Osgoode Hall Law Journal

Volume 5, Number 2 (October 1967)

Article 7

Re Tilco Plastics Ltd. v. Skurjat et al., Attorney-General for Ontario v. Clark et al. (1966) 2 O.R. 547

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Citation Information

Campbell, Archie Gray. "Re Tilco Plastics Ltd. v. Skurjat et al., Attorney-General for Ontario v. Clark et al. (1966) 2 O.R. 547." *Osgoode Hall Law Journal* 5.2 (1967) : 267-282.
http://digitalcommons.osgoode.yorku.ca/ohlj/vol5/iss2/7

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LABOUR LAW

Re Tilco Plastics Ltd. v. Skurjat et al.; Attorney-General for Ontario v. Clark et al. [1966] 2 O.R. 547.

EX PARTE INJUNCTION—CONTEMPT OF COURT.

Referring to the leading Canadian case on contempt of court for breach of a labour injunction, Professor A. W. R. Carrothers, has suggested:

> Perhaps the most impressive feature of the *Poje* case, at least to one removed from the heat of the dispute, is not the law of the case but the events which produced it.[1]

The same may be said of *Re Tilco Plastics v. Skurjet et al.; Attorney-General for Ontario v. Clark et al.*[2], a decision of the Chief Justice of the High Court of Ontario which resulted in the jailing of 25 picketers and demonstrators. The court's response in *Tilco* to mass demonstrations outside the struck Tilco Plastics plant in Peterborough can only be understood against the background of earlier labour strife in Oshawa. Early in 1966 a long-simmering controversy over the use of labour injunctions approached the boiling point. Newspaper reports predicted that Oshawa, a strong union town, would become "a battleground against the use of court injunctions in labour disputes".[3] An injunction limiting to ten the number of picketers outside the struck Oshawa Times was met with mass picketing in numbers up to three or four hundred.[4] According to one newspaper report[5] the sheriff attempting to read the injunction was interfered with and pelted with snowballs. The employer instituted proceedings for contempt which came before Gale, C.J.H.C. but were withdrawn after the strike was settled.[6]

On the evening before leave was granted to withdraw the Oshawa contempt proceedings, a labour rally was held in St. Peter's Auditorium in Peterborough. Several of those who were later to be convicted in *Tilco* were present at the rally and made statements to the press that

1 CARROTHERS, A. W. R., THE LABOUR INJUNCTION IN BRITISH COLUMBIA, (Toronto: 1956), 19.

2 [1966] 2 O.R. 547. Also reported in (1966) 57 D.L.R. (2d) 569. For the subsequent history of the case see (1967) 61 D.L.R. (2d) 644. The judgment of Gale, C.J.H.C. was upheld without reasons by the Ontario Court of Appeal. Leave to appeal to the Supreme Court of Canada was refused both by the Ontario Court of Appeal, and the Supreme Court of Canada.

3 The Globe and Mail, February 1966. All references in this casenote to newspaper reports are taken from the collection of press reports in REPORT OF A STUDY ON THE LABOUR INJUNCTION IN ONTARIO Vol. II. (A. W. R. Carrothers, Editor and Director of the Study, E. E. Palmer, Deputy Director of the Study.)

4 Tilco [1966] 2 O.R. 547, at 553.

5 The Globe and Mail, February 3, 1966.

6 Tilco, *supra* note 4 at 554.

mass demonstrations would be forthcoming in Peterborough.[7] It is not clear from the judgment which of the Tilco respondents were there, although the evidence placed Rouse, Mulders, Rutherford[8] and Skurjat[9] on the platform, with Mulders as chairman of the meeting. Rutherford on that occasion stated, "If it takes mass picketing to get the government to step in, we will be only too glad to accommodate them".[10] This meeting was regarded by the court as "a particularly revealing incident,"[11] and Rutherford's announcement to the meeting about mass picketing is referred to twice in the judgment.[12] Partly on the basis of this meeting, the court inferred that the subsequent events on which the convictions of the twenty-six respondents were based, were "well-planned and well-organized"[13] and that "the choice to use mass picketing was deliberate".[14]

Throughout the case it is apparent that the court regards the Tilco mass picketing not as an isolated phenomenon, but rather as part of a continuum of activity by union leaders designed to promote a direct clash between the courts and the labour movement. Gale, C.J.H.C. emphasizes the connection between the events in Oshawa and Peterborough, and states toward the end of his judgment:

> In my view it was more than a mere coincidence that the demonstrations in Peterborough on February 23rd and 24th followed closely the incidents in Oshawa, to which I have already alluded. Manifestly, the lawlessness displayed *in either case* ought not to be condoned or allowed to be repeated.[15]

Further on he adds:

> It was only after victory was achieved at Oshawa in the current and well advertised war against labour injunctions that the lawful activities at Peterborough were transferred into the next battle.[16]

This latter statement emphasizes the highly emotional atmosphere which at all times surrounded the *Tilco* case. The words "victory", "war", and "battle" underline the combative posture of the parties, and the "war" was seen by the court not merely as a war against

[7] Tilco, *supra* note 4 at 567. Although the court states that "[s]everal of the respondents made statements to the press indicating that mass demonstrations would be forthcoming," there is no finding, apart from the reference to a certain Mr. Rutherford's announcement, of who made the statements, or of what form the statements took.

[8] Note that as the proceedings were instituted by originating notice of motion, those charged are properly referred to not as defendants, but as respondents. See also Tilco, *supra* note 4, at 573.

[9] Tilco. *supra* note 4 at 574. It might be argued, as Skurjat was an official of the Textile Workers, that his presence there could be just as consistent, (in the absence of any evidence at all about his participation in the meeting) with an innocent purpose (perhaps a report on the progress of union settlement with the company) unconnected with the mass demonstrations, as with a more sinister purpose.

[10] *Id.*, at 567 and 573.

[11] *Id.*, at 567. Apart from Rutherford's statement, there is no finding in the judgment as to what specifically happened at the meeting.

[12] *Id.*, at 567 and 573.

[13] *Id.*, at 571.

[14] *Id.*, at 567.

[15] *Id.*, at 577, (emphasis added).

[16] *Id.*, at 578.

labour injunctions, but as an attack on the courts themselves. That the conduct at the Tilco plant was regarded by the court not as a quasi-political demonstration against the use of injunctions in labour disputes, but as a well-planned frontal assault upon the authority of the court, is apparent from the statement:

> The occurences of February 23rd and February 24th at the Tilco plant in Peterborough were not the result of impulse but rather came as part of an organized plan, a premeditated and wilful course of conduct taken by all respondents with a view to challenging and defying the authority of the court.[17]

Tilco was clearly regarded by the court as having an importance beyond the immediate facts of the case and involving principles at the very core of the administration of justice in the province. The decision is obviously intended as an object lesson to those who would defy the courts, and is declared to be the public response of the courts to the challenge openly posed by the demonstrators:

> The respondents obviously sought to publicize their contempt for the court's order. It is incumbent upon the Court now to publicize its legitimate and vital authority.[18]

Thus the court accepted the offer to become a party to the conflict; the gauntlet was thrown down by the demonstrators and picked up by the court. Was it necessary for the court to accept the conduct of the Tilco demonstrators as a challenge, to descend to the arena of conflict, and to assume the role of a party to the strife? To answer these questions a review of the evidence is necessary.

The employees of Tilco Plastics, represented by the Textile Workers Union, went out on a legal strike December 14, 1965. On December 17, 1965, Haines J. granted an *ex parte* interim injunction prohibiting all picketing for three days. On December 20, the injunction was varied and extended on consent of the parties by King J. The order of King J. allowed a maximum of twelve picketers at the Tilco plant, enjoined interference with free access to the plant, and was in form addressed to "the defendants, their servants, representatives and agents or any person or persons acting under their instructions or persons having notice of this order". The order also enjoined the "ordering, abetting, counselling, procuring or encouraging in any manner whatsoever whether directly or indirectly, any person or persons to commit the aforesaid acts or any of them".[19]

Although the only respondents named in the injunction were Clark and Skurjat,[20] the court was later to find in the contempt proceedings that anyone who took an active part in the demonstrations was well aware of the injunction order.

The demonstrations took place on February 23 and February 24 of 1966. The number of participants varied and at times were esti-

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[17] *Id.*, at 579.
[18] *Id.*, at 580.
[19] *Id.*, at 551.
[20] *Id.*, at 574, 581.

mated as high as three hundred and fifty. Photographs and witnesses depicted

> . . . a long moving human belt running along both edges of a five-foot sidewalk and extending from the southerly limit of the company's premises on Park Street to the westerly limit of the company's premises on Parkhill Road.[21]

A variety of signs were carried by the demonstrators. A number made reference to labour injunctions generally, and others referred specifically to support for the Tilco strikers.[22] There was evidence of two fairly distinct groups — one comprising the mass demonstrators and one composed of Tilco employees under the direction of the respondent Clark, an official of the Textile Workers Union. Skurjat, also a Textile Workers official, spent most of his time at the strike headquarters across the street although photographs placed him on two occasions near the demonstrations and, as mentioned above, he was evidently on the platform at the meeting on February 10.[23]

A circular (Exhibit M) which bore the heading "Why Are the Working Citizens of Peterborough Demonstrating?" and issued by the Peterborough Labour Council Injunctions Committee was distributed to demonstrators and passers-by.[24]

The respondents were apparently served with the originating notice of motion to commit for contempt sometime on February 24.[25] On February 25, the number of pickets at the Tilco plant was twelve or less, and the demonstrations which formed the subject of the prosecution had been terminated. The court, referring to the institution of contempt proceedings against the respondents, stated:

> The irresistible conclusion is that the decision to discontinue the demonstrations was coincident with service of the notice of motion in this matter on the respondents.[26]

On the evening of February 24, a press release was read at a meeting in the Peterborough Labour Council Hall. In the release, Mulders, president of the Peterborough Labour Council, is quoted as saying:

> Twenty-eight demonstrators have been served with subpoenas. We have accomplished what we set out to do and there is no point in continuing the demonstrations.[27]

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21 *Id.*, at 554.

22 *Id.*, at 566.

23 *Id.*, at 574-757.

24 *Id.*, at 567.

25 The judgment does not state exactly when the notice was served, but at 550, the court notes that Wilson J. on February 24 granted leave to the Attorney-General to examine certain witnesses *viva voce*, and it appears from the context of evidence reviewed at 556-567 that the notice must have been served some time prior to the meeting which took place on the evening of February 24.

26 Tilco, *supra* note 4, at 556.

27 *Id.*, at 574.

and further:

It is now up to the courts.[28]

In the same release, Rouse, described as spokesman for the demonstrators, asked provincial trade unionists to support a private member's bill, then pending in the legislature, to amend the Judicature Act with respect to labour injunctions.[29]

On the evidence the court found twenty-six of the twenty-seven respondents guilty of criminal contempt of court; Clark and Skurjat because as parties named in the original injunction they counselled and aided others in disobeying it,[30] and the others for

> . . . treating the Court's process with contempt, by deliberately acting in defiance of it and in aiding others to do so.[31]

A number of elements of this case compel comment. First, the evidence with respect to the activities of Clark and Skurjat deserves close attention. It was urged on Clark's behalf that he

> . . . was at all times merely a supervisor of the female pickets who were said to be picketing the plant entrances in compliance with the court order.[32]

and further, that

> . . . the two groups remained distinct at all times, that Clark and his group had a right to be where they were and that no fault or connection was to be attributed to Clark for or with the massive picketing taking place.[33]

Similarly, it was argued that Skurjat, also an official of the Textile Workers, spent his time at the strike headquarters and not on the picket line; Gale, C.J.H.C. indeed conceded that there was no evidence to show that Skurjat was an active participant in the picket line, and stated that he was prepared to treat both Clark and Skurjat on the basis that neither of them actually engaged in the demonstration.[34]

Thus we have a finding that neither man engaged directly in the demonstration which was found to be a public defiance of the courts, yet both were convicted and sentenced to jail for two months. It becomes important to examine the evidence which connects them with the prohibited conduct. On the first morning of the demonstrations, a picture was taken of Clark, Skurjat, and others conferring on the company lawn with the Chief of Police. Shortly after that conversation, both were seen conferring with the Sheriff, who attempted to read the injunction order aloud, but was drowned out by the shouting of the demonstrators. On another occasion, Clark and Skurjat were seen with an unknown female picketer on the west

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28 *Id.*, at 574.
29 *Id.*, at 574.
30 *Id.*, at 575.
31 *Id.*, at 576.
32 *Id.*, at 575.
33 *Id.*, at 575.
34 *Id.*, at 575.

side of Park Street. Skurjat was also seen talking with both Rouse and Mulders in the vicinity of the strike headquarters[35] — this in itself hardly seems sinister — and was noticed by a witness on the platform at the February 10 meeting some two weeks before the illegal conduct occurred.[36]

While it would require the utmost naïveté to infer from these facts that Clark and Skurjat were unsympathetic to the prohibited conduct, the conclusion that they actively aided and abetted the prohibited conduct is somewhat less than compelling. According to the terms of the injunction granted by King J., the Textile Workers Union had a right to have twelve pickets outside the Tilco plant. As officials of that union, it would only be natural for Clark and Skurjat to attend to supervise the legal picketing. It would not be unnatural, as officers responsible for the legal picketing, to confer with the Sheriff and the Chief of Police when those gentlemen appeared on the scene.

Gale, C.J.H.C., however, states:

> Those two respondents would have had this Court believe that they were in the nature of innocent bystanders to the mass picketing, that they were powerless to discourage it, that it was none of their doing. Photograph J9 shows them in conference with the Sheriff who is telling them about the injunction and the reading to take place. Why did they not protest their innocence at that point? Why did they not tell the Sheriff that it was none of their doing and retire from the group? Photograph J8 shows Mr. Clark conferring with the Chief and others. The Chief is relating police concern over the demonstration. Why did Clark not then state the position which was taken before me?[37]

With respect, one might ask whether there was any duty on either Clark or Skurjat to protest their innocence at that point to the Sheriff or the "Chief". Neither Clark nor Skurjat had been charged; neither were under arrest; it is not as if they sought to establish an alibi which to be effective as a defence must be raised at the earliest opportunity. Their defence was that they were engaged in lawful conduct and had every right to do what they were doing. Surely there is no duty on innocent men in such circumstances to "protest their innocence". As for "retiring from the group" it is difficult to see how willingness on the part of a citizen to confer with officers of the law can be tortured into an inference of guilt.

From the evidence it is apparent that the conduct of Clark and Skurjat falls somewhere on the scale which stretches from active aiding and abetting on one hand to passive acquiescence or indifference on the other. Their position on that scale depends on one's working premises; the relative weight one attaches to the competing values of freedom of expression and order, liberty and authority; one's view of the validity of the goals to which the conduct, sought to be impugned, is directed; the extent to which one is prepared to find conspiracy in the similar activities of various groups and indi-

[35] *Id.*, at 574, 555.
[36] *Id.*, at 558.
[37] *Id.*, at 575.

viduals. The drawing of inferences from evidence such as this is by no means a dry mechanical process, and the result depends on a host of unarticulated values and premises..

The form of Gale, C.J.H.C.'s rhetorical questions indicates a certain lack of sympathy with the position taken by Clark and Skurjat. Let us posit that they had nothing to do with the mass demonstrations, but were continuing the supervision of the members of the union, who continued to picket during the mass demonstrations as they had done both before and after the course of the illegal activity. Especially in the absence of findings as to what words passed between the participants at the conferences with the Sheriff and the Chief of Police, how can a duty arise in such circumstances to protest one's innocence? Gale, C.J.H.C.'s question indicates a circular argument; Clark and Skurjat are guilty because they did not protest their innocence, and they did not protest their innocence because they were guilty.

One particular area of the judgment where some sort of unarticulated premise shows itself is in Gale, C.J.H.C.'s statement:

> If trade unions feel that present legislation is unfair or unrealistic and that they should have unbridled power to use mass picketing, then they should seek proper channels for bringing about a change.[38]

The word 'unbridled' carries with it certain emotional undertones. The entry opposite the word in Roget's Thesaurus reads:

> unbridled, adj. unrestrained: violent, licentious; unruly, intractable. See VIOLENCE. Ant., see MODERATION.[39]

and conveys something of the flavour which attaches to the word 'unbridled' in popular usage. The use of such a word, which carries distinct overtones of violence, in a reference to trade union objectives, imports a strong association of disapproval.

Another point of interest in the case focuses on Exhibit M, the handbill distributed among the demonstrators and passers-by. Gale, C.J.H.C. says of it:

> It imputes to the Courts an unholy and biased approach in the granting of labour injunctions and indeed, it is a document which, in my view, is scandalous to the courts.[40]

Although the handbill is not quoted in the judgment, Gale, C.J.H.C. later refers to it with the comment:

> For the leaders of that campaign to suggest that the Court grants injunctions to employers as a matter of course, without necessary proof on their part is to impute to the Court a biased and improper approach.[41]

making it clear that he is referring to a passage in the bill which states:

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[38] *Id.*, at 577.

[39] THE NEW AMERICAN ROGET'S COLLEGE THESAURUS (Signet Books, 1960) 377.

[40] Tilco, *supra* note 4, at 567.

[41] *Id.*, at 578.

> That the employer has refused to bargain in good faith, or has rejected all peacemaking efforts, seems to merit no legal consideration by the courts. Even if the employer comes into court with unclean hands, the courts grant the restraining order or injunction as a matter of course, as though it were his inalienable right.[42]

The paragraph of the handbill preceding the above excerpt had referred to *ex parte* injunctions,[43] and although it is not clear from the handbill, the context makes it likely that the impugned passage is a reference to *ex parte* injunctions. There is very little law on what constitutes a scandal to the courts. It is obvious that the totality of the surrounding circumstances might render scandalous something not otherwise scandalous. However his Lordship appears to base his finding that the document is scandalous to the courts, not on the basis of the circumstances under which it was published and distributed, but rather on its contents.

It is interesting in this context to note that Casey J. of the Quebec Court of Queen's Bench (Appeal Side), stated in the course of his judgment in *Hébert* that the dominant factor in cases of an alleged scandal on the courts was the right to criticize.[44] He suggests that a balance be struck between the benefits of free discussion and the necessity of defending established institutions, and concludes:

> Having weighed in this way the interference with justice against other aspects of the public interest, if the scales come down in favour of the latter we do not consider that the act complained of should be regarded as a contempt at all.[45]

Although on its facts *Hébert* is very different from *Tilco*, some of the principles which it lays down, such as the above, are worthy of notice.[46]

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[42] The handbill is not quoted in the judgment, but there is a copy in the appeal book. Its closing words—"If you think this injunction law should be changed, why not join us?"—emphasizes that the main thrust of the demonstration was not directed towards the Tilco strike itself, but toward the political campaign against labour injunctions. However as the court points out (at 566) in rebutting the argument that the demonstrators' activity was not 'picketing' (and thus not within the terms of the injunction), at least a few of the signs carried by the demonstrators referred to the Tilco strike itself.

[43] "On these occasions the employer requests an *ex parte* injunction, which is obtainable without the prior knowledge of the strikers, and thus cannot be defended by the workers."

[44] Hébert v. Procureur Générale de la Province de Québec, [1966] B.R. 197. (Cour du Banc de la Reine (en appel)).

[45] In Regina v. Glanzer, [1963] 2 O.R. 30, the Ontario High Court of Justice did not focus on the right to criticize, but on the necessity of ". . . preserving the processes of justice from abusive, nasty, vulgar articles . . ." (at 36) and imposed a fine of $4,000 on the respondent. See Hébert, *supra* note 44, at 222

[46] The court (at 561 and 562) points out the great differences which distinguish *Hébert* (apparently unreported at that time) from *Tilco*. It is interesting however to note that in *Tilco*, the court, in determining the nature of the contempt, states its finding as a conclusion: "Because of the large numbers of persons involved and the public nature of the defiance of the Court order, patently there was a public depreciation of the authority of the Court and the administration of justice." (576) In *Hébert*, Tremblay, C.J. takes a further step and applies the evidence to a more general test: "Je dois considérer le québecois moyen et me demander si les observations faits par l'appelant a l'égard du juge sont de nature à lui faire perdre confiance dans les tribunaux et à empêcher ceux-ci de remplir leur rôle."

It must be kept in mind that at the time the handbill was circulated, the use of injunctions in labour disputes was a very active political issue. To find scandalous to the courts such a comparatively mild statement, on an issue where emotions on both sides ran strong, indicates a rather high degree of sensitivity on the part of the Court.

This sensitivity is further demonstrated when Gale, C.J.H.C. undertakes to defend the existing state of the law with respect to the granting of injunctions in labour disputes — "The law with respect to the granting of injunctions in labour disputes is not onerous. . . .",[47] and to make some general observations on the right to strike — "There appears to be a misconception among certain leaders and members of trade unions, concerning the respective privileges of employers and employees . . .".[48]

The mass demonstrations arose out of activity which was directed, ultimately, towards a political goal — legislative amendments to the Judicature Act with respect to labour injunctions.[49] In pursuit of that goal, the law was broken. In convicting those who broke the law, the presiding judge did not confine himself to commenting on the breach of the law, but undertook to give his view on the political issue which motivated the breach. When Gale, C.J.H.C. chose to defend the existing state of the law with respect to injunctions in labour disputes, he placed himself in the position of appearing to support the cause of one side of a live political issue. In doing so, he provided a target for a great deal of virulent abuse which promptly emanated from certain quarters. For instance, one trade union official was quoted in a newspaper report as saying:

> The judge has in fact exceeded his jurisdiction and engaged in an impertience that the political life of the province cannot accept — of using the bench as a rostrum for presenting opinions on such matters as *ex parte* injunctions which have been in the political arena. He is entitled to interpret the law. He is not entitled to turn the courts into a soap box for reactionary views on political issues presently before the public.[50]

The extremism and demagoguery of this statement speak for themselves. Nevertheless, if the judgment had made no reference to the political issue — the state of the existing law on labour injunctions — this sort of irresponsible comment would have found no mark.

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[47] Tilco, *supra* note 4, at 577. For an opposite view of the injunction power in labour disputes, see Robinson v. Adams, (1924) 56 O.L.R. 217, at 224, where Middleton J.A., after criticizing the use of injunctions in labour disputes concludes with the ringing phrase "Government by injunction is a thing abhorrent to the law of England and of this province."

[48] Tilco, *supra* note 4, at 578.

[49] As already mentioned, the last paragraph of the handbill, Exhibit M, states "If you think this injunction law should be changed, why not join us?" The political nature of the demonstrations is further underlined by a passage from a press release made at the February 24th meeting, quoted by the court: "Mr. Stanley Rouse, president of local 872 IAM, and spokesman for the demonstrators, asked trade unionists across the province to solicit the support of their Provincial members of the Legislature for Bill 25, an act to amend the Judicature Act, which was introduced by Mr. James Renwick, (NDP-Riverdale) and received its first reading in the house on February 3, 1966." Tilco, *supra* note 4, at 574.

[50] The Globe and Mail, June 28, 1966.

In accepting the challenge of the Tilco and Oshawa demonstrators to become a party to the "battle" against the use of labour injunctions, Gale, C.J.H.C. placed the court in a position where it was no longer above the conflict about labour injunctions, but could be made to appear to be taking one side in the controversy. If the court had confined its comments to the illegality of the conduct, without going into the more general issues which lay behind it, there would likely have been fewer of what Gale, C.J.H.C. referred to, in passing sentence, as:

> . . . the often irresponsible but more often unpremeditated and illogical statements and comments that apparently have been made since the release of my judgment in this matter. . . .[51]

In determining the sentence to be meted out to the respondents, Gale, C.J.H.C. stressed that the governing principle was to be neither reformation, as the respondents were persons of normally good character, nor retribution in the sense of revenge. Considering the necessity of cautioning citizens

> . . . against all forms of defiance of the law, even if inspired by allegedly legitimate goals . . .[52]

and stressing the openness with which the defiance of the courts was staged, he declared that the primary objective in the determination of sentences should be deterrence.[53] The leaders were accordingly sentenced to two months in jail, and the other respondents to 15 days.

There is virtually no guideline, either from statute or precedent, for the determination of a sentence for criminal contempt of court of this nature. In an earlier case, where it had been argued that a judge exercising his summary power to commit for contempt committed in the face of the court was bound by certain statutory limits on length of sentence, it was pointed out that:

> . . . in discharging his discretionary power to punish for contempt committed before him, he is not governed by the provisions of the Criminal Code as to penalties . . .[54]

[51] Tilco, *supra* note 4 at 579. On the next page of the judgment, the court, in referring to the absence of a sincere and genuine apology by the respondents, remarked: "Indeed, if press reports are accurate, it would seem that the respondent Skurjat and others are still endeavouring to mislead the public as to the nature and effect of this proceeding." It is not clear what statements are referred to, whether the court is taking judicial notice of comments attributed to Skurjat, or what weight and relevance is given to them.

[52] Tilco, *supra* note 4, at 580.

[53] In Re Bolton and County of Wentworth (1911), 23 O.L.R. 390, a case of civil contempt, cited in *Tilco* on the issue of strictness of proof of service, Middleton J. stated (at 395): "The jurisdiction to punish for contempt is one that should be most sparingly exercised, and in cases such as this should be regarded as coercive and not punitive . . .". That *Tilco* is a criminal contempt distinguishes it from *Bolton*, but insofar as the criminal contempt jurisdiction is coercive as well as deterrent, one might note that in *Tilco* the court found that the decision to stop the demonstrations was coincident with the institution of contempt proceedings. (See *supra* notes 25 and 26.) Thus the coercive element of the contempt jurisdiction had been discharged even before the case came on for trial.

[54] Ex Parte Lunan, (1951) 11 C.R. 340.

In fact the scope of judicial discretion in sentencing for contempt of court is so wide that during the Parliamentary debate on the revision of the Criminal Code the then leader of the opposition was moved to remark

> It does seem to me that this is a most extraordinarily open-ended power in the hands of any judge, no matter how much we may respect our judiciary, to leave him completely free to decide what the penalty should be . . . I know of nothing at all that suggests any uniform pattern. It is entirely at the whim of the judge himself.[55]

Actually there are so few cases on this sort of contempt that it is impossible to state that a pattern exists — there is just not a large enough sample on which the existence of a pattern may be based. In *Poje*,[56] where the facts were somewhat similar to those of *Tilco*, the leader of the demonstrations was sentenced to three months in jail and a fine of $3,000. In *General Printers v. Thomson*,[57] a case involving contemptuous breach of a labour injunction accompanied by threats and violence, the sentence was 15 days — although the *Thomson* case involved a civil contempt, whereas the contempt in *Tilco* was found to be criminal.[58] In *Lunan*[59] a witness was sentenced to a year for refusing to testify. In *R. v. Neale*,[60] a British Columbia Case with a great many similarities to *Tilco*, the leaders of a demonstration which involved an assault upon a police officer were sentenced to 6, 4, and 3 months, depending on their degree of participation. Compared to these latter two decisions, the *Tilco* sentences are mild. It could be argued that because of the peacefulness of the

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55 Hon. George Drew, HANSARD, June 3, 1954, at 5471.

56 [1953] 1 S.C.R. 516, affirming (1952) 6 W.W.R. 473 and (1952) 7 W.W.R. 49.

57 (1964) 46 D.L.R. (2d) 697.

58 The contemnor in *Thomson* threw stones at a non-striker's car and on a later occasion tore the ignition wires from the distributor cap of the same car. He also let the air out of another car's tires and assaulted a 17 year old youth, threatening him with physical harm and saying that he (the youth) was as good as dead if he continued to work for his employer. The court described the nature of the proceedings as "quasi-criminal." (699) In cases such as this, the distinction between contempts criminal and contempts civil is, to say the very least, blurred. As one learned author has noted; ". . . . identical behaviour may rightly be classified as criminal or civil contempt, depending on the person of the contemnor or the purpose of the classification. . . . It is difficult to predict when in any given case the court will classify a contemnor's behaviour as civil contempt . . . the law of contempt, at least with respect to its criminal and non-criminal aspects, is shrouded in obscurity." Fisher, Hugo, *Civil and Criminal Aspects of Contempt of Court* (1956) 34 CAN. BAR REV. 121 at 162-63. This distincton, blurred as it is, could become absolutely crucial in the application of section 9 of the Criminal Code, especially if there is any merit in the constitutional issue raised by the then Minister of Justice when the new Criminal Code was being debated in Parliament: "With regard to contempt of court committed in a civil court, without going into the matter too carefully, I would be inclined to think that an appeal from a citation for contempt of court occuring in provincial courts exercising civil jurisdiction would more than likely have to be provided by provincial legislation." HANSARD, June 3, 1954, at 5475.

59 (1951) 11 C.R. 340.

60 (1966) 67 C.L.L.C. ¶14016 (B.C. C.A.).

demonstration[61] and the fact that the respondents were apparently first offenders, the *Tilco* sentences were somewhat severe. But it is apparent that Gale, C.J.H.C. gave the question of sentencing the most thorough and painstaking consideration, and in light of his findings with respect to the gravity of the offence and the threat it posed to the administration of justice and to public respect for the law, the sentences could very easily be regarded as mild. In the absence of a number of comparable cases, it would be difficult to find any solid basis for describing the sentences as severe.

An interesting legal aspect of the *Tilco* case involves the right to jury trial in cases of criminal contempt of court. Counsel for the respondents argued

> . . . that the Attorney-General ought to have proceeded by indictment pursuant to Section 108 of the Criminal Code, and not by originating notice of motion.[62]

Section 108 of the Criminal Code reads:

> Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money is, unless some penalty or punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

The court responded to this argument by stating:

> The section itself contains the answer to this objection in the words 'unless some penalty or punishment or other mode of proceeding is expressly provided by law'. The Attorney-General is seeking to invoke the inherent power of the Court to punish summarily for contempt. . . .[63]

and continuing at some length on the history of the inherent power of superior courts of record to punish for contempt, referring as well to Section 8 of the Criminal Code. Section 8, which abolishes common law offences, contains the saving clause:

> . . . but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or magistrate had, before the coming into force of this Act, to impose punishment for contempt of court.

With respect, the court does not directly answer the problem posed by the presence of the words "expressly provided" in Section 108. While there is some authority for the proposition that the word 'expressly' can under certain circumstances mean 'impliedly',[64] the very fact that the contempt power is described by the court as in-

[61] The Attorney-General did not even allege that the respondents were in breach of that part of the injunction of King J. which banned molestation or intimidation. Tilco, *supra* note 4. In commenting on the potential menace posed by the demonstration the court stated, "that no violence erupted was undoubtedly due to the skill and judgment of the police and the restraint exercised by the demonstrators and their leaders." (Tilco, at 556) The court later notes: "There is the further evidence of the Deputy Chief of Police who was told by the organizers of the demonstration that a body of 30 to 35 men had been formed to patrol the demonstration line and to keep order."

[62] Tilco, *supra* note 4, at 559.

[63] *Id.*

[64] Rex *ex rel.* MacGinnish v. Hassell, [1937] 1 W.W.R. 726 (B.C. B.S.). *Re* Browne, [1944] 1 D.L.R. 365.

herent would seem to negate the proposition that it is "expressly provided". And Section 8 of the Criminal Code, while it recognizes the existence of the inherent power and saves it from a common grave with the other common law offences, could hardly be said to 'provide' the mode of proceeding which, according to *Rex v. Almon,*[65] has existed from time immemorial.

Although this argument in itself may seem unduly semantic, the issue is crucial. If the Attorney-General is obliged to proceed by the route provided in Section 108, the accused has the right to trial by jury. However if the Attorney-General is allowed to invoke the court's inherent power and to proceed summarily by originating notice of motion, the respondent is denied the right to jury trial.

The issue was adverted to in *Nissho v. Longshoremen's Union,*[66] a contempt of court action which also arose out of the breach of a labour injunction. In *Nissho,* the argument that the Attorney-General must proceed, where possible, by the route of Section 108 was rejected by Wilson, C.J.S.C. who was not convinced that he could,

> where two valid alternative methods of procedure are open to the Attorney-General, say that he must adopt one rather than the other.[67]

There is a strong current of judicial opinion to the contrary. In *R. v. Davies,*[68] Wills J., although holding that the case before him (newspaper comments prejudicing the fair trial of an accused) was a proper one for the exercise of the summary process stated:

> It is true that the summary remedy, with its consequent withdrawal of the offence from the cognizance of a jury, is not to be resorted to if the ordinary methods of prosecution can satisfactorily accomplish the desired result, namely, to put an effectual and timely check upon such malpractices.[69]

A similar approach is taken in *Hébert;*[70] where Tremblay, C.J. says of the procedure:

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65 Cited in *Tilco* at 559.

66 (1966) 54 W.W.R. 295 (B.C. S.C.) (In Chambers). From the dates of the cases it would appear that it is to one of the *Nissho* decisions that the court (in *Tilco*) refers to at 579: "I have also familiarized myself with the cases which seem to be relevant on this issue. Indeed I have read one that was delivered a week ago in British Columbia. I managed to get a copy of it. It is the most recent." The report of *Nissho* ((1966) 54 W.W.R. 295) does not deal with the case on its merits, but consists of a number of interim rulings. The *Nissho* case itself is reported in (1965) 66 C.L.L.C. ¶14113, and although the terms of the sentence do not appear in the judgment itself, the subsequent case of Regina v. Neale, (1966) 67 C.L.L.C. ¶14016 indicates that in *Nissho* "a very substantial fine" was imposed.

67 (1966) 54 W.W.R. 295 at 301. Technically this is mere obiter dictum, as the court found itself unable at that stage of the proceedings to determine whether the contempt was civil or criminal: "To hold that he is bound to utilize section 108 of the Criminal Code is to hold that the matters alleged in his notice of motion constitute criminal contempt. I do not think that I can in the present state of the authorities so hold before hearing the evidence."

68 [1906] 1 K.B. 32.

69 *Id.* at 41.

70 *Supra* note 44.

> Ce pouvoir ne doit être exercé qu'avec une très grande prudence, avec angoisse, et seulement dans le cas ou il est necessaire d'agir avec urgence pour permettre aux tribunaux de continuer à remplir leur fonction.[71]

These dicta are of particular relevance in a case like *Tilco* where the court found that the prohibited conduct ceased as soon as the contempt proceedings were instituted and there was no apparent urgency in having the matter proceed speedily to trial. Of course on the facts of *Hébert,* as the court points out in *Tilco,*[72] the summary proceedings were much more summary than those afforded to the respondents in *Tilco.* But the principle remains that any diminution of the rights of the accused, including the right to jury trial, is to be guarded against and resorted to only in the most extreme circumstances. Even in *Nissho,* Wilson, C.J.B.C. says of the argument based on the right to jury trial through Section 108 of the Criminal Code:

> But the general thought behind it, that if a man is entitled to trial by jury, he should not be deprived of that right except by the letter of the law, appeals to me.[73]

To succeed with this argument, it is necessary to leap the considerable hurdle posed by *Poje.*[74] There, Kellock, J. made an express finding that there had been a breach of Section 165 (now Section 108) of the Criminal Code (and, by inference, that an alternative to the summary procedure was available) yet he found no fault with the form of the proceedings by originating notice of motion. Against this authority it could be urged that the argument on the right to jury trial based on the wording of Section 108 was not raised and that no case is authority for a proposition that was not before the court. Alternatively it could be argued that much of the judgment of Kellock, J. is obiter dictum — that he needed only to find that Farris C.J. had jurisdiction to hear the application for committal Kerwin and Estey, JJ., who dismissed the appeal on the narrow jurisdictional ground, specifically refused to comment on other aspects of the case.

Another obstacle to the argument on the right to jury trial based on the wording of Section 108 is presented by the case of *In re Gerson*[75] where the court referred to Section 165 (which corresponds to the present Section 108) and Section 180(d) (which corresponds to the present Section 119) and stated:

> The argument on this point was that the appellant could be prosecuted under either of these sections and that these proceedings being available the right of the Court to punish for a contempt of court had been abrogated. Without deciding whether either of these sections would apply in the circumstances, we are of opinion that even if that were so it is a necessary incident to every superior court of justice to imprison for a contempt of court committed in the face of it . . . That right persists and has not been abrogated by either of the sections of the Criminal Code referred to . . .

[71] *Id.,* at 216.
[72] Tilco, *supra* note 4, at 562.
[73] *Supra* note 66, at 300.
[74] *Supra* note 56.
[75] [1946] S.C.R. 547. See also *In Re* Mat Simmons Nightingale, [1946] S.C.R. 538.

In response to this case, one might argue that the contempt in *Gerson* was committed in the face of the court, and was therefore a much more direct affront to the administration of justice than a contempt, like *Tilco,* not committed in the face of the court.[76] It must also be remembered that *Gerson,* arising out of the refusal of a witness to testify in one of the post-war "spy" cases, involved an urgent issue of national security and that it may have been too cumbersome and time-consuming in such an emergency to resort to proceedings by indictment.[77]

It is quite apparent that this question of the right to jury trial in contempt cases is still in England an open question. Pearson, L.J. remarked in *Re Atty.-Gen.'s Application; Atty.-Gen. v. Butterworth*:

> In this case it has not been contended on either side that there is an alternative procedure by indictment (which, though said to be disused, could be revived) and that it would be a more suitable procedure in this case on the grounds that, after the conclusion of proceedings, there is prima facie no pressing need for prompt disposal of the matter, and trial by jury would be appropriate for determining the intention or purpose of each of the defendants in voting for or otherwise helping to procure the removal of Greenlees from his offices. The decision in this appeal does not preclude any submission on those lines which may be made in any future case.[78]

Whether it is an open question in Canada is more doubtful. Although there has been no decision directly on the point, it seems in light of *Gerson, Poje, Nissho* and now *Tilco*[79] that the argument that the right to jury trial may be preserved in contempt cases by the wording of Section 108 of the Criminal Code, would meet short shrift. It is unfortunate that this issue, involving the liberty of the subject and the ancient and fundamental right to trial by jury, has never been directly met by the courts.

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[76] In the United States some jurisdictions have expanded their power to punish for contempt committed in the face of the court by inventing the fictional category of "contempts *constructively* committed in the face of the court". See GOLDFARB, R. L., THE CONTEMPT POWER (Columbia University Press, 1963).

[77] For the background of these "spy" cases see *Hard Cases Make Bad Law,* (1967) January, CHITTY'S L.J., 1.

[78] [1962] 3 W.L.R. 819 at 840. Quoted in *Nissho, supra* note 66, at 300.

[79] The Court in *Tilco* refers to *Re* Campbell and Cowper, (1934) 63 C.C.C. 36 (Alta. C.A.) for authority that the right of the courts to proceed summarily against contempts is well entrenched and virtually unquestioned. It had been argued in *Campbell* that instead of proceeding summarily it would have been more appropriate to proceed under section 180 of the Criminal Code (the 'obstruction of justice' section, now section 119). Mitchell J.A. replied: "This section however is restricted to and covers only that class of contempt in which the words 'wilfully attempts' would be applicable and might fall far short of providing a remedy for the offence now before us, for in my opinion a charge prosecuted under this section under the facts of this case might result in a dismissal and a most serious offence against the course of justice go unpunished." With respect, this indicates a grave potential danger in the use of the summary process. The procedure can be used to invoke an 'inherent' jurisdiction which is poorly defined and which may well visit with criminal liablity conduct not otherwise unlawful. In the particular example of the *Campbell* case, it was used to avoid the necessity of proving *mens rea* and thus, by the court's own admission, the ambit of the criminal law was expanded by the exercise of judicial discretion.

Although one might raise a few questions of fact or law in connection with the *Tilco* decision, it cannot be seriously disputed in the result that the respondents (with the possible exception of Clark and Skurjat) were aware of the probable consequence of their actions and got what they bargained for. Having deliberately set for themselves a collision course with the courts they cannot be heard to complain of the resulting impact. Having held themselves out as sacrificial lambs for their political cause, it would lie ill in their mouths to complain of their jail sentences.

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