COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. C.D.*,
2023 BCCA 319

Date: 20230809
Docket: CA47399

Between:

Rex

Respondent

And

C.D.

Appellant

SEALED FILE

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated April 16, 2021 (sentence) (*R. v. C.D.*, Vancouver Docket 31563).

Counsel for the Appellant:	B.R. Anderson S.E. Hiscock
Counsel for the Respondent:	M. Mereigh
Place and Date of Hearing:	Vancouver, British Columbia May 31, 2023
Place and Date of Judgment:	Vancouver, British Columbia August 9, 2023

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Voith

Summary:

C.D. pleaded guilty to criminal contempt and was sentenced to six months' imprisonment, 18 months' probation and ordered to make a donation of $30,000 to

a charity. Prior to the sentencing hearing, the Crown had offered to support a joint submission in favour of a sentence of 45 days' imprisonment if C.D. agreed to plead guilty. Counsel for C.D., Mr. Linde, did not accept that offer, apparently hoping to obtain a conditional discharge and to avoid C.D.'s having a "criminal record". Crown counsel advised Mr. Linde that a conviction of criminal contempt would not leave C.D. with a criminal record. During the sentencing hearing, the summary trial judge had given strong hints to the effect that in his view, a 45-day period of imprisonment would be "woefully inadequate".

At the hearing, Mr. Linde sought a conditional discharge, but withdrew that suggestion shortly thereafter. Crown counsel sought a sentence of 45 days' imprisonment but made it clear there was no joint submission. Sentencing judge imposed the sentence described above. On appeal, C.D. argued that Mr. Linde had provided ineffective assistance of counsel and that 'but for' counsel's refusing the Crown's offer of a 'plea deal', C.D. would have been freed at the end of the hearing, without a record, having served almost 45 days in custody. "Fresh" evidence proferred by C.D. was unclear as to whether Mr. Linde had even discussed the Crown's offer with his client.

Held: Appeal allowed. A reasonably competent lawyer would have known, or found out, that the Crown's offer was exceptionally good for C.D. and that it would have been extremely difficult for the sentencing judge to reject a joint submission. SCC in R. v. Anthony-Cook had imposed a very high threshold on sentencing courts for rejecting joint submissions. In this case, CA found that although the sentence of six months may well have been a fit one (in the absence of a joint submission), the failure of Mr. Linde to accept the Crown's offer constituted ineffective assistance of counsel. Finding that the high threshold described in Anthony-Cook had not been met — i.e., that a 45-day sentence would not have led reasonable members of the public to conclude that the criminal justice system had broken down — CA sentenced C.D. to "time served", or effectively 45 days' imprisonment, which would have led to his immediate release. In the absence of evidence concerning C.D.'s rights in respect of "crowdfunding" of $30,000 raised for C.D., and in the absence of evidence as to his ability to pay that amount, CA also deleted the requirement that C.D. make a donation of $30,000 to a charity.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] C.D. appeals a sentence of six months' imprisonment for acts constituting criminal contempt, a common law offence. These acts — the violation of court orders prohibiting the publication of material that disclosed the identity of C.D.'s child, "A.B.", and the medical professionals treating him — have had consequences of a public nature and they are still ongoing.

[2] A.B. has been under medical treatment for gender dysphoria since he was about 14 years old. His father strongly objects to A.B.'s receiving such treatment and to the fact that his, C.D.'s, consent was not required for treatment to be

provided: see the *Infants Act,* R.S.B.C. 1996, c. 223, s. 17. Family law proceedings were originally brought on behalf of A.B. in early 2019 seeking the Supreme Court's assistance in protecting his privacy, but C.D. disregarded the Court's orders. Even when A.B.'s family law file was eventually transferred to the criminal registry, C.D. continued to grant interviews, provide photos, and post information that enabled users of the Internet in Canada and elsewhere to identify A.B. and his medical caregivers. C.D. also commenced proceedings against A.B. but they were dismissed in July 2019 as vexatious and an abuse of process.

[3] A recurring theme throughout the proceedings has been that C.D. cannot, or will not, recognize the distinction between simply expressing his own opinions and doing so in such a way as to violate A.B.'s privacy — even though C.D. has claimed that he has no wish to hurt A.B. Indeed, C.D. appears to have gone out of his way to publicize his own and A.B.'s identity on several platforms in Canada and the U.S., thus ensuring that C.D. would not be able to purge his contempt completely. C.D. has never given a satisfactory answer to the question of why he did not simply redact A.B'.s name and personal details and his own name from his publications, interviews and postings so that A.B.'s privacy would be protected and court orders would not be breached.

[4] The Crown brought a charge of criminal contempt against C.D. on July 30, 2020. By the time the charge was set for trial in April of 2021, C.D.'s counsel at that time, Mr. Linde, had recognized that the Crown was in a position to prove its case beyond a reasonable doubt. C.D. decided to plead guilty, and the Court moved immediately to the sentencing stage before Mr. Justice Tammen.

[5] C.D. sought a conditional discharge; the Crown sought a sentence of 45 days' imprisonment plus a probation order of 18 months, which the Crown described as the low end of the range of what would be "fair". The judge had already warned counsel that he was likely to find a sentence of 45 days to be "wholly inadequate". For reasons dated April 16, 2021, the Court sentenced C.D. to six months in prison, less credit for time served at the usual rate of 1:1.5. This left 134 days to be served in custody.

[6] C.D. asserts on appeal that he received inadequate assistance from counsel in preparing for the sentencing and at the hearing itself. 'But for' Mr. Linde's failure to appreciate the benefits C.D. could have realized if he had agreed to a 'plea deal'

proffered by the Crown, C.D. says he would have been released on the day of sentencing, having served time in custody with credit adding up to almost 45 days. His new lawyers contend in this court that he suffered a miscarriage of justice. They ask that the six-month sentence of imprisonment be set aside and a sentence of time served be substituted therefor. They also contend that the Court's order that C.D. pay $30,000 to a children's charity was erroneous and that the sentence was demonstrably unfit.

[7] C.D. has applied to adduce "fresh" evidence in the form of one affidavit of himself and two of Mr. Linde detailing their discussions before and during the sentencing hearing[1]. The affidavits disclose some differences in their versions of what occurred, and leave many questions unanswered. Normally, these deficiencies would be resolved or at least minimized by cross-examination, as contemplated by this court's *Practice Directive on Ineffective Assistance of Trial Counsel (Criminal Practice Directive, 12 November 2013)*. However, neither side applied to cross-examine C.D. or Mr. Linde on their respective affidavits. We are therefore left to try to determine "the truth" of what happened in the week in which C.D. pleaded guilty and was sentenced, based only on the affidavits, read in light of the transcript of the hearing and the reasons of the sentencing judge.

[8] I turn first, however, to the facts of C.D.'s conduct, as found by the judge, that were found to constitute criminal contempt.

C.D.'s Conduct

[9] The conduct to which C.D. pleaded guilty consisted of the breach of various orders — beginning with a protection order granted by Madam Justice Marzari under s. 183 of the *Family Law Act*, S.B.C. 2011 c. 25, and two granted by Tammen J. in February 2020.

[10] Marzari J.'s order was made in the context of the original family case (*A.B. v. C.D. and E.F.*), and had followed an even earlier order of Mr. Justice Bowden dated February 27, 2019. (We were not provided with the reasons given for these orders.) Among other things, Bowden J. declared that it was in the best interests of A.B. that he receive medical treatment for gender dysphoria and that he henceforth be acknowledged and referred to as male and be identified by the name he had chosen rather than the name set out in his birth certificate. Bowden J.'s order also stated that attempting to persuade A.B. to abandon his treatment or referring to A.B.

as a girl or with female pronouns would be considered to be "family violence" under the *Family Law Act*.

[11] Marzari J.'s order dated April 15, 2019 was made pursuant to s. 183 of the *Family Law Act*, which is contained in Part 9, headed "Protection from Violence". The order anonymized the names of health professionals involved in A.B.'s care; restrained C.D. from attempting to persuade A.B. to abandon his treatment for dysphoria; and prohibited C.D. from publishing or sharing information relating to A.B.'s sex, gender, identity, health or medical status except to certain persons. In his later reasons for sentence, Tammen J. recounted that the protection order had become necessary because C.D. had given interviews to two online publishers who had published them, along with links to personal medical information of A.B., in unredacted form. In the interviews, C.D. expressed his disagreement with A.B.'s decisions, made light of a suicide attempt by him, and referred to him as a girl.

[12] C.D. appealed various aspects of the orders of Justices Bowden and Marzari and the sealing of the petition. In January 2020, for reasons indexed as 2020 BCCA 11, this court allowed the appeal in part. The Court set aside some parts of the declaratory relief granted by Bowden J. and replaced Marzari J.'s protection order with a conduct order made under s. 227(c) of the *Family Law Act*. The conduct order stated in part:

> C.D. shall not, directly or indirectly, through a third party, publish information or provide documentation relating to A.B.'s gender identity, physical and mental health, medical status or treatments, other than with:
>
> (i) His retained legal counsel;
>
> (ii) Retained legal counsel for A.B. or E.F.;
>
> (iii) Medical professionals engaged in A.B.'s care or C.D.'s care;
>
> (iv) Any other person authorized by A.B.'s written consent;
>
> (v) Any other person authorized by court order.

(This order would expire in April 2020, being one year from Marzari J.'s original order; see s. 183(4) of the *Family Law Act*.)

[13] The Court of Appeal emphasized in its reasons that C.D. was entitled to express his views about A.B.'s course of action towards changing his gender identity and name, but that C.D.'s right to share those opinions with third parties

"may properly be subject to constraints aimed at preventing harm to A.B." In the Court's words:

> While of course CD is fully entitled to his opinions and beliefs, he cannot forget that AB, now a mature 15-year-old, with the support of his mother and his medical advisors, has chosen a course of action that includes not only hormone treatment, but a legal change of his name and gender identity.
>
> It is our view that in these circumstances, a limited conduct order, made with the objective of protecting the best interests of AB, is consistent with the *Charter* values underlying ss. 2(a), 2(b), and 7. CD has the right to his opinion and belief about AB's gender identity and choice of medical treatment. His right to hold a contrary opinion would not be unduly affronted by an order that CD respect AB's choices by acknowledging them in his communications with AB and publicly with third parties, both generally and in respect of these proceedings. His right to express his opinion publicly and to share AB's private information to third parties may properly be subject to constraints aimed at preventing harm to AB. However, we would not restrict CD's right to express his opinion in his private communications with family, close friends and close advisors, provided none of these individuals is part of or connected with the media or any public forum, and provided CD obtain assurances from those with whom he shares information or views that they will not share that information with others. [At paras. 213–4.]

The Court declined to prohibit C.D. from expressing to A.B. his opinion concerning A.B.'s hormone treatment, since such a direction would "interfere too closely with his role as a parent." (At para. 215.)

[14] As noted in the sentencing reasons, C.D. immediately breached the order of the Court of Appeal. He gave an interview to a blogger in February 2020 in which he violated the conduct order and the publication ban by naming himself and one of A.B.'s healthcare providers. The judge recounted:

> At that time, counsel for A.B. presented an interview C.D. had given to Jeremiah Keenan of The Federalist that post-dated the February 12 [2020] appearance. During the interview, on the accompanying video, a photograph of A.B., then approximately 12, holding an elementary school graduation certificate, was shown. With freeze-frame and zoom functions, A.B.'s full name is visible on that certificate. The circumstances of that photograph being in the hands of The Federalist, and timing of same, were unclear. However, there was evidence that the offending video had been posted to a GoGetFunding page in C.D.'s name the previous day.
>
> I made an express order to this effect concerning social media and any crowdfunding page created by C.D.: "C.D. is restrained from posting online, on Facebook, GoGetFunding, or any other online forum, in a manner that may identify him as the father in these proceedings." [At paras. 16–7.]

I note that in the interview given to "The Federalist", C.D. acknowledged that his interviews kept disappearing from online sites in Canada, but that "… we were

smarter, we sent everything to the States, made sure it was backed up on different platforms, you can find them anywhere." (At para. 49.)

[15] Two days of hearings were held in February 2020 at which Tammen J. gave directions concerning other posts and prohibited C.D. from giving an online interview to Jenn Smith, an associate of C.D. The order also directed C.D. to take down a 'crowdfunding' page that breached the existing orders and publication bans by referring to C.D. by name. (At paras. 13–14.)

[16] Counsel for A.B. asked the Court to refer the matter to counsel for the Attorney General to consider whether contempt of court proceedings should be initiated. The judge declined to do so, but made detailed orders on February 13 and 24, 2020, copies of which are attached as Schedules A and B to these reasons.

[17] Appearing in court in March 2020, counsel for A.B. presented evidence of further breaches of orders by C.D. and renewed the request that the matter be referred to the Attorney General. The Court ultimately acceded to this request. C.D. deposed that he had removed an offending video from one crowdfunding page, but that the other page had been hacked and content had been posted without his knowledge or consent. In the final sentence of his affidavit he said he had "no desire to share information that would hurt A.B." and that proceedings in the court below had "helped him to see how he could share his story while still adhering to court orders."

[18] On June 26, 2020, however, C.D. gave an interview in which he and the interviewer referred to C.D. by his full name several times and solicited donations to the crowdfunding page. By July 30, 2020 C.D. had given at least five other interviews that were posted online. The sentencing judge described them thus:

> One was an interview with Frank Vaughan, accessed by a member of the Vancouver Police Department on C.D.'s GoGetFunding page on July 22, 2020. The crowdfunding page in C.D.'s own name was in breach of both the publication bans and a specific term of the February 21, 2020, order.
>
> However, the interview with Frank Vaughan is compliant with the publication bans and anonymity orders. Both parties used initials for participants throughout. Only Mr. Vaughan appeared on screen. During the interview, there was reference to the bans and the fact that both were bound by them. There was meaningful discourse, in which C.D. was able to put forward his views about this case and his situation. Thus, both C.D. and online broadcasters were able to meaningfully broadcast their message online without breaching court ordered publication bans.

> The second interview with Jonathon van Maren, given July 29, 2020, and posted on YouTube, was non compliant and breached those orders. C.D. appeared on screen. The interviewer referred to C.D. by his full name, and during the interview, C.D.'s last name appeared on screen, albeit with an incorrect first name. C.D. referred to both G.H. and I.J. by their full names during the interview.
>
> That site appears to be an American one. During the interview, C.D. referred to the fact of court orders and that when he broke his silence, Canadian outlets might take interviews down in response to such requests, but that American outlets did not care and would keep them up. C.D. also referred to his crowdfunding page and acknowledged that he had been before the court about previous breaches.
>
> As at April 9, 2021, that video was still accessible online and had 1,534 views.
>
> C.D. then gave at least three interviews to Canadian online broadcasters: to Erin Brewer on August 1; Dan Dicks on August 3; and another to Frank Vaughan on August 30, 2020. As at April 9, 2021, only the Dicks interview remained accessible online. That interview has as its title: "Exclusive - Parent of transgender daughter now facing 30 to 45 days in jail for telling his story."
>
> There are both further breaches and admissions of prior breaches in all three interviews.
>
> Of note, in the Dicks interview, C.D. said that he decided about one month after the Court of Appeal decision that it was “important to break the gag order”. In the Vaughan interview, C.D. stated that at a certain point, he had to break his silence and that landed him in court. [At paras. 31–8.]

[19] There was also evidence that the crowdfunding page, accessed by police on March 1, 2021, was owned by C.D., using his full name. It featured several photographs of A.B., including a graduation photo with A.B.’s name visible and an image of I.J. with his full name shown on screen. (At para. 40.) Based on this material, Tammen J. issued a warrant for C.D.’s arrest on March 4, 2021, but directed it be held until C.D. had had an opportunity to present himself to the Court.

[20] Over the ensuing 12 days, the judge recounted, C.D. “took the opportunity ... to engage in the most egregious breaches of the anonymity orders and publication bans to date, leading to offending material being posted on American sites. Thus, C.D. ensured that he would be unable to purge his contempt at this hearing.” (At para. 42.) In a post-script to his reasons regarding bail on March 19, 2021 (which are to be read in conjunction with the Court’s later reasons for sentence), Tammen J. described escalating breaches of publication bans that had been

brought to his attention by the Crown. He had not considered this evidence in reaching his decision regarding bail, but described it as follows:

> The body of evidence at issue includes a videoclip of a lengthy interview C.D. gave to an organization that describes itself as a "pro-family activist organization." That entity maintains a website, on which it publishes. Although the organization is clearly based in the United States, and thus beyond the territorial jurisdiction of this court, through its website, it publishes on the World Wide Web. Some of the content is a flagrant breach of the publication ban orders in this case. Obviously, that content is available within British Columbia, and has the potential to cause great harm to A.B.
>
> 1) The interview given by C.D. provides the strongest evidence of his criminal intent. Through his own mouth, C.D. evinces a clear intention to flout court orders, and attempt to get his message out before his bail hearing. Thus, rather than take the opportunity that he was given by the delay in execution of the warrant, to comply with the court orders, C.D. in fact escalated his offending behaviour.
>
> 2) The content which is most alarming is contained within the attachments posted below the interview clip with C.D. All of those attachments are documents which could only have been provided to the website host by C.D. or his counsel. The documents include the Crown disclosure for his criminal trial and a press release authored by C.D.'s counsel, Mr. Linde.
>
> 3) Two documents relate to A.B. and his medical treatments. They both contain intensely private information about A.B. One of those documents contains information that on its face is an extremely egregious breach of both A.B.'s fundamental right to privacy and the publication ban.
>
> I alert C.D. now that he must make every effort to have the offending content removed from that website. If it at some point I must sentence C.D. for criminal contempt and that content remains, the range of sentence might be very different to the one I referenced in my reasons on judicial interim release. [At paras. 33-4; emphasis added.]

(See also paras. 43–5 of the reasons for sentence.)

[21] During the lead-up to his scheduled trial date of April 12, 2021, C.D. issued a press release from Mr. Linde about C.D.'s upcoming surrender into custody. Medical documents relating to A.B. were provided, posted online and remained accessible. The judge found that C.D.'s online activities relating to the arrest warrant had played a "significant role" in his ability to raise funds on the crowdfunding site. As of March 19, 2021, C.D. had raised just under $30,000, and according to the Crown, he ultimately received approximately $52,000.

[22] At the time of sentencing, C.D. was 47 years old, divorced with two children, the younger being A.B. C.D. has no criminal record, although he received a conditional discharge for an assault in December 2013.

Reasons for Sentence

[23] The sentencing judge began his analysis at para. 55 of his reasons, noting that although criminal contempt is a common law offence, the Court should be guided by the "overarching principles of sentencing, largely now codified in the *Criminal Code*." These included the principles of restraint, proportionality and parity — i.e., that a sentence should be similar to sentences imposed on similarly-situated offenders. At the same time, he recognized that sentencing for criminal contempt raises "unique" considerations. The need for court orders to be obeyed, the judge observed, meant that the principles of denunciation and deterrence "loom large". (At para. 57.) Further, since contemptuous conduct may be of an ongoing nature, whether a contemnor purges his or her contempt prior to sentencing is an important consideration. Unfortunately in this case, C.D. had "ensured that he would be unable to fully purge his contempt". Attempts by C.D. and Jenn Smith to remove posted materials subsequent to C.D.'s incarceration had failed; both the "MR" site and The Federalist had refused to remove the offending material.

[24] The judge noted that the orders breached by C.D. had been made to protect the privacy of A.B., a vulnerable young person. As observed by the Supreme Court of Canada in *A.B. v. Bragg Communications Inc.* 2012 SCC 46, protecting the privacy of young persons fosters respect for their dignity, personal integrity and autonomy. (At para. 18.) In this case, A.B. had chosen to come to court seeking a limited publication ban and anonymity order, which C.D. had then chosen to ignore. A.B.'s confidence in the Court had been "shaken and diminished", and so too, the sentencing judge observed, would the confidence of right-thinking citizens fully apprised of the facts of the case. The judge continued:

> ... I do not accept that C.D.'s intention was otherwise than to attempt to undermine the authority of the courts and the overall administration of justice.
>
> Moreover, I expressly reject C.D.'s sworn assertion from March 10, 2020, that he had no desire to share information that would harm A.B. His conduct in sharing the personal, medical, and identifying information with M.R. prior to his surrender into custody reveals his true intentions.
>
> Indeed, when he testified on April 13, C.D. said in part, when asked if he would desist in his breaches of court orders, that he would do so, because

> he had gotten his message out, there was nothing more for him to do, and he would pass on the torch to others.
>
> Neither C.D. nor his counsel has ever explained the motivation to provide American online publications with A.B.'s medical and personal information, knowing that it would be potentially posted online in perpetuity. [At paras. 65–8; emphasis added.]

In short, C.D. had "blatantly, wilfully, and repeatedly" breached court orders and had done so in an "extremely public manner and with full knowledge that he was violating court orders; indeed after being cautioned repeatedly about his behaviour." (At para. 71.) The only mitigating factors were that C.D. had no relevant criminal record, had pleaded guilty and, once he realized that the sentence might exceed 45 days, had expressed remorse. The judge did not give great weight to this expression.

[25] In terms of comparable cases, the judge found *R. v. Krawczyk* 2010 BCCA 542 to be the most analogous. Ms. Krawczyk was an elderly female environmental protestor who was sentenced to 10 months' imprisonment for criminal contempt. Unlike C.D., she had many prior convictions, but as in this case, the overall conduct was persistent and ongoing in the face of repeated warnings from the Court about possible consequences. In the judge's view, the impact of C.D.'s contemptuous conduct was far greater in terms of effects on individual victims, in particular A.B. Moreover, breaches of the anonymity orders were still ongoing. (At para. 76.)

[26] In the judge's view, a "strong denunciatory sentence" was required and the principle of deterrence, both general and specific, required a prison sentence. C.D. had evidently considered right up to the time of sentencing that he might be sentenced to 45 days' incarceration and had not been at all deterred by that prospect. The judge concluded:

> In my view, like-minded members of the public should expect that if they are inclined to blatantly disregard court ordered publication bans in a similar fashion, the sentence will be more readily measured in weeks or months than in days.
>
> As noted, I view the appropriate range of sentence to be six to nine months. I intend to impose a sentence at the very low end of that range, taking into account C.D.'s late expression of remorse, his belated efforts to purge his contempt, and the eloquent plea made on his behalf by Jenn Smith. [At paras. 78–9; emphasis added.]

The judge pronounced the sentence of six months' imprisonment, from which 46 days spent in pre-trial custody were to be deducted, leaving 134 days to be served.

[27] At para. 83 of his reasons, the judge also stated that there should be a "monetary component to the sentence, in lieu of a fine." He set this amount at $30,000, being the "minimum amount of money C.D. collected through crowdfunding, in direct violation of court orders." C.D. was to pay this to the Ronald McDonald House Charities within six months of his release from prison.

The Appeal

[28] C.D.'s original notice of appeal, filed April 21, 2021, was signed by Mr. Linde. It appealed only the sentence. On April 27, 2021, an amended notice was filed, signed by Mr. V. Larochelle, appealing both conviction and sentence. In August, 2022, Mr. Larochelle applied to withdraw as counsel and his application was granted. After a few months of case management, Ms. Hiscock became C.D.'s counsel of record on the sentence appeal. C.D. abandoned his appeal against conviction and was granted leave to appeal sentence on February 8, 2023.

[29] In this court, C.D. asserts the following grounds of appeal, namely:

1. Sentencing counsel provided ineffective assistance to the appellant in a manner that prejudiced the results.
2. The sentence imposed is demonstrably unfit.
3. The sentencing judge erred by imposing a fine of $30,000 without an inquiry into the appellant's ability to pay and therefore imposed an unduly severe sentence.

[30] Although criminal contempt is a common law offence, the ability of a court to impose punishment for contempt of court is preserved by s. 9 of the *Criminal Code,* R.S.C. 1985, c. C-46. Section 10 allows for appeals from conviction or sentence:

> 10 (1) Where a court, judge, justice or provincial court judge summarily convicts a person for a contempt of court committed in the face of the court and imposes punishment in respect thereof, that person may appeal
>
> (a) from the conviction; or
>
> (b) against the punishment imposed.
>
> (2) Where a court or judge summarily convicts a person for a contempt of court not committed in the face of the court and punishment is imposed in respect thereof, that person may appeal
>
> (a) from the conviction; or
>
> (b) against the punishment imposed.

[31] In *MacMillan Bloedel Ltd. v. Brown* [1994] B.C.J. No. 268 (C.A.), Chief Justice McEachern for this court stated:

> Contempt of court is a common law offence preserved by the proviso to s. 9 of the *Criminal Code*. At common law there was no appeal from a conviction or sentence for contempt. Parliament has provided for an appeal to this Court against both conviction and sentence by *Code s.* 10, which also provides that such appeals shall be governed by the provisions of Part XXI of the *Code*. Apart from satisfying ourselves that a sentence under appeal is a lawful sentence, our jurisdiction in sentence appeals is prescribed by *Code* s. 687, which only permits us to consider the fitness of the sentence appealed against. [At para. 39.]

The Chief Justice also confirmed that neither the common law nor the *Code* provides any prohibition against the imposition of both a custodial sentence and the payment of a fine for criminal contempt. (At para. 66.)

[32] Ms. Mereigh for the Crown seemed to question at one point in her submission whether ineffective assistance of counsel may be raised in an appeal from *sentence*, as opposed to an appeal from conviction. She did not provide any argument or authority on the point, but I note that courts of appeal have indeed entertained such appeals: see *R. v. Nercessian* 2022 ONCA 704; *R. v. Lavergne* 2017 ONCA 642; *R. v. Desbiens* 2012 ONCA 744; *R. v. VanEindhoven* 2020 MBCA 123; and *R. v. Mavros* 2022 ABCA 157.

[33] Most helpful, however, is *R. v. Publicover* 2021 NSCA 78, the facts of which bear some resemblance to those of this case. The appellant there sought to withdraw his guilty plea or have his sentence reduced due to allegedly ineffective assistance of counsel. Mr. Publicover had been adamant before pleading guilty that he wanted a "community-based" disposition and accordingly, had instructed his counsel to reject a joint recommendation in favour of a period of incarceration of between two and three years. Defence counsel deposed that he had "explained to Mr. Publicover that in the absence of a joint recommendation, the Crown would not likely be seeking the same length custodial sentence. Mr. Publicover understood the risk and instructed me that he did not wish to accept the joint recommendation offered by the Crown, instead seeking a community-based disposition." (At para. 41.) The Court rejected the appellant's argument. Mr. Justice Beveridge stated for the Court:

> ... First, the appellant pled guilty to the assault in November 2018. It had nothing to do with the Crown's eventual position. Second, the appellant does not say he entered guilty pleas in exchange for a particular position by the

> Crown. Third, it is contradicted by [defence counsel's] unchallenged affidavit that the Crown's position would be more than the spurned deal for a joint recommendation of 2-3 years' incarceration; and, the appellant had to have known from his experience of 22 prior convictions for break and enter ... that he faced more than a minimum period of federal incarceration. Fourth, the Crown's position on sentence is simply a submission made by counsel—absent a joint recommendation, trial judges can and frequently depart from the positions advanced by either or even both Crown and defence counsel.
>
> Dissatisfaction with the sentence imposed is not a valid ground to permit withdrawal of guilty pleas. There is nothing in the materials to substantiate a miscarriage of justice. I would dismiss this ground of appeal. [At paras. 46–7; emphasis added.]

[34] I also note the comment of the Supreme Court of Canada in *R. v. G.D.B.* [2000] 1 S.C.R. 520 that the right to effective assistance of counsel "extends to all accused persons" and "is seen as a principle of fundamental justice derived from the evolution of the common law, s. 650(3) of the *Criminal Code*, and ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*." (At para. 24.) The Court also quoted a passage from the reasons of Doherty J.A. in *R. v. Joanisse* (1995) 102 C.C.C. (3d) 35 (Ont. C.A.), which included the following:

> … Effective representation by counsel makes the product of the adversarial process more reliable by providing an accused with the assistance of a professional trained in the skills needed during the combat of trial. The skilled advocate can test the case advanced by the prosecution, as well as marshal and advance the case on behalf of the defence. We further rely on a variety of procedural safeguards to maintain the requisite level of adjudicative fairness in that adversarial process. Effective assistance by counsel also enhances the adjudicative fairness of the process in that it provides to an accused a champion who has the same skills as the prosecutor and who can use those skills to ensure that the accused receives the full benefit of the panoply of procedural protections available to an accused. [At para. 57.]

[35] It has not been suggested to us that similar reasoning should not apply to counsel appearing on a sentencing matter. Although navigating the process of sentencing may not require the same degree of skill and learning as is required of trial counsel, a convicted person is nevertheless entitled to a fair process in being sentenced and should be able to have confidence that his or her counsel has an understanding of the alternatives available to the court and the ability to assess and state his or her client's case with reasonable competence. Accordingly, I propose to follow the lead of the Court in *Publicover* and proceed on the basis that the argument of ineffective assistance of counsel is available in sentence as well as conviction appeals, including a conviction for criminal contempt.

[36] I also note that even where counsel was (as in this case) acting *pro bono*, the expected standard is no lower than if counsel were being fully remunerated: see *R. v. Cunningham* 2010 SCC 10 at para. 40.

Counsel's Performance at Sentencing

[37] Given the first ground of appeal, it is necessary to review in some depth what occurred between C.D. and Mr. Linde during the week of the sentencing and what occurred at the hearing itself, as disclosed by the transcript. Proceedings began on April 12, 2021, when the five-day trial of the charge of contempt had been scheduled to begin before Tammen J. Evidently Mr. Linde had realized the case against C.D. was irrefutable and he and counsel for the Crown, Mr. Pruim, had discussions concerning a guilty plea. After a review of the open court principle and how C.D.'s surname could be kept confidential, Mr. Linde told the Court that he and counsel for the Crown had "*come to a clear agreement* which we both realize is completely up to your discretion." (My emphasis.) He asked the judge if he would like to be informed of that agreement or "wait until tomorrow". The judge said he could wait until the next day. At the very end of the hearing, Mr. Pruim said he would be asking the Court to review s. 606 of the *Criminal Code* with C.D., even though it did not "strictly apply". He added, "*This isn't a joint submission*".

[38] When proceedings resumed on the morning of April 13, Mr. Linde told the Court that C.D. wished to enter a plea of guilty. C.D. then pleaded guilty. In response to questioning by the judge in accordance with s. 606 of the *Code*, he confirmed that he understood he was giving up his right to have a trial. The following questions and answers were recorded:

> THE COURT: All right. And you also understand that I'm about to hear submissions from both lawyers about what an appropriate sentence is but that at the end of the day it is up to me to determine what is a fit sentence and that I am not bound by the positions taken by counsel?
>
> C.D.: I am aware of that. Yes.
>
> THE COURT: All right. And you have entered a plea freely and voluntarily?
>
> C.D.: I have, yes. [Emphasis added.]

Mr. Linde then advised the Court as follows:

> The Crown is seeking a finding of guilt, and [C.D.] is seeking a conditional discharge. I will get into that in due course. Because he's seeking a conditional discharge, it's my submission that he should be permitted to testify and explain what I as his counsel think is necessary to support the

> argument for a conditional discharge. I do not know, as I said before, I'm a complete neophyte in criminal court. It's been 40 years. So I'm just asking, I don't know my friend's -- I think he's a little bit uncertain, leaving it to you. [Emphasis added.]

[39] Mr. Pruim then made his submissions on behalf of the Crown, seeking "effectively a sentence of 45 days' jail and an 18-month probation term." At p. 562 of the transcript, he began his argument on the principles of sentencing and relevant case law. He brought a wide variety of contempt cases, with wide variations in the sentences imposed, to the judge's attention. These included *MacMillan Bloedel Ltd. v. Simpson*, in which the Court upheld various sentences imposed on various offenders, some consisting of 45 days' imprisonment. Speaking for the majority, Chief Justice McEachern noted the broad range of available sentences for criminal contempt:

> There is no question that the sentences were lawful. Further, in my judgment, no error in principle has been shown. The question then becomes whether a sentence of imprisonment for 45 days is "fit" having regard to all of the circumstances. In my view, it would be impossible to say that even longer sentences of from three to six months would be unfit, even for first offenders who participated in blockades with an expectation of being arrested and who, with full knowledge of the consequences, and after being warned and asked to desist, chose deliberately to break the law by refusing to obey a court order. [At para. 53.]

As well, counsel referred to *R. v. Dhillon* 2015 BCSC 1298, where the contemnor had published defamatory statements about various legal and accounting professionals in connection with a bankruptcy matter. Madam Justice Holmes, as she then was, sentenced him to 30 days' imprisonment, which was upheld on appeal: see 2021 BCCA 271. This court emphasized that a long period of time had passed between the sentencing and the appeal hearing, leaving little time to serve, and that the offender had no criminal record. (See para. 49.)

[40] Crown counsel also drew the sentencing judge's attention to *Lemay v. The Board of the College of Midwives* 2002 BCCA 467. Ms. Lemay had been sentenced to five months' incarceration and one year of probation and was before a judge in chambers to seek release pending her appeal. Mr. Justice K. Smith dismissed the application and in the course of his reasons said this about sentencing for criminal contempt:

> ... This Court has established, in cases over the past ten years or so, that the appropriate range of sentence for first offenders on criminal contempt charges is somewhere between three and six months. This is not a first

> offender. Although she purged her contempt in 1995, the appellant was nevertheless found guilty of that contempt. That was in the case of the coroner's inquest. Five months is within the range for first offenders, and given that she is a second offender, I see no chance that the appellant could persuade a panel of this Court that Mr. Justice Blair imposed a sentence that was demonstrably unfit or clearly unreasonable in all of the circumstances. I dismiss the application for release pending appeal from sentence on the ground that the appeal is frivolous with s. 679(3)(a). [At para. 12; emphasis added.]

[41] Finally, Crown counsel referred to *Interfor v. Paine and Krawczyk* 2001 BCCA 48, which again involved Ms. Krawczyk. On this occasion, she had been sentenced to one year in prison for activities protesting a logging operation in the Elaho Valley of British Columbia. Mr. Justice Donald for the majority found that the one-year sentence was excessive and unfit and indeed, the only one-year sentence imposed in similar circumstances was a 1968 labour case. Ms. Krawczyk was released, having served four months. (I note that in the same year, 2001, this court set aside a one-year sentence imposed on a 'ringleader' of protestors at the Elaho Valley protest, and substituted a sentence of six months: see *International Forest Products Ltd. v. Kern* 2001 BCCA 174.)

[42] Returning to the case at bar, the transcript discloses that after the lunch break on April 13, Mr. Linde stood up to inform the Court about "the change in circumstances that I received from my client over the lunch break. Number 1, he is *withdrawing his application to obtain from you, sir, a conditional discharge*. And, number 2, we are not going to be showing any videos. I've told my friend that and Madam Clerk." (My emphasis.)

[43] Mr. Pruim for the Crown told the Court that he was seeking 45 days' incarceration, which he described as being at "the low end of the range applicable to C.D. given the aggravated nature of his breaches and the ongoing harm from some of the breaches." Mr. Pruim emphasized that C.D. had no criminal record. He suggested C.D. should be given credit at 1.5 days for every day he had already served, which would result in credit of 42 days, plus the day of the hearing itself, for 43 days. The Crown was amenable to his immediate release.

[44] The judge inquired whether the Crown had considered requesting that a fine be imposed in light of the fact that C.D. had been "permitted to raise funds on GoGetFunding" despite his "flagrantly breaching the anonymity or publication bans in place". Counsel suggested that the Court could impose a fine since the *Criminal*

Code did not apply to criminal contempt; or that the Court could "require a donation" of funds that C.D. had raised.

[45] Mr. Linde then began his submissions, which continued for the balance of the day and into the following day. At p. 648 of the transcript he reached the case of *R. v. Anthony-Cook* 2016 SCC 43, which of course deals with plea agreements, or joint submissions, between Crown and defendants in sentencing. Mr. Linde stated:

> You're aware of that. Okay. It basically says that it takes …serious circumstances for a court to vary from a plea agreement.
>
> Now, we say we did not have a 100 percent plea agreement coming into the trial, not the trial hearing, and yesterday I announced that we were moving to one by abandoning the argument that there should be a discharge. I would urge the court to not, therefore, separate those two as sort of one. So we're here now. And the -- so that's one point. I would say that we have an agreement, and I don't think there's any extraordinary circumstances from what I read in the head note of that case that would warrant this. [Emphasis added.]

[46] Mr. Linde suggested that a reasonable sentence would be "time served" plus 18 months of probation. In answer to the Court's question about C.D.'s being permitted to "keep his ill-gotten gains", Mr. Linde suggested that "the entire sum [should] go to his first lawyer whose fee is substantially outstanding, higher than that … He's done an awful lot of hard work and hasn't been paid. That would be my suggestion." The sentencing judge then asked for Mr. Linde's response to the notion of a "mandated charitable donation" and at one point that Mr. Linde asked his client if "Ronald McDonald House" was "okay". C.D. responded that that he "like[d] McDonalds" and was familiar with the charity.

[47] The sentencing judge informed counsel that he did not perceive that what he had heard was a joint submission. Thus he did not consider what was said in *Anthony-Cook* to be binding in this instance, subject to what counsel might say later in the day. He warned that:

> If that is now an issue, I would invite the parties to think about it over lunch. But I'll tell you that I am very much thinking of imposing a further term of imprisonment beyond time served which was the position the Crown took before me yesterday.
>
> My view and it has not thus far changed very much during these proceedings is that the totality of the conduct at issue here, a sentence of 45 days is woefully inadequate and would tend to be administration of justice into disrepute. So I'll leave the parties to think about that, and we'll return at 2:00. [Emphasis added.]

[48] When the hearing resumed, the judge permitted Jenn Smith to help explain "what was happening" when C.D. had committed his acts of criminal contempt. After hearing Jenn Smith, the sentencing judge told Mr. Linde that as among Mr. Linde, C.D. and Jenn Smith, the only one who appeared to understand "the gravamen of the conduct here" was Jenn Smith. The judge stated that C.D. was being sentenced not because he felt "aggrieved because his rights as a parent have been violated", but because he had disagreed with the publication bans and had simply decided to "feel free" to violate them.

[49] In response to the judge's question as to why C.D. had thought it necessary to "breach the publication ban … in respect to A.B.'s identity in order to get his message out there," Mr. Linde launched into a long and unresponsive speech. At the end of it he suggested that if the Court were to sentence C.D. to any further time in jail, the Court might be making a martyr of him. He concluded by suggesting that the donation to Ronald McDonald House might be better spent "on a Canadian-wide expert polling … survey asking this question: Whose acts, those of C.D. or of this sentencing court, might bring the reputation of justice into greater disrepute? I have nothing further to say."

[50] When court resumed the following day, April 14, Crown counsel made his reply with respect to authorities Mr. Linde had cited earlier concerning contempt of court. Mr. Pruim submitted that "civil disobedience" is not a defence in criminal law, contrary to what Mr. Linde had suggested. In closing, he again emphasized that "*This is not a joint submission*" and that the Crown's position had not changed when Mr. Linde abandoned the idea of a conditional discharge. In counsel's words:

> But within the meaning of a joint submission within *Anthony-Cook* and how a court should deal with that, this cannot be considered a joint submission.
>
> C.D. approached the Crown and asked if the Crown would accept a guilty plea. The Crown indicated yes. He indicated he would be asking for a discharge. The Crown told him its position. [Emphasis added.]

[51] Mr. Linde in a "sur-reply submission" told the Court that it had never been his position that civil disobedience was a defence. He asked if it was appropriate for his client to "summarize". The judge asked C.D. if there was anything he wished to say before the Court determined the appropriate sentence. The only portion of his comments that is relevant to this appeal is the following:

> I have a few things I want to say. I'm going to try to get it out as best I can.

> I mean, the obvious is I did plead guilty to the charges. I had agreed with Crown when I found out a week ago yesterday that a deal had been reached. I had accepted that deal. I didn't realize that we were going to be challenging it. In fact, I've been a bit surprised the last couple days. In fact, I figured it would be something that would be done by 10:00 yesterday. So obviously there was some miscommunication, and I'm not clear on how these things obviously work.
>
> But having said that, I -- I have to take full responsibility one way or the other. I have pled guilty. That is not in dispute. [Emphasis added.]

[52] The judge gave oral reasons for sentence, as noted earlier, on April 16, 2021, imposing a six-month term of imprisonment plus 18 months' probation and the mandatory "donation" of $30,000 to a children's charity.

Ineffective Assistance of Counsel

[53] I return to C.D.'s first ground of appeal, which I consider to be his primary ground. He asserts that Mr. Linde provided ineffective assistance by failing to advise him properly regarding the Crown's offer to make a joint submission for a sentence of 45 days, if C.D. were to plead guilty. He also submits that Mr. Linde failed to provide accurate advice to C.D. regarding the fact that he would not have a "criminal record" for criminal contempt; failed to cite any authorities concerning the appropriate sentence; failed to properly prepare C.D. for testifying at the sentencing proceeding; failed to properly advocate for C.D. by "focusing significant portions of his submissions on transgender issues"; made "incendiary and inappropriate submissions" to the Court; and failed to provide "adequate submissions" on C.D.'s ability to pay a fine — the subject of the second ground of appeal. In these circumstances, C.D. submits through his new counsel that a miscarriage of justice occurred and resulted in substantial prejudice to him. Specifically, he did not obtain the benefit of a joint submission on sentence that could have "restrained" the judge; evidence that would not otherwise have been before the Court was presented "through the appellant's testimony"; Mr. Linde did not present any case law to the Court concerning an appropriate sentence; and C.D. was ordered to pay a fine that he could not afford.

[54] The fact that C.D. has framed his submissions on the basis of a miscarriage of justice is consistent with the approach adopted by the Supreme Court of Canada in *R. v. G.D.B.* There the Court confirmed that for an appellant to succeed on the basis of ineffective assistance of counsel, the appellant must establish first, that

counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted. (At para. 26.) Major J. for the Court continued:

> Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.
>
> Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised. [At paras. 27–8.]

The Court directed that in cases where it appears that no prejudice has occurred, it is usually "undesirable for appellate courts to consider the performance component of the analysis", since the purpose of an ineffectiveness claim is not to "grade counsel's performance or professional conduct." (At para. 29.)

[55] The Court in *G.D.B.* also dealt with an application to admit fresh evidence. Major J. noted that the four "*Palmer*" criteria (see *Palmer v. The Queen* [1980] 1 S.C.R. 759) had recently been confirmed in *R. v. Warsing* [1998] 3 S.C.R. 579. At para. 50 of *Warsing*, the criteria were summarized as follows:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[56] Although appellate courts had varied as to whether *Palmer* should be applied at all in cases where ineffective assistance of counsel is alleged, the Supreme Court clearly proceeded in *G.D.B.* on the assumption that *Palmer* remains good law, although it acknowledged that the criterion of due diligence "must yield in circumstances where its rigid application would result in a miscarriage of justice." (At para. 37.) That factor would not seem to be applicable in the unusual facts of this case. Here, it is the fourth criterion — that the evidence must be such that if

believed, it could reasonably be expected to have affected the result — that must be applied with particular care.

[57] In *R. v. Aulakh* 2012 BCCA 340, this court confirmed that the right to a fair trial, guaranteed by s. 650(3) of the *Code* and ss. 7 and 11(d) of the *Charter*, includes the right to the effective assistance of counsel. Madam Justice D. Smith noted that courts have adopted a cautious approach to assessing allegations of professional incompetence because of the deference normally owed to strategic and tactical decisions made by trial counsel. This point had been emphasized in *Joanisse* and by this court in *R. v. Jim* 2003 BCCA 411.

[58] The Court in *Aulakh* also gave guidance concerning how fresh evidence applications should be approached in this type of case. In the words of Smith J.A.:

> The Court [in *G.D.B.*] concluded that "defence counsel had implied authority to decide not to use the tape" and as such "the appellant has failed to satisfy the due diligence requirement of the *Palmer* analysis": para. 36. In arriving at this conclusion, the Court emphasised that appellate courts should not look behind the decisions of counsel made in good faith during the course of a trial unless it is necessary to prevent a miscarriage of justice. However, where the reliability of the trial result has been compromised, the evidence may be admitted notwithstanding the failure to satisfy the due diligence criteria, if it is necessary to prevent a miscarriage of justice.
>
> In summary, I would propose to consider the appellant's application to adduce fresh evidence in the following manner:
>
> 1. Determine if the fresh evidence is admissible under the rules of evidence (e.g., no hearsay, speculation, opinion or mere argument).
> 2. If the fresh evidence complies with the rules of evidence and if it is apparent from the trial record that the fresh evidence could not reasonably have affected the result (assuming the allegations of ineffective representation could be established) there is no miscarriage of justice and the application to adduce fresh evidence and the appeal should be dismissed.
> 3. If that determination is not apparent and the fresh evidence in support of the allegation of ineffective representation is relevant to that issue and credible, admit the fresh evidence for the limited purpose of determining the allegation of ineffective representation, an issue that was not adjudicated at trial. At this stage the fresh evidence will not be admissible to determine the substantive issue of whether a miscarriage of justice has occurred.
> 4. In considering whether the performance component of the test for ineffective representation has been established, apply the standard of "reasonable professional judgment", remembering that the appellant must establish the facts underlying the claim of ineffective assistance on a balance of probabilities.
> 5. If the performance component of the ineffective assistance of counsel claim is established, consider whether the appellant has established the prejudice component of the test, namely a "reasonable probability" that the outcome of the trial would have been different if the appellant had received the effective

> assistance of counsel (i.e., if there has ... been a miscarriage of justice). If the answer is yes, the fresh evidence application should be granted, the appeal allowed, and a new trial ordered. If the answer is no, the fresh evidence and the appeal should both be dismissed. [At paras. 67–8; emphasis added.]

The Fresh Evidence

[59] With this guidance in mind, I turn first to C.D.'s own fresh evidence. He deposes that he was represented by Mr. Linde at the sentencing hearing, describing him as a "lawyer specializing in family law and transgender issues." C.D. continues:

> … Once I was charged with criminal contempt, Mr. Linde advised me that he was also knowledgeable in criminal law, so I retained him to represent me.
>
> …
>
> March 19, 2021, I was detained on this matter.
>
> While in custody, I told Mr. Linde that I no longer wished to have a trial and instead wanted to plead guilty. At the time, I was concerned about the impact a criminal record would have on me because I regularly travel to the United States. As a result, I instructed Mr. Linde to try to reach a plea deal with the Crown that would not leave me with a criminal record so that it would not impact my travel.
>
> Mr. Linde told me he asked the Crown to consider a conditional discharge, but the Crown would not agree. Instead, the Crown offered a plea deal of 45 days jail plus 18 months' probation (the "Deal"). I instructed Mr. Linde to take the Deal.
>
> Mr. Linde told me that I would be sentenced in person in Vancouver on April 13, 2021, and that I would be released that same day. Operating on that belief, I asked Mr. Linde to inquire about how I would collect my things from NFPT since I was going to be released in Vancouver.
>
> On April 13, 2021, after I entered a guilty plea, Mr. Linde told the court that he was seeking a conditional discharge. This was very surprising to me. I did not know Mr. Linde was not following the Deal, nor did I give him a change in instructions to do so.
>
> During the lunch break, I asked Mr. Linde why he was asking for a conditional discharge when my instructions were to take the Deal. He did not give me a straight answer but subsequently advised the court that he was no longer seeking a conditional discharge.
>
> When Mr. Linde began his submissions, he told the court that I would take the stand and be subject to cross-examination. We had not previously discussed this, there was no preparation done, and I was given no legal advice about testifying.
>
> As the proceedings progressed, I believed Mr. Linde was not properly advocating for me. Because of this, I asked Mr. Linde to call Jenn Smith as a witness. I felt she could do a better job advocating for me and explaining the steps we took to remove content from the internet that were the subject matter of this charge.

> During my final address to the court, I told the court that I had accepted the Deal and did not realize Mr. Linde was challenging it.
>
> At no point before, during, or since these proceedings did Mr. Linde give me legal advice about what a joint submission is.
>
> Now that I have been advised about the benefits of, and legal requirements for, a joint submission, I understand that by Mr. Linde asking for a conditional discharge eliminated the benefit a joint submission could have afforded me. [Emphasis added.]

C.D. ends by stating that had his instructions to accept "the Deal" been followed, he "could have been afforded the benefits of a joint submission."

[60] Mr. Linde's affidavit evidence contradicts or at least casts doubt on several aspects of his then-client's evidence. In his first affidavit, the lawyer deposes:

> I did have a discussion with C.D. about the consequences of having a criminal record from a finding of criminal contempt, whether as a result of a guilty plea or conviction after trial. My initial belief, and my advice to C.D., was that a criminal conviction for contempt of court might be treated like any other criminal conviction, and would leave the offender with a criminal record as in any other conviction. I was aware that this was of concern to C.D., and was a reason why he was hesitant about pleading guilty. However, in correspondence with the Crown I was advised that a court record would be maintained of the fact of conviction (whether by plea or finding after trial), this would not be a "criminal record" as that term is commonly understood. Attached as Exhibit "A" to this affidavit is a true copy of a letter I received from Crown counsel Daniel Pruim dated 6 April 2021. I conveyed this information to C.D.
>
> I also discussed with C.D. the possibility that we might be able to persuade the Court to order a conditional or absolute discharge. I advised him if the court imposed a discharge there would be no criminal record in the ordinary sense. However, I also made it clear from the outset that I could not guarantee that the Crown or the court would agree to a discharge. As it turned out, as soon as I raised the possibility of a discharge with Mr. Pruim, he made it clear that the Crown would not support a discharge. [Emphasis added.]

Mr. Linde does not deal directly with the Crown's offer or even say whether he told C.D. about it. Nor does he explain why, if he knew C.D.'s conviction would not result in a criminal record, he did not consider accepting the offer of the joint submission in favor of 45 days' imprisonment. If he was uncertain, it was a matter that could be easily researched. In the absence of a reason, I am inclined to infer that he continued to hope the judge would be willing to grant a discharge — an extremely unlikely prospect given the Court's warnings.

[61] Mr. Linde exhibited a copy of a letter from Mr. Pruim to Mr. Linde dated April 6, 2021, in which the Crown declined to agree that a conditional discharge would be an appropriate sentence. Mr. Pruim wrote that if C.D. chose to enter a guilty plea, the Crown would be seeking a sentence of 45 days' imprisonment plus 18 months' probation. The 45 days' imprisonment would be effectively taken up by time served, so that C.D. would likely be released from custody on the date of the plea. If on the other hand, C.D. proceeded to trial, Mr. Pruim said he would *not* take the same position regarding the appropriate sentence. Of course, he did not in the event change his position from 45 days. That does not signify, however, that the sentencing judge should have proceeded as if a joint submission had been made: the Supreme Court recently made it clear in *R. v. Nahanee* 2022 SCC 37 that something "close" to a joint submission does not qualify: see para. 27.

[62] On the question of criminal record, Mr. Pruim in his letter cited a passage from *MacMillan Bloedel v. Brown*, where the majority stated that a person convicted of criminal contempt does not for that reason have a "conventional criminal record". At the same time, the Court had said, "it cannot be doubted that a record may be kept of the fact of such conviction, and a prosecutor would be entitled to prove that previous conviction in appropriate subsequent proceedings." (At para. 81.) As well, Mr. Pruim told Mr. Linde that the *Identification of Criminals Act*, R.S.C. 1985, c. I-1, does not apply to a common law offence, again confirming that C.D. would not have a "criminal record". At the end of the letter, counsel had added:

> I do not require the sentencing to be a joint submission, meaning you could seek a Conditional Discharge on behalf of your client. However, I refer you to *R. v. Anthony-Cook* … regarding the benefits of a joint submission. Should your client request a joint submission on the above proposed terms, I am agreeable to that as well. [Emphasis added.]

[63] In his second affidavit, Mr. Linde deposes that his practice was a family law practice and that he had not "specialized in transgender issues, nor … claimed to". He says he told C.D. he had a general understanding of criminal law but had not practised it for several decades. (As mentioned earlier, he told the sentencing judge that he was a "neophyte" in criminal law and on another occasion that his knowledge of the subject was "zero.") He states that when the original family file was transferred to the criminal registry, he continued acting for C.D. because he,

> was no longer seeking a conditional discharge was because, with the submissions of Crown counsel in open court, C.D. was then satisfied that he had no risk of a conventional criminal record, so that aspect of a conditional discharge was no longer relevant.
>
> I strongly disagree with para. 12 of the Affidavit of C.D. No. 7. It was crystal clear in all my discussions with C.D. that he would take the witness stand. He wanted to take the stand to explain his position. I had many, many telephone and in-person conversations with C.D. to assist him to explain to the court who he was as a father, why he felt he had a duty as a father to act as he had, and his perspective generally on the issues that arose in family court. The sessions in which we discussed in detail how he should express himself are seared in my memory. This was one of the greatest challenges in my career.
>
> ...
>
> In response to paras. 15-17 of the Affidavit of C.D. No. 7, for the reasons set out above, there was no agreement on a joint position because I could not give C.D. the assurances about the possibility of a criminal record that he required, with the certainty the required, until Crown counsel made the statements in court referred to in paragraph 4(a), above. [Emphasis added.]

[64] Again, this affidavit leaves many questions unanswered: most importantly, did Mr. Linde ever bring up the subject of the "Deal" offered by the Crown with his client the week before? If so, what instruction did he receive? The affidavit does not even say that he told C.D. about it before the guilty plea was entered.

The Aulakh Analysis

[65] With respect to the first step outlined at para. 68 of *Aulakh*, I am satisfied that the fresh evidence is of the type that would be admissible under the rules of evidence — i.e., it is not hearsay or otherwise inadmissible. The second stage of the analysis —whether the fresh evidence could or could not reasonably have affected the result in this case — is more difficult, but on the whole, I do not find that it is apparent the fresh evidence *could not* have reasonably affected the result.

[66] With respect to the third stage formulated in *Aulakh*, I note again the Supreme Court's comment in *G.D.B.* that if it is "apparent that no prejudice has occurred", a court should not consider the "performance component" of the analysis, but move directly to the question of prejudice. (At para. 29.) I am not satisfied at this stage that no prejudice occurred, and I therefore move to the third question, namely:

> If that determination is not apparent and the fresh evidence in support of the allegation of ineffective representation is relevant to that issue and credible, admit the fresh evidence for the limited purpose of determining the allegation of ineffective representation, an issue that was not adjudicated at

> trial. At this stage the fresh evidence will not be admissible to determine the substantive issue of whether a miscarriage of justice has occurred. [At para. 68; emphasis added.]

[67] This step is predicated, obviously, on our being satisfied that the proferred fresh evidence is "credible". Given that neither Mr. Linde nor C.D. was cross-examined on the affidavits, I am reluctant even to attempt to decide on many of the conflicts or "gaps" between their affidavits. However, I do infer from all the evidence, including Mr. Linde's affidavits, that he did not appreciate either the requirements or the benefits of a joint submission. A reasonably competent lawyer in Mr. Linde's position would have known (or discovered by due diligence) that a conviction for criminal contempt would not result in a criminal record, and that a joint submission would make it *very* difficult for the sentencing judge to depart from a "deal". In *Anthony-Cook*, Mr. Justice Moldaver for the Court explained the high threshold that must be met before a court should consider departing from a joint submission: see paras. 32–4 quoted below.

[68] A reasonably competent lawyer in the case at bar could be expected to be aware of the advantage of certainty implicit in a joint submission, which advantage was in this instance greater than usual, given Tammen J.'s clear warnings to counsel. Mr. Linde has not given any credible reason why he did not accept the Crown's offer, at the latest before court resumed on April 12; nor why, after he was satisfied about the criminal record issue, he did not approach the Crown to see if the idea of a joint submission could be salvaged.

[69] Accordingly, I would admit the fresh evidence for the limited purpose, at this point, of determining whether the allegation of ineffective assistance is proven. (*Aulakh* at para. 68, point 3.) I am satisfied that it is proven.

[70] The question, then, is whether there is a *"reasonable probability"* that the outcome of the sentencing hearing would have been different if C.D. had received the effective assistance of counsel and a joint submission had been made to the sentencing judge. This question involves two potential issues — whether on a consideration of the "stringent test" for departing from a joint submission outlined in *Anthony-Cook*, it would have been open to the sentencing judge to depart from the hypothetical joint submission in favour of 45 days' imprisonment; and, if that course had been open to him, whether the sentencing judge would have departed from the joint submission in the circumstances of this case. In my respectful view, the facts

of this case were *not* such as to permit the sentencing judge to depart from a joint submission in favour of 45 days' imprisonment had that submission been made to the Court.

[71] With respect to the "public interest" test that would have been applicable to a hypothetical joint submission, I note again the very high standard described in *Anthony-Cook*, where Moldaver J. for the Court reasoned:

> Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.
>
> In *Druken*, at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the criminal justice system". And, as stated by the same court in *R. v. B.O.2*, 2010 NLCA 19, at para. 56, when assessing a joint submission, trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts".
>
> In my view, these powerful statements capture the essence of the public interest test developed by the Martin Committee. They emphasize that a joint submission should not be rejected lightly, a conclusion with which I agree. Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold — and for good reason, as I shall explain. [At paras. 32–4; emphasis added.]

[72] I acknowledge that I share much of the sentencing judge's frustration at C.D.'s constant breaching of court orders, and the judge's sense of amazement that C.D. made repeated choices to publicize A.B.'s name, in the full knowledge that it would hurt A.B., perhaps permanently. I believe most judges would pronounce a sentence of imprisonment of more than 45 days. But can it be said that 45 days would be regarded by reasonable persons as signalling that the *proper functioning of the justice system had broken down*? In my view, it cannot. While a sentence of up to six months would in my opinion have been fully defensible in the absence of a joint submission, I cannot say a sentence of 45 days would have been "so unhinged from the circumstances of the offence and the offender" that it would lead reasonable and informed people to believe the justice system has "broken down".

[73] I therefore conclude that if the joint submission had been made to him, the sentencing judge would have been bound to accept it on the authority of *Anthony-Cook*. It is therefore not necessary to consider what sentence the judge would have imposed in the face of a joint submission.

[74] In the result, I am persuaded that C.D. suffered substantial prejudice as a result of Mr. Linde's failure to realize that the Crown's offer was an extremely good one and indeed such as to ensure that on pleading guilty, C.D. would be immediately released, without a criminal record. Although most of the fresh evidence was of very little assistance, Mr. Pruim's letter to Mr. Linde offering a joint submission meets the *Palmer* criteria and is admissible for the purpose of determining that the outcome of the trial would likely have been different if C.D. had received the effective assistance of his lawyer in connection with the sentencing.

Fitness of Sentence

[75] Given the foregoing, it is unnecessary to consider the second ground of appeal, namely whether the sentence pronounced by the court below was a fit one.

$30,000 Donation

[76] The third ground of appeal relates to the order that in lieu of paying a fine, C.D. was to pay $30,000 to the Ronald McDonald House Charities. This is a substantial amount and I infer that it was ordered because of the evidence that C.D. had collected crowdfunding of over $30,000 (and perhaps as much as $52,000), which the Court was told had been intended to enable him to pay legal fees. C.D. had already incurred legal fees to his previous lawyer and Mr. Linde told the Court that he, Mr. Linde, was acting *pro bono*.

[77] In *MacMillan Bloedel v. Brown*, a majority of the Court set aside fines that had been imposed on the appellants on the basis that it was "inappropriate … to impose substantial or any fines without first conducting an inquiry into the ability of the appellants to pay. There were no such inquiries in these cases." (At para. 71.) Similar reasoning applies here, in my view. What little evidence there was concerning funds available to C.D. was vague and there was no indication of the terms on which the crowdfunding donations were made — were they subject to some trust, for example? — or whether the funds were in fact in C.D.'s possession. Since no party requested that an accounting be carried out, and the time and

expense of an accounting would be difficult to justify at this late date, I would delete the mandatory donation ordered by the sentencing judge.

Disposition

[78] I would allow the appeal, set aside the sentence pronounced by the sentencing judge and substitute therefor a sentence of time served — i.e., effectively 45 days. Allowing credit at the ratio of 1:1.5, C.D. would have been entitled to be released immediately, as the Crown had agreed. I would also set aside the mandatory donation. This leaves the probation order of 18 months, which I would affirm.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Abrioux"

I agree:

"The Honourable Mr. Justice Voith"

Schedule A

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY
FEB 13 2020
ENTERED

No. E-190334
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

A.B.

Claimant

And

C.D. and E.F.

Respondents

ORDER MADE AFTER APPLICATION

BEFORE) Mr. Justice Tammen) TUESDAY, THE 12th DAY OF FEBRUARY, 2020

ON THE APPLICATION of the Claimant A.B., filed February 10, 2020, coming on for hearing at 800 Smithe Street, Vancouver, BC on February 12, 2020 and on hearing: Sarah Chaster and Kay Scorer, counsel for the Claimant, A.B.; Dionne Liu, counsel for G.H., Stephanie Hamilton, counsel for I.J. and PHSA, Jessica Lithwick counsel for E.F., Laura Lynn Tyler Thompson, Respondent, C.D., Respondent, and Jenn Smith, Respondent.

THIS COURT ORDERS AND DECLARES that:

1. Laura Lynn Tyler Thompson must remove forthwith the February 9, 2020 video interview of C.D. and reference to the names of the parties to this proceeding, and the medical professionals in A.B.'s care, from any platform where she has posted the video, including but not limited to Facebook, Twitter, BitChute, YouTube;

2. The publication of the February 9th, 2020 interview of C.D. by Laura Lynn Tyler Thompson is in breach of court orders, including publication bans in this matter.

3. Jenn Smith must remove the Facebook Posts on Jenn Smith's Facebook page from February 7, 2020 to date in which C.D. is personally named and which link to or describe previous publications which use non-anonymized names of the Health Care Providers as defined in the entered order of Madam Justice Marzari made April 15, 2019;

4. C.D. and Jenn Smith are prohibited from publishing information relating to A.B.'s gender identity, physical and mental health, medical status or treatments and information that could identify the names of the parties referred to in this proceedings as A.B., C.D., E.F., G.H., I.J., K.L., M.N., O.P., Q.R., S.T., U.V., and W.X.

5. C.D. and Jenn Smith are restrained from carrying out an interview about A.B.'s gender identity, physical and mental health, medical status or treatments, which Jenn Smith has publicized through Facebook as being scheduled to occur with C.D. on February 12, 2020 and scheduled to be shared live on Facebook Live and YouTube, and are restrained from publishing, disseminating or transmitting copies, hyperlinks or descriptions of previous publications containing non-anonymized names of the Health Care Providers as defined in the entered order of Madam Justice Marzari made April 15, 2019.

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6. C.D. is restrained from providing further interviews in breach of the conduct order and publication ban.

7. C.D. has breached the conduct orders pronounced by the British Columbia Court of Appeal on January 10, 2020 by providing interviews about A.B.'s gender identity, physical and mental health, medical status or treatments, including by providing the February 9, 2020 interview to Laura Lynn Tyler Thompson.

8. Costs are payable to A.B. at a lump sum of ~~$500~~ payable by each ~~Defendant~~ Respondent forthwith.

~~I.J. and PHSA~~

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Sarah Chaster
Counsel for the claimant, A.B.

Dionne Liu
Counsel for G.H.

Stephanie Hamilton
counsel for I.J. and PHSA

Jessica Lithwick
Counsel for E.F.

Laura Lynn Tyler Thompson

Jenn Smith

C.D.

By the Court.

Registrar

CHECKED SC

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