

Table of Contents

Dedication	iii
Also by Jeffrey Miller	v
Table of Cases	xv
Abbreviations Particular to This Book	xli
Chapter One Historical Introduction: Justice Uncloistered	1
Chapter Two General Definitions and Overview	15
2.1 Contempt	15
2.2 Calculated	18
2.3 Contumacious	19
2.4 Criminal contempt vs. civil contempt	19
2.5 <i>In facie</i> vs. <i>ex facie</i> contempt	25
2.6 “Cite” for or in contempt	27
2.7 Summary	28
2.8 Show cause and rule nisi	29
2.9 <i>Sub judice</i>	29
2.10 Scandalizing the court	30
2.11 <i>Strictissimi juris</i>	30
2.12 Bifurcated hearing/bifurcation	31
2.13 <i>Ex mero</i> (or <i>proprio</i>) <i>motu</i>	31
2.14 Purge	32
Chapter Three Constitutional and <i>Charter of Rights</i> Considerations	33
3.1 Jurisdiction	33
3.2 Effect of potentially unconstitutional order	36
3.3 Applicability of the <i>Canadian Charter of Rights and Freedoms</i>	37

3.3(a)	General applicability	37
3.3(b)	Freedom of expression: <i>Charter</i> s. 2(b)	38
3.3(c)	Fundamental justice.	41
3.3(d)	Right to retain and instruct counsel, <i>Charter</i> s. 10(b)	44
3.3(e)	Right to be informed of specific offence charged: <i>Charter</i> s. 11(a)	44
3.3(f)	Self-crimination: <i>Charter</i> s. 11(c)	45
3.3(g)	Right to be presumed innocent: <i>Charter</i> s. 10(d)	45
3.3(h)	Right to jury trial: <i>Charter</i> s. 11(f)	46
3.3(i)	Reverse onus and the presumption of innocence: <i>Charter</i> s. 11(d)	47
3.3(j)	Right to trial by independent and impartial tribunal: <i>Charter</i> s. 11(d)	48
3.3(k)	Citation for contempt as a s. 24(1) remedy	50
3.3(l)	Renvoi: An invitation from a chief justice?	50
3.4	Interveners	50
Chapter Four Jurisdiction		51
4.1	Which court?	51
4.1(a)	Characterizing the contempt to decide jurisdiction.	55
4.1(b)	What is a “court of record”?	55
4.1(c)	Conflict of laws: the “where” of the offence.	55
4.2	Jurisdiction over whom?	56
4.2(a)	Jurisdiction over persons generally	56
4.2(b)	Native peoples.	57
4.2(c)	Judgment debtors	57
4.2(d)	Young persons	58
4.2(e)	Non-parties, and aiders and abettors	59
4.2(f)	Corporations, directors, and officers	59
4.2(g)	Unions and other non-corporate bodies.	61
4.2(h)	Constructive intent in certain breaches of the <i>sub judice</i> rule	62
4.2(i)	Liability of the Crown and Crown officials	62
4.3	Timing of the hearing.	64
4.4	Hearings by the directly aggrieved court or judge: Hearings before whom?	64
4.5	Consent orders	65
4.6	Enforcement of foreign orders.	65
4.7	Appeals from rulings on contempt jurisdiction	66
4.8	The Federal Court of Appeal.	66
4.9	Parole	66

Chapter Five Procedural Considerations	69
5.1 Proceedings generally	69
5.2 Availability of contempt proceedings	72
5.3 Commencing proceedings; service and notice	76
5.4 Sufficiency of the charging language	80
5.5 Interveners	81
5.6 Conduct of the proceedings	82
5.6(a) Evidence	82
5.6(a)(i) Affidavits vs. oral evidence	85
5.6(a)(ii) Evidence of witnesses in proceedings outside Canada	87
5.6(b) Immediate committal for in facie contempt	87
5.6(c) Summary procedure or prosecution by way of indictment?	92
5.6(d) The timing of the proceedings	95
5.6(e) Stay of contempt proceedings	98
5.6(f) Bifurcation	98
5.6(g) Proceeding by indictment	101
5.6(h) Intervention by the attorney-general	102
5.6(i) Procedure where journalists refuse to identify sources	103
5.6(j) Sentencing and appeals	103
5.7 Effect of contempt order/Alternative sanctions	104
5.8 Setting aside a contempt order	104
5.9 Consequences of failure to purge a contempt	105
5.10 Costs	108
5.11 The Federal Court of Canada	111
5.12 The Tax Court of Canada	112
5.13 The Supreme Court of Canada	112
Chapter Six Disobedience of Court Process and Procedures	115
6.1 Some relevant statutory provisions	115
6.2 What constitutes contempt “in the face of the court”	117
6.3 Contemptuous behaviour by counsel in the face of the court	117
6.3(a) The <i>actus reus</i> : contumacious behaviour as distinct from “mere discourtesy”	117
6.3(b) Failure to appear in court/“Double-booking”	118
6.3(c) Contemptuous statements by counsel in the face of the court	124
6.3(d) Withdrawal from record by counsel	129
6.4 Witnesses	129

6.4(a)	Refusal to appear, testify, or answer particular questions	129
6.4(b)	Protection by journalists of sources and source documents	134
6.4(c)	Tampering with witnesses	134
6.5	Intoxication during court proceedings	135
6.6	Disrupting court proceedings	135
6.6(a)	Disruption by persons lacking a right of audience	135
6.6(b)	Fighting in the courtroom	136
6.6(c)	Interruption of proceedings by a court employee	137
6.7	Other contempts of court process and procedure	137
6.7(a)	Refusing to stand when a presiding judicial officer enters and leaves court	137
6.7(b)	Accusing the court of prejudice	138
6.7(c)	Obstructing access to the courts of justice or otherwise interfering with persons having business at the courts	138
Chapter Seven Disobedience of Court Orders		141
7.1	Categorizing the offence: the mental element	141
7.2	Contemptuous disobedience versus disobedience under <i>Criminal Code</i> s. 127	146
7.3	The three-pronged test	147
7.4	What is a court order?	148
7.5	Filing tribunal orders such that they “have the same force and effect as orders of the court”	153
7.6	Potential offenders: To whom does the given order apply?	154
7.6(a)	Notice to parties in the litigation and/or named in the order	154
7.6(b)	“Any person or persons having notice”	156
7.6(b)(i)	Aiders, abettors, and third parties (including corporations)	156
7.6(c)	Enforcement of foreign orders (conflict of laws)	159
7.7	Deadline for compliance with order	160
7.8	The ambit of the order	160
7.9	Open, continuous, and flagrant defiance	162
7.10	Ambiguous orders	163
7.11	Orders wrong or ineffective in law	167
7.11(a)	Generally	167
7.11(b)	Orders “impossible of compliance”	168
7.12	Conscientious objection to court orders	169
7.13	Defence of necessity	170
7.14	Family Law and Judgment Debt Orders	170

7.15	Secondary picketing	175
7.16	Effect of continuing breach: no right of audience	176
7.17	Contempt of contempt orders	176
Chapter Eight The <i>Sub Judice</i> or “Publication Contempt” Rule		179
8.1	The <i>Times Newspaper</i> case and the basic rule	179
8.2	Prejudging the issues	181
8.3	“Real risk” of prejudice	189
8.4	Counsel speaking to media while proceedings are <i>sub judice</i>	191
8.5	Renvoi: When to hold contempt proceedings	192
8.6	Reform (or not) in the age of mass communication	192
Chapter Nine Scandalizing the Court: What’s Left of the Law?		201
9.1	Defining the offence	201
9.2	The offence in Canada and constitutional considerations	203
9.3	When the impugned cause is no longer <i>sub judice</i>	209
9.4	Categorizing the offence	210
9.5	The situation post- <i>Kopyto</i>	211
Chapter Ten Contempt of Other Bodies and Offices		213
10.1	Jurisdiction	213
10.2	Tribunal orders filed for enforcement with the courts	215
10.3	Other courts of record and court officers	216
10.4	Contempts of Parliament and legislatures	216
Chapter Eleven Defences: An Overview		219
11.1	Due diligence and inadvertence: <i>R. v. Edge</i> , the sequel	219
11.2	Reasonableness and good faith/Alleged contempt based on legal advice/Lack of intent	221
11.3	Solicitor-client confidentiality and other professional ethical concerns	222
11.4	The alleged contemnor did not know of the order or did not understand its terms	223
11.5	The corporate veil	223
11.6	Certain officials or bodies are not capable of prose- cution	224
11.7	Nonfeasance versus misfeasance	224
11.8	Order is incorrect, null, etc.	224

11.9	Order issued on consent and is therefore merely an agreement between the parties	225
11.10	Breach not open, continuous, flagrant (re criminal contempt)	225
11.11	Justifiable reason for refusal to testify	225
11.12	Although material is published in violation of a publication ban or the <i>sub judice</i> rule, the material is true	225
11.13	Critical remarks about the justice system or a judge are true	226
11.14	The matter is no longer <i>sub judice</i> (regarding scandalizing the court)	226
11.15	Insofar as the trial will take place in the distant future, the matter is technically not <i>sub judice</i>	226
11.16	At the time of the alleged breach of the <i>sub judice</i> rule, the proceedings and testimony had been widely reported by other sources.	227
11.17	Necessity	227
11.18	Mistake of fact	227
11.19	Conscientious objection/public interest	228
11.20	Court shows contempt for its own process	228
11.21	Parliamentary privilege.	228
Chapter Twelve Penalties / Sentencing Digest		229
12.1	The sanctions available	229
12.2	Principles and procedure	235
12.3	Aiders/abettors of and third parties to the contempt.	240
12.4	The effects of purging the contempt and of an apology	241
12.5	Range of sentence.	242
12.6	Procedure on appeal.	243
12.7	A selected sentencing digest	244
12.7(a)	Refusal to be sworn or testify	244
12.7(a)(i)	Refusal by journalist-witness to reveal source	247
12.7(b)	Contemptuous words in <i>facie</i>	247
12.7(c)	Intoxication <i>in facie</i>	250
12.7(d)	Fighting in the courtroom	251
12.7(e)	Breach of mandatory order	251
12.7(f)	Breach of prohibition/injunction	252
12.7(f)(i)	Estate matters.	252
12.7(f)(ii)	Professional and business regulation generally	255
12.7(f)(iii)	Intellectual property	255
12.7(f)(iv)	Protest activity/picketing, etc.	256
12.7(f)(v)	Breach of <i>Mareva</i> injunction freezing assets	258

12.7(f)(vi) Breach of prohibition/injunction by aboriginal persons	259
12.7(g) Breach of protective order	260
12.7(h) Breach of family law order regarding financial matters	260
12.7(i) Breach of judgment debt orders	261
12.7(j) Breach of undertaking	262
12.7(k) Breach of <i>sub judice</i> rule	262
12.7(l) Scandalizing (<i>ex facie</i>)	263
12.7(m) Obstruction of civil process	264
Chapter Thirteen Appeals	265
13.1 Generally	265
13.2 “Unpurged” contempts	266
13.3 Standard of review	267
13.4 Certiorari	269
13.5 Sentencing	269
13.6 Stay of orders pending appeal	269
13.7 The <i>Youth Criminal Justice Act</i>	271
13.8 The Federal Court of Appeal	271
13.9 The Supreme Court of Canada	271
<i>Appendix I</i> Alleged Contempt of a Rabbinical Court: A Case in Point on How Law Evolves	273
<i>Appendix II</i> A Cautionary Scandalizing Prosecution, Thirty-Three Years Before <i>R. v. Kopyto</i>	277
Index	281