

Project Development, Civil Disobedience, and Injunctive Relief: The New Normal?

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**BC Expropriation Association,
Fall Conference, October 27/28, 2017**

Introduction

- **Introduction**
- **General Overview**
 - Civil Disobedience
 - Police Assistance (or not)
 - Injunction 101
 - Enforcement & Contempt of Court
- **Practical Tips**
 - Its All Logistics
 - Avoiding Some Confrontation, Some of the Time
- **Emerging Issues:**
 - Political Involvement
 - Technology and Social Media

Protesters removed from Imperial Metals' annual conference

A dozen RCMP officers called to scene

CBC News Posted: May 25, 2017 9:19 AM PT | Last Updated: May 25, 2017 11:36 AM PT



Neil Young, Willie Nelson to protest pipeline

10,000 people are expected to attend the musicians' "Harvest the Hope" concert.

By Annie Martin | Aug. 19, 2014 at 5:40 PM | Follow @anmccarthy

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A dozen



Rock star Neil Young (L) arrives to meet protestor Ron Raz of Pipersville, Pennsylvania as they prepare to join marchers during a demonstration organized by the Cowboy Indian Coalition (CIA) to protest against the building of the Keystone XL pipeline, April 26, 2014, in Washington, DC. Ranchers, farmers, Native Americans and environmentalists are calling on President Obama to reject the pipeline. UPI/Mike Thelmer | License Photo

More than a thousand protesters rally against Northern Gateway pipeline in Vancouver

TIFFANY CRAWFORD, VANCOUVER SUN | 05.10.2014 |



The crowd at Vancouver's Northern Gateway protest at Sunset Beach Saturday. SUPPLIED / SUPPLIED

Protests stall Energy East hearings in Montreal

SHAWN MCCARTHY

OTTAWA — The Globe and Mail

Published Monday, Aug. 29, 2016 9:56AM EDT

Last updated Monday, Aug. 29, 2016 7:09PM EDT



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Twenty years after clash at Clayoquot Sound, activists see new wave of unrest on the horizon

MARK HUME

The Globe and Mail

Published Sunday, Aug. 11, 2013 3:19PM EDT

Last updated Sunday, Aug. 11, 2013 10:11PM EDT

Chilcotin native leader wins major award for mine protest

[LARRY PYNN, VANCOUVER SUN - 04.20.2015]



Marilyn Bagstee has won a \$175,000 US Goldman Environmental Prize for her activism, successfully fighting a planned gold-copper mine at Fish Lake. **GOLDMAN ENVIRONMENTAL PRIZE**

Keystone XL pipeline faces opposition from 'historic union' of Canada, U.S. Indigenous tribes

Blackfoot Confederacy and Great Sioux Nation leaders signing declaration against pipeline Wednesday in Calgary

By Blake Nicholson, The Associated Press Posted: May 16, 2017 12:06 PM MT | Last Updated: May 17, 2017 9:18 AM MT



A 16-page declaration will be signed in Calgary Wednesday by Indigenous leaders representing thousands of people across North America. It highlights their treaty rights and opposition to the proposed \$8-billion Keystone XL pipeline. In the photo above, pipeline protesters with the Idle No More movement demonstrate in Washington in 2014. (Anna Lee-Popham)

Tsawwassen Causeway and Island

July 17, 1958: first announced

Early 1959: construction begins

June 15, 1960: first sailings

Conception to completion in < 2 years



Civil Disobedience



Image Source: Transition Voice

Civil Disobedience

- Civil disobedience involves members of the public intentionally breaking the law in the belief that they are following the dictates of higher justice.



Image Source: Greenpeace

Julia E. Lawn, “The John Doe Injunction in Mass Protest Cases” (1998) 56:1 UT Fac L Rev 101 at para 3 (QL)

Civil Disobedience

- “Civil disobedience” is defined in Black’s Law Dictionary (7th edition) as:



Image Source: Warrior Publications

“A deliberate but **non-violent act of lawbreaking** to call attention to a particular law or set of laws of questionable legitimacy or morality.”

Slocan Forest Products Ltd v Doe et al, 2000 BCSC 150, [2000] BCJ No 1592

Police Intervention

16 Greenpeace activists arrested near Shell site

CBC News | Posted: Oct 04, 2009 12:24 PM MT | Last Updated: Oct 04, 2009 12:21 PM MT

Sixteen Greenpeace activists were arrested early Sunday after spending 24 hours chained high up on smokestacks and a construction crane at a Shell Canada upgrader expansion site northeast of Edmonton.

The occupation started early Saturday when 19 activists stormed the under-construction upgrader in Fort Saskatchewan, which upgrades heavy oil into a lighter synthetic oil that can be refined into gasoline and other products.



Greenpeace activists suspended banners in an attempt to bring attention to the 'climate crimes of the tarsands.' ((Greenpeace))

Source: CBC News

Police Non-Intervention



*Image Source: Clayoquot
Action*

Police Non-Intervention

- ...if there is no violence or serious property damage, then we have been advising the party aggrieved to obtain a court injunction and arrange to have it served on the protestors. If it isn't obeyed, we ask them to go back to the court and get an enforcement order, after which time we take action.

**RCMP Staff Sergeant Buck,
MacMillan Bloedel Ltd. v. Simpson,
[1996] 2 S.C.R. 1048**

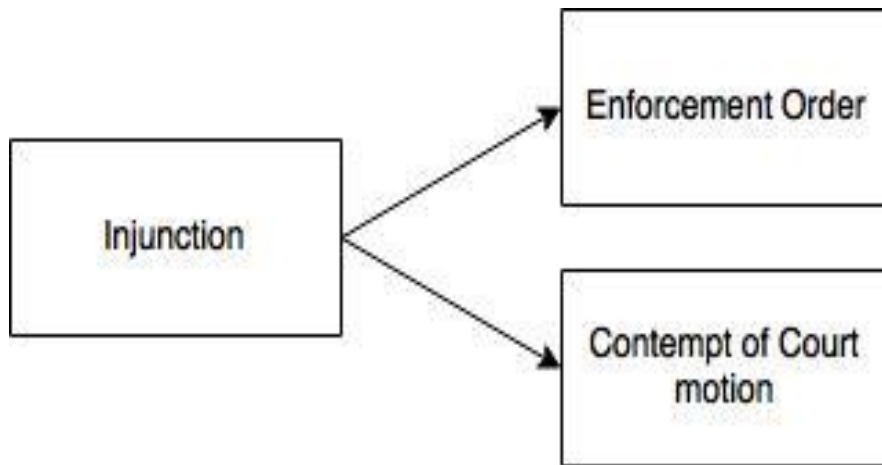
Injunctions 101:

Test for Injunctive Relief

- (1) Serious question to be tried (sometimes called strong prima facie case)
- (2) The moving party will suffer irreparable harm if the relief is not granted
- (3) The balance of convenience lies in favour of the moving party

***RJR MacDonald v. Canada (Attorney General)*, [1994]
1 S.C.R. 311**

Enforcing An Injunction



Contempt of Court

- **Failing to obey the Court's Order**
 - Committing act prohibited by the Order
- **Requires:**
 - Service/Knowledge of the Order; and
 - “Deliberately or willfully or knowingly” committing an act designed to result in the breach
 - Intent usually inferred from the act once knowledge of Order is proven



Contempt of Court

- **Two forms: criminal and civil**
- **Civil Contempt**
 - Contempt actions are private
 - Dispute stays between the parties
 - Usually sought by private litigant
- **Criminal Contempt**
 - Contempt actions are public
 - Nature brings justice system into disrepute
 - Actions usually attract or seek media attention
 - Usually sought by Attorney General



Contempt of Court

- **Purpose:**
 - Uphold dignity of court and administration of justice
 - Specific deterrence - stop defendants from continuing
 - General deterrence - deter others from doing the same
- **Crown Counsel Policy Manual**
 - Use of criminal sanctions for acts of civil disobedience is “generally not appropriate”
 - Crown counsel should “encourage the police to exercise discretion”
 - Encourage private litigant to proceed with civil contempt proceedings if failure to comply

Contempt of Court vs Enforcement Orders

- **Absent bad faith, courts will not interfere with exercise of prosecutorial discretion**
- **Civil contempt: onus on private party**
- **Burden of proof: on private party & high standard**

Contempt of Court vs Enforcement Orders

- **Civil punishment for breaching an injunction does not typically prevent the enjoined conduct from occurring in the first place or stop it re-occurring**
- **Proceedings typically very costly and time-consuming for a private party to bear**
- **Cannot deal with mass public protests (where the contempt is criminal in nature)**

Contempt of Court vs Enforcement Orders

- **Emergence of Enforcement Orders**
 - Expressly authorizes police to enforce an injunction
 - Available either concurrently with injunction, or after breach has occurred
- **Practical means to enforce the Order where mass disobedience**
- **Police require them or they will not act**
 - BUT the police retain operational discretion and control enforcement

Enforcement Orders: Standard Terms

Any peace officer is authorized to arrest and remove any person who the peace officer has reasonable and probable grounds to believe is contravening or has contravened the provisions of this Order;

Any peace officer who arrests and removes any person pursuant to this Order is authorized to:

(a) release that person from arrest upon that person undertaking in writing to appear before this Court at such time and place as may be fixed in the Notice for the purpose of being proceeded against for contempt of court or of fixing a date for such a proceeding and such other undertakings as the peace officer may deem appropriate; or

(b) where such person has refused to give such written undertaking or where in the circumstances the peace officer considers it necessary, to bring forthwith such person before this Court at [*nearest courthouse*], British Columbia or such other place as the Court may direct for the purpose of being proceeded against for contempt of court or of fixing a time for such proceedings, and a peace officer may, where circumstances dictate, detain such person until it is possible to bring such person before the Court.

TAKE NOTICE that if you, the bodies or persons affected by this Order neglect to obey this Order, you will be liable to process of execution and proceedings for attachment and contempt.

Telus v. Telecommunications Workers Union

2006 BCSC 441

“TAKE NOTICE that if you, the bodies or persons affected by this Order neglect to obey this Order, you will be liable to process of execution and proceedings for attachment and contempt and that your activities may well allow a peace officer and any member of the Royal Canadian Mounted Police to come to the conclusion that they have reasonable and probable grounds to believe that you should be arrested under one or more of the following offences set out in the Criminal Code:

- Section 31: breach of the peace;
- Section 127: disobeying a Court order;
- Sections 265-269: assault and causing bodily harm;
- Section 270: assaulting a peace officer;
- Section 423(1)(c): persistent following;
- Section 423(1)(f): watching and besetting;
- Section 423(1)(g): blocking or obstructing a highway;
- Section 430(1): mischief to property, including interference with lawful use, enjoyment or operation of property”

Enforcement Orders

- **Factors in support of concurrent relief:**
 - Remote location
 - Number of participants varies from day to day or difficult to identify
 - Protestors have indicated they will disregard the injunction
 - Safety concerns
 - Window to perform work is limited
 - Police have indicated they will not enforce injunction without express enforcement order
- **However, may not be required: *Trans Mountain Pipeline ULC v. Gold*, 2013 BCSC 2403**

Enforcement Orders

- ***Finning Ltd. v United Mine Workers of America*, (1992), 10 CPC (3d) 17 (BCSC):**
 - “... I want to say for the record that orders of this court should be enforced without an enforcement order. The police authorities have a public duty, as well as a duty to this court, to enforce its order without any further direction. It is only because the police authorities for some reason consider this to be outside of the duties they normally undertake and because of the potential for violence in this case and as well, because of the remoteness of the area that I am prepared to make the enforcement order.”

Enforcement Orders

- ***MacMillan Bloedel Ltd v Simpson*, [1996] 2 SCR 1048:**

- The respondent accepts that the authorization [re enforcement] is superfluous, and states that it is included only because the police have requested such wording... I observe only that the inclusion of police authorization appears to follow the Canadian practice of ensuring that orders which may affect members of the public clearly spell out the consequences of non-compliance. Members of the public need not take the word of the police that the arrest and detention of violators is authorized because this is clearly set out in the order signed by the judge. Viewed thus, the inclusion does no harm and may make the order fairer.

Enforcement Orders

- ***Telus v. Telecommunications Workers Union, 2006 BCSC 441***
 - Despite my considerable frustration with the positions taken by the Province and by peace officers including the R.C.M.P., it is clear that private litigants such as the Plaintiffs will have to continue to seek the assistance of the Court to enforce orders of this Court and that it will be necessary for orders granted to include an enforcement clause before peace officers will fulfill their public duty as well as their duty to this Court to enforce orders without further direction rather than attempting to act as neutral mediators when labour disputes or civil disobedience protests arise. Even though their statutory mandate is to enforce the law including orders of the Court, it remains necessary for the Court to tell peace officers that they should do what they are already required to do.

Canadian National Railway Company v. Plain (2012 ONSC 7348)



Image Source: Huffingtonpost.ca

Canadian National Railway Company v. Plain (2012 ONSC 7348)

- **Blockade of CN main line near Sarnia, Ontario**

THIS COURT ORDERS that the Defendants, and each of them, and any and all persons having knowledge of this Order, forthwith remove any and all obstructions placed or created or imposed by them to the Plaintiff's full use of its lands, premises, facilities and equipment on the Spur Line.

- **THIS COURT ORDERS that any police service or peace officer be and hereby is authorized to arrest, or arrest and remove, any person who has knowledge of this Order and who the police service or peace officer has reasonable and probable grounds to believe is contravening or has contravened the provisions of this Order, and for greater certainty, such a police service or peace officer retains his or her discretion to decide whether to arrest or remove any person pursuant to this Order.**

Canadian National Railway Company v. Plain Sarnia Police Service on December 26, 2012



Image Source: The Sarnia Observer

- “The Service has read and reviewed the [injunction] Order and believes it imperative that it maintain its discretion when it comes to the enforcement of same. For the time being, and while efforts are being made to find a peaceful solution to this situation through an amalgamation of community partners, the Service is of the view that a more pro-active approach, by the police, would be detrimental not only to the interests of CN Rail and the industrial area affected by the blockage, but also the safety of the community at large”
- “A more rigid application of the rule of law would also undue much of the goodwill that the Service has created with the aboriginal members of the community that it serves.”

Canadian National Railway Company v. Plain Justice Brown on December 27, 2012



HON. JUSTICE DAVID BROWN
Judge, Court of Appeal of Ontario
LLM 2005, Constitutional Law

Image Source: www.osgoodepd.ca

- ...no representative of the Sarnia Police saw fit to appear in court today, notwithstanding service of CN's motion on Sarnia Police Deputy Chief Bob Farlow on December 24 at 4:26 p.m. I must confess that I am shocked by such disrespect shown to this court by the Sarnia Police.
- ... It was not open to the Sarnia Police to interpret the injunction order as permitting the blockade to remain indefinitely.
- As a judge, I make an order expecting it will be obeyed or enforced. If it will not be enforced, why should I make the order? An order which will not be enforced is simply a piece of paper with meaningless words typed on it, and making a meaningless order only undermines the authority and concomitant legitimacy of the courts.

Canadian National Railway Company v. Plain Justice Brown on December 27, 2012



Image Source: valaw.ca

- **THIS COURT ORDERS** that any police service or peace officer be and hereby is authorized to arrest, or arrest and remove, any person who has knowledge of this Order and who the police service or peace officer has reasonable and probable grounds to believe is contravening or has contravened the provisions of this Order, ~~and for greater certainty, such a police service or peace officer retains his or her discretion to decide whether to arrest or remove any person pursuant to this Order.~~

Canadian National Railway Company v. Plain Justice Brown on January 3, 2013

CONTEMPT

Sarnia judge declares 'this blockade ends today'

By [Neil Bowen](#), QMI Agency

Thursday, January 3, 2013 7:14:48 EST AM



Aamijwnaang First Nation Chief Chris Plain, right, shakes hands with Sarnia Police Chief Phil Nelson prior to a celebratory ceremony at the CN rail blockade on Williams Dr. Wednesday. PAUL OWEN/THE OBSERVER/QMI AGENCY

A 13-day blockade of a CN spur line serving petro-chemical industries in Sarnia was expected to end Wednesday night following a Superior Court hearing.

Hopefully it will end today by 6 p.m., said CN's lawyer Christopher Bredt during a Superior Court hearing to have protest spokesman Ron Plain declared in contempt of a Dec. 21 court order to end the blockade.

Plain left the courtroom for the blockade site with the understanding he would work with the protesters to end the blockade.

Earlier in the proceeding Plain told the court protesters had been working on an exit strategy that would have seen the blockade lifted by Saturday.

"That was very promising," said Sarnia Police Chief Phil Nelson following the hearing's adjournment.

Canadian National Railway Company v. Plain Justice Brown on January 3, 2013



Image Source: Canadian Lawyer Magazine

- **Justice Brown:** Just over two weeks ago, I issued an injunction requiring First Nations protestors blocking a CN spur line to remove “forthwith” their obstructions. To my astonishment, the local police failed to assist in enforcing that order until January 2, 2013 under pressure from another judge of this court, a passage of almost two weeks.

***Canadian National Railway Company v.
Doe et al, 114 O.R. (3d) 126***

Contempt of Court with Enforcement Orders

- **Enforcement Orders**
 - Do not mean the contempt is necessarily criminal
 - Do not mean the Attorney General will necessarily step in
- **Used in mass or public “in-the-media” protests**
 - Indicates court views contempt as probably criminal
- **AG is the entity that deals with criminal matters**
 - Controls and institutes criminal proceedings
 - May step in on own initiative or at any time if views as criminal
- **Court can request AG to step in**
 - Private party can seek a declaration contempt is criminal
- **BC practice: AG will take over contempt proceedings where criminal in nature**

Technology & Social Media

By the Company

- Identification
 - Interference
 - Failure to Abide by Order
-
- **EVERYTHING IS ON FILM**
 - Everything!

Technology & Social Media

By the Protesters

- Drum up support & organize the protest
 - Application to set aside
 - Influence customers
-
- **Very Selective in What They Publish**
 - If organized

It Can Hurt





Political Endorsements of Civil Disobedience

- Necessity of enforcement orders illustrated in two recent cases in which police and/or politicians endorse civil disobedience of protestors

Vancouver Mayor Gregor Robertson



Practical Tips

- **Its all logistics!!**
- **Know your challenges**
- **DO ADVANCE PREPARATION**
 - Legal team, H.O. team, on the ground team
 - Operational information requirements
 - Media strategy
- **“Clean hands”: training for your on site people**
- **Information for the legal team**
 - Permits & authorizations
 - Operations (what you are doing) and necessities (timing/access)
 - Impacts: valuation, people out of work

Practical Tips

- **Support & on the ground team**
 - Who will gather the evidence (format so can use it)
 - What is occurring
 - Where it is happening
 - Who is involved & Identification
 - Immediate impacts
 - Timing for information, application, Order, service, enforcement
 - Advance calls to the police and AG (and federal Dept. of Justice)
 - How to get the Order delivered if remote location
 - Who will serve the Order, how will you prove it
- **Enforcement assistance**
 - When & who is in charge

Would YOU Stay Calm?



Avoiding Confrontation

- **Know the players, Establish relationships**
- **Training for frontline, on site people**
 - Avoid and de-escalate confrontations
 - “Clean hands” essential
 - Be aware of the “mob” effect
- **In front of the media**
 - Have a strategy
 - One Spokesperson
- **Consistent in response (court, at site, in media)**

Sometimes you can't avoid it: don't make it worse

THANK YOU

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