

# Civil Disobedience and the Law: The Role of Legal Professionals

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# Civil Disobedience and the Law: The Role of Legal Professionals

## **Abstract**

Discusses the role of judges when cases of civil disobedience are brought before the court.

## **Keywords**

Civil disobedience--Law and legislation; Judicial discretion; Civil rights; Canada

## Commentary

# CIVIL DISOBEDIENCE AND THE LAW: THE ROLE OF LEGAL PROFESSIONALS<sup>©</sup>

BY THE HONOURABLE JAMES MACPHERSON\*

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I.	INTRODUCTION
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Justice is one of the most important subject areas in a democratic and civilized society. If you asked Canadian citizens to close their eyes and identify the areas in which they want governments to be involved, and indeed to do a good job, I suspect that most of them would say: health care, public education, provision of a basic social safety net for the poor, sick and afflicted, and justice.

The importance the public attaches to justice is nothing new. It is as old as Confederation as reflected in ss. 91(27), 91(28), and 92(14) of the *Constitution Act, 1867*,<sup>1</sup> all of which assign powers to both the federal and provincial levels of government to enact laws relating to various aspects of the justice system.

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\* Justice, Ontario Court of Appeal.

<sup>1</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

The preamble to the Constitution provides: "Whereas Canada is founded upon principles that recognize . . . the rule of law." A judge's oath of office requires the judge to faithfully uphold the law where it is clear what it prescribes and proscribes. But, because justice also depends on access to the courts, a crucial role of governments and of courts is to promote access, of people and of issues, to the justice system. That is the theme of my remarks today. Naturally, my perspective on that theme will be that of the judge, in my case a trial judge for six years and an appellate judge for two years.

Now, this presentation is offered as part of a project on civil disobedience and the limits of the law. Civil disobedience creates a problem for the above-described roles of judges. It involves a flaunting of the law. It often leads to the repression of activists and agitators for change, posing difficult questions when these disobedient citizens come before the courts. How should judges assess the way in which frontline law officers deal with wilful, public breaches of the law? What are they to be told as to how they should exercise their necessary discretion? Inasmuch as the choices they made were informed by consciously and unconsciously held political beliefs and perceptions of what is acceptable to conventional wisdom about the legitimacy of particular legal rules or implementations, they may lead to outcomes that will appear arbitrary or discriminatory if given approval by the judiciary. The courts might inflame dissatisfaction with the status quo by adhering to the strict letter of the law. Doing justice and giving access to justice are not simple tasks. These very difficult questions inhere in a legal system committed to liberal democratic principles. The dissident must be given some room for manoeuvre, while the status quo is to be defended. The judge is on the frontline. One of the ways in which judges discharge their very complex obligations is by reading generously their role in providing access to justice. This presentation considers how this is done as judges settle the very narrowly presented issues before them.

For the purposes of the discussion, I divide the cases into discrete categories. I begin by noting the kinds of situations where a person is brought before a court almost certainly against her will. Here the judges try to satisfy their constitutional mandate to provide access to justice by furnishing the reluctant participant with as much aid as possible. More strongly, courts sometimes have to consider giving assistance to people who want to challenge perceived abuses of power. In one set of circumstances, this can be done by giving organized protest groups more standing to be heard in judicial proceedings. It might also be done by reading elastically the apparent legal restrictions on social and political strategies to change the status quo. This may help to assure the public that grievances may be forcefully protested in our liberal democratic polity, that the authority of

law and the State does not require blind obedience. Here I consider two sets of situations. Implicitly, of course, there will be limits on the extent to which courts will feel themselves entitled to manipulate existing doctrines. There are limitations on their capacity to accommodate dissent and, in effect, to treat it as if it were perfectly acceptable behaviour.

I think the cases that come before judges can be divided into four broad categories. I will identify those categories and discuss the role of judges in each of them, with a particular emphasis on what judges can and should do to promote access to the courts.

## II. CASES IN WHICH PEOPLE DO NOT WANT TO BE IN COURT

This is an obvious category of case and the criminal law is its most obvious component. There is no formal problem with respect to access in these cases. A person is charged with a criminal offence and, usually, there will be a trial and a verdict. However, the criminal justice system is not an easy one for the ordinary accused person to navigate. Criminal cases can be long and complex. Moreover, they involve a value of high significance in Canadian society—the liberty of the subject.

There is another reality in the criminal justice system, namely, a strong link between criminal activity and poverty. A very large percentage of accused persons in Canada come from backgrounds of poverty, low education and broken families. Yet, in the 1990s, government funding of legal aid programs decreased by 30 per cent across Canada.

These facts—the length, complexity and importance of a criminal trial, the background of many accused persons, and the weakening of the legal aid system—taken together, create a real problem in the criminal justice system. A growing number of accused persons are being forced to represent themselves in criminal trials.

A judge can alleviate this problem in several ways. In criminal cases, a provision in the *Criminal Code* is an important potential tool for appellate judges:

684.(1)A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal ... where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

(2)Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel

shall be paid by the Attorney General ... in the appeal.<sup>2</sup>

Unfortunately, a similar provision is not available to trial judges, although they have an inherent jurisdiction, in the interests of ensuring a fair trial, to order the appointment of counsel.

Another example of the courts providing assistance to self-represented accused persons is the duty counsel program for inmate appeals developed by my colleague, Justice Marc Rosenberg. The Court of Appeal travels to Kingston several times a year to hear appeals from inmates in the Kingston-area penitentiaries. Justice Rosenberg, with the cooperation of the defence bar, has developed a program whereby defence counsel, including some of the most capable in Ontario, provide legal assistance to the inmates in the presentation of their appeals. They provide this service on a *pro bono* basis. The idea of a single judge, and the unselfish service of a substantial number of defence counsel, show the legal profession at its best.

### III. CASES IN WHICH PEOPLE WANT TO BE IN COURT

In this category of case, individuals and groups seek access to the courts, either because they want to challenge a perceived abuse of power (usually by government) or because they hope that the law will provide them with something they perceive as positive. In my view, governments and courts should not be concerned about this category of case. In a speech to students at Amherst College in October 1963, President John Kennedy said: "The people who create power make an indispensable contribution to the nation's greatness, but the people who question power make a contribution just as indispensable, especially when that questioning is disinterested."<sup>3</sup>

I agree with this statement. In a constitutional democracy anchored in the principle of the rule of law, the courts are a necessary and important forum for reviewing the laws and conduct of governments.

Once again, judges play an important role in this category – to promote access to the courts. In Canada in recent years, the courts have played this role by expanding the definitions of standing and intervention to permit a wider range of individuals and groups to bring important legal issues to the courts.

The test for standing in the private law domain is a narrow one – a

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<sup>2</sup> R.S.C. 1985, c. C-46.

<sup>3</sup> *John F. Kennedy: Containing the Public Messages, Speeches, and Statements of the President* (Washington: Government Printing Office, 1962-64) vol. 3 at 816.

person can make a claim only if he or she has a direct interest in the subject matter of a claim. For many decades, that was also the test for standing in the public law domain. That changed, almost completely, with the decision of the Supreme Court of Canada in *Minister of Justice of Canada v. Borowski*<sup>4</sup>, in which the court permitted Joseph Borowski, a male Manitoban, to challenge the abortion provisions of the *Criminal Code* in the Saskatchewan courts. Martland J. enunciated this test for standing, at p. 608:

... [T]o establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.<sup>5</sup>

This definition, coupled with the enactment of the *Charter*<sup>6</sup> the following year, has opened the door to many individuals and groups to bring a broad range of social issues to the courts.

The courts have similarly broadened the notion of intervenor status in public law litigation. An intervenor is a party with no direct stake in litigation but with a point of view that it wants the court to be aware of when the court is considering its decision. A good example of the role of intervenors in public law litigation is the recent decision of the Supreme Court of Canada in *Law Society of British Columbia v. Mangat*.<sup>7</sup> In that case, Mr. Mangat, an immigration consultant, challenged a British Columbia law that prohibited non-lawyers from practising law. He said that this law conflicted with the federation *Immigration Act*<sup>8</sup> which permitted non-lawyers to appear on behalf of clients before the Immigration and Refugee Appeal Board.

The parties in the case were, of course, the Law Society of British Columbia and Mr. Mangat. However, the court permitted the following parties to appear as intervenors to make arguments on the legal issues—Attorneys General (Canada, Ontario, Manitoba, and British Columbia), Organization of Professional Immigration Consultants Inc., Canadian Bar Association, and Association of Immigration Counsel of Canada.

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<sup>4</sup> *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575.

<sup>5</sup> *Ibid.* at 598.

<sup>6</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>7</sup> [2001] 3 S.C.R. 113.

<sup>8</sup> R.S.C. 1985, c. I-2 [repealed: S.C. 2001, c. 27, s. 274(a), effective June 28, 2002).

Ultimately, Mr. Mangat won because the provisions of the *Legal Professions Act* of British Columbia<sup>9</sup> were found to be in conflict with federal constitutional power over immigration and naturalization. Therefore, the federal Immigration Act, which allows non-lawyers to appear before the Immigration and Refugee Board, most prevail.

My conclusion on the second category of cases that come before the courts is this: courts have encouraged, and should continue to encourage, resort to the courts through broad and liberal definitions of the concepts of standing and intervention.

#### IV. CASES IN WHICH PEOPLE END UP IN COURT—THEY MAY OR MAY NOT WANT TO BE THERE, BUT THEY ARE WILLING TO DEFEND THEIR POSITION IF CHALLENGED

The people involved in these cases display a mixture of ambivalence and principle. They are, in the words Professor Rosenthal used in his remarks on this panel, “people who risk violating the law”.

This is not classic civil disobedience, because people are not overtly breaking the law. But—and I regard this as an important point—there is much less need for civil disobedience in Canadian society today than, for example, a generation ago when I was a law student like you. That is because, in the 25 years I have been a lawyer, law teacher and judge, the law and the legal profession have developed in important ways that render resorting to civil disobedience less necessary. The law itself—and here I am thinking of the superb *Charter* jurisprudence enunciated by the Supreme Court of Canada in the first few years of the life of the *Charter*—is now sufficiently liberal and creative to permit progress on major social issues *through the courts*. As for the legal profession, there is now a coterie of well-trained and dedicated lawyers prepared to represent people engaged in these issues. Your own Parkdale Legal Services Clinic immediately comes to mind.

Let me illustrate this significant shift with an example from my experience as a trial judge. Twenty-five years ago, the impugned conduct in this case would have been labelled civil disobedience, even by those engaging in it. The reason is that the law was both clear and narrow and would have prohibited the conduct.

In the late 1990s, the parties who engaged in the conduct made no such concession. They asserted that their conduct was lawful although they

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<sup>9</sup> S.B.C. 1987, c. 25 [now S.B.C. 1998, c. 9].

were also prepared, in classic civil disobedience mode, to accept the legal consequences if the courts declared that they were wrong.

A. *Daishowa Inc. v. Friends of the Lubicon*<sup>10</sup>

The Lubicon Cree is a small and poor native band in northern Alberta. They have been engaged for many years in a land rights dispute with the Government of Alberta.

Daishowa Inc. (“Daishowa”) is a large multi-national forest products company. The Government of Alberta granted Daishowa logging rights in the disputed territory. Daishowa built a large mill in Peace River. It also has a plant in Manitoba where it manufactures paper products, principally bags and boxes which it sells to Canadian retailers.

The Friends of the Lubicon (“FOL”) is a very small Toronto-based group which supports the Lubicon Cree. Its three principal members at the relevant time were a peace studies student at the University of Toronto, a church worker and a Shiatsu massage therapist. The FOL mounted what I would call an Amnesty International-type campaign in support of the Lubicon Cree. They wrote letters, spoke in public schools and organized small conferences. Not surprisingly, none of this had any effect on Daishowa, which continued to exercise its logging rights.

Then someone on the FOL had a bright idea. He realized that it would do no good to picket Daishowa’s mill in Peace River, Alberta or its plant in Manitoba because such activity would be almost invisible to the public. However, he learned that Daishowa provided boxes and bags to many of the largest and most well-known retailers in Canada. Relying on this knowledge, the FOL conceived of a boycott campaign, not against Daishowa directly, but rather against the consumers of Daishowa products.

The first target was Pizza Pizza outlets in Toronto, with placards urging people to boycott Pizza Pizza. The campaign worked—spectacularly. The FOL expanded it to other retailers. It worked again and again. Within three years, approximately 50 Canadian companies stopped buying Daishowa products in order to prevent the boycott of their products. The list of capitulating companies reads like a Who’s Who of the Canadian retail scene—Pizza Pizza, the LCBO, Cultures, Country Style Donuts, Mr. Submarine, Bootleggers, A&W, KFC, Roots, Club Monaco, Mövenpick Restaurants, Holt Renfrew, and many more.

Eventually, Daishowa resorted to the courts and sought a permanent injunction restraining the FOL’s conduct. Daishowa contended

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<sup>10</sup> (1998), 39 O.R. (3d) 620 [*Daishowa*].

that the FOL's conduct was tortious in several respects—interference with economic and contractual relations, intimidation, defamation, and the use of unlawful means, including unlawful secondary picketing.

The FOL defended the action and were represented by Sierra Legal Defence Fund.

The starting point for Daishowa's legal argument was the correct submission that secondary picketing is unlawful in the labour relations context in Ontario. Daishowa argued that the change in context, from labour to consumer relations, should make no legal difference.

The FOL's response was that its activity had nothing to do with an economic dispute between employers and employees. Rather, its activity was speech on an important public issue, the fate of the Lucicon Cree in Alberta. I agreed with this distinction.

Daishowa's argument then became that the message in the FOL's speech was an economic message, namely urging consumers not to buy Daishowa's products and that this type of speech was not worthy of legal protection when set against the losses Daishowa was suffering (profits for sure, and potentially jobs in Alberta and Manitoba).

I concluded that this argument did not assist Daishowa because in a series of major cases, the Supreme Court of Canada had decided that commercial speech was protected by s. 2 of the *Charter*. I reasoned:

If the great principle of freedom of expression protects a corporation, say Daishowa, whose simple message is: "Here is why you should buy our products", then is there any reason why the same principle should not protect a small group of consumers of Daishowa products, say the Friends, from saying to fellow consumers: "Here is why you should not buy Daishowa's products"? In my view, the answer is clear; there is no reason, in logic or in policy, for restraining a consumer boycott.

Indeed, the argument for protection of the expression of the consumers is perhaps even the better one. The corporation's expression is almost always entirely economic; it is designed to promote its own economic interests and, inevitably, to harm the economic interests of competitors. There is no "public issue" context within which most of the corporation's expression will operate. Nike hires Tiger Woods to speak on its behalf because it wants to make money and harm Adidas and Reebok. Roots hires Ross Rebagliati because it wants to sell more winter jackets and hats, and hopes that Sporting Life's sales of the same items will decline. There is nothing unlawful about any of this—the attempt to persuade people to purchase your product, and a concomitant attempt, either explicit (e.g. negative advertising) or implicit, to dissuade people from purchasing a competitor's product, is entirely an economic message and entirely a lawful form of expression.

The Friends' message has a similar starting point. It is, as Daishowa asserts, a message with a negative economic content; it says bluntly to the public "Do not buy Daishowa's bags". However, there is no economic self-interest in the Friends' message; they do not add as a reason "because we have better or less expensive bags to sell". Rather, the economic component of the Friends' message is anchored in the same foundation as all of its activities, namely an attempt to focus public attention on a public issue, the plight of the Lubicon, and

Daishowa's alleged connection to that issue.<sup>11</sup>

Twenty-five years ago, Canadian law would not have permitted this line of reasoning. The FOL's conduct would have been seen as unlawful and the FOL members would have been seen, even by themselves, as being engaged in civil disobedience. But the law developed in those 25 years. The *Charter* was enacted and the Supreme Court of Canada interpreted it in a fashion that converted the FOL's conduct from unlawful to lawful, from civil disobedience to protected speech on an important issue.

As the judge in the *Daishowa* decision, the guidance of the *Charter* was crucial. *Daishowa* relied heavily on a now 40-year-old case, *Hersees of Woodstock Ltd. v. Goldstein*<sup>12</sup>, which suggested that secondary picketing was illegal under common law. But I could not accept the applicability of the *Hersees* reasoning because it was specific to the labour relations context. In *Daishowa*, I was dealing with the assertion of freedom of expression in a consumer boycott, and I pointed out that it is precisely that right which is protected by the *Charter*:

The fact that freedom of expression is protected in the *Canadian Charter of Rights and Freedoms*, coupled with the absence of any economic rights, except for mobility to pursue the gaining of a livelihood, in the same document, is a clear indication that free speech is near the top of the values that Canadians hold dear.<sup>13</sup>

Today, it would be an easier conclusion to reach, because the Supreme Court of Canada has, essentially, reached the same one. In *Retail, Wholesale and Department Store Union, Local 558 v. Canada Beverages (West) Ltd.*,<sup>14</sup> the Court dealt with secondary picketing in a labour dispute.

The *Hersees* rule ... denies free expression any value outside primary picketing. Given the vast scope of activities captured within the nebulous boundaries of the term "secondary picketing" from peaceful picketing to the highly disruptive, an absolute prior restraint on all such activities risks unduly compromising freedom of expression. It would extend, for example, to peaceful picketing aimed at consumers, without disruption of access to the store, employment, deliveries or any other facet of the secondary employer's business. In our opinion, a blanket prohibition is too blunt a tool with which to handle such a vital freedom.<sup>15</sup>

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<sup>11</sup> *Ibid.* at 648-49.

<sup>12</sup> [1963] 2 O.R. 81.

<sup>13</sup> *Daishowa*, *supra* note 9 at 644..

<sup>14</sup> 2002 SCC 8.

<sup>15</sup> *Ibid.* at para. 70..

The *Charter* has changed the face of Canadian jurisprudence, as well as the art of non-violent political change.

## V. CASES IN WHICH PEOPLE KNOWINGLY BREAK THE LAW AND END UP IN COURT—CIVIL DISOBEDIENCE

Over a century and a half ago, Henry David Thoreau wrote his classic *Essay on Civil Disobedience*<sup>16</sup> as an explanation of his refusal to pay taxes in protest against the Mexican-American war in the 1840s. In the 20th century, Mahatma Gandhi and Martin Luther King Jr. put Thoreau's ideas into action.

Classic civil disobedience has four components: (1) clear identification of the law being challenged; (2) open disobedience of the law; (3) non-violence (Gandhi: "Civil disobedience does not admit of any violence or countenancing of violence, directly or indirectly"<sup>17</sup>); and (4) acceptance of the legal consequences of breaking the law (Gandhi: "Civil disobedience is a preparation for mute suffering"<sup>18</sup>).

The implication of this fourth component is that the practitioners of civil disobedience *target governments* in their hope to change certain laws. They do not expect the courts to change the laws because, provided the laws are constitutional, they acknowledge that the courts are sworn to uphold the rule of law. Thus, whereas lawyer Rosenthal can say to you "as a lawyer, in court I will try to advance the politics of my client", as a judge I can say no such thing. For a judge, the rule of law is more important than any single law, even a bad law.

## VI. CONCLUSION

It is a wonderful time to be a first year law student in a great Canadian law school. The long tradition of this school is to develop lawyers who will try to represent people and issues which other lawyers ignore. I hope that at least some of you will embark upon your legal careers faithful to that tradition. You will enjoy the work if you do, and you will bring honour to the profession and, hopefully, improve Canadian society.

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<sup>16</sup> *The Writings of Henry David Thoreau*, reprint of 1906 ed. (New York: AMS Press, 1968) vol. 4 at 356-87.

<sup>17</sup> *The Collected Works of Mahatma Gandhi* (Delhi: Publications Division, Ministry of Information and Broadcasting, 1958-97) vol. 26 at 538.

<sup>18</sup> D.G. Tendulkar, *Mahatma: The Life of Mohandas Karamchand Gandhi*, new ed., rev. (Delhi: Publications Division, Ministry of Information and Broadcasting, 1960-63) vol. 2 at 84.