

# Sentencing

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## Sentencing statement

### Preface

Good morning Madame Justice, Crown counsel, and staff.

I would like to introduce myself briefly, and recognize that we are on the unceded territories of the Musqueam, Tsleil Waututh and Squamish peoples.

I am 69, a dual American/Canadian citizen, originally from North Carolina. I retired 2 years ago from UBC after teaching French there for 31 years. This is the first charge I have ever faced. I hope you will excuse my lack of familiarity with court conventions and language.

I have been a climate activist since 2014, when I participated in the protests on Burnaby Mountain. Up until this past September, my activism included the usual marches, petitions, and organizing, none of which had the slightest impact on the growth of fossil fuel infrastructure or the growth in atmospheric CO2 levels, which have gone from 402 ppm in 2014 to 417 ppm in 2022. The NASA climate scientist James Hansen has famously warned that life on Earth is incompatible with anything over 350 ppm.

I joined the Brunette River tree-sit during the spring of 2021 and was arrested on the 22nd of September, two days after the federal election.

I'm sorry that we are at odds here when in fact I sincerely believe we want the same thing, that is, to preserve the rule of law. The Crown must follow the letter of the law and therefore quite reasonably charged my friends and me with criminal contempt of court. Under normal circumstances, I would applaud the good work of the RCMP, the Crown and the Court. But we are in such unprecedented times that we are paradoxically at odds even when we fundamentally agree. That is one effect of the unprecedented nature of climate breakdown. It

divides people who would otherwise be united. The fear that drives me is that climate breakdown means the utter annihilation of organized society and the rule of law.

I will be arguing more specifically that the Crown's sentencing position omits some important mitigating circumstances because of the climate emergency. Even the standard considerations, such as my being a first time offender with an early guilty plea and complying with the RCMP and the court order since my arrest, would need to be reweighted.

To my mind, the core question is: What compulsion would lead my friends and me to accept the sacrifice of prison? Climate breakdown creates a specific compulsion and a fundamentally distinct sentencing position which detaches it from the authorities the Crown has referenced in its sentencing position since 2018.

My motivations would lead me normally to plead NOT guilty for reasons of necessity. Past attempts to enter that plea, especially the Gooderham and Nathan appeal, have failed. Judge Affleck refused that defence citing Chief Justice McEachern's position on McMillan Bloedel cases. Here is a key quote from Justice McEachern:

QUOTE

[56]

[46] ~~Second,~~ I do not believe the defence of necessity can ever operate to avoid a peril that is lawfully authorized by the law. M & B had the legal right to log in the areas in question, and the defence [of necessity] cannot operate in such circumstances. [Affleck quoting Chief Justice McEachern in MacMillan Bloedel]

END QUOTE

As I understand it, Justice McEachern is saying that the moment the court has considered a specific action --called the peril here-- and authorized it, it becomes a non-peril for the necessity plea. A necessity plea about a non-peril will not be heard.

Justice Affleck agrees. Referring to that quotation by Justice McEachern, he says:

QUOTE

The applicants have attempted to find a means to evade those adamant words, but I am bound by them. [Affleck, Reasons]

END QUOTE

What is not addressed is whether that non-peril nevertheless incites a compulsion in the defendants. It may be excluded from a defence at trial, but it is not excluded from the minds of the defendants. I contend that it should not be excluded as a consideration for sentencing.

The points I want to raise in favor of sentence mitigation by necessity are:

- **First: Climate breakdown creates a moral compulsion.**

- **Second: The Federal government's declaration of climate emergencies in 2019 and the UN's declaration of a code red for humanity should lead to revisions of the Crown's sentencing guidelines of 2018.**
- **Third : The crime of ecocide has already made its way into the general public's understanding and that too leads to a moral compulsion.**

I believe all these factors are mitigating circumstances that justify a sentence that includes rehabilitation, in place of one week of the jail time the Crown is asking for.

I am raising at the same time a more general question. Can the unprecedented nature of climate breakdown be dismissed from sentencing? It is not recognized in the Crown's submission. My contention is that it cannot be simply ignored.

## Development

### Necessity and breakdown

The Crown is treating this breach of the injunction as if it were like any other breach of an injunction. That is why the Crown references Justice Grist's judgment, which is the most recent opinion referenced in the Crown's Sentencing Guidelines. Justice Grist gives examples of noble causes that people might be tempted to defend by breaching an injunction:

QUOTE

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. 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.  
<https://www.bccourts.ca/jdb-txt/sc/07/03/2007bcsc0305.htm>

END QUOTE

There are two points I would like to underline here.

First, Justice Grist is using the slippery slope argument. That argument is a logical fallacy according to textbooks on the subject. I can accept that breaches of the injunction need to be punished like any crime or misdemeanor, but this slippery slope argument is an argument to quell non compliance with ratcheted sentencing, not just to deter or punish breaches of the injunction. To a lay person, it feels like sentencing overreach. Penalties are a deterrent but

typical prosecution is not on a mission to quell unlawful acts. DUI repeat offenders may face increasing penalties because of their individual arrest history, but first time offenders are not judged on what other offenders have done or on what future offenders will do. There has been no ratcheting of sentencing for DUI first time offenders even though DUIs have been prosecuted for as long as I can remember. Yet drunk driving cause of death. Peaceful protest does not.

Second, all the noble protests Justice Grist mentions are indeed worthy causes that seek to protect and improve life. But that is not the nature of the cause we are defending here. Far from it. I have accepted the science that says that no life will survive climate breakdown. No rule of law, no society; no poverty, no homelessness, no health care -- nothing.

There is no authority in the Crown's sentencing guidelines that references climate breakdown.

None.

Which means the authorities referenced there are misleading. They appear to apply but they don't at all. This is the predicament the court must face when confronted with something unprecedented, and particularly on an unprecedented scale like climate breakdown.

At trial, the defence of necessity must be very narrowly defined for two reasons. First because it is subject to abuse and second because emergencies that the world has encountered until now have all been limited and repairable. The damage the climate crisis brings is neither limited nor repairable: It represents the end of human history, the end of society, the end of the rule of law.

In several recent climate protest cases, juries have delivered a not guilty verdict even when the judge has explained that there is no defence in law. Perverse verdicts were handed down in London in favour of Extinction Rebellion protestors and in favour of protestors in the US in Washington State for felony offences for shutting down pipelines. The layman's understanding of "morally involuntary conduct" is very broad, but in law it is very narrow. To my knowledge, no judge in Canada has ever accepted the necessity defence in a climate-related case. The difference between judges and juries is that ordinary people follow general moral principles and the natural justice that comes out of daily interactions with their peers. Generally, the text of the law aligns with those principles so we say we are law-abiding. In fact, we are abiding by natural justice and typically don't consider or understand the text of the law, which generally requires special training.

Juries will acquit in climate cases because they understand intuitively what it is like to be at the mercy of forces they can't control. They are able to judge unprecedented cases because in such cases only the general moral principles of natural justice apply. The text of the law is of little use. There is no precedent for cases involving the end of the world.

The charge of criminal contempt is the court's way to defend against a specific attack on the rule of law. My friends and I feel we are defending the rule of law not in the specific manner of this

court but in the general manner of mitigating climate breakdown. We have seen here in BC the impact of climate breakdown on the rule of law:

- The rule of law was irrelevant for the 600+ who died during the heat dome.
- It was irrelevant for the people of Lytton and especially for the two seniors who were burned to death there.
- It was irrelevant for those who had to abandon their homes, fields and livestock during the floods in Sumas Valley.

The same is true beyond our borders:

- The rule of law was irrelevant during the long track tornado that went across Kentucky in the US, killing over 70 people.
- Irrelevant in the Syrian civil war that was precipitated by 2 years of droughts and resulted in the largest mass migration since the Second World War.

None of these deaths were necessary. None were natural disasters. They were all man-made disasters. Fossil fuel companies have lied to the public, manipulated governments and public opinion and knowingly geo-engineered the Earth in a way they knew would kill. No rule of law stopped them.

My friends and I are motivated to act on what we see as the horror of a world without the rule of law. Simply, we find ourselves at odds with the court's understandable focus on the here and now and what is specific and local rather than general and foundational. Climate activists have a legitimate fear of the world-wide collapse of the rule of law.

## Emergency

Vancouver and 515 other municipalities in Canada have declared a climate emergency. Canada's federal government, who owns the pipeline expansion, has declared a climate emergency. The UN has declared a climate code red for humanity. The intermittent effects of the climate crisis have meant that while the province of BC has not declared a climate emergency, it has declared several states of emergencies for fires, floods and the pandemic.

That is why I am suggesting that the Crown's sentencing position should not stand. It is an extension of the 2018 sentencing guidelines, which predates these declarations of emergency. The guidelines rely far too heavily on the MacMillan Bloedel cases of 1994, which are 28 years old, and even include cases going back to 1970, 52 years ago. Even the most recent authority of 2007 is still 15 years old and pre-emergency.

My contention is that we are in a fundamentally distinct sentencing situation, and a matter of first impression.

I understand that the consequences of obeying a court order would not change in an emergency. We can't exclude, however, the predictable and normal response to the pressures of an emergency. The psychological effect of the peril persists, whatever the order. There may be little or no discretion at trial. To use Justice Affleck's words: at trial, judges are bound by the laws' adamant words. But not at sentencing. Discretion in sentencing is one way to recognize the emergency rather than sweeping the most monumental threat to humanity under the rug.

## Ecocide

The threat of climate breakdown has triggered a moral shift in how society sees resource extraction. We are in an abolitionist moment, where this time it is nature's place in society that is being recognized rather than slaves' humanity. Slavery was a respectable wealth-generating industry up until the moment it was seen as a crime -- a crime as great as any.

In the present abolitionist phase, resource extraction is still seen by some as a respectable wealth-generating industry and by others as the extremely serious crime of ecocide, a crime that jeopardizes all life on Earth. Belgium has already voted to recognize ecocide as an international crime. The European Union is drawing up similar legislation. As well, work is now being done to include ecocide in the Rome Statute of the International Criminal Court, alongside crimes against humanity, crimes of aggression, war crimes, and genocide.

The transition out of slavery was, as we know, achingly painful. We are still experiencing its sequelae, particularly in the US. The transition out of ecocidal resource extraction is proving to be just as painful, if not more so. Such a massive societal transformation, under the extreme duress of disasters and conflict, will be fraught with injustice and pain. We see some of that pain expressed in Alberta's Wexit movement and the provincial government's War Room, which resemble the Slave South's response to abolition, motivated by the same economic and social forces.

Climate protestors have a natural justice view of the law that includes ecocide. The general public lives their lives according to basic principles of respect for each other. It was through the growth of that natural justice law that slaves could no longer be seen as cattle, and that even cattle are due humane treatment. The crime of ecocide is simply a recognition that it is unfair to drive to extinction any life we share this planet with. We are presently driving millions of species to extinction, at our own peril.

I am suggesting that the Court should take into consideration the impact of protestors' natural justice view of the law on the issue of climate change. The public abides by the rule of natural justice, not by statutes, case law or even injunctions. The pressure of this massively transformative new law of ecocide is being felt in the public even before it finds its way into the written text of the law. In the court of natural justice the crime of ecocide has already been legislated. It seems reasonable to me to adapt the Court's response to this transition in the only place it has discretion, that is, in sentencing.

## Conclusion: Rehabilitation

My request to vary the Crown's sentencing is based on my admittedly fragile understanding of how our legal system works and on the way I have subjectively processed the scientific literature, real world catastrophes, and social response to the climate crisis.

I oscillate between dread and blissful ignorance about the future. My friends and I are like an otherwise healthy person who has been diagnosed with terminal cancer and given 2 months to live. Breaching the injunction is for us the same as if that cancer patient had broken into an experimental lab and stolen a potentially life-saving treatment. Stopping suicidal fossil fuel projects is the only cure we know, the only way to protect life. Against that patient's plea of necessity, the Crown might argue exactly as it has done for the breaches of the TMX injunction.

- The patient could have tried legal avenues.
- He was not in immediate peril so he may live to get other treatments that are just as effective.
- He could have lobbied his MP to intervene and get the treatment legally.

All of that is true, but wouldn't anyone be compelled to break the law in his circumstances? Would the cancer diagnosis not create a compulsion to preserve life and would that not be a mitigating circumstance for his sentencing?

Our society has been diagnosed with terminal climate breakdown with only a 8 years left to implement any kind of treatment. In fact, it is more like we are diagnosed with lung cancer, yet we are continuing to smoke. We are continuing to smoke in the presence of our children who now face lung cancer.

My friends and I have tried other avenues to steer policy away from collapse. We have protested peacefully, visited our MPs and MLAs, initiated and signed petitions, voted for policies that would begin to address climate breakdown, and supported every initiative that would put our institutions in a position to act.

However, we have not sought to challenge or vary the injunction. We consider that a deadend. When faced with the choice between money and the natural world, our institutions choose money.

The Fairy Creek injunction was reinstated because of Teil Jones's potential loss of profit. The loss of 1000 year old trees had no play in the decision. Millions of dollars were spent on enforcement of the rule of law at Fairy Creek rather than sparing the trees and paying for a just transition of forestry workers. The government distributed billions of dollars in CERB payments but none to avoid conflict and save the trees. We cannot hope to reply to the climate crisis unless our government takes a stance against business as usual. Until we are on a wartime footing, we will lose the battle against planetary physics. We have already lost much.

Court cases are hopelessly ineffective at arriving at timely judgments when they are being fought by deep pockets. It took 17 years for a class action suit against big tobacco to be decided in Québec, 67 years for the entire Class period. Here is Judge Riordan's summary:

#### QUOTE

Over the nearly fifty years of the Class Period, and in the seventeen years since, the Companies earned billions of dollars at the expense of the lungs, the throats and the general well-being of their customers. If the Companies are allowed to walk away unscathed now, what would be the message to other industries that today or tomorrow find themselves in a similar moral conflict?

<https://untobaccocontrol.org/impldb/quebec-canada-15-5-billion-ruling-against-three-tobacco-companies/>

#### END QUOTE

Unfortunately, the message to corporations is not at all what Judge Riordan thinks it is. A CEO is completely unconcerned by any accountability that might happen a half century later. By then, the CEO would have banked his bonuses and left the company. Even in the worst-case scenario where the CEO must face the courts, it would take decades to reach a decision. Corporate money is a get out of jail free card.

I'm willing to believe that I have a jaundiced view of how corporate interests have warped justice in Western society. I may be wrong. I know I am very unschooled in the justice system. As well, though I have read a great deal about the climate, I still may be overly alarmist and terribly misinformed about how dire our situation actually is.

It makes sense to me that my sentence would help correct any unfounded beliefs and attitudes that have led me to this court. Changing my attitude is a question of rehabilitation. Prison is unlikely to change my dread of climate breakdown or the fear I have for the future of our children, nor will it open a door to working constructively with the levers of the court.

In short, I run the risk of reoffending if I continue to believe we are facing extinction, which means hundreds of millions of deaths in the short term and billions long term, and if I don't believe there is a legal path to avoiding collapse. I do not want to find myself back in this courtroom facing charges for climate related protest. If I can see the world otherwise, it might serve as a model for other potential climate offenders.

I'm asking therefore for rehabilitative instruction in place of 1 week of prison. In this scenario, I would take two courses, one that would deal with the present state of the climate crisis. The other would deal with the judicial system's potential response to ecocide. Each would be composed of 30 hours of instruction.

My full sentence would therefore be 14 days in jail for denunciation and deterrence; 60 hours in class for rehabilitation.



I see this as a sentence that would not abandon the precedent of sentences for breaching injunctions but would at the same time recognize the stress on people living through this very real and difficult transition.

## Postscript

Thank you for your patience. It is long-winded, but the issues are complex. As well, I hope this is a once in a lifetime experience for all concerned.