SUPREME COURT OF NOVA SCOTIA
Citation: Terris v. Meisner, 2019 NSSC 295

Date: 20191011
Docket: 463235
Registry: Halifax

Between:

Kimberley Terris

Plaintiff

v.

Tracey Meisner

Defendant

LIBRARY HEADING

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	September 10 and September 20, 2019 in Halifax, Nova Scotia
Written Decision:	October 11, 2019
Subject:	Civil Contempt of Court – Civil Procedure Rule 89
Summary:	Ms. Terris sued Ms. Meisner for defamation. Ms. Terris was a registered nurse charged with the care of Ms. Meisner's institutionalized son. Ms. Meisner "went public" with allegations of mistreatment of her son. During that litigation, Ms. Meisner was found guilty of contempt by her having provided information and written statements on more than one occasion, to third parties contrary to the implied undertaking Rule.
Issues:	(1) what sanctions are appropriate in response to the contempt?
Result:	Given the seriousness of the breach, it was appropriate to impose a substantial civil fine ($5000), order full indemnification of the solicitor-client costs incurred by Ms.

Terris related to her pursuit of the contempt motion and related matters, as well as a mandatory injunction prohibiting any continued possession, use or further dissemination of information and materials disseminated by Ms. Meisner in violation of the implied undertaking Rule.

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Defendant

Decision on Contempt Sanction

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	September 10 and September 20, 2019, in Halifax, Nova Scotia
Counsel:	Laura Veniot, for the Plaintiff Tracey Meisner, for the Defendant

By the Court:

Introduction

[1] This decision addresses what is the appropriate sanction for Ms. Meisner's violations of the implied undertaking Rule, each of which constitute a contempt of court.

Background

[2] In my decision 2019 NSSC 252, I found Ms. Meisner guilty of two counts of civil contempt.

[3] Both her actions of contempt were violations by her of the "implied undertaking rule". Breach of this rule is serious. Let me briefly explain why.

[4] Broadly speaking, litigants are *compelled* by our Civil Procedure Rules to disclose to opposing litigants all non-privileged relevant information, including documents, electronic information and other things that are relevant to the litigation and are, or have been, within their control or custody. Litigants are also *compelled*, unless there is a demonstrable legal basis for refusing to do so, to answer relevant questions on discovery (i.e. when under oath/affirmation and recorded, they are asked questions by opposing counsel in private sessions where only the parties are present).

[5] Disclosure of relevant information and answering relevant questions on discovery are the means by which each opposing party comes to understand the information (and therefore potential evidence) that the other side has in relation to the material issues in dispute in the litigation. It is hoped that such *fulsome and candid disclosure and discovery of private information* will allow the litigation to be resolved in the most efficient and effective manner possible.

[6] Since the parties are disclosing private information which they are *not* otherwise compelled to disclose, they are also entitled to expect that that information *will not be used by the other party except for the purpose of securing justice in the litigation in which the disclosure and discovery answers were compelled.*

[7] Ms. Meisner purposefully violated that Rule.

[8] In summary, she received witness statements in an Affidavit Disclosing Documents ("ADD") and in a letter from Ms. Terris's counsel during ongoing litigation between Ms. Meisner and Ms. Terris. The written witness statements

were created or provided for the benefit of Ms. Terris in support of her claim of defamation against Ms. Meisner[1].

[9] Firstly, while she was represented by legal counsel, Ms. Meisner forwarded witness statements created for Ms. Terris's counsel in the litigation to the Nova Scotia Health Authority ("NSHA"), employer of those witnesses, complaining of a breach of her son's privacy, by those witnesses having made the statements about an incident involving Ms. Terris and Ms. Meisner's son. In response, Ms. Terris's counsel sent a "cease and desist" letter to Ms. Meisner's counsel, clearly stating that Ms. Meisner was in breach of the "implied undertaking rule" and alleging a contempt of court by Ms. Meisner.

[10] Secondly, sometime later, while she was self-represented, she forwarded such witness statements to the College of Nursing as the basis of a complaint against Ms. Terris and Ms. Holmans, who are each a Registered Nurse (RN).

The positions of Ms. Terris and Ms. Meisner regarding the sanction to be imposed by the court

Ms. Terris

[1] To the extent that I conclude there was otherwise conduct by Ms. Meisner that could amount to an "aggravating" factor herein, I do so by recognizing that as in relation to criminal offence sentencing, such factors that tend to increase the severity of the sentence must be proved beyond a reasonable doubts: *R v. Gardiner*, [1982] 2 SCR 368 (now codified in the *Criminal Code* at s. 724(3)(e).

[11] She urges the court to:

1. order "full indemnity" solicitor – client costs be payable by Ms. Meisner regarding Ms. Terris's costs incurred in relation to the contempt motion (relying upon CPR 77.01(1)(b) and Justice Arnold's decision in *Mutual Transportation Services Inc. v Saarloos*, 2017 NSSC 26 at para. 5) and for Ms. Terris' costs of responding to Ms. Meisner's 2019 complaint to the College of Nursing. She notes that the contempt motion involved non-routine research and preparation, involving nearly a full day hearing, the resolution of a pre-hearing evidentiary issue regarding hearsay, and the issuance of two subpoenas and personal service arising therefrom, in addition to the full day (one half day on each September 10 and 20th 2019) required for the sanction hearing. Moreover, to the extent that Ms. Meisner argues she is impecunious, Ms. Terris notes that CPR 77.04(4) reads: "An order against paying costs [relief from liability because of poverty] does not apply to costs under Rule 88 – Abuse of Process, Rule 89 – Contempt, or Rule 90 – Civil Appeal." ;

2. impose a "substantial" civil fine on Ms. Meisner, which would be paid to Ms. Terris.

3. consider imposing a mandatory prospective injunction, prohibiting any person, statutory body or other legal entity who has directly or indirectly obtained possession of any information protected from disclosure by the implied undertaking rule herein from acting or relying upon, or continuing to have possession of such information, without permission of the court.

[12] In relation to the civil fine, Ms. Terris's position is set out in her written argument:

> 22 At paragraph 63 of Ms. Terris's brief dated June 14, 2019, we outlined the factors to be considered where a court must determine whether a civil fine ought to be ordered, and in assessing the amount of any such fine.
>
> 23 We wish to elaborate on these factors with the benefit of having completed the hearing, and the new evidence filed in support of the sanction hearing. The factors, and our respective comments, are as follows:
>
> (a) whether the contemnor has admitted the breach;
>
> Ms. Meisner has never admitted to breaching the implied undertaking rule. This factor must be weighed against her.

[I conclude that Ms. Meisner did not demonstrably accept responsibility for her breaches until after she was found in contempt]

> (b) whether the contemnor has demonstrated a full acceptance of the paramountcy of the rule of law, by tendering a formal apology to the court;

> Ms. Meisner has never accepted responsibility for her contemptuous conduct, and has not apologized to this Honourable Court. Rather, she has already taken steps to avoid complying with an anticipated order to be issued by Your Lordship, by purporting to transfer the interest in her real property to her husband by way of Quit Claim Deed. Further, though her arguments at the hearing were not extensive, she did argue that she had the right to file complaints against Ms. Holmans and Ms. Terris, thereby demonstrating further disregard for the implied undertaking rule. This factor must be weighed against her.

[I conclude that Ms. Meisner's apology, while articulated, is late in the process and therefore, if indeed genuine, is entitled to little weight.[2] Even thereafter, during the sanction hearing she was asked in cross-examination: "you feel justified [in using these statements outside the litigation process] because your son's privacy was breached? "No – it's because of 'nurses using his information for their own purposes'."]

> (c) whether the breach was a single act or part of an ongoing pattern of conduct in which there were repeated breaches;
>
> As noted in our submissions dated June 14, 2019, this was not a single breach, but two (2) separate findings of contempt for the same type of breach.
>
> (d) 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;
>
> Your Lordship noted at paragraph 38 of the decision on the contempt motion that Ms. Meisner had "proper notice of the implied undertaking rule"; that "she is presumed to have actual knowledge of the Rules of court"; that after receiving the cease and desist letter, "she clearly knew the restrictions imposed on her as a litigant by the implied undertaking rule, but nevertheless went ahead to violate it once more in the following year"; and finally that she "wilfully did these acts, knowing they were prohibited by the implied undertaking Rule".

[2] Generally regarding apologies and purging contempt, see: Ontario (Attorney General) v. Paul Magder Furs Ltd. [1993] O.J. No. 22, especially the factors at para. 17.

This factor must be weighed against Ms. Meisner, given the findings of fact.

[I agree]

(e) the extent to which the conduct of the contemnor displayed defiance;

We respectfully submit that Ms. Meisner has displayed significant defiance, given her knowledge of the implied undertaking rule and her wilful disregard for it. Again, though she did not engage in extensive oral submissions at the hearing, she did argue that she had the right to file complaints against Ms. Holmans and Ms. Terris despite the implied undertaking rule. She appears to have no regard or respect to the rules of this Honourable Court. Finally, she has already taken steps to avoid compliance with an anticipated Order by Your Lordship, by signing a Quit Claim Deed to her real property to her husband.

[Ms. Meisner was asked why, if she recognized the wrongfulness of her use of the statements/information in issue, she did not withdraw the complaint to the College regarding Ms. Holmans. She replied: "my understanding is that she was approaching other staff so that is why it was not withdrawn"; and "they just have to interview the right people".]

(f) 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;

As noted in our brief dated June 14, 2019, retaliation against witnesses and parties to litigation, goes to the very heart of the administration of justice. There is clearly a public benefit to the implied undertaking rule, and Ms. Meisner's flagrant disregard for it ought to be taken very seriously by this Honourable Court.

[I conclude that what motivated Ms. Meisner's contempt was her belief, based *inter alia* on the January 20, 2017 report by Joanne Blight in response to her

PPCA complaint, that there were reasonable grounds to believe that her son had been mistreated by Ms. Terris in particular, and her perception that the staff were "closing ranks" to protect Ms. Terris by giving statements to Ms. Terris's lawyer. Seen in that light, her actions disseminating the statements of those witnesses suggest her motivation was retaliatory and could be seen as intended to deter them from supporting Ms. Terris in the employment and College of Nursing disciplinary contexts, and ultimately at the defamation trial. Her misconduct prejudiced the private interests of those persons whose statements she disclosed to the NSHA and the College of Nursing who were not parties to the litigation.]

> (g) the need for specific and general deterrence;
>
> Specific deterrence is clearly required in this case, given that Ms. Meisner has shown a disregard for the rules of this Honourable Court and has knowingly breached the implied undertaking rule on more than one occasion. In terms of general deterrence, the Courts have been clear that preserving the integrity of the implied undertaking rule is of vital importance to the administration of justice. Litigants in general should be deterred from acting in the way that Ms. Meisner has chosen to act, and a significant fine would be helpful in effecting that general deterrence.
>
> (h) the ability of the contemnor to pay.
>
> We still have no evidence of Ms. Meisner's financial situation. However, she has owned real property since 1985, the assessed value of which exceeds the amount that Ms. Terris is seeking on this motion. The fact that her name is no longer on title should clearly not affect this Court's assessment of her ability to pay a civil fine.

24. In essence, *none* of the factors cited by Justice Arnold weigh in Ms. Meisner's favour. A civil fine ought to be ordered, and it ought to be of such substantial significance so as to have a real impact on her. To order a nominal or insignificant amount would simply serve

> as a "slap on the wrist" and is not likely to deter her from future breaches, given her pattern of knowingly defying the court.

[13] In support of her argument, Ms. Terris filed a Fourth affidavit. It sets out the invoices she has received from her counsel, regarding the contempt motion including for disbursements, and also the costs incurred in defending against Ms. Meisner's complaint with the College of Nursing.

[14] Therein as well, is a true copy of registered documentation, obtained from the publicly accessible database Property Online, which shows that a *Warranty Deed executed August 14, 2019* was signed by Ms. Meisner and her husband transferring real property (identified by PID 60067709) exclusively to her husband (which she conceded; and in relation to which she claimed in her written argument, if required to: "I am prepared to prove that the transaction is *bona fide*"). The deed was registered on August 15, 2019. Notably *I advised the parties by email on August 12, 2019 that I had "concluded a contempt has been proven beyond a reasonable doubt.* A written decision will be forthcoming". On August 16, 2019 my contempt finding decision was released to the parties. The August 14, 2019 Warranty Deed conveyed the same property as had been conveyed to Mr. and Mrs. Meisner as joint tenants by Warranty Deed dated July 5, 1985, and registered July 5, 1985. I give little weight to Ms. Meisner's bald statement that the conveyance is *bona fide*.

Ms. Meisner

[15] In her written argument, she states in part:

> "I wish to purge myself as best that I can. I sincerely apologize to the court for breaching the implied undertaking rule. I have learned how important and necessary it is to abide by these rules as it pertains to a lawful society. It has been a very tough lesson and I have no intention of ever doing so again. I have withdrawn my complaint against Ms. Terris to the College of Nursing. I am hoping that the court will understand my position about why I breached the implied undertaking rule.… Ms. Terris and Ms. Holmans were Registered Nurses at Emerald Hall Unit where my son was a patient of theirs. There was an incident between my son and Ms. Terris on September 3, 2016. This incident was serious enough to warrant an investigation by the Nova Scotia Hospital and the *Protection for Persons in Care Act*. *The result of this investigation found that Ms. Terris had been abusive to my son.* I went public about the treatment my son endured. I felt at the time that this would protect him and spare him from this ever happening again… My son has been a patient at the Nova Scotia Hospital since 2004… I had always thought that one's personal health information was protected and could not be used outside "the circle of care*"…. I was completely horrified to learn that Ms. Holmans took it upon herself to approach staff that were caring for my son. She asked many staff to sign statements that contained my son's personal health information*. When I learned this, I honestly didn't know what to do about it. I felt betrayed that a Registered Nurse would do this for her own benefit. *As far as Ms. Terris was concerned, she had already violated my trust. I didn't realize at the time what lengths she would go to in order to save herself. Because I was in such a predicament about my son's health information being used outside of the hospital, I felt that to ensure that this breach would not go any farther I had to report it to Mr. Mailman*… I am not making an excuse about breaching the implied undertaking rule to the court. This is merely my side of the story… *This lawsuit has been financially draining. So far it is costing $23,254.90 of which I still owe Mr. Joyce about $7000. My gross income in 2018 was about $15,000.* I will provide the court with my T4 for the last three years.... As the Court is aware through Ms. Terris's brief that I had signed over the title of our house to my husband. *This is not to defraud Ms. Terris as she has suggested in her brief.* I will pay what the court decides I have to. *The title transfer was an act of good faith*… When Ms. Terris takes me to court (again) because she thinks this is a fraudulent conveyance, I am prepared to prove the transaction is *bona fide*."

[16] I have italicized portions of Ms. Meisner's written argument to highlight portions that introduce factual references that have not been established by evidence.

[17] On September 20, 2019 the contempt sanction hearing proceeded with testimony from affiants Ms. Terris, Ms. Holmans, and Ms. Meisner.

Contempt sanction hearing

Applicant's witnesses

Kimberley Terris

[18] She has filed five affidavits in total. Her Fifth affidavit relates to the sentencing of Ms. Meisner – in particular her claim for solicitor-and-client costs.

Cross-examination

[19] She reiterated that the *NSHA complaint* at the College of Nursing was fully dismissed, and she was cleared of wrongdoing (referencing paragraphs 5 and 14 of her affidavit). She received notification from the College on February 22, 2018, and 4-6 weeks later, a 25-page decision.

[20] In her Fifth affidavit she confirms that she learned on September 10, 2019 during court that Ms. Meisner had withdrawn *her complaint* to the College of

Nursing against her – although not against Debbie Holmans- and that she had effected the withdrawal on August 26, 2019, *after* Ms. Meisner had been found guilty of contempt of court by decision dated August 15, 2019.

[21] I found her to be very credible, honest and reliable.

Debbie Holmans

[22] She filed three affidavits, two of which are particularly relevant here – those filed June 14 and September 17, 2019.

Cross-examination

[23] Ms. Holmans was adamant that she did not approach other staff as Ms. Meisner claimed, and she only assisted Dave Campbell by typing his statement for him, and once he had signed it placing it in a sealed envelope which was given to Ms. Terris. She did it "because he asked", and he did not have typing skills.

[24] I found her to be very credible, honest and reliable.

Respondent witness

Tracy Meisner – she adopted her September 12, 2019 filed affidavit

Cross-examination

[25] She agreed that Ian Joyce had represented her for over a year (her Notice of Defence was filed by him on June 5, 2017) and that she had to date paid most of his bill-which her documentation suggests was between 10,000 and $15,000 in total-and that there is approximately $5000 still outstanding.

[26] She has a "home equity line of credit" which she believes is a "mortgage", and she was surprised not to see it as showing on Property Online, when shown Exhibit "E" of Ms. Terris's Fourth affidavit.

[27] She submitted her T4 federal returns [not her Notices of Assessment however] for the years 2016, 2017 and 2018: line 150 total income is: $15,808; $16,266; and $14,500 respectively. She testified that she is only working 2 to 3 days per week at Lunenburg Homecare, to which location(s) she commutes from Blandford. She also tries to take her son for time outside the Nova Scotia Hospital, such as for swimming, and to McDonald's restaurant, as often as possible, which requires her to commute to Halifax.

[28] She insisted her apology to the court was sincere.

[29] She stated that she has tried to purge the contempt or undo the damage – she withdrew the complaint regarding Ms. Terris (but I note, not the one against Ms.

Holmans, which is based on the same tainted information she had provided simultaneously for the complaint against Ms. Terris)[3].

[30] She did not withdraw the complaint against Ms. Holman's because "my understanding was that she was approaching the other staff so that is why it's not withdrawn."

[31] Notably staff from the College of Nursing advised Ms. Meisner that in response to her very recent request to withdraw her complaint against Ms. Terris: "Thank you for your email. I wanted to follow-up to let you know that your request to withdraw the complaint against Ms. Terris is with our CEO for review… may be withdrawn where the CEO and complainant agree".

[32] As to why she didn't apologize to the court, and purge her contempt in this respect earlier, she suggested in argument that: "I felt I was following a procedure – I knew I was in trouble, so I kept quiet".

[33] Regarding her breaches of the implied undertaking rule, she stated: "well, I never thought I would get away with it".

[3] In exceptional cases and where the contempt has been purged before a court reaches the sanction stage, it is possible for the court to revisit the contempt finding – see *Carey v. Laiken*, 2015 SCC 17 at paras. 37 and 55 per Cromwell, J. This is not such a case.

[34] On the other hand, in relation to the delay in assessing her complaint to the College regarding whether Ms. Holmans had approached other staff to sign statements in support of Ms. Terris, Ms. Meisner said on September 20, 2019: "they just haven't interviewed the right people".

[35] Ms. Meisner reiterated that the PHIA violation complaints against Ms. Terris and Ms. Holmans have *not* been withdrawn.

Summary of the evidence

[36] In summary: in addition to Ms. Meisner's "going public", as a result of events related to a **September 3, 2016** incident, Ms. Meisner complained about Ms. Terris, Ms. Holmans and others to:

1. the **College of Nursing about Ms. Terris and Ms. Holmans between April 10, and May 16, 2019 (see para. 22, Ms. Terris's First Affidavit)**[4];
2. Karen Hornberger (via Lee Mailman in April 2018) of the **NSHA** regarding a breach of the *Personal Health Information Act*, SNS 2010,

[4] Notably, the College has claimed the contents of the complaints and subsequent proceedings are subject to strict confidentiality, and therefore were not directly available to the court as evidence. I observe as well that, as early as on or about **October 16, 2018** – para. 5 Arbitration decision- it is suggested that as a result of the NSHA investigation which had concluded by then, the **NSHA forwarded a complaint** about privacy breaches to the College of Nursing regarding Ms. Holmans.

c. 41, (**PHIA**) by **Ms. Terris and Ms. Holmans** (who Ms. Meisner says referred her to the Halifax Regional Police – which Ms. Meisner followed up on in the fall of 2018-however HRP considered the matter not one that they were best suited to investigate and declined to do so);

3. Lee Mailman (which also had employment consequences, the relevant employer being the **NSHA** -as early as **April 5, 2018** as a result of the phone call made to him by Ms. Meisner – although he suggested that in **September 2016**, as the Unit Manager for Emerald Hall, he had himself filed a complaint with the College of Nursing about Ms. Terris's conduct relating to the incident, and that on November 1, 2016 the College of Nursing imposed restrictions on Ms. Terris's nursing practice (see Arbitration decision para. 15 - that was not directly established by the evidence before me, but I infer that it is likely)) and Karen Hornberger of the **NSHA,** about breaches of Ms. Meisner's son's private information by **Ms. Terris** (who had resigned her position by October 30, 2018 according to Lee Mailman), and her co-workers including **Matt Steylen, Stacey Burgess, Deborah MacLeod, Dave Campbell, and Ms. Holmans** (who was suspended without pay on or about June 20, 2018 pending an investigation, and

terminated on October 16, 2018 in part because Ms. Meisner shared some of the written statements in issue here that Ms. Holmans had made:

a. see Exhibit "A" to her June 14, 2019 affidavit, **an October 16, 2018** letter to Ms. Holmans from NSHA Health Services Manager, Oluseye Akinkunmi notifying her of her termination; and

b. complaints that NSHA Privacy Officer Karen Hornberger (presently Director of Privacy) concluded by her **September 27, 2018** letter to Ms. Meisner (Exhibit 4) were valid as follows:

i. April 24, 2017- Ms. Holmans sent an email to a lawyer who represents the NSGEU and was supporting her grievance of her termination;

ii. on June 27, 2018, Ms. Hornberger received from Ms. Meisner a statement given by Ms. Holmans on August 25, 2017 which was provided to Ms. Meisner's counsel via the ADD [see paras. 8-15 and Exhibits "E", "F", "H" and "K" to Ms. Terris's June 14, 2019 affidavit];

iii. March 2018- Ms. Holmans coordinated the signing and delivery of a letter by Dave Campbell intended for Ms. Terris's lawyer, being a breach by both Mr. Campbell for signing the letter and Ms. Holmans for coordination of the letter. However she successfully grieved her dismissal *insofar as* the alleged inappropriate disclosures of materials by Ms. Meisner contrary to the implied undertaking rule were concerned – decision of Augustus Richardson, QC, dated **April 15, 2019**. Although she was *partially* successful in the grievance, in having the tainted documents ruled inadmissible as a basis for her dismissal, the matter is not concluded. Moreover, as of September 17, 2019, Ms. Meisner's complaint against Ms. Holmans at the College of Nursing has not been withdrawn;

4. **Nova Scotia Department of Health and Wellness** under the ***Protection for Persons in Care Act***, SNS 2004, c. 33, (**PPCA**) on or about **September 12, 2016**, which resulted in a report by Joanne Blight dated January 20, 2017, which stated that "*there are reasonable grounds to conclude the allegations [use of physical force resulting in pain, discomfort or injury and mistreatment causing*

> *emotional harm as defined in section 3 (1) (a) and (b) of the Regulations*"] which also directed Emerald Hall, a unit of the Nova Scotia Hospital, that "should the implicated person continue to be employed at the facility", they receive education regarding patient respect, sensitivity, and communication.

[37] I infer that, on or about **January 20, 2017**, Ms. Meisner became aware that the Department of Health and Wellness would nevertheless *not* be taking direct action against Ms. Terris or Ms. Holmans. Once Ms. Meisner received this report or news of its conclusions, she may have felt somewhat justified in her words and actions towards particularly Ms. Terris. Ms. Terris strongly resists Ms. Blight's investigation's conclusions, stating that they contain serious inaccuracies, and she did not make any attempt to contact persons who were present who could support Ms. Terris's position.

[38] Ms. Terris's counsel was unaware of Ms. Meisner's breach of the implied undertaking rule until just before she sent a "cease and desist" letter to Ms. Meisner's counsel "dated" July 19, 2018 stating that "your client is in breach of the implied undertaking rule… Please advise your client that if she does not cease and desist immediately with this conduct, I will be bringing a motion asking the court to find her in contempt". Particulars were sent by another letter on **July 18, 2018**.

[39] *The* 2016 *NSHA complaint* to the College of Nursing and perhaps other considerations, may have prompted Ms. Terris to resign her position on or before October 30, 2016. After a lengthy investigation into the incident by the College of Nursing, the NSHA complaint's specific allegations against Ms. Terris were dismissed in a decision Ms. Terris received between **February and April 2018**. Only as of September 10, 2019, has *Ms. Meisner's complaint* to the College of Nursing been withdrawn as against Ms. Terris. Notably, the College of Nursing takes the position that its investigation and results are confidential and may not be referenced publicly. Ms. Meisner's complaint about Ms. Terris made pursuant to the PPCA and its "reasonable grounds to believe that" findings, although strenuously objected to by Ms. Terris, cannot be directly challenged or appealed (para.7 Fifth affidavit Ms. Terris).

[40] In spite of the numerous avenues Ms. Meisner brought to bear in pursuing her concerns about her son's circumstances on September 3, 2016, I must not lose sight of the distinction between her making complaints to various persons and bodies, and her providing statements or information received from the disclosure by way of ADD, or otherwise, to various persons and bodies, in breach of the implied undertaking rule.

[41] In my decision finding Ms. Meisner guilty of contempt, I stated:

> 33 Based on direct and indirect evidence, it is an inescapable conclusion that Tracey Meisner had access to, and copies of, the statements of various individuals that had provided them in support of Kimberley Terris, who was suing Tracey Meisner for defamation. These statements were provided by Kimberley Terris as part of her ADD. They were subject to the implied undertaking Rule contained in CPR 14.03 (1): which creates an obligation "not to use information disclosed or discovered in a proceeding for a purpose outside the proceeding, without the permission of a judge."
>
> 34 It is further proved beyond a reasonable doubt that Tracey Meisner provided "information disclosed or discovered in a proceeding for a purpose outside the proceeding without the permission of a judge."
>
> 35 Firstly, she effected this by orally communicating this to persons such as Lee Mailman, and Karen Hornberger of the Nova Scotia Health Authority. She effected this by providing the statements in question to staff of the NSHA between April 5 and September 27, 2018 (See Exhibits 1,2,3,4 and the associated testimony from Lee Mailman, Karen Hornberger, and references in the affidavits and testimony of Kimberley Terris and Debbie Holmans).
>
> 36 Kimberley Terris's counsel sent a "cease and desist" letter to Tracey Meisner's lawyer on or about July 18, 2018 -- Kimberley Terris's affidavit paras. 15-18.
>
> 37 Secondly, she effected this (as a self -represented individual having filed documentation to that effect April 15, 2019) by using information she received in the ADD from Kimberley Terris, in support of her complaint to the then [College of Nurses] (since June 4, 2019, the new legislation refers to it as the "Nova Scotia College of Nursing") on or about May 16, 2019- paras. 21-30 of Kimberley Terris's affidavit.

[42] Thus, the focus should properly be on:

- Ms. Meisner’s provision of information to staff of the NSHA in April 2018, in breach of the implied undertaking rule;

- Ms. Meisner’s provision of information specifically to Lee Mailman on April 5, 2018, drawn directly from a letter Ms. Venoit had sent to Mr. Joyce on **March 27, 2018** which referenced and included “a recent statement from Debbie Holmans” (Ms. Terris’s Supplemental affidavit Exh. “A”);

- Ms. Meisner's provision of written excerpts, including from four pages of statements made by Debbie Holmans on August 25, 2017, to Karen Hornberger on June 27, 2018 (see contempt hearing Exhibit 3 and Ms. Terris's First affidavit);

- Ms. Terris's ADD (containing the witness statements of Debbie Holmans-November 15, 2016, Deborah MacLeod, Debbie Holmans – March 13, 2018, Matt Steylen, Dave Campbell) sent to Mr. Joyce on or about **May 18, 2018**, and Ms. Venoit's "cease and desist" letter sent to Ms. Meisner's counsel on July 18, 2018 (see Ms. Terris's First Affidavit and its Exhibits); and

- Ms. Meisner's provision of the following, as the basis for her complaints against Ms. Terris and Ms. Holmans, *after* she became self-represented on or about April 15, 2019, to the College of Nursing between April 10 and May 16, 2019, which I am satisfied Ms. Terris is accurate in describing in her First Affidavit at para. 22 as: "attaches several documents that come from my Affidavit of Documents, including Dave Campbell's letter to my lawyer, the letter from Debbie Holmans written to my lawyer, the letter from Debbie Holmans written to the Department of Health and the statement of Stacey

> Burgess prepared for the Department of Health, all of which are referenced above in this affidavit."

What is in appropriate sanction for Ms. Meisner's contempt of court?

[43] In *McLean v Sleigh*, 2019 NSCA 71, the court reviewed a finding of contempt and the consequent sentencing. The contemnor was found guilty of contempt for not providing her address (and contact information) and fined $2500 and ordered to pay (not solicitor-client costs, but 80% of the other party's taxed legal fees and 100% of his taxed legal disbursements) costs and disbursements totaling $15,297.77. Although the appeal was allowed in part on an immaterial aspect regarding the finding of liability, the court concluded that the judge did not err in finding a contempt and imposing the fine and costs. More generally Justice Hamilton for the court stated:

> 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 (Ont. CA) 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.

…

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.

[44] Insofar as the considerations and factors relevant to a contempt sanction are concerned, I find helpful Justice Arnold's comments in *Mutual Transportation Services Inc. v Saarloos*, 2017 NSSC 26:

> 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.

…

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 CarswellNS 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.

[My italicization added]

…

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.

[45] Given that a finding of civil contempt requires proof beyond a reasonable doubt, similar to the standard for a criminal offence, I agree with Justice Arnold's conclusion at para. 32 that "a review of the aggravating and mitigating factors is therefore critical in arriving at the appropriate remedy [i.e. insofar as the civil fine is concerned]". The civil fine is intended to act as a general deterrent to other persons of like mind, and specifically as a deterrent to Ms. Meisner to respect the court and its processes.

[46] Not unlike in the case of a criminal conviction, contemnors should be sanctioned based on the circumstances of the contempt, and their own personal circumstances. Therefore, let me then next turn to an application of these principles to the circumstances of the contempt, and circumstances of Ms. Meisner.

The aggravating and mitigating factors regarding the civil fine remedy

[47] The aggravating factors include that Ms. Meisner's impugned conduct: was purposeful- intended to "retaliate" against Ms. Terris and Holmans in particular- and has persisted from April 2018 to September 2019. If Ms. Meisner truly believed that her son's personal information should have been better protected, she arguably could have merely raised such a generalized "concern" with the NSHA and the College of Nursing, without providing details in violation of the implied undertaking rule, and left it to them to investigate the circumstances. Each of the NSHA, College of Nursing, and Department of Health and Wellness had received notice of related complaints and investigated them between 2016-2017. However, even though she had already provided such in April -July 2018 in support of the NSHA investigation and their College of Nursing complaints, and she was warned in July 2018 to "cease and desist", between April and May 2019 she unilaterally acted to provide to the College of Nursing, information and statements in violation of the implied undertaking rule, to support her own personal complaints against Ms. Terris and Ms. Holmans.

[48] I have also commented on some of the aggravating factors earlier when I reviewed Ms. Terris's arguments regarding the appropriateness and quantum of a civil fine.

[49] While Ms. Meisner has articulated an apology and made efforts to purge some of her contemptuous behavior (eg. withdrawing her complaint to the College of Nursing against Ms. Terris) I only give these factors modest weight given the circumstances otherwise[5].

[50] I must consider Ms. Meisner's financial situation – her ability to pay a fine, and within what time period she realistically can be expected to do so.

[51] Although I conclude that she was not altogether forthright in relation to her financial means, I conclude she is likely of modest means, and specifically she should not, without good reason, be deprived of the means to maintain herself, her household, and to continue to support her son financially and emotionally. I am satisfied that she is a loving and caring parent to her son, and his difficult circumstances naturally make her prone to be very protective of him. She testified that he is confined to the hospital except when she and her husband might take him out for family time, including trips to McDonald's and for sightseeing and recreational activities.

[5] While not raised by Ms. Meisner, I bear in mind that conceivably a "public interest" motivation for conduct sometimes referred to as similar to "whistleblower leaks" may in rare circumstances be argued as a legal justification for otherwise contemptuous conduct [eg. See *Joshi v. Allstate Insurance Company of Canada*, 2019 ONSC 4382 - however this is not such a case] and may require a court to consider exercising its residual discretion not to sanction such contempt – see Cromwell, J. in *Carey v. Laiken* at paras. 36-37.

[52] I also keep in mind that she is presently facing the defamation allegations by Ms. Terris, and if she is to defend those with any assistance of legal counsel, the imposition of a fine should not disproportionately deprive her of the means to do so.

[53] She presently works 2 to 3 days a week earning approximately $16,000 employment (total income line 150 income tax return). She had a matrimonial home, which she claims was mortgaged, but there was no evidence of a mortgage nor independent evidence of her debt levels (excepting amounts owing to Mr. Ian Joyce – roughly $5000), if any others are outstanding. She did not reference her "household" income, nor the cost of maintaining the household, or any motor vehicles to get to and from Blandford, Nova Scotia.

[54] While she is of modest means, I am however convinced that, from among the potential sanctions available to the court in such cases, a substantial civil fine is required in order to send a sufficiently denunciatory and deterrent signal to others so inclined who may flout the law and court orders, and to Ms. Meisner. This concern is a very serious one.

[55] While each case must be assessed based on its own unique factual circumstances, I conclude Ms. Meisner should be responsible to pay a civil fine in the amount of $5000 to Ms. Terris by June 30, 2020[6].

[56] The primary purpose of a contempt sanction is to coerce compliance with the order so that the party entitled to the benefit of the order in fact receives it. Unusually in this case, Ms. Meisner's contempt has affected Ms. Terris, but also directly affected Ms. Holmans, and to a lesser extent Stacey Burgess and Dave Campbell.

[57] Mr. Terris ought to be restored, to the extent possible, to the position she would have occupied, had Ms. Meisner not committed the contempts of court.

[58] Ms. Terris had to incur substantial legal fees to defend herself against potential and actual effects of the contempt by Ms. Meisner. She also had to defend herself at the College of Nursing and in relation to her employment situation, as well as bring this contempt motion in this court. Ms. Terris has presented uncontroverted evidence that she has incurred reasonable and necessary legal fees and disbursements as follows: $16,604.43.

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[6] In *Saarloos and McLean*, the courts concluded civil fines of $2500 were appropriate – in *Saarloos* the contemnor had no present ability to pay.

[59] As is common in such cases, I am satisfied it is in the interests of justice that Ms. Meisner be responsible for the solicitor-client costs directly and indirectly incurred by Ms. Terris as a result of Ms. Meisner's contempt. I order Ms. Meisner to pay Ms. Terris $16,604.43 forthwith. Impecuniosity is not a consideration in assessing the amount of costs.

[60] The effects of Ms. Meisner's providing the information and statements of witnesses in violation of the implied undertaking Rule persists to this day (and my Order, while it may not specifically reference all such affected persons, governs and is applicable as well to any other individuals whose information, and statements were wrongfully disseminated by Ms. Meisner) particularly in relation to:

1. the College of Nursing complaint against Ms. Terris and Ms. Holmans;
2. the NSHA employment situation of Ms. Terris, Ms. Holmans, Stacey Burgess and Dave Campbell.

[61] It is the intention of the court that a mandatory injunction will issue within the Order, to the effect that any information or materials wrongfully disseminated by Ms. Meisner, are prohibited to be possessed, used or further disseminated in any manner, by generally any individual, statutory body, or other legal entity, or

otherwise, including any of those potential parties identified specifically in CPR 31.03; and their agents – without permission of the court. This aspect of the order will be retroactively applicable as of March 27, 2018 *nunc pro tunc*.

Conclusion

[62] Ms. Meisner is fined $5000, to be paid to Ms. Terris by June 30, 2020; ordered to pay solicitor-client costs in the amount of $16,604.43 forthwith to Ms. Terris; and a mandatory injunction will issue prohibiting the possession, use or further dissemination of any materials wrongfully disseminated by Ms. Meisner, without permission of the court, dated back to March 27, 2018, *nunc pro tunc*.

Rosinski, J.