

Citation: ☀ R. v. Bethune and Secreve  
2022 BCPC 0243

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File No: 65754-1  
Registry: Richmond

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA**

**REX**

v.

**MICHEL JEAN-JACQUE BERTHIAUME also known as ERIC BETHUNE  
and ASTRID MARIA SECREVE**

**REASONS FOR SENTENCE  
OF THE  
HONOURABLE JUDGE D. VANDOR**

Counsel for the Crown:	D. Tam
Appearing on their own behalf:	E. Bethune and A. Secreve
Place of Hearing:	Richmond, B.C.
Dates of Hearing:	September 15, 16 & October 11, 12, 2022
Date of Judgment:	November 3, 2022

## Overview

[1] Mr. Eric Bethune and Ms. Astrid Maria Secreve are before the Court for sentencing after pleading guilty to committing mischief by wilfully obstructing, interrupting, or interfering with the lawful use, enjoyment, or operation of the property of a small café in Richmond, British Columbia contrary to s. 430(4) of the *Criminal Code*. They committed this mischief by pouring coffee on the floor of the café. The offence date is March 29, 2021. They pled guilty on the third day of trial.

[2] This offence occurred during the COVID pandemic in British Columbia. Mr. Bethune and Ms. Secreve were patrons of the café and ordered coffee and a pastry. Although they were wearing masks, they did not abide by the COVID-seating restrictions. Café employees asked them to sit elsewhere, and they refused. After repeated requests to move, they stood up from the table and poured their coffee on the ground.

[3] There are aggravating features to this mischief. Mr. Bethune and Ms. Secreve perceived both café employees to be of Chinese race or ethnic origin. Before leaving the café, Ms. Secreve said to the café manager, “Fuck you Chinese”. A tussle ensued between them. The café manager followed the couple to their car and video recorded them. Before driving away, Mr. Bethune said to the café manager, “Fucking Chinese” and “the Coronavirus is you”.

[4] My task is to sentence Mr. Bethune and Ms. Secreve for this offence. The Crown is seeking a suspended sentence with a term of probation for 18 months. Mr. Bethune and Ms. Secreve are asking for an absolute discharge. Since the Crown proceeded summarily, these positions are within the sentencing range for this mischief.

[5] To determine an appropriate sentence for each offender, I will first outline the findings of fact in relation to the circumstances of each offence, and the personal circumstances of each offender. I will then address the relevant principles of sentencing, as well as the aggravating and mitigating factors. Finally, I will set out my analysis for a

just and fit sentence for the mischief committed by Mr. Bethune and for the mischief committed by Ms. Secreve.

## **Procedural Fairness**

[6] Mr. Bethune and Ms. Secreve were self-represented during the trial and sentencing of this matter. As demonstrated in the court record of these proceedings, I have applied the principles endorsed by the Supreme Court of Canada as they relate to the self-represented in criminal proceedings: *Pintea v. Johns*, [2017] 1 SCR 470 at para. 4. I am satisfied that both Mr. Bethune and Ms. Secreve had a full and fair opportunity to be heard on the issues that I need to decide in sentencing.

## **Circumstances of each Offence and Findings of Fact**

[7] I will next set out the circumstances of each offence and my findings of fact, disputed or not, as they occurred over time. I will incorporate both the evidence at trial and submissions made. The Crown has the burden of proving disputed facts beyond a reasonable doubt.

### ***Findings of Fact – Not Disputed***

[8] On March 29, 2021, Mr. Bethune and Ms. Secreve walked into a small café and ordered two extra hot mochas and one lemon square. The interactions inside the café are on surveillance video. Mr. Bethune says “the video speaks for itself”.

[9] The store manager, Ms. Tan, and the barista, Mr. Chan, were serving customers on that day. Mr. Chan took their order and Ms. Tan made their drinks. Mr. Bethune and Ms. Secreve perceived both café employees to be of Chinese race or ethnic origin.

[10] Although Mr. Bethune and Ms. Secreve wanted to enjoy their coffee and pastry indoors, there was no indoor seating available at the time of their order because the café was operating under provincial health directives during the pandemic.

[11] The café was serving customers at reduced capacity, through social distancing, and following sanitization protocols. Mr. Bethune and Ms. Secreve were offered a seat outside on the patio. Rather than wait for an indoor table to become available, or sit outside on the patio, Mr. Bethune picked up a table from the patio and brought it inside the café. He unstacked two chairs from the back of the café. Mr. Bethune and Ms. Secreve sat down at that table, took off their masks, and began consuming their beverage and food.

[12] After they sat down at that table, café employees began approaching them. Mr. Chan came first. Mr. Chan told the couple that they could not sit there. They ignored him, remained seated, and asked him to leave. He went to his manager, Ms. Tan, who spoke to them. She told them that they are not allowed to sit beside the washroom. She invited them to move outside on the patio. They ignored her. A short time later, Ms. Tan approached them again after another indoor table became available and had been sanitized. She invited them to move to that indoor table. She remembers them saying words to the effect, “we already sat down and don’t want to move”.

### ***Findings of Fact – Disputed***

*Did Mr. Bethune and Ms. Secreve violate the COVID-seating restrictions?*

[13] I find that Mr. Bethune and Ms. Secreve violated the COVID-seating restrictions of the café. The act of setting up another table inside the café was a problem for the store manager, because she believed that the table was blocking the entrance to the public washroom and there were now more tables than what the café allowed. From her perspective, the café now exceeded maximum seating capacity and the placement of this table violated social distancing protocols.

[14] Mr. Bethune disputes that the table blocked access to the public washroom, and that the café exceeded maximum seating capacity. He believes he did nothing wrong when he set up another indoor table. Mr. Bethune’s explanation for setting up another indoor table does not detract from my finding that he was not supposed to do it in the first place. The café is a private business that was operating under provincial health

directives during the pandemic. It was the responsibility of café employees, not café patrons, to place tables to ensure social distancing and restrict the number of customers inside the café to ensure compliance with COVID safety regulations.

[15] While Mr. Bethune may question the wisdom of those seating arrangements, it was not his decision to make. As a patron, he was not accountable for breaches of the public health orders issued by the provincial health officer. The café was. It was the responsibility of this café manager to keep customers safe and comply with the COVID safety regulations. While Mr. Bethune may disagree with how Ms. Tan exercised her discretion in enforcing COVID protocols, it was not his discretion to exercise. As a guest of this café, he had no authority over the management of that space.

*How many times did café employees ask these offenders to comply with COVID protocols?*

[16] The video shows that Mr. Bethune and Ms. Secreve were approached three times by café employees to comply with COVID protocols. Notwithstanding his earlier statement that “the video speaks for itself”, Mr. Bethune suggests that there may have been more times. However many times these offenders were asked to comply with COVID protocols is irrelevant to the issues before me in this sentencing.

[17] There is no dispute as to what happened next. Mr. Bethune stood up and poured his coffee on the floor. Ms. Secreve then stood up, poured her coffee on the floor, and said something to Ms. Tan.

*Did Ms. Secreve say “Fuck you Chinese” to Ms. Tan?*

[18] Ms. Secreve denied saying “Fuck you Chinese” during her guilty plea. Therefore, it is necessary for me to make a finding as to whether the evidence at trial establishes proof beyond a reasonable doubt that the comment was made.

[19] I heard from Ms. Tan, and I accept what she said. Ms. Tan testified that Ms. Secreve said “fuck you Chinese” to her after pouring coffee on the café floor.

[20] Ms. Tan's evidence on what she heard Ms. Secreve say is cogent and consistent with her other evidence on when that comment was made. She had a significant reaction. The circumstances of that reaction speak to the fact that something quite upsetting happened. She testified that the comment made her angry. She became very upset. Her reaction was instinctual. She flicked her dish towel.

[21] Ms. Tan originally denied hitting Ms. Secreve with the towel. She does not remember hitting anyone with the towel. After seeing the video, Ms. Tan acknowledges hitting Ms. Secreve with the towel. She explained that she threw the towel because she was angry about what Ms. Secreve said to her. I have attributed that discrepancy to the reliability of her memory rather than to her credibility because Ms. Tan readily acknowledged facts that were detrimental to her interests. In my view, there is nothing with respect to what she said in her evidence, or the manner in which she said it, that raises any reasonable possibility that she was being untruthful.

[22] Ms. Tan's evidence on what she heard Ms. Secreve say is consistent with the timing and circumstances of the surveillance video. The video clearly depicts Ms. Tan flicking a dishtowel at Ms. Secreve two seconds after Ms. Secreve stood up, poured her coffee on the floor, and looked at Ms. Tan as she walked past her towards the exit.

[23] In summary, I found this witness credible and her evidence reliable because of the internal consistency of her account of events, the external consistency of her account with the surveillance video, and the inherent plausibility of her evidence in the context of this interaction: *R. v. E.A.G.*, 2020 BCSC 1691, at para. 194. Based on these considerations, I accept Ms. Tan's evidence that Ms. Secreve said "fuck you Chinese" to her. Her evidence establishes proof beyond a reasonable doubt that the comment was made.

*Did Ms. Secreve intentionally throw a cup at Ms. Tan?*

[24] The video shows Ms. Secreve releasing the cup from her hand into the air one second after Ms. Tan flicked a dish towel at her. The cup landed on Ms. Tan's head. Based on this evidence, I cannot conclude that it was intentional.

[25] Although Mr. Bethune and Ms. Secreve dispute the number of droplets of coffee that made contact with Ms. Tan from the throwing of this cup, there is no dispute that some droplets of coffee landed on her. The photographs in evidence show some coffee drips on Ms. Tan's face.

***Findings of Fact – Not Disputed***

[26] Next Mr. Bethune and Ms. Secreve tried to leave the café. Ms. Tan did not want them to leave the café. She told them not to leave and that she was going to call the police. She then tried to physically restrain them from leaving. Ms. Tan grabbed the back of Ms. Secreve's sweater yanking her backwards. She also grabbed Mr. Bethune's arm. Once Mr. Bethune and Ms. Secreve left, Ms. Tan followed them with a camera.

[27] Ms. Tan followed the couple outside the café and began audio and video recording them on her phone. This recording is in evidence. Mr. Bethune does not dispute the accuracy of this recording. Although there were, at times, overlapping speakers, the essence of the recorded exchange is as follows:

Mr. Bethune says to Ms. Secreve: "get in the car"

Ms. Tan: "What did you say?" "What did you say?" "Huh?"

Mr. Bethune: "I said leave it be." "Let it go."

Ms. Tan: "What did your wife say?"

Mr. Bethune: "Let it go." "She's not well. Let it go."

Ms. Tan: "Huh?"

Mr. Bethune: "Let it go". "Okay?"

Mr. Bethune: "Fucking Chinese."

Ms. Tan: "Okay."

Mr. Bethune: "Fucking Chinese."

Ms. Tan: "You're Fucking Racist."

Mr. Bethune: "The Coronavirus is you."

Ms. Tan: "You're Fucking Racist."

[28] As I understand this recording, the first time Mr. Bethune said "Fucking Chinese" was an answer to Ms. Tan's question, "What did your wife say?" I place no weight on

what Mr. Bethune said that Ms. Secreve had said because that evidence is inadmissible.

[29] I do, however, place weight on the statements that Mr. Bethune made. Mr. Bethune acknowledges making statements in that video. I have placed weight on the second time Mr. Bethune said “Fucking Chinese” and his last statement “The Coronavirus is you”.

[30] Mr. Bethune was upset when Ms. Tan followed and recorded him as he was leaving the café. He considered this a provocation and a violation of his privacy. From his perspective, he was trying to diffuse the situation and leave. Ms. Secreve was so distraught that she left her purse inside the café. They had to return a short time later to retrieve her belongings. In the meantime, Ms. Tan had called the police.

### **Circumstances of each Offender**

[31] Mr. Bethune and Ms. Secreve pled guilty on the third day of trial and before the close of the Crown’s case. Since they did not want to order a pre-sentence report, I rely on their submissions.

[32] Mr. Bethune and Ms. Secreve are seniors. Mr. Bethune is 74 years old. Ms. Secreve is 76 years old. They come before this Court with no criminal record.

[33] They have known each other for over 30 years. They used to be married. Mr. Bethune says that, although they separated, he still loves her and he is very protective of her. They still spend time together. They have described the COVID pandemic as isolating and hard on their health. On the date of this offence, they had met at the café to have a coffee and share a lemon square.

#### ***Mr. Bethune***

[34] Mr. Bethune was crying and visibly shaken up by these criminal proceedings. He has found these court proceedings very stressful, and he wants the proceedings to go away. He describes experiencing depression and sleep problems due to this trial. Mr.

Bethune says that, in his 74 years in this world, he never thought that an incident like this would happen. He blames himself and others for overreacting. He feels victimized. As seniors, he considers them to be the most vulnerable members of society who incurred the most deaths during the COVID pandemic. He did not intend to cause harm. They had an adverse reaction and it was unfortunate. He is very sorry that it happened. He believes that this whole thing has been turned around to make them look bad.

***Ms. Secreve***

[35] Ms. Secreve says that she is not well and that she has health issues. She gets very tired easily and does not go out very much. She contracted COVID, and since then, she describes experiencing brain fog and fatigue. She also describes experiencing depression.

[36] Ms. Secreve appears to have memory problems. For example, she did not remember that she received a conditional discharge over twenty years ago for assaulting a police officer. When confronted with the court record, she denied that fact and considered it “absolute nonsense”. Ms. Secreve acknowledges that she has memory issues. Although Mr. Bethune believes that his ex-wife has dementia, there is no medical evidence to support that conclusion. Ms. Secreve denies that she has dementia. She was offended by her ex-husband’s suggestion. She attributes her memory issues to brain fog after contracting COVID.

[37] Having heard her submissions both at trial and on sentence, and observed her cross-examination, I am satisfied that she has the mental capacity to understand the proceedings and to represent herself appropriately.

## **Purpose and Principles of Sentencing**

[38] The fundamental purpose of sentencing as expressed in section 718 of the *Criminal Code* is to protect society, contribute to respect for the law, and maintain a just, peaceful and safe society by imposing just sanctions that further one or more of these objectives. The sentence must speak to the broader community by denouncing unlawful

conduct and repair the harm done to victims or to the community. The sentence must deter the offender specifically, and other persons generally, from committing similar offences. The sentence must assist, where necessary, in the rehabilitation of offenders. A sentence should strive to promote a sense of responsibility in offenders, and an acknowledgement of harm done to the victims or to the community. Where necessary, a sentence must separate offenders from society.

[39] The relevance and relative importance of each of these objectives will vary according to the circumstances of the offence and offender. Having considered the circumstances of each offence and the circumstances of each offender, I find that the sentencing principles from s. 718 of the *Criminal Code* that apply to Mr. Bethune and Ms. Secreve for their mischief are denunciation, general and specific deterrence, rehabilitation, and promotion of responsibility. Below, I will explain what weight attaches to these sentencing objectives.

[40] A number of principles listed in the *Criminal Code* guide the sentencing judge. The sentences imposed for the mischief offence committed by Mr. Bethune and Ms. Secreve must balance all of these important principles.

[41] Section 718.1 of the *Criminal Code* expresses the overall principle that the sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[42] Section 718.2 of the *Criminal Code* sets out other sentencing principles that complement the proportionality principle and influence its application. These include the principle that a sentence should be increased or reduced to account for relevant aggravating or mitigating circumstances; and the parity principle that a sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances.

[43] A sentence that reflects the gravity of the offence serves the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. A proportionate sentence does not exceed what is appropriate, given the

degree of responsibility of the offender. In this sense, the principle serves a restraining function and ensures justice for the offender. A just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other: *R. v. Campbell*, 2012 BCSC 904, at para. 24.

## **Aggravating Factors**

[44] There are aggravating features to this mischief. I find that the Crown has proven three aggravating factors beyond a reasonable doubt.

### ***COVID Pandemic***

[45] First, on the evidence before me, I am satisfied that the mischief is aggravated by the fact that it occurred during the COVID pandemic. I find that the obstruction, interruption, or interference with the lawful use, enjoyment, or operation of this café is greater because it occurred during a serious phase of the COVID pandemic.

[46] My finding of fact is reasonably inferred from the public health orders issued in British Columbia in March 2021, for which I take judicial notice. The café was operating under an order of the Provincial Health Officer dated March 12, 2021. That order allowed for restricted dine-in service under strict social distancing protocols to account for the increased risk of transmission flowing from the cool weather and people interacting and spending time indoors. Hours after this offence was committed on March 29, 2021, the Provincial Health Officer issued another public health order that became effective midnight on March 30, 2021. That order prohibited dine-in service, except for outdoor patios. The Provincial Health Officer justified these new restrictions because “over the past week, the number of COVID-19 infections has increased significantly raising the risk of exponential growth in cases which would result in increased hospitalization, intensive care admissions and deaths”.

[47] As the café manager, Ms. Tan was just doing her job. She was trying to keep this café open and keep customers safe during a pandemic. When café employees asked

these offenders to comply with health directives during a pandemic, they refused to do so. This was defiant conduct in the face of a pandemic.

[48] This was a brazen and disrespectful mischief, which disrupted a private business on private property. It disturbed the comfort of other customers. The video shows two customers getting up from their tables, gesturing at the spill, including an elderly woman who used a walker. Ms. Tan and Mr. Chan had to clean up the coffee on the ground. Mr. Chan stopped taking orders after the mischief. He observed other customers leave the café after the mischief. The café closed early, before the scheduled closing time of 4 p.m. Mr. Chan did not leave the café until 7 p.m. because he had to talk to the police and provide them with the surveillance video.

[49] Mr. Bethune and Ms. Secreve argue that there was not a big impact on the café because the coffee was poured on a concrete floor and the café was about to close anyways. I reject that argument because it fails to acknowledge the impact of such a mischief in the context of the COVID pandemic.

### ***Impact on Victim***

[50] Second, on the evidence before me, I am satisfied beyond a reasonable doubt that that each mischief is aggravated by the significant impact on the victim, Ms. Tan. I have the benefit of her Victim Impact Statement, and other evidence about her personal circumstances.

[51] A sentence should be increased to account for evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation: s. 718.2(iii.1) of *Criminal Code*.

[52] As the café manager, Ms. Tan was trying to enforce COVID safety protocols. Rather than comply with these safety measures, these patrons, Mr. Bethune and Ms. Secreve, flagrantly ignored the very COVID safety protocols that were designed to keep them safe. After committing a mischief, each of them made anti-Chinese comments to Ms. Tan that adversely impacted her ability to do her job as the manager of this café.

[53] Ms. Tan found their comments shocking and unexpected. She recalls serving this couple at the café a few times before. She remembered Mr. Bethune as a “gentleman” and Ms. Secreve as a “good lady”. She described Ms. Secreve’s comment as “it just happened” and a “very big shock”. Since she came to Canada, no one had ever spoken to her in this way before.

[54] The Crown argues that Ms. Secreve’s mischief is aggravated by her throwing a cup at Ms. Tan. I reject that argument because I cannot conclude that it was intentional. However, I accept that this unintentional action had a significant impact on Ms. Tan. The fact that droplets of coffee from Ms. Secreve’s cup made contact with Ms. Tan is aggravating. This is not because Ms. Secreve threw it intentionally, but because these droplets increased the risk of transmission of the COVID virus to Ms. Tan. That adds to the significant impact on this victim.

[55] After Ms. Secreve and Mr. Bethune left in their car, Ms. Tan testified that she returned to the café and could not hold her emotions. She began crying. She was not able to serve customers. She felt traumatized for a very long time. She felt very insecure and uncomfortable going to work. She wanted to hide and avoid friends and family. She felt fragile. She fears that Mr. Bethune and Ms. Secreve will seek revenge on her because she called the police. She was afraid of walking on the street and making eye contact with people, especially Caucasian people, because she was afraid that they would hurt her too. She has experienced insomnia and nightmares, back pain and frequent headaches. She eventually stopped working at the café three months after the mischief because she was not comfortable working there any longer.

### ***Motivation***

[56] Third, on the evidence before me, I am satisfied beyond a reasonable doubt that that each mischief is aggravated by the comments made by each offender. Ms. Secreve said “Fuck You Chinese” after committing her mischief. Mr. Bethune said “Fucking Chinese” and “the Coronavirus is you” after committing his mischief. Having found that these comments were made, I will explain what they mean and how are they relevant to this sentencing.

[57] The main issue that I need to decide is whether these comments inform a statutory aggravating factor.

[58] The Crown argues that each mischief is motivated by anti-Chinese bias, prejudice, or hate. Section 718.2(a)(i) of the *Criminal Code* says that a sentence should be increased to account for evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age mental or physical disability, sexual orientation, or gender identity or expression, or any other similar factor. The onus is on the Crown to prove this aggravating factor beyond a reasonable doubt.

[59] Mr. Bethune and Ms. Secreve deny that their mischiefs were motivated by any bias, prejudice, or hate. They say that this is not a hate crime, it is nothing more than a mischief. They say that they are allowed to express themselves, and they were just engaging in freedom of speech. They do not consider their comments to be relevant to sentencing for mischief. I will address each of these arguments below.

#### *Principle of Parity*

[60] Before I do so, it is necessary to set out the legal principles that inform this analysis. The Crown has provided me with four cases where the Court found that the offence was statutorily aggravating through its motivation:

- *R. v. Van-Brunt*, 2003 BCPC 559 (*Van-Brunt*)
- *R. v. Kandola*, 2010 BCSC 841 (*Kandola*)
- *R. v. Shier*, unreported BCPC decision on April 12, 2019, File no. 248918-1, Vancouver Registry (*Shier*)
- *R. v. Gillard*, 2022 ONCJ 164 (*Gillard*)

[61] I have reviewed and considered all of these cases. What these cases demonstrate is that sentencing is a highly discretionary and individualized process. The Crown recognizes that no two cases are alike and, unsurprisingly, have not been able to find a case that is factually identical to this one. In all of these cases, the hateful words were said before an act of violence, not after an act of mischief.

[62] In *Van-Brunt*, the Court found that the aggravated assault was motivated by racial bias, prejudice, or hate: para. 49. The offender was driving a vehicle past the victim, who was with his friends. The victim said “nice car”. The offender stopped the car, got out with a concealed metal bar, called the victim a “nigger” and then hit the victim over the head with a metal bar. The victim was the only person in the group who was black. After the assault, the offender called the victim again the racial slur and then threatened his mother.

[63] In *Kandola*, the Court found that the assault causing bodily harm was motivated by hatred directed at the victim because of his sexual orientation: para. 36. The victim and his boyfriend were walking on a street holding hands in the early morning hours when they were met by a group of about five males. The group approached the victim, who backed away defensively. The video clearly showed the offender moving out from the back of the pack, circling around to the victim’s left, dramatically winding up and hitting the victim from his blind side. He fell and was knocked unconscious. The offender stood over him shouting obscenities, called him a “faggot”, and gestured to kick him in the face or head. The offender admitted to the derogatory language prior to and after the sucker punch. The offender then exchanged words with the victim’s boyfriend. The victim suffered a broken jaw and required almost immediate surgery. He had a concussion from head trauma. He suffered from headaches and dizziness, his jaw was wired shut for six weeks, and he experienced severe emotional trauma.

[64] In *Shier*, the Court found that the assault was motivated, in whole or in part, by bias against the victim’s sexual orientation. The offence involved an unprovoked attack in a public mall where the offender and the victim had no prior relationship. The offender targeted the victim in a public mall, called the victim a “faggot”, and then assaulted him by punching him in the face.

[65] In *Gillard*, the Court found that the assault was motivated by hate based on Mr. Gillard’s targeted words and targeted physical grab of the victim’s hijab: para. 21. The offender and the victim lived in a high-rise apartment building in Toronto. They were both in the lobby waiting for the elevator. The victim saw the offender having a verbal

argument with another person. She intervened to try to maintain peace. The male offender then directed his aggression at the female victim. He started swearing at her. As she stepped into the elevator, he approached her and bumped her with his chest. She told him not to touch her. He then stated “you fucking guys wearing these ugly things” while pointing at her hijab. He grabbed her hijab from her head, pulled it off, and threw it on the floor. He then punched her on the left side of her face, causing her to fall to the floor. He was pulled away by other bystanders. She sustained swelling on the left side of her face and a scrape to her right knee. The Court had the benefit of a Community Impact Statement, and in the context of discussing violent hate crimes against Muslim populations, considered this offence in the context of “gendered Islamophobia”: para. 20.

[66] I have found *R. v. Woodward*, 2011 BCCA 251 (*Woodward*) of assistance because the aggravating factor was found in the context of words spoken immediately after the offence. In that case, the offender was sentenced to six years imprisonment for the aggravated assault of the victim. The sentencing judge found that the offender had been motivated by bias, prejudice or hate towards “homosexuals”: at para. 17 citing to sentencing decision at para. 24. That sentence was upheld on appeal.

[67] The offender, Mr. Woodward, stopped by the pub with a friend for drinks after work. The victim stopped by the pub to celebrate his retirement. This was Mr. Woodward’s second visit to the pub and he was aware of the sexual orientation of some of its patrons: *Woodward*, para. 6. However, neither the victim nor Mr. Woodward identify that way. It was because Mr. Woodward perceived the victim to be gay that he went out of his way to strike him.

[68] There were only two brief interactions prior to this aggravated assault, both initiated by the victim. On the first occasion, the victim offered to buy Mr. Woodward a drink. In doing so, he put his hand on his shoulder. On the second occasion, the victim asked if Mr. Woodward would like to play a game of pool. The offender declined both offers. Shortly after this, the victim was preparing to start a game of pool with a friend. At the same time, Mr. Woodward decided to leave the pub with his friend.

[69] Mr. Woodward walked over to the victim, and without saying a word, punched him in the face. That blow rendered the victim unconscious. He fell backwards, hit his head on the floor, and the injury was so severe that he could no longer care for himself. Mr. Woodward stepped over the victim and walked outside. A number of people followed Mr. Woodward out of the pub and restrained him until the police arrived. When asked why he did it by one of the persons, Mr. Woodward responded, “He’s a faggot – he deserved it – the faggot touched me – I’m not a faggot – he deserved it”. Mr. Woodward repeated similar words to the officers over the next half hour.

[70] On appeal, Mr. Woodward did not dispute that his attack on the victim was motivated by bias and hatred towards homosexuals, nor did he dispute that this motivation is an aggravating factor on sentencing. Rather, he argued that the sentencing judge gave that factor too much weight. The Court of Appeal rejected this argument at para. 26:

The flaw in Mr. Woodward’s submission is that what he did is the very type of conduct he acknowledges is significantly blameworthy and, therefore, deserving of significant denunciation. Mr. Woodward’s actions were premeditated. He could easily have left the pub without incident. However, rather than doing so, he went out of his way to deliver what he intended to be a punishing blow to Mr. Dowrey. To put it bluntly, Mr. Woodward “targeted” Mr. Dowrey because of his perception that Mr. Dowrey is gay and then sought to justify what he had done on that basis. Such cannot be viewed as anything other than a significant aggravating factor.

[71] Although all of these cases involve an offence of violence against another person, I have found these cases helpful in the legal principles that apply to this sentencing. *Kandola* identified six factors that the courts, through case law, have considered in determining whether an offence is motivated by bias, prejudice or hate:

[...] whether there was anti-homosexual language uttered before, during, or after the offence was committed; whether the offence was committed in a high-visibility, for lack of a better term, location where homosexuals are known to frequent; the lack of provocation; any lack of prior interaction between the accused and victim; extreme or disproportionate violence; and finally, absence of any possible alternative explanation or motivation given the presence of some or all of the above-noted factors. (para. 11)

[72] Those factors were recently applied in *Shier* in finding that the Crown has proven this statutorily aggravating factor beyond a reasonable doubt: para. 19. Although both cases applied these factors in the context of sexual orientation, they are equally applicable to a determination of whether each mischief in this case is motivated by bias, prejudice, or hatred based on the perception of each offender that Ms. Tan was Chinese.

[73] It is not necessary that this be the sole motivation. *Van-Brunt*, quoting from *R. v. Vrdoljak*, [2002] O.J. No. 1332, acknowledges that there may be a number of possible motivating factors that may be present, and there is no requirement for a crime to be solely motivated by bias, prejudice, or hate for this statutory aggravating factor to apply: paras. 46 and 47. Rather, what must be established beyond a reasonable doubt is that the offence was motivated at least in part by bias, prejudice or hate based on Ms. Tan's Chinese race or ethnic origin: *Van-Brunt* at para. 47.

[74] There is one more case that merits comment. The Crown also provided a copy of *R. v. Castonguay*, 2021 BCPC 315 (*Castonguay*), but did not make submissions on it.

[75] Although *Castonguay* involves a mischief, the facts are distinguishable. Mr. Castonguay was sentenced to a lengthy jail term after pleading guilty to wilfully committing a mischief by causing damage to the Chinese Cultural Centre during the COVID pandemic. He defaced the Chinese Cultural Centre with his racist diatribe, and his conduct was motivated by bias, prejudice, or hate towards persons of Chinese ethnic origin or descent. This was not a spontaneous outburst, but one that was clearly in Mr. Castonguay's mind when he went to the centre and spent over ten minutes writing his screed on the windows.

[76] This case is helpful in its contextual analysis of the legal principles on sentencing, which acknowledges the increased vulnerability of the Canadian-Chinese community because of misinformation linking them to the COVID pandemic. Mr. Castonguay targeted a revered cultural institution, at the heart of the historical roots of the Chinese community, at a time of increased vulnerability because of misinformation

directed at persons who appear to be Chinese and blaming them for the COVID pandemic: para. 25.

[77] Having identified the framework for analysis, I will next consider the evidence surrounding the motivation of each offender to determine whether this statutory aggravating factor has been engaged for each offence.

*Motivation of Ms. Secreve*

[78] On the evidence before me, I am satisfied beyond a reasonable doubt that Ms. Secreve's mischief was motivated, at least in part, by her bias or prejudice or hate based on the café manager's Chinese race or ethnic origin.

[79] In this case, there is no dispute that Ms. Secreve perceived the café manager to be of Chinese race or ethnic origin. "Fuck you Chinese" was a deliberate choice on Ms. Secreve's part. This anti-Chinese comment was uttered immediately after the offence. Ms. Tan flicked the dish towel at her in response to hearing the comment. The video records two seconds between Ms. Secreve pouring the coffee on the floor and Ms. Tan flicking her dish towel at her. The mischief was public and there was a lack of provocation. Any prior interaction between the café manager and Ms. Secreve was professional. Ms. Tan made their drinks, and approached them in an effort to enforce COVID-seating protocols and offer them another table. Ms. Secreve's mischief was an extreme or disproportionate response to a policy that was designed to keep her safe.

[80] Ms. Secreve denies that her mischief was racially motivated. She describes it as an instinctive reaction. Since Ms. Secreve poured her coffee immediately after Mr. Bethune poured his coffee, I have considered the possibility that she poured her coffee on the floor – not to cause a disturbance – but to follow the lead of her ex-husband.

[81] I completely reject the possibility that her motivation in pouring the coffee was unrelated to her bias or prejudice or hate against Chinese given the timing and immediacy of her comment. She said "Fuck You Chinese" directly to Ms. Tan less than two seconds after she poured her coffee on the ground. There is no dispute that Mr. Bethune said nothing immediately after pouring his coffee on the floor. If Ms. Secreve

was simply following the lead of her ex-husband in committing her mischief, then I would have expected her to say nothing as well. She did not. She chose to say something. Her language was abhorrent.

[82] There is no requirement for a crime to be solely motivated by bias, prejudice, or hate for this statutory aggravating factor to apply. Rather, what must be established beyond a reasonable doubt is that the offence was motivated at least in part by bias, prejudice or hate based on Ms. Tan's race or ethnic origin. Given Ms. Secreve's abhorrent language towards the café manager inside the café that was made immediately after she poured her coffee on the floor, I see no other possible explanation or motivation for her mischief other than bias or prejudice or hate based on Ms. Tan's Chinese race or ethnic origin.

*Motivation of Mr. Bethune*

[83] On the evidence before me, I am satisfied beyond a reasonable doubt that Mr. Bethune's mischief was motivated, at least in part, by his bias or prejudice or hate based on the café manager's Chinese race or ethnic origin.

[84] Mr. Bethune was the one who violated the COVID seating protocols by setting up a table and chairs inside the café. He was the one who brought the drinks to that table. He was the first to stand up and pour the coffee on the floor.

[85] The offence was committed in a public place in front of another café employee and other café patrons. There was a lack of provocation. The only interaction between Ms. Tan and Mr. Bethune prior to the mischief was professional. She made their drinks, and was doing her job by trying to serve them in the context of a pandemic. As the café manager, she cannot be faulted for enforcing COVID seating protocols. She offered them another table. The mischief was an extreme and disproportionate reaction to a café manager who was just doing her job to keep patrons safe during a pandemic. In this case, there is no dispute that Mr. Bethune perceived the café manager to be of Chinese race or ethnic origin.

[86] I acknowledge that there were intervening events between Mr. Bethune's mischief and his anti-Chinese comments.

[87] I find that the timing between his mischief and his comments was less than one minute. My finding is reasonably inferred from the timing and circumstances of both videos. The surveillance video records less than 20 seconds between his mischief and leaving the café. Ms. Tan is seen on that surveillance video leaving the café in pursuit of him. Her video recording outside the café is of a very short duration.

[88] Mr. Bethune made these anti-Chinese comments while angry and upset at Ms. Tan. Mr. Bethune's comments were made outside the café as he was trying to leave in his car. He was upset and offended at Ms. Tan for following him and recording him on her phone. He acknowledges that he got mad at her. As a senior, he found it an intrusion of privacy. He was also upset that she had physically tried to restrain him from leaving the café. This is captured on the surveillance video, which shows that Ms. Tan had also grabbed Mr. Bethune's arm and sweater. Prior to making this comment, he said "leave it be", "let it go", "she is not well, let it go".

[89] To some extent, this supports Mr. Bethune's submission that he was trying to diffuse the situation. However, he did not. Rather than say nothing, Mr. Bethune chose to say a few things to Ms. Tan. He said "Fucking Chinese" and "You are the Coronavirus". Mr. Bethune asserts on his own behalf some racist comments.

[90] I have considered the possibility that his motivation in pouring the coffee was unrelated to his bias or prejudice or hate against Chinese. Mr. Bethune has provided two alternative explanations for his mischief.

[91] First, Mr. Bethune says that he poured coffee on the floor – not to cause a disturbance – but to get Ms. Secreve and Ms. Tan to "stop bickering" and to "get attention and put an end to this nonsense". From his perspective, "it was getting out of hand".

[92] I completely reject Mr. Bethune's explanation that his mischief was his attempt to de-escalate the situation given the timing of his mischief. Mr. Bethune poured his coffee

on the floor before the confrontation between Ms. Secreve and Ms. Tan, not after. Furthermore, his explanation does not make any sense at all. Pouring coffee onto the floor of a café in the context of an argument over seating is an extraordinarily hostile and aggressive act. It is an intended insult that crossed the line into criminal conduct.

[93] What plausible other explanations could there be for such an irrational act? The victim had the delegated authority of the café owner to manage it and was exercising that authority lawfully. As guests of the cafe, these offenders were obliged to follow the rules of the café, whether they agreed with them or not. If they did not want to follow them, then they should have gone to another café with different rules or with less strict enforcement of the COVID protocols.

[94] Second, as I understand his submissions, Mr. Bethune says that he poured the coffee on the floor because of the COVID pandemic and not because he perceived Ms. Tan to be Chinese. He says that his mischief had nothing to do with disliking or liking Chinese.

[95] I completely reject Mr. Bethune's explanation because it is undermined by his own admissions. Mr. Bethune acknowledges that his mischief was COVID-related. He says that the whole event was around the COVID virus. However, Mr. Bethune equated Ms. Tan to the COVID virus when he said “the Coronavirus is you”. There are a myriad of derogatory or insulting words that Mr. Bethune could have used, but he chose that one specifically. Given Mr. Bethune’s abhorrent language towards the café manager outside the café, I see no other possible explanation or motivation for his mischief on Ms. Tan other than bias or prejudice or hate based on her Chinese race or ethnic origin.

#### *Response to Arguments*

[96] Mr. Bethune and Ms. Secreve make two more arguments that their mischiefs are not motivated by any anti-Chinese bias, prejudice, or hate.

[97] First, they argue that this is not a hate crime. I agree that this is not a hate crime. Section 318 and 319 of the *Criminal Code* are the sections sanctioning hate crimes. They have not been charged with committing a “hate crime” under those sections.

Rather, they have been charged and have pled guilty to committing a mischief under s. 430(4) of the *Criminal Code*.

[98] Second, they say that they are allowed to express themselves, and they were just engaging in freedom of speech. They argue that being sanctioned for making comments after their mischief is a violation of their right to freedom of expression.

[99] The right to freedom of expression, guaranteed by s. 2(b) of the *Charter of Rights and Freedoms*, serves three purposes: fostering Canada's democracy, enabling the search for truth, and nourishing self-fulfilment: *R. v. Keegstra*, [1990] 3 SCR 697 at paras. 87 to 89; *Grant v. Torstar Corp.*, 2009 SCC 61 at paras. 47 to 50. These three purposes are animated by those values that the Supreme Court of Canada has recognized as "essential to a free and democratic society", namely:

Respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individual and groups in society.

*R. v. Oaks*, [1986] 1 SCR 103 at pg. 136 cited in *R. v. Keegstra*, [1990] 3 SCR 697 at para. 45

[100] While the scope of s. 2(b) has been interpreted to capture the broadest range of expression, the freedom has never been "absolute". The law has long distinguished between expression which furthers the values underlying s. 2(b) and expression which detracts from them: *Grant v. Torstar Corp* 2009 SCC 61, para. 2.

[101] However, distasteful, inappropriate or socially harmful it may be, Canadians of every background - including Mr. Bethune and Ms. Secreve - have the freedom to hate and feel bias or prejudice against others without fear of criminal sanction. They are free to hurl insults that are motivated by hate, bias or prejudice. If they had only done that, without pouring coffee onto the café floor, they would never have been charged with an offence. It is only when hate, bias or prejudice motivates them to commit an act that crosses the line into criminal conduct that they have gone too far. When that happens, it becomes an aggravating factor that the Court can apply in sentencing.

*Alternative Conclusion with respect to Anti-Chinese Comments*

[102] Even if I am wrong in my finding that this is a statutory aggravating factor, it is still an aggravating factor because these gratuitous Anti-Chinese comments are, in and of themselves, aggravating.

[103] Ms. Secreve's comment, "Fuck you Chinese" and Mr. Bethune's comment "Fucking Chinese" are humiliating and denigrating expressions, that were directed at Ms. Tan who was just doing her job when she enforced COVID protocols. If these café patrons were upset with how this café manager was enforcing COVID protocols, they could have criticized her work performance. They did not. Rather, they chose to identify her on the basis of a characteristic that was unrelated to her work performance – their perception that she was Chinese. These comments, at their core, marginalized an individual based on membership in a group.

[104] Mr. Bethune's comment "the Coronavirus is you" goes one step further. He associated Ms. Tan to a virus. This is a dehumanizing expression that calls into question whether Ms. Tan qualifies as a human being. This is a message of vilification. One of the most extreme forms of vilification is to dehumanize a protected group by describing its members as subhuman. As recognized in *Castonguay*, these expressions expose both the individual, Ms. Tan, and the group to which they perceived her to belong, Chinese, to hatred. This kind of speech vilifies the targeted group by blaming its members for the current problems in society.

### **Mitigating Factors**

[105] There are also mitigating factors in this case that apply to each offender. The first mitigating factor is that neither offender has a criminal record.

[106] The second mitigating factor is that both offenders have pled guilty. I have given this factor less weight because Mr. Bethune and Ms. Secreve pled guilty on the third day of trial after Ms. Tan had already completed her evidence.

[107] I reject the Crown's argument that these offenders are not entitled to any mitigating benefit of their guilty pleas in these circumstances. Despite the lateness of a plea, it merits consideration: *R. v. Barrett*, 2013 QCCA 1351 at paras. 18 to 22. These guilty pleas have spared further judicial resources and inconvenience to other witnesses. As it relates to the Crown's case, the evidence of the second civilian witness had not yet completed. The Crown was planning to call three police witnesses to give evidence. Three *voir dire*s may have been required to address the admissibility of some of that evidence given that issues were raised regarding the voluntariness of statements made by the accused to persons in authority.

## **Just and Fit Sentence**

### **Is a Conditional Discharge a just and fit sentence?**

[108] These offenders are seeking an absolute discharge. The distinguishing feature of a discharge is that no permanent criminal record would be recorded. Discharge provisions are found in s. 730 of the *Criminal Code* and provide for discharges for eligible offences, where it would be in the best interest of the offender and not contrary to the public interest. Thus, I must apply the test set out by in *R. v. Fallofield*, [1973] 13 C.C.C. (2d) 450 (*Fallofield*).

### ***Is granting a discharge in the offender's best interest?***

[109] Applying the first part of the *Fallofield* test, I find that a discharge is in the best interest of each offender because it would result in no permanent criminal record. Mr. Bethune and Ms. Secreve are seniors and have no criminal record. Although they both had contact with the criminal justice system, that was over twenty years ago. Ms. Secreve received a conditional discharge for assaulting a police officer, and Mr. Bethune entered into a recognizance under s. 810 of the *Criminal Code*. This history does not detract from my finding that they are first-time offenders. Based on these considerations, I conclude that it is in the best interest of each offender to receive a discharge.

***Is granting a discharge contrary to the public interest?***

[110] Applying the second part of the *Fallofield* test, I find that it is contrary to the public interest to grant either Mr. Bethune or Ms. Secreve a discharge because the primary sentencing objectives necessary to meet the purposes and principles of sentencing in this case are not achieved through a discharge. My reasons are as follows.

*General Deterrence*

[111] First, the need for general deterrence. I have considered the gravity of this offence. Mr. Bethune and Ms. Secreve each said that all they did is pour coffee on the floor. They did more than that. They committed this mischief during the COVID pandemic.

[112] Especially during this serious phase of the COVID pandemic, no café would have countenanced customers re-arranging tables, contrary to COVID protocols and against the wishes of the proprietor, as each of them did. Most establishments would not have even served them. Despite their non-compliant behaviour, Ms. Tan offered to let them sit at a nearby table that had just been vacated. That table had even been cleaned and sanitized for them.

[113] They were frustrated with COVID-seating restrictions that were designed to keep them safe. When they were asked to comply with health directives during a pandemic, they refused to do so. This was defiant conduct in the face of a pandemic. They each committed a brazen and disrespectful mischief, which disrupted a private business on private property. It disturbed the comfort of other customers.

[114] Rather than apologize, as they should have done, each of them hurled insults at this café manager based on personal characteristics that had nothing to do with her job. These were not just any insults. They were anti-Chinese comments directed towards a café manager who they perceived as Chinese. As the café manager, she was trying to keep this café open and customers safe during a pandemic. She was trying to keep them, and other café patrons like them, safe during a pandemic.

[115] They made these comments because they were annoyed by the COVID-seating restrictions and how Ms. Tan chose to enforce those restrictions. What each of them did in response through their mischief, by spilling their coffee on the ground, and then each of them directing gratuitous anti-Chinese comments at her, was totally over the edge of what our society is prepared to accept. As the BC Court of Appeal stated in *Woodward* at para. 27:

Section 718(2)(a)(i) reflects the fact that Canadians take pride in being members of a pluralistic, multicultural society, in which every individual is entitled to respect. Not only do we abhor violence, we particularly abhor it being gratuitously directed at someone solely because of their personal characteristics. Such conduct is antithetical to our collective beliefs.

[116] Deterrence, in my view, is particularly crucial when, as here, the Crown has proven beyond a reasonable doubt that their anti-Chinese comments are aggravating, regardless of whether their bias or prejudice or hate is a motivation in their crime.

[117] Their anti-Chinese comments were gratuitously directed at someone solely because of her personal characteristics. They had nothing to do with her ability to do her job. It is hard to imagine how, something as non-confrontational, as keeping café patrons safe during a pandemic, can cause such a visceral reaction to either Mr. Bethune or Ms. Secreve.

[118] Their anti-Chinese comments did, however, have an adverse impact on Ms. Tan's ability to do her job. The impact on this victim is significant and statutorily aggravating. Ms. Tan, the recipient of their gratuitous anti-Chinese comments, identifies as a member of the Canadian-Chinese community, a group that has historically been discriminated against in Canada.

[119] The aggravating features of this mischief heightens the need to deter others from expressing frustration during a pandemic in the way that they did. As this Court stated in *R. v. Zeng*, 2021 BCPC 297 at para. 5:

There is a wide range of conduct that takes place in our society, that may be inappropriate or perhaps rude, offensive or insulting, but none-the-less does not attract the sanction of the criminal law. The criminal law of

Canada is a collective statement of our Canadian society, as expressed through Parliament, as to exactly what kind of conduct is so offensive and unacceptable, that it becomes punishable by the law.

[120] This aggravated mischief is the kind of conduct that our society, through parliament, has deemed to be deserving of criminal sanctions.

[121] The threat of punishment – through a criminal conviction – can have the educational effect of dissuading others from committing illegal methods of protest.

[122] First-time offenders cannot be sentenced in isolation from the larger context of these kinds of aggravated mischiefs and the sheer number of those who are wilfully breaking the law to make a point. The point that Mr. Bethune and Ms. Secreve were trying to make does not even make sense. As they have repeatedly stated in this Court, they are seniors and vulnerable because of the pandemic. They, in essence, put themselves at greater risk through their illegal actions on that day.

#### *Denunciation*

[123] Second, the need for denunciation. By denunciation, the Court speaks for the members of the community when it says that what occurred here was wrong.

[124] The public nature of their mischief matters: *Shier* at para. 28. What each of them did was seen by others. What each of them said was heard by others. This offence does not just affect the victim, Ms. Tan, but all those who witnessed what happened at the café on March 29, 2021 or who have subsequently become aware of it.

[125] The message that Mr. Bethune and Ms. Secreve conveyed through their aggravated mischief is harmful. The harm to the community is growing. How each of them expressed themselves on that day, through their aggravated mischief, has had an impact on the community, as is evident from the community impact statements filed: s. 722.2 of the *Criminal Code*.

[126] The moral culpability of these offenders is high because their comments made after their mischief during a pandemic is an affront to the dignity of all persons,

particularly the Canadian-Chinese community. It would send the wrong message to the community that crimes that occur in such a public and callous fashion could result in a discharge. This demands a criminal conviction.

[127] Mr. Bethune has referenced the extensive media coverage. He believes that they have been vilified as racists by the media. He states that they have “more than paid for the mistake and the infraction”. He asks the Court for compassion.

[128] As I understand his submissions, Mr. Bethune is suggesting that this ought to be treated as a fact which mitigates his sentence. In my view, there is insufficient evidence to support a finding that the publicity surrounding Mr. Bethune’s mischief, or the publicity surrounding Ms. Secreve’s mischief, has had an inordinate impact beyond the stigma, which attaches to anyone who is found guilty of criminal conduct.

[129] Accordingly, while the pre-sentence publicity to which Mr. Bethune and Ms. Secreve have been subjected may satisfy in part the objective of denunciation and deterrence, it does not satisfy these objectives entirely. The publicity surrounding these proceedings results from the fact that these offenders have committed the type of crime for which they are each being sentenced, a further reflection, likely, of the revulsion with which the community at large views this conduct.

[130] In my view, the circumstances of this offence call out for a sentence that must address the principle of denunciation – that is the outrage of society at their conduct.

#### *Specific Deterrence*

[131] Third, the need for specific deterrence. I understand that Mr. Bethune and Ms. Secreve have been staying away from people as much as possible. They have concerns about their safety. They no longer go to restaurants, and they make their coffee at home.

[132] Specific deterrence has not been achieved here. While Mr. Bethune and Ms. Secreve are sorry for pouring coffee on the café floor, they are not sorry for making the

comments that they did. In fact, they repeated them several times during this criminal proceeding.

[133] Ms. Secreve said, "I never said a racial slur except go back to China and take your virus with you". By telling someone who she perceives as Chinese to "go back to China and take your virus with you", Ms. Secreve is essentially telling them that:

- they are not a Canadian because of the way they look, and therefore, will never be accepted as Canadian no matter how many generations they may be in this country;
- someone who appears to be of Chinese origin is a member of a group that is less deserving of rights than the speaker - including the right to live in this country - and a member of a group that is not deserving of any respect or courtesy.

[134] Ms. Secreve appears to acknowledge this racial slur. Since her statement conveys a message of entitlement to the speaker through the disentitlement of a group based on race, it conveys the essence of racism.

[135] Mr. Bethune said, "there is nothing racial here", "it is about mischief", and "the Chinese community is sensitive because they are being blamed for COVID coming from China". His statement conveys a message of blame. Mr. Bethune is, in essence, blaming anyone who he perceives as Chinese for bringing the COVID virus into Canada. *Castonguay* recognizes the increased vulnerability of Canadians because of misinformation directed at persons who are perceived to be Chinese and blaming them for the COVID pandemic.

[136] The statements made by Mr. Bethune and Ms. Secreve during this sentencing hearing are clearly expressions that reflect their beliefs, their world view, and their attitude toward persons of Asian background. It is not reasonable to conclude that Mr. Bethune and Ms. Secreve did not have such feelings until after they poured the coffee. These are typically feelings, beliefs, and attitudes that are deeply rooted and of long standing.

[137] Based on these considerations, I am not satisfied that this criminal proceeding has had a deterrent effect on these offenders. I have to give weight to specific deterrence in these circumstances.

*Rehabilitation*

[138] Fourth, rehabilitation is not a strong sentencing objective in this case. Mr. Bethune and Ms. Secreve have no prior criminal record. By entering into a guilty plea, they have accepted at least some responsibility for their actions. These factors indicate that they are capable of rehabilitation. Still, each of them deny the significance of their mischief. Their constant refrain was that Ms. Tan was the aggressor and they are the victim. While I accept that certain factors favouring rehabilitation exist in this case, I am not emphasizing their rehabilitation in this sentencing. As I understand their positions, they do not think they need it.

[139] I am not discounting rehabilitation because of their age. Seniors can learn from their mistakes. Rather, rehabilitation is not a strong sentencing objective because of their lack of genuine remorse. Remorse means a regret for what the offender's wrongdoing has caused. Remorse is not feeling sorry for oneself.

[140] It would be rare for an offender to feel remorse while committing the offence. For many offenders, it takes some time and reflection for them to understand the nature of their conduct and to be truly remorseful. In this case, Mr. Bethune and Ms. Secreve have had over one and a half years to reflect on their mischief and the impact of their actions on others. They have demonstrated little, if any, understanding of the impact of their criminal actions.

[141] Although each of them have admitted to committing the essential elements of the offence of mischief, they have taken the position that their criminal conduct is excusable.

[142] Ms. Secreve pled guilty, but feels she did nothing wrong. She is asking for a discharge because she believes that her mischief did not result in anyone getting hurt or any damage to property.

[143] Mr. Bethune told this Court that he pled guilty because he wanted “this nightmare to be over” and his “health is more important than this absurd prosecution”. He blames Ms. Tan for provoking him into committing this mischief. He says that his comments were made under duress because he felt assaulted by Ms. Tan when she tried to restrain him from leaving the café. From his perspective, he was doing nothing wrong. He describes minding his own business at the café. He describes Ms. Tan as a person who did not let go. He says that, while he may have broken the COVID rules, this incident would not have escalated to criminal charges had Ms. Tan just let them leave.

[144] While Mr. Bethune is willing to take responsibility for spilling the coffee on the floor, he does not acknowledge that his comments damaged Ms. Tan. He has described this as an “unpleasant interaction” and says that it was “out of place to call names” and “it was bad taste”. He describes the victim of his crime as “domineering”, “confrontational”, “harassing”, and “aggressive”. He accuses Ms. Tan of lying to police and staging this whole thing.

[145] Mr. Bethune accuses Ms. Tan of wanting to “come across as the victim”. He says that the impact on him from this criminal proceeding is far greater than the impact of his crime on Ms. Tan.

[146] Mr. Bethune believes that they have been unfairly portrayed by the media as racists and committing a hate crime, when it was nothing more than a mischief. He believes that they are victims of the Chinese community in Richmond who have organized, blown this mischief out of proportion, and mischaracterized it as a hate crime.

[147] The consequences of their mischief may not have been intended, but they were certainly foreseeable. Even if the community’s reaction to their words have come as a surprise to each of them, they have yet to express real remorse in this Court. They have not acknowledged the harm done to Ms. Tan or to others who witnessed their mischief nor accepted responsibility for their actions and despicable words.

[148] While genuine remorse is a mitigating factor, lack of remorse is not an aggravating factor. However, where offenders take the position that their crimes are excusable, as is the case here, then denunciation and specific and general deterrence must be paramount.

### *Responsibility*

[149] Finally, this sentence should operate in such a manner as to promote a sense of responsibility on their part for the harm that their aggravated mischief has caused. Again, in the circumstances, I do not see how that objective can be accomplished where both offenders claim to be the victim and deny any responsibility for the aggravating features of their offence.

## **Suspended Sentence**

[150] Based on these considerations, I conclude that it would be contrary to the public interest to grant a discharge to either Mr. Bethune or Ms. Secreve. This criminal conduct demands criminal consequences. As such, I am suspending the passing of sentence and placing each offender on probation.

[151] The Crown is seeking a probation order of 18 months with seven conditions in addition to the compulsory conditions.

[152] Given their poor current prospects for rehabilitation, I do not agree with the Crown's proposal for counselling, community hours, or requirement to write an apology letter to Ms. Tan. Since Mr. Bethune and Ms. Secreve are not remorseful or apologetic for this offence, I am not persuaded that they can be rehabilitated in this way.

[153] Although Mr. Bethune and Ms. Secreve said that they want to leave the province, conditions are still necessary to protect the public from their mischief. Although it is not clear whether Ms. Tan currently resides in Canada, there is no dispute that she travelled to British Columbia for this trial, and that she has lived and worked here in the past. Mr. Chan currently lives and works in British Columbia. Thus, conditions that protect this

café and these victims from their mischief are appropriate and further the sentencing principles in a proportionate way.

[154] I find that a probation order of one year is appropriate given that these offenders are elderly. They are both over 75 years of age.

## **Disposition**

[155] Mr. Bethune, please stand. On Information 65754 and Count 1, I am suspending the passing of sentence and placing you on probation for 12 months.

[156] Ms. Secreve, please stand. On Information 65754 and Count 2, I am suspending the passing of sentence and placing you on probation for 12 months.

[157] The conditions of your probation order are the same.

[158] Each of you must comply with the following probation order for a term of 12 months. There are six conditions to this probation order. The first three conditions are compulsory, which means that they are included in every probation order issued by this Court, regardless of whether they apply to your personal circumstances. The next three conditions are ones that I have decided are necessary conditions to protect the public from your mischief. The conditions are:

1. You must keep the peace and be of good behaviour.
2. You must appear before the Court when required to do so by the Court.
3. You must notify the Court or probation officer in advance of any change of name or address, and promptly notify the Court or the officer of any change of employment or occupation.
4. You must not go to Rocanini Coffee Roasters at 3900 Moncton Street, Richmond, British Columbia.
5. You must have no contact or communication, directly or indirectly, with Yinying “Nikki” Tan or Way “Raymond” Chan.
6. You must not go to any place where Yinying “Nikki” Tan or Way “Raymond” Chan live, work, attend school, worship, or happen to be. If you see them, you must leave their presence immediately without any words or gestures.

**Victim Fine Surcharge**

[159] Pursuant to s. 737(2)(b) of the *Criminal Code*, I am ordering that each of you, Mr. Bethune and Ms. Secreve, pay a victim fine surcharge of \$100 to the Clerk of the Court within 60 days. If you require further time to pay the surcharge, you must apply in writing to ask the Court for an extension.

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The Honourable Judge D. Vandor  
Provincial Court of British Columbia