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Casting Light into The Shadows: Finding Civil Contempt in the Envacon Decision

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Case Commented On: *Envacon Inc v 829693 Alberta Ltd*, 2018 ABCA 313 (*Envacon*)

Case law and common sense tells us there must be a bright line drawn between civil and criminal matters. From standard of proof to sanctioning, civil justice diverges significantly from criminal justice. Despite this great divide, there are occasions when the two areas meet. When that occurs, the law creates something singular, defying categorization. Civil contempt is one such area. In the recent Alberta Court of Appeal decision in *Envacon* the Court grapples with these distinctions by emphasizing the criminal law character of civil contempt. The question raised by this decision is whether civil contempt's criminal law character should dominate the proper interpretation of this unique application of law.

First, a civil contempt primer is in order. Civil contempt arises from English common law, although it can now be grounded in statute. It is a tool used by the civil courts to enforce court orders and to maintain the integrity of court proceedings. To be in contempt in the eyes of the law is to be in disobedience of that self-same law. Contemptuous behaviour cannot be countenanced and must be severely punished. A loss of liberty can be the result. A loss of legal rights is inevitable. Yet the kinds of behaviour captured under the rubric of civil contempt is varied. For instance, civil contempt proceedings can occur in the context of a self-represented suitor failing to attend case management meetings (*Pintea v Johns*, 2017 SCC 23 where the Supreme Court vacated the declaration of contempt) or when lawyers fail to comply with a *Mareva* injunction by disposing of assets as in *Carey v Laiken*, 2015 SCC 17 (*Carey*) or when First Nations engage in a peaceful blockade contrary to court injunctions (*Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 2008 ONCA 534). Civil contempt covers a wide net. It can arise from family matters, labour disputes, and environmental rights. An order of the court is one thread that binds them all.

Although a common law tool, it is found statutorily as well. It is in the statutory powers where civil and criminal law straddle the divide between them. In the *Criminal Code RSC* 1985, c C-46, for instance, section 127 creates a blanket offence for when any person, "without lawful excuse," "disobeys" a court order, other than an order for monetary compensation. As worded, this offence can apply for non-compliance of a civil court order. Even so, this offence, although broadly engaged, is an offence of last resort. It cannot be utilized if there is another recourse, "expressly provided by law," available.

There are indeed other statutory recourses to the criminal law. Turning from the *Criminal Code* to the *Alberta Rules of Court* AR 124/2010, Part Ten, Division 4, provides a mechanism for non-

compliance with rules of court and interference with the administration of justice under Rule 10.49. Civil contempt of court is found under Rules 10.51 to 10.53. These Rules specify the entire civil contempt regime including the process used to bring the alleged contemnor before the court (Order to Appear pursuant to Form 47, which can double as an arrest warrant), the mechanism for finding a person in contempt (Rule 10.52), and the possible punishment such as imprisonment "until the person has purged the person's contempt" (Rule 10.53). Rule 10.52(3) provides criteria for declaring a person in civil contempt with the caveat that no such declaration will ensue should the person have a "reasonable excuse." Similar powers are found for provincial court matters under s. 9.61 of the *Provincial Court Act* RSA 2000, c P-31. There, however, no such contempt declaration is made if the person furnishes an "adequate excuse."

In the lower court decision in *Envacon* (2017 ABQB 623), Associate Chief Justice Rooke declared the Appellant/Defendant 829693 Alberta Ltd in civil contempt pursuant to the criteria enumerated under Rule 10.52(3) of the *Alberta Rules of Court*. The contempt related to a failure of 829693 Alberta Ltd to produce financial statements in accordance with three production orders issued by the case management justice. To assist in interpreting the requirements under the Rules, the Associate Chief Justice applied Alberta case law arriving at four key elements of a civil contempt declaration (*Envacon* QB at para 17). First, was the requirement for court orders to produce the statements. Second, was the notice requirement to 829693 Alberta Ltd of those orders. Third, was proof that the failure to produce was as a result of "an intentional act of a failure to act" on the order. Fourth, was the requirement, on a balance of probabilities, that the failure to act was performed without "adequate" excuse.

As all elements were established, a contempt finding was declared. The remedy or more properly the punishment for the contempt was to strike the pleadings of 829693 Alberta Ltd should they continue to be in non-compliance with the orders. Solicitor and client costs for Envacon were also granted (*Envacon* QB at para 31). On appeal, the Court of Appeal found the first and second production orders were not "clear orders" and vacated the contempt relating to them (at para 68). The third production order, however, was clear and unequivocal requiring 829693 Alberta Ltd to produce the statements (at paras 14, 29 and 67). This left two real issues on appeal: whether 829693 Alberta Ltd failed to comply with the order and if so, whether 829693 Alberta Ltd had a "reasonable excuse" for that non-compliance. Ultimately, the Court of Appeal found 829693 Alberta Ltd did fail to comply with the order and there was "ample support" for the conclusion the corporation had no reasonable excuse (para 58). On the final issue of the remedy, the appellate court varied the penalty by removing the potential striking of 829693 Alberta Ltd pleadings and granting Envacon "costs on a solicitor and client basis" not on "solicitor and own client costs" (at paras 67 and 69. See also *Twinn v Twinn*, 2017 ABCA 419 for a discussion of the differences between the two forms of costs at paras 23–28).

The issues arising from this appeal are inter-related. A failure to comply may be connected to a reasonable excuse for doing so. A remedy is reflective of the context of the contempt and the corrective influence such a remedy may have. In other words, is the contempt power used to punish or is it used to coerce compliance? Is the court maintaining integrity of its processes or is it using the sanction, as in criminal law, to show the disapprobation attached to the contemptuous conduct? Here again we see that bright-line division between criminal and civil matter.

It is this bright-line which previous case law on civil contempt attempted to illuminate. In the 2015 *Carey* decision, Justice Cromwell at paragraph 31, commences discussion of the elements of civil contempt by comparing civil contempt with criminal contempt. According to the Court, criminal contempt required an element of "public defiance," while civil contempt was primarily "coercive rather than punitive." The *Carey* decision rightly demarcates criminal and civil contempt by invoking the traditional dividing line between the two areas of law. This public nature of criminal law versus the private matter of civil suits lends a contextual framework to the law of civil contempt as delineated in *Carey* and in *Envacon*. Although residing on two sides of the same coin, there is still a public aspect to civil contempt. The disobedience of a civil court order can add time and expense to a civil case, reducing access to the courts and impacting the administration of justice. In the era of *Hyrniak v Mauldin*, 2014 SCC 7 and *Jordan*, 2016 SCC 27, where civil and criminal justice is at risk due to a complaisance attitude toward trial fairness, "public defiance" has a new and more robust meaning. Further, in certain circumstances, there can be a punitive dimension to civil contempt to highlight the public interest need for deterrence and denunciation. The higher standard of proof also recognizes the public dimension of civil contempt. In such a finding, the public is not indifferent but is engaged through the lens of public interest. The *Envacon* decision recognizes the overlapping aspects of contempt by requiring judges to impose remedies consistent with the specific objective of the original order. 829693 Alberta Ltd was required to produce financial statements as part of case management in order to "permit proper adjudication of the claims" (at para 67). The failure requires a coercive response not punishment.

The public versus private distinction not only impacts the remedy but also the interpretation of civil contempt requirements. The failure to comply is not an intentional or deliberate disobedience of the order itself. Rather, it is an intentional act to fail to act in accordance with that order. The difference is subtle yet essential. In the first instance, requiring intent to disobey the order, the fault requirement is high, consistent with the high level of subjective *mens rea* typically required for murder (intent to kill) or robbery (intent to steal). Such a high level of intention or, as Justice Cromwell in *Carey* characterized it, contumacious intent, would "open the door" (*Carey* at para 42) to unjustifiable arguments against a declaration of contempt. The focus would no longer be on the act that creates the disobedience. Instead, the contemnor could argue there was no intention to disobey as they were mistaken as to the import of the order or they misinterpreted it, despite the order's clarity. Such a situation would be incongruous. As suggested by Justice Cromwell, as he then was on the Nova Scotia Court of Appeal in *TG Industries Ltd. v. Williams*, 2001 NSCA 105 (*TG Industries*), it would provide a mistake of law defence for civil contempt when such a defence would be unavailable for a murder (*TG Industries* at para 11). Thus, the criminal and civil law analogy only goes so far. Civil contempt is firmly not criminal and the application of criminal *mens rea* principles have no place in the determination.

In the case at hand, 829693 Alberta Ltd did not produce the financial statements (*Envacon* QB at para 17). There was some argument that the statements were not in 829693 Alberta Ltd's power to produce as they were lodged with the CRA and the IRS. 829693 Alberta Ltd wrote to these organizations and provided the production order with no success. The requests made, however, were not in proper format (*Envacon* ABCA at para 23). Finally, the CRA sent documents, which were not complete. 829693 Alberta Ltd did not contact the CRA for explanation or with a further

request (*Envacon* ABCA at para 26). Efforts with the IRS were no better (*Envacon* ABCA at para 27). The court of appeal agreed with Rooke ACJ that 829693 Alberta Ltd did not act with "a sufficient degree of due diligence" in attempting to comply (*Envacon* ABCA at para 28). 829693 Alberta Ltd thereby intentionally failed to produce as required by the order.

This finding, although logical, does impact the role of "reasonable excuse" in the contempt finding. If a finding of intentionally failing to act involves a due diligence discussion, then what kind of discussion is needed to determine if the person was acting without reasonable excuse? Is due diligence different than reasonable excuse and if so how? *Carey* is silent on this. Rooke ACJ considered both issues separately. In paragraphs 19 to 21 of his decision, Rooke ACJ found an intentional failure to produce based on a number of factors including that the order requirements were clear, that there was in fact no production of those statements, and that requests were "inadequately made" on the basis 829693 Alberta Ltd was "going through the motions," the request lacked specificity and there was no "follow up." (*Envacon* QB at para 21). Although "due diligence" is a loose summary of Rooke ACJ's finding on that aspect, the discussion of "adequate excuse" ran much deeper. It is in that review, where the court is clearly going beyond the discussion points on 829693 Alberta Ltd's failure to act. For instance, at paragraph 22, Rooke ACJ finds 829693 Alberta Ltd to have obstructed justice in the sense that their efforts to produce the statements from the CRA and the IRS was not the point. The point was their ability to produce by other means such as recreating the documents.

The Court of Appeal considered how the ruling in *Carey* on the intent required for civil contempt impacted the reasonable or adequate excuse requirement. *Carey*, in their view, did not change this requirement. Admittedly, Justice Cromwell in *Carey* did not directly discuss the impact of the reasonable excuse requirement. He did find the contemnor "was in contempt and his obligations to his client did not justify or excuse" the failure to comply with the *Mareva* injunction (*Carey* at para 3). However, on a review of the *TG Industries* decision, written by Justice Cromwell when he was on the Nova Scotia Court of Appeal, he suggests such an analysis may be pertinent to the discretion wielded by the judge after a finding of contempt (comments on the due diligence defence at paras 31 and 32). This is further supported by Justice Cromwell's comments in *Carey* on the three elements of civil contempt, none of which include contemplation of an excuse, reasonable or otherwise (*Carey* at para 32). This omission may be explained by the context of *Carey*, which applies Rule 60.11 of the Ontario *Rules of Procedure* RRO 1990, Reg 194. That rule sets out contempt procedure but offers no criteria for a finding of contempt except that it may be found when it is "just" to do so. This is in contrast with the Alberta Rules that have clear requirements including a reasonable excuse determination.

The Court of Appeal does not, however, focus on these statutory differences but on the criminal/civil law differences. In their view, the discussion in *Carey* was about the level of intent needed for contempt, a classic criminal *mens rea* or fault element issue (at para 36). This did not, in their view, impact the reasonable excuse requirement, which, in the case of contempt, could impact *actus reus* or conduct (at para 37). By applying criminal law nomenclature such as *actus reus* and *mens rea*, the court is drawing an analogy between civil contempt and a criminal offence. Yet, the classic criminal law definition of an excuse given by Justice Dickson, as he then was, in *Perka v The Queen*, [1984] 2 SCR 232, 1984 CanLII 23 (SCC), suggests otherwise. An excuse, according to Justice Dickson, applies after the *mens rea* and *actus reus* are proven as

it "concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor" (*Perka* at p 246). A successful excuse defence will result in an acquittal. The problem in *Envacon* is not whether the court properly identified whether the excuse pertains to *mens rea* or *actus reus*. The true problem with the decision lies in the use of the criminal law analogy in the first place. Civil contempt is not a criminal offence. The overlay of criminal law concepts onto civil contempt simply does not work.

This *ab initio* error leads the court to further suggestive reasoning. At paragraph 37 of *Envacon*, the court explains how a reasonable excuse can relate to the *actus reus*,

Particularly in the case of mandatory orders, an alleged contemnor may argue that his or her failure to do what the court required was not intentional. In these cases, a finding of contempt will turn on whether the alleged contemnor did enough to bring about the result the court order required. This enquiry is distinct from the question of mens rea or contumacious intent, which was at issue in Carey. Thus, not all "reasonable excuses" encompassed by rule 10.52(3) are excluded by the Supreme Court's rejection of contumacious intent as an element of contempt.

The inquiry of whether the alleged contemnor "did enough" seems to be connected to whether they intentionally failed to do the act as required by the order, which Rooke ACJ did contemplate during discussion under paragraphs 19 to 21 of his judgment, separate from the "adequate excuse" discussion following those findings. The court of appeal appears to be conflating the finding of a failure with the reasonable excuse requirement. The reference, in paragraph 38 and 39 to Justice Cromwell's position in *Carey*, that due diligence may be considered after a finding of contempt, hardly supports the court of appeal's reasoning. As indicated earlier in this case commentary, Justice Cromwell's position seems to weaken the applicability of reasonable excuse, not strengthen it.

The court of appeal, having found reasonable excuse as an element of civil contempt, discusses the burden and standard of proof for that element. It should be recalled that Rooke ACJ in assessing "adequate excuse" relied on previous Alberta case law that "once the *actus reus* of contempt is proven beyond a reasonable doubt, the contemnor may respond, on a balance of probabilities, with evidence and argument intended to try to demonstrate justification" (*Envacon* QB at para 23 and see *FIC Real Estate Fund Ltd v Lennie*, 2014 ABQB 105). Here again, *Carey* provides little assistance other than reiterating the ultimate standard of proof as proof beyond a reasonable doubt. There is no due diligence defence specifically contemplated in *Carey* and thus no need to suggest a different burden for the reasonable excuse requirement.

It is also difficult to have a discussion on the burden of proof issue considering the clear message from *Carey* that civil contempt should be distinguished from criminal contempt. As such, civil contempt is unique and should not be viewed through the criminal law lens. There is no other civil construct requiring this high criminal standard. However, this high standard is required, not because civil contempt is criminal law, but because of the potential loss of liberty. It is the

criminal law-like sanction that attracts the high standard not the criminal quality of civil contempt. The court of appeal by applying a criminal template to civil contempt obscures the real issues in the *Envacon* case.

In fact, the court of appeal had two viable options. The first option would be to find that reasonable excuse is subsumed by the *Carey* civil contempt elements and is not a separate decision-making requirement. The second option would be more consistent with *Carey* and *TG Industries* by finding reasonable excuse applies after the finding of contempt. Thus, reasonable excuse would have a gatekeeper discretionary function. Acting as a concession to human or corporate frailty, so to speak. Instead, the court of appeal entered into a regulatory offence type of discussion on burdens of proof and whether the burden shifted on the alleged contemnor to satisfy the court they had a reasonable excuse on a balance of probabilities. The court of appeal preferred to find that neither the legal or evidential burden shifted but that, depending on the circumstances, a *prima facie* case may require the contemnor to proffer some evidence of an excuse (para 48). This preference is no doubt resulting from the uncomfortable fit a shifting of the burden would be considering civil contempt is not prosecuted and is a judge-led determination. Nevertheless, making evidence of an excuse a tactical or strategic requirement makes good sense, but it still muddles the issues. The court of appeal in many ways creates something out of nothing and lends a criminal law nostalgia to a uniquely civil common law tool.

Civil contempt proceedings are not unique in Alberta. According to a CanLII database search, Alberta has 384 case decisions on civil contempt, second only to Ontario with 393 decisions. Civil contempt is an important expression of the court's obligation to protect the integrity of the administration of justice. It is a powerful tool, which must be wielded carefully and sparingly considering the potential dire consequences. The stakes of a civil contempt finding are incredibly high as loss of liberty is possible and a loss of access to justice is inevitable. In an age where the spotlight of public confidence centres on the courts, civil contempt deserves clarity. The decision in *Envacon* may have cast more shadows on an area of law which appears to be cast in a light of its own.

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