

## I Fought the Law: Civil Disobedience and the Law in Canada

By Jennifer Koshan

### Cases commented on:

*Calgary (City) v Bullock (Occupy Calgary)*, [2011 ABQB 764](#);  
*Batty v City of Toronto*, [2011 ONSC 6862](#); *R v SA*, [2011 ABPC 269](#); *R v Charlebois*, [2011 ABPC 238](#), etc.

On February 1, 2012, I participated in a public forum entitled “Civil Disobedience: Concept, Law and Practice” organized by the [Sheldon Chumir Foundation for Ethics in Leadership](#). This post is an elaboration of my remarks at the forum on how civil disobedience is handled under Canadian law. I will review some recent cases on civil disobedience, including the Occupy litigation, to examine issues such as whether civil disobedience may be protected under the *Charter*, and if not, what sorts of sanctions protestors might expect to face.

The Occupy movement is a useful illustration of how civil disobedience intersects with the law. The initial reaction of many people to the occupations across Canada and in the U.S. was: “they’re breaking the law, so they have to be forced to leave.” It is true that by definition, civil disobedience implies a breach of the law. According to Amir Attaran: “The definitive feature of civil disobedience is protest coupled with the wilful violation of law... [I]n a protest involving civil disobedience ... protesters are willing indeed, ideologically committed to be criminally stigmatized in order to make a political statement.” (See “Mandamus in the enforcement of the criminal law: Ending the anti-protest injunction habit--Issues arising from *MacMillan Bloedel v. Simpson*” (1999) 33 UBC Law Rev 181 at 183).

However, it is possible to conceive of two kinds of civil disobedience. First, given that the law of Canada includes constitutionally protected rights and freedoms (i.e. the *Charter*), not every act of civil disobedience may be ultimately illegal. This is because section 52 of the *Constitution Act, 1982* provides that the constitution is the supreme law of Canada, and laws that are inconsistent with the constitution are of no force or effect. In this sense, protest activities that are protected under the *Charter* may not really count as civil disobedience at all, although we still often think of and refer to them that way. The second form of civil disobedience would be those activities which are not protected by the *Charter* and are therefore illegal and subject to either civil or criminal sanctions, which is really the true form of civil disobedience. Even though they are not protected by the *Charter* and are subject to sanction, these actions may still draw attention to particular inequities in law and policy and create impetus for legal change.

As an example, consider a city bylaw preventing tents and overnight stays in a park. Calgary’s [Parks and Pathways Bylaw](#), Bylaw Number 20M2003, provides in section 4 that parks are closed overnight (with some exceptions) and section 9 provides that no one shall camp or erect a tent or

other structure in a park unless allowed to do so by a permit. Persons tenting in the park overnight would seem to be breaking the law and, if they did so deliberately to protest the law, they would be engaged in civil disobedience. Committing a breach of the law as a form of civil disobedience is not in itself a defence (see e.g. *R v Krawczyk*, [2007 BCSC 2011](#) at para 24), but if the underlying law violates one of the rights or freedoms protected by the *Charter* that may constitute a defence. For example, the Bylaw may violate the freedom of expression, peaceful assembly or association of persons occupying a park, all protected under section 2 of the *Charter*. Alternatively, in the case of homeless persons who have inadequate shelter, the bylaw may violate their rights to life, liberty and security of the person, protected under section 7 of the *Charter*.

However, rights and freedoms are not absolute in Canadian law, as section 1 of the *Charter* allows governments to place reasonable limits on rights and freedoms that are demonstrably justified in a free and democratic society. To return to the example, the interests of other users of public parks will be taken into account in deciding whether the *Parks and Pathways Bylaw* can be justified as a reasonable limit on the rights and freedoms of park dwellers. If the Bylaw is justified, then there is no defence available, and any previous or ongoing violations of the law will be subject to sanctions.

These issues are normally resolved by the courts, and can arise in various ways. First, someone engaged in civil disobedience who is charged with breaching a law can challenge the constitutionality of that law under the *Charter*. For example, this occurred in the case of *R v Kapp*, [2008 SCC 41](#). In that case, a 24 hour salmon fishing priority on the Fraser River had been granted to the Musqueam Nation as part of the federal government's Aboriginal Fishing Strategy (AFS); other fishers deliberately engaged in a "protest fishery" during that 24 hour period and were charged with violating fisheries regulations. They then argued that the AFS violated their equality rights under section 15(1) of the *Charter*. Their argument was ultimately unsuccessful, as the Supreme Court found that the AFS was an ameliorative program protected by section 15(2) of the *Charter*, so this and any future acts of protest fishing would be subject to sanctions.

A more local example is *R v Pawlowski*, where Artur Pawlowski has been repeatedly charged with violating Calgary bylaws effectively prohibiting his street preaching activities, and has then challenged the bylaws as contrary to his freedom of religion and expression under the *Charter*. The case is currently before the Alberta Court of Appeal (see [2011 ABCA 267](#) and my blog on the case [here](#)).

This mode of challenging the law was called into question by Justice Frans Slatter in *R v Lefthand*, where he queried the propriety of bringing collateral challenges as a way of asserting Aboriginal rights (see [2007 ABCA 206](#) at para 19 et seq). However, in a subsequent case another panel of the Alberta Court of Appeal confirmed that collateral challenges are an accepted way of challenging the constitutionality of laws (see *R v Caron*, [2009 ABCA 34](#) (at para 21)).

This way of challenging what would otherwise amount to civil disobedience is probably the most accessible, as arguments about constitutionality are raised in the context of proceedings that have already been mounted by the government in response to a breach of the law. At the same time, a recent Alberta case suggests that challengers should not be forced into this position. In *R v SA*, [2011 ABPC 269](#), the court was faced with a young person who was subject to a ban on using public transit issued under the *Trespass to Premises Act*, RSA 2000, c. T-7, and the Act itself did not provide a means of challenging the ban by appeal or other procedures. According to Judge D. Dalton, "it is unconscionable to effectively coerce someone to engage in civil disobedience

and place herself at risk in proceedings such as these in order to access a forum to have the merits of a ban to public property reviewed.” (at para 170). The ban on public transit was found to be a violation of the young person’s liberty under section 7 of the *Charter*, and the absolute nature of the ban with no means to challenge it was contrary to the principles of fundamental justice. The case is currently under appeal.

The second way that arguments about constitutionality can be raised is when the government or a private party applies to the courts for an injunction to halt a protest or other form of civil disobedience. Arguments about the rights and freedoms of the protestors can then be introduced in an attempt to defeat the injunction application or if subsequent contempt proceedings are mounted by the government. The Occupy Calgary case is an example of this approach (see *Calgary (City) v Bullock (Occupy Calgary)*, [2011 ABQB 764](#)). In November 2011, the City of Calgary applied for an injunction to enjoin the occupiers from continuing to breach sections 4 and 9 of the *Parks and Pathways Bylaw*, and for an order that they immediately remove all tents, structures and other material from Olympic Plaza. Chief Justice Neil Wittman noted that injunctions are normally granted where there has been “open and continuous disregard” of the law and its sanctions that is unlikely to stop without intervention of the court (at para 29, citing *Alberta (Attorney General) v Plantation Indoor Plants Ltd.* (1982), 34 AR 348 (CA)). However, a court may deny an injunction where there are exceptional circumstances. If the injunction were to breach the occupiers’ *Charter* rights, that would amount to circumstances that would preclude granting the injunction (at para 30). Applying this approach, Wittman, C.J. found that the Bylaw violated the occupiers’ freedom of expression - in fact this was conceded by the City. However, the Bylaw was seen as a reasonable limit on the occupiers’ *Charter* rights, particularly because the limit was not absolute – the occupiers could apply for a permit, and occupy the park during the daytime without structures. The City’s injunction application was therefore granted, and the Court noted that refusal to comply would likely result in civil remedies for contempt of court (at para 50). In closing, Chief Justice Wittman delivered the following commentary on civil disobedience and the government’s response to it (at para 51):

Many of the values and rights we cherish today have been the subject of debate and fierce protest in years past. Society does not easily change for the better, and it is often necessary for individuals with strong views to take extraordinary steps to make their voices heard. The Occupy Calgary group has been, if not entirely organized, certainly passionate and peaceful. The City of Calgary has also exercised restraint in the manner in which it has dealt with the group, up to and including the way in which it acted in the conduct of this proceeding and the remedy sought. I hope that in the days that follow the granting of this application, both sides continue to act in a measured, conscientious and peaceful manner.

Another example in this category is *R v Krawczyk*, [2007 BCSC 2011](#), where Betty Krawczyk, a well-known environmental protestor, was subjected to contempt proceedings for breaching an injunction and argued that the proceedings violated her *Charter* rights. The BC Supreme Court stated that “Everyone who breaches a court order faces contempt proceedings, environmental protestor or otherwise. As our courts have stated repeatedly, those who take issue with an order must take appropriate steps to challenge the order, whether by applying to set it aside, or by appeal. One cannot breach now, challenge later. To do so constitutes an impermissible collateral attack...” (at para 5). It appears that disobeying a court order as a means of bringing a constitutional challenge may not be looked upon as favourably as disobeying a statute (as in *Kapp, Pawlowski and Caron*, above). Betty Krawczyk was found in contempt, and her appeal was dismissed ([2009 BCCA 250](#); more on this case, including sentence, below).

Third, constitutional challenges can be brought more proactively or preventively, before anyone is charged with breaking the law or is held in contempt for violating a court order. For example, in *Batty v City of Toronto*, [2011 ONSC 6862](#), the Occupy Toronto case, the occupiers brought an application to challenge a trespass notice that had been issued against them by the City under the *Trespass to Property Act*, RSO 1990, c T-21. Unlike the City of Calgary in the *Bullock (Occupy Calgary)* case, the City of Toronto disputed that its actions violated the occupiers' freedoms under the *Charter*, arguing that "camping out and effectively taking over a public park is not protected under section 2" (at para 65). Justice D.M. Brown rejected this argument, and found that "the structures erected by the applicants and other Protesters in the Park form part of the manner of expressing their political message and therefore engage section 2(b) of the *Charter*" (at para 72). He also held, without much analysis, that the trespass notice violated the occupiers' freedom of conscience, assembly and association under sections 2(a), (c) and (d) of the *Charter*. However, these violations could all be justified under section 1 as reasonable limits on the occupiers' expression. As in *Bullock*, the court's focus was on the fact that the City's actions did not result in an absolute ban on the occupation. According to Justice Brown: "It may well be that displacing the peace and order of our existing community is part of the message and objective of the Protesters ... But ... the rigidity and absolutism of the Protesters' position – let us keep our tents and around-the-clock occupation – does not fit with the balancing of competing interests which our *Constitution* requires" (at para 111). The application for a declaration that the trespass notice was unconstitutional therefore failed.

Another example of this approach is *Victoria (City) v Adams*, [2008 BCSC 1363](#), aff'd [2009 BCCA 563](#). In this case, a number of homeless persons in Victoria, B.C. brought an application to have a city bylaw similar to the *Parks and Pathways Bylaw* declared unconstitutional because it violated their rights to life, liberty and security of the person in ways that were arbitrary and overbroad. Their claim was ultimately successful, such that the ban on tenting overnight in city parks would no longer be illegal when the number of homeless persons exceeded the number of shelter spaces available in Victoria (see my comment on the trial decision [here](#)). This case is an example of how violations of life, liberty and security of the person, particularly those involving threats to health or life, are more difficult for governments to justify than violations of freedom of expression, and so civil disobedience grounded in section 7 of the *Charter* may be a useful strategy where such arguments are available.

This third way of mounting constitutional arguments depends on the challenger having private or public interest standing, and can only be initiated at the superior court level. Private interest standing arises when a claimant has a direct, personal interest in the outcome of the proceedings that is different than a member of the general public (see *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607). The young person in *SA* would meet that test, since she was subject to a public transit ban that affected her personally. Judge Dalton noted in that case, however, that it was "wildly optimistic" to "expect that a young person from a marginalized group who relies on public transportation will launch a review of a ban issued under the *Trespass to Premises Act* in the Court of Queen's Bench" (at para 169). Although public interest standing would allow a group to step forward as challenger, the test for this category of standing has been interpreted fairly restrictively, particularly the criterion that there is no other reasonable and effective manner in which to raise issue before the court (see e.g. *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236). The Supreme Court of Canada is currently considering a case involving public interest standing, and its decision will have significant ramifications for those seeking to challenge laws on a public interest basis (see

*Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, [2010 BCCA 439](#), leave granted 2011 CanLII 19610 (SCC)).

Overall then, laws can be challenged either in a proactive, pre-emptive constitutional challenge, or more reactively by disobeying the law and fighting the consequences on *Charter* grounds. If the *Charter* argument fails, or if none is made, the result is that the civil disobedience actually was a breach of the law. The person in question would then be penalized under whatever law they breached, with the penalties depending on the particular statute. For example, the *Parks and Pathways Bylaw*, Schedule A specifies a fine of \$100 for breaching either section 4 or section 9, and subsequent offences are subject to higher penalties (see s 64).

Alternatively, if the civil disobedience was in relation to a court order, the person could be found in civil or criminal contempt. The difference between civil and criminal contempt was discussed in the *Krawczyk* case (see 2007 BCSC 2011 at para 15, citing *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901 at para 51): “A person who simply breaches a court order ... is viewed as having committed civil contempt. However, when there is public defiance of the court’s process in a way calculated to lessen societal respect for the courts, it becomes criminal.” To prove criminal contempt, the Crown must prove beyond a reasonable doubt that the accused 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*) (*United Nurses of Alberta* at para 55).

Sanctions for civil contempt are set out in the [Provincial Court Act](#), (RSA 2000, c P-31, s 9.61(3)) for breaches of provincial court orders, and in the [Alberta Rules of Court](#), (Alta Reg 124/2010, s 10.53), for breaches of orders of the Court of Queen’s Bench. Both statutes provide for imprisonment until the person has purged the contempt or for up to 2 years, and fines (with imprisonment in default of payment), and these sanctions can be waived if the contempt is purged.

In the criminal context, section 127 of the *Criminal Code*, RSC 1985, c C-46 creates an offence of breaching a lawful court order where there is no other penalty provided by law, and can be proceeded with as an indictable or summary conviction offence. Other criminal offences, such as mischief (s 430) or obstruction of the police (s 129), may also be relevant, with the consequences depending on the offence in question. Section 9 of the *Criminal Code* retains the common law offence of criminal contempt, which was upheld as compliant with the *Charter* in the *United Nurses of Alberta* case. As noted in *Krawczyk*, criminal contempt is dealt with summarily, with no option of a jury trial, but at the same time it is not subject to the normal 6 month maximum for summary conviction offences (2010 BCCA 542 at paras 5, 21).

A couple of recent cases illustrate the kinds of sanctions that a person might face for civil disobedience.

In *Krawczyk*, [2007 BCSC 345](#) (aff’d [2010 BCCA 542](#), leave to appeal dismissed [2011 CanLII 25148](#) (SCC)), the BC Supreme Court issued a sentence of 10 months imprisonment for Betty Krawczyk’s breach of an injunction, which it had earlier found amounted to criminal contempt. The injunction had been obtained by the contractor working on the Sea to Sky highway between Vancouver and Whistler to enjoin environmental protests, and Ms. Krawczyk had breached the injunction on three separate occasions in May and June of 2006. Several aggravating factors were considered. This was Krawczyk’s fifth conviction for criminal contempt, she had breached the injunction “with planning and deliberation” in order to “obtain publicity for her cause”, she

had encouraged others to breach the order, she had “no insight into and no concern about the harm” she had caused, and she was found “likely to reoffend” (at paras 4-5). On the mitigating side, the court noted Ms. Krawczyk’s age (78 years old at the time), her contributions to society, and the non-violent nature of her protest (at para 6). Interestingly, the BCSC refused to take into account the fact that Krawczyk had spent 26 days in pre-trial custody, which would normally reduce the ultimate sentence, because she was in jail based on her own decision not to abide by the injunction (at para 10). The BC Court of Appeal affirmed the sentence without affirming the correctness of failing to deduct the time served – in fact, Justice Tysoe stated “I have reservations as to whether this approach is correct in principle” (2010 BCCA 542 at para 29, Justices Rowles and Bennett concurring). Since the point had not been raised by Krawczyk or addressed by the Crown, the Court decided to leave its resolution to a case where it had the benefit of full submissions. It remains a live issue whether this is an appropriate approach to sentencing in cases of civil disobedience.

At the other end of the spectrum is *R v Charlebois*, [2011 ABPC 238](#). In this case, seven Greenpeace activists pleaded guilty to the criminal offence of mischief after an environmental protest in August 2010 when they climbed and rappelled down the Calgary Tower and hung a banner criticizing the relationship between the Alberta and Canadian governments and the oil industry. The offenders sought absolute or conditional discharges, as they wished to avoid incurring criminal records. Judge Allan Fradsham of the Alberta Provincial Court set out some sentencing principles relevant to cases of civil disobedience more broadly. First, the objectives of sentencing in this kind of case are deterrence (general and specific) and denunciation of the offending conduct, but “Given that it was the strongly held social beliefs of the offenders which motivated their criminal conduct, rehabilitation as an objective is not applicable” (at para 44). Factors relevant to the consideration of a discharge include the nature and prevalence of the offence, whether the accused stood to gain personally from the offence at the expense of others, the value of the property in question, whether the offence was impulsive or deliberate, and whether the offence should be a matter of public record (at para 69, citing *R v MacFarlane*, (1976), 55 AR 222 (SCAD)). Applying these factors to the case at hand, Judge Fradsham noted that although the offence did not involve violence, there was a risk of injury to the protestors as well as nearby pedestrians and motorists, and that the action “caused significant traffic disruption” and “a serious disruption of the business operations of the Calgary Tower” (at paras 72-73). Further, although there was no property damage, costs were incurred by the City and the Calgary Tower as a result of the incident. As for the prevalence of the offence, Judge Fradsham stated that “While political protests are a common event in our democratic society, actions amounting to civil disobedience are less common” (at para 74). There was no personal gain by the protestors except publicity for their cause, but the offence was said to be “the product of carefully planned and calculated conduct ... executed with military-like planning and precision” (at para 77). The fact that Greenpeace was the organizing mind behind the conduct, and that the offenders engaged in that conduct for the sole purpose of attracting public attention to Greenpeace meant that a discharge would not deter future acts of this kind by Greenpeace supporters (at para 95). The impact of a criminal record on the various protestors was not enough to outweigh this consideration, and they received fines of \$2000 each rather than the discharges they sought. Judge Fradsham distinguished other cases where discharges were granted for civil disobedience related offences, including *R v Lawrence* (1992), 132 AR 194 (QB); *R v Orr*, 2005 BCPC 104; *R v Waters* (1990), 81 Sask R 126 (QB); *R v Paul* (1994), 145 NBR (2d) 272 (CA); *R v Kernerman*, [1997] OJ No 1974 (Ont CJ- Prov Div); and *R v Pratt and Stevenson*, [1990] 3 CNLR 120 (Sask Prov Ct).

There is one other noteworthy way in which the law deals with civil disobedience in Alberta. The *School Act*, (RSA 2000, c S-3), provides as follows in section 3:

- 3(1)** All education programs offered and instructional materials used in schools must reflect the diverse nature and heritage of society in Alberta, promote understanding and respect for others and honour and respect the common values and beliefs of Albertans.
- (2)** For greater certainty, education programs and instructional materials referred to in subsection (1) must not promote or foster doctrines of racial or ethnic superiority or persecution, religious intolerance or persecution, social change through violent action or disobedience of laws. (emphasis added)

One hopes that this provision would not dissuade teachers from using instructional materials that show how civil disobedience eventually resulted in changing the law to conform with constitutional rights and freedoms or with evolving notions of what is fair and just in society.