

Judicial Complaint Filed Regarding a Judge’s Conduct and Imprisonment of Indigenous Land Protectors for Praying Peacefully: An Update

Based on detailed observations spanning several months, we have filed a complaint with the Canadian Judicial Council (CJC) regarding the conduct of the judge overseeing the Trans Mountain injunction in the BC Supreme Court. In our complaint, we explain how this judge’s treatment of Indigenous land protectors undermines public confidence in the court’s ability to provide fair and just trials, outlining judicial behaviour that we and others have found disturbing.

The CJC’s Ethical Principles for Judges (the “Principles”) are intended to enable the public to have confidence in the integrity of the judicial system. The Principles state that “Judges should carry out their duties with appropriate consideration for all persons (for example, parties, witnesses, court personnel and judicial colleagues) without discrimination” (p. 23). Also, “Judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability” (p. 23).

From the perspective of those most disadvantaged by colonization, systemic racism is built into BC’s court system through how it marginalizes and disregards Indigenous law and Indigenous values. It is not this judge’s fault that she has inherited this colonial system, but she nonetheless has a responsibility to consider Indigenous defendants in the context of reconciliation. Instead, however, we contend that this judge is perpetuating systemic racism through her behaviour in a manner that is not befitting of an impartial judge and is not consistent with the Principles.

In August 2018, three Indigenous men—Mekoch Kanim (Jim Leyden), Tawahum Bige, and Gitchi Makwa (Stacy Gallagher)—were charged with criminal contempt and faced 28 days of jail for violating an injunction¹; from their perspective, they were praying for the protection of the land and upholding Coast Salish laws. They were tried by Mr. Justice Kenneth Affleck, who found them guilty, but then retired before the sentencing hearing was scheduled. After Justice Affleck retired in October 2019, Madam Justice Fitzpatrick took over the Trans Mountain case, S183541. Although she did not preside over their 2019 trials, she was tasked with the sentencing hearing for these three Indigenous defendants in September 2020. She also presided over the trials for Gitchi Makwa - Stacy Gallagher (August 2020) and Mekoch Kanim - Jim Leyden (Dec 2020).

As members of the public who observed these proceedings, we decided to convey concerns shared by many observers that this judge’s conduct and demeanour crosses the line of

¹ See the research of the Yellowhead Institute on how injunctions perpetuate bias against Indigenous peoples and values: <https://yellowheadinstitute.org/2019/11/14/injunctions-by-first-nations-results-of-a-national-study/>

acceptability for judges that has been set by the Canadian Judicial Council. As the commentary in the Principles points out: “Unjustified reprimands of counsel, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgment and intemperate and impatient behaviour may destroy the appearance of impartiality” (p. 33). Our complaint discusses how this judge was repeatedly disrespectful and insulting to the Indigenous defendants Gitche Makwa - Stacy Gallagher, Mekoch Kanim - Jim Leyden and Tawahum Bige, as well as their counsel and witnesses for the defense. Through the examples we cited in our complaint, we contend that both her remarks and tone were harmful, demonstrating bias, lack of cultural competence, lack of understanding for equity and reconciliation, contemptuous disregard for certain aspects of law, and, we argue, frankly ignorant and offensive to a reasonable, fair-minded audience in 2020.

The issues we outlined fall into four areas:

1. Racist Inequities Resulting in Lack of Regard for Serious Health Issues and Continued Over-Incarceration of Indigenous People
2. Lack of Impartiality and Disrespect for the Defense Counsel
3. Showing Contempt and Dismissiveness for Basic Facts of Indigenous History
4. Unexamined Stereotyping and Ignorant Attitude Towards Indigenous Peoples, Cultures, and Values

This judge’s statements and refusal to acknowledge that we are on unceded Coast Salish lands by deeming it “irrelevant” undermined our, and many other people’s, confidence, in her impartiality. We observed her to be dismissive and disrespectful towards Indigenous peoples, not adequately taking into consideration elder Jim Leyden’s fragile health - appearing to be flippant and irresponsible in the face of evidence presented to her - and sentencing this peaceful land protector to imprisonment during the COVID-19 pandemic, although it is well-known that incarceration in this situation poses additional risks and extreme hardships. We are seriously concerned that the demeanor displayed reflected bias against Indigenous peoples, resulting in judgments that are potentially life-threatening for elderly defendants (and their family members) living with severe health risks.

The complaint asks that this judge receive the cultural sensitively training that we feel, based on our observations, was so clearly lacking. We are also worried that both Jim Leyden and Stacy Gallagher face more imprisonment in 2021 when they are subjected to the same judge in the BC Supreme Court for sentencing. Jim has already been hospitalized due to his incarceration; further incarceration could easily become a death sentence for him. The BC Supreme Court, in a province that is committed to the United Nations Declaration on the Rights of Indigenous People, appears to us to be showing contempt for Truth and Reconciliation from the kind of conduct we have witnessed.

Questions can be directed to:

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