**SUPREME COURT OF NOVA SCOTIA**
**(FAMILY DIVISION)**
**Citation:** ***Power v. Power,*** 2015 NSSC 258

**Date:** 2015 - 09 - 23
**Docket:** 1201-059120; SFH-D 035445
**Registry:** Halifax

**Between:**

**Joseph Patrick Power**

Petitioner

v.

**Angela Rose Power**

Respondent

**Judge:** The Honourable Justice Elizabeth Jollimore

**Heard:** September 25, 2014, April 8, 2015

**Counsel:** Brian F. Bailey for Joseph Power
Judith A. Schoen for Angela Power

**By the Court:**

**Introduction**

[1] This decision relates to Angela Power's application to find Joseph Power in contempt of orders for the payment of child support and an order for costs. In response, Joseph Power raises the defence of impossibility.

**Proceeding**

[2] In January 2014, Angela Power filed an *ex parte* Application. This was subsequently amended three times and, ultimately, found its form in a Notice of Application filed on April 4, 2014.

[3] On July 7, 2014 Joseph Power filed a "Response to Contempt Application" in which he sought "a moratorium on the collection of child support arrears and/or forgiveness of any and all child support arrears". On the same date, he filed a Notice of Variation Application, seeking to vary the table amount of child support.

[4] Pre-trial conferences were convened before other judges and the contempt motion and variation application were scheduled to be heard together.

[5] To secure a speedier hearing date, the parties agreed to condense the amount of time for this hearing to one day and to schedule it before me, rather than wait for a two day hearing before the judge who presided at their pre-hearing conference. The hearing was not concluded in a single day and the parties waited almost seven months to conclude it.

[6] More importantly, the conference judge was willing to hear the contempt motion and variation application simultaneously. While some will take this approach to reduce delay and minimize expense, I do not adopt this procedure for the reasons given by Justice Saunders in *Godin*, 2012 NSCA 54 at paragraph 44. Because different judges adopt different approaches, I believe that in contempt proceedings, the judge hearing any preliminary conference must be the judge who hears the contempt motion.

[7] To ensure that the contempt motion and variation application were isolated, I considered them separately and unique reasons are provided for each. This decision addresses only the contempt motion. The decision relating to Mr. Power's variation application is reported at *Power*, 2015 NSSC 234.

**The allegations**

[8] Ms. Power seeks a finding that her former husband is in contempt of provisions of various orders of the Supreme Court of Nova Scotia (Family Division):

a. paragraph 2 of the order of June 7, 2013;
b. paragraph 6 of the "Consent Order" of May 24, 2005;

c. paragraph 1 of the order of May 21, 2013; and
d. paragraphs 2 and 3 of the order of May 6, 2013.

[9] Paragraph 2 of the June 7, 2013 order states that, "For purposes of clarification, given that Mr. Power chose not to attend the scheduled hearing on Costs, he is hereby given notice that interest of 5% pursuant to the *Interest on Judgments Act* will commence to accrue effective June 11, 2013."

[10] The Notice of Application refers to "the Consent Order of May 24, 2005 signed by counsel on behalf of the parties and of which both the Agreement and the Order are incorporated into the Corollary Relief Judgment". This Consent Order was never issued on its own. It was incorporated by reference in the parties' Corollary Relief Judgment. Specifically, Ms. Power alleges that Mr. Power is in contempt of paragraph 6 of the Consent Order which requires him to pay her "one-half of the children's health expenses over and above the costs of the monthly premium for the medical plan when the expenses are in excess of $100.00." This payment is to be made through the Maintenance Enforcement Program (MEP) and upon Ms. Power's presentation of receipts to him.

[11] Paragraph 1 of the May 21, 2013 order compels Mr. Power to pay costs of $21,938.00 to Angela Power before June 10, 2013.

[12] Paragraph 2 of the May 6, 2013 order compels Mr. Power to pay retroactive child support of $171,786.00 to Ms. Power before June 10, 2013.

[13] Paragraph 3 of the May 6, 2013 order compels Mr. Power to pay monthly child support of $3,242.00 to Ms. Power, beginning on April 1, 2013 and continuing on the first day of each following month.

**Contempt, generally**

[14] *Carey v. Laiken*, 2015 SCC 17 is a recent and unanimous decision of the Supreme Court addressing the law of civil contempt. At paragraph 32 of the decision, Justice Cromwell said, "Civil contempt has three elements which must be established beyond a reasonable doubt".

[15] The first element, he continued at paragraph 33, "is that the order alleged to have been breached 'must state clearly and unequivocally what should and should not be done'."

[16] "The second element is that the party alleged to have breached the order must have had actual knowledge" of the order, according to Justice Cromwell at paragraph 34.

[17] The third element was described in paragraph 35: "the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels". It was the meaning of this third element that was at issue in *Carey v. Laiken*, 2015 SCC 17 and which is at issue before me. I will address it in detail later in my reasons.

**Analysing the allegations**

[18] Of the five contempt allegations Ms. Power has made, three can be dealt with briefly, while the remaining two require greater analysis. I will address those which can be dealt with briefly first, then I will turn to the remaining two.

**Paragraph 2 of the June 7, 2013 order**

[19] Paragraph 2 of the June 7, 2013 order states that, "For purposes of clarification, given that Mr. Power chose not to attend the scheduled hearing on Costs, he is hereby given notice that interest of 5% pursuant to the *Interest on Judgments Act* will commence to accrue effective June 11, 2013." This paragraph contains nothing that requires Mr. Power to perform any act or to refrain from any act, so he cannot be found in contempt of it.

**Paragraph 6 of the May 24, 2005 Consent Order**

[20] The allegation relating to the Consent Order alleges that Mr. Power is in contempt of the requirement to pay Ms. Power "one-half of the children's health expenses over and above the costs of the monthly premium for the medical plan when the expenses are in excess of $100.00." The Consent Order required payment to be made upon "the presentation of receipts".

[21] The only evidence that Ms. Power offered with regard to this charge was the statement that Mr. Power "has never contributed to these expenses since separation". It would be appropriate for Mr. Power to "never" contribute to the children's health expenses if receipts were never presented. There was no evidence that she (or anyone) ever presented him with any receipts. In the absence of evidence that Mr. Power was presented with receipts for health expenses, Mr. Power cannot be found in contempt with respect to this allegation.

**Paragraph 1 of the May 21, 2013 order**

[22] Paragraph 1 of the May 21, 2013 order addresses costs.

[23] *Civil Procedure Rule* 89.02 limits the circumstances when a contempt order may be granted to punish a failure to pay money to two circumstances: when the order to pay money is an order for family maintenance or support; and where the order "expressly provides" that the failure may be punished as contempt.

[24] The costs order is neither an order for family maintenance or support nor does it contain an express provision that failure to pay may be punished as contempt. Mr. Power may not be held in contempt of this order.

[25] I now turn to the two allegations which require a more detailed analysis: the allegations that Mr. Power is in contempt of paragraphs 2 and 3 of the May 6, 2013 order.

**Paragraphs 2 and 3 of the May 6, 2013 order**

[26] Most of the evidence focused on provisions of the May 6, 2013 order for child support. Paragraph 2 of the order deals with retroactive child support and paragraph 3 deals with prospective child support.

**The first element: clarity of the order**

[27] With regard to retroactive child support, the order provides:

> Joseph Patrick Power shall pay retroactive child support to the Applicant, Angela Rose Power in the total amount of $171,786.00 (for the period 2007 to March 2013) payable within 90 days of the Decision being June 10, 2013.

[28] In terms of prospective child support, the order provides:

> Commencing April 1, 2013, and payable on the 1st day of each and every month thereafter, the Petitioner, Joseph Patrick Power shall pay child support to the Applicant, Angela Rose Power at the rate of $3,242.00 per month payable on the 1st day of each and every month thereafter, based upon his imputed income of $263,753.15 for 2012.

[29] Mr. Power did not dispute the clarity of the provisions that are the subject of these allegations. I am satisfied beyond a reasonable doubt that the terms of the order relating to retroactive and prospective child support are clear and unequivocal.

**The second element: actual knowledge of the order**

[30] In his affidavit, Mr. Power acknowledged his awareness of these provisions of the May 6, 2013 order by reciting the terms. He further evidenced his awareness of the order, saying he "planned on appealing" these terms. In fact, he filed an appeal. I am satisfied beyond a reasonable doubt that Mr. Power had actual knowledge of the order.

**The third element: intent**

[31] In *Carey v. Laiken*, 2015 SCC 17 at paragraph 35, Justice Cromwell described the third element of civil contempt as "the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels".

[32] Mr. Power admitted that he failed to pay the retroactive child support award and failed to pay much of the prospective child support that was ordered. The affidavit Mr. Power filed at the Court of Appeal in response to Ms. Power's motion for security for costs was before me as an exhibit to Ms. Power's affidavit of August 21, 2014. In this affidavit, Mr. Power swore that he was ordered to pay monthly child support of $3,242.00 and that he was paying "$1,830 per

month". He said "I know that this is not what I was ordered to pay". He also said, "I have not paid toward the Order for costs or retroactive support".

[33] I am satisfied beyond a reasonable doubt that Mr. Power intentionally failed to do what he was ordered to do in terms of paying retroactive and prospective child support.

**A fourth element?**

[34] Mr. Power argued that there is more to intent than intentionally doing what one has been ordered not to do or intentionally failing to do what one has been compelled to do.

[35] Mr. Power based his argument on the unanimous decision of the British Columbia Court of Appeal in *Swann*, 2009 BCCA 335. At paragraph 10 in *Swann*, 2009 BCCA 335, Justice Groberman said there are **four** elements that must be proven "to establish contempt of court for non-payment of maintenance ordered by the court." According to Justice Groberman, the fourth element is that "the debtor was, in fact, capable of complying with the order (i.e., that he or she had the means to make the required payments)." Mr. Power argued that he is unable to pay the amounts ordered. He said the fourth element has not been proven and he must be acquitted.

[36] Justice Groberman's comments in *Swann*, 2009 BCCA 335 about a fourth element are clearly at odds with the Supreme Court of Canada's statement in *Carey v. Laiken*, 2015 SCC 17 at paragraph 32 that there are only three elements.

[37] *Carey v. Laiken*, 2015 SCC 17 was not a decision about the non-payment of support. It involved a *Mareva* injunction which enjoined anyone with knowledge of the injunction from disposing of, or otherwise dealing with, the assets belonging to certain individuals. Mr. Carey was counsel representing one of the individuals, Mr. Sabourin, and Mr. Carey had funds belonging to Mr. Sabourin in his trust account. Though he was aware of the injunction, Mr. Carey returned the trust funds to Mr. Sabourin. Ms. Laiken sought to have Mr. Carey found in contempt of the *Mareva* injunction for returning the trust funds to Mr. Sabourin.

[38] *Swann*, 2009 BCCA 335 was a case about the non-payment of support. Failure to comply with orders for the payment of money is not punishable by contempt in all Canadian jurisdictions. In Nova Scotia and a few other jurisdictions (British Columbia and Saskatchewan, for example) contempt may be found where someone fails to comply with an order for the payment of money. Contempt is not available in such circumstances in Ontario, where *Carey v. Laiken*, 2015 SCC 17 originated.

[39] While the Supreme Court of Canada was not dealing with a case involving an order for the payment of money, its reasons were broader than the facts on which it was based. The Supreme Court's decision was clear at paragraphs 32 to 35: in civil contempt cases there are only three elements. This declaration wasn't qualified or restricted, and I accept it for the proposition that there are only three elements to all civil contempt cases.

[40] With regard to intent, Mr. Carey argued that there must be an intention to interfere with the administration of justice, not merely the intention to do the prohibited act or to not do a

required act. Mr. Carey argued that where the alleged contemnor cannot "purge" the contempt (because the act that constituted the contempt can't be undone, or a conflicting legal duty prevents compliance with the order), the intent necessary for a conviction is more than the intent to do the prohibited act or to not do the required act.

[41] The Supreme Court expressly rejected Mr. Carey's argument at paragraph 41 in *Carey v. Laiken*, 2015 SCC 17 where Justice Cromwell said that requiring a "higher degree of fault" undermined the purpose of the contempt power by offering a "special charity" to those "whose acts in violation of an order make subsequent compliance impossible." He observed that "where a party is unable to purge his or her contempt" the defence of impossibility of compliance provides a better answer.

**The defence of impossibility**

[42] With regard to the defence of impossibility in *Carey v. Laiken*, 2015 SCC 17, Justice Cromwell cited *Jackson v. Honey,* 2009 BCCA 112 and *Sussex Group Ltd. v. Fangeat* (2003), 42 CPC ($5^{th}$) 274 (OSCJ).

[43] In the unanimous decision of *Jackson v. Honey*, 2009 BCCA 112 at paragraph 14, Justice Smith held that Ms. Honey "could not be said to have willfully or deliberately disobeyed" an order where "it was impossible for her to have complied with it." The order required Ms. Honey to return a light fixture to Mr. Jackson, however the light had been sold some time earlier when Ms. Honey sold the house containing it. The British Columbia Court of Appeal specifically found that Mr. Jackson hadn't led sufficient evidence to prove that Ms. Honey's inclusion of the light fixture in the house sale was in contempt of another order that she not dispose of, or remove items of personal property which Mr. Jackson had itemized in a list. The impossibility of returning the light fixture meant that Ms. Honey was not found in contempt.

[44] At paragraph 56 in *Sussex Group Ltd. v. Fangeat* (2003), 42 CPC ($5^{th}$) 274 (OSCJ), Justice Cumming said, "It is not a defence to an allegation of contempt that it is impossible for the contemnor to purge his contempt or to comply with the court order **where such impossibility is the result of the contemnor's own conduct**." [emphasis added] Justice Cumming cited the Ontario Court of Appeal's decision in *Manis*, 2001 CanLII 3851 (ON CA) as authority for this proposition.

[45] In *Manis*, 2001 CanLII 3851 (ON CA), Mr. Manis argued that his compliance with an order to secure certain debts in his divorce would constitute a preference contrary to the provisions of Ontario's *Assignments and Preferences Act* and the federal *Bankruptcy and Insolvency Act*. Justice MacPherson, with whom Chief Justice McMurtry and Justice Abella concurred, rejected the factual basis of this argument: Mr. Manis had failed to comply with the order for four months prior to invoking the *Assignments and Preference Act* and the *Bankruptcy and Insolvency Act*.

[46] As well, following the divorce, Mr. Manis made a voluntary assignment into bankruptcy which meant that he could no longer work as a chartered accountant or investment dealer. There was no evidence that, at the time, any creditor was making any demand on him. Mr.

Manis created a situation where he was unable to pay his support. Here, too, the facts did not support Mr. Manis' claim that compliance was impossible.

[47] The Court of Appeal resolved Mr. Manis' appeal on the basis that it was an impermissible collateral attack on a valid court order at paragraphs 22 and 23 in *Manis*, 2001 CanLII 3851 (ONCA).

**Mr. Power's defence**

[48] The three elements of civil contempt have been proven beyond a reasonable doubt.

[49] Mr. Power asserts the defence of impossibility. He says that his unemployment or underemployment mean that it was impossible for him to pay the lump sum retroactive child support and periodic prospective child support awarded by Justice Lynch in May 2013.

[50] According to Justice Cromwell at paragraph 41 in *Carey v. Laiken*, 2015 SCC 17, the defence of impossibility of compliance exists where "a party is unable to purge his or her contempt". This impossibility cannot result from the party's own actions.

[51] For the reasons below, I conclude that the defence of impossibility is not available to Mr. Power.

[52] In his affidavit, Mr. Power said that Ms. Power began to seek enforcement of his support payments "in or around September 2013". He acknowledged that one enforcement measure available to MEP was "to take my passport away". He said that his employer advised him that if MEP took his passport he would "be unemployed".

[53] Mr. Power said that security clearances "essential to [his] work" were tied to his passport and when he lost his passport he lost his Canadian and American federal security clearances. He said that his work visa for the United States was revoked when his passport was lost.

[54] Mr. Power was aware of the consequences of failing to meet his support obligation. He knew the effect losing his passport would have on his employment and his ability to pay support. In his affidavits he said that he contacted an employee at MEP and advised her "that I would lose my job should they take my passport away and that this would impact my ability to pay."

[55] Mr. Power said that a website, created by Sean Forbes sometime in late 2013 or early 2014, which provided information about his default of support payments impaired his ability to find work, as did negative statements disseminated by Ms. Power's boyfriend.

[56] Mr. Power said he paid $13,780.00 in child support over the course of 2013 and paid $1,830.00 per month until the end of September 2013. (If Mr. Power paid $13,780.00 in 2013, he did not pay $1,830.00 each month until September 2013.) Though he knew the consequences of failing to meet his support obligation, Mr. Power made no payment toward the retroactive lump sum child support award and in no month did he ever pay the full amount of monthly prospective support. This all occurred before there were any problems with Mr. Power's

passport, security clearances and visa, before there was any damaging website and before there was negative commentary by Ms. Power's boyfriend.

[57] Mr. Power said that he planned on appealing Justice Lynch's decision. He filed an appeal, but discontinued his appeal on January 14, 2014 after Justice Beveridge ordered him to pay $5,000.00 as security for costs by January 15, 2014, failing which Ms. Power would be at liberty to apply to have Mr. Power's appeal dismissed. Justice Beveridge's decision is reported at *Power*, 2013 NSCA 137.

[58] I have no evidence that Mr. Power ever sought a stay of Justice Lynch's order. Only in July 2014 did he apply to vary her order. This was fifteen months after Justice Lynch rendered her decision.

[59] The circumstances which Mr. Power said make compliance with Justice Lynch's order impossible are circumstances of Mr. Power's own creation. He cannot avail himself of the defence of impossibility.

[60] Even if the defence of impossibility was available to Mr. Power, it is my view that his evidence is insufficient to support applying that defence to his circumstances, circumstances in which Mr. Power's credibility is at issue.

[61] In *R. v. W.(D.)*, [1991] 1 SCR 742 at 758, Justices Gonthier, Cory and Iacobucci identified when an acquittal must be entered in a case where credibility is in issue. First, I must acquit Mr. Power if I believe him. Second, if I don't believe Mr. Power, but I am still left in reasonable doubt by his evidence, I must acquit him. Third, even if Mr. Power's evidence doesn't leave me in reasonable doubt, I still must consider whether I'm convinced beyond a reasonable doubt of his guilt on the basis of other evidence which I have accepted.

[62] More recently, in the unanimous decision in *R. v. Dinardo*, 2008 SCC 24, at paragraph 23, Justice Charron said that I must respect the substance of *R. v. W.(D.)*, [1991] 1 SCR 742: I must direct my mind "to the decisive question of whether [Mr. Power's] evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt." Does the evidence as a whole, establish Mr. Power's guilt beyond a reasonable doubt?

[63] Even if the defence of impossibility was available to Mr. Power his evidence does not raise a reasonable doubt that it was impossible for him to comply with Justice Lynch's order.

[64] Mr. Power was employed from January 2013 until November 2013. His passport was revoked on October 31, 2013. He has done freelance work since then. His passport was returned to him in March 2014.

[65] Mr. Power said that in March 2013 when Justice Lynch rendered her decision, he "earned approximately $140,000.00 a year". This amount would be sufficient for him to pay his income taxes, his monthly contribution of $4,000.00 to his household's expenses, and the periodic prospective child support awarded by Justice Lynch.

[66] Mr. Power remained employed until November 2013. Regardless, at no point prior to November 2013 did he comply with either aspect of Justice Lynch's order. He did not pay the lump sum amount, and he did not pay the monthly payments she ordered.

[67] According to his 2013 tax return, Mr. Power had total taxable income of approximately $128,000.00. Again, this amount would be sufficient to pay his income taxes, his contribution to household expenses, and his monthly child support payments. Regardless, Mr. Power stopped making regular child support payments in September 2013.

[68] Mr. Power provided various documents (profit and loss statements, balance sheets and invoices) prior to the commencement of the hearing. These showed that he continued to work and continued to earn an income at least until July 2014 – when he last filed income information.

[69] On his Statement of Income prepared in 2014, Mr. Power estimated that his annual earnings were $90,000.00. This amount is not consistent with the invoices, balance sheet and profit and loss statements he provided. Annualized, the earnings shown on these other documents equate to an annual income of between $160,000.00 and slightly more than $200,000.00. Discrepancies between the invoices and the statements suggest that there are invoices not included in the statements. Whatever the exact figure, it was sufficient for him to pay the periodic support Justice Lynch ordered.

[70] According to his affidavits, Mr. Power paid $3,000.00 in child support in the Spring of 2014. The parties were unable to agree on the amount of child support that Mr. Power paid while the hearing was under way. His child support payments since 2013 have been well less than the amounts ordered by Justice Lynch.

[71] Mr. Power did not provide a Statement of Property to show that he lacked the resources to fund his retroactive or prospective child support obligation. He identified a modest RRSP, with a pre-tax value approximately equivalent to one month's child support payment. His tax returns do not disclose that this was withdrawn prior to the commencement of the hearing, though it might have been used to meet his child support obligation.

[72] For the most part, Mr. Power did not address his failure to comply with the order that he pay lump sum retroactive child support. He focused mainly on his income stream and the obligation to pay periodic child support. Mr. Power testified that as of June 30, 2014 there was $66,000.00 held in a bank account managed by a financial management services company he employed in Anguilla. When asked if he could have accessed these funds if he chose, Mr. Power was dismissive of this option and said, "Sure. Bankrupt the company." However, he said that he had accessed some of this money to support his current family. He declined to make the same choice to comply with Justice Lynch's order.

[73] Mr. Power's evidence does not raise a reasonable doubt as to his guilt. To borrow Justice Charron's words at paragraph 23 in *R. v. Dinardo*, 2008 SCC 24, "the evidence as a whole establishes [Mr. Power]'s guilt beyond a reasonable doubt". I find Mr. Power is in contempt of paragraphs 2 and 3 of the order of May 6, 2013.

**Conclusion**

[74] The allegation that Mr. Power is in contempt of paragraph 2 of the June 7, 2013 order is defective and I have not tried Mr. Power on it.

[75] I acquit Mr. Power of the allegation that he is in contempt of the requirement to pay Angela Power "one-half of the children's health expenses over and above the costs of the monthly premium for the medial plan when the expenses are in excess of $100.00" contained in paragraph 6 of the Consent Order of May 24, 2005, which was incorporated into the parties' Corollary Relief Judgment.

[76] A contempt order may not be granted to punish a failure to pay costs, according to *Civil Procedure Rule* 89.02. As a result, Mr. Power has not been tried on the allegation that he is in contempt of paragraph 1 of the May 21, 2013 order.

[77] Mr. Power raises the defence of impossibility. I find the defence is not available to him: by his own actions, Mr. Power has created the circumstances which he says make it impossible for him to comply. Even if the defence of impossibility was available to Mr. Power, applying the rationale of *R. v. W.(D.)*, [1991] 1 SCR 742, the evidence does not raise a reasonable doubt that it was impossible for him to comply with paragraphs 2 and 3 of Justice Lynch's order of May 6, 2013 and I find Mr. Power in contempt of these provisions.

[78] Neither party continues to retain counsel. They will appear before me at Family Division on Friday, October 23, 2015 for the penalty phase of this proceeding. The hearing is scheduled from 2 o'clock until 4:30 in the afternoon and is to be concluded within that time.

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Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia