CITATION: Frontenac Ventures Corporation v. Ardoch Algonquin First Nation, 2008 ONCA 534
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COURT OF APPEAL FOR ONTARIO

ROSENBERG, FELDMAN and MACPHERSON JJ.A.

BETWEEN:

FRONTENAC VENTURES CORPORATION

Plaintiff (Respondent in Appeal)

and

ARDOCH ALGONQUIN FIRST NATION, SHABOT OBAADJIWAN FIRST NATION, ROBERT LOVELACE, PAULA SHERMAN, DOREEN DAVIS, RANDY COTA, HAROLD PERRY, JANE DOE, JOHN DOE and PERSONS UNKNOWN and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants (Respondent in Appeal)

and

ARDOCH ALGONQUIN FIRST NATION, SHABOT OBAADJIWAN FIRST NATION, ROBERT LOVELACE, PAULA SHERMAN, DOREEN DAVIS, HAROLD PERRY, EARL BADOUR SR., FRANK MORRISON, DAVID MILNE, JOHN HUDSON, JANE DOE, JOHN DOE and PERSONS UNKNOWN

Respondents on Contempt Motion (Appellants)

Christopher Reid and Sarah Dover for the appellants Ardoch Algonquin First Nation, Robert Lovelace and Paula Sherman

Neil J. Smitheman and Tracy A. Pratt for the respondent Frontenac Ventures Corporation

Malliha Wilson, E. Ria Tzimas and Tamara Barclay for the respondent Her Majesty the

Queen in Right of Ontario

Julian N. Falconer and Kimberly R. Murray for the intervener Nishnawbe Aski Nation

Mary Eberts for the intervener Native Women's Association of Canada

Heard: May 28, 2008

On appeal from the sentences imposed by J. Douglas Cunningham A.C.J.S.C. on February 15, 2008.

MACPHERSON J.A.:

A. INTRODUCTION

[1] This is an appeal by Robert Lovelace, Paula Sherman and the Ardoch Algonquin First Nation ("AAFN") from the sentences imposed on them by Cunningham A.C.J.S.C. for their admitted contempt of court orders made on August 27 and September 27, 2007.

[2] The two court orders allowed the respondent, Frontenac Ventures Corporation ("Frontenac"), to conduct a campaign of exploratory drilling for uranium on lands the AAFN claims is within the traditional territory occupied by its members for centuries.

[3] Mr. Lovelace, Paula Sherman, who is co-chief of the AAFN, and other AAFN members engaged in a peaceful protest and blockade, which together prevented Frontenac's managers and employees from engaging in any drilling on the land.

[4] After tripartite negotiations among Frontenac, the AAFN and the Government of Ontario ("Ontario") failed to resolve the impasse, the motion judge held that the appellants were in contempt of two previous court orders. The appellants admitted their contempt of the court orders, but stated that their conduct flowed from their adherence to Algonquin law.

[5] The motion judge sentenced Mr. Lovelace and Chief Sherman to six months in jail and imposed substantial fines on them and on the AAFN.

[6] Mr. Lovelace and the AAFN appeal their sentences. Chief Sherman appeals the only component of her sentence that remains, the fine.

[7] At a superficial level, this appeal raises the typical legal issues posed by any sentence appeal: did the sentencing judge make an error in principle or were the sentences demonstrably unfit? However, the reality is that this narrow focus cannot resolve the appeal. That is because the conduct of Frontenac, and especially the appellants, requires a broader analytical framework, including consideration of constitutional, civil, criminal, aboriginal and statute law.

[8] At the conclusion of the hearing, the court indicated that the appeal was allowed, Mr. Lovelace was to be released immediately, and the fines imposed on all three appellants were stayed pending the release of the court's reasons. These are our reasons.

B. FACTS

(1) The parties and events

[9] There are three appellants in this appeal. The first is the Ardoch Algonquin First Nation, a First Nation community located in the Ottawa valley in eastern Ontario.

[10] Robert Lovelace is a member of the AAFN. He is a former chief and currently holds the positions of spokesman and chief negotiator. He is 60 years old and the father of seven children, including four minor children for whom he is a single parent. He is employed as a lecturer and aboriginal student counsellor at Queen's University and is a full-time instructor at Fleming College. He has no criminal record.

[11] Paula Sherman is a co-chief of the AAFN. She is a single mother of two children and a grandmother. She overcame a lifetime of poverty and hardship to obtain a Ph. D. She is currently employed as a Professor of Native Studies at Trent University. She has no criminal record.

[12] Frontenac is a private uranium exploration company. It holds a mining lease, multiple mining claims, and several agreements with private property owners to conduct mineral exploration on lands in Frontenac County, about 60 miles north of Kingston. Most of the mining claims are on Crown land. Frontenac's lease, mining claims and agreements are all within an area of land subject to an Algonquin land claim ("the subject property"). The Algonquin land claim was accepted for negotiation by the Governments of Canada and Ontario and negotiations have been ongoing since 1991.

[13] In early 2007, members of the AAFN learned that Frontenac had staked mineral claims on the subject property as authorized under Ontario's *Mining Act*, R.S.O. 1990, c. M.14. They also learned from Frontenac's website that the company was planning "an aggressive exploration and development program" in order to determine if future uranium exploration and development was warranted. The website further stated that "substantial

drilling and engineering studies … indicated that there was potential for an open-pit operation on one of these properties."

[14] In June 2007, the AAFN, Shabot Obaadjiwan First Nation ("Shabot") and non-aboriginal community groups protested against Frontenac's uranium exploration plans. The protest led to a blockade that prevented Frontenac from gaining access to the lands on which it wished to carry out mineral exploration.

[15] One of the stated reasons for the protest was a purported failure on the part of Ontario to consult with the AAFN and the Shabot about Frontenac's exploration plan and the renewal of its mining lease. The appellants assert that Frontenac is not legally entitled to conduct mineral exploration within the subject property until the Crown discharges its constitutional duty to consult with the affected First Nations about the impact of mining activity on the environment, wildlife harvesting and sacred, archaeological, historical and culturally significant sites on the property.

(2) <u>The litigation</u>

[16] In July 2007, Frontenac commenced an action against the AAFN and the Shabot and their leaders, seeking an injunction and $77 million in compensation.

[17] Frontenac first sought an interim injunction against the AAFN and the Shabot to restrain them from interfering with its exploration program. Frontenac's motion was heard on August 23, 2007. The appellants filed no evidence and made no submissions on this motion. Instead, counsel for the appellants attended and advised the court that they had, respectfully, decided not to participate in the injunction proceedings and had written to the Premier of Ontario to propose negotiations to end the dispute. On August 27, 2007, Thomson J. granted the order sought by Frontenac.

[18] The appellants did not abide by Thomson J.'s order. Frontenac initiated civil contempt proceedings in September 2007, which were rescheduled to November 2007.

[19] Frontenac then sought an interlocutory injunction against the AAFN and the Shabot, restraining them and anyone associated with them from interfering with, disrupting or hindering in any way Frontenac's legitimate activities on the subject property.

[20] Frontenac's motion for an interlocutory injunction was heard by Cunningham A.C.J.S.C. on September 24 and 25, 2007. Once again, the AAFN chose not to participate in this proceeding. They did not provide any evidence, including evidence related to their reliance on Algonquin law or their reliance on s. 35 of the *Constitution Act, 1982*, which recognizes existing aboriginal and treaty rights. On September 27, 2007, the motion judge issued the requested interlocutory injunction.

[21] The appellants did not abide by Cunningham A.C.J.S.C.'s order. The blockade of the subject land continued. Frontenac was unable to continue its uranium exploration program.

[22] Frontenac brought an urgent motion returnable on October 4, 2007 to have the appellants and other alleged contemnors found in contempt of court for not obeying the interlocutory injunction.

[23] With prompting by Cunningham A.C.J.S.C., and with the assistance of Scott J., on October 5, 2007 the parties agreed to enter into mediation for a twelve-week period. This period corresponded with the preliminary and non-invasive period of Frontenac's exploration schedule. As a result, the contempt proceedings were adjourned. One of the purposes of the mediation as expressed by Cunningham A.C.J.S.C. was to avoid contempt proceedings:

> [F]irst of all, I'm very much obliged to all counsel for taking this matter so seriously, and trying to work out a realistic solution to a difficult problem. And I'm also very much obliged to Mr. Justice Scott, for his intervention – which I think has borne some fruit. And I wish you well. I'm very hopeful that the process that you have agreed to become a part of will be successful, and will avoid the necessity of us having to re-convene on November 14th. I think, if good will and a real serious attempt at resolution is to prevail, then I think these problems can be put aside.

[24] Negotiations among Frontenac, the AAFN and Ontario proceeded. However, despite the efforts of the parties, the mediation was not successful and the issues in dispute, especially the mineral exploration issue, were not resolved.

(3) <u>The contempt proceedings and sentencing hearing</u>

[25] After the failed mediation, Frontenac revived its civil contempt motion in relation to alleged non-compliance with the August 27 and September 27 court orders. The motion was heard by Cunningham A.C.J.S.C. on February 12 through 15, 2008.

[26] The appellants did not contest the motion for contempt. They admitted that they had not complied with the two court orders.

[27] The appellants restricted their evidence and submissions to the issue of sentence. Mr. Lovelace testified on behalf of all of the AAFN defendants. The essence of his testimony was that uranium exploration on the subject lands would violate Algonquin law, which imposed a "moratorium" on such activity:

> Q. [E]xactly where does the authority, in your view, at least as a matter of Algonquin law, lie for this particular expression, the moratorium?
>
> A. The authority for this particular moratorium lies both with the AAFN Algonquin First Nation – Mr. Perry was our representative Elder who after hearing consensus within the community and at the Family Heads Council – and it also comes from the authority of William Commanda who is the principal Elder of all of the Algonquin people, and after he considered it, after he talked with the people that are important to him and the Algonquins that he feels are – are representative of the Algonquin voice, then he also gave his hand to signing that moratorium.
>
> . . .
>
> With the voice of William Commanda, all Algonquins have the opportunity to heed that law. All Algonquins can turn to William Commanda and say, I respect this Elder, I respect his teachings, I respect his learned opinion, and they can either subscribe to that or not.

[28] On February 13, 2008, the motion judge declared the AAFN defendants in contempt of the August and September 27, 2007 court orders. One contemnor, former chief Harold Perry, a 78-year-old man in poor health, then purged his contempt by providing a permanent undertaking to the court to abide by the order of September 27, 2007.

[29] On February 15, 2008, the motion judge delivered his reasons for sentencing the remaining contemnors. Mr. Lovelace and Chief Sherman were each sentenced to six months in jail. Mr. Lovelace was fined $25,000, Chief Sherman was fined $15,000, and the AAFN community was fined $10,000. The motion judge also imposed a fine on the three respondents of $2000 per day for future non-compliance. He struck AAFN's statement of defence in the action brought by Frontenac and ordered that "no other motions or applications to this court may be made by them until their contempt has been purged."

[30] Immediately after the sentences were imposed, Chief Sherman, a single mother responsible for three children, provided a permanent undertaking to the court to abide by

the September 27, 2007 order. As a result, the motion judge discharged the custodial portion of her sentence.

[31] Robert Lovelace did not purge his contempt. He was incarcerated from February 15 to May 28, 2008. On the latter date, at the conclusion of the appeal hearing, he was ordered to be released.

[32] Mr. Lovelace appeals the custodial portion of his sentence. All three appellants appeal the fines imposed on them. The appellants do not appeal the component of the order striking their pleadings and restricting their future access to the courts while their contempt continues.

C. ISSUE

[33] The sole issue on the appeal is whether the sentences imposed on the appellants were fit sentences.

D. ANALYSIS

[34] This case was prosecuted by way of a motion for civil contempt. In a civil contempt case, the range of potential penalties is prescribed in subrules 60.11(1) and (5) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194:

> 60.11 (1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.
>
> . . .
>
> (5) In disposing of a motion under subrule (1) the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,
>
> (a) be imprisoned for such period and on such terms as are just;
>
> (b) be imprisoned if he or she fails to comply with a term of the order;
>
> (c) pay a fine;

> (d) do or refrain from doing an act;
>
> (e) pay such costs as are just; and
>
> (f) comply with any other order that the judge considers necessary,
>
> and may grant leave to issue a writ of sequestration under rule 60.09 against the person's property.

[35] In his reasons for sentence, the motion judge observed that counsel for the appellants agreed that his clients' contemptuous behaviour came "perilously close to criminal contempt." McLachlin J. for the majority of the Supreme Court of Canada in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at 931, explained that the distinction between civil and criminal contempt "rests in the concept of public defiance that accompanies criminal contempt." She illustrated the distinction as follows:

> 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.

[36] In the Canadian Judicial Council's *Guidelines on the Use of Contempt Powers* (May 2001) at p. 13, the Council described public disobedience of an injunction as "a classic criminal contempt." The Council stated at p. 14 that, "In many cases arising out of disobedience of an injunction, the application for contempt will be brought in the civil proceedings, but the court may nevertheless make a finding of criminal contempt."

[37] The motion judge in this case did not make a finding of criminal contempt. The choice of appropriate penalty for contempt must recognize an important distinction between civil and criminal contempt: the purpose of a sentence for criminal contempt is punishment, whereas the purpose of a sentence for civil contempt is coercive or persuasive, designed to enforce the rights of a private party: see *Poje v. Attorney General (B.C.)*, [1953] S.C.R. 516 at 517. However, I would not place significant weight on this differential purpose in reviewing the fitness of the sentences imposed by the motion judge for civil contempt. As appellants' counsel acknowledged at the sentencing hearing, the nature of the appellants' conduct in repeatedly disobeying the interim and

interlocutory injunctions came extremely close to criminal contempt and may potentially have justified such a finding by the motion judge.

[38] As mentioned above, the motion judge imposed a combination of penalties – six months in jail for Mr. Lovelace and Chief Sherman, fines ranging from $10,000 to $25,000, prospective fines for future disobedience of $2000 per day, and striking the appellants' pleadings.

[39] There is no doubt that these are serious, even stiff, penalties. Incarceration for professional people who are respected leaders of their community and substantial fines for the same leaders and for an impoverished aboriginal community are onerous penalties.

[40] In imposing these sentences, the motion judge grounded his reasons in the rule of law. The core of the rule of law, in his view, was respect for and compliance with court orders:

> Compliance with orders of this court is not optional.
>
> . . .
>
> When one ignores orders of our courts, or takes the law into one's own hands, respect for our court system evaporates, and our entire society suffers.
>
> . . .
>
> Mr. Lovelace says that while he respects the rule of law, he cannot comply because his Algonquin law is supreme. He says he finds himself in a dilemma. Sadly, it is a dilemma of his own making.
>
> His apparent frustration with the Ontario government is no excuse for breaking the law. There can only be one law, and that is the law of Canada, expressed through this court.

[41] In this court, the appellants and the interveners made lengthy submissions about the nature of the rule of law. They argued that the rule of law is not fully described as respect for court orders. Their submissions were primarily based on Laskin J.A.'s articulation of the rule of law in another recent case dealing with an aboriginal occupation

of disputed land. In *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* (2006), 82 O.R. (3d) 721 at paras. 140-42, Laskin J.A. stated:

> [N]o one can deny the importance of the rule of law in Canada. The preamble to our Constitution states that Canada is founded on principles that recognize the rule of law. The Supreme Court of Canada has said that it is one of our underlying constitutional values. See *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; and *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.
>
> But the rule of law has many dimensions, or in the words of the Supreme Court of Canada is "highly textured." See *Reference re Resolution to Amend the Constitution*, *supra*, at 805. One dimension is certainly that focused on by the motions judge: the court's exercise of its contempt power to vindicate the court's authority and ultimately to uphold the rule of law. 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.
>
> Other dimensions of the rule of law, however, have a significant role in this dispute. These other dimensions include respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiations, fair procedural safeguards for those subject to criminal proceedings, respect for Crown and police discretion, respect for the separation of the executive, legislative and judicial branches of government and respect for Crown property rights.

[42] I fully accept and agree that compliance with court orders is an important, but not exclusive, component of the rule of law. The motion judge in his sentencing decision did not address the other dimensions of the rule of law referred to in *Henco*. However, I do not think that he erred in focusing at the sentencing stage of contempt proceedings on the dimension of the rule of law that relates to ensuring that orders of the court are enforced. The following passage from McLachlin J.'s reasons in *United Nurses of Alberta*, at p. 931 supports this view:

> 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.* [Emphasis added.]

[43] In my view, the stage at which the comprehensive and nuanced description of the rule of law expressed in *Henco* must be considered is when a court is requested by a private party to grant an injunction and where doing so might have an adverse impact on asserted aboriginal and treaty rights affirmed in s. 35 of the *Constitution Act, 1982*. Such cases demand a careful and sensitive balancing of many important interests in assessing whether to grant the requested injunction and on what terms.

[44] In the present case, as in *Henco*, the competing interests include the asserted aboriginal rights of the Algonquin First Nations, Frontenac's private interest in pursuing its exploration plan in accordance with valid mining claims and agreements, and respect for the Crown property rights of Ontario.

[45] And how are these interests to be effectively balanced? The answer has been clear for almost 20 years in the jurisprudence of the Supreme Court of Canada – consultation, negotiation, accommodation, and ultimately, reconciliation of aboriginal rights and other important, but at times, conflicting interests: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; and *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, [2005] 3 S.C.R. 388. The honour of the Crown requires that it act as a committed participant in the undoubtedly complex process of consultation and reconciliation: *Haida Nation*, *Taku River* and *Mikisew Cree*.

[46] Having regard to the clear line of Supreme Court jurisprudence, from *Sparrow* to *Mikisew*, where constitutionally protected aboriginal rights are asserted, injunctions sought by private parties to protect their interests should only be granted where every effort has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interests. Such is the case even if the affected aboriginal communities choose not to fully participate in the injunction proceedings.

[47] I am quick to point out that in this case, the AAFN did not appeal either the interim or the interlocutory injunctions granted by Thomson J. and Cunningham A.S.C.J.C. It is thus not for this court to address the merits of either order. However, I

think it is important to give judicial guidance on the role to be played by the nuanced rule of law described in *Henco* when courts are asked to grant injunctions, the violation of which will result in aboriginal protestors facing civil or criminal contempt proceedings.

[48] Where a requested injunction is intended to create "a protest-free zone" for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations: see Julia E. Lawn, "The John Doe Injunction in Mass Protest Cases" (1998) 56 U.T. Fac. L. Rev. 101. The court must further be satisfied that every effort has been exhausted to obtain a negotiated or legislated solution to the dispute before it. Good faith on both sides is required in this process: *Haida Nation*, p. 532.

[49] I turn then to the sole issue on this appeal – the merits of the sentencing decision. In my view, and with great respect to a judge trying conscientiously to resolve a difficult, bordering on intractable problem, the sentences he imposed are too harsh. I say this for several reasons.

[50] First, in his reasons the motion judge focused exclusively on punishment and deterrence, both specific and general. He said nothing about promoting reformation and rehabilitation of leaders of a First Nation community. Both sides of the standard analytical framework in sentencing cases needed to be assessed in a balanced fashion.

[51] Second, the motion judge failed to refer to the mitigating factors that were present in this case. Importantly, both Mr. Lovelace and Chief Sherman were first offenders. Until the events giving rise to their protest and blockade, they had led lives characterized by leadership in their community, including leadership in demonstrating respect for Canadian law. Both candidly conceded their contempt. These significant facts should have been acknowledged and taken into account in fashioning an appropriate sentence.

[52] In addition, some account should have been taken of the way in which the protest and blockade were conducted. The appellants' conduct was peaceful, with no violence and no damage to property.

[53] Moreover, there should have been recognition of the limited purpose of the appellants' conduct. The purpose was not a "no entry" purpose, whereby non-Algonquins could not set foot on the disputed property. Rather, the purpose was to prevent mining exploration on lands which were, and still are, subject to land claim negotiations with the Governments of Canada and Ontario.

[54] All of these factors ought to have been considered by the motion judge when fashioning appropriate sanctions for their acts of contempt. Another way of saying this is that the sentencing principles articulated by the Supreme Court of Canada in *R. v. Gladue*

(1999), 133 C.C.C. (3d) 385, are applicable when fashioning a sentence for civil or criminal contempt on the part of aboriginal contemnors.

[55] In *Gladue*, the Supreme Court of Canada was asked to consider the purpose of s. 718.2(e) of the *Criminal Code*, which requires that a court take into account the principle that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aboriginal offenders*" [emphasis added]. At para. 50, the court referred to the "acute problem of the disproportionate incarceration of aboriginal peoples." The court accepted that the purpose of s. 718.2(e) is to provide sentencing judges with the flexibility and authority to "resort to the restorative model of justice in sentencing aboriginal offenders and to reduce the imposition of jail sentences where to do so would not sacrifice the traditional goals of sentencing" (para. 50). According to the court, sentencing judges must pay particular attention to the unique circumstances of aboriginal offenders, namely: "[t]he unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts" and "[t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances of the offender because of his or her particular aboriginal heritage or connection" (para. 66).

[56] Frontenac and Ontario contend that the *Gladue* principles should not be extended beyond the criminal context because criminal law sentencing is designed to achieve entirely different objectives from sentencing for contempt. I do not agree with this submission. The *Gladue* principles have already been extended to a variety of other contexts in the criminal justice system, including bail, parole eligibility, dangerous offender applications, and disposition hearings of the Ontario Review Board. In this last context, in *R. v. Sim* (2005), 78 O.R. (3d) 183 (C.A.), Sharpe J.A. said, at para. 16: "I do not think that the principles underlying *Gladue* should be limited to the sentencing process and I can see no reason to disregard the *Gladue* principles when assessing the criminal justice system's treatment of NCR accused."

[57] Although *Gladue* was focused primarily on the serious problem of excessive imprisonment of aboriginal peoples, the case in a broader sense draws attention to the state of the justice system's engagement with Canada's First Nations. I note three factors in particular that were highlighted in *Gladue:* the estrangement of aboriginal peoples from the Canadian justice system, the impact of years of dislocation, and whether imprisonment would be meaningful to the community of which the offender is a member. Those factors were all at stake in this case.

[58] First, while the appellants did not contest the injunctions and admitted that they were in breach of the orders, the enforcement of the injunctions by imprisonment could not help but emphasize the estrangement of this community and aboriginal peoples generally from the justice system. The use of incarceration as the first response to breach

of the injunction dramatically marginalizes the significance of aboriginal law and aboriginal rights. Second, imposing a lengthy term of imprisonment on a first offender fails to recognize the impact of years of dislocation. The fact that persons of the stature of Mr. Lovelace and Chief Sherman saw no meaningful avenues of redress within the justice system and felt driven to take these drastic measures demonstrates the impact of years of dislocation and the other problems discussed in *Gladue* at paras. 67-69. Finally, imprisonment, far from being a meaningful sanction for the community, had the effect of pitting the community against the justice system. That the court found it necessary to imprison the leaders of the AAFN simply serves to emphasize the gulf between the dominant culture's sense of justice and this First Nation's sense of justice.

[59] For these reasons, I cannot agree that the principles underlying the *Gladue* decision have no application in the civil contempt context. Rather, as in *Gladue*, the court must look at the unique systemic or background factors at play in this case.

[60] What then are the unique systemic or background factors that played a part in bringing the AAFN and two of its leaders before the courts to be sentenced for contempt? The first background factor is that there *is* an existing land claim negotiation between the Algonquin Nation and Ontario. In *Haida Nation*, the Supreme Court of Canada held at pp. 532-36 that when the Crown has knowledge that a First Nation community has claimed rights or title in respect of a territory, it must consult the affected community and, where indicated, must accommodate aboriginal concerns before approving any activity that could have an impact on the claimed rights or title. In *Taku River*, at p. 567, the Supreme Court also held that the fact that a land claim has been accepted by the Crown for negotiation establishes a *prima facie* case that the claim has merit. Ontario accepted the Algonquin land claim for negotiation in 1991: see *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, [2007] O.J. No. 3360 (S.C.J.) at para. 25. *Haida Nation* and *Taku River* together instruct that the existing, and as yet unresolved, Algonquin land claim – the basis for the AAFN's protest and blockade – cannot simply be dismissed as illusory, flawed or weak.

[61] The second background factor that played a part in bringing the appellants before the courts is the nature and content of Ontario's *Mining Act*. It is a remarkably sweeping law. It establishes a "free entry" system whereby all Crown lands, including those subject to aboriginal land claims, are open for prospecting and staking, without any consultation or permitting required. Anyone with a prospector's licence may stake claims and prospect for minerals on any Crown land. Once a claim has been staked, in accordance with the Act, the Mining Recorder must record the claim. There is nothing in the *Mining Act* about considering aboriginal land claims or interests.

[62] The intersection of these two background circumstances creates an obvious problem, indeed the problem that lies at the heart of this case. What Frontenac wants to

do on Crown land – staking and exploration – is legal under the *Mining Act*. However, the appellants' response, although in contempt of two court orders, is grounded, at a minimum, in a respectable interpretation of s. 35 of the *Constitution Act, 1982* and several recent decisions of the Supreme Court of Canada. In summary, the appellants' character and circumstances, their actual conduct, and the difficult legal context within which it occurred, should have counted as significant mitigation when sentences were imposed on them. The circumstances of the offences and these aboriginal offenders are such that, in accordance with the *Gladue* principles, sentences of incarceration were inappropriate.

[63] The third reason for concluding that the sentences imposed on the appellants were too harsh is that they are considerably more severe than the sentences imposed in other protest/blockade cases. In *MacMillan Bloedel Ltd. v. Brown* (1994), 88 C.C.C. (3d) 148, the British Columbia Court of Appeal allowed in part appeals from sentences for criminal contempt consisting of public disobedience of court orders related to logging operations in Clayoquot Sound. McEachern C.J.B.C., for the majority, discussed past sentences that were imposed by B.C. courts for contempt in non-violent protest cases, at para. 8:

> In most cases the courts have endeavoured to deal firmly, but leniently with those found guilty of contempt… In the more recent disputes, although short, unsuspended terms of imprisonment were imposed in some of the [abortion clinic protest cases (e.g., *Everywoman's Health Centre Society v. Bridges* (1990), 54 B.C.L.R. (2d) 273 and *R. v. Bridges (No. 2)* (1989), 61 D.L.R. (4th) 154)], sentences have been nominal fines or suspended terms of imprisonment and probation.

In *MacMillan Bloedel*, the majority reduced the sentences of those who had pleaded guilty from 45 days to 30 days imprisonment (one appellant received a suspended sentence) and upheld the sentences of 45 days for offenders who had not pleaded guilty. The majority set aside fines of up to $1500 imposed against each of the appellants because there had been no inquiry into their ability to pay.

[64] A further illustration of the tendency of courts to impose nominal fines or short terms of imprisonment in blockade/protest cases is the recent decision of *Peter Kiewet Sons Co. v. Perry*, 2007 BCSC 305. Sixteen individuals were arrested for breaching a court-ordered injunction that restrained protestors from obstructing work crews in building a highway. Seven of the defendants were found guilty of criminal contempt. One of these defendants, who did not admit her contempt, was sentenced to 14 days imprisonment, while the other six were sentenced to a fine of $5000 or 250 hours of community service. The remaining defendants, who acknowledged their contempt but who "did not engage in open flagrant and continuous violation of the court order" were

sentenced to a $250 fine or 24 hours of community service (with one exception of a $500 fine or 50 hours of community service for a second-time offender: see para. 28). Against the backdrop of these and many other similar cases, custodial sentences of six months and fines of $10,000 to $25,000 for first time offenders are very high indeed.

[65] Fourth, I observe that, by the time of the sentencing hearing on February 15, 2008, the Shabot contemnors and Chief Perry of the AAFN had purged their contempt by undertaking not to continue their protest and blockade activities. Only Mr. Lovelace and Chief Sherman remained. It appeared that a process initiated with care, sensitivity and fairness by the motion judge in the autumn of 2007 was bearing fruit. In my view, continued adherence to the conciliatory values that drove that autumn process suggested a more moderate sentence for the only two contemnors still not complying with the earlier court orders. On February 15, 2008, in light of the progress already made, much of it with the encouragement and assistance of the motion judge, there was no need to bring down the hammer of long jail sentences and very substantial fines.

[66] For these reasons, I conclude that the custodial and monetary components of the sentences imposed on the appellants were too harsh. Accordingly, I would allow the appeal and set aside both components of the sentences, including the prospective fines for future disobedience. In my view, in Mr. Lovelace's case, a fine of $1000 would have been appropriate. However, having regard to the time he has spent in custody, I refrain from imposing any penalty on him. I would not fine Chief Sherman or the community who have no ability to pay the fines. I would leave intact the pleadings component of the sentencing decision, with which the appellants do not take issue.

[67] Nor, at this juncture, would I order any custodial sentence. That is not to say that incarceration is always out of place in civil contempt cases. In some cases, including potentially this case down the road, incarceration and substantial fines may be necessary. However, it would be wrong to cross this bridge now for these first offenders in a situation that cries out for dedicated negotiation among Ontario, the AAFN and Frontenac with a view to reconciliation of the competing interests.

[68] On this final point I could cite almost 20 years of Supreme Court of Canada decisions, from *Sparrow* to *Mikisew*, or the eloquent *Report of the Ipperwash Inquiry* (Queen's Printer for Ontario, 2007). However, I choose to quote the equally thoughtful observation by the motion judge near the end of his reasons in support of the interlocutory injunction he issued on September 27, 2007:

> I fully recognize that this case engages complex relations between the Crown and aboriginal peoples. I also recognize that respect for consultation lies at the heart of resolving such disputes even when certainty over the legitimacy and extent of the claim is unresolved. As the Supreme Court of Canada

> has noted in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 and in *Haida*, *supra*, conciliation between aboriginal and non-aboriginal peoples, and their respective claims, interests and ambitions is the fundamental objective of these negotiations.

E. DISPOSITION

[69] I would allow the appeal and set aside the custodial and monetary components of the sentences imposed on the appellants.

[70] The appellants are entitled to their costs of the appeal. They may file costs submissions of not more than five pages within 30 days of the release of these reasons. The respondents should file their responses within 14 days thereafter. The interveners should neither pay nor receive costs.

RELEASED: July 7, 2008 (“M.R.”)

“J.C. MacPherson J.A.”
“I agree M. Rosenberg J.A.”
“I agree K. Feldman J.A.”