COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Dempsey v. Pagefreezer Software Inc.,* 2023 BCCA 202

Date: 20230515
Docket: CA48392

Between:

Nathan K. Dempsey

Appellant
(Petitioner)

And

Pagefreezer Software Inc. & Michael Riedijk

Respondents
(Respondents)

SEALED FILE

Before: The Honourable Mr. Justice Voith
(In Chambers)

On an application for contempt from Orders of the Court of Appeal for British Columbia, made August 22, 2022 and November 3, 2022 (*Dempsey v. Pagefreezer Software Inc.*, Vancouver Docket CA48392).

The Appellant, appearing in person (via videoconference):	N.K. Dempsey
Counsel for the Respondent:	C.W. Garton E. De Paoli, Articled Student
Place and Date of Hearing:	Vancouver, British Columbia April 28, 2023
Place and Date of Judgment:	Vancouver, British Columbia May 15, 2023

Summary:

The Respondents seek an order finding the Appellant in civil contempt. They allege the Appellant breached sealing orders issued by this Court when, without leave of the Court, he disclosed sealed materials to various non-parties. The Respondents also ask that the Appellant be found in contempt for failing to pay a fine in relation to his prior breach of a sealing order. HELD: Application allowed. The sealing orders at issue were clear and unambiguous. The Appellant had actual knowledge of those orders, and deliberately breached them. He is liable in civil contempt. The Appellant had lawful means by which to challenge the sealing orders if he thought them wrongly imposed, but chose not to make use of those options. The Appellant is also in contempt for failure to pay the previous fine that was imposed by this Court. In these circumstances, the appropriate sanction is a $10,000 fine, with special costs of this application to the Respondents.

Reasons for Judgment of the Honourable Mr. Justice Voith:

OVERVIEW

[1] The Respondents in this matter, Pagefreezer Software Inc. (“Pagefreezer”) and Mr. Riedijk, apply for an order finding the petitioner (appellant), Mr. Dempsey, in contempt of orders of this Court. The Respondents also ask this Court for special costs of this application.

BACKGROUND

[2] Pagefreezer is a company providing monitoring and archiving services for online content. Mr. Riedijk is a founder and CEO of Pagefreezer. Mr. Dempsey was a former employee and shareholder of Pagefreezer.

[3] There are a number of underlying proceedings relevant to this application which I will attempt to summarize succinctly.

[4] In September 2021, Mr. Dempsey and Pagefreezer entered into a settlement agreement to resolve an oppression dispute between them. In February 2022, Mr. Dempsey asked the Court to rescind the agreement as he believed he should have received more money in the settlement (the “Petition to Rescind”). That petition was dismissed in October 2022.

[5] A number of interim sealing orders were imposed in relation to those proceedings due to the sensitive nature of the documents on file. Mr. Dempsey sought to involve third parties in the proceeding and wished to disclose materials under seal to them. In June 2022, Justice Tucker, in reasons indexed at 2022 BCSC 1246, sealed the entire file and granted a protective order to prohibit Mr. Dempsey from disclosing any part of the sealed file to any party not named in the style of proceeding.

[6] Mr. Dempsey sought leave to appeal from Justice Tucker’s order in July 2022 (the “First Appeal”). In his application materials he included confidential and sensitive information about Pagefreezer. Following the expiry of an interim stay issued by Justice Butler in this Court, the Respondents applied for additional sealing

and protective orders in the Court of Appeal (chambers) in August 2022. Justice Willcock made the following orders:

a) A permanent sealing order over portions of the appeal record;

b) A 90-day interim sealing order over the remainder of the appeal record; and

c) A protective order restraining Mr. Dempsey from disclosing "items under seal in this Court" to non-parties without leave of the Court.

[7] In late August 2022, Mr. Dempsey brought another appeal, this time in relation to an earlier unsuccessful attempt to add the Canada Revenue Agency as a party to his Petition to Rescind (the "Second Appeal"). The Attorney General on behalf of Her Majesty the Queen in Right of Canada filed a notice of appearance in the Second Appeal. The entire record of that file is now subject to sealing and protective orders issued by Justice DeWitt-Van Oosten (unpublished reasons issued on 13 September 2022).

[8] On October 27, 2022, the Respondents applied to dismiss the First Appeal and permanently seal the record. On November 3, 2022, Justice Marchand (Chambers):

a) dismissed the First Appeal due to Mr. Dempsey's failure to post security for costs; and

b) permanently sealed portions of the First Appeal record, including all materials filed on or after August 22, 2022.

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[9] Justice Marchand also found Mr. Dempsey in civil contempt of court in relation to Justice Willcock's orders for emailing sealed materials from the First Appeal to numerous third parties, including "10 international news outlets",

corporate competitors of the Respondents, and government agencies. He was ordered to pay a fine of $5,000. Special costs of the application were awarded to the Respondents.

[10] Mr. Dempsey refused to sign the orders of Justice Marchand. The respondents scheduled a hearing before the Registrar to settle the terms of Justice Marchand's orders, fix ordinary costs of the First Appeal and to fix the special costs awarded in the contempt application.

[11] Mr. Dempsey's written submissions before the Registrar of the Court of Appeal, to fix special costs (the "Costs Submissions"), are subject to the sealing orders made by Justices Marchand and Willcock.

[12] Following receipt of written submissions and a hearing, the Registrar settled the terms of the orders made by Justice Marchand and he awarded the Respondents ordinary costs of the First Appeal in the amount of $4,545.44 and special costs of the contempt application in the amount of $36,726.09.

[13] Mr. Dempsey has not paid the ordinary or special costs issued against him, nor the $5,000 fine for his contempt.

[14] Following dismissal of the Petition to Rescind, Mr. Dempsey filed two other claims, one a petition and the other an action against the Respondents in which the Crown and the Attorney General of Canada were named as parties (the "Other Claims"). One of those claims was discontinued and the other was dismissed. The dismissal reasons of Justice Majawa in the court below declared Mr. Dempsey to be a vexatious litigant in the Supreme and Provincial Courts of British Columbia.

Alleged breaches of sealing order

[15] The Respondents have deposed that on January 27, 2023, Mr. Dempsey sent a copy of the sealed Cost Submissions to various federal politicians, including the

office of the Prime Minister, Mr. Jagmeet Singh, Mr. Maxime Bernier, Mr. Pierre Poilievre, Ms. Elizabeth May and Ms. Chrystia Freeland (the "Political Non-Parties").

[16] The Respondents also depose that on February 10 and 14, 2023, Mr. Dempsey sent a copy of the sealed Costs Submissions to the Law Society of British Columbia, the Canadian Bar Association, the Canadian Judicial Council, and the British Columbia Human Rights Tribunal (the "Regulatory Non-Parties").

[17] Mr. Dempsey did not seek leave of this Court, as required by the order of Justice Willcock, to make these disclosures.

ISSUES

[18] The issues in this application are:

a) whether Mr. Dempsey is liable for civil contempt for disclosing sealed materials to non-parties; and

b) whether Mr. Dempsey is liable for civil contempt for failing to pay the $5,000 fine issued by Justice Marchand.

If (a) and/or (b) are answered in the affirmative, I must also determine:

c) the appropriate penalty; and

d) whether the Respondents are entitled to special costs of this application.

The Legal Framework

[19] A justice of the Court of Appeal has the same powers as the Supreme Court of British Columbia to punish contempt of court: *Court of Appeal Act*, S.B.C. 2021, c. 6 at ss. 24(2)(b) and 30(d)(i). Rule 22-8(1) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 states that the power to punish contempt of court must be exercised by way of an order for committal or imposition of a fine, or both.

[20] Civil contempt has three elements, which the applicant must prove beyond a reasonable doubt:

a) The order alleged to have been breached clearly and unequivocally stated what should and should not be done;

b) The party alleged to be in breach had actual knowledge of the order; and

c) The party alleged to be in breach intentionally did the act prohibited in the order, or intentionally failed to do the act that the order compels.

Carey v. Laiken, 2015 SCC 17 at paras. 32–35.

[21] The Court in *Carey* emphasized the power to punish a contempt of court is discretionary and ought to be used sparingly: at para. 36.

[22] Further, “all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice”: *Carey* at para. 38. A contemnor need not intend to disobey the court order: *Carey* at para. 38.

DISCUSSION

Disclosure of sealed materials to non-parties

[23] The Respondents say both sealing orders relevant to this application—that of Justice Willcock and Justice Marchand—are clear and unambiguous. I agree and Mr. Dempsey does not suggest otherwise. Justice Willcock’s order clearly stated that Mr. Dempsey must not disclose any material under seal in the Court of Appeal to any person other than those named in the style of proceedings, and their counsel, without leave of the Court. Similarly, Justice Marchand’s order states that all filings made in the First Appeal after August 22, 2022 are permanently sealed. I accept the first element of the contempt test is established.

[24] It is equally clear that Mr. Dempsey had actual knowledge of these orders: he was in the court room when Justices Willcock and Marchand read their oral reasons for judgment in those matters. Mr. Dempsey approved the form of order made by Justice Willcock. Though he objects to the order made by Justice Marchand, a matter I will return to, he did not suggest he did not know of its terms.

[25] Finally, I am satisfied Mr. Dempsey intentionally breached both the sealing and protective orders made by Justices Willcock and Marchand when he:

a) sent the sealed Costs Submissions to the Political Non-Parties on January 27, 2023;

b) sent the sealed Costs Submissions to the Regulatory Non-Parties on February 10 and 14, 2023.

[26] These acts were deliberate and intentional.

[27] Mr. Dempsey primarily argues that he was entitled to send the Cost Submissions to the Political Non-Parties because the Attorney General of Canada had filed a notice of appearance in the Second Appeal. He argues that, for example, Ms. May or Mr. Singh are one and the same as the Attorney General of Canada. He maintains that it would have been open to him to send the Cost Submissions, or I imagine any other materials under seal, to any member of Parliament.

[28] I disagree. The Political Non-Parties are not parties to the Second Appeal. They could not be sent sealed documents from that proceeding without first obtaining leave of this Court. The Crown does not include opposition politicians or, for that matter, the Regulatory Non-Parties: *Gauthier v. Canada (Speaker of the House of Commons),* 2006 FC 570 at para. 11; *Law Society of British Columbia v. Canada (Attorney General),* 2001 BCSC 1593 at para. 64.

[29] Mr. Dempsey also defended his decision to release sealed materials to the Regulatory Non-Parties by relying on s. 21(1) of British Columbia's *Human Rights Code*, R.S.B.C 1996, c. 210 which states that "[a]ny person or group of persons that alleges that a person has contravened this *Code* may file a complaint with the tribunal in a form satisfactory to the tribunal".

[30] Mr. Dempsey's argument appears to be that he was justified in sending various sealed materials to different regulatory bodies as part of a complaint under the *Human Rights Code* because s. 4 states that the *Code* prevails over other

"enactments". However, "enactments" refers to a statute or regulation passed by the legislature or under the authority of the Lieutenant Governor in Council: *Interpretation Act,* R.S.B.C. 1996, c. 238 at s. 1. The orders Mr. Dempsey is alleged to have breached are orders of the Court, not legislative enactments. Those provisions have no relevance to his case.

[31] Mr. Dempsey raised a number of other matters, both in his written submissions and oral argument, which he says are relevant to the different elements of a civil contempt that are described in *Carey*.

[32] First, at the outset of the hearing in Chambers, Mr. Dempsey said he was seeking a reconsideration of Justice Marchand's sealing order. Although it is the breach of that order that is at issue in this application rather than its validity, I allowed Mr. Dempsey to speak to his concern that the order was unfair or prejudicial to him. In particular, he emphasized that the court's power to punish contempt is discretionary and should be exercised sparingly. I accept this as a general proposition. He pointed to *Moncur v. Plante*, 2021 ONCA 462 at para. 10 and to *Carey* at para. 36 that I identified earlier.

[33] Mr. Dempsey appeared to suggest Justice Marchand ignored or wrongly applied these authorities in finding him liable for civil contempt. However, my reading of Justice Marchand's reasons show he was attentive to the discretionary nature of contempt rulings as a "tool of last resort" for obtaining compliance with court orders. At paras. 18–19 of his reasons he expressly referred to *Carey* at para. 36 and to *Taherkhani v. Este*, 2020 BCCA 226 at para. 32 which is to similar effect. He was also mindful of that guidance when he imposed a fine of $5,000 on Mr. Dempsey, despite opposing counsel seeking a $10,000 fine.

[34] Overall, nothing arose in Mr. Dempsey's submissions that would cause me to question Justice Marchand's order. In any event, and likely more importantly, Mr. Dempsey did not seek to appeal that order—a step which would have been the appropriate and lawful means of challenging any purported deficiency or error in the order.

[35] Second, Mr. Dempsey contends that no judge who has dealt with the various proceedings I have described has bothered to read the affidavit materials he has submitted. He says that if they had, they would have plainly seen that he has been victimized by the state, has been oppressed by the judicial system, is a political target in Canada, and has been denied legal counsel who are "loyal" to him. He also claims his materials show "egregious" police misconduct including the use of "falsified police reports" made against him. He asserts that had the judges read those materials, they would have made different orders.

[36] With respect, I consider it unlikely that the many judges involved in the various applications and appeals I have described neglected to consider Mr. Dempsey's written materials. Nevertheless, given the nature of his concerns, I advised Mr. Dempsey that I would take additional care in reviewing the materials he presented for this application. This included his five affidavits totaling almost 800 pages. Unfortunately, those materials simply do not support Mr. Dempsey's assertions or reveal any judicial or police misconduct. Nor are they relevant to the relatively narrow issues that are raised on this application.

[37] Third, Mr. Dempsey states that, on account of earlier judges' inattention to his submissions, he has been left with no other choice than to release the sealed materials to politicians, regulators and others who he feels should be notified about his case. He referred me to two Supreme Court of Canada cases dealing with the defenses of necessity and duress in criminal proceedings, namely *R. v. Ruzic*, 2001 SCC 24 and *R. v. Hibbert*, [1995] 2 S.C.R. 973. He says these authorities support his assertion that he was "pressed" to share these materials and that he therefore should not be found liable for contempt.

[38] The cases Mr. Dempsey cites speak to fundamentally different circumstances than those present on this application. *Ruzic* and *Hibbert* concerned the *mens rea* of individuals coerced to commit criminal acts as a result of serious and imminent threats of harm to themselves or others. These cases have no direct relevance to the contempt application before me. To be clear, this case is about *civil* contempt;

the criminal law power is not engaged. Further, these cases concern situations where “the person had no other viable or reasonable choice available” than breaking the law: see *Ruzic* at para. 29, citing *Perka v. The Queen*, [1984] 2 S.C.R. 232 at 250. Mr. Dempsey had reasonable, lawful options available to him to challenge the sealing orders. If he considered the sealing orders were wrongly issued, he could have appealed the orders of Justices Marchand and Willcock, but chose not to. He could have sought clarification from the Court about what he could and could not share with non-parties but, again, he chose not to do this. Finally, he could have sought leave of the Court to make disclosure of otherwise sealed materials but he again chose not to do so. It is incorrect to say he was somehow out of options and “forced” by necessity to breach the sealing orders.

[39] In the result, I am unable to accede to any of the responses or defences Mr. Dempsey has raised on this application. I am satisfied, beyond a reasonable doubt, that Mr. Dempsey is in civil contempt of the sealing orders made by each of Justice Willcock and Justice Marchand.

Failure to pay contempt fine

[40] I turn now to the test for civil contempt as it relates to Mr. Dempsey’s failure to pay the fine issued by Justice Marchand. I view that order to pay as clear and unambiguous: see the unpublished reasons of Justice Marchand at para. 36.

[41] I am also satisfied Mr. Dempsey had actual knowledge of this fine. Again, he was present in the courtroom when Justice Marchand’s reasons were read. Mr. Dempsey acknowledged before me that he has not paid the fine and he provided no real explanation in his failure to do so.

[42] I am therefore satisfied, beyond a reasonable doubt, that Mr. Dempsey is liable for civil contempt for not paying the fine issued (or ordered) by Justice Marchand.

Appropriate sanction

[43] The more difficult question in this application is what the appropriate sanction should be for Mr. Dempsey's continued flouting of orders made by this Court. To determine a fit penalty, it is useful to first review some core principles governing sanctions for contempt.

[44] First, the power of the superior courts to punish contempt of court is grounded in the rule of law itself. As McLachlin J. (as she then was) explained in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at 931–932:

> 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 in neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th-century have exercise the power to punish for contempt of court.
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> ….
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> … The gravamen of the offence is not actual or threatened injury to persons or property; other offences deal with those evils. The gravamen of the offence is rather the open, continuous and flagrant violation of a court order without regard for the effect that it may have on the respect accorded to edicts of the court.
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> [Emphasis added.]

[45] Additionally, this Court has emphasized that the violation of court orders is about much more than the dispute between two parties. Rather it "strikes at the very heart of the administration of justice": *Larkin v. Glase*, 2009 BCCA 321 at para. 8, citing *Ontario (Attorney General) v. Paul Magder Furs Ltd.,* (1992) 10 O.R. (3d) 46 (C.A.) at 53.

[46] In *Langford (City) v. dos Reis,* 2016 BCCA 460 at para. 16, this Court recognized a number of factors relevant to determining appropriate penalties for civil contempt. I will not recount all of them, but they include the following:

a) The inherent jurisdiction of the court, as a superior court, allows for the imposition of a wide range of penalties for civil and criminal contempt;

b) Deterrence, both general and specific, but especially general deterrence, as well as denunciation, are the most important factors to be considered in the imposition of penalties for civil, as well as criminal, contempt;

c) Imprisonment is normally not an appropriate penalty for a civil contempt where there is no evidence of active public defiance (such as public declarations of contempt; obstructive picketing; and violence) and no repeated unrepentant acts of contempt;

d) Where a fine is to be imposed, the level of the fine may appropriately be graduated to reflect the degree of seriousness of the failure to comply with the court order; and

e) In setting the overall level of penalty, the court may take account of the level of penalty imposed in similar cases in the past and may adjust the penalty upwards or downwards, depending on the court's assessment as to whether previous levels of penalty have had an effective general deterrent effect.

[47] The Respondents ask that Mr. Dempsey be issued a fine for his contemptuous conduct, or be required to complete community service. As I noted earlier, they sought a fine of $10,000 before Justice Marchand, but a fine of $5,000 was imposed. Deterrence is of particular importance given Mr. Dempsey's repeated defiance of various sealing orders made by this Court. In my view, a fine of $10,000 is appropriate having regard to the history of this case and the considerations I have identified.

Special costs

[48] The Respondent also seeks special costs in relation to this application. They seek fixed costs of $15,570.24, or costs in an amount determined by the Registrar.

[49] Section 45(1) of the *Court of Appeal Act* allows a judge to make any order or direction they consider appropriate in the circumstances, in line with the *Rules*.

Rules 69–71 of the *Rules* allow a justice to order ordinary, increased or special costs.

[50] When awarding special costs for Mr. Dempsey's breach of Justice Willcock's order, Justice Marchand explained:

> [39] Special costs are generally only awarded against a party that has engaged in some form of reprehensible conduct but there are exceptions: *Gichuru v. Smith,* 2014 BCCA 414 at para. 90. One of the exceptions is the "long-standing practice" to award special costs to the successful party in a civil contempt proceeding. The reasoning is that a party that obtains a court order is entitled to have it obeyed without having to incur any further expense.

[51] Like Justice Marchand before me, I see no reason to depart from the "long-standing practice" and therefore award special costs against Mr. Dempsey in relation to both his failure to abide by the orders I have identified, as well, his failure to pay the fine issued by Justice Marchand. I am satisfied that in the interest of efficiency, and to avoid the cost and delay that would attend a further hearing before the Registrar, I should fix an amount of special costs directly. Based on the materials that the respondents have filed, and the amount of the last special costs order made by the Registrar, I am satisfied that a special costs award of $15,570.00 is fair and reasonable.

DISPOSITION

[52] To summarize, I make the following orders:

a) Mr. Dempsey is in contempt of court for breaching both the order of Justice Willcock made on August 22, 2022, and the order of Justice Marchand made on November 3, 2022;

b) Mr. Dempsey is ordered to pay a fine of $10,000; and

c) Mr. Dempsey is to pay special costs of $15,570.00 to Pagefreezer and Mr. Riedijk in relation to this contempt application.

"The Honourable Mr. Justice Voith"