IN THE SUPREME COURT OF NEW ZEALAND SC 48/2009

BETWEEN **VINCENT ROSS SIEMER**

Appellant

AND **SOLICITOR-GENERAL**

Respondent

Hearing: 2 March 2010

Court: Elias CJ
Blanchard J
McGrath J
Wilson J

Appearances: R M Lithgow QC and L A Scott for the Appellant
M F Laracy and B C L Charmley for the Respondent

CIVIL APPEAL

MR LITHGOW QC:

If the Court pleases, I appear with my learned friend, Ms Scott, but of course our very position is that it's a criminal appeal and we've filed it both ways, as the Court will be aware.

ELIAS CJ:

That's all right. Thank you, Mr Lithgow, thank you, Ms Scott.

MS LARACY:

May it please the Court, counsel's name is Ms Laracy, I appear for the Solicitor-General with my learned friend, Ms Charmley.

ELIAS CJ:

Thank you, Ms Laracy and Ms Charmley. Yes, Mr Lithgow?

MR LITHGOW QC:

Yes, if the Court pleases, you do have a huge amount of material covering the idea, really, around what to do with the law of contempt in the 21st century, because it is essentially something that has resided in the power of Judges and is essentially, you might understand, the outside world may see as a bit of an orphan, and that is a series of vague powers which can end up with a citizen being put in jail for lengthy periods of time. Now, there's lots written about why that is so, how long that has been so, the length of time that practices have been available to Judges in themselves scarcely justifies them, but it means that there's a lot written about it. Really, the position seems to be that there would be cases, particularly perhaps *R v Cohn* in the Canadian jurisdiction and the American cases of *International Union, United Mine Workers of America v Bagwell* 114 S Ct 2552 (1994) and also *Gompers v Bucks Stove and Range Co.* 221 US 418 which would support the position that for this type of situation that Mr Siemer faces the categorisation of what's occurring in the Courts would be that it's criminal. Now, if that it correct, if that is correct, then that's one way of resolving this case. That is, that it really always was a criminal matter, that a range of indicia show it's a criminal matter, that the High Court correctly dealt with it, in the sense that they revealed the true nature of it at the end, their protestations that it was a civil matter was wrong, and so therefore we adopt the, really, the Court of Appeal reasoning. The Court of Appeal reasoning was that if that's the way it's dealt with, then it was criminal. Because the various stages, what the complainant, what the applicant, what the Solicitor-General, what the party thought they were doing, has never been held to be decisive. The subject matter's never been held to be decisive, the fact that you end up in jail, in itself, has not been held to be decisive, taking all the indicia, that this would be criminal.

The other propositions are that, and didn't in the *International Union, United Mineworkers of America,* this is discussed in additional material, particularly

by Scalia J, by others, that where the injunction isn't just yes, no, do this, do that, where it can't be stated simply what it is exactly it is you're supposed to do or not do, that there's absolutely nothing the matter with having a jury trial, that there are factual issues for the jury to determine in terms of compliance, it's not just a question of law as we've tried to make them, in a way.

So, the starting point, then, is what exactly was Mr Siemer told to do? And the injunction has set out, the operative part of the injunction's set out. But the Solicitor-General's proposition was that he had a deliberate, a persistent and an unjustifiable disregard for the High Court injunction, and that that was an assault on the authority of that Court, and that he did not respond to previous sanctions imposed by the Court for the same or similar behaviour, and that his actions thereby constituted serious and ongoing active contempt requiring an indefinite term of imprisonment.

Now the first part of it is really sort of geographical in that it's said to be the websites in respect of which he was editor, or over which he has control. His actions are said to be a deliberate, persistent, unjustifiable disregard for the High Court injunction. It's got the aggravating feature, apparently, that he's done it before, failed to respond to previous chances, and then there's a penalty. Now just even beginning there, why, why do we not think that that's some kind of a criminal allegation? Why is the language of our Courts become so peripatetic that it just can make things which are penal, criminal, that we can turn them into something else? And the question is whether we want to chop through all this history, and it's been done for years, whether we want to chop through all this history and simplify it? And it would absolutely –

ELIAS CJ:

I thought your point was rather that the history is equivocal, that you can pick authority which says that these matters are to be characterised as criminal and those that characterise them as civil, and that your submission is, well, the substance is criminal.

MR LITHGOW QC:

My earlier reference to the long period at which these powers of contempt have been is because we sometimes see periods, 600, 800 years, referred to, going right back to the Norman conquest presumably, although it's easy to imagine that all kinds of Courts have sanctions for not doing what your told. But the modern history, the modern overseas precedents provide a range of options Courts, different Courts, face: human rights, Bill of Rights, modern propositions about how much power Judges should have in these circumstances. So I was really talking about the modern history provides an, not an ambiguous, but an elastic set of propositions. I mean, that, perhaps unfortunately, provides that loose net result, that despite what the Crown says, and in my submission the situation is there is material the Court could use, which would be entirely consistent with jury trials, for the bulk of criminal contempts and would reserve summary justice to, in the sense it's meant in contempt, for cases like the Skelton kidnapping and cases like that, where there was identifiable urgency and where a modified procedure short of full criminal process could be given. There's no real –

ELIAS CJ:

So you'd accept that the procedure in *Jones v Skelton* was appropriate?

MR LITHGOW QC:

Well, if it was appropriate on the facts it was appropriate to make a procedure that made it happen. If it had to be done then the fact that the Court uses an ancient procedure to achieve it would be an exception that most people would understand. A child, who's got independent rights, has been taken – so it's not just a question of breach of a Court order in a kind of defiant situation. The child has an independent right to freedom and to be out and about.

ELIAS CJ:

So is the difference between the use of the contempt power to compel compliance and use of the contempt power to punish?

MR LITHGOW QC:

Well, that would be an example. I mean, it lends itself to arguments, complicated arguments it made in relation to torture during 9/11 and Guantanamo Bay and it has, you can take it down that road –

ELIAS CJ:

Well, we're not taking it down that road.

MR LITHGOW QC:

Yes. But that would be it, where the exigencies require –

ELIAS CJ:

No, sorry, what I'm asking you, though, is I'm feeling for the difference in principle between *Skelton* and what you say applies in this case.

MR LITHGOW QC:

Yes.

ELIAS CJ:

Is it because you say that in this case this was a penalty exacted by the Court, whereas in *Skelton* it was trying to achieve compliance and therefore could proceed summarily?

MR LITHGOW QC:

Yes, however I'm not accepting that all low-level compliance needs would require a *Skelton* type scenario.

ELIAS CJ:

No.

MR LITHGOW QC:

The Court has a need to achieve compliance, but modern contempt cases have shown that they're anything but summary, as they stretch on and it's seen to have got into disclosure and semi, increased pleadings, and huge

amounts of time go by, of which the *Solicitor-General v Miss Alice* saga would be a clear demonstration. Because the Crown have perhaps come to consider the Judge alone part of summary to be the essential condition of summary process, but summary process has a number of aspects. One is a, with a degree of urgency or despatch is what "summary" actually means.

ELIAS CJ:

But in this context it's contrasted with proceeding by way of indictment. That's the way the cases use it here, isn't it?

MR LITHGOW QC:

Well, except that it's come to almost forget the other components that are attempted to be achieved by the summary process. Because we longer – I mean, you wouldn't recognise it – we not longer have the Judge normally who has been the subject of a contempt dealing with it, often have two Judges, often have significant delay, often have a process of disclosure. All of those were not what summary originally meant, and the one thing that's been clung to is Judge alone. Now, I know we associate criminal, or we associate juries in the modern era with delay, but that's not a feature of juries, that's not an essential ingredient, and with the grand jury system they were often assembled very, very simply and quickly. And if you read, for example, the biography of famous Dunedin lawyer, Alf Hanlon, that even the grand jury depositions and High Court trials were held within a couple of months of an event. So we, at the moment, associate assembling a jury as being some sort of burdensome time-consuming event, but that's strangely actually because of the history of the development of the summary process in New Zealand, which took so long, so that summary process came to mean the opposite of what the Act intended by being –

ELIAS CJ:

Well, for the purpose of your argument, what are you saying "summary" means? Quick or…

MR LITHGOW QC:

Quick, reduced, reduced process, adapted to meet the exigencies, and that was always done by a Judge alone. All I'm saying about the Crown's encapsulation of summary is that they have made it, or it's evolved to be, synonymous with Judge alone only, forgetting what its other ingredients were meant to be. Now we're still dealing now with what the High Court did. The High Court actually used the word that sentenced him to six months' imprisonment. He appealed and was granted bail. And the key feature was that he had always sought a jury trial, on the basis that he was liable to over three months' imprisonment, so that his jeopardy, as he asserted it and as was perhaps plain from the Solicitor-General's application, made true by what actually happened, was in excess of three months' imprisonment. So if we compare that with the *Cohn* case in Canada, where they adopted a procedure that the Court of Appeal favoured, in Canada the threshold is five years' imprisonment.

ELIAS CJ:

That's the Charter, –

MR LITHGOW QC:

Yes, right to a jury trial.

ELIAS CJ:

– rights, yes.

MR LITHGOW QC:

So the same trigger event that's five years in Canada is three months in New Zealand, and that just is. Whether that's right, whether that will survive the next decade, is not relevant. That's what the New Zealand Bill of Rights considers the threshold for a right to put it before a cross-section of non-professional Judges, which our law has considered a public good since at least the first version of the *Magna Carta.* What they did in *Cohn* was to say, "Oh, well, but in Canada no-one's been sentenced more than three years in the last living memory," or according to their researchers, "therefore as a

matter of reality," and it was a bit pragmatic, but as a matter of reality they were able to say that a person starting a contempt trial in Canada is not at risk of getting five years or more. Now, we don't use that trigger definition in New Zealand. Generally, in the criminal law, it's what the maximum for the statutory offence is, but, in the situation where there is no maximum.

ELIAS CJ:

So your submission is that if the Judge was not confident that the penalty, should he find the contempt established, was going to be under three months' imprisonment, what?

MR LITHGOW QC:

Then he should make the Bill of Rights Act guarantee come true by whatever means necessary to achieve it. And the retrospective attempt to fix it – let's say all the Court of Appeal have done is change it to one weeks' imprisonment – that that doesn't logically fix it, because the time of jeopardy is the time of trial, and that when then the – so this isn't a person as some cases show that didn't know about the right or can't be demonstrated to have given it any thought, this is a man that asserted the right and the Court refused to give it to him, and then went and did the very thing that he said he was at risk. So it doesn't make sense to just say, "Well, we'll fix it by a different method," that is, "We'll fix the sentence." The jeopardy provision is –

ELIAS CJ:

Why doesn't that substantially meet the harm?

MR LITHGOW QC:

What –

ELIAS CJ:

You said that the Court would have to give effect to the Bill of Rights guarantee or make it come true by whatever means were necessary. That seems to me to be an entirely proper acknowledgement that the Court has to

act in a manner which is compliant with the Bill of Rights Act. Why is not giving effect to the substance of the Bill of Rights Act guarantee sufficient?

MR LITHGOW QC:

Well, in New Zealand, for example, if you're charged with manslaughter and, as many people do, end up with a non-custodial sentence, say, a hunting accident or something, that couldn't possibly be said to fix a procedural guarantee as basic as your right to put that in front of a jury.

ELIAS CJ:

What couldn't fix it?

MR LITHGOW QC:

Just giving you a non-custodial sentence. The lawyer might think, "You're only up for a non-custodial sentence, classic hunting accident situation, for manslaughter, look at previous cases, apply street sense, and you're going to end up with a non-custodial sentence. Judge knows that, everybody knows that, why bother with a jury trial."

ELIAS CJ:

That parallel isn't exact though, because you do have a statutory regime. Here, the Court, on your argument, which I'm not unattracted to, is that the Court must fashion an appropriate response which is compliant with the Bill of Rights Act. So you can't point – unless you can say that this is a charge, you can't really point to the literal application, even of section 24(e), can you? You have to argue that the Court must give effect to the substance of that guarantee.

MR LITHGOW QC:

I'll just grab the Crimes Act for a minute. Yes, because, just before I move to that, it's not the imprisonment. The Bill of Rights doesn't say that if you don't have a jury trial you can't get more than three months' imprisonment.

ELIAS CJ:

Yes.

MR LITHGOW QC:

It says if you can get more than three months' imprisonment you're entitled to a jury trial.

ELIAS CJ:

No, I understand that point.

MR LITHGOW QC:

It's not just the going to jail that hurts, it's the fact that the State has a piece of constitutional legislation, and fundamentally they're telling you what you've done wrong but they don't ensure that they do the more important thing. Because he is, after all, –

ELIAS CJ:

The fact that you weren't given your right?

MR LITHGOW QC:

– accused of being defiant –

ELIAS CJ:

Yes.

MR LITHGOW QC:

– to the Court, and whereas the two High Court Judges are defying the Bill of Rights Act, would be the proposition, so they're very analogous challenges by the citizenry to professional judging, aren't they? And that's where, classically, we have the backup of lay people taken at random. Now, why I'm not at all sure the fascination with the definition of offence under the Crimes Act, because to the – let's just start from the beginning. From the outside, as I set out, it looks like an allegation of morally reprehensible behaviour, it looks like they're trying to put you in jail, it looks like you've done

quite bad things that involve criticism of the nation state, it's prosecuted by the junior law officer who does that kind of thing, but they're saying that because it doesn't meet the definition of "offence" under the section 2 of the Crimes Act, which is, "An act or omission for which one can be punished under this Act or under any enactment, whether on conviction on indictment or on some reconviction," that it can't work. To which I say, what about the beginning of section 2, which says, "In this Act, unless the context otherwise requires, offence means –"

ELIAS CJ:

Well, we're not under the Crimes Act, that's the point.

MR LITHGOW QC:

No, but we're taking the definition from this Act, and isn't this a classic example of where the context otherwise requires, that is, one fragment of our legal history that has not been converted into statute, it still puts people in jail, I don't know of any other ones, wouldn't that be a classic context of our laws and usages of New Zealand –

ANDERSON J:

But the argument is under the Bill of Rights Act, not under the Crimes Act, and the issue is, how should section 24(e) be interpreted and/or applied, consistent with the purposes of the Bill of Rights Act?

MR LITHGOW QC:

Well –

ANDERSON J:

Whereas the approach has been to treat "offence" as if it were offence under the Crimes Act. It may have a completely different meaning for the purposes of the Bill of Rights Act.

MR LITHGOW QC:

Well, exactly, and that's probably a better way to do it, to say it doesn't say, "Charged with an offence as defined under the Crimes Act," it said, "Charged with an offence."

ANDERSON J:

It's really concerned with the consequence of conduct, which is the deprivation of liberty for more than three months.

MR LITHGOW QC:

Well, I agree with you absolutely, but I think in fairness we do have the problem that references to three months et cetera are parallel train tracks, aren't they, to other parts of our law. So it's a natural thing to see the ways in which these concepts are talked about in the other enactments. But, fundamentally, that must be correct that if the Bill of Rights Act can be made to make sense on its face, why do we go looking for obstacles in references which aren't there? And the answer is, I suggest, that neither the Crown nor the Courts look forward to juries having a look at contempt type issues. And that's classically a perspective question, isn't it? It's classically a question you can imagine that professional Judges and members of the public at large may have different views on whether that's a good idea or not. So it is about whether or not this Court signals a change in their powers and privileges that have been around for a long, long time, time immemorial, in order to meet modern concepts that are set out in a Bill of Rights-type document. Strangely, of course, the Bill of Rights-type document is just as old as many of the feature of our Courts, but in respect of contempt the English tradition has been to stay away. So what Justice Anderson puts forward as one of the roots must, with respect, be the tidiest, the most basic of roots. It follows earlier New Zealand decisions that if the Bill of Rights provides a protection, Courts have got to make it work, unless there's some extraordinary reason why not.

ANDERSON J:

One of the difficulties has been that the process adopted in more modern times, such as the originating summons process, which leaves a hiatus between that procedure and the establishment of the jury trial. But what I'm wondering is whether the old practice of proceeding on indictment is still available, in which case a person wanting to hold someone to account for contempt can go the originating summons way, which limits any imprisonment to three months because of the operation of the Bill of Rights Act, or it can go the indictment way, which invokes all the protections of people being tried on indictment. So what I'm really wondering is whether one may still proceed on indictment as an elected course.

MR LITHGOW QC:

As a matter of process, we'd have to decide whether this indictment was inserted in the system in a time sense, because you've got the same problem trying to begin with an information. But *Solicitor-General v Radio Avon Ltd & Anor* [1978] 1 NZLR 225 (CA), which is the case it says who can't proceed on indictment in New Zealand, when you read it, it only keeps repeating it. It doesn't really seem to say why exactly that is. It says it three times. But how it quite makes that so I've been unable to fathom. There's no doubt that it says it. But the argument as to why that's wrong is, I think, set out by Sir Geoffrey Palmer as he then was, as counsel, wasn't really worked through.

McGRATH J:

I suppose part of the difficulty, Mr Lithgow, that in terms, historically, of the Crimes Act, going back to also the 1908 Act and Salmond's judgment about 1925, the formalistic views being taken of contempt, which seems to be reflected in other jurisdictions. And you've got these categorisations of civil contempt and criminal contempt with different factors said to influence them. Now, you're making, as I understand it, the point that the Bill of Rights is not to be interpreted by reference to form, such as narrow definitions of offence and other statutes. It's to be interpreted by reference to the substance of the right, and the sort of, if you like, a generous rights consistent interpretation, where that's possible. But we are, nevertheless, have to have some regard when we

come to operate the Crimes Act revisions with concepts such as indictment as to whether a generous approach in the Bill of Rights Act can be an available interpretative means of altering the way that the Crimes Act has been applied. On that basis saying that *Radio Avon* no longer applies since the Bill of Rights Act and we must have a new approach. I think that you've got to – it's not just enough to say that if it's covered by the Bill of Rights Act, that's got to be given effect, because our Bill of Rights Act isn't of that constitutional nature.

MR LITHGOW QC:

Well, it has a constitutional nature in that it is to be applied, if it's possible to apply it, if it doesn't offend other black letter law that is more important, or there's an exception required in a free and democratic society. But quite how a residual common law right to put people in jail, which is really what the problem is, not Judges doing other things, necessarily, or trying other coercive means. But a reserved common law right of Judges to put people in jail for over three months, then I guess the baseline is that I would say that the Bill of Rights has to be made to work on that. If Judges still want to put people in jail for three months or more without a right to a jury trial, then that would have to be demonstrated to be an exception, because as Anderson J invites, we don't need to go beyond those sections. Now, what Your Honour indicates as being a formalistic approach is, with respect, a bit of smoke and mirrors, really. Because when you try, every writer has said that we have these categories. But you can read the cases to your heart's content and still be none the wiser as to how exactly you can predict which side of the line it's going to fall on. Because the fact that a Solicitor-General brings it is obviously not determinative. The fact that the person goes to jail is not determinative. The fact that it started as a civil case is not determinative, that it's interlocutory is not determinative, that it's stand-alone is not determinative. So Your Honour correctly says it's been given a formality, and a formality is, if you like, pretended. But no text writer has suggested that it holds up in any predictable way under fire. In fact, this is the very reason why so much time and effort is spent trying to categorise to meet the ultimate needs.

ELIAS CJ:

But is it necessary to categorise? Because it's not, I think, a difficult leap to say that if a power or jurisdiction, which I tend to think is what the power to penalise through contempt is, it's a power that the Judges have which is ancillary. If it does have characteristics of criminality, then of course the procedures in the Bill of Rights Act must guide the Judges in the use of that power. But that doesn't necessarily mean that it is a crime. And I think that it's that characterisation that I would question. It's a bit like – I was thinking of an analogy. It's a bit like the case we had about the dentist. No-one would have said that the disciplinary proceedings were a crime, a criminal offence. But some, at least, of us thought that the procedure of the disciplinary tribunal had to take into account the safeguards for criminal offences in the Bill of Rights Act, by analogy. And it may be that that's the right way to look at this, instead of this endless quest for classification as to whether it's a crime or it's civil, an acknowledgement that because it's a penalty, it's appropriate to look to the Bill of Rights Act. But that doesn't necessarily mean it's a crime. Now, what that could mean is that instead of fashioning a criminal procedure, it's implicit in section 24(e) that there is a limit on the power to be implied.

MR LITHGOW QC:

Well, obviously that's the most attractive to this argument, that when reading the protection, that the emphasis is on the imprisonment, not on how you're not there. That charged with an offence is just an ordinary expression, meaning, you've been charged with doing something bad, which obviously it would have to be, because we don't have any other reason to put people in jail. You're being punished for doing something bad, if you're liable to more than three months, these protections exist. And that would be the last, really, of the protections, of what we consider to be loosely called criminal process, for an allegation of contempt. Because the other ones seem to have just arrived last century, although some of them arrived the century before that, such as the obligation to prove it beyond reasonable doubt. But as people, as Judges have kind of sensed what they're up to, and I guess the unhappy look of the kind of cases which have ended up with serious contempt situations where it's a battle between big business and unions, which has also, no

doubt, made Judges evolve the situation, as the twentieth century carried on, that this is the last one left, and that the trigger for its introduction now is the Bill of Rights Act. It could be rendered otiose, couldn't it, by simply saying, well, we used to be pretty hard on these things, but imprisonment is considered more serious than it was in, perhaps, previous eras. Maybe we just won't ask for that kind of imprisonment, we'll be self-limiting.

ELIAS CJ:

Well, that's what I'm putting to you, that in fact there is a limitation to be read from section 24(e) to this power.

MR LITHGOW QC:

So that's apart from the other end, say, if you're going to do the common law contempt thing and not any of the other serious, genuinely criminal contempts that are now part of the Crimes Act, that three months is the maximum.

ELIAS CJ:

Yes.

MR LITHGOW QC:

That's it. And that anyone that wants to go down that path has to just remember that. It won't be going beyond that.

ANDERSON J:

That's for each offence.

MR LITHGOW QC:

Ah, well –

ANDERSON J:

You see, the statutory provisions for dealing with contempt in the face of the Court, whether under the Crimes Act or under the Summary Proceedings Act, or whatever it is, has a maximum of three months for each offence, or each occasion, each transgression, I suppose. But at least that three month

indication is some – lends support to the idea of a self-limiting impact on the inherent powers by reason of the Bill of Rights Act.

MR LITHGOW QC:

Well, that didn't – obviously, they didn't come via the Bill of Rights Act, but they are consistent with that, or that cut-off point. So it's not as though giving away anything which is, if constitutional, significance that the sanction system won't work if you can't have unending –

ANDERSON J:

If one wants to punish for a contempt that's been committed and is not continuing, one might see that three months might be quite consistent with the statutory view of things, which envisages events. But if the contempt is continuing, a person could just be brought back before the Court for the continuation.

MR LITHGOW QC:

Well, that, obviously, has problems, and is, really, discordant with New Zealand practice that we would accumulate like that. I don't know that there's been a case where that's been really necessary.

ANDERSON J:

Whatever the present one.

MR LITHGOW QC:

Well, to get on to the problem of the present one, which is the problem highlighted in the –

ANDERSON J:

I don't want to distract you.

MR LITHGOW QC:

- *United Mine Workers* is what, exactly, is he being told to do something, or is being told to –

BLANCHARD J:

But before we go there, can we continue to explore this idea that you're putting forward. Would you see it operating somewhat in the same way as the provision that I think is now in the Sentencing Act, which prevents the imposition of a sentence of imprisonment where the accused is not represented at the appropriate point by counsel?

MR LITHGOW QC:

Well, it was in the sentencing provisions. I'm just not exactly sure whether it's in the current Sentencing Act, but yes –

BLANCHARD J:

Well, never mind where it is. It exists, and we discussed it in *Condon*.

MR LITHGOW QC:

Yes, it's an absolute.

BLANCHARD J:

Yes. So would you see it operating that if the prosecutor chose to proceed for contempt in a summary way, then the person concerned could not be subjected to a penalty of imprisonment for more than three months?

MR LITHGOW QC:

As a solution to all this, or as logically flowing from everything else said?

BLANCHARD J:

Well, yes.

MR LITHGOW QC:

Well, it's just – that is one way to do it, and that's perfectly logical endpoint to that process.

BLANCHARD J:

So if somebody got more than three months from a summary process, then the Court of Appeal would be obliged to overturn the sentence and substitute a penalty which did not conflict with the Bill of Rights.

MR LITHGOW QC:

Well, that, then, is what they, in a way, did do.

BLANCHARD J:

Well, that's what would happen if there was a transgression of that statutory provision that, let us assume for the moment, is in the Sentencing Act.

MR LITHGOW QC:

That has the – that's if he was never able to get more than.

BLANCHARD J:

Well, if this Court were to accept the argument you're putting up, and say that you could never get more than three months, then that would be the same effect.

MR LITHGOW QC:

Well, I would see, I'd be saying that as of now. Because clearly the summary process is a matter of legal history, it has allowed more than three months. So it would be as of now.

BLANCHARD J:

But as Judge-made law, this Court could clarify it.

MR LITHGOW QC:

Well, it can't clarify it by re-writing it. It's history. They have to say we're going to make a change.

BLANCHARD J:

Well, exactly.

ELIAS CJ:

The change is the Bill of Rights Act.

BLANCHARD J:

We change the law not infrequently.

MR LITHGOW QC:

I'm suspicious that I'm going down a cul-de-sac that ends up with saying that when he sought a trial by jury, the reality was he couldn't have got more than three months, because my argument is so logical.

ELIAS CJ:

But the reality was that he couldn't have got trial by jury. That does follow from it, unless, as an alternative, which, I must admit, I'm not immediately attracted to, the Court has to construct a different process in the event that the Judge is minded to impose more than three months imprisonment.

BLANCHARD J:

Yes, I was going to ask about that alternative process. Are there any impediments on constructing that kind of process? The Crown seem to think there are. I'm just wondering whether that's, in fact, so.

MR LITHGOW QC:

I have incorporated with his agreement as set out, Rodney Harrison's QC propositions he put to the Court of Appeal, in which he identifies that getting the jury into the Courtroom is a function of the Juries Act, which doesn't limit itself to what they're going to do.

BLANCHARD J:

The Juries Act seems to apply to any jury.

MR LITHGOW QC:

Yes. So if we get the jury there, whether we quite have the formalities of persons standing in the dock, whether they're charged, whether the document which the Court says mandates everything is called an indictment.

BLANCHARD J:

But presumably all that was originally a matter of common law.

MR LITHGOW QC:

Yes, well, it would have been. I can't see why you can't end up before a jury for contempt –

BLANCHARD J:

I'm sorry, Mr Lithgow, I don't mean to interrupt. I was more concerned, when I was thinking about this, to see whether there was going to be any difficulty for the Court in summoning a jury, ensuring that the jury performed its duties in an appropriate way, and also, that the jurors would get paid. Now, all of that, I think, is in the Juries Act, but I haven't studied it with particular care.

MR LITHGOW QC:

Well, I believe it is. But going back to the Chief Justice's proposition, you would then say, if the jury said, what are we here for, a civil case or a criminal case, the Judge could say, well, don't worry about that. The standard proof –

BLANCHARD J:

But the Juries Act doesn't make any distinction, does it?

MR LITHGOW QC:

So they'd just be told – and eventually we would work out how to do it. But they would be told what the onus of proof is, why that's important, what the standard of proof is, and all the normal directions. So ultimately whether they thought they were doing a civil or a criminal case, as long as they – because we don't tell them about penalty, apparently, the fact that people go to jail is a mystery to them – but the legal directions –

BLANCHARD J:

I always thought that it was defence counsel who didn't want penalties mentioned.

ELIAS CJ:

Not always.

MR LITHGOW QC:

It's a strange anomaly that may disappear. So the other aspects of dealing with juries, what happens with your verdict, what's going to happen to this man, that's always been covered by, you don't tell them that kind of thing. That part of the disposition following verdict is a matter for the Judge. So obviously I think criminal libel was abolished before I was around, but I'm not exactly sure what juries were told about what they were up to, and how they were told it differed from a defamation case, which, at one time, was quite popular. In fact, the jury trial that was interrupted by the 1924 case was deciding a separate case, I think.

BLANCHARD J:

Sorry, what 1924 case?

MR LITHGOW QC:

The New Zealand case that followed *Nash v Nash Re Cobb* [1924] NZLR 495 (SC) in 1924, where a party spoke to a juror. It was a matrimonial case that a jury was sitting on, I think.

BLANCHARD J:

Does it matter?

MR LITHGOW QC:

Well, it's interesting, if you are interested, that the Judge didn't use the jury to deal with that matter, even though they were there. He dealt with the contempt part of it. So it was obviously, there's no suggestion at that time,

that even though it would not have slowed things down, that anybody would deal with this aspect other than the Judge.

McGRATH J:

Mr Lithgow, on your argument, is every allegation of contempt the charging of an offence for the purposes of sections 24 and 25?

MR LITHGOW QC:

Well, never say never, obviously.

ELIAS CJ:

Some do.

MR LITHGOW QC:

If we look at the way things are being imagined for the future and civil and criminal process in the Courts, and the way it was attempted in England in recent times, where time limits, counsel's behaviour, little odds and ends of process could be, the Department of Justice now call it "incentivised" by fines. So we go into a system like police or the military have of Judges dishing out little fines to lawyers. Those things, which would have been low-level disobedience of Court's wishes, and could be characterised as minor contempts, probably not brought forward to the Court as contempts because the Court may well find that technically it might have been one, but who cares, be de minimis, that it is possible to characterise all of those now, or, if that system arrives in New Zealand, as offences. So most of them would end up being offences. But there will be ones that may not be offences. They may be the classic one, that is a modern fashion in the District Court. People turn up to miscellaneous prosecutions list for failing to file tax return. They promise to file them, finally get around to doing it, even though they've been two years doing nothing, they'll finally, apparently, manage to do it. That is then converted into a Court order, and then the Commissioner of Inland Revenue seeks that they be found in contempt for not having done it within the three week time. So, if that's the way they want to do it, then the penalties would be, and should be, prescribed. But in the general enforcement of

interlocutory obligations, well, with *Solicitor-General v Miss Alice [2007] 2 NZLR 783 (HC)* and his disclosure of material discovered under a civil case, that was a criminal prosecution. His prosecution of the Solicitor-General and the previous Solicitor-General and myself and one other for allegedly doing the same thing was a criminal prosecution. He alleged that we did something criminally wrong. And is, although the vagueness – I've tried to use the vagueness of the contempt procedure against it. But there is benefit in using the proposition set out in *Mafart v TVNZ* [2006] 3 NZLR 18 (SC) and also *Black*. But you can make rational progress by deciding what the thing really is. Just forget about the ancient labels, as the Chief Justice is suggesting. Not to say that they're always only one thing and we'll just dump one of the labels, but that having a good look at what it was, rather than trying to tick boxes on a list might produce a better result. And the result would be that most of them would be allegations that you'd done something that would be an offence to the orderly administration of justice, or the Court itself. Now, the interparties along the way would be many and various, but this kind of one, if it is a role, to carry on attacking somebody if that has been correctly classified as a wrong, then it's easy to see that its continuation is an offence.

Now, there's still the question as to whether or not it could be dealt with by indictment. Would the Courts risk placing these matters before a jury when clearly there's an institutional practice over hundreds of years not to do so, because they see it as something, one of their own powers that they want to risk letting this one go, or are they going to limit it in a way to make it conform? So stick to a three month maximum. And again, just going back to *Radio Avon*, it's not exactly clear in *Radio Avon* how they figured that section 9 of the Crimes Act meant that it couldn't be dealt with by indictment. It is interesting that the similar loose use of language has been used in England, where they've said it's no longer prosecuted on indictment, and good thing, too. Good riddance. But it doesn't actually say that you can't.

McGRATH J:

Sorry, could you just say that again. It is not clear how the Court in *Radio Avon* reached the conclusion that …

MR LITHGOW QC:

Reached the conclusion that it couldn't be prosecuted on indictment, because that's section 9 of the Crimes Act which they asserted, adopted the proposition that in *Nash v Nash* –

McGRATH J:

Gave legal effect to *Nash v Nash*, yes.

MR LITHGOW QC:

Yes, it's a very slow legislative response, but equally you could say that that had come to be the position, so somebody thought, just put it in the Act to regularise that. But it doesn't actually say in section 9 that you couldn't prosecute it by indictment.

ANDERSON J:

It says in section 9, effectively, that except for the case of the common law offence of contempt of Court, no-one shall be convicted of a common law offence.

MR LITHGOW QC:

Yes. In fact, it really says the opposite of what *Radio Avon* says it says, and that is that the old common law power is unaffected, and the old common law power included the right to proceed by indictment. So it would be the one exception to not having common law indictable something or others.

BLANCHARD J:

Your argument on the meaning of "offence" under section 24(e) of the Bill of Rights Act is perhaps strengthened or supported by that interpretation of section 9, and –

MR LITHGOW QC:

The last stated interpretation?

BLANCHARD J:

Yes, and interestingly it also, section 24(e) also talks about an offence under military law, and the second proviso to section 9 to be dealing with the same thing.

MR LITHGOW QC:

Yes, well, the officer in the New Zealand forces, of course, does have a summary power, but that's presumably – sorry, I don't know what residual powers they have that aren't statutory in the armed forces now, but presumably in theatres of war, I think that's Dr Barton's thesis that I haven't read, but –

BLANCHARD J:

But it's very easy to read section 24(e) consistently with that interpretation of section 9, the interpretation that Justice Anderson was putting on it.

MR LITHGOW QC:

Well, I say exactly, but it's obvious that the Summary Proceedings Act was going to have a few gaps, so there'd have to be other ways of getting the indictment through to a Court that was going to hear it.

ANDERSON J:

Just seek leave of the High Court to file an indictment. It used to be the practice, even within my practising years, for Crown solicitors in regional areas to appear on one particular day at the beginning of the sessions and ask for leave to file an indictment.

MR LITHGOW QC:

Yes, well, if it is a reservation of one only of common law powers, of course you could remember those officers who were entitled to prefer matters to be tried on indictment without any preliminary process, and that included coroners. Now that's been taken away in New Zealand. It still exists in Queensland and other places, where a coroner can, simply, without the person every having been at the coroner's hearing, have him indicted in the

High Court for manslaughter. And so we've just forgotten how to do that. It could be done, if this is a simple exception.

ANDERSON J:

You'd get a situation, I think, in terms of election, analogous to the offence of assault, where one can proceed summarily or one can proceed indictably, and it's the informant who elects the process, with the consequential jeopardies. Now, suppose you had a situation where you could proceed indictably or you could proceed by way of originating motion. And suppose that if you go by way of originating motion there's a three month limitation on any imprisonment aspects of the judicial response. The person who want to invoke the Court's powers in some way can elect to go the originating motion way with the broader restorative powers it involves, or the indictment way, with the broader punitive powers it involves. And that's perhaps the method that would work in practice.

MR LITHGOW QC:

Yes, well, one of the things which we come to later about it, using the originating application process to give it a civil process, would lend itself to some kind of sorting it out. Because, when all's said and done, in the modern era, Judges do back the system and themselves and the lawyers and the other participants, to resolve things, because they simply think that's a better way to do it, and have got the resources to hear everything. So the thing which was considered an affront in *Siemer*, that is, "Could we do it this way, could we do a deal?" if you used the originating process and considered that a non-specific civil/criminal process that's all the protections but you can't go to jail for more than three months, then that would be perfectly useful.

ELIAS CJ:

How does your argument apply to the power of the House of Representatives to punish for contempt?

MR LITHGOW QC:

I can't remember if they have – well, the short answer is that I'm not trying to affect them, and –

ELIAS CJ:

No, and I shouldn't invite you to.

MR LITHGOW QC:

– neither are you, but –

ELIAS CJ:

But I'm just, I should indicate that I'm not enormously attracted to the view that section 9 is a complete answer with section 24(e) and to reference to offence, because it does seem to me that section 9 is making the distinction that the power to punish for contempt, whether it's a power of the Court or the House of Representatives, is a power or an authority and doesn't purport to describe an offence at common law.

MR LITHGOW QC:

Why, as has been many times observed, if that is so, why do they bother to say it? Because it doesn't need to be in the Crimes Act.

ELIAS CJ:

Because it could have been –

MR LITHGOW QC:

Who thought it was?

ELIAS CJ:

Because it could have been said to limit or affect.

MR LITHGOW QC:

Well, I think it's because everybody thought it was something to do with crimes and all that, that it's been put in the Crimes Act, and they just used the

expression “power or authority” because that was the nearest description they could yet.

ELIAS CJ:

Well, I think –

MR LITHGOW QC:

I mean, we don’t have any other –

ELIAS CJ:

– it may be the more accurate.

MR LITHGOW QC:

Mmm?

ELIAS CJ:

It may be more accurate.

MR LITHGOW QC:

Well, that's if expressions like “criminal” had an exact meaning as well.

McGRATH J:

If you take the tradition view, section 9 was simply giving effect to the judgment of Salmond J in *Nash.* I mean, that’s against you, isn’t it?

MR LITHGOW QC:

Yes, but –

McGRATH J:

Nash sees the purpose of the predecessor in the 1908 Act as being to do no more than abolish common law felonies and common law misdemeanours, as being the subject matter of indictment, and that the only indictable offences in the future would be those set out in the statute, and the usual view that's

taken of section 9 is that it gave legislative effect to that judgment of the Court of Appeal.

MR LITHGOW QC:

Well, all this assumes that the reason that distinctions such as misdemeanours and crimes under the old law was simple and, of course, Stephen's code was precisely because he was a person with a big enough, big picture brain to see that that could never be rationalised and he had to cut through it with a code. And section 9, I submit really, is best taken at its, just its straight meaning, that the previous powers which the Courts enjoyed prior to the codification of the criminal law, were exactly as they were before, nothing added, nothing taken away. And if that is so, if nothing's added and nothing is taken away, whether it is or it isn't characterised and as an offence or a crime of whatever, you can still do it on indictment. I mean, it just doesn't say that you can't. It says quite the opposite, doesn't it?

McGRATH J:

Well, what I've endeavoured to invite you to address is the history of the provision and Salmond's J judgment in particular. But, I mean, you may want to come back to it.

MR LITHGOW QC:

Well, does Salmond J say that there could never be an indictment?

McGRATH J:

You're the one who's making the submissions, Mr Lithgow. I mean, you're making some interesting but unorthodox submissions, and I'm just really bringing you back to the traditional view that's been taken of section 9. But if you don't want to take it up that's fine.

MR LITHGOW QC:

All right, well, I'll have another look at *Nash* over the adjournment. But I think the missing link there would be that I haven't looked at the parliamentary debates to see –

McGRATH J:

I'm not interested in the parliamentary debates, just really the final paragraph of *Nash* that I'm drawing to your attention and suggesting that section 9 traditionally has been seen as giving legislative effect to that.

ANDERSON J:

Bearing in mind that section 5 of the 1908 Act is rather different from section 9 of the 1961 Act.

McGRATH J:

Yes.

MR LITHGOW QC:

Well, section 5 doesn't have any of the reservations.

ELIAS CJ:

Now, Mr Lithgow, where do you want to go to with your argument now?

MR LITHGOW QC:

Well –

ELIAS CJ:

Because you've probably covered a large part of it, I think, and of course we have read your written submissions.

MR LITHGOW QC:

It is worth, if people want to have a look now at the last paragraph of *Nash*, because for myself I cannot see where His Honour says that contempt be taken on indictment, and it's probably – that's at tab 11 and it's the last page and it begins, "We conclude accordingly," if you just assume all section 5 does is abolish common law felonies.

ANDERSON J:

It rather seems, doesn't it, that under the 1908 Act you couldn't proceed indictably?

MR LITHGOW QC:

For contempt?

ANDERSON J:

Mmm.

MR LITHGOW QC:

Well, you're seeing things in there that I can't see. It says –

ANDERSON J:

By the terms of section 5, which is rather different from section 9. And if that is the case, it could hardly have been the legislature's intention in 1961 to reintroduce an obsolete form of procedure for contempt.

MR LITHGOW QC:

But they didn't call – the language of contempt in those days wasn't to call them felonies and misdemeanours, and so the proposition is, "This being so, the Supreme Court preserves unimpaired and unaffected its original jurisdiction to secure the efficiency and purity of the administration of public justice by dealing summarily with all conduct which is recognised by the common law as amounting to criminal contempt of Court." Now, the expression "summarily" there presumably is that the Judge would deal with it, which is how it was done, even on indictment, in England.

ELIAS CJ:

I'm sorry, are you saying that in England contempt did proceed on indictment?

MR LITHGOW QC:

On indictment, but before a Judge alone, as I understand it. At that time. It's now obsolete, they don't use indictments now.

ELIAS CJ:

What's the authority for that?

MR LITHGOW QC:

For which proposition?

ELIAS CJ:

For the proposition that in England at that time contempt proceeded on indictment.

MR LITHGOW QC:

I'm not saying it did, but it could. It could, still, until a certain time – I'll have to get that out of Arlidge.

ELIAS CJ:

Could proceed by way of indictment. I hadn't actually picked that up from the submissions. So there are cases where contempt was proceeded with by way of indictment?

MR LITHGOW QC:

Well, that's as I understand it, but I've got Arlidge here and I'll fix that, I'll have a look at that in the break.

ELIAS CJ:

So, where do you want to go with the argument?

MR LITHGOW QC:

Well, I'm just suggesting really that the Court has got a good handle on the general change propositions as to what the possibilities are, and that being ultimately common law with a Bill of Rights overlay, that you have to work out a way to fix it, I'm not suggesting that one way is better than the other. But shall we move on to Mr Siemer's particular circumstances?

ELIAS CJ:

Where are you in your submissions at this stage? Is this the factual matters, that you address at the end?

MR LITHGOW QC:

No, no, no. Just dealing with whether or not even applying traditional rules or attempting to apply traditional rules, at the time that he entered the system in the High Court, that he was in fact, even without any change to the law, liable to imprisonment and therefore was entitled to a trial by jury, not affecting the general run on contempt cases. So we would adopt what the Court of Appeal said about that, that he should have had a, it does engage the right, as the Court of Appeal set out, the leading case is *Cohn.* But the Crown's proposition is that really that they're sticking to the idea that this is actually a civil case. One of the indicia of a case suitable for a jury, as set out in *United Mine Workers,* revolves around the discussion as to traditional injunctions, which is the subject matters of this, and that that is that they have to be subject of a clear contempt, that they have to be simple and straightforward, so people know whether they're doing what they were told to do or not doing what they were told to do. This became very loose in the High Court, where the last word from the High Court was that he had to take down the websites and not just those parts of them that related to allegations of financial impropriety in respect of the Paragon receivership. So although the –

ELIAS CJ:

Sorry, are you referring here to the words of the injunction or…

MR LITHGOW QC:

The words of the injunction relate solely to Mr Stiassny's conduct of the Paragon receivership.

ELIAS CJ:

Sorry, where do we find those words in your submissions? Sorry, I'm probably best in the Court of Appeal decision, it's all right.

MR LITHGOW QC:

The easiest place for this is in volume 3, page 813. "The central proposition is not to publish in any form any information containing allegations of criminal or unethical conduct or as to the improper enrichment on the part of the plaintiffs in relation to their conduct of the receivership in Paragon Oil Systems Limited;" and then at, "Any claim that they overcharged Paragon Oil the sum of $10,000;" and then, "Together with the information as to the fact of complaints made by Mr Siemer and/or Paragon Oil to the Institute of Chartered Accountants or the Serious Fraud Office and related to discovery in respect of Paragon Oil."

ELIAS CJ:

So that's the interim injunction, but it was replaced, wasn't it?

MR LITHGOW QC:

That's the second interim injunction, -

ELIAS CJ:

Oh, I see.

MR LITHGOW QC:

– which became a final –

ELIAS CJ:

Oh, yes, yes, the France chain one, yes.

MR LITHGOW QC:

Yes.

McGRATH J:

So that's the current provision and the relevant provision?

MR LITHGOW QC:

Yes. So that was made final in the form proof before Cooper J. Strangely, he seems to make it final as part of the defamation proceedings, although the Court of Appeal had said that they weren't relating it to the defamation proceedings but to a breach of contract that had been entered into between the contract of settlement between Paragon Oil and Mr Siemer and Stiassny and Korda Mentha and Ferrier Hodgson.

ELIAS CJ:

So, where do we find that statement? I just want to be –

MR LITHGOW QC:

We don't need to, but it is –

ELIAS CJ:

It just repeats those terms?

MR LITHGOW QC:

Yes.

ELIAS CJ:

Yes, thank you.

MR LITHGOW QC:

But it's just an indication of how it sort of gets –

ELIAS CJ:

I know, it's later.

MR LITHGOW QC:

– forgotten as to what it's all about.

McGRATH J:

But the point I think you're making, Mr Lithgow, is that when the Court of Appeal dismissed an appeal against Ellen France's J decision, that terms of that injunction became final, is that it?

MR LITHGOW QC:

No, it became, no, it stayed interim, it didn't become final. It became enduring because of the –

McGRATH J:

Thank you, yes, I accept that that's a better way of putting it, yes.

MR LITHGOW QC:

Because he'd run out of options –

McGRATH J:

Yes, thank you.

MR LITHGOW QC:

– and it lasted throughout. But the problem then for a website is, is he being told to do something or, has he been told to actively do something or to stop doing something?

ELIAS CJ:

Well, he's told not to publish, in any form.

BLANCHARD J:

Isn't a website a species of ongoing publication?

MR LITHGOW QC:

Well, that's the way it's been decided in New Zealand, but in terms of being contemptuous, it has enormous difficulty in how you make it go away, because once you put stuff out there it gets incorporated in all kinds of other people's sites –

BLANCHARD J:

Well, I don't think that the injunction is related to that. It would surely have to be read as being related only to things that Mr Siemer did, including things he had control over.

MR LITHGOW QC:

Well, what he did was, in conjunction with the Solicitor-General, they attempted to identify with the Domain Name Commissioner what was offensive, and a number of things were removed. One of the sites passed out of his ownership and then another, but there were two other sites that contained just really fragments of criticism, which didn't seem to amount to much. But he offered to the High Court to forget all that, forget about how to just get words out, he would close down the websites, if he could have his day in Court.

WILSON J:

Mr Lithgow, when you talk about Mr Siemer's day in Court, if he is entitled to a jury trial, will he be entitled to argue in front of the jury that the injunction should not have been issued or only that he was not in breach of it?

MR LITHGOW QC:

Well, he would be able to – you know what he wants to argue, –

WILSON J:

Yes, it's why I asked the question.

MR LITHGOW QC:

– but the current state of the law is that he would have to argue that the, either that the injunction has been substantially met or the extent to which it wasn't wasn't his fault. But could he argue that the effective breadth of the injunction was a breach of fundamental rights of his, and that would go right back to English cases and the hard-won right that if it is a criminal allegation then the

jury, having had directions on the law, are masters of the entire case and a bulwark against the State.

McGRATH J:

But those arguments presumably should have been run in his appeal against the interim injunction, and –

MR LITHGOW QC:

Well, they were, and failed.

McGRATH J:

– that matter's now been resolved, and failed. So this is coming back to Justice Wilson's point, is he not confined under any proceeding now to the question of whether – well, in the lower Courts – to whether or not he disobeyed the injunction?

MR LITHGOW QC:

Well, in front of a jury, though, the correct position is that we don't know the way in which they would – if they believe that the – this injunction was only meant to last until the determination of the underlying action. The determination of the underlying action was he was excluded from that by costs orders. "Notwithstanding being excluded by costs orders the plaintiff was allowed to amend proceedings without reference back to him," and then the injunction was made permanent. Now isn't a jury allowed to have an opinion on that?

WILSON J:

It's not a question of any opinion, the question surely is, if Mr Siemer gets his jury trial, will he seek to argue in front of the jury that the injunctions should not have been issued?

MR LITHGOW QC:

Seek to, or will he be permitted to?

WILSON J:

I'm asking first, will he seek to?

MR LITHGOW QC:

Well, I only have my instinctive knowledge of how he views these things, and his view would be that it is a demonstrably –

ELIAS CJ:

Well, do you want to take instructions on that?

MR LITHGOW QC:

Well –

ELIAS CJ:

Because I think it's –

MR LITHGOW QC:

He's under the control of the Court if he has a jury trial, as to what he's allowed to argue, so it's irrelevant as to what I think he would like to argue really. What people want to argue in front of juries in their mind and what they're allowed to do on the day is very different, isn't it?

ELIAS CJ:

Right, do you want to get an answer to that?

WILSON J:

Yes, I would like to, perhaps put the further question, speaking hypothetically, would you on behalf of Mr Siemer accept a limitation on a right to jury trial if a trial were avoided, that the trial would be confined to the question of whether the injunction had been breached and not extend to the prior question of whether the injunction should have been issued?

MR LITHGOW QC:

Ah, well, as a counsel, there would be a formalistic but not always clear distinction between an injunction which could be demonstrated to be a nullity in some way, that has obvious problems that it's been on appeal and those appeal right are exhausted, so as a counsel you'd be stuck with, unless you could remount that argument again on a new basis, not asking a jury to make a different decision on the same basis as an appeal Court, you'd be stuck with substantial compliance, something along those lines. But if the exercise in judicial power is utterly without foundation or right, then that could be reargued at a jury trial, whether in front of a jury or in front of the Judge as a preliminary matter is another thing, that would have to be all sorted out.

WILSON J:

When you say it could be, it might be in terms of what your client would seek to do, in other words.

MR LITHGOW QC:

Ah, well, there's lots of things in criminal-type trials that you can argue as many times as you like but you're on a diminishing return if it's been argued before, an answer's been given and there's nothing new to be said. But there's always rights in jury trials to re-litigate in front of, at different stages.

ELIAS CJ:

All right, we'll take the morning adjournment now, thank you.

COURT ADJOURNS: 11.33 PM

COURT RESUMES: 11.50 AM

MR LITHGOW QC:

And no doubt to just advance some matters that arose before the adjournment. The first one are the propositions about a negotiated settlement with the Court are at 803, page 803 and 804 of volume 2 of the case on appeal and just going back the significance of that is that these reactions by

the Court are entirely consistent with the kind of answer a convicted person would get from a sentencing Court.

The question of what exactly, exactly how indictments were used in England at the time of the 1908 Crimes Act, the case at tab 46 of *R v Davies* [1906] 1 KB 32.

ELIAS CJ:

Sorry what tab?

MR LITHGOW QC:

Tab 46.

ELIAS CJ:

Yes thank you.

MR LITHGOW QC:

Now the, it's a bit of a jigsaw but this is just one of the references to it but if we look at page 39, halfway down, "Almost total absence of any recorded case in which a contempt in an inferior court has come into question is abundant proof that serious offences of this kind are very rare. They were also always punishable by indictment and in the old days when the means of communication were slow and uncertain and expensive there was an inducement to refrain from appealing to the Kings Bench."

And then over the page at 41, about the same position, "The Courts of inferior jurisdiction which have not the power of protecting themselves from some encroachments upon their independence, the public mischief is the same, is identical and in each instance it's undoubtedly a possible recourse to indictment or criminal –

ELIAS CJ:

But that's because it's not original jurisdiction to use –

MR LITHGOW QC:

Exactly. So they were using that mechanism it appears –

ELIAS CJ:

Yes.

MR LITHGOW QC:

– to get it into a Court that did have the jurisdiction to deal with it so the indictment was not a –

ELIAS CJ:

It was really a common law offence.

MR LITHGOW QC:

Um well I took it to mean it was simply a convenient method by which you got it into a Court that could deal with contempt because they, inferior Courts didn't have the jurisdiction to deal with their own contempts.

ELIAS CJ:

Who is this Judge? Lord Alverstone.

MR LITHGOW QC:

I'm sorry.

McGRATH J:

Wills J .

ELIAS CJ:

Not to be confused with Willis J.

MR LITHGOW QC:

There will be other references.

ELIAS CJ:

Yes. So, thank you.

MR LITHGOW QC:

So that would be just using an indictment as a vehicle so Your Honour's suggested objection to starting to muck about, that would just be a way in which, not because an indictment is an ancient form that needs providing, but because as a, as a way of putting it before a Court capable of assembling a jury but really if this Court says you don't need an indictment to assemble a jury because you don't need an indictment to assemble a jury in a declaration case, other, obviously other forms of documentation could be used and not to get so concerned with the form –

ANDERSON J:

Well the jury is assembled in a defamation case because of procedures arising under the Rules of the High Court in its civil jurisdiction.

MR LITHGOW QC:

Yes.

ANDERSON J:

Whereas the essence of your argument here is that this isn't civil in nature but criminal and therefore section 24(e) of the Bill of Rights Act is invoked.

MR LITHGOW QC:

Or that the, or that – well all I'm saying is that procedure isn't going to be impossible because we always can imagine problems but the reality is that it can be made to work and of course we've got a one piece prosecution, one piece of paper prosecution system on the horizon which again may weigh – or may make it simpler to do it that way.

In respect of what is it that Mr Siemer would seek to argue at a, if there was a hearing before a jury. He does give the diplomatic response that of course he would have to take legal advice as to what was possible but he would be

attempting to attack the very sub-stratum of the whole complaint but that's analogous to even though a, even though for example a police officer is not on trial, that you are able to gain advantage in a purely criminal trial by undermining his motivation and credibility and so as he attempted here, and as the Solicitor-General avoided, if he can somehow or other create a situation where he's allowed to cross-examine the Solicitor-General, then he would like to do so in the same way as any other in – if an informant happened to become a witness in a trial which of course they're often not.

Was there any other aspect of that – I mean the history of our law is a challenge between judicial pride in the jury system and the judicial reluctance to trust juries with certain aspects and the, as I say, the control of the whole case which isn't the situation in a civil case but is the situation in a criminal case, that subject to direction the jury choose the total legal factual interplay whereas in a civil trial they simply make decisions of fact and the Judge works out how it all fits together. That is, that is something which the Court would ought to allow. In general the American jurisprudence is the one that's the least apprehensive about that because they're used to having juries decide all kinds of things which we would consider not jury material. Simple human challenges, contracts, torts, et cetera.

I'd like to turn to, in this case, whether or not the Court of Appeal resolution of the matter is appropriate and fair and lawful. I go right back to the commencement proposition that it was Mr Siemer who correctly identified his jeopardy. The full Bench of the High Court incorrectly identified his jeopardy because they said it was a civil case and that he wasn't entitled to a jury trial. The Court of Appeal decided he was in those, in that full Bench's hands, in a criminal proceeding, or one that engaged the criminal protections of the Bill of Rights Act. But really it was criminal proceeding under the conventional propositions related to contempt of Court. We can argue that ad infinitum both ways but it has, there's more ingredients that indicate it's being dealt with as a criminal matter than they are that it's being dealt with as a civil matter but I don't think there's really much I can add about that, they're all laid out there.

So what should happen then? The resolution of the Court of Appeal was that they simply treat it as a sentence out of range, correct the sentence and that corrects the underlying wrong done by not having a jury trial. That has the semantic ongoing problem that this Court, through its registry and this Court at different times tried to assume that it was a civil case even though the Court of Appeal had said that that it was criminal in the High Court, we've converted it back. The Court of Appeal registry treated it as a civil case and it's got lots of, there's lots of impediments attached to that label, that affect litigants in all kinds of ways, both as to cost and in other ways. Yet the truth of the matter was, that he was involved in a proposition of criminality and he got a criminal sentence. So it is the same as being denied an election and should go right back to the beginning, if anybody wants to, unwind the wrong that's been done to him and give him the election again if the Solicitor-General wishes to proceed or if one of the variations that the Court is looking at, the Solicitor-General would have to choose to self-limit and the Court would have to say something about whether the Court is limited by that self-limitation because the process of determining whether or not you've got a right to a jury trial after the game's been run, or after the appeal process has run its course, is inherently illogical and flawed. It seems like a tidy way of making it go away but it doesn't stand up to any kind of principled scrutiny in my submission.

WILSON J:

Mr Lithgow, is your argument in essence that the reference to "the penalty" in 24(e) has to be to the possible penalty and not the actual penalty?

MR LITHGOW QC:

Yes because it's a jeopardy not an outcome. That's how it's universally understood in the rest of the black letter criminal law and the only way it's ever been treated. It's because, and we touched on this earlier, the jury trial right is an ancient right and privilege of the English tradition. It's not a, it's not a process in which you get to a level of sentence. It's a right to place your dispute with the nation's state, or an individual lay prosecutor, in the hands of ordinary people, which is a good idea, although Judges have been against it for contempt. But I invite you to consider it might actually be a good idea and

that it might be like the police's determination now to increase a penalty for assaulting a policeman which will place them in the –

ELIAS CJ:

We're not dealing with that really. I am not sure that the analogy is very helpful Mr Lithgow.

MR LITHGOW QC:

Well you see the assault on police was, even though it was six months maximum, that's one of the cases that, where the High Court decided that because there was no process available once the Bill of Rights Act came along we couldn't have a jury trial for assaulting a police officer and the traditional view that perhaps juries were not to be, not to be trusted with that kind of thing. But it rather begs the question, it might actually discover that juries are very easily, very easily able to do decide that if Court orders are made they should be enforced. It is, after all, something that Court's keep asserting is in their interests as in the public confidence in the orderly administration of justice, but have proved over the centuries to be very reluctant to test that theory out to see whether it is, it is the belief of a random group of 12 or whether the way in which it's dealt with coincide with that of a Court. Now, it is a leap of faith but it's an ancient one in all other areas of criminal law and I just invite you to just rethink the whole thing in a way which other jurisdictions have been reluctant to do.

What is it about juries that would make them hard to get through to as to the natural necessity that if cases are taken to Court that –

ELIAS CJ:

Why do we need to get into this because we, on your argument there was a right of election so whether that's a good thing or a bad thing is not something this Court is going to be concerned with.

MR LITHGOW QC:

Well I think the Court will be deciding, I suspect it will be deciding, whether or not there is going to be a broad three month limitation and that this will be an exception. It may work out that this is an exception that has triggered that change and that you start with the three month maximum or whether, which Your Honour indicated was not your favoured option, to start having two systems. You would have more than three months, you might end up with a jury trial, and if you're prepared to self-limit to three months then we can stick with the summary process and no right of trial and think perhaps what I started after the adjournment but never finishes is this Court will have to say that that self-limitation by the prosecutor, by the applicant, informant, whatever, the Solicitor-General or a party or whatever, will bind the Courts.

ELIAS CJ:

Aren't we just going over points that now have been thoroughly teased out? Do you want to move on to the points that you haven't yet addressed because I am anxious to hear what the Crown has to say about the argument.

MR LITHGOW QC:

Well I understand that. I don't think that we mentioned before whether the courts accept the limitation of the prosecutor. That's something that's got to be thought through. There's nothing much I can add to that but if it's going to be – well that's not quite right. Your Honour referred to whether prosecutor lays the summary information or electable information, that's correct Your Honour, if Your Honour considered that was sufficient for the purpose then I'll move on.

ANDERSON J:

Your submissions indicated that you wanted to traverse factual matters?

MR LITHGOW QC:

Yes.

ANDERSON J:

Was that within the scope of the grounds or....

MR LITHGOW QC:

The judgment granting leave is at 851 and has two parts and the Crown view is that the judgment of the Court a) leave is granted, b) the approved ground is where the Court of Appeal erred in making orders A and B of its judgment. But over the page we have a minute of the Court which says that, "no leave hearing is necessary. An order granting leave has now been made. It is intended to cover all matters covered in the written submissions", so they don't exactly fit together neatly but that's the way they both came out together.

I don't want to go through the detail but the proposition is that by the time we got to the final bill at 803 of the case on appeal with Chisholm J and Gendall J, the proposition is that the websites are to be unconditionally closed down in terms of our judgment, 8 July 2008 failing which Mr Siemer will be committed to prison for six months on Friday. Now this is way wider than the proposition that he's not allowed to publish anything related to the Paragon receivership that suggests that Mr Stiassny corruptly manipulated that situation. And Mr Siemer's complaint is this looseness that had entered the equation there, continued in the Court of Appeal and so it was just assumed that he had to stop everything. And his protestations, no doubt interwoven with other kinds of material, but his protestations that it is for the Court threatening him with imprisonment to tell him exactly what is now required, bearing in mind the evidence that the Solicitor-General and Mr Siemer had reached, what appeared on the face of it, to be a stated compliance, what it is that he's supposed to do, because the nature of injunctive relief, historically is, do this and you're in, do that and you're out. Or don't do this and you're in or don't do that or you're out.

Now counsel can understand that the Court had felt badgered to an extent, that they had to solve the problems, but in reality they did have to. They did have to say, well of all the bits and pieces that have been removed, what are we down to now that is genuinely still offending the black letter injunction and

they declined to do that, and this I guess, Mr Seimer's challenge is that if this Court cannot identify what it is he has to do to be compliant, because it's not – he's not determined to go prison just to be a martyr, what he has to do to be compliant but that he does have the proposition that a blanket distillation that he has to close down three public websites is a fundamental – another fundamental breach of the Bill of Rights Act which it's inappropriate to be imposed on him, it would be – it would create a kind of a unsustainable type of legal order, notwithstanding that he can't appeal it.

ANDERSON J:

Why do you say that he had to close down the websites when the words on page 803 simply require him to remove the offending material? The offending material I would take to mean the material that's prescribed in the injunction to which the application related. It's a classical, key is in the pocket type process, if he complies with the injunction according to its term.

MR LITHGOW QC:

Right but that is earlier in time than the later proposition where he's trying to simplify matters by doing a deal.

ELIAS CJ:

Well the Court says that's not unacceptable, it's only a minute and it refers back to the terms of our judgment of 8 July. So to the extent that publication is through the websites, they're to be unconditionally closed down. I don't see that this is a different, or this is any sort of variation, it's a response to the deal that was put to them.

MR LITHGOW QC:

Well by the time it gets to the Court of Appeal –

ELIAS CJ:

But we're not really concerned with that are we, we're just concerned with your submission at this stage that he didn't know what he had to do to comply. And the answer to that surely is, he had to comply with the judgment of 8 July.

MR LITHGOW QC:

And who has to work out what particular parts of it, after the bits that had been removed, were still wrong. Does he have to do something or nothing?

WILSON J:

What do you say in response – what do you say Mr Lithgow in response to the Crown submission at paragraph 132?

MR LITHGOW QC:

Of their submissions here?

WILSON J:

Yes.

MR LITHGOW QC:

I'd have to take instruction on that because I understand that he has a separate proposition that if the, if the material comes from things said or done in a different Court case, that they couldn't be enjoined under the contractual injunction related to the settlement of the Korda – the original Paragon and Ferrier Hodgson case. Remember it's not a defamation, it's not anything he says against him, the injunction is for a breach of an undertaking not to blame each other for what happened in the Paragon, the Paragon insolvency.

ELIAS CJ:

Well, does it matter?

MR LITHGOW QC:

Well, yes.

ELIAS CJ:

Why? He has to comply with the terms of the injunction.

MR LITHGOW QC:

Is he not allowed to criticise Mr Stiassny at all, even if it comes up somewhere else?

ELIAS CJ:

Well, if it is in breach of the terms of the injunction, no. Not until he gets the injunction discharged.

WILSON J:

Or varied.

ELIAS CJ:

Or varied, yes.

MR LITHGOW QC:

So that if it's a report, if he writes a report of say today's proceedings, he's not allowed to refer to it even as discussed in an open courtroom for example.

ELIAS CJ:

Well, that raises questions as you know, different questions.

WILSON J:

To go back to the opening words of the injunction, "Not to publish in any form." Those words, "in any form" would seem to be clear, aren't they?

MR LITHGOW QC:

Well, in any form obviously includes a website but can you have an injunction that stops a public explanation, even if highly coloured, of other Court cases. It's a contractual injunction, as the Court of Appeal held, solely related to the contractual agreement based on a settlement between Ferrier Hodgson and the Paragon. It's not – they declined to order the injunction as a general defamatory, out of a general defamatory need.

BLANCHARD J:

Has he sought a variation of the injunction?

MR LITHGOW QC:

Well, I haven't asked him that but it occurred to me this morning, that's the one thing he doesn't seem to have done. He's appealed this and that –

BLANCHARD J:

Well, in that case, it seems to me that we have to proceed on the basis of the wording of the injunction. If Mr Siemer feels that it is too broad, or broader than he thought he was agreeing to in the, what you've called the contract litigation, then presumably he can apply for a variation but in the meantime, there is an injunction in these terms and it seems to me the only question is whether it's been breached. The only question we're talking about at the moment.

MR LITHGOW QC:

Yes because if as happened, the dispute binds into a proliferation of Court cases up and down the system, whether rightly or wrongly, can an original injunction that simply relates to the contractual, the mutual contractual restraint that it was being enforced, just be allowed to apply to everything and effectively only to him because the original contractual restraint obviously depended on the proposition that he'd agreed to something and was stuck with it and he should stick to it and that the Court ordered him to do so. As it goes into Court of Appeal cases et cetera, et cetera and since he is a writer who publishes in a modern media format, are these breaches being viewed in their correct light and is it appropriate, is it more appropriate for the Court to attempt to assist as to how it could be met, modified, altered, to meet the new circumstances?

ANDERSON J:

I don't see, with respect, how you can challenge the framing of the injunction. In this appeal, it was challenged in the Court of Appeal and that challenge failed. Now, if you wanted to try and take it to the Supreme Court at that stage, that was the time to do it but you can't have a belated parasitic appeal against the original order.

MR LITHGOW QC:

No but it's a context thing, isn't it and also when dealing with the so-called, you know, the seriousness with which the alleged breaches are taken, the context has rather been forgotten. That this was a voluntary kind of restraint, mutual restraint between two businessmen that was originally agreed to. There's obviously disputes as to whether it was properly agreed to but that Court held that it was but it's sort of been assumed that he's now not allowed to defame Mr Stiassny in any way, shape, or form which isn't correct.

ANDERSON J:

Go back to the High Court and get it varied, if it warrants it.

MR LITHGOW QC:

Isn't this Court entitled to say well, things have got a bit out of hand here, it's sort of lost, lost sight of what this was all about. The Court of Appeal refused to give him a defamatory injunction, refused to give Stiassny a defamatory injunction.

ANDERSON J:

I can see that the degree of culpability might be relevant if for example, for any reason, the case were remitted for re-sentence. You mean, you might be able to say well if, as a matter of law, the maximum sentence was three months, the sentencing Court should look at it in that context but not the worst possible case of its kind time of thing. Apart from that, I don't see how you can collaterally appeal against the original order.

MR LITHGOW QC:

Well, isn't that always part of, kind of contempt that we're always looking at where it's all up to, by the time even at appeal stage? That is a feature of contempt, that you can take into account new facts, it just didn't stop on the day. Now, is he allowed to say, Court records shows Stiassny falsely labelled the cash rich company insolvent?

ELIAS CJ:

We are not going to give you an advisory opinion in the course of this hearing but the terms of the injunction are in fact quite specific. They don't stop any commentary or opinions, except in relation to allegations of criminal or unethical conduct, improper personal enrichment, in relation to their conduct of the receivership of Paragon Oil Systems Limited.

MR LITHGOW QC:

Right.

ELIAS CJ:

This isn't a gag in relation to anything connected with Mr Stiassny or the other receivers.

MR LITHGOW QC:

Isn't it a contra –

ELIAS CJ:

It's in relation to their conduct of the receivership of Paragon Oil Systems Limited.

MR LITHGOW QC:

It's an enforcement of a contract that arose out of relationship.

ELIAS CJ:

It's a Court order.

MR LITHGOW QC:

So, if he later gets a job as a Court reporter, or is given an accreditation in a Court where all this is hash over again –

ELIAS CJ:

Then he has to bring himself –

MR LITHGOW QC:

– is he the only person that's not allowed to, unless he gets it varied –

ELIAS CJ:

– under the general provisions in terms of accurate reporting if he wants to take advantage privilege which is an entirely different matter.

MR LITHGOW QC:

All right. Well, that's what he wants to say about that, that's it got out of hand, that the Court has forgotten what it was about and he's been given the wide proposition that has become, in his mind, unable to be fixed unless, as the Court loosely put it, he takes down the whole websites which he believes is an improper –

ELIAS CJ:

Well, that isn't the terms of the injunction and it's not what the minute, properly read, suggests. It responds to the deal which could only have been in connection with the offending comments.

MR LITHGOW QC:

All right, well his – the only last matter is obviously his proposition, is if the Court is by some manner or means going to **uphold an unless order or** a variation of what the Court of Appeal did, then the Court does have to articulate how he can comply, with respect, without simply saying comply with the injunction A in A.

ANDERSON J:

Well presumably Mr Lithgow, if he writes for a website, he understands English.

MR LITHGOW QC:

So Your Honour's putting forward that it's simple, he could – must be able to sub-edit the thing and make it all go away?

BLANCHARD J:

Well the terms of the injunction are not very complicated.

MR LITHGOW QC:

I'm not expressing an opinion about that Your Honour.

ELIAS CJ:

Well what parts are complicated?

MR LITHGOW QC:

Well aren't we really just left with splinters of stuff?

BLANCHARD J:

Maybe we are. The splinters should be removed.

MR LITHGOW QC:

Well how small do you go, that's the thing about splinters.

ELIAS CJ:

All right, I think we understand your argument on the point. Thank you Mr Lithgow. And what – was there anything else you wanted to add?

MR LITHGOW QC:

No thank you, not at this stage.

ELIAS CJ:

Thank you Mr Lithgow. Yes Ms Laracy?

MS LARACY:

Thank you. If this case is about trying to coerce compliance and the Solicitor-General obviously says it is, there are a number of different ways to analyse and in my submission, properly dismiss the appellant's request for a jury trial. And this really is just by way of introduction, but one is to say it's not criminal. One is to say it's not criminal within the meaning of the Bill of Rights. Another is to take the line taken in the US jurisprudence that I pointed the

Court to and to focus on the nature of the relief and say that coercive sanctions are not criminal but a civil. But perhaps cutting to the end point, the most powerful consideration in my submission is to think about what it would mean for people in the position of, if people in the position of Mr Siemer, could have a jury trial inserted at this stage in a proceeding, where what was sought was compliance with an extant order of the Court, in the Solicitor-General submission the impact on the rule of law, especially on the binding nature of all Court orders and the important certainty that that brings to litigants and society would be seriously undermined.

In the seminal, United States Supreme Court decision of *Bagwell*, the Court opined that in that situation judgments would become advisory only if they had to be referred to a jury or some other tribunal, other than the Court who made the order to determine whether they could be enforced. It's a fundamental tenet of our law and the rule of law that that is not the case. And while slippery slope arguments are often alarmist and are relied upon when there's no better argument, that is not the case here. The Court just has to think about the hundreds of orders that are made throughout the country on a daily basis in a range of Courts, the Family Court, the District Court, suppression orders, undertakings which as a matter of contempt law are said to operate like injunctions, procedural orders, final judgments – it's critical to the effective running of our form of democracy and to our judicial system that unless and until orders are successfully appealed, they must in their own terms, be obeyed without more.

And the idea that an individual's intransigence can be so determined and so longstanding that he has to be threatened with imprisonment, does not provide any principled analysis for requiring that the order relating to him can only be enforced after a jury trial. And in my submission, were that the case it would in fact be an invitation to all those other people who are the subject of orders that they disagree with, not to comply as they currently do, but instead to hold out and see how they go before a jury trial.

The civil contempt power has been described by Skillier J in a case that's cited in *Bagwell* as a judicial power of self defence. And in the *Vidéotron Ltée v Industries Microlec Produits Electroniques Inc* [1992] 2 SCR 1065 case in the Supreme Court of Canada, L'Heureux-Dubé J there talked about the civil contempt power operating as the enforced execution of an injunction. And my submission is that these characterisations of the relationship between civil contempt and the law of injunctions or the law of Court orders is accurate, that they must be seen very much as part of the enforcement of the civil process. And a necessary means for completing and giving effect to the civil process.

There is a threshold question here which the Court has shown a good deal of interest in with my learned friend, which concerns whether the appellant is charged with an offence for the purposes of section 24(e) of the Bill of Rights. The issue there is do the criminal Bill of Rights Act provisions have any application? The Solicitor-General says no in the context of coercive contempt, as I've described it in the submissions. In the context of criminal contempt, the submission which I can develop in due course if the Court is interested, is that it's very difficult to reconcile with criminal contempt proceedings, but that may be that the way the Court ends up going.

ELIAS CJ:
Sorry what is difficult to reconcile?

MS LARACY:
Criminal contempt.

ELIAS CJ:
With –

MS LARACY:
Is difficult to reconcile with the criminal, with the criminal provisions in the Bill of Rights Act, section 23 to 25.

ELIAS CJ:

Yes, thank you.

McGRATH J:

Is that a submission that section 4 of the Bill of Rights Act applies, in other words that there is a law that, that even if it's a breach of the Bill of Rights, the underlying law must stand and be applied?

MS LARACY:

Yes, yes effectively Your Honour. Well it's really a submission that the Court might reach the point that criminal contempt is criminal but that does not mean to say that it's criminal for the purposes of the Bill of Rights Act because those provisions in 23 to 25 are very tightly geared.

McGRATH J:

Yes I think you said you were coming back to that, I'll be interested to hear that.

MS LARACY:

Yes. But our submission is that this in fact is an easy case because it must be seen as in substance a simple case, as the Court of Appeal analysed it because it is a proceeding to enforce a Court order. Now that's a factual matter, the Court of Appeal made factual findings about that and that's before this Court as well.

Civil contempt at common law was not generally considered to be an offence, whereas criminal contempt at common law was commonly described as being a misdemeanour and an offence and the reference there is in footnote 52 of my submissions. One of the consequences which blow from this is that there was never the right to a trial by jury in civil contempt cases. The reference for that proposition is in footnote 35, which gives a reference to the text of Arlidge and Eady which I've provided. However that is not to say that very significant fair trial protections don't apply to civil contempt. Indeed they do and in New Zealand always have applied through the common law and now are guaranteed through the right to natural justice in section 27 of the

Bill of Rights. This is not a case where the Solicitor-General is seeking to exclude only section 24(e), to deny people in the position of Mr Siemer, a right to a jury trial because it's too hard or because it's inconvenient. The submission is that none of the criminal Bill of Rights provisions apply because it's not a criminal case.

ELIAS CJ:

They may not apply, or is this something you're coming back to. They may not apply in their own terms but that doesn't mean to say that the Court acting consistently with its obligation under section 3 shouldn't ensure that in substance they are met as standards.

MS LARACY:

That is certainly open to the Court and that maybe what the Supreme Court in Canada, in fact did in the *Vidèotron* case, where the majority deliberately refrained from saying that the Charter provisions applied. However they said they analysed the issue there and their finding that the witness was entitled not to be compelled to give evidence against himself, in the context of a civil contempt case, they justified that on the basis that it was consistent with the Charter provisions.

And again, as a final introductory matter, the Solicitor-General did not understand the Court's grant of leave to extend to the factual matters which the appellant has raised, however they have been addressed in the submissions and I do propose to address them here in case the Court has a different view of what the leave extended to.

One of the propositions that my learned friend has made in his written submissions, is that the law of contempt is so uncertain and so historically complicated and overlapping and inconsistent, as to be bad essentially for uncertainty, and one response to this is to – for the Court really, just to declare that all contempts are criminal, to do away with the distinction. There's plenty of authority from very senior Courts in a number of jurisdictions, that the common law of contempt is not bad for uncertainty in the sense of being

contrary to fundamental principles of justice or charters or Bill of Rights and that sort of instrument, but where the Solicitor-General does agree with the appellant is that there is a need for the Courts now in this country to clarify the criminal or civil status of particular contempt proceedings and this is important, most immediately for, what are really pragmatic purposes. What legal aid provisions do apply. What appeal processes apply, is there an appeal right, does the Crown or the prosecutor have an appeal right and so that from the commencement of proceedings, the procedure and the rules that have to be followed are clear. Now the options for the Court in doing that are, would seem to be three-fold. One is to find that all contempt is criminal. One is to find that all contempt is in civil – is in substance civil and the third is to take the middle road, which has always been taken in different forms and different jurisdictions, that some proceedings are one and some proceedings are the other.

ANDERSON J:

But that's simply jurisprudential analysis, it's nothing of practical utility. Is there other civil proceeding where the defendant can be in prison, now that **imprisonment for death's gone by the board**?

MS LARACY:

No there are other proceedings, civil proceedings where people can be detained for long periods of time, say under the Immigration Act.

ANDERSON J:

But that, that serves a difference purpose.

MS LARACY:

Yes.

ANDERSON J:

And I find it difficult and artificial in this day and age to say, a process in which you can be imprisoned is essentially civil. Because that means we countenance civil imprisonment.

MS LARACY:

The Solicitor-General's answer to that is that it's a process where you can be imprisoned if that's what you choose. The Court does not emphatically impose imprisonment that cannot be avoided. The Court gives the person an option, you either comply with the order, or I'll make you comply. That's the fundamental distinction, that is the distinction which the Court of Appeal found persuasive in this case. It hasn't really been addressed by the appellant so much in his submissions, but that is the issue under appeal.

ANDERSON J:

So it's a sort of question of whether a process is – motive is essentially remedial or essentially punitive.

MS LARACY:

Well –

ANDERSON J:

It's a just a choice of remedies.

MS LARACY:

Yes it is, motive becomes a complicated word and the United States cases have looked at this and said it's not a question of motive, the law's motive, the Court's motive, it's a matter of examining the nature of the relief sought. So for instance you could in fact have a case where an applicant seeking a term of – seeking that the alleged contemnor will be imprisoned indefinitely for failing to comply with a Court order, where that individual's motive was in fact malicious and knowing that the person would not comply, sought to have them locked up for as long as possible, that's the problem with motive but the advantage or the certainty that comes –

ANDERSON J:

Purpose I meant.

MS LARACY:

Purpose, but it's the purpose of the relief, the relief sought not the purpose of the applicant seeking the relief and I can – and that is a very important distinction – in my case, in my submission .

ANDERSON J:

But you could say something is essentially criminal, but there are different remedies for criminal behaviour.

MS LARACY:

Or perhaps a, the other way to look at it is the conduct is neither criminal nor civil. The conduct is the conduct, the person has for a certain time and currently is still breaching a Court order. The proceeding, in my submission, is civil if the relief sought is purely to compel compliance with that order, the proceeding is criminal if the relief sought is to punish for the breach to date.

ANDERSON J:

I think I understand your position.

McGRATH J:

And so it can – do you agree with the Canadian approach that it can start off civil, being coercive in its object, but become criminal if the condemnation, denunciation element comes to play in a prominent way?

MS LARACY:

The Canadian case law is interesting in this area, it has – the Canadian law has developed its own – what I really think of as a hybrid of criminal contempt law because they've added an element of public defiance and that's what converts a civil contempt in Canada to a criminal contempt. In my submission that's not an attractive precedent, as the dissent in the *United Nurses of Alberta v Attorney-General of Alberta* [1992] 1 SCR 901 case shows because it's very difficult at the commencement of a proceeding to work out if it's going to be civil or criminal, if what has to be assessed is how public the defiance was and it was on that fact, that factual issue that the Judges in that case differed, the minority thought that it wasn't in fact it wasn't a very public

defiance and therefore it should be treated as a civil contempt. So that's one problem with the Canadian line of contempt authorities.

The other aspect which limits them in terms of being useful precedents, in my submission, is that they don't really analyse the difference between coercive forward looking relief and punishment for past conduct. So they adopt the common law's historical approach which is that if there is a breach of a Court order, if that's the subject matter of the proceeding, regardless of going on to analyse whether there's an attempt to compel, compliance or punish. If there's a breach of a Court order it's civil whereas other forms of contempt which the common law has historically broken down into certain categories are simply because of historical categorisation criminal. It's not, it's not a principled or logical basis for determining the distinction and one of the very interesting examples of how difficult this becomes is that in English common law which to that extent Canadian law follows, as does New Zealand common law, the general proposition is that a breach of a Court order is a civil contempt.

Now that's different obviously from what the US case law says but a breach of a Court order is a civil contempt. However the common law has always accepted that a breach of a Court order by a third party is a criminal contempt because they're not a party to the underlying proceedings. So it's not even as simple as saying that a breach of a Court order is a civil contempt. This is one of the reasons why the Solicitor-General says that certainty would be a useful thing for the Court and litigants in this area and that in trying to find a principled basis upon which certainty from the outset for all contempt proceedings can be, can be guaranteed, the United States approach really does recommend itself.

McGRATH J:

What concerns me a little is I sense there is an artificiality in the strictness of the division between coercion and if you like the assault on the authority of the Court. Is it not indicated in this case by the fact that the Solicitor-General used the language as Mr Lithgow pointed out in the beginning of his

submissions, of concern about an assault on the authority of the Court which is a hallmark of criminal category of your view whereas you are very firmly submitting to us that, no this is a civil contempt. It's a matter of looking to coercion and to secure compliance. Isn't the reality that the, particularly when a matter falls into the law office's hands, so it's out of the hands of a party who's seeking enforcement, that both elements will be prominent in the purpose of the proceedings. Doesn't this really tell against the strict United States separation and in favour of the Canadian?

MS LARACY:

Well the United States cases, as with the Canadian cases, and as with the Court of Appeal judgment under consideration here, have always accepted that in almost all contempts there will be both punitive elements, namely those aspects of the Court's intention really, or the prosecutor's intention, which are aimed at vindicating the Court's authority. There will always be punitive elements and there will always be coercive elements and in that context, in the context of coercion in a criminal case what's really talked about is deterrence. If the Court punishes this individual for a criminal contempt, it has the effect of deterring future litigants from doing the same thing, but my point is that –

ELIAS CJ:

And obtaining compliance?

MS LARACY:

Yes.

ELIAS CJ:

And it really does seem a little artificial to be as categorical here. As soon as it's accepted that there is a vindication of the Court's authority that is in issue, it's both.

MS LARACY:

Well certainly –

ELIAS CJ:

You achieve compliance through punishment of the perpetrator in the particular case, even if the contempt in the particular case has come to an end. But in this case you've got both directly involved.

MS LARACY:

It might be useful to perhaps turn then to the United States cases because they deal with this directly the, the Supreme Court –

ELIAS CJ:

Sorry, can I just ask you, this idea about the third party intervention. It's not true to say that the third party is outside the Court order. The third party is caught by the Court order and defies it or acts in breach of it so it just doesn't really seem to be very helpful to have a different view of matters according to whether someone has been a party to the proceedings which produced the Court order or not.

MS LARACY:

Well in English law the way it's been reasoned is that say in the context of an injunction, is they act in personam in relation to individuals named in the Court order, restraining or directing the individuals do certain things. If a stranger to the proceeding knowing about the injunction, does something which undermines or thwarts it, they haven't breached the injunction directly. They were never bound by it in the first place, but they have impeded the Court in what the Court lawfully sought to do and it's that residual category which is being labelled criminal contempt whereby any act which has the effect of undermining the efficacy of the Court's process will be a criminal contempt. It's via that process that the third party's action is considered to be criminal. I don't take any issue with that that, it's just that I was making the point that it's not as simple as breach of Court order is necessarily a civil contempt.

ELIAS CJ:

No well I certainly accept that but I'm not sure that it is really useful to plug on, to any great extent, about the characterisation as civil or criminal. It really is in a special category and it may have analogies with criminal law because it may achieve compliance through punishment so you need to tailor something that's appropriate to that aspect but simply labelling it doesn't seem to me to be enormously helpful at all. However, you're wanting to take us to the –

MS LARACY:

The United States cases simply because they do squarely engage with the fact that most contempt sanctions have both a private and a public law overlap and that, well really that's it, and that they are neither wholly civil nor wholly criminal and perhaps the starting point is the first United States case which really identified this distinction and that's the *Gompers v Bucks Stove and Range Co.* 221 US 418 decision which is at tab 21 at page 441.

McGRATH J:

Am I right in saying that this opinion is not ascribed to any particular Judge?

BLANCHARD J:

Mr Lamer J, page 435.

MS LARACY:

I thought there was a Judge. In fact perhaps the best passage where the Court talks about the intermixed elements of contempt is at page 443. "It is true that either form of imprisonment has also an incidental effect. For if the case is civil and punishment is purely remedial, there is also a vindication of the Court's authority." I won't read the rest of that paragraph but I do just refer the Court to it. And there's, the Court also, the Supreme Court in the *Bagwell* decision expressly directed their attention to this aspect as well at page, that decision is at tab 20 and at page 2557. So the United States cases are based on the proposition that it's not the fact that a person may be punished but the purpose which punishment serves, that distinguishes the two classes of contempt. And if the –

McGRATH J:

As long as the consequences are indirect.

MS LARACY:

Yes.

McGRATH J:

There's a subsidiary note.

MS LARACY:

Yes.

McGRATH J:

There can be a subsidiary purpose that would categorise it as criminal but won't because it's only subsidiary?

MS LARACY:

Yes and one of the implications of this is that in the United States it's been accepted that a single contempt action can have both criminal and civil remedies to it. This is because the criminal remedy seeks to punish yesterday's breach, as it's described in the *Penfield Co v SEC* 330 US 585 case, as a civil remedy seeks to compel compliance and restrain, prevent tomorrow's breach.

ANDERSON J:

But you would never get to that second level unless the first one had occurred?

MS LARACY:

That's right.

ANDERSON J:

You can't get **(inaudible 13.00.41)**

MS LARACY:

And the Court in that situation has said, and it's confirmed in the *Bagwell* decision, but the criminal character or part of the relief fixes the nature of the proceeding as a whole and that would make sense. So where both forms of relief are sought say, for instance, a fine for the past breaches and imprisonment to compel the person to comply in the future, that will be a criminal case because the element, both forms of relief are present.

ELIAS CJ:

Ms Laracy, is that a convenient time to take the adjournment?

MS LARACY:

Yes thank you.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.16 PM

MS LARACY:

I have quite a lot of material still to get through but this might be a sensible point, so as I don't leave it until the end, to go back and address some of the matters that have appeared to be important to the Court in questioning. I thought a good place to start would be the Chief Justice's question whether there needs to be a distinction between civil and criminal contempts, or between, within the field of contempt, between some that might be treated as criminal proceedings and others that might be treated as civil proceedings. The short answer to that, in my submission, is yes there does need to be a distinction because there are two distinct types of proceedings which are overall, while they may share certain characteristics, they are overall trying to achieve two different legal ends. It's already clear to the Court what those two are, in my submission.

One type of proceeding seeks to give the individual the benefit of a lawful order that's been made in their favour. The other type of proceeding seeks to punish the respondent to the contempt application for their disobedience and those are different proceedings. It follows from this, that to give people the benefit of orders, it's important that valid orders without more can be executed and that's the point I made at the beginning and it's also referred to in the justified limitation section of my submission and I won't go over that but I do say that enforcement by the Court is part and parcel of the ability to make the order in the first place. So that first type of proceeding for contempt is complementary and directly aligned to the Court's original jurisdiction to make the order. It's simply execution of what the Court has done.

Second point I wanted to make is that some of the problems with the common law distinction between civil and criminal contempt are perhaps even more overwhelming than the problems the Court might identify with the United States case law. By example, as we've seen, generally at common law breach of a Court order is regarded as being a civil contempt and a civil proceeding but in English common law, under New Zealand common law to date and in Canadian common law, for breach of that type of order, breach of a Court order, it can be called a civil proceeding but in fact the purpose maybe simply to punish for a past breach, the applicant maybe seeking to imprison solely for a past breach with no thought to future compliance. In the common law to date that's been regarded as a civil proceeding. Now, in the United States, they would say that's a criminal proceeding because –

McGRATH J:

No in Canada though.

MS LARACY:

No, not in Canada.

McGRATH J:

Can I just say that, while I understand why there are two different aims that you can call the aim of the civil litigant and the paradigm model or the aim of a

person who has a public responsibility to uphold the Court. I'm still not sure why, if just speaking conceptually as opposed to the statutes we have and things of that sort, I'm still not sure why you need to have the distinction. I do accept there are two different aims, as you've explained but I'm not quite sure why there need be the distinction on a continuing basis. This might be more for Parliament than us but if you're sure that there is value in it, I'd like to hear more about that.

MS LARACY:

Certainly. It probably leads onto my second point. The distinction comes about because those two aims have certain characteristics and the characteristics of the aim that is to punish are things that we associate with the criminal law and I can go on to address that.

McGRATH J:

Is punishment a word that falls neatly into the two categories of coercion to comply and upholding the Court. I mean, it seems to me it's punishment in both cases, certainly if you're looking at it from the recipient's point of view. To comply and upholding the Court. I mean, it seems to me it's punishment in both cases, certainly if you're looking at it from the recipient's point of view.

MS LARACY:

It certainly is but the relevant distinction is that in the coercive case it's conditional punishment. It is not an unconditional punishment imposed by the Court, it's a punishment that can be either mitigated or, as in this case, entirely averted. In the Solicitor-General's application, there was, for instance, there was no prayer for relief seeking punishment for its own sake and I can take you to the application but it was that the appellant be incarcerated until he complied with the Court order –

McGRATH J:

Yes, yes, no, I understand that –

MS LARACY:

– nothing additional sought –

McGRATH J:

I understand that. I'm just wondering how important that is or how desirable it is in some respects. I mean, what was wrong with what the High Court did?

MS LARACY:

What was wrong with what it did is that –

McGRATH J:

This is not the subject you're on but, I mean –

MS LARACY:

No but it's directly relevant –

McGRATH J:

– I'd like to identify it at some stage.

MS LARACY:

Well, one thing, in the Solicitor-General's submission that was wrong about it, is that it did not give the appellant any incentive to comply with the order which was the purpose we were seeking to achieve. As I've already submitted, the very same conduct could have led to the Solicitor-General filing an application seeking he simply be imprisoned for the breaches that had occurred up to the time of filing our application and after Potter's J second committal for contempt. We could have sought a punishment that covered those past breaches. That wasn't our purpose.

ANDERSON J:

I can see how theoretically one could analyse in the way that you've explained but I can't see the point of it. I can't see the utility of it, it's just an academic analysis when, at the end of the day, it's still jail and there's no other civil process that contemplates that remedy.

MS LARACY:

Well, I think the answer is that in the one case it's jail, in the other case it may be jail depending.

ANDERSON J:

So it's a putative –

MS LARACY:

Yes –

ANDERSON J:

– criminal proceeding –

MS LARACY:

– and it has the benefit for the interested party and for the Courts and for the Solicitor-General and for the public interest that the intransigent individual may well make the sensible decision and choose to actually do what they're required to do and that's in everyone's interests.

ANDERSON J:

But there's no difference in procedure?

MS LARACY:

No, no, not in New Zealand.

ANDERSON J:

There's no difference in the jails, I might say. There's nothing different except the academic analysis of it and on one analysis you avoid giving people Bill of Rights' rights and on the other you don't.

MS LARACY:

Well, it is an important submission that perhaps I need to address, that that's not the purpose of the analysis but –

ANDERSON J:

Well, if there's no purpose, what's the point?

MS LARACY:

That analysis, that may well follow, that on the one analysis you don't get the benefit of criminal rights but the answer is, in my submission because it's not criminal.

WILSON J:

How do you classify contempt by non-compliance with an order made in criminal proceedings?

MS LARACY:

The nature of the underlying proceedings has never, at common law, been taken to determine the nature of the contempt. A civil contempt or a criminal contempt can occur in the context of a criminal case. A civil contempt where the Court, for instance, directs a party to do something in a criminal case and they refuse to do it, that has traditionally been a civil contempt albeit a criminal case.

WILSON J:

It's all very, fairly artificial, isn't it?

MS LARACY:

That's why there are difficulties with the common law analysis. So, Your Honour Justice Anderson's question, leads me directly to my next point which was to address the proposition that's been made at various times, that even if it's not, if the conduct here is not properly characterised as an offence for the purposes of the Criminal Bill of Rights Act provisions, should those provisions apply by analogy, the Solicitor-General would agree that they could or they should, if the Court is first satisfied that the proceedings share enough of the characteristics of whatever it is the Court determines to be the characteristics of criminal proceedings. And in our submission this type of

coercive contempt does not share those characteristics and for that reason, they should not be applied by analogy, there's no logical reason why they should. There are other protections, in fact, of the same order except to say for the jury trial right, that do apply there, the common law albeit at section 27, but unless the Court is satisfied that this is substantially a criminal proceeding, they should not be thought of applying via sections 23 to 25 of the Bill of Rights.

And I won't go into it because it's set out in my submissions, but one way of looking at that, it just brings the Court back to that very difficult question that's been looked at in so many contexts, is to what is in substance a criminal proceeding. It was looked at in *Mafart* in a particular context. In the European Court cases that I have included in my submissions are two of many, many but the cases that are very close to the type of scenario you have in contempt cases which is why I've included them and they set out the European Court's test, and on my submission, applying that type of a test, the type of proceeding we have in this case would not be deemed to be criminal.

McGRATH J:

You don't seem to be urging on us a literal approach, you don't seem to be saying the word "charge" has a technical meaning, where "defence" has a technical meaning, that's the way to go. You seem to be taking more of a broad rights consistent approach, but saying if you've got the keys to the door in your pocket that's not criminal, is that – would that be a quick summary of approach you're taking?

MS LARACY:

Yes. And it's certainly something that I do need to address. I'd quite like to address it in a very coherent way because it's very much a stand alone issue. But that is right. The Solicitor-General does not concede however, that this time, that contempt does amount to being charged with an offence. And I set that out in my submissions, I've tried to identify to the Court why this is very, a very vexed issue.

The arguments in favour and against are set out very clearly in the texts by the two leading authorities on this area which are in my case materials. One is the Paul Rishworth and Ors commentary which talks about how broadly the word "offence" in sections 23 to 25 should be interpreted. And he says they advocate an approach whereby the word "offence" in each section and subsection can be given a meaning, that may not be identical in each other subsection under those sections.

That broad approach can be contrasted with the analysis that's been taken by Andrew and Petra Butler in their commentary, which is attached there. Interestingly enough, the approach that they take is that it's contrary to orthodox interpretative principles, for instance, I think they call it "cherry picking", so to say that for instance, that 24(e) makes sense in the context of contempt, but to acknowledge for instance, that some of the other provisions don't apply. So they're very critical of an approach whereby you can pick out certain rights out of their context, which is plainly a statutory criminal offence context and apply them to other types of conduct that may or may not be properly described as offences.

The interesting thing about that however that the Court does need to know, is despite being opposed to the cherry picking approach and despite the fact that there are a number of provisions in sections 25 to 25 which I've identified in my submissions, sit very uncomfortably with contempt law, where criminal or civil law, the Butlers do say that criminal contempt should be properly – must be treated as falling under section 24.

So that's –

BLANCHARD J:

Which are the provisions that don't fit?

MS LARACY:

Well the, it really relies on – first the proposition that's in a number of the early Court of Appeal cases dealing with the Bill of Rights Act that these are a

package of provisions dealing with a flow of criminal procedure rights that apply properly to statutory, to statutory processes that have to followed in a criminal case. I've identified – my submissions on this point start at paragraph 53 and at paragraph 57 the Solicitor-General submits that concepts such as charging, rights on arrest, the right to bail and the right to be presumed innocent are not concepts that sit easily with contempt.

So for instance just take the fundamentally criminal –

BLANCHARD J:

Well what's the problem with rights on arrest – if there isn't an arrest, section 23 1(a) simply won't apply. What I'm looking for is the things that won't work.

MS LARACY:

What can be said is that there are things like the routine application of bail, the arrest which is –

BLANCHARD J:

What's wrong with that?

MS LARACY:

Well it's generally not part of a contempt process.

BLANCHARD J:

Well –

ELIAS CJ:

Well it was in this case.

MS LARACY:

It's not to say it's inconsistent with it, it's simply – it's interpretative argument –

BLANCHARD J:

If the person is arrested or detained, then bail may be appropriate, but if there's no arrest or detention, then bail's simply irrelevant.

MS LARACY:

The right to be presumed innocent in a case where the contempt is committed in the face of the Court.

ANDERSON J:

But that has its own regime doesn't it?

MS LARACY:

Yes.

ANDERSON J:

I suppose in – well first of all the question whether there's been a contempt requires a factual examination, something in the nature of a trial of some sort. Secondly a person is hooked off the street under the authority of an order for writ of arrest, why shouldn't they be told why they're being arrested. For all they know they could be arbitrarily detained for some political reason. The fact that the attitude to contempt has been conditioned by this academic analysis over the centuries doesn't mean the Bill of Rights can't work, it just means the Bill of Rights has to be made to work.

MS LARACY:

Well made to work or, my point really is that it's awkward and that it's often unnecessary. People facing contempt charges are generally not arrested, until they are committed.

ANDERSON J:

So there's no problem then.

MS LARACY:

The general – for that reason they're not granted bail because there's no need to apply for the bail. They are told of the charge when the proceedings are served upon then, they're not summonsed – and then they're required to or asked to appear.

BLANCHARD J:

So they're getting an equivalent?

MS LARACY:

Yes.

BLANCHARD J:

But where doesn't it work?

MS LARACY:

My submission is that it's awkward. That these are provisions that make sense as a package –

BLANCHARD J:

Well reading them through, I didn't see that. Some of them may be irrelevant but I didn't see that they were unworkable. And where in a particular context they might be unworkable, then section 5 might well come into play.

MS LARACY:

Yes. So this is a matter that the Court of Appeal has come close in other contexts to considering, to what extent can these – should 23 to 25 be extended from the core statutory criminal context. It hasn't been the subject of any reasoned or any final decision in that case, in the cases that have been to the Court of Appeal.

ELIAS CJ:

What sort of cases?

MS LARACY:

Drew was the one I'm thinking of.

WILSON J:

Yes.

MS LARACY:

That was a case involving a prison disciplinary offence and the issue concerned the procedure that needed to be followed in hearing the charge and –

McGRATH J:

Natural justice rights applied?

MS LARACY:

Yes, natural justice rights applied but the –

McGRATH J:

In the disciplinary, in the professional disciplinary context the view has been taken, perhaps not at Court of Appeal level, but certainly in the High Court that that doesn't involve criminal rights.

MS LARACY:

Yes.

McGRATH J:

But here we're dealing with imprisonment?

MS LARACY:

Yes and the Solicitor-General has conceded that certainly for criminal contempt at common law that has been considered to be an offence. It has been treated – offence of a type. A sui generis offence but it has been labelled an offence. It's also been properly considered by Courts in England to be a misdemeanour in the past so there's, there's no, um, insurmountable obstacle but there's a reasoning process that the Court, in an interpretation process that the Court has to go through before it applies to criminal contempt. The issue then, in my submission is, even if you get that far does, do these provisions apply to the type of contempt we've got in this case, which in my submission is a civil proceeding, because of the nature of the remedy sought. So –

McGRATH J:

Well we might be stuck with the classification and the general law of contempt. We're not necessarily stuck with it looking at the Bill of Rights, are we?

MS LARACY:

No.

McGRATH J:

No, that's never been considered before?

MS LARACY:

No not, not in this country. In Canada the analysis has gone so far as to apply, for contempt to be applied to the, to the charter and I can take the Court to those cases because they are helpful.

McGRATH J:

I'd be interested to see them while bearing in mind the different provision in the Charter.

MS LARACY:

Yes. So if I can just sum up this part of my submissions. It really is that, we're returning to the European court analysis for instance, is that the fact of penal consequences is not enough, the mere fact of penal consequences is not enough. That is consistent with the United States cases but it's also consistent with *R v Wigglesworth* [1987] 2 SCR 541 which is the leading Canadian Supreme Court decision on the distinction – on what amounts to a criminal case and I'll come and deal with that very shortly. In fact I could deal with it now. One discrete topic which the Court was interested in, and it might be better for me to come back to it later, is section 9 of the Crimes Act, I'm not sure if this is a convenient place to deal with that, if the Court is interested in that or if I should continue with *Wigglesworth* and the substance of criminal proceedings?

I'll just turn to section 9. A search on New Zealand case law has not found, to the best of my endeavours, or the Supreme Court's endeavours in *Nash* or the Court's research in *Radio Avon* ever to find a case in New Zealand of contempt that's been dealt with on indictment. So that's just a matter of historical interest so far as it goes. I accept that's not determinative of the issue before the Court. *Nash* was a decision of a Bench of four Judges sitting in the Supreme Court and it concerned section 5 of the then Crimes Act. The important thing about section 5 is it did not mention contempt at all and page 497 of *Nash* which is at tab 11 of my casebook sets out the reasoning that was applied in that case in response to an application by a respondent to contempt for a jury trial. The reasoning of the Court was that Parliament in section 5 had sought to abolish common law offences and to provide that all offences were to be proceeded against either summarily or indictably. So as is summarised there at 497 its purpose is to abolish common law offences as the subject of indictment. But section 5 says nothing about contempt and the Supreme Court says that this leaves the Supreme Court with its inherent jurisdiction untouched. So it's simply a statutory provision which doesn't go there. It says nothing about contempt so we're left with the inherent jurisdiction that the New Zealand Court had always had and unfortunately *Nash* doesn't go on to analyse in any depth what that inherent jurisdiction was but it's hinted at and it's implicit in the passage at page 498 that the Court's already looked at.

BLANCHARD J:

What were they getting at when they said, "There is nothing in section 5 which excludes its exercise –" that's the jurisdiction in contempt, "– because the contempt in question happens to be also an indictable offence." Is that a reference back to something that is earlier in the judgment which I have not read?

MS LARACY:

It was the submission that because the Crimes Act codified a lot of conduct which amounted to contempt at common law –

ELIAS CJ:

Jury tampering and that sort of thing?

MS LARACY:

Yes.

ELIAS CJ:

Yes.

MS LARACY:

Perverting the course of justice, that the Court should not be allowed to proceed by way of common law contempt, instead it must use the search and codify of statutory law.

BLANCHARD J:

I see.

MS LARACY:

And the Supreme Court said that's not the case. And this is exactly the same position has been taken by the Canadian Courts as well.

ANDERSON J:

The New Zealand Court was concerned to preserve its summary powers and not be obliged to rely on indictment.

MS LARACY:

Yes.

ANDERSON J:

And it's, it's likely that the section 9 in 61 was just to recognise the *Nash* decision.

MS LARACY:

My submission is that section 9 of the Crimes Act, yes, really is very much a for the avoidance of doubt provision. It confirms and avoids any doubt that contempt has been included in that abolition of criminal, of common law offences. But with respect to what jurisdiction the Court did have, it simply hinted at in the final paragraph where the Court talks about the ability of the Supreme Court to do justice by dealing summarily with all conduct. In my submission that's a reflection the Court knew that in New Zealand to that date that was the only way that contempt had been dealt with.

ANDERSON J:

Does it amount it that? It just means that they see that as a convenient power to preserve?

MS LARACY:

Yes well –

ANDERSON J:

But I may have misread the case but it seemed to me that they didn't want to have to rely on the indictment when it was more convenient to use the summary proceeds. For practical reasons.

MS LARACY:

Yes although in my submission the Court here is, is also making the statement that the indictable procedure is not, not available. It didn't come in through section 5 and –

ANDERSON J:

Well maybe as a matter of practice it was never used in New Zealand because it was too cumbersome and the summary power was there, so.

MS LARACY:

Possibly.

ANDERSON J:

A situation **(inaudible 14.43.41)** is presumed to have been aware of in 1961.

MS LARACY:

Yes. I would adopt Your Honour's analysis that if it wasn't there at the time of *Nash* it didn't come back with the 1961 Act. The important, one of the important things to note about the 1961 Act is that offence is very prescriptively defined in the Crimes Act and I set that out at page 55 of my submissions. And I say prescriptive because the definition is that "offence" in the Crimes Act –

ELIAS CJ:

Sorry was that paragraph 55?

MS LARACY:

Yes paragraph 55. "Offence means (not includes) any act that can be essentially dealt with on conviction on indictment or on summary conviction." In my submission contempt, there's nothing in the Crimes Act that makes contempt an offence under that Act. Indeed there are hints the other way. So for instance the appeal right in section 384(3) talks about a finding of contempt being a right to appeal that finding and that it being deemed to be a conviction for the purposes of the criminal appeal by the contempt law and I would also adopt Your Honour Justice Elias' observation, I think it was in my favour, that the reference in section 9 to the House of Representatives retaining its ability to deal with contempt again suggests that contempt was not considered by Parliament at the time the 1961 Act was drafted, as being an offence of the type covered by the Crimes Act because obviously the House of Representatives has never had the ability to use the Court process for dealing with contempt in the House.

So in my submission it's also consistent with the, this analysis is also consistent, indeed identical really, with the Supreme Court's analysis in the *R v Vermette* [1987] 1 SCR 577 case, which I'll take the Court to, which held that in the context of a provision very similar to section 9 the Court held that

contempt is not an offence for the purposes of the criminal code. That it might be properly described as an offence at common law but not for the purpose of the statutory code and the same approach really has been taken by the Australian High Court in the *Re Colina; Ex P Torney* [1999] 200 CLR 386 (HC) case and I've referred to that in a footnote in the brief section where I deal with Australian **audio stops at 14.46.29**

COURT ADJOURNS: 2.46 PM

COURT RESUMES: 2.59 PM

MS LARACY:

I was endeavouring just to take the Court to some passages which summarised the history, so that you've got it in a handy form, and one of the most helpful historical summaries can be found in the *MacMillan Bloedel Ltd v Simpson* (1994) 113 DLR (4th) 368 (BC CA) case, which is at tab 39, page 387. In essence, what the passage says is that the historian, John Fox, in 1972, had put a number of Courts wrong, really, by suggesting that contempt had always been dealt with by the summary process. That was not correct, there had been these alternative forms for certain contempts, whereby they could be dealt with by indictment or information, and that's really addressed in *Arlidge,* but the Court there just goes on to explain that, regardless of that, a consistent body of practice has been to deal with criminal contempt through what's been called the summary process, and the Court goes on to suggest, on page 388, that in modern times the Supreme Court of Canada has upheld that process in a powerful statement in defence of the authority of the Court to deal with proceedings that way. So, I'll just leave the Court with those passages.

The most significant case on this issue in Canada, however, is the Supreme Court's decision in *Vermette*, which is at tab 33, and in that case the Crown proceeded with a contempt case by way of indictment, and the Supreme Court upheld the ability of the Crown to do that, on the basis that at common law the Court had always had the ability to deal with certain forms of

contempt by indictment, and that was an important part of the superior Court's inherent jurisdiction, and unless that inherent jurisdiction had been expressly abrogated by statute, and in that case the Canadian criminal code, it would subsist. It said that hadn't happened. The Court, however, went on to say that contempt, even when brought by way of indictment, was not an offence in terms of the statutory offence provisions in the Canadian criminal code because they, like our offence, are defined in terms of being able to, offences under statutory law and able to be dealt with by indictment and summary process under that law. However, the Court did allow that the indictable process for contempt existed, albeit it might never be resorted to again.

And one of the interesting things that happened in that case is that although the Crown sought to give the respondent the benefit of a jury trial, he in fact elected trial by Judge alone, but he did so under the equivalent of our Summary Proceedings Act, and went ahead, had a contempt hearing, was convicted and then appealed, and the Supreme Court said, in fact, that whole process was wrong, procedurally wrong, and it had to start again. Because, although the Crown could proceed by way of indictment, the election process which had been used was part of the statutory criminal law, and that didn't apply to contempt. So, back at the beginning again, the choice would have been left with the Crown, "Do we do this by the normal contempt summary process or by the indictable process? But if we do the inherent jurisdiction originating indictable process, there's no right of election under the criminal code.

Taylor v Attorney-General [1975] 2 NZLR 675 (CA) in New Zealand has held that –

McGRATH J:

Were there any particular passages in *Vermette* that you are drawing to our attention?

MS LARACY:

No, it's quite a short judgment, yes, –

McGRATH J:

All right, that's all right.

MS LARACY:

– and it really is as clear as that, it's an unanimous decision. It hasn't been referred to again by the Supreme Court, but it is referred to in some of the other lower Canadian Court cases, which I've given the Court. Your Honour, would this be suitable point to deal with section 384?

ELIAS CJ:

Yes, thank you.

MS LARACY:

I haven't included a copy of that authority in the materials. But section 384(3) of the Crimes Act, in 1961, gave the respondent to a contempt proceeding the ability to appeal because in common law there was no ability to appeal a contempt finding, unlike the result in a normal criminal case, and subsections (3) and (4) deal with the right to appeal in the context of criminal contempt that's not in the face of the Court. Subsections (1) and (2) deal with in the face of the Court. And I really referred to Your Honour to that provision because it talks about a finding of contempt being treated as if it were a conviction.

ELIAS CJ:

Yes.

MS LARACY:

Because I'm conscious time is running out and I do have a lot to cover, what I propose to do is really just to address the key sections that I've set out in my submissions, and I did want to do this by just summarising why, in the Solicitor-General's submission, the United States approach is persuasive. I'll endeavour to do this very quickly and then move on to the Canadian case law, which is of interest.

In our submission, the persuasiveness of the United States law stems from the starting point of the analysis, which is the nature and purpose of the sanction, as opposed to being conduct-based, or based on historical categories. That approach is consistent with the dictate in *Mafart*, whereas the common law categories are not. It has the great advantage of being able to be identified as civil or criminal at the time the proceeding is filed. It doesn't rely on the Court's subsequent characterised. It can be gleaned from an examination of the release sough and the application itself, the notice of motion. This makes the procedure clear, the jeopardy clear, and the control that the conterminal has over the matter. In my submission, that's important.

The basis for distinguishing the civil and criminal forms of contempt in the United States case law has been long settled. Their jurisprudence is highly developed. It's very subtle. They've had a lot of case law, and it's been established for about 100 years, since the *Gompers*. In due course, at a point during the 1960s, the right to the jury trial had to be considered. And what's significant about this, in my submission, is that it shows that, it has the comfort of the fact that this analysis has not been developed to avoid providing rights that might be thought to be due. Instead, it's simply the application of well-established principles. So in the United States, where a proceeding can be classified as criminal in substance, according to the definition of primary punitive proceedings as the case law analyses it, those proceedings, if you're in jeopardy of a sentence of imprisonment of six months or more, will attract the right to a jury trial. They haven't sought in any way to avoid that implication. If the right to a jury trial is not engaged, it's because the proceedings are not criminal proceedings, or because the penalty to be imposed will be within the summary jurisdiction. And that can be, certainty can be had from the outset, because it is up to the Court when it begins to hear the contempt case, to consider itself bound in a criminal contempt case, either by the summary jurisdiction or to afford the right to a jury trial. The cases also have the advantage of analysing the jury trial issue in the context of a similarly low threshold for the right to a jury, which is another reason why the Canadian cases tend, their helpfulness on this particular point is limited because the jury trial threshold is so high, that the Canadian Courts in *Cohn*

and other provincial Courts have held that it's essentially never going to be reached, and the summary limit at five years means that all criminal contempt can be dealt with by the summary process. And the maximum that's ever been imposed in Canada is two years.

The comment I wanted to make about the Canadian cases is that they're not against, not contrary to the Solicitor-General's submissions. They're not inconsistent with the US approach, really. But they're not analysed in the same way. *Vidèotron* case in the Supreme Court of Canada, L'Heureux-Dubé J is the leading Canadian case on contempt, in my submission. The Supreme Court has implied – I think in my submissions I said "held", but that does put it too strongly, has implied – the criminal fair trial procedure rights will apply even to a civil contempt, because of the punitive consequences and the public law aspect.

McGRATH J:

What paragraph of your submissions is that?

BLANCHARD J:

92.

MS LARACY:

Lamer J in a concurring decision with the majority did however go on to say that in his view the charge of provisions applied directly albeit the majority had found it was a civil case but as the majority decision is looked at alone, what they said in that case is that the nature of civil contempt is such that these protections are suitably applied, not that they apply directly or analogously from the Charter, but they're the right types of procedures to attach to these proceedings.

ELIAS CJ:

That sounds analogous.

MS LARACY:

Yes. As I have indicated the analysis of what is civil and criminal is further complicated when looked at from the perspective of New Zealand law by the fact that the specific definition of criminal contempt involves this extra element of public defiance and that is difficult to identify in advance because obviously the degree of publicity and the public nature of an act is very much a matter of judicial assessment and there was certainly room for a good deal of disagreement on that in the *Vidèotron* case. And in my submission it's not clear that there's a great deal of support for the appellant in the Canadian cases because if this particular conduct was held not to be sufficiently public, a not very public breach of the Court's order, then that would be a civil proceeding and it would be a civil contempt and consistent with the majority decision in *Vidèotron* there's no suggestion that the Charter rights would apply and certainly there's – because of the jury trial threshold there's no possibility that the right in section 11(f) to a jury trial could be given to him. The distinction between civil and criminal contempt in Canada is very much alive. This was one of the points that the Court of Appeal looked at because it was argued in the Court by the amicus that there really was no distinction though that's not right, they've very strongly upheld a distinction and that's apparent from the three Supreme Court cases which I've given you on that topic, *Poje v Attorney-General of British Columbia* [1953] 1 SCR 516, *United Nurses of Alberta* and the *Vidèotron* case. They say that the distinction is important and that would seem to be for the reason that's given by Cory J in the *United Nurses of Alberta* case that the, that the two types can be clearly distinguished having regard to their purpose to protect society as opposed regulating and protecting private relationships.

The minority decision in the *Vidèotron* case was delivered by L'Heureux-Dubé J, His Honour was concerned that the majority had read too much public law into a case which involved a breach of private rights and it was really on that point of principle that he disagreed with them and his, in his, sorry, considered that, she considered that it was a civil case and in substance a civil proceeding and that it was wrong to relegate to the background the private rights of the affected party.

She held that the fact of imprisonment is associated, does not alter the primary function of enforcing private rights, that's at page 1093 and in my submission, the passage at section 1095 to 1096 is very close to the United States analysis. I won't read it out but it starts at the top of page 1095, "The function of contempt arising from a civil injunction order is thus one of coercion" and really down to the bottom of that column and over to the next, the first paragraph on the next page. That's where she comments that "Civil contempt arising from an injunction acts as a form of enforced execution of the judgment." She goes on to talk about the necessary complementary relationships between injunctions and civil contempt. Also distinguishes civil contempt from the punishments addressed in the *Wigglesworth* decision and this is on the basis that they are neither punitive nor deterrent focused. Although that is a dissenting judgment, in my submission, it has a lot to merit it this Court.

The *Wigglesworth* decision is a very important decision because it's been cited quite often in New Zealand case law when the Court has been trying to work out whether a proceeding is civil or criminal and it is the leading Canadian decision on that issue. The case is at tab 37. It was a case involving an allegation of double jeopardy which is section 11(h) of the charter. So not a jury trial case at all and not a contempt case. It concerned a former police officer who was facing a disciplinary offence, having already been convicted of a criminal offence arising out of the same conduct which was an assault. The majority reasoned that the disciplinary offence was criminal but that in terms of the penal consequences test in *Wigglesworth* but that in fact the protection against double jeopardy did not apply because the offence was not the same offence as that for which he had been convicted.

There are just a couple of passages, really only one passage, I wanted to take the Court to in this because it's a bit more subtle than my analysis of *Wigglesworth* in my written submissions. The judgment of the majority was delivered by Wilson J. The judge held that, "The section 11 rights are for the benefit of those prosecuted by the state for public offences –

ELIAS CJ:

Sorry, where are you?

MS LARACY:

Sorry, this is page 560 to 1. So, I'm trying to characterise the range of rights which are criminal or offence rights that are protected by section 11 of the charter. The Judge talks about concepts of public offences involving punitive consequences. The test that Wilson J came up with which was accepted by the majority, is that offences are either criminal by their nature or because upon conviction there maybe true penal consequences. True penal consequences fundamentally include things like imprisonment and a fine. In discussing what "public" meant, at page 560, the Judge suggested that "public" means conduct which, or rules which are intended to promote public order and welfare within a public sphere of activity. "This is to be distinguished from private domestic or disciplinary matters which are regulatory, protected or corrective within a limited private sphere of activity." So the issue for the Court here is whether this type of proceeding might fall within that definition "public" even though the order on one analysis is aimed at regulating the conduct of a single individual in a very limited sphere of activity. That particular public aspect of the test can also be seen in the European Court test which I've set out.

McGRATH J:

I suppose you could say, couldn't you, that having a public element does have a link to whether the authority of the Court is being undermined by the conduct?

MS LARACY:

Yes, yes and –

McGRATH J:

Is that what's driving this line of thinking –

MS LARACY:

– that was very much what the Court thought in *Vidéotron*, where they said it is a civil contempt but it's got – we think that the right not to be compelled to testify against yourself in a civil proceeding for contempt should be afforded because there is sufficiently public interest at stake and the consequences are punitive. In that case it was a proceeding for past breaches of a Court order, so there's no suggestion that there was going to be a coercive sanction but it was described as a civil contempt. Sizeable fines had been imposed on the offending party in the past for previous breaches of the order but yes, so the Court was very much influenced by the idea of public aspects to the conduct.

ELIAS CJ:

That has to be absolutely fundamental in all contempt cases because that's why it is contempt, that's why it is of its own type because it's the affront to the administration of justice that engages the peremptory punishment, whether it's civil or criminal.

MS LARACY:

Yes. I really can't do more on that than say that all the cases from all the relevant jurisdictions acknowledge that, despite having a civil and criminal distinction, they all accept that there is a great deal of overlap and that most contempts share both public and private law, criminal and civil, punitive deterrent and coercive aspects. My submission is that simply that in trying to find a way of working out what rules ought to apply to proceedings to deal with certain bad conduct, the United States approach which fixes the nature of the proceeding by looking to the substance of the remedy sought, is principled and makes sense and also acknowledges that public law aspect, it doesn't deny it.

The second part of the test is whether there are true penal consequences and Wilson J held that where the tests conflict, so for instance the Court might be satisfied that there aren't really any public aspects to the offending but there are penal consequences. Where they conflict, the penal consequences arm

of the test has precedence. That maybe of use to the Court's analysis here. She says, "True penal consequences are those that by their magnitude –

BLANCHARD J:

Now, where are we?

MS LARACY:

Sorry, I'm just really taking the Court through *Wigglesworth* but my own summary of it.

BLANCHARD J:

Oh, no wonder I haven't been able to follow it –

MS LARACY:

Well, page –

McGRATH J:

We need to know the page numbers.

MS LARACY:

Page 561 is the analysis of the tests, 560 the Judge sets out her view of the test there. "In my view of a particular matter –" that's the passage that deals with the public nature arm of the test and at the bottom of that page, 560, "This is not to say that if a person is charged with a private domestic or disciplinary matter..." and the Judge goes on to say that the penal consequences arm will also qualify. I'm really just explaining to the Court, at 561, how the Judge reasoned. "It was held that true penal consequences are those that by their magnitude appear to be imposed for the purpose of redressing the wrong done to society at large, rather than to the maintenance of internal discipline –"

BLANCHARD J:

Are you reading from it?

MS LARACY:

Well I'm actually reading from my notes but it's at – they're almost verbatim. It's the top paragraph of 561 Your Honour. "Penal consequences which attract the application of section 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large, rather than to the maintenance of internal discipline within the limited sphere of activity." The Judge then goes on in the passage below, the paragraph below which goes from page 561 to 562. In my submission, to make some observations which are important qualifiers on the relevance of true penal consequences –

ELIAS CJ:

Well look, one can understand why in a case about double jeopardy emphasis on true penal consequences looms rather large but in this case, surely, do we need to go much further than the Supreme Court of Canada's acceptance that that aspects of criminal procedure have to apply?

MS LARACY:

Well, Your Honour, obviously the Court can adopt that approach –

ELIAS CJ:

I'm just really wondering why we're labouring this so much. I'm just wondering what the proposition is that you're trying to take from this case because it is a case of double jeopardy?

MS LARACY:

Well, except –

ELIAS CJ:

So, there had to be a close analysis of what was the determination and what character it had.

MS LARACY:

Well, the relevance of this case is that it identifies the test for criminality that's applied and the passages I was about to take the Court to are passages that indicate that although there maybe what the Judge has described as "true penal consequences", that itself is not necessarily going to mean that the conduct is criminal in terms of section 11 of the Charter. There is a qualification built in there.

ANDERSON J:

In relation to the issue, the fundamental issue we're facing which is whether a person meeting contempt proceedings is entitled to the protection of section 24 of the New Zealand Bill of Rights. Where does this sort of analysis come in, how do you link this back to that fundamental question, or is it just a general discourse on the nature of contempt? I can't see any direct link between what you're saying and what our issue is.

MS LARACY:

Well, in my submission, imprisonment is a true penal consequence, there's no issue taken with that but there's nothing in the Canadian cases that would suggest that where that's conditional upon the appellant's own behaviour, that that would qualify for the test of criminal. Nor is there anything to suggest, in terms of the public – in terms of the way that *Wigglesworth* analyses, the public limb of conduct designed to affect, rules designed to affect the public generally, that the type of proceeding you've got where you're dealing with an individual for coercive contempt meets the public limb. So I'm just saying, there are limitations on how that test applies in the context of coercive contempt.

ANDERSON J:

I'd have thought that if someone is in jeopardy of an order of the Court that says, "If you don't do this you go to jail," that that's a fairly significant consequence and one that is attended by penal attributes in many respects. So, how is one helped in the question of whether there should be Bill of Rights protections by this minute analysis which is academic at heart, about the

difference between civil and criminal contempt when it's already conceded, they always tend to overlap anyway?

MS LARACY:

In my submission it's not minute analysis because what the Court is focusing on there and what the appellant would have the Court focus on there is the mere fact of the possibility of imprisonment and in fact the tests are more subtle than that. Imprisonment itself does not render a proceeding criminal. It is a characteristic of the criminal proceeding but –

ANDERSON J:

Is this a semantic argument then on the issue before us?

MS LARACY:

It's not semantic. It goes –

ANDERSON J:

Does it mean offence –

MS LARACY:

It goes to the heart of the approach that the Court of Appeal adopted and which the Solicitor-General advocates. It's got the support as we've seen of a hundred years of jurisdiction in the United States. It's not inconsistent with the approach taken by the European Court where the fact – where the severity of penal consequences is a very weighty factor that is not determinative and nor is it inconsistent with *Wigglesworth* and so the Judge goes on to say that even a fine which has been accepted as being a true penal consequence, if it's imposed by a body or an official for the purposes of regulating conduct in a particular small sphere, and it's imposed for the purposes of trying to achieve that body's lawful limited purpose, then that's not criminal. And in my submission that's very much what the Court is trying to do with coercive contempt.

ANDERSON J:

Well would it be a summary of your argument on this point then to say that section 24(e) of the Bill of Rights does not give a protection to conduct which has been traditionally classified as civil contempt?

MS LARACY:

No Sir. Section – my submission is that section 24(e), like the surrounding criminal provisions in the Bill of Rights Act, do not apply to coercive contempt.

ANDERSON J:

And this is a case of coercive contempt?

MS LARACY:

Yes that, I also have made the point in my written submissions that the label civil and criminal contempt do not help the Court go forward at all. They have to look at the nature of the proceedings and at least if we're talking about coercive contempt then the Court knows that I am talking in the context whereby a body of jurisdiction has labeled that conduct civil, whether or not the Court agrees, but –

ANDERSON J:

I didn't understand there to be any contest between you and counsel for the appellant that traditionally this type of order would be an order imposed in a civil contempt case.

MS LARACY:

Yes.

ANDERSON J:

His point being notwithstanding that.

MS LARACY:

Yes but the Solicitor-General has said in the submissions that the fact you call it a civil contempt doesn't relieve the Court of having to go on and ask what

rules apply and whether it in substance should be treated as akin to a criminal or a civil proceeding. We acknowledge that which is why it is necessary to go on. It's not enough for us to rest our case on the submission that this has always been treated as civil contempt at common law. It should still be treated as civil contempt. We have to go on and in my submission recommend an approach to the Court which explains why it is in substance a civil proceeding. And that's exactly the approach that the Court did take in *Vidèotron*.

ELIAS CJ:

Your suggested division is between coercive and –

MS LARACY:

Criminal.

ELIAS CJ:

Criminal, well coercive and penal I suppose, yes?

MS LARACY:

Yes. And so a lot of what would have been civil contempt at common law, punishment for past breach of an order, we would end up putting into the criminal bracket.

ELIAS CJ:

And what do you do with one's that are partly one and partly the other?

MS LARACY:

This is where the United States has said that if you've got the one application and you're seeking to punish for yesterday's breaches and equally to compel compliance with tomorrows, then the criminal nature of the, the first – the fact that there's a criminal remedy there and a criminal proceeding, that must fix it. It's got to be one or the other. The criminal is the one that needs the special protections. In the end it's all a related proceeding and that's, the authority for that proposition is in *Penfield* but it's also referred to in *Bagwell*.

ELIAS CJ:

Thank you.

MS LARACY:

And that's -

ELIAS CJ:

Is there really more to be said about this analysis or does this – that's where it all comes down to. That you think that there should be, you are submitting there should be a distinction between coercive and punitive and if there's an overlap because of the policy in providing protection you treat it as punitive?

MS LARACY:

Yes. And the reason that this is important is because in fact in our submission it's quite hard because the Court does not find a lot of principled guidance from the common law. Actually unless we're going to subsist with the difficulties we've always had of trying to work out whether something is a civil or a criminal contempt based on historical categories and forms of conduct and then work out what rules apply, unless we're going to stick with that there needs to be a new form of identifying these proceedings right at the time they're filed.

ELIAS CJ:

Well I want to suggest that the alternative might be a purposive approach applying the Bill of Rights Act and as it talks about imprisonment, so that should be the, what brings about the application of section 24(e).

MS LARACY:

And if that's the Court's approach then it's certainly available. It's less subtle than the three step approach.

ELIAS CJ:

Is it bad for that?

MS LARACY:

Well it's the fact of imprisonment. I haven't found a jurisdiction where the fear fact of imprisonment has meant that a proceeding has been deemed to be criminal and I've certainly not found any jurisdiction where they have grappled with conditional imprisonment which would only be imposed if the appellant so chooses.

ELIAS CJ:

But if you look at all of our statutory provisions together, I mean I'm not looking at them all, but if you look at section 384, it's quite striking that imprisonment until the rising of the Court is excluded from the appeal provision.

MS LARACY:

Yes.

ELIAS CJ:

That's not –

MS LARACY:

That's for the contempt in the face of the Court?

ELIAS CJ:

Yes. Although 384 doesn't make any subtle distinction between the different purposes of contempt, does it?

MS LARACY:

No. in my submission what the law is doing there is the need for the Court to be able to maintain conduct and achieve its purposes in an orderly fashion recognises that where someone has been disruptive for instance the presiding Judge needs to be able to deal with that and lock them up and then the contempt in the face of the Court can be dealt with. They can be separately punished for their bad behavior in Court, and that might be by fine or a further

term of imprisonment. That part of the order can be appealed but the fact that they were imprisoned for however many hours during the sitting of the court is not part of the appeal right because that is actually something that is directed to the Court regulating its process. It needs to be able to do that. It's nothing that should be able to be retrospectively appealed, commented on, rights afforded by a subsequent Court looking back at it.

McGRATH J:

Have you finished with *Wigglesworth*?

MS LARACY:

Yes Sir.

McGRATH J:

Because it did seem to me that Justice Wilson, from the foot of page 561 to 562, seems to be taking a slightly different view than that you're advocating in relation to imprisonment when she speaks of having, "… grave doubts whether any body or official which exists in order to achieve some administrative or private disciplinary purpose can ever imprison an individual. Such a deprivation of liberty seems justified as being in accordance with fundamental justice under section 7 of the Charter only when a public wrong or transgression against society, as opposed to an internal wrong is, committed." Now that's a, that is sort of reserving a special place for imprisonment in the categorisation that seems to be you would acknowledge is in the criminal zone?

MS LARACY:

Sorry I'm just trying to find the passage.

McGRATH J:

The last couple of lines of 561 and the first paragraph in 562 of Bertha Wilson's J judgment.

MS LARACY:

Yes, I take your point. The Court obviously wasn't, didn't turn its mind in the *Wigglesworth* decision to how contempt applied to that analysis.

McGRATH J:

That's all. If you –

MS LARACY:

I do take the point and I just think there's also a qualification in there in the passage a little bit further up in the same paragraph where the Judge says, "It's my view – " and she's talking about the regulation of conduct in a limited sphere including by imposing fines, then she suggests that's not a penal consequence if it's to achieve the particular purpose of that body.

McGRATH J:

Thank you.

MS LARACY:

Just really dealing with matters of facts then. The submission has been made that, on the facts, the Court was wrong to find that this was a civil case of coercive contempt as the Court of Appeal has defined it and I'd just like to refer the Court to some matters there because it also ties in with further submissions that were made by my learned friend.

The contempt application itself is before the Court and it's incontestable, as a result of that, exactly what in writing the Solicitor-General sought and that was obviously very influential in the Court of Appeal's decision. The fact that the Solicitor-General did not seek any additional punitive remedy but merely the imprisonment of the appellant unless and until he complied and that he should be released when he did.

McGRATH J:

Did the Solicitor-General originally seek an indefinite sentence?

MS LARACY:

Yes and maintained that that was the appropriate sentence.

McGRATH J:

In the United States, that has led to people being imprisoned for seven years plus.

MS LARACY:

Yes and I've got those cases there in the casebook. The challenge that has been made to the Supreme Court in that context has been that there must come a point where the imprisonment is so oppressive because the person has been incarcerated for so long, that it must be unconstitutional and the Court needs to release them and the Supreme Court has consistently said that that's not the case, it's not unconstitutional because there is a release provision there, they can be released as soon as they comply. So they need not suffer an imprisonment at all.

McGRATH J:

It just seems getting a bit doctrinaire Ms Laracy at the extremes.

MS LARACY:

These are cases, for instance, in one of the cases where a very wealthy man had been ordered to pay a certain sum of money in a matrimonial settlement to his wife –

McGRATH J:

I know the type of cases but I just feel a little discomfort if we're going to end up in that situation. Now, neither of the Courts below provided for that sort of penalty. They each had a fixed term or a fixed term maximum but what you're saying is the Solicitor-General's approach was that it could be open-ended?

MS LARACY:

It could be open-ended and the hope and expectation was that there would be no imprisonment at all.

McGRATH J:

Could be open-ended and as long as the condition was attached, it could never be infringe against section 24(e) of the Bill of Rights?

MS LARACY:

That's right and when – in terms of whether it's harsh or not, obviously an analysis can go along the lines that a shorter fixed term of imprisonment is substantially more harsh as it does not allow the respondent to avoid the penal consequences.

McGRATH J:

Yes, I understand what you're saying.

ELIAS CJ:

Ms Laracy, how long do you expect to be because we might consider taking a short adjournment. What do you want to cover?

MS LARACY:

I'd like to – probably 15 minutes.

McGRATH J:

You're going to address justified limitations you said?

MS LARACY:

Well, I feel I've really done that, both in the written submissions and in the – what I said in the introductory. The primary justified basis upon which a justified limitation argument can be made is that if this a proceeding to coerce compliance, then it's absolutely necessary that the Court have the ability to enforce its own order without resort to some independent body. It's already a valid order and resort to an independent body such as a jury, can only undermine the rule of law, if orders can only be enforced after adjudication by a jury. I'm happy to –

ELIAS CJ:

Yes, just pause a moment. Are you happy to continue?

McGRATH J:

Not very.

ELIAS CJ:

We'll take a short adjournment, thank you. We'll take an adjournment for 10 minutes.

COURT ADJOURNS: 3.44 PM

COURT RESUMES: 3.54 PM

MS LARACY:

I was just addressing the Court on some of the core material I wanted you to consider in support of the Court of Appeal's finding that in fact despite the fixed nature of the sentence imposed by the High Court, having regard to the relief sought, this was in fact, should in fact have been considered to be a civil proceeding and was by the Court of Appeal and the Court had regard to the wording of the contempt application. The submissions of the Solicitor-General, the written submissions which were part of the High Court file, the Solicitor-General's evidence which was before the High Court at the contempt hearing because Mr Siemer applied to call him as his witness and in respect of that I just wanted to take the Court, through the reference, to a couple of the key passages there. This is in volume 2 of the case on appeal, page 724. At the top of that page there's a passage where the Solicitor-General is speaking and he says, "My motivation was entirely due to –" that's one of the passages. An important passage I'd like the Court to note is at page 725 where again in response to –

ELIAS CJ:

Sorry, why are we looking at this Ms Laracy?

MS LARACY:

Simply because it was, it was addressed in the, the written submissions of the appellant as one of the bases for this appeal, namely that the Court of Appeal was wrong to find that this was in fact a civil contempt as defined by the Court of Appeal.

ELIAS CJ:

So you're looking at the evidence given as to why the contempt proceedings were brought?

MS LARACY:

As to motivation and the passage on 725 is very relevant to the nature of the relief sought and David Collins says there that talking to Mr Siemer that you'll be in a – if you're in a position to persuade the Court that you should be released from prison if you're sentenced to prison. "Mr Siemer if the application succeeds and you are sentenced to prison your destiny is very much in your own hands." And I simply wanted to alert the Court to those, those parts of the case. And some further passages on page 734 which are to the same effect.

WILSON J:

But in the High Court is Mr Siemer at risk of imprisonment for more than three months?

MS LARACY:

In my submission, no, because that question comes from the criminal context. It's geared to offences which have a maximum penalty. It's simply outside the context of contempt and it is very difficult to apply that to the context of a coercive proceeding where there is no penalty necessarily included where he's only at risk if he so chooses.

WILSON J:

But it may have been a risk that he could manage that was he never – nevertheless not at risk of imprisonment for more than three months?

MS LARACY:

That is the issue Your Honour.

ELIAS CJ:

Well you say he wasn't at risk because it was a contingent penalty that was imposed on him, is that right?

MS LARACY:

Yes, yes.

ELIAS CJ:

Well one might say exactly the same thing about people who have hopes of parole I suppose. I'm just trying to think about other examples where you could say it depends on them.

MS LARACY:

As the Court is very familiar the way the US, the United States Supreme Court has analysed it, it talks about the keys to the prison but certainly in one case it talks about the appellant having something better than the keys to the prison. He has the ability not to go there at all. If this Court is of the view that some of the factual issues raised by my learned friend are properly within the scope of the appeal, namely where there was material before the High Court at the time of the contempt hearing that was in breach of the injunction, then I address that briefly in my written submissions. But the argument that is being made today is that Mr Siemer did not know what he had to do to comply and in my submission that's an unfair submission to make and the notice of motion which was an originating application –

ELIAS CJ:

Just pause a moment. We don't need to hear you on this Ms Laracy.

MS LARACY:

Okay. Well unless there is any other aspect I can assist the Court with, those are my submissions of the Solicitor-General.

ELIAS CJ:

Thank you. Yes Mr Lithgow?

MR LITHGOW QC:

There are a couple of little things, first of all, that may be worth looking at. The first is when we are deciding whether or not, if it is significant, as to whether or not the 1961 change in the Crimes Act, section 9, was the absorption of the 1924 decision. I just notice when shown *Vermette*, so that's at tab 33 and page 579, we see the Canadian Criminal Code section 8 has a very similar wording dated from 1955 but nothing in this, from the beginning of McIntyre's J decision, but nothing in this section affects the power, jurisdiction or authority that a Court, Judge, Justice or provincial Court Judge has and then they give a start date to impose punishment for contempt of court. So it may have been one of those improvements to legislation that was circling at common law world had very little to do with any one country. And of course there's the addition in New Zealand that why the put Parliament in there isn't at all clear at all because that hadn't received a mention in the earlier case.

Now bearing in mind that, well bearing in mind that our case is reasonably simple and that is if there is to be imprisonment then you get the maximum number of protections under the Bill of Rights Act somehow or other. Really the most, the two most useful cases to look at are the two leading American cases because, with respect to my learned friend, I don't think either *Gompers* or the *International Union, United Mine Workers of America v Bagwell* support the Solicitor-General's propositions at all. I suggest quite the opposite. *Gompers*, which is the earlier case, at tab 21, has certain similarities in that it was about publishing statements, that there was a boycott against the Bucks Stove and Range Co and that this was in breach of certain combine laws of the State at the time. The – Lamer J analyses the thing first of all demonstrating that it mattered a lot in terms of appeal and remedies as to

whether it was going to be the enforcement of an equitable remedy in the equitable jurisdiction or whether it was a question of law. He also, interestingly for Wilson J, sidestepped by accepting that if he wasn't able to sidestep they would have to address the question as to whether or not in the injunction was the abridgement of freedom of speech. What happened there is that the civil litigants sorted it out and solved it and the Court said that it has a strong public element, that people can't just start a contempt case and then say that we can stop it again.

Looking at the bottom then, at page 441, "Contempts are neither wholly civil nor altogether criminal and it may not be always easy to classify in a particular Act as belonging to one of these classes or the both, they may partake the characteristics of both. It's not the fact of a punishment but rather the character and purpose it often serves to distinguish but if it is through a criminal contempt and the sentence is punitive to vindicate the authority of the Court, then it's criminal." Now, in this case of course, the parties didn't want to vindicate the Court anymore, they wanted to get on with work, stop arguing with the Union and to get selling stoves. It is a dainty argument because in the end of course the net result was that, having decided that it was criminal, they then reversed it all out. So, I invite the Court to look at *Gompers* very carefully because there is – really, it is that there is always public elements.

At the bottom of page 449 which is exactly, if you like, what happened here, according to the Solicitor-General, that he wasn't really eligible for a finite sentence even though the Court of Appeal said he clearly was because he got one. "There was therefore a departure, a variance between the procedure adopted and the punishment imposed. When in answer to a prayer for remedial relief in the equity cause, the Court imposed a punitive sentence appropriate only to a proceeding at law for criminal contempt. The result was as fundamentally erroneous as in an action of (a) versus (b) for assault and battery, the judgment entered had been that the defendant was confined in prison for 12 months." So really, *Gompers* in the end, read as a whole as they say, strongly supports the proposition that where you get to jail, if jail is on the horizon, then you need the criminal protections.

McGRATH J:

Mr Lithgow, what page was the last one you were reading from?

MR LITHGOW QC:

Sorry, I'll just check but I thought it was 441, I'll just check it again. Sorry, 451. Then, if we look at how this was all discussed really, in the Supreme Court with *United Mine Workers of America*. Actually, I do want to go back to *Gompers*. I'm sorry, this is important because it was the opening words of the Solicitor-General's proposition and that was a quote in *United Mine Workers* but from *Gompers* and it's best to read it at tab 21, page 450. This was put forward as the proposition that a summary jurisdiction was required otherwise judgments would only be advisory and we all have to sit around waiting for a jury.

What it actually says is, "For while it is sparingly to be used, yet the power of Courts to punish for contempts is a necessary and integral part of the –

ELIAS CJ:

Sorry, where is that?

MR LITHGOW QC:

This is on page 450, the first paragraph. ""Yet the power of the Courts to punish for contempts is a necessary and integral part of the independence of the judiciary and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would only be advisory." That is only talking about the contempt jurisdiction. It's not saying anything at all about how it is, how in fact, by what process. It doesn't say anything about the unsatisfactory nature allegedly of allowing a jury near it.

ELIAS CJ:

Well that is further down the page though. "There has been general recognition of the fact."

MR LITHGOW QC:

Yes but if we then – that's what it does say but when we look then at how this is used in the *United Mine Workers* –

ELIAS CJ:

I take it we don't have *Bessette v W B Conkey Co* here?

MR LITHGOW QC:

We don't have them here, no. If we go then to *United Mine Workers* and we look at page 2560, in the second paragraph which is halfway down. This is page 2560 of tab 20. This is the Supreme Court having a go at it and they've already acknowledged in various places that there's a huge overlap, everybody agrees, it's hard to tell the difference. The underlying somewhat elusive distinction between civil and criminal contempt fines, an ultimate question posed, procedural protections, et cetera. I do invite you to read these two cases because they really say everything there is to be said. We know lots of different jurisdictions have ended up in different places but all the arguments are set out here but at this page, 2560, "Summary adjudication becomes less justifiable once a Court leaves the realm of immediately sanctioned petty erect contempts. If a Court delays punishing a direct contempt until the completion of trial for example, due process requires that the conterminal rights to notice and a hearing be respected." So, the Solicitor-General's proposition that –

ELIAS CJ:

Sorry, can you show me, where you said that it quotes *Gompers*, where does it quote *Gompers*?

BLANCHARD J:

Page 2557 and the next page.

ELIAS CJ:

Yes, sorry, I interrupted you.

MR LITHGOW QC:

No, that's all right, these American judgments are very hard to tell the difference between notes and the core decision.

ELIAS CJ:

Well, some of them, the most significant things are in the notes.

MR LITHGOW QC:

But not written by the Judges.

ELIAS CJ:

Well, perhaps.

MR LITHGOW QC:

Not always, depends on the report. Now, when we get then to Scalia J he looks at the equitable jurisdiction. We keep talking about the common law as if America didn't have a common law that arose from the English tradition but it does obviously.

BLANCHARD J:

Well, it has a number of common laws.

MR LITHGOW QC:

Yes which state did this originally come from? Well, this is the state of Virginia, is that part of the, owned by the old Commonwealth states?

ANDERSON J:

It's called the old dominion.

MR LITHGOW QC:

An old dominion, it was a dominion as well?

ELIAS CJ:

Oh no, a colony.

ANDERSON J:

The old dominion, they called themselves.

ELIAS CJ:

Did they?

ANDERSON J:

Mhm.

BLANCHARD J:

Nostalgically, I think.

MR LITHGOW QC:

He goes through the evolution of this kind of remedy of enforcing injunctions when injunctions used to have a single yes/no purpose and the difficulty of overlaying that with contempt, where there's a number of controls and future behaviour is controlled. Looking at the bottom of the first column at page 2565, "When continuing prohibitions or obligations are imposed, the order cannot be complied with and the contempt purged in the single act, it continues to govern the party's behaviour on pain of punishment, not unlike the criminal law." Then Ginsburg J and the Chief Justice make the similar point that –

ELIAS CJ:

Where is that reference to criminal punishment, what column?

MR LITHGOW QC:

This is at the bottom of the first column at 2565 and at the top of the second column of 2565, beginning "To govern the party's behaviour on pain of punishment." What they're saying is this idea, this idea you can make a clear distinction between coercive punishments, isn't really the entire criminal law

particularly in regulatory areas, is a constant coercive punishments to the law abiding, that if you don't do this and you don't do that, you want be punished.

The roman II on page 2566 sets out the Chief Justice's and Ginsburg's J observation that the classification described in *Gompers* has come under strong criticism and even that the *Gompers* Court itself, the category civil and criminal contempt, they are unstable in theory and problematic in practice which must be correct. Then they go on, "Our cases, however, have consistently resorted to the distinction between criminal and civil contempt to determine whether certain constitutional protections, required in criminal prosecutions, apply in contempt proceedings. See *United States v Dixon* (**"**We have held that [certain] constitutional protections for criminal defendants ... apply in non-summary criminal contempt prosecutions just as they do in other criminal prosecutions.") Then at the first column on the next page 2567, they're looking at considerations that persuade them that it's criminal –

ELIAS CJ:
And they don't accept the conditional –

MR LITHGOW QC:
They don't go for this –

ELIAS CJ:
– coercive business?

MR LITHGOW QC:
– coercive business, although it had been argued by *Bagwell*. They state the proposition, "The fines would have been "conditional" in this sense, however, even if the Court had not supplemented the injunction with its fines schedule; indeed any fine is "conditional" upon compliance or non-compliance before its imposition." So they see this attempt to bring in this coercive analysis as having a similar range of problems in terms of just fundamental thinking about criminality, criminal law, since the very nature of criminal law is coercive

because most people obey it only because of a vague sense that it's there and could hurt them.

The point is not that the Court reserves the right to sting people, hurt people in various ways but that they have, having been through various rights, many of which are considered now very distasteful, the Courts have now only got civil remedies and imprisonment. Now, if you are going to use imprisonment that's fine but it's subject to modern protections because that's what the nation wanted to do in relation to imprisonment. You've still got this oddment area of law not often used, of putting people in prison without the normal methodology, fine, it's got its uses but it has to, as you have to, comply with the Bill of Rights Act. I don't know why that shouldn't be a joy to a Solicitor-General since it's just more compliance with more law, why is it seen as a challenge to? Why is it seen as a challenge as undermining the orderly application of law, it is the orderly application of law because it's saying that no matter who you are, whether you're a Judge or whatever, you have to, you're bound by the Bill of Rights Act and that's a public good.

ELIAS CJ:

Thank you Mr Lithgow. Thank you counsel for your thorough submissions on this matter, we are indebted to you. We will take time to consider our decision.

COURT ADJOURNS: 4.22 PM