SUPREME COURT OF NOVA SCOTIA

Citation: *Mutual Transportation Services Inc. v. Saarloos*, 2017 NSSC 26

Date: 2017 02 02
Docket: Hfx No. 215409
Registry: Halifax

Between:

Mutual Transportation Services Inc.

Plaintiff

v.

Rodi Saarloos, Bransam Enterprises Inc. and Bransam Logistic Services Inc.

Defendants

Judge:	The Honourable Justice Joshua Arnold
Heard:	February 8, 2016, in Halifax, Nova Scotia
Final Written Submissions:	October 5, 2016
Counsel:	Richard Norman, for the Plaintiff Michael Blades, for the Defendant, Rodi Saarloos Christopher Madill, for the Defendant, Bransam Logistic Services Inc.

By the Court:

Overview

[1] This decision addresses the issue of penalty following a finding of civil contempt. The original contempt decision is cited as *Mutual Transportation Services Inc. v. Rodi Saarloos*, 2016 NSSC 164.

[2] The plaintiff, Mutual Transportation Services Inc., argues that as a result of my finding that it has proven the contempt of Saarloos beyond a reasonable doubt, the defence should be struck, Saarloos should be ordered to pay costs in the amount of $29,325.00 plus HST as well as disbursements in the amount of $2,350.00, and Saarloos should be ordered to pay a civil fine directly to Mutual in the amount of $65,000.00 as a form of punitive damages.

[3] Saarloos argues that his defence should not be struck, no punitive damages or fine should be imposed and that the penalty imposed against him be confined to an award of costs of $14,241.94.

[4] On February 7, 2016, Mutual confirmed the withdrawal of the contempt motion against Bransam Logistic Services Inc. ("Logistic"). As a result, the contempt motion was against Saarloos and Enterprises only. Logistic therefore requests that if the defence is struck that Logistic should be permitted to file an amended defence on its own behalf.

Difficulties in Obtaining the Disclosure

[5] Mutual commenced an action against all the defendants in 2004, alleging breach of contract and breach of fiduciary duty.

[6] Mutual sought production of documents beginning in 2008. They obtained a production order from Murphy J. dated April 28, 2008, requiring disclosure of certain documents within thirty (30) days (the "Murphy Order"). The Murphy Order was not fully satisfied. In January 2010, Mutual applied for leave to bring a Civil Procedure Rule 89 contempt of court motion regarding the defendants' response to the Murphy Order.

[7] On June 13, 2011, the defendants were cited in contempt by Wright J. for failing to comply with the Murphy Order. The defendants were then ordered to

inquire about and produce certain documents (the "Wright Order"). Some documents mentioned in the Wright Order were produced by the defendants and some were not. In particular, the Wright Order required the defendants to inquire about and produce bank records for Bransam Enterprises Inc. ("Enterprises") between November 2003 and November 2004, to inquire about and produce Canada Revenue Agency ("CRA") records for Logistic and Enterprises, and also to produce specific telephone records.

[8] Saarloos had delivered the requisite telephone records to his previous lawyer in 2010 and swore his November 22, 2010, affidavit with the understanding that they would be attached as exhibits. They were not. No explanation was provided as to why his former lawyer did not attach those documents to the affidavit.

[9] When Saarloos's new counsel received the file from his previous counsel in December 2015, he found the telephone records among the file materials. Those telephone records were then attached as Exhibit "C" to Saarloos's affidavit of January 22, 2016. Mutual is now in possession of those telephone records. Saarloos was not found in contempt in relation to the telephone records.

[10] The Wright Order required Logistic and Enterprises to forthwith inquire with CRA to obtain copies of or summaries of all their tax returns for a certain period, and immediately disclose those documents when received. I found that Saarloos, as the operating mind of Enterprises, did not make adequate effort to inquire with CRA to obtain the requisite tax returns. As a result I found him in contempt.

[11] Subsequent to arguments on the contempt motion heard on February 8, 2016, Saarloos's new lawyer made diligent efforts to obtain the requested CRA records. As it turned out, CRA confirmed that there were no such Enterprises tax records to produce. Nonetheless, Saarloos did not obey the Wright Order that required him to inquire with CRA.

[12] Most significant to this analysis, the Wright Order contained a similar provision regarding the banking records of Enterprises. Justice Wright ordered Enterprises to "make inquiries forthwith to its bank(s) for its banking records between November 2003 and November 2004, and immediately disclose any of those records produced by the bank(s)". Again, Saarloos, as the operating mind of Enterprises, did not make adequate effort to inquire with the relevant bank (CIBC) forthwith. Subsequent to the February 8, 2016, hearing, Saarloos's new lawyer attempted to determine whether such bank records were in existence.

[13] CIBC eventually notified Saarloos that they could not confirm whether there had ever been such banking records for Enterprises, but if such records had existed, due to the bank's internal seven-year retention policy, 2003 and 2004 banking records would have been destroyed in 2010 and 2011. This is an important consideration in relation to remedy.

[14] To the extent Saarloos may have partly addressed some of the contempt issues since the hearing of February 8, 2016, this was only undertaken in the face of these contempt proceedings. Saarloos's failure to diligently inquire with either CIBC or CRA in 2011 is not erased by the recent efforts made in 2016. The fact that the CIBC records may have been destroyed in 2010 or 2011 due to the passage of time does not excuse the failure of Saarloos to properly inquire with CIBC in 2011. The fact that it was recently determined that no tax records were filed by Enterprises in 2005 does not excuse Saarloos's failure to properly inquire with CRA in full as required by the Wright Order.

[15] The Murphy Order of April 28, 2008, required production of the documents. The Wright Order of June 13, 2011, required inquiries of the bank and CRA, and production of certain documents. Saarloos was fully aware for years that he was required to inquire with CRA and CIBC. There never were CRA records to produce. There is no longer any ability to determine whether there ever were banking records to produce.

Delay

[16] Due to the passage of time there is no way to determine whether the requested banking records ever existed, and if they did, what they would contain. Saarloos blamed the delay in obtaining the bank records on his previous counsel, Kelly Shannon of Burnside Law. While I found that Saarloos was not excused from culpability based on the legal advice he says he received, and in light of the specific facts of this case, some review of the cause for delay is necessary in determining the appropriate remedy.

[17] In his affidavit of January 22, 2016, Saarloos said that his former lawyer advised him that his efforts to comply with the Wright Order were satisfactory and, therefore, he did not pursue the outstanding banking, CRA and telephone records:

> 6. To the best of my knowledge and recollection, at no time did my former lawyer Mr. Shannon ever ask me to clarify which of the "Bransam" companies those bank records pertained to. Since the production of the banking records on

> or about August 17, 2011, my understanding and honest belief was that this portion of the Order of The Honourable Justice Wright dated June 13, 2011 (the "Wright Order") had been satisfied.
>
> …
>
> 8. To the best of my knowledge and recollection, at no time since the execution of my August 11, 2011, Affidavit sworn in this proceeding, did my former lawyer Mr. Shannon ever advise me that any further document production efforts were required with respect to tax documentation of Bransam Enterprises Inc.
>
> 9. To the best of my knowledge and recollection, at no time since executing my Affidavit sworn in this proceeding on August 11, 2011, did my former lawyer Mr. Shannon ever advise me that the Plaintiff continued to dispute the fulfillment of paragraph 2(iv) of the Wright Order. My understanding and honest belief since that time was that this portion of the Wright Order had been satisfied.
>
> 10. Attached hereto and marked Exhibit "C" are true copies of phone bills which, I am advised by my lawyer whom I do verily believe, were found within the original file materials which my lawyer received in December 2015 from my former lawyer Mr. Shannon. To the best of my knowledge and recollection, I delivered these phone bills to Mr. Shannon at the same time as I delivered to Mr. Shannon the banking records which were attached as Exhibit "A" to my November 22, 2010 Affidavit. As such, my belief is that these phone bills have been in Mr. Shannon's possession for more than five years. I have no explanation as to why Mr. Shannon did not produce these phone bills to the Plaintiff in 2010.
>
> …
>
> 13. I am advised by my lawyer, whom I do verily believe, and I have read in the email exchange attached as Exhibit "D" hereto, that my former lawyer produced certain phone records to the Plaintiff in August 2011 which were duplicative of phone records which my former lawyer had already previously produced in 2010. To the best of my knowledge and recollection, at no time since August 2011 did my former lawyer Mr. Shannon ever advise me that the Plaintiff continued to dispute the fulfillment of paragraph 2(v) of the Wright Order. My understanding and honest belief since that time was that this portion of the Wright Order had been satisfied.
>
> 14. To the best of my knowledge and recollection, at no time since August 2011 did my former lawyer ever advise me that any requirement of the Wright Order remained outstanding.
>
> 15. Since August 2011, and until being personally served in 2015 with notice of this Contempt Motion, it had been my understanding and honest belief that all requirements of the Wright Order had been satisfied.

[18] Saarloos claims that he was not aware of a compliance problem in relation to the Wright Order until 2015. He knew that he had only made one or two inquiries

of CIBC and CRA that had not achieved anything, but claims that his previous lawyer told him he was in compliance with the Wright Order.

[19] Saarloos's claim that some of his actions were condoned by his former counsel is supported by a May 21, 2015, letter from Derek Brett (another lawyer with Burnside Law) to Joey Palov (who represented Mutual). This letter states in part:

> First, I wish to address your March 27, correspondence, as follows, with due reference to the Court's Order of June 13, 2011:
>
> > With regard to the income tax records of Bransam Enterprises, Inc. for the year ending September 2005, this demand is without any basis. Judge Wright's Order of June 13, 2011.
> >
> > With regard to the bank record details, reference to Judge Wright's Order will also provide you with the necessary elaboration – the Order pertained to records from Bransam Enterprises, Inc. So, evidently, the production pertained to this company.
> >
> > With regard to phone records, you again will be required to refer to the Court's Order. The Court's Order specifically references Kelly Shannon's Affidavit of November 22, 2010, and the paragraph regarding phone records. Specifically, Mr. Shannon provided that there were cell phone records, and that those cell phone records would be produced. Subsequently, those records were produced – twice – to your Firm. Therefore, it is incomprehensible why you would now demand records already produced, and threaten contempt proceedings.
> >
> > In a new development, you are demanding documents associated with Kreative Carriers. No such documents have ever been previously requested; further, we cannot fathom how any documents relating to Kreative Carriers, a non-party to this action, has any bearing on any effort by your client's pursuit of admissible evidence.
>
> Presumably, this provides a full response on this matter. Your May 14, letter, from your associate, Mr. Norman, threatens a contempt motion. We believe any such effort to be in bad faith, and would plan to respond, accordingly.
>
> My review of the casefile reveals that we address any remaining issues of disclosure. Since your previous departure from Cox & Palmer, there has been zero activity on this file – a period exceeding three (3) years. Since that time, Mr. Saarloos sold any and all interest in Bransam which, as you know, was later amalgamated into Eisener's Transport, to a company called Calyx Transportation Systems, based in Toronto. Mr. Saarloos is presently working out of Alberta, and travels back and forth from Nova Scotia; he has no association with any of these companies. It appears that Calyx assumed responsibility for Bransam; we, as a

> law firm, were never involved in that transaction. At present, I am attempting to secure instructions from both Calyx and Mr. Saarloos on which one of them will be responsible for this matter.
>
> …
>
> Finally, I must confess surprise in what I perceive as a practice and pattern by Mutual Transportation of delaying progress in this action, year after year. Indeed, this appears further supported by the nature of your recent correspondence.
>
> We are now entering the beginning of the 12th year of this litigation; I do not intend to see this litigation survive until its 13th year. Incidentally, if you wish to move quickly, my client is amenable to a joint dismissal of actions, without imposition of costs on either side. (emphasis added)

[20] Mr. Shannon was not provided an opportunity to respond to Saarloos's accusations on this motion. However, on his motion to withdraw as Saarloos's solicitor of record, Mr. Shannon filed an affidavit on September 8, 2015, and stated in part:

> 9. This particular matter has an extremely lengthy history, spanning over a decade with several periods of time wherein the matter had lay dormant through inactivity on the part of the Plaintiff to move matters forward.
>
> 10. In approximately 2011, the court record in this matter reveals that an application was made by the Plaintiff for an order finding Mr. Saarloos in contempt of court. Subsequently, costs were awarded against Saarloos.
>
> 11. Subsequently, we learned that counsel for the Plaintiff, Joey Palov, changed firms, assuming an in-house position. Consequently, there was no activity on the file of any kind in the intervening years following the hearing of the matter.
>
> 12. In early 2015, almost four years later, I received a telephone call from Mr. Palov, who had returned to his previous position with Cox Palmer, and advising that he was seeking to move matters forward on the case-at-bar. By this time, my file had become dormant; I had not received any contact from Mr. Saarloos since approximately September 2011. I attempted to reach Saarloos through email and via his mobile number. The email address I had for Saarloos was no longer valid; however, the telephone number for Saarloos was still active and appeared from its message to belong to him. I left a message for Saarloos to contact me.
>
> 13. Having not heard a response, I had tried on a couple of occasions to reach Saarloos, eventually reaching him via teleconference in April 2015.
>
> 14. During my call with Saarloos, he advised that he had since sold or transferred any remaining interest in Bransam, Eiseners and any of [sic] companies associated with same to the Calyx group of companies, and had commenced a new business venture in Alberta.

> 15. Mr. Saarloos was of the view that Calyx would be responsible for the matters moving forward in relation to any claims made prior, and asked me to direct my inquiries to Calyx's President, Marcus Pryce-Jones. Pryce-Jones, in turn, directed me to Calyx's Executive Vice President, Bill Gurd.
>
> …
>
> 20. Since that time, there has only been one other contact with Saarloos, in late June 2015, and repeating our message of April. Subsequently, we have received no word from Mr. Saarloos despite repeated calls, emails, and letters sent to him. We have received no instructions, nor retainer.
>
> 21. Mr. Brett followed up and received word from Calyx's Bill Gurd that the matter be referred to the companies recognized agent, George Caines, Q.C. Mr. Caines has not accepted the matter as legal counsel, only remaining recognized agent. Caines has indicated that he has no instructions to act on the matter or to appoint anyone to act on the matter at this point.
>
> 22. Presently, there is an action before this court that has been dormant for approximately four years against three separate parties, Rodi Saarloos, Bransam Logistics Services and Bransam Enterprises Limited.
>
> [Emphasis added]

[21] Mutual did little between 2011 and 2015 to move this litigation along, and did little to pursue the documents detailed in the Wright Order. The affidavit of Richard Norman dated August 13, 2015, contains five letters from Cox & Palmer requesting a response to a request for the documents and refers to some telephone calls, but it appears that is all that was done between 2011 and 2015 by Mutual until Norman wrote to Saarloos on May 14, 2015, stating he had instructions from his clients to proceed with a contempt motion. While Saarloos was obligated to comply with the Wright Order, it is difficult to understand why Mutual did nothing to move this litigation forward for years on end.

Remedies

Civil Procedure Rules

[22] Civil Procedure Rule 89.13 describes the penalties for contempt. It states:

> 89.13 (1) A contempt order must record a finding of guilt on each allegation of contempt for which guilt is found and it may impose a conditional or absolute discharge, a penalty similar to a remedy for an abuse of process, or any other lawful penalty including any of the following:

(a) an order that the person must abide by stated penal terms, such as for house arrest, community service, or reparations;

(b) a suspended penalty, such as imprisonment, sequestration, or a fine suspended during performance of stated conditions;

(c) a fine payable, immediately or on terms, to a person named in the order;

(d) sequestration of some or all of the person's assets;

(e) imprisonment for less than five years, if the person is an individual.

(2) A contempt order may provide that a penalty ceases to be in effect when the person in contempt causes contemptuous behavior to cease, or when the person otherwise purges the contempt.

(3) A contempt order may provide for, or a judge may make a further order for, the arrest and imprisonment of an individual, or sequestration of the assets of a corporation, for failure to abide by penal terms, fulfill conditions of a suspended penalty, or comply with terms for payment of a fine.

[23] Civil Procedure Rule 88.02 deals with remedies for abuse of process. It states:

88.02 (1) A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following:

(a) an order for dismissal or judgment;

(b) a permanent stay of a proceeding, or of the prosecution of a claim in a proceeding;

(c) a conditional stay of a proceeding, or of the prosecution of a claim in a proceeding;

(d) an order to indemnify each other party for losses resulting from the abuse;

(e) an order striking or amending a pleading;

(f) an order expunging an affidavit or other court document or requiring it to be sealed;

(g) an injunction preventing a party from taking a step in a proceeding, such as making a motion for a stated kind of order, without permission of a judge;

(h) any other injunction that tends to prevent further abuse.

(2) A person who wishes to make a motion under section 45B of the *Judicature Act* may do so by motion in an allegedly vexatious proceeding or a proceeding

allegedly conducted in a vexatious manner, or by application if there is no such outstanding proceeding.

Striking Out The Defence

Mutual's Position

[24] Mutual requests that Saarloos's defence be struck In doing so they rely on the words of Wright J. during the previous contempt motion on May 31, 2011:

> Quite frankly Mr. Saarloos I say this to you directly the efforts that you have made since April of '08 have simply not been sufficient. It's not sufficient just to delegate it to a bookkeeper and not follow up and this isn't just a minor transgression of two or three months from the date of Justice Murphy's order. This is something that has been going on now, that went on for about two and a half years with sporadic production of documents. Now does that constitute contempt? Well certainly it technically does because under the principles of civil contempt set down by Justice Cromwell in *TG Industries and Williams*, all that is necessary to establish civil contempt is that there be a clear order that directs a person to do something or refrain from doing it, that the person on the receiving end of the order be aware of it, and that the person fail to comply with it. And intention to deliberately disobey the order is not a requirement for civil contempt. Justice Cromwell's decision makes that very clear and so I mean Mr. Shannon acknowledges because he's playing the hand he was dealt, that there hasn't been timely compliance with the order and as I say, this is not just a minor non-compliance that sufficient efforts to comply with Justice Murphy's order were not made. It was not complied with and no effort was made to come back to the court to gain a variation of that order. So you know I say to you, Mr. Shannon, instead of telling Mr. Palov that he should be doing this, that or the other thing, if your client couldn't reasonably comply with that order of April '08, I suggest there was a higher onus on your client to have brought an order – sorry, brought a motion to this court for a variation of an order and of course that wasn't done. So the inescapable legal conclusion on this is that Mr. Saarloos is in contempt of the Murphy order. There's no getting around that. The criteria laid down in the TG Industries case is clearly met.
>
> And so then it becomes a question of what should the remedy be. Well Mr. Palov is over-reaching on that today. Number 1, I've already indicated in the course of my exchange with him that I would not consider this a case that should be dealt with on the footing of a fine. It should be dealt with on the footing of costs and just wait 'til I get that before me. A second aspect where Mr. Palov is over-reaching today is asking for me to grant an order today striking the defence. Well that wasn't on the table for today. What Mr. Palov was seeking, and I think rightly so, was an order for outstanding production to be completed within 30 days of this contempt hearing and then failing compliance, and then failing that,

> failing compliance with that, then the defence might be struck although I think he's suggesting there it be struck automatically. So am certainly not prepared to simply take the drastic step of striking the defence summarily right now on this hearing because Number 1, it wasn't sought in the first instance and Number 2, I don't think the Defendant should be denied one last opportunity here. So I am going to be granting an order which is going to have two prongs to it. Actually it's going to have three prongs to it. And we're not going to be able to sort the form of this order out today so what I'm going to do it broad-brush it for counsel. Mr. Palov will be making up the order and then we're going to have to come back. We're going to have to come back on another occasion later this month – or sorry, next month, I hope, to talk about finalizing the form of the order and to speak to costs because I don't have enough information before me to deal with the costs the way that I want to. But I will say to counsel that there will be a three-pronged order that's going to be granted. One will cite the Defendant in civil contempt. The second will deal with specific areas of documentation which I'll come to in a moment which are to be completed within 30 days, failing which the Plaintiff will be at liberty to make further motion to strike the defence. It will not be automatic. Rarely do I ever do that. And the third branch of the order, the third category of the order will deal with costs. …

[25] Because Wright J. stated that "I don't think the defendant should be denied one last opportunity here…", and the defendant has been cited in contempt again, Mutual argues that his defence should be struck. Mutual cites *Bell ExpressVu Ltd. v. Torroni*, 2009 ONCA 85:

> 35 It was open to the motion judge to consider striking the appellant's defence based on his failure to pay the costs of the November 16 Orders and on his conduct in relation to those Orders: rules 57.03(2) and 60.12(b). Striking out a defence is a severe remedy, however, and in my opinion ought generally not to be a remedy of first resort in circumstances such as this, without at least providing the defaulting defendant with an opportunity to cure the default. The appellant was afforded no such opportunity.

[26] Mutual also relies on the following cases as support for their position that the defence should be struck and the trial should proceed undefended: *Serhan Estate v. Bjornson*, 2001 ABCA 294; *Macklem v. L'Ecuyer*, 2010 ONSC 6382; *1860035 Ontario Ltd. v. Velika Realty Inc.*, 2015 ONSC 5630, affirmed 2016 ONCA 195; *Kin Franchising Ltd. v. Donco Ltd.*, 1993 ABCA 7; *Hover v. Metropolitan Life Insurance Co.*, 1999 ABCA 123; *Bains Engineering Corp. v. 734560 Alberta Ltd.*, 2004 ABQB 780, affirmed 2005 ABCA 187.

[27] Mutual says that Saarloos's defence is worthy of dismissal because: 1) he was previously found in contempt by Wright J.; 2) he has now been cited for

contempt twice in relation to the same matter; 3) the matter dragged on for years; and 4) if the CIBC banking records ever existed they have now been destroyed.

Saarloos's Position

[28] Saarloos argues that because a finding of contempt can arise in a variety of circumstances, there are a broad range of remedies available to the court. As Duncan J. noted in *Mason v. Lavers*, 2011 NSSC 97:

> 2 ... To summarize, *Civil Procedure Rules* 89.13 and 89.14 set out the available penalties. The *Rules* provide a broad discretion to the court to impose a remedy. This discretion is necessary as a means to respond to the wide array of circumstances that may result in a contempt finding.
>
> 3 As stated in *TG Industries Limited v. Williams* 2001 NSCA 105 the court must determine the penalty having regard to that which is appropriate and in the interest of justice in all of the circumstances. The primary purpose of the sanction is to coerce compliance with the order and so those circumstances include a consideration of whether and in what manner to restore the complainant to the position that they would have been in, but for the contempt. The decision in *TG* affirms the principle that the discretion in fashioning an appropriate penalty is a broad one.
>
> 4 The court in *TG Industries* went on to set out a non exhaustive list of factors that may be considered:
>
> > 1) That contempt based on disobedience to an order may, in the Court's discretion, be purged by subsequent compliance with it;
> >
> > 2) The diligence of the alleged contemnor in attempting to comply with the order;
> >
> > 3) Whether there was room for reasonable disagreement about what the order required;
> >
> > 4) The fact that the alleged contemnor did not benefit from the breach of the order;
> >
> > 5) The extent of the resulting prejudice to the appellant; and
> >
> > 6) The importance of court orders being taken seriously by all affected by them -- this could be characterized as the generally deterrent effect of the penalty on others of like mind and in similar circumstances.

[29] The primary purpose of a civil contempt motion was discussed by Cromwell J.A. (as he was then) in *TD Industries Ltd. v. Williams*, 2001 NSCA 105:

> 35 In civil contempt, the primary purpose of the sanction is to coerce compliance with the order: see. e.g. *Sharpe*, *supra* at para. 6.100 and *Skipper, supra* at para. 73. So, for example, contempt based on disobedience to an order may, in the Court's discretion, be purged by subsequent compliance with it. The judge in fashioning an order after a finding of civil contempt is entitled to do so in a way that will obtain compliance with the order so that the party entitled to the benefit of the order in fact receives it. The result is that the party in whose favour the order is made receives a remedy.
>
> 36 This was the effect of the judgment of this Court in *MacNeil v. MacNeil* (1975), 14 N.S.R. (2d) 398. Mr. MacNeil had been ordered to pay his former wife a lump sum of $50,000 "forthwith". Six months later the amount had not been paid and Mr. MacNeil had removed securities in excess of that value from his bank in Sydney and placed them in a bank in Virginia in what he claimed was a form of trust for his two younger children. It was found that Mr. MacNeil was in contempt of the court (in that case it was criminal contempt) for concealing and removing assets from the jurisdiction to avoid execution. The sanction imposed was to commit Mr. MacNeil until he purged his contempt by paying the amount due under the original order to the sheriff or until Mrs. MacNeil acknowledged that those amounts had been paid to her. (see also *Brennan v. Myers* (1977) 26 N.S.R. (2d) 131 (S.C.T.D.) at 138 - 139 and *Salter v. Tibbetts*, [1991] N.S.J. No. 732, 1991 Carswell N.S. 662 (S.C.T.D.) at para 17.)
>
> 37 If there has been compliance with the order by the time of the contempt application, it will often be the case that no further sanction beyond an order for costs will be imposed: see *Sharpe* at para. 6.70. Where there have been substantial and proper measures taken by the alleged contemnor to comply, the contempt may be excused or the imposition of any sanction postponed to allow those measures to continue: see e.g. *Attorney General v. Walthamstow Urban District Council* (1895) 11 T.L.R. 533.

[30] In *Skipper Fisheries Ltd. v. Thorbourne*, (1994), 137 N.S.R. (2d) 62, [1994] N.S.J. No. 549 (S.C.), Gruchy J. listed seven non-exclusive factors that could be considered when a penalty of a dismissal is requested:

> 47 The text, Sanctions, the Federal Law of Litigation Abuse by Gregory P. Joseph (Michie Company, 1989) sets forth at p. 449 a list of factors for consideration where there has been a failure by a party to comply with the Rules:
>
> > 1. Dismissal or Default
> >
> > The court has discretion to dismiss an action or enter a default judgment as a sanction for any of the violations set forth in Rule 16(f). Among the factors that the court considers in deciding whether to enter an order of dismissal or default are:

> 1. The extent of the party's (as opposed to counsel's) personal responsibility for the violation;
>
> 2. The prejudice to the adversary caused by the violation;
>
> 3. Whether there is a clear record of delay or contumacious conduct by the offender;
>
> 4. Whether the offense was wilful or in bad faith;
>
> 5. Whether the purpose of the sanction can be substantially achieved by use of a less drastic alternative;
>
> 6. The merits of the claim or defense that would be stricken; and
>
> 7. The prejudice to the court caused by the violation.

[31] Saarloos says that reliance on legal advice that leads to contempt may be a mitigating factor when considering remedy. According to the *Canadian Encyclopedic Digest* IV.1.(b):

> 92 The court may take into consideration any apology of the offender in considering to commit for contempt and in mitigation of sentence. Other mitigating factors include reliance on legal advice in determining a court of conduct, and attempts made to comply with a court's order.

[32] A review of the aggravating and mitigating factors is therefore critical in arriving at the appropriate remedy.

Aggravating Factors

- This action was commenced against Saarloos in 2004, so it has been dragging on for many years;
- During discoveries in 2008, Saarloos undertook to produce the banking records;
- Justice Murphy made an order against Saarloos on April 28, 2008, requiring production of the banking records within thirty (30) days of the Order;
- Justice Wright made an order against Saarloos on June 12, 2011, requiring him to inquire about and disclose the CIBC and CRA records; and
- CIBC banking records pertaining to Enterprises in 2003 and 2004 would have been destroyed by the bank by 2011, if such records ever existed, and therefore that contempt cannot be purged.

Mitigating Factors

- Efforts were made after the February 8, 2016, hearing to try to purge the contempt relating to CRA and the banking records;
- As it turned out, the requested CRA records did not exist;
- Saarloos's previous counsel supported his wrongful view of the obligations under the Wright Order;
- The possibly-destroyed banking records only relate to the four-month period of August to November 2004;
- Mutual has not shown that the banking records during this time period are vital to its case;
- Aside from delaying the course of the proceedings, Saarloos did not receive any benefit from the contempt;
- Significant delays in moving the litigation forward were caused by Mutual's own inaction; and
- A nominal mitigating factor is that Mutual's request that issues related to Kreative Carriers Transportation and Logistic Services Inc. be heard in conjunction with this motion was denied.

[33] Balancing all of these factors, justice does not require the defence to be struck.

Civil Fine or Punitive Damages

[34] Mutual requests an award of punitive damages or a civil fine on the basis that if there had been CIBC banking records, those records have now been destroyed. In doing so, Mutual relies on Civil Procedure Rule 89.13(1)(c). They also rely on *Brown v. Waterloo (Region) Commissioners of Police* (1982), 37 O.R. (2d) 277 (Ont. H.C.), varied on other grounds, 150 D.L.R. (3d) 729 (Ont. C.A.), where Linden J. stated:

> 40. The goal of punitive or exemplary damages, on the other hand, is to punish and deter. They are meant to furnish retribution against a defendant, to prevent him from repeating his conduct and to dissuade others from following his

> example. Although an award for punitive damages is granted to the plaintiff, its chief aim is not compensatory but prophylactic and retributive. It is administered "to teach the wrongdoer that tort does not pay" (*S. v. Mundy*). There is no need to show any actual loss by a plaintiff. It is akin to a "civil fine".

[35] In *Han v. Cho*, 2009 BCSC 458, Griffin J. also examined the issue of punitive damages:

> 116 The Supreme Court of Canada in *Whiten* emphasized that proportionality is the key to an award of punitive damages, at para. 111:
>
> > Retribution, denunciation and deterrence are the recognized justification for punitive damages, and the means must be rationally proportionate to the end sought to be achieved. A disproportionate award overshoots its purpose and becomes irrational. A less than proportionate award fails to achieve its purpose. ...
>
> 117 The Court went on to explain that the award of punitive damages must be proportionate: to the blameworthiness of the defendant's conduct; to the degree of vulnerability of the plaintiff; to the harm or potential harm directed specifically at the plaintiff; to the need for deterrence, after taking into account other penalties, civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct; and to the advantage wrongfully gained by the defendant from the misconduct.

[36] In *Armoyan v. Armoyan*, 2015 NSSC 188, Forgeron J. ordered a fine in relation to a contempt finding and stated variously:

> 24 I have reviewed the evidence, submissions, and law. I have reached my decision on penalty. The following factors are relevant to my determination:
>
> > * Mr. Armoyan undertook minimal efforts to comply with the court order. Mr. Armoyan's flagrant defiance spanned many months. The maintenance order, dated October 26, 2012, was registered in Nova Scotia on February 23, 2013. It was not until two years later, in February and March 2015, that Mr. Armoyan finally paid some support to the Maintenance Enforcement Program, and then only in an amount that represented approximately one-third of the monthly sum that was due. No other payments were deposited before or after.
> >
> > * Mr. Armoyan did not contest that arrears in the shameful amount of $1,601,984.12 were, and are, outstanding. Neither did he seek an order to determine the amount of arrears, which is an option, should there be a dispute, under s 15(4) of the MEA. Nor did he file an application to vary. I thus find the statement of arrears to be correct. Therefore, any money which Mr. Armoyan paid directly to Ms. Armoyan, as opposed to a maintenance enforcement agency, and after the Florida court order issued,

will form a credit against the $1,474,592.47 unpaid cost award granted by the Florida Circuit Court.

* Mr. Armoyan had, and has, the ability to pay the arrears. As noted at para 38 of the contempt decision, Mr. Armoyan accessed, possessed and controlled over $6.3 million from the time the order was registered in Nova Scotia on February 23, 2013 until the contempt hearing was held on April 29, 2015. This money was in addition to the $23 million which Mr. Armoyan previously transferred to the Middle East. Thus, despite having the financial resources to pay support, Mr. Armoyan chose to ignore the order. Mr. Armoyan did not act in good faith; to the contrary, his actions were an egregious, planned and deliberate scheme to avoid the payment of child and spousal support.

* Mr. Armoyan benefited from the breach of the order. He used his time to "manipulate, conceal and remove assets from the jurisdiction so as to make execution impossible," in a manner reminiscent of that described in *MacNeil v. MacNeil*, *supra*.

* There are many aggravating features. Mr. Armoyan refuses to pay maintenance. Mr. Armoyan strategically transferred millions of dollars out of the country, and then encumbered his remaining assets to avoid execution. To exacerbate the situation, Mr. Armoyan left Canada to avoid the personal consequences arising from his contemptuous conduct. Mr. Armoyan advised in his June 16 email that he was no longer a resident of Nova Scotia or Canada effective April 25, 2015. The contempt hearing was held on April 29. The inference to be drawn from Mr. Armoyan's decision to leave the country is unmistakeable.

* There is no room for a reasonable disagreement about what the order required. Mr. Armoyan was ordered to pay $29,612 US in monthly child and spousal support, together with arrears. He did not. Mr. Armoyan disagreed with the decisions of the courts. He therefore disregarded a court order. Mr. Armoyan conducted himself as if he was above the law, as if the law was of no consequence. Such an attitude cannot be condoned as noted in *Surgeoner v. Surgeoner*, [1992] O.J. No 299 (Ct J), wherein Blair, J stated at para 5 as follows:

> 5 Today, I, too, echo those sentiments. No society which believes in a system of even-handed justice can permit its members to ignore, disobey, or defy its laws and its courts' orders at their whim because in their own particular view, it is right to do so. A society which countenances such conduct is a society tottering on the precipice of disorder and injustice.

* Significant prejudice has arisen from Mr. Armoyan's contemptuous conduct. In *Armoyan v. Armoyan*, 2013 NSCA 99, Fichaud, JA described Mr. Armoyan as "[h]aving bled Ms. Armoyan financially with his litigious

> shenanigans:" at para 288. Mr. Armoyan's approach has not changed. Ms. Armoyan and the children struggle to survive, while Mr. Armoyan, a father with millions of dollars, unabashedly ignores the court order and his legal responsibilities. Ms. Armoyan, with the assistance of her dedicated legal team, is left to navigate an international legal labyrinth in an attempt to enforce child and spousal support orders. This outcome cannot be tolerated.
>
> * Mr. Armoyan's contemptuous conduct also obstructs access to justice and frustrates the efficient use of judicial resources.
>
> * It is imperative that orders be taken seriously by all affected by them, especially in the family law context, as noted by Blair, J in *Surgeoner v. Surgeoner, supra*, at para 6 which states as follows;
>
> > 6 The need for the sanction of contempt proceedings is of significant importance in the field of family law. There is an undertow of bitterness and sense of betrayal which often threatens to drown the process and the parties themselves in a sea of anger and "self-rightness." In this environment it is all too easy for a spouse to believe that he or she "knows what is right," even after a matter has been determined by the court, and to decide to ignore, disobey or defy that determination.
>
> * Mr. Armoyan has shown no remorse. There has been no apology and no effort to comply.
>
> * Mr. Armoyan' egregious conduct deteriorated further by his failure to attend at the contempt and penalty hearings in direct defiance of the court's direction to appear.

[37] Justice Forgeron went on to consider a fine that was appropriate and proportional to the gravity of the offence:

> 29 I have further determined that a fine of $384,000 is appropriate and proportional to the gravity of the offence. This fine, in conjunction with the committal order, will hopefully coerce compliance. In so doing, I adopt the method of calculation provided by Ms. Armoyan's counsel as providing an objective measure upon which to calculate a fine, given the context of this case. The calculation is based on s 37 (3)(d) of the *MEA*, which states that where there is a failure to make a maintenance payment by a date specified in an order, a payor can be fined in an amount not exceeding $3,000 for each default.
>
> 30 The support order compels Mr. Armoyan to pay four separate orders: retroactive spousal support of $261,962; retroactive child support of $441,105; monthly spousal support of $14,612 and monthly child support of $15,000. Mr. Armoyan's default in making these four separate payments spanned 32 months.

> The multiplication of the $3,000 penalty by 32 months yields a product of $384,000.
>
> 31 The maximum penalty of $3,000 per month for each default is appropriate in the context of this case. Such a penalty represents a small percentage of the financial toll which the nonpayment of maintenance has exacted on Ms. Armoyan and the children. For example, they have been forced to move to inferior residences on several occasions because Ms. Armoyan can no longer afford the rent. Ms. Armoyan has been forced to use credit, with inherent high interest rates, to meet living expenses. Ms. Armoyan has been forced to reduce expenses to bare necessities; her family's lifestyle has plummeted. In contrast, Mr. Armoyan's capacity to sustain the marital standard of living has not changed.

[38] Saarloos argues that no fine should be imposed. Specifically, he submits that:

> 41. Noted above, the primary purpose of a contempt penalty is to achieve compliance with an order and to place the Plaintiff in the position it would have been in had the contempt not occurred.
>
> 42. A punitive fine, such as is requested by the Plaintiff here, does nothing to serve that purpose. The Wright Order has been complied with through the purging of the contempt as noted above. That, plus an award of legal costs (addressed below) would restore the Plaintiff to the position it would have been in before the contempt to the extent that such an award can reasonably be made against Mr. Saarloos in the circumstances.
>
> 43. A punitive fine such as is requested by the Plaintiff would serve only to bestow upon the Plaintiff a financial windfall. To refer to page 12 of the Plaintiff's Brief, such a punitive fine:
>
> - is <u>not</u> proportionate to the degree of the Plaintiff's vulnerability (here there is no such vulnerability);
> - is disproportionate to the degree of harm/prejudice arising from the contempt (see the foregoing discussion on this mitigating factor above); and
> - is disproportionate to the blameworthiness of Mr. Saarloos' conduct (see all of the mitigating factors discussed above).
>
> 44. Furthermore as noted above, a fine must realistically reflect the ability of Mr. Saarloos to pay, and Mr. Saarloos has no such ability.
>
> 45. To summarize, a punitive fine such as is requested by the Plaintiff would be unnecessary, serve no purpose except to financially reward the Plaintiff, and would not realistically reflect the ability of Mr. Saarloos to pay. No such award is warranted in the circumstances.

[39] Saarloos defied the Murphy Order. Saarloos defied the Wright Order. Banking records requested by Mutual may have been destroyed as a result. While I have not struck his defence, the words of Cote J.A. in *Bains Engineering Corp. v. 734560 Alberta Ltd.*, 2005 ABCA 187, are instructive:

> 2 Many Alberta lawyers believe that court orders and Rules of Court have no real teeth, because no judge or master ever has the fortitude to impose a serious penalty for delay or procedural disobedience in civil litigation. That is not true, but many of the decisions imposing serious sanctions are oral or unreported. The few reported ones are not well known.
>
> 3 Yet the topic is vital. Both Lord Woolf's Report on reforming civil procedure, and Mr. Zuckerman's recent textbook on English civil procedure, conclude that courts must get and keep control over the pace of litigation. A culture of delay, laissez-faire, mutual blindness by counsel, and continual forgiveness by judges, is fatal, they say. Far more important to civil procedure than new tools, is using some of the tools which courts have had for a long time.

[40] Saarloos filed an affidavit on this application dated September 26, 2016. In that affidavit he details his poor financial situation and states in part:

> 4. I received no income during the year 2015, and I have yet to receive any income during the year 2016. I am currently not employed, and I do not receive any manner of salary or wages.
>
> 5. For at least the past two years, my personal financial circumstances have been severely constrained. Any money which I have been able to generate, which has primarily been through borrowing funds, has been utilized to pay down my extensive personal debts. I estimate that I have paid more than $200,000.00 towards my personal debts during the past two years.
>
> 6. The following chart provides a true and accurate approximate representation of my limited personal assets and extensive personal debts as of September 26, 2016:

Personal Assets	
Real Property	Nil
Personal Property	$30,000.00
Total Personal Assets	*$30,000.00*

Personal Liabilities	
RBC Visa (credit card)	$21,000.00
CIBC Visa (credit card)	$29,500.00
BMO MasterCard (credit card)	$21,000.00
Wells Fargo (credit card)	$19,000.00
Valley Credit Union (loan)	$307,000.00
McInnes Cooper	$18,768.00
CRA	$285,000.00
Total Personal Liabilities	*$701,268.00*

> 7. I currently have no personal bank account. The only personal bank account which I held during the past 15-20 years was forcibly closed in May 2016 by my banking institution due to my inability to continue rendering periodic payments towards a credit card debt with that same banking institution. That personal bank account was at a negative-balance at the time that it was closed.

[41] In *Boucher v. Kennedy* (1998), 60 O.T.C. 137, [1998] O.J. No. 1612 (Ont. Ct. J. Gen. Div.), affirmed at 124 O.A.C. 151 (Ont. C.A.). Ferrier J. outlined a number of considerations a court might consider when imposing a civil fine:

> 69 Without limiting the factors that the court may take into account in deciding the amount of a fine to impose for contempt, I am of the view that the court should consider in addition to the nature of the contemptuous conduct, the following:
>
> (1) whether the contemnor has admitted the breach;
>
> (2) whether the contemnor has demonstrated a full acceptance of the paramountcy of the rule of law, by tendering a formal apology to the court;
>
> (3) whether the breach was a single act or part of an ongoing pattern of conduct in which there were repeated breaches;
>
> (4) whether the breach occurred with the full knowledge and understanding of the contemnor that it was a breach rather than as a result of a mistake or misunderstanding;

> (5) the extent to which the conduct of the contemnor displayed defiance;
>
> (6) whether the order was a private one, affecting only the parties to the suit or whether some public benefit lay at the root of the order;
>
> (7) the need for specific and general deterrence;
>
> (8) the ability of the contemnor to pay.
>
> 70 In cases where the contempt is ongoing, increasing fines on a daily basis, or committal, may be the only effective method of ensuring compliance. As well, a contempt may be so serious even though not ongoing as to warrant punishment by committal.

[42] According to the criteria in *Boucher v. Kennedy*, in this case: 1) Saarloos has not fully admitted the breach but has made efforts to purge the contempt since retaining his current counsel; 2) Saarloos has not tendered a formal apology to the court; 3) the breach was not a single action but was limited to two isolated acts; 4) Saarloos says his previous counsel had advised him that his efforts were not contemptuous and this appears to be supported by some correspondence; 5) Mutual has proven beyond a reasonable doubt that Saarloos was in contempt, but with regard to the "extent to which the contemnor displayed defiance" I would put this at the lower end of the scale; 6) this contempt was in relation to a private order affecting only the parties and no public benefit was at the root of the order; 7) there is a need for both general and specific deterrence in this case as members of the public must know that court orders are to be complied with and it must also be brought home to Saarloos for the second time that he must comply with court orders; and 8) according to Saarloos's September 26, 2016 affidavit, he does not have any significant ability to pay a fine.

[43] In *Oommen v. Capital Regional Housing Corp.*, 2016 ABQB 283, [2016] A.J. No. 506, the respondent, who was the self-represented plaintiff in an action, was found in contempt for failing to comply with an order to produce certain documents. The contempt proceeding was heard about six-and-one-half months after the original order was made. Veit J. said:

> 8 Mr. Oommen is fined $1,000.00 for his contempt. Based on the only information available to the court, which suggests that Mr. Oommen has limited means, the fine should be greater than the cost of a contested hearing, but should not be as great as would be appropriate if the plaintiff were a man of means. Also, because Mr. Oommen apparently has limited means and because an application for summary judgment in favour of the defence has previously been denied by the Master, the usual requirement that fines and costs be paid before any new step can be taken in the proceedings is not appropriate here. The fine will be paid by Mr.

> Oommen to CHRC in any event of the cause, but is only required to be paid or accounted for at the conclusion of the proceedings.

[44] Mutual asks for a fine payable directly to them of $65,000.00 based on two times the originally claimed legal fees. Saarloos says no fine should be ordered as he has no ability to pay and that any fine would result in a windfall to Mutual, having nothing to do with achieving compliance with the Wright Order.

[45] Mutual's request for a fine in the amount of twice the originally claimed legal costs does not have any convincing basis in principle. I am mindful that contempt of court, with the element of ignoring or flouting orders of the court, has a special status that demands something more than a purely nominal fine. In this case the contempt was serious, but it only directly impacted the parties. In addition, the lack of urgency Mutual showed in pursuing the matter should not be encouraged.

[46] Saarloos ignored two direct orders by judges of this court. Some records sought by Mutual may have been destroyed as a result. Once new counsel became involved with Saarloos, diligent (although unsuccessful) efforts were made to purge the contempt. Most significant to my analysis on the quantum of a fine is the fact that Saarloos has little current ability to pay. But for his bleak financial situation a significant fine would be in order. Nonetheless, it must be brought home to Saarloos that he is required to comply with court orders. That being said, considering the costs order that I will also impose, a civil fine payable directly to Mutual in the amount of $2,500.00 is sufficient.

Costs

[47] In *Armoyan v. Armoyan*, 2013 NSCA 136, Fichaud J.A. confirmed that when it comes to costs, "tariffs are the norm, and there must be a reason to consider a lump sum."

[48] In this case neither Mutual, nor Saarloos, propose that the tariff applies. In their arguments both parties exclusively discuss solicitor and client costs and lump sum payments. For example, Saarloos argues:

> 46. Mr. Saarloos agrees that an award of legal costs to the Plaintiff is an appropriate remedy in the circumstances. This, combined with the purging of the contempt, would fully serve the primary purpose of returning the Plaintiff to the position it would have been in had the contempt not occurred.

> 47. However, such an award, in the circumstances, cannot be a full indemnity due to Mr. Saarloos' dire financial situation and inability to pay.
>
> 48. The Plaintiff has submitted that pre-tax legal fees have been incurred in the amount of $34,500.00 in connection with this Contempt Motion. The Plaintiff has offered up a 15% discount to that figure based upon duplication of effort evident within its accounts for services rendered, thereby claiming $29.325.00 plus HST plus disbursements of $2,350.00."
>
> …
>
> 53. The foregoing amount of $28,483.88 should not fully be awarded to the Plaintiff because Mr. Saarloos has no realistic ability to pay that amount. Based on Mr. Saarloos' dire financial circumstances, Mr. Saarloos submits that one-half of that amount – namely $14,241.94 – should be awarded. This penalty is more than Mr. Saarloos can possibly pay, and will cause great hardship to him, but it will serve the important purpose of providing a substantial partial indemnification to the Plaintiff's legal fees which, in conjunction with the complete purging of the contempt, is an appropriate remedy in the circumstances.

[49] Mutual says:

> A special costs remedy would ensure that Mutual is not penalized for Mr. Saarloos' failure to respect the Wright Order and for the efforts made to revive Enterprises, which Mr. Saarloos permitted to be dissolved.
>
> The affidavit of Angie Singer outlines the costs incurred by Mutual. To date, Mutual has spent approximately $34,500 in legal fees not including HST, and disbursements of $2,350, in efforts associated with chasing the defendants over the last five years, including four Court appearances prior to the contempt motion (through no fault of Mutual), efforts to revive Enterprises, and the contested contempt motion itself. A proceeding which has dragged on as long as this one is bound to involve some duplication of effort, and although Mutual lays the blame for any inefficiency at the feet of the defendants, it nevertheless proposes that a reasonable award of special costs would factor in a 15 per cent discount to the amount of $34,500. In total, Mutual claims $29,325 + HST + disbursements of $2,350.

[50] Therefore, since both parties agree that a lump sum should be awarded, according to *Armoyan*, the next step is the calculation of the lump sum. In *Armoyan,* Fichaud J.A. stated:

> 10 The Court's overall mandate, under Rule 77.02(1), is to "do justice between the parties".
>
> 11 Solicitor and client costs are engaged in "rare and exceptional circumstances as when misconduct has occurred in the conduct of or related to the litigation".

> *Williamson v. Williams*, 1998 NSCA 195, [1998] N.S.J. No. 498, per Freeman, J.A. This Court rejected most of Mr. Armoyan's submissions on the merits. But there has been no litigation misconduct in the Nova Scotia proceedings that would support an award of solicitor and client costs. So these are party and party costs.

[51] Mutual was given the runaround by Saarloos. The four months of CIBC bank records cannot be resurrected, if they ever existed. However, Mutual had not shown these records to be vital to their claim. Even if Mutual had pursued the failure of Saarloos to comply with the Wright Order in 2011 or 2012 when they should have, they would still have had to bear the expense of unnecessary litigation. Saarloos is guilty of misconduct in this aspect of the litigation.

[52] Mutual should receive a reasonable contribution to their costs in relation to this litigation. In *Fresneda v. Ocean Pacific Hotels Ltd*., 2008 BCSC 238, Dickson J. stated:

> 44 Where civil contempt has been established an award of special costs is appropriate regardless of whether the contempt has been purged. A party who obtains a court order is entitled to have it obeyed without having to incur further expense to compel compliance: *Everywoman's Health Centre Society (1990) v. Bridges*, [1990] B.C.J. No. 2859 (C.A.), at p. 18-19; Sorrenti at para. 20.

[53] A similar finding was made in *1307347 Ontario Inc. v. 1243058 Ontario Inc. (c.o.b. Golden Seafood Restaurant)*, [2001] O.J. No. 585 (Ont. Sup. Ct. J.), wherein Nordheimer J. stated:

> 5 In my view, as I indicated in my reasons, the costs of a successful motion for a finding of contempt should be awarded on a solicitor and client scale. There ought to be something approaching a complete indemnity to the successful party in such motions since to do otherwise would involve some cost or punishment to the successful party arising solely out of the conduct of the other party in violating a court order. As Warren J. said in *Rogers Cable T.V. Ltd. v. International Brotherhood of Electrical Workers (IBEW), Local Union 33*, [1994] B.C.J. No. 1035 (S.C.) at para. 8:
>
> > "In my view therefore, were I to award special costs, it would be to recognize that as between the parties to the litigation, the conduct of the contemnor was outrageous or scandalous and to provide as close to complete indemnity as possible for the party obliged to bring on the application. In my view, where there is contempt of Court, there is nothing offensive in an award of special costs which may both act as a form of chastisement to the contemner and provide indemnity for the complainant. In my opinion it is precisely for this type of situation that special costs were designed."

> I note that the same conclusion has been reached in Ontario - see, for example, *Leo Sakata Electronics (Canada) Ltd. v. McIntyre*, [1996] O.J. No. 1437 (Gen. Div.) *and Industrial Hardwood Products (1996) Ltd. v. International Wood and Allied Works of Canada, Local 2693*, [2000] O.J. No. 3510 (S.C.J.).
>
> 6 Having said that, however, an award of solicitor and client costs does not mean that the successful party can claim whatever costs might have been charged to it by its solicitors for the work done on the matter. As Morden A.C.J.O. said in *Murano et al v. Bank of Montreal et al* (1998), 41 O.R. (3d) 222 (C.A.) at p. 248:
>
> > "In this regard, I think that the approach of Haines J. in *Worsley v. Lichong*, [1994] O.J. No. 614 (Gen. Div.) is the correct one. In para. 5 he said:
> >
> > > '... I believe the fixing of costs still requires a critical examination of the work undertaken in order to determine that the costs claimed have been reasonably incurred and reflect what the court considers to be proper and appropriate in the circumstances given the complexity and significance of the proceedings held up against the backdrop of full indemnification.'"

[54] Saarloos argues that he should not be responsible for costs associated with the revival of Bransam Enterprises Limited since he did not allow it to dissolve in a contemptuous manner. Although Saarloos did not purposely dissolve Enterprises in an effort to avoid compliance with a court order, his failure to comply with the Wright Order resulted in a contempt motion. The revival of Enterprises was relevant to the contempt motion. Saarloos refused to revive Enterprises and Robertson J. therefore directed Mutual to perform this task. Saarloos was directly responsible for the contempt litigation and indirectly responsible for the need to revive Enterprises. Saarloos is responsible for the costs related to the revival of Enterprises.

[55] In *Armoyan*, Fichaud J.A. went on to explain:

> As noted in *Williamson*, with which I agree, generally speaking the "substantial contribution" should exceed fifty percent of the appropriate base sum, but should not approach the full indemnity of a solicitor and client award. The percentage should vary, in a principled manner, according to the circumstances of the case.

[56] Mutual put forward an affidavit outlining their costs in relation to this litigation. They say they have accumulated $34,500.00 in legal fees not including HST and disbursements of $2,350.00. Mutual says this includes:

> … chasing the defendants over the last five years, including four Court appearances prior to the contempt motion (through no fault of Mutual), efforts to

> revive Enterprises, and the contested contempt motion itself. A proceeding which has dragged on as long as this one is bound to involve some duplication of effort, and although Mutual lays the blame for any inefficiency at the feet of the defendants, it nevertheless proposes that a reasonable award of special costs would factor in a 15 per cent discount to the amount of $34,500. In total, Mutual claims $29,325 + HST + disbursements of $2,350.

[57] Saarloos argues that a discount should be applied since Mutual's attempt to litigate issues relating to Kreative Carriers was unsuccessful. Additionally, he argues that because he is personally in a poor financial situation, costs to Mutual should be further reduced to a total of $14, 241.94.

[58] Mutual was unsuccessful in its effort to include issues relating to Kreative Carriers in this contempt motion. While the Kreative Carriers issue was insignificant in comparison with the entirety of the contempt motion, some resultant reduction in Mutual's costs must be recognized. I would reduce Mutual's claim, before HST, by $1,000.00 in recognition of the Kreative Carriers issue.

[59] Mutual should be entitled to reasonable costs. That being said, the courts general discretion over costs still exists; a judge is entitled to "make any order about costs as the judge is satisfied will do justice between the parties": Civil Procedure Rule 77.02(1).

[60] Saarloos is guilty of misconduct. Mutual allowed years to lag prior to addressing the contempt issue. Mutual itself recognizes that the delay has no doubt resulted in some duplication of effort. In view of the lack of urgency displayed by Mutual, but without downplaying the seriousness of a contempt order, I conclude that complete indemnification for solicitor-client costs would be excessive. At the same time (and not proposed by either counsel), I do not consider either Scale 3 of Tariff A (for a decision or order in a proceeding) or Tariff C (for an application in chambers) as sufficient.

[61] I am satisfied that costs should be "on an accelerated basis but not on a solicitor and his own client basis": *Oommen* at para 11. I would therefore award a lump sum pursuant to Rule 77.08, of sixty percent of solicitor-client costs as appropriate (On the application of Rule 77.08, see *Andrews v. Keybase Financial Group Inc.*, 2014 NSSC 287, [2014] N.S.J. No. 418, at paras. 20-31). The original amount of solicitor-client costs claimed was $34,500.00. I have reduced this by $1,000.00 to account for Kreative Carriers.

[62] Mutual will therefore have costs of $20,100.00, and disbursements of $2,350.00, plus HST as applicable.

Conclusion

[63] The defence will not be struck.

[64] Saarloos is ordered to pay costs in the amount of $20,100.00 plus HST plus disbursements of $2,350.00. Saarloos will also be ordered to pay a civil fine directly to Mutual in the amount of $2,500.00.

Arnold, J.