# Court of King's Bench of Alberta

**Citation: 0678786 BC Ltd v Bennett Jones LLP, 2023 ABKB 470**

**Date:** 20230815
**Docket:** 1701 17308, 1801 07870
**Registry:** Calgary



Docket: 1701 17308

Between

**0678786 B.C. Ltd.**

Plaintiff/Respondent on Applications/
Applicant on Cross-Application

- and –

**Jeffrey Poole**

Third Party/Respondent on Applications/
Applicant on Cross-Application

- and -

**Bennett Jones LLP, Robert W. Staley, Raj S. Sahni, Jonathan G. Bell, Ilan Ishai and Grant N. Stapon**

Defendants/Applicants on Application/
Respondents on Cross-Application

- and –

**Voorheis & Co. LLP**

Third Party/Applicant on Application/
Respondent on Cross-Application

Docket: 1801 07870

And Between

**0678786 B.C. Ltd. and 8028702 Canada Inc.**

Plaintiffs/Respondents on Applications/
Applicants on Cross-Application

- and -

**Jeffrey Poole**

Third Party/Respondent on Applications/
Applicant on Cross-Application

- and -

**Bennett Jones LLP, Robert W. Staley, Raj S. Sahni,
Jonathan G. Bell, Ilan Ishai and Grant N. Stapon**

Defendants/Applicants on Application/
Respondents on Cross-Application

- and -

**Voorheis & Co. LLP**

Third Party/Applicant on Application/
Respondent on Cross-Application

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**Memorandum of Decision
of the
Honourable Justice P.R. Jeffrey**

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[1] Bennett Jones LLP and Voorheis & Co. LLP apply for a declaration that the numbered company Respondents (067 and 802) and their lawyer, Mr. Jeffrey Poole, were in civil contempt. The Applicants acknowledge the contempt has now been purged but say the declaration of contempt should be made nevertheless, and a consequence imposed. They ask for a monetary

penalty equal to all the legal costs they have been caused. In the alternative, they say they should receive their costs on an indemnity basis for their successful contempt applications.

[2] I rendered an initial decision on their contempt applications, reported at: 2022 ABQB 599 (the "**Phase 1 Decision**"). That was the "liability phase." This decision is the "penalty phase" (the "**Phase 2 Decision**"), as described in paragraph 18 of *Carey v Laiken*, 2015 SCC 17 (excerpted at para 155 of the Phase 1 Decision). In this Phase 2 Decision capitalized terms have the same meanings I ascribed to them in the Phase 1 Decision.

[3] The underlying dispute among these parties relates to the Respondents' failures to comply with the Orders requiring they immediately cease disclosing publicly and otherwise using the Information and that they immediately do all they can to undo their prior disclosures of the Information. The Information was found to be subject to solicitor client privilege (the privilege belonging to a client of Bennett Jones – Voorheis), and inadvertently passed by Bennett Jones to Mr. Poole (who had begun acting for 067 and 802). 067 and 802 were past clients of Bennett Jones and had instead retained Mr. Poole's law firm, which then commenced the 1701 claim against Bennett Jones. Information was included among the client records of those companies that Bennett Jones had accumulated and forwarded to their new counsel, Mr. Poole. An earlier decision of this Court (the Privilege Decision) found that Mr. Poole had not deal with the Information as the law required, and the Orders required he and his clients, 067 and 802, rectify that. A fuller background is chronicled in the decisions cited at paragraphs 10 and 11 of the Phase 1 Decision.

[4] The Applicants said the Respondents failed to comply with the Orders and applied for the Respondents to be found in civil contempt. In the Phase 1 Decision I found that the test for civil contempt was satisfied (para 90). But, for the reasons explained there, largely reasons of procedural fairness, I deferred my decision on whether to declare the Respondents in civil contempt (paras 91, 114 – 117), if so whether to impose a consequence, and any decision on costs. I then added the following comment in conclusion, at para 117:

> […] any efforts of the Respondents between now and that second phase hearing to purge the identified areas of non-compliance and to perform the undertakings offered, will be considered in the exercise of my discretion on those remaining decisions.

[5] The Applicants acknowledge that the Respondents have now purged their contempt.

### *Preliminary Comments*

[6] During the Phase 2 hearing, counsel periodically misdirected their submissions. It seems this was because the discretion to quantify a monetary penalty for contempt and the discretion to impose indemnity-scale costs were both before the Court in the same application. They were sometimes conflated, each creeping into the discussion of the other. For example, satisfying the legal test for solicitor and own client (indemnity) costs is *not* a prerequisite to the Court using total costs incurred as the basis for a monetary penalty for contempt. They are two very different things.

[7] In this decision I endeavour to keep these matters distinct. I deal separately with, first, whether a declaration of contempt is just in the circumstances; second, whether any further

consequence is warranted; and, in any event of those first two determinations, third, whether indemnity costs, or any costs, ought to be awarded for the two-phase contempt application.

[8] For the second issue, Voorheis suggests I order payable to it an amount equal to the total it has incurred in legal costs from the start of its involvement – roughly $475,000.00. Voorheis says it would reduce that by any amount it may have already received from 067 and 802 in payment of costs awarded to them by any of the Courts involved. Bennett Jones suggests I order payable to it an amount equal to the legal costs it has incurred since the start of just the contempt proceedings – roughly $73,000.

[9] If those penalties are awarded, then on the third issue the Applicants say they no longer request costs. If no penalty is imposed for the contempt, then the Applicants say they are entitled to costs on an indemnity basis.

[10] Important to recognize is that at this time there is no claim before the Court for damages for possible injury or losses caused to Voorheis. Any such claim is not foreclosed if I order moneys paid to Voorheis as a penalty for contempt.

[11] The conflating of these contempt penalty and costs issues, or at least the confusion around the scope of the process for their determinations, manifested itself also in Mr. Poole saying that if the Court were to consider agreeing with the Applicants' allegation that he and his clients knew all along the Information might be privileged, yet nevertheless intentionally declined to do what the law required they do with it and brazenly disclosed it publicly, which the Respondents flatly deny, then to be able to fairly respond they would need to regain access to their past court filings that contained the privileged Information, to refresh their memories and to use to defend against the personal attacks.

[12] The evidentiary record on these matters and has been closed for some time. It is not about to be re-opened lightly and certainly not without satisfying the *Palmer* test. Moreover, all of this is misplaced. The present applications relate to non-compliance of Orders that did not even exist when Mr. Poole received the boxes from Bennett Jones that included the privileged notes. His conduct and motives at that time, whatever they may have been, are irrelevant to the current issues. Any such suggestion from an Applicant that I consider those motives might simply and safely have been ignored by Mr. Poole, as irrelevant, rather than by threatening still more legal process to again try to gain back the Information he was ordered to *not* possess or use.

### ***Declaration of Contempt***

[13] Nothing in the parties' further submissions offered me any basis to not now call out the non-compliant conduct as contempt, by way of a formal declaration. The aspect of the allegations of contempt that none of the parties addressed in the Phase 1 hearing, and upon which they were accorded the further opportunity to be heard as part of this Phase 2 hearing, was that the Respondents were not required to ensure any specific treatment of the Information by the LSO (see paras 34 to 43 of the Phase 1 Decision). In the Phase 1 hearing, all parties operated on the mis-understanding that the Respondents were required to ensure a certain result from the LSO with respect to the Information it earlier received from Mr. McCann via the Respondents. They were not. All the other clear requirements in the Orders, and breaches thereof, discussed in the Phase 1 Decision (see paras 55- 61 and 90) remain.

[14] The Respondents say that declaring them now to have been in contempt would serve no practical purpose, since they have purged their contempt. I disagree. Respect for the Court's authority, dignity, and processes are vital to maintenance of the rule of law. Overlooking intentional breaches of its orders, rather than sanctioning them, erodes that respect for the proper administration of justice. See further: *Carey*, at paras 30 and 41.

[15] I declare that all three Respondents were in civil contempt: 067, 802 and Mr. Poole (collectively, the "**Contemnors**"). I consider the declaration necessary in all the circumstances, including the following.

[16] The Contemnors' conduct was not the result of a momentary lapse of judgement in an otherwise conscientious, prompt, and diligent effort to comply with the Orders, nor did it pertain to an isolated exception to an otherwise comprehensive effort to comply. There were many acts and failures to act that satisfied the three-part test for civil contempt (see paras 106 – 108, 110 – 113, Phase 1 Decision).

[17] The unduly long time that Voorheis' privileged Information remained in the public domain, in daily disregard for its privilege, cannot now be overlooked or appear to be countenanced simply because it was finally removed – at very long last and against great reluctance, great resistance, and numerous attempts to re-litigate the existence of any privilege. "Immediate obedience to an Order is required, absent extraordinary circumstances": *AUPE v Strathcona County*, 2001 ABQB 338 at para 5. There were no extraordinary circumstances here.

[18] Extraordinary time and effort were expended, by both the Applicants and the Court, to coerce and procure compliance that should have been immediately forthcoming. I find that absent the efforts of the Applicants in pursuing contempt as a remedy, after first exhausting less coercive measures, the Contemnors would still have not complied.

[19] In response to these contempt applications, the Contemnors sought advice and directions from the Court. If they had been diligent about promptly complying with the Orders and been genuinely unclear on the requirements in the Orders, then they would have themselves applied for clarification of any points of uncertainty, and much sooner, not left it to the Applicants to commence contempt proceedings before then applying for advice and directions. They took no such initiative, belying their representations of acting always in good faith and of having great respect for the courts and the rule of law. I say "genuinely" because their confusion on the very clear requirements of the Orders (para 32, Phase 1 Decision) remains dubious after they consented to the wording of those Orders. In their request for advice and directions they re-argued again various previous positions, as if to say "but, did you really mean it?" and "does 'all' really mean 'all'?".

[20] Non-compliance with a court order is always serious, but more so when, as here, it is by a lawyer. Lawyers have sworn to uphold the law and to serve as officers of the court. As Sharpe, JA said in his reasons on *Carey v Lakein* at the Ontario Court of Appeal, affirmed at para 46 of *Carey* by the Supreme Court of Canada:

> As an officer of the court, a solicitor of record is duty-bound to take scrupulous care to ensure respect for court orders.

[21] It is not contempt for a lawyer (or anyone else) to disagree with a decision of a court. It is not contempt for a lawyer or anyone to appeal a decision of the courts. It can be contempt for anyone, especially a lawyer, to intentionally not comply with a clear court order, especially after

exhausting all rights of appeal and after the expiry of any stay of that order as was the case here. Counsel are not expected to be happy about performing an order they think to be wrong or invalid. They need not even feign they agree with a court decision in which their arguments did not succeed or to like having to perform what they think is a very bad and misguided decision. But they must honour the authority of the courts rendering such decisions. They cannot pick and choose which court orders they abide; they must comply with all Court orders that are in force.

[22] The declaration of contempt is warranted in this case as a deterrent to the public and all lawyers generally. The conduct here cannot be overlooked, made light of, or countenanced in any way. The declaration will underscore to all litigants and lawyers the importance the law places on guarding solicitor-client privilege, and that cavalier foot-dragging will not do when ordered by a court to minimize the time improperly disclosed privileged information remains in the public domain.

[23] The declaration of contempt may also help deter other lawyers from thinking their professional conduct expectations are optional or may be subverted upon suitable justification or won't be taken too seriously if they're ultimately proven wrong after taking a calculated risk to violate them. I am not saying it has been proven that Mr. Poole here took a calculated risk (see paras 66 – 67, Phase 1 Decision and paras 11 and 12 above) but it remains possible that he did so in considering his options when first perusing the Information inadvertently sent to him. And whether that occurred or not, the point here is only that a public declaration of contempt here may serve to deter other counsel from contemplating such calculated risks when privilege is involved.

[24] The Contemnors remain unapologetic about their non-compliance with the court Orders. Instead, they delayed compliance and were selective in their approach to compliance, continuing to make use of the Information despite the Orders prohibiting their further use.

[25] The closest the Contemnors come to an apology was in their very last submission to the Court on this Phase 2 process, in which they acknowledge responsibility for "missteps along the way" and admit that they "could have engaged in different practices in filing their materials" (paras 7 and 26 respectively, Contemnors' final written brief on Phase 2 issues).

[26] Mr. Poole says the Contemnors "have always made good faith efforts to effect compliance with the Orders". The Supreme Court of Canada said "... where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order," the judge may decline to call the conduct contempt: *Carey*, at para 37.

[27] Mr. Poole's assertion is contrary to the findings of fact in the Phase 1 Decision, that the Contemnors' failures to comply were intentional (see paras 53 – 69). Intentional non-compliance is inconsistent with "good faith efforts to effect compliance." This Phase 2 hearing is not for attacking collaterally or re-opening the findings in Phase 1.

[28] I find that formally declaring there to have been contempt will not work an injustice (see *Carey* at para 37) but is in fact necessary to avoid one. For the reasons just given, the nature and circumstances of the non-compliant conduct in this case demand the sharp and public rebuke of a formal court declaration.

***Consequences of the Contempt***

[29] With the contempt now purged, am I without the discretion to impose a further consequence for the contempt? The Supreme Court of Canada in *Carey*, at para 31 (citations omitted) said 'not necessarily':

> […] With civil contempt, where there is no element of public defiance, the matter is generally seen "primarily as coercive rather than punitive": .... However, one purpose of sentencing for civil contempt is punishment for breaching a court order: .... Courts sometimes impose substantial fines to match the gravity of the contempt, to deter the contemnor's continuing conduct and to deter others from comparable conduct: ....

[30] This has long been the law. The Ontario Court of Appeal said (*Re Ajax & Pickering General Hospital*, 1981 CanLII 1849 (ON CA), relying on a decision of the Saskatchewan Court of Appeal 5 years earlier):

> Purging of contempt by compliance does not deprive the court of power to punish the person who has flouted its orders. It is merely a matter to be taken into account in assessing the penalty to be imposed upon the contemnor.

[31] In their written submissions the Contemnors opposed a declaration of contempt, but they did not address whether there should be a further consequence if I do make that declaration. They did not oppose the Applicants' suggestion that a monetary penalty is appropriate. They do not directly address the Applicants' requests for a consequence in the form of a monetary penalty or the amounts proposed, other than to provide reasons why they say the test for awarding costs on a solicitor-client scale is not satisfied here. That is a different issue: see paragraph 6 above. I consider those submissions when I turn my mind to whether to award any costs on these two phases of the contempt applications.

[32] In this case there are aggravating circumstances that warrant imposition of a further consequence in addition to the declaration of contempt, despite the contempt having been purged. Those circumstances are contained in the Phase 1 Decision and in the reasons above for my making the formal declaration of contempt. Significant among those factors are the very public nature of the contempt, the involvement of a member of the Law Society of Alberta in the contempt, and the obvious foot dragging until the Applicants applied for contempt.

[33] Determining a just consequence for the contempt, proportionate to the Contemnors' conduct, is more challenging.

[34] The Applicants have suggested that I impose a monetary penalty. Given that the original claim (1701) against Bennett Jones seeks a monetary remedy and that the misuse of the Information was in the context of seeking a further monetary remedy (1801), I agree with the Applicants that a monetary penalty is an apt consequence on top of the public declaration.

[35] The Applicants use as a guide for fixing the amount of the monetary penalty the amount of legals costs they have each been caused. The amounts suggested by the two Applicants are significantly different, because each bases the penalty on their legal costs from a different starting point. Bennett Jones counts only its costs since the commencement of these contempt proceedings, whereas Voorheis works from the start of its involvement, long before the Orders existed, let alone the contempt of them.

[36] Cost causation is a relevant consideration on fixing an appropriate monetary penalty. The costs caused are not only those of counsel opposite, but also the needless extra work the Contemnors have caused the Court by necessitating these contempt applications. The amount of costs incurred by counsel will be indicative of the drain on court resources. In this case it has been high.

[37] Fixing the amount of a monetary penalty is not as strictly tied to cost causation as would be a tort remedy or an award of civil litigation costs.

[38] On the one hand on cost causation, far greater amounts could have been reasonably proposed by the Applicants as a monetary penalty in this case, given all of the foregoing, the contempt striking at the core of an institution under the Canadian Constitution, and the contempt eroding one of the core elements of our system of justice, solicitor-client privilege. The contempt in this case had more public and more insidious implications than contempt in a purely private dispute, such as for example in cases of resistance to court ordered document disclosure or resistance to court ordered dismantling of a structure erected over a boundary onto a neighbour's property.

[39] On the other hand, cost causation should not be so broad as to encompass Mr. Poole's original failure to apprehend that notes of communications between two lawyers could possibly be subject to a claim of privilege (which would have necessitated he cease his review and use of the notes and then either return them or apply to a court for a determination of the validity of any asserted privilege). Mr. Poole maintains that claim to this day, that he did not consider the notes as possibly privileged until considerably later in time. This is despite the evidence to the contrary in the form of the claim he filed soon after reading the notes, that started the 1801 action. That original disclosure of the privileged Information of Voorheis was the primary cause of Voorheis' ensuing legal expenses, and maybe other damages, but such early costs and perhaps damages were not a consequence of the Contemnors' civil contempt.

[40] The Applicants seek no betterment from what has happened by their limiting their recovery of any penalty to their legal costs to date. But they also feel they should not end up bearing any cost for the Contemnors' choices.

[41] And so the measure of a suitable amount of the penalty is not capped at an amount that indemnifies others who were adversely affected by the contempt. Nor is indemnity of them necessarily commensurate with the gravity of the non-compliant conduct such as the public harm to the authority of the Court or the harm to the public's confidence that solicitor-client privilege will be honoured by all lawyers.

[42] Further, a monetary penalty equal to the legal costs caused may not in all cases be feasible. The means of the payor may not be able to pay such an amount and therefore it could result in a far greater consequence than would be just or would 'fit the crime'. At the other end of the wealth spectrum, using the total legal costs caused as a proxy for a contempt penalty could be nothing more than a license fee for the well-resourced litigant. It could be trifling on a relative basis and have no deterrent effect. To operate as a deterrent, a monetary consequence must be of some significance, if not some materiality, to a contemnor or in the right circumstances to the directing mind of a corporate contemnor. That amount may far exceed an indemnity for costs caused. No concern arises in this case that either extreme comes into play, nor was any such concern expressed by the parties about either extreme.

[43] In assessing an appropriate penalty amount, I have considered the factors compiled in two Alberta cases, as follows. From *Dreco Energy Services Ltd. v Wenzel*, 2005 ABCA 185, at para 12:

> In the context of this case, it is open to the case management judge in assessing the sanctions which should be imposed to take into account a number of considerations including: (1) the role of counsel, including the extent to which the actions of the respondents' counsel might have contributed to the respondents' contempt; (2) the motivation for the destruction/erasure of the computer records while the undertakings to produce them remained extant; (3) the consequences flowing from the destruction of those records and what redress should flow from that, including consideration of whether any adverse inferences should be drawn as a result thereof; (4) the entire context and history of the litigation; (5) the amount of reasonable thrown-away costs properly incurred; (6) the nature of the contempt; and (7) the degree of culpability of the contemnors.

The second case (*Precision Forest Industries Ltd. v Cox*, 2013 ABQB 524), at para 55, lists factors that are all entailed by the generality of the foregoing list, nevertheless they contain a useful degree of particularity, as follows:

> In addition to the nature of the contemptuous conduct, in determining the appropriate remedy in response to a finding of contempt for breach of a court order, the court may consider factors including:
>
> a. whether the contemnor has admitted the breach;
>
> b. whether the contemnor has tendered a formal apology to the court;
>
> c. whether the breach was a single act of part of an ongoing pattern of conduct;
>
> d. whether the breach occurred with the full knowledge and understanding that
>
> e. it was a breach rather than as a result of a mistake or understanding;
>
> f. the extent to which the conduct of the contemnor displayed defiance;
>
> g. whether the order was a private one, affecting only the parties to the suit of whether come public benefit lay at the root of the order;
>
> h. the need for specific and general deterrence; and
>
> i. the ability of the contemnor to pay.

[44] The Court in *Precision* then added a further comment, that "the sanction of contempt should be proportional to the personal responsibility of the person in contempt and to the seriousness of the contempt" (para 55). These will be readily recognized by lawyers who practice criminal law as the paramount sentencing considerations. It suggests the sanction imposed will vary among the Contemnors. Here, two of the three Contemnors are corporations, but operating under the direct control of their common principal Mr. McCann. The other is their counsel, Mr. Poole, also acting under instructions from Mr. McCann. But, first, no counsel is to knowingly abide client instructions that involve breaching a court order – for that they take professional responsibility personally – and, second, the client instructions here will have been influenced by the information and advice of Mr. Poole. I have observed many interactions between the two men, and their manner one with the other, over numerous case management meetings; I have

heard the comments of Mr. Poole about his instructions and about the age-related challenges episodically affecting Mr. McCann; and I have come to understand the primary and principled motivation of Mr. McCann for the broader litigation against Bennett Jones, and his priority concerns for it. Also, Mr. Poole is the one expected to know about and comply with the duties he bears to his clients and to the Court concurrently. All these factors conspire to my concluding that Mr. McCann is the more vulnerable to influence from the other and that Mr. Poole is the more personally responsible of the two in the contempt. To return to words from criminal sentencing law, Mr. Poole is the more morally culpable of the two.

[45] In assessing an appropriate amount of a penalty, *Carey* calls on me to wield the powers of contempt "cautiously and with great restraint" (para 36).

[46] In that regard, the nature of the Contemnors' intentions should not be overstated. In the Phase 1 Decision, their acts and omissions were found to be intentional acts and omissions that constituted breaches of clear requirements of the Orders. This was enough to satisfy the intention element for civil contempt. This is not the same as intending to defy the Court's authority by way of the acts and omissions: see the distinction at paragraph 38 of *Carey*. In the former, the driving intention is to commit or omit an act that also happens to breach a court order, whereas with the latter the driving intention is to defy the court and the specific breach(es) of a court order are incidental to that objective. They just happened to be the way the contemnor comes out from under the rule of law and defies a court. Such contumacy is likely to escalate the penalty following a finding of civil contempt. The point here is that contumacious intent by the Contemnors here does not necessarily follow merely because of their being found in civil contempt.

[47] This distinction between types of intent helps understand Mr. Poole's contention. Mr. Poole says, in effect, that he and his clients have been found in non-compliance, but they were not contumacious. They did not fail to comply *in order to* dis-respect the Court or defy its authority. The non-compliance occurred ancillary to their objective of pursuing a remedy for the injustice they say Mr McCann's companies endured by the alleged misconduct of Bennett Jones. The law recognizes the former as more serious than the latter.

[48] The facts found in the Phase 1 Decision disclose a disconcerting degree of intentionality on the part of the Contemnors, from which contumacious conduct might be inferred. But so far the conduct has only found to be the less egregious contempt, not intentional (contumacious) defiance. And the non-compliance was not on everything. The Contemnors "substantially complied" on some requirements and have now purged their contempt on all that remained. They should not be penalized as if stridently pervasively contumacious.

[49] I also factor into my determination of penalty that the objective of setting its amount is not to keep any victims whole, as might be erroneously inferred from the Applicants seeking cost indemnity via a monetary penalty. Indeed, this is not the only opportunity for Voorheis to seek a remedy for whatever loss(es) it may have been caused by the inadvertent disclosure, by the ensuing failure of Mr. Poole to respond to that inadvertence in accordance with the law, by the later civil contempt of the Contemnors, including their various "missteps". Similarly, Bennett Jones has other avenues of recovery for any foreseeable damage caused it by the Contemnors' misuse of the Information. Importantly, in any such processes, the Contemnors would have an opportunity to challenge the alleged causation and quantum. They did not have that opportunity in these applications with a damages claim on the line: see paragraphs 10 to 12 above.

[50] I also factor into my determination that the declaration itself constitutes a harsh public censure of both the principal of the corporate Contemnors 067 and 802, Mr. McCann, and the Contemnor Mr. Poole. They each place high value on their reputations. Both took the time to inform the court of what they said were their reputations, backed-up in Mr. McCann's case by an impressive and commendable list of public awards and accolades from governments and community organizations. For each gentleman the reputation appeared to represent for them a form of lifetime achievement recognition. Whatever else the Court might conclude from those representations, they imply the Contemnors believe their reputations matter. The public declarations of contempt will therefore have a commensurate degree of opprobrium, taking some of the winds out of those billowed sails. While a further monetary penalty will not be without significance to the Contemnors, and the public declaration is not alone a sufficient consequence, it will be the public declaration that will more likely cause them each to reassess objectively the severity of their conduct and deter them from repeating it. This reputational effect mattering to them has a downward pressure on the quantum of needed monetary penalty.

[51] I grant the application of Bennett Jones in part and impose a contempt penalty payable to it by all the Contemnors jointly, in the sum of $50,000.

[52] I grant the application of Voorheis in part and impose a contempt penalty payable to it by all the Contemnors jointly, in an amount also equal to two thirds of its full legal costs for the contempt application processes, not two thirds of its claimed full legal costs since becoming involved in this matter. This is not to be reduced by any amounts it has already received from the Contemnors in payment of costs on the Contempt applications. It is not an award of costs; it is a penalty for contempt.

[53] These amounts are warranted for all the reasons above but, in short, to vindicate the integrity of the system, to reflect their respective degrees of personal responsibility, to deter the Contemnors from repeating their behaviour, and to deter all litigants and counsel tempted to err similarly.

[54] The forgoing penalty amounts are payable forthwith.

[55] While the following allocation among the three Contemnors is not being mandated, it is the Court's belief that 30% should be borne by Mr. Poole personally from his own not his firm's resources, and 70% should be borne by 067 and 802 in whatever allocation among them Mr. McCann may choose. This should reasonably reflect their differing degrees of personal responsibility and their differing financial means. Mr. Poole's greater personal responsibility is more than offset by his clients' ability to access greater means.

***Costs***

[56] I grant to each of Voorheis and Bennett Jones their Schedule "C" costs at 2 times the amounts in column 3, less any amounts either has received from 067 or 802 as costs on both phases of the contempt application.

[57] I consider this best satisfies the "overriding issue [of] proportionality" described in *Barkwell v McDonald*, 2023 ABCA 87, at para 57, affirmed in *Petropoulos v Petropoulos*, 2023 ABCA 193, at para 18. It reflects my application of the considerations in Rules 10.29 and 10.33.

[58] This costs award addresses the conduct of the Respondents through the legal process, rather than their civil contempt that was the subject of the process.

[59] Costs on this enhanced scale are appropriate in this case. The Applicants were largely successful throughout on both Phases of the process. The Respondents improperly attempted to re-litigate previously decided issues, collaterally attacking earlier final decisions. The Respondents failed to keep the court process focussed on the issues of contempt, liability and then penalty. For example, they said my conclusion should reflect that it was Mr. McCann not Mr. Voorheis who was the "innocent one." Mr. McCann's alleged mistreatment by Bennett Jones years before the Orders, which is the basis for the claims in 1701, of course has nothing whatsoever to do with either the liability or penalty for the contempt of the Orders by the numbered companies under Mr. McCann's direction years later. The 1701 action is scheduled for trial in 2024; that is the proper venue for any determination on the dealings among the various players. But that was the sort of misdirection and confounding of issues that felt like attempts to obfuscate what otherwise were relatively straightforward issues. And, of course, counsel facilitating their clients' civil contempt is itself egregious litigation conduct.

[60] But I do not grant costs on an indemnity (solicitor and own client) basis as requested. Solicitor-client costs are available only in rare and exceptional circumstances, where there has been "reprehensible, scandalous or outrageous conduct on the part of one of the parties": *Young v Young*, [1993] 4 SCR 3 at 134. While the conduct of the two phases of the contempt litigation by the Respondents warrants escalated costs, it was overall not litigation misconduct meeting that rare and exceptional category of scandalous and outrageous. Costs on an escalated basis, even if not full solicitor client costs, suffice "to signify court disapproval of a litigant's conduct": *Joy Estate v 1156653 Ontario Ltd*, 2007 CarswellOnt 7323 (Sup Ct) at para 34.

***Conclusion***

[61] In result, I declare 067, 802 and Mr. Poole to have been in civil contempt. I impose the monetary penalties described at paragraphs 51 and 52 above, that each Contemnor is liable jointly for the total amounts of the penalties, and I award costs in favor of both Applicant on the scale described at paragraph 56 above against the number companies jointly.

Heard by oral and written submissions between the 31st day of May and the 28th day of July 2023.

**Dated** at the City of Calgary, Alberta this 15th day of August 2023.

**P.R. Jeffrey**
**J.C.K.B.A.**

**Appearances:**

R. Paul Steep and Erin Chesney
for the Third Party Applicant, Third Party Respondent on Cross-Application, Voorheis & Co LLP

Ryan Phillips
for the Defendants/Applicants on Applications and Respondents on Cross-Application, Bennett Jones LLP, Robert W. Staley, Raj S. Sahni, Jonathan G. Bell, Ilan Ishai and Grant N. Stapon

Jeffrey Poole
for Plaintiffs/Respondents on Applications and Applicants on Cross-Application, 0678786 BC Ltd and 8028702 Canada Inc
and for the Third Party Respondent on Applications and Applicant on Cross-Application, Jeffrey Poole (self-representing)