs de la *Charte canadienne des droits et libertés* ont jugé bon de prévoir, à l'al. 11*e*) de ce texte, que tout inculpé a le droit « de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable » (*R. c. Hall*, 2002 CSC 64, [2002] 3 R.C.S. 309, par. 13).

[35] En revanche, une fois la déclaration de culpabilité inscrite, la présomption d'innocence est écartée et l'al. 11*e*) de la *Charte* cesse de s'appliquer. C'est ce qui ressort du déplacement du fardeau de la preuve qui se produit lorsqu'une personne ayant été déclarée coupable et condamnée à une peine sollicite sa mise en liberté sous caution en attendant l'issue de son appel. Contrairement à ce qu'il a fait dans le contexte antérieur au procès — étape où il incombe généralement au ministère public de démontrer que l'accusé devrait être détenu sous garde —, le législateur a jugé bon, dans le cas des appels, de faire porter ce fardeau au demandeur dans tous les cas[1].

[36] C'est avec ces considérations à l'esprit que je vais maintenant examiner les intérêts liés à la force exécutoire des jugements et au caractère révisable de ceux-ci afin d'expliquer comment, avec les adaptations qui s'imposent, les facteurs relatifs à la confiance du public énumérés à l'al. 515(10)c) sont utiles dans la détermination des facteurs qui composent le volet de l'al. 679(3)c) relatif à la confiance du public.

b) *L'intérêt lié à la force exécutoire des jugements*

[37] La gravité du crime joue un rôle important lorsqu'il s'agit de déterminer si les préoccupations relatives à la confiance du public justifient une ordonnance de détention avant le procès en vertu de l'al. 515(10)c). Plus grave est le crime, plus grand est le risque que la confiance du public envers l'administration de la justice soit minée par la mise en liberté sous caution de l'accusé en attendant l'issue de

[1] Alors que le par. 679(3) oblige le demandeur à « établi[r] » que les trois critères prévus par la loi sont remplis, le par. 515(1) impose généralement au ministère public le fardeau de « fa[ire] valoir [. . .] des motifs justifiant la détention du prévenu sous garde ».

component under s. 679(3)(c), I see no reason why the seriousness of the crime for which a person has been convicted should not play an equal role in assessing the enforceability interest.

[38] With that in mind, I return to s. 515(10)(c), where Parliament has set out three factors by which the seriousness of a crime may be determined: the gravity of the offence, the circumstances surrounding the commission of the offence, and the potential length of imprisonment (s. 515(10)(c)(ii), (iii) and (iv)). In my view, these factors are readily transferable to s. 679(3)(c) — the only difference being that, unlike the pre-trial context, an appeal judge will generally have the trial judge's reasons for sentence in which the three factors going to the seriousness of the crime will have been addressed. As a rule, the appeal judge need not repeat this exercise.

[39] I pause here to note that while the seriousness of the crime for which the offender has been convicted will play an important role in assessing the enforceability interest, other factors should also be taken into account where appropriate. For example, public safety concerns that fall short of the substantial risk mark — which would preclude a release order — will remain relevant under the public confidence component and can, in some cases, tip the scale in favour of detention: *R. v. Rhyason*, 2006 ABCA 120, 208 C.C.C. (3d) 193, at para. 15; *R. v. Roussin*, 2011 MBCA 103, 275 Man. R. (2d) 46, at para. 34. The same holds true for lingering flight risks that do not rise to the substantial risk level under s. 679(3)(b). By the same token, the absence of flight or public safety risks will attenuate the enforceability interest.

son procès. Il en va de même pour la mise en liberté sous caution jusqu'à ce qu'il soit statué sur l'appel. En ce qui concerne le volet de l'al. 679(3)c) relatif à la confiance du public, je ne vois pas pourquoi la gravité du crime pour lequel une personne a été reconnue coupable ne devrait pas jouer un rôle équivalent dans l'appréciation de l'intérêt relatif à la force exécutoire des jugements.

[38] Gardant cela à l'esprit, je reviens à l'al. 515(10)c), où le législateur a énoncé trois facteurs qui permettent de déterminer la gravité d'un crime : la gravité de l'infraction, les circonstances entourant sa perpétration et la durée possible de l'emprisonnement (sous-al. 515(10)c)(ii), (iii) et (iv)). À mon avis, ces facteurs sont facilement transposables à l'al. 679(3)c), à la seule différence que, contrairement à ce qui se passe dans le contexte antérieur au procès, le juge d'appel bénéficiera généralement des motifs exposés par le juge du procès lors de la détermination de la peine, motifs dans lesquels ce dernier aura examiné les trois facteurs relatifs à la gravité du crime. En règle générale, le juge d'appel n'a pas besoin de refaire cet exercice.

[39] Je m'arrête ici pour souligner que, bien que la gravité du crime pour lequel le délinquant a été reconnu coupable joue un rôle important dans l'appréciation de l'intérêt lié à la force exécutoire des jugements, d'autres facteurs devraient aussi être pris en considération lorsque cela est indiqué. Par exemple, des préoccupations relatives à la sécurité du public ne constituant pas un risque important — risque qui ferait obstacle à une ordonnance de mise en liberté — demeureront pertinentes à l'égard du volet de la confiance du public et pourront, dans certains cas, faire pencher la balance en faveur de la détention (*R. c. Rhyason*, 2006 ABCA 120, 208 C.C.C. (3d) 193, par. 15; *R. c. Roussin*, 2011 MBCA 103, 275 Man. R. (2d) 46, par. 34). Il en va de même pour les risques de fuite persistants qui ne correspondent pas au risque important visé à l'al. 679(3)b). Dans le même ordre d'idées, l'absence de risques de fuite ou de risques pour la sécurité du public atténuera l'intérêt lié à la force exécutoire des jugements.

(c) *The Reviewability Interest*

[40] The remaining factor that Parliament has identified as informing public confidence under s. 515(10)(c) is the strength of the prosecution's case (s. 515(10)(c)(i)). In the appellate context, this translates into the strength of the grounds of appeal — and, as I will explain, in assessing the reviewability interest, the strength of an appeal plays a central role. I say this mindful of the fact that some authorities have expressed concerns about assessing the merits of an appeal beyond the s. 679(3)(a) "not frivolous" criterion: see *R. v. Allen*, 2001 NFCA 44, 158 C.C.C. (3d) 225, at paras. 31-52; *Parsons*, at paras. 55-59. With respect, I do not see this as a problem.

[41] In my view, allowing a more pointed consideration of the strength of an appeal for purposes of assessing the reviewability interest does not render the "not frivolous" criterion in s. 679(3)(a) meaningless. On the contrary, the "not frivolous" criterion operates as an initial hurdle that produces a categorical "yes" or "no" answer, allowing for the immediate rejection of a release order in the face of a baseless appeal.[2]

[42] Justice Donald put the matter succinctly, and in my view correctly, in *Porisky*, at para. 37:

[2] While it is not before us, a similar function may be fulfilled by the "sufficient merit" requirement for bail pending a sentence appeal under s. 679(4)(a) of the *Code*. That provision reads:

679 . . .

(4) In the case of an appeal [from sentence], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that

(a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;

c) *L'intérêt lié au caractère révisable des jugements*

[40] Le dernier facteur que le législateur reconnaît, à l'al. 515(10)c), comme facteur qui sous-tend la confiance du public est la solidité du dossier du poursuivant (« le fait que l'accusation paraît fondée »; sous-al. 515(10)c)(i)). Dans le contexte d'un appel, cela correspond à l'existence de moyens d'appel solides et, comme je l'expliquerai plus loin, la solidité de l'appel joue un rôle central dans l'appréciation de l'intérêt relatif au caractère révisable des jugements. Je dis cela en étant conscient que, dans certains jugements, des réserves ont été exprimées en ce qui concerne une appréciation du mérite de l'appel qui serait plus exigeante que le critère de « non-futilité » énoncé à l'al. 679(3)a) (voir *R. c. Allen*, 2001 NFCA 44, 158 C.C.C. (3d) 225, par. 31-52; *Parsons*, par. 55-59). En toute déférence, je ne vois aucun problème à de telles appréciations.

[41] À mon avis, le fait de permettre un examen plus poussé de la solidité de l'appel pour l'appréciation de l'intérêt relatif au caractère révisable des jugements ne vide pas de son sens le critère de « non-futilité » énoncé à l'al. 679(3)a). Au contraire, ce critère constitue une première étape qui aboutit à un « oui » ou à un « non » catégorique, ce qui permet de refuser immédiatement une ordonnance de mise en liberté lorsque l'appel est dénué de fondement[2].

[42] Le juge d'appel Donald a présenté la question de manière succincte et à mon avis correcte dans l'arrêt *Porisky*, par. 37 :

[2] Bien que nous ne soyons pas saisis de cette question, il convient de noter que l'exigence prévue à l'al. 679(4)a) du *Code* — selon laquelle, pour pouvoir obtenir une mise en liberté sous caution en attendant qu'il soit statué sur l'appel d'une sentence, l'appel doit être « suffisamment justifié » — pourrait jouer un rôle semblable. Cette disposition est libellée comme suit :

679 . . .

(4) Dans le cas d'un appel [d'une sentence], le juge de la cour d'appel peut ordonner que l'appelant soit mis en liberté en attendant la décision de son appel ou jusqu'à ce qu'il en soit autrement ordonné par un juge de la cour d'appel, si l'appelant établit à la fois :

a) que l'appel est suffisamment justifié pour que, dans les circonstances, sa détention sous garde constitue une épreuve non nécessaire;

The express mention of "not frivolous" in s. 679(3)(a) and "sufficient merit" in s. 679(4)(a) does not, in my view, foreclose consideration of the merits for a purpose other than a threshold test. Once over the threshold, the applicant faces the question of the public interest, a phrase not defined in the legislation but which had to be given some limits if it was to survive constitutional scrutiny. That is what *Farinacci* did. In setting boundaries for the public interest criterion, in particular the public confidence element, *Farinacci* employed the merits assessment for a purpose different from the threshold test. So I see no redundancy; nor do I doubt our authority to consider the merits as part of the public confidence question.

[TRADUCTION] L'utilisation expresse des termes « pas futile » à l'al. 679(3)a) et « suffisamment justifié » à l'al. 679(4)a) n'empêche pas selon moi de considérer le mérite de l'appel dans un autre but que l'application du critère préliminaire. Une fois qu'il a satisfait à ce critère, le demandeur doit répondre à la question de l'intérêt public, expression non définie dans la loi, mais que l'on doit circonscrire si l'on veut qu'elle résiste à un examen constitutionnel. C'est ce qui a été fait dans l'arrêt *Farinacci*. En assortissant de limites le critère de l'intérêt public — en particulier l'élément relatif à la confiance du public — dans cet arrêt, le tribunal a apprécié le mérite de l'appel dans un but différent de l'application du critère préliminaire. Il n'y a donc à mon avis aucune redondance, et je ne doute pas non plus que nous ayons compétence pour considérer le mérite de l'appel dans l'examen de la question de la confiance du public.

See also: *R. v. Delisle*, 2012 QCCA 1250, at paras. 4 and 52 (CanLII).

Voir aussi : *R. c. Delisle*, 2012 QCCA 1250, par. 4 et 52 (CanLII).

[43] Gary T. Trotter, now a Justice of the Court of Appeal for Ontario, reached a similar conclusion in his article "Bail Pending Appeal: The Strength of the Appeal and the Public Interest Criterion" (2001), 45 C.R. (5th) 267, where he explained:

[43] Gary T. Trotter, maintenant juge à la Cour d'appel de l'Ontario, est parvenu à une conclusion analogue dans son article « Bail Pending Appeal : The Strength of the Appeal and the Public Interest Criterion » (2001), 45 C.R. (5th) 267, dans lequel il a donné les explications suivantes :

. . . realistically, most cases do not raise strong claims regarding the public interest, at least not beyond the general concern that all criminal judgments ought to be enforced. . . . However, when an offence is serious, as with murder cases, such that public concern about enforceability is ignited, there should be a more probing inquiry into the chances of success on appeal. It is in this context that the balancing required by *Farinacci* requires some assessment of the merits, separate from the question of whether the appeal is frivolous or not. [Footnotes omitted; p. 270.]

[TRADUCTION] . . . de façon réaliste, la plupart des affaires ne donnent pas lieu à la présentation d'arguments solides basés sur l'intérêt public, à tout le moins d'arguments qui débordent le souci général que tous les jugements en matière criminelle soient exécutés. [. . .] Toutefois, en présence d'une infraction grave, par exemple dans une affaire de meurtre, qui fait naître chez le public des préoccupations en ce qui a trait à l'exécution du jugement, il devrait y avoir un examen plus poussé des chances de succès de l'appel. C'est dans ce contexte que la mise en balance requise par *Farinacci* exige qu'on apprécie dans une certaine mesure le mérite de l'appel, indépendamment de la question de savoir si l'appel est futile ou non. [Notes en bas de page omises; p. 270.]

[44] In conducting a more pointed assessment of the strength of an appeal, appellate judges will examine the grounds identified in the notice of appeal with an eye to their general legal plausibility and their foundation in the record. For purposes of this assessment, they will look to see if the grounds of appeal clearly surpass the minimal standard required to meet the "not frivolous" criterion. In my view,

[44] En effectuant une appréciation plus poussée de la solidité de l'appel, les juges d'appel examineront les moyens mentionnés dans l'avis d'appel en tenant compte de leur plausibilité générale en droit et des éléments au dossier sur lesquels ils reposent. Lors de cette appréciation, ils se demanderont si les moyens d'appel vont clairement au delà des exigences minimales requises pour qu'il soit satisfait

categories and grading schemes should be avoided. Phrases such as "a prospect of success", "a moderate prospect of success", or "a realistic prospect of success" are generally not helpful. Often, they amount to little more than wordsmithing. Worse yet, they are liable to devolve into a set of complex rules that appellate judges will be obliged to apply in assessing the category into which a particular appeal falls.

[45] In the end, appellate judges can be counted on to form their own "preliminary assessment" of the strength of an appeal based upon their knowledge and experience. This assessment, it should be emphasized, is not a matter of guesswork. It will generally be based on material that counsel have provided, including aspects of the record that are pertinent to the grounds of appeal raised, along with relevant authorities. In undertaking this exercise, appellate judges will of course remain mindful that our justice system is not infallible and that a meaningful review process is essential to maintain public confidence in the administration of justice. Thus, there is a broader public interest in reviewability that transcends an individual's interest in any given case.

[46] As a final matter, I note that the remedy sought on appeal may also inform the reviewability interest. For example, if a successful appeal can result only in a murder conviction being reduced to manslaughter, this will lessen the interest in reviewability, even if the grounds of appeal appear to be strong: *R. v. Meda* (1981), 23 C.R. (3d) 174 (B.C.C.A.); *R. v. Olsen* (1996), 94 O.A.C. 62, at para. 5; *R. v. Roe*, 2008 BCCA 253, 256 B.C.A.C. 308, at para. 14; *R. v. Lees*, 1999 BCCA 441, 127 B.C.A.C. 280, at paras. 4-5.

au critère de « non-futilité ». À mon avis, il faut éviter de créer des catégories et des systèmes de classification. Des expressions comme « des chances de succès », « des chances modérées de succès » ou « des chances réelles de succès » ne sont généralement pas utiles. Elles ne constituent souvent guère plus qu'un exercice sémantique. Pire encore, elles risquent d'évoluer en une série de règles complexes que les juges d'appel seront obligés d'appliquer pour déterminer la catégorie à laquelle appartient un appel donné.

[45] En fin de compte, on peut s'en remettre aux juges d'appel pour qu'ils effectuent leur propre « appréciation préliminaire » de la solidité d'un appel sur la base de leurs connaissances et de leur expérience. Cette appréciation, il convient de le souligner, n'est pas le fruit de conjectures. Elle se fonde généralement sur les documents que les avocats ont fournis, notamment des éléments du dossier qui sont pertinents relativement aux moyens d'appel soulevés, ainsi que sur la jurisprudence et d'autres sources pertinentes. En procédant à cet exercice, les juges d'appel garderont bien sûr à l'esprit que notre système de justice n'est pas infaillible et qu'un processus véritable de révision est essentiel pour ne pas miner la confiance du public envers l'administration de la justice. Il existe donc un intérêt public plus large en faveur du caractère révisable des jugements qui transcende l'intérêt de l'individu concerné à cet égard dans un cas donné.

[46] Pour terminer, je tiens à souligner que la réparation sollicitée en appel peut aussi jouer un rôle dans l'appréciation de l'intérêt relatif au caractère révisable des jugements. Si, par exemple, un appel fructueux aura uniquement pour effet de réduire la déclaration de culpabilité pour meurtre à une déclaration de culpabilité pour homicide involontaire coupable, ce facteur amoindrira l'intérêt relatif au caractère révisable des jugements, et ce, même si les moyens d'appel paraissent solides (*R. c. Meda* (1981), 23 C.R. (3d) 174 (C.A. C.-B.); *R. c. Olsen* (1996), 94 O.A.C. 62, par. 5; *R. c. Roe*, 2008 BCCA 253, 256 B.C.A.C. 308, par. 14; *R. c. Lees*, 1999 BCCA 441, 127 B.C.A.C. 280, par. 4-5).

(d) *The Final Balancing*

[47] Appellate judges are undoubtedly required to draw on their legal expertise and experience in evaluating the factors that inform public confidence, including the strength of the grounds of appeal, the seriousness of the offence, public safety and flight risks. However, when conducting the final balancing of these factors, appellate judges should keep in mind that public confidence is to be measured through the eyes of a reasonable member of the public. This person is someone who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society's fundamental values: *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at paras. 74-80. In that sense, public confidence in the administration of justice must be distinguished from uninformed public opinion about the case, which has no role to play in the decision to grant bail or not.

[48] In balancing the tension between enforceability and reviewability, appellate judges should also be mindful of the anticipated delay in deciding an appeal, relative to the length of the sentence: *R. v. Baltovich* (2000), 47 O.R. (3d) 761 (C.A.), at paras. 41-42. Where it appears that all, or a significant portion, of a sentence will be served before the appeal can be heard and decided, bail takes on greater significance if the reviewability interest is to remain meaningful. In such circumstances, however, where a bail order is out of the question, appellate judges should consider ordering the appeal expedited under s. 679(10) of the *Code*. While this may not be a perfect solution, it provides a means of preserving the reviewability interest at least to some extent.

[49] In the final analysis, there is no precise formula that can be applied to resolve the balance between enforceability and reviewability. A qualitative and contextual assessment is required. In

d) *La mise en balance finale*

[47] Les juges d'appel sont indubitablement tenus de se fonder sur leur expertise et leur expérience en droit pour apprécier les facteurs qui sous-tendent la confiance du public, notamment la solidité des moyens d'appel, la gravité de l'infraction, la sécurité du public et les risques que l'accusé s'enfuie. Toutefois, lorsqu'ils effectuent la mise en balance finale de ces facteurs, les juges d'appel devraient garder à l'esprit que la confiance du public doit être mesurée du point de vue d'un membre raisonnable du public. Il s'agit d'une personne réfléchie, impartiale, bien informée sur les circonstances de l'affaire et respectueuse des valeurs fondamentales de la société (*R. c. St-Cloud*, 2015 CSC 27, [2015] 2 R.C.S. 328, par. 74-80). En ce sens, la confiance du public envers l'administration de la justice ne saurait être mesurée à l'aune d'une opinion publique mal informée à l'égard du dossier, une telle opinion publique n'ayant aucun rôle à jouer dans la décision d'accorder ou non une mise en liberté sous caution.

[48] Pour résoudre la tension entre le principe de la force exécutoire des jugements et celui de leur caractère révisable, les juges d'appels doivent aussi garder à l'esprit le délai prévu pour que soit tranché l'appel par rapport à la durée de la peine (*R. c. Baltovich* (2000), 47 O.R. (3d) 761 (C.A.), par. 41-42). Lorsqu'il appert que la totalité de la peine, ou une partie appréciable de celle-ci, sera purgée avant que l'appel soit entendu et tranché, la mise en liberté sous caution revêt une plus grande importance si l'on veut que l'intérêt lié au caractère révisable des jugements ait une signification. Toutefois, dans de telles circonstances, lorsqu'il est hors de question d'ordonner une mise en liberté sous caution, les juges d'appel doivent envisager la possibilité de rendre, en vertu du par. 679(10) du *Code*, une ordonnance visant à hâter l'appel. Cette solution n'est peut-être pas parfaite, mais elle permet de préserver, du moins dans une certaine mesure, l'intérêt relatif au caractère révisable des jugements.

[49] En dernière analyse, il n'existe pas de formule précise qui puisse être appliquée pour résoudre la tension entre le principe de la force exécutoire des jugements et celui du caractère révisable de ceux-ci.

this regard, I would reject a categorical approach to murder or other serious offences, as proposed by certain interveners. Instead, the principles that I have discussed should be applied uniformly.

[50] That said, where the applicant has been convicted of murder or some other very serious crime, the public interest in enforceability will be high and will often outweigh the reviewability interest, particularly where there are lingering public safety or flight concerns and/or the grounds of appeal appear to be weak: *R. v. Mapara*, 2001 BCCA 508, 158 C.C.C. (3d) 312, at para. 38; *Baltovich*, at para. 20; *Parsons*, at para. 44.

[51] On the other hand, where public safety or flight concerns are negligible, and where the grounds of appeal clearly surpass the "not frivolous" criterion, the public interest in reviewability may well overshadow the enforceability interest, even in the case of murder or other very serious offences.

[52] Before applying these principles to the case at hand, I propose to address the principles that govern a review hearing under s. 680(1) of the *Code*.

C. *The Review Hearing Under Section 680(1) of the Criminal Code*

[53] In this case, s. 680(1) of the *Code* operates as a review mechanism for an order of a single judge of the Court of Appeal made under s. 679(3). I note, however, that the provision applies as well to certain pre-trial bail orders made by superior court judges for various offences, including murder. For convenience, s. 680(1) is reproduced below:

Une appréciation qualitative et contextuelle est requise. Sur cette question, je rejetterais l'application d'une approche par catégories à l'égard des meurtres ou d'autres infractions graves, approche que proposent certains intervenants. Au contraire, j'estime que les principes que j'ai examinés précédemment devraient être appliqués uniformément.

[50] Cela dit, lorsque le demandeur a été déclaré coupable de meurtre ou d'un autre crime très grave, l'intérêt du public relatif à la force exécutoire des jugements sera élevé et l'emportera souvent sur l'intérêt lié au caractère révisable de ceux-ci, particulièrement dans les cas où il existe des préoccupations persistantes en matière de sécurité publique ou de risques de fuite, où les moyens d'appel semblent faibles, ou les deux (*R. c. Mapara*, 2001 BCCA 508, 158 C.C.C. (3d) 312, par. 38; *Baltovich*, par. 20; *Parsons*, par. 44).

[51] En revanche, lorsque les préoccupations en matière de sécurité publique ou de risques de fuite sont négligeables, et que les moyens d'appel vont clairement au delà des exigences du critère de « non-futilité », l'intérêt du public lié au caractère révisable des jugements peut très bien l'emporter sur l'intérêt lié à la force exécutoire de ceux-ci, même en cas de meurtre ou d'une autre infraction très grave.

[52] Avant d'appliquer ces principes à l'affaire qui nous occupe, je propose d'examiner les principes qui régissent l'audience de révision prévue au par. 680(1) du *Code*.

C. *L'audience de révision prévue au par. 680(1) du Code criminel*

[53] En l'espèce, le par. 680(1) du *Code* prévoit un mécanisme de révision pour les ordonnances rendues en vertu du par. 679(3) par un juge de la Cour d'appel siégeant seul. Je note toutefois que la disposition s'applique également à certaines ordonnances relatives à la mise en liberté sous caution rendues avant le procès par un juge d'une cour supérieure pour diverses infractions, dont le meurtre. Pour plus de commodité, je reproduis ci-après le par. 680(1) :

680 (1) A decision made by a judge under section 522 or subsection 524(4) or (5) or a decision made by a judge of the court of appeal under section 261 or 679 may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,

(a) vary the decision; or

(b) substitute such other decision as, in its opinion, should have been made.

[54] As the provision makes clear, the review process consists of two stages: first, an initial vetting by the chief justice; and second, a review by the court, if directed by the chief justice. In practice, the review will generally be conducted by a panel of three judges, as it was in this case.

[55] The nature of the review and the standard to be applied by the panel in deciding whether to interfere with the impugned order are factors that the chief justice is likely to take into account in carrying out his or her initial screening function. Accordingly, I find it useful to address the review panel's mandate before addressing the chief justice's screening function.

(1) Panel Review

[56] The parties disagree on the principles governing a s. 680(1) panel review. Mr. Oland and the intervener Criminal Lawyers' Association (Ontario) ("CLA") submit that a standard of correctness should apply, meaning that the panel should engage in a robust review of the record and come to its own independent determination, irrespective of whether the single judge's decision was tainted by legal error. The respondent Crown and the Attorneys General of Ontario and Alberta submit that a more deferential standard is appropriate — one in which an error of law or principle must be found before intervention will be warranted.

680 (1) Une décision rendue par un juge en vertu de l'article 522 ou des paragraphes 524(4) ou (5) ou une décision rendue par un juge de la cour d'appel en vertu des articles 261 ou 679 peut, sur l'ordre du juge en chef ou du juge en chef suppléant de la cour d'appel, faire l'objet d'une révision par ce tribunal et celui-ci peut, s'il ne confirme pas la décision :

a) ou bien modifier la décision;

b) ou bien substituer à cette décision telle autre décision qui, à son avis, aurait dû être rendue.

[54] Comme l'indique clairement cette disposition, le processus de révision comporte deux étapes : premièrement, un filtrage initial par le juge en chef, et, deuxièmement, une révision par la cour, si le juge en chef en donne l'ordre. En pratique, la révision sera généralement effectuée par une formation de trois juges, comme cela a été le cas en l'espèce.

[55] La nature de la révision et la norme qui doit être appliquée par la formation pour décider s'il convient ou non de modifier l'ordonnance contestée sont des facteurs que le juge en chef est susceptible de prendre en compte dans l'exercice de sa fonction de filtrage initial. Par conséquent, il est utile à mon avis d'examiner le mandat de la formation de révision avant de se pencher sur la fonction de filtrage du juge en chef.

(1) Révision par la formation

[56] Les parties ne s'entendent pas sur les principes qui régissent la révision effectuée par la formation en vertu du par. 680(1). M. Oland et l'intervenante la Criminal Lawyers' Association (Ontario) (« CLA ») soutiennent que la norme de contrôle applicable est celle de la décision correcte, à savoir que la formation devrait procéder à un examen rigoureux du dossier et parvenir à sa propre décision de façon indépendante, que la décision rendue par le juge siégeant seul soit ou non viciée par une erreur de droit. Le ministère public intimé et les procureurs généraux de l'Ontario et de l'Alberta affirment pour leur part qu'il convient d'appliquer une norme plus déférente — une norme selon laquelle l'intervention n'est justifiée qu'en présence d'une erreur de droit ou de principe.

[57] In support of their position, Mr. Oland and the CLA make two main submissions. First, they point to ss. 520 and 521 of the *Code* — the bail review provisions that apply at the trial stage. Unlike s. 680(1), those provisions require the applicant to "show cause" to succeed on a bail review. In *St-Cloud*, this Court observed that the words "show cause" signal a less interventionist, more deferential approach to bail reviews at the trial stage. In doing so, the Court noted the absence of similar language in s. 680(1) (paras. 97-104). Hence, it is argued that s. 680(1) should be interpreted as invoking a less deferential standard than the standard applicable at trial.

[58] I would not give effect to this argument. While the words "show cause" are not found in s. 680(1), I am not convinced that their absence is as significant as Mr. Oland and the CLA suggest. In the context of a review provision, I would have expected more explicit language than the language used in s. 680(1), if Parliament intended the review to be a process in which the panel could, without more, simply substitute its opinion for that of the judge. In so concluding, I note that in *St-Cloud*, at para. 104, Wagner J. for the Court stated that his comments were not determinative of the type of review contemplated by s. 680(1).

[59] Second, Mr. Oland and the CLA submit that the constitutionality of s. 679(3)(c) hinges on the existence of a robust correctness review. They base this submission on an excerpt from *Farinacci*, where Arbour J.A. stated, at p. 47:

[57] À l'appui de leur thèse, M. Oland et la CLA présentent deux arguments principaux. Premièrement, ils renvoient aux art. 520 et 521 du *Code*, les dispositions qui s'appliquent, à l'étape du procès, à la révision des ordonnances relatives à la mise en liberté sous caution. Contrairement au par. 680(1), ces dispositions obligent la personne qui demande à un juge de réviser une telle ordonnance à « fai[re] valoir des motifs justifiant de le faire » pour que sa demande soit accueillie. Dans l'arrêt *St-Cloud*, notre Cour a souligné que les mots « fait valoir des motifs justifiant de le faire » traduisent la volonté que l'approche soit moins interventionniste et plus déférente pour la révision des ordonnances relatives à la mise en liberté sous caution au stade du procès. Ce faisant, elle a fait remarquer que le libellé du par. 680(1) ne renfermait pas de termes semblables (par. 97-104). Par conséquent, il faudrait, plaident-ils, considérer que le par. 680(1) requiert l'application d'une norme moins déférente que celle applicable à l'étape du procès.

[58] Je ne puis accepter cet argument. Bien que les mots « fait valoir des motifs justifiant de le faire » ne figurent pas au par. 680(1), je ne suis pas convaincu que leur absence soit aussi importante que M. Oland et la CLA le prétendent. Dans le contexte d'une disposition en matière de révision, je me serais attendu à un texte plus explicite que celui figurant au par. 680(1) si le législateur avait voulu établir un processus de révision dans lequel la formation pourrait, sans plus, simplement substituer son opinion à celle du juge. En concluant ainsi, je souligne que, dans l'arrêt *St-Cloud*, le juge Wagner, qui s'exprimait alors au nom de la Cour, a précisé au par. 104 que ses observations n'étaient pas déterminantes quant au type de révision que prévoit le par. 680(1).

[59] Deuxièmement, M. Oland et la CLA font valoir que la constitutionnalité de l'al. 679(3)c) tient à l'existence d'un examen rigoureux fondé sur la norme de la décision correcte. Ils fondent cet argument sur un extrait de l'arrêt *Farinacci*, où la juge Arbour a écrit ceci à la p. 47 :

Although its application is often not free from difficulty, and although judges may differ in its application, it is a standard against which the correctness of individual decisions can be assessed. In contrast, a standardless sweep would preclude any debate regarding the correctness of a decision made under its authority as it would authorize judges to pursue their own personal predilections. [Emphasis added.]

[60] I do not find this reference to be persuasive. In *Farinacci*, the Court of Appeal was focused on the constitutionality of s. 679(3)(c), a matter that does not concern us in this appeal. Moreover, the argument assumes that correctness is the only form of meaningful review which can protect against vagueness. While the availability of review may have been important to the Court of Appeal in considering the constitutionality of s. 679(3)(c), it does not follow that the nature of that review must invoke a correctness standard along the lines suggested by Mr. Oland and the CLA. In any event, in the absence of a constitutional challenge, I do not consider it necessary to decide this issue beyond concluding that the comments of the Court of Appeal are not dispositive in settling the nature of review contemplated under s. 680(1).

[61] Ultimately, in my view, a panel reviewing a decision of a single judge under s. 680(1) should be guided by the following three principles. First, absent palpable and overriding error, the review panel must show deference to the judge's findings of fact. Second, the review panel may intervene and substitute its decision for that of the judge where it is satisfied that the judge erred in law or in principle, and the error was material to the outcome. Third, in the absence of legal error, the review panel may intervene and substitute its decision for that of the judge where it concludes that the decision was clearly unwarranted.

[62] This approach allows for meaningful review while extending a measure of deference to the judge's decision. It also achieves symmetry with the review

[TRADUCTION] Bien que son application ne soit souvent pas exempte de difficultés et qu'elle puisse différer en fonction du juge, cette norme permet d'évaluer le caractère correct de décisions individuelles. En revanche, si le contrôle s'effectuait sans recours à une norme, il ne pourrait y avoir de débat sur le caractère correct d'une décision prise sous le régime de cette norme, puisque les juges se verraient autorisés à faire prévaloir leurs préférences personnelles. [Je souligne.]

[60] Je ne trouve pas cet extrait convaincant. Dans *Farinacci*, la Cour d'appel s'est attachée à la constitutionnalité de l'al. 679(3)c), une question qui ne nous intéresse pas en l'espèce. De plus, l'argument suppose qu'une révision selon la norme de la décision correcte est la seule forme d'examen valable pour contrer l'imprécision. Bien que l'existence d'un recours en révision ait pu être un facteur important pour la Cour d'appel dans son examen de la constitutionnalité de l'al. 679(3)c), il ne s'ensuit pas que la nature de cette révision exige l'application d'une norme de la décision correcte conforme à celle que suggèrent M. Oland et la CLA. Quoi qu'il en soit, en l'absence de contestation constitutionnelle, je ne crois pas qu'il soit nécessaire de se prononcer sur cette question, si ce n'est pour conclure que les observations de la Cour d'appel ne permettent pas de trancher la question de la nature de la révision visée au par. 680(1).

[61] En dernière analyse, je suis d'avis que les trois principes suivants devraient guider la formation chargée de réviser, en vertu du par. 680(1), la décision rendue par un juge siégeant seul. Premièrement, en l'absence d'erreur manifeste et dominante, la formation de révision doit faire preuve de déférence à l'égard des conclusions de fait du juge. Deuxièmement, elle peut intervenir et substituer sa décision à celle du juge lorsqu'elle est convaincue que celui-ci a commis une erreur de droit ou de principe, et que cette erreur était importante quant à l'issue de l'affaire. Troisièmement, en l'absence d'une erreur de droit, la formation de révision peut intervenir et substituer sa décision à celle du juge dans les cas où elle conclut que celle-ci était clairement injustifiée.

[62] Cette approche permet une véritable révision tout en prévoyant qu'une certaine déférence s'impose à l'égard de la décision du juge. Elle assure aussi

process at the trial stage, save for those offences identified in s. 469 of the *Code*, for which the review process is governed by s. 680(1). This symmetry is important because, as Gary T. Trotter explains in *The Law of Bail in Canada*, it avoids an anomaly that would otherwise result:

> Focusing on the review of pre-trial bail orders, endorsing a correctness standard in the application of s. 680 creates differential standards of review for s. 469 vs. non-469 offences. It will allow a more generous scope of review in respect of the most serious offences in the *Criminal Code*. . . . There is no principled reason that supports a situation where someone detained on a murder charge enjoys a broader scope of review under s. 680 when compared to a person charged with manslaughter or attempted murder (both non-s. 469 offences) who is dealt with under the narrower s. 520. [p. 8-31]

une symétrie avec le processus de révision applicable au stade du procès, sauf en ce qui concerne les infractions mentionnées à l'art. 469 du *Code*, pour lesquelles ce processus est régi par le par. 680(1). Cette symétrie est importante parce que, comme Gary T. Trotter l'explique dans son ouvrage intitulé *The Law of Bail in Canada*, elle permet d'éviter une anomalie :

> [TRADUCTION] Si l'on s'attache à la révision des ordonnances relatives à la mise en liberté sous caution rendues avant le procès, le fait d'adopter la norme de la décision correcte pour les besoins de l'art. 680 se traduit par l'application de normes de révision différentes pour les infractions visées à l'art. 469 et pour celles qui ne le sont pas. Cela aura pour effet d'autoriser une révision de portée plus large à l'égard des infractions les plus graves du *Code criminel*. [. . .] Aucune raison logique ne justifie une situation où une personne détenue par suite d'une accusation de meurtre jouirait d'une révision de portée plus large en vertu de l'art. 680 qu'une personne accusée d'homicide involontaire coupable ou de tentative de meurtre (deux infractions non visées à l'art. 469), personne relevant du régime plus étroit de l'art. 520. [p. 8-31]

(2) The Chief Justice's Discretion to Direct a Review

[63] There is no formal procedure in the *Code* governing the chief justice's decision to direct a panel review. We are told that courts of appeal have adopted different approaches and levels of formality. The procedural aspects of the gatekeeping function are not before us and I do not propose to address them. Some guidance can, however, be given as to the test a chief justice should apply in deciding whether to direct a panel review.

[64] The test, as I see it, should be relatively straightforward in its application. It flows from the principles the panel is required to apply when conducting a review. In short, the chief justice should consider directing a review where it is arguable that the judge committed material errors of fact or law in arriving at the impugned decision, or that the

(2) Le pouvoir discrétionnaire du juge en chef d'ordonner une révision

[63] Le *Code* ne prévoit aucune procédure précise en ce qui concerne la décision du juge en chef d'ordonner une révision par une formation. On nous rapporte que les cours d'appel ont adopté différentes approches et différents degrés de formalisme. On ne nous a pas demandé de nous prononcer sur les aspects procéduraux de la fonction de gardien du processus judiciaire qu'exerce le juge en chef, et je n'entends pas le faire. Il est cependant possible de donner certaines précisions sur le critère que ce dernier devrait appliquer pour décider s'il convient ou non d'ordonner une révision par une formation.

[64] À mon sens, ce critère devrait être relativement simple à appliquer. Il découle des principes que la formation doit appliquer pour effectuer une révision. En résumé, le juge en chef devrait envisager d'ordonner une révision dans les cas où il est possible de soutenir que le juge a commis des erreurs importantes de fait ou de droit lorsqu'il a rendu la

impugned decision was clearly unwarranted in the circumstances.

V. Application to This Case

[65] By all accounts, aside from the seriousness of the offence for which Mr. Oland was convicted, he presented as an ideal candidate for bail. The notoriety of this case, which stemmed largely from his prominence in the community, and any uninformed public opinion about it, were rightly ignored by the appeal judge. Mr. Oland, I emphasize, was entitled to the same treatment as someone less prominent.

[66] In the circumstances, there is considerable merit to Mr. Oland's submission that if *he* did not qualify for release, no one convicted of a similarly serious offence would ever be released, absent a showing of unique or exceptionally strong grounds of appeal. That cannot be right. Parliament did not restrict the availability of bail pending appeal for persons convicted of murder or any other serious crime and courts should respect this. Thus, for the purposes of s. 679(3)(c), even in the case of very serious offences, where there are no public safety or flight concerns and the grounds of appeal clearly surpass the "not frivolous" criterion, a court may well conclude that the reviewability interest overshadows the enforceability interest such that detention will not be necessary in the public interest.

[67] Every case is different and there may be operative factors in other cases, such as a prior criminal record, public safety and flight risk concerns, or a weaker release plan, which could raise concerns warranting detention. Emphatically, a contextual

décision contestée, ou que celle-ci était clairement injustifiée dans les circonstances.

V. Application à l'espèce

[65] Mis à part la gravité de l'infraction pour laquelle il a été déclaré coupable, M. Oland paraissait, de l'avis général, un candidat idéal pour une mise en liberté sous caution. C'est à juste titre que le juge d'appel a fait abstraction de la notoriété de l'affaire — laquelle découlait en grande partie du fait que M. Oland était une personne bien en vue dans la collectivité — et de toute opinion publique mal informée au sujet de celle-ci. Je tiens à souligner que M. Oland avait le droit d'être traité de la même manière qu'une personne moins connue que lui.

[66] Dans les circonstances, un mérite considérable doit être accordé à l'argument de M. Oland selon lequel si *lui* ne satisfait pas aux critères de la mise en liberté sous caution, aucune personne déclarée coupable d'une infraction d'une gravité semblable ne sera jamais libérée sous caution en l'absence de moyens d'appel hors du commun ou exceptionnellement solides. Une telle situation ne serait pas acceptable. Le législateur n'a pas restreint la possibilité pour les personnes reconnues coupables de meurtre ou de tout autre crime grave d'obtenir une mise en liberté sous caution en attendant l'issue de leur appel, et les tribunaux devraient respecter cela. En conséquence, pour l'application de l'al. 679(3)c) et même dans le cas d'infractions très graves, lorsqu'il n'existe pas de préoccupations en matière de sécurité publique ou de risques de fuite et que les moyens d'appel vont clairement au delà des exigences du critère de « non-futilité », un tribunal peut fort bien conclure que l'intérêt relatif au caractère révisable des jugements l'emporte sur l'intérêt lié à la force exécutoire de ceux-ci et que, pour cette raison, la détention ne sera pas nécessaire dans l'intérêt public.

[67] Chaque cas est différent et il pourrait y avoir des facteurs clés dans d'autres affaires, par exemple l'existence d'antécédents judiciaires, des préoccupations en matière de sécurité publique et de risques de fuite, ou encore un plan de libération peu solide,

analysis that can account for these differences is required.

[68] In this case, the appeal judge was satisfied that there were no appreciable public safety or flight risk concerns and the grounds of appeal were "clearly arguable" — which I take to mean that they clearly surpassed the "not frivolous" criterion. Those findings are not challenged on appeal. In addition, the appeal judge overlooked what I consider to be an important finding made by the trial judge, namely, that in the circumstances, Mr. Oland's crime gravitated more toward the offence of manslaughter than to first degree murder. This finding was important because it served to lessen Mr. Oland's degree of moral blameworthiness, thereby attenuating the seriousness of the crime and hence the enforceability interest. In my view, the cumulative effect of these considerations ought to have tipped the scale in favour of release. In other words, Mr. Oland's detention was clearly unwarranted and the Court of Appeal erred in failing to intervene.

[69] While that is sufficient to dispose of this appeal, I feel obliged to identify a legal error that the appeal judge made in his analysis. In particular, his reasons indicate that he did not apply the correct test in assessing the strength of Mr. Oland's appeal and the implications flowing from it. Much as he was satisfied that Mr. Oland had raised "clearly arguable" grounds of appeal, this was not enough. As the following excerpt from his reasons shows, he required more, something in the nature of unique circumstances that would have virtually assured a new trial or an acquittal:

In the end, the reasonable member of the public, looking at this dispassionately, would balance the fact that the offence for which Mr. Oland was convicted ranks among the most serious in the *Criminal Code*, as well as the brutality with which the offence was committed and the trial

qui pourraient susciter des inquiétudes justifiant une détention. Il est évident qu'une analyse contextuelle permettant de tenir compte de ces différences est nécessaire.

[68] En l'espèce, le juge d'appel était convaincu qu'il n'existait aucune préoccupation importante en matière de sécurité publique ou de risques de fuite et que les moyens d'appel pouvaient « nettement être soutenus », ce qui, à mon avis, signifie qu'ils allaient clairement au delà des exigences du critère de « non-futilité ». Ces conclusions ne sont pas contestées en appel. En outre, le juge d'appel a fait abstraction de ce que je considère être une conclusion importante tirée par le juge du procès, à savoir que, dans les circonstances, le crime commis par M. Oland se rapprochait davantage de l'infraction d'homicide involontaire coupable que de celle de meurtre au premier degré. Cette conclusion était importante parce qu'elle contribuait à réduire le degré de culpabilité morale de M. Oland, et qu'elle atténuait par le fait même la gravité du crime et, partant, l'intérêt lié à la force exécutoire des jugements. Cumulativement, ces considérations auraient dû, à mon avis, faire pencher la balance du côté de la libération. Autrement dit, la détention de M. Oland était clairement injustifiée et la Cour d'appel a commis une erreur en n'intervenant pas.

[69] Bien que cela suffise pour trancher le présent pourvoi, il me faut relever une erreur de droit dans l'analyse effectuée par le juge d'appel. Plus particulièrement, ses motifs indiquent que celui-ci n'a pas appliqué le critère approprié pour apprécier la solidité de l'appel de M. Oland et les conséquences qui en découlent. Même s'il était convaincu que M. Oland avait soulevé des moyens d'appel qui pourraient « nettement être soutenus », cela ne suffisait pas. Comme le montre l'extrait suivant de ses motifs, il a exigé quelque chose de plus, telles des circonstances uniques qui auraient garanti pour ainsi dire la tenue d'un nouveau procès ou un acquittement :

En définitive, le membre raisonnable du public porterait sur l'affaire un regard impartial et mettrait dans la balance, d'une part la gravité du crime dont M. Oland a été déclaré coupable, qui compte parmi les plus terribles du *Code criminel*, la perpétration brutale du crime et la

judge's imposition of a life sentence, against the other factors that weigh in favour of Mr. Oland's release. In my respectful view, that reasonable member of the public would find that, although the grounds of appeal may be clearly arguable, none fall in the category of the unique circumstances that would virtually assure a new trial or an acquittal. In the end, I am forced to conclude that knowing all this, should Mr. Oland be released in these circumstances, the confidence of the reasonable member of the public in the administration of criminal justice would be undermined. [Emphasis added; para. 32.]

Respectfully, he erred in this regard. That Mr. Oland's grounds were "clearly arguable" was enough to establish that they clearly surpassed the "not frivolous" criterion.

[70] In the result, had intervening events not rendered the appeal moot, I would have set aside Mr. Oland's detention order and ordered his release pending appeal. However, because the appeal is moot, I would simply allow the appeal and make no further order.

Appeal allowed.

Solicitors for the appellant: Alan D. Gold Professional Corporation, Toronto; Gary A. Miller Professional Corporation, Upper Kingsclear, New Brunswick; Cox & Palmer, Saint John.

Solicitor for the respondent: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

peine d'emprisonnement à perpétuité prononcée par le juge du procès, d'autre part les facteurs favorables à la mise en liberté. À mon respectueux avis, il conclurait que, s'il se peut que les moyens d'appel puissent nettement être soutenus, aucun ne ressortit aux circonstances uniques qui garantiraient pratiquement un acquittement ou la tenue d'un nouveau procès. En somme, je suis contraint de conclure que, sachant tout cela, le membre raisonnable du public verrait sa confiance dans l'administration de la justice criminelle minée si M. Oland était mis en liberté dans les circonstances. [Je souligne; par. 32.]

En toute déférence, il a commis une erreur à cet égard. Le fait que les moyens invoqués par M. Oland pouvaient « nettement être soutenus » suffisait pour établir qu'ils allaient clairement au delà des exigences du critère de « non-futilité ».

[70] Par conséquent, si les événements survenus dans l'intervalle n'avaient pas rendu le pourvoi théorique, j'aurais annulé l'ordonnance de détention de M. Oland et ordonné sa mise en liberté en attendant qu'il soit statué sur l'appel. Toutefois, comme le pourvoi est théorique, je suis d'avis de simplement accueillir celui-ci et de ne rendre aucune autre ordonnance.

Pourvoi accueilli.

Procureurs de l'appelant : Alan D. Gold Professional Corporation, Toronto; Gary A. Miller Professional Corporation, Upper Kingsclear, Nouveau-Brunswick; Cox & Palmer, Saint John.

Procureur de l'intimée : Procureur général du Nouveau-Brunswick, Fredericton.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Calgary.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Brauti Thorning Zibarras, Toronto; Ursel Phillips Fellows Hopkinson, Toronto; Presser Barristers, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Brauti Thorning Zibarras, Toronto; Ursel Phillips Fellows Hopkinson, Toronto; Presser Barristers, Toronto.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Her Majesty the Queen v. Cass,*
2018 BCCA 424

Date: 20181101
Dockets: CA45692; CA45693; CA45694; CA45695

Docket: CA45692

Between:

Her Majesty the Queen

Respondent

And

Kathryn Cass

Appellant

- and -

Docket: CA45693

Between:

Her Majesty the Queen

Respondent

And

Brenda Morrice

Appellant

- and -

Docket: CA45694

Between:

Her Majesty the Queen

Respondent

And

Deborah Ann Wood

Appellant

- and -

Docket: CA45695

Between:

Her Majesty the Queen

Respondent

And

Kira McLean

Appellant

Before: The Honourable Madam Justice Fisher
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated October 30, 2018 (*Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 1890, Vancouver Docket S183541).

Oral Reasons for Judgment

Counsel for the Appellants:	D.M. Turko, Q.C.
Counsel for the Respondents:	S.A. Hulko T.A. Shaw
Place and Date of Hearing:	Vancouver, British Columbia November 1, 2018
Place and Date of Judgment:	Vancouver, British Columbia November 1, 2018

Summary:

Each of the appellants received 14-day jail sentences after pleading guilty to criminal contempt, the charges arising from their defiance of a court order that restrained persons from blocking access to the worksites of Trans Mountain Pipeline. Each was granted leave to appeal their sentence and ordered to be released pending determination of their appeal. The appellants had shown that the appeals had sufficient merit to meet the tests for leave and for release pending appeal. Refusing their release would cause unnecessary hardship, as they would have served their sentences before their appeals could be heard. There was no issue of public safety and their detention was not necessary in the public interest.

[1] **FISHER J.A.**: On October 19, 2018, the appellants, Kira McLean, Brenda Morrice, Deborah Wood and Kathryn Cass, each pleaded guilty to criminal contempt of court. The contempt arose from their defiance of an order of the Supreme Court of British Columbia made on March 15, 2018 and varied on June 1, 2018. The order granted an injunction to Trans Mountain Pipeline ULC, a plaintiff in civil proceedings commenced against a number of individuals, and restrained the defendants and others who had knowledge of the injunction from blocking access to Trans Mountain's worksites.

[2] Given the number of individuals who were alleged to have defied the order, the Attorney General of British Columbia intervened in April 2018 and took conduct of the proceedings as involving prosecutions for criminal contempt of court. These prosecutions have been heard before Mr. Justice Affleck in the court below. On October 30, 2018, he sentenced each of the appellants to 14 days' imprisonment.

[3] The appellants immediately filed notices of appeal and notices of application for release from custody pending determination of the appeal.

Background

[4] Ms. McLean and Ms. Morrice were both arrested on August 20, 2018, in similar circumstances. Mr. Justice Affleck described the circumstances at paras. 14 and 25 of his reasons for sentence:

> [14] Kira McLean was arrested by the RCMP on August 20, 2018 near the Westridge Marine Terminal of Trans Mountain. That morning, Ms. McLean, along with a number of other persons, was blocking access to the terminal in

> the presence of numerous onlookers. Some of whom were using video cameras. The RCMP played an audio recording of a reading of the injunction, then gave Ms. McLean and the others who were blocking access to the terminal an opportunity to comply with the injunction and avoid arrest. Ms. McLean and some others did not take that opportunity. Ms. McLean was arrested and was later released on an undertaking and promise to appear. Her disobedience of the injunction was peaceful.
>
> …
>
> [25] Brenda Morrice was also arrested on August 20, 2018, in similar circumstances to those of Ms. McLean. Ms. Morrice also acted peacefully when arrested.

[5] Ms. Wood and Ms. Cass were both arrested on August 24, 2018, in circumstances similar to the others. In short, all four were involved with others in blocking access to the Trans Mountain terminal and were arrested after being given the opportunity to comply with the injunction and refusing to do so, and all four acted peacefully.

[6] Ms. McLean is 24 years old and a recent graduate of the University of British Columbia. She lives with her mother in Vancouver and works for her intermittently as an assistant and social media strategist. She also volunteers at the Social Justice Centre at UBC. She has some health concerns that I will not detail here, but which her physician describes as stable.

[7] Ms. Morrice is 57 years old. She has lived in the same residence in Vancouver for the last 22 years. After a career as a medical office assistant, she began receiving long-term disability in 2013. She has a daughter who lives in Port Coquitlam and a son who lives in Ontario. She deposed that she takes seven medications daily to manage depression and anxiety.

[8] Ms. Wood is 64 years old. She has lived on Vancouver Island since 1993 and at her current residence in Sooke since 2003. She obtained a Bachelor of Social Work from the University of Victoria, and worked in several capacities in the mid to late 1990s. She is actively involved with her adult children and grandchildren and her community.

[9] Ms. Cass is a 66-year-old widow who lives in Victoria. She has both Bachelor and Master's degrees in Science and a Ph.D. in psychology. She worked for many years as a psychologist at a centre for Children's Health. She has a son in Victoria, a daughter in Quebec, and a network of supportive friends.

[10] None of the appellants has a criminal record.

Reasons for sentence

[11] In sentencing the appellants to 14 days' imprisonment, Mr. Justice Affleck took into account a number of factors, which he set out in some detail at para. 31 of his reasons:

> [31] ...
>
> 1. Each behaved in a peaceful manner at the time of arrest;
> 2. Each believes that the building of the pipeline must be stopped and that this belief justified their public defiance of the injunction;
> 3. Participation in an organized public and mass defiance of an order of this Court is a serious offence which has long been characterized in our law as criminal contempt;
> 4. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. The rule of law requires a justice system that can ensure orders of the court are enforced and the process of the court is respected;
> 5. It is likely unnecessary to deter the four people before me today from repeating their disobedience. Therefore, specific deterrence is only a minor consideration. General deterrence however continues to be a relevant factor. Other members of the general public who may be tempted to pick and choose the court orders that they will obey, either in this situation, or in others, must be deterred from flouting orders of the court;
> 6. The decision of the Federal Court of Appeal is irrelevant to sentencing. Though it may provide a sense of moral vindication to the contemnors, each of the four people before me chose to disobey the injunction and thereby engaged in conduct that they knew was unlawful. The decision of the Federal Court of Appeal does not change the character of their misconduct;
> 7. Counsel for the Crown made a public statement of its intention to seek terms of imprisonment for later arrests and guilty pleas. This statement was made well before the people before

> me today were arrested. I am aware that many of the supporters of those charged with criminal contempt of court have been present throughout these proceedings in the courtroom and I have no doubt the four persons here for sentencing today were, at the time of their arrests, aware of the position of the Crown on sentencing. The first term of imprisonment of seven days was imposed on July 31, 2018. That sentence appears to have had no deterrent effect on Ms. McLean, Ms. Morrice, Ms. Wood or Ms. Cass;
>
> 8. I acknowledge that Ms. McLean, Ms. Morrice, Ms. Wood and Ms. Cass is each a valuable member of their respective communities, and of society more broadly. The letters that I have read are eloquent statements to that effect. But that does not give them a pass when they choose to defy a court order. On the contrary they ought to have recognized an obligation to obey the injunction. By the express terms of the injunction they were entitled to engage in peaceful, lawful and safe protest of the building of the pipeline but chose instead to defy it; and
>
> 9. In regard to Ms. McLean's health history, I do not view it to be a relevant factor in these sentencing proceedings. I have no doubt that corrections services have experience in dealing with a wide range of health issues and have an obligation to provide appropriate treatment and medical care, if that is recommended.

[12] The judge disagreed with a submission from Ms. McLean that she ought to have been granted a conditional discharge. He did so on the basis that there is no record of conviction for these sentences and he did not consider a conditional discharge to be in the public interest given the importance of the principles of denunciation and general deterrence in contempt proceedings.

Procedure

[13] Criminal contempt of court is not an offence found in the *Criminal Code*, R.S.C. 1985, c. C-46. It is a common law offence. However, s. 10 of the *Criminal Code* provides a right of appeal from a conviction for contempt in respect of both conviction and sentence, and by virtue of s. 10(3), the provisions of Part XXI of the *Code* – procedure on appeals by indictment – apply, with such modifications as the circumstances require.

[14] Release pending determination of appeal, or bail, is governed in Part XXI in s. 679(1). In the case of an appeal against sentence only, as here, a judge of this

Court has the authority to release an appellant who has been granted leave to appeal.

The applicable tests

[15] The test for granting leave to appeal against sentence is whether the appeal is not frivolous and has a reasonable chance of success: *R. v. Hawthorne* (1992), 21 B.C.A.C. 173 at para. 6.

[16] To succeed in obtaining release pending a sentence appeal, s. 679(4) of the *Criminal Code* requires that each of the appellants establish three things on a balance of probabilities:

> (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if she were detained in custody;
>
> (b) she will surrender herself into custody in accordance with the terms of the order; and
>
> (c) her detention is not necessary in the public interest.

[17] The merits threshold for bail pending a sentence appeal is somewhat more stringent than the “not frivolous” test required for bail pending a conviction appeal. This is because there is no longer a question of whether the appellant was properly convicted and the central question is the fitness of the sentence. The appellants must show that their appeals have sufficient merit that it would cause unnecessary hardship if they were detained in custody. The primary objective of releasing an applicant on bail pending a sentence appeal is to ensure that the time spent in custody awaiting an appeal is not greater than the time the appellant would have spent in custody under a fit sentence: *R. v. Wilder*, 2007 BCCA 344 at paras. 14–15.

[18] The public interest criterion, discussed in *R. v. Oland*, 2017 SCC 17, has two components: public safety and public confidence in the administration of justice. Public safety is not an issue here, but public confidence is. Public confidence is measured through the eyes of a reasonable and informed member of the public and it involves balancing two competing interests: enforceability and reviewability: *Oland*

at para. 24. Enforceability relates to the public interest in having a person convicted of a serious offence being denied bail, and reviewability relates to the public interest in judgments being reviewed and errors corrected. In this regard, as *Oland* instructs, the focus on appeal is on the strength of the grounds of appeal.

Application of the test

[19] Each appellant asserts two grounds of appeal in their notices of appeal. The first is common to all four:

> 1. The Honourable Justice Affleck overemphasized certain factors as per the four pronged test in *College of Traditional Chinese Medicine v. Fischer*, [2017 BCSC 1045]: a) the extent of the willful and deliberate defiance of the court order; b) the seriousness of the consequences of the appellant's contemptuous behaviour; c) the necessity of effectively terminating the appellant's defiance; and d) the importance of deterring such conduct in the future.

[20] The second ground of appeal asserted by Ms. Wood and Ms. Cass is:

> 2. The sentence is excessive. A jail sentence was not necessary to satisfy the principles of sentencing for the Appellant. The Appellant is a first time offender with no criminal record, and had sufficient deterrence from being part of the criminal process.

[21] A similar second ground is asserted by Ms. McLean and Ms. Morrice:

> 2. The Honourable Justice Affleck did not give sufficient weight to [the appellant's] personal circumstances, and apology and promise to the Court not to return to the Kinder Morgan site to protest. Conditions of general and specific deterrence would be satisfied without a jail sentence.

[22] The appellants submit that the sentencing judge erred in principle

> (a) by failing to properly consider the principles of sentencing under the *Criminal Code*, more particularly that general deterrence could be achieved for these individuals without imposition of a jail sentence given their personal circumstances and the nature of the offences;
>
> (b) by accepting, without proof beyond a reasonable doubt, that the appellants were aware of the Crown's initial sentencing positions, more particularly of the increased sentences for later arrests;

(c) by accepting a one-size-fits-all punishment for everyone in a particular category.

[23] The appellants also submit that the judge erred by giving no effect to the fact that the protests were discontinued after August 30, 2018, when the Federal Court of Appeal released its decision that suspended the process, a factor said to be relevant to the application of general deterrence.

[24] Ms. McLean also submits that the judge erred in refusing to consider a conditional discharge on the basis that she will not have a criminal record as a result of this conviction.

[25] The Crown opposes both leave to appeal and release on the basis that the appeals have insufficient merit. It submits that Justice Affleck made no errors in principle and the 14-day sentences were not demonstrably unfit. It says that the Federal Court decision is not relevant to the court's considerations of general deterrence and denunciation, as its effect was simply to pause the pipeline process. The Crown considers these offences to be serious ones given the broader principles that apply where the court is enforcing compliance with its orders and more broadly the rule of law. It does acknowledge, however, that the appellants may suffer hardship if they are not released given that they will have served their sentences before their appeals can be heard.

[26] With respect to the knowledge of these appellants about the Crown's position on sentencing, counsel acknowledges that the judge's findings on this issue were based on inferences made from the public notoriety of these protests and how they were organized. I was advised that the Crown's position on sentencing was set out in its notices of motion filed in the court below, which was referred to in open court in all of the various proceedings.

[27] In those motions, the Crown approached sentencing by creating categories of "qualified defendants" based on when they were arrested, if they pleaded guilty within a certain period of time, and if they were convicted after a trial. A qualified

defendant was one who met certain criteria that included one arrest only, no prior convictions for contempt of court or administration of justice offences in the past 5 years, and no acts of violence. The concept was one of escalating sentences the longer the contempt carried on. The third amended motion, filed on August 3, 2018, added a category 5 that applied to those arrested after August 2, 2018, where the recommended sentence was 14 days' jail.

[28] The Crown also opposes release on the basis that the public interest favours enforcement where the grounds of appeal are weak and the offences are serious.

Merits

[29] I agree with the Crown that these are serious offences simply because criminal contempt is a challenge to the rule of law. I also agree that the sentencing judge made no error in principle by considering the principles of general deterrence and denunciation to be paramount. However, I am not convinced that these appeals have insufficient merit to meet the tests for leave and for release pending appeal.

[30] Sentences for criminal contempt are by their nature very particularized to the circumstances of each case. While there may be a "range" that starts with a fine and escalates to jail sentences, there is much less guidance from case authorities than for sentences imposed under the *Criminal Code*. There is no question, however, that imposing a sentence for criminal contempt is an exercise of careful judicial discretion governed by an overriding concern about upholding the rule of law: see *MacMillan Bloedel Ltd. v. Brown* (1994), 92 B.C.L.R. (2d) 1 at paras. 5–6 (C.A.) and the comments of Wood J. (as he then was) cited therein.

[31] Justice Affleck was rightly concerned about continued breaches of the court order, regardless of the ongoing judicial and political process surrounding the pipeline issue. He was also rightly concerned about those who came before him knowing full well that the Crown would be seeking escalated sentences. However, the appellants raise a valid point as to whether that fact was one that should have been considered an aggravating factor that required proof by the Crown beyond a reasonable doubt. It was clearly a factor that had a bearing on the judge's imposition

of the 14-day sentences, as it mirrored the Crown's recommendation that was in turn based in part on escalating sentences due to continuing deliberate breaches made with presumed knowledge of the consequences. There is at least an arguable case, in my view, that treating these appellants as simply falling into one category despite the mitigating factors relating to their personal circumstances is an error in principle that impacted the sentence. Moreover, given the short sentences imposed, the consequence of refusing to release the appellants is that they will have served their sentences before their appeals can be heard.

Public interest

[32] I fully appreciate that enforceability is an important public interest here because cases of criminal contempt require speedy responses. However, given the personal circumstances of each of these appellants, I do not see detention pending appeal to be necessary in the public interest. It is the fact of the sentences that is important to upholding the judge's application of the principles of denunciation and general deterrence. And importantly, their appeals will be moot if they are not released pending their determination.

Disposition

[33] For these reasons, I am satisfied that the appellants have established sufficient merit to justify granting leave to appeal, and sufficient merit that, in the circumstances, it would cause unnecessary hardship if they are detained in custody pending their appeals. In all of the circumstances, I do not consider their detention to be necessary in the public interest, and there is no issue concerning the terms of their release.

[34] Leave to appeal is granted, as well as an order releasing the appellants on giving the undertaking required in s. 679(5)(a).

[Discussion with counsel re: return date]

[35] **FISHER J.A.**: The order releasing the appellants is returnable January 31, 2019, or the date set for the appeal, whichever occurs first.

"The Honourable Madam Justice Fisher "

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trans Mountain Pipeline ULC v. Mivasair,* 2019 BCSC 2472

Date: 20191025
Docket: S183541
Registry: Vancouver

Between:

Trans Mountain Pipeline ULC

Plaintiff

And

David Mivasair, Bina Salimath, Mia Nissen, Corey Skinner (aka Cory Skinner), Uni Urchin (aka Jean Escueta), Arthur Brociner (aka Artur Brociner), Karl Perrin, Yvon Raoul, Earle Peach, Sandra Ang, Reuben Garbanzo (aka Robert Arbess), Gordon Cornwall, Thomas Chan, Laurel Dykstra, Rudi Leibik (aka Ruth Leibik), John Doe, Jane Doe, and Persons Unknown

Defendants

Before: The Honourable Mr. Justice Affleck

Oral Reasons for Judgment
(Re Justin Bige, Stacy Gallagher, and James Leyden)

Counsel for the Provincial Crown:	M.R. Ruttan M. L. Crisp
Counsel for the Defendants Justin Bige and Stacy Gallagher:	S.J. Rauch
Counsel for the Defendant James Leyden:	D.N. Fai
Place and Date of Hearing:	Vancouver, B.C. July 22-26 and September 20, 2019
Place and Date of Judgment:	Vancouver, B.C. October 25, 2019

[1] **THE COURT:** These are reasons for judgment on the prosecutions of Justin Bige, Stacy Gallagher, and James Leyden for criminal contempt of court. If the reasons are transcribed, I reserve the right to edit them for grammar and syntax. The results will not change.

[2] On March 15, 2018, an injunction was granted in this proceeding restraining persons having knowledge of the injunction from physically obstructing, impeding, or otherwise preventing access by the employees, agents, or contractors of Trans Mountain Pipeline ULC to various worksites, including the Westridge Marine Terminal ("the Terminal"). The injunction was varied on May 31, 2018.

[3] Justin Bige was arrested on August 14, 2018, for alleged criminal contempt of court for disobedience of the injunction. The arrest took place on an access road to the terminal known as Bayview Drive. Stacy Gallagher and James Leyden were arrested on August 21, 2018, in the same location, again for the alleged offence of criminal contempt of court. Each of the accused describes himself as indigenous.

[4] Mr. Bige and Mr. Leyden each pleaded not guilty to the offence of criminal contempt of court. Mr. Gallagher declined to plead and a plea of not guilty was entered.

[5] I will describe the evidence, the submissions of counsel, and my conclusions.

[6] The Crown's case was put before the court in part through affidavits with the deponents made available for cross-examination. The Crown also tendered video evidence and other photographic evidence. Each of the accused testified.

[7] The RCMP received a call early in the morning of August 14, 2018, to advise that Bayview Drive was being obstructed by a number of persons who were on the roadway. Corporal Sunner went to Bayview Drive at about 9:00 a.m. He saw about 25 people who he described as protestors who were on Bayview Drive. Video of the scene was taken later that morning showing protestors on Bayview Drive obstructing access to the terminal. The protestors were sitting in chairs and had stretched a banner across Bayview Drive on which were various words protesting the pipeline.

The presence of those persons and the banner would have prevented traffic from gaining access to the terminal. The protestors were singing and Mr. Gallagher is seen standing on Bayview Drive, drumming and encouraging the singing.

[8] Starting at 9:44 a.m. on August 14, 2018, the injunction was read to the persons who were on Bayview Drive. The voice of the policeman who read the injunction aloud was greatly amplified and there can be no doubt that all of the persons present within the vicinity of the banner and Bayview Drive at the entrance to the terminal would have heard the reading of the injunction.

[9] As the reading took place, paper copies of the injunction were given to some of the persons on Bayview Drive who were seated next to the banner. When the reading of the injunction was concluded, nine persons remained seated in tables on Bayview Drive, but shortly thereafter six of them left Bayview Drive.

[10] The police then advised the three persons who remained that they were engaged in an unlawful act which they were asked to discontinue. If they continued in their unlawful conduct, they were advised they would be arrested for criminal contempt of court and charges would be laid against them, causing personal inconvenience, expenses associated with court time, and their employment and reputation and ability to travel might be adversely affected. They were asked if the police could do anything to gain their cooperation. The advice and information given to the persons standing or sitting on Bayview Drive is described in the injunction of May 31, 2018, as the “five-step process”.

[11] All three persons who remained on Bayview Drive declined to leave and were arrested. Mr. Bige was one of those next to the banner which impeded access to the terminal. He was arrested and led to an adjacent area where the police advised him of his *Charter* rights.

[12] In cross-examination of Corporal Sunner by Ms. Rauch, he testified that he had no training addressed particularly to dealing with protestors and no training in indigenous culture or laws. Corporal Sunner testified that when access to Bayview

Drive was obstructed by the banner and by the person seated next to it, there were two or three trucks whose drivers had been prevented from driving the trucks into the terminal.

[13] Constable Premack was a member of the arrest team on August 14, 2018. He described the protest site on Bayview Drive as located about 20 metres in front of the main gate of the terminal. Constable Premack was responsible for reading the injunction aloud through an amplifier. He saw the arrest of the three persons who had remained seated next to the banner, but did not know if Mr. Bige was one of those arrested.

[14] Constable Pinto was instructed to video the events on the morning of August 14, 2018, on Bayview Drive. The video became evidence on the trial of Mr. Bige, and he is shown in the video near the banner on the morning of August 14, 2018.

[15] Mr. Bige testified. On August 14, 2018, he did not attend Kwantlen College, as he had in previous weeks, but instead went to Bayview Drive. He had attended many protests involving the Trans Mountain Pipeline. He testified he knew a number of people would be present at the terminal on the morning of August 14, 2018, and he viewed his presence at that location as, as he put it, an opportunity to make change. Mr. Bige testified he was drumming and singing while on Bayview Drive on August 14, 2018, and he heard someone using a loudspeaker. He described his arrest, but could not remember receiving a copy of the injunction. On his arrest, he was escorted by the police to a processing area where he gave the police his date of birth, as well, his name and address.

[16] In cross-examination by Mr. Fai, Mr. Bige testified that prior to his arrest, he was in a medicated state and, to use his language, his “ADHD was up”, especially in the presence of police.

[17] In cross-examination by the Crown, Mr. Bige testified that before August 14, 2018, he had been to both the Burnaby terminal of the Trans Mountain Pipeline and the Westridge Marine terminal. He had seen other persons arrested on those

occasions, at those locations, and he had followed the news about what he described as “activists” who were arrested for protesting the enlarging of the pipeline.

[18] Mr. Bige spent the night before August 14, 2018 at a site known as the watch house. There he learned from others present that the next day there was “important work to be done”. Mr. Bige could not recall if, on the morning of August 14, 2018 he helped to set up chairs on Bayview Drive near the entrance to the terminal, but when the chairs were set up, he decided to sit on one of them.

[19] I will now describe the events of August 21, 2018, on Bayview Drive which are relevant to the allegations against Mr. Gallagher and Mr. Leyden.

[20] Corporal Mulrooney was the site commander on August 21, 2018. That day was the sixth occasion he had been working with the arrest teams regarding alleged breaches of the injunction. He was aware that on that day Mr. Leyden and Mr. Gallagher were arrested. They were both known to him from previous occasions when Corporal Mulrooney had been involved in arrests.

[21] On August 21, 2018, Corporal Mulrooney saw about 30 people on Bayview Drive near the entrance to the terminal. There were two crew buses and some dump trucks waiting to go into the terminal. They were about 10 to 20 metres distant from the persons on the road. Corporal Mulrooney asked the drivers of those vehicles to move them back further because, as he put it, he was concerned that “tempers can flare”.

[22] Corporal Mulrooney asked an RCMP member to play a recording of a reading of the injunction. As that was being done, Corporal Mulrooney could see Mr. Leyden and Mr. Gallagher were present. He described the reading of the injunction as “very, very loud”.

[23] Following the reading of the injunction, the police then told the persons on Bayview Drive of the five step process referred to in the injunction. Those steps were

described "as any person who breaches the order will be arrested in accordance with the RCMP's five-step process, which is:

1) ask the individual to cease the unlawful act;

2) inform the individual their action is unlawful;

3) caution the individual that if they continue to act unlawfully, they will be arrested and could face charges;

4) confirm that the individual is aware that they will be arrested and could face charges; and

5) arrest the individual in accordance with the appropriate *Charter* obligations."

[24] Corporal Mulrooney testified that Mr. Leyden and Mr. Gallagher did not leave their locations on Bayview Drive and were arrested. Corporal Mulrooney testified that it was clear to him that Mr. Gallagher did not want to leave. Corporal Mulrooney described Mr. Gallagher as going through a moral dilemma. Mr. Gallagher sat on the road and Constable Potts was asked to read the five steps to him. Mr. Gallagher was then advised he was under arrest. Constable Potts touched Mr. Gallagher's arm, which he pulled away, and Mr. Gallagher said, "Get your hands off me, I am in prayer." Mr. Gallagher was holding a smudge pot and a feather. Corporal Mulrooney testified he was aware of the cultural significance of those objects. Constable Potts remained with Mr. Gallagher for about 30 minutes while Mr. Gallagher prayed and chanted. During that time, a member of an RCMP Division Liaison Team spoke to Mr. Gallagher, who did not appear to respond.

[25] Corporal Mulrooney consulted with his command centre. He then spoke to Mr. Leyden and, after a brief lapse of time, Mr. Leyden went to Mr. Gallagher and took the smudge pot from him. Mr. Gallagher kept the feather he had been holding. Mr. Gallagher was then placed on a cart to be taken to the processing area.

Corporal Mulrooney testified that Mr. Gallagher was cooperative and did not resist arrest. That is apparent from the video.

[26] In cross-examination, Corporal Mulrooney testified that he had the impression that Mr. Gallagher did not intend to be arrested. The police did not make inquiries of protestors about para. 13 of the injunction which reads:

> This Order shall not apply to persons acting in the course of or in the exercise of a statutory duty, power or authority.

[27] In cross-examination by Ms. Rauch, Corporal Mulrooney agreed that Mr. Gallagher had "a bit of a relationship with the police", including praying with the police and smudging with them. Ms. Rauch asked Corporal Mulrooney about the role of the Division Liaison Team, which he testified was to liaise between the police and the protestors. Corporal Mulrooney did not give the Division Liaison Team any instructions. The Command Centre gave Corporal Mulrooney advice about "traditions and items at the scene", to use his phrase. Part of the advice was to slow down the arrest process of Mr. Gallagher. Corporal Mulrooney testified it was not his decision to arrest Mr. Gallagher, but he told his officers to go through the five steps and then "do your job". Mr. Gallagher had been free to leave before the five steps were read to him, but thereafter he was under arrest. Corporal Mulrooney agreed that Mr. Gallagher had assisted in keeping the scene of arrests calm.

[28] James Leyden testified that he is a sun dancer who "must walk in peace and humility, in knowledge, wisdom, and truth". Mr. Leyden spoke of his belief in natural law, saying everything is a spirit and we are all connected. He testified that when people who protested were arrested, he and others of like mind would be present "to hold the people and to talk to them about 'walking in peace'", and everyone is invited to pipe ceremonies, including the police.

[29] James Leyden spoke of the discussions he had had with an important chief of the Coast Salish people, requesting him to take on a role representing indigenous people at the scenes of the protests of the pipeline.

[30] Mr. Leyden testified he was present prior to August 23, 2018, on 30 or 40 occasions when people were arrested for disobedience of the injunction. On none of those occasions did he put himself in a position to be arrested. But on August 21, 2018, to use his words, “I chose to do this because I could get before the court to speak about unceded territory.” He testified that Chief Wilson of the Coast Salish people had told him that it was his duty to speak about unceded territory. His decision to be arrested was, he testified, made immediately after the last person on the line was arrested. He said to the police at that time, “We are on unceded territory and I should not be arrested.”

[31] In cross-examination by Crown counsel, it was put to Mr. Leyden that, “You were standing on the road and at least on one level you expected to be arrested and the court would resolve the matter.” In response, Mr. Leyden said, “Yes, I agree with that.”

[32] Stacy Gallagher testified that he comes from the spirit world. He knows the songs of every tree and every river. On August 21, 2018, while on Bayview Drive near the entrance to the terminal, he was praying, smudging, and offering medicine to the people. He insists he did not block Bayview Drive, and when asked if he was aware of the injunction, his answer was, “I do not really know.”

[33] In cross-examination, Mr. Gallagher agreed August 21, 2018, was the 23rd day on which people had been arrested for disobeying the injunction, and he had been present on each of those days. Mr. Gallagher was adamant that he had no memory of hearing the five steps read to him, because he was in ceremony and was praying. He acknowledged that when he was singing and dancing on Bayview Drive, he was also speaking to other persons who were nearby.

[34] Mr. Gallagher testified that on a previous occasion, he had testified on behalf of one of the accused persons named Sylas Bradley. After Mr. Gallagher was asked about that testimony, he then reluctantly agreed that he was aware of the injunction, but insisted he did not know that there was a court order that could lead to his arrest.

[35] Mr. Fai made two submissions on behalf of Mr. Leyden. The first relies on para. 13 of the injunction which provides that it does not apply to persons acting in the course of or in the exercise of a statutory duty, power, or authority.

[36] Mr. Fai submitted that it was the obligation of the Crown to prove Mr. Leyden did not act in the course of or in the exercise of a statutory duty, power, or authority, and that the Crown had not met that obligation. Mr. Fai submitted the evidence leads to the conclusion that Mr. Leyden, on August 21, 2018, was the emissary of the Coast Salish Nation and he referred to the important chief who had urged Mr. Leyden to become involved in the protest to assert rights in relation to unceded land. The evidence had been that the chief was present at some of the protests including the protest on August 21, 2018. The chief did not testify at the trial.

[37] Mr. Fai also referred to what he described as the “Niagara Agreement” or the “Niagara Treaty”, which he asserted was made in 1764 between the Crown and various indigenous peoples. He submitted that the Niagara Agreement or Treaty had established a nation-to-nation relationship between the Crown and indigenous peoples. Mr. Fai submitted the agreement or treaty has application in British Columbia. No reference was made to the actual agreement or treaty.

[38] I accept there is a *Royal Proclamation of 1763*, which has been applied to the relationship between the Crown and Indian lands in North America over which the Imperial Crown exercised sovereignty. There has been controversy about the extent of the territory to which the *Royal Proclamation of 1763* applies, including controversy over whether it governs such relationships in what is now British Columbia.

[39] In *Delgamuukw v. British Columbia*, (1993), 104 D.L.R. 4470, the British Columbia Court of Appeal agreed with the trial judge that the *Royal Proclamation of 1763* did not govern the relationship between the Crown and Indian lands in British Columbia. The Supreme Court of Canada, in reasons found at [1997] 3 S.C.R. 1010 in the *Delgamuukw* matter, determined that although the status of the *Royal Proclamation of 1763* in British Columbia was before the court, it did not decide that

issue. I know of no judicial authority which has applied the *Royal Proclamation of 1763* to British Columbia in a manner which would have any influence on the outcome of these prosecutions.

[40] I do not accept Mr. Fai's arguments can prevail. He is correct that the injunction provides that it does not apply to a person who acts when exercising a statutory duty, power, or authority, but there is no basis on which I can find that Mr. Leyden acted in accordance with such duty, power, or authority. No statute was brought to my attention which could be relevant to para. 13 of the injunction. A statute is a written law which expresses the will of a legislature. The directions given to Mr. Leyden by an important chief of the Coast Salish people cannot be read into para. 13 of the injunction as if those directions constituted a statutory duty, power, or authority.

[41] Mr. Fai also submitted that the Crown had not proven the intention of Mr. Leyden to disobey the injunction. That intention is commonly referred to as the mental element of an offence or the *mens rea*. In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, Madam Justice McLachlin, later Chief Justice of Canada, wrote at para. 25:

> To establish criminal contempt [of court] 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.

[42] I am satisfied beyond a reasonable doubt that Mr. Leyden made a conscious choice to defy the injunction in a public way on August 21, 2018. He intended to be arrested, and thereby put himself in a position in this Court to be able to express his strongly held views against the injunction.

[43] I find the Crown has proven all of the elements of criminal contempt of court against Mr. Leyden and I find him guilty.

[44] Ms. Rauch, on behalf of Mr. Bige and Mr. Gallagher, adopted Mr. Fai's argument concerning para. 13 of the injunction, which I have rejected. Ms. Rauch made several other arguments on behalf of Mr. Bige and Mr. Gallagher. One argument was that the necessary *mens rea* had not been proven in respect of her two clients. That argument rests on the proposition that Mr. Bige and Mr. Gallagher were, to use her expression, "swept up" in the need on August 14, 2018 in Mr. Bige's instance and August 21, 2018 on Mr. Gallagher's, to obey indigenous laws. By "swept up" in that need, I understand Ms. Rauch to take the position that each was praying, dancing, and singing, and became indifferent to the reading of the injunction and to the reading of the five steps to them by the police. They were governed by aboriginal laws which they considered applied to their conduct.

[45] I do not accept Mr. Gallagher or Mr. Bige did not hear the reading of the injunction. Further, I have no doubt Mr. Gallagher and Mr. Bige knew of the injunction before August 14, 2018 in Mr. Bige's case and before August 21, 2018 in Mr. Gallagher's case. I am persuaded beyond a reasonable doubt that Mr. Gallagher was aware on August 21, 2014, that if he continued to obstruct access to the terminal by singing and dancing while on Bayview Drive, he would be arrested.

[46] I am satisfied that Mr. Bige was aware from his experiences before August 14, 2018, that numerous persons had been arrested for defiance of the injunction. I conclude, on the whole of the evidence about his conduct on that date, that he deliberately courted arrest.

[47] Despite all of the elements of criminal contempt of court having been proven against her clients, Ms. Rauch places great stress on the importance of applying not only the criminal law of Canada to her clients' conduct, but also aboriginal law, which I understand her to say governs these proceedings. Nevertheless, I have been given no basis on which to articulate the reason why aboriginal law applies, except the bare assertion that it does, nor have I been provided with the content of the

aboriginal law Ms. Rauch relies on. Ms. Rauch provided a copy of an article by a former Chief Justice of British Columbia on “The Duty to Learn: taking account of indigenous legal orders in practice”. In the article, Chief Justice Finch urged, among other matters, that future training in law schools ought to include an understanding of aboriginal law. I have found the article interesting, but it does not assist me in determining any aboriginal law that could properly be applied to the conduct of Ms. Rauch’s clients. I was also provided with an article by an Osgoode Hall law professor named John Borrows entitled, “With or Without You: First Nations Law (in Canada)”. The article urges courts to take account of aboriginal law in certain circumstances. It is an opinion piece, but it does not lay down principles by which I can properly be guided. Ms. Rauch also provided me with a copy of the supplementary report of the “National Inquiry into Missing and Murdered Indigenous Women and Girls”. I have not found it useful in deciding the matters before me.

[48] Ms. Rauch referred to s. 25 of the *Charter of Rights and Freedoms* which provides that the rights and freedoms which are guaranteed by the *Charter* are not to be construed to abrogate or derogate from aboriginal treaty or other rights. Notwithstanding Ms. Rauch invoked that section, no submission was made that the injunction abrogates or derogates from any rights enjoyed by aboriginal peoples. No *Charter* remedy is sought. The position of Ms. Rauch appears to be that indigenous law obliged Mr. Bige and Mr. Gallagher to disobey the injunction. No evidence was offered of the content of any aboriginal or indigenous law or laws that may be applicable to the conduct of Mr. Bige and Mr. Gallagher and which is relevant to their prosecution for criminal contempt of court for disobedience of the injunction.

[49] I find that the common law offence of criminal contempt of court is applicable to the conduct of Mr. Bige and Mr. Gallagher at the time of their respective arrests. I conclude they were each aware of the injunction and each made a decision to disobey it in the presence of a large number of people. The courts of this country, including the Supreme Court of Canada in the *United Nurses of Alberta* have determined that such conduct is a criminal offence.

[50] I find Mr. Bige and Mr. Gallagher each guilty of criminal contempt of court.

"Affleck J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trans Mountain Pipeline ULC v. Mivasair,* 2020 BCSC 1512

Date: 20201006
Docket: S183541
Registry: Vancouver

Between:

Trans Mountain Pipeline ULC

Plaintiff

And

David Mivasair, Bina Salimath, Mia Nissen, Corey Skinner (aka Cory Skinner), Uni Urchin (aka Jean Escueta), Arthur Brociner (aka Artur Brociner), Karl Perrin, Yvon Raoul, Earle Peach, Sandra Ang, Reuben Garbanzo (aka Robert Abress), Gordon Cornwall, Thomas Chan, Laurel Dykstra, Rudi Leibik (aka Ruth Leibik), Linda Hutchings, John Doe, Jane Doe, and Persons Unknown

Defendants

And

Attorney General of British Columbia

Intervenor

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment (Gallagher/Bige/Leyden - Sentencing)

Counsel for the Crown:	M.R. Ruttan
Counsel for the Defendant, James Leyden:	D. Fai
Counsel for the Defendants, Justin Bige and Stacy Gallagher:	S.J. Rauch
Place and Date of Hearing:	Vancouver, B.C. September 15-18, 2020
Place and Date of Judgment:	Vancouver, B.C. October 6, 2020

INTRODUCTION

[1] The matter before the Court is the sentencing of Stacy Gallagher, Justin Bige and James Leyden (collectively, the "Contemnors").

[2] On October 25, 2019, Justice Affleck convicted all three men of criminal contempt arising from their breach of an order granted in this proceeding on March 15, 2018 and varied on May 31, 2018 (the "Injunction"). In substance, the Injunction prohibited interference with the operations of the plaintiff Trans Mountain Pipeline ULC ("Trans Mountain"). Justice Affleck's reasons are indexed at *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 2472 (the "Conviction Reasons").

[3] That conviction arose from Mr. Bige's breach of the Injunction on August 14, 2018 and Mr. Gallagher and Mr. Leyden's breach on August 21, 2018.

[4] This sentencing hearing began after issuance of my reasons for judgment where I dismissed the Contemnors' application to grant a judicial stay of proceedings or, in the alternative, direct certain sentencing procedures: *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCSC 1297 (the "Stay Reasons").

[5] The Crown and the Contemnors present starkly different views as to the determination of a fit sentence for these offenders.

CIRCUMSTANCES OF THE OFFENCES

[6] The circumstances of the offences are outlined in the Conviction Reasons. In addition, I have reviewed the evidence that gave rise to the convictions, including watching the video recordings and listening to portions of the audio recording. Finally, I have reviewed the transcript of the evidence at trial, including the testimony of the Contemnors.

[7] In March 2018, this Court granted the Injunction to address protest activity against Trans Mountain and its pipeline expansion project. In broad terms, the Injunction prohibited obstruction of access to and from various Trans Mountain work

sites, including the Westridge Marine Terminal on Bayview Drive in Burnaby, BC (the "Terminal").

[8] In early 2018, Trans Mountain's project attracted considerable controversy at the time. Protests and arrests of protestors began almost immediately after the granting of the Injunction. All told, the police arrested in excess of 200 people for breaching the Injunction. Controversy concerning Trans Mountain's project continues to this time.

August 14, 2018

[9] The events of August 14, 2018 concern only Mr. Bige, although Mr. Gallagher was also present at that time. The events are summarized in the Conviction Reasons at paras. 7-18.

[10] Mr. Bige, then a Kwantlen College ("Kwantlen") student, spent the previous night at what is called the "Watch House", which was set up by various Indigenous groups near the Terminal to allow monitoring of Trans Mountain's activities. Mr. Bige was well aware that a protest was planned for the next day. His testimony at trial indicates that he fully intended to participate in that protest in order to "protect the land", citing the "need for change". He also referred to the "work" that was being done, and he wanted to ensure that some of that "work" would be done that evening or in the morning. I will return to his latter sentiment regarding "work" later in these reasons.

[11] Mr. Bige was present when the RCMP played a recording of the Injunction. He was part of the human chain sitting in chairs that were arrayed across Bayview Drive, next to banners with anti-pipeline messages. He was there when six of the protestors left this area after the reading of the Injunction. He was one of three people who did not leave, even after the RCMP spoke to each of them in what has been called the "five-step process" set out in paragraph 12 of the Injunction.

[12] A number of people attended the protest. At least one person appears to have been recording the event, and specifically the array of nine people on chairs across Bayview Drive.

[13] Mr. Gallagher was also very much involved that day. He is on the roadway much of the time, essentially acting as a cheerleader for the protestors on the chairs in the roadway.

[14] The five-step process is direct and to the point. The RCMP advised each person separately that, if the unlawful conduct continues, they will be arrested for criminal contempt and could face charges. The five-step process includes a specific caution to the individual that an arrest could cause:

> . . . personal inconvenience in terms of time spent in court, associated costs. In addition, if you are found guilty you could be sentenced to community service or a fine or jail time.

[15] After the caution, the RCMP officer asks the person to cooperate and leave before any arrest.

[16] Mr. Bige saw the first person sitting on a chair, a female, go through the five-step process; when she refused to leave, he would have seen the RCMP escorting her away after her arrest just before the RCMP officer turned to him. All the while, Mr. Gallagher is not feet away from them, again supporting them and their actions with his talk, dancing and drumming, while he was in the middle of the roadway.

[17] After Mr. Bige's arrest, he held his eagle feather high above his head as he walked to the RCMP processing tent, all to the cheers and clapping of many other protestors and supporters who witnessed the event.

[18] This was not Mr. Bige's first involvement in the Trans Mountain protests and the arrests; his own arrest could not have been a surprise to him. It did not arise from any rash decision on his part. Before August 14, 2018, Mr. Bige had been to various other protests at Trans Mountain's work sites and he had seen people arrested as a result. In the Conviction Reasons, Affleck J. stated:

> [46] I am satisfied that Mr. Bige was aware from his experiences before August 14, 2018, that numerous persons had been arrested for defiance of the injunction. I conclude, on the whole of the evidence about his conduct that date, that he deliberately courted arrest.

August 21, 2018

[19] One week later, another protest formed on Bayview Drive near the Terminal. The events are summarized in the Conviction Reasons at paras. 19-34.

[20] On this occasion, all three of the Contemnors were present.

[21] Again, the RCMP play a recording of the Injunction over a loudspeaker. Mr. Gallagher is seen walking on the roadway and on the side of the road at various times. Mr. Bige is also standing in the middle of the roadway in front of a banner, while moving an eagle feather around another person.

[22] During the reading of the Injunction, Mr. Leyden is seen moving between the side of the roadway and the row of aligned protestors in front of the many chairs stretching across the roadway. At one point, Chief Judy Wilson begins speaking over a megaphone to the protestors while standing on the side of the roadway. While this is going on, Mr. Leyden brings over his own chair and takes up a position on the roadway with the others.

[23] Both Mr. Leyden and Mr. Gallagher witness the RCMP undertake the five-step process with a number of people, all of whom walked away. Mr. Leyden then did not leave the roadway, leading to the RCMP completing the five-step process with him and, given that he remained, his arrest. Before that time, he asserted that he was on unceded territory, that he had been asked by the local First Nations to be there and that the RCMP were acting illegally.

[24] Mr. Gallagher continued to act as a cheerleader of sorts for Mr. Leyden as the RCMP dealt with him. Mr. Bige was close by at all times too, including walking with Mr. Leyden along with others as Mr. Leyden was led to the RCMP processing tent.

[25] Mr. Gallagher's activities on this day were a more prolonged affair. After Mr. Leyden's arrest, he sat down on the roadway. After the five-step process and his arrest, Mr. Gallagher refused to move, claiming that he was "in prayer". Mr. Bige was again close by, singing and/or drumming in support, while in the middle of the roadway.

[26] After the RCMP processed Mr. Leyden, he returned to the site and assisted in removing some items from the roadway. Mr. Gallagher never voluntarily moved off the roadway after his arrest; after some time, RCMP officers eventually placed him on a cart and moved him to the RCMP processing tent.

[27] As with Mr. Bige, Mr. Gallagher was not unaware of previous protests and arrests under the Injunction. This was the 23rd day of arrests under the Injunction. Mr. Gallagher acknowledged that he had been present on each of those days. On some occasions, Mr. Gallagher had even been present in court when other protestors, who had been arrested and charged, were addressed in these proceedings.

[28] As of this date, Mr. Leyden also acknowledged that he had extensive experience with the Trans Mountain protests, having been present on 30-40 occasions when people were arrested.

[29] Mr. Leyden advances a number of reasons why he chose to be arrested that day. He refers to two events where an orca was swimming in the local waters with her dead calf and an eagle flying into Trans Mountain's site that day. As noted in paras. 30-31 of the Conviction Reasons, Mr. Leyden refers to being asked to stand up for the cause by Chief Wilson; he says he got arrested in order to get before the Court to speak about unceded territory and how it was all a mistake.

[30] At para. 49 of the Conviction Reasons, Affleck J. found that both Mr. Gallagher and Mr. Leyden, while aware of the Injunction, each made a decision to disobey it in the presence of a large number of people.

[31] As with the August 14, 2018 protest, the events of August 21, 2018 were peaceful, although clearly unlawful.

CIRCUMSTANCES OF THE CONTEMNORS

[32] Information as to the circumstances of the Contemnors is found in their trial evidence, their *Gladue* reports, the evidence of Mr. Gallagher and Mr. Bige at the August 4, 2020 hearing (the "August 2020 Hearing") and, finally, the Contemnors' remarks to the Court at this sentencing.

[33] It is common ground that the sentencing process is an individualized process and that the Court must consider the particular circumstances of the person before the Court.

[34] There are, however, certain commonalities between the Contemnors. All of them are Aboriginal through their mothers lineage. Their home Indigenous territories are not in BC or even in the local area, being the traditional territories of the Coast Salish peoples. In addition, none of these men have criminal records.

Mr. Leyden

[35] Mr. Leyden is 68 years old. He was born in Ontario.

[36] Mr. Leyden's *Gladue* report indicates that he has only a few memories of his family life, which unfortunately included abuse, both substance and sexual. The authorities apprehended him at three months of age. He believes that his mother was of a blended Anishinaabe/Italian heritage; his father was non-Aboriginal.

[37] Mr. Leyden was adopted at age seven by a non-Aboriginal family who did not expose him to his Aboriginal heritage.

[38] Mr. Leyden began a life of drug and alcohol abuse starting at age 12, which involved some element of a criminal lifestyle. In the 1970s, he moved west, eventually ending up in Vancouver where, unfortunately, his drug and alcohol abuse continued. In the 1980s, when he was around 34 years old, Mr. Leyden began to embrace his Aboriginal heritage, a change of direction that allowed him to attain

sobriety that he maintains to this day. Since then, Mr. Leyden has worked and volunteered in the Indigenous and addictions recovery community.

[39] Mr. Leyden is currently single. He has fathered six children, two of whom have passed away. He is not involved in the lives of his other four children. He states that he has taken a pledge of poverty; currently, he is supported financially by a small pension while living in a van in a church parking lot.

[40] Mr. Leyden reports that he has a variety of ailments, including heart issues. He takes medication every day.

[41] In 2018, Mr. Leyden's connection to the Trans Mountain matter arose when, Tsleil-Waututh and Squamish First Nation elders asked him to provide services at the Watch House, including "keeping the peace". He is described as a "sun dancer" and "pipe carrier", titles within the Aboriginal community, as was discussed by Affleck J. in the Conviction Reasons at paras. 28-29.

Mr. Gallagher

[42] Mr. Gallagher is 58 years old. He was born and raised in Vancouver.

[43] Mr. Gallagher's *Gladue* report outlines his aboriginal heritage. His father was non-Aboriginal and his mother was of "blended Anishinaabe descent". He is a member of the Serpent River (Anishinaabe) First Nation, located on Lake Huron near Sudbury, Ontario.

[44] Mr. Gallagher describes his family life as marred by both substance and sexual abuse, poverty, transience and trauma. He began his own personal history of substance abuse when in Grade 8 and that lifestyle continued until his late 40s.

[45] Similar to Mr. Leyden, Mr. Gallagher's salvation came from his reconnection to his Aboriginal heritage. For the last ten years, he has been working and volunteering in Indigenous communities throughout BC.

[46] Similar to Mr. Leyden, Mr. Gallagher's relationship with local Aboriginal communities seems to have begun in 2018. The *Gladue* report refers to him providing various "services" to the Tsleil-Waututh and Squamish First Nations, including providing sacred teachings and medicines and keeping the peace. I have read the various letters of support for him introduced at this hearing, which speak to his community involvement and volunteer work.

[47] Mr. Gallagher is in a relationship. He has two adult children from a previous relationship who live in Ontario; he has regular contact with them.

[48] Mr. Gallagher has a Grade 12 education. He has been employed in a variety of jobs over the years, most recently sporadically employed as a carpenter, while doing volunteer work. He is currently unemployed and collecting the Canada Emergency Response Benefit (CERB).

[49] Mr. Gallagher lives with his mother in Vancouver. His mother is 86 years old and she has various medical conditions. Ms. Gallagher's letter presented to the Court states that she is housebound and needs her son at home to care for her health and do chores for her.

[50] Like Mr. Leyden, various members of the Aboriginal community describe Mr. Gallagher as a "sun dancer", a "pipe carrier" and a spiritual person. He has also been described as a "Heyoka", as referred to in letters of support and in the testimony of Gordon Jaggs. Mr. Jaggs says that a "Heyoka" is a contrarian, a description of Mr. Gallagher well supported by his disobedience of the Injunction in this matter.

Mr. Bige

[51] Mr. Bige is 27 years old (a correction from the Stay Reasons at para. 98). He was born and raised in the Lower Mainland, where he currently lives.

[52] Mr. Bige's *Gladue* report indicates that his father is non-Aboriginal. His Aboriginal heritage arises on his mother's side, whose Aboriginal community is the Lutsel K'e Dene First Nation, located in the Northwest Territories (NWT).

[53] Mr. Bige's mother was in foster care as a child and his grandparents were in the residential school system. Mr. Bige describes that his home life involved poverty, violence and abuse. After Mr. Bige moved from home when he was 18 years old, he does not appear to have maintained any relationship with his parents. Another woman adopted Mr. Bige through an Indigenous ceremony and he maintains that relationship to this time.

[54] In 2013, Mr. Bige began studies at Kwantlen; he graduated in 2019 with a Bachelor of Arts. While at Kwantlen, Mr. Bige began connecting with his Aboriginal heritage and Indigenous issues, generally. Later still, Mr. Bige began participating and organizing such events. In 2018, Mr. Bige visited his First Nation in NWT for the first time. He has taken a traditional name, Tawahum.

[55] Mr. Bige now lives in a two-bedroom apartment with roommates in downtown Vancouver. He describes himself as a poet, performer and youth mentorship facilitator. He supports himself with various endeavours, including performances and workshops for which, at times, he received grants. In recent months, he has not been working, but collecting CERB.

[56] In the past, Mr. Bige has struggled with mental health issues. He is currently taking medication for ADHD and depression. He has provided a letter from a medical clinic that states that his mental health condition will be greatly exacerbated and worsened if he is incarcerated.

[57] Mr. Bige has clearly had a great impact on his community, both in the Aboriginal community and beyond, despite his young age. He has provided in excess of 50 letters of support from people who know him and are involved with him. They speak of his art, his passion, his work (both paid and unpaid) in the community

and his contribution to their lives. Much of his accomplishments are set out in his curriculum vitae.

[58] Mr. Bige's *Gladue* report states that he "understood that committing the offence before the Court was wrong" and that he was only there to "support" the local First Nations.

[59] Like Mr. Gallagher, Mr. Bige often repeats that he had no intention to "disrespect the Courts".

[60] As I described in the Stay Reasons, Mr. Bige presented a less aggressive and combative stance than Mr. Gallagher at the August 2020 Hearing. He stated then that he regrets the personal consequences of his involvement in these court proceedings, noting the impact that it has had on his family, friends and colleagues. In the Stay Reasons at para. 118, I noted comments by Mr. Bige at that time that suggested a continuing defiance of the Court's authority. At para. 117, I also stated that the ". . . collision of ideology and reality has now come home to roost for the young and impressionable Mr. Bige, but only to a certain degree".

[61] Mr. Bige has now advanced his thinking on the matter, some six weeks later at this sentencing hearing. Mr. Bige now states that he has done a lot of learning through this court process and he expresses remorse. He says that he did not truly appreciate how his disobedience could affect the Court and its authority. He says that he now realizes that he cannot just disobey a court order and that there are other ways to honour and advance his politics and causes.

CROWN / DEFENCE POSITIONS

[62] As I stated at the outset, the Crown and defence counsel submit widely differing views as to what sentence is fit for the Contemnors.

The Crown

[63] The Crown's sentencing position with respect to the protestors convicted of criminal contempt for violating the Injunction has evolved over time, as matters

progressed over the spring/summer 2018 when approximately 200 people were arrested at various Trans Mountain work sites.

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

[65] On April 24, 2018, the Crown indicated an initial sentencing position of a $500 fine and, if unable to pay, 25 hours of community work service where the contemnor pleads guilty.

[66] On May 23, 2018, the Crown filed an Amended Notice of Motion setting out three categories of its sentencing positions depending on the date of the arrest, and whether the matter was disposed of by guilty plea or trial:

a) Category One: Defendants arrested before April 16, 2018:

Early: $500 fine or 25 hours of community service for persons pleading guilty no later than the week of May 28;
Late: $1,500 fine or 75 hours of community service for persons pleading guilty no later than the first day of trial. If convictions result for Category One defendants at the end of a trial, the Crown would consider a general sentencing position of a $3,000 fine or 150 hours of community service.

b) Category Two: Defendants arrested between April 16-May 8, 2018:

Early: $1,500 fine or 75 hours of community service for persons pleading guilty on or before June 25;
Late: $4,500 fine or 225 hours of community service for persons pleading guilty no later than the first day of trial. If convictions result for

Category Two defendants at the end of a trial, the Crown would consider a general sentencing position of seven days' imprisonment;

c) Category Three: Defendants arrested after May 8, 2018:

Early: A fine of $5,000 or 240 hours of community service for persons pleading guilty one month before trial;
Late: Seven days' imprisonment for persons pleading guilty no later than the first day of trial. If convictions result for Category Three defendants at the end of a trial, the Crown would consider a general sentencing position of 14 days' imprisonment.

[67] Later in late May or early June 2018, Trans Mountain applied to amend the order to add further locations and to permit a reading of the order to protestors by audio recording. The five-step process before arrest by the RCMP, as set out above, was also added to the order.

[68] In July 2018, the Crown filed a Second Amended Notice of Motion adding "Category Four" to its sentencing positions for defendants arrested after May 28, 2018:

d) Early Category Four: Seven days' imprisonment for persons pleading guilty within one month after their first appearance in court;
Late Category Four: Ten days' imprisonment for persons pleading guilty no later than the first day of trial. If convictions result for Category Four defendants at the end of a trial, the Crown would consider a general sentencing position of 14 days' imprisonment.

[69] On August 3, 2018, the Crown filed a Third Amended Notice of Motion adding "Category Five" to its sentencing positions for defendants arrested after August 2:

e) Early Category Five: 14 days' imprisonment for persons pleading guilty within one month after their first appearance in court;

> Late Category Five: 20 days' imprisonment for persons pleading guilty no later than the first day of trial. If convictions result for Category Five defendants at the end of a trial, the Crown would consider a general sentencing position of 28 days' imprisonment.

The Crown also stated it may seek longer jail sentences for Category Five defendants in respect of arrests occurring after August 2, 2018 at any time without further notice.

[70] In this case, the Crown is seeking jail terms of 28 days for the Contemnors, consistent with Late Category Five.

[71] In my view, the increasing severity of the sentences sought by the Crown over that time were in keeping with the need to send an increasingly stronger message to the protestors who continued to openly flaunt and disobey the requirements of the Injunction even months after it was granted. There is substantial authority to support such an approach.

[72] In *MacMillan Bloedel Ltd. v. Brown* (1994), 88 C.C.C. (3d) 148 (B.C.C.A.), Chief Justice McEachern was addressing ongoing protests with respect to logging in the Clayoquot Sound area. At para. 21, he stated that the appellants, who were appealing their jail sentences, could not reasonably have assumed that ". . . public defiance of lawful orders of the court would continue indefinitely to be visited with only nominal fines and non-custodial sentences". Further, the court stated:

> [45] . . . it would be naive to consider these sentences, even for first offenders, in isolation from the larger picture of events at these blockades. These Appellants were not guilty of youthful exuberance or rash judgment, which are the usual hallmarks of first offenders. With foolish, herd bravery, the Appellants chose to join in what they knew was an unlawful disobedience of the law. Every accused person is entitled to be considered separately from every other accused person, but a sentencing judge is not required to blind himself to the obvious fact that these were not ordinary first offenders and that they were acting in concert. 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 that judges generally offer to first offenders.

[73] In *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156, the court adopted that same approach in this matter in relation to protestors who were arrested at the Terminal in late August 2018. Justice Affleck had sentenced them to 14 days in prison, consistent with the Crown's sentencing position (Early Category Five).

[74] In *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156, Justice Butler for the court confirmed that escalating sentences can be appropriate:

> [60] It was also not unprecedented for the judge to use escalating sentences in a criminal contempt sentencing hearing. In *MacMillan Bloedel*, six out of 44 protestors arrested for violating an injunction order in contempt appealed their custodial sentences. McEachern C.J.B.C. held that escalating sentences were sometimes reasonably necessary to preserve the rule of law in contempt proceedings:
>
> > [48] . . . [J]udges may have no alternative but to impose increasingly severe sentences for subsequent offences should the sentences imposed in these cases prove insufficient to convey the message that Canada, as its Constitution states, is a country founded upon the rule of law.

[75] The Crown advises that 12 people have been convicted under Category Five. All but two of them plead guilty and they received either jail time or a Conditional Sentence Order (CSO). Two of them were convicted at trial and received 28-day jail sentences (Late Category Five). Indeed, the two people who were arrested along with Mr. Bige on August 14, 2018 were sentenced to jail terms under Category Five: a young woman with health issues was sentenced to seven days in jail; a man was sentenced to 14 days in jail.

Defence Positions

[76] Mr. Gallagher and Mr. Bige seek an absolute discharge. They assert that it would be in their best interests and not contrary to the public interest if such a sentence was imposed, consistent with s. 730 of the *Criminal Code,* R.S.C. 1985, c. C-46 (the "*Code*").

[77] In the alternative, Mr. Gallagher and Mr. Bige seek a conditional discharge; in the further alternative, they seek a CSO, without curfews and possibly providing for

community work service. They assert that they do not have the means to pay any significant fine, which appears to be the case given that they are both unemployed. They suggest a nominal fine amount of $200 each. Finally, if jail is to be imposed, they seek the shortest time possible and less than 28 days.

[78] Mr. Leyden seeks a non-custodial sentence. He seek a conditional discharge/probation or a suspended sentence. He suggests that conditions could include abiding by the Injunction and community work service hours. In the alternative, he seeks a CSO.

PRINCIPLES OF SENTENCING

[79] Although contempt of court is a common law offence, and therefore prosecuted under the common law, courts have frequently stated that guidance in respect of sentencing for criminal contempt may be sought from the *Code*: *International Forest Products Ltd. v. Kern*, 2001 BCCA 48 at para. 20. See also *R. v. Dhillon,* 2015 BCSC 1298 at para. 10; *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156 at para. 55.

[80] I am aware of the purpose and principles of sentencing set out in the *Code*, particularly at ss. 718, 718.1 and 718.2.

[81] Substantial authority exists that the primary sentencing objectives in relation to criminal contempt are that of denunciation and deterrence, both general and specific.

[82] In *Dhillon*, Justice Holmes (as she then was) stated:

> [11] The fundamental purpose of sentencing, as both the *Criminal Code* and the common law recognize, is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. From that fundamental purpose flow six main objectives of sentencing, namely: (1) denunciation of the offending conduct; (2) deterrence of the offender and all other people from criminal conduct; (3) separation of the offender from society when necessary; (4) rehabilitation of offenders; (5) reparation to victims or the community; and (6) the fostering of the offender's acknowledgement of responsibility and of the harm done to victims and the community. The relative emphasis to be given to the various objectives will vary according to the particular offence and the particular offender.

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

[83] In *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156, the court recently expressed this same sentiment:

> [56] The objectives of separating offenders from society and providing reparation to victims are generally not applicable to sentencing in contempt cases. Rehabilitation is often important in civil contempt cases, where the Court is primarily concerned with securing compliance with its orders: *Larkin v. Glase*, 2009 BCCA 321 at para. 49. However in *Larkin*, Justice Chiasson comments that even in cases of civil contempt deterrence is more important than rehabilitation (at para. 51).
>
> [57] Denunciation and deterrence are the principal sentencing objectives in criminal contempt cases. Chief Justice Farris described the underlying rationale in *Canadian Transport (U.K.) Ltd. v. Alsbury* (1952), 6 W.W.R. (N.S.) 473 at 478 (B.C.S.C.), aff'd [1953] 1 D.L.R. 385 (C.A.), aff'd [1953] 1 S.C.R. 516:
>
> > One law broken and the breach thereof ignored is but an invitation to ignore further laws and this, if continued, can only result in the breakdown of the freedom under the law which we so greatly prize.
>
> [58] General deterrence was the primary objective of sentencing in *MacMillan Bloedel,* where the focus was likewise on securing respect for the rule of law. A summary of sentencing principles for contempt was set out in *Transportaction Lease Systems Inc. v. Virdi*, 2009 BCSC 695 at para. 17*,* citing *Health Care Corp. of St. John's v. Newfoundland and Labrador Assn. of Public and Private Employees*, [2001] N.J. No. 17 (S.C.T.D.) at para. 2:

> 1. The inherent jurisdiction of the court, as a superior court, allows for the imposition of a wide range of penalties for civil and criminal contempt;
>
> 2. Deterrence, both general and specific, but especially general deterrence, as well as denunciation, are the most important factors to be considered in the imposition of penalties for civil, as well as criminal, contempt;
>
> . . .
>
> 9. In setting the overall level of penalty, the court may take account of the level of penalty imposed in similar cases in the past and may adjust the penalty upwards or downwards, depending on the court's assessment as to whether previous levels of penalty have had an effective general deterrent effect; . . .

[84] The Crown has referred to other well-known BC authorities addressing protest activity: *Everywoman's Health Centre Society (1988) Victoria Drive Medical Clinic Ltd. v. Bridges*, [1989] B.C.J. No. 456 (S.C.) and *Peter Kiewit Sons Co. v. Perry*, 2007 BCSC 305.

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

[86] Accordingly, the Court's main focus in this sentencing process is to send a clear signal to the Contemnors, and others who may be influenced by them and their actions, that such behavior will not be tolerated. Deterrence is the main sentencing objective here, although I acknowledge that rehabilitation remains a possibly relevant consideration.

ABORIGINAL BACKGROUNDS

[87] Much of the time at this hearing was spent with a focus on the Contemnors' Aboriginal status and how that status factors into the determination of a fit sentence. The Contemnors are not the first Aboriginal persons that this Court has convicted of criminal contempt in this proceeding, although they stand as the first ones where the Crown is seeking a jail sentence.

[88] The defence places great emphasis on the Contemnors' Aboriginal heritage, which I accept is a relevant consideration at this sentencing. The defence submits that, in accordance with s. 718.2(e) of the *Code*:

> . . . 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 … with particular attention to the circumstances of Aboriginal offenders.

[89] I am aware that s. 718.2(e) of the *Code* mandates that I consider the Contemnors' 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).

[90] However, such considerations do not mandate that the principle of restorative justice will have primacy in any given case.

[91] The Crown refers to *R. v. Wells*, 2000 SCC 10. At paras. 36-42, the Court emphasized that within the scope of s. 718.2(e), the court must still consider the matter on a case-by-case basis, considering the offence, the offender, the victim and

the community. The fact that an offender is Aboriginal does not dictate that a restorative approach is appropriate toward rehabilitation.

[92] In *Wells*, the Court stated:

> [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
>
> [Emphasis in original.]

[93] Unlike the facts in *Wells*, I accept of course that the convictions here did not arise from any violent offence. The offences here were, however, serious, consistent with the need for this Court to denounce and deter such behavior, both generally and specifically, as the authorities above indicate.

[94] The Crown submits that, in this case, where denunciation and deterrence are the primary sentencing objectives, there is no principled basis upon which the Contemnors should be treated differently than other protestors.

[95] The Court in *Ipeelee* discussed how systemic factors and an Aboriginal offender's heritage, background and circumstances relate to an offence, 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. ... 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.]

[96] Accordingly, although the Contemnors' 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.

[97] It is apparent here that the offences did not arise from the systemic factors or backgrounds of the Contemnors, although not strictly necessary in applying *Gladue* principles and s. 718.2(e) of the *Code*. While each of them has clearly faced difficult circumstances in their pasts, it is commendable that they have risen above those difficulties. Mr. Leyden and Mr. Gallagher have achieved sobriety and have chosen to be fully engaged in their communities, particularly their Aboriginal communities, where they provide significant support for others. The same can be said for Mr. Bige, who, despite his young age, has obtained an education and is similarly fully engaged in his community.

[98] I will first address a common refrain in these proceedings, as advanced by the Contemnors. They have repeatedly submitted that they never meant any disrespect for the Court through their actions.

[99] However, such words are meaningless when juxtaposed against their actual actions. This Court has already found that the Contemnors, knowing what the Injunction required them not to do, purposefully did just that. Their actions belie any real sense of respect for the Court's authority. At bottom, they were there to protest the activities of a pipeline company in violation of the Injunction, to register their objection to that activity.

[100] The true substance of the Contemnors' position in relation to their Aboriginal heritage is founded on their view that they were entitled to disobey the Court's order because of their heritage and what they perceive as being their obligations to their own Indigenous rule of law.

[101] Such a view has been a continuing theme in these proceedings in relation to the Contemnors.

[102] At the trial, Affleck J. addressed and rejected Mr. Leyden's arguments that he was exercising a statutory duty, power or authority. Mr. Leyden asserted that he was authorized by the Coast Salish Nation to protest in order to assert rights over unceded territory and take the position that he could not be arrested at the protest site: Conviction Reasons, paras. 36-40. Similarly, Affleck J. rejected arguments from Mr. Gallagher and Mr. Bige's counsel that some "Aboriginal law" obliged her clients to disobey the Injunction sufficient to excuse their conduct and avoid conviction: Conviction Reasons, paras. 47-48.

[103] In August 2020, this line of argument continued at the Contemnors' application before me for a stay of proceedings or directions concerning the sentencing. As Affleck J. did, I rejected the proposition that unspecified Aboriginal laws could apply in the sentencing process: Stay Reasons, paras. 121-122.

[104] Despite that lack of success, these arguments persisted during this sentencing. Much of the evidence adduced by the Contemnors at this hearing was directed towards the assertion that they had a spiritual role to protect the land, the people, the animals and the plants. Their counsel assert that reconciliation requires that this Court recognize and apply Indigenous laws and obligations, even in the face of contrary requirements under Canadian law and this Court's orders.

[105] The defence called various witnesses to support this argument.

[106] Dr. Bruce Miller is an anthropologist who works as a professor at the University of British Columbia. His area of expertise is the history of the Coast Salish people and he has written extensively in the area. He speaks of these people's connection to the land and their legal orders, protocols and practices.

[107] I was directed to Chapter 3 of Dr. Miller's book of edited essays, "Be of Good Mind", where an Aboriginal person discusses aspects of Stó:ló culture and history. Dr. Miller also referred to the works of Professor John Burrows, another scholar who

works in this area. Mr. Gallagher and Mr. Bige have referred me to the articles introduced at the trial before Affleck J. (Conviction Reasons, para. 47). Finally, I was referred to Mr. Burrows' paper *Indigenous Legal Traditions in Canada* (Report for the Law Commission of Canada, January 2006). In this paper, Professor Burrows refers to "Indigenous legal traditions" or "laws", that he mentions are practiced to this day in Canada.

[108] William George, from the Tsleil-Waututh Nation, indicated his support for his friends, the Contemnors. He asserted that they had done nothing wrong and they were only following the spiritual laws of their people.

[109] As the Crown notes, Mr. George's testimony, presumably supported by the Contemnors, highlights the very problem faced here in terms of the Contemnors' current attitude to their conviction – namely, the idea that the Contemnors did nothing wrong, they should not have been convicted and that they should not face any consequences. Such an assertion again belies the very notion that the Contemnors respect the authority of the Court.

[110] The defence also called Chief Wilson, who is a leader in the Aboriginal community. Chief Wilson confirms Mr. Leyden's testimony that she asked him on August 21, 2018 to stand up to the authorities and assert that he was on unceded territory and that the police were acting unlawfully. Mr. Leyden's counsel states that Mr. Leyden heeded this call from his leader and "put his body on the line for his beliefs".

[111] I find Chief Wilson's testimony troubling and objectionable. She was, in a fashion, the general sending her foot soldier into the breach (quite literally) to take the bullet for the cause, while standing herself safely on the side of road, not in violation of the Injunction and not exposing herself to arrest or possible jail time. In my view, it does not now lie in Chief Wilson's mouth to suggest that her soldier should escape the consequences of his actions when she knew that he would do so, not her. Chief Wilson would have known, as did Mr. Leyden, that there were legal

means of challenging the activities of Trans Mountain; in fact, those were underway at the time of this protest.

[112] The argument that Aboriginal persons should be excused from any consequences if they disregard court orders when they believe that Aboriginal laws dictate otherwise flies in the face of well-established BC authority that this Court has jurisdiction over Aboriginal persons. In essence, such an argument is a backdoor collateral attack on the validity of the order and this Court's jurisdiction to enforce its order in the sentencing process: *British Columbia (Attorney General) v. Mount Currie Indian Band*, [1991] B.C.J. No. 616 (S.C.) at paras. 52-54 and *R. v. Ignace*, [1998] B.C.J. No. 243 (C.A.) at paras. 11-12.

[113] In respect of a conviction, Affleck J. rejected an argument along the same lines in *Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 1909 at paras. 21-24. Justice Affleck stated:

> [24] Another argument that might have been made by S.B. is that the injunction is invalid so far as it purports to apply to S.B. because he enjoys aboriginal status, and the document spoken of by Mr. Manuel may provide some form of immunity from the injunction. There are many difficulties with this potential argument. One I have already mentioned is that the courts of this province have jurisdiction over aboriginal accused persons where it is alleged an offence has been committed. Another difficulty is that the injunction must be accepted as valid and enforceable by its terms unless it is set aside or varied.

[114] This same point was made in *R. v. Krawczyk*, 2009 BCCA 250 at paras. 27-30. To quote from para. 28, "One cannot breach now, challenge later".

[115] Defence counsel suggest that the Contemnors' Aboriginal backgrounds play a large role at the sentencing stage in excusing their conduct. Mr. Leyden's counsel refers to *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation,* 2008 ONCA 534. That case involved Aboriginal protestors who were convicted of civil, not criminal, contempt.

[116] At para. 42 of *Frontenac Ventures Corp.*, the court agreed that the sentencing judge did not err in focussing on the rule of law to ensure compliance with its orders.

The sentences were overturned for a variety of reasons, including: an early admission of guilt, there were ongoing land claims for the area and the conclusion that the jail sentence of six months was harsh, in contrast to other decisions, cited from BC. None of those circumstances apply here.

[117] Chief Wilson and Mr. George's support of the Contemnors' position that they were not contravening any laws is without merit. In fact, if nothing else, it serves to reinforce that this Court must continue to signal to the community at large, including the Aboriginal community and its leaders, that disrespect of the court's order will not be tolerated and that consequences will follow if that occurs (i.e. this Court will denounce and deter).

[118] Mr. Leyden's counsel also argues that, while not an excuse, Mr. Leyden "reasonable beliefs" as to the validity of the Injunction in the face of what he understood as a higher imperative, stands as a mitigating factor.

[119] I strongly disagree.

[120] Firstly, there is no higher imperative in respect of the Injunction, save as might have been imposed by the Court of Appeal. None of the Contemnors sought to overturn the Injunction if they considered that it did not apply to them. They did nothing in that respect. They have disobeyed a court order that applies to them and for that, they must face the consequences, albeit through the lens of the sentencing principles and in particular, *Gladue* and the *Code*, s. 718.2(e).

[121] Secondly, the protests were fundamentally directed at the environmental issues raised in the community about Trans Mountain's proposed pipeline expansion project. Certainly, some people in the Aboriginal community viewed that issue through the lens of their right to object and oppose the project, at least in part based on their right to be consulted by the government. However, the Aboriginal voices against the pipeline were only one of many; some in the Aboriginal community support the project, even to the point of indicating a desire to buy Trans Mountain from the federal government.

[122] To allow a lesser sentence here because of the Contemnors' beliefs in their cause through the Aboriginal lens would be to draw a distinction from the hundreds of other protestors who were arrested and faced charges. In my view, such a distinction does not exist.

[123] I would venture to say that all of the protestors who the police arrested were fervent in their passion toward protecting the environment and their view that Trans Mountain was acting in a fashion that threatened the environment. Passion for a cause does not justify giving an offender a pass from the consequences of their illegal conduct.

[124] In *Peter Kiewit Sons Co.*, Justice B. Brown stated:

> [16] I have no doubt that the individuals before me sincerely believe that their cause was just. However, we have many individuals and groups in society who are passionately committed to what they view as just causes. Poverty, homelessness, health care immediately come to mind. If each individual or group chose to break the law and breach court orders to enforce their view of a correct response to a just cause, our democratic society would quickly fail. This is not a frivolous or theoretical concern. As the Newfoundland Supreme Court said in the *Health Care* case which I have quoted, our courts deal every day with parties who lose; who feel passionately that they should not have to obey the orders of the courts. When a group of citizens chooses to publicly defy the order of the court, they encourage each individual to disobey court orders which they do not like. It is this defiance which undermines the rule of law and brings the administration of justice into disrepute.

[125] Indigenous issues in our society have clearly gained some prominence in the public discourse. However, that does not mean that Aboriginal citizens of Canada have some elevated ability to disregard court orders when they feel like it, or by asserting that they had "no choice" but to act otherwise under Aboriginal laws or traditions. Clearly, Aboriginal people, including the Contemnors, have choice in that respect. Nor does it mean that they have some greater ability to escape the consequences of illegal behavior.

[126] I have also heard a great deal of testimony about the Contemnors' activities at the Trans Mountain site, when the Contemnors assert that they were in prayer or ceremony. I take no issue with their right to pray or be in ceremony as they wish. I

also take no issue with their characterization as to what they were doing in the middle of the roadway; however, it is only the *means* by which they chose to spend their time while wilfully disobeying the Injunction after having moved into the roadway.

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

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

[129] With all of the above circumstances in mind, I find that the Contemnors' 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. In my view, the Contemnors' actions stand on the same plain as protestors already arrested, charged and convicted in this matter, subject to a consideration of their relevant individual circumstances.

WHAT IS A FIT SENTENCE?

[130] I acknowledge that these were peaceful protests.

[131] I also acknowledge that each of the Contemnors have very passionate views as to their role in this dispute, all in support of their communities, including Aboriginal communities.

[132] The Contemnors were arrested on August 14 and 21, 2018, months after and well into the existence of the Injunction and the well-publicized arrests which began almost immediately after it was granted.

[133] Each of them were well aware of what they were doing at the time. They had seen people arrested on countless occasions before. Mr. Gallagher had attended in court to support or assist others as they went through that process. The Contemnors knew that they were going to be arrested if they violated the Injunction. Despite their knowledge and/or involvement in the extensive history of these proceedings to enforce the Injunction over many months, the Contemnors were not deterred.

[134] They refused to move even after the RCMP began the five-step process, when the RCMP specifically reminded them that a jail term was possible if they did not leave. They did not. They chose to flagrantly disobey the Injunction, knowing they would be arrested and ultimately dealt with by the Court. The remarks in *MacMillan Bloedel Ltd.* are very apt—the Contemnors could not expect that the Court would view their actions with any leniency in all of the circumstances.

[135] These are serious offences. This is particularly so given the flagrant manner in which they occurred and the very public manner in which they occurred, particularly as their supporters on the sidelines cheered the Contemnors in their actions and later arrest. These were not the actions of “youthful exuberance or rash judgment”, as was mentioned in *MacMillan Bloedel Ltd.* at para. 45.

[136] The Contemnors suggest that they should receive lesser sentences now, suggesting that the protests against Trans Mountain have died down and the need for general deterrence does not have the same urgency as it did in the late summer/fall 2018.

[137] I disagree. The Injunction remains in place for a reason. In addition, as recently as early September 2020, the police arrested another protestor at a Trans Mountain site. The need for general deterrence remains at this time.

[138] I have no difficulty concluding that the Court is required to signal the continuing need to respect the Injunction, by way of general deterrence to others. Throughout this hearing, defence counsel have indicated that there continues to be significant interest in the community about the fate of the Contemnors. If that is so, others in the broader community who might follow their lead need to be discouraged in the strongest measure. In addition, there can be no signal from this Court to other would-be protestors that they might expect to get a pass if there is any disobedience on their part based on their views as to the applicability of the Injunction to them or whether it should have been granted in the first place.

[139] No mitigating factor arises from a guilty plea, whether early or late. Having said that, the Contemnors were entitled to a trial and a conviction after trial does not translate into an aggravating circumstance for consideration at this sentencing.

[140] There is also the matter of the continuing attitude of the Contemnors. I am obliged to consider whether they are truly remorseful in terms of assessing the matter of rehabilitation as a relevant prospect: *R. v. Pouce Coupe*, 2014 BCCA 255 at paras. 21-24.

[141] The evidence at trial supports that Mr. Leyden and Mr. Bige were there to make a statement. Mr. Gallagher did not actually say he was there to protest the pipeline, instead referring to his need to follow natural laws and protect the earth and its creatures. However, I infer that protesting Trans Mountain's activities was indeed Mr. Gallagher's ultimate purpose. Despite these objectives, whether spoken or inferred, consequences follow from the choices that they made in achieving those objectives.

[142] Mr. Gallager and Mr. Bige's attitudes to their conviction were further on display at the August 2020 Hearing.

[143] At that time, Mr. Gallagher's *Gladue* report offered no insight into his attitude following his conviction. His evidence at that hearing, which he was anxious to tell the Court at that time, was described by me in the Stay Reasons:

> [114] I can only describe Mr. Gallagher's evidence as combative and aggressive, despite often stating to the Court that he "means no disrespect to the Court". He describes that "you have your rule of law, we have ours", the latter being described as his "natural laws" which he obeys. He refers to "us", which I take to be the Court, as "fake rulers", abiding by "colonial ways" that are very discriminatory and racist. He denies that the Court has any jurisdiction over him. He denies that Canada is a nation, calling it a "corporation"; he argues this would not even allow a "nation to nation" discussion. He proclaims that there is "more to come" in that thousands of people have signed up to be arrestable (presumably to oppose Trans Mountain's pipeline project).

[144] Mr. Bige's evidence at the August 2020 Hearing was similar toward displaying a continuing disrespect for the Court and its authority, albeit less so than Mr. Gallagher: Stay Reasons, paras. 117-118.

[145] Mr. Gallagher and Mr. Bige's counsel submits that the issue of their remorse is complex. She submits that the trial process has been difficult for them, although they appreciate the time that the court has spent in using public resources to deal with their issues. I am paraphrasing when I say that their counsel suggested that they had been "rehabilitated" through this court process by "showing up" as they "grew and learned" through this experience, an astounding proposition.

[146] Mr. Gallagher now says that he is trying to educate himself about the court system, asserting that he is "new to this" and that the rule of law is "new" to his Nation. He states that he now understands a little bit about injunctions.

[147] In my view, Mr. Gallagher's current vague statements, coming very late in the day, are difficult to frame as conveying any remorse. I frankly find his attitude disingenuous, coming on the heels of his objectionable comments only six weeks ago. I do not consider that Mr. Gallagher has any sense of remorse and I conclude that his overall demeanor indicates an attitude of continuing defiance of the Court's authority when he considers he can act otherwise. I do not consider this or find that this is an aggravating factor, but it is a relevant factor as to his assertions that his attitude stands as a mitigating factor: *Pouce Coupe* at para. 24. His attitude is also highly relevant to the matter of specific deterrence.

[148] Mr. Bige addressed the Court at this hearing, both in his letter and his final comments.

[149] Mr. Bige is a young man and I have no doubt that he has been significantly affected by this proceeding. He has attempted to draw a distinction between himself and his older Contemnors, suggesting they had more life experience toward understanding the consequences of their actions. That may be so, but Mr. Bige was old enough at the time to grasp the gravity of his actions, particularly when the RCMP were reading to him the potential consequences he faced.

[150] Mr. Bige's actions even after his arrest on August 14, 2018 also raise concerns. Mr. Bige was released after giving an undertaking to the police that he would abide by the terms of the Injunction. Yet one week later, on August 21, 2018, his actions on the video recording that day show him clearly in the middle of the roadway participating in the protest.

[151] The Crown asserts that this is a factor relevant to a consideration of Mr. Bige's character although not supporting any different sentence than what the Crown seeks for the others. I agree that, while Mr. Bige was not arrested on August 21, 2018, his actions then showed a continuing contempt for the authority of the Court and a disregard for the personal undertaking that he had provided to secure his release.

[152] That said, I was struck by what I saw at this sentencing hearing as to Mr. Bige's evolved understanding that what he did was wrong. He says that he is not the same person. He now talks of perhaps going to law school to learn how to address conflicts between people. I consider that, although late in the day, Mr. Bige has come to a place of some genuine remorse, now realizing that he can protect as he wishes so long as he does so legally and peacefully. He has come to this hearing ready to face the consequences, as he must.

[153] Mr. Leyden's address to this Court referred to his continuing belief in his causes. Mr. Leyden explained his rationale for acting as he did, essentially as was

described in the Conviction Reasons. I consider that Mr. Leyden is man of principle, standing firm in his convictions. He took up the call to arms from his leader and he is now facing the consequences unapologetically.

[154] I am of the view that specific deterrence remains a factor here, particularly with respect to Mr. Gallagher and Mr. Leyden, but less so with respect to Mr. Bige.

[155] I acknowledge the significant contributions by all of the Contemnors to their communities, including through their volunteer work. It is clear to me that all of them have a special status within their communities, and that they are widely regarded and valued. In these circumstances, it is unfortunate that they have chosen to mar that status through a conviction for willful disobedience of the law. One can only hope that the people in the Contemnors' lives that they influence will not take their actions as justification for their own disobedience of the law, particularly by the impressionable young people they all work with.

[156] As mentioned above, the sentencing positions of the Crown and defence vary widely.

[157] I have no difficulty concluding that a period of incarceration for each of the Contemnors is an appropriate and fit sentence.

[158] I cannot conclude that a discharge, whether absolute or conditional, is an appropriate response to this offence and these offenders. I decline to exercise my discretion to impose such a sentence.

[159] Clearly, the Contemnors would prefer such a lenient sentence. However, I am not satisfied that they are of such a character that a more onerous sentence would have significant repercussions to them, such that a discharge is in their best interest. Even if it was in their best interests, in my view such a sentence would be contrary to the public interest, particularly given the need for deterrence here, both general and specific: *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.) at 454-455. Such a timid response to this serious affront to the dignity and authority of the Court would be seen as the classic "slap on the wrist" or the judge "throwing up her hands" (per

MacMillan Bloedel Ltd. at para. 51) with an invitation to others to pursue the same path. That is not the message that this Court needs to send.

[160] Further, the offer by the Contemnors to do community work service is hardly meaningful. They are already very engaged in that type of work; yet, those altruistic endeavors have failed to instill any greater attitude of respect for the Court. Similarly, the nominal fine that they offer up as a punishment is a token gesture at best.

[161] I have also considered CSOs as possible sentences. Mr. Gallagher presents the most compelling argument in that respect, given that he cares for his elderly mother in her home. However, in all of the circumstances, I do not find that a CSO would adequately address the principles of denunciation and general and specific deterrence called for here.

[162] Returning to Mr. Gallagher's mother, it is unfortunate that he has put himself in a position such that he will not be available to assist his mother. That situation arises from his choices, and no one else. No person has stated at this hearing that others could not undertake what Mr. Gallagher does for his mother. In any event, there is substantial authority to the effect that a lesser sentence is not justified because of the adverse consequences to other family members arising from a fit sentence: see discussion and authorities discussed in *R. v. Mackay*, 2019 BCSC 1112 at paras. 60-63.

[163] Another major point of discussion at this sentencing was the impact on the Contemnors arising from the COVID-19 pandemic. The Crown confirms that, as of the day before the sentencing hearing, no person had been diagnosed with COVID-19 in any BC correctional facility. Some people had symptoms, but they were being isolated while waiting test results.

[164] The Crown has also presented a Factsheet from the Ministry of Public Safety and Solicitor General describing BC Corrections' response to COVID-19. As one would expect, BC Corrections has followed the recommendations and guidelines of the Provincial Health Officer and other BC health authorities. At intake, everyone

completes a questionnaire and temperature check. Any person with symptoms is medically isolated. All other persons are placed in an induction unit for a 14-day period and, while there, they are allowed outside of their cell as much as possible. Those persons in the induction unit are in a “bubble” and are able to socially interact, while physically distancing. No visits are allowed. After the 14-day isolation, all asymptomatic persons are integrated into the general population within a living unit.

[165] I do not consider that an intermittent sentence is appropriate or even practical in the circumstances, particularly given COVID-19 concerns. As noted in the Factsheet, having people come and go could heighten the risk of COVID-19 transmission and it would require that the Contemnors go through the induction unit process every time they showed up.

[166] Overall, I conclude that BC Corrections is addressing the matter as best they can. While incarceration is not an entirely risk free matter, neither is anyone’s general movement outside of jail in our communities. In my view, the circumstances of the pandemic do not lead me to conclude that a lesser sentence is appropriate: *R. v. Costell*, 2020 BCSC 1206 at paras. 76-77.

[167] Finally, I acknowledge the health concerns raised by Mr. Leyden and Mr. Bige, for which they take medication. Understandably, they have concerns about how BC Corrections will handle their medication and medical care in an institution. However, the issues raised by them are largely speculative and unsupported by any evidence.

[168] I can only assume that these offenders are not the first and will not be the last to be incarcerated while dealing with medical issues. I have no doubt that BC Corrections has experience in that respect and that they will deal with the issues as necessary and appropriate. In that respect, I would adopt the remarks of the court in *R. v. Potts*, 2011 BCCA 9 at para. 85 in that, while Mr. Leyden and Mr. Bige’s health is relevant, it does not justify any reduction in their sentence.

[169] Mr. Gallagher, you are already standing. You are sentenced to 28 days incarceration.

[170] Mr. Leyden, you are already standing. You are sentenced to 28 days incarceration.

[171] Mr. Bige, you are already standing. You are sentenced to 28 days incarceration.

[172] On a final note, I want to convey to Mr. Bige that I enjoyed listening to his poem, which I assume is called “Work to be Done”.

[173] The Court’s work is now concluded with respect to these offences and these offenders. As for all of the Contemnors, I hope that you will use the time of your punishment to “work on” gaining some understanding of what you have done and why this Court was required to address your illegal behavior in this manner. You all clearly have much to contribute to your communities. I sincerely hope that you will return to your lives and your work in the community with an attitude of respect for the rule of law, the administration of justice and the very important role that court orders play in maintaining the peaceful and democratic society that we all enjoy.

[174] I wish you all well.

“Fitzpatrick J.”