Colonial architecture with British lions
Former Supreme Court of British Columbia

KRAWZYCK VS BC

REASONS FOR JUDGMENT ON APPEAL

SUPREME COURT OF BRITISH COLUMBIA 29 MAY 2009

REPORT BY EAGLERIDGE BLUFFS COALITION

Thank you Betty for your continued dedication to this important issue of civil liberties, which are being trampled on in BC by corporations, government, and their shared prerogatives

"So Ends Another Chapter of Justice Canadian-Style"

Notes by a spokesperson for the Eagleridge Bluffs Coalition:

Nothing too earth shattering in the BC Appeals Court on 28 May 2009. The judges were respectful and patient in trying to help guide Betty to where she had the best chance of success. We hope that they have a solid grasp of the argument presented in Betty's factum arguing that a finding of Criminal Contempt has to be more rigorous than 'open, continuous and flagrant' acts to also incorporate 'real and substantial risk' to the administration of justice. This criteria for elevating to criminal contempt is simple for the judges to contend with so I had thought they might have raised objections to suggested changes to the criteria but they did not.

Reasons for Judgement delivered on 29 May 2009: The biggest surprise was that the Crown didn't even argue against the suggestion in one of Betty's factums, written by Jason Gratl, past President of the British Columbia Civil Liberties Association (BCCLA), that the criteria used to elevate civil to Criminal Contempt ("open, continuous and flagrant") be rewritten as it was insufficient to show intent to depreciate the court's authority or at least recklessness in acting in a way that was likely to cause a depreciation of the Court's authority. In media law, it has been argued successfully that there must be a 'real and substantive' risk of injury to the court in order to elevate to criminal.

Although this looks bad on the surface, it may have a silver lining. Interestingly, neither the Crown nor the Appeals Court judges raised any substantive argument against Betty's main argument that in order to limit free speech in the way that elevating to Criminal Contempt does through 'open, continuous and flagrant', there must be clear and substantial risk to the administration of justice. This argument has been won in publication contempt so there is a possibility it could still work in our situation.

Betty spoke with the lawyer who had written the factums for her and he seems to think that the mention of the Supreme Court is an invitation to take it to that level, although he said he'd have to have a read of it before considering it further, though he did not rule out arguing it on Betty's behalf if it looked winnable.

The greatest challenge is in arguing this point while appealing Betty's sentence as that she is perhaps the most notorious, 'flagrant' protester in the province and the courts simply don't like being 'scandalized' by the likes of her. It is also hard to argue that the criteria is insufficient AFTER you've violated it. Perhaps Jason Gratl will consider a Charter challenge on a broader basis that would look at the 'open, continuous, flagrant' criteria from a wider perspective beyond just Betty. Many people in BC have been stung with this and although Betty has received by far the highest penalties, some of the other cases may better show how ridiculous the criteria is.

Perhaps no great surprise but just to let others know that the appeals court dismissed Betty's appeal without responding in any great detail to her legal arguments except to say that she was unable to prove a reasonable apprehension of bias and that Justice Brown followed 'long standing procedure' in hearing both preliminary and trial evidence. Diddo on adhering to the 'open, continuous, flagrant' criteria for elevating penalties. The suggestion was that the Appeals Court was bound by previous Supreme Court of Canada rulings supporting the 'open, continuous, flagrant criteria and changes to the criteria must therefore come from the Supreme Court of Canada itself.

So ends another chapter of Justice Canadian style.

As one of the judges said, Criminal Contempt is an unfortunate choice of words to describe the elevation in penalties brought about by an 'open, continuous, flagrant' civil contempt. In Canada there are in essence two criminal contempts, one under civil law and one under criminal law. Betty was charged under civil or common law, a charge having to do with publicly depreciating the courts authority (scandalization is another term used). Because penalties are at the discretion of a judge and unregulated, they can run the full gamut and may include penal sanctions, even lengthy jail sentences. In Betty's case, the public nature of her blockades in combination with her notoriety (the fact that she is well known in the province) pretty much assures that she will be found guilty of criminal contempt each and every time she protests under injunction and that penalties will continue to escalate with each subsequent arrest.

The criteria for elevating civil contempt to criminal contempt under common law is not terribly stringent, requiring only that the contempt be 'open, continuous, flagrant'. This can be as innocuous as having media follow an ongoing protest where activist do not leave the injunction zone the minute they learn of the courts order. The argument used in Betty's appeal centred on whether the judge erred in neglecting to look at whether there was real or substantial risk of damage to the court's authority as the Charter requires that in order to infringe upon fundamental rights under section 2 (b), infringement must be justified in terms of a clear and substantive risk of damage (Section 1). This type of argument has apparently been argued successfully in publication contempt where comments made by media were found not to have affected the outcome of a trial or the proper function of the court. They merely put the judiciary in a negative light.

Criminal contempt under Section 127 of Canada's criminal code differs from elevated civil contempt in that it is an actual criminal charge and carries with it not only the consequences of a criminal offense, but also all of the protections provided to those accused of a criminal offence. The crown must prove beyond a reasonable doubt that an perpetrator had the mens rea or criminal mind that comes with intending to undertake a criminal act and all of the provisions of the Charter must be adhered to. BC's AG continues to discourage using section 127 under the criminal code against environmental protesters, likely because it would be difficult to gain a conviction due to Charter protection.