



PROTEST LAW AND CIVIL DISOBEDIENCE

Andi Mackay & Martin Peters

Is Civil Disobedience a viable concept known to the law of protest in British Columbia

- Topics:
- Can (or should) a **lawyer attend** a protest?
- How is a lawyer to **defend** a person arrested at a protest or engaged in an act of civil disobedience?
- Are there really **any viable defences** or should a person engaged in civil disobedience take their knocks and move on?
- What are the **powers of the court to punish** for contempt?

Can (or should) a lawyer attend a protest?

- **Or, what advice should you give yourself and your clients:**
- Everyone, even lawyers, has the right to freedom of **expression, assembly and association: Charter, sections 2(b)(c)&(d)**
 - The law affords protestors great leeway in communicating their views. They do not have to be rational or polite. The fact that their speech may cause economic harm is also not determinative. **Communications that create bad publicity or consumer boycotts are types of social pressures that are permissible exercises of freedom of speech:** *Hudsons's Bay Mining and Smelting Co. Limited v. Dumas*, 2014 MBCA 6 at [72]

Charter: section 2:

- These rights have constitutional paramountcy but are not absolute:
 - The *Charter* pertains to government conduct;
 - But does protect the right to protest;
 - But may not restrain the issuing of an injunction;

- While history may ultimately vindicate a protestor's cause, that does not mean they have a right to communicate at any time, place or in any manner desired: *Hudson's Bay, supra* at [65]

Where no injunction issued

- *Criminal Code*, section 423(1)(g) a hybrid offence to block **or obstruct** a highway without lawful authority
 - **Highway will be interpreted broadly** and may include forest access roads (logging roads);
 - Would **permit the police to arrest in the absence of a court order**;
 - The **general police practice** in British Columbia is to **not arrest until a court order has been issued**;
 - And otherwise endeavour to keep the peace without occasioning arrests.

Where injunction order issued by the court

- Historically, the act of **blockading lawful commercial activity for political reasons has not been tolerated** by the courts and has resulted in injunctions:
 - *Hudson Bay Mining and Smelting Co. Limited*, 2014 MBCA 6
- **Enforcement order:** directions and some discretion given to police for implementation of the order:
 - Members of the public need not take the word of the police that the arrest and detention of violators is authorized because this is clearly set out in the order signed by the judge. Viewed thus, the inclusion does no harm and may make the order fairer:
 - *MacMillan Bloedel Ltd. v. Simpson*, 1996 CanLII 165 (SCC), [1996] 2 SCR 1048 at [41]

What are the scope of police powers in enforcing an injunction order?

- The **law imposes broad general duties** on the police but it provides them with **only limited powers to perform those duties**.
- Police conduct is **not rendered lawful merely because it assisted in the performance** of the duties assigned to the police.
- **Where police conduct interferes with the liberty or freedom of the individual, that conduct will be lawful only if it is authorized by law.**
 - *R. v. Simpson* (1993), 1993 CanLII 3379 (ON CA), 12 O.R. (3d) 182, at p. 194
- Because of the potential impact on an individual's liberty, the **formalities for contempt proceedings must be strictly complied with:**
 - *Morasse v. Nadeau-Dubois*, 2016 SCC 44 (headnote)

Do Common law police powers extend the ability of the police to enforce an injunction?

- police officers ... **only act lawfully if they act in the exercise of authority which is either conferred by statute or derived as a matter of common law from their duties**": *Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, at p. 28.
- Waterfield test: common law police power:
 - first stage, "the court must ask whether the action falls within the general scope of a police duty imposed by statute or recognized at common law" (*R. v. MacDonald*, 2014 SCC 3, at para. 35).
 - In the second stage, the court must strike a "balance between the competing interests of the police duty and of the liberty [or other] interests at stake" (*R. v. Mann* 2004 SCC 52, at para. 26). Put another way, is the police action "reasonably necessary for the carrying out of the particular duty in light of all the circumstances" (*MacDonald*, at para. 36)

Police common law powers: Waterfield cont.

◦ In *MacDonald*, at para. 37, the Supreme Court explained that the factors to be weighed in the second stage include:

- (1) The importance of the duty to the public good;
- (2) The extent to which it is necessary to interfere with liberty to perform the duty;
and
- (3) The degree of interference with liberty.

Can the police implement an « exclusion zone » to restrict protest activities?

- the **civil liberty to move unimpeded on public highways is part of a long common law tradition. The right to move freely on public highways (often called the right to “pass and repass” in older cases) has been upheld many times by appellate courts, including the Supreme Court, Britain’s House of Lords, and this court. See e.g. *Vancouver (City) v. Burchill*, 1932 CanLII 29 (SCC), [1932] S.C.R. 620, at pp. 624**
- the case law demonstrates, even in the absence of statutory authority, **the police must be taken to have the power to limit access to certain areas, even when those areas are normally open to the public. However, this is not a general power; it is confined to proper circumstances, such as fires, floods, car crash sites, crime scenes, and the like:** *Figeuras v. Toronto (Police Services Board)*, 2015 ONCA 208 at [60]

Exclusion Zones as a means to enforce an injunction

- 2010 G-20 Summit protests in Toronto: the police targeted demonstrators walking down a public street and required that they submit to a search of their belongings if they wished to proceed: *Figeuras v. Toronto (Police Services Board)*, 2015 ONCA 208 at [1]
- **the police conduct in this case was a *prima facie* infringement of two liberties: freedom of expression under the Charter and the common law right to travel unimpeded down a public highway:** *Figeuras* at [80]
- Exclusion zones have been recently utilized by RCMP in enforcing an injunction order for Coastal GasLink against Wet'sewet'en land defenders.

Legal Observers

- This is **an American concept** which has not found favour with British Columbia police:
 - Legal observers were arrested by RCMP along with others found in an « exclusion zone » off the side of a Forest Service Road in Wet'suwet'en territory;
 - Legal observers were recently arrested in Vancouver during the Crab Park protests.
- **The intention of the legal observers may yield a defence for contempt as their purpose was not to publicly disrespect a court order or court process.**

Legal advice to protesters

- **Pre-protest: proceed with caution in terms of counselling an offence**, consider:
 - whether **an injunction order has been made**;
 - whether the conduct **may block a highway**: (offence irrespective of court order)
 - whether there are **other court orders that apply: (prior undertaking or probation to keep the peace)**
 - Best: try not to get arrested;
 - Do counsel rights on arrest.
- **legal advice at the protest to those arrested**;
 - May garner an **arrest for obstruction** of an officer: *Criminal Code*: section 129.

Arrest, Detention and Release

- Arrests for breach of an injunction order usually **follows the terms of enforcement** clause:
 - Rather than any underlying criminal conduct such as
 - Section 127: breach of court order;
 - Section 423(1)(g): blockading a road;
- Detention:
 - Usually shortlived with release from the site or at detachment;
 - **Alert: Covid 19 questionnaire used as a means of pre access to counsel questioning: Crab Park**;
 - Access to counsel will be facilitated, eventually;
 - Advice: see Release and terms;

Undertakings to Abide by the Injunction

- Advice:
 - Standard with a recent arrest where no bail hearing contemplated;
 - **Will need to discuss with arresting or supervising officer what terms will be required by the senior officer on an undertaking;**
 - **Crab Park:**
 - **some arrestees faced extensive restrictions and no go areas;**
 - **Others were simply to abide by the terms of the court order;**
- Undertakings:
 - may be negotiated with the police;
 - Should be as minimal as possible;
 - Unless signed client will be held for a bail hearing.

Undertakings, continued:

- *R. v. Zora*, 2020 SCC 14
- The ladder principle (see *R. v. Antic* 2017 SCC 27) applies to conditions of release just as it applies to forms of release. **There is a link between the ladder principle and the number and content of bail conditions.** Without a restrained approach to bail conditions, a less onerous form of bail, such as an undertaking with conditions, can become just as or more onerous than other steps up the bail ladder or, in some cases, even more restrictive than conditional sentence and probation orders issued after conviction; at [24]

How is a lawyer to defend a person arrested at a protest or engaged in an act of civil disobedience?

- Everywoman's Health Centre Society v. Bridges, 1990 CanLII 5409 (BC CA):
 - [80] Civil disobedience was mentioned in argument almost as if it was a principle of law justifying lawlessness. **Civil disobedience is a philosophical, not a legal principle.** Presumably for this reason, its dimensions have never been carefully examined in authoritative jurisprudence.
 - [81] Those commentators who have written on this subject all seem agreed that, except with respect to a law which every right thinking person would regard as intrinsically evil, it is the duty of every citizen to obey the law. **Even philosophers agree that those who disobey any law, by civil disobedience or otherwise, must expect to be punished according to law. Civil disobedience is not a defence to any wilful breach of the law.**

Civil Disobedience as a defence: a more nuanced perspective:

- But the rule of law has many dimensions, or in the words of the Supreme Court of Canada is "highly textured": ***Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at p. 805 S.C.R.**
 - One dimension is certainly that focused on by the motions judge: the court's exercise of its contempt power to vindicate the court's authority and ultimately to uphold the rule of law. The rule of law requires a justice system that can ensure orders of the court are enforced and the process of the court is respected.
 - *Henco Industries Limited v. Haudenosaunee Six Nations Confederacy Council*, 2006 CanLII 41649 (ON CA), at [141]
 - [142] **Other dimensions of the rule of law, however, have a significant role in this dispute. These other dimensions include respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiations, fair procedural safeguards for those subject to criminal proceedings, respect for Crown and police discretion, respect for the separation of the executive, legislative and judicial branches of government and respect for Crown property rights.**

Contempt of Court

- **Rule of Law:**
- Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.
 - United Nurses of Alberta v. Alberta (Attorney General), [1992] 1 S.C.R 901 at p. 932

Civil & Criminal Contempt:

- **Civil contempt:** requires **knowledge of the court order:**
 - And **conduct which constitutes a breach;**
 - I.e. Failure to abide by a child custody order;
 - Civil proceedings governed by BCSC rule 22-8.
- **Criminal contempt:**
 - What the courts have fastened on in this and other cases where criminal contempt has been found is the concept of **public defiance that "transcends the limits of any dispute between particular litigants and constitutes an affront to the administration of justice as a whole":**
 - **The gravamen of the offence** is not actual or threatened injury to persons or property; other offences deal with those evils. The gravamen of the offence is rather the **open, continuous and flagrant violation of a court order without regard for the effect that may have on the respect accorded to edicts of the court.**

Criminal Contempt, continued

- **To establish criminal contempt the Crown must prove**
 - that the **accused defied or disobeyed a court order in a public way** (the actus reus),
 - with **intent, knowledge or recklessness** as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*).
 - **The Crown must prove these elements beyond a reasonable doubt.** As in other criminal offences, however, the necessary ***mens rea* may be inferred from the circumstances.** An open and public defiance of a court order will tend to depreciate the authority of the court. Therefore **when it is clear the accused must have known his or her act of defiance will be public, it may be inferred that he or she was at least reckless as to whether the authority of the court would be brought into contempt.** *United Nurses, supra*, page 933.

Are there really any viable defences or should a person engaged in civil disobedience take their knocks and move on?

- **How or should a lawyer defend a person arrested at a protest or engaged in an act of civil disobedience?**
 - Question: if the purpose of the protest was to shine a light on an issue what is served by marshalling a defence;
 - Would a plea of guilty and the client's public statement to the court as part of sentencing advance the client's cause.
 - Ie: Trans Mountain Pipeline sentencing proceedings;
 - Ghandi plead guilty to contempt in defiance of the salt taxes.
- Consider:
 - **Actus reus: whether the strict terms of the order were breached;**
 - **Mens rea:**
 - **Can the Crown prove that the protester actually got notice of the order;**
 - **Was the defiance public in nature;**
 - **Was any defiance of the court order designed to bring disrespect on the court or its process;**
 - Ie: *Trans Mountain Pipeline v. Roivas*: acquittal where party was engaged in smudging ceremony rather than blocking a road way.

Challenging the Injunction Order

- **Without a challenge to the order itself the Court may consider any defence to be a collateral attack on the injunction order or on another proceeding:**
 - What the defendants are in effect asking this Court to do is to assess the merits of the appeals before the Federal Court of Appeal and the British Columbia Court of Appeal and decide whether a stay should be issued in one or another of those Courts if one were sought by Burnaby. I am in no position to make that assessment.
 - Cullen A.C.J. in *Trans Mountain Pipeline ULC v. Gold*, 2014 BCSC 2133 at para. 76
- **If a challenge is successful, a protester may still be prosecuted** but the Plaintiff (if proceeding with civil contempt) or the BC Prosecution (if proceeding with criminal contempt) may not be inclined to continue if there is no longer a valid and subsisting Injunction order;

What are the powers of the court to punish for contempt?

- There are many statements in the books that contempt proceedings for breach of an injunction are civil process, but it is obvious that conduct which is a violation of an injunction may, in addition to its civil aspect, possess all the features of criminal contempt of court. . **But a punitive sentence is called for where the act of violation has passed beyond the realm of the purely civil.**
- **It is sufficient to say that such interferences when they amount to contempt of Court are quasi-criminal acts, and orders punishing them should, generally speaking, be treated as orders in criminal cases**
 - Poje v. Attorney General for British Columbia, [1953] 1 S.C.R. 516, page 517.

Sentencing, principles

- The purpose of sentencing in these cases is to repair the depreciation of the authority of the court.
 - *International Forest Products Ltd. v. Kern* [2001] B.C.J. No. 135 (B.C.C.A.)

There are a number of sentencing principles, including those recently enacted in the code which have relevancy here. I consider the following principles to be of particular significance:

- (a) deterrence, both general and specific, but especially general deterrence, as well as denunciation, are the most important factors to be considered in the imposition of penalties for criminal contempt;
- (b) it is the defiance of the court order, here repeated, and not the illegality of any actions which led to the granting of the court order in the first place, which must be the focus of the contempt penalty;
- (c) those with a special visible position of leadership who purport to act and speak within a group for the group may be regarded as committing a more serious contempt if they refuse to comply with a court order and thereby may appropriately receive a greater penalty.
 - *Hayes Forest Services Limited v. Forest Action Network et al.*, 2003 BCSC 1569

Sentencing: scope

- **Public figures:** fine: *TMPL v. Minivasair*, 2018 BCSC 947 (Elizabeth May)
- **Clayquot Sound protests:** (1990s) range from short sentences to 6 months;
- **Repeat offenders: up to 9 months**
 - *Hayes Forest Services Limited v. Krawczyk*, 2006 BCCA 156
 - *TMPL v. Christenson*: 9 months;
- **Trans Mountain Pipeline v. Minivasair:** 2019 BCSC 217, paragraph 8:
 - Justice Afleck utilized a **gradated sentencing regime** based upon the **date of the protest in relation to issuance of the injunction order.**
 - Range was from:
 - **Fines or probation with community services** (the size of fine and length of community service varied)
 - Sentences of **imprisonment from 7 -28 days;**
 - In the case of one **repeat offender a sentence of 9 months.**