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. 5, new paragraphs to follow the first sentence on the page, ending "was appointed Lord Chancellor."]

In 1875, Sir Alexander Cockburn, the chief justice, seems to have felt complicit, involuntarily, in a possible contempt of his own court and judicial person, after accepting the invitation of his friend, W.S. Gilbert, to view the first production of *Trial by Jury*. Apparently Gilbert was returning a favour, after a fashion, having attended the chief justice's performances, joining him on the bench during the so-called "Tichborne claimant" fraud. Fred Sullivan, brother to Gilbert's musical partner and composer of the operetta, had kitted himself as Cockburn, C.J., to play the judge of the satire, never mind that this personage is probably the biggest rogue of the piece, whose theme, set in a trial for breach of promise of marriage, is how pervasive cronyism, lubricious sexism, politics, and incompetence in the justice system are symptomatic of greater cultural rot. The judge enters to "Behold your judge!," an over-the-top parody of Handel at his most anthemic, lusting after the bridesmaid witnesses and then the jilted bride herself. Immediately thereafter, in the wonderful "When I, Good Friends, Was Called to the Bar," he provides his professional autobiography: as a young barrister and "impecunious party," he meets a rich solicitor who has an "elderly, ugly" (which is to say middle-aged) daughter. He and the solicitor strike a bargain: to get first-class briefs, the young barrister will marry the daughter. Soon enough, "the briefs came trooping gaily," and "many a burglar" the barrister "restore[s] to his friends and his relations." Now enjoying access to the perquisites of being a rich "nob" himself, he becomes a judge "though all my law be fudge." The former impecunious party "throws over" his older wife, and never mind his father-in-law's efforts to "disparage" his

"character high," he remains comfortably on the bench, "ready to try this breach of promise of marriage."

True to form, he is sympathetic to the defendant cad's defence that he is a cad by nature – by, in fact, the "law of nature," which dictates constant change that militates against monogamy. Consider, he argues, the waxing and waning of the moon and climate, and the inevitable melting of Monday into Tuesday:

> Consider the moral, I pray,
> Nor bring a young fellow to sorrow,
> Who loves this young lady to-day,
> And loves that young lady to-morrow.
> One cannot eat breakfast all day,
> Nor is it the act of a sinner,
> When breakfast is taken away,
> To turn his attention to dinner.
> And it's not in the range of belief,
> To look upon him as a glutton,
> Who, when he is tired of beef,
> Determines to tackle the mutton. (ll. 296ff.)

"That seems a reasonable proposition," his lordship tells plaintiff's counsel, "To which your client, I think, may agree" (ll. 319-20). Having thus reached this stalemate, never mind that the jury sees the defendant as a "monster," the judge proposes to settle the action by marrying the plaintiff himself.

Chief Justice Cockburn's review of *Trial* is not entirely surprising. As Gilbert describes it, "Although he was very fond of me personally, and very fond of music, he did not like the notion of our *Trial by Jury* at all, as he thought the piece was calculated to bring the Bench into contempt." It was clever enough and "'all that sort of thing,' but he would not go again for fear

he should seem to encourage it."[3] All the same, we might assume that a contempt citation against the operetta's production would have looked like protesting too much.

[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."[4]

[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,"[5] 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

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[3] See, e.g., Andrew Goodman, *Gilbert and Sullivan at Law* (Toronto: Associated University Presses, 1983), 61-63. The description and characterizaion of the operetta's action are mine, however.

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

[5]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.

this attempt to "nationalize" it languishes unadopted. However, the "explanatory note" fails to 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".[6]

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. 24, add as new second paragraph:]

In January, 2020, the Supreme Court of Canada dismissed an application for leave to appeal a ruling that (1) *United Nurses of Alberta* was still good law, and (2) while the advent of social media and smartphones had rendered many matters instantly and widely public, this did not change circumstances or evidence so as to blur fatally the demarcation between civil and criminal disobedience of court orders. In refusing to hold that all contempts in the digital age should now be considered civil, the British Columbia Court of Appeal had reiterated the *United Nurses* view that civil contempt is not made criminal simply because it is publicized, "but rather because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt."[7]

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

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[6] *Lymer v Jonsson*, 2016 ABCA 76, at para. 15.
[7] *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 267 (CanLII), paras. 23, 34, 47, leave to app. dism'd, January 26, 2020 (S.C.C.), citing *United Nurses of Alberta v. Alberta (A-G)*, [1992] 1 S.C.R. 901, at 931-32

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."[8]

[P. 27, as new last paragraph in the subsection, to follow, "at p. 156 (C.A.)":]

It is probably wise that these days *ex facie* contempts, particularly where there are allegations of scandalizing, are rarely styled "constructive contempts."[9] The literal-minded assumption in this old characterization seems comparable to that informing ancient rituals such as *feoffment with livery of seisin:* unless something takes place physically between the parties (the alleged contemnor and the court; the medieval seller and purchaser of real property exchanging an actual clod of dirt or a twig) it occurs only metaphorically. Surely it is obvious that one can be contemptuous of the court while out of its view and hearing, and that, as the cases constantly say, contempt doctrine does not protect the personal dignity of the judge but the integrity of the administration of justice, itself a metaphysical but also very real and contingent construct.

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).

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[8] *R. v. Devost*, 2010 ONCA 459 (CanLII).
[9] See, e.g., *In re O'Brien* (1889), 16 S.C.R. 197.

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

3.1 Jurisdiction

[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.[10]

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

[10] *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.

specifically to cease their strike and return to work immediately and to remind all members of AUPE to comply with the Directives."[11] The court applied the "Dagenais/Mentuk test"[12] to hold:

> 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.[13]

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

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[11] (2014), 374 DLR (4th) 336; 2014 ABCA 197 (CanLII).

[12] *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. *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."

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

recognizes that labour strikes necessarily entail certain annoyances, inconveniences, and disorder that can be significant for the employer."[14]

3.3(f) Self-crimination, Charter *s. 11(c)*

[Page 45, new first paragraph:]

In *Droit de famille - 122875*, a mother cited for contempt of court orders (to send her children to camp and to return custody to the father) had agreed to testify in the hope that her children would not have to give evidence, and because she felt her conduct had been misrepresented in previous contempt proceedings against her. The Quebec Court of Appeal has held that this violated her freedom from self-incrimination under both the Canadian and Quebec *Charters of Rights and Freedoms.* This was so particularly because the judge asked the mother, who was not represented by counsel, to testify before the prosecuting husband had finished presenting his case, and given that the mother had understood from the vague show-cause order that the only ground of complaint was her failure to drive the children to camp – which delinquency she admitted while conversing with the judge about the nature and mechanics of the proceedings. Note that this case provides a useful summary in general of procedure in contempt cases generally, and particularly in Quebec.[15] That said, however, at para. 47 it misstates the law on the *mens rea* necessary to found a prosecution for breach of a court order. (While remarking that the mother deliberately did not drive the children to camp, the court holds that the requisite intention to breach the order was absent given that it was the children who insisted that they did not want to go to camp, let alone return to their father's custody. Even if mother was thereby

[14] *Paul Albert Chevrolet Buick Cadillac inc. c. Thibeault*, 2016 QCCA 557 (CanLII) at para. 19 (my translation from the French).
[15] *Droit de famille - 122875*, 2012 QCCA 1855 (CanLII).

placed in an impossible position, as the court implies, this would be a matter to consider in sentencing, not in whether she intended to ignore what the order required.)

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

[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."[16]

4.2(i) Liability of the Crown and Crown officials

[P. 64, add as new first paragraph on the page, to precede the existing first paragraph:]

While a government department (here, Transport Canada) is not a legal entity capable of being sued, it can face enforcement proceedings where it fails to implement those aspects of a court order within its purview and capable of being filed and enforced in the Federal Court (as well as, presumably, in other courts). However, as an aspect of the Crown, it cannot be found in contempt of court, although its minister could be held contemptuous insofar as that official "has the statutory responsibility for 'the management and direction of the Department.'"[17]

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

[16] *Lymer v Jonsson*, 2016 ABCA 76, at para. 13.
[17] *Hughes v. Canadian Human Rights Commn*., 2019 CanLII 118898 (F.C.) paras. 38-39. That said, the minister had no duty to assure that payments were made under the order, insofar as that was the responsibility of a different ministry.

"compliance orders") "shall not be heard by the judge who made the court order in relation to which a compliance order is sought."[18]

[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.[19]

4.9 Parole

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

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

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[18] 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).

[19] *2363523 Ontario Inc. v. Nowack*, 2016 ONCA 951, leave to appeal refused, 2017 CanLII 32944 (S.C.C.), at para. 45-47..

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."[20]

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 being tried together."[21] 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

[20] *Interfor v. Paine*, 2001 BCCA 48 (CanLII) at para. 19.
[21] *Interfor v. Simm*, 2000 BCCA 500 (CanLII) at para. 25.

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."[22]

[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."[23]

5.2 Availability of contempt proceedings

[P. 72: Correct first paragraph under the indented quotation (beginning, "For example, where") by adding it to that quotation. Then, as a new paragraph under that quotation (ending "circumstances of the case"):

The Ontario Court of Appeal recently followed this dictum by finding that, although a father had breached a court order regarding access to his children, the motion judge erred in law by failing to consider whether a contempt finding was warranted in the circumstances, even though she had imposed no sanction on the contemnor. In particular, the judge erred in not exercising her discretion as to the best interests of the children: the father's intentions had been good, technically breaching the order on one occasion so that he could feed the children when he believed the mother was unable to do so. Yet he was left "with the opprobrium of a contempt

[22] 2016 ONSC 4568 (Div. Ct.) at paras. 15-16.
[23] *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.

order." The court adds, "As this court stated in *Ruffolo*,[24] it is in the best interests of the children to encourage professional assistance as an alternative to making a finding of contempt too readily. ... It is especially important for courts to consider the discretion to impose a contempt finding in high-conflict matrimonial cases such as this one."[25]

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

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."[26]

[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

[24] *Ruffolo v. David*, 2019 ONCA 385, 25 R.F.L. (8th) 144, at para. 19.
[25] *Chong v. Donnelly*, 2019 ONCA 799 (CanLII), at paras. 11-12.
[26] *R. v. D.L.W.*, 2016 SCC 22 (CanLII).

prothonotary had the power to certify that the order was a true copy, and that a carbon-copy signature on it was insufficient.[27]

[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 the opponent with an adverse finding in order to improve the chances of success at trial. This should be discouraged."[28] 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.*[29]

[P. 76, add new subsection as follows:]

5.2(a) Leave to commence a contempt proceeding

Some rules of court require that a litigant obtain leave to bring a contempt application or motion. Newfoundland's Rule 53.02.(1), for example, requires as a condition precedent an *ex parte* application for leave, which preliminary application is meant to serve "as a screening tool. It is used to ensure persons will not be subjected to this type of quasi-criminal process unless there is some good and apparent reason for doing so." The province's court of appeal has set out five "factors" for consideration during such screening:

> 1. The application is made *bona fide* and not for some ulterior and improper purpose;
> 2. The alleged contemnor has been made aware of the existence of the court order that allegedly has not been complied with;

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[27] *Procom Immobilier inc. c. Commission des Valeurs Moblières du Québec*, 1992 CanLII 3073 (QC CA).
[28] *Bassett v. Magee*, 2015 BCCA 422 (CanLII) at para. 43.
[29] *Warde v. Slatter Holdings Ltd.*, 2016 BCCA 63 (CanLII) at 49.

> 3. There is some *prima facie* evidentiary basis, beyond *de minimis*, for believing that there has been a breach of the order in question;
> 4. It is in the interests of justice, from the point of view of the maintenance of the rule of law or ensuring the enforcement of the court's orders, that the contempt power be utilized; and
> 5. Whether issuing a contempt order would be premature, in the sense that the alleged contemnor is making efforts to comply or that the order could be enforced by other less drastic means or to enforce it would work an injustice in the circumstances of the case.

That said,

> ... Although an application seeking leave for a contempt order is made *ex parte*, that does not preclude the applications judge from requiring an *inter partes* discussion or a case management meeting on the issue prior to making the decision on leave. An application for directions may be a useful tool to engage when there appear to be unclear provisions in an order leading to a party misinterpreting the order. These are a few examples of resources available to avoid the blunt instrument of contempt.[30]

5.3 Commencing proceedings; service and notice

[P. 76, add to end of footnote 24: See also *Squires v. Smith*, 2019 NLCA 54 (CanLII) at paras. 19-20.]

[P. 78, second paragraph, to precede "When the applicant serves alleged contemnors...":]

Where committal is desirable (here, a material witness warrant had been issued against the contemnor, but he was arrested only after the trial of the matter, at which he did not appear and where the accused was acquitted),

> it would have been preferable if the Crown would have filed and served a notice of motion or indictment asking that the appellant be held in custody, specifying the basis on which it was intending to proceed and the nature of the relief that it sought.
>
> In addition, written notice is preferable when, as was found by the trial judge in this case, the contempt is *ex facie* of the Court or was committed outside of the Court's knowledge, as opposed to one committed *in facie* where all the facts of the contempt are within the knowledge of the Court.

[30] *Squires v. Smith*, 2019 NLCA 54 at paras. 15-17, 42.

> ... In this case, formal notice could have avoided confusion regarding the procedure and penalty sought by the Crown.[31]

(On appeal, the contemnor argued that the court wrongly used its common-law contempt jurisdiction instead of proceeding under Criminal Code s. 708, regarding criminal failure to give evidence.) *[End the paragraph here and move subsequent existing text in this paragraph to a new one (beginning with "When the applicant serves alleged..,"]*

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

[P. 80, as last sentence to precede the existing 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.[32]

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."[33] 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 "full knowledge" of the seven previous related orders which he ignored, and "was provided a full

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[31] *R v. Asselin*, 2019 MBCA 94 (CanLII), at paras. 18-20.
[32] *Heijs v. Breuker (Trustee),* 2018 PECA 12 (CanLII) at para. 13.
[33] See also *Procom Immobilier inc. c. Commission des Valeurs Moblières du Québec*, 1992 CanLII 3073 (QC CA).

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."[34]

[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."

[P. 80, add as new first full paragraph:]

Where court rules require leave ("screening") to issue a contempt order (here, a "contempt appearance notice"), the court should be cautious not to "rubber-stamp" applications. In Newfoundland and Labrador, at least, five conditions must be satisfied:

> 1. The application is made bona fide and not for some ulterior and improper purpose;
> 2. The alleged contemnor has been made aware of the existence of the court order that allegedly has not been complied with;
> 3. There is some prima facie evidentiary basis, beyond *de minimis*, for believing that there has been a breach of the order in question; and
> 4. It is in the interests of justice, from the point of view of the maintenance of the rule of law or ensuring the enforcement of the court's orders, that the contempt power be utilized.
>
> *In Hynes v. Suncor Energy Inc.*, 2016NLTD(G)117, Hall J. concluded that an additional consideration on the issue of leave is whether issuing a contempt order would be premature, in the sense that the alleged contemnor is making efforts to comply or that the order could be enforced by other less drastic means or to enforce it would work an injustice in the circumstances of the case (paragraphs 32, 41 and 54).
>
> Regarding the second and third factors ..., it is important to ensure that there is some basis for concluding that each of the elements of civil contempt could be satisfied if the matter were to proceed.[35]

5.4 Sufficiency of the charging language

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[34] *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.

[35] *Anderson v. Nalcor Energy*, 2019 NLCA 17 at paras. 56-58, citing *True North Springs Ltd. v. Power Boland* (2000), 197 Nfld. & P.E.I.R. 143 (NFSC).

[P. 80, add to footnote 49: See also *Droit de famille - 122875*, 2012 QCCA 1855 (CanLII), at paras. 25-27.*]*

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 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.)[36]

5.6(e) Stay of contempt proceedings

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

[36] *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.

An intervening bankruptcy, however, can trigger a stay. In *Walchuk v. Houghton*,[37] 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."[38]

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.[39]

[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

[37] *Walchuk v. Houghton*, 2016 ONCA 643.
[38] Para. 10.
[39] *Syndicat de copropriétaires de Domaine de l'Éden phase 1 c. Gestion Denis Chesnel inc.*, 2016 QCCA 123.

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.[40]

5.6(f) Bifurcation

[P.98, to follow first sentence (ending "a separate sentencing phase."):]

This seems to apply even in Quebec, never mind art. 54 of the *Code of Civil Procedure*: "Judgment is rendered after summary hearing; if it contains a condemnation it must state the punishment imposed and set forth the facts upon which it is based, and in such case it shall be executed in accordance with Chapter XIII of the Code of Penal Procedure (chapter C-25.1)." [41]

[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.[42]

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

It is probably imprecise to say that the rather eccentric *Rego v. Santos*[43] 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. Carleton Condominium Corporation* 145, 214 ONCA 574), given the

[40] *Interfor v. Simm*, 2000 BCCA 500 (CanLII).
[41] *Javanmardi c. Collège des médecins du Québec* 2013 QCCA 306 (CanLII), paras. 46, 52.
[42] *Guignard c. St-Hyacinthe (Ville)*, 2015 QCCA 1908 (CanLII), leave to appeal ref'd 2016 CanLII 34014 (S.C.C.).
[43] 2015 ONCA 540 (CanLII) at para. 14.

> 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[44]). 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.[45] *[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 definition of "court" under s. 2" of the *Bankruptcy and Insolvency Act.* Therefore, an appeal from

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

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."[46]

"It is not until both phases..." *[and so on, and add to last paragraph of section, after "fulfil undertakings":]* or breaches a *Mareva* injunction.[47] *[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. 104, new first paragraph:]

Generally, "where the non-disclosure of a material fact [is] of significance to the potential outcome" of a show-cause order,

> the normal response should be to set aside the order. This is because, regardless of whether the non-disclosure was intentional, the integrity of the original decision, reached as it was in the absence of knowledge of material facts, is in doubt. It is only in situations where the reviewing court is completely satisfied that had the material facts been known, the

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

> result would inevitably have been the same, that there would be justification for allowing the order to stand.[48]

[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 compliance, the contemnor had obeyed the order in issue), the contemnor still would have been guilty beyond a reasonable doubt.[49]

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"[50] or where "the interests of justice, particularly, the interests of justice as they

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[48] *Anderson v. Nalcor Energy*, 2019 NLCA 17 at para. 88.
[49] *Guignard c. St-Hyacinthe (Ville)*, 2015 QCCA 1908 (CanLII), leave to appeal ref'd 2016 CanLII 34014 (S.C.C.).
[50] *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.

affect the respondent [in this instance a wife claimed disobedience of a support order], dictate that the appeal should be heard."[51]

5.10 Costs

[P. 110-111, add as last paragraphs 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 matter between the parties, the penalty concerns interaction between a person or entity and the court.[52] While "a judge is not precluded from making an award of special costs in circumstances where the judge has declined to make a finding of contempt but the elements of contempt have been established," the judge has the discretion to refuse a special costs order on finding that the alleged contemnor's conduct was not particularly reprehensible, "despite the apparent failure to obey the terms of the consent order." This is especially the case where it is not clear that the moving party is seeking special costs even if the contempt motion proves unsuccessful.[53]

Regarding awards of costs against counsel personally as an alternative to citing them for contempt (in light of their behaviour *as* counsel), see s. 6.3.

Chapter Six: Disobedience of Court Process and Procedures

6.3 Contemptuous behaviour by counsel in the face of the court

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[51] *Ibid.*, *Berry v. Berry*, 2002 BCCA 151 (CanLII) at para. 17.
[52] *S.(L.) v. S.(G.)*, 2016 BCCA 346 at paras. 72 and 82, citing *Frith v. Frith*, 2008 BCCA 2.
[53] *Architectural Institute of British Columbia v. Halarewicz*, 2019 BCCA 146.

[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."[54] 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.[55]

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.

[P. 118, as new last sentence to penultimate paragraph of s. 6.3(a) (to follow "behaviour contemptuous") and new final paragraph to the section:] Again, where counsel failed to set down a matter for trial within a prescribed time limit (after having successfully persuaded the

[54] *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.
[55] *Groia* at paras. 327, 329.

court to overturn a dismissal of the action for delay), counsel was acting presumptuously, not contemptuously, expecting that his failure "would be excused."[56]

This ruling anticipates higher and co-equal authority to the same effect. In 2017 the Supreme Court of Canada held, 7:2, that the power of the courts to control their process through contempt sanctions runs, in the case of misconduct by counsel, parallel with the courts' power to award costs against lawyers, and with the disciplinary powers of law societies. "If need be, [such sanctions] can even be imposed concurrently in relation to the same conduct." Contempt "is strictly a matter of law and can result in harsh sanctions, including imprisonment," and calls for "more exacting" evidentiary proof beyond a reasonable doubt. "Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt." Usually, a personal costs order is the least serious of the sanctions.[57] The Manitoba Court of Appeal has adopted this reasoning to award costs against a lawyer who failed to respect court timelines:

> In circumstances involving a court's inherent jurisdiction to award costs in common law contempt or abuse of process situations, the standard of conduct is whether "the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice" (*Jodoin* at para 29). The conduct generally contains elements of bad faith (see *Jodoin* at paras 33, 42).
>
> Contrast this with contempt and abuse of process situations where, as stated in *Jodoin*, the objective is to punish. Gascon J stated that awards of costs made against counsel personally in criminal cases are purely punitive and do not include the compensatory aspect costs have in civil cases (see para 31).[58]

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.":]

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[56] *Jadid v. Toronto Transit Commission*, 2016 ONCA 936 (CanLII) at para. 28.
[57] *Quebec (D.C.P.P.) v. Jodoin*, [2017] 1 S.C.R. at para. 21, citing I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Leg. Probl.* 23, at 46-48, and at para. 24.
[58] *R. v. Gowenlock*, 2019 MBCA 5 (CanLII) at paras. 70, 75.

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.'"[59]

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 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

[59] 2016 ONCA 532 (CanLII) at paras. 19 and 25.

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.[60]

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

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

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."

[P. 134, add new paragraph before the paragraph ending the subsection:]

Criminal Code s. 708, permitting contempt proceedings against a person "who, being required by law to attend or remain in attendance for the purpose of giving evidence, fails, without lawful excuse, to attend or remain in attendance accordingly is guilty of contempt of court," is "inclusive" insofar as it does not nullify the superior court's common law contempt jurisdiction in such circumstances. That is, in instances of failure to give evidence, the court can proceed under the section or at common law. The Supreme Court of Canada "has consistently found that those types of provisions do not oust the power of a superior court to deal with contempt pursuant to the common law. ... *Publications Photo-Police (SCC)* reinforced the notion that the fact that a contemptuous act may constitute a criminal offence does not prevent the Court from

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

citing a person for contempt."[61] The same reasoning applies to the relationship of the common law of contempt with *Code* s. 127 (criminal disobedience of a court order).[62]

[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."[63] 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

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[61] *R v. Asselin*, 2019 MBCA 94 (CanLII), at paras. 35, 42-43, citing (*inter alia.*) *Quebec (Attorney General) v. Publications Photo-Police Inc*, [1990] 1 S.C.R. 851

[62] *Ibid.*, para. 49.

[63] *R. v. Normore*, 2018 NCLA 10 (CanLII) at para. 5.

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."[64]

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[65]:

> 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.[66]

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:]

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[64] *Ibid.* at paras. 14 and 35.
[65] 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.
[66] *Ibid.*, paras. 81, 83, and 85, citations omitted.

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

[P. 133: New para. to precede the final para. on the page, beginning "In any event, the Ontario Divisional..."]

How the outcome of the main litigation can complicate contempt matters arising therefrom is particularly remarkable in *R. v. O. (L.)*, a matter before the Ontario Court of Appeal in 2018. During a police sting operation, O confessed to a murder. At trial he testified on his own behalf, to recant the confession: he had lied, he told the jury, and the murderer was in fact a friend who had shared with him the details of the brutal crime. When O refused to identify the friend, the trial judge cited him for contempt. After the jury acquitted him of the murder, the judge found him guilty of contempt and sentenced him to three years in prison, noting that whether it was he or his friend who committed the killing, a brutal murderer had not been brought to justice. On appeal, O unsuccessfully argued that in sentencing him on the contempt matter, the trial judge had ignored the jury's verdict and treated him as though he were responsible for the murder.[67] The court's judgment includes a strong dissent, however (see *infra*, s. 12.5)

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

6.7(d) Contempt by abuse of process

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,[68] what we would often describe today as "the trial of an issue." *Re Williams v. Swan and Gray*

[67] *R. v. O. (L.)*, 2018 ONCA (CanLII) 599. For more detail regarding the sentencing, see ss. 12.5 and 12.7(a).
[68] See *Hovey v. Whiting* (1887), 14 S.C.R. 515 and Blackstone III 452.

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.[69]

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." [70] 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 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

[69] *Re Williams v. Swan and Gray Coach Lines*, [1942] 4 D.L.R. 488 at 492 (Ont. C.A.).
[70] [1925] 3 D.L.R. 661 at 669-70 (Ont. C.A.), quoting Holt C.J. in *Brewster v. Kitchin* (1697), Comberbach 424.

already owed "the estate much more than his share of what remains," the estate funds having been dissipated by the litigation.[71] 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.[72]

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.[73]

[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.

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[71] *Susin v. Susin*, 2014 ONCA 733 (CanLII) at para. 20.
[72] at paras. 23 and 25-26. The italics are those of Blair J.A.
[73] 2015 QCCA 1142 (CanLII); *Chirico v. Szalas*, 2016 ONCA 586 (CanLII).

[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.*[74] 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

[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

[74] 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."

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*)."[75] The procedure is to be followed *strictissimi juris*.[76] 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."[77] The important consideration is that the affected parties have proper notice.

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

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.[78]

7.4 What is a court order?

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

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[75] *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.

[76] 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.).

[77] *Procom Immobilier inc. c. Commission des Valeurs Moblières du Québec*, 1992 CanLII 3073 (QC CA) (my translation, at 4.)

[78] *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.

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 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."[79]

Then again, the Ontario Superior Court has ruled that if a party uses material produced at discovery without understanding that it is not to be exploited for purposes beyond the litigation at hand – here, audio tapes obtained by discovery were aired on a radio show hosted by B, the alleged contemnor – there is no contempt. While B was aware of the deemed undertaking rule,[80] he believed that he could use the tapes if they were "not injurious to provider" (he contended that

[79] *Power v. Parsons*, 2018 NLCA 30 (CanLII), paras. 19-21, per White J.A.
[80] In fact, he was a principal in D.G. Jewellery, the plaintiff in the leading case in Ontario on deemed undertakings. But at para. 23, the court here rules that there existed no evidence that he "was the directing mind behind that litigation." See note 38 in the published version of this book, *infra*.

there was potential injury only to himself) and that the tapes were in the public domain. Before finding a contempt in such a case, the court must be satisfied that "the evidence establishes that [the alleged contemnor] knew of both the existence of the deemed undertaking rule and the acts prohibited by it."[81] This of course tracks the contempt law principle that one is guilty of contemptuous disobedience of a court order only if that person has knowledge of the order.

[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.[82]

[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

[81] *Konstan v. Berkovits*, 2014 ONSC 786 (CanLII).
[82] *2363523 Ontario Inc. v. Nowack*, 2016 ONCA 951, leave to appeal refused, 2017 CanLII 32944 (S.C.C.) at para. 35.

J.A., for the court, notes that in the circumstances he sees "no practical difference between failing *to obey* the orders and failing *to recognize and accept* the validly-made previous orders."[83]

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).[84]

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[83] at para. 23.

[84] *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

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.[85]

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

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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).

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

> "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, 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].[86]

[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."[87]

[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.[88] Unless the relevant labour legislation provides otherwise, the contempt in issue is not of the board but of the

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[86]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.

[87] *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.

[88] *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.[89]

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

[P. 158, as new second sentence in the section (after sentence ending "bound to obey the order.":]

This includes, for example, a wife who files legal proceedings in her own name as "a thin veneer" for what is in fact litigation by her husband, who has been declared a vexatious litigant precluded from litigating absent leave.[90]

[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.[91] 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

[89] *United Nurses of Alberta, Local 79 v. General Hospital (Grey Nuns) of Edmonton*, 1990 ABCA 65 at para.19.
[90] *Virgo v. Canada (A-G)*, 2019 FCA 167 (CanLII).
[91] "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."

"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.

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*."[92]

[P. 159, add as new s. 7.6(c), such that current 7.6(c) becomes 7.6(d):]

7.6(c) Journalists

In 2019, the Court of Appeal of Newfoundland and Labrador stipulated that where an *ex parte* injunction has been issued to control protests by indigenous peoples at a construction site, the court below errs in lumping in with alleged contemnors a journalist reporting on the protests, insofar as that journalist is not actually participating in the protest activities. The journalist here, Brake, joined the protesters in trespassing on the private property in issue, but only insofar as his work required him to do so, in the mere "grass-bruising" sense. Therefore, it was incumbent on those seeking the injunction, and seeking leave to issue contempt-hearing notices for its breach, to inform the court of the journalist's status. Insofar as they had not done this, the injunction and show-cause notice were set aside as against Brake.

The court adds that, "The importance of considering the incidental effect of injunctions and contempt on the ability of the media to perform their jobs is ... heightened in the context of the coverage of events about aboriginal issues." The point is to help "achieve the goal of reconciliation. ... Accordingly, where a journalist is covering aboriginal protests, his or her role should be a material fact disclosed and considered when an applicant seeks an *ex parte* order that

[92] *Morasse v. Nadeau-Dubois*, 2016 SCC 44, at paras. 19-43.

may reasonably have the effect of interfering or unnecessarily restricting the journalist's coverage."[93]

7.8 The ambit of the order

[P. 160, new second paragraph in this subsection:]

Similarly, one who is complicit or assists in a contempt can herself be held liable – as where a wife undertakes legal proceedings in her own name, without leave, as "a thin veneer" for what is in fact litigation by her husband, who has been declared a vexatious litigant precluded from litigating absent leave.[94]

[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.[95] 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

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[93] *Anderson v. Nalcor Energy*, 2019 NLCA 17, *passim* and at paras. 81-83.
[94] *Virgo v. Canada (A-G),* 2019 FCA 167.
[95] *2363523 Ontario Inc. v. Nowack,* 2016 ONCA 951, leave to appeal refused, 2017 CanLII 32944 (S.C.C.) at para. 15.

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 order for contempt is available where the evidence supports a finding that the alleged contemnor failed to follow the spirit of the order."[96]

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

7.9 Open, continuous, and flagrant defiance

[P. 162, add as new final para. on the page:]

In *Trans Mountain Pipeline ULC v. Mivasair*,[97] the contemnors argued that social media and electronic communication now make many matters widely and instantaneously public such that almost any civil contempt could be rendered criminal. The courts have unanimously held that this does not constitute a significant change in circumstances or evidence that should work to overturn *United Nurses of Alberta*[98] and thereby to rule that all contempts are now to be treated as civil. The fact that something might readily be made public is distinct from the

[96] *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.
[97] *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 267 (CanLII), leave to app. dism'd, January 26, 2020 (S.C.C.)
[98] *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901.

criminal act "'of defiance of the court in circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt.'"[99]

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."[100]

P. 163, add as new second paragraph:]

British Columbia courts have stipulated

> that the alleged contemnor is "entitled to the most favourable interpretation" of the order... . This does not mean, however, that the alleged contemnor is entitled to have the courts contort the language of an order to narrow its ambit. The court will interpret the order in accordance with its ordinary meaning, taking into account its context. It is only within those limits that the alleged contemnor is entitled to the most favourable interpretation of the order.[101]

- *add to footnote 91, just before the citation for* Morasse c. Nadeau-Dubois*:]* ; *Gurtins v. Goyert*, 2008 BCCA 196 (CanLII); *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; *Hama v. Werbes*, 2000 BCCA 367 (CanLII), 76 B.C.L.R. (3d) 271 at paras. 8-9, 19.

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[99] *Trans Mountain Pipeline ULC v. Mivasair*, *supra*, citing *United Nurses*, *ibid.* at 931-32.
[100] *Trade Capital Finance Corp. v. Cook*, 2017 ONCA 281 (CanLII), at para. 32.
[101] *Schmidt v. Fraser Health Authority*, 2015 BCCA 72 (CanLII) at para. 4, citing *Gurtins v. Goyert*, 2008 BCCA 196 (CanLII). See also *R. v. Dhillon*, 2019 BCCA 373 (CanLII).

- *add at end of footnote 91, to follow the citation for* Rado-Mat Holdings Ltd.: *B.(C.) v. H.(H.)*, 2018 NBCA 45 (CanLII) at para. 112 (order to pay solicitor-client costs "not free from ambiguity," given that it did not specify a date).

[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 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."[102]

[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, 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."[103]

7.11(b) Orders "impossible of compliance"

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

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

[103] *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."

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."[104]

[P. 170, new subsectin 7.14, such that the existing 7.14 becomes 7.15 and subsequent subsections are adjusted accordingly:]

7.14 Family law orders

It is frequently stated that contempt proceedings are a last resort, with special emphasis on this dictum in family law cases. Lately the Court of Appeal of Newfoundland and Labrador was stimulated to this quasi-*cri de coeur*:

> Contempt should not be the usual procedure for enforcement of court orders. Contempt is a remedy of last resort in family law matters and should not be the remedy of choice when other alternatives are available. Too often family law litigants, especially in high conflict cases, seek to use the power of contempt inappropriately. Judges are aware of this and have been provided with resources and tools to effectively manage non-compliance with court orders. The new *Family Law Rules* provide judges and litigants with a number of resources and responsibilities to manage matters coming before the court.[105]

Indeed, family law rules in other provinces now include specific contempt-related provisions and alternatives to the sanction.

[Existing] 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 ...

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

[105] *Squires v. Smith*, 2019 NLCA 54 (CanLII) at para. 41.

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* (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.[106]

[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.[107]

[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."[108]

[P. 174, add to end of note 127:]

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

And see, e.g., *B.(C.) v. H.(H.)*, 2018 NBCA 45 (CanLII) at para. 112.

[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 for a declaratory order, the party should apply for a contempt order under the *Supreme Court Family Rules*.[109]

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

[109] *Warde v. Slatter Holdings Ltd.*, 2016 BCCA 63 (CanLII) at 49.

judge had erred in proceeding on a second contempt citation, "rather than invoking enforcement mechanisms for breach of a conditional sentence."[110] Eventually, the sentence was confirmed, but 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.[111]

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

[110] *Astley v. Verdun*, 2015 ONCA 225 (CanLII; endorsement) at paras. 2-4.
[111] *Astley v. Verdun,* 2015 ONCA 543 (CanLII) at para. 3, 4.

> understanding of the role of an appellate court, which has limited inherent jurisdiction, and generally limits itself to the questions properly raised before it.[112]

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 at least Quebec and Alberta, due diligence can be an acceptable defence to breach of a court order, although the defence is defeated (according to Quebec law) by "gross indifference" (*une insouciance grossière*)[113] as well as (obliviously, considering what "due diligence" means) blatant disobedience. A 2019 Alberta judgment holds,

> As pointed out by this Court in *Envacon Inc v. 829693 Alberta Ltd*, 2018 ABCA 313 at paras 40 to 41, 75 Alta. L.R. (6th) 98 (which was another case of alleged non-compliance with an order for discovery) the alleged contemnor is entitled to plead due diligence in the effort to comply in answer to the citation [for contempt]. Recognizing the possibility of such an answer is designed to encourage efforts to comply – which is an aim effectively recognized by Rule 10.52(3)(a) of the *Rules of Court*, AR 124/2010 as amended [setting out the conditions precedent for when a judge "may declare a person to be in civil contempt of Court."][114]

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:*]*

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[112] *Brooks v. Law Society of New Brunswick*, [2015] NBJ No 78 (QL), at para. 5.
[113] *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.).
[114] *Vavrek v. Vavrek*, 2019 ABCA 325 (CanLII), at para. 11.

; *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 to act contrary to the order.)[115] 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."[116]

11.8 Order is incorrect, null, etc.

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

[115] *Chartier c. Chamandy*, 2016 QCCA 501 at para. 12.
[116] *Langford (City) v. dos Reis*, 2016 BCCA 201 (CanLII) at paras. 23-24.

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).[117]

11.13 Critical remarks about the justice system of a judge are true

[Add to end of existing paragraph in the section (ending "with justice administration"):]

However, truth is not a defence to criminal contempt, as where the contemnor publishes blog posts in violation of an order enjoining him and others having notice of the order from publishing "disparaging or defamatory statements about the Trustee, counsel for the Trustee, or any other person or entity connected to the administration of this bankruptcy." Disparaging remarks are defamatory, never mind that truth is a defence in the law of defamation.[118]

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.[119]

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.

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[117] *Procom Immobilier inc. c. Commission des Valeurs Moblières du Québec*, 1992 CanLII 3073 (QC CA) ; [1992] RDJ 561 (Q.C.C.A.)
[118] *R. v. Dhillon*, 2019 BCCA 373 (CanLII).
[119] *R. v. DaFonte*, 2016 ONCA 532 (CanLII).

[P. 230, as new penultimate paragraph on the page, to precede the paragraph beginning "In a leading Ontario case...":]

In British Columbia in 2019, contemnors had pleaded guilty to breaching an injunction by blocking access to pipeline construction. Many fellow protesters in this highly public and nationally contentious affair had been sentenced before them, some on a grid of escalating jail terms based on the dates of the offences (the later the date, generally the sentence sought was higher, on the reasoning that contemnors would be aware of the possible consequences of their conduct but would anyway defy the court order). The contemnors had been explicitly advised by police that jail terms were possible for violations of the injunction. The British Columbia Court of Appeal has held that

> there is no requirement for the Crown to give notice of its explicit sentencing position prior to the arrest of protestors on a charge of criminal contempt. Further, proof of knowledge of the Crown's escalating sentencing position is not required before a court may impose a more onerous sentence. ... It follows from the nature of criminal contempt that the longer the "open, continuous and flagrant violation of a court order" persists, the more serious the contemptuous acts become. As the circumstances of the offence become more serious, the court will understandably be less inclined to impose a light sentence. ...
>
> In short, in cases of criminal contempt, the concept of parity, as applied to the circumstances of the offence, must take into account the persistence of the "open, continuous and flagrant violation of a court order". The longer the violation continues, the greater the need for general deterrence to preserve the rule of law.

General deterrence is a significant consideration, even where the contemnors are peaceful first offenders.[120]

[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."

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[120] *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156 at paras. 47, 53.

[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."[121]

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.[122]

[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.[123]

[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:

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[121] *Balice v. Serkeyn*, 2016 ONCA 372 (CanLII) at para. 18.
[122] *Astley v. Verdun*, 2015 ONCA 543 (CanLII) at para. 3.
[123] *Leeming v. Leeming*, 2016 ONSC 1835 (CanLII) (Div. Ct.), at paras. 11, 30; *Chan v. Town*, 34 R.F.L. (7th) 11.

> 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.[124]

[P. 232, add to existing footnote 20:]

See also *Wilson v. Fatahi-Ghandehari*, 2019 CanLII 1036 (Ont. C.A.).

[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."

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

Note, however, that writing minority opinion in *Frith v. Frith*,[125] 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. ...

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[124] *R. v. DaFonte*, 2016 ONCA 532 (CanLII) at para 36.
[125] *Frith v. Frith*, 2008 BCCA 2 (CanLII) at paras. 1, 35-36.

> 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."[126]

[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 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)."[127]

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

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

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[126] *Greeley Estate v Greeley*, 2016 NLCA 26 (CanLII) at para. 33.
[127] *Langford (City) v. dos Reis*, 2016 BCCA 460 (CanLII) at paras. 25-26.

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 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.[128]

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

[128] *Rego v. Santos*, 2015 ONCA 540 (CanLII), at paras. 11 and 13.

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."[129]

[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] 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.[130]

12.2 Principles and procedure

[129] at paras. 48-49 and 52-53.
[130] 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).

[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."[131]

[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.[132]

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.[133]

[P. 236, in first full paragraph (beginning "These principles"), in the eighth line, after "lack of violence"add:] , and even compliance with a breached order in the interval between conviction for contempt and sentencing.[134])

[P. 236, to precede the second full paragraph ("These principles have been..."), add this new paragraph:]

The sentencing order must of course be clear as to what the contemnor must do. In *Mississippi Valley Conservation Authority v. Mion*, for example, the appellants breached an order to "rehabilitate and restore the wetlands to conform with the guidelines and requirements

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[131] 2016 ONCA 532 (CanLII) at para. 32, citing *R. v. Arradi*, 2003 SCC 23, [2003] 1 S.C.R. 280, at para. 30.
[132] *Susin v. Susin*, 2014 ONCA 733 (CanLII) at para. 37.
[133] *Larkin v. Glase,* 2009 BCCA (CanLII) 321 at para. 39.
[134] *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.

set by the Mississippi Valley Conservation Authority with[in] 6 months of the date of this Order or such further time period as the MVCA may permit in writing." The Ontario Court of Appeal has held that in the context of the sentencing judge's full reasons, and given that (1) "the appellants must be taken as knowing what they removed [unlawfully from a conservation area], from where and in what quantities," and (2) the contempt motion judge had excised certain portions of the order, the order was clear. The appeal court concludes:

> The appellants had rebuffed several attempts by the MVCA to engage them in complying with the order. Until the contempt motion, the appellants never took the position that the terms of the order were unclear and never made inquiries of the MVCA as to the remedial steps that had to be taken. The appellants had taken the position at the hearing of the charges against them that they were able to remediate the property.[135]

[P. 238, add the following to the end of the first full paragraph (to follow "error in principle."):]

Further, as to length of incarceration, the British Columbia Court of Appeal has ruled it inappropriate for a judge to order that contemnors are not to be offered parole on sentences of one year (here, regarding particularly contumacious protests at logging sites). The cases do not clarify whether a no-parole order is to be avoided in all contempt cases (the probable view) or specifically in ones of this nature:[136] "In a previous decision of this Court *The Queen v. Krawczyk***,** this Court decided that such a direction concerning parole was inappropriate. In this Court, counsel for the Crown concedes that the direction here is equally inappropriate and it will be removed from the sentence."[137]

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[135] *Mississippi Valley Conservation Authority v. Mion*, 2018 ONCA 691, paras. 1 and 6.
[136] *R. v. Kern*, 2001 BCCA 174 (CanLII).
[137] *Ibid.*, at para. 2. It seems that the court is referring to *Interfor v. Paine*, 2001 BCCA 48 (CanLII) at para. 19. See *infra, s. 12.7(?), Protest activity / picketing, etc.*

[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.[138]

*[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.[139] 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*.[140]

[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 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).[141]

[P. 240, to precede last paragraph, new paragraph to follow "stint in chokey.":]

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[138] *2363523 Ontario Inc. v. Nowack,* 2016 ONCA 951, leave to appeal refused, 2017 CanLII 32944 (S.C.C.), at para. 31.

[139] *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).

[140] *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.

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

During the sentencing phase of a contempt matter, it is a reviewable error not to admit fresh evidence that contemnors have purged their contempt. This does not amount to splitting their case as to whether contempt was made out.[142]

12.4 The effects of purging the contempt and of an apology

[P. 241, add to end of existing footnote 60:] See also *Wolseley Canada Inc. v. Neal Traffic Services Limited*, 2019 ONCA 276 (CanLII), holding that, during the sentencing phase of a contempt hearing, the court should permit fresh evidence as to whether the contemnors have purged.

[P. 241, add to footnote 63:]

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

[P. 243, add the following new section and text:]

12.5 Credit for time served

As with sentencing for other offences, the court may take into account time served as provided in *Criminal Code* ss. 719(3)-(3.1). The possible complications inherent in this are made clear by *R. v. O. (L.)*, a 2018 decision of the Ontario Court of Appeal.

During a "Mr. Big" police sting, O confessed to a particularly brutal murder. Awaiting trial for this crime, he spent three-and-a-half years in pre-trial custody. The confession led him to testify that he had lied during the "Mr. Big" operation, and that he knew the fine details of the crime because a friend, the actual murderer, had told him. O refused, however, to identify that person and the trial judge cited him for contempt. The jury acquitted him of the murder and, upon his subsequent conviction for the contempt by refusal to answer, the trial judge sentenced him to a three-year prison term, refusing to take time served into consideration. The appeal court

[142] *Wolseley Canada Inc. v. Neal Traffic Services Limited*, 2019 ONCA 276.

upheld this decision, agreeing with the trial judge that there was no nexus between the murder trial and the contempt:

> She did not accept that the pre-trial custody on the murder charge meant that the sentence on the contempt was "as a result of" the murder charge, concluding there was no causal relationship between two. Specifically, she stated, at para. 65: "O was convicted of contempt because he refused to comply with a lawful order of the court. The fact that he was on trial …does not create any kind of causal relationship between the charge before the court and the contempt".

The majority of the panel found that the trial judge did not in effect ignore the jury verdict, having made clear in her reasons that she was obliged to accept the acquittal on the murder charge, never mind her observations that if O were

> telling the truth about the "mystery man" who he said described to him in great detail the brutal killing ..., then his failure to name that man has enabled a killer to escape justice. Alternatively, if O was lying about the existence of the "mystery man", his refusal to answer proper questions on cross-examination prevented the authorities from being able to expose that lie and helped secure his acquittal. Either way, at least in part, O's contempt in the face of the court enables a vicious murderer to walk free in our community.[143]

It must be said that the dissent is compelling in this case. Sachs J. (sitting *ad hoc*) notes that

> that while the maximum sentence for contempt is five years, that penalty has never been imposed. The maximum sentence ever imposed on someone found guilty of contempt for the first time is three years and for someone found guilty of contempt for the second time is four years. That sentence was imposed on a witness who refused to testify at the separate trials of two other men who were charged with first degree murder in relation to an execution-style killing by drug traffickers. The witness had "engaged in a life of crime for twenty years". He was sentenced to three years for the first contempt and to four years for the second. In both cases, the witness's polite and respectful conduct was taken into account by the court as a mitigating factor.

[143] *R. v. O. (L.)*, 2018 ONCA (CanLII) 599, paras. 28 and 34.

> [O] received the same sentence as the witness described above. This is in spite of the fact that he was a youthful (19 when he was arrested) first offender who pleaded guilty, was polite and respectful to the court and who had taken steps to improve his situation in life since being released from prison.
>
> The trial judge found that [O]'s contempt was worse than that of a witness who had been subpoenaed to testify as he had a choice as to whether to testify. However, the nature of the case ... was such that he had no realistic choice but to testify. He had confessed to the murder, and his only chance of proving his innocence was to explain why he had confessed to the undercover officers and explain the presence of the corroborating evidence. ...
>
> [I]t is only because O was on trial for murder that he committed the contempt. It is true that he could have chosen to answer the questions that were put to him (and thus avoided being convicted of contempt), but that does not mean that there is no factual "nexus" between the murder charge and the contempt charge. There is clearly a nexus. ...
>
> As the trial judge points out, the purpose of the sentence of imprisonment for contempt is to protect the integrity of the administration of justice. Further, the fundamental purpose of sentencing is to contribute to a respect for the law (see s. 718 of the Code). In this case, two things happened in [O's]'s murder trial that affected the reputation of the administration of justice. The first is that O refused to answer a question that was put to him in spite of being ordered to do so by the court. The second is that O served three and half years in custody for a crime of which he was found innocent. To give effect to the first while giving none to the second undermines, rather than promotes respect for the law.[144]

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

[144] *Ibid.*, paras. 38-40, 47. Justice Sachs does not provide a citation for the comparative case, but it seems it is probably the one reported at https://www.cbc.ca/news/canada/manitoba/crown-seeks-25-year-murder-sentence-for-cansanay-1.950682 .

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.[145]

12.7(a) Refusal to be sworn or testify

[P. 244, new first entry for the subsection:]

CA gave two statements to police regarding second-degree murder charges against R. He informed the Crown that he would not attend court of testify in proceedings against R, citing a variety of reasons, including that he would be on vacation and could not afford to miss work. He added that, even if he were arrested, he would not cooperate in the prosecution. The Crown obtained a material witness warrant, but police did not arrest CA until after R was acquitted. Subsequently, CA was sentenced to nine months in prison for *ex facie* contempt. On appeal, CA argued that the sentence should have been imposed in accordance with convictions under *Criminal Code* s. 708 (treating contempt proceedings against a person "who, being required by law to attend or remain in attendance for the purpose of giving evidence, fails, without lawful excuse, to attend or remain in attendance accordingly is guilty of contempt of court,"), which attracted prison sentences of no more than 15 days.

Held: the appeal was dismissed. Sentences imposed under s. 708 "would not reflect the high level of moral blameworthiness of the appellant in this case. ... A brief review of sentences for similar offences demonstrates a range of 12 months to three years' incarceration for a first

[145] *Larkin v. Glase*, 2009 BCCA (CanLII) 321 at para. 31.

offence of contempt by persons who refuse to be sworn or testify in murder or serious violent-offence trials."

R v. Asselin, 2019 MBCA 94 (CanLII), at paras. 54, 57.

[P. 245, to follow the summary for R. v. Neuberger:*]*

In a "Mr. Big" sting, O confessed to a brutal murder. This impelled him to testify at trial for the crime that the confession was false, and that in fact a friend had committed the murder and divulged to O the details. O refused to provide the friend's identity and after the jury acquitted him of the murder, the trial judge convicted him of contempt, assessing a penalty of three years' imprisonment, with no credit for pre-trial custody of 3.5 years and never mind that he was nineteen at the time of the crime and had no criminal record. O contended that he would not have had to testify – and refuse to identify the murderer out of fear for his safety and that of his family – but for the murder trial, but the trial judge held that the murder prosecution and refusal to answer were discreet matters, and though she was obliged to respect the jury's decision, O's refusal to answer had allowed a brutal criminal to go free, whether it was himself or another person. This was affirmed by the majority of the appeal panel, Benotto J. adding for them,

> While the three-year sentence imposed was high, contempt of court is a very serious crime, which strikes at the heart of the administration of justice: *R. v. Aragon*, 2018 ONCA 124, at para. 1. It is a sanction imposed by courts "to maintain the dignity and authority of the judge and to ensure a fair trial": *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214.[146]

12.7(e) Breach of mandatory order...

[P. 251, add as last entries in the section:]

[146] *R. v. O. (L.)*, 2018 ONCA 599

The appellant participated in a $7.3 million fraud and, upon conviction, lied to the court about his subsequent failure to appear and evaded service of documents, such that the court issued a bench warrant for his arrest. Among other defaults, he had provided no information as ordered regarding transfer of assets defrauded and bank accounts, as well as a real property sale itself undisclosed in an an affidavit. The judge below had sentenced him to one year's imprisonment for contempt of court.

Held: appeal dismissed. The contemnor "was given ample opportunity to purge his contempt" but made no real effort to do so. Rather,

> during the contempt proceedings, he has attempted to deceive the court. The findings of the sentencing judge in that regard have not been appealed. Nor have the sentencing judge's findings that the contempt was brazen, deliberate and among the worst the judge has ever seen. The appellant was found to have perpetrated a $7 million civil fraud. Nothing has been recovered despite the lengthy delay given by the judge before imposing sentence. As noted by the plaintiff, the only disclosures made were of assets that had already been identified by the plaintiff and were either now out of reach or could not be located.
>
> While we agree that some of the sentencing judge's comments during the proceedings could be viewed as intemperate, we are not satisfied that they led him to impose an inappropriate sentence.
>
> Although the one-year sentence is long, we do not consider it excessive in the circumstances.

Caja Paraguaya De Jubilaciones y Pensiones Del Personal De Itaipu Binacional v. Garcia, 2018 ONSC 6569 at paras. 11-14; *Caja Paraguay de Jubilaciones y Pensiones del Personal de Itaipu Binacional v. Obregon*, 2019 ONCA 803, at paras. 4-5.

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).

[New subsection, such that subsequent ss. numbers are adjusted accordingly:

12.7(?) 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[147]) 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 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."[148]

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

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

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 paragraphs to the section:]

K was a party to placing a protestor in a tree at a logging site, in breach of an injunction. He refused to disclose the location of the "sitter," facilitating interference with the logging operation. The motion judge sentenced him to a year in prison without parole. On appeal, in accordance with *Interfor v. Paine* (see next), the court struck down the no-parole order. (It seems the court means that no-parole terms are inappropriate in contempt cases generally, but this is not clear.) As well, it shortened the incarceration term to six months, remarking that the term imposed below was much greater than those imposed in similar cases:

> [I]t is not, I think, appropriate that we should leap from sentences of two months to one year. It may be, that if the sentences in the Clayoquot Sound case [see below], in certain other cases and in this one do not sufficiently deter persons who are minded to do as this appellant did, the courts will have to impose longer sentences than the sentence which we are going to impose here.

BK 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 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. (BK'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 to follow existing 12.7(f)(iv), with subsequent subsections adjusted accordingly:]

Real property matters

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 to follow existing 12.7(f)(v), with subsequent subsection numbers adjusted accordingly:]

12.7(f)(vi) Breach of sealing and non-publication 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 (CanLII).

[P. 260, new subsection to follow existing 12.7(f), with subsequent subsection numbers adjusted accordingly:]

Breach of a remediation order

The appellants were convicted under the *Conservation Authorities Act*, R.S.O. 1990, c. C.27, of interfering with and removing material from wetlands. Subsequently, the motion judge found them guilty of criminal contempt for ignoring an order to "rehabilitate and restore the wetlands to conform with the guidelines and requirements set by the Mississippi Valley Conservation Authority with[in] 6 months of the date of this Order or such further time period as the MVCA may permit in writing." They attacked the remediation order's alleged ambiguity only once they faced the contempt motion. The motion court ordered that they pay $5,000 each, which finding was affirmed on appeal. *Mississippi Valley Conservation Authority v. Mion*, 2018 ONCA 69

[P. 260, new subsections to follow existing 12.7(g) such that subsequent section numbers are amended accordingly:]

Breach of no-contact (safeguard) orders

MA had breached a permanent injunction embodying a no-contact order fourteen times, such that he previously had been fined $5,000, subjected to a new no-contact order, and sentenced to imprisonment terms of three and six months. On this occasion, in violation of the injunction, he contacted authorities in Florida to accuse those protected by the order of bad faith and crimes such as fraud, money-laundering, and perjury. He pleaded guilty to breaching the order, whereupon the motion judge assessed a fine of $8,000. Those named in the no-contact order appealed, arguing that the sentence was inadequate.

Held: appeal allowed; sentence varied to six months' incarceration and a fine of $5,000. The sentence below was unreasonably lenient. It was necessary to impress the contemnor with the gravity of his disregard for the administration of justice. While the contemnor had promised he would not further breach the order, he lacked credibility given his prior conduct, even in the face of imprisonment and the fine. His behaviour here was nothing but a new instance of his continuing, sustained, planned, and deliberate guerilla warfare on the appellants. He was a serial, remorseless recidivist.

Bellemare c. Abaziou, 2009 QCCA 210 (CanLII) (in French)

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.

(Existing ss.) 12.7(h) Breach of family law order regarding financial matters

[p. 261, as new concluding paragraph in this subsection:]

The respondent husband wilfully breached a support order requiring him to maintain a life insurance policy toward the support of his former spouse of 28 years, who was disabled, and of their fifteen-year-old son. The husband had declared bankruptcy two months before trial of the matter. On appeal, the court granted the wife's request that a fine be paid to her directly, although not at the $5,000 demanded. Noting that under Rule 31(5) of Ontario's *Family Law Rules* contemnors could be ordered "to pay an amount to a party as a penalty," the court set the fine at $2,295, "the total amount of the monthly premiums the respondent avoided paying from when he cancelled the insurance in June 2015 for the next 17 months, and before the insurance obligation was terminated by the trial judge."

McKinnon v. McKinnon, 2018 ONCA 596 (CanLII).

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.[149]

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

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*.[150] Therefore, an appeal from the dismissal (or presumably from the granting of the motion) "lies either as of right under ss. 193(a)

[149] *Sydor v Sydor*, 2016 MBCA 102 (CanLII), citing *Willms v Willms*, 2001 MBCA 123 (CanLII).
[150] R.S.C. 1985, c. B-3.

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."[151]

Even where the sanction for contempt can be severe (in this case, striking out pleadings), the court will not extend the time for filing a notice of appeal where the contemnor has been clearly dilatory in settling the terms of the contempt order and in perfecting the appeal. Such behaviour is an abuse of the court's process, never mind that counsel claimed to have thought "that an appeal of a contempt order cannot be perfected until the sentence has been imposed."[152] Here, the deadline for filing was more than a year stale.

[P. 266, new paragraph (beginning as a quotation) to follow existing first full paragraph (ending "never be reached"):]

> Although the appeal from a finding of contempt is governed by the timelines set out in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (see *Kopaniak v. MacLellan*),[153] the appeal is usually not heard until the sanction has been imposed. ... [A] contempt proceeding has only come to a final conclusion once the sanction has been imposed. Until the motion judge has disposed of the motion, including the sanction, the appeal court will not know how serious the motion judge considered the contempt to be or how the judge intended to bring about compliance or punish the contemnor. In the words of Sharpe J.A., "[t]hese are elements integral to the nature and character of the contempt proceeding and essential to an appellate court's full appreciation of the disposition under appeal": at para. 9.

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[151] *Wallace (Re)*, 2016 ONCA 958 (CanLII) at paras. 7-8. The pertinent provisions of the *BIA* read:

> 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.

[152] *Wilson v. Fatahi-Ghandaheri*, 2019 CanLII 1036 (ON CA), at paras. 6, 10.

[153] (2002), 212 D.L.R. (4th) 309 (Ont. C.A.), leave to appeal dism'd, [2002] S.C.C.A. No. 263.

However, where the penal stage of the hearing had not been conducted for more than three years after the finding of contempt, it was appropriate for the court to exercise its discretion to hear an appeal from the finding. Still, "civil contempt proceedings should generally not be heard until the sanction has been determined."[154]

Where the question on appeal has become moot (such that "there is nothing left to appeal"), the appeal court "has no jurisdiction to make an order for contempt ... when these matters were not sought or raised before the judge making the order subsequently appealed to it." To raise the contempt matter, the litigant must return to the lower court level, where the order originated.[155]

[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[156] as well as dismissal.[157] 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).[158]

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

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[154] *Ruffolo v. David,* 2019 ONCA 385, 25 R.F.L. (8th) 144, at paras. 5-7.
[155] *Szczepanski v Jorgensen*, 2019 ABCA 354 at para. 5.
[156] *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."
[157] *XY, LLC v. IND Diagnostic Inc.,* 2016 BCCA 469 (CanLII).
[158] *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.

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"[159] or where "the interests 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."[160]

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. A.U.P.E.* 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.[161]

[159] *Elensky v. Elenskaya*, 1993 CanLII 1937 (B.C.C.A.) (CanLII) at para. 6.
[160] *Ibid.*, *Berry v. Berry*, 2002 BCCA 151 (CanLII) at para. 17.
[161] (2014), 374 D.L.R. (4th) 336 at para. 15 (Alta. C.A.). See also *Architectural Institute of British Columbia v. Halarewicz*, 2019 BCCA 146 (CanLII); *Friedlander v. Claman*, 2016 BCCA 434 (CanLII) at para. 52.

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:]

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."[162]

[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:[163]

> 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,*[164] a decision of Alberta's Court of Appeal:

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[162] *O.(R.) v F.(D.)*, 2016 ABCA 170 at para. 29.
[163] *Serhan (Estate of) v. Bjornson*, 2001 ABCA 294 (CanLII) at para. 8, citations omitted.
[164] 2016 ABCA 38 (CanLII) at para. 42.

> 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*,"[165] literally, "manifest and determinative error" but which can be translated as "palpable and overriding error."

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)*:[166] 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. In a case concerning persistent disobedience of orders to pay a judgment and provide information to the applicants, the British Columbia Court of Appeal adds that the final and most important criterion for granting a stay is "the interests of justice."[167] The Alberta Court of Appeal has ruled that "having to pay money alone" (here, a fine for contempt of court) "is not irreparable harm."[168]

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

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[165] *Paul Albert Chevrolet Buick Cadillac inc. c. Syndicat démocratique des employés de Saguenay-Lac-Saint-Jean*, 2016 QCCA (CanLII) 558 at para. 20.
[166] [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.
[167] *San Bao Investments Inc. v. Sun*, 2019 BCCA 30 (CanLII).
[168] *M.(D.) v. S.(W.)*, 2019 ABCA 422 (CanLII) at para. 12, citing *Moses v Weninger*, 2006 ABCA 52 at para 21.

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.[169] 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, and incomplete. Moreover, much of what he asserts lacks any credibility. His compliance is more a matter of form rather than of substance."[170]

In *R. v. Wood*, sixteen appellants sought a stay pending appeal of their sentences for breaching court orders respecting the construction of the Trans Mountain Pipeline in British Columbia. To simplify procedure, they applied as a group. Of those fined, most had been assessed $500. Two of the three sentenced to community service had already completed their hours. The court refused the stay, remarking that

> the decision to stay proceedings is discretionary and highly individualized. In this case, the circumstances of the appellants and the sentences they were given are not all the same. In my view, it would not be appropriate to consider whether the interests of justice favor such relief for the appellants as a group, nor would the materials filed allow me to make such a determination.

[169] *Astley v. Verdun*, 2015 ONCA 225 (CanLII; endorsement) at paras. 2-4.
[170] *Martyn v. Martyn*, 2016 ONCA 726.

> Further, the appellants have been convicted and sentenced. As must be apparent, a party is not granted relief from the consequences of their actions, and a court order, merely because they have appealed. A strong argument could be made that the public interest favours their sentences being enforced.[171]

If the appeals were successful, the court added, the fines would be returned to the appellants.

[171] 2018 BCCA 310 (CanLII), paras. 8-9.