Civil Contempt and Enforcement of Judgments: A Primer and Review of Recent Case Law

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Overview

Contempt of court has been referred to as the "big stick of civil litigation".[1] It is an exceptional remedy to be deployed where all else has failed and a party is disobeying a court order. While civil contempt is easy to understand in theory (after all, it is simply the act of disobeying a court order), in practice this remedy has a number of special features unique in the practice of civil litigation, including proof beyond a reasonable doubt and a bifurcated penalty hearing.

Moreover, a party cannot be found in contempt for failure to satisfy an order for the payment of money, but can be found in contempt for breaching orders relating to the enforcement of an order for the payment of money or where it appears from an examination in aid of execution that a debtor has "concealed or made away with property to defeat or defraud creditors".[2] The question of how contempt applies (or does not) in proceedings relating to the enforcement of a debt can be a complex issue of in and of itself. This article aims to provide an overview of the law of contempt in the specific context of the enforcement of monetary judgments and to review recent case law relevant to this issue.

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[1] *Fisher v. Fisher*, [2003] O.J. No. 976 (S.C.J.), at para. 11
[2] *Rules of Civil Procedure*, Rule 60.18(5)

Nuts and Bolts of Contempt

Contempt of court is an ancient remedy that is essential to the administration of justice and to society itself. At its core, the potential for contempt is what ensures that courts are obeyed. As explained by the Supreme Court in *United Nurses of Alberta v. Alberta (Attorney General)*:

> Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.[3]

Or, as explained by Lord Denning:

> . . .The phrase 'contempt in the face of the court' has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power–without trial–but it is a necessary power.[4]

Contempt of court encompasses both the act of disobeying a court order as well as conduct tending to disrespect the court's authority. The classic definition of contempt is broad:

> Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to

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[3] *United Nurses of Alberta v. Alberta (Attorney General),* [1992] 1 SCR 90, at para. 157(2)
[4] *British Columbia (Attorney General) v. Cram*, 1994 CanLII 480

> obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court.[5]

While contempt of court is certainly broader than simply disobeying a court order, breaching an order is the most common type of contempt. The test for civil contempt in the context of breaching an order is as follows:

> 1. The order alleged to have been breached must state clearly and unequivocally what should and should not be done;
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> 2. The party alleged to have breached the order must have had actual knowledge of it; and
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> 3. The party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act the order compels.[6]

These three branches are all that is required for a finding of contempt of court.

An important nuance to this test is that intention to disobey the order is <u>not</u> a necessary element of the test – it is sufficient that a person has intentionally done the act the order prohibits or failed to do the act the order compels. Being mistaken with respect to the meaning of an order is not a defence to an allegation of contempt.[7]

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[5] *Prescott-Russell Services for Children and Adults v. G. (N.)*, 2006 CanLII 81792 (ON CA), at para. 21 citing *R. v. Gray*, [1900] Q.B. 36, at p. 40

[6] *Greenberg v. Nowack*, 2016 ONCA 949, at para. 25

[7] *Carey v. Laiken*, 2015 SCC 17, at paras. 38 and 42; *Greenberg v. Nowack*, 2016 ONCA 949, at para. 29

It is also not necessary that civil contempt of court be "contumacious" or have any element of public defiance.[8] It is the criminal, not civil, offence of contempt of court that requires an element of public defiance.[9]

However, simply meeting the test above goes not guarantee a finding of contempt. Contempt is a measure of last resort and it is within the court's discretion to decline to make a finding of contempt even where the technical requirements are met.[10] Its routine use is discouraged by the courts and, as a practical matter, where it is possible to do so a party will generally be given multiple opportunities to remedy the contempt.

In the specific context of the enforcement of a judgment debt, under Rule 60.18(5) (discussed in greater detail below) contempt is also available where an examination in aid of execution shows that "a debtor has concealed or made away with property to defeat or defraud creditors …"

Civil contempt is unique in that it is of a quasi-criminal nature. This means that even in civil litigation all of the elements of civil contempt must be proved beyond a reasonable doubt rather than the usual civil standard of balance of probabilities. As a result, the criminal framework for the assessment of evidence under *R. v. W.(D).* applies. As explained in *Sweda Farms Ltd. v. Ontario Egg Producers*:

> [25] I am required to work through three steps, adapting the criminal jury instruction. First, if I believe Mr. Bourdeau's exculpatory evidence, then I must dismiss the motion. Second, if I do not believe his exculpatory evidence but I am nonetheless left in reasonable doubt by it or otherwise have a reasonable doubt

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[8] *Carey v. Laiken*, 2015 SCC 17, at paras. 40-41
[9] *Carey v. Laiken*, 2015 SCC 17, at para. 31
[10] *Carey v. Laiken*, 2015 SCC 17, at para. 36

> about where the truth of the matter lies, then I must dismiss the motion. Third, even if I am not left in doubt by Mr. Bourdeau's evidence, I must ask myself whether, on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt by that evidence that Mr. Bourdeau is in contempt of court. This approach applies to credibility findings in respect of disputed evidence on the elements of contempt of court and on the elements of defences raised to it.[11]

In addition, the *Canadian Charter of Rights and Freedoms* applies to civil contempt proceedings and a party is entitled to the full panoply of constitutional and procedural protections afforded by the *Charter*.[12] As a result, an alleged contemnor cannot be compelled to testify.[13]

Certain additional statutory requirements are provided in rule 60.11 of the *Rules of Civil Procedure*. Under Rule 60.11(2), a notice of motion for a contempt motion must be served personally. And, perhaps most importantly, under Rule 60.05 a contempt order may only be obtained in relation to "an order requiring a person to do an act, other than the payment of money". Finally, a notice of motion on a contempt motion must set out "concrete facts of a nature to identify the particular acts alleged to constitute contempt with sufficient particularity to permit the defendant to purge the contempt".[14]

Where a corporation is in contempt, a contempt order may also be made against any officer or director of the corporation: Rule 60.11(6).

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[11] *Sweda Farms Ltd. v. Ontario Egg Producers*, 2011 ONSC 3650, at para. 25, see also *Tribecca Finance Corporation v. Tabrizi*, 2018 ONSC 486, at para. 134

[12] *2363523 Ontario Inc. v. Nowack*, 2016 ONCA 951, at paras. 37 to 47

[13] *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, 1992 CanLII 29 (SCC)

[14] *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic*, 2009 CanLII 9368, citing *Dare Foods (Biscuit Division) Ltd. v. Gill*, 1972 CanLII 506 (ON SC), [1973] 1 O.R. 637 (H.C.J.)

Contempt of Court and Non-Application to Money Judgments

The history of contempt as it relates to judgment debts has roots in the long-abolished institution of debtor's prison: the practice of imprisoning debtors as a result of failure to pay their debts. An interesting discussion of this history can be found in Justice Perell's decision in *Greenberg v. Nowack* (notably, in the early 19th century 48% of Ontario's prison population were debtors rather than convicts).[15]

Happily, the days of debtor's prisons are long behind us and imprisonment as a result of failure to pay a debt is no longer part of our legal system. With respect to contempt, the power of the courts to enforce court orders through imprisonment or other criminal penalties specifically excludes an order for the payment of money, as set out in Rules 60.05 and 60.11(1):

> **ENFORCEMENT OF ORDER TO DO OR ABSTAIN FROM DOING ANY ACT**
>
> 60.05 An order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be enforced against the person refusing or neglecting to obey the order by a contempt order under rule 60.11.
>
> …
>
> **CONTEMPT ORDER**
>
> Motion for Contempt Order
>
> 60.11 (1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.

[15] *Greenberg v. Nowack*, 2016 ONSC 808, at paras. 46 to 55, appeal allowed 2016 ONCA 949

The effect of these Rules is to remove the court's inherent jurisdiction to use its contempt power to enforce an order for the payment of money.[16]

However, while a party cannot be found in contempt as a result of failing to pay a judgment, it is possible for a party to be found in contempt as a result of failure to comply with orders made to facilitate enforcement of a monetary judgment. A contempt finding is also possible under Rule 60.18(5) where it appears from an examination in aid of execution that a debtor has "concealed or made away with property to defeat or defraud creditors". In other words, there does remain some scope for the application of contempt process vis-à-vis a party able but unwilling to pay a judgment debt.

Drawing the line between a debtor who is unable to pay and a debtor who is able but unwilling to pay is something of an art and requires advocacy to persuade a judge to accept your client's position. Factors likely to support a finding of contempt in relation to the enforcement of a debt will include evidence the debtor is living a lavish lifestyle beyond his or her means, transfers of assets to family members, corporations or others with an intent to place assets beyond the reach of creditors, false or misleading evidence provided at an examination in aid of execution or elsewhere, and a refusal to produce documents or to provide responsive answers with respect to assets.

In addition, an order requiring a person to provide a letter of credit or security for costs has been held not to be an order for the payment of money within the meaning of 60.11: *Dickie v. Dickie*.[17] As such, a contempt finding remains possible for the breach of such an order.

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[16] *Forrest v. Lacroix (Estate of)*, 2000 CanLII 5728 (C.A.)

Relationship Between Contempt Order and Other Enforcement Tools

Despite contempt not applying to orders for the payment of money, contempt remains a necessary tool in enforcement proceedings to ensure compliance with orders relating to the enforcement of a debt. Judgment debtors can certainly be found in contempt for failing to comply with orders aimed at facilitating the enforcement of a debt, including for example orders for production of financial information, attendance at examinations or injunctions for the preservation of assets.

The availability of contempt is essential given that a judgment debtor will frequently have no interest in participating in the enforcement process, will actively resist paying the judgment, and will be immune from the usual discipline of a costs award by virtue of already having a judgment against them. As a practical matter parties in this situation will where possible be given multiple opportunities to comply with a court order and a finding of contempt is generally made after a demonstrated pattern of unwillingness to comply. A request for case management or for a judge to be seized of the matter will be appropriate where there are multiple attendances anticipated.

However, a contempt order is not a tool of first resort. In enforcing a judgment, use of the statutory enforcement tools of the examination in aid of execution and garnishment will usually come first.

A finding of contempt may arise either through refusal to comply or engage with these enforcement tools (i.e. failing to produce information or to attend at a examination in aid of execution) or as a result of information revealed through these processes (i.e. statements and

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[17] *Dickie v. Dickie*, 2007 SCC 8

admissions made or documents produced at an examination in aid of execution that prove that a person is deliberately concealing property).

Many contempt cases involve parties simply ignoring court orders. The contempt jurisprudence is replete with cases involving parties who have disregarded enforcement-related court orders and have been found in contempt as a result. For example, in the recent case of *Dean Warren Enterprises Inc. v. 1628655 Ontario Inc*., a refusal to answer undertakings and questions posed at an examination in aid of execution led to a sixty-day jail sentence. This case provides a good example of the type of blatant non-compliance which can result in an order of incarceration:

> [1] On May 11, 2017, I found Mr. Feeley to be in contempt of court. He was to comply with specific undertakings. He was given a specific list. He was told how he could purge the contempt. He has not done so. He was told at the last attendance on July 24, 2017, that he would be incarcerated the next time if he did not comply. He has not. Despite the warnings, he comes today with no affidavit evidence and flimsy comments only. He was told the last time that he needed to produce an affidavit. He has not done so. His efforts to avoid providing the plaintiff with information to enforce the judgment amounts to a flagrant disregard for the legal obligation imposed upon judgment-debtors.[18]

Likewise, lies and obfuscation with respect to the enforcement process can also lead to a finding of contempt. A recent example of this is *Boroni v. Polidoro*, where a contempt finding and significant 90-day jail sentence were imposed as a result of repeated failures to attend examinations and produce financial information, and as a result of the debtor lying to the court

[18] *Dean Warren Enterprises Inc. v. 1628655 Ontario Inc.*, 2017 ONSC 5038, at para. 1

about the death of his father to attempt to excuse his failures to comply, which was found to warrant a custodial sentence in and of itself.[19]

A more complicated situation is where rather than simply ignoring court proceedings a party actively participates in the proceedings in an effort to create the impression that they are attempting to comply with their legal obligations. A recent example of this type of case is *Greenberg v. Nowack*, where the judgment debtor in a fraud case provided certain information and argued that he was in substantial compliance with the various production orders, and had essentially "done his best" to comply with the orders. These arguments were accepted by the motions judge, who concluded that while the debtor had "not been perfect in performance, his recent failures are not flagrant or contumelious."[20] However, this finding was overturned by the Court of Appeal, which emphasized that the test for contempt does not require a contemnor to *intentionally* disobey a court order. This decision reduces the likelihood of success of an argument of "I tried but I couldn't fully comply". As the Court of Appeal explained:

> [27] In this case, at para. 48 of his reasons, the motion judge described the three-part as follows: first, whether the order clearly and unequivocally states what should and should not be done; second, whether the alleged contemnor disobeyed the order deliberately and wilfully; and third, whether the contempt was proven beyond a reasonable doubt. This is inconsistent with how the test is described in *Carey v. Laiken*. The question is not whether the alleged contemnor wilfully and deliberately disobeyed the relevant order. Rather, what is required is an intentional act or omission that breaches the order. "The required intention relates to the act itself, not to the disobedience; in other words, the intention to disobey, in the sense of desiring or knowingly choosing to disobey the order, is not an essential element of civil contempt": Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf, 4th ed. (Toronto: Canada Law Book, 2015), at para. 6.190 (citations omitted). Requiring the alleged contemnor to have intentionally

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[19] *Boroni v. Polidoro*, 2017 CanLII 47376, at para. 36
[20] *Greenberg v. Nowack*, 2016 ONSC 808, at para. 65

> disobeyed a court order would result in too high a threshold: *Carey v. Laiken*, at para. 38.[21]

In other words, just as ignorance of the law is no excuse for not complying with it, a mistake of law is not an defence to an allegation of civil contempt. Likewise, reliance on legal advice does not shield a party from a finding of contempt: *Carey v. Laiken*.[22]

Perhaps the best-known case of civil contempt relating to the enforcement of a judgment debt is the Court of Appeal's decision in *Chiang (Trustee of) v. Chiang*, described as "one of the worst cases of civil contempt to come before this court." In *Chiang*, the debtors unsuccessfully attempted to argue that they had complied with their undertakings to the best of their ability and that any failure to provide answers was outside of their control.[23]

These cases underscore the limited relevance of having an intention to breach a court order, and make it clear that the question of intention relates to the act required by the order, and not to whether there was an intention to breach the order.

Rule 60.18(5) – Concealment or Making Away With Property to Defeat or Defraud Creditors

In addition to the act of disobeying a court order, there is also a specific statutory contempt provision applicable where an examination in aid of execution reveals concealment of property to defeat creditors. Rule 60.18(5) provides as follows:

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[21] *Greenberg v. Nowack*, 2016 ONCA 949, at para. 27
[22] *Carey v. Laiken*, [2015] 2 SCR 79, 2015 SCC 17, at para. 44
[23] *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3

> (5) Where it appears from an examination under subrules (2) to (4) [an examination in aid of execution] that a debtor has concealed or made away with property to defeat or defraud creditors, a judge may make a contempt order against the debtor.

There is not a significant amount of jurisprudence under Rule 60.18(5) and this may be an area in which the law develops in the future. On its face, Rule 60.18(5) provides a distinct contempt power in the sense that it does not specifically require a breach of an order (other than in the sense of breach of an order for the payment of money by concealing or making away with assets). The limited case law considering this section lends support to the premise that contempt under Rule 60.18(5) is distinct from contempt under Rule 60.11.

Rule 60.18(5) has been used to support a finding of contempt in the face of admissions given at an examination in aid of execution as to the existence of funds combined with a demonstrated refusal or failure to pay the judgment debt: *Thompson v. Thompson*.[24] In that case, the respondent specifically argued that Rule 60.11(1) prevented him from being held in contempt because what the applicant wanted was the payment of money. The court disagreed and held that contempt under Rule 60.18(5) had been proved beyond a reasonable doubt. The court sentenced the respondent to 30 days in jail, but held that the contempt could be purged by making scheduled payments to the applicant.

Thompson v. Thompson was subsequently relied upon in *Vassallo v. Mulberry Street Ltd.*, where a judge made a similar order that contempt in relation to an examination in aid of

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[24] *Thompson v. Thompson*, 1988 CarswellOnt 290, at paras. 8-13

execution could be purged by payment of the judgment into court.[25] A stay pending appeal of the order was denied.

More recently, in *Bank of Montreal v. Novapro Equipment Ltd*., the court found a party in contempt under Rule 60.18(5) on being satisfied beyond a reasonable doubt that a debtor had concealed or made away with property to defeat or defraud the bank.[26] There was no discussion of the three elements of the test for civil contempt, therefore suggesting that the test under Rule 60.18(5) is a distinct statutory basis for a contempt finding.

A contempt order under Rule 60.18(5) as a result of income and asset concealment was also made in *Tribecca Finance Corporation v. Tabrizi*.[27]

The only appellate jurisprudence touching on Rule 60.18(5) (and not substantively) is *International Tour Entertainment Corp. v. Cutting Edge Films Inc.* In that case, a party who had obtained a contempt order relating to refusal to answer questions at an examination in aid of execution attempted to defend the order on appeal by relying on Rule 60.18(5). The Court of Appeal set aside the order on the basis that the motion judge had not explained whether his order was in fact made under Rule 60.18(5).[28]

The Rule 60.18(5) contempt remedy has elements similar to a claim for fraudulent conveyance. At first blush this may seem contradictory given that a fraudulent conveyance does not itself give rise to contempt. However, the availability of a contempt finding for something

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[25] *Vassallo v. Mulberry Street Ltd.*, [1995] O.J. No. 2680 (C.A.). The procedural history of this case is somewhat complicated. A second contempt order issued under Rule 60.18(5) was stayed by the Court of Appeal pending the appeal.

[26] *Bank of Montreal v. Novapro Equipment Ltd*., [2012] O.J. No. 443 (S.C.J.)

[27] *Tribecca Finance Corporation v. Tabrizi*, 2018 ONSC 486, at para. 140

[28] *International Tour Entertainment Corp. v. Cutting Edge Films Inc.*, 2009 ONCA 507, at para. 3

which would otherwise give rise to civil liability but not to contempt can be justified on the basis once a judgment is issued and the court process of an examination in aid of execution is underway, the dignity of the court and of judicial proceedings are engaged. The public interest rationale of contempt – protecting the rule of law by ensuring judgments and court processes are not thwarted or ignored – is therefore advanced through Rule 60.18(5). The Rule is also consistent with the consensus that no person should face penal sanctions for inability to pay a debt because it incorporates an element of deliberate fraudulent behaviour going beyond mere inability to pay.

Sentencing and Purging Contempt

Another unique feature of a contempt hearing is that it will generally be bifurcated into a liability and penalty phase.[29] First, the court will hold a hearing into whether a party is in contempt of court. The court will then conduct a second subsequent hearing into what the appropriate penalty is for the contempt. This will provide the contemnor with an opportunity to seek to purge their contempt in circumstances where it is possible to do so.

A sentencing hearing in a contempt proceeding has similarities to sentencing in criminal matters. The range of sentences for civil contempt is essentially unlimited (although the sentence cannot be greater than five years), and a person found in civil contempt can be given any type of sentence available for a criminal offence, including a fine or community service.[30]

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[29] However, liability and penalty hearings can be dealt with together where it is clear that a custodial sentence is warranted and where it will not be possible for the contemnor to purge his or her contempt: *Boroni v Polidoro*, 2017 CanLII 47376, at para. 36.

[30] *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3, at para. 11

A fine for contempt will be paid to the province, not to the opposite party (*SNC-Lavalin Profac Inc. v. Sankar*), and therefore may be of limited practical benefit to a party bringing the contempt motion.[31]

In contrast to criminal contempt the purpose of sentencing in civil contempt proceedings is primarily remedial rather than punitive: see the Court of Appeal's recent explanation in *Business Development Bank of Canada v. Cavalon Inc*.[32] In other words, the goal of contempt is to obtain compliance with the court orders, with punishment as a secondary purpose. As explained by Justice Dunphy in *2363523 Ontario Inc. v. Nowack*:

> [69] Firstly – and usually primarily - the objective of sentencing is to coerce the contemnor to comply with the orders in question. …
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> [71] A second objective of sentencing is punishment. Punishment serves to denounce conduct that requires denouncing and thereby deter the contemnor specifically and others more generally who might contemplate breaches of court orders. There can be no toleration of a doctrine of "economic breach" of court orders. No party should ever seek to calculate whether it is "worth it" to breach an order to secure some other objective.[33]

With respect to sentencing, the factors relevant to a determination of an appropriate sentence for contempt were set out succinctly by the Court of Appeal in *Business Development Bank of Canada*, *supra*, citing the court's earlier decision in *Boily v. Carlton Condominium Corporation 145*:

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[31] *SNC-Lavalin Profac Inc. v. Sankar*, 2009 ONCA 97

[32] *Business Development Bank of Canada v. Cavalon Inc*., 2017 ONCA 663, at paras. 76-81.

[33] *2363523 Ontario Inc. v. Nowack*, 2016 ONSC 2518 (CanLII), aff'd 2016 ONCA 951 (CanLII), 135 O.R. (3d) 538, at paras. 68-72, leave to appeal to S.C.C. refused, 37376 (June 1, 2017), as cited in *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663, at para. 81

> (a) Proportionality of the sentence to the wrongdoing – a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: see also *Chiang*, at para. 86; *Mercedes-Benz Financial*, at para. 12.
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> (b) Presence of aggravating and mitigating factors: see also *Chiang*, at paras. 50-51, 87-89; *Sussex Group Ltd. v. Fangeat*, [2003] O.T.C. 781 (S.C.), at para. 67.
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> (c) Deterrence and denunciation – the sentence should denounce unlawful conduct and promote a sense of responsibility in the contemnor, and deter the contemnor and others from defying court orders: see also *Chiang*, at para. 91; *Fangeat*, at para. 67.
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> (d) Similarity of sentence in like circumstances.
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> (e) Reasonableness of a fine or incarceration: see generally *Chiang.*[34]

A good list of aggravating and mitigating factors is provided in Justice Perell's recent decision in *Mohammad v. Anwar*:

> … Aggravating factors include blatantly or intentionally violating a court order, continued defiance, lack of remorse, incredible explanation, profiting from the breach of the court order, the breach of the order causing harm or prejudice to others, whether the order being breached involved the public interest, and previous convictions. Mitigating factors include absence of contumacious intent, admission of wrongdoing, sincere apology, absence of prior convictions and the purging of the contempt. …[35]

One of the most important mitigating factors is whether a contemnor has purged his or her contempt by complying with the court order. At the liability phase, judges will frequently provide a person who had been found in contempt with specific steps that can be taken to purge

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[34] *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663, at para. 90, citing *Boily v. Carlton Condominium Corporation 145*, 2014 ONCA 574

[35] *Mohammad v. Anwar*, 2018 ONSC 2437, at para. 55

the contempt. Given that purging contempt is a mitigating factor, the onus to prove it is, like other mitigating factors, on the defendant on the balance of probabilities.[36]

A helpful list of other factors relevant to sentence is provided in *2363523 Ontario Inc. v. Nowack*, *supra*:

> a. The nature of the contemptuous act;
>
> b. Whether the contemnor has admitted his breach;
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> c. Whether the contemnor has tendered a formal apology to the Court;
>
> d. Whether the breach was a single act or part of an on-going pattern of conduct in which there were repeated breaches;
>
> e. Whether the breach occurred with the full knowledge and understanding of the contemnor such that it was a breach rather than a result of a mistake or misunderstanding; and
>
> f. The extent to which the conduct of the contemnor has displayed defiance;
>
> g. Whether the order was a private one affecting only the parties or whether some public benefit lays at its root.[37]

The imposition of incarceration in a civil case is rare. This is because usually a finding of contempt together with other appropriate orders in the litigation is sufficient to achieve compliance. However, while incarceration is rare and giving a contemnor multiple chances is common, it would be a mistake to consider the recent judicial approach as lenient, particularly in cases of ongoing contempt. The contemporary judicial approach to sentencing is described accurately by Justice Brown in *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic*:

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[36] *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3, at para. 51
[37] *2363523 Ontario Inc. v Nowack*, 2016 ONSC 2518, at para. 73

[9] In Chiang (Trustee of) v. Chiang, 2009 ONCA 3 (CanLII), [2009] O.J. No. 41 (C.A.), the Court of Appeal observed that custodial sentences for civil contempt are rare, and lengthy custodial sentences even rarer. Ordinarily incarceration is a sanction of last resort: Chiang (OCA), para. 20.

[10] In that case the Court of Appeal also noted that Canadian courts have tended to punish contempt of court leniently. I suspect this observation was based on the commentary contained in the document published in May, 2001 by the Canadian Judicial Council entitled, "Some Guidelines on the Use of Contempt Powers", where, at page 40, the following statements are found:

> In Canada punishment for contempt has been quite moderate, reflecting the courts' usual view that a conviction for contempt and a modest fine is usually sufficient to assert the courts' authority, to protect their dignity or to ensure compliance. Often these sentences are imposed after the contemnor has apologized and purged his or her contempt which substantially mitigates any punishment that might otherwise be imposed.

Notwithstanding these comments by the Canadian Judicial Council, sentences imposed in recent years by Ontario courts for civil contempt of court do not display a tendency towards leniency, especially in cases where the contemnor has engaged in a lengthy course of disobedience and has not purged his contempt. As J.W. Quinn J. stated in Niagara (Municipality) (Police Services Board) v. Curran (2002), 2002 CanLII 49405 (ON SC), 57 O.R. (3d) 631 (S.C.J.), when court orders are ignored our legal system is wounded: para. 35. In Sussex Group Ltd. v. 3933938 Canada Inc. (c.o.b. Global Export Consulting), 2003 CanLII 49334 (ON SC), [2003] O.J. No. 2952 (S.C.J.), Cumming J. observed that "where the disobedience of an order of the court has been willful, it should not be lightly regarded." Contempt of court, whether civil or criminal, undermines the authority of the courts and diminishes respect for the law. Our Canadian Charter of Rights and Freedoms identifies two fundamental principles upon which our country rests, one of which is the rule of law. In my respectful view conduct that undermines one of our country's fundamental principles should not be treated with leniency. While I recognize that civil and criminal contempt constitute qualitatively different offences against our system of justice, any differences in the resulting range of sentences should flow, in my opinion, from the application of the principle of proportionality, not from some notion that courts should treat instances of civil contempt leniently. [Emphasis added][38]

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[38] *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic*, 2009 CanLII 9423; see also *Cellupica v. Di Giulio*, 2011 ONSC 1715, at para. 12

As can be seen from the cases discussed above, custodial sentences for contempt have been imposed in numerous recent cases involving enforcement of judgment debts.[39]

Finally, costs on a contempt matter are subject to a rebuttable presumption that they are to be on a substantial indemnity basis. As explained by Justice Goldstein in *Astley v. Verdun*:

> [57] I characterize the test this way: there is a rebuttable presumption that substantial indemnity costs are appropriate in a contempt of court case. The presumption may be rebutted where the contemnor is suitably contrite, has attempted to purge his or her contempt, has taken steps to minimize costs incurred by the other party, and the contempt itself is towards the lower end of the "flagrant and wilful" scale.[40]

The unifying theme of civil contempt sentencing is at its essence a concern with protecting the rule of law by ensuring that courts orders and processes are respected. The availability of a penal sanction for flouting of court processes is necessary to the proper functioning of society, and the courts have shown a willingness to recognize that a contempt finding alone without a penal sanction will in some cases be insufficient to protect the court process. Indeed, the concept that a mere finding of contempt constitutes a "black mark" on the contemnor sufficient to satisfy the principle of public deterrence has been commented upon sceptically as follows:

> Sadly, this might sound quaint, or even amusingly naïve today, to the business mind that views legal sanction as not a bright line or even an impediment so much as a necessary "cost of doing business."[41]

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[39] A useful list of a variety of sentences is provided in Justice Perell's recent decision in *Mohammad v. Anwar*, 2018 ONSC 2437, at para. 56.

[40] *Astley v. Verdun*, 2013 ONSC 6734, at para. 57

[41] The Law of Contempt in Canada, Jeffrey Miller, Carswell, at page 230

Conclusion

The law of contempt provides a clear bright-line test that is tempered by strong procedural protections. A healthy amount of discretion at all stages of the process avoids the unjust results that could flow from its gratuitous application. Viewed as a whole, this framework allows courts to respond firmly but flexibly to the twin private and public interests of obtaining compliance with orders and preserving respect for the courts.

APPENDIX – Rules 60.05, 60.11 and 60.18 of the *Rules of Civil Procedure*

ENFORCEMENT OF ORDER TO DO OR ABSTAIN FROM DOING ANY ACT

60.05 An order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be enforced against the person refusing or neglecting to obey the order by a contempt order under rule 60.11. R.R.O. 1990, Reg. 194, r. 60.05.

CONTEMPT ORDER

Motion for Contempt Order

60.11 (1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made. R.R.O. 1990, Reg. 194, r. 60.11 (1).

(2) The notice of motion shall be served personally on the person against whom a contempt order is sought, and not by an alternative to personal service, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 60.11 (2).

(3) An affidavit in support of a motion for a contempt order may contain statements of the deponent's information and belief only with respect to facts that are not contentious, and the source of the information and the fact of the belief shall be specified in the affidavit. R.R.O. 1990, Reg. 194, r. 60.11 (3).

Warrant for Arrest

(4) A judge may issue a warrant (Form 60K) for the arrest of the person against whom a contempt order is sought where the judge is of the opinion that the person's attendance at the hearing is necessary in the interest of justice and it appears that the person is not likely to attend voluntarily. R.R.O. 1990, Reg. 194, r. 60.11 (4).

Content of Order

(5) In disposing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

(a) be imprisoned for such period and on such terms as are just;

(b) be imprisoned if the person fails to comply with a term of the order;

(c) pay a fine;

(d) do or refrain from doing an act;

(e) pay such costs as are just; and

(f) comply with any other order that the judge considers necessary,

and may grant leave to issue a writ of sequestration under rule 60.09 against the person's property. R.R.O. 1990, Reg. 194, r. 60.11 (5).

Where Corporation is in Contempt

(6) Where a corporation is in contempt, the judge may also make an order under subrule (5) against any officer or director of the corporation and may grant leave to issue a writ of sequestration under rule 60.09 against his or her property. R.R.O. 1990, Reg. 194, r. 60.11 (6).

Warrant of Committal

(7) An order under subrule (5) for imprisonment may be enforced by the issue of a warrant of committal (Form 60L). R.R.O. 1990, Reg. 194, r. 60.11 (7).

Discharging or Setting Aside Contempt Order

(8) On motion, a judge may discharge, set aside, vary or give directions in respect of an order under subrule (5) or (6) and may grant such other relief and make such other order as is just. R.R.O. 1990, Reg. 194, r. 60.11 (8).

Order that Act be done by Another Person

(9) Where a person fails to comply with an order requiring the doing of an act, other than the payment of money, a judge on motion may, instead of or in addition to making a contempt order, order the act to be done, at the expense of the disobedient person, by the party enforcing the order or any other person appointed by the judge. R.R.O. 1990, Reg. 194, r. 60.11 (9).

(10) The party enforcing the order and any person appointed by the judge are entitled to the costs of the motion under subrule (9) and the expenses incurred in doing the act ordered to be done, fixed by the judge or assessed by an assessment officer in accordance with Rule 58. R.R.O. 1990, Reg. 194, r. 60.11 (10).

EXAMINATION IN AID OF EXECUTION

…

Examination of Debtor

(2) A creditor may examine the debtor in relation to,

(a) the reason for nonpayment or nonperformance of the order;

(b) the debtor's income and property;

(c) the debts owed to and by the debtor;

(d) the disposal the debtor has made of any property either before or after the making of the order;

(e) the debtor's present, past and future means to satisfy the order;

(f) whether the debtor intends to obey the order or has any reason for not doing so; and

(g) any other matter pertinent to the enforcement of the order. R.R.O. 1990, Reg. 194, r. 60.18 (2).

(3) An officer or director of a corporate debtor, or, in the case of a debtor that is a partnership or sole proprietorship, a partner or sole proprietor against whom the order may be enforced, may be examined on behalf of the debtor in relation to the matters set out in subrule (2). R.R.O. 1990, Reg. 194, r. 60.18 (3).

(4) Only one examination under subrule (2) or (3) may be held in a twelve month period in respect of a debtor in the same proceeding, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 60.18 (4).

(5) Where it appears from an examination under subrules (2) to (4) that a debtor has concealed or made away with property to defeat or defraud creditors, a judge may make a contempt order against the debtor. R.R.O. 1990, Reg. 194, r. 60.18 (5).