



Know Your Rights

Injunctions and

Contempt of Court

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Note: This resource is for informational purposes only, and does not constitute legal advice. If you are arrested for contempt of court, contact a lawyer.

On January 7, 2019, fourteen people were arrested at the checkpoint on Gidumt'en Territory, a part of the Wet'suwet'en Nation. The majority of those arrested were charged with contempt of court for allegedly breaching the injunction granted to Coastal GasLink in December of last year. In this resource, I will be answering the following questions that have emerged since the arrests:

- What is an injunction?
- What is contempt of court?
- What are your rights when you go to court on this charge?

Before I answer these questions, I want to set out some of the legal context for the territories on which the arrests took place. No treaty has been concluded between the Crown (i.e. the federal or provincial government) and the Unist'ot'en or any of the Wet'suwet'en with respect to their territories. Therefore, their land rights continue unextinguished.¹ As has been recognized in a series of Supreme Court of Canada cases,² what is known in Canadian law as "Aboriginal Title" includes

the right to use, manage, possess land, and to decide how land is to be used. Aboriginal Title also means that the Crown must obtain consent from the First Nation to use that land. In turn, the First Nation can exclude the Crown and others from using the land.

The clans of the Wet'suwet'en have governed and controlled their territories for thousands of years prior to the Crown's arrival to assert its claim in 1846. Wet'suwet'en laws and governance system operated prior to the arrival of the Crown, and have continued to operate since. The Unist'ot'en have, according to Wet'suwet'en law, adopted the Unist'ot'en Declaration, which is direct evidence of the Wet'suwet'en's continuous governance and control over their territories.

While we recognize Wet'suwet'en law and governance system, the information below relates to Canadian law and legal system, under which the people arrested on Gidumt'en Territory will be prosecuted.

1 See *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

2 See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 and *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

What is an Injunction?

An injunction is a court order that is intended to prevent one party from interfering with the legal rights and interests of another party. A party to an injunction may include an individual, a corporation, a government, or a First Nation. In order to prevent one party from interfering with the legal rights and interests of another, injunctions contain terms that prohibit particular conduct. For example, one of the terms in the Trans Mountain (a.k.a. “Kinder Morgan”) pipeline injunction is intended to prevent people from:

“physically obstructing, impeding or otherwise preventing access by Trans Mountain, its contractors, employees or agents, to, or work in, any of the sites or work areas set out...”

In addition to the above, the Trans Mountain injunction contains what is known as an enforcement clause. Most injunctions contain an enforcement clause, which provides police with the legal authority to arrest people who they have reasonable and

probable grounds to believe have breached one of the terms of the injunction. However, in arresting people, police action must not constitute “misconduct” under Part 11 of British Columbia’s Police Act.³

In the context of a resource extraction project, such as the Trans Mountain pipeline, an injunction is part of a pending civil lawsuit. The process is as follows. Firstly, the corporation, such as Trans Mountain, files a civil claim against the parties (i.e. the “protesters”) it alleges are interfering with its legal rights and interests. The corporation’s civil lawsuit may include a claim for damages due to interference with economic relations⁴ or interference with contractual relations.⁵ Secondly, the corporation applies for an injunction to further prevent interference with its legal rights and interests while the civil lawsuit is being litigated. An injunction may be granted on a temporary or permanent basis. While an injunction is in place, the corporation can bring charges of civil contempt of court against people who breach one of the terms of the injunction.

³ See *Police Act*, RSBC 1996, c. 367, [Part 11](#).

⁴ An intentional civil tort that allows a plaintiff to sue a defendant for economic loss resulting from the defendant’s unlawful act against a third party: see *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, [2014 SCC 12](#).

⁵ An intentional civil tort that constitutes the act of intentionally causing harm to another by tortious interference with a contract by a person who attempts to induce a party who has a contractual relationship with the plaintiff to breach that contract.

What is Contempt of Court?

Contempt of court is a common law offence for knowingly breaching a court order, such as an injunction. The offence dates back to twelfth-century English law, and remains part of Canadian law to this day.⁶ Superior courts, such as the BC Supreme Court, have powers to preserve the Rule of Law principle under the Canadian constitution. In order to preserve the Rule of Law, the Constitution provides superior courts with the power to issue legally-binding orders against individuals, corporations, or governments. It also provides superior courts with the power to enforce those orders by way of contempt of court charges and proceedings.

We note that, while superior courts have the power to preserve the rule of law within the Canadian state, what is at stake in the dispute over control of Unist'ot'en land is what the rule of law means—i.e. which law rules—in the context of a dispute between the Crown and the Wet'suwet'en. Within this dispute, the assertion that the “rule of law” must be obeyed negates answering the fundamental question of who has the right to control and use the land.

Civil vs. Criminal Contempt of Court

There are two types of contempt of court: civil contempt and criminal contempt. Civil and criminal contempt are similar but separate offences. In a civil contempt case, the dispute is private in nature; that is, between a private party who alleges the contempt and the person accused of contempt (a.k.a. the “contemnor”). In a criminal contempt case, the dispute is public in nature; that is, between the Crown and the contemnor. Proceedings for both civil and criminal contempt of court are heard in the BC Supreme Court. Proceedings for civil contempt of court are governed by Rule 228 of the [Supreme Court Civil Rules](#), B.C. Reg. 168/2009. Proceedings for criminal contempt are governed by the conventions of a summary criminal trial.

For civil contempt of court, the private party alleging the offence must prove beyond a reasonable doubt (the criminal standard of proof) that:

1. There is a valid court order prohibiting the alleged conduct.
2. The accused has breached a term of the court order.
3. The identity of the person who committed the breach is the accused.
4. The accused had knowledge of the court order.⁷

⁶ See *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at para. 20.

⁷ See *MacMillan Bloedel Ltd. v. Simpson*, 1994 CanLII 738 (BC SC) (“*MacMillan*”).

For criminal contempt of court, the Crown must prove beyond a reasonable doubt the four elements of civil contempt (above) plus the two following elements:

5. The conduct of the accused is of a public nature, open, continuous, and flagrant [i.e. the Actus reus—the act that constitutes a crime].
6. The accused's intent, knowledge or recklessness that public disobedience tends to depreciate the respect for orders of the court [i.e. the Mens Rea—the mental state required to commit a crime]⁸

Contempt of court is an unusual offence. A charge for civil contempt can be converted into a charge of criminal contempt during the course of a court proceeding. A charge for civil contempt can be converted if, based on the accused's alleged conduct, the Crown believes that the accused knew, intended, or was reckless in knowing that their conduct constituted a public defiance of a court order.⁹ In the context of an injunction, public defiance may include breaching one of the terms of the injunction in front of television cameras or on social media platforms, such as Facebook or Twitter. If the Crown believes that the conduct constitutes criminal contempt, the party who was granted the injunction will step aside, and the Crown will assume control of the prosecution.

There have been several high-profile cases in which charges for civil contempt of court were converted into criminal contempt, including the MacMillan Bloedel (i.e. Clayquot Sound¹⁰) and Trans Mountain (i.e. "Kinder Morgan")

cases. In the recent Trans Mountain cases, people were arrested for civil contempt of court, but were tried for criminal contempt when Crown assumed control of the prosecution from Trans Mountain. Because this is commonplace in the context of protests, the remainder of the information relates primarily to criminal contempt of court.

What Are Your Rights in a Criminal Contempt of Court Proceeding?

Criminal contempt of court is a common law offence that is not codified in the Criminal Code, RSC, 1985, c. C46. However, [Section 9](#) of the Code sets out powers of superior courts to hear charges of criminal contempt of court.

A proceeding for criminal contempt is similar to a summary criminal trial. At trial for criminal contempt, you have the following rights:

- the right to cross-examine witnesses;
- the right to give evidence or call evidence on your behalf;
- the right to make submissions in relation to both guilt and punishment; and
- the right to be presumed innocent and to require proof beyond a reasonable doubt.

However, you have no right to a trial by jury.¹⁰

⁸ *MacMillan, ibid.*

⁹ See *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 90 ("*United Nurses*"), at p. 903.

¹⁰ See *British Columbia (Attorney General) v. Mount Currie Indian Band*, [1991] 4 W.W.R. 507 ("*Mount Currie*"), at para. 38.

What are the Potential Defences for Criminal Contempt of Court?

Due to the nature of the offence of criminal contempt of court, the potential defences are limited. Last year, I spoke with Neil Chantler, a Vancouver-based lawyer who represented a number of people charged with criminal contempt of court for protesting the Trans Mountain pipeline. I asked Mr. Chantler about defending against a charge for criminal contempt of court.

Q: What are the common defences for a charge of criminal contempt of court?

A: Common defences include proving the terms of the injunction aren't sufficiently clear, or the defendant's conduct wasn't actually in breach of terms of the order. Some defendants have argued duress or necessity, but these defences have rarely been successful.

Q: How do you approach this particular defence?

A: We start by dissecting the injunction, and then the facts alleged against the accused. We dissect both down to their microscopic level. The injunction has to specify exactly what conduct is

prohibited, and it must do so clearly. There must be no room for ambiguity in the terms of the order, as to what conduct is prohibited. An accused cannot be in contempt for breaching an injunction that is not sufficiently clear. We then look at the evidence of the accused's conduct. Does it show the accused breached the injunction on the civil standard of proof?

Q: What are some other potential defences?

A: There aren't many, which is a problem. Many of the traditional criminal law defences aren't available.

Q: Why is that?

A: It is a well-established principle of law that you can't attack the legitimacy of the injunction you are alleged to have breached. You cannot argue issues of entitlement to the land, for example. Those arguments had to be made at the time the injunction was granted, or in a subsequent application to quash the injunction. To argue the injunction was improperly granted is called a "collateral attack".

What is the Collateral Attack Rule?

The Collateral Attack Rule is based on two principles. The first principle is that a court order, such as an injunction, is valid and binding until it is varied or set aside by the court.¹¹ The second principle is that the validity of a court order cannot be “attacked” in a proceeding other than that in which the question before the court is whether or not to vary or set aside the order.¹²

In the context of an injunction, a collateral attack is when a person accused of contempt of court for breaching the injunction challenges the validity of that injunction in a contempt of court proceeding. The “attack” is considered “collateral” (or secondary) because the question before the court in a contempt proceeding is whether or not the accused knowingly breached the injunction. The validity of the injunction is not the question in a contempt proceeding. However, the validity of the injunction can be challenged in a separate proceeding in which the question before the court is whether or not the injunction should be granted, varied, or set aside.

To illustrate how the Collateral Attack Rule works, I will break down two types of BC Supreme Court proceedings. These two proceedings relate to injunctions and

contempt of court. The first proceeding (“Proceeding A”) is one in which an application to grant, vary, or set aside an injunction is heard. The second proceeding (“Proceeding B”) is one in which an allegation of contempt of court is heard.

Proceeding A: Proceeding to Grant, Vary, or Set Aside an Injunction

While proceedings to grant, to vary, or to set aside an injunction are separate applications and separate hearings, I will refer to them as one “proceeding” for the purposes of this explanation. In a hearing to apply for an injunction, the question before the court is whether or not the injunction should be granted to the party seeking it. At that hearing, the party seeking the injunction presents evidence as to why the injunction should be granted. The party opposing the injunction presents evidence as to why the injunction should not be granted. Based on the evidence, the judge decides to either grant or not grant the injunction. If the injunction is granted, the party who opposed it in the first hearing can apply to vary or set it aside in a subsequent hearing. In that subsequent hearing, both parties will have the opportunity to present evidence as

¹¹ See *United Nurses*, *supra*, at p. 935.

¹² See *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, at para. 60.

to why the injunction should be varied or set aside.

Proceeding B: Proceeding for Contempt of Court

While a proceeding for contempt of court is related to the injunction, it is separate from proceedings to grant, vary, or set aside the injunction. The question at a contempt of court proceeding is whether or not the party accused of contempt knowingly breached the injunction. The party who alleges contempt of court presents evidence to show that the accused breached the injunction. In a civil contempt of court case, the party who was granted the injunction will present the evidence. In a criminal contempt case, the Crown will present the evidence. The accused will have the opportunity to plead guilty or not guilty to the charge. If the accused pleads not guilty, they will have an opportunity to raise a defence against the charge.

Collateral Attack

In the above example, the appropriate proceeding to challenge the validity of the injunction (i.e. to vary or set aside) would be Proceeding A. To challenge the validity of the injunction in Proceeding B would be considered a “collateral attack” on that injunction.

The BC Supreme Court has applied the Collateral Attack Rule in a number of contempt of court cases. In *Krawczyk*,¹³ the accused raised the defence that the injunction infringed on her right to

freedom of expression under the Canadian Charter of Rights and Freedoms. The court considered this a collateral attack on the injunction, rejected the defence, and convicted the accused. In the *Mount Currie* case,¹⁴ the accused raised the defence that the injunction infringed on the Indigenous sovereignty of the Nation. The court also considered this a collateral attack.

As stated above, the appropriate proceeding to raise the defences of freedom of expression or Indigenous sovereignty would be Proceeding A.

What are the Potential Sentences for Criminal Contempt of Court?

The potential sentences for criminal contempt of court include a fine or jail time or both. Because criminal contempt of court is not codified in the Criminal Code, there are no theoretical limits as to the amount of the fine or the length of the jail time. Sentences are based on fines or jail time imposed in similar cases. While sentences for criminal contempt of court differ from case to case, we can learn a lot from the recent *Trans Mountain* (a.k.a. “Kinder Morgan”) cases.

In the *Trans Mountain* cases, the Crown’s Initial Sentencing Position was a fine of \$500 with no jail time for people arrested in the early months of the protest. However, for those arrested in the latter months of the protest or for those arrested multiple times, the Crown’s sentencing position increased to include stiffer fines and jail time.

¹³ See *Hayes Forest Services Limited v. Krawczyk*, 2006 BCCA 156.

¹⁴ See *Mount Currie*, *supra*.

Below is a snapshot of a select number of custodial (i.e. jail or house arrest) sentences for people convicted of criminal contempt of court:

Arrests, Charges, and Pleas

Number of people arrested for Contempt of Court	229
Number of charges of Criminal Contempt of Court dismissed by Crown	13
Number of people who pleaded guilty to Criminal Contempt of Court	158
Number of people who pleaded Not Guilty to Criminal Contempt of Court and appeared at trial in 2018	24
Number of people who pleaded Not Guilty to Criminal Contempt of Court and are appealing denials of their pre-trial applications	22
Number of people acquitted of Criminal Contempt of Court at trial	1

Custodial Sentences (current to December 18, 2018)

4 days in jail	1
7 days in jail	20
7 days of house arrest + 150 hours of community service	1
14 days in jail	6
14 days of house arrest + \$2,000 fine	1
28 days of house arrest + 125 hours of community service	1

Statistics provided by Kris Hermes of Protect the Inlet Coalition

Can a Conviction for Criminal Contempt of Court be Appealed?

Both convictions and sentences for criminal contempt of court can be appealed in the BC Court of Appeal under [Section 10](#) of the Criminal Code. Note that the time limit to file an appeal is only 30 days.

What are the Potential Consequences of a Conviction for Criminal Contempt of Court?

One of the questions we are asked is whether a conviction for criminal contempt of court will impact future volunteer, employment, or travel opportunities. The answer to this question is not a simple yes or no. While records of arrests, charges, and convictions are stored on police databases, there are restrictions on what information can be disclosed to other parties, such as employers. Despite these restrictions, there have been incidents in which information that was supposed to be restricted was disclosed as part of a record check.

Employment and Volunteer Opportunities

With respect to employment or volunteer opportunities, a record of a conviction for criminal contempt of court will not appear on your criminal record, and, therefore, will not appear in a Criminal Record Check. However, a record of your arrest and charge may appear on a more comprehensive record check. For example, people who work with children or vulnerable adults may be required to submit a Police Information Check (Vulnerable Sector)

in addition to a Criminal Record Check. In a Police Information Check, records of “adverse contact” may be disclosed to an employer. It is important to note, however, that BC’s Human Rights Code prohibits an employer from discriminating against a person for having been “convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.”

Travel Opportunities

With respect to travel opportunities outside Canada, a record of your conviction for criminal contempt of court should not be accessible by border agents, such as U.S. Homeland Security. However, border agents may ask you questions that could reveal your conviction, such as questions about whether or not you have ever been arrested or charged. If you are concerned about travel outside Canada, we recommend you consult with a lawyer.