SUPREME COURT OF NOVA SCOTIA
Citation: *Welch v. Welch*, 2024 NSSC 360

Date: 20241122
Docket: Hfx No.: 520641
Registry: Halifax

Between:

Jonathan Welch

Applicant

v.

Jeremy Welch

Respondent

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	November 13 and 22, 2024, in Halifax, Nova Scotia
Written Decision:	November 22, 2024
Counsel:	Richard W. Norman, for the Applicant Jeremy F.R. Welch, Respondent, on his own behalf

By the Court (orally):

INTRODUCTION

[1] Jonathan Welch (Jonathan) moves for an order holding Jeremy Welch (Jeremy) in civil contempt. Jonathan alleges that Jeremy has failed to comply with Orders dated February 10, 2023 and October 18, 2023. Jeremy resists the application and asks for it to be dismissed.

[2] Both parties filed briefs, and Jonathan also provided the Court with four authorities:

1. *Carey v. Laiken*, 2015 SCC 17
2. *McLean v. Sleigh*, 2019 NSCA 71
3. *Mutual Transportation Services Inc. v. Saarloos*, 2016 NSSC 164
4. *Willis v. Willis*, 2009 CarswellOnt 3439 (Ont. SCJ)

[3] In terms of evidence Jonathan filed affidavits sworn May 5, 2023, August 4, 2023 and April 10, 2024. Jeremy filed an affidavit sworn October 29, 2024. Both Jonathan and Jeremy were cross-examined

BACKGROUND

[4] The parties are brothers. Their father, Dr. Philip Welch provided Jeremy with a Power of Attorney (POA) on February 24, 2017. On June 10, 2021 Dr. Welch was declared to be no longer competent. The February 10, 2023 Order is a consent Order requiring Jeremy to provide an accounting of his use of the POA.

[5] Jeremy provided some, but not all of the required information set forth in the February 10, 2023 Order. Jonathan moved for a contempt citation and a hearing was held in August, 2023. This resulted in the October 18, 2023 Order. Pursuant to this Order, Jonathan provided Jeremy with an itemized list of the items he believed to be outstanding. Jeremy responded with further production in late 2023. Jonathan determined that the responses were inadequate and filed an Amended Notice of Motion on June 13, 2024 moving for an Order holding Jeremy in contempt and punishing him for contempt.

ORAL EVIDENCE

Jonathan Welch

[6] During Jonathan's cross-examination, exhibit 1 – a summary of the 41 document requests and Jeremy's responses – was introduced. The bulk of the cross-examination questions pertained to Jonathan's alleged "accurate review" of Jeremy's production.

[7] Jonathan considered his review to be so accurate as to warrant a "ten out of ten". He also took issue with Jeremy's overall production, likening the plethora of email responses to "throwing stuff in a shoebox".

[8] Jonathan acknowledged that he "came across in the bank statements" phone, power, cable and property payments made by Jeremy in his capacity as POA. Nevertheless, Jonathan said he continued to request receipts for these items because they represented household bills. Challenged as to whether the Orders insist that a receipt be provided for every expenditure, Jonathan conceded, "there is a form of explanation".

[9] Jonathan was asked why he insisted on the second page of Scotiabank statements when the pages only contained advertising. He responded by stating that he would not know this without seeing the pages, adding that he did not check all of the bank statement calculations.

[10] Jonathan acknowledged receiving Jeremy's financial notes attached as exhibit K to Jonathan's May 5, 2023 affidavit. He said that even with the benefit of these notes and various PDFs that he still had "no indication of what receipts were provided to what withdrawals". Given an example that Jeremy paid Rogers bills online, Jonathan was not prepared to concede the point, stating that he would have to check the statements. He added, "…bank statements do not always tell you where the money went".

[11] Jonathan noted various deficiencies with the production. He said that he was provided with "a deluge of documents …if I did receive [a flash drive], I did not make the connection …I did not perform an entire, complete financial audit". With specific reference to an alleged missing $42,000.00, Jonathan allowed, "…there appears to be a gap in the transfer, but the documents account for the $42,000.00". Later Jonathan said that he understood the financial notes adding, "the difficulty was reconciling the sea of receipts to where they belonged".

[12] Asked if he requested further clarification or simply went forward with his contempt motion, Jonathan said he had to engage counsel and proceed with obtaining the Order(s).

Jeremy Welch

[13] Jeremy acknowledged signing the February 10, 2023 consent Order, after asking for changes that were provided. He said that he received Jonathan's counsel's April 13, 2023 letter (exhibit 2) which states in part:

> I note your comment that statements relating to the *inter vivos* trusts are privileged. My client does not understand what type of privilege would attach to these forms or why they have not been provided. They appear to be part of the information that is required by the Court order.
>
> In addition, a large number of the documents are not in good order. There are account statements that are jumbled together. There are also quite a large number of statements that are missing. Below is a list that my client compiled …

[14] The list goes on for four pages listing a host of missing material according to Jonathan. Jeremy agreed that he did not respond to the letter until after the within motion was filed (originally on April 10, 2023). He added that he was "very aggrieved by it because many of those things were supplied and the list was padded …I didn't see a whole lot of legitimacy to this".

[15] Jeremy acknowledged that the October 18, 2023 Order followed an appearance before Justice Smith and that he provided input concerning the Order. He agreed that he carefully read and understood the Order. He agreed that he received Mr. Norman's November 3, 2023 email and attachment (exhibit 3). It was put to Jeremy that the attached PDF folders are random and "don't show anything". Jeremy responded by noting that he does not have a feeder scanner or staff. He added that he "knew you were going to print the contents …it was not my intention to confuse". Jeremy said he did his "upmost to provide. I didn't see anything about organization".

[16] Jeremy was taken to Jonathan's April 10, 2024 affidavit and exhibit E, Mr. Norman's December 13, 2023 letter and attachment (with the 41 items and Jeremy's responses). Jeremy took issue with Mr. Norman's letter, characterizing the alleged inadequacies as "fallacies". He noted that he had responded in September; "I've provided all of what's asked of me and then some".

[17] Through further questioning Jeremy admitted that his brief filed on this motion provided for the first time, an explanation that he had sold a leather recliner to his father. He also agreed that the brief provided a much more detailed explanation of the $42,000.00 line item. Jeremy agreed that due to a “time crunch” that he did not articulate what loan was being re-paid to his father.

[18] In answer to several detailed questions Jeremy provided further explanation as background to what he produced.

GOVERNING LAW

[19] Our Court of Appeal recently canvassed the law on civil contempt in *A.M.G. v. C.J.K.*, 2024 NSCA 62. Justice Bourgeois touched on the relevant Rule and Supreme Court of Canada authority at paras. 63 – 68:

> 63 Motions for civil contempt, including those arising in family law matters, are governed by Civil Procedure Rule 89. Several aspects of the Rule are of note:
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> - The procedure set out in Rule 89 for the hearing of motions can be modified by a judge but only if the modifications can "be adapted to the requirements of the *Canadian Charter of Rights and Freedoms* for a criminal or penal proceeding" (Rules 89.01(2)(b) and 89.12(2)).
> - The contents of a motion for contempt are prescribed in the Rule, and must include a statement that the alleged contemnor carries the presumption of innocence and the right to silence.
> - Rule 89.07 requires the setting of "the earliest available date" for hearing, and recognizes the alleged contemnor has "the right to a speedy hearing".
> - A judge may vary or discharge an order for contempt.
>
> 64 In addition to the above, courts have undertaken to define the substantive contents of civil contempt. The most recent statement of the law from the Supreme Court of Canada is found in *Carey v. Laiken*, 2015 SCC 17. There, a lawyer was alleged to be in contempt by releasing trust funds contrary to the terms of a *Mareva* injunction.
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> 65 Writing for the Court, Justice Cromwell identified three elements which, if proven beyond a reasonable doubt, could give rise to a finding of civil contempt:
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> 1. The existence of a clear and unequivocal order setting out what should or should not be done (at para. 33),
> 2. The alleged contemnor had actual knowledge of the order (at para. 34), and

3. The alleged contemnor must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels (at para. 35).

66 With respect to satisfying the first element, it is important for the judge to be convinced the order is clear. Justice Cromwell stated:

> [33] The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done": *Prescott-Russell*, at para. 27; *Bell ExpressVu*, at para. 28, citing with approval *Jaskhs Enterprises Inc. v. Indus Corp.*, 2004 CanLII 32262 (Ont. S.C.J.), at para. 40. This requirement of clarity ensures that a party will not be found in contempt where an order is unclear: *Pro Swing*, at para. 24; *Bell ExpressVu*, at para. 22. **An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning**: *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, 326 D.L.R. (4th) 463, at para. 21.
>
> (Emphasis added)

67 Cited by Justice Cromwell, the reasons in *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151 are of assistance in underscoring the importance of considering the clarity of the order. The Saskatchewan Court of Appeal noted:

> [20] In *Baumung*, the Court referred to numerous authorities to illustrate the statement that "**in order to ground a contempt finding, a court order must be clear or, to put the point in another way, that an ambiguity in an order should be resolved to the benefit of the alleged contemnor**" (at para. 27). Similarly, in *Sonoco Ltd. v. Local 433, Vancouver Converters of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers* (1970), 13 D.L.R. (3d) 617 at p. 621, the British Columbia Court of Appeal wrote: "persons enjoined ought to be able to tell from the order what they may not do without having to decide whether they are acting lawfully or not." **Further, the very clarity of the court order must be proven beyond a reasonable doubt before a finding of contempt will be sustained** (see: *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 at p. 224).
>
> (Emphasis added)

68 It is also essential to note that even where all three elements have been established beyond a reasonable doubt, a judge retains a discretion to not make a finding of contempt. Justice Cromwell explained:

> [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.
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> [37] For example, where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt. . . While I prefer not to delineate the full scope of this discretion, given that the issue was not argued before us, **I wish to leave open the possibility that a judge may properly exercise his or her discretion to decline to impose a contempt finding where it would work an injustice in the circumstances of the case**.
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> (Emphasis added; citations omitted)

ANALYSIS AND DISPOSITION

[20] In the Amended Notice of Motion Jonathan alleges as follows:

> It is alleged that you have failed to comply with the Order of Justice Gabriel dated February 10, 2023 compelling you to produce a full accounting of your use of the Power of Attorney provided to you by Dr. Philip Welch in accordance with Section 13 of the *Powers of Attorney Act* for the time period beginning August 1, 2018 through to the present (the "Accounting"). The Accounting, bank and investment account statements were to be provided within twenty calendar days of the date of the Order and the balance of the Accounting was to be provided within 60 calendar days of the date of Order. In addition, you failed to comply with the order of Justice Smith dated October 18, 2023.

[21] I pause to point out that the October 18, 2023 Order's third recital reads:

> AND WHEREAS the Respondent provided well over 4000 pages of materials responsive to the Order;

[22] In any case, the most recent Order also stayed the original contempt motion, but it was revived with the filing of the Amended Notice of Motion on June 13, 2024. The remainder of the Order compelled a telephone appearance before the Court and six production requirements as follows:

- The Respondent shall provide to the Applicant's lawyer by end of day August 24, 2023 documents in his possession relating to the sale of the parties' father's house and any other account statements which he currently has in his possession;

- The Respondent shall make best efforts to provide MD Trust Management with a copy of his power of attorney and obtain records relating to the trust account statements referred to in the Court filings;
- On or before August 31, 2023, the Applicant will provide to the Respondent an itemized list of any other items of any sort which the Applicant believes are outstanding and should be provided pursuant to an accounting of the use of the power of attorney;
- The Respondent shall reply no later than September 8, 2023 to the itemized request from the Applicant and shall either explain whether the documents do not exist or have been destroyed, whether he will provide them, or whether he will decline to provide them with an explanation of why he is declining to do so;
- For greater clarity, the Respondent is not required to provide receipts for items under $500 in value, with the exception of the following (a – p) requests. The following items which may be under $500 in value shall be produced (if available, and if not available, the Respondent must provide a reasonable explanation as to why the document(s) is/are unavailable) by the Respondent (quotations are references to the April 2023 accounting document provided by the Respondent):
    a) receipts relating to Supra towing and inspection;
    b) receipts relating to the line item for “all household bills” paid in September 2018, listed as “Phone/internet, cellphone, power, property taxes etc.”;
    c) receipts relating to the line item for “all monthly household bills” paid in October 2018;
    d) receipts for transfer of $453.50 transfer to Jeremy in April 2019;
    e) receipt for $70 MVI for Corolla in July 2019;
    f) receipts for “May bills” transfer in June 2020;
    g) receipt for purchase of La-Z-Boy in September 2020;
    h) documents including legal bill relating to “migration registration” in October 2020;
    i) receipts for house inspections and any appraisals relating to eventual sale of 1 Blue Heron Lane;
    j) receipts for monthly “storage Fees” of $200 per month;
    k) receipt for trailer rental March 2021;
    l) receipt for new leather recliner $300 in November 2021;
    m) receipts for $475.48 – flowers and food – November 2021;
    n) receipts for “dinner” in January 2022;
    o) receipts for “executor expenses” paid to Andrew Welch in August 2022;

> p) receipts for $76.97 to Jan for moving expenses in February 2019.
>
> Also for greater clarity, receipts for other records of any payments from the donor to the Respondent or for the Respondent's benefit shall be provided (if available, and if not available, the Respondent must provide a reasonable explanation as to why the document(s) is/are unavailable) no matter the value;
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> - The Respondent shall provide all required documents on a USB Key or memory stick to the Applicant no later than October 31, 2023. The Applicant will provide to the Respondent a printout or screenshot showing what documents were received within seven calendar days.

[23] I am satisfied that the above Orders are clear and unambiguous. I am also satisfied that Jeremy had actual knowledge of the Orders. The question remains as to whether Jeremy has intentionally failed to do the acts that the Orders compel. Having regard to the evidence, I must answer this question resoundingly in the negative.

[24] In this regard I am satisfied that the combination of the following key materials and evidence before the Court demonstrate that Jeremy has responded to the Orders:

- the third recital of the October 18, 2023 Order
- exhibit 1
- Jeremy's brief filed October 29, 2024
- Jeremy's affidavit filed October 29, 2024
- Jeremy's cross-examination evidence

[25] *McLean v. Sleigh* explains what is meant by "purging of contempt by compliance". Justice Hamilton noted as follows at paras. 76 – 77:

> 76 A court has jurisdiction to punish for disobedience of a court order where the contemnor has complied with the order by the time of the contempt hearing. In such cases, "purging of contempt by compliance ... is merely a matter to be taken into account in assessing the penalty": *Re Ajax and Pickering General Hospital* (1981), 132 D.L.R. (3d) 270 (OntCA) at 284. Purging of the contempt is usually considered a relevant mitigating factor: *Business Development Bank of Canada v. Cavalon Inc*., 2017 ONCA 663 at para. 86; *Boily v. Carleton Condominium Corp* 145, 2014 ONCA 574 at para. 121; and *Braun (Trustee of) v. Braun*, 2006 ABCA

> 23 at para. 27. The onus to prove that the order has been complied with is on the contemnor on a balance of probabilities: *Ryan v. Maljkovich*, [2001] O.J. No. 1268 (Sup.Ct.) at para. 17, and *Chiang (Re)*, 2009 ONCA 3 at paras. 50-52.
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> 77 If a person could not be punished for contempt after they have purged their contempt, they could flagrantly disobey court orders so long as they purged the contempt prior to sentencing. This would put at risk the fair and proper administration of justice which relies upon respect for and obedience of court orders. The basis for a sanction where the contemptuous act has ceased or been resolved is that the act itself was an affront to the court and the administration of justice, and it is that act which attracts sanction: Jeffrey Miller, *The Law of Contempt in Canada*, 2nd ed. (Toronto: Thomson Reuters, 2016) at pages 144-145.

[26] Our Court of Appeal went on to explain situations when courts may award significant costs, often on a solicitor-client or full or substantial indemnity basis.

[27] I do not regard what has transpired here as justifying any such costs. For example, I see nothing in the evidence to warrant an apology by Jeremy. To my reckoning, his actions in no way approximate the kinds of cases our Court of Appeal reviewed when they referenced "reprehensible conduct", "contemptuous behavior" and the like. Accordingly, I exercise my discretion to decline to award any costs to Jonathan.

[28] I would add that to the extent that Jeremy was not in compliance with the Orders prior his filings and attendance on this motion, I do not characterize any shortcomings as equating with an intentional failure. Rather, the evidence reveals that he has endeavoured to respond to very detailed requests to the best of his ability. Indeed, having regard to all of the evidence, I consider his responses to be reasonable. Indeed, I find the substance of this motion to be more akin to a standard Appearance Day or production motion.

[29] In conclusion, I have determined that Jonathan has fallen far short of beyond a reasonable doubt proving Jeremy's contempt. In declining the motion, I am proceeding as the Supreme Court of Canada directs, with caution and great restraint. In the result, I hereby exercise my discretion to not make a finding of contempt. Given that a large swath of production occurred since the filing of the amended motion, I decline to award costs to Jeremy, the successful party on this motion.

Chipman, J.