

civil
disobedience:



a legal
handbook
for activists

IMPORTANT INFORMATION

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IMPORTANT INFORMATION - CONTINUED

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INTRODUCTION

This handbook was created as a response to the increasing occurrence of civil disobedience in Canadian forests. The discussion of civil disobedience in the handbook is based on a hypothetical situation, which has been replayed in many forests of British Columbia and other parts of Canada:

1. A forest company has a license from the provincial government to log a particular valley or area.
2. Environmental groups oppose the logging, and resolve to use physical means to prevent the logging.
3. They create a human blockade by standing on the logging road in front of any logging trucks.
4. In response, the forest company goes to court and gets an injunction against the blockade.
5. The protesters either leave voluntarily or decide to remain as an act of civil disobedience.
6. Those that remain are arrested for violating the injunction.
7. The protesters are brought before the court to answer allegations of contempt of court, and tried in front of a judge.
8. Based upon the evidence before it, the court decides whether to convict the protesters of civil or criminal contempt.
9. The forest company may choose to sue the protesters for damages resulting from the blockade.

The information in this handbook covers the last six steps in the dispute, attempting to highlight the legal basis of each step and the possible consequences of various actions. The handbook is designed to ensure that environmental protesters who are considering participating in acts of civil disobedience are fully informed of the potential consequences of their acts, and of the legal distinctions between various courses of action.

DEFINING CIVIL DISOBEDIENCE

Civil disobedience can be defined as deliberate disobedience of the law out of obedience to a higher authority such as religion, morality or an environmentalist ethic. Civil disobedience has existed in various forms for as long as people have lived in organized societies governed by the rule of law. Its primary purpose is usually to change the law or society's views on a particular issue. It is a public action intended to have a political effect. Civil disobedience can be defined by certain criteria:

- it is employed only after other means have failed
- it is non-violent
- it is undertaken openly
- its participants are willing to submit to prosecution and punishment for breaking the law
- it is aimed at publicizing and challenging injustice
- it is not employed for coercive or intimidating reasons

Civil disobedience is seen as morally justifiable if it contributes to the social good and is performed by someone who is well intentioned and well informed. Reasoned and thoughtful resistance through civil disobedience can often serve as a check on the political system and prevent serious departures from justice. The fact that one can engage in principled disobedience of the law is generally a sign of a nearly just society, for in an unjust society, dissenting voices may be simply crushed. In a relatively just society, the use of civil disobedience

can be an effective and morally justifiable way to change laws or government policies.

THE HISTORY OF CIVIL DISOBEDIENCE

The literature on civil disobedience is vast. Socrates wrote extensively on the citizen's obligation to obey just laws. The Socratic principle is often referred to as the "persuade or obey" doctrine: a citizen must either persuade the government that the law should be changed, or obey the law as it is written.¹ According to the Socratic principle, only just laws are deemed worthy of compliance, otherwise the citizen has a duty to obey a higher authority. Disobedience of the law is justified by appealing to the principle of necessity.

Henry Thoreau wrote extensively on civil disobedience in the nineteenth century. His view was that people should be "men first, and subjects afterwards."² Thoreau was opposed to such social evils as slavery and war, and refused to pay taxes to governments that supported such wrongs. "Under the name of Order and Good Government," he wrote, "we are all made at last to pay homage to and support our own meanness."³ Civil disobedience is distinguished from merely breaking the law by the attempt to be 'civil' and adhere to the criteria listed above.

By participating in civil disobedience, however, there should be no doubt that one is breaking the law. Chief Justice McEachern of the British Columbia Court of Appeal wrote that

Civil disobedience is a philosophical, not a legal principle. ... 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.⁴

In modern times, Mahatma Gandhi and Martin Luther King Jr. have entrenched the concept of non violence within civil disobedience. However, many violent displays have occurred, such as the Black Panthers' protests against racial oppression. It is questionable whether or not these acts are truly in the spirit of civil disobedience. In the environmental context, groups such as Earth First or The Sea Shepherd Society serve as examples of the extreme in civil disobedience. These groups are generally recognized as aggressively passionate "eco-warriors". They believe that active resistance is necessary to bring quick focus and needed change to human activities which pose ecological threats.

STEP 1: THE INJUNCTION

An injunction is a legal remedy granted by a court to prevent interference with the legal rights of a person, a company or the government. A forest company facing a blockade can seek an injunction by going to court on the basis of a claim of interference with its right to log an area. That is, the company might sue the individuals or the environmental group for interference with the company's "economic relations." Because the court will not usually make a decision on the legal claim immediately, the company will seek interim measures to protect it before trial. The principal interim measure in this context is an injunction.

The injunction is designed to prevent greater damage to the forest company's rights in the period between when the lawsuit (based on, for example, economic interference) is begun and when it is decided. Injunctions are commonly issued against certain named people, and "all others having knowledge of" the injunction. The injunction might prohibit those people from blocking access to a certain road or bridge.

An injunction can be issued by a court on the application of one party (the forest company) without the other party (the environmental group) being present (an *ex parte* injunction). Injunctions can vary in their duration. *Interim injunctions* are usually in place for only periods of time, although those periods may be indefinite. *Interlocutory injunctions* usually remain in effect until the trial on the substantive claim brought by the company. Alternatively, an injunction may be

permanent, for example to prohibit people from preventing access to an abortion clinic.

Generally, an injunction is issued to enforce a private right, for example the right of a forest company to log a valley. However, an injunction may also be issued by the court at the request of the provincial Ministry of Forests or Attorney General, to protect the public interest. The "public interest" is generally defined as "the public's interest in seeing the law obeyed."

Contesting an injunction

A court will not issue an injunction against protest activity without an application by the forest company. The company will typically file a "writ of summons" to begin the lawsuit, usually alleging economic interference. After the writ is filed and served on the opposing party (the environmental group named in the writ), the opposing party has seven days to file an "appearance". An appearance is a fairly simple document which indicates to the court that the group intends to contest the claim of the forest company. If no appearance is filed, the forest company can file for "default judgment" and request a permanent injunction as a remedy.

If an appearance has been filed, the company may still apply for an injunction, but only an "interlocutory" injunction, that is, one which will be in place until the trial. The company does this by filing a "notice of motion" with the court. Unless the court has been convinced that the situation is urgent or that no notice is necessary, 48 hours notice must be served on the group that would be affected by the injunction. This service

must include copies of any affidavits which the injunction application will rely upon.⁵

Thus there are two periods of time in which to stop an injunction: in the seven days after the writ is filed, and in the two days after the notice of motion is filed for an injunction.

The test for issuing an injunction

If the appearance is not filed and the forest company applies for an injunction, the group can oppose the application. In order to get the injunction, the company must establish facts about the protest which support its claim that the protesters are acting illegally. An environmental group can contest the application by providing sworn statements which state the group's version of the facts related to the protest.

A court will only issue an injunction if it is a "just and equitable" remedy in the situation. There are three stages to the test which the court must consider before issuing an injunction against a protest:

1. Is there a "*fair question to be tried?*" The forest company must prove that its lawsuit is not "frivolous or vexatious." The lawsuit may be considered frivolous if it is simply a false front for the application for an injunction, while the initial lawsuit itself will not be pursued. The court may also consider who would be likely to win, on the evidence before it, when the case goes to trial.

2. The forest company must convince the court that it faces "*irreparable harm*" should the protests continue. This is usually defined as cases where the act complained of would put the plaintiff out of business, deprive him of his livelihood, or cause irrevocable damage to reputation or professional standing. However, sometimes the court will also consider whether the defendants are capable of financially compensating the forest company for lost business, should it win at trial.⁶
3. The court will consider whether the "*balance of convenience*" favours the granting of an injunction. The court must be satisfied that it would not do more harm by issuing the injunction than it would by declining the injunction.

Essentially, the test in Canada is to look at the possible results of the lawsuit. If it would be adequate to grant the forest company a monetary award ("damages") after the lawsuit, then an injunction is unnecessary. Damages are considered inadequate where the harm done by protesters would be irreparable, the company would be unable to recover any money from the protesters, or where keeping people working is considered more valuable than allowing a protest.

It may be that Charter arguments could be used to challenge an injunction application by a company. Charter arguments would "trump" the balance of convenience test, which usually favours the company. For information on possible Charter arguments which could be used to contest the injunction, contact the ELC

or visit our website for a copy of "Contesting the Environmental Injunction: Five Charter Arguments."

After the injunction has been issued

Once the injunction has been issued, any affected individual or group can apply to have it "rescinded, suspended or varied."⁷ The applicant needs to show that the test above was wrongly applied by the court. If the court granted the injunction in the absence of the environmental group (*ex parte*), then the group may also argue that the forest company did not reveal all of the facts to the court when it applied for the injunction. It should be noted that once someone has been charged with violating an injunction, s/he is severely constrained from attacking the validity of the injunction. This is referred to as the "rule against collateral attack."

STEP 2: CONTINUING CIVIL DISOBEDIENCE DESPITE THE INJUNCTION

The best opportunity for preventing logging is at the stage of the injunction. Once it is issued and upheld by the court, the injunction makes it illegal for anyone to engage in the prohibited actions. Assuming that it is prohibited by the injunction, blocking a logging road at this point in the scenario may amount to civil disobedience, and contempt of court.

Once the injunction has issued, the applicant (the forest company) is responsible for providing copies or somehow notifying the protesters of its contents. If the civil disobedience continues despite the injunction, then the forest company may request the police to become involved. The standard police practice in these situations is to seek an enforcement order from the court, allowing them to detain violators of the injunction. Once this is granted, the police will go to the blockade and read out the injunction. Protesters refusing to leave after the injunction has been read once more are then arrested.

Upon arrest, everyone has the right to be informed of the reasons for the arrest, and to retain and instruct counsel without delay, and to be informed of that right.⁸ As well, anyone charged has the right to be informed without delay of the specific offence or offences alleged.⁹

Once arrested, protesters are detained until they can be brought before a judge, who determines how much bail will be required and when the trial will take place. During this interval, which may be as long as a week-

end, protesters are often fingerprinted and photographed by the police. It is interesting to note that the British Columbia Court of Appeal is of the opinion that allegations of criminal contempt alone are not sufficient to warrant fingerprinting or photographing.¹⁰ The practice has not been put to the test in a formal legal challenge however.

STEP 3A: ARREST FOR CONTEMPT OF COURT

Contempt of court is a unique, unwritten offence that predates Canada's *Criminal Code*.¹¹ While it is difficult to define contempt precisely, it generally comprises any conduct that brings "the authority and administration of law into disrespect" or "interferes with the due course of justice or process of the court."¹²

This definition points to two major characteristics of contempt. First of all, contempt is quite a vague term. Applying it to specific behaviour involves a considerable degree of discretion on the part of the courts. Secondly, courts have tended to view contempt with special concern, as a serious offence that directly challenges their power and authority. As one judge stated, "everyone will recognize the importance of maintaining the authority of the courts in restraining and punishing interferences with the administration of justice."¹³

The seriousness of contempt means that judges believe that it is essential that they have broad powers to punish those in contempt of court. According to one commentator, "the punishment of contempt is the basis of all legal procedure."¹⁴ The power to punish for contempt is taken to be integral to maintaining the rule of law. Thus, courts have allowed themselves a considerable degree of discretion when it comes to dealing with contemptuous conduct.

Types of contempt of court

Contempt of court can be divided into two types of categories: direct versus indirect, and civil versus criminal. Direct contempt of court refers to those acts which occur in or near a court, and directly interfere with its proceedings. This type of contempt is not of concern here. Indirect contempt is where the disobedience occurs away from the court, often involving a refusal to follow an order of the court. Indirect contempt is most relevant to environmental protesters faced with an injunction.

Indirect contempt is further divided between civil and criminal contempt of court. Contrary to popular belief, the distinction between civil and criminal contempt is not made on the grounds that civil contempt arises out of disputes between private parties, while criminal contempt involves criminal acts punishable by penal sanctions. In fact, civil contempt can end in imprisonment, and criminal contempt can arise out of private actions. Rather, the distinction rests upon the consequences of the contempt. Specifically, contempt is viewed as criminal when it tends to depreciate the authority of the court in the mind of the public.

It is often a surprise to people that, even when the origin of the court proceedings were civil (a lawsuit for economic interference between an environmental group and a forest company, for example, is a civil action), this has no bearing on whether the contempt charges will be civil or criminal. Even a peaceful protest over a civil matter can give rise to a finding of criminal contempt if

the judge is convinced that the public defiance of the injunction has reduced the authority of the court.

The distinction between civil and criminal contempt hinges on whether or not the conduct in question goes beyond a private dispute between two parties and enters the realm of public interest. Civil contempt is disobedience of an order of the court. Criminal contempt is when the disobedience in question diminishes public respect for the justice system, and in particular, the court. Actions subject to a finding of criminal contempt are viewed as attacking the court itself. In such cases, the court seeks to enforce the order and also to restore the court's dignity by punishing the protester.

STEP 3B: CRIMINAL CONTEMPT OF COURT

Distinguishing criminal from civil contempt of court is not easy. In order for someone to be convicted of criminal contempt, two factors must be proven beyond a reasonable doubt. First, it must be shown that the accused intended, or should have foreseen, that his or her disobedience of the court order tends to "depreciate the authority of the court".¹⁵ This principle is based on a fear that, by disobeying the court's order, the accused is encouraging others to do the same. A society ruled by law relies on voluntary compliance with the law, so it is important to society as well as the court that its orders are followed.

Beyond the fact that someone is not following a court order, judges are generally reluctant to consider the reasons behind the disobedience. Judges cannot normally allow people to disobey the law based on their own personal moral standards. Contempt is a flexible offence, however, and the degree of moral justification can affect a court's ruling. This subject is discussed in greater detail below.

The second factor in proving criminal contempt has three parts. The accused must have disobeyed the injunction in a public, flagrant, and continuous way.¹⁶

1. "Public" is the most crucial of the three criteria. There have been several recent cases where disobedience of the court was both "flagrant" and "continuous," but fell short of criminal contempt because the conduct wasn't considered public.¹⁷ In

determining the public degree of the protest, the judge is often concerned with who was there, other than those who were arrested.

Certainly it is enough that members of the media were present. However, where media are not invited, or the protest is aimed at a local audience rather than a provincial or national audience, the court may still find that it was public. It may be enough that police or protesters who chose not to be arrested were present at the time.¹⁸

Some judges may see all protests as attempts to gain public sympathy for a cause, and thus those judges may consider all protesters' defiance of the court "public." Publicity is therefore a double-edged sword for the protester. On one hand, the publicity of the protest may make it more effective in terms of persuading people of the justice of the cause. On the other hand, the publicity of the defiance is a strong indicator of criminal contempt.

The one element that may reduce the backlash of an effective publicity campaign is the elimination of unnecessary criminal activity. Public defiance may be seen as inevitable, but reducing the extent to which the court feels specifically targeted by the public element of the defiance has been found to lesser criminality in some cases.

2. "Flagrant" has been interpreted in several ways. Most often, it means that the actions of the protesters amounted to an insult to the

administration of justice. Judges consider whether or not the conduct was deliberate, done in an inflammatory way, whether the protesters were given the opportunity to avoid arrest, and whether they amassed in large numbers for the purpose of intimidating the police. Protesters who state without apology their determined defiance of the court are more likely to be seen as acting flagrantly.

The more physical force the police have to use to remove a blockade, the greater the implied intent of the protesters to resist arrest, and the greater the flagrancy. The police have a duty to arrest those violating an injunction, so resisting arrest has little moral value. The original act of blocking the road thus loses some of its moral value by being contaminated by the intention to resist arrest. A court may decide that protesters who resist arrest are showing contempt for both the forest company and the administration of justice.

3. "Continuous" is the least definite of the three criteria. The court has said that continuous is "equivalent to something more than momentary or trivial."¹⁹ Continuous contempt could thus include defying an injunction for only a few minutes, depending on the circumstances. If the only reason why a blockade or protest ends is due to police intervention, then the court will find that it was continuous - no matter how short-lived it may have been. A blockade which is designed to be an extended affair, with many protesters, support

groups, and a physical blockade will almost certainly be considered continuous.

Further factors distinguishing civil from criminal contempt

As can be seen, there are major obstacles to a campaign of civil disobedience that seeks to avoid criminal sanctions. There is no legal loophole or special strategy for conducting a campaign that protects both the environment from threats and the protesters from criminal liability; it is likely to follow any extremely effective campaign of civil disobedience. That said, there have been exceptions.

Two cases from the Kootenay region of British Columbia, involving the Valhalla Wilderness Society²⁰ and the Perry Ridge Water Users Association,²¹ are exceptions to the general rule. In these cases, despite the elements of publicity, flagrancy and continuity, environmental protesters were convicted only of civil contempt.

The facts of these cases make the court's reluctance to label the actions criminal contempt understandable. Although the protests garnered extensive media coverage and involved hundreds of people, the protesters were polite and non-confrontational, and took pains to apologize for defying the court order. There was also a high level of local support for the environmentalists, and those that were arrested spoke eloquently in their own defence. Mr. Justice McEwan, the judge in both cases, made this statement in his judgment:

In this case each of the contemnners spoke. They are all highly educated, accomplished and impressive individuals. They do not seem to be naive or unsophisticated. They all professed no disrespect toward the Court.²²

Although the judge found the protesters guilty only of civil contempt, he did impose a penal sanction on the protesters. The sentence was a suspended seven-day jail term. That is, the protesters would not go to jail unless they defied the injunction again, or got arrested for some other offence. Despite the threat of imprisonment, the sentence was significantly lighter than the 45 - 60 day jail terms imposed in some many criminal contempt cases.

It is important to note that in these cases, due to some evidentiary problems, crown counsel did not intervene, and the plaintiff's counsel did not ask for a finding of criminal contempt by the court. This was unusual for contempt proceedings, and was cited as a factor by the court when it made its finding of civil contempt. Thus, these cases may be less significant than they first appear. However, it remains the case that the court had the power on its own to make a finding of criminal contempt, and did not. It may be therefore, that another court in a similar position will, if faced with similar facts, follow the findings of Mr. Justice McEwan and impose a civil rather than a criminal penalty.

To summarize, the main aspects of the Kootenay cases which supported the judge in convicting the protesters for civil rather than criminal contempt were:

1. The peaceful nature of the protest.
2. The restraint and cooperation of the protesters when the police arrived.
3. The politeness of the protesters to the police, opponents, and the court.
4. The eloquence in court of those charged with contempt.
5. The protester's apologies to the court for having to violate the injunction.
6. The fact that no one was seeking a finding of criminal contempt.

Incorporating these first five factors into an environmental protest is no guarantee that the protesters will be found guilty of only civil contempt. However, it may help the court, in some cases, to make a finding of civil rather than criminal contempt. For these reasons, as well as factors involved in sentencing (not to mention obvious non-legal considerations), environmentalists are well advised to consider carefully the presence or absence of these factors when conducting a protest.

STEP 4A: TRIAL FOR CONTEMPT OF COURT

A person who is arrested for disobeying an injunction may be found guilty of civil or criminal contempt of court, as outlined above. Despite the recent Kootenay cases, the majority of people arrested during environmental protests are charged with criminal contempt of court. The following is a description of the likely procedures which follow arrest on a charge of criminal contempt.

Trial without jury

A person charged with contempt of court is brought before a judge for trial. The trial will be without a jury, as criminal contempt of court charges typically carry a sentence of less than two years in jail. After the prosecution states the allegations, the court will ask the defendants to plead guilty or not guilty. If the plea is guilty, then the court will proceed to sentencing. If the plea is not guilty, then the prosecution will question witnesses, and lead evidence to try and prove the contempt. The defendant will then be given an opportunity to present any of his or her defences.

STEP 4B: POSSIBLE DEFENCES

When a decision to plead not guilty is made, it is important that the defendant have an understanding of what types of arguments the court will be willing to hear. Protesters are very often disappointed with the court's lack of sympathy for defences which rely on broad environmental, social and political arguments. This is because the court will deal exclusively with issues of law. Broad decisions, such as government forest policy, are beyond the scope of the courts and must be addressed in the political forum. Consequently, in determining whether or not a person is guilty of contempt of court, the only relevant factors for the court are those proving or disproving legal elements of contempt:

1. Was the defendant aware of the injunction?
2. Did she or he disobey the injunction?
3. In determining criminal contempt, was the defendant's conduct in disobeying the injunction public, flagrant, and continuous?

As discussed above, the power of the courts to protect themselves from disobedience is considered integral to their authority and the rule of law. Challenges to the courts' authority, such as the deliberate violation of an injunction, are perceived to strike at the very core of the judicial process. For this reason, as well as the one mentioned above, the courts give little weight to many arguments in defense of civil disobedience actions. The following are a selection of defences which have been put forward in the past, with a

brief consideration of the validity of each one:

1. *The injunction violated my right to freedom of expression, under the Charter of Rights and Freedoms.*

Although the right to freedom of expression has offered limited protection to temporary, peaceful interruption of objectionable practices, this protection has never been extended to justify the deliberate violation of a court order. The argument is weakened further if alternative methods of lawful expression (such as standing alongside the road and expressing dissent) were available.²³

2. *I was practicing civil disobedience.*

Civil disobedience is a philosophical or political action, not a legal right. Disobedience of the law, regardless of its form or reason, may be subject to penalty.

3. *I violated the injunction only because it was necessary to prevent environmental destruction.*

The defence of necessity recognizes that a law may be broken if it is the only means of avoiding a greater peril. However, as justification for violating injunctions, this defence has failed for two reasons. First, alternatives to breaking the law, such as applying to the court to have the injunction set aside, are available. The defence of necessity requires that there was no reasonable opportunity for an alternative course of action that did not involve a

breach of the law.²⁴ Second, the defence of necessity is not applicable when the peril to be avoided, such as government authorized logging, is sanctioned by law.²⁵

4. *I was not aware of the exact terms of the injunction.*

If no attempt was made to communicate the terms of the injunction to those present, then a valid defence of ignorance of the injunction may arise. However, if copies of the injunction were distributed, or read aloud, any ignorance of its terms has been treated by the courts as willful indifference. Therefore, those refusing to accept a copy of the injunction, or covering their ears while it is read aloud, cannot rely on a defence of ignorance of the terms of the injunction.

5. *I did not intend to commit contempt of court.*

It is rarely the intention of an environmental protester to bring the court into contempt. However, when a person refuses to comply with an injunction once it has been served, the courts have found it reasonable to infer that they intended to defy the order, and thus commit contempt of court.²⁶

6. *I did not intend to commit criminal contempt. I did not intend for my actions to be public.*

The violation of the injunction may be considered public if it occurs before members of the public or

the media, whether or not they were invited, or if the object of the action is to gain public sympathy.²⁷

7. *I was not aware that my actions would depreciate the authority of the court.*

It is not necessary to prove that a person knew as a fact that the court's authority would be undermined as a result of their actions. Recklessness regarding the effect of their actions on the authority of the court is considered sufficient intent to commit criminal contempt.²⁸

8. *My actions were not continuous.*

No matter how short-lived, contempt is considered continuous if it would have continued if the person had not been stopped by arrest or another act.²⁹

9. *I was not a party to the original injunction. The injunction was issued against "John Doe, Jane Doe, and Persons Unknown."*

If someone is aware of an injunction and refuses to obey it, the person is liable to punishment for contempt, even if the person is not a party to that injunction.³⁰

10. *The injunction was not granted recently.*

An injunction remains in full force and effect until varied or appealed, unless the expiry date is written into the injunction itself, as in an interim injunction.³¹

11. *The party being protected by the injunction was involved in illegal activities.*

Except in cases of immediate peril or necessity, no right exists to break the law to prevent another party from acting illegally. The proper mode of action is to notify the relevant authorities.³²

12. *A civil injunction cannot lead to criminal charges.*

Disobeying a lawful order can be pursued as a criminal offence, whether the order itself was criminal or civil in nature.

13. *As a youth, I am entitled to be tried in a youth court under the Young Offenders Act.*

A Superior Court such as the B.C. Supreme Court, where contempt of court trials are held in B.C., takes precedence over the jurisdiction of youth courts. It is left to the discretion of the Superior Court to try youths for contempt or to defer them to a youth court.³³

14. *The injunction was not properly granted, and therefore I was not obligated to obey it.*

Even if an injunction is granted to a forest company when it should not have been, for example, due to some legal defect or an incorrect judicial decision, it is still considered to have the strength of the law. Courts do not allow arguments against the injunction to be used as defences against contempt charges.

This is called the "rule against collateral attack". The position of the court is that the proper recourse in such a situation is to challenge the injunction through legal means.³⁴

STEP 4C: THE SENTENCE

The penalty for civil contempt of court is usually a fine. Criminal contempt of court charges have been typically assigned a jail sentence and a fine. Because judges have a lot of discretion as to the sentence for contempt, the amount of fines imposed varies greatly with the circumstances of each case. Fines for environmental protesters have been in the range of \$500 - \$3000, though it is possible that a higher fine could be imposed. Jail sentences have been as low as a few days and as high as sixty days. For those sentenced to jail, electronic monitoring by the use of an anklet is sometimes possible.

Factors determining the sentence

The more criminal the blockade, the stiffer the likely penalty. Courts have considerable discretion in deciding how high a fine or how long a jail sentence to impose on those convicted of contempt. Harsher sentences have been assigned to people where they

- did not show respect for the judge by being disruptive or defiant
- did not show remorse or apologize for their actions
- disobeyed other laws in the course of defying the injunction
- had prior convictions for criminal contempt of court.

Some people charged with criminal contempt of court have been completely acquitted after apologizing to the court and promising not to repeat their acts.

Criminal Records

Criminal records are a concern to many people, and are much misunderstood. There are several kinds of "records" that are created after a conviction for an offence. The term "criminal record" is usually used to refer to records kept in the Canadian Police Information Centre (CPIC). These records only include convictions under the Criminal Code, and as criminal contempt is a common law offence not listed in the code, individuals convicted of criminal contempt do not have CPIC records.³⁵ However, there is another, much more inclusive, police database which does include contempt convictions, called the PIRS (Police Information Retrieval System). Although being listed in this database is not the same as having a "criminal record," there are implications. If an individual is being tried for contempt, information from the PIRS may be used as evidence or in sentencing. As well, this information is available to border crossing guards. Some protesters have been refused access to the United States because of PIRS criminal contempt conviction records.

Some parties have applied to have their PIRS records for contempt expunged," or deleted, by the court. The courts have refused, stating that it is outside their jurisdiction.³⁶

STEP 5: LAWSUITS FOR ECONOMIC INTERFERENCE

Another area of law which may affect environmental activists is the area of economic interference torts. Torts are private wrongs committed by individuals (or companies) against other individuals, such as negligence and defamation. Torts are different from crimes against the state, such as murder and robbery: after committing a tort, the offender may have to pay compensation to the victim, but the offender is never sentenced to jail for committing the wrong.

When an environmental protest results in monetary losses to a forest company, it may be possible for that company to sue the protesters or the group which organized the protest. As noted above, before the forest company can get an injunction against the protest, it must make some kind of legal claim. That is, the forest company must claim that the environmental group, by protesting, is committing a tort, and should be prevented from doing so by an injunction.

Once the injunction has been issued, forest companies in the past have typically ignored the initial claim. Environmentalists and environmental groups often have no means to pay compensation, so the lawsuit would not usually be worthwhile for the forest company. However, the company is entitled to pursue the lawsuit beyond the first stage and try to get money from the protesters as compensation for their protest. In fact, such a practice is becoming more common, and threatens

to overwhelm environmental groups attempting to mount large scale protests.

By blockading the road and preventing the forest company from logging, the protesters effectively prevent the company from carrying out its business. The forest company may have contracts with other companies, such as sawmills and shipping companies. If the forest company cannot cut and remove the timber, these contracts may be broken, and the forest company may lose money.

Essentially, by suing the protesters for interfering with its economic relations, the company can seek to recover some of the profits which it lost by being blocked from the valley. The company would typically have to prove that:

1. the protesters' activities resulted in economic harm to the forest company by interfering with its business interests, and
2. the protesters intended to cause the forest company the harm, or that the economic harm could have been expected from the activities

Economic Interference and SLAPP Suits

The potential for using the tort of economic interference against actions that result in a financial loss make it a commonly used foundation for SLAPP suits. SLAPP stands for Strategic Lawsuit Against Public Participation, and these suits are often used by corporate interests as a means of discouraging public criticism of their actions. SLAPPs are becoming common in the

United States, and are beginning to have a significant effect on Canadian public interest groups.

The case regarded by many commentators as the leading Canadian example of a SLAPP suit is *Daishowa Inc. v. Friends of the Lubicon*.³⁷ In that case, Daishowa Incorporated sued a group called the Friends of the Lubicon for various acts of economic interference by the Friends. The Friends wanted to stop the company from logging certain areas in northern Alberta claimed by the Lubicon Cree as their ancestral lands. Instead of using a physical blockade, the Friends used an economic boycott to try to stop the logging. They picketed customers of Daishowa, such as Pizza Pizza, that continued to purchase its paper products. Daishowa lost money because of the boycott. It sued the Friends and applied for an injunction preventing future protests. In April of 1998, the Ontario Court (General Division) dismissed Daishowa's application for a permanent injunction, stating that the actions of the protests of the Friends constituted a legitimate consumer boycott (although damages of \$1 was awarded to Daishowa for defamatory comments that the court found to have been published by the Friends). More than \$300,000 in legal fees were spent defending the Friends from the Daishowa suit.

Although SLAPP suits are without strong legal foundation, as the injunction application was found to be in *Daishowa*, it is the scale and expense of defending them that makes public interest groups especially vulnerable. At the time of this writing, Daishowa is in the process of appealing the decision of the Ontario Court.³⁸

STEP 6: CRIMINAL CODE CHARGES

While lawsuits are becoming more common as part of the legal effects of environmental blockades, to this point criminal charges (apart from contempt) have been uncommon. According to the B.C. Attorney General's Crown Counsel Policy Manual on Civil Disobedience, protesters should be allowed to express their opinions. The Ministry encourages private individuals who are affected by the protest to seek a civil injunction through the courts, as discussed above in step 1, and to enforce it through civil contempt proceedings, as discussed in step 3a.

That said, it is possible in some situations for the Crown to lay charges, such as breach of the peace, instead of or in addition to contempt of court. Criminal charges would be considered in the following five scenarios:

1. The protest involves violence resulting in physical harm or the reasonable apprehension of injury;
2. The protest causes property damage which is not insignificant;
3. The protesters assault a police officer; or
4. The protest clearly contravenes the public interest
5. The protest amounts to a breach of the peace.

If any of the above scenarios occur, there are a variety of charges which might be laid against protesters. If the protest involves violence, those involved may be

charged with assault. Similarly, if protesters assault a police officer, they may be charged with that offence. If property damage occurs, the Crown may charge some of the protesters with mischief.

According to the *Criminal Code*, mischief occurs when someone intentionally "interferes with the lawful use, enjoyment or operation of property".³⁹ In an Ontario case, striking workers stood shoulder to shoulder to prevent management personnel from entering the company's property. The court held that the workers could be guilty of mischief.⁴⁰ Similarly, environmental protesters preventing a forest company from using its property might also be found guilty of mischief.

Another possible charge is intimidation, which occurs when someone "blocks or obstructs a highway" for the purpose of preventing others from exercising their legal rights.⁴¹ A highway is generally defined in B.C. law as any public road.⁴² Thus an environmental protester blocking a logging road to stop a forest company from logging might be guilty of intimidation. A further possible charge is obstruction of a highway, which is a relatively obscure offence under the B.C. *Highway Act*.⁴³

In most cases, environmental protesters would not normally incur any of these charges, as the protesters usually already face a penalty for contempt of court. Additionally, before any charge is laid by the Crown, it must be approved by the Regional and Executive Crown Counsel, who must consider the appropriate action in the circumstances.

In the event that an environmental protester is charged with any of the above offences, including criminal contempt, he or she may apply for legal aid. Legal aid is generally granted to those who have a very limited monthly income (currently less than \$833 for a single person) and who face a reasonable likelihood of a jail sentence if convicted of the charge.

Applications for legal aid must be made in person. In Victoria, the office is located at 1221 Broad Street. In Vancouver, the office is located at 605 Robson Street. There are legal aid offices in many communities. Even if legal aid will not cover the charge, lawyers at the office can at least offer some advice as to how to deal with a criminal charge.

EDITORIAL COMMENTS

Historically, our legal system evolved from protecting narrow economic interests rather than broader social concerns. While this role is changing, it may be some time before pressing social issues, such as the protection of the environment, are given the recognition that they deserve. Nevertheless, it is important to remember the role the courts play as defenders of the rule of law, and the irreplaceable role that the rule of law plays in a better future. The importance of this role was stated eloquently by Mr. Justice Josiah Wood of the British Columbia Supreme Court:

The fragility of the rule of law is such that none of us who seek to enjoy its benefits can be permitted the occasional anarchical holiday from its mandate, no matter how compelling or how persuasive may be the cause that such anarchy seeks to advance. Furthermore it is only through the rule of law that any meaningful, lasting or effective change can be wrought in the law. Thus it is that by seeking to change the law by deliberately disobeying it you threaten the continued existence of the very instrument, indeed the only instrument, through which you may eventually achieve the end you seek. Such conduct is not only illegal, it is completely self-defeating.⁴⁴

Judge Wood's remarks may overstate somewhat the fragility of the rule of law and the arguments against civil disobedience. History has shown time and again the value of challenges to unjust laws by individuals concerned with creating a better society. Nevertheless underlying much of the philosophy behind civil disobedience is a basic understanding that the rule of law is an vital part of a better future. Although many

arguments can be made against the injustices dealt to environmental protesters, it is important to remember that an integral part of such disobedience is the honour and self-sacrifice involved in accepting an unjust punishment, as a foil for exposing that injustice.

ENDNOTES

The endnotes below are designed to assist those who are interested in doing further research into this area of the law. Where the source is a book, it can be found at any large public or university library. Where the source noted is a court case, for example *Macmillan Bloedel Ltd. v. Simpson*, it can be found at any law library. The most accessible law libraries are in the courthouses and at law schools, at the University of Victoria and U.B.C. Law librarians can assist those interested in reading the cases themselves.

The reference after the court case, for example (1994) 90 B.C.L.R. (2d) 37 (B.C.C.A.), lists the book in which the case can be found. It also lists the year of the case (1994) and the level of the court which decided the case (British Columbia Court of Appeal). Cases which are referred to by number, for example O.J. No. 729, are found in "QuickLaw", an online legal database. In general, the higher the court, for example the Supreme Court of Canada (S.C.C.), and the more recent the decision, the more important the decision is to current law.

¹ Bruce Wardhaugh, "Socratic Civil Disobedience", *Canadian Journal of Law and Jurisprudence* v. 2 n. 2 (July 1989), p. 107.

² Henry David Thoreau, *Early essays and miscellaneous writings*, J.J. Moldenhauser et al, eds. (Princeton: Princeton UP, 1975), p. 1.

³ Thoreau, p. 3.

- ⁴ *R. v. Bridges* (1991), 62 C.C.C. (3d) 455 at 458 (B.C.C.A.).
- ⁵ Rule 44 of the *Supreme Court Rules*.
- ⁶ Robert Sharpe, *Injunctions and Specific Performance*, (Toronto, Canada Law Book Ltd, 1983)
- ⁷ Rule 45(5) of the *Supreme Court Rules*.
- ⁸ Section 10 of the *Charter of Rights and Freedoms*
- ⁹ Section 11(a) of the *Charter of Rights and Freedoms*
- ¹⁰ *MacMillan Bloedel Ltd. v. Brown* (B.C.C.A.) [1994] B.C.J. No. 268 DRS 94-06391
- ¹¹ While the *Criminal Code* does prohibit contempt under section 127, environmental protesters are usually charged with "common law" contempt, which is not listed in the *Code*.
- ¹² *Canadian Encyclopedic Digest (Western)*, 3rd ed. (Carswell), v. 7 para. 2.
- ¹³ *Poje v. British Columbia Attorney General* [1953] 1 S.C.R. 516 at 519.
- ¹⁴ Sir John Fox, cited in *MacMillan Bloedel v. Simpson* [1995] 4 S.C.R. 725 at 744.
- ¹⁵ *United Nurses of Alberta v. Alberta (Attorney General)* [1992] 1 S.C.R. 901.
- ¹⁶ *B.C.G.E.U. v. British Columbia (Attorney General)* (1988), 2 S.C.R. 214.
- ¹⁷ *Merck & Co. v. Apotex Inc.* (1996), 106 F.T.R. 114.
- ¹⁸ *Oak Bay Marine Ltd. v. Haida Nation (Council of)* [1994] B.C.J. No. 6 DRS 94-04641 Victoria Registry No. 90 1661
- ¹⁹ *Simpson v. McMillan Bloedel* (B.C.C.A.) [1994] B.C.J. No. 670 DRS 94-09285
- ²⁰ *Slocan Forest Products Ltd. v. Valhalla Wilderness Society* [1997] B.C.J. No. 2135. Hereafter "Slocan".
- ²¹ *B.C. Attorney General v. Perry Ridge Water Users Association* [1997] B.C.J. No. 2134.
- ²² *Slocan*.
- ²³ *MacMillan Bloedel Ltd. v. Simpson* (1994), 90 B.C.L.R. (2d) 37 (B.C.C.A.).

- ²⁴ *R. v. Perka* [1984] 2 S.C.R. 232
- ²⁵ *Ibid.* at 38.
- ²⁶ *Ibid.* at 34.
- ²⁷ *Ibid.* at 35.
- ²⁸ *Ibid.* at 34.
- ²⁹ *Ibid.* at 35.
- ³⁰ *Canada Transport v. Alsbury* [1952] 6 WWR 473.
- ³¹ *R. v. Watson* (1996), 77 B.C.A.C. 16.
- ³² *Ibid.*
- ³³ *MacMillan Bloedel Ltd. v. Simpson* [1995] 4 S.C.R. 725.
- ³⁴ *BCAG v. Perry Ridge Water Users* [1998] B.C.J. No. 350
- ³⁵ *MacMillan Bloedel Ltd. v. Brown* (B.C.C.A.) [1994] B.C.J. No. 268 DRS 94-06391
- ³⁶ *MacMillan Bloedel Ltd. v. Brown* (B.C.C.A.) [1994] B.C.J. No. 268 DRS 94-06391
- ³⁷ *Daishowa Inc. v. Friends of the Lubicon*, 158 D.L.R. (4th) 699
- ³⁸ For further information on SLAPPs, see Chris Tollefson, "Strategic Lawsuits Against Public Participation: Developing a Canadian Response", *Canadian Bar Review* vol. 73 (1994); and the June 1997 issue of *Taiga News* (no. 21). Information may also be obtained from the ELC and the Sierra Legal Defence Fund.
- ³⁹ *Criminal Code* s. 430 (1)(c).
- ⁴⁰ *R. v. Mammolita* (1984), 9 C.C.C. 85 (O.C.A.).
- ⁴¹ *Criminal Code* s. 423 (1)(g).
- ⁴² *B.C. Highway Act*, R.S.B.C. 1996 c. 188 s. 1.
- ⁴³ *Ibid.* s. 14 (e).
- ⁴⁴ *R. v. Bridges* (1989), 48 C.C.C. 545 (B.C.S.C.).

ACKNOWLEDGEMENTS

This handbook is the result of collaborative group project undertaken by a subcommittee of the Environmental Law Centre, composed of:

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