CA45402

COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA FROM THE JUDGMENT AND SENTENCE OF THE HONOURABLE MR. JUSTICE AFFLECK PRONOUNCED THE 1ST AND 27TH DAYS OF JUNE AND THE 31ST DAY OF JULY 2018 AT VANCOUVER, BRITISH COLUMBIA

BETWEEN:

TRANS MOUNTAIN PIPELINE ULC

(PLAINTIFF)

AND

DAVID MIVASAIR, BINA SALIMATH, MIA NISSEN, COREY SKINNER (AKA CORY SKINNER), UNI URCHIN (AKA JEAN ESCUETA), ARTHUR BROCINER (AKA ARTUR BROCINER), KARL PERRIN, YVON RAOUL, EARLE PEACH, SANDRA ANG, REUBEN GARBANZO (AKA ROBERT ARBESS), GORDON CORNWALL, THOMAS CHAN, LAUREL DYKSTRA, RUDI LEIBIK (AKA RUTH LEIBIK), JOHN DOE, JANE DOE, and PERSONS UNKNOWN

(DEFENDANTS)

AND

BETWEEN:

REGINA

RESPONDENT

AND

ALEXA CLAIRE WOOD, ANNEKE ROTMEYER, ANNEMARIE MOBACH, CAROLYN (FRANKIE) McGEE, MEEKA MARSOLAIS, QUIN LAWRENCE, LOUISE LECLAIR, SHARON B. KRAVITZ, TAVIN KEMP, JUDY KALYAN, ROBERT ALLEN HENRICHSEN, BRANDON GOSNELL, AARON GOODBAUM, CORINA BYE, VICTOR BRICE, CADINE BOECHLER, JOEL MACKENZIE, PATRICIA WHITE and DIANA HARDACKER

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PART 1 – STATEMENT OF FACTS

Overview of the Appeal

1. Does peaceful public protest in violation of an injunction *always* undermine the authority of the Court, interfere with the Court, or bring the administration of justice into scorn? These questions feature centrally in this appeal as this Court defines when otherwise civil conduct becomes criminal.

2. In the spring and summer of 2018, concerned individuals protested the construction of the "Trans Mountain Pipeline" project – a pipeline that would carry bitumen from Alberta oilsands to ports in the City of Burnaby, Province of British Columbia. Each appellant acted contrary to the injunction issued by Mister Justice Affleck on 14 March 2018. The Crown, who assumed the prosecution from the civil plaintiff, did not allege that any of the appellants engaged in any violent behavior, resisted arrest, or demonstrated behavior to express contempt or scorn for the courts or the injunction. To the contrary, the protests and resulting arrests were peaceful.

3. From the appellants' first appearance in court until His Lordship convicted and sentenced each appellant, Justice Affleck stated that the appellants engaged in, not civil, but **criminal** contempt of court because they violated His Lordship's injunction in a "public way".

4. This court must decide whether, along with proving the elements of a civil contempt of court, evidence of publicity, is (1) a necessary and sufficient condition; (2) a necessary, but insufficient condition; (3) a sufficient, but unnecessary condition; or, (4) merely a factor, neither necessary nor sufficient; that the court may use in deciding whether someone has committed a criminal contempt of court.

5. Mister Justice Affleck believed that publicity is an entirely sufficient condition. The appellants submit that proof of publicity in this appeal is only a factor, not a necessary or sufficient condition to justify a conviction for criminal contempt of court as employed by

Justice Affleck. They say as well that the evidence in this appeal does not satisfy the proof necessary to justify conviction of any appellant for criminal contempt of court.

Chronology of the Contempt Proceedings

6. On 8 March 2018, Trans Mountain Pipeline ULC ("TMP") filed a Notice of Civil Claim in the Supreme Court of British Columbia seeking, among other remedies, an injunction.

Appeal Book Volume 1 ("AB 1"), p. 1, see esp. p. 7, para. 29

7. On 15 March 2018, TMP applied for an injunction to restrain the Defendants in this Action and persons unknown from obstructing access to TMP's facilities in the City of Burnaby, Province of British Columbia.

AB1, pp. 58, 61-75

8. Mister Justice Affleck ordered the injunction.

Ibid

9. Each of the appellants was arrested for breach of the injunction**.**

AB1, pp. 58-60, 78, 96, 115, 135, 154, 173, 191
209, 227, 245, 264, 282, 300, 318, 336, 362, 366

10. At an appearance before 11 April 2018, certain Appellants appeared before Justice Affleck. In that hearing, His Lordship advised that it appeared the conduct at issue amounted to "criminal contempt of court" and stated in open court:

> I'm going to tell you that it is important for everyone here who has been arrested by the police at the worksites where the injunction applied and continues to apply, if you've been arrested for a violation of the injunction, **you should know that the conduct involved from the evidence that I heard at the time that the injunction was granted, and subsequent evidence that I have read, that conduct is, as a matter of law, criminal contempt of court. It is not civil contempt. I know there's been some mention that it may be civil contempt. It is not, it is criminal contempt of court, and it is, for me, as the judge presiding, to make that finding on the facts that it is criminal contempt, if proven.**

> …
> Trials will begin with those who were first arrested. They'll begin by the dates of those arrests and they will continue until all trials are completed. The trials will be focused on a single issue, namely, did each of those **people who were arrested disobey the injunction in a manner which was publicly defiant of the order; that is, the public defiance is what makes this criminal contempt as opposed to civil contempt**.
>
> **[emphasis added]**

Transcript, 11 April 2018, p. 5, line 34 to p.6, line 1 and p.6, lines 36-44

11. By Notices of Application dated 18 April 2018, 20 April 2018, and 23 April 2018, the Crown:

a) assumed conduct of Trans Mountain Pipeline's application to find the contemnors guilty of the common law charges of **civil** contempt of court;

b) proposed a process by which respondents could receive summary trials; and,

c) proposed a process by which respondents could plead guilty;

d) described the sentences that the Crown would seek against those pled guilty to **criminal** contempt of court pleaded guilty before trial or were found guilty after a trial.

AB 1, pp. 26-35, pp.367-372; AB 2, pp. 588-605

and see also AB 2 pp. 609-625

12. Following the Crown taking over the matter of contempt, the process has become an odd hybrid between criminal and civil matters. The matter still has a civil court number, and there was never any criminal information, indictment, or ticket, laid against the appellants, let alone one that charges criminal contempt of court or an offence under s. 127 of the *Criminal Code* (Disobeying an Order of the Court).

13. They were never formally charged by the Crown with any crime, but rather face only TMP's contempt application, of which the Crown now prosecutes. The appellants were never arrested for or given a charging document alleging criminal contempt.

The Contempt Proceedings

14. The appellants applied for an opinion of the Court on the question of whether the appellants ought to be found guilty of criminal contempt of court.

AB 2, p.626, see esp. p.628, para. 3(a)

15. For the purpose of that application only, the appellants and the Crown agreed to a statement of facts, that between 17 March 2018 and 16 April 2018 (the "Relevant Period"):

a) each of the Applicants, on one of the days between the Relevant Period, impeded access to TMP's facilities, contrary to the Injunction;

b) on the day that an Applicant acted contrary to the Injunction, the RCMP arrested that Applicant, along with other individuals, whom the RCMP alleges to have acted contrary to the Injunction;

c) before arresting an Applicant, the RCMP advised the Applicant specifically and expressly that he or she may be arrested for "civil contempt of court" and given an opportunity to remove themselves from the area;

d) had the RCMP advised the Applicant that they were arresting the Applicant for "criminal contempt of court," each would have vacated the area and sought to ensure that he or she complied with the Injunction;

e) on arrest, the RCMP advised each Applicant that the RCMP was arresting that Applicant for "civil contempt of court";

f) after being advised of their reasons for arrest, the RCMP provided each Applicant an opportunity to consult legal counsel; and,

g) to be released from arrest, each Applicant signed a Promise to Appear asserting, among other matters, that each Applicant was arrested for “civil contempt of court”.

AB 2, pp. 629-630, para. 13

16. The court heard and dismissed the Appellants’ application on 29 May 2018 with oral reasons on May 30, 2018. Justice Affleck issued written reasons after convicting the Appellants.

AB 2, p. 740

17. Pursuant to this court’s suggestion in *R. v. Duong*, 2006 BCCA 325, in three separate court appearances after 29 May 2018, each of the Appellants consented to the filing of an Agreed Statement of Facts prepared by the Crown. Each pleaded “not guilty” to the offence of criminal contempt of court. None of them called any evidence in their defence. Based solely on the Agreed Statements of Fact, Justice Affleck found each of the Appellants guilty of criminal contempt of court and sentenced all but three to pay a $500 fine. At their election, the other three Appellants were ordered to serve a term of probation and to serve 25 hours of community work service.

Supra, para. 9
and AB 1, pp. 39-56 and
AB 2 pp. 706-737, 748-751

PART 2 – ERRORS IN JUDGMENT

18. The Trial Judge erred in law by

a) conflating the test of criminal contempt of court and allowing the Crown to prove *mens rea* solely on proof of publicity rather than on proof of a specific intent to depreciate the authority of the court, or a recklessness in relation to such;

b) additionally, inferentially making a finding that each of the Appellants possessed the specific intent of depreciating the authority of the court solely on the circumstantial evidence of publicity, and with no other evidence of intent led by the Crown, which evidence does not reasonably inexorably lead to the conclusion that the Appellants sought to depreciate the court's authority.

PART 3 – ARGUMENT

19. For generations, common law courts maintained two forms of contempt: civil and criminal. Intentionally violating a court order generally results in a civil contempt. Intentionally violating a court order in a way to cause public harm may result in criminal contempt. Traditionally, while a contempt committed in a broadly public way may constitute criminal contempt, depending on the circumstances, it has never been the common law that publicity alone justifies a finding of criminal contempt of court.

20. Justice Affleck erred when he convicted the Appellants of criminal, rather than civil, contempt of court solely because the appellants committed the contempt in a public way. This submission is supported by the following four points:

a) the *Criminal Code* of Canada guarantees that no conviction for criminal contempt of court may be entered if the conduct was not criminal contempt at common law in 1955;

b) the common law courts have, in 1955 and beyond, limited the application of their criminal contempt power to contempts causing public harm – not a contempt committed in public;

c) Justice Affleck misapplied the Supreme Court of Canada's decision in *United Nurses* in holding that the Crown need only prove publicity to transform a civil contempt into a criminal one; and finally,

d) the Crown led no evidence to prove any intent by the Appellants to undermine the court's authority, to impede the court, or to cast scorn on the court – the established approaches to define "public harm".

The *Criminal Code* preserved the need for public harm

21. Criminal contempt of Court is the only surviving common law criminal offence in Canada. More importantly, criminal contempt of court is defied only in the form it existed as of 11:59 p.m., March 31, 1955:

> **9** Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730
>
> **(a)** of an offence at common law,
>
> **(b)** of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or
>
> **(c)** of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,
>
> **but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.**
>
> **[emphasis added]**
>
> *Criminal Code*, R.S.C. 1985, c. C-46, s. 9

22. No court may expand the definition and scope of criminal contempt of court beyond its 1955 limits as this definition has been fixed by statute, and like any penal statute, must be interpreted to resolve any ambiguity in favour of those sought to be punished.

R. v. *McIntosh*, [1995] 1 SCR 686, at para. 27.

23. If a judge purports to convict an individual of a common law offence s. 9(a) of the *Code* is a complete answer, unless the matter falls into the exception created under 9(c). To convict someone of common law criminal contempt of court in a manner unknown in 1955 is inconsistent with s. 9(a).

Criminal Contempt of Court Requires Proof of Public Harm

24. Traditionally, and certainly in 1955, the distinction between criminal and civil contempt was notoriously difficult to precisely delineate. It did not depend on any single, easy to identify factor, such as whether the conduct occurred in public or not. As Miller explains, "… [T]he precise borderline between the two branches of contempt has bedevilled the law for many years".

C.J. Miller, *Contempt of Court,* (London: Elek Books, 1976), at p. 3

See also Lord Shawcross, *A Report by Justice: Contempt of Court,* (London: Stevens & Sons Ltd., 1959) at p. 4

25. While it was difficult to precisely delineate civil from criminal contempt, what was clear however was that the courts focused on whether the contempt tended to interfere with, or bring into scorn, the administration of justice:

> My Lords, although criminal contempts of court may take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice, either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is administering it. [emphasis added]

Attorney General v. Leveller Magazine Ltd., [1979] AC 440 at 449

26. The functional distinction focusing on harm to justice as a general concept was described in 1952 by Chief Justice McRuer of the Ontario High Court of Justice in the following fashion:

> A contempt may be either criminal contempt or civil contempt. The difference between contempts criminal and contempts civil seems to be that contempts which tend to bring the administration justice into scorn, or which tend to interfere with the due course of justice, are criminal in their nature, but a contempt in disregarding the orders of a judge of a civil court is not criminal in its nature. It is the obstruction or interference with the fair administration of justice with which the law of criminal contempt is concerned, and it has nothing to do with the personal feelings of the judges; it is not a power to be used for the vindication of the judge as a person, and no judge should allow his personal feelings to have any weight in the matter.
>
> There is no law which precisely and comprehensively defines contempt of court, nor are there landmarks pointing out the boundaries in all cases. Criminal contempt of court may be defined as any act done or any thing published tending to obstruct, impair or interfere with the fair administration of justice or to bring the court of judge into contempt of lower his authority; or any act done or writing published tending to obstruct or interfere with the due course of justice or lawful process of the courts. [Emphasis added].

J.C. McRuer, “Criminal Contempt of Court Procedure: A Protection to the Rights of the Individual” (1952) 30 Can. Bar Rev. 225 at 226.

27. In articulating the kind of contempts that would amount to criminal contempt, high appellate authorities have traditionally focused on acts such as:

a) the intimidation or corruption of jurors;

b) outrages on judges in court;

c) interference with persons attending court;

d) a defiant disobedience to a judge in court;

e) libels on judges or courts or their officers;

f) insolence to judges or comments in court on their decision;

g) interfering with witnesses or jurymen or officers of the court;

h) creating a disturbance in court;

i) jurors eating in court; and,

j) any publication which offends the dignity of the court or tends to prejudice the course of justice in any pending trial or litigation.

Scott v. *Scott*, [1913] A.C. 417
Lord Shawcross, A Report by Justice: Contempt of Court,
(London: Stevens & Sons Ltd., 1959) at p. 5
Borrie and Lowe's, The Law of Contempt,
(London: Butterworths, 1973) at p 369

28. The Supreme Court of Canada in *Poje v. British Columbia* affirmed this distinction between the two forms of contempt and affirmed the distinction of criminal contempts versus civil contempts as one focusing on whether the contempt tended to interfere with the administration of justice or brought scorn on the administration of justice.

Poje v. *Attorney General for British Columbia*, [1953] 1 SCR 516

29. Justice Kellock wrote for the majority Court in *Poje*, considering at length the distinction between civil and criminal contempt. He wrote:

> In my opinion the statement in Oswald, the 3rd edition, at page 36, correctly distinguishes between civil and criminal contempts:
>
> > And, generally, the distinction between contempts criminal and not criminal seems to be that contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of justice, are criminal in their nature; but that contempt in disregarding orders or judgments of a Civil Court, or in not doing something ordered to be done in a cause, is not criminal in its nature. In other words, where contempt involves a *public* injury or offence, it is criminal in its nature, and the proper remedy is committal—but where the contempt involves a private injury only it is not criminal in its nature.

30. In *Poje,* the distinction between criminal and civil contempt did not turn merely on the fact that the breach of the order occurred in public. Rather, Justice Kellock considered the entire *context* that the breach occurred - a clear implication of a sense of violence and intimidation. This sense of intimidation in opposing the enforcement of a court order elevated what may otherwise have been a mere civil matter into a public one justifying the court's use of its criminal contempt power.

31. Therefore, to remain consistent with the *Criminal Code*, courts cannot find a party guilty of criminal contempt of court unless the person applying for such a conviction – who may be, but is not necessarily, the Crown – proves beyond a reasonable doubt that the alleged contemnor caused, or intended to cause, public harm. This is otherwise referred to as interfering with the administration of justice or heaping scorn on the justice system.

United Nurses **Cannot Have Expanded Contempt Beyond its 1955 Limits**

32. The trial judge suggests in his reasons on the application that the judgment of McLachlin J. (as she then was) in *United Nurses of Alberta v. Alberta (Attorney General)* is an answer to the argument regarding the state of the law in 1955. However, *United Nurses* maintained the requirement that a person must intend to impede the

administration of justice or intend to heap scorn on the justice system to be convicted of criminal contempt of court.

United Nurses of Alberta v. *Alberta (Attorney General)*,
[1992] 1 S.C.R. 901 (*United Nurses*)

The majority preserved the need to prove public harm

33. McLachlin J. stated in *United Nurses* as follows:

> 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": B.C.G.E.U. v. British Columbia (Attorney General), supra, at p. 237, per Dickson C.J., Lamer, Wilson, La Forest, and L'Heureux Dubé JJ. concurring. 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.
>
> The trial judges on the motions giving rise to this appeal focused on these concepts of public disobedience and public defiance. Sinclair J., after quoting from Poje stated:
>
> ". . . the public disobedience of a court order is a criminal contempt because it involves a public challenge to the Court's authority." [Emphasis added.]
>
> O'Byrne J. identified the same element of public disobedience and public defiance:
>
> The disobedience of the order was public, indeed it was notorious. The union knew of the previous conviction and the penalty imposed. Their actions constitute an open defiance of the law with full knowledge of the consequences.
>
> 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. On the other hand, if the circumstances leave a reasonable doubt as to whether the breach was or should be expected to have this public quality, then the necessary mens rea would not be present and the accused would be acquitted, even if the matter in fact became public. While publicity is required for the offence**, a civil** contempt is not converted to a criminal contempt merely because it attracts publicity, as the union contends, but rather because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt
> [emphasis added]

Ibid at paras. 22-26, per McLachlin J. (as she then was)

34. Justice Affleck focused solely on the actus reus of the offence – that the appellants violated His Lordship's injunction in a public way. However, there is no discussion as to whether the appellants violated His Lordship's injunction with the intention of depreciating the authority of the court. In *United Nurses*, McLachlin J. refines the definition of criminal contempt of court so that this element is found in the *mens rea* of the offence rather than the *actus reus* and refines the test to be overcome any vagueness concerns under the *Charter*. Most importantly, McLachlin J. does not remove the historical requirement to justify a criminal contempt of court conviction that the contemnacious act depreciate the court's authority. McLachlin J. expressly states that while publicity may itself constitute a basis to find a criminal contempt, it is not a necessary, nor sufficient, factor.

Ibid, esp. para. 26

35. Justice Affleck's sole reliance on the "publicity" of the contempts and his reliance on Justice McLachlin's reasons in *United Nurses* was erroneous because Justice Affleck ignored other requirements defined by the majority reasons in *United Nurses* – reasons that preserve the historical and established requirements to prove public harm.

Alternatively, any expansion of the criminal contempt law was *per incuriam*

36. If Affleck J. interpreted *United Nurses* properly, and Justice McLachlin's decision should be read as redefining criminal contempt as a contempt committed in public, then Her Ladyship's decision should be read as *per incuriam*.

37. The principle issue in *United Nurses* was whether common law criminal contempt was consistent with the *Charter*. The facts of the case involved a nurses' strike, which violated directives forbidding such an action issued under the Alberta *Labour Relations Code.* The nurse's union was found to be in criminal contempt of court, and subject to substantial fines.

38. The appellant union argued against the conviction on *Charter* grounds. They argued both that criminal offences must be codified, and that the offence of common law criminal contempt was too vague to satisfy minimum *Charter* standards. McLachlin J. provided a clear definition of criminal contempt, focusing on whether a court order was disobeyed in a public way. In so doing, she defined the offence in a way that could withstand *Charter* scrutiny. But when doing so, she never addressed whether, by positing a new definition of the offence, she expanded the offence beyond its statutory limits set by s. 9 of the *Criminal Code*.

39. Notably, Justice Cory foreshadowed the danger that courts may interpret Justice McLachlin's reasons as expanding the definition of criminal contempt of court beyond its 1955 limits - in dissenting reasons joined by Lamer C.J.:

> My colleague McLachlin J. concludes that in essence all that is necessary to transform a defiance of a court order into criminal contempt is that the conduct occur in public. With respect, I cannot agree. To accept such a standard would be to ignore the basis of the distinction between criminal and civil contempt. It would replace a functional distinction derived from the separate interests which the law of civil and criminal contempt are designed to protect with an arbitrary distinction based on the public profile of a dispute which has resulted in the breach of a court order. I would certainly agree that the intentional defiance of a court order, which takes place in full public view, may well be a significant factor in leading a court to conclude that there had been an injury to the public interest. However, to make it the sole determining factor expands the scope of criminal contempt powers far

> beyond the limits necessary to achieve their end. Criminal contempt provides the court with an awesome power which may have devastating consequences. It should be exercised with the greatest restraint and caution. [Emphasis added].
>
> *Ibid*, per Cory J. at para. 73

40. *United Nurses* was therefore decided *per incuriam* on the point of whether s. 9 creates a statutory limit on the breadth of the common law. As explained by this Court in *United Brotherhood of Carpenters and Joiners of America, Locals 527, 1370, 1598, 1907 and 2397 v. Labour Relations Board*, 2006 BCCA 364, a Court may decline to follow a previous decision under the *per incuriam* rule when a decision is given "in ignorance or forgetfulness of some inconsistent statutory provision". The reasoning of the Supreme Court of Canada in *United Nurses* shows that it did not consider the effect of s. 9 on limiting its ability to expand common law criminal liability for contempt beyond its 1955 limits.

41. Justice Affleck committed the error foreshadowed in Justice Cory's critique of Justice McLachlin's reasons. Rather than noting Justice McLachlin's *mens rea* requirements, Justice Affleck elevated a civil contempt into a criminal one merely because the appellants violated the injunction in public. This was a misreading of Justice McLachlin's reasons and constituted an erroneous expansion of the court's criminal contempt powers outside the limits defined by s. 9 of the *Criminal Code*.

The Problem of Mere Publicity

42. The Appellants do not question that a court could rely on evidence of publicity as part of a broader inquiry into whether public injury occurred, and whether the *mens rea* element was established. However, proof of public defiance alone was not enough in 1955 to establish liability, and therefore cannot be enough today.

43. There could be many situations where activity in defiance of a Court order was privately, and has still injured the justice system. The advent of smartphones and social networking, for example, has allowed any event or interaction to be recorded and, in a matter of moments, broadcast to the world. As soon as a recording device is present, any

place can become “public”. That does not mean that any defiance of any court order where a recording device might be present functionally does injury to the justice system such that the act becomes fundamentally criminal rather than civil in nature.

44. On the other hand, there can be many instances where ostensibly “private” conduct is done with the intention of causing injury to the justice system, such as a private act of witness intimidation, or a refusal to abide by an order of the Court out of a “Freeman on the Land” philosophy focused on denying and depreciating the Court’s authority.

45. Publicity might be an indicia of harm to the justice system, but on its own is not a determinative factor in deciding whether an act has functionally caused injury to the justice system. Rather, just as in 1955, the Crown always must prove beyond a reasonable doubt that the appellants intended to cause functional injury to the justice system.

46. Furthermore, ensuring that the 1955 functional distinction between criminal and civil contempt is maintained is consistent with *Charter* values. *Charter* values must animate interpretation of the common law. Contempt proceedings in respect of political protest engage core s. 2(b) concerns, and therefore ensuring that the common law is interpreted in a manner consistent with the strong protections such speech deserves is necessary. To put it bluntly, we cannot in 2018 have less protection against the criminalization of political speech than we had in 1955.

Trial Judge Focused on Whether Harm was Done in Public, Not To the Public

47. In the case before this Court, the trial judge erred in law by focusing **not** on whether damage had been done **to the public**, but rather exclusively with whether the injunction His Lordship issued had been **defied in public**.

48. Despite the facts that:

a. what was before him were civil proceedings commenced by TMP to allow it to enjoy the benefit of its court order; and,

b. that the appellants were, like all arrestees, threatened with and then arrested for civil contempt

The trial judge, on his own volition, and before hearing any evidence, decided that the alleged contempt was criminal. He made this determination solely on the understanding that the injunction had been defied “in a public way”.

49. The trial judge was clear in explaining his view that the distinction between criminal and civil contempt was straightforward and turned solely on whether the act in question occurred in public. Taking such a simple approach, an approach unknown in 1955, was an error of law.

50. At this point, early in the proceedings, the trial judge could not have considered whether the Crown had proven functional harm to the justice system; he had heard no evidence at all. He evidently did not entertain whether a remedial solution under the law of civil contempt aimed only at protecting TMP’s rights under the injunction was appropriate. Instead, and in the absence of charges brought under the *Criminal Code,* he decided on his own understanding of the facts of the matter to criminalize a civil proceeding.

51. Later, in his reasons dismissing the application, the trial judge again repeated his view that the delineation between criminal and civil contempt simply turned on whether there was a breach of a court order that occurred in public. He explained at paragraph 5 of his reasons:

> I informed the alleged contemnors as they came before me that if the alleged defiance of the injunction was proven to have been conducted in a public manner, their conduct constituted the offence of criminal contempt of court.

52. He found that the authority of the court brought into contempt in each case, and entered convictions for criminal contempt, solely on a statement in the agreed statement of fact that the actions of the Appellants “defied the Order in a public way”.

53. This is a significantly broader statement of liability under common law criminal contempt than existed in 1955 and inconsistent with a proper reading of *United Nurses*.

No Proof of Public Harm

54. Not only did Justice Affleck err in misapplying the test for criminal contempt of court, the trial judge erred on relying only on circumstantial evidence to find essential elements of the offence of criminal contempt of court had been met when other inferences were available to it.

55. The Crown may rely on circumstantial evidence to prove an essential element of a criminal case, it has not discharged its burden of proof beyond a reasonable doubt on a circumstantial case if there are other inferences that may be drawn from the facts proven.

R. v. *Griffin*, 2009 SCC 28, at para. 33

56. In entering convictions, the Court relied only on the agreed fact that the defiance of the injunction occurred in public. As explained, public defiance alone cannot be the only precondition to the criminalization of what is otherwise a civil matter. Rather, it is at most circumstantial evidence of the *actus reus* and *mens rea* of the offence. That defiance occurred in public may be a circumstance that could help support an inference of a public injury, and an intention to cause such injury, but other inferences can be drawn from such a fact as well.

57. There are many innocent reasons why a person may commit a contempt in public that do not inexorably lead to a conclusion that a contemnor sought to undermine or depreciate the court's authority. In many cases civil disobedience causes no injury to the justice system, but rather serves only to emphasize the Court's authority.

58. Those involved in civil disobedience do so often with the expectation that they may be punished, and do not question the authority of the Court to mete out that punishment. They engage in disobedience fully expecting that they will pay a cost for doing so, whether it include arrest, fine, or even imprisonment. Disobedience taken in such a spirit does not depreciate the authority of the court. Rather, it is based on an underlying affirmation of the court's authority.

See esp. Statement of Cadine Boechler in Sentencing,
Transcript, p. 17 line 37 to p. 18, line 30

59. Indeed, it is the expectation of punishment that can make an act of civil disobedience so profound. The action is made meaningful *precisely by* the acceptance of whatever consequence permitted by law that may be imposed upon the protestor. The act of protest becomes a statement that some cause or value, such as indigenous rights, environmental protection, or human health, is of sufficient importance that it is worth facing whatever consequence may follow, as articulated by Martin Luther King Jr.:

> In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, **and with a willingness to accept the penalty**. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, **is in reality expressing the highest respect for law**.

16 April 1963, Letter from a Birmingham Jail as cited in
D.B. Oppenheimer, "Martin Luther King, Walker v. City of Birmingham, and the Letter from Birmingham Jail", 26 U.C. Davis L. Rev. 791 1992-1993

60. There was not enough evidence led by the Crown to determine if this was the type of disobedience that is criminal in nature, causing harm to the justice system, or simply civil, depriving a party of the fruit of its judgment. As the circumstantial evidence was not consistent only with the inference that the essential elements had been proven beyond a reasonable doubt, it was an error of law to enter a conviction.

Conclusion

61. The trial judge committed errors of law by failing to give effect to s. 9 of the *Criminal Code,* and then by convicting each of them on ambiguous circumstantial evidence alone. These errors justify the intervention of this Court. The court should set aside the

appellants' convictions, acquit each of them, and restore the fines each of them have paid.

PART 4 – NATURE OF ORDERS SOUGHT

62. The Appellants respectfully request this Court to grant the following orders:

i. To set aside the convictions of Cadine Boechler, Victor Brice, Corina Bye, Rob Dramer, Aaron Goodbaum, Brandon Gosnell, Dianna Hardacker, Robert Allen Henrichson, Judy Kalyan, Tavin Kemp, Louise Leclair, Quin Laurence, Meeka Marsolais, Anneke Rotmeyer, Anne-Marie Mobach, Alexa Wood, Frankie McGee, Patricia White;

ii. To acquit each of the Appellants of criminal contempt of court; and,

iii. An order to return monies by each of the Appellants as fines to each Appellant.

iv. to set aside the convictions of Cadine Boechler, Victor Brice, Corina Bye, Rob Dramer, Aaron Goodbaum, Brandon Gosnell, Dianna Hardacker, Robert Allen Henrichson, Judy Kalyan, Tavin Kemp, Louise Leclair, Quin Laurence, Meeka Marsolais, Anneke Rotmeyer, Anne-Marie Mobach, Alexa Wood, Frankie McGee, Patricia White;

v. to acquit each of the Appellants of criminal contempt of court; and,

vi. an order to return monies by each of the Appellants as fines to each Appellant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver this 22nd day of February 2019.

_____	_____
Chilwin Cheng	Oliver Pulleyblank
Counsel for the Appellants	Counsel for the Appellants

APPENDIX

Criminal Code

R.S.C., 1985, c. C-46

Criminal offences to be under law of Canada

9 Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730

- **(a)** of an offence at common law,
- **(b)** of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or
- **(c)** of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.

Disobeying order of court

127 **(1)** Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of

- **(a)** an indictable offence and liable to imprisonment for a term not exceeding two years; or
- **(b)** an offence punishable on summary conviction.

Attorney General of Canada may act

(2) Where the order referred to in subsection (1) was made in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, any proceedings in respect of a contravention of or conspiracy to contravene that order may be instituted and conducted in like manner.

LIST OF AUTHORITIES

Cases **Para(s)**

Attorney General v. Leveller Magazine Ltd., [1979] AC 440 at 449 25
Poje v. Attorney General for British Columbia, [1953] 1 SCR 516 ..... 28, 29, 30
R. v. Griffin, 2009 SCC 28, at para. 33 55
R. v. McIntosh, [1995] 1 SCR 686, at para. 27. 22
Scott v. Scott, [1913] A.C. 417 27
United Brotherhood of Carpenters and Joiners of America, Locals 527, 1370, 1598, 1907 and 2397 v. Labour Relations Board, 2006 BCCA 364 40
United Nurses of Alberta v. Alberta (Attorney General), [1992] 1 S.C.R. 901 ..... 20, 32-37, 40, 53

Enactments

Criminal Code, R.S.C. 1985, c. C-46, ss. 9, 127 .....12, 20, 21, 31, 38, 41, 50, 61

Treatises

16 April 1963, Letter from a Birmingham Jail 59
Borrie and Lowe's,The Law of Contempt, (London: Butterworths, 1973) at p 369 27
C.J. Miller, *Contempt of Court,* (London: Elek Books, 1976), at p. 3 24
J.C. McRuer, "Criminal Contempt of Court Procedure: A Protection to the Rights of the Individual" (1952) 30 Can. Bar Rev. 225 at 226 26
Lord Shawcross, *A Report by Justice: Contempt of Court,* (London: Stevens & Sons Ltd., 1959) at p. 4 ..... 24, 27