Court File No. S-183541
Vancouver Registry

In the Supreme Court of British Columbia

Between:

Trans Mountain Pipeline ULC	Plaintiff

And:

David Mivasair, Bina Salimath, Mia Nissen, Corey Skinner (aka Cory Skinner), Uni Urchin (aka Jean Escueta), Arthur Brociner (aka Artur Brociner), Karl Perrin, Yvon Raoul, Earle Peach, Sandra Ang, Reuben Garbanzo (aka Robert Arbess), Gordon Cornwall, Thomas Chan, Laurel Dykstra, Rudi Leibik (aka Ruth Leibik), John Doe, Jane Doe and Persons Unknown	Defendants

NOTICE OF APPLICATION

Names of the Applicants:	Cadine Boechler, Victor Brice, Corina Bye, Rob Dramer, Aaron Goodbaum, Brandon Gosnell, Dianna Hardacker, Robert Allen Henrichson, Judy Kalyan, Tavin Kemp, Louise Leclair, Quin Laurence, Shannon (Joel) Mackenzie, Meeka Marsolais, Anneke Rotmeyer, Anne-Marie Mobach, Alexa Wood, Frankie McGee (the "Applicants")
To:	Her Majesty the Queen, in Right of the Province of British Columbia The Attorney General of British Columbia (the "Respondents")

TAKE NOTICE that an application will be made by the Applicants to the presiding Judge at the Courthouse at 800 Smithe Street, City of Vancouver, Province of British Columbia on **Tuesday, 29 May 2018 at 2:00 PM** for the order set out in Part 1 below.

Contents

PART 1: ORDER SOUGHT

1. The Applicants and the Respondents apply for the opinion of the Court:

> *Should the Superior Courts constituted under section 96 of the Constitution Act, 1867 unify the offenses of criminal contempt of court and civil contempt of court into one standard named, "contempt of court."*
>
> *If not, should the Respondents in this present Notices of Motion be required to prove that each of the Applicants "caused serious public injury" and not that the accused defied or disobeyed a court order in a public way.*

PART 2: FACTUAL BASIS

INTRODUCTION

2. With the consent of the Respondents, the Applicants seek an opinion of the Court, the answer of which will govern the how both the Applicants and the Respondents will proceed to resolve the contempt proceedings against the Applicants.

3. The Applicants should not be found guilty of criminal contempt of court. Instead, the court should no longer recognize and enforce a distinct common law criminal contempt of court for two reasons:

a) The modern distinction between civil and criminal contempt of court is inconsistent with section 9 of the Criminal Code and the definition of contempt of court as it existed on 1 April 1955.

b) The distinction between criminal and civil contempt of court is inconsistent with Charter values against arbitrariness under section 7.

4. Further, in the facts of this case, the court's conversion of the proceedings from one of civil contempt to criminal contempt engaged the Applicants' rights under section 11(a) of the Canadian Charter of Rights and Freedoms to be informed without unreasonable delay of the specific charge against them.

5. In this Notice of Application, the Applicants present as follows:

a) The court's jurisdiction to proceed with this application.

b) The assumed facts underlying the application, to which the Applicants expect the Respondents to agree.

c) The legal basis for the conclusion sought.

JURISDICTION TO MAKE ORDERS

6. As the Rules of Court do not apply to the present proceedings, the Applicants and the Respondents rely on the court's inherent jurisdiction to issue the opinion sought by the parties. The Respondents' decision to proceed against the Applicants, and the Applicants' pleas, will depend on the outcome of this application. The parties propose to proceed as suggested by the Court of Appeal in *R.* v. *Duong*, 2006 BCCA 325.

7. The orders sought are like the orders that the Applicants could seek under Rule 9-3 (Stated Case) or 9-4 (Proceedings on a Point of Law), and the Applicants propose a generally analogous procedure.

8. Both the Applicants and the Respondents respectfully submit that the proposed process is fair, expeditious, efficient, and allows all parties to achieve their litigation objectives while respecting this courts' process. For those reasons, the Parties ask this court to exercise its inherent jurisdiction to hear this application.

THE ASSUMED FACTS

9. The Applicants and the Respondents submit the following facts in this Part as the facts on which they rely on for this opinion.

10. On 8 March 2018, Trans Mountain Pipeline ULC ("TMP") filed a Notice of Civil Claim in the Supreme Court of British Columbia seeking, among other remedies, an injunction.

11. On 14 March 2018, TMP applied for an injunction to restrain the Defendants in this Action and persons unknown from obstructing access to TMP's facilities in the City of Burnaby, Province of British Columbia.

12. Mister Justice Affleck ordered the injunction.

13. For this application only, the parties agree that between 17 March 2018 and 16 April 2018 (the "Relevant Period"):

a) each of the Applicants, on one of the days between the Relevant Period, impeded access to TMP's facilities, contrary to the Injunction;

b) on the day that an Applicant acted contrary to the Injunction, the RCMP arrested that Applicant, along with other individuals, whom the RCMP alleges to have acted contrary to the Injunction;

c) before arresting an Applicant, the RCMP advised the Applicant specifically and expressly that he or she may be arrested for "civil contempt of court" and given an opportunity to remove themselves from the area;

d) had the RCMP advised the Applicant that they were arresting the Applicant for "criminal contempt of court," each would have vacated the area and sought to ensure that he or she complied with the Injunction;

e) on arrest, the RCMP advised each Applicant that the RCMP was arresting that Applicant for "civil contempt of court";

f) after being advised of their reasons for arrest, the RCMP provided each Applicant an opportunity to consult legal counsel; and,

g) to be released from arrest, each Applicant signed a Promise to Appear asserting, among other matters, that each Applicant was arrested for "civil contempt of court".

14. At an appearance before 11 April 2018, certain Applicants appeared before Justice Affleck. In that hearing, the court advised that it appeared the conduct at issue amounted to "criminal contempt of court" and invited the Respondent, the Attorney General of British Columbia to assume the conduct of the Contempt Application from TMP.

15. On 11 April 2018 and in court appearances after that, the court indicated that the court would not accept pleas from Applicants for civil contempt of court if the facts alleged by the Crown supported the finding that an Applicant acted contrary to the Injunction with "public defiance."

16. There is uncertainty as to the consequences to individuals who are found guilty of criminal contempt of court. To provide but two examples of the uncertainty, there are hearsay reports of individuals who are refused entry in the United States of America on the basis that they were arrested for criminal contempt of court and concerns raised by employers on being advised that an employee was convicted of criminal contempt of court.

17. Each Applicant has a reasonable concern of their ability to answer questions whether they were ever convicted or found guilty of a criminal offense.

PART 3: LEGAL BASIS

18. These proceedings engage the delicate balance between the obligations of individuals to respect the court's authority against the democratic polity's role in defining the power and discretion of the court. The court should unify criminal and civil contempt of court for the following reasons:

a) The Criminal Code limits the court's inherent jurisdiction to its definition as it was on 1 April 1955.

b) The scope of what will be criminal, as opposed to civil, contempt has extended far beyond its formulation as at 1 April 1955.

c) The distinction between civil and criminal contempt creates consequences for persons inconsistent with the values animated by the Canadian Charter of Rights and Freedoms.

d) The fundamental parameters of social debate regarding what one may reasonable characterize as private and public activity have changed dramatically since 1 April 1955 with the advent of modern communications technology that warrants a reformulation of the common law of contempt of court.

19. Alternatively, if the Court does not unify the distinction between criminal and civil contempt. Then, the Applicants ask this Court to apply the test of criminal contempt of court as that term is defined by Cory J. in the minority decision in *United Nurses of Alberta* v. *Attorney General (Alberta), infra.* In that 4-3 decision, Cory J. defined the elements of the offence of criminal contempt of court to be:

a) conduct that causes serious public injury (the *actus reus*); and,

b) the perpetrator willfully or knowingly caused the serious public injury or alternatively acted with a reckless disregard that such harm was a foreseeable consequence of the act (the *mens rea*).

THE COURT'S INHERENT JURISDICTION CANNOT OVERRIDE EXPRESS LEGISLATION

20. This Court relies on its inherent jurisdiction to try the Applicants and to find them, if appropriate, guilty of criminal contempt of court. The Attorney General has laid no information for any offense under the Criminal Code or any other federal or provincial statute. TMP commenced these proceedings under the Rules of Court; but, as noted by the Rules, this court may dispense with them when convenient and just to do so to promote the efficient administration of justice. In doing so, this Court ruled that the Civil Rules will not apply to these proceedings and expressly relies on its inherent jurisdiction. Consequently, the circumstances of these proceedings

determine this scope of this Court's power over the Applicants to find each of them in contempt of court.

21. Our courts must carefully prescribe the boundaries of their power. The Courts must not circumscribe their power to such a degree that they become unable to operate where there might be a legislative vacuum effectively. However, if the Courts define themselves too broad a role, they risk becoming unelected public decision-makers without direct democratic legitimacy – a role antithetical to our political tradition.

22. Fortunately, our courts have grappled with this issue. Superior courts possess inherent jurisdiction to ensure that they can function as courts of law and fulfill their mandate to administer justice. However, the courts' inherent jurisdiction is limited. Courts may exercise an inherent jurisdiction so long as it can do so without contravening other statutory provisions, and the courts should only exercise it sparingly and in a clear case.

R. v. *Cunningham*, 2010 SCC 10 at para. 18.
See also *Montreal Trust Co.* v. *Churchill Forest Industries (Manitoba) Ltd.*, 1971 CanLII 960 (MBCA), esp. para. 547 per Freedman CJ
Baxter Student Housing Ltd. v. *College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, per Dickson J.

23. In the context of political protest, our Supreme Court of Canada has recognized that the legislature can limit the scope of the courts' inherent jurisdiction concerning contempt of court:

> … [I]t has long been settled that under the rule of law Parliament and the legislatures may limit and structure the ways in which the superior courts exercise their powers. These inherent powers of superior courts are simply innate powers of internal regulation which courts acquire by virtue of their status as courts of law. The inherent power of superior courts to regulate their process does not preclude elected bodies from enacting legislation affecting that process
>
> …
> T]he superior courts of this country are controlled by an elaborate matrix of statute and regulation limiting the way they exercise powers over their own process. Legislation intrudes on a number of areas traditionally within the domain of the court's inherent power, including matters such as contempt of court, testimonial compulsion, the attendance of spectators, hours of sitting and the imposition of publication bans over court proceedings. Parliament and the legislatures routinely make rules limiting the scope for the exercise of the court's inherent powers in these and other areas. In every province Rules of Court limit and define the ways in which superior courts can exercise their

> inherent powers. The Income Tax Act restricts the circumstances in which courts may exercise their inherent jurisdiction to order the Minister of National Revenue to release confidential information...
>
> In the criminal sphere, s. 486(4) of the Criminal Code … removes the discretion a judge would have at common law to refuse a publication ban upon the request of a complainant or prosecutor where the accused is charged with one of the listed offenses. How a court must deal with contempts arising in certain circumstances is now prescribed in some detail (see, e.g., ss. 127(1), 708(1), 605(2), 484, 486(1)and (5)).
>
> Interestingly, in order to preserve the court's jurisdiction over contempt in s. 9, the Code specifically excludes that offense from the general withdrawal of jurisdiction over the common law offenses. The drafters clearly recognized the competence of Parliament to remove an aspect of inherent jurisdiction, and consequently the need to segregate contempt from the general provision eradicating those offenses if the courts were to retain this power.

MacMillan Bloedel Ltd. v. *Simpson*, [1995] 4 S.C.R 725, McLachlin J., (as she then was), dissenting on other grounds, at paras. 78-80
See also, *R.* v. *Imona-Russel*, 2013 SCC 43 Karakatsanis J.

24. The Rules of Court are, in determining limits on inherent jurisdiction, in the same position as formally enacted statutes dealing with the courtroom process.

Conseil scolaire francophone de la Colombie-Britannique v. *British Columbia*, 2013 SCC 42 at para. 50.

25. In the majority of cases, the court has relied on and invoked its inherent jurisdiction to address matters of procedure and form within the determination of substantive rights to address matters not contemplated by statutes or rules.

Lines v. *W & D Logging Co. Ltd.*, 2009 BCCA 107, *per* Saunders J.A.
Gillespie v. *Manitoba (Attorney General)*, 2000 CanLII 26952 (MBCA), 2000 MBCA 1
Borkovic v. *Laurentian Bank of Canada*, 2001 BCSC 337

26. Therefore, this court can only maintain a distinction between criminal and civil contempt of court if, and only to the extent that, the governing legislation allows it.

PARLIAMENT HAS SPOKEN ON CONTEMPT OF COURT

27. The legislature, through the Criminal Code of Canada, and the Rules of Court have prescribed many aspects of the offense of contempt of court.

28. The Criminal Code of Canada has a codified offense of contempt of court. Section 127 of the Criminal Code states:

> 127 (1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of
>
> (a) an indictable offence and liable to imprisonment for a term not exceeding two years; or
>
> (b) an offence punishable on summary conviction.

29. Similarly, the Rules of Civil Procedure provides for a comprehensive process by which a party may seek a ruling on contempt of court. Our Supreme Court of Canada has held that the contempt procedure must be applied strictly. Even for civil contempt of court, the standard of proof is beyond a reasonable doubt. This proposition is consistent with the court's requirement that this standard of proof be satisfied before it will commit a person to jail.

Carey v. Laiken, 2015 SCC 17, esp. paras. 30-37

30. These legislative norms demonstrate the legislative codification of the court's contempt power. The court must not exercise a contempt power in a manner inconsistent with statutory law, including the Criminal Code or the Rules of Court.

THE CRIMINAL CODE DID NOT ABOLISH COMMON LAW CONTEMPT OF COURT.

31. The common law of criminal contempt of court, however, exceeds its definition as it was on 1 April 1955. Section 9 of the Criminal Code prohibits any Court from convicting anyone for a common law offense:

> Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730 (a) of an offence at common law…

32. The effect of s. 9 generally is that it is only Parliament, not the Courts, who can now change the scope of criminal liability by creating, changing, or expanding criminal offenses.

R. v. *DLW*, 2016 SCC 22, at para. 3

33. There is an exception in s. 9 relating to the common law offense of contempt of Court. However, that provision includes a critical limitation. The Criminal Code preserves the common law offense of contempt of court *as it existed immediately before 1 April 1955.* The provision reads:

> …but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.

34. The exception to the rule outlawing common law offenses relating to contempt of court, therefore, has a significant limitation: the offense cannot be expanded beyond its scope as it stood on 1 April 1955.

35. However, without apparent consideration of this limit in s. 9, the offense of criminal contempt has expanded since 1955, due to the introduction of the "public v. private" distinction as being determinative if the conduct was criminal or civil contempt

36. Before 1955, the leading articulation of the common law in Canada was *Poje* v. *Attorney General for British Columbia*, [1953] 1 SCR 516.

37. This case set out a functional distinction between criminal and civil contempt. Specifically, the law was clear that the moving party must prove that the contempt caused "public injury" for the contempt to be criminal:

> And, generally, the distinction between contempts criminal and not criminal seems to be that contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of justice, are criminal in their nature; but that contempt in disregarding orders or judgments of a Civil Court, or in not doing something ordered to be done in a cause, is not criminal in its nature. In other words, where contempt involves a public injury or offense, it is criminal in its nature, and the proper remedy is committal—but where the contempt involves a private injury only it is not criminal in its nature.

38. That case involved defiance of a court order by a large group picketing contrary to an injunction. Kellock J. explains his reasoning in a manner that goes well beyond just asking if the conduct was "public" or not:

> It is idle to suggest that on the evidence the presence of these large numbers of men blocking the entrance to the bridge was intended merely for the purpose of communicating information. That had been very efficiently done for a considerable time by the six pickets with their signs or cards, and the notices

> at the bridgehead. The congregation of the large numbers of men at the times that the longshoremen were to arrive had no other object or effect than to present force.
>
> The context in which these incidents occurred, the large numbers of men involved and the public nature of the defiance of the order of the court transfer the conduct here in question from the realm of a mere civil contempt, such as an ordinary breach of injunction with respect to private rights in a patent or trade-mark, for example, into the realm of a public depreciation of the authority of the court tending to bring the administration of justice into scorn. It is to be observed that the nuisance created by the incidents referred to brought the appellants within the scope of s. 501 of the Criminal Code; Reners v. The King[20] . S. 165 as well as s. 573 were also infringed. There is no doubt that the appellants and those associated with them were acting in concert. Their conduct was thus entirely criminal in character in so far as these specific offenses are concerned. Over and above these offenses, however, the character of the conduct involved a public injury amounting to criminal contempt.

39. What mattered at the time of this decision was not merely whether the contemnor committed contempt in a public fashion. Instead, the critical issue was whether, functionally - was the injury suffered by the public?

40. This functional distinction was abandoned by McLachlin J. (as she then was) in *United Nurses of Alberta* v. *Alberta (Attorney General)*, [1992] 1 SCR 901. Instead, Her Ladyship held the distinction was only whether defiance was public or not:

> To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the actus reus), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the mens rea).
>
> Per McLachlin J. (as she then was) at para. 25

41. The "functional" component, of whether the public suffered the injury, and whether the administration of justice was brought into scorn, was lost. The minority of the court explicitly criticized her expansion of the law. The dissenters in *United Nurses*, written by Cory J. and concurred in by Lamer CJC (Sopinka J. dissenting from the test but writing another formulation), Cory J. wrote:

> My colleague McLachlin J. concludes that in essence all that is necessary to transform a defiance of a court order into criminal contempt is that the conduct occur in public. With respect, I cannot agree. To accept such a standard would be to ignore the basis of the distinction between criminal and civil contempt. It would replace a functional distinction derived from the separate interests which the law of civil and criminal contempt are designed to

> protect with an arbitrary distinction based on the public profile of a dispute which has resulted in the breach of a court order. I would certainly agree that the intentional defiance of a court order, which takes place in full public view, may well be a significant factor in leading a court to conclude that there had been an injury to the public interest. However, to make it the sole determining factor expands the scope of criminal contempt powers far beyond the limits necessary to achieve their end. Criminal contempt provides the court with an awesome power which may have devastating consequences. It should be exercised with the greatest restraint and caution. [Emphasis added]

42. Cory J. made clear in this passage that he saw McLachlin J. as changing the law of contempt, ignoring a functional distinction, and expanding the scope of the criminal contempt power. Instead, Cory J. set out his test, concurred in by Lamer C.J.C.:

> The actus reus for the offence of the criminal contempt must be conduct which causes a serious public injury.. Th[is]would include acts of violence or threats of violence by large groups, or activities which could lead to a serious breakdown of the social order. The requisite mens rea of the offence is that the perpetrator wilfully or knowingly caused this harm, or alternatively, acted with a reckless disregard that such harm was a reasonably foreseeable consequence of the act [edits added]
>
> Cory J. at para. 72

43. In *United Nurses,* McLachlin J. never denies Cory J.'s assertion that she is expanding the scope of the power. Instead, Her Ladyship alludes to the idea that defining criminal contempt in a manner that turns on whether the defiance is public serves to make it clear what is and is not criminal, thereby avoiding Charter problems. Her Ladyship wrote:

> Criminal contempt, thus defined, does not violate the Charter. It is neither vague nor arbitrary. A person can predict in advance whether his or her conduct will constitute a crime. The trial judges below had no trouble applying the right test, suggesting that the concept is capable of application without difficulty. Thus the case that the crime of contempt violates the principles of fundamental justice has not been made out. For the same reasons, violation of s. 11(a) and (g) of the Charter is not established, assuming arguendo that these provisions are applicable in the circumstances of the case.

44. Removing the requirement that the Court be satisfied that a person was violating an order with an injury to the public and requiring proof only of "public defiance" significantly expands criminal contempt beyond its 1955 limits. Therefore, the expansion of the current formulation of contempt of court to focus only on a

distinction between private and public acts and not the functional question of the nature of the harm is prohibited by Parliament under section 9 of the Criminal Code.

45. No reported caselaw evidence any consideration that McLachlin J. expanded the test from its definition as it was on 1 April 1955. The Applicants ask this court to do so now. However, since 1955, Canada passed the Canadian Charter of Rights and Freedoms and many of the aspects criminal contempt of court is inconsistent with the Charter.

MODERN CRIMINAL CONTEMPT OF COURT CREATES ARBITRARY LEGAL RESULTS

46. The maintenance of a distinction between civil and criminal contempt is not consistent with Charter values. Moreover, the mere requirement of "publicity" as the present *actus reus* of the offence creates significant inconsistencies contrary to values expressed by the Charter. Specifically, the distinction is inconsistent with the values underlying sections 7 and 11 of the Charter.

Not consistent with section 7

47. Section 7 of the Charter reads as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

48. As contempt, whether civil or criminal, allows the court to commit a person to imprisonment, its invocation attracts the scrutiny of section 7 of the Charter because it engages section 7's liberty interest.

49. A cornerstone principle of our law is that individuals facing state sanction should not be treated arbitrarily. The principle finds itself expressed in section 9 of the Charter:

> Everyone has the right not to be arbitrarily detained or imprisoned.

50. The courts express the same principle through principles of judicial review of discretionary decisions.

> 59(1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

…
(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
…

Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 59
Suresh v. *Canada (Minister of Immigration)*, 2002 SCC 1, *per curiam* esp. para. 29

Actus reus of mere publicity causes arbitrariness

51. Maintaining the distinction between criminal and civil contempt of court is arbitrary and creates arbitrary prejudice to the Applicants for many reasons:

a) as discussed later in this argument, in our present age of ubiquitous personal broadcasting capability, the distinction between a private disobedience of a court order and public defiance is meaningless; under the present formulation of the test, any act contrary to a court order can be, or become, public;

b) a person who commits an act of contempt cannot control whether their acts will be broadcast to the public;

c) the characterization of whether a contempt of civil or criminal occurs after the hearing of the matter, it is outside the meaningful influence or control of the person who is the subject to the hearing. For example, it was this court's direction that the contempt proceedings brought by TMP were to be characterized as criminal in nature rather than civil without prior notice to the Applicants;

d) if a person faces criminal contempt proceedings, that person does not have the statutory protections and entitlements that he or she would have enjoyed had they been charged under section 127 of the Criminal Code, including:

   i) the tested processes of procuring the attendance of the Applicants and the entitlements to the judicial interim release provisions (bail) under Part 16 of the Criminal Code; and,

   ii) express entitlements to the sentencing provisions of Part 23 of the Criminal Code;

52. These handicaps have practical consequences to the Applicants. For example, whether a person may have the benefit of legal aid funding may be initially triggered by that person being charged with a criminal offence and be subject to the provisions of the Criminal Code had they been charged under s. 127 of the Criminal Code.

Criminal contempt of court discriminates arbitrarily

53. Further, common law contempt of court exposes the Applicants to consequences that would not affect each of them had they been charged under section 127 of the Criminal Code.

> 11. Any person charged with an offence has the right
>
> (a) to be informed without unreasonable delay of the specific offence;
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> …
> (e) not to be denied reasonable bail without just cause;
>
> (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
>
> …

54. While the Applicants do not challenge the court's order directing that the Applicants would be arrested and held in custody if they did not sign an undertaking to comply with the court's order, the Applicants submit that the circumstances in which that order was made was not a "bail" hearing within the meaning of the s. 11(e) of the Charter as the decisions were not made within the framework of Part 16 of the Criminal Code, dealing with judicial interim release.

55. Respectfully, when the court ordered that the Applicant's liberty be conditional on their compliance with the court order, they were effectively arrested as their liberty was no longer absolute. Each of the Applicants was entitled to a proper bail hearing.

R. v. Rudko, 1999 ABQB 691

56. There is no evidence that any of the Applicants refused to sign the undertaking or that the Court held any Applicant in custody, hence the Applicant's demurring on a challenge to that process. However, the events illustrate the stark difference in the

process the Applicants would have experienced had they been charged under the Criminal Code rather than the ad hoc process in this proceeding.

57. The Applicants face unlimited exposure to imprisonment under the contempt process. The common law has not set an upper limit to the term of imprisonment that may be imposed on a person. The Rules of Civil Procedure do not set a maximum imprisonment sentence. In contrast, section 127 limits the imprisonment sentence to a duration of 2 years or less, expressly if charged by indictment, or by implication if tried by summary conviction.

58. This court has recognized that imposing a term of imprisonment of more than five years on an accused for contempt of court without allowing a trial by jury would contravene section 11(f) of the Charter of Rights and Freedoms.

R. v. *Krawczyk*, 2010 BCCA 542, para. 23

59. Again, this is an anomalous result. If charged under section 127 of the Criminal Code, an accused faces at most two years in jail – and enjoys the protection of a full criminal trial. However, if facing a criminal contempt proceeding, an accused faces up to five years in jail and is entitled only to summary processes.

60. The participation of the Respondents in select cases exacerbates the arbitrariness of resulting from the co-existence of criminal contempt of court and section 127 of the Criminal Code.

Not consistent with section 11.

61. Contempt proceedings attract Charter scrutiny. Specifically, our courts have long held that contempt proceedings engage the rights under section 11 of the Canadian Charter of Rights of Freedoms.

Krawczyk, ibid para. 50
Potratz v. *Potratz*, 2015 BCSC 1608

62. In this case, no one informed any Applicant that he or she faced a charge of *criminal* contempt of court until she or he appeared before the Court. In fact, the RCMP, both before and on arrest, advised each Applicant that each of them was being arrested and charged with *civil* contempt of court. As such, each of the Applicants was deprived of their rights to be informed without unreasonable delay of the specific offense alleged against them.

Summary of Charter inconsistency

63. Since 1955, the Charter requires the courts to fashion the common law consistent with Charter values. Section 7 requires the common law not to impose arbitrary consequences or processes on people. Section 11 requires the state to notify people of the specific charges against them so that they can exercise their other rights. Though the two offences seek to enforce a similar value – compliance with the court's authority – proceedings under the criminal contempt of court power and section 127 of the Criminal Code impose expose people to different jeopardy.

64. In these proceedings, that the court – on its own motion – directed the Respondents to assume conduct of the proceedings without prior notice to the Applicants exacerbates the confusion caused by this distinction. This proceeding began as the enforcement of TMP's **private rights**. However, with the participation of the RCMP and the Respondents, this proceeding has morphed functionally into that of a **public prosecution** – but with few of the protections, rights, and entitlements that are owed to the Applicants.

COMMON LAW MUST EVOLVE

65. Rather than maintain, though restrictively, the criminal contempt of court power to the *Poje* test, this court should reformulate the contempt power altogether and end the distinction between criminal and civil contempt. Our courts modify the common law to meet the needs of modern, evolving society. Specifically, the common law must evolve to respond to social realities and to be consistent with Charter values. Determining if a matter is criminal or not based solely on whether it was done "publicly" is no longer workable given the dramatic and fundamental change in what is "public."

R. v. *Salituro*, [1991] 3 S.C.R. 654, 1991 CanLII 17
R. v. *Marakah*, [2017] 2. S.C.R 608, 2017 SCC 59

66. The issue of what constitutes "public defiance" was never thoroughly explained in *United Nurses,* but, in 1993, the Court did not have in mind the expansion of the public sphere caused by modern technology. It is no longer principled nor practical to distinguish a contempt of court based on whether there is public defiance or public harm or not. Rather, the emergence of social media, ubiquitous recording capability and private broadcast facilities are massive changes in social practice that constitutes

a fundamental change in the parameters of the debate in what constitutes a "public act."

Carter v. *Canada (Attorney General)*, [2015] 1 S.C.R. 331

67. In the modern age of social media, communications mobility, and the dramatically lower cost of broadcasting and publishing, even one private individual can reach a range of the public not contemplated in 1955 or 1992. To say that proof of public defiance can be proven when someone commits a contempt "in public" obscures the reality of the power of modern communication media channels, including social media and mobile messaging channels, to greatly expand what could be "public."

68. It has become arbitrary to change the characterization of an offense from that merely as being a wrong against the civil order to one of criminal act merely by whether the act of defiance is "public." An act committed, even in the privacy of one's home, can be broadcast across the entire world through all manner of social media platforms. Any party to a private dispute could choose to "criminalize" any private contempt he or she might witness by pulling out a smartphone, recording the event, and broadcasting it widely.

69. For these reasons, the courts should no longer maintain the distinction between civil and criminal contempt. The public debate and attention, and the attendant risk to the social order which criminal contempt seeks to guard against can be engaged by the failure to comply with a court order if it is broadcast in any way, including a text message, blog post, podcast, or on social media channels. To suggest otherwise is to deny the reality of modern-day life. Therefore, the distinction of contempt between civil and criminal based on a legal test of whether the contempt was made with public defiance no longer has any practical utility and has become arbitrary, and should no longer stand. Violating a court order is always an offense to public order – and is a defined offense in the *Criminal Code*. To the extent that the court wishes to punish more public acts of contempt with more severity, the court may incorporate the degree to which the contempt was broadcast as an aggravating factor on sentencing.

70. The Applicants accept that the court must retain the power to control its own processes. Section 127 of the Code expresses the norm that the public has a general interest in enforcing compliance with the court's authority. The court's contempt

power animates the court's need to control its own processes and its own specific interest in enforcing compliance with its authority. However, while similar, these norms are distinct. The court's power is focused on the need for it to control its own processes. The Criminal Code authority focuses on the principles expressed in its sentencing principles, such as the need to express general and specific deterrence and denunciation.

71. To that end, the two regimes impose different consequences on individuals. A finding of contempt of court does not necessarily create a record of wrongdoing committed by the Applicants that may find itself in the possession of an international border agent – whereas a criminal conviction will. A person may be required to disclose to an employer that they, at one point, posed a risk to public order as evidenced by a conviction of section 127 of the Criminal Code. However, that person may not necessarily have to disclose their participation in an act of civil disobedience in a contentious matter of public debate to an employer.

72. Maintaining criminal contempt of court and enforcing such contempt with the weight of the court (acting on its own motion) and the Respondents' institutional force and resources unnecessarily exacerbates the prejudice resulting from this different treatment. Maintaining a distinct common law criminal contempt of court and civil contempt of court is not merely an argument about labels and semantic. It has practical and serious effects on the Applicants lives. The Applicants expressed their honestly held conscience. Though each of them must acknowledge each acted contrary to the Injunction as a matter of civil disobedience, labelling them as criminals is unjust.

CONCLUSION

73. Nothing in these submissions suggests that the court should not have the power to control its processes and to enforce them with the contempt power. However, the court cannot use its powers in a manner inconsistent with modern life and Charter values. Unifying civil and criminal contempt allows the court to maintain its ability to control its processes, maintain the flexibility required to fashion remedies to ensure compliance with its processes through the diversity of situations it is required to navigate, and do so while respecting the role of the legislature in defining, enforcing, and administering criminal law.

74. Alternatively, the Applicants seek a direction from the court that the Crown must prove more than that the Applicants (and all persons subject to the Respondents Notice of Motion) committed their acts in public. Rather, the Crown must beyond a reasonable doubt that each of the Applicants caused serious public injury and that each of them intended to cause, or was reckless as to whether their acts would cause, serious public injury.

75. Finally, to the extent that the courts maintain their contempt power, the Applicants submit that the court ought to consider and adopt the following factors when fashioning future processes to enforce contempt of court that are consistent with the prevailing Rules of Court:

a) Courts should only imprison contemnors using summary procedures when the contempt is *in facie curiae*, that is, contempt in the face and presence of the court.

b) If the court considers, on application by a private party, to find a person in contempt on a matter *ex facie curiae*, such as a breach of an injunction, then the court should not consider imprisonment as a remedy unless the proceedings have been consistent with all *Charter* requirements:

    i) The initiating party has applied for relief and established reasonable and probably grounds for an arrest warrant under Form 115 to issue.

    ii) Arresting officers executing a Form 115 warrant should comply with all *Charter* requirements, including those processes directed by sections 10 and 11 of the Charter.

c) Parties seeking an order of committal should ensure that they comply with, and ensure the court complies with, section 11 of the Charter.

d) The court should only direct the peace officers to support the enforcement of an order, such as a mandatory or restrictive injunction, in the rarest of cases.

e) To the extent that the courts have a concern about the public nature of defiance, the courts should only direct the Attorney General to consider charges under section 127 of the Criminal Code or another relevant statute. Otherwise, the court must rely on the party seeking to enforce the injunction to execute the injunction and its enforcement in compliance with the *Charter*.

76. In these proceedings, if this Court provides the opinion sought in this Application in the affirmative, then the Applicants will seek:

a) a dismissal of their charges on the basis that they have been charged with an offense that no longer exists; or,

b) if the Crown proceeds against the Applicants for civil contempt of court, then the Applicants intend to seek a stay of proceedings on the basis that the proceedings to date have prejudiced their ability to make a full answer and defense through their participation in these proceedings.

77. If the Court answers the opinion sought in the negative, then the Applicants will govern themselves accordingly at the trial of their charges.

PART 4: DOCUMENTS RELIED ON

See attached Schedules

The Applicants estimate that the application will take 2 hours. *The Applicants seek an order requiring the court to make a final disposition.*

DATED: 28 May 2018

Chilwin C. Cheng
Ascendion Law
Solicitor for the Defendants

[X] This matter is NOT within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days after service of this Notice of Application,

(a) file an application response in Form 33,
(b) file the original of every affidavit, and of every other document, that
(i) you intend to refer to at the hearing of this application, and
(ii) has not already been filed in the proceeding, and
(c) serve on the applicant two copies of the following, and on every other party of record one copy of the following:
(i) a copy of the filed application response;
(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs *[specify]* of Part 1 of this notice of application

[ ] with the following variations and additional terms: *[specify]*

Dated: _____

Signature of
[ ] Judge [ ] Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

[ ] discovery: comply with demand for documents
[ ] discovery: production of additional documents
[ ] other matters concerning document discovery
[ ] extended oral discovery
[ ] other matter concerning oral discovery
[ ] amend pleadings
[ ] add/change parties
[ ] summary judgment
[ ] summary trial
[ ] service
[ ] mediation
[ ] adjournments
[ ] proceedings at trial
[ ] case plan orders: amend
[ ] case plan orders: other
[ ] experts