<u>NOVA SCOTIA COURT OF APPEAL</u>

Citation: *McLean v. Sleigh*, 2019 NSCA 71

Date: 20190827
Docket: CA 481509
Registry: Halifax

Between:

Roxanne McLean

Appellant

v.

Andrew Sleigh

Respondent

Judge: The Honourable Justice M. Jill Hamilton

Appeal Heard: May 30, 2019, in Halifax, Nova Scotia

Subject: Contempt

Summary: In 2014, Justice Gass ordered, among other things, that Ms. McLean provide her address to Mr. Sleigh and that he have two weeks of summer access and one week of Christmas access with the parties' daughter. In 2015, Mr. Sleigh had no summer or Christmas access with their daughter because Ms. McLean failed to respond to his emails and phone messages and he did not know where she lived in Ontario. He made a motion for contempt in June 2015 that was not heard until October 2016 due to delays caused by Ms. McLean and an unsuccessful motion she made. In 2017, Ms. McLean was found guilty of contempt for not providing her address and was fined $2,500.00 and ordered to pay costs and disbursements totalling $15,297.77. She appeals the contempt finding, the fine, and the costs.

Issues:

(1) Did the judge err by refusing to consider affidavits where the affiants were not available for cross examination?
(2) Did the judge err by depriving Ms. McLean of procedural fairness by not following an appropriate procedure?
(3) Did the judge err in finding Ms. McLean in contempt?
(4) Did the judge err in imposing an excessive penalty and costs?

Result:

Appeal allowed in part. The judge did not err in refusing to consider her affidavits as her lawyer did not tender them at the contempt hearing and Ms. McLean did not make herself available for cross-examination at the sentencing hearing despite the judge's many indications that she must do so in order for her affidavits to be considered. Ms. McLean received the procedural and substantive rights she was entitled to. The judge did err in finding Ms. McLean was guilty of contempt for failing to provide her "contact information", but did not err in accepting Ms. McLean's counsel's concession that she was in contempt for not providing her "address". Given the standard of review applicable on the issue of penalty and costs, the judge did not err in the fine and costs she imposed.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 20 pages.

NOVA SCOTIA COURT OF APPEAL

Citation: *McLean v. Sleigh*, 2019 NSCA 71

Date: 20190827
Docket: CA 481509
Registry: Halifax

Between:

Roxanne McLean

Appellant

v.

Andrew Sleigh

Respondent

Judges:	Van den Eynden, Hamilton and Scanlan, JJ.A.
Appeal Heard:	May 30, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed, in part, with costs, per reasons for judgment of Hamilton, J.A.; Scanlan and Van den Eynden, JJ.A. concurring
Counsel:	Michael F. Donovan, Q.C., for the appellant Richard A. Bureau, for the respondent

Reasons for judgment:

[1] Roxanne McLean, the appellant mother, appeals Justice C. LouAnn Chiasson's (1) January 30, 2017 decision that she was in contempt of paragraph 7 of Justice Deborah Gass' (as she then was) December 17, 2014 Order and (2) September 18, 2018 Order that she pay a fine of $2,500.00 to Andrew Sleigh, the respondent father, together with $14,395.70, representing eighty percent of his taxed legal fees, and $902.07, representing one hundred percent of his taxed legal disbursements. She does not appeal the taxation of Mr. Sleigh's legal fees and disbursements, rather she seeks a reduction to the portion she was ordered to pay should this Court not overturn the contempt conviction.

[2] For the reasons that follow, I would allow the appeal of the contempt finding only as it relates to Ms. McLean's obligation to provide her "contact information" under paragraph 7, not as it relates to her obligation to provide her "address", and dismiss the appeal of the sanctions imposed.

Background

[3] Justice Gass' December 17, 2014 Order granted the parties, who then both lived in Nova Scotia, joint custody of their daughter and gave Ms. McLean primary care and control of the child with her primary residence to be in Ontario. The Order provided that Mr. Sleigh would have access with his daughter for seven days during every Christmas school break and for two weeks every summer without setting specific dates.

[4] It also provided:

> 7. The parties shall keep each other informed of the **address** and **contact information** in which the child is residing or staying while in their care.
>
> …
>
> 18. Mr. Sleigh shall have videoconferencing with the child every Sunday from 6:00 p.m. to 7:00 p.m. eastern time and every Wednesday from 6:00 p.m. to 7:00 p.m. eastern time and such other videoconferencing as may be arranged from time to time between the parties. Attempts of such additional videoconferencing shall not require specific notice. (emphasis added)

[5] Following his 2014 Christmas access, which took place in January 2015, Mr. Sleigh was only permitted to videoconference with his daughter on February 13,

2015 and to speak with her on the phone twice, on May 22, 2015 and July 19, 2015.

[6] Mr. Sleigh commenced contempt proceedings against Ms. McLean on June 25, 2015 pursuant to s. 41(1) and (2) of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, since replaced by the *Parenting and Support Act*, R.S.N.S. 1989, c. 160. He alleged she failed to comply with paragraphs 7 and 18 of Justice Gass' Order:

> Pursuant to s.41(1) and (2), the Applicant, Andrew Sleigh, is seeking a determination as to why the Respondent has failed to comply with paragraph 7 and paragraph 18 of the Order (Family Proceeding) issued on December 17, 2014 and to enforce the provisions of the said Order and for a finding of Contempt against the Respondent and/or for any additional Order this Honourable Court deems just;

[7] Unable to personally locate Ms. McLean, Mr. Sleigh's lawyer caused the application and supporting documents to be emailed to her on July 23, 2015. On August 21, Ms. McLean failed to attend the scheduled court appearance. An order for substituted service was obtained on September 3. Notices were sent to Ms. McLean, but she failed to attend the rescheduled appearances on September 24 and December 14, 2015.

[8] The appearance was once again rescheduled and Ms. McLean participated by telephone without counsel on January 22, 2016. During this appearance she was asked for, and provided, her home address. The issue of Mr. Sleigh having his daughter with him for a week or two during her upcoming 2016 March school break, to make up for not having had his 2015 access time with her, was raised. Ms. McLean refused, saying: there was no provision for this in Justice Gass' Order, that her daughter had dance, music, swimming and martial arts lessons during her March break and raising the allegation that he had abused his daughter.

[9] The court hearing was adjourned to April 4, 2016 to give Ms. McLean time to hire a lawyer and to make any application she felt was required to address the allegation against Mr. Sleigh. On February 10, two days before her materials were to be filed, her lawyer filed a motion to have the Nova Scotia Court decline jurisdiction to enforce Justice Gass' Order. Her application was dismissed on March 4, 2016. The judge noted costs with respect to this application would be dealt with at the end of the contempt matter.

[10] The hearing of Mr. Sleigh's contempt application was adjourned to April 4, to June 2, to September 29 and finally to October 27, 2016 due to Ms. McLean's change of counsel and failure to make arrangements to appear by video conferencing on the set dates. The judge stated costs relating to these adjournments would be dealt with at the conclusion of the contempt matter.

[11] Ms. McLean never pursued the allegation she raised on January 22, 2016 concerning Mr. Sleigh abusing his daughter.

[12] On October 25, 2016, in advance of the October 27 hearing, Justice Chiasson's assistant sent an email to Ms. McLean's counsel confirming Justice Chiasson's earlier advice that in order for Ms. McLean's filed "affidavits to be accepted by the court she must be available for cross examination". This was confirmed at the October 27 hearing.

[13] Ms. McLean did not attend the October 27 hearing. Her counsel appeared alone. He conceded for the first time that Ms. McLean had been in contempt of paragraph 7 of the Order:

> **THE COURT:** What I am indicating is I have a notice of application with two counts that I am asked to rule on beyond a reasonable doubt, video conference and **a lack of address**. If your client would like to argue about the video conferencing allegation we will deal with that. If she wants to concede on the point with respect to **not providing her address**, that again is another point. But if she is not conceding that I am not dealing with the second stage which is the penalty phase, I am simply dealing with the first preliminary phase to determine whether or not [there is or] is not contempt.
>
> **MR. GERVAIS:** You're absolutely right on. In all fairness there has to be a concession that para.7 was not complied with at the date of the commencement of the application.
>
> **THE COURT:** Thank you.
>
> **MR. GERVAIS:** That then gets us at least now down to the one count.
>
> **THE COURT:** Mr. Bureau.
>
> **MR. BUREAU:** If I understand correctly My Lady, the Respondent, through her counsel, is conceding that para. 7 of the order was not followed.
>
> …
>
> **THE COURT:** … there is [a] concession with respect to the **address.** (emphasis added)

[14] It is important to remember this exchange. The judge refers to Ms. McLean's failure to provide her address. This is interpreted by counsel as the sole charge against Ms. McLean under paragraph 7 of Justice Gass' Order. No consideration was given to there being a second allegation of contempt under paragraph 7 with respect to her additional obligation to provide her "contact information". This understanding was appropriate because the record indicates Ms. McLean had provided Mr. Sleigh with her phone number, texting information and an email address, although they were not effective in permitting him to arrange access with his daughter in 2015 because Ms. McLean failed to respond to his communications requesting access.

[15] With Ms. McLean's concession that she was in contempt of paragraph 7 by not providing her address to Mr. Sleigh, the hearing proceeded on the basis the only contempt issue remaining for the judge to determine was videoconferencing under paragraph 18 of Justice Gass' Order. The parties were given time to file written briefs and Justice Chiasson reserved her decision.

[16] Prior to her decision being given, Mr. Sleigh learned that Ms. McLean's only property in Nova Scotia was being sold. Concerned she would not pay any penalty or costs awarded if Justice Chiasson found her to be in contempt, he sought a date from Justice Chiasson to make a motion in the outstanding proceeding for a preservation order.

[17] In connection with the "preservation motion", which Justice Chiasson characterized as substantially "a motion for security for costs" under Rule 45, Mr. Sleigh filed the January 26, 2017 affidavit of Kate N. Royal-Preyra. It described the unsuccessful attempts made on behalf of Mr. Sleigh to personally serve Ms. McLean with notice of his "preservation motion". The motion and supporting documents were emailed to her. Her lawyer of record was contacted but indicated he was not authorized to accept service on her behalf. Ms. Royal-Preyra herself unsuccessfully attempted service twice at the civic address in Brantford, Ontario that Ms. McLean had provided to the Court. Ms. Royal-Preyra swore that "[t]he home appeared vacant". She also indicated two other process servers unsuccessfully attempted to serve Ms. McLean at that address on January 23 and 24, 2017 respectively. One indicated her mailbox was full and that a neighbour informed him that "he was quite sure that Roxanne McLean had moved at least a month earlier. He advised that there had been a large moving bin on the front lawn for a couple of weeks and once it was gone he had not seen anyone there since".

[18] On January 30, 2017 the judge directed that service of the "preservation motion" on Ms. McLean be accomplished by service on her counsel of record. The motion never proceeded as the property closing was moved up and the property sold before the hearing of his motion could be scheduled.

[19] Also on January 30 the judge gave her oral decision in Mr. Sleigh's contempt application and on February 2, 2017 she released her written reasons (2017 NSSC 28). She found Ms. McLean guilty of contempt with respect to paragraph 7, now referring to the "address and the contact information":

> [23] As to the first count, I find [Ms. McLean] in contempt of the Order as it relates to paragraph 7 of the Order and specifically find that [Ms. McLean] failed to provide her **address and contact information** to Mr. Sleigh. Counsel on behalf of [Ms. McLean] admitted to this finding at the time of the hearing on October 27, 2016. Additionally, I am satisfied that Mr. Sleigh has met the evidentiary burden on him to prove the three elements of contempt beyond a reasonable doubt. (emphasis added)

[20] She found Ms. McLean not guilty of contempt with respect to paragraph 18:

> [29] As to the second count, I do not find [Ms. McLean] in contempt of the Order as it relates to paragraph 18. The case of *Soper v. Gaudet* [2011 NSCA 11] clearly highlights the court's obligation when reviewing such allegations of contempt to be aware of any lack of clarity in the Order. Although the Order was specific as to date and time of the videoconferencing, the provision did not specify who was responsible for initiating the videoconferencing, nor was it specific as to the provision of the equipment to enable the videoconferencing to occur, nor was it specific as to which party was responsible to correct any lapse in videoconferencing related to malfunction or repair of equipment.

[21] March 21, 2017 was the date set for sentencing. On March 13 an affidavit of Ms. McLean and another were filed disputing the allegation in Ms. Royal-Preyra's affidavit that she had moved. Her counsel's written brief was also filed on March 13 indicating he would not attend the hearing. It stated, among other things:

> The Respondent's phone # is still the same *****. Their daughter still attends the same school-*****. The Applicant knows this. He has confirmed it. The respondent and their daughter still live at ***** Brantford ON *****.

[22] Neither Ms. McLean nor the other affiant were present at the sentencing hearing, despite Ms. McLean and her counsel having been told by the judge on several occasions that affiants had to be available for cross-examination if their affidavits were going to be accepted by the court.

[23] On March 29, 2017 the judge gave her oral sentencing decision. Ms. McLean's counsel was present by telephone. The judge indicated she gave no weight to the affidavits filed on behalf of Ms. McLean because the affiants had not made themselves available for cross-examination. She referred to the penalties provided for contempt in *Nova Scotia Civil Procedure Rule* 89, the Rule dealing with contempt. She found denunciation and deterrence were the primary principles of sentencing to be considered. She reviewed the evidence to assess the effect Ms. McLean's refusal to provide her address had on Mr. Sleigh's ability to have access with his daughter in 2015, concluding it prevented his access:

> **As a result of the foregoing affidavit evidence there was clear and obvious impact on Mr. Sleigh's ability to arrange access in 2015, and he had no summer access or Christmas as a result.** As indicated by Mr. Bureau [Mr. Sleigh's counsel] in submissions at the time of the sentencing, it is difficult to imagine how Mr. Sleigh could possibly have arranged and planned access when Ms. McLean and he were not able to communicate via phone or text and he did not know where she lived. As stated by Mr. Bureau how was he to fly to some jurisdiction in Ontario, then attempt to locate Ms. McLean somewhere in Ontario, and then arrange access?
>
> The suggestion that the lack of communication and the inability to communicate because of the lack of information – the fact that there is an assertion that that did not impact access ignores the practical reality of the situation. The distance between the parties and the infrequency of access are factors to be considered in weighing the import of Ms. McLean's contemptuous act. By not providing the information as directed by the Court, Ms. McLean was able to thwart access between Mr. Sleigh and ***** and this must cease. (emphasis added)

[24] The judge refused to order a penal consequence as requested by Mr. Sleigh. She ordered Ms. McLean to pay a fine of $2,500.00 to Mr. Sleigh as permitted by Rule 89.13(1)(c). She also ordered costs and disbursements:

> Additionally, I am prepared to award costs to Mr. Sleigh to significantly compensate him for his legal costs. Mr. Gervais indicates that the file needn't have proceeded to trial. I do not agree. Ms. McLean did not acknowledge guilt on any of the two counts until the commencement of the hearing. The hearing time devoted to the second count of contempt was nominal in comparison to the multiple pre-trial appearances and the volume of evidence submitted on behalf of Mr. Sleigh.
>
> Costs are in the discretion of the trial judge. Civil Procedure Rule 77.02(1) states that I, quote:
>
>> "…may at any time make any order about costs as I am satisfied will do justice between the parties."

> Costs of Mr. Sleigh are to be taxed. I'm prepared to order that costs are awarded to Mr. Sleigh equivalent to 80 percent of his taxed cost. Those will be and include his disbursements as well.
>
> …
>
> I am not prepared to order solicitor/client costs, but the conduct of Ms. McLean has resulted in numerous appearances and significant delays in dealing with this matter. Furthermore, Mr. Sleigh was the successful party in relation to the pre-trial motion regarding jurisdiction and the matter was resolved significantly in favour of Mr. Sleigh.
>
> As I've indicated, the lack of providing the most basic of information from one parent to the other with an access order which is premised on them negotiating and arranging times, is of such significant consequence that I'm prepared to order the costs as I've indicated and prepared to order the fine as I've indicated.

[25] After the judge gave her sentencing decision, Ms. McLean's lawyer asked the judge if she had made a finding of whether or not Ms. McLean lived at the address she had provided to the court. The judge explained that she had intentionally not made that finding, even though she had rejected the evidence in the affidavits filed by Ms. McLean because of his submission that she had not moved:

> **THE COURT:** Although it is problematic to accept that Ms. McLean continues to reside at that address, I have not made a finding with respect to whether or not the contempt continues or had been purged. I have rejected her evidence.
>
> …
>
> **MR. GERVAIS:** … So, as of today then that issue, … is -- still … up in the air because you haven't made that decision?
>
> **THE COURT:** I have not made that decision … You are counsel of record for Ms. McLean. You have indicated that she continues to reside at that address.
>
> **MR. GERVAIS:** Absolutely, I've been doing this 43 years I would never say anything to the Court that was not true and I hope ---
>
> **THE COURT:** And that is why, Mr. Gervais, I have not made a ruling with respect to whether or not I find that she is resident at the address.
>
> **MR. GERVAIS:** Okay. Thank you, your Honour.
>
> …
>
> **THE COURT:** … So, I'm indicating that Mr. Sleigh will provide notification related to the summer access for 2017. Ms. McLean must communicate with Mr. Sleigh so that that is arranged.

> And if it is not, and if there is a further contempt application, I will maintain jurisdiction over any contempt application. The application will be heard on an expedited basis because we are not going to have the significant delays that resulted – as a result of the circumstance of this hearing. And so, Mr. Gervais, if she lives at that address, if Mr. Sleigh communicates, if summer access is arranged, there's no issue on contempt.
>
> **MR. GERVAIS:** That's fine, Your Honour.

[26] The taxation was eventually completed, with Ms. McLean participating, and the judge's Order issued on September 18, 2018.

[27] In dealing with the issues, I will supplement the background as necessary.

Issues

[28] The issues are:

(a) Did the judge err by refusing to consider affidavits where the affiants were not available for cross-examination?

(b) Did the judge err by depriving Ms. McLean of procedural fairness by not following an appropriate procedure?

(c) Did the judge err in finding Ms. McLean in contempt?

(d) Did the judge err in imposing an excessive penalty and costs?

Standard of Review

[29] There is no standard of review with respect to the second issue. It is for us to decide whether the procedure was fair to Ms. McLean: *Whalen v. Whalen*, 2018 NSCA 37 at para. 27.

[30] The standard of review for the remaining issues is set out in *Murphy v. Murphy*, 2013 NSCA 144:

> [12] In *Godin v. Godin*, 2012 NSCA 54, para 43, this Court applied to a contempt appeal the normal appellate standard to a decision of a judge, *i.e.* that stated in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. The *Housen* standard means the Court of Appeal examines (1) for correctness to determine whether there is an error of law or principle, and (2) for palpable and overriding error to determine whether there is an error of either fact or mixed fact and law with no extractable legal error. Further, to the extent that the judge exercised a discretion delegated by law, this Court also examines to determine whether the discretionary ruling

> resulted in a patent injustice: *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, paras 22, 26-29, which reviewed the line of Nova Scotia authorities. That is the approach that I will apply.
>
> [13] In my view, this statement of the standard of review is substantially the same – though worded somewhat differently – as the Alberta Court of Appeal's approach in *Metropolitan Life Insurance Co. v. Hover*, 1999 ABCA 123, para 10, that this Court quoted in *Soper v. Gaudet*, 2011 NSCA 11, para 21.

[31] An appellate court will only intervene in a judge's determination of penalty for a contempt finding if the judge made an error in principle that impacted the sentence or the sentence is otherwise demonstrably unfit, see *R. v. Lacasse*, 2015 SCC 64 at paras. 11, 44; see also *Morasse v. Noreau-Dubois*, 2016 SCC 44 at para. 131 (*per* Wagner J. (as he then was), dissenting); *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156 at para. 24; *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663 at para. 92).

[32] The judge's decision and Order will be reviewed on these standards.

Analysis

Did the judge err by refusing to consider affidavits where the affiants were not available for cross-examination?

[33] The issue of the judge's refusal to consider an affidavit unless the affiant was available for cross-examination overlaps all the complaints raised by Ms. McLean. I will deal with it first.

[34] Dealing first with her complaint that the judge erred by depriving her of procedural fairness, Ms. McLean argues the judge erred by not considering her affidavits because there is no evidence she was given notice by Mr. Sleigh that she was required to be present for cross-examination pursuant to Rule 23.09(3) and strict compliance with the Rules is required in contempt matters.

[35] Rule 23.09(3) provides:

> (3) A party who intends to cross-examine an affiant must immediately notify each other party in writing and either the judge who is to hear the motion or, if no judge is assigned, the prothonotary.

[36] There is no merit to this argument. As discussed under the second issue, procedural fairness does not require slavish compliance with every Rule. What is required is that the contemnor has a right to a hearing that observes the rules of

natural justice and substantive and evidentiary principles applicable to criminal proceedings. Here, Ms. McLean and her counsel were told by the judge from the very beginning, in writing and verbally, that the presence of an affiant for cross-examination was required, either by videoconference or in person, in order for their affidavit to be considered. There was no confusion about this. In these circumstances, a further notice under Rule 23.09(3) was unnecessary and did not affect the fairness of the procedure followed.

[37] Nor is there merit to Ms. McLean's argument that the judge erred in not considering her affidavits filed in connection with the contempt hearing. It was Ms. McLean's counsel who decided not to tender her affidavits as evidence:

> **MR. GERVAIS:** I think we're going to conclude this today Your Honor. So we are not phoning [Ms. McLean], she's not going to be submitting any evidence, there won't be any cross examinations.
>
> …
>
> **MR. BUREAU:** Yes My Lady, I am not accepting anything other than what Mr. Gervais is saying to me and the court is that he's offering no evidence.
>
> **THE COURT:** I've written down no evidence tendered on behalf of Ms. McLean.

[38] The judge cannot be faulted for not considering Ms. McLean's affidavits when her counsel made the decision not to tender them into evidence at the contempt hearing.

[39] With respect to the sentencing hearing, the judge did refuse to admit the two affidavits filed on Ms. McLean's behalf when the affiants did not make themselves available at the sentencing hearing for cross-examination.

[40] I see no merit to Ms. McLean's argument that the judge erred in refusing to do so. Ms. McLean knew from the clear direction previously given by the judge that an affidavit would not be considered unless the affiant was available for cross-examination. In the face of this direction, she failed to ensure affiants were available. It was the actions of Ms. McLean, not the judge, that led to her affidavits not being considered. The judge made no error in refusing to consider these affidavits.

Did the judge err by depriving Ms. McLean of procedural fairness by not following an appropriate procedure?

[41] Appellate counsel for Ms. McLean appropriately conceded at the hearing that commencing a civil contempt proceeding under s. 41 of the *Maintenance and Custody Act* is not in itself fatal, but he continued to argue that every provision of Rule 89 must be strictly followed and was not.

[42] Superior courts have inherent jurisdiction to punish for civil contempt: *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at paras. 33-40; *L & B Electric Ltd. v. Oickle*, 2004 NSCA 42 at paras. 17-22. Because of this, statutory rules of court should generally be considered supplementary to that core jurisdiction.

[43] I.H. Jacob stated in his seminal paper, "The Inherent Jurisdiction of the Court" (1970) 23:1 Current Legal Problems 23 at 28:

> (5) The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.

[44] Jacob's paper has been quoted with approval in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at 240 and Canadian Judicial Council, "*Some Guidelines on the Use of the Court's Contempt Powers*" (Ottawa: May 2001) at endnote 19.

[45] See also paragraph 88 of *MacMillan, supra*, where McLachlin J. (as she then was) states (dissenting, but not on this point) "all rules of court must be read as subject to the inherent power of the superior court to do what is required to preserve their process".

[46] Because the power to find contempt stems from the court's inherent jurisdiction to "punish for contempt", it is not always necessary that every aspect of the procedure set out in Rule 89 be followed, although doing so provides an invaluable safeguard.

[47] The procedural protections an alleged contemnor faced with civil contempt is entitled to are set out by Melissa N. Mackovski in "Administering Justice: The

Law of Civil Contempt" in Todd L Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation 2009* (Toronto: Thomson Reuters, 2009) at page 48:

> … Civil contempt is quasi-criminal in nature and therefore an alleged contemnor is afforded the same protection and procedural safeguards as an accused in a criminal proceeding. The procedural protections afforded to an alleged contemnor faced with civil contempt accord with the principles of fundamental justice applicable to an accused in a criminal proceeding including:
>
> > (a) the right to be served with a Notice of Motion which particularizes the allegations of contempt;
> >
> > (b) the right to a hearing;
> >
> > (c) the right to be presumed innocent until proven guilty beyond a reasonable doubt, the burden of proof resting with the party seeking a finding of contempt;
> >
> > (d) the right to make full answer and defence including the right to counsel, the right to cross examination of the moving party's affidavit evidence or witnesses and the right to submit or call evidence; and
> >
> > (e) the right not to be compellable as a witness in the hearing.
> > (footnotes omitted)

See also *Godin v. Godin*, 2012 NSCA 54, paras. 44, 46; *Vale v. USWA, Local 6500*, et al., 2010 ONSC 3039, para. 3.

[48] The Notice commencing Mr. Sleigh's application, together with his affidavits, particularized the allegations of contempt against Ms. McLean. With them she knew the case she had to meet. Her counsel's discussions at the October 27 hearing made this clear.

[49] A hearing was held, in which Ms. McLean participated, albeit almost one and a half years after Mr. Sleigh filed his application due to delays largely caused by Ms. McLean's conduct.

[50] The record demonstrates that the judge made it clear to Ms. McLean and her counsel several times that she was presumed innocent and that the burden was on Mr. Sleigh to prove contempt beyond a reasonable doubt.

[51] Ms. McLean retained two different counsel during the proceedings. The first counsel brought the application in the middle of the contempt proceeding asking the court to decline jurisdiction to enforce Justice Gass' Order. During the hearing of that application, he was asked if he wished to cross-examine Mr. Sleigh on his

affidavits. Ms. McLean knew she had the right to call evidence and filed several affidavits with respect to the contempt hearing, although her counsel eventually decided not to seek to have them admitted, and conceded contempt under paragraph 7 for failure to provide her address. She also filed affidavits in advance of the sentencing hearing.

[52] The record further confirms that Ms. McLean was informed several times by the judge that she had the right to remain silent.

[53] Neither Ms. McLean nor her trial counsel ever challenged the procedure followed. That was appropriate as there was no reason to do so.

[54] There is no merit to this ground of appeal. Ms. McLean received the procedural and substantive rights she was entitled to. The judge did not err by depriving Ms. McLean of procedural fairness.

Did the judge err in finding Ms. McLean in contempt?

[55] Ms. McLean argues that the three elements of contempt – the terms of the order must be clear and unequivocal, she must have actual knowledge of the terms and she must have intentionally failed to do the act the order compels (*Carey v. Laiken*, 2015 SCC 17 at paras. 32-35) – were not proved beyond a reasonable doubt.

[56] With respect to the judge's finding that Ms. McLean failed to provide her "address" to Mr. Sleigh as required by paragraph 7 of Justice Gass' Order, there is no merit to this argument.

[57] The terms are clear as her trial counsel admitted at the October 27 hearing. Paragraph 7 requires Ms. McLean to keep Mr. Sleigh informed of the address where their daughter is living while in her care. There is nothing to support her arguments that she was not required to provide her address unless Mr. Sleigh asked for it or if any other part of the Order was not being strictly followed.

[58] There was never a suggestion Ms. McLean was not aware of the terms of Justice Gass' Order. In addition, at the January 22, 2016 appearance the judge confirmed Ms. McLean's familiarity with the Order and a number of its terms.

[59] To support her argument on intention, Ms. McLean relies on what she says is evidence of reasonable doubt contained in the affidavits she filed but that were not admitted because her counsel intentionally decided not to tender them into

evidence at the contempt hearing. These affidavits could not be considered by the judge once her counsel decided not to tender them. There is nothing in the evidence that was admitted suggesting a reasonable doubt of Ms. McLean's intention not to provide her address.

[60] The judge made no error in adopting the concession of Ms. McLean's counsel that she was in contempt of paragraph 7 for failing to provide her address and finding Ms. McLean in contempt on that basis.

[61] There is, however, merit to Ms. McLean's argument that the judge erred in stating she was guilty of contempt under paragraph 7 on the expanded basis of failing to provide her "contact information". A thorough reading of the transcript of the October 27 contempt hearing confirms that everyone treated the failure to provide her address as the sole basis for the alleged and admitted contempt under paragraph 7. The judge pointed this out at the very beginning of the hearing and repeated it several times throughout. Counsel for both parties did the same, including counsel for Ms. McLean when he conceded she was in contempt of paragraph 7 for her failure to provide her address. Once Ms. McLean conceded contempt for failure to provide her "address", paragraph 7 was not considered again and the contempt hearing proceeded on the basis that the failure to ensure videoconferencing occurred was the only remaining charge to be dealt with. The same position was taken by counsel in their written briefs. Despite this, in paragraph 23 of her reasons the judge states Ms. McLean is guilty of contempt for failing to provide her "contact information" in addition to for failing to provide her "address".

[62] It is not clear if this was a slip by the judge or intentional. Considering the context of this record, it may well have been an unintentional slip caused by referencing paragraph 7 of Justice Gass' Order more fully versus the discrete complaint of failing to provide the address. Whether intentional or unintentional, the contempt finding respecting "contact information" should be corrected as the evidence, arguments and admission focused only on Ms. McLean's failure to provide her "address" and there was evidence Mr. Sleigh had her phone number, texting information and email address.

[63] I would allow Ms. McLean's appeal in part and reverse the judge's finding of contempt only as it relates to Ms. McLean's obligation to provide her "contact information". This has no effect on the judge's finding that Ms. McLean was in contempt for not providing her home address, which is contempt in and of itself

and, as I will later explain, the error in finding contempt respecting "contact information" had no effect on penalty.

Did the judge err by imposing an excessive penalty and costs?

[64] Ms. McLean makes two arguments in support of this ground that the judge erred by imposing an excessive penalty – a $2,500.00 fine – and $15,297.77 in costs and disbursements. She says the judge erred by admitting the affidavit of Ms. Royal-Preyra filed in connection with Mr. Sleigh's "preservation motion". She says the judge also erred by failing to make a finding that she purged her contempt by providing her address in January 2016 and by imposing a sentence that failed to take her purging into account.

[65] With respect to Ms. Royal-Preyra's affidavit, Ms. McLean says it should not have been considered because no notice was given under Rule 39.06(2), it contained hearsay and was irrelevant because even if she had moved by the time of the sentencing hearing that would be a new contempt irrelevant to the sentence being imposed.

[66] Rule 39.06 provides:

> Use of affidavit in same proceeding
>
> 39.06 (1) An affidavit may be filed for use on a motion or application.
>
> (2) An affidavit filed on a motion in a proceeding may be used on another motion in the proceeding, if the party who wishes to use the affidavit files a notice to that effect before the deadline for that party to file an affidavit on the motion.
>
> (3) The affidavit may be used for other purposes in the proceeding, if a judge permits.

[67] Ms. McLean's argument is that since Ms. Royal-Preyra's affidavit was filed in the "preservation motion", not the contempt application itself, it could not be relied upon without her being given notice under Rule 39.06(2). This argument is raised for the first time on appeal.

[68] While it is ideal for the procedures set out in the *Nova Scotia Civil Procedure Rules* to be followed, failure to give notice in the form set out therein may not be detrimental if it is apparent from the record that the appellant had direct knowledge of the nature of the document such that the purpose of filing formal notice has been fulfilled.

[69] This is in keeping with Rule 2.02(1) which states that "failure to comply with these Rules is an irregularity and does not invalidate a proceeding".

[70] It is clear from the record that Ms. McLean was provided with a copy of Ms. Royal-Preyra's affidavit. She responded to it by filing two affidavits prior to the sentencing hearing. Therefore, she suffered no prejudice by not being given notice under Rule 39.06(2). She was not deprived of the right to know the case she had to meet and the opportunity to respond.

[71] What is more, the judge had the ability to deal with this affidavit under Rule 39.06(3) which states that "[t]he affidavit may be used for other purposes in the proceeding, if a judge permits".

[72] With respect to Ms. McLean's arguments concerning hearsay and irrelevance, Ms. Royal-Preyra's affidavit does contain some hearsay. Ms. McLean's trial counsel referred to this hearsay in his written submissions to the judge but made no argument that her affidavit, or any part of it, should not be admitted due to hearsay or rejected as irrelevant. The judge did question Mr. Sleigh's counsel about some of the hearsay in the affidavit but did not indicate how she would deal with it.

[73] It is unnecessary for me to consider further whether the judge erred in admitting Ms. Royal-Preyra's affidavit as I am satisfied its admission had no impact on the fine or costs the judge imposed. Her sentencing decision makes no mention of whether Ms. McLean had moved or not by that time, the issue addressed in Ms. Royal-Preyra's affidavit. That issue was not considered. Instead, her decision makes it clear that her sole reason in setting the fine at $2,500.00 was to punish Ms. McLean for the significant effect her failure to provide her address had on Mr. Sleigh's 2015 access with his daughter – it prevented it from happening. Her decision also makes it clear her reasons for ordering the costs she did was because the time it took to deal with the second count under paragraph 18 was nominal; the evidence Mr. Sleigh was required to file was significant; Mr. Sleigh incurred substantial throw away costs due to the delays and adjournments caused by Ms. McLean's conduct; Mr. Sleigh's success on the jurisdiction application and his substantial success on the contempt matter itself. The amount of the fine and the amount of costs she ordered are unconnected to the issue dealt with in Ms. Royal-Preyra's affidavit. Her affidavit was a non-issue as far as these determinations were concerned.

[74] Ms. McLean's final argument is that the judge erred by not making a finding that she purged her contempt by providing her address in January 2016 and in imposing a sentence that was excessive by failing to take her purging into account.

[75] The standard of review applicable to the discretionary sentencing decision of a judge for contempt is set out above at paragraph 31.

[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.

[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.

[78] In *Health Care Corp. of St. John's v. Newfoundland and Labrador Association of Public and Private Employees* (2000), 196 Nfld. & P.E.I.R. 275 (NLSC) the Court states:

> [51] The acts of contempt are now over. The contemnors have ceased refusing to comply with the injunction and have apologized for their behavior. There is no need, therefore, to fashion a penalty with a view to bringing about compliance with the order in question. The focus must accordingly be on punishment for past acts with a view to promoting law - observance in the future, not only by the contemnors but also by other members of the defendant union and the public generally.

[79] The judge ordered that Ms. McLean pay significant costs. A costs decision is highly discretionary. Because of the nature of civil contempt proceedings, more often than not costs are awarded on a solicitor-client or full or substantial indemnity basis: *Langford (City) v. dos Reis*, 2016 BCCA 460 [in chambers] at paras. 28-29; *Oommen v. Capital Region Housing Corp.*, 2017 ABCA 143 at paras. 22-25. New Brunswick has employed a presumption of solicitor-client costs in contempt involving family matters: *Calvy v. Calvy*, 2015 NBCA 53 at para. 39; *Schelew v. Schelew Estate*, 2016 NBCA 16 at paras. 47-53. In *Boily v. Carleton Condominium Corp. 145*, 2014 ONCA 735 at paras. 11-12, the court states that a successful contempt application does not, in itself, warrant awarding costs on an elevated scale but recognizes that they are appropriate where an offer to settle is involved or when the losing party has engaged in behaviour worthy of sanction.

[80] Elevated costs are often justified because flagrantly breaching court orders is reprehensible conduct and the party who commenced the contempt proceeding should never had to do so in the first place: *Langford (City)*, *supra* at para. 28. See also Mackovski, "Administering Justice: The Law of Civil Contempt" at 78-79 and Miller, *The Law of Contempt in Canada* at 108-109. Without significant costs being awarded it is possible a mockery will be made of contempt and its effectiveness will be undermined: *Boivin v. MacDougall*, 2005 NBCA 62 at para. 19.

[81] In *R. v. Chek TV Ltd*. (1987), 30 B.C.L.R. (2d) 36 (BCCA) the Court held that courts can award costs thrown away because of contemptuous behaviour:

> [27] As to the argument that the appellant should not have to pay part of the costs thrown away, there is ample precedent for the course taken by the learned trial judge. See *Soc. de Publication Merlin Ltee v. R.* (1978), 5 C.R. (3d) 367,43 C.C.C. (2d) 557 at 564 (Que, C.A.); and *R. v. Bengert* (1979), 15 C.R. (3d) 215, 50 C.C.C. (2d) 119 at 122 (sub nom. *R. v. Froese; R. v. Bannerman*).

[82] Ms. McLean's first argument, that the judge erred by not making a finding that she purged her contempt by providing her address in January 2016, is correct. The judge should have made this finding as both parties put this issue in dispute before her and it was relevant to determining the proper sanction. Such an error would be a reversible error if it impacts the sanction imposed. In this case, I am satisfied it is not a reversible error because reading the judge's sentencing reasons indicates her failure to make this finding had no impact on the fine she ordered.

[83] While the judge refused to make a finding on whether Ms. McLean had purged her contempt it is implicit in her reasons for imposing the $2,500 fine that

Ms. McLean had provided her address in January 2016. Her reasons clearly focus only on Mr. Sleigh not having her address in 2015. The only harm she found was caused by Ms. McLean's contempt related solely to Mr. Sleigh being prevented from access with his daughter in 2015, not after. She stated:

> As a result of the foregoing affidavit evidence there was clear and obvious impact on Mr. Sleigh's ability to arrange access in 2015, and he had no summer access or Christmas as a result.

[84] The fine she imposed was fashioned only to punish Ms. McLean for preventing Mr. Sleigh's 2015 access by her failure to provide her address before January 2016. No sanction was imposed with respect to 2016 or later.

[85] I am satisfied the fine would not have been different if the judge had made a finding that Ms. McLean had purged her contempt by providing her address in January 2016. Having no impact on the sentence, the judge committed no reviewable error in failing to determine that Ms. McLean had purged her contempt.

[86] Ms. McLean also suggests the fine itself is excessive. The purpose of the imposed fine is to deter and denounce breaking court orders and the judge's sentencing decision is owed deference. Although Ms. McLean complains of the amount, she did not provide any cases for comparison. The onus is on Ms. McLean.

[87] The judge noted Ms. McLean's failure to provide her address in 2015 effectively prevented Mr. Sleigh from access with his daughter, then a four- to five-year-old child, for over a year. Without her address, there was nothing more Mr. Sleigh could do to gain access with his daughter once Ms. McLean failed to respond to his requests to arrange access.

[88] Ms. McLean provided her address in January 2016. She admitted her contempt of not providing Mr. Sleigh with her address at the contempt hearing on October 27, 2016. Paragraph 7 of Justice Gass' Order was clear in requiring Ms. McLean to provide her address, which was a simple thing to do. Ms. McLean failed to provide her address knowing it would prevent Mr. Sleigh from having access with his daughter. She never apologized or expressed any remorse. The fine was directed solely at her refusal to provide her address before January 2016.

[89] Taking these factors into account, I am satisfied the fine of $2,500.00 to punish Ms. McLean for her breach is not unfit.

[90] Ms. McLean also argues the costs the judge awarded were excessive.

[91] As indicated in the case law on costs referred to above, while each case will depend on its own circumstances, costs in contempt matters, even those involving family disputes, may be significant to impress upon the contemnor and the public generally that court orders must be followed. If costs are not sufficient, it may make a mockery of and undermine contempt proceedings.

[92] The judge explained that she ordered the costs she did because the time to deal with the second count under paragraph 18 was nominal; the evidence Mr. Sleigh was required to file was significant; Mr. Sleigh incurred substantial throw away costs due to the delays and adjournments caused by Ms. McLean's conduct; Mr. Sleigh's success on the jurisdiction application and his substantial success on the contempt matter itself. These were all appropriate considerations and do not disclose any error on the part of the judge in making this highly discretionary decision.

[93] I would allow the appeal of the contempt finding only as it relates to Ms. McLean's obligation to provide her "contact information" under paragraph 7, not as it relates to her obligation to provide her "address", and dismiss the appeal of the sanctions imposed.

[94] I would also order Ms. McLean to pay costs for this appeal in the amount of $2,000.00 to Mr. Sleigh forthwith, inclusive of disbursements. This amount of costs is to recognize that while Mr. Sleigh is successful on the appeal, there is merit of some of Ms. McLean's arguments, even though they ultimately had no impact on the outcome.

Hamilton, J.A.

Concurred in:

Scanlan, J.A.

Van den Eynden, J.A.