FW: CGL Update BN

From: Stubbs, Eric <Eric.Stubbs@rcmp-grc.gc.ca>
To: wayne.rideout@gov.bc.ca, glen.lewis@gov.bc.ca, Ward Lymburner <ward.lymburner@gov.bc.ca>, brian.sims@gov.bc.ca, Lewis, Glen PSSG:EX <Glen.Lewis@gov.bc.ca>, Lymburner, Ward C PSSG:EX <Ward.Lymburner@gov.bc.ca>, Sims, Brian A PSSG:EX <Brian.Sims@gov.bc.ca>, Rideout, Wayne PSSG:EX <Wayne.Rideout@gov.bc.ca>
Sent: January 3, 2022 8:11:25 PM PST

-------- Original message --------
From: "Brewer, John" <john.brewer@rcmp-grc.gc.ca>
Date: 2022-01-03 7:22 p.m. (GMT-08:00)
To: "Lucki, Brenda" <brenda.lucki@rcmp-grc.gc.ca>, "Brennan, Brian" <brian.brennan@rcmp-grc.gc.ca>, "Daley, Dennis" <dennis.daley@rcmp-grc.gc.ca>, "Whelan, Alison" <Alison.Whelan@rcmp-grc.gc.ca>, "Rupa, Sorab" <Sorab.Rupa@rcmp-grc.gc.ca>, "McDonald, Dwayne" <Dwayne.McDONALD@rcmp-grc.gc.ca>, "Stubbs, Eric" <Eric.Stubbs@rcmp-grc.gc.ca>, "Brewer, John" <john.brewer@rcmp-grc.gc.ca>
Subject: CGL Update BN

January 03, 2021

Over the past 24-36 hours there have been several reports on social media of RCMP members moving to the Houston area for impending enforcement. It appears that these rumors of RCMP impending arrival were leaked throughout the town and social media. As a result, it became known that the Marten Blocakade was vacated by contemnors early this morning. The two tiny houses and bus parked on the Marten FSR were moved from the Marten FSR to the 44 Km camp. The Marten FSR is now under the control of CGL security, and secured with a cable across the road pending the construction of a gate in the next few days.
CGL has drilling equipment enroute from Edmonton to the Marten FSR.
s.15

Information will be provided in a detailed update and summary tomorrow.

No changes at New Hazelton.

Submitted by:

John Brewer
CIRG Gold Commander

FW: SIT REP #2 : BC Supreme Court Injunction Enforcement, near Houston, BC - 2021-0356

From: Stubbs, Eric <Eric.Stubbs@rcmp-grc.gc.ca>
To: Lewis, Glen PSSG:EX <Glen.Lewis@gov.bc.ca>, Rideout, Wayne PSSG:EX <Wayne.Rideout@gov.bc.ca>, Sims, Brian A PSSG:EX <Brian.Sims@gov.bc.ca>, Lymburner, Ward C PSSG:EX <Ward.Lymburner@gov.bc.ca>
Sent: January 4, 2022 12:41:26 PM PST
Attachments: 22-01-04 1236 Sit Rep #2_Form.pdf

[EXTERNAL] This email came from an external source. Only open attachments or links that you are expecting from a known sender.

This is our latest update sent to NHQ
Eric

A/Commr. Eric Stubbs
Criminal Operations Officer
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Commissaire adjoint
Officer responsable des enquetes criminelles Services de police de base- Division E
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From: EDIV_SENSITIVE_SMT_REPORTING <EDIV_SENSITIVE_SMT_REPORTING@rcmp-grc.gc.ca>
Sent: January 4, 2022 12:38 PM
To: Christiansen, Terry Dawne <terry.christiansen@rcmp-grc.gc.ca>; Evans, Tim <Tim.EVANS@rcmp-grc.gc.ca>; Fox, Veronica <Veronica.Fox@rcmp-grc.gc.ca>; Kim, Richard <richard.kim@rcmp-grc.gc.ca>; Legault, Michel <michel.legault@rcmp-grc.gc.ca>; Lepage, Mark <Mark.LePage@rcmp-grc.gc.ca>; Lew, Heather <Heather.Lew@rcmp-grc.gc.ca>; Matterson, Christine <Christine.Matterson@rcmp-grc.gc.ca>; McDonald, Dwayne <Dwayne.McDONALD@rcmp-grc.gc.ca>; Meghji, Shaleena <Shaleena.Meghji@rcmp-grc.gc.ca>; Singer, Bruce <Bruce.Singer@rcmp-grc.gc.ca>; Stubbs, Eric <Eric.Stubbs@rcmp-grc.gc.ca>; Theisen, Jeanette <jeanette.theisen@rcmp-grc.gc.ca>; Brewer, John <john.brewer@rcmp-grc.gc.ca>; Blackadar, Andrew <Andrew.Blackadar@rcmp-grc.gc.ca>; Sproule, Aaron <Aaron.SPROULE@rcmp-grc.gc.ca>; Henderson, Brent <brent.henderson@rcmp-grc.gc.ca>; E_Civil_Lit_SBN <E_Civil_Lit_SBN@rcmp-grc.gc.ca>; E_CROPS_FISOC_Tracking_Sensitive <E_CROPS_FISOC_Tracking_Sensitive@rcmp-grc.gc.ca>; Allchin, Dean <dean.allchin@rcmp-grc.gc.ca>; Ng, Will <will.ng@rcmp-grc.gc.ca>
Subject: FW: SIT REP #2 : BC Supreme Court Injunction Enforcement, near Houston, BC - 2021-0356

From: Cleary, Sean
Sent: Tuesday, January 4, 2022 12:38:00 PM (UTC-08:00) Pacific Time (US & Canada)
To: NOC / CNO; EDIV_SENSITIVE_SMT_REPORTING
Cc: Tsui, Peter; E_CROPS_RiskManagementTeam; Levy, Maureen; Brown, Warren; Kirkpatrick, Bruce; Haugli, Brad

SIT REP #2 : BC Supreme Court Injunction Enforcement, near Houston, BC - 2021-0356

Update to SIT REP sent 2021-10-14

CURRENT STATUS:

- **Over the past 24-36 hour's, there have been several reports on social media of RCMP members moving to the Houston area for impending enforcement. It appears that these rumors of RCMP impending arrival were leaked throughout the town and social media.**

- **As a result, the Marten Blockade was vacated by contemnors early this morning. The two tiny houses and bus parked on the Marten FSR were moved from the Marten FSR to the 44 Km camp. The Marten FSR is now under the control of CGL security, and secured with a cable across the road pending the construction of a gate in the next few days.**

- **CGL has drilling equipment enroute from Edmonton to the Marten FSR. CGL will be increasing security, constructing fences and cameras in an attempt to prevent further incursions into the drill site.**

s.15

STRATEGIC CONSIDERATIONS:

- **The BC RCMP continues to be challenged by unlawful protest who intentions are unknown at this time.**

STRATEGIC COMMUNICATIONS:

- **Original protest activity in contravention of the injunction, and subsequent RCMP enforcement, attracted media interest across the world.** s.13

s.13

In consultation with:
C/Supt. John Brewer, Deputy CROPS Officer, Gold Commander

Prepared by:
Cpl. Sean Cleary
CROPS Risk Management Team
E Division

Recommended by:
Insp. Terry Dawn Christiansen
OIC CROPS Secretariat
E Division

Approved by:
C/Supt. John Brewer
Deputy Criminal Operations Officer (Core Policing)
E Division

Cliff: 619527
Date Prepared: January 4, 2022

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL
POLICING AND SECURITY BRANCH
INFORMATION BRIEFING NOTE

PURPOSE: For **INFORMATION** for Doug Scott, Deputy Solicitor General

ISSUE: Direct Action Update for the Natural Resource Public Safety Meeting – Week of January 4, 2022

SUMMARY:

- Teal Jones Cedar Products (TJCP):
  - Since police enforcement of the Supreme Court of BC (SCBC) order has resumed in the Fairy Creek Watershed, the RCMP have arrested 1,188 individuals to date, 110 of whom were previously arrested with a combined total of 261 times. Of the total arrested, 919 were for breaching the injunction, 222 for obstruction, 22 for mischief, 10 for breaching their release conditions, 12 for assaulting a police officer, 1 for counselling to resist arrest, 1 for causing a disturbance, and 1 *Immigration Act* related offence.
  - TJCP appeared before the BC Court of Appeal (BCCA) in November 2021 to appeal the SCBC's decision not to extend its Injunction Order. The panel reserved its decision. In the meantime, enforcement operations continue.

s.15

  - Police reported that protestor activity has been limited during the holiday season and all routes remain open.

- Coastal Gas Link (CGL):
  - Since police enforcement of the SCBC order began on November 18, 2021, there have been a total of 31 arrests to date, including two journalists. Of those arrested, 1 accused was released with no charges and 8 were released on conditions not to re-attend the protest sites.
  - Between November 22 and 24, 2021, 20 contemnors appeared before the SCBC to set their release conditions. The remaining contemnors were released on varied conditions to not attend CGL work areas within the Injunction Zone. For those identified as Wetsuwet'en, the SCBC made some provisions for attendance within the Injunction Zone for ceremonial and cultural purposes, however with distance restrictions from active work sites.
  - On December 20, 2021, the RCMP advised that the Coyote Protestor Camp was reoccupied near KM 63.5 of the Morice River West FSR, close to the CGL drill platform. As a result, the RCMP were in the process of mobilizing an enforcement response, which was anticipated to occur around January 10, 2022.
  - Over the past 24-36 hours, the RCMP advised that there have been several reports on social media rumouring the arrival of RCMP members in the Houston area for impending enforcement. As a result, it became known that the

Martin Spur Road Blockade was vacated by contemnors in the morning of January 3, 2022. Two tiny houses and a bus parked on the Martin FSR were relocated to the KM 44 Camp. The Martin FSR is now under the control of CGL Security, pending the construction of a gate in the next few days.

s.15

- Trans Mountain Pipeline:
  - As of January 4, 2022, the RCMP advised that there is currently little activity at the Tiny House Warriors (THW) Camp in Blue River. No protest activity has occurred at this site over the past few weeks.
  - The RCMP advise that there has been no renewed direct action along the Burnaby right of way since the arrest of a protestor on November 25, 2021.

- SCBC Ruling regarding the Canadian National Railway Company's Injunction Order
  - On December 6, 2021, the SCBC issued a ruling in favour of the Canadian National Railway Company's right to privately prosecute northern BC rail blockade participants. In short, the SCBC reserved the right to review matters of criminal and civil contempt regarding the company's injunction order. Crown Counsel may influence these decisions, but ultimately the Court wishes to make the final decision on charges with respect to the injunction order.
  - This ruling may have ramifications for TJCP, CGL, and TMP when seeking criminal remedies in contempt of SCBC injunction orders.

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BACKGROUND:

Teal Jones Cedar Products (TJCP)/Fairy Creek Injunction Enforcement:

- On September 28, 2021, the SCBC denied TJCP's application to extend the injunction. On October 8, 2021, the BCCA issued a stay of the SCBC decision, temporarily reinstating the injunction until an official appeal hearing could be held between November 15 and 17, 2021. The panel reserved its decision. Until a decision is provided by the BCCA, enforcement operations continue in Fairy Creek in accordance with the BCCA's stay of the SCBC decision.

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- The RCMP noted a significant reduction in protest activity over the final weeks of 2021 due to work shutdowns because of weather and flooding. Approximately 13 arrests were made over the course of early December with some traffic disruptions cause by protestors. s.15

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LNG/Coastal Gas Link (CGL):

- Since enforcement activities began on November 18, 2021, the RCMP have made 31 arrests to date, with the majority of contemnors released on conditions not to attend the Injunction Zone.

- On December 20, 2021, the RCMP advised that the Martin Spur Road was re-occupied by Coyote Camp protestors in contravention of the SCBC order issued to CGL. The RCMP received a report from CGL Security that in the morning of December 19, 2021 (1:30 am), 10 to 12 contemnors on snowmobiles overwhelmed CGL Security at KM 63.5 of the Morice River West FSR.

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- The RCMP were in the process of mobilizing an enforcement response, anticipated to occur around January 10, 2021. However, recent rumours on social media of RCMP arrival to the Houston area for impending enforcement have caused all contemnors to relocate to the 44 KM Camp, allowing CGL to regain control of the Martin Spur Road. With that said, the anticipated enforcement around January 10, 2022 may not be necessary, although the intentions of the contemnors at KM 44 may require a police response if direct action ensues.

- RCMP report that the Morice River West FSR remains open. The RCMP advise that CGL has increased its security s.15

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Trans Mountain Pipeline (TMP):

- TMP continues to construct a Worker Accommodation Camp off Myrtle Lake Road in Blue River, which has been the cause of increased direct-action activities between September and October 2021.

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s.15 The RCMP have advised that for the past few weeks, little protest activity has occurred in the TMP Injunction Zone, given that work has been shut down in many work areas due to flooding.

INDIGENOUS PEOPLES CONSIDERATIONS:

- There are many Indigenous governments, Hereditary Chiefs, and other partners with a diverse range of involvement and responses in each of these activities. The RCMP are directly engaged with Indigenous governments and organizations as monitoring and enforcement activities continue.

OTHER MINISTRIES IMPACTED/CONSULTED:

- FLNRORD, MOTI, EMLCI, ENV, MIRR, GCPE, AG, and MCFD – Impacted

ATTACHMENTS:

- NA

PREPARED BY:
s.15; s.19
Senior Policy Analyst
Policing and Security Branch
s.15; s.19

APPROVED January 4, 2022 BY:
Brian Sims
Executive Director
Policing and Security Branch
s.17

APPROVED January 4, 2022 BY:
Wayne Rideout
Assistant Deputy Minister and Director of Police Services
Policing and Security Branch
(250) 387-1100

Critical Incident Secretariat PSSG - Situational Awareness as of January 4, 2022

From: McPhail, Norman PSSG:EX <Norman.McPhail@gov.bc.ca>
To: Rideout, Wayne PSSG:EX <Wayne.Rideout@gov.bc.ca>
Cc: Lewis, Glen PSSG:EX <Glen.Lewis@gov.bc.ca>, Lymburner, Ward C PSSG:EX <Ward.Lymburner@gov.bc.ca>, Sims, Brian A PSSG:EX <Brian.Sims@gov.bc.ca>, Richards, Paul PSSG:EX <Paul.Richards@gov.bc.ca>, Nicholson, Therese PSSG:EX <Therese.Nicholson@gov.bc.ca>, Beaulieu, Mark J AG:EX <Mark.Beaulieu@gov.bc.ca>, Ferrier, Rob L PSSG:EX <Rob.Ferrier@gov.bc.ca>, Khelawan, Sharon PSSG:EX <Sharon.Khelawan@gov.bc.ca>, Latham, Hope GCPE:EX <Hope.Latham@gov.bc.ca>, Kalman, Evelyn PSSG:EX <Evelyn.Kalman@gov.bc.ca>, Waldron, Fraser PSSG:EX <Fraser.Waldron@gov.bc.ca>, Koehle, Leah GCPE:EX <Leah.Koehle@gov.bc.ca>
Sent: January 4, 2022 3:25:29 PM PST
Attachments: 2021 BCSC 2469 Canadian National Railway Company v. Doe.pdf

Coastal Gas Link (CGL)

Current situation : As of January, 3, 2022, Coyote Camp protesters have left the CGL Drill Platform and abandoned the blockade of the Martin Spur Road. s.15

s.15

The RCMP was is in the process of mobilizing an enforcement response, which was apparently made know to the the contemnors and the subject of recent protester social media posts. RCMP believe that the build up of police in the immediate area was a trigger for the contemnors to abandon the occupation of the CGL Drill Site on the Martin Spur Road. The RCMP currently has active patrols of the SCBC injunction areas underway and reports all roads and routes are open.

RCMP advise that CGL has re-occupied the Drill Platform Site on the Martin Spur Road and has re-established a security perimeter/presence at this work site. CGL has not reported any damage to company assets as the result of the latest Coyote Camp blockade and occupation.

s.15

Recent history : On September 8, 2021, CGL removed a "tree house platform" installed by Gidimt'en protesters on the construction right of way situated near KM 44 of the Morice River West FSR, which is near the Gidimt'en protest site and land occupation. RCMP resources were in the area and advised that no direct action occurred at the time of removal.

On September 26, 2021, Gidimt'en protesters from the protest site at KM 44 of the Morice River West and the Lamprey Creek Recreation occupation set up a blockade on the Martin Spur Road off (KM 63) off the Morice River West FSR. This protest blockade was established on and around a drill platform, which CGL had put in place to micro-tunnel gas line under the Morice River. Protesters parked a bus and other vehicles to initially establish a roadblock. Then these protesters allegedly absconded CGL heavy equipment, which was used to dig up the roadway and create obstructions to CGL work to pass LNG pipe under the Morice River.

RCMP initial responders were confronted by a protester onboard an excavator at this blockade. s.15

s.15; s.22

s.15

The RCMP advised that a number of WHCs attended to the Gidimt'en protest blockade on the Martin Spur Road.

On October 3, 2021, RCMP responded to a complaint of shots fired near the Lamprey Creek area, which is where CGL had signage of active work sites are in the area. CGL reported on injuries or damages, however RCMP advised a misuse of a firearm investigation was underway.

s.15; s.16

On October 11, 2021, a 3 personal RCMP patrol attended to the site of the Gidimt'en protest blockade on Martin Spur road. RCMP advised that upon attendance to the area, police were met by approximately 6 aggressive occupants at the periphery of this site, who were identified as Mohawk Warriors. As a result RCMP stood down and left the site. RCMP later learned via s.15 that Chief Woss had invited Mohawk Warriors to the blockade, conducted a ceremony with same to allegedly go to war against the CGL crossing of the Morice River on his territory. RCMP advised that between 40-60 protesters were believed to be in the blockade area on the Martin Spur Road, some of whom were known to police as associated to violence.

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As in the past, s.15 was calling for another "shut down Canada" movement should police action be taken to dismantle the Martin Spur Blockade. s.15

s.15

As police awaited whether a negotiated settlement could be reached to end the Martin Spur Blockade, a number of criminal events occurred. s.15

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s.15 This blockade was cleared and arrests

made. On October 27, 2021, the RCMP attended to 2nd protest blockade on the Shae access road at the entry to the Camp 2 CGL Worker Accommodation. This blockade was holding back trucks sent to re-provision (food, water and fuel) to this CGL work camp with over 400 employees. The RCMP arrested 2 subjects at this blockade, for alleged mischief, theft and possession of stolen property. After these 2 arrests the remaining protesters at the blockade disbanded. The two accused were later released by police on conditions, one of the two accused was identified as a hereditary wing chief of the Wetsuwet'en.

On October 29, 2021, the RCMP met with Sr. CGL officials to re-iterate the operational policing position in regard to enforcement of the SCBC injunction at the Martin Spur Road Blockade.

On November 9, 2021, the RCMP advised that there were further incidents of criminal mischief (hydraulic lines cut) on CGL equipment in the Parrot Lake area occurred. CGL sent a letter to the OW and WHCs seeking assistance.

On November 13, 2021, CGL advised that Chief Woss had issued an evacuation notice to CGL employees, which requested all CGL employees leave the Gidimt'en territory within 8 hours, after which the roads in would be blockaded. CGL reported this matter to RCMP out of concern for public safety as over 500 workers would be trapped in the area. CGL was not able to get employees out of the area . CGL advised the RCMP it would only be a matter of days before supplies ran out in the worker accommodations.

On November 14, 2021, Gidimt'en protesters blocked the Morice River West FSR beyond KM 30 and points beyond, creating an imminent public safety issue for those trapped behind the blockades. s.15
s.15
s.15 Poor weather, road conditions and a general state of provincial emergency due to flooding presented challenges to this police response.

On November 18, 2021, the RCMP cleared obstructions and blockades along Morice River West FSR. Police arrested 14 persons persons for contraventions of the BCSC order.
CGL was then able to move supplies and supports to people in the works camps on the Shea FSR.

On November 19, 2021, the RCMP attended to the blockades at KM 2 of the Martin Spur road and encountered obstructions, blockades, two building-like structures as well as a wood pile that was on fire directly around a drilling site. Police determined that protesters were inside these buildings and refused to come outside. Police read aloud the BC Supreme Court injunction. Police encouraged those inside building to leave or face arrest and did so numerous times. Police advised that these protesters failed to comply and as a result police broke through the doors, entered the structures and made arrests without further incident. Police confirmed that two individuals found inside these structures identified themselves as independent journalists, after police entered the buildings. A total of 11 individuals were arrested at this location.

RCMP arrested 4 persons additional persons this day, in regard to rock throwing incidents on the Morice River West FSR at the Martin Spur Road. These 4 accused and the 11 others arrested were held in custody to appear in the BCSC on November 22, 2021. All RCMP enforcement actions were documented, including the use of video and body worn cameras for court or complaint purposes.

On November 22 - 24, 2021, bail hearings were held at the SCBC Prince George via video conference before Madam Justice Church. Over three (3) days the accused were released on various conditions to not attend CGL work areas within the injunction zone. For those identified as Wetsuwet'en, the SCBC made some provisions for attendance within the injunction zone for ceremonial and cultural purposes, however with distance restrictions from active work sites.

The RCMP advise that the area remains cleared of obstacles and the roads open, with active police patrols underway along the Morice River West FSR and adjoining roads. CGL has since repaired the damage and other impacts created by the protest blockades. An RCMP Access Control Point (ACP) at KM 27.5 remains in place on the Morice Forest West FSR.

CGL has re-established the drill platform and equipment at the Martin Spur and is now in the process site preparations to micro-tunnel under the Morice River. Other CGL operations have resumed in the immediate area.

RCMP advised that on November 26, 2021, three subjects blocked the Morice River West FSR at KM 44 with a vehicle. Police responded and arrested 2 of the 3 subjects at this roadblock, who were later released on conditions. These contemnors were not known by police, nor identified themselves as Wetsuwet'en.

The RCMP advised on December 13, 2021, that the Gidimt'en checkpoint at KM 44 was not occupied by protesters and has not been for several days. On site protest presence appears to have slowed due to winter weather conditions, however RCMP advised that s.15 continues in earnest to have supporters "shut down Canada" - which in recent times has not resulted in further direct action.

s.15

The RCMP received a report from CGL Security that during the early morning hours of January 19, 2021 (1:30 am), 10-12 contemnors on snowmobiles overwhelmed the security presence at the Martin Spur access point at KM 63.5 of the Morice River West FSR. No reports of assault, save incursion by forceful presence and means used by the contemnors. s.15

s.15

Teal Jones Cedar Products (TJCP)

s.15

Recent history : On April 1, 2021, TJCP was issued a SCBC injunction to prevent the Rainforest Flying Squad (RFS) from interfering with selective logging operations in the Sooke/Lake Cowichan RCMP detachment areas. TJCP initiated civil actions in the SCBC against key leaders of the RFS for alleged breaches of SCBC injunction. Pacheedaht, Huuayaht & Ditidaht First Nations governments (elected and hereditary) have approved selective TJCP logging activities on these territories and have issued media releases/public statements regarding the need for outsiders to respect and not unlawfully interfere with land use decisions of these nations as rights and title holders.

RCMP began enforcement of the SCBC Injunction order on May 17, 2021.

Enforcement of the SCBC order issued to TJCP continues to be a complex multi-layered public safety operation which deploys police resources with specialized skills/techniques that are required to safely secure resistant, non-compliant persons, who are found bound to bridges, trees, equipment, tripods, or other obstacles by means of secure devices meant to make removal difficult. RCMP continue to seize caches of concrete mix, rebar, pipes, cut poles, as well as tools that are apparently in place to aid contemnors in creating obstructions. s.15

s.15

The RCMP, when required, restrict access into the logging tenure covered by the SCBC injunction order. Police access restrictions were disputed by the RFS/Media at a hearing before Judge Thompson at the SCBC Nanaimo. Judge Thompson in reviewing the matter made comments that RCMP restrictions may be too limiting for media and protest, subsequent to this the RCMP followed the Court's advice and eased some restrictions.

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s.15 To seek relief, TJCP applied to the SCBC to increase restrictions and search provisions for police enforcement as disregard for the injunction order was nearing 1000 arrests for breaches and related contraventions of criminal law. TJCP also sought an extension of the SCBC order as protester direct action had significantly restricted/prevented scheduled work being completed within the logging tenure on scheduled time lines. RCMP provided affidavits via DOJ to TJCP Legal Counsel in support of varying the SCBC injunction order to allow stricter access control and search provisions for those entering into the injunction zone.

TJCP Legal Counsel appeared before the SCBC Nanaimo on September 13, 2021 to seek this variance to the injunction order as well as seek an extension to it. The RFS also gave evidence to the SCBC opposing the TJCP requests. The injunction remained in place as Judge Thompson considered a decision. On September 28, 2021, Justice Thompson provided a written decision on the TJCP application to vary and extend the SCBC Injunction Order. The decision being that the injunction not be extended and terminated. Subsequent to this, the RCMP requirement to enforce this SCBC order ended at 4 pm September 28, 2021. In response to Judge Thompson's decision TJCP legal counsel filed a notice to the BC Court of Appeals (BCCA).

In response TJCP closed off the logging tenure area to all unauthorized traffic by installing gates, trenching roadways in/out and posting a heavy security presence around work sites in order to maintain safety and security. RCMP demobilized the larger policing presence from the Fairy Creek Watershed since the termination of the SCBC injunction order, but retained resources on site to assist with keeping the peace, keeping Truck Route 11 open and related enforcement as may be required.
The TJCP application to appeal to the BCCA was heard on October 8, 2021. The BCCA also re-instated the previous BCSC injunction issued to TJCP until such time as the appeals court makes a decision. As a result the RCMP re-mobilized sufficient police resources to once again enforce the SCBC order.

Police enforcement of the injunction order in the Fairy Creek Watershed area has been ongoing, with continued focus on keeping the Granite Mainline Forest Service Road and other corridors free from any obstructions, devices and open for industry access.

On December 2, 2021, RCMP were called to the main gate on the Pacific Marine Road, where a large number of individuals were blocking road access. Upon arrival, police read the injunction to the crowd and provided them the opportunity to leave or risk being arrested. Most voluntarily moved, but a few individuals decided to remain.

A total of 12 individuals were physically carried off the roadway, allowing industry vehicles to travel through. Once the road was re-opened to traffic, the 12 individuals were arrested; 10 of whom for breaching the

injunction (contempt of court), 1 for obstruction after refusing to move off the road, and 1 for mischief after attempting to place a sticker on a police vehicle.

11 of the arrested individuals were processed and then released in Port Renfrew. One individual who was arrested for breaching the injunction (contempt of court) refused to identify themselves, and so was held in custody.

Police are still searching for the individuals who assaulted officers on November 29, and enhanced patrols of the corridor will continue to ensure the roads remain clear of obstructions.

Since enforcement began, the RCMP have arrested 1188 individuals; 110 of whom were previously arrested with a combined total of 261 times. Of the total arrested, 919 were for breaching the injunction (contempt of court), 222 were for obstruction, 22 were for mischief, 10 were for breaching their release conditions, 12 were for assaulting a police officer, 1 for counselling to resist arrest, 1 for causing a disturbance, and 1 Immigration Act.

s.15

The RCMP reported that no arrests have been made since December 2, 2021, however there was a peaceful protest presence over this past weekend, that created some traffic disruptions and pedestrian safety issues. RCMP working with MOTI to determine if further traffic control devices can be installed to help mitigate these traffic issues.

Trans Mountain Pipeline (TMP)

Current situation: The RCMP advised that there is currently little activity at the THW camp in Blue River. No protest activity has occured at this site over the past week. Focus remains on flood recovery along the TMEP routes and impacted communities.

The RCMP advise that there has been no renewed direct action along the Burnaby right of way since the arrest of s.22 on November 25, 2021.

Recent history : TMP continues to construct a worker accommodation off Myrtle Lake Road, in Blue River. This is to house up to 550 workers. In early August of 2021, TMP erected security fencing, a security presence and surveillance systems around the proposed construction site. On August 26, 2021, TMP began to move building materials into this secure building site and in doing so had to move road obstructions (rocks and logs) placed on the road by the Tiny House Warrior (THW) occupation located adjacent to TMP property. RCMP were called and one THW protester was arrested for allegedly assaulting a TMP employee.

THW use aerial drones to monitor the perimeters of the TMP work site and continue to call for action to stop TMP work. The THW stage out of 4 portable home units (6-12 persons) placed on Myrtle Lake Road, along TMP property and between two entry gates to the worker accommodation construction site.

s.15; s.16

s.15

On September 15, 2021, a group of protesters from the THW camp began throwing rocks at solar panels, damaging fencing and engaged with TMP Security, which resulted in a TMP employee being injured (broken ribs). RCMP attended and are investigating this matter. The 4 females and 1 male arrested have been charged and released on conditions. RCMP advise that damages to TMP property have exceeded $ 90,000 and that additional arrests in regard to this matter are pending.

s.15

s.15; s.16

On September 24, 2021, RCMP arrested two people involved in ongoing demonstrations in Burnaby. The first demonstrator was arrested around 9:30 a.m. after trespassing into a fenced area on private property owned by BNSF Railway, in violation of a court ordered injunction. Around 12 p.m., RCMP officers returned to the area, responding to reports that a Trans Mountain worker had been injured after being struck on the head by a branch near an occupied tree-sit. The worker was knocked unconscious and taken to hospital for treatment of a possible concussion. It appears a branch fell on the worker while a protester was repelling between tree-sits. RCMP located and arrested this protester at around 3:20 p.m. Further tree sits have been erected by protesters along this right of way and TMP security is engaging with RCMP if and when police support is needed.

On September 25, 2021, RCMP responded to a call of shots fired near the Hope TMP site and determined that a group of hunters, sighting in rifles nearby had a ricochet that landed near the work site. Police are investigating and this situation is apparently misadventure and not targeted at TMP.

s.13; s.14; s.16

On October 18, 2021, the RCMP were advised by TMP that BC Hydro and BC Tel will soon require access to Blue River worker accommodation camp in order to bring in power and telephone services to the site. Apparently these services are located directly in the midst of the THW occupation located on Myrtle Lake road. RCMP advise that a call for service is expected from TMP in the coming week or so, as the company expected to be obstructed by the THW when accessing the source of hydro and telephone services. RCMP advised that the Court Injunction would apply and police enforcement would be authorized, if TMP work is obstructed.

s.15

RCMP advised that for the past week, little protest activity has occurred in the TMEP work areas with work in many areas shut down due to flooding. One protester was arrested on November 25, 2021 in Burnaby after refusing to exit a tree stand he occupied on the TMEP right of way. This contemnor, s.22 was released on conditions to attend Court at a later date.

On November 30, 2021, EMLI advised that BC Hydro and BC Telephone may have a work around which will avoid the need to encroach on the THW occupation. Specifically, a below ground solution to bring power and telecommunications services into the TMEP Blue River Worker Accommodation. RCMP aware.

On December 13, 2021, the RCMP reported that the campground operator near the THW occupation sent a letter of thanks to police. Apparently the enhanced patrols in the area have been observed by others to have calmed direct action efforts from the THW occupation. RCMP advised that the THW occupation has from 2 - 7 persons at this site and engaged in limited activities within the tiny homes.

Critical Incident Secretariat

The BCSC recently posted a decision with regard to CN Rail seeking criminal contempt charges against accused who blocked the CN Rail line in Februry of 2020. The BC Prosecution Service did approve charges and BC Rail appealed this to the SCBC. In the judgement, the BCSC granted BC Rail approval to seek criminal contempt of Court charges against accused in that matter. This SCBC may have application where the BCPS has not indicated a will to prosecute. See attached.

Situational awareness with provincial agencies remains ongoing, as appropriate, by direct liaison with MIRR, MAG, EMLI, LNG Secretariat, GSO and RCMP. The writer attends weekly scheduled meetings of provincial agencies within the TMP Regional Coordination call hosted by EMLI, the Regulatory, Legal and Direct Action Committee of the LNG Secretariat, the CGL Regional call hosted by the LNG Secretariat and through the Critical Incident Secretariat Conference call hosted by PSSG, which includes an RCMP delegation.

As update and with regards

Norm

Norm McPhail
Public Safety Initiatives | Policing and Security Branch
Ministry of Public Safety and Solicitor General
Ph. s.17

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canadian National Railway Company v. Doe,* 2021 BCSC 2469

Date: 20211206
Docket: S201466
Registry: Vancouver

Between:

Canadian National Railway Company

Plaintiff

And

Jane Doe, John Doe and Persons Unknown

Defendants

Before: The Honourable Mr. Justice Branch

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	S. Nelligan
Counsel for the Defendants:	M. Peters E. Wunder
Counsel for the British Columbia Prosecutions Service:	T. Shaw P. Sares, A/S
Place and Date of Hearing:	Vancouver, B.C. November 9, 2021
Place and Date of Judgment:	Vancouver, B.C. December 6, 2021

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I. INTRODUCTION

[1] This contempt proceeding relates to twelve persons arrested at a railway blockade that was the subject of an injunction issued by this Court (the "Arrestees"). The parties agreed that the Court should first determine a legal issue. This issue was initially framed by the Arrestees as follows: Does this Court have the authority to prosecute on its own motion for criminal contempt in the present case (the "Issue")?

[2] Notwithstanding this framing of the Issue, at the hearing itself, the position of the Arrestees and the intervenor, the British Columbia Prosecution Service (the "BCPS"), was more refined. Specifically:

a) The Arrestees suggested that their objection was not as to whether the Court may continue with a criminal contempt prosecution after the BCPS declined the Court's invitation to carry the prosecution, but rather whether the Court should continue.

b) The BCPS also accepted that the Court has the authority to allow a criminal contempt proceeding to move forward, but argued that should occur only if the Court determines that the BCPS's refusal was the result of an abuse of process.

II. BACKGROUND

[3] On the application of the Canadian National Railway Company ("CNR"), this Court issued an injunction on February 10, 2020 to prevent trespassing on, and blockading of, CNR's North Line (the "North Line Injunction"). That same day, Justice Gropper issued an injunction in relation to CNR's South Line (the "South Line Injunction"). Both injunctions (collectively, the "Injunctions") were amended by this Court on February 21, 2020.

[4] On February 24, 2020, arrests were made of certain persons at a blockade on CNR's North Line near New Hazelton, B.C., including the Arrestees.

[5] On June 26, 2020, the Court invited the Attorney General of British Columbia to consider prosecuting criminal contempt proceedings. On April 18, 2021, the BCPS declined to participate. For nine of the Arrestees, the BCPS concluded that it could not establish that they had knowledge of the terms of the injunction. For the remaining three, the BCPS stated that although the evidence was sufficiently clear that these Arrestees had knowledge of the injunction, it was not in the public interest that they be prosecuted for criminal contempt. The factors considered by the BCPS included the following:

a) these Arrestees did not engage in property damage or violence,

b) they were otherwise cooperative;

c) the injunction was successfully enforced on February 24, 2020, and had not been breached since; and

d) a prosecution during the midst of the COVID-19 outbreak would present public health challenges.

[6] Notwithstanding the BCPS's decision, CNR decided to carry on with contempt proceedings, including the pursuit of a potential finding of criminal contempt.

III. THE *VFPA* DECISION

[7] Determination of the issues in the present case demands a careful consideration of the extent to which the outcome is controlled by Justice

Tammen's decision in *Vancouver Fraser Port Authority v. Doe*, 2021 BCSC 1109 ("*VFPA*").

[8] The *VFPA* decision arose in the context of blockades at entrance points to the Vancouver Fraser Port Authority (the "Port Authority"). An injunction was issued and arrests took place. Justice Tammen invited the BCPS to assess whether prosecutions for criminal contempt should be pursued. The BCPS declined Justice Tammen's invitation on the basis that while "the evidence supported a finding of criminal contempt, and rose to the level of substantial likelihood of conviction… it was not necessary in the public interest that prosecutions proceed": *VFPA* at para. 20.

[9] Notwithstanding this decision by the BCPS, the Port Authority filed a notice of application seeking a finding of contempt against the six respondents and putting them on notice that a finding of criminal contempt was available on the evidence. Counsel advised the court that all six respondents intended to plead guilty, but the respondents wished to argue that the decision of the BCPS precluded a finding that their conduct amounted to criminal contempt. The parties appeared before Justice Tammen to argue this legal issue before any guilty pleas were received. The BCPS appeared at the hearing. The positions taken by the parties at the hearing were summarized as follows:

> [25] On May 31, 2021, the respondents appeared and expressed a desire to plead guilty to contempt. I then heard submissions on the legal question of the nature of the contempt finding open to the Court in these circumstances.
>
> [26] The respondents submitted that the Court should defer to the assessment of the public interest made by the B.C. Prosecution Service, on behalf of the Attorney General. The Court, having referred the matter to the Attorney General for consideration, should not substitute its view of the public interest for that of counsel for the B.C. Prosecution Service.
>
> [27] In addition, the respondents submitted that if the Court were to find criminal contempt, the plaintiff would have had two opportunities to seek such a finding: one when the plaintiff sought to have the Court make the referral to the B.C. Prosecution Service, and another on filing the February 19, 2021 notice of application. The respondents submit that the only permissible recourse for the plaintiff, once the B.C. Prosecution Service decides not to assume carriage, is to proceed in civil contempt.
>
> [28] Counsel with the B.C. Prosecution Service appeared and made submissions on behalf of the Attorney General. In part, those submissions echoed the last point made by the respondents, but with even greater force. Counsel submitted that once the B.C. Prosecution Service makes a

> determination not to proceed in criminal contempt, a private plaintiff is precluded from seeking a finding of criminal contempt.
>
> [29] Counsel also submitted that the principle of Crown discretion was squarely engaged, and that the court should defer to the exercise of that discretion, absent a finding of abuse of process. The position of counsel for the B.C. Prosecution Service is that criminal contempt should be treated essentially in the same fashion as all other criminal offences, subject to the sole discretion of Crown counsel whether or not to prosecute. The only difference would be a requirement that Crown report to the court on the manner in which the discretion was exercised. Absent an abuse of process in the exercise of that discretion, both the court and the plaintiff are foreclosed from proceeding in criminal contempt, submits counsel for the B.C. Prosecution Service.
>
> [30] The plaintiff submitted that it is open to the Court to find criminal contempt, since the law is clear that a determination of the nature of the contempt is made by the presiding judge during the course of the proceedings. Mr. Nelson acknowledged that the present circumstances are somewhat unusual, in that criminal contempt is being prosecuted by a civil plaintiff, but submitted that such proceedings are legally permissible. Plaintiff's counsel made no submission on whether I should find criminal or civil contempt, leaving it to the Court to determine on the evidence and agreed facts.

[10] Justice Tammen carefully considered the role of the court and of the Attorney General in criminal contempt proceedings, and determined that criminal contempt could be pursued:

> [46] It is accepted as a matter of law that the Supreme Court has authority, *ex mero motu* (on its own motion), to initiate proceedings for contempt pursuant to its inherent jurisdiction…
>
> [47] However, the more common, and recommended, course is for the Attorney General to assume carriage of criminal contempt proceedings in discharge of his duty to uphold the law and the integrity of the court. Chief Justice Esson referred to one of the reasons for this in *MacMillan Bloedel Ltd. v. Simpson* (1993), 87 B.C.L.R. (2d) 154 (S.C.) [*MacMillan Bloedel (SC)*] at para. 4:
>
> > It is clear, as a matter of law, that this court has the power on its own motion to initiate proceedings for contempt. But to do so would create practical difficulties and would create an appearance of the court entering the arena. So it should not be done unless it is unavoidable.
>
> [48] The practice has developed in this province whereby the court requests the Attorney General's involvement where it has determined that alleged conduct, if proven, would constitute criminal contempt…
>
> [49] The Attorney General initially rejected Finch J.'s request, publicly expressing the view that he had no responsibility in the matter. After a "lively public debate", the Attorney General assumed conduct of the proceedings. As Esson C.J.S.C. observed (at para. 10), "from that day until

now [1993] that procedure has been followed and has been recognized as a sound one."

[50] Among the proceedings in which that procedure had been followed was *Fletcher Challenge Canada Ltd. v. Miller* (August 8, 1991), Vancouver Registry No. C915008 (S.C.), which initially involved civil contempt proceedings brought by Fletcher Challenge for violation of an injunction enjoining interference with its logging operation in the Walbran Valley. A motion was brought asking the court to review the allegations against those who had been brought before the court to ascertain whether those allegations, if true, would constitute criminal contempt. In a ruling that would become a template for future cases, Finch J. stated:

> … If it should develop that the Attorney decides not to proceed against any of the individuals presently cited on the basis that there is insufficient evidence, or other reasons, for not proceeding by way of criminal contempt, it will of course be open to the plaintiff to continue the process it has set in motion for civil contempt against those persons against whom the Attorney chooses not to proceed.

[…]

[55] The preference expressed for the Attorney General, as opposed to a private party, to prosecute contempt cases mirrors the comments of McColl J. cited above that private parties should not be compelled to shoulder the responsibility of prosecuting public disputes. The intervention of the Attorney General likewise ensures that the evidence is presented by a neutral third party, as opposed to one of the parties to the original civil dispute. Such intervention also permits the court to remain above the fray, rather than descending into the arena and assuming a quasi-prosecutorial role.

[56] Thus, there are strong arguments in favour of timely intervention by the Attorney General in any case of widespread public breaches of court orders, on invitation by the court to assume carriage of the proceedings. The question now before me is this: is the court foreclosed from finding criminal contempt in circumstances where the Attorney General demurs, and does not take conduct of the ongoing contempt proceedings?

[57] For the reasons that follow, I conclude that the decision of the B.C. Prosecution Service to decline to conduct criminal contempt proceedings does not preclude a finding of criminal contempt by the Court.

[…]

[58] I reach the foregoing conclusion for three inter-related reasons:

a) The question whether impugned conduct constitutes civil or criminal contempt is a question of law, to be decided by the presiding judge;

b) The ability of the superior court to punish for all forms of contempt, including *ex facie* criminal contempt, is a core aspect of its inherent jurisdiction; and

c) In deciding that impugned conduct appears to be criminal as opposed to civil contempt, a judge is making a determination that the long term repute of the administration of justice, and thus the public interest, is engaged.

[Emphasis added.]

[11] In arriving at his decision, Justice Tammen relied heavily on Chief Justice Lamer's determination in his majority judgment in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 ("*MacMillan Bloedel SCC*"), stating:

> [36] The Chief Justice reviewed in some depth the contours of the inherent jurisdiction of superior courts, quoting with approval from I.H. Jacob's seminal article, "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 23. He also surveyed the leading academic commentary and jurisprudence that spoke to the role of the contempt power as an essential attribute of superior courts. At para. 45, he wrote:
>
> > [45] The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law. It is unnecessary in this case to enumerate the precise powers which compose inherent jurisdiction, as the power to punish for contempt ex facie is obviously within that jurisdiction. The power to punish for all forms of contempt is one of the defining features of superior courts. The in facie contempt power is not more vital to the court's authority than the ex facie contempt power. The superior court must not be put in a position of relying on either the provincial attorney general or an inferior court acting at its own instance to enforce its orders. …
>
> […]
>
> [65] As a matter of principle, the decision of the Attorney General not to assume conduct of contempt proceedings is not determinative of either the nature of the contempt or the court's ability to find and punish for criminal contempt. As expressly noted by Chief Justice Lamer in the majority judgment in *MacMillan Bloedel SCC*, the superior court must not be put in the position of relying on the provincial Attorney General to enforce its orders.
>
> [Emphasis added.]

[12] Justice Tammen also found support for his conclusion in Justice Parrett's decision in *R. v. Godbout and the P.G. Citizen*, 2004 BCSC 1307. In that case, Justice Parrett issued a contempt citation against a reporter and his newspaper for an opinion piece critical of the justice system published on the eve of a jury trial. Crown Counsel subsequently advised the court that it would not be intervening in the proceedings, as the material available did not meet the Crown's charge approval standard. Justice Parrett stated:

> [22] I cannot, however, allow to pass Mr. Kuzma's apparent suggestion that the material in this case does not meet Crown counsel's charge approval standards. By implication, Mr. Kuzma suggested that the initiation of criminal contempt charges by this court is subject in some way to the review of Crown counsel and their charge approval standards. That

> suggestion, if it was intended, is plainly and unequivocally wrong. The Crown's sole task when the court initiates proceedings such as this is to consider whether in fulfilling its historical and constitutional role the Crown will participate to assist the court in the proceedings...
>
> [Emphasis added.]

[13] In the result, the court in *Godbout and the P.G. Citizen* did not continue with criminal contempt proceedings, but instead directed that they be stayed. However, the court did so with substantial reluctance, and with a direction that the issues raised by the matter be referred to the Chief Justice for further consideration:

> [32] I have carefully considered all aspects of this regrettable incident. In particular, it is important, in my view, to keep uppermost in the court's mind that our primary goal must be to ensure that this trial takes place as soon as practicable and in the community closest to that where the events occurred.
>
> [33] Matters which interfere with those goals or distract from them should be avoided if at all possible.
>
> [34] While I remain of the view that the disruption of the process of this court justified calling upon those responsible to show cause why they should not be held in contempt, and that this process was tacitly agreed to by the Crown, the position now taken by the Crown threatens to overshadow the proper process of the court, and to potentially further affect the timing or the location of this trial.
>
> [35] That position and its alteration from September 13, 2004 to September 27, 2004, potentially give rise to serious constitutional concerns between this court and the representatives of the Attorney General. Such issues are traditionally dealt with between the Chief Justice of this court and the Attorney General.
>
> [36] In all of the circumstances of this case it is with reluctance that I have concluded that this contempt citation should not proceed further. I direct that those proceedings be stayed and that the other issues be referred to the Chief Justice for his consideration.

[14] Returning to *VFPA*, Justice Tammen also relied on recent commentary from the B.C. Court of Appeal in *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 385 (“*Mivasair 2020*”), where the court stated:

> [25] Further, however, as the Court pointed out in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, criminal contempt is an offence *sui generis*. The power to prosecute for contempt is part of the “core or inherent jurisdiction” integral to the role of s. 96 courts, essential to the maintenance of their independence, and a power that cannot be removed from them “by either level of government, without amending the Constitution”…

> [26] Therefore, not only is Parliament not required to codify all criminal law, the contempt power of s. 96 courts has a constitutional dimension that limits Parliament's power to do so…
>
> [Emphasis added.]

[15] Justice Tammen rejected the BCPS's argument that the court could not pursue a criminal contempt charge after the BCPS declined to carry the matter forward:

> [84] Despite such pronouncements by the Supreme Court of Canada and our Court of Appeal, counsel for the B.C. Prosecution Service submitted that it, not the court, should play the central role in criminal contempt proceedings. Indeed, counsel submitted that there could be no proceedings for criminal contempt without the imprimatur of the B.C. Prosecution Service, applying its charge screening process. The only exception would be a showing of bad faith on the part of the B.C. Prosecution Service, in the exercise of its discretion. That position is legally untenable.
>
> [85] The position of the B.C. Prosecution Service ignores the following: the unique nature of criminal contempt, an offence *sui generis*; the importance of the criminal contempt power as part of the superior court's core jurisdiction; and, the unique role of the Attorney General in criminal contempt proceedings, namely protecting the authority and integrity of the court.
>
> [86] There is good reason to question the appropriateness of any charge approval process by the B.C. Prosecution Service following an invitation by the court to assume carriage of criminal contempt proceedings. In the present case, counsel for the B.C. Prosecution Service determined there was a substantial likelihood of conviction. The reason given for declining the Court's invitation was that the public interest did not require prosecution. With that assessment, I respectfully disagree.
>
> [87] The circumstances here were straightforward. The plaintiff filed a notice of application, initiating contempt proceedings against six individuals. The preliminary evidence presented was that gathered and prepared by police, in execution of their duties, enforcing the injunction. That evidence, if accepted, clearly disclosed criminal contempt. It was mass organized disobedience of a court order, which order was made to put an end to other unlawful protest activity, aimed at a different lawful order of the court. Such conduct tends to depreciate the authority of the court, and inevitably brings the administration of justice into scorn and disrepute. Thus, the public interest is squarely engaged, and prosecution is required. That is almost axiomatic, as noted by Justice Wood in his preliminary ruling in the *Everywoman's* case, where he noted that anything less "would be to resign the citizens of this community to anarchy."
>
> [88] The court, by inviting counsel for the Attorney General to assume carriage of the proceedings, is not seeking an assessment of the public interest in prosecution for criminal contempt. The court has already decided that the public interest is engaged, that the long term repute of the administration of justice is imperilled by the mass public disobedience of a

> court order. The court thus asks the Attorney General to take conduct of the proceedings in order to ensure that the integrity of the court is preserved.
>
> [Emphasis added.]

[16] Justice Tammen also commented on the charge approval standard applied by the BCPS:

> [67] Thus, it will be readily apparent that in inviting the Attorney General to assume carriage of contempt proceedings the court is not in a similar position to a complainant in a criminal case, nor is the court's request akin to that of a police agency, forwarding a Report to Crown Counsel recommending charges. It is therefore somewhat puzzling that in recent times the practice has developed within the B.C. Prosecution Service, the prosecutorial arm of the Ministry of the Attorney General, that all such court requests are subject to the same charge screening process as other allegations of criminal conduct. The applicability of that two-pronged standard, which considers both substantial likelihood of conviction and public interest in proceeding, is not without controversy in contempt proceedings.
>
> [68] The Court of Appeal noted the following in *Hayes Forest Services Ltd. v. Forest Action Network*, 2006 BCCA 156 [*Hayes Forest Services*] at para. 53:
>
> > When the Attorney General intervenes in contempt proceedings in this province he assumes conduct of the proceedings where the evidence relating to those proceedings meets the charging standard of the Criminal Justice Branch. Contrary to the argument of the appellant, the Attorney General does not require an invitation of the court or the consent of any party to assume the conduct of a criminal contempt proceeding.
>
> [69] I read the first sentence as merely an acknowledgement of the practice that has developed within the Ministry of the Attorney General. The issue there under consideration was the standing of the Attorney General to advance criminal contempt proceedings. The discrete issue of applicability of the charge screening process was not squarely before the court.

[17] After issuing *VFPA*, on June 30, 2021, Justice Tammen accepted guilty pleas by the alleged contemnors and sentenced them consistent with the jointly proposed terms: *Vancouver Fraser Port Authority v. Joseph*, 2021 BCSC 1527. The court introduced its sentencing decision as follows:

> [1] … Before the court for sentencing are six individuals who have entered guilty pleas to an allegation of criminal contempt arising from protest activity amounting to a blockade of the entrance to the Port of Vancouver and the adjacent city streets on February 25, 2020. That protest activity and blockade was in violation of an order I made on February 9,

> 2020, enjoining all individuals from blockading access to the various port entrances in the Lower Mainland.
>
> [Emphasis added.]

[18] *VFPA* has already received some judicial consideration. In *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2021 BCSC 1380, another injunction contempt case, Justice Thompson summarized the effect of *VFPA* as follows:

> [11] I was referred to a line of cases where this Court has invited the Attorney General to assume conduct of contempt proceedings. The most recent of these cases is *Vancouver Fraser Port Authority v. Doe*, 2021 BCSC 1109. In the course of his reasons, Justice Tammen reviewed leading authorities on the nature of inherent jurisdiction and the contempt power, and the nature of civil and criminal contempt, before turning to the role of the Attorney General in criminal contempt proceedings. He cited from Chief Justice Esson's judgment in *MacMillan Bloedel Ltd. v. Simpson* (1993), 87 B.C.L.R. (2d) 154 (S.C.) in making the point that while the Court has the power on its own motion to initiate contempt proceedings, this creates the appearance of the Court entering the arena, and the more common and preferable course is for the Attorney General to assume carriage of the proceedings where the contempt may be criminal in nature (paras. 46-47). Tammen J. then turned to a survey of the cases and a discussion of the practice that has developed in British Columbia surrounding requests by the Court for involvement by the Attorney General.
>
> [12] The issue for Tammen J. was whether it was open to him to make a finding of criminal contempt where the Attorney General had, as in that case, declined the Court's invitation to step in and assume conduct of the contempt proceedings. He held that the actions of protestors in that case constituted criminal contempt (para. 94) and he concluded that the decision of the B.C. Prosecution Service to decline to conduct criminal contempt proceedings did not preclude a finding of criminal contempt (para. 57). He described as untenable the Crown's submission that in the absence of bad faith there could be no proceedings for criminal contempt without the "imprimatur" of the B.C. Prosecution Service, applying its charge screening process (para. 84).
>
> [13] In *obiter dicta*, Tammen J. expressed strong views on whether the Attorney General ought to employ the B.C. Prosecution Service's usual charge approval process and criteria when deciding whether to accept a Court's invitation to take up the prosecution of criminal contempt. At para. 88, he said:
>
> > The court, by inviting counsel for the Attorney General to assume carriage of the proceedings, is not seeking an assessment of the public interest in prosecution for criminal contempt. The court has already decided that the public interest is engaged, that the long term repute of the administration of justice is imperilled by the mass public disobedience of a court order.
>
> [Emphasis added.]

[19] By memorandum to counsel dated June 29, 2021, I asked for submissions from the parties and the BCPS on the extent to which the issues before me were controlled by *VFPA*.

IV. ANALYSIS

[20] As noted above, notwithstanding the initial framing of the Issue, no party maintained that the Court did not have the authority to proceed with a criminal contempt proceeding if the BCPS declined to advance the prosecution. Rather, the focus of this hearing was on defining the conditions under which the Court should continue with such a prosecution, and whether the necessary preconditions are present in the case at bar.

[21] The BCPS and the Arrestees effectively presented four reasons why the Court should not proceed with criminal contempt here:

a) The Court should allow the civil contempt proceeding to move forward instead;

b) the issues before the Court raise constitutional questions for which proper notice had not been given;

c) *VFPA* need not, and should not, be followed; and

d) there is no evidence of abuse of process in the BCPS's decision not to prosecute.

A. Should the Court Direct that the Matter Proceed as a Civil Contempt Proceeding Only?

[22] I find that the potential for a criminal contempt finding cannot and should not be negated simply because civil contempt remains available. As Justice Tammen emphasized in *VFPA*, criminal contempt is a separate tool available to the Court to ensure that its orders are not flagrantly disrespected:

> [32] Derived from the court's inherent jurisdiction to control its own process, the judicial contempt power has existed for as long as courts themselves. Its purpose is to uphold the rule of law by protecting the administration of justice. As the Supreme Court recognized in *United Nurses of Alberta v. Alberta (Attorney General),* [1992] 1 S.C.R. 901 [*U.N.A.*]:
>
> > [20] Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at

> the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court. [Emphasis added.]

[33] The authorities are replete with superlatives in describing the foundational importance of the rule of law and the role of the contempt power in preserving it…

[34] Similarly, in *MacMillan Bloedel Ltd. v. Miller*, 1993 CarswellBC 588 (S.C.), one of a series of criminal contempt decisions arising out of anti-logging protests in the Clayoquot Sound area of Vancouver Island, Mr. Justice Bouck wrote:

> [172] Preserving the dignity of the court is only a minor part of contempt proceedings. The fundamental issue is much deeper. Underneath it all, contempt proceedings are taken primarily to preserve the rule of law. Without the rule of law democracy will collapse. Individuals will then decide which laws they will obey and which ones they won't. Government by the rule of law will disappear. People will then be controlled by the rule of the individual. The strongest mob will rule over the weak. Anarchy will prevail.

[35] In *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 [*MacMillan Bloedel SCC*], Lamer C.J.C., writing for the majority, declared (at para. 44):

> . . . the provincial superior courts are the foundation of the rule of law itself. Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected.

[23] While civil contempt is available, criminal contempt is of a different character and seeks to achieve a different purpose. As Justice Tammen explained:

> [39] Criminal contempt is distinguishable from civil contempt, the distinction resting upon the element of public defiance. While the purpose of civil contempt is to secure compliance with a court's order, the purpose of criminal contempt is to punish for conduct calculated to bring the administration of justice by the courts into disrepute.

[24] This distinction was also emphasized by Chief Justice McEachern in *Everywoman's Health Centre Soc. (1988) v. Bridges* (1990), 54 B.C.L.R. (2d) 273 (C.A.):

> [77] A civil contempt is one where the dispute is entirely between private parties which does not threaten the proper administration of justice. A criminal contempt is one where, because of the nature of the conduct in question, the issues transcend the interests of the parties, and the public has an interest in ensuring the proper administration of justice.
>
> [Emphasis added.]

See also *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at 931-932 ("*United Nurses*").

[25] The BCPS acknowledged that certain sentencing principles in criminal contempt differ from those applicable to civil contempt.

[26] The fact that a penalty for civil contempt may also have a deterrent effect does not negate the purpose of—and need for—the additional criminal contempt remedy in appropriate circumstances. The BCPS argument implies that criminal contempt is pointless. That is simply incorrect.

[27] Here, I previously made the preliminary assessment that there was sufficient evidence on the record to support a potential prosecution for criminal contempt. It is for that reason that I made the request to the Attorney General to intervene. I find that it would be inappropriate for me to now treat criminal contempt as having no purpose simply because the BCPS views civil contempt proceedings as preferable. Were that the proper approach, criminal contempt could rarely be pursued, as civil contempt will almost always be available as an alternative.

B. The Need for a Constitutional Notice

[28] The BCPS argues that the constitutionality of s. 2(a) of the *Crown Counsel Act*, R.S.B.C. 1996, c. 87, and s. 579 of the *Criminal Code*, R.S.C. 1985, c. C-46, are at issue, and hence notice under ss. 3 and 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, should issue before any challenges are advanced.

[29] I disagree. No party is seeking to challenge the constitutionality of the identified provisions. The issue is simply whether the Court should exercise its discretion to allow a criminal contempt prosecution to proceed after the BCPS has declined to become involved.

[30] Section 2(a) of the *Crown Counsel Act* provides as follows:

> 2 The Branch has the following functions and responsibilities:
>
> > (a) to approve and conduct, on behalf of the Crown, all prosecutions of offences in British Columbia…

[31] No challenge has been brought to this section and no constitutional remedies are sought in the present case. The most that can be said is that the

BCPS seeks to invoke this section as a guide to the proper assessment of the issues before the Court.

[32] More importantly, the applicability of s. 2(a) is constrained by its own terms. It applies only to the prosecutions of “offences”. The term “offence” is a defined as follows in s. 1 of the *Crown Counsel Act*:

> "offence" means an offence
>
> > (a) under the *Criminal Code* or any other enactment of Canada with respect to which the Attorney General of British Columbia may initiate and conduct a prosecution, and
> >
> > (b) under an enactment of British Columbia.

[33] Pursuant to s. 1 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, “enactment” refers to “an Act or a regulation or a portion of an Act or regulation”. Being a common law offence, criminal contempt does not come within that definition.

[34] Section 9 of the *Criminal Code* expressly affirms the court’s common law contempt powers:

> Criminal offences to be under law of Canada
>
> 9 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,
> >
> > (b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or
> >
> > (c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,
>
> 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.
>
> [Emphasis added.]

[35] The BCPS relies on the following authorities in arguing that “offences” under the *Crown Counsel Act* includes criminal contempt: *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156 at para. 2; *United Nurses* at 932; *R. v. Krawczyk*, 2009 BCCA 250, leave to appeal denied [2010] S.C.C.A. No. 33.

[36] However, none of these decisions even cite the *Crown Counsel Act*, let alone the definition of "offence" under that statute. The mere fact that those judgments—and *VFPA*—use the word "offence" does not mean that criminal contempt is an offence governed by an enactment, or that the use of that language ousts the specific statutory definition. In *Sullivan on the Construction of Statutes*, 6th ed., (Markham, Ont.: LexisNexis, 2014), the author states at 225 that "[i]dentical words may not have identical meanings once they are placed in different contexts and used for different purposes. This is particularly true of general or abstract words." The use of a general term in a judgment cannot displace the clear and unambiguous meaning of a statutory provision.

[37] The BCPS also suggests that constitutional notice should have been provided given the effect of the arguments on section 579 of the *Criminal Code*, which provides that the Attorney General may direct the stay of a proceeding. Again, no challenge is advanced to the constitutional validity of that provision. What is at issue is the power of the court to continue a criminal contempt proceeding in a proceeding that is brought outside the four corners of the *Criminal Code*, not the power of the Attorney General to stay a proceeding brought inside that enactment's four corners. As the Court of Appeal stated in *Mivasair 2020*:

> [26] Therefore, not only is Parliament not required to codify all criminal law, the contempt power of s. 96 courts has a constitutional dimension that limits Parliament's power to do so. As Chief Justice Lamer observed in *MacMillan Bloedel v. Simpson* (at para. 22):
>
> > … While it is indeed possible to conceive of a system where all of the contempt proceedings are transformed into codified offenses, such a system would be antithetical to ours, where the superior court of general jurisdiction plays the central role.
> >
> > [Emphasis added.]

See also *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 1247 at paras. 118, 137.

[38] While it is clear that s. 579 grants the Attorney General broad authority to stay proceedings brought under the *Criminal Code*, it is not yet clear that this authority extends to contempt proceedings brought under the inherent jurisdiction of the court. I did not have the benefit of full submissions on this issue, and therefore will not consider it further, but it must be noted that removing the inherent

jurisdiction of superior courts requires “clear and precise statutory language”: *Canada (Attorney General) v. Fontaine*, 2017 SCC 47 at para. 33.

[39] For these reasons, I find that there was no need for a constitutional notice to issue before the issues before the Court could be considered.

C. Should *VFPA* be Followed?

[40] The BCPS and the Arrestees offered a variety of reasons why *VFPA* should not be followed.

1. Was Justice Tammen’s Finding Obiter*?*

[41] Although this point was not addressed in their oral submissions, the BCPS took the position in their written argument that Justice Tammen’s finding on the authority of the court to proceed in *VFPA* was *obiter*. The BCPS argues that the arrestees in that case had already agreed to plead guilty and to a joint submission on penalty, regardless of whether the case proceeded criminally or civilly.

[42] I disagree. It is clear to me that Justice Tammen treated his later sentencing decision as one for criminal contempt, which would not have been the case had he found differently in *VFPA*. The introduction to Justice Tammen’s sentencing decision strongly suggests that it related to “guilty pleas to an allegation of criminal contempt”. The words “civil contempt” are not noted anywhere in the sentencing decision. Justice Tammen presumably tested the proposed sentence against the appropriate standard for criminal contempt.

[43] Hence, Justice Tammen’s determination on the legal issue was material to the final outcome of the matter. His conclusion on the authority of the court mattered, both from the perspective of the court and of the parties. The fact that Justice Tammen eventually accepted a sentencing proposal does not change the materiality of his earlier determination of the court’s authority.

[44] Hence, I find that I am not entitled to ignore *VFPA* on this basis.

2. Was VFPA Wrongly Decided?

[45] The BCPS and the Arrestees argue that *VFPA* was wrongly decided. As such, they submit that this Court need not follow it.

The Applicable Test

[46] The court in *C.K.M. v. H.R.M.*, 2021 BCSC 1297, summarized the principles applicable where a court is called upon to consider the correctness of another decision of the same court:

> [126] Judicial comity is an important principle intended to bring certainty to the law: *United States v. Fiessel*, 2004 BCSC 908 at para. 38. In British Columbia, there is a long-standing "rule of practice" for judges exercising judicial discretion when determining whether to go against the judgment of another judge of the Court, described in the frequently cited case of *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 at 592, 13 W.W.R. (N.S.) 285 (B.C.S.C.). The *Re Hansard Spruce Mills* approach provides that a judge should not go against the judgment of another judge of this Court unless (1) subsequent decisions have affected the validity of the impugned judgment; (2) it is demonstrated that some binding authority or relevant statute was not considered in the impugned judgment; or (3) the impugned judgment was 'unconsidered', in the sense of being an immediate decision given without opportunity to fully consult authority.
>
> [127] The practice is not invariable because along with certainty and consistency, a desirable characteristic of the law is that it be open to change: [citations omitted.] Thus, the rule of practice is discretionary. Additionally, there is a difference between the decision of a single judge and a "course of judicial decision" or "stream of authority": [citations omitted.] At all times the approach to judicial comity should advance the interests of justice, which will almost always involve following a decision of another judge of the same court, but is not limited to a "rote" application of the *Re Hansard Spruce Mills* approach: *R v. Sipes*, 2009 BCSC 285 at paras. 10-11.
>
> [128] Nonetheless, while a judge of this Court is not "bound" by the decision of another judge of this Court, judicial comity would dictate that it should be followed unless there is sound reason to the contrary: [citations omitted.] The starting point is that it is highly desirable to maintain consistency among decisions of the same court: *House of Sga'nisim* at para. 92.
>
> [Emphasis added.]

[47] I apply this standard below, applying the critiques made regarding *VFPA* by both the BCPS and the Arrestees.

The Charge Approval Critique

[48] The BCPS' criticism of *VFPA* is largely based on Justice Tammen's treatment and commentary on the BCPS's charge approval standard. However, this is a classic "straw man" argument, and is quickly set up and knocked down:

a) Justice Tammen's comments on the charge approval standard were clearly *obiter*; but

b) this *obiter* commentary does not affect this Court's determination as to when and whether to exercise its discretion to proceed.

[49] On the first point, in *Teal Cedar Products Ltd.*, Justice Thompson found that Justice Tammen's additional commentary about the BCPS's approach to the charge approval standard was *obiter* at para. 13, and I agree with his finding.

[50] On the second point:

a) this Court is not bound to apply the BCPS's internal charge approval standards in making its own determination, making the commentary generally irrelevant to the outcome here; and

b) given that Justice Tammen's comments on the charge approval standard were *obiter*, even if they are wrong, it would not undermine the correctness of his initial finding on the jurisdictional authority point.

Failure to follow binding authority

[51] The BCPS raises a number of decisions which they say undercut the bases underpinning *VFPA*.

[52] First, the BCPS argues that Justice Tammen failed to follow the B.C. Court of Appeal's binding decision in *Krawczyk*. Specifically, the BCPS argues that *Krawczyk* "clearly established that Crown counsel acting for the Attorney General are entitled to consider both whether sufficient evidence exists and 'other reasons' in responding to an invitation from the court". Once again, the BCPS sets up a straw man. The argument about what factors or reasons the BCPS should consider internally is not applicable to the issues before the Court.

[53] The BCPS relies on the following extract from *Krawczyk*:

> [7] Madam Justice Brown, in inviting the Crown to conduct the proceedings relating to the incidents of 25 and 31 May 2006, referred to the decision of Mr. Justice Finch (as he then was) in *Fletcher Challenge Canada Ltd. v. Miller* (August 8, 1991), Doc. Vancouver C915008 (B.C.S.C.), and said this at para. 7:

> [2] So in the words of Mr. Justice Finch, then, of this court, I am satisfied that there is evidence in this case which, if accepted by the court, may support a finding of criminal contempt against Mrs. Krawczyk…
>
> [...]
>
> [4] Again, in the words of Mr. Justice Finch, if it should develop that the Attorney decides not to proceed against Mrs. Krawczyk on the basis that there is insufficient evidence or other reasons for not proceeding by way of criminal contempt, it will, of course, be open to the plaintiff to continue the process it has set in motion for civil contempt against Mrs. Krawczyk. If the Attorney chooses not to proceed, I will then invite Mr. Sullivan to consider this issue and to proceed if satisfied.
>
> [Emphasis added.]

[54] I find that the court in *Krawczyk* was simply affirming that, if the Attorney General decides not to proceed, it is "open" for the plaintiff to continue to pursue civil contempt. That is undoubtedly correct. What *Krawczyk* does not answer is whether the court is foreclosed from moving forward with criminal contempt when the BCPS refuses to participate, nor does it provide any guidance on when the court should take that step. The charge standard discussion in *Hayes Forest Services Ltd. v. Forest Action Network*, 2006 BCCA 156, leave to appeal to SCC refused, 2006 CanLII 39431, or in *Vancouver Fraser Port Authority v. Brett*, 2020 BCSC 1368, two other decisions raised by the BCPS and the Arrestees, are similarly not germane to the issues before the Court. In *MacMillan Bloedel Limited v. Simpson*, 1993 CanLII 2760 (B.C.S.C.), and *Krawczyk v. Peter Kiewit Sons Co.*, 2008 BCSC 612 at paras. 39-41, the issue of the court's power to proceed in the face of the BCPS's refusal to act was again not squarely before the court.

[55] Similarly, the comments in *R. v. Anderson*, 2014 SCC 41, *Krieger v. Law Society of Alberta*, 2002 SCC 65, *R. v. Cawthorne*, 2016 SCC 32, and *R. v. Power*, [1994] 1 S.C.R. 601, discussing how core decisions made by the Crown are only reviewable on an abuse of process standard are not material to the issue. I am not asked to decide the extent to which the court can instruct or direct the Crown. Rather, the question before me requires a consideration of the scope of the court's discretion to pursue criminal contempt charges when the BCPS refuses to do so. When the court exercises this discretion, it does not sit in review of the Crown's decision or impinge on the separation of powers, but instead draws on its own well-established common law powers to protect its own processes.

The Effect of Subsequent Decisions

[56] The BCPS argues that two recent decisions of the Supreme Court of Canada ("SCC") require fresh consideration of Justice Tammen's approach.

Reference re* Code of Civil Procedure *(Que.), art. 35, 2021 SCC 27

[57] In the *Reference re Code of Civil Procedure* (Que.), art. 35, 2021 SCC 27 (the "*Reference")*, the SCC considered a provincial law moving jurisdiction for certain lower value civil cases from the Quebec Superior Court to the Provincial Court of Quebec. The majority found that this improperly interfered with the jurisdiction of s. 96 courts under the *Constitution Act, 1867*.

[58] The BCPS argues that the SCC's comments in the *Reference* about the benefits of a harmonious judicial system support their position. They submit that, in the case of criminal contempt prosecutions, harmony would best be achieved by limiting the court's ability to proceed to cases where the Attorney General's refusal to do so constitutes an "abuse of process".

[59] This argument is not supported by the majority decision. If anything, the majority's willingness to confirm the superior courts' exclusive jurisdiction under s. 96 only validates Justice Tammen's analysis, insofar as he emphasized that this court's authority over contempt proceedings has its genesis in s. 96: *VFPA* at para. 83. In the *Reference*, the court stated:

> [4] The purpose of s. 96 is to give effect to the compromise reached at Confederation by protecting the special status of the superior courts of general jurisdiction as the cornerstone of our unitary justice system. The principles of national unity and the rule of law are central to this organization of the judiciary. To ensure that s. 96 fulfills its function, this Court has developed various tests over time, the most recent being the three-step test from *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 ("*Residential Tenancies*"), and the core jurisdiction test adopted in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725. These two tests are based on a shared concern reflected in earlier jurisprudence: the nature and role of superior courts are to be protected, and the creation of courts with provincially appointed judges that mirror or usurp the functions of superior courts is not permitted.
>
> […]
>
> [54] In accordance with this evolutive approach, s. 96 has gone through a "process of liberalization" to adapt to modern realities (*Residential Tenancies*, at p. 730). Despite this liberalization, this Court has consistently reiterated the prohibition against establishing parallel courts that usurp the

> functions reserved to superior courts, as such parallel courts would eviscerate the protection afforded by s. 96.

[60] Notably, the majority relied on one of its contempt jurisdiction cases in confirming the importance of maintaining superior court jurisdiction:

> [89] … The superior courts of general jurisdiction are and must remain central to the Canadian justice system (*MacMillan Bloedel* [*Ltd. v. Simpson,* [1995] 4 S.C.R. 725], at paras. 22 and 51-52)…

[61] The BCPS also argues that the *Reference* stands for the proposition that, in s. 96 challenges, a countervailing factor is whether provincial authorities are pursuing "an important societal objective": *Reference* at para. 126. In the context of criminal contempt, the BCPS argues that it is best placed to assess the broad range of societal objectives justifying a prosecution or not. I accept that the BCPS's expertise in determining when charges should be brought should be considered by the court in deciding whether to proceed, notwithstanding the BCPS's refusal to participate. However, I find that it cannot operate as a bar.

[62] The BCPS applies its expertise in assessing countervailing societal objectives when it determines if pursuing a criminal contempt prosecution is in the public interest. However, the BCPS is not the sole arbiter of the public interest in this regard. By the very act of inviting the Attorney General to pursue charges of criminal contempt, the court demonstrates that it views prosecution as potentially advancing the public interest. As stated in *VFPA*, "[i]n deciding that impugned conduct appears to be criminal as opposed to civil contempt, a judge is making a determination that the long term repute of the administration of justice, and thus the public interest, is engaged": para. 58. While the BCPS has expertise in assessing and pursuing criminal offences, the court undoubtedly has its own expertise in protecting the administration of justice and ensuring respect for the courts, and thus is entitled to exercise the powers within its "core or inherent jurisdiction": *Mivasair 2020* at para. 25. See also *MacMillan Bloedel SCC* at paras. 22, 38-40.

[63] Moreover, the majority in the *Reference* were careful to moderate the ability of government to simply rely on "societal objectives" to sanctify any step taken. When read in context, para. 126 of the *Reference* supports a broader approach to this issue:

> [126] Granting jurisdiction to a court with provincially appointed judges may be the means a legislature adopts to try to address a societal concern. The pursuit of an important societal objective may lend credence to the idea of a legitimate exercise of the provincial power in relation to the administration of justice, that is, of an exercise of that power for a purpose other than the creation of a prohibited parallel court. Access to justice, for example, is an important societal objective that could justify granting certain areas of jurisdiction to courts with provincially appointed judges (*Re: B.C. Family Relations Act*, at p. 107). The provinces must have considerable flexibility in what they do to address the needs of a changing society. The only limit on their initiative is that they may not create parallel courts that undermine the role of the superior courts of general jurisdiction. That being said, it is not enough to allege that there is an important societal objective; it is also necessary to show that the objective is real and that there is a connection between the grant of jurisdiction to a court with provincially appointed judges and the achievement of the objective. Given that the provinces are responsible for the administration of justice, for the adoption of rules of practice and for the financing of court operations, they cannot avail themselves of an access to justice argument on the basis of their own failure to give the superior courts sufficient resources.
>
> [Emphasis added.]

Toronto (City) v. Ontario (Attorney General)

[64] The BCPS also argues that the law has shifted as a result of the SCC's decision in *Toronto (City) v. Ontario (Attorney General),* 2021 SCC 34, where the constitutionality of a law changing the composition of a municipal council was challenged on the basis that it infringed the rule of law, which was said to be an unwritten constitutional principle. In dissent, Justice Abella found the law was unconstitutional, relying in part on *MacMillan Bloedel SCC*:

> [176] Beyond the Reference context, in *MacMillan Bloedel* [citation omitted], this Court used the rule of law principle to read down s. 47(2) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, which granted youth courts exclusive jurisdiction over contempt of court by a young person, so as not to oust the jurisdiction of superior courts. Writing for the majority, Lamer C.J. held that Parliament cannot remove the contempt power from a superior court without infringing "the principle of the rule of law recognized both in the preamble and in all our conventions of governance" (para. 41).

[65] However, the majority took issue with this characterization, stating:

> [50] … [O]ur colleague's reliance upon *MacMillan Bloedel Ltd. v. Simpson*, [citation omitted] (at para. 176), [does not] support the capacity of unwritten constitutional principles to invalidate legislation, since the finding there was that granting exclusive jurisdiction to the youth court would infringe ss. 96 to 101 and 129 of the *Constitution Act, 1867*. Regardless, any uncertainty on the question of whether unwritten constitutional principles may invalidate legislation that may have remained after the

> *Reference re Resolution to Amend the Constitution* and the *Secession Reference* was, as we will explain, fully put to rest in *Imperial Tobacco*.

[66] The BCPS argues that the effect of this discussion is to narrow the footing of *MacMillan Bloedel SCC.* In particular, the BCPS argues that it limits and controls *MacMillan Bloedel SCC*'s analysis as to when a core aspect of a court's s. 96 jurisdiction has been removed.

[67] I do not read *Toronto (City)* as undermining *MacMillan Bloedel SCC*'s applicability to the present proceeding in any way. The position that the court can continue a criminal contempt proceeding is not based on any unwritten constitutional principle, but directly upon the court's s. 96 jurisdiction over contempt.

Teal Cedar Products Ltd.

[68] BCPS argues that the subsequent decision in *Teal Cedar Products Ltd.* supports its position, because that court ultimately decided not to proceed with a criminal contempt prosecution. I do not see that decision as the court concluding that it could not proceed without BCPS's support. Rather, the court exercised its discretion not to do so. In *Teal Cedar Products Ltd.*, Justice Thompson followed *VFPA* on the core issue, and simply identified certain other aspects where Justice Tammen was speaking in *obiter*. I do not find that the decision in *Teal Cedar Products Ltd.* is inconsistent with *VFPA*.

Sound Reason to the Contrary

[69] The arguments for rejecting the analysis in *VFPA* addressed up to this point all targeted specific exceptions established in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.). However, the BCPS and the Arrestees also put forward broader arguments to support their position that *VFPA* should not be followed. In terms of setting these remaining arguments within the legal framework, they fit best within the residual category identified in *C.K.M.* Under this category, the court allows for the possibility that a judge might choose not to follow another decision of the same court if there was "sound reason" to do so.

Did* VFPA *Fail to Recognize the Hazards of Having a Private Party Carry a Criminal Prosecution?

[70] The BCPS raises a concern that the effect of following *VFPA* would be that CNR will be in the position of carrying the prosecution forward.

[71] I agree this is not ideal, but this is precisely why this Court issued its invitation to the Attorney General. When its invitation is rejected, the court is effectively left to "make the best out of a bad situation".

[72] Furthermore, once the BCPS allows for even a narrow "abuse of process" exception discussed below, it must inevitably accept that there will be circumstances where a private party is left in the position of carrying the criminal contempt proceeding.

[73] While I accept that this may be a factor weighing against the court allowing the criminal contempt proceeding to move forward without BCPS participation, I find that it is not a bar.

Did* VFPA *Fail to Give Due Regard to the* Henco Industries Ltd. *Decision?

[74] Although not going so far as to argue that a decision of the Ontario Court of Appeal should be treated as binding, the BCPS does look to that court's decision in *Henco Industries Ltd. v. Haudenosaunee Six National Confederacy Council* (2006), 82 O.R. (3d) 721 (C.A.), as being supportive of its proposed approach. They argue that Justice Tammen erred in not following the same approach.

[75] I agree with Justice Tammen's reservations about the applicability of *Henco Industries Ltd.* in British Columbia: *VFPA* at paras. 71-82. Our different historical practices support a different approach. I also agree with the distinguishing factors that he identified. However, to the extent that *Henco Industries Ltd.* cannot be read as consistent with this judgment, I choose not to follow it.

Did the Court apply the proper test in* VFPA*?

[76] As noted, by the time of the hearing, the BCPS and the Arrestees were no longer arguing that the court could not proceed without the BCPS's approval. The question was whether the Court should do so. However, within even that narrower position, they still argue that Justice Tammen erred in applying too liberal an approach to the exercise of any discretion.

[77] The BCPS argues that the only situation where the court should ever decide to proceed with a criminal contempt application in the face of the BCPS's decision not to intervene is where the court is able to conclude that the BCPS's decision was made as a result of an abuse of process. BCPS submits that, given that there is no such evidence here (nor was there in *VFPA*), and hence this Court should not allow the criminal contempt prosecution to proceed.

[78] However, when this argument is considered in the broader context of contempt proceedings, it quickly becomes obvious that an "abuse of process" exception alone is too narrow. For example, in situations of *ex facie* contempt in court, there will often be no time to refer the matter to the Attorney General, let alone wait for the BCPS to make a decision that may or may not be an abuse of process.

[79] The BCPS complained that Justice Tammen decided to proceed based solely on his belief that the BCPS's decision was wrong. They rely on the following extract:

> [86] There is good reason to question the appropriateness of any charge approval process by the B.C. Prosecution Service following an invitation by the court to assume carriage of criminal contempt proceedings. In the present case, counsel for the B.C. Prosecution Service determined there was a substantial likelihood of conviction. The reason given for declining the Court's invitation was that the public interest did not require prosecution. With that assessment, I respectfully disagree.

[80] However, in relying on this extract, the BCPS failed to recognize the context in which this commentary was made: specifically, this extract was introductory, not conclusory. Justice Tammen went on to carefully analyze the full context. He stated as follows in the subsequent paragraphs:

> [87] The circumstances here were straightforward. The plaintiff filed a notice of application, initiating contempt proceedings against six individuals. The preliminary evidence presented was that gathered and prepared by police, in execution of their duties, enforcing the injunction. That evidence, if accepted, clearly disclosed criminal contempt. It was mass organized disobedience of a court order, which order was made to put an end to other unlawful protest activity, aimed at a different lawful order of the court. Such conduct tends to depreciate the authority of the court, and inevitably brings the administration of justice into scorn and disrepute. Thus, the public interest is squarely engaged, and prosecution is required. That is almost axiomatic, as noted by Justice Wood in his preliminary ruling in the *Everywoman's* case, where he noted that anything less "would be to resign the citizens of this community to anarchy."

> [88] The court, by inviting counsel for the Attorney General to assume carriage of the proceedings, is not seeking an assessment of the public interest in prosecution for criminal contempt. The court has already decided that the public interest is engaged, that the long term repute of the administration of justice is imperilled by the mass public disobedience of a court order. The court thus asks the Attorney General to take conduct of the proceedings in order to ensure that the integrity of the court is preserved.

[81] As such, Justice Tammen only made his decision to proceed based on his conclusion that the circumstances "were straightforward", the preliminary evidence "clearly disclosed criminal contempt", and that "the public interest [was] engaged": *VFPA* at paras. 87-88. Contrary to the BCPS's arguments, this was not an unconsidered decision, nor was it a simple second-guessing of the BCPS's decision. Justice Tammen exercised his discretion carefully and on a reasoned basis. I find no basis upon which to disregard his decision.

D. Exercise of the Court's Discretion

[82] So what is the proper expression of the court's residual discretion to proceed with a criminal contempt proceeding in the face of the BCPS's decision not to intervene?

[83] As noted, the BCPS suggests that it should be restricted to "abuse of process" situations. In my view, this expression is too narrow. I have already noted that it does not fit, for example, the exercise of the court's discretion to pursue *ex facie* contempt, where the Attorney General will not generally be asked to become involved at all before the court both tries and penalizes such conduct. Chief Justice McEachern could not have addressed the problem of courthouse picketing in the manner he did he did if the BCPS's position were correct: *British Columbia Government Employees Union (Re)* (1983), 48 B.C.L.R. 5 (S.C.), aff'd 64 B.C.L.R. 113 (C.A.), aff'd [1988] 2 S.C.R. 214. He moved the matter forward of his own motion, without the blessing from the BCPS, and without a finding that the BCPS was acting inappropriately:. See also: *Poje v. Attorney General of British Columbia*, [1953] 1 S.C.R. 516 at 526.

[84] The BCPS relies on the fact that "abuse of process" is the usual standard under which a court can review prosecutor's decisions, relying on *Krieger* at paras. 31-32, *Cawthorne* at paras. 25-30, and *Henco Industries* at para. 115. However, the present case is not evaluating the BCPS's exercise of prosecutorial discretion,

but rather is assessing the proper formulation of the court's residual discretion. Abuse of process on the part of the BCPS will certainly be relevant to the court's decision to proceed or not, but it cannot be limited to that situation.

[85] The SCC in *Krieger* acknowledged that there is conduct that falls outside of the principles regarding the protection of prosecutorial discretion. In that case, the court accepted that the Law Society retained the ability to review an allegation that a Crown prosecutor acted dishonestly and in bad faith in failing to disclose relevant information: *Krieger* at paras. 4-5. The court stated:

> [47] … Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.

[86] I find that the court's exercise of its own s. 96 jurisdiction over contempt similarly lies outside the scope of the strict application of the principles governing the review of prosecutorial discretion, although the court should clearly respect the expertise of the BCPS when making its decision.

[87] I find that the court can and should make its own assessment about the need to proceed with criminal contempt, although it should carefully consider any reasons the BCPS has provided for its refusal to intervene.

[88] Requiring a finding of an abuse of process would be an undue restriction on the court's ability to control its process. It would also invite precisely the type of second-guessing of the BCPS decision-making process that the BCPS suggests should be guarded against. Further, at a practical level, it is difficult to see how evidence of abuse of process would ever come to light, given that the BCPS is not a party subject to discovery in a contempt proceeding brought by a private party.

[89] In *MacMillan Bloedel v. Simpson* (1993), 87 B.C.L.R. (2d) 154 (S.C.), the court stated:

> [4] It is clear, as a matter of law, that this court has the power on its own motion to initiate proceedings for contempt. But to do so would create practical difficulties and would create an appearance of the court entering the arena. So it should not be done unless it is unavoidable.
>
> [Emphasis added.]

[90] The Canadian Judicial Council's publication, "Some Guidelines on the Use of Contempt Powers", states as follows:

> Except in exceptional circumstances immediately affecting the proper administration of justice, the preferred course is to leave the initiation and conduct of proceedings for contempt out of court to the parties in litigation or to the Attorney General. (p. 4)
>
> In most cases, it will be the wise course for the judge to leave the initiation of proceedings to the parties or to the Attorney General. Indeed, it may be appropriate, particularly where there is a large number of defendants, for the court to request that the Attorney General take conduct of the proceedings. (p. 21)
>
> [Emphasis added.]

[91] I find that these expressions of the proper exercise of the court's authority are appropriate statements of principle. Specifically:

a) Unless unavoidable, where the court is of the view that there may be a proper basis for a finding of criminal contempt, the court should invite the Attorney General to consider undertaking such a prosecution. The "unless unavoidable" condition will address situations of urgency and *ex facie* contempt.

b) If the BCPS declines to intervene, the court should only continue with criminal contempt proceedings in exceptional circumstances affecting the proper administration of justice.

c) In assessing whether such exceptional circumstances exist, the court should have regard to any reasons provided by the BCPS for declining to intervene.

d) In considering the reasons provided by the BCPS, the court should give greater weight to reasons that fall within the traditional scope of the exercise of prosecutorial discretion.

e) On the other hand, where the reasons provided relate to issues in which the BCPS has no special expertise, or no greater expertise than the court itself, those reasons may not carry the same weight.

f) If the court concludes that the facts present an exceptional case where the administration of justice may be undermined if a criminal contempt prosecution is not seen through to its conclusion, then the court may, in its discretion, allow such a prosecution to continue.

E. Application to the Facts of this Case

1. The First Nine Arrestees

[92] For 9 of the 12 Arrestees, the BCPS concluded that it "cannot be satisfied of the ability to prove the presence of nine of the persons before the Court today during the reading of the injunction, and therefore cannot provide knowledge of its terms of the required level under" the Civil Disobedience Policy or Charge Assessment Guidelines Policy.

[93] In terms of evaluating the need for identification and evidence of *mens rea*, I accept that the BCPS has substantial knowledge and expertise in the evaluation of these points. The BCPS routinely determines the level of proof required for criminal charges, in terms of both identification and the requisite *mens rea*. I am prepared in this case to rely on their expertise in this regard, and find that those nine individuals should not be pursued further in criminal contempt. The allegation of civil contempt may continue.

2. The Last Three Arrestees

[94] When it comes to the last three Arrestees, I have concluded that the potential for a finding of criminal contempt should be maintained. For these three, the BCPS itself concluded that "the video is sufficiently clear to show they were present for the reading of the injunction and therefore that they had knowledge of its terms". The BCPS also recognized "the economic and other harms caused by railway blockades, including shortages of essential goods that may be caused when transportation systems are disrupted." Finally, the BCPS stated that "there is a very important public interest in encouraging respect for court orders through prosecutions for criminal contempt, even when the court orders have been successfully enforced by the removal of protestors." Nonetheless, the BCPS declined to intervene.

[95] The BCPS's reasons for declining to prosecute are summarized above. I find that these reasons do not relate to issues in relation to which BCPS has

materially greater understanding, expertise, or knowledge than the Court. More importantly, I find that their reasons are overstated or not supportable. Specifically:

a) The fact that there was no property damage is of little moment. The injunction was meant to allow safe passage of CNR's trains along the North Line. The disruption of passage could be accomplished without property damage, since it was enough to physically block the line. The disrespect for the authority of the court is not materially lessened by the fact that it was not necessary to commit property damage in order to violate the terms of the court's injunction.

b) The fact that these parties were "otherwise" cooperative is similarly of little moment. Their level of cooperation may be relevant to sentencing, but does not lessen the wrongfulness of the actions. A party's conduct after allegedly committing a criminal act does not necessarily lessen the societal value in pursuing a prosecution.

c) The fact that there have been no further blockades also does not mitigate the alleged disrespect for the Court's order. This is not a situation where an accused is entitled to "one free pass", and is only subject to penalty if they repeat their offence. The initial willful violation of a court order remains a violation of a court order. Again, the fact that the offence was not repeated may go to the appropriate sentence, but does not affect the prospects for conviction.

d) Finally, while risks associated with COVID-19 remain an important consideration, the wheels of justice must continue to turn. The courts have gone to considerable lengths to keep the judicial system moving through this crisis, and have developed a number of strategies to minimize risks. In particular, the parties could be given the opportunity to participate remotely from their own homes if safety is a dominant consideration. Alternatively, as was the case with the hearing of the present application, counsel and parties from various courthouse locations may be linked via video or MS Teams from sufficiently large courtrooms to allow for physical distancing in accordance with current provincial requirements. The court has been holding trials, both civil and criminal, for many months, and has done so in a way that moderates the

> risk to the parties, court staff, and counsel. In terms of managing the judicial system to control for such risks, the court itself arguably has more knowledge and expertise than the BCPS. Given the court's own experience, I find that the court and the parties should be able to find a way for the contempt hearing to proceed safely. Finally, I note that declining to proceed with criminal contempt would not have the effect of ending the civil contempt proceeding, so any COVID-19 risk was going to have to be addressed in any event.

[96] For these reasons, I find that the present case qualifies as an exceptional circumstance where, after careful consideration of the BCPS's reasons, the Court remains of the view that failing to maintain the possibility of a finding of criminal contempt may undermine the administration of justice.

V. CONCLUSION

[97] As Chief Justice Lamer observed in *MacMillan Bloedel SCC* at para. 22, when it comes to the contempt power, the court must "play a central role":

> … While it is indeed possible to conceive of a system where all of the contempt proceedings are transformed into codified offenses, such a system would be antithetical to ours, where the superior court of general jurisdiction plays the central role.

[98] In the exercise of that central role, I direct that the proceedings against the first nine Arrestees proceed forward solely as a civil contempt proceeding, but in relation to the last three Arrestees, I find that the matter can continue to assess whether they engaged in either criminal or civil contempt.

[99] I note that the BCPS did not provide the names of the individuals that fall into each category. I assume that the BCPS will voluntarily provide that detail to the Court and the parties. If not, the parties may appear back before me for further direction.

[100] For the sake of clarity, I confirm that no finding of criminal contempt has been made at this time, and that the three Arrestees may present argument and evidence at the next hearing as to the appropriateness of any finding of criminal contempt.

"The Honourable Mr. Justice Branch"