IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Richmond Inn Hotel Ltd. v. Unite Here Local 40,* 2023 BCSC 1550

Date: 20230901
Docket: S234833
Registry: Vancouver

Between:

Richmond Inn Hotel Ltd. dba Sheraton Vancouver Airport Hotel, and Vancouver Airport Centre Ltd. dba Vancouver Airport Marriott Hotel, dba Hilton Vancouver Airport

Plaintiffs

And

Unite Here Local 40, Gulzar Grewal, Shaelyn Arnould, Felisha Perry, Lloyd McMahon, and Persons Unknown

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiffs:	L. Babbitt
Counsel for the Defendants:	S. Quail J. Wahba
Place and Date of Hearing:	Vancouver, B.C. August 22, 2023
Place and Date of Judgment:	Vancouver, B.C. September 1, 2023

Table of Contents

I. Introduction

[1] The plaintiffs own and operate a number of hotels near the airport in Richmond, British Columbia. They are in the midst of a labour dispute with certain of their employees who are members of the defendant union, Unite Here Local 40 (the "Union"). Since June 14, 2023, those employees have been on strike and, with the support of the Union, actively picketing at or near the affected hotels.

[2] In this action, the plaintiffs contend, among other things, that the noise generated by the picketers and their supporters has been so loud that it amounts to an actionable nuisance. On July 7, 2023, the plaintiffs filed an application with the court seeking an interim injunction to prohibit certain kinds of activities on the picket lines, with a view to limiting the level of noise being generated.

[3] That application came on for hearing before Kent J. on August 2, 2023. During the hearing, the parties consented to an order (the "Injunction") aimed at achieving that result, but on terms that were not as restrictive as those originally sought. In particular, paragraph 1 of the Injunction prohibits the defendants and any persons acting under their instructions and anyone having knowledge of the Injunction from:

> a) Using sirens, air horns, blow horns, or whistles at or hear the hotels' premises; and
>
> b) Using drums, microphones, speakers, megaphones or any other electronic device to amplify sound or to play pre-recorded sounds or pre-recorded music over 75dBA on an approved sound meter as defined by the City of Richmond Bylaw No. 8856, emanating at least 6.1 meters from the source of the noise or sound.

[4] That language was drawn from previous orders granted by this court in other actions involving the Union, namely, *Hotel Georgia (OP) Limited Partnership v. Unite Here, Local 40*, 2019 BCSC 1744 and *SWA Vancouver Limited Partnership v. Unite Here, Local 40*, 2019 BCSC 1806.

[5] The plaintiffs now allege that, since the pronouncement of the Injunction on August 2, 2023, the Union and its Vice President, Gulzar Grewal (together, the "Respondents"), have deliberately failed or refused to comply with those terms, in particular because the picketers have been making noise in excess of 75 dBA at various times on the following dates, by the following means:

a) August 3, 2023, using drums, megaphones and hand-clappers;

b) August 4, 2023, whistling and using drums and hand-clappers;

c) August 5, 2023, using drums and hand-clappers; and

d) August 7, 2023, using drums and hand-clappers.

[6] On that basis, the plaintiffs seek, on this application, the following orders:

a) holding the Respondents in contempt of court;

b) requiring them to cease their conduct in breach of the Injunction; and

c) adding a police enforcement clause to the Injunction.

[7] The Respondents oppose the application. They say that the plaintiffs have failed to prove any breach of the Injunction, let alone contempt of court.

[8] For the reasons that follow, I have concluded that the application should be refused.

II. The Plaintiffs' Evidence

A. Security Guards

[9] In support of the application, the plaintiffs have adduced affidavits from three of their security guards, Daniel Maharaj, Trent Christopherson and Jason Brown. Those affiants attest to having measured the picketing noise from a distance of 20 feet or 6.1 metres, at a level in excess of 75 dBA, at various times and in various locations.

[10] In his first affidavit, Mr. Maharaj does not identify the specific source of the noise he measured, other than the picketers generally. In his second affidavit, Mr. Maharaj attaches a video-recording that is said to depict, "the Defendants and picketers whistling and using drums and hand clappers on August 4, 2023." The video-recording appears to have been taken at 4:33 pm but is not contemporaneous with any of the measurements he took on that day.

[11] Mr. Christopherson deposes that on August 7, 2023, he took noise measurements of picketers using drums and hand-clappers and also video-recorded them on two occasions. The first exhibited recording shows picketers at a distance using plastic hand-clappers and one drum. The second shows a reading of 87 dBA on the measuring device as picketers with plastic hand-clappers march past the camera, followed by a sole picketer banging on a drum a few seconds later. Neither recording allows the observer to connect the reading shown on the measuring device to the noise generated by the drum specifically.

[12] Mr. Brown has deposed that after copies of the Injunction were distributed among the picketers on August 2, 2023, there was a temporary reduction in the level of noise until the following day, when Ms. Grewal made what Mr. Brown describes as "excessive" noise using hand-clappers. Mr. Brown states that on the morning of August 3, 2023, between 7 and 7:30 am, he measured the noise level while standing 6.1 metres away from the picketers, and obtained readings well above 75 dBA at various locations. He observed that, at the time, the picketers were making noise using drums, megaphones, and hand-clappers. He describes an incident on August 11, 2023, when he and a colleague read out the Injunction to the picketers, including Ms. Grewal, who responded by "creating excessive levels of noises", particularly "belligerently hollering, chanting, and whistling towards us, before continuously yelling 'Sheraton on Strike'".

[13] In a subsequent affidavit made on August 20, 2023 in response to the Respondents' materials, Mr. Brown described another round of measurements taken on August 18 and 20, 2023. On August 18, 2023 he observed the picketers using a

speaker. The exhibited video-recording, taken on August 18, 2023, shows readings in excess of 75 dBA while picketers can be seen making noise with plastic hand-clappers and their voices. The recording made on August 20 shows a reading that rises steadily as a group of picketers approach the measuring device, but surpasses 75 dB only when they are clearly less than 6.1 metres away.

[14] Two of the security guards, Mr. Christopherson and Mr. Brown, made supplemental affidavits after delivery of the Respondents' responding materials, attesting to the presence of Union leaders, including Ms. Grewal and others, on the picket lines at the material times.

B. Expert Evidence

[15] The plaintiffs have adduced two affidavits from Farbod Ghanouni, who describes himself as an acoustical consultant. He set up sound level measuring devices at five locations near the picket lines on the morning of August 4, 2023, and prepared a report of his findings later on that same day. Three of the five locations are reported to have yielded measurements in excess of 75 dBA.

[16] The source of the noise he measured is described as "crowd noise." The original version of the report attached a photograph showing one of the locations where measurements were taken. The associated caption stated as follows: "the crowd can be seen using drums, clappers and whistles to generate noise." On August 9, 2023, Mr. Ghanouni delivered a revised version of the report in which, among other things, that caption was replaced with the following one: "the crowd can be seen using clappers and whistles to generate noise. We also observed drums being used to generate noise during our measurements."

[17] In neither version of the caption is the actual location of the photograph identified, so it is not possible to determine whether it depicts one of the three locations that yielded measurements in excess of 75 dBA.

III. The Respondents' Evidence

A. Union Representatives

[18] The Respondents have adduced an affidavit from Matthew De Marchi, who describes himself as an organizer employed by the Union. He has been in that position, he says, since 2015. His affidavit describes how in 2019, in response to a court order made on October 1, 2019 in one of the previous actions against the Union (and upon which the Injunction was modeled), the Union hired an acoustic engineer, Denny Ng, to measure the level of noise generated by various instruments with a view to determining whether they could continue to be used on the picket lines without breaching the order. Mr. De Marchi deposes that the Union interpreted Mr. Ng's report dated October 7, 2019, to mean that drums and plastic hand-clappers could be used without breaching the order provided the drums were not beaten with too much force and the noise-making instruments were spaced at a sufficient distance from each other. That report, which is attached as an exhibit to Mr. De Marchi's affidavit, concludes that certain items, such as "voice over megaphone", were consistently found to generate noise exceeding 75 dBA from a distance of 6.1 metres, whereas "snare drum using drumsticks" sometimes did and sometimes did not.

[19] Mr. De Marchi deposes further that after the pronouncement of the Injunction in this action, he advised the picketers about the changes that needed to be made in order to comply with it, which included ceasing using prohibited instruments, such as whistles. He says the picketers complied with that direction. He says that he also told the picketers that plastic hand-clappers were permissible and that the picketers now use them instead. He says that the picketers sometimes use drums, but the drums "are spaced out and are not hit hard."

[20] In her affidavit, Ms. Grewal deposes that she is the Vice President of the Union. She states that she has been in regular attendance on the picket line outside the Sheraton Vancouver Airport Hotel. When she has observed the plaintiffs' security guards taking noise measurements, they have never been more than two

metres away from the picketers whose noise they are measuring. She says that after learning of the Injunction, she and others instructed the picketers to stop using megaphones, horns, whistles and pots and pans. She and others also instructed the person who brings Union materials to the picket lines to stop bringing drums, whistles, megaphones, horns and pots and pans. She acknowledges that there was one drum in use on the picket lines but she says the drummer was using a plastic ladle to strike it, in order to reduce the volume of the resulting sound. She says that the picketers are no longer using a drum. She says some picketers have made whistling sounds with their mouths but they do not use whistles.

B. Expert Evidence

[21] The Respondents have adduced two affidavits from Mr. Ng, who describes himself as an acoustic engineer. Mr. Ng has also prepared an expert report for this application, dated August 15, 2023. It recounts that he took sound measurements of the picketing at the Vancouver Sheraton Airport Hotel on August 9, 2023. The only readings he obtained in excess of 75 dBA came from, respectively, one group of six and another group of 12 picketers, each using plastic hand-clappers and their voices to make the noises that were measured. He separately tested the sound from a single drum struck with a plastic ladle, finding it to have generated noise measured at exactly 75 dBA from a distance of 6.1 metres. The speakers he tested (one at 50% volume) both yielded results under 75 dBA.

[22] In his first affidavit, Mr. Ng is critical of Mr. Ghanouni's methodology and results, which he says are unreliable for various reasons, including a failure to set out the serial numbers of the measuring devices he used, or their last valid calibration dates (Mr. Ghanouni has since filed a supplemental affidavit in response, in which that information is provided). Mr. Ng is also critical of the devices used by the security guards (which, he says, do not conform with the requirements of the Richmond Noise Bylaw) and the manner in which they were used, all of which casts doubt, in Mr. Ng's view, on the reliability of the measurements recorded by them. Mr. Ng adds that some of the measurements taken by the security guards appear to have been taken in close proximity to an exhaust fan which was itself measured to

be generating noise in excess of 75 dBA. In his second affidavit, Mr. Ng raised similar concerns with respect to the reliability of Mr. Brown's measurements.

IV. The Parties' Arguments

A. The Plaintiffs

[23] The plaintiffs submit that the Injunction must be interpreted in a manner consistent with its "spirit and intent", which is to ensure that the sound emanating from the picket lines is kept within reasonable limits. Accordingly, the term "drums" in para. 1(b) should be read to mean all percussion instruments, including plastic hand-clappers. Moreover, the paragraph should be read to prohibit the use of all such instruments to the extent such use contributes, alone or with other sources, to an overall level of noise exceeding 75 dBA at any given time.

[24] In support of that broad interpretation, the plaintiffs rely on *Chirico v. Szalas*, 2016 ONCA 586. In that case, Epstein J.A., writing for the Court, explained how, in the context of a contempt hearing, the terms of the order alleged to have been breached should be interpreted, stating as follows:

> [52] The test for civil contempt is well established. The order must be clear and unequivocal, the failure or refusal to comply with the order must be deliberate, and the failure or refusal to comply with the order must be proved beyond a reasonable doubt: *Boily v. Carleton Condominium Corp. No. 145* (2014), 121 O.R. (3d) 670, [2014] O.J. No. 3625, 2014 ONCA 574, at para. 32.
>
> [53] The test is not in issue. What is in issue is the manner in which the conduct of the alleged contemnor should be analyzed in relation to the requirements of the order.
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> [54] This court has rejected a formalistic interpretation of the relevant order. It is clear that a party subject to an order must comply with both the letter and the spirit of the order: *Ceridian Canada Ltd. v. Azeezodeen*, [2014] O.J. No. 4484, 2014 ONCA 656, at para. 8. That party cannot be permitted to "hide behind a restrictive and literal interpretation to circumvent the order and make a mockery of it and the administration of justice": *Boily*, at para. 59; *Sweda Farms Ltd. v. Ontario Egg Producers*, [2011] O.J. No. 3482, 2011 ONSC 3650 (S.C.J.), at para. 21.

[25] The plaintiffs submit that, if the Injunction is interpreted as they propose, then the evidence before the court demonstrates beyond a reasonable doubt that the

Respondents have been and continue on a daily basis to be in deliberate breach of the Injunction, as alleged in the Notice of Application.

[26] The plaintiffs submit further that the Union is responsible for the conduct of the picketers, insofar as the Union has condoned and encouraged it. In support of that submission, the plaintiffs rely on *Rogers Cable T.V. Ltd. v. International Brotherhood of Electrical Workers (IBEW)*, [1993] B.C.J. No. 2822 (S.C.), where Warren J. held the union to an "obligation … to exercise diligence to ensure the order is obeyed to the letter." The plaintiffs also rely on *Entex Door Systems Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 1928*, [1985] B.C.J. No. 1524 (S.C.), in which Wallace J. stated as follows:

> [27] A union is obliged, on occasions such as this, to properly advise and instruct their members and supporters of the restrictions imposed by a court injunction on their right to picket and it must refrain from participating in or encouraging or condoning any breach of the court order … Furthermore, the Union, knowing of the restraining order, was obliged to do all it could to carry out the terms of the order …
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> [Citations omitted.]

B. The Respondents

[27] The Respondents oppose the application on a number of grounds.

[28] First, they argue that the plaintiffs' broad interpretation of the Injunction, along with some of the evidence relied upon in support of it, was not properly pleaded in the Notice of Application. In addition, they say, the supplemental affidavits of Mr. Christopherson and Mr. Brown, delivered after the Respondents had already responded to the application, are inadmissible as impermissible case-splitting. To grant the plaintiffs the relief they seek on those grounds would, according to the Respondents, run afoul of the principle that contempt hearings must be conducted *strictissimi juris*.

[29] The scope of that doctrine was discussed by Burnyeat J. in *Telus Communications Re: Ruling No. 1*, 2006 BCSC 12. After canvassing a number of

authorities, he refused allow the applicant seeking a contempt order to amend the application or adduce reply evidence, for the following reasons:

> [19] The doctrine of *strictissimi juris* applies. The Plaintiffs should not be allowed to amend their Motion to include an affidavit not originally listed in the motion that was served. It is fundamental to the principle of *strictissimi juris* that everything must be set out in either a motion or the affidavits to be read in support of a motion before an alleged contemptor must make the decision whether to answer what is alleged and, if so, what answer will be given. By introducing later affidavit material, the Plaintiffs can "split their case" after the decision has been made whether to answer what is alleged in the original materials and, if so, what answer will be made. The Plaintiffs should not be allowed to do so.
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> [20] It should be noted that Rule 56(7) states "all affidavits". This is a clear direction to the profession that any and all affidavits to be read in support of a motion for contempt are to be served at least seven days prior to the hearing of the application and that affidavits served afterwards will not be available to the applicants. While the discretion is always available to the Court to allow reference to "late" affidavits where the application is for contempt, the discretion available to the Court should only be exercised if the party already had "reasonable notice" of what would be set out in the additional affidavit or if the alleged contemptor consents to the affidavit being read in support of the application. If the order itself must be unambiguous, it follows that it should also be unambiguous what must be answered before an answer is given.

[30] In any event, the Respondents say, the application must fail even if the plaintiffs are permitted to make their case as they have attempted to make it. Fundamentally, they say, the application rests on an overly broad interpretation of the Injunction. The Respondents submit that the word "drums" cannot reasonably be interpreted to mean all percussion instruments, including plastic hand-clappers. Moreover, what is enjoined is the use of drums (and the other devices listed) only insofar as they, on their own, make a noise that is louder than 75 dBA. If the Injunction is interpreted in that manner, as the Respondents say it should be, then the application fails for want of any reliable evidence of a breach.

[31] In support of that submission, the Respondents rely on *Gurtins v. Goyert*, 2008 BCCA 196, where Frankel J.A., writing for Court, described the proper approach to interpretation of court orders in the contempt context, as follows:

> [15] The rule of law requires that court orders be obeyed. Accordingly, it is of paramount importance that persons who are subject to court orders be able to readily determine their obligations and responsibilities. They do this

> by having regard to what is on the face of the formal order setting out what they are required to do, or refrain from doing. As stated in *Arlidge, Eady & Smith on Contempt* (London: Sweet & Maxwell, 2005) (at para. 12-55), "[a]n order should be clear in its terms and should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation". See also: *Northwest Territories Public Service Association v. Commissioner of the Northwest Territories* (1979), 107 D.L.R. (3d) 458 (N.W.T.C.A.) at 478, 479*; In re A Bankrupt; Rudkin-Jones v. The Trustee of the Property of the Bankrupt* (1965), 109 Sol. Jo. 334 (C.A.).
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> [16] A concise and most helpful summary of the principles applicable to the interpretation of an order in contempt proceedings is found in *R. (Mark Dean Harris) v. The Official Solicitor to the Supreme Court,* [2001] EWHC Admin 798 (Q.B.D.), wherein Mr. Justice Munby stated (at para. 68):
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> > (i) No order will be enforced by committal unless it is expressed in clear, certain and unambiguous language. So far as this is possible, the person affected should know with complete precision what it is that he is required to do or to abstain from doing.
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> > (ii) It is impossible to read implied terms into an injunction.
> >
> > (iii) An order should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation. Looking only at the order the party enjoined must be able to find out from the four walls of it exactly what it is that he must not do.
> >
> > (iv) It follows from this that, as Jenkins J said in *Redwing Ltd v Redwing Forest Products Ltd* (1947) 177 LT 387 at p 390, a Defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question.

[32] The same principle was restated by Groberman J.A., writing for the Court in *Schmidt v. Fraser Health Authority*, 2015 BCCA 72, in the following terms:

> [4] It is well-established that, in order to establish contempt of a court order, an applicant must demonstrate that the clear and precise dictates of the order have been breached: *Hama v. Werbes*, 2000 BCCA 367 at para. 8. Further, it has been said that the alleged contemnor is "entitled to the most favourable interpretation of it" (*Gurtins v. Goyert*, 2008 BCCA 196). This does not mean, however, that the alleged contemnor is entitled to have the courts contort the language of an order to narrow its ambit. The court will interpret the order in accordance with its ordinary meaning, taking into account its context. It is only within those limits that the alleged contemnor is entitled to the most favourable interpretation of the order.

[33] The Respondents say that this is not a case like *Chirico,* in which the alleged contemnor relies on a mere technicality or an absurdly narrow interpretation of the governing order. Rather, they say it is the plaintiffs who are improperly seeking "to read implied terms" into the Injunction in order to justify a finding of contempt.

V. Discussion

[34] The elements of a civil contempt of court, the kind alleged here, were recently summarised by Walker J. in *Axion Ventures Inc. v. Bonner*, 2023 BCSC 313, as follows:

> [14] In *Carey v. Laiken*, 2015 SCC 17, the Supreme Court of Canada outlined the test for civil contempt. Civil contempt has three elements, each of which must be established beyond a reasonable doubt, being:
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> a) the order alleged to have been breached must state clearly and unequivocally what should and should not be done;
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> b) the party alleged to have breached the order must have had actual knowledge of it; and
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> c) the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do what the order compels.
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> See also: *Lee v. Weidner*, 2019 BCCA 326 at para. 44.
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> [15] For the first element, the order must state unequivocally what should be done, and this relates to the *actus reus* for contempt: *Workers' Compensation Board of British Columbia v. Skylite Building Maintenance Ltd*., 2019 BCSC 231 at para. 101.
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> [16] The second element – actual knowledge – relates to the *mens rea* of contempt: *Skylite Building Maintenance* at para. 105. Knowledge can be established where the putative contemnor has counsel leading up to and in the execution of the order: *Derencinovic v. 7 West Homes Ltd*., 2021 BCSC 1707 at para. 41.
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> [17] For the third element, which also relates to the *mens rea* of contempt, all that is required to be proven is that the contemnor intended to do the act forbidden or failed to do what was ordered: *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316 at para. 14. The Court in *Carey* held that the intention to disobey the order is not required:
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> > [42] The appellant correctly notes that civil contempt is quasi-criminal in nature, which he says justifies a higher fault element where contempt cannot be purged. But civil contempt is always quasi-criminal, so this provides no justification for carving out a distinct mental element for particular types of civil contempt cases. As I have already discussed, requiring contumacious intent would open the door to mistakes of law

> providing a defence to an allegation of civil contempt. It could also permit an alleged contemnor to rely on a misinterpretation of a clear order to avoid a contempt finding, which would significantly undermine the authority of court orders.
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> [18] Contempt is a remedy of last resort. The Court in *Carey* cautioned against routine use of contempt to enforce court orders:
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> > [36] The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders. If contempt is found too easily, "a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect". As this Court has affirmed, "contempt of court cannot be reduced to a mere means of enforcing judgments". Rather, it should be used "cautiously and with great restraint". It is an enforcement power of last rather than first resort.
> >
> > [Citations omitted]
>
> [19] In *Hokhold v. Gerbrandt*, 2016 BCCA 6 at paras. 31-32, the Court of Appeal described contempt of court as a "heavy, blunt tool" and that "[a] measured response to non-compliance with court orders is the standard; a contempt order should be a last resort to obtaining compliance." The standard of proof for contempt is therefore high, which is why the applicant bears the onus of proving all of the elements of contempt beyond a reasonable doubt: *Lee v. Weidner*, 2019 BCCA 326 at para. 44.

[35] In this case, the principal dispute between the parties focuses on the first, or *actus reus*, element of that test. The parties disagree in particular on precisely what conduct is enjoined and what conduct has been demonstrated to have occurred.

[36] The Injunction contains two kinds of prohibitions.

[37] The first category, set out in para. 1(a), takes the form of an absolute prohibition on the use of any of the listed items at or near the hotels. One of those items is "whistles". Although there are a few suggestions in the plaintiffs' affidavits that the picketers have used whistles since the pronouncement of the Injunction, these generally appear to be references to "whistling" (that is, making a whistling sound with the mouth and lips) rather than the use of a kind of instrument that could be described as a whistle. The caption to Figure 3 in Mr. Ghanouni's report (in both its original and amended versions) suggests that the photograph shows picketers using whistles, among other things, to generate noise, but I am unable to discern

any whistles in that photograph. Moreover, Mr. Ghanouni had to replace the original version of that caption because it claimed the same photograph also depicted picketers using drums, when in fact it did not. Both Mr. De Marchi and Ms. Grewal have deposed that, after the Injunction was pronounced, the Union leaders told the picketers to cease using whistles and the other prohibited items, and that they complied. In any event, the Notice of Application itself alleges only that on August 4, 2023, there was "whistling", which is not the same as using an instrument identifiable as a "whistle." On that basis, I am not satisfied that any breach of para. 1(a) has been established.

[38] The second category of prohibitions, set out in para. 1(b), is cast in less absolute terms and therefore presents a closer question. The meaning of that paragraph is also less than entirely clear. If it is to bear any sensible meaning at all, then the underlined words added in parentheses below must be understood to be missing or implicit:

> Using drums, microphones, speakers, megaphones or any other electronic device to amplify sound or to play pre-recorded sounds or pre-recorded music [<u>at a level measured at</u>] over 75dBA on an approved sound meter as defined by the City of Richmond Bylaw No. 8856, emanating at least 6.1 meters from the source of the noise or sound.

[39] Without those added words, the paragraph, read literally, would appear to prohibit the use of the listed items to amplify or play sound or music on an approved sound meter at a level over 75 dBA, which was obviously not what was intended.

[40] However, I am not persuaded that any other words must be considered to be missing or implicit. In particular, I disagree with the plaintiffs' submission that the word "drums" must be understood to connote any percussion instrument. The Respondents are not advancing an unduly narrow, literal or technical interpretation of those words when they assert that plastic hand-clappers are not drums.

[41] The Merriam-Webster Dictionary defines the word "drum" as follows:

> a percussion instrument consisting of a hollow shell or cylinder with a drumhead stretched over one or both ends that is beaten with the hands or with some implement (such as a stick or wire brush)

> Source: https://www.merriam-webster.com/dictionary/drum

[42] A similar definition appears in the Cambridge English Dictionary:

> a musical instrument, especially one made from a skin stretched over the end of a hollow tube or bowl, played by hitting with the hand or a stick …
>
> Source: https://dictionary.cambridge.org/dictionary/english/drum

[43] The one attribute that "drums" share with the other items listed in para. 1(b) (namely, microphones, speakers, megaphones or any other electronic device) is their capacity to amplify sound, an attribute that plastic hand-clappers do not possess.

[44] In addition, I have concluded that the paragraph is ambiguous insofar as it fails to specify precisely what conduct is enjoined. There are at least three potentially viable interpretations, as follows:

a) there must be no noise measured in excess of 75 dBA where any of the listed items contribute to it (the plaintiffs' proposed interpretation);

b) none of the listed items may be used to generate, <u>on their own</u>, a noise measured in excess of 75 dBA (the Respondents' proposed interpretation); or

c) none of the listed items may be used to generate, <u>alone or in combination with one or more of the other listed items</u>, a noise measured in excess of 75 dBA.

[45] I am not persuaded that the plaintiffs' interpretation is the only sensible one in that group. The purpose of the Injunction, and the context within which it was made, do not necessarily require that result. The Respondents are, accordingly, entitled to the benefit of the doubt with respect to that ambiguity.

[46] The evidence shows only that, after the pronouncement of the Injunction, the picketers used a drum on various occasions, a megaphone on August 3, 2023 and a speaker on August 18, 2023. The evidence does not demonstrate to the requisite

standard that any of these alone, or even in combination with one or more of the others, generated a noise or sound that was measured in the requisite manner at over 75 dBA at the times alleged.

[47] Although it is clear that the picketers have regularly been generating noise in excess of 75 dBA, that, by itself, is not what is enjoined. The primary source of that noise appears to be their voices and their use of plastic hand-clappers, neither of which are specifically enjoined at any level.

[48] That is sufficient to dispose of the application. Even if the supplementary evidence that is the subject of the Respondents' objection were to be included in the analysis, the plaintiffs have not met their burden to demonstrate beyond a reasonable doubt that any term of the Injunction has been breached in the manner alleged.

[49] The application must therefore be refused.

VI. Conclusion

[50] The application is refused.

[51] Although costs would normally follow the event, my order will be that the parties will bear their own costs. According to the Respondents' own expert, the use of the drum on August 9, 2023, by itself, generated noise measured at 75 dBA from 6.1 metres away. That is just shy of a breach, even on the Respondents' own interpretation of what was required of them. The use of megaphones on August 3, 2023, observed by Mr. Brown, is also of concern, in view of Mr. Ng's October 7, 2019 report showing measurements consistently over 75 dBA from that source in the past. It is clear at the very least that the Respondents have at times skated perilously close to the line, notwithstanding that the plaintiffs have failed to prove, to the requisite standard, that they actually crossed it.

"Milman J."