Jeffrey Miller – The Law of Contempt in Canada, Second Edition
Cumulative Supplement (Draft)

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Chapter One: Historical Introduction: Justice Uncloistered

[P. 3, add footnote indicator to end of second paragraph – "…on capital charges" – and as that new note (to follow note 7 at bottom of page), add:]

Then there is that old story[1] about more deliberate, possibly contumacious, carpentry: as this other carpenter had not been paid for erecting gallows, he neglected to erect new ones for the coming circuit. When the circuit judge arrived, he summoned the carpenter and demanded to know why he had "failed to erect the gibbet on my account." "I most sincerely beg your pardon, my lord," the carpenter replied. "Had I known it was for your lordship, I would have completed the work immediately."

[P. 3, to follow the first sentence of third paragraph - … "by attacking court officers":]

Around the middle of the eighteenth century, a sheriff's agent in Surrey visited a man named Davy to serve him regarding a matter at Common Pleas. While the officer enjoyed a drink provided by Davy, his host heated a poker, then offered the agent the choice of eating the sheepskin writ or the iron poker. The court committed Davy to prison for contempt, whereby he supposedly acquired "a taste for the law" and eventually became a serjeant (a senior barrister).[2]

Again, in 1773…

[P. 3, revise the copy beginning with the second sentence of the last paragraph (currently beginning "In 1775...") as follows:]

Circa 1725, for example, two solicitors were attached and fined £50 apiece after they filed suit on behalf of a highwayman alleging "breach of partnership" against his colleague in iniquity. The plaintiff claimed the defendant had stolen from him the proceeds of their crimes.

[And add to the associated note 10:]

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[1] See, e.g., Arthur H. Engelbach, ed., *Anecdotes of Bench and Bar* (London: Grant Richards, 1913), at 38.
[2] Peter Hay, *The Book of Legal Anecdotes* (New York: Facts on File, 1989), at 76, citing Owen Manning and William Bray, *The History and Antiquities of the County of Surrey* (London: John White, 1804).

A few years after this capital crime of *chutzpah*, but on separate occasions, the bandits were hanged.

[P. 10, add to the footnote, to follow "(Régie de logement)": During the Toews's tenure as Minister of Public Safety, he promoted legislation to force internet service-providers to disclose private information about their customers. When the bill was roundly and widely attacked as an unconstitutional invasion of privacy, he declared that dissenters could "either stand with us or with the child pornographers." In 2017, the federal ethics commissioner found that, shortly after he left politics but before he was a justice, he was in a conflict of interest for providing services to two first nations in his home province. Regarding that finding, the Canadian Judicial Council has ruled that there was nothing in it "that would suggest an attempt to mislead or reveal conduct incompatible with the duties of judicial office."[3]

[P. 12, add as second full paragraph:]

Beginning in 1986, the Uniform Law Commission put forward, with amendments in successive years, its "Court Orders Compliance Act,"[4] created

> to simplify that area of contempt which addresses non-compliance or "mere" disobedience of non-monetary court orders. The focus of the suggested legislation is the enforcement of private rights resulting from the litigation process. It leaves to the criminal law true contempt of court, i.e. conduct which threatens the integrity of the administration of justice.

Given the disparity among provincial rules and procedures regarding court orders, creating uniformity and thereby broad coherence in the law of civil contempt is desirable, never mind that this attempt to "nationalize" it languishes unadopted. However, the "explanatory note" fails to

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[3] See, e.g., http://nationalpost.com/pmn/news-pmn/canada-news-pmn/former-cabinet-minister-vic-toews-cleared-of-conflict-judicial-council.

[4] http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/720-judgments/local/contempt-of-court/1732-court-orders-compliance-act. Under this proposed legislation, "contempt orders" would become "compliance orders," ostensibly to make clearer the distinction between civil and criminal contempts.

remark that systemic integrity is always a central policy concern in all contempt law, even though at common law, to establish contemptuous disobedience of an order it is unnecessary to show intentional compromise of the administration of justice. The commission's commentary admits as much further along, in discussing the right of someone who applies for sanction under its uniform act to discontinue proceedings: "It is true that the noncompliance strikes at the integrity of the judicial process and is thereby a matter of public concern; however the thrust of the remedy is directed at the enforcement of private rights in the civil context." It is contradictory to recognize the public concern only to dismiss it; even where the dispute is subject to private law exclusively, deliberate disobedience of the court is a "true" contempt.

[P. 16, footnote 9, add:] ; *2363523 Ontario Inc. v. Nowack*, 2016 ONCA 951 at para. 24, leave to appeal refused, 2017 CanLII 32944 (S.C.C.).

[P. 21, footnote 30, add, after "iteration.":] And see *2363523 Ontario Inc. v. Nowack*, 2016 ONCA 951 at para. 24, leave to appeal refused, 2017 CanLII 32944 (S.C.C.).

Chapter Two: General Definitions and Overview

[P. 19, new section 2.3, such that subsequent subsection numbers are adjusted accordingly:]

2.3 Commit/commital for contempt

The Alberta Court of Appeal has expressly ruled that "commit for contempt" means "jail for contempt" (or presumably, in the case of committals before a hearing, "jail for alleged contempt"). Where s. 192(3) of the *Bankruptcy and Insolvency Act* prohibits "committal" for contempt, this phrase is not to be

> read as excluding all contempt powers. … The word "commit" has been used consistently in federal legislation in the context of imprisonment. For example, former *Criminal Code* provisions on contempt speak of "commit[ting] the person to prison": *Criminal Code*, RSC 1970, c C-34,

> s 472. The current provision refers to a "warrant of committal": *Criminal Code*, s 708(3). Likewise, *Black's Law Dictionary* defines the word "commit" as meaning "to send (a person) to prison ... esp. by court order": *Black's Law Dictionary*, 9th ed, *sub verbo* "commit".[5]

The court might also have noted that all *Criminal Code* forms for committals (for contempt and otherwise) expressly order imprisonment.

2.5 In facie *versus* ex facie *contempt*

[P. 25, add as beginning of first sentence in the second paragraph (before "Only courts of superior..."):]

Criminal, *in facie* contempt is "a true crime requiring proof of prohibited conduct (*actus reus*) and proof that at the time the accused engaged in the prohibited conduct, he or she had the requisite culpable state of mind (*mens rea*). Both elements must be proved beyond a reasonable doubt."[6]

2.11 Strictissimi juris

[P. 30, add to end of footnote 72:]

; *Friedlander v. Claman*, 2016 BCCA 434 (CanLII); *Hokhold v. Gerbrandt* 2016 BCCA 6 (CanLII); *Guay c. Lebel*, 2016 QCCA 1555; *Bassett v. Magee*, 2015 BCCA 422 (CanLII) at para. 35; *Procom Immobilier inc. c. Commission des Valeurs Moblières du Québec*, 1992 CanLII 3073 (QC CA).

Chapter Three: Constitutional Law and *Charter of Rights* Considerations

3.1 Jurisdiction

[5] *Lymer v Jonsson*, 2016 ABCA 76, at para. 15.
[6] *R. v. Devost*, 2010 ONCA 459 (CanLII).

[P. 34, add to footnote 6:] ; *United Nurses of Alberta, Local 79 v. General Hospital (Grey Nuns) of Edmonton*, 1990 ABCA 65 (CanLII) at paragraph 11.

3.2 Effect of potentially unconstitutional order

[P. 37, as new, final paragraph:]

Where an alleged contemnor gives notice of a constitutional challenge to legislation that is the basis for an order, it is unnecessary to adjourn contempt proceedings to await the outcome of that challenge, particularly where the contempt has been open and flagrant.[7]

3.3(b) Freedom of expression: Charter *s. 2(b)*

[P. 39, add as second full paragraph, to follow "'the province would be respected.'"]

Alberta v. AUPE called upon the Alberta Court of Appeal to consider terms in a contempt order directing the union (AUPE) to "remove from its website any and all references to solidarity or support with the strike referred to in these Directives" (which, as permitted by provincial rules of procedure, had been filed as orders in the court) and refrain from Internet "statements in solidarity with or in support of the strike referred to in these Orders." As well, the court below had ordered union leadership to "sign and publish on the AUPE website ... a statement encouraging the members of AUPE to meet their obligations under the directives ... and specifically to cease their strike and return to work immediately and to remind all members of AUPE to comply with the Directives."[8] The court applied the "Dagenais/Mentuk test"[9] to hold:

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[7] *Continuing Care Employers' Bargaining Association v. AUPE*, 2002 ABCA 148 at paras. 89-91, citing *U.N.A. v. Alberta (Attorney-General)* 1992, 89 DLR (4th) 609 at 639.

[8] (2014), 374 DLR (4th) 336; 2014 ABCA 197 (CanLII).

[9] *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835, 120 D.L.R. (4th) 12, and *R. v Mentuck*, [2001] 3 S.C.R. 442. To describe the test, at para. 50 the court quotes *R. v. N.S.*, [2012] 3 S.C.R. 726:

[32] Under the *Dagenais/Mentuck* framework, once a judge is satisfied that both sets of competing interests are actually engaged on the facts, he or she must try to resolve the claims in a way that will preserve both rights.

> While the risks to the administration of justice were serious in the circumstances, a balance had to be struck to protect AUPE's *Charter* rights. In our view, without further evidence, it would be difficult to conclude that the circumstances were so serious and dangerous as to justify limiting the right to freedom of expression by imposing both negative and positive obligations as was done in the Impugned Paragraphs. While the strike had been in place for several days, the terms of the Contempt Order that limited freedom of expression were to continue indefinitely. There was no evidence about whether the salutary effects of the Impugned Paragraphs outweighed AUPE's freedom of expression and its ability to communicate its position during a labour dispute. In light of the constitutional protection of expression, lesser measures were called for to ensure compliance than the measures ordered in the Impugned Paragraphs, which went beyond ensuring compliance and sought instead to impose adhesion. Accordingly, we are not satisfied the Impugned Paragraphs can be justified under section 1 of the *Charter* on this record.[10]

Note, as well, that, in upholding the dismissal of a contempt motion regarding alleged breaches of an injunction during a lawful strike, the Quebec Court of Appeal has held that, "the law recognizes that labour strikes necessarily entail certain annoyances, inconveniences, and disorder that can be significant for the employer."[11]

3.3(i) Reverse onus and the presumption of innocence: Charter s. 11(d)

Dagenais refers to this as the requirement to consider whether "reasonably available alternative measures" would avoid the conflict altogether (p. 878). We also call this "accommodation". We find a way to go forward that satisfies each right and each party. Both rights are respected, and the conflict is averted.
[…]
[34] If there is no reasonably available alternative that would avoid a serious risk to trial fairness while conforming to the witness's religious belief, the analysis moves to the next step in the *Dagenais/Mentuck* framework. The question is whether the salutary effects of requiring the witness to remove the niqab, including the effects on trial fairness, outweigh the deleterious effects of doing so, including the effects on freedom of religion (*Dagenais*, at p. 878; *Mentuck*, at para. 32).
[35] As *Dagenais* makes clear, this is a proportionality inquiry, akin to the final part of the test in *R. v. Oakes*, [1986] 1 S.C.R. 103.
At para. 52, the court adds: "In *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*], the Supreme Court noted that the *Oakes* framework is difficult to apply outside the context of reviewing a law or other rule of general application for *Charter* compliance. Some aspects of the *Oakes* test are poorly suited to the review of discretionary decisions, both of judges and of administrative decision-makers: *Doré* at para 37."

[10] *Alberta v. AUPE* (2014), 374 D.L.R. (4th) 336 (Alta. C.A.) at para. 58.

[11] *Paul Albert Chevrolet Buick Cadillac inc. c. Thibeault*, 2016 QCCA 557 (CanLII) at para. 19 (my translation from the French).

[P. 48, add footnote to end of first (incomplete) paragraph, "...party alleging contempt."]

For instances of the burden being improperly reversed, see *R. v. Devost*, 2016 ONCA 532 (CanLII) and *Godin v. Godin*, 2012 NSCA 54 (CanLII).

Chapter Four: Jurisdiction

4.1(b) What is a "court of record"

[P. 55, add as last paragraphs of section:]

In 2016, the Alberta Court of Appeal expressly has held that a registrar in bankruptcy possesses jurisdiction to hear and determine alleged contempts for *ex facie* breaches of the registrar's orders, and, upon a finding of contempt, impose sanctions short of imprisonment.

The *Bankrupcty and Insolvency Act*, s. 183(d), defines a court as including "a registrar when exercising the powers of the court conferred on a registrar under this Act," while s.192(1)(k) gives registrars the power "to hear and determine any matter relating to practice and procedure in the courts." Section 192(3), however, provides that "a registrar has no power to commit for contempt of court." The Alberta court holds that these provisions,

> when read in context and given their ordinary meaning within the scheme and object of the *BIA*, expressly confer on the registrar the power to make a finding of *ex facie* contempt and to impose sanctions for that contempt, short of imprisonment. Unlike other inferior tribunals which operate in their own sphere exercising jurisdiction granted by their governing statutes, the registrar is deemed by the *BIA* to be part of the Court of Queen's Bench [that is, a court of superior jurisdiction] when exercising the powers of the court conferred on the registrar. The registrar's express powers include the power to make orders and the power to hear and determine any matter of procedure in the courts. As the power to make a finding of *ex facie* contempt arises from a court's power to control its own procedure, it follows that the grant of powers to make orders, exercise the powers of the court and control procedure must carry with it the power to enforce compliance with those orders through the *ex facie* contempt process -

as long as the registrar does not purport to commit the contemnor to prison. It is no argument that, in proscribing committal for contempt, the *BIA* removes all contempt jurisdiction from the registrar. Commit means "send to prison."[12]

4.4 Hearings by the directly aggrieved court or judge: Hearings before whom?

[P. 64, add after the third sentence in the last paragraph on the page, to follow the words "in the trier.":]

The Uniform Law Commission's suggested "Court Orders Compliance Act" would mandate that motions seeking to remedy the breach of court orders (that is, seeking what the commission calls "compliance orders") "shall not be heard by the judge who made the court order in relation to which a compliance order is sought."[13]

[P. 65, as new last paragraph to the section:]

In 2016 the Ontario Court of Appeal held that there is no general rule stipulating that it is contrary to principles of natural or fundamental justice for a judge to hear a contempt citation regarding breaches of that judge's orders. "[S]uch a rule would be both impractical and inconsistent with the overall objective of contempt motions in securing compliance with orders." In some cases, given that the judge is already seized with the main litigation, it is fairer (and presumably more efficient) for that judge to consider the contempt matter.[14]

4.9 Parole

[P. 67, add as last paragraph in the section:]

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[12] *Lymer v Jonsson*, 2016 ABCA 76, at para. 13.

[13] http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/720-judgments/local/contempt-of-court/1732-court-orders-compliance-act., s. 3(5).

[14] *2363523 Ontario Inc. v. Nowack*, 2016 ONCA 951, leave to appeal refused, 2017 CanLII 32944 (S.C.C.), at para. 45-47..

As well, it is appropriate to

> discourage sentencing judges from making directions in contempt cases which purport to supercede the ordinary process in the administration of a jail sentence. ... [S]entencing for criminal contempt should mirror the conventional practices and procedures of the criminal law even though criminal contempt is uniquely a common-law offence. Otherwise there is a risk that penalties for contempt will be seen as capricious and arbitrary.

Therefore, despite the fact that the contemnor had been convicted previously respecting contempts of injunctions involving logging operations, and despite her obdurate declarations that she would not express regret, pay a fine, accept a conditional sentence, or perform community service, the trial judge erred in imposing a one-year sentence without the possibility of earned remission or parole. "The one-year sentence in this case is equivalent to a three-year sentence for a *Criminal Code* offence which the Crown agrees is excessive."[15]

Chapter Five: Procedural Considerations

5.1 Proceedings generally

[P. 69, add this footnote to the end of the first sentence (ending "impartial tribunal":]

Article 53.1 of Quebec's *Code of Civil Procedure*, C.Q.L.R. c. C-25, s. 53.1 makes the burden of proof statutory (insofar as the code applies): "The proof submitted to establish contempt of court must leave no possibility of reasonable doubt."

[P. 71, add these new paragraphs before final paragraph (beginning "Finally,":]

In 2000, the British Columbia Court of Appeal stated specifically that "[w]here a number of persons combine to engage in common conduct, there is no inherent injustice in the group

[15] *Interfor v. Paine*, 2001 BCCA 48 (CanLII) at para. 19.

being tried together."[16] Here, the six contemnors had been part of a group in breach of an injunction by protesting logging operations.

In the context of funding contempt motions, *Jajj v. Jajj* shows how contemnors can trap themselves in their own vicious circle. (See also Section 7.17, *Contempt of contempt orders.*) Jajj's parents claimed that he had defrauded them through their company. Though subject to a *Mareva* injunction (which froze his assets to the extent possible), Jajj had "repeatedly failed to disclose what he has done with the diverted money in India and ... breached the court order and his various undertakings requiring him to provide such disclosure." He unsuccessfully applied to vary the injunction's terms such that, to fund the contempt litigation, he could have access to his retirement savings or compel his respondent relatives to provide the money. The Divisional Court upheld the application judge's findings that Jajj "had not established on the evidence that he has no other assets available to pay his expenses other than those frozen by the injunction" and his "failure to explain what had become of the funds transferred by him in his case disentitles him from claiming a need for advance funding."[17]

[P. 72, as new last paragraph to the section:]

The Alberta Court of Appeal has held that "there is no such thing as an 'interim finding of contempt,' or an 'interim sanction for contempt.' ... [A] respondent cannot be found in contempt on an interim basis, pending the contempt hearing."[18]

5.2 Availability of contempt proceedings

[P. 74, add after partial first sentence on page (to follow "of the Canadian parliament.":]

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[16] *Interfor v. Simm*, 2000 BCCA 500 (CanLII) at para. 25.
[17] 2016 ONSC 4568 (Div. Ct.) at paras. 15-16.
[18] *R. v Canadian Broadcasting Corporation*, 2016 ABCA 326 (CanLII) at para 7. Claiming that the respondent had breached a publication ban, the Crown appealed the denial below of an injunction requiring the respondent to remove certain material from its website. The originating notice for its application also sought a finding of contempt.

As the Supreme Court of Canada has put it, "In Canada, there can be no liability for common law crimes apart from criminal contempt of court."[19]

[P. 74, add to note 16, at end of first sentence (to follow "Reg. 194): and, e.g., *Greenberg v. Nowack*, 2016 ONCA 949 (CanLII).

[P. 75, add to end of footnote 19:]

Regarding the *strictissimi* principle, see *Iron Ore Co. of Canada v. U.S.W.A., Local 5795 (1979),* 20 Nfld. & P.E.I.R. 27 (Nfld.C.A.) at 43, *per* Gushue J.A.; *Vidéotron ltée c. Industries Microlec produits électroniques inc.*, [1992] 2 S.C.R. 1065 (S.C.C.) at 1078; *Hokhold v. Gerbrandt* 2016 BCCA 6 (CanLII); *Bassett v. Magee*, 2015 BCCA 422 (CanLII) at para. 35; *Procom Immobilier inc. c. Commission des Valeurs Moblières du Québec*, 1992 CanLII 3073 (QC CA).

[P. 75, add as new first full paragraph (to follow "was a live issue.":]

That said, the *strictissimi juris* principle does not excuse "artificial and excessive formalism." The Quebec Court of Appeal has held that it is no defence to a contempt citation for breach of an injunction that the contemnors were informed of the order's details by counsel to the applicant, via a carbon copy of the document. The court rejected argument that only the prothonotary had the power to certify that the order was a true copy, and that a carbon-copy signature on it was insufficient.[20]

[P. 76, add to footnote 24:] ; *Fiorito v. Wiggins,* 2015 ONCA 729 at para. 16.

[P. 76, as last paragraph in the section:]

Donald J., of the British Columbia Court of Appeal, has suggested more recently that contempt motions "in high conflict family cases" have become common "as a weapon in the war, almost as standard pleading. The tactic is to get the court on the applicant's side, and to weaken

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[19] *R. v. D.L.W.*, 2016 SCC 22 (CanLII).
[20] *Procom Immobilier inc. c. Commission des Valeurs Moblières du Québec*, 1992 CanLII 3073 (QC CA).

the opponent with an adverse finding in order to improve the chances of success at trial. This should be discouraged."[21] That said, in British Columbia, at least, rather than seeking a declaratory order that a person has breached a family law order, the aggrieved party should seek a contempt finding under the *Supreme Court Family Law Rules.*[22]

5.3 Commencing proceedings; service and notice

[P. 78, add to footnote 37, to follow "para. 3":] ; Ebrahim v. Ebrahim, 2000 BCCA 398 (CanLII).

[P. 80, as last sentence to precede first full paragraph (beginning "Where procedure permits…), add the following sentence, as well as this new paragraph to succeed it:]

Generally in such cases, it is of course unnecessary for cited parties explicitly to authorize counsel to accept service on their behalf.[23]

In 2014, the Ontario Court of Appeal held, however, that personal service was unnecessary where the contemnor otherwise had clear notice of the possibility of contempt proceedings should he persist in contumacious conduct and had avoided service, such that his son accepted it on the household doorstep, as (apparently) the contemnor stood at the window. While contempt procedure generally is *strictissimi juris*, here procedural protections were "meaningless" and "ought not to trump substantive compliance where the purpose of personal service has been met in the circumstances and there has been no substantial wrong or miscarriage of justice."[24] While it would have been preferable had the moving parties obtained an order of substituted service, the contemnor received motion materials and filed affidavits in response, had

[21] *Bassett v. Magee*, 2015 BCCA 422 (CanLII) at para. 43.
[22] *Warde v. Slatter Holdings Ltd.,* 2016 BCCA 63 (CanLII) at 49.
[23] *Heijs v. Breuker (Trustee),* 2018 PECA 12 (CanLII) at para. 13.
[24] See also *Procom Immobilier inc. c. Commission des Valeurs Moblières du Québec*, 1992 CanLII 3073 (QC CA).

"full knowledge" of the seven previous related orders which he ignored, and "was provided a full opportunity to be heard." In any event, the applicable rules of procedure permitted the court "to dispense with full compliance with the rules where the interests of justice require it."[25]

[P. 80, add to existing note 45:] ; *Serhan (Estate of) v. Bjornson*, 2001 ABCA 294 (CanLII) at para. 9. In the latter, the court adds that, once counsel is served, the onus shifts to the alleged contemnor "to affirmatively allege or lead some evidence that he had no notice of the [show-cause] order."

5.6(a) Evidence

[Add to note 54:] The Quebec Court of Appeal has ruled that gross indifference (*insouciance grossière*) is sufficient to ground a contempt conviction. The contemnor had pleaded due diligence: *Syndicat de la fonction publique du Québec inc. c. Québec (Procureur général),* 2008 QCCA 839 (CanLII). See also *Daigle c. St-Gabriel-de-Brandon (Corp. Municipale),* [1991] R.D.J. 249 (C.A.).

5.6(d) The timing of the proceedings

[P. 97, new paragraph to follow first full paragraph, ending "of the time limit.":]

According to the Alberta Court of Appeal, however, the court hearing a contempt motion in a labour law matter makes no "reversible error in failing to adjourn the contempt proceedings to await the results of the constitutional attack on the legislation" – even though, here, the contempt of the order had lasted only a day. (The contemnors – striking hospital workers – had

[25] *Susin v. Susin*, 2014 ONCA 733 (CanLII)., at paras. 38-45, citing the dissenting judgment of Laskin J.A. in *Dickie v. Dickie* (2006), 78 O.R. (3d) (C.A.), and *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217.

publicly announced an intention to disobey the order even before it was filed as such in court – when it was, that is, a labour board directive which they had flouted.)[26]

5.6(e) Stay of contempt proceedings

[P. 98, add as last paragraphs in the section:]

An intervening bankruptcy, however, can trigger a stay. In *Walchuk v. Houghton*,[27] Walchuk had obtained a debt judgment against Houghton, who then was ordered to attend at an examination in aid of execution, with the pertinent documents, on September 17. On September 16, he made an assignment in bankruptcy. When he appeared at the examination the next day, instead of the documents he brought a notice of stay of proceedings as provided under s. 69 of the *Bankruptcy and Insolvency Act*. The judge below instituted contempt proceedings in any event. On appeal, Houghton argued successfully that contempt proceedings are not a claim provable in bankruptcy, but the court anyway imposed a stay, given that the alleged contempt (the failure to produce the documents) did not occur until after the bankruptcy assignment. The appeal court observes that allowing the contempt matter to proceed would have offended the "principle" that "the bankruptcy process is intended to be a single forum for creditors."[28]

The Quebec Court of Appeal has held that a decision below is entitled to deference where, as a matter of procedural efficiency, it stays a contempt hearing until the outcome of an appeal of the main action that gave rise to the orders allegedly breached.[29]

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[26] *Continuing Care Employers' Bargaining Association v. AUPE*, 2002 ABCA 148 at paras. 89-91, citing *U.N.A. v. Alberta (Attorney-General)* 1992, 89 DLR (4th) 609 at 639.
[27] *Walchuk v. Houghton*, 2016 ONCA 643.
[28] Para. 10.
[29] *Syndicat de copropriétaires de Domaine de l'Éden phase 1 c. Gestion Denis Chesnel inc.*, 2016 QCCA 123.

[P. 98, new s. 5.6(f), such that "Bifurcation" becomes 5.6(g), and subsequent subsection numbers change accordingly:]

Guilty plea

In *Interfor v. Simm*, young first offenders who participated in a mass logging protest were charged with criminal contempt, but the court accepted pleas of guilty to civil contempt. In an *obiter dictum* the British Columbia Court of Appeal questioned the procedural propriety of this insofar as "civil contempt is not an 'included offence' in the ordinary sense," of criminal contempt." It left the question there, however, given that it was not raised at trial or on appeal.[30]

5.6(f) Bifurcation

[P. 100, as second paragraph, to follow "financial penalty for contempt":]

A few months after handing down judgment in *Carey*, the Supreme Court of Canada refused leave to appeal a ruling of the Quebec Court of Appeal that, following a conviction for contempt, exculpatory evidence is not admissible during the sentencing phase of the hearing.[31]

[P. 101, as final paragraph of this section:]

It is probably imprecise to say that the rather eccentric *Rego v. Santos*[32] bucks this trend of insisting on bifurcation, never mind that there was no particular urgency in the circumstances. It is perhaps safer to say that the Ontario Court of Appeal deals there with particular facts in the family law context (breach of a temporary access order). The court holds that the motion judge did not err in her

> decision not to bifurcate the liability and penalty phases of the contempt motion in order to afford the appellant an opportunity to purge her contempt. Although there is good reason to bifurcate contempt proceedings (*Boyd v.*

[30] *Interfor v. Simm*, 2000 BCCA 500 (CanLII).
[31] *Guignard c. St-Hyacinthe (Ville)*, 2015 QCCA 1908 (CanLII), leave to appeal ref'd 2016 CanLII 34014 (S.C.C.).
[32] 2015 ONCA 540 (CanLII) at para. 14.

> *Carleton Condominium Corporation* 145, 214 ONCA 574), given the appellant's pattern of non-compliance and the consequences to the respondent and their daughter, it was open to the motion judge to impose the penalty immediately.

5.7 Effect of contempt order/Alternative sanctions

[P. 104: Amend first paragraph as follows, and place the second sentence in the existing paragraph as the beginning of the second paragraph in the section:

Ontario and Manitoba authority hold that a finding of contempt constitutes a final order, while the dismissal of a contempt motion is interlocutory (sometimes styled as interim[33]). In 2016, Ontario's court of appeal elaborated that "whether an order disposing of a motion for contempt ... is final or interlocutory depends on the circumstances surrounding the order." Where contempt proceedings have ended and "the party seeking a contempt order has no other means of obtaining relief arising out of a failure to abide by the terms of an order, then an order disposing of a motion for contempt – either a dismissal or a finding of contempt – is a final order." The distinction becomes clear on the facts in the case: the motion judge had found that S was in contempt of an euthanasia order after he avoided delivering up his dangerous dog for destruction, and he finally sent it out of the jurisdiction. While the issue of the health officer's right to enforce the euthanasia order was still in dispute, S's contempt matter had been finally determined.[34] *[This note (here 33) and its associated citation begin new note 138, as described next; start with it, then add the text and citations described just below – that is,* "See also *Fiorito...*"*]* As well, where a motion for a contempt finding is "brought in the context of the bankruptcy proceeding, based on the Bankrupt's conduct in the bankruptcy," the court's judgment is "an 'order or decision of a judge of the court' within the meaning of s. 193 and the

[33] See, e.g., *Sydor v Sydor*, 2016 MBCA 102 (CanLII); *Willms v Willms*, 2001 MBCA 123 (CanLII).
[34] *Chirico v. Szalas*, 2016 ONCA 586 (CanLII) at paras. 43, 48.

definition of "court" under s. 2" of the *Bankruptcy and Insolvency Act.* Therefore, an appeal from a dismissal of the motion (or presumably from the granting of it) "lies either as of right under ss. 193(a) to (d), or with leave of a judge" of the appeal court "under s. 193(e). On this analysis and in light of the unlimited introductory language of s. 193, the issue whether the challenged dismissal order is interlocutory or final is irrelevant."[35]

"It is not until both phases..." *[and so on, and add to last paragraph of section, after "fulfil undertakings":]* or breaches a *Mareva* injunction.[36] *[add this new footnote.]*

[P. 104, add new footnote 138 to end of first sentence on page (ending "(i.e., not interlocutory)," to follow citation for Chiricio, *as described just above:]* See also *Fiorito v. Wiggins*, 2015 ONCA 729 (CanLII) at para. 13*; Bush v. Mereshensky*, 2007 ONCA 679 (CanLII) at para. 10; *Mantella v. Mantella*, 2009 ONCA 194 at para. 17.

[P. 104: Begin existing footnote 139 with:] Sydor v Sydor, 2016 MBCA 102 (CanLII), citing *Willms v Willms*, 2001 MBCA 123 (CanLII).

[Begin existing footnote 140 with:] Hover v. Metropolitan Life Insurance Company, 1999 ABCA 123 (CanLII); [*amend last sentence in footnote to begin:]* Note that in this latter case...

5.8 Setting aside a contempt order

[P. 105, as last paragraph in the section:]

Even more recently, the high court upheld a judgment of the Quebec Court of Appeal that, during the sentencing phase of a contempt matter, it is not open to a contemnor to lead exculpatory evidence regarding his conviction. The Quebec court notes that, even had the evidence been admitted (that eventually, following his conviction for and grace periods for

[35] *Wallace (Re)*, 2016 ONCA 958 (CanLII) at paras. 7-8.
[36] *Trade Capital Finance Corp. v. Cook*, 2017 ONCA 281 (CanLII).

compliance, the contemnor had obeyed the order in issue), the contemnor still would have been guilty beyond a reasonable doubt.[37]

5.9 Consequences of failure to purge a contempt

[P. 105, add to footnote 146, to follow the citation for Dickie v. Dickie*:]*

XY, LLC v. IND Diagnostic Inc., 2016 BCCA 469 (CanLII); *Larkin v. Glase,* 2009 BCCA 321 at para. 30; *Schmidt v. Wood*, 2012 ABCA 235 (CanLII); *Elensky v. Elenskaya*, 1993 CanLII 1937 (B.C.C.A.) (CanLII;);

[P. 108, new paragraph just before last paragraph of the section:]

Then again, in British Columbia, at least, appeal courts will consider cases where appellant contemnors offer "a convincing explanation … of the impossibility of compliance with the court order"[38] or where "the interests of justice, particularly, the interests of justice as they affect the respondent [in this instance a wife claimed disobedience of a support order], dictate that the appeal should be heard."[39]

5.10 Costs

[P. 110-111, add as last paragraph in the section:]

Where special costs are awarded on a contempt motion, this does not mean that failure to pay those costs amounts to a contempt. Costs awards consequent on the adjudication of the contempt allegation should not be conflated with the penalty for contempt on the motion. The costs generally are not part of "the disposition of the contempt proceedings." Where costs are a

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[37] *Guignard c. St-Hyacinthe (Ville)*, 2015 QCCA 1908 (CanLII), leave to appeal ref'd 2016 CanLII 34014 (S.C.C.).
[38] *Elensky v. Elenskaya*, 1993 CanLII 1937 at para. 6 (B.C.C.A.). See also *Berry v. Berry*, 2002 BCCA 151 (CanLII) at para. 17.
[39] *Ibid.*, *Berry v. Berry*, 2002 BCCA 151 (CanLII) at para. 17.

matter between the parties, the penalty concerns interaction between a person or entity and the court.[40]

Chapter Six: Disobedience of Court Process and Procedures

6.3 Contemptuous behaviour by counsel in the face of the court

[P. 118, add to follow the existing last sentence of the second full paragraph, after "of the Canadian Bar Association.":]

As a schedule to the recent *Groia* case (where a barrister's law society had found him guilty of professional misconduct for abusive and otherwise discourteous behaviour as trial counsel), the Ontario Court of Appeal quotes from the Law Society of Upper Canada's 1998 *Handbook on Professional Conduct* where it stipulates, "Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit discipline."[41] Writing in dissent, Brown J.A. notes,

> The range of tools and sanctions available to a court is limited to regulating the barrister's continued participation in the court proceeding, with contempt as the ultimate sanction. Even then, a contempt finding by and large seeks to secure the barrister's compliance with the directions given by the court for the remainder of the proceeding. ...
>
> [T]he sanctions a court applies for in-court misconduct are designed to ensure that the particular proceeding continues in a fair way, free from further misconduct by the barrister.[42]

Though it is implicit in Justice Brown's final words here, the goal is more significant than those words denote – protecting the integrity of the administration of justice.

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[40] *S.(L.) v. S.(G.)*, 2016 BCCA 346 at paras. 72 and 82, citing *Frith v. Frith*, 2008 BCCA 2.
[41] *Groia v. The Law Society of Upper Canada*, 2016 ONCA 471 (CanLII), citing The 1998 Handbook: The Law Society of Upper Canada, *Professional Conduct Handbook*, (Toronto: L.S.U.C., 1998, 2nd ed.), Rule 10.7, appeal all'd on other grounds, 2018 SCC 27.
[42] *Groia* at paras. 327, 329.

[P. 118, as new last sentence to penultimate section of s. 6.3(a) (to follow "behaviour contemptuous":] Again, where counsel failed to set down a matter for trial within a prescribed time limit (after having successfully persuaded the court to overturn a dismissal of the action for delay), counsel was acting presumptuously, not contemptuously, expecting that his failure "would be excused."[43]

6.3(b) Failure to appear in court / "Double-booking"

[P. 122, add to follow second sentence in second para., ending "process of the court.":]

In *R. v. DaFonte*, for example, the trial judge refused to accept counsel's defence that influenza or antibiotics had induced in her an honest mistake as to when she was to appear on behalf of a client in a criminal assault matter. The judge "concluded the appellant's conduct demonstrated reckless indifference to her obligations to the court and her client" and that this "'went far beyond mere discourtesy or inconvenience' and interfered with the court's authority and its ability to administer justice." On appeal, though the court quashed the conviction so as to amend the sentence (see below at subsection 12.7(e)), it found no palpable or overriding error in the contempt finding, nor in the trial judge's conclusion that counsel's defence was "part 'of a pattern of unreasonable excuses.'"[44]

6.3(c) Contemptuous statements by counsel in the face of the court

[P. 127, add as new paragraph after second full paragraph (ending "for a separate inquiry."):]

In *R. v. Devost*, junior counsel was instructed by senior counsel to represent C at a sentencing hearing in Ontario, on a conviction for uttering threats and housebreaking. She met

[43] *Jadid v. Toronto Transit Commission*, 2016 ONCA 936 (CanLII) at para. 28.
[44] 2016 ONCA 532 (CanLII) at paras. 19 and 25.

C, who "told her that he had pled guilty to certain charges in Québec the prior week and had received a two-year sentence. The client had a long criminal record and was no doubt quite familiar with the operation of the criminal justice system." C asked Devost whether the sentence on the Ontario matters would run concurrently to those for the Quebec conviction if she did not mention that he was currently incarcerated. Devost was little experienced in criminal matters but checked with other counsel, who advised her that, unless the court heard of the Quebec sentence, the Ontario sentence would run concurrently to it. Devost was convicted of contempt once it came to light that she did not mention the Quebec sentence at the Ontario sentencing hearing, but instead asked for credit for time served in Ontario. The Ontario Court of Appeal quashed her conviction given that, as her written apology and explanation made clear, she had not intended to mislead the court.

> Clearly, the [apology] letter was not an admission of the requisite *mens rea*. To the contrary, it was an express and emphatic denial of the existence of the *mens rea*. ... [T]he judge convicted the appellant because she made a misstatement that misled him into imposing the wrong sentence and because she failed to offer an explanation or apology that was 'sufficient to negative' that conduct. This analysis fails to address her state of mind at the relevant time. Furthermore, it inappropriately places a burden on the appellant to negate a finding of contempt once the *actus reus* is established. Both errors are sufficiently serious to require the quashing of the conviction.[45]

6.4(a) Refusal to appear, testify, or answer particular questions

[P. 131, to footnote 69, add this:]

As the Ontario Court of Appeal puts the distinction in *R. v. Aragon*, 2018 ONCA 124 (CanLII) (refusal to testify), "He knew the difference between perjury and contempt and he chose contempt."

[45] *R. v. Devost*, 2010 ONCA 459 (CanLII) at paras. 5, 39.

[P. 132, new paragraph to follow the first paragraph on the page, ending "the wrong reasons:]

A recent decision from Newfoundland and Labrador seems to reject or at least discourage this approach, adding the interesting query: does a *trial judge* obstruct justice when he does *not* cite a recalcitrant witness for contempt? The judge here eventually convicted Alex Normore of attempted murder, uttering a threat to cause death, and breaking and entering while committing attempted murder. At trial, Thomas, an otherwise cooperative defence witness, had refused to answer a question, about who gave him notes incriminating Normore. Thomas told the court that the disclosing information could endanger the person's life, considering Normore's apparently dangerous schizophrenia. The judge warned Thomas that his refusal to answer could be a contempt. Thomas politely responded that he understood this, but felt unable to answer given the risk, and his promise not to disclose his source. The judge replied, "We're going to have to move on but I may, … you may have to come to Court later on, to deal with this matter after the trial is over. So you are putting yourself in jeopardy."[46] After the trial, defence counsel asked the judge "whether Mr. Thomas would face any consequences for refusing to answer the question." The judge responded that "he did not think the answer to the question 'would have had much bearing on the trial' and thus had decided not to proceed with any further sanction." On appeal, the court accepted defence contentions that "the trial judge's failure to follow the correct contempt procedure was an error which affected the fairness of the accused's trial by precluding a legitimate line of inquiry relevant to the defence." This meant that "the trial judge failed to use all of the tools at his disposal to compel Mr. Thomas to answer the question thereby foreclosing the inquiry into the continuity of the notes which may have impacted the weight to be given to the second note."[47]

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[46] *R. v. Normore*, 2018 NCLA 10 (CanLII) at para. 5.
[47] *Ibid.* at paras. 14 and 35.

The dissenting judgment, however, seems at least equally compelling, given that the provenance of the notes did not seem significantly probative of the matters in issue[48]:

> Mr. Thomas was not a witness who refused to be sworn or to give any evidence, or who attempted to mislead the court with half-truths or evasive answers. Moreover his fear was based on concern for others, not himself. If the Judge had found Mr. Thomas in contempt, this would have "worked an injustice in the circumstances of the case" (*Carey [v. Laiken*, [2015] 2 S.C.R. 79] at paragraph 37). ...
>
> The focus of the trial was on whether Mr. Normore committed the alleged offences. Attempting to force Mr. Thomas to answer an irrelevant question of next to no probative value and which did not go to a point in issue could easily have become a lengthy and distracting sideshow. This would have consumed undue courtroom time and created significant reasoning prejudice. ...
>
> In the result, the dignity and process of the court were not undermined in any way by the Judge's handling of the matter ... nor were contempt proceedings necessary to safeguard the administration of justice.[49]

It is worth noting, as well, that when Thomas refused to answer, the court warned him that he might face contempt proceedings: that is, there was in fact judicial compulsion to answer the question.

[P. 132; Amend the first sentence in the existing first full paragraph ("Perhaps the better approach...") to this:]

Perhaps a workable compromise lurks in the shadows of *Fields:* if the witness...

[New section 6.7(d), p. 139]

6.7(d) Contempt by abuse of process

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[48] Normore had admitted to writing one gravely incriminating note, while the Crown contended that the second, less specifically incriminating note might have been forged, given that police had not sealed Normore's apartment for four months after the laying of charges – the apartment's being where the letters were found pursuant to a lawful search.

[49] *Ibid.*, paras. 81, 83, and 85, citations omitted.

In a very few instances, the courts have used "feigned action" to describe what amounts to fraudulent or vexatious proceedings, and to remark that such proceedings can constitute a contempt of court. It is important to note, however, that, historically, a feigned action – or, more precisely, a "feigned issue" – has described proper (permissible) procedure in certain cases,[50] what we would often describe today as "the trial of an issue." *Re Williams v. Swan and Gray Coach Lines*, for example, concerns a bus passenger injured in a collision with a car driven by Swan. Williams and the bus line agreed to settle, on the condition that Williams continue her action against the line and Swan, to determine liability as between those defendants. After the bus line tendered settlement monies, Williams purported to rescind the agreement, arguing *inter alia* that her persisting "feigned action" was a contempt of court. The court disagreed, remarking that the action was not deceptive, and anyway was instituted by Williams herself.[51]

In *Re Hazell*, the court considered a chain of deeds that caused a wife to lose her dower rights. Referring to "fob actions" brought merely "to learn the opinion of the Court," as distinct from appropriate feigned issues, Middleton J.A. writes: "I draw attention to this, for it cannot be too plainly emphasized that a feigned application intended to prejudice the rights of other litigants is a gross form of contempt of Court."[52] These days it would seem that, even were the deed transactions undertaken as a "test case," such conduct would not be viewed as contemptuous(?).

In *Susin v. Susin*, fully seven judges had ruled that the proper venue for the litigation – a bitterly contentious, drawn-out estate dispute within a family of nine children – was Welland, Ontario. Despite this, the contemnor brought a motion for the passing of accounts in Brampton. The Ontario Court of Appeal affirmed the motion judge's finding that, whether or not this

[50] See *Hovey v. Whiting* (1887), 14 S.C.R. 515 and Blackstone III 452.
[51] *Re Williams v. Swan and Gray Coach Lines*, [1942] 4 D.L.R. 488 at 492 (Ont. C.A.).
[52] [1925] 3 D.L.R. 661 at 669-70 (Ont. C.A.), quoting Holt C.J. in *Brewster v. Kitchin* (1697), Comberbach 424.

constituted a breach of previous orders, it was a contemptuous abuse of process, a common law contempt. (The contemnor argued that the venue rulings were not orders requiring him "to do any act" (as the Ontario rules put it), or abstain from any act.) "It subverts the administration of justice," the motion judge had held, "by making ineffective the rules of procedure and basic concepts of fairness such as *res judicata*." Aggravating this was the fact that the contemnor already owed "the estate much more than his share of what remains," the estate funds having been dissipated by the litigation.[53] For the appeal court, R. A. Blair J.A. writes:

> I see no practical difference between failing *to obey* the orders and failing *to recognize and accept* the validly-made previous orders, in these circumstances. They are tantamount to the same thing. Substantively they have the same destructive effect on the integrity of the administration of justice. In any event, breach of a prior court order is not the only type of conduct that will justify a finding of contempt. …
>
> As the motion judge found, [the contemnor] brought the [Brantford] motion intending to subvert the administration of justice, intending to show disrespect for the court, and intending to harass the opposing beneficiaries, all for vindictive reasons and in the context of having been previously warned of the risk of imprisonment for contempt.[54]

Chapter Seven: Disobedience of Court Orders

7.1 Categorizing the offence: the mental element

[P. 142, first paragraph; add after "order prohibited" and its superscript designating footnote number four:]

In *Chamandy c. Chartier*, the Quebec Court of Appeal has held that one must obey not only the black letter of the order, but also its "spirit," considered in in the order's particular context. The Ontario Court of Appeal has ruled similarly.[55]

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[53] *Susin v. Susin*, 2014 ONCA 733 (CanLII) at para. 20.
[54] at paras. 23 and 25-26. The italics are those of Blair J.A.
[55] 2015 QCCA 1142 (CanLII); *Chirico v. Szalas*, 2016 ONCA 586 (CanLII).

[P. 142; add to end of footnote 5: See also *Topgro Greenhouses v. Houweling*, 2003 BCCA 355 (CanLII).

[Page 143, add to footnote 7: See also *Langford (City) v. dos Reis,* 2016 BCCA 201 (CanLII), in which the court holds that it was no defence that, in failing to remove a building in conformity with a court order, the contemnor's intention was to save the structure, not to flout the order.

[P. 144, as new first full paragraph on the page, to follow quotation ending "what was required.":]

Despite these clarifications, it seems that courts still sometimes misconstrue or warp the test, particularly where the distinctions are fine (sometimes to the point of metaphysical). *Caron c. Paul Albert Chevrolet Buick Cadillac inc.*[56] depends primarily on the court's determination that the order supposedly breached was ambiguous as to whether it prohibited loud noise by workplace picketers. Yet in overturning the contempt conviction (among other things, the accused persistently had blown flutes, whistles, a trumpet, and "an air-pump," such that the motion judge found that the noise made business operations impossible), the majority held, "It seems there was no proof that the noise was meant to impede or limit work" or that, beyond a reasonable doubt it intimidated those still working. Again, this is not the test. The test, adapted to this situation, is whether the accused intentionally performed an act the order forbade, that is, whether he disrupted the employers' operations beyond the distractions of conventional picketing. What else would he have meant to do with his "music?" (See also *Langford (City) v. dos Reis, supra*, note 143 and *infra*, section 11.2.)

7.3 The three-pronged test

[56] 2016 QCCA 554 (CanLII) at para. 41, my translation of "Il n'apparaît toutefois aucunement de la preuve que ce bruit avait pour but d'empêcher ou de limiter le travail de celles-ci ou que, hors de tout doute raisonnable, il intimidait les travailleurs de l'entreprise."

[P. 148, add as new first paragraph:]

Quebec has had its own "three-pronged test" since at least 1991 (albeit it is more precise to label it a "three-step test"). In 2004 the province's court of appeal characterized the procedure as, first, the moving party "must demonstrate beyond a reasonable doubt that the accused has not obeyed the court order (*actus reus*)." Second, the onus then switches to the accused "to explain why he has not obeyed the judgment." Finally, the onus returns to the moving party "to establish beyond a reasonable doubt the falsity of the explanation given and to convince the court that the accused acted voluntarily and deliberately without legitimate excuse (*mens rea*)."[57] The procedure is to be followed *strictissimi juris*.[58] Regarding this latter, note that it is no defence that the order was a "carbon copy" provided to the contemnor by counsel to the party opposite. The contemnor argued that only the prothonotary had the power to certify an order as a true copy, which the court here characterizes as an "artificial and excessive formalism."[59] The important consideration is that the affected parties have proper notice.

[P. 148, add to end of existing first paragraph:]

[57] *Roques c. Sans* (2004), REJB 2004-55580 (C.A.), citing *Daigle c. St-Gabriel-de-Brandon (Corp. Municipale),* [1991] R.D.J. 249 (C.A.); *Droit de la famille – 1605,* [1995] R.D.F. 8 (C.A.), leave to appeal refused (S.C.C.); *Droit de la famille – 3674,* [2000] R.D.F. 493 (C.S.). Regarding the first step, *Daigle* adds, at para. 11: "If the judgment in question is susceptible to multiple interpretations or is ambiguous, the judge must take this into account when undertaking the subsequent steps." My translations and paraphrase.
[58] Ibid., para. 2, citing *Vidéotron Ltée c. Industries Microlec produits électroniques inc.*, [1992] 2 R.C.S. 1065; *Charlebois c. Bourbeau,* [1979] C.A. 545; *P. (P.-A.) c. F. (A.),* [1996] R.D.J. 419 (C.A.).
[59] *Procom Immobilier inc. c. Commission des Valeurs Moblières du Québec*, 1992 CanLII 3073 (QC CA) (my translation, at 4.)

Ontario authority holds that, while the motion judge must consider all three prongs of the test, it is unnecessary "to set out the test expressly in his or her reasons" or give extensive detail regarding them.[60]

7.4 What is a court order?

[P. 149, new paragraph to follow first full paragraph ending "breaches of an implied undertaking rule":]

Where a document comes inadvertently or otherwise innocently into third-party possession, and where that party has a duty to act on the documents' contents, there is no obstruction of justice, and thus no contemptuous breach of the implied undertaking rule (or a "court order"). So held the Newfoundland and Labrador Court of Appeal in 2018, in a case where Power had brought an action, on his own behalf and on behalf of a corporation, against accountant Parsons. All but one of the documents in question were the plaintiffs', although they acquired access to them only after Parsons disclosed them at discovery. As part of separate complaints made against Parsons to his professional regulator, Power then turned the documents over to the Institute of Chartered Accountants of Newfoundland and Labrador. While "[t]hird parties who obtain the information innocently but choose to use it so as to frustrate the purpose of the implied undertaking ... may also be in contempt of court," here there was no attempt to frustrate the purposes of the implied undertaking rule – the principle that the use of such information for a collateral purpose could pervert, systemically, effective discovery. "A third party who inadvertently obtains information subject to an implied undertaking will not be in

[60] *2363523 Ontario Inc. v. Nowack*, 2016 ONCA 951, at paras. 21, 25-6, citing *Bell ExpressVu Limited Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614, at para. 29; *Chiang (Re)*, 2009 ONCA 3, 93 O.R. (3d) 483, at paras. 11 and 50.

contempt of court for using the information if it has a statutory obligation to investigate it, since a use mandated by the legislature is justified and not an obstruction of justice."[61]

[P. 150, add as new first para:]

It seems convenient to add here that, at least in Ontario, where a court hearing a civil matter orders production of documents from a Crown brief in a related criminal cause, it is no defence to a finding of non-production that the contemnor disclosed the documents' existence in an affidavit. It is incumbent on the person under such an order to move or gain consent for the production of the documents, and to produce them.[62]

[P. 153, new section 7.5, subsequent section numbers to be adjusted upwards accordingly:]

7.5 What is "disobedience" of an order?

In *Susin v. Susin*, protracted litigation over an estate, seven judges had ruled that the proper venue for proceedings was Welland, Ontario. Nonetheless, the contemnor brought a motion to pass accounts in Brampton, and when he was cited for contempt argued that the Brampton motion did not amount to disobedience of a court order insofar as the previous rulings did not require him to do any act (as the province's contempt rules stipulate) or abstain from any act. The Ontario Court of Appeal confirmed the finding of contempt, agreeing with the motion judge that insofar as the contemnor's conduct constituted a serious abuse of process, it amounted to a common law contempt, whether or not he had disobeyed any order. However, R. A. Blair J.A., for the court, notes that in the circumstances he sees "no practical difference between

[61] *Power v. Parsons*, 2018 NLCA 30 (CanLII), paras. 19-21, per White J.A.
[62] *2363523 Ontario Inc. v. Nowack*, 2016 ONCA 951, leave to appeal refused, 2017 CanLII 32944 (S.C.C.) at para. 35.

failing *to obey* the orders and failing *to recognize and accept* the validly-made previous orders."[63]

The Alberta Court of Queen's Bench has ruled that, where a fact is lawfully reported on a news service website, it is not contemptuous disobedience to refuse to take it down if a court bans the information thereafter. Here, in a news report on its website, the CBC had named an Alberta girl who was murdered. Twelve days later, during the accused murderer's first appearance, the court banned publication of the girl's name. From then on, the CBC did not name the child in its internet postings, but it refused to remove her name from the pre-ban postings. Against the Crown's claim that this amounted to criminal, or at least civil, disobedience, the court ruled that, for the purposes of contempt law, allowing access does not amount to publishing, never mind that this differs from some defamation law and provisions of the *Youth Criminal Justice Act*. Here, it was material that (1) the information was available elsewhere, digitally and in print (in newspapers, publicly-accessible court files, etc.); (2) the alleged contemnor did not publish the name *after* the ban, it simply allowed access to it; (3) an infringement of a constitutional right such as free expression must be precisely defined, and whether there was disobedience here was debatable, such that the CBC seemed simply to have interpreted the ban differently than the Crown had; the media guide issued by the Alberta Court of Appeal said that permitting access is not publishing; allowing access is not transmitting or broadcasting (which in some provinces amounts to publication at each access).[64]

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[63] at para. 23.

[64] *R. v. The Canadian Broadcasting Corporation*, 2017 ABQB 329 (CanLII), appeal all'd 2018 SCC 5.
The Crown argued that the contempt was criminal or, alternatively, civil. As to the criminal contempt, the court had a reasonable doubt given that: the name was available elsewhere all over the internet and in print; again, the CBC was not disobeying the order so much as disagreeing with Alberta's interpretation of it, such that it was not "defying" anything; the CBC had a right and duty to report. As well, the court holds that the CBC had not been "strident or even disrespectful" but principled in its disagreement with the Alberta Crown's view of the ban, and that, with potential libels, one knows his obligations from the start whereas here the CBC would have had to predict the future here (i.e., that the publication ban would issue).

The significance of the ruling is that the Supreme Court of Canada has signalled that it might accept this unique definition of "publish" for the purposes of contempt law. In overturning an injunction ordering the CBC to remove the girl's name pending an appeal of the contempt motion decision, Brown J. writes for the court that the injunction application and the contempt motion are linked, given that the Crown sought injunctive relief based on the contempt litigation. He then notes that, in (improperly) ordering the CBC to take down the girl's name at least temporarily, the majority of the Alberta Court of Appeal has admitted that both the Crown and CBC positions are "arguable." This, Brown J. concludes, is "an acknowledgment that the Crown had not shown a strong *prima facie* case of criminal contempt." That is, the Supreme Court overturns the injunction because the Crown has not shown presumptive contempt – suggesting that, should the contempt matter reach the high court, it might well find that there is no contempt for internet access to material that is posted before a court bans that publication.[65]

7.5 Filing tribunal orders such that they 'have the same force and effect as orders of the court"

[P. 153, add footnote to end of first sentence in section ("… as orders of the court.")

See, for example, *Continuing Care Employers' Bargaining Association v. AUPE*, 2002 ABCA 148.

[P. 153, add to follow the first sentence in the section, ending "as orders of the court.":]

The model "Court Orders Compliance Act" simplifies the procedure by including tribunal orders in its definition of orders subject to enforcement under the model legislation. As drafted by the Uniform Law Commission of Canada, s. 1 provides that a

> "court order" means an order, judgment, or any other determination made by any court in a civil proceeding and includes an order, judgment, or other determination of a non-judicial body that by law may be [filed,

[65] *R. v. Canadian Broadcasting Corp*., 2018 SCC 5.

> entered and recorded in the (appropriate court in the enacting jurisdiction) and enforced as a judgment of that court], if the order, judgment, or other determination has been [filed, entered and recorded].[66]

[The next sentence in the existing text, beginning "Unless the administrative legislation...," should now be made the beginning of a new paragraph.]

[P. 154, add to end of first partial paragraph on the page (just after "immediate labour peace."]

The Alberta Court of Appeal has held that "contemnors must know they are disobeying a court order, and therefore must have notice that the order has been filed. Generally speaking, contempt of an order can only be established by proof that the alleged contemnor had notice of the order and its substance."[67]

[P. 154, add new paragraph before first full paragraph (beginning In M.G.E.A. v. Manitoba*…]*

Alberta authority, however, adds the qualification, "Board directives are not converted to court orders when filed in Court. They continue to be directives of the Board but, upon filing [with the court], are enforceable as judgments or orders of the Court." Thus, a contemnor cannot argue that his stated intention to breach the directive or related legislation is inadmissible at the contempt hearing insofar as he made the statement before the directive was filed with the court. "The statements made prior to the filing of the Board directive in Court were admissible to establish that the strike was planned, authorized and caused by" the contemnors.[68] Unless the relevant labour legislation provides otherwise, the contempt in issue is not of the board but of the

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[66]http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/720-judgments/local/contempt-of-court/1732-court-orders-compliance-act. The brackets and parentheses are those of the subsection, placed there so that the individual jurisdiction could adapt it to its rules and policies.

[67] *United Nurses of Alberta, Local 79 v. General Hospital (Grey Nuns) of Edmonton*, 1990 ABCA 65 at para. 20, citing *Re Tilco Plastics Ltd. v. Skurjat* (1966) 57 D.L.R. (2d) 596 (Ont. H.C.) at 619.

[68] *Continuing Care Employers' Bargaining Association v. AUPE*, 2002 ABCA 148 at paras. 68-69 and 73, citing *United Nurses of Alberta v. Alberta (Attorney-General)* 1992, 89 DLR (4th) 609 at 643.

order on which it is based. Where there is disobedience before the directive is filed, this does not unlawfully render the contempt a contempt of the board.[69]

7.6(b)(i) Aiders, abettors, and third parties (including corporations)

[P. 158, add as third full paragraph, to follow "guaranteeing free expression":]

In late 2016, the Supreme Court of Canada affirmed this judgment, noting that the contempt sanction was "exceptional" in Quebec as "an enforcement power of last resort" (this, of course, is generally true across the country), available only "where it is genuinely necessary to safeguard the administration of justice." As at common law, under art. 50 of Quebec's *Code of Civil Procedure* the contemnor must have had "actual or inferred knowledge" of the order, never mind that Morasse prosecuted under art. 761.[70] Nadeau-Dubois had no notice as to which part of art. 50 he was required to defend himself against: did Morasse allege the first sort of contempt – disobeying "any process or order of the court or of a judge thereof" – or was the allegation that Nadeau-Dubois acted "in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the court"? Morasse had not proved that the order in issue "was clear, that Mr. Nadeau-Dubois had knowledge of it and that he intentionally did what the order prohibited." By extension, neither had Morasse proved that Nadeau-Dubois intended to violate the order or to encourage others to do so.

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[69] *United Nurses of Alberta, Local 79 v. General Hospital (Grey Nuns) of Edmonton*, 1990 ABCA 65 at para.19.

[70] "Any person named or described in an order of injunction, who infringes or refuses to obey it, and any person not described therein who knowingly contravenes it, is guilty of contempt of court and may be condemned to a fine not exceeding $50,000, with or without imprisonment for a period up to one year, and without prejudice to the right to recover damages. Such penalties may be repeatedly inflicted until the contravening party obeys the injunction."

As for the television interview, it could not "be used in a way that attributes knowledge of Émond J.'s order to Mr. Nadeau-Dubois. Doing so opens the door to punishing individuals vicariously for the speech of *others*."[71]

7.8 The ambit of the order

[P. 160, add to follow first sentence of the second paragraph in the section, ending "specific directive":]

Where, for example, a litigant is ordered to provide an accounting, it is insufficient simply to authorize access for the opposing party to the relevant records.[72] On the facts of *Chirico v. Szalas,* S's dog that had bitten several people, which incidents resulted in an order from the medical officer of health requiring S to surrender the animal to the Humane Society for destruction. S obtained a stay of the euthanasia order pending appeal, and an interim consent order released the dog to him meanwhile, under conditions including that he was to surrender the dog if he breached the terms. He in fact violated the conditions but refused to give up the dog. A representative from the Society for the Prevention of Cruelty to Animals visited S's home to seize the dog, but he refused to cooperate and ultimately sent the animal to the United States. The motion judge accepted his contention that he was not in contempt of the euthanasia order insofar as it required him to surrender the animal to the Humane Society, not to the Society. The Ontario Court of Appeal overturned this, finding that orders were not to be interpreted formalistically. S intended to and did frustrate the euthanasia order, never mind "the modality" by which the dog was to be seized. The judge below had erred in "failing to appreciate that an

[71] *Morasse v. Nadeau-Dubois*, 2016 SCC 44, at paras. 19-43.
[72] *2363523 Ontario Inc. v. Nowack*, 2016 ONCA 951, leave to appeal refused, 2017 CanLII 32944 (S.C.C.) at para. 15.

order for contempt is available where the evidence supports a finding that the alleged contemnor failed to follow the spirit of the order."[73]

In *Glazer v. Union Contractors ... [continue with existing text, but in this new paragraph]*

7.10 Ambiguous orders

[P. 163, add to end of first paragraph (after "immediate effect."), and add pertinent footnote:] However, "[a] Mareva Order does not want for clarity simply because it does not concretize every particular of a party's obligations."[74]

- *add to footnote 91, just before the citation for* Morasse c. Nadeau-Dubois*:]* ; *Paul Albert Chevrolet Buick Cadillac inc. c. Syndicat démocratique des employés de Saguenay-Lac-Saint-Jean*, 2016 QCCA (CanLII) 558; *Chamandy c. Chartier*, 2015 QCCA 1142 (CanLII) at para. 15*; Zhang c. Chau* (2003), 229 D.L.R. (4th) 298 at para. 30, application for leave to appeal to S.C.C. refused 2008 CanLII 63507 (CSC) - 2008-12-04.

[P. 164, add to footnote 94, at end:] See also *Trade Capital Finance Corp. v. Cook*, 2017 ONCA 281 (CanLII), at para. 21.

[P.165, add as new first full paragraph:}

Orders can have a broad sweep without being too vague for reasonable compliance, as where an order restrained employers in the asbestos remediation industry "from breaching the provisions of the *Workers Compensation Act of British Columbia*, R.S.B.C. 1996, Ch 492, and the Occupational Health & Safety Regulation, B.C. Reg 296/97, enacted pursuant thereto." Although the order did not specify compliance with the legislation currently or compliance with

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[73] *Chirico v. Szalas*, 2016 ONCA 586 (CanLII) at paras. 8, 54, 58-59. See also *Chamandy c. Chartier*, 2015 QCCA 1142 (CanLII); *Paul Albert Chevrolet Buick Cadillac inc. c. Syndicat démocratique des employés de Saguenay-Lac-Saint-Jean*, 2016 QCCA (CanLII) 558 at paras. 22-23; *Zhang c. Chau* (2003), 229 D.L.R. (4th) 298 at paras. 30-35, application for leave to appeal to S.C.C. dismissed 2008 CanLII 63507 (CSC) - 2008-12-04.

[74] *Trade Capital Finance Corp. v. Cook*, 2017 ONCA 281 (CanLII), at para. 32.

it as amended from time to time, the latter was "the only reasonable interpretation." It made "no sense to require compliance with statutory or regulatory requirements that had been replaced or superseded," and the legislation's health-and-safety context evolved with "changes in knowledge and technology." As well, those in the industry had a continuing "obligation ... to keep informed and abreast of workplace requirements." For similar reasons, the order was not unclear simply because the legislation was complex overall, such that complying with the order might require the respondents to "cross-reference" the order with the legislation. The order did not mandate comprehensive knowledge of the legislation but required that the respondents "be aware of those provisions of the *Act* and *Regulation* that apply to the industry in which they voluntarily participate." Indeed, they had a long history of breaching the legislation, and so should have been familiar with it. Moreover, "the fact that some provisions of the *Act* or *Regulation* may be attacked as unclear does not render an order to comply with the *Act* and *Regulation* incapable of enforcement by contempt."[75]

[P. 167, add to end of note 103, just before "And see Section...:] ; *Chartier c. Chamandy,* 2016 QCCA 501, noting that the lawyer was not advising on the propriety of the order, but (erroneously) on when it came into effect pending appeal and pending negotiations with the opposing party.

7.11 Orders wrong or ineffective in law

7.11(a) Generally

[P. 168, add to the end of the first partial paragraph that begins the page, to follow "through the courts.":] The British Columbia Court of Appeal has approved a finding that it is contemptuous to bring new proceedings in a foreign jurisdiction to attack a local order (here, on consent,

[75] *Workers' Compensation Board of British Columbia v. Seattle Environmental Consulting Ltd*., 2017 BCCA 19 (CanLII) at paras. 79-102.

establishing that British Columbia was the habitual residence of the litigants' children, whom the mother had removed to Israel in breach of that order): "If outstanding appeal proceedings in this jurisdiction cannot be an excuse for failing to obey a court order, the existence of proceedings in a foreign court cannot offer any greater protection."[76]

7.11(b) Orders "impossible of compliance"

[P. 168, new paragraph, to follow last paragraph on page:]

That said, British Columbia authority states that the court will hear an appeal of a contempt conviction upon the contemnor's providing "a convincing explanation … of the impossibility of compliance with the court order."[77]

7.14 Family law and judgment debt orders

[P. 173, penultimate paragraph, to follow second sentence (ending "engage the court's contempt jurisdiction."):] More lately, Alberta's Court of Appeal has elaborated that provincial rules of this type do not "exclude the use of the contempt power to punish ... for defiance of, and to coerce ... compliance with" orders, here "a mandatory injunction explicitly limiting ... household expenditures and requiring a proper accounting, nor does it preclude disgorgement as sanction." It is irrelevant that a

> contempt order requires that money or money's worth be paid because a court order that punishes and coerces is not the functional equivalent of payment ... for ordinary debts – a critical distinction: *Dickie v Dickie*

[76] *S.(G.) v. S.(L.)*, 2013 BCSC 1725 (CanLII) at para. 24, affirmed *S.(L.) v. S.(G.)*, 2016 BCCA (CanLII). As the appeal court puts it, at para. 65, "L.S. was found to be in contempt of court for pursuing actions before the Israeli courts alleging that Israel had become the habitual residence of the children, and to have the Israeli courts take jurisdiction in defiance of the consent order made in British Columbia."

[77] *Elensky v. Elenskaya*, 1993 CanLII 1937 at paragraph 6. See also *Berry v. Berry*, 2002 BCCA 151 (CanLII) at para. 17.

> (2006), 262 DLR (4th) 622 at paras 105-116 (Laskin JA), affd 2007 SCC 8, [2007] 1 SCR 346. ...
>
> Rule 10.53 expressly authorizes the imposition of fines, imprisonment and costs.
>
> Fines and imprisonment are means of enforcing "compliance with the process of the court itself": *Johnson v Schwalm*, 2006 CanLII 13771 at para 24, 2006 CarswellOnt 2620.[78]

[P. 173, add to penultimate paragraph on the page, to follow "varied or overturned.":]

It should be added, however, that British Columbia law requires four "elements" to establish contempt for failure to pay court-ordered maintenance: "that the debtor had notice of the order, that he or she did not comply with the order, that the non-compliance was 'wilful' (*i.e.*, deliberate, as opposed to accidental or unintentional), and that the debtor was, in fact, capable of complying with the order (*i.e.*, that he or she had the means to make the required payments)." Where proven, inability to pay is a complete defence.[79]

[P. 174, new paragraph after second full paragraph on the page (ending "'an order to post security.'"):

Note, too, that while contempt orders are "not available to enforce the payment of a monetary judgment, ... there is no question that breach of a court order requiring financial disclosure in the course of enforcement of a judgment debt can ground a finding of civil contempt."[80]

[P. 175, new second-to-last paragraph in the section:]

In British Columbia family law matters, "a party cannot seek a stand-alone declaration or finding of a breach of an order in the absence of contempt proceedings." Rather than applying

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[78] *Mella v. 336239 Alberta Ltd* 2016 ABCA 226 (CanLII) at paras. 24-27.
[79] *Swann v. Swann*, 2009 BCCA 335 at para. 10; *S.(L.) v. S.(G.)*, 2016 BCCA
[80] *Greenberg v. Nowack*, 2016 ONCA 949 (CanLII).

for a declaratory order, the party should apply for a contempt order under the *Supreme Court Family Rules*.[81]

7.16 Effect of continuing breach: no right of audience

[Add as footnote on word "order" in the phrase "breach of a court order":]

See, e.g., *Martyn v. Martyn*, 2016 ONCA 726.

7.17 Contempt of contempt orders

[P. 176, new paragraph to follow quotation footnoted as 138 ("of the Defendants if it so chooses") and before the sentence beginning "Insofar as those inclined…," which now itself will begin a separate paragraph:]

In *Astley v. Verdun*, Verdun had been sentenced to three months' house arrest (a "conditional sentence") and 200 hours of community service for breach of (contempt of) an injunction. When he failed to make a timely return to Ontario to begin serving the sentence, the sentencing judge found him in contempt of the sentencing order and penalized him a further seven months' house arrest and another 200 hours of community service, while suspending the existing eighteen months' probation order (for the first contempt) to begin after Verdun had served this second sentence. Verdun applied for a stay of the sentence pending appeal, which stay was granted. The Ontario Court of Appeal held that it was "arguable" that the sentencing judge had erred in proceeding on a second contempt citation, "rather than invoking enforcement mechanisms for breach of a conditional sentence."[82] Eventually, the sentence was confirmed, but

[81] *Warde v. Slatter Holdings Ltd.*, 2016 BCCA 63 (CanLII) at 49.
[82] *Astley v. Verdun*, 2015 ONCA 225 (CanLII; endorsement) at paras. 2-4.

with the striking of the community service order as "simply unreasonable." The court this time commented:

> A judge is free to use s. 742 of the *Criminal Code* [conditional sentences] for guidance in imposing a conditional sentence as penalty for a contempt. However, that does not subject the judge to the constraints of s. 742. It was open to the motion judge to levy a new penalty for the appellant's breach of the sentencing order for the first contempt regardless of the requirements of s. 742 in the context of criminal contempt.[83]

Insofar as those inclined… *[Existing text from this point.]*

Chapter Nine: Scandalizing the Court: What's Left of the Law?

[P. 204, new paragraph, to follow first full paragraph (ending "…the finding of scandalizing":]

As recently as 2015, albeit in the context not of a contempt motion but of an appeal against the striking out of a claim, the New Brunswick Court of Appeal seems to suggest that a self-represented litigant has scandalized it, *in facie*:

> The grounds advanced in support of Ms. Brooks' recusal motion stem from her losses before this Court in previous instances. At the root of most of Ms. Brooks' contentions is her obsessively held belief that she has been defrauded of sufficient spousal support as a result of a conspiracy between her own family solicitor and the one representing her ex-husband. Notwithstanding the fact that this alleged fraud has never been adjudicated in court in any matter in which the alleged perpetrators have had an opportunity to rebut what are until now mere allegations, Ms. Brooks expected the Court of Appeal to find fraud and make sweeping declarations. Since the Court has not done so in any of the previous proceedings before it, she accuses the Court of having "conspired and colluded to conceal" the alleged fraud and "violated [her] Charter Rights to an impartial and unbiased tribunal". Frankly, her arguments are contemptuous. They betray a flawed understanding of the role of an appellate court, which has limited inherent jurisdiction, and generally limits itself to the questions properly raised before it.[84]

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[83] *Astley v. Verdun*, 2015 ONCA 543 (CanLII) at para. 3, 4.
[84] *Brooks v. Law Society of New Brunswick*, [2015] NBJ No 78 (QL), at para. 5.

Chapter Ten: Contempt of Other Bodies and Offices

10.2 Tribunal orders filed for enforcement with the courts

[P. 215, add to end of footnote 12:] ; *United Nurses of Alberta, Local 79 v. General Hospital (Grey Nuns) of Edmonton*, 1990 ABCA 65 at paragraph 11.

Chapter Eleven: Defences: An Overview

11.1 Due diligence and inadvertence: R v. Edge, *the sequel*

[P. 220, to follow first full paragraph, ending "excuse for disobedience.":]

As well, in Quebec due diligence can be an acceptable defence to breach of a court order, although the defence is defeated by "gross indifference" (*une insouciance grossière*)[85] as well as blatant disobedience.

11.2 Reasonableness and good faith / Alleged contempt based on legal advice / Lack of intent

[P. 222, add to footnote 12, just after the citation for Carey v. Laiken:*]*

; *Chartier c. Chamandy,* 2016 QCCA 501, noting that the lawyer was not advising on the propriety of the order, but (erroneously) on when it came into effect pending appeal and pending negotiations with the opposing party.

[P. 222, as first full paragraph (to follow "'contempt, as an aggravating factor.'"):]

More generally, as Quebec authority puts it, good faith is not tantamount to absence of intention to breach a court order. (Again, what is pertinent is whether there exists the intention

[85] *Syndicat de la fonction publique du Québec inc. c. Québec (Procureur général)*, 2008 QCCA 839 (CanLII) ; citing *Daigle c. St-Gabriel-de-Brandon (Corp. Municipale)*, [1991] R.D.J. 249 (C.A.).

to act contrary to the order.)[86] In *Langford v. dos Reis*, the court below had ordered dos Reis to remove a building from specified lands because it was in breach of city bylaws. She instead pursued various administrative options. On the contempt motion she argued that, insofar as the city forbore enforcing the removal order as she pursued these alternatives, she believed that she was not breaching the removal order. According to the British Columbia Court of Appeal, the city's (Langford's) forbearance was no excuse. "The respondent had no reasonable prospect of succeeding on the variance applications. She had years to sort this conflict out with the appellant. After she failed to sustain her position in this Court, her 'options' (her word) narrowed to compliance, and the administrative procedures she took were untimely." It was no defence "that her mind was on saving the building, not on breaching the order."[87]

11.8 Order is incorrect, null, etc.

[Add as second sentence in the section (to follow "...the first order.":]

Neither is it a defence that the order was a "carbon copy" supplied by the opposite side and therefore allegedly not a "true copy" (presuming, one would imagine, that there is no evidence to the contrary).[88]

11.18 Mistake of fact

[P. 227, add as second to last sentence of the section (Just before "See also next.":]

Note, however, that honest mistake can be a defence to criminal contempts if the respondent credibly shows that it affected the pertinent intent.[89]

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[86] *Chartier c. Chamandy*, 2016 QCCA 501 at para. 12.
[87] *Langford (City) v. dos Reis*, 2016 BCCA 201 (CanLII) at paras. 23-24.
[88] *Procom Immobilier inc. c. Commission des Valeurs Moblières du Québec*, 1992 CanLII 3073 (QC CA) ; [1992] RDJ 561 (Q.C.C.A.)

Chapter Twelve: Penalties/Sentencing Digest

12.1 The sanctions available

[P. 229 add to footnote number 3:] ; Zhang c. Chau (2003), 229 DLR (4th) 298 at para. 29, application for leave to appeal to S.C.C. refused 2008 CanLII 63507 (CSC) - 2008-12-04.

[P. 231, add new footnote to end of first sentence (at "good behaviour":] See, e.g., *Friedlander v. Claman,* 2016 BCCA 434 (CanLII): citing the province's *Family Court Rules*, the court approves an order requiring a mother to post security for "future good behaviour."

[P. 231, to follow first sentence (ending "good behaviour"):] An Ontario case suggests the breadth of other possible sanctions: having found a mother in contempt of an order treating custody and access, a motion court awarded the father an additional 122 days of access over two years. On appeal it was held:

> It may be that the children's best interests require more time with the [father] to offset [the mother's] efforts and preserve his relationship with his children. But a more detailed examination of the impact of 122 days' make up time is required to assess the need for such an order and its effect on the children's best interests."[90]

As to conditional sentences (s. 742 of the *Criminal Code*):

> A judge is free to use s. 742 ... for guidance in imposing a conditional sentence as penalty for a contempt. However, that does not subject the judge to the constraints of s. 742. It was open to the motion judge to levy a new penalty for the appellant's breach of the sentencing order for the first contempt regardless of the requirements of s. 742 in the context of criminal contempt.[91]

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[89] *R. v. DaFonte*, 2016 ONCA 532 (CanLII).
[90] *Balice v. Serkeyn*, 2016 ONCA 372 (CanLII) at para. 18.
[91] *Astley v. Verdun,* 2015 ONCA 543 (CanLII) at para. 3.

[The next sentence – "The Ontario Court of Appeal..." – should now begin the next paragraph, such that it precedes "As in sentencing..."]

[P. 232, as new first full paragraph, to follow "exculpatory evidence.)":

Ontario authority holds that the courts cannot order a change in child custody arrangements as a punishment for contempt.[92]

[P. 232, add new paragraph just before the existing first full paragraph on the page, beginning "As noted earlier...":]

As Brown J.A. points out in *R. v. DaFonte*, where a lawyer was cited for contempt after failing to appear on behalf of a client charged with domestic assault:

> Since 2010, formal protocols have existed between the Law Society and all levels of Ontario courts under which a judge who experiences misconduct by a lawyer can refer the lawyer to the Law Society to be mentored, rather than investigated, for misconduct.1 According to the protocols, where a judge refers a lawyer for mentoring, the Law Society will arrange for a senior member of a professional organization, such as the Criminal Lawyers' Association, to conduct a mentoring meeting with the lawyer to discuss the lawyer's conduct and mentor the lawyer about the conduct in question. A judicial referral for mentoring does not constitute a complaint of professional misconduct, but a request by the court that the professional regulator provide the member with the assistance needed to address and correct inappropriate conduct.[93]

[P. 232, add to existing footnote 21, to follow "below":]

; *Mella v. 336239 Alberta Ltd* 2016 ABCA 226 (CanLII) at para. 29, holding that "sound public policy underlies the imposition of a costs order: it is the contemnors who ought to bear a substantial portion of the costs directly relating to their contempt, as this brings home the seriousness of their action and their responsibility for the consequences of their contempt: *Dreco Energy Services Ltd v Wenzel*, 2005 ABCA 185 at para 11."

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[92] *Leeming v. Leeming*, 2016 ONSC 1835 (CanLII) (Div. Ct.), at paras. 11, 30; *Chan v. Town*, 34 R.F.L. (7th) 11.
[93] *R. v. DaFonte*, 2016 ONCA 532 (CanLII) at para 36.

[P. 233, add to end of first paragraph:]

Note, however, that writing minority opinion in *Frith v. Frith*,[94] Chiasson J. seems to add nuance to this, albeit ambiguously – in a case where, over a period of years, a mother had denied a father access to their children, with the motion judge forgoing penalty insofar as "he saw efforts underway to resolve the access issue":

> Merely finally obeying a court order after there has been a finding of contempt is insufficient. Relevant to the disposition of a contempt proceeding is a contemnor's acknowledgment that it was an error to disobey the court's order and a commitment to obey in the future. ...
>
> The chambers judge stated "the awarding of costs [was] sufficient penalty" ... . Although I do not suggest that it was necessary to impose any particular penalty on the mother, a matter within the discretion of the chambers judge, in my view it was an error to equate the payment of costs with a penalty for contempt (*Weston v. Courts Administrator of the Central Criminal Court*, [1976] 2 All. E.R. 875). Costs is a matter between litigants. A contempt penalty is a matter between a person or entity and the court. As was noted by Dubin C.J.O. in *Paul Magder Furs Ltd.*, a finding of contempt "transcends the dispute between the parties".

In 2016, the appeal division of Newfoundland's Supreme Court held that "the failure to follow court orders does not invariably call for solicitor-client costs. ... But noncompliance puts solicitor-client costs on the table. In a civil contempt application, it becomes the rule and not the exception."[95]

[P. 233, new first sentence to last full paragraph (to precede "However, in Ontario":]

The British Columbia Court of appeal has held that while the "penalty for contempt may be satisfied by other means than a fine payable to the Province, such as by payment to charitable organizations harmed by the contempt ..., public policy militates against awarding the payment of contempt fines to litigants." In this case, the contemnor had persistently ignored a court order to tear down an eyesore structure in compliance with a city bylaw, and the city had sought

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[94] *Frith v. Frith*, 2008 BCCA 2 (CanLII) at paras. 1, 35-36.
[95] *Greeley Estate v Greeley*, 2016 NLCA 26 (CanLII) at para. 33.

payment of the $5,000 fine to its coffers. The court notes that contempt offends "the authority of the court and administration of justice, and [a conviction] must not appear to function as a civil action in tort or contract: *SNC-Lavalin Profac Inc. v. Sankar*, 2009 ONCA 97, followed in *City of Kamloops v. 678254 B.C. Ltd.*, 2011 BCSC 1231 (Chambers)."[96]

[Then amend "However, in Ontario at least," to:] In Ontario...

[P. 234, add to end of note 27:]

See also *Susin v. Susin*, 2014 ONCA 733 (CanLII) at paras. 39-46, distinguishing *Boily v. Carleton Condominium Corp. 145 (2014)*, 376 D.L.R. (4th) 60 – where the court ordered a fine payable to a condominium corporation – from *SNC-Lavalin Profac Inc.* on the basis that *Boily's* "principal issues were the quantum of the fine and the personal liability of the directors, and not the fact that the fine had not been made payable to the Provincial Treasurer" (at paragraph 43).

[P. 234, new paragraphs, to follow first full paragraph ending "'for contempt of court'":]

That said, in 2015 the Ontario Court of Appeal seems to have endorsed an exception to this general rule in certain family law cases. The mother had been in contempt twice of orders regarding the father's access to the parties' children. As part of her penalty following the second contempt (of a temporary order), the motion judge ordered her to pay "a fine" of $5,000 directly to the husband, plus $10,000 in costs, all of this to be set off against his arrears of child support and ongoing child support thereafter. The mother abandoned this ground of appeal, which decision the court found reasonable insofar as

> Rule 31(5) of the Family Law Rules, O. Reg. 439/07 clearly provides that a court may order payment of a penalty to a party. … [T]he motion judge clearly made the order with the child's best interests in mind. She considered the potential financial effect [of the set-off] on the child and determined, not unreasonably, that an incentive for the mother to facilitate access by the

[96] *Langford (City) v. dos Reis*, 2016 BCCA 460 (CanLII) at paras. 25-26.

> father was of greater overall benefit to the child. Moreover, the motion judge was sensitive to the concern that the child should not suffer undue economic consequences and structured the set-off accordingly.[97]

Note as well that in *Susin v. Susin*, where parties opposing the contemnor in estate litigation requested that a fine against him be quashed insofar as it would diminish his ability to satisfy his liabilities to the estate, the court agreed: given that the contemnor had spent three days in jail as part of the penalty, "a fine was not necessary in this case to meet the goals of deterrence and the need to stress the importance of respect for the court's process." As to the additional penalty prohibiting the contemnor from "from taking any further steps in this proceeding or in any proceeding to which [two of the parties opposite in the litigation] are parties, except for an appeal from today's Orders to the appropriate Appeal Court," the scope was too broad. While the motion judge's exercise of discretion merited "considerable deference," in this instance there was an error in principle. The prohibition order should be amended to add the concluding words, "without leave of the court."[98]

[P. 235, add as final paragraph to the section (12.1):]

The Uniform Law Commission's suggested "Court Orders Compliance Act" provides that, as "punishment," courts may impose prison terms of not more than six months "or a fine not exceeding $50,000 or both." To secure compliance, the court can (1) imprison the contemnor "for a fixed term, or for a term that is to continue until the order is complied with, not exceeding six months;" (2) impose a fixed fine or a fine "that is to accrue on a daily basis until the order is complied with, not exceeding $50,000 in total;" (3) order the sequestration of the contemnor's assets pending compliance; order the contemnor to provide security pending compliance; "order that the act which the [contemnor] fails or refuses to do may be done at the [contemnor's]

[97] *Rego v. Santos*, 2015 ONCA 540 (CanLII), at paras. 11 and 13.
[98] at paras. 48-49 and 52-53.

expense by the applicant or by an other person appointed by the court;" order the contemnor "to pay compensation for the loss, injury or damage suffered by the applicant as a result of the [contemnor's] failure or refusal to comply with the court order;" order such "costs as the court considers just." An explanatory note says that while the maximums of $50,000 seem preferable, "the enacting jurisdiction" should decide whether they are appropriate.[99]

12.2 Principles and procedure

[P. 235, add as new first paragraph to the section:]

As Brown J.A. writes in *R. v. DaFonte,* "Other than in exceptional circumstances where an *instanter* summary proceeding is justified, the summary procedure for contempt is subject to the requirements of natural justice, which include affording the parties an opportunity to make representations about an appropriate sentence following a finding of contempt."[100]

[P. 235, add to end of third full paragraph on page ending "rule of law itself":]

When litigants are self-represented, it is best to adjourn sentencing to allow them to consult or instruct counsel regarding submissions. This was particularly so where the court asked the contemnor to make such submissions and he became flustered, remarking that he intended to appeal with the help of counsel.[101]

The British Columbia Court of Appeal has held that the court does not err where it refuses to adjourn sentencing (here for breach of family law orders) while the contemnor applies to vary the orders breached and re-open trial.[102]

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[99] http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/720-judgments/local/contempt-of-court/1732-court-orders-compliance-act, s. 5(1).
[100] 2016 ONCA 532 (CanLII) at para. 32, citing *R. v. Arradi*, 2003 SCC 23, [2003] 1 S.C.R. 280, at para. 30.
[101] *Susin v. Susin*, 2014 ONCA 733 (CanLII) at para. 37.
[102] *Larkin v. Glase*, 2009 BCCA (CanLII) 321 at para. 39.

[P. 236, in first full paragraph (beginning "These principles"), in eighth line, after "lack of violence"add:] , and even compliance with a breached order in the interval between conviction for contempt and sentencing.[103])

[P. 238, add to end of second full paragraph (to follow "the Criminal Code.)":]

While partial compliance with a court order is not a defence to contempt for disobeying the order's terms, it can be a mitigating element in sentencing.[104]

*[P. 238, new paragraph to precede last paragraph (which begins "*In *Re Gerson...]*

Where a show-cause order stipulates that, upon finding him in contempt (here, of a court order), an alleged contemnor will be subject to a fine of not more than $5,000, it is not open to the motion court to impose a higher fine on the basis that the contemnor committed multiple breaches. Nothing in the language of such an order puts the contemnor on notice that he is accused of more than one contempt or that he will be subject to greater punishment for multiple contempts. The contempt is to be considered as a single breach.[105] Indeed, a series of judgments from the province's court of appeal are to similar effect insofar as they prohibit "bundling" contempts in a single citation without specifying that more than one contempt is in issue. Such an approach is a breach of Quebec's *Code of Civil Procedure*.[106]

[P. 236, add after last sentence on page:]

In another family law case (but without specifically limiting itself to that context), the British Columbia Court of Appeal has held that, regarding contempts, "deterrence is more important

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[103] *Langford (City) v. dos Reis*, 2016 BCCA 460 (CanLII) at para. 4. The contemnor had been in breach of the order for about eighteen months.

[104] *2363523 Ontario Inc. v. Nowack*, 2016 ONCA 951, leave to appeal refused, 2017 CanLII 32944 (S.C.C.), at para. 31.

[105] *Guignard c. St-Hyacinthe (Ville)*, 2015 QCCA 1908 (CanLII), leave to appeal ref'd 2016 CanLII 34014 (S.C.C.), citing *Syndicat de la fonction publique du Québec inc. c. Québec (Procureur général)*, 2008 QCCA 839 (CanLII).

[106] *Chamandy v. Chartier*, 2015 QCCA 1142 (CanLII). Here, although the show-cause order made reference only to contempt generally, the motion judge found that there were three occasions – of the contemnor blocking access to a servitude, in breach of a court order – and imposed a fine of $40,000 for each.

than rehabilitation." Where it was clear that the contemnor (who had breached four orders and remained in breach of support orders) was "unlikely to meet a monetary penalty," a prison term was appropriate (here, ten days, at the lower end of the range).[107]

12.4 The effects of purging the contempt and of an apology

[P. 241, add to footnote 63:]

See also *R. v. DaFonte,* 2016 ONCA 532 (CanLII) at paras. 27-28.

12.6 Procedure on appeal

[P. 243, add to end of section:]

In *Larkin v. Glase*, Glase was in contempt of four family law orders and by the time of appeal remained in breach of child support orders. He acknowledged B.C. authority that said he could not appeal those orders as long as they were not purged, but contended that the court should hear his appeal against sentence, of ten days in prison, as a distinct order. Chiasson J.A. holds for the panel that

> the authority of this Court to refuse to hear or to dismiss an appeal is not limited to disobedience of the order under appeal. The refusal to hear or to dismiss an appeal is based on the policy of this Court to protect the administration of justice by avoiding circumstances where the Court could be held in disrepute by assisting a party who has exhibited disdain for the judicial process. Whether that disdain is of the order under appeal or some other court order may be a matter this Court would take into account in considering how it will proceed, but it is not determinative.[108]

[P. 251, add new section 12.7(e), with subsequent subsection numbers adjusted (renumbered) accordingly;]

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[107] *Larkin v. Glase,* 2009 BCCA (CanLII) 321 at paras. 51 and 55-56.
[108] *Larkin v. Glase,* 2009 BCCA (CanLII) 321 at para. 31.

12.7(e) Breach of mandatory orders

[Add as last entry in the section:]

The appellant solicitor, AS, was one of three executors of a family estate. AS disobeyed various court orders requiring his cooperation in the sale of the estate's last remaining asset, an asset that AS had managed through a corporatin during the deceased's lifetime. The New Brunswick Court of Appeal accepted the motion judge's findings that the contempt had been "repeated and continuous" and constituted "obstruction and interference with the due administration of justice." It affirmed a penalty of $10,000 each against AS and the estate, with solicitor-client costs.

Schelew v. Schelew, 2016 NBCA 14 (CanLII).

12.7(e) Failure of counsel to appear in court

D, a sole practitioner, twice failed to appear in court to represent her client charged with domestic assault. Rejecting D's explanation that illness had caused her to confuse the relevant times, and her argument that her apology completely purged the contempt, the trial judge imposed a $500 fine and referred the case to the Law Society of Upper Canada for possible discipline proceedings.

Held: While there was no palpable or overriding error in the judgment below, the conviction was quashed (while the finding of contempt was upheld[109]) and the sentence was amended to an absolute discharge plus referral to the Law Society for practice mentoring. D was a young lawyer (in practice for ten years). Further:

> Although she leased space from a group of lawyers, she did not make use of any of the administrative services available through that chambers arrangement. She ran her practice out of her cellphone without putting in

[109] Query as to whether this is possible at law.

> place the administrative and technological safety nets needed to meet her professional obligations. It is obvious that [she] would benefit from assistance in organizing and conducting her professional practice.

In the circumstances, practice mentoring presented "a more proportional and effective solution ... than would resorting to the judicial contempt power."[110]

12.7(f)(ii) Professional and business regulation generally

[P. 252, as new first paragraph:]

The contemnor had agreed to a consent order to refrain from holding himself out and practising as a chiropractor. The motion judge found that his years-long disobedience of the order was "obvious, unrepentant and ongoing up to just days before his sentencing hearing." The Ontario Court of Appeal upheld the motion judge's order that the contemnor was to serve six months' house arrest, his chiropractic college had leave to obtain a writ of sequestration to seize his office equipment, and the contemnor was to pay costs of $35,000.

College of Chiropractors of Ontario v. Dies, 2016 ONCA 2.

12.7(f)(iv) Protest activity / picketing, etc.

[P. 256, add as new first paragraph to the section:]

K was a serial protester at logging operations (see next), with previous convictions for contempt of injunctions. She was 73 and participated in such protests as a matter of conscientious objection, using her age and appearance to gain notoriety for her environmentalism, and refusing to express regret, or to accept conditional sentences, fines, or community service. However, the British Columbia Court of Appeal found that the trial judge's

[110] *R. v. DaFonte*, 2016 ONCA 532 (CanLII) at paras. 38-39.

imposition of a one-year sentence without parole, albeit for criminal contempt, was disproportionate, unfit, and "well outside the range of comparable cases" – amounting to a three-year sentence under administrative practices (including "step-up") related to *Criminal Code* sentencing. (K's previous conviction had attracted a prison term of 45 days.) The majority reduced the sentence to time served (four months, "at the top of the range"), without any probation order, and discouraged "judges from making directions in contempt cases which purport to supercede the ordinary process in the administration of a jail sentence." Note that Crown counsel and provincial attorney-general agreed that the sentence was excessive. *Interfor v. Paine*, 2001 BCCA 48 (CanLII).

[P. 258, remove Sound Contracting *citation from digest of* Tilco Plastics *case (last sentence of digest.)]*

[P. 258, new subsection 12.7(f)(v), such that current subsection becomes 12.7(vi) and subsequent subsections are adjusted accordingly:]

C enjoyed a servitude (a right of way) that led to and included a beach. For three years, the contemnor, who owned an adjoining property, interfered with the servitude. When C obtained an order addressing the problem, the contemnor continued to impede access (e.g., instead of providing a key to locked gates, he obliged C to contact a security guard to open them, such that she and her guests were obliged to wait, sometimes for long periods, for access and for the ability to leave the area once they had visited the beach). Finding there had been three contempts of the order, the motion judge fined the contemnor $40,000 per contempt – $120,000 in total. The Quebec Court of Appeal reduced the fine to $10,000, ruling that it was inappropriate to impose three penalties for what essentially was cited as a single contempt. While the contemnor was a man of considerable wealth and showed no remorse, the actual

"litigious events" occurred during a short period, and following the contempt finding the contemnor ordered his security guard to remain on site during visits to the beach by C and her guests, such that they did not have to wait at the padlocked areas. The penalty "should be proportionate to the seriousness of the offence and to the degree of the offender's responsibility (by analogy to the *Code of Penal Procedure* art. 229 and *Criminal Code* s. 718.1)." This was a first offence and fines for contempts rarely exceeded $5,000 (the court likely has in mind here judgments in Quebec, under that province's civil law regime), and it was important not to set a fine that would encourage litigants to pursue contempt remedies.

Chamandy v. Chartier, 2015 QCCA 1142 (CanLII). In French, my translation.

[P. 259, current subsection 12.7(f)(v), add new digest to follow Majormaki Holdings *digest:]*

Appellants, connected with a financial services company, had repeatedly breached a *Mareva* injunction that supported an allegation that they had fraudulently used corporate funds. They continued to deal with corporate funds in violation of the injunction, and were uncooperative in arranging court-ordered examinations and production of documents, at one point "simply dumping 1,000 boxes of documents on the respondent." When respondents brought a contempt motion seeking to strike the appellants' statement of defence and crossclaim, the motion judge adjourned it to permit appellants a further opportunity to comply with existing orders. Upon reconvening, the judge found that appellants had continued to breach the orders and run the corporation in violation of the *Mareva* injunction. He found the appellants in contempt and adjourned the sanction hearing for two months, to allow the appellants to purge their contempts. Appellants continued to behave in a manner that fell short of what was ordered, even upon a further order to comply on specific terms. The Ontario Court of Appeal approved a sanction of ninety days imprisonment against the appellant corporation's directing mind, the

term to be served on weekends, and that the statement of defence and crossclaim were to be struck, "with leave to amend should [the corporate appellant] comply with the ordered disclosure," plus costs on a full indemnity basis (the latter being part of the contempt sanction). *Trade Capital Finance Corp. v. Cook*, 2017 ONCA 281 (CanLII).

[P. 259, new subsection 12.7(f)(vi), such that the subsection currently so numbered becomes (f)(vii), and subsequent subsections are adjusted accordingly:]

12.7(f)(vi) Breach of restricted court access orders

The contemnor had initiated an action against D alleging sexual battery. Given the nature of the allegations, the court granted sealing orders and a publication ban regarding the parties' identities. D alleged that the contemnor breached the ban such that graphically defamatory statements were posted about him and his wife on social media. The postings included a photograph of D and identified his employer. The court dismissed the contemnor's arguments that the defamatory postings were the result of her computer's having been hacked. It "struck her statement of claim; restrained her from contacting [D] or disclosing his identity or that of his wife, children and employer; and directed the appellant to pay costs of $217,000." The finding and penalty were upheld on appeal.

O.(R.) v F.(D.), 2016 ABCA 170.

[P. 260, new section 12.7(h) such that subsequent section numbers are amended accordingly:]

12.7(h) Breach of family law order regarding access

The mother had twice breached temporary orders permitting the father access to the couple's daughter. On appeal, the court approved an order that the mother "pay a fine of $5,000" directly to the father, with costs of $10,000, which amounts were to be set off against the father's

child support arrears and on-going child support obligation. The Family Law Rules, (O. Reg. 439/07) permitted the court to order payment of a penalty to a party, and the judge below "clearly made the order with the child's best interests in mind," taking into account the set-off's "potential financial effect on the child and determined, not unreasonably, that an incentive for the mother to facilitate access by the father was of greater overall benefit to the child."
Rego v. Santos, 2015 ONCA 540 (CanLII), at paras. 11 and 13.

Chapter Thirteen: Appeals

13.1 Generally

[P. 265, amend the first sentence in fourth paragraph, so that it now reads:]

A finding of contempt constitutes a final order, and an appeal is not "ripe" (available) until the sentencing phase of the hearing is completed.[111]

[P. 266, add as new first full paragraph (to follow "is by right.":]

However, where a party seeks a contempt finding "in the context of the bankruptcy proceeding, based on the Bankrupt's conduct in the bankruptcy," the dismissal of such a motion is "an 'order or decision of a judge of the court' within the meaning of s. 193 and the definition of 'court' under s. 2" of the *Bankruptcy and Insolvency Act*.[112] Therefore, an appeal from the dismissal (or presumably from the granting of the motion) "lies either as of right under ss. 193(a) to (d), or with leave of a judge" of the appeal court "under s. 193(e). On this analysis and in light of the unlimited introductory language of s. 193, the issue whether the challenged dismissal order is interlocutory or final is irrelevant."[113]

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[111] *Sydor v Sydor*, 2016 MBCA 102 (CanLII), citing *Willms v Willms*, 2001 MBCA 123 (CanLII).
[112] R.S.C. 1985, c. B-3.
[113] *Wallace (Re)*, 2016 ONCA 958 (CanLII) at paras. 7-8. The pertinent provisions of the *BIA* read:

[P. 266, new paragraph at end of section:]

Regarding sentencing, see Section 12.6, *Procedure on appeal.*

13.2 "Unpurged" contempts

[P. 266, add as new second sentence, and add related footnote: Sanctions can include stays[114] as well as dismissal.[115] The courts can exercise such discretion even where the litigant breaching a court order has not been cited for contempt (that is, even where there is no contempt motion against that party).[116]

[P. 266, to beginning of footnote 8 add:]

Larkin v. Glase, 2009 BCCA 321 (CanLII) at para. 31; *Elensky v. Elenskaya*, 1993 CanLII 1937 (B.C.C.A.) (CanLII).

[P. 267, add new paragraph to end of section:]

British Columbia courts will hear appeals where the contemnor provides "a convincing explanation … of the impossibility of compliance with the court order"[117] or where "the interests

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> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
> (a) if the point at issue involves future rights;
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
> (e) in any other case by leave of a judge of the Court of Appeal.

[114] *XY, LLC v. Zhu*, 2016 BCCA 276 (CanLII): contemnor fails to surrender to the appeal courts jurisdiction: fearing arrest, he has fled Canada, and now claims questionably that he is too ill to attend the appeal proceeding. "It is only in exceptional circumstances that a court will not dismiss an appeal when an appellant has repudiated the Court's jurisdiction: see *R. v. Dzambas* (1973), 14 C.C.C. (2d) 364 at 365 (Ont. C.A.). If Mr. Zhu had not filed an affidavit indicating that he is suffering from Hepatitis B and unable to travel, I would not have hesitated to dismiss the appeal."

[115] *XY, LLC v. IND Diagnostic Inc.*, 2016 BCCA 469 (CanLII).

[116] *Aalbers v. Aalbers*, 2016 SKCA 1 (CanLII): respondent in especially flagrant breach of family support obligations, seeking to appeal the dismissal of his application to vary those.

[117] *Elensky v. Elenskaya*, 1993 CanLII 1937 (B.C.C.A.) (CanLII) at para. 6.

of justice, particularly, the interests of justice as they affect the respondent [here the wife claiming breach of a support order], dictate that the appeal should be heard."[118]

13.3 Standard of review

[P. 267, add as new first paragraph, and revise the first sentence of the existing first paragraph (now paragraph two) as follows:]

In *Alberta v AUPE* the Alberta Court of Appeal provides a comprehensive guide to the standard of review on an appeal of contempt findings:

> The standard of review in considering an appeal from a contempt citation varies with the issue. Where the appeal involves a question of law, the standard of review is correctness: *Koerner v. Capital Health Authority*, 2011 ABCA 289 at para 5, 515 AR 392 [*Koerner*]. Where the issue relates to the exercise of discretion, the standard is one of reasonableness: *Broda v. Broda*, 2004 ABCA 73 at para 8, 346 AR 376. The findings of fact and inferences of fact underlying a finding of contempt are reviewed for palpable and overriding error: *Koerner* at para 5. The finding of contempt in a particular case involves the application of a legal standard to the facts, meaning it is a mixed question of fact and law and it is reviewable on the palpable and overriding error standard: *Koerner* at para 5.[119]

This expands on a similar ruling in *Ouellet v. B.M.*: *... [quotation from that case as in existing text. Revise footnote to* Ouellet v. B.M.*, so as to move the full style of cause/title for that case into the note, as part of the citation. Also, add to the end of that note:]*

See also *Demb v Valhalla Group Ltd.*, 2016 ABCA 172 (CanLII) at para. 30; *R.O. v D.F.*, 2016 ABCA 170 (CanLII) at para. 29.

[P. 268, before first para. (to follow the end of the indented quotation:]

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[118] *Ibid.*, *Berry v. Berry*, 2002 BCCA 151 (CanLII) at para. 17.
[119] (2014), 374 D.L.R. (4th) 336 at para. 15 (Alta. C.A.). See also *Friedlander v. Claman*, 2016 BCCA 434 (CanLII) at para. 52.

More recently, another bench of the court has held: "If the error alleged is a legal error, the review is on the standard of correctness. If the error alleged concerns a judge's exercise of discretion, the standard of review is reasonableness."[120]

[P. 269, first full paragraph, just before the beginning of s. 13.4]

To a certain extent this echoes the standard detailed by the British Columbia Court of Appeal:[121]

> The standard of review in considering a party found in contempt is whether an error of law was made or an error in the exercise of the discretion of the chambers judge. With respect to the former, this Court will apply a standard of review of correctness. With respect to the latter, this Court will apply a standard of review of reasonableness, usually put in terms of whether the chambers judge has given no weight or insufficient weight to relevant considerations or failed to consider relevant considerations or considered irrelevant considerations. In reviewing the valid exercise of discretion, this Court will not substitute its discretion for that of a chambers judge.

[P. 269, as the last two paragraphs in the section:]

This view is echoed in *Dagher v Glenn*,[122] a decision of Alberta's Court of Appeal:

> The decision to find a party in contempt is discretionary, as is the sanction for contempt, and both are reviewable on a standard of reasonableness. A reviewing court may not substitute its own discretion unless the chambers judge failed to give sufficient weight to relevant considerations, proceeded on wrong principles, or there is likely to be a failure of justice.

Quebec law states the standard as "*erreur manifeste et déterminante*,"[123] literally, "manifest and determinative error" but which can be translated as "palpable and overriding error."

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[120] *O.(R.) v F.(D.)*, 2016 ABCA 170 at para. 29.
[121] *Serhan (Estate of) v. Bjornson*, 2001 ABCA 294 (CanLII) at para. 8, citations omitted.
[122] 2016 ABCA 38 (CanLII) at para. 42.

13.6 Stay of orders pending appeal

[P. 269, add as new first sentence in the first para. of the section:]

As with other applications for stay of orders pending appeal, the applicable "well-known tripartite test" derives from *RJR-MacDonald Inc. v Canada (A-G)*:[124] the applicant must demonstrate (1) a serious question to be considered on appeal; (2) irreparable harm will result if the stay is not granted; and (3) the balance of convenience favours the applicant.

[P. 271, add as last paragraph in the section:]

In *Astley v. Verdun*, pending appeal the Ontario Court of Appeal granted a stay of a sentencing order consequent on Verdun's second contempt in the same matter. The first contempt finding and conditional sentencing order were for breach of an injunction, the second for breach of the sentencing order. (Verdun failed to return to Ontario when his "house arrest" was scheduled to begin.) The appeal court held that there was "an arguable issue" whether the sentencing judge "was entitled to proceed by further contempt motion rather than invoking enforcement mechanisms for breach of a conditional sentence." Verdun faced "potential irreparable harm if a stay pending appeal is not granted," and the balance of convenience favoured a stay.[125] However, the same court refused to lift a stay of an appeal of a contempt order given that the contemnor's compliance with orders in a matrimonial action – to serve and file a financial statement, respond to his wife's request for information, and supply documents relating to his purported residence in a foreign country – had been "piecemeal, vague, selective,

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[123] *Paul Albert Chevrolet Buick Cadillac inc. c. Syndicat démocratique des employés de Saguenay-Lac-Saint-Jean*, 2016 QCCA (CanLII) 558 at para. 20.
[124] [1994] 1 S.C.R. 311 at 314-315, as cited (e.g.) in *Envacon Inc v. 829693 Alberta Ltd.*, 2018 ABCA 18 (CanLII) at para. 16.
[125] *Astley v. Verdun*, 2015 ONCA 225 (CanLII; endorsement) at paras. 2-4.

and incomplete. Moreover, much of what he asserts lacks any credibility. His compliance is more a matter of form rather than of substance."[126]

[126] *Martyn v. Martyn*, 2016 ONCA 726.